

# Counterterrorism and the risk of over-classification of situations of violence

**Gloria Gaggioli and Pavle Kilibarda\***

Gloria Gaggioli is the Director of the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) and an Associate/Swiss National Science Foundation Professor at the Law Faculty of the University of Geneva. Prior to joining the University of Geneva, she served as Legal Adviser in the ICRC Legal Division.

Pavle Kilibarda is a PhD candidate and Assistant at the Faculty of Law of the University of Geneva, and a Teaching Assistant at the Geneva Academy. He obtained an LLM from the Geneva Academy in 2014 and a BA from the University of Belgrade in 2013. Prior to joining the University of Geneva, he worked as a Legal Training Associate at the ICRC and as a Researcher at the Belgrade Centre for Human Rights.

## Abstract

*Richard Baxter famously stated that “the first line of defence against international humanitarian law is to deny that it applies at all”. While “under-classification” remains an issue today, a parallel trend needs to be acknowledged. This is the tendency to over-classify situations of violence, especially in relation to transnational terrorist organizations such as the so-called Islamic State group or*

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*Al-Qaeda. This tendency stems from practical difficulties inherent in the changing operational environment. The last few years have witnessed a proliferation of armed non-State actors that are labelled or designated as terrorists (e.g., in Iraq, Syria, Mali, Nigeria and Yemen). Terrorist groups are characterized by opaque, often volatile organizational structures and tend to operate in decentralized networks rather than clear hierarchies. The formation of splinter groups, changing alliances, temporary reunification and even open hostility among former allies are common phenomena. This complex factual situation has led to the proliferation of theories of conflict classification, many of them arguing in favour of more flexible classification via the loosening of existing standards. Because international humanitarian law is in many respects less protective than international human rights law, particularly regarding the rules on the use of force and detention, classifying a situation of violence as an armed conflict when the threshold has not been met is a problem that should not be underestimated. In this article, we revisit the criteria of intensity and organization, as well as the related matter of the role of motives in conflict classification, considering conflicts involving armed groups described as terrorists. Our goal is to identify minimum requirements that could diminish the risk of over-classification by various stakeholders.*

**Keywords:** over-classification, counterterrorism, international humanitarian law, international human rights law, non-international armed conflict, conflict classification, organized armed groups, use of force, terrorist groups.

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## Introduction

Richard Baxter famously stated that “the first line of defence against international humanitarian law is to deny that it applies at all”.<sup>1</sup> It is certainly a politically sensitive matter for States to admit the existence of an armed conflict on their soil, particularly when facing a perceived domestic terrorist threat. Even when faced with overwhelming evidence of an armed conflict, some States have tended to ignore international humanitarian law (IHL) and formally treat the matter as a simple issue of law enforcement.<sup>2</sup> This “under-classification” phenomenon has been particularly problematic in situations which are arguably too volatile to be

1 Richard Baxter, “Some Existing Problems in Humanitarian Law”, in *The Concept of International Armed Conflict: Future Outlook*, Proceedings of the International Symposium of Humanitarian Law, Brussels, 1974, p. 2.

2 For example, such has been the position of the Russian Federation and Turkey towards the conflicts with Chechen insurgents and the Kurdistan Workers’ Party, respectively, and this was reflected in these States’ submissions to the European Court of Human Rights (ECtHR) in cases related to these situations. See, for example, ECtHR, *Ergi v. Turkey*, Appl. No. 66/1997/850/1057, 28 July 1998; ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Appl. Nos 57947/00, 57948/00, 57949/00, 24 February 2005; ECtHR, *Aslakhanova and Others v. Russia*, Appl. Nos 2944/06, 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012.

properly contained by the more restrictive framework of international human rights law (IHRL).

Yet today, the opposite is often the case: situations which ought not be covered by IHL are treated as armed conflicts in order to justify means not permissible under IHRL. There is an increasing tendency for terrorism to be treated as an armed conflict rather than a policing matter in the post-9/11 world. The rise of global terrorist networks incentivizes some States to use lethal force in a manner which is at odds with the standards of IHRL. The more permissive rules of IHL governing the use of force seem to offer an attractive alternative to the law enforcement paradigm for counterterrorist operations, as attested to by numerous examples, such as the targeted killing of Al-Qaeda cleric Al-Awlaki in Yemen in 2011 in a US drone strike,<sup>3</sup> or the Egyptian government's response to terrorist attacks (with no apparent link to the ongoing Sinai insurgency) in what resembles a conduct of hostilities manner.<sup>4</sup>

There are two main reasons for this current problem of “over-classification”.<sup>5</sup> First, the tendency clearly stems from practical difficulties inherent in the changing operational environment today. The last few years have witnessed a proliferation of armed non-State actors that are labelled or designated as terrorists (e.g., in Iraq, Syria, Mali, Nigeria and Yemen). Terrorist groups are characterized by opaque, often volatile organizational structures and tend to operate in decentralized networks rather than clear hierarchies. The formation of splinter groups, changing alliances, (temporary) reunification and even open hostility among former allies are common phenomena. Eric Talbot Jensen summarizes the common organizational features of terrorist groups: many designated terrorist groups have no “pyramidal” (hierarchical) structure, preferring a decentralized organizational command chain; their leadership often merely provides instructions and guidance and not orders or commands in the military sense; their “fighters” are geographically dispersed, with cells operating in very different contexts and perhaps with significant geographical distance between operatives conducting an attack and the group's leadership; and finally, there are great fluctuations in the functioning of terrorist networks, with even their leadership possibly being unaware of which individuals are members.<sup>6</sup> After

3 “Islamist Cleric Anwar Al-Awlaki Killed in Yemen”, *BBC News*, 30 September 2011, available at: [www.bbc.com/news/world-middle-east-15121879](http://www.bbc.com/news/world-middle-east-15121879) (all internet references were accessed in September 2021).

4 After a late 2018 bomb attack against a tourist bus in Giza, Egyptian forces claimed to have killed forty alleged terrorists in Giza and Northern Sinai. See “Egypt Police ‘Kill 40 Militants’ in Raids after Tourist Bus Blast”, *BBC News*, 29 December 2018, available at: [www.bbc.com/news/world-middle-east-46708695](http://www.bbc.com/news/world-middle-east-46708695). As far as the authors of this article are aware, Egypt has not publicly stated its views on the use of force paradigm governing the raids, but the operation was aimed at eliminating “militants” rather than arresting suspected criminals as required under law enforcement.

5 A concise restatement of the problem of over-classification is offered by Sassòli, who notes that “States try to ‘overclassify’ a situation as an armed conflict in order to apply IHL even where it does not apply”. Marco Sassòli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 50.

6 Eric Talbot Jensen, “Targeting of Persons and Property”, in Geoffrey S. Corn *et al.*, *The War on Terror and the Laws of War: A Military Perspective*, Oxford University Press, Oxford, 2015, p. 86.

the so-called Islamic State group (IS) lost most of the territories that it once controlled in Iraq and Syria, analysts feared a proliferation of splinter groups that are less structured but no less deadly, and a further geographical dispersion of their activities through “foreign fighters” returning home or relocating and sleeper cells in Europe and elsewhere;<sup>7</sup> identifying the workings of such groups, their links to the “parent group”, where one group ends and another begins and how they coordinate, can prove a difficult exercise. Classifying conflicts under these circumstances can be nigh impossible: how should one navigate, say, conflicting claims regarding the attribution of attacks in Mali to Nusrat Al-Islam,<sup>8</sup> or the uncertainties regarding the organizational structure of various factions in Libya<sup>9</sup> and Yemen,<sup>10</sup> in order to determine with some degree of confidence that IHL applies to certain acts or groups? Yet the presumption more often than not seems to be that one or more non-international armed conflicts (NIACs) exist and that IHL applies to the situation of violence as a whole.

The second cause of over-classification relates to a lack of clarity in IHL regarding the classification criteria of organization and intensity, and their intertwined nature. Practitioners usually rely on standards developed by international criminal tribunals to ascertain whether an armed conflict exists. However, as this jurisprudence is inherently limited by the facts presented to the courts in specific cases, applying these standards verbatim to a very different context can lead to counterintuitive results. Theories of conflict classification have therefore proliferated in the past decade, many of them arguing in favour of more flexible classification by loosening existing standards and factors.<sup>11</sup> This is typically framed as a response to challenges raised by complex factual situations

- 7 See Syed Huzaifah Bin Othman Alkaff and Remy Mahzam, “Islamic State after the Fall of Mosul and Raqqa: Impact on Organisation and Propaganda”, *Counter Terrorist Trends and Analyses*, Vol. 10, No. 1, 2018.
- 8 See Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), “Non-International Armed Conflicts in Mali”, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse2accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse2accord).
- 9 See Geneva Academy, “Non-International Armed Conflicts in Libya”, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-libya#collapse2accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-libya#collapse2accord).
- 10 See Geneva Academy, “Non-International Armed Conflicts in Yemen”, available at [www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse2accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse2accord).
- 11 See, for example, Rogier Bartels, “The Organisational Requirement for the Threshold of Non-International Armed Conflict Applied to the Syrian Opposition”, *Armed Groups and International Law*, 9 August 2012, available at: <https://armedgroups-internationallaw.org/2012/08/09/the-organisational-requirement-for-the-threshold-of-non-international-armed-conflict-applied-to-the-syrian-opposition/>; Ashley Deeks, “Common Article 3 and Linkages between Non-State Armed Groups”, *Lawfare*, 4 October 2017, available at: [www.lawfareblog.com/common-article-3-and-linkages-between-non-state-armed-groups](http://www.lawfareblog.com/common-article-3-and-linkages-between-non-state-armed-groups); Vaios Koutroulis, “Classifying Contemporary Conflicts: The Challenge of Coalitions of Non-State Armed Groups and/or States”, in *Legal Challenges for Protecting and Assisting in Current Armed Conflicts*, 20th Bruges Colloquium, 2019; Marten Zwanenburg, “Addressing the Threat Posed by Coalitions of Non-State Armed Groups: A State Perspective”, in *Legal Challenges for Protecting and Assisting in Current Armed Conflicts*, 20th Bruges Colloquium, 2019; Jelena Nikolić, 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/>; Adil Ahmad Haque, “Triggers and Thresholds of Non-International Armed Conflict”, *Just Security*, 29 September 2016, available at: [www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/](http://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/); and many others.

involving many different groups fighting the government or each other, and also commonly engaging in tactical or strategic cooperation against a common enemy. Scholars have thus tended to soften the NIAC criteria and look for new ways of establishing that they have been met – by aggregating acts of violence committed by different groups, or by linking different groups through notions of “associated forces” or “co-belligerency” (or some derivative of the “support-based approach”), or by downright diminishing the requirements under each of the criteria. Although the motivation is understandable, we strongly believe that the costs of such “flexibility” greatly outweigh its benefits.

In relation to counterterrorism operations more specifically, scholars have also raised IHL standards as a necessary tool for fighting powerful global networks. Some authors, such as Buchanan and Keohane, have gone so far as to find that “the large scale of major terrorist attacks means that the war paradigm is a better fit than the policing paradigm for the sorts of conflicts that make a regulatory regime for lethal drone use valuable”.<sup>12</sup> Peter Margulies – who advocates for a more flexible approach to conflict classification in relation to counterterrorism – has written that “[u]nder IHRL, terrorists have a greater opportunity to operate with impunity. Applying [the law of armed conflict], in contrast, diminishes the non-State actor’s room to maneuver.”<sup>13</sup>

We disagree with these attempts, and in the present article argue against theories and interpretations that in our view lead to the current over-classification problem in relation to counterterrorism. Because IHL is in many respects less protective than IHRL, particularly regarding the rules on the use of force and detention, classifying a situation of violence as an armed conflict when the threshold has not been met is a problem that should not be underestimated. For example, the status/function-based targeting rules of IHL allow the immediate application of intentional lethal force against combatants/fighters and civilians directly participating in hostilities, whereas IHRL restricts such force to a measure of last resort in the protection of human life against an imminent threat.<sup>14</sup> In the same vein, IHL allows administrative detention for security reasons without proper *habeas corpus*, while under IHRL, such internment remains wholly exceptional and *habeas corpus* remains a requirement at all times.<sup>15</sup> In our view, over-applying IHL

12 Allen Buchanan and Robert O. Keohane, “Toward a Drone Accountability Regime”, *Ethics & International Affairs*, Vol. 29, No. 1, 2015, p. 16.

13 Peter Margulies, “Networks in Non-International Armed Conflicts: Crossing Borders and Defining ‘Organized Armed Group’”, *International Law Studies*, Vol. 89, 2013, p. 57.

14 See, in this regard, Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, International Committee of the Red Cross (ICRC), Geneva, 2013.

15 See, for example, Human Rights Committee, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, 16 December 2014, paras 15, 66. See also ECtHR, *Hassan v. United Kingdom*, Appl. No. 29750/09, 16 September 2014, para. 106; UK Supreme Court, *Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant)*, [2017] UKSC 2, 17 January 2017, paras 99–109; and, more generally, Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Hart Publishing, Oxford, 2013.

does not serve victims of acts of terror and may play the role of a self-fulfilling prophecy by fuelling acts of violence.<sup>16</sup>

In order for a situation to be described as a NIAC, it must involve “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>17</sup> This influential remark by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Tadić* case was subsequently interpreted as resting on two pillars of classification: the existence of a sufficient degree of organization of the belligerent parties, and of a certain degree of intensity of the armed violence.<sup>18</sup> If a situation of violence does not fulfil both criteria separately, it cannot be considered a NIAC.<sup>19</sup>

Hence, our main argument is that these criteria cannot be construed too broadly, and that even a situation of violence of high intensity cannot be considered an armed conflict if it does not involve armed clashes with a belligerent group exhibiting a certain and specific level of organization. The manner in which a number of “terrorist groups”<sup>20</sup> function is unsuitable for either criterion, and they will only exceptionally be classified as organized armed groups (OAGs) for the purposes of IHL. Over-classification in the context of counterterrorism is only one of the manifestations of the phenomenon (though

16 Social sciences support the notion that the radicalization of non-State groups often arises as a reaction to the actions of others, including States. See Clark McCauley and Sophia Moskalenko, “Mechanisms of Political Radicalization: Pathways Toward Terrorism”, *Terrorism and Political Violence*, Vol. 20, No. 3, 2008; Marc Sageman, *Turning to Political Violence: The Emergence of Terrorism*, University of Pennsylvania Press, Philadelphia, PA, 2017; Tom Parker, *Avoiding the Terrorist Trap: Why Respect for Human Rights is the Key to Defeating Terrorism*, World Scientific Press, London, 2019.

17 International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision (Appeals Chamber), 2 October 1995, para. 70.

18 See, for example, ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 84; ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras 32 ff.

19 See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed. Geneva, 2016 (2016 Commentary on GC I), para. 434.

20 It should be recalled that there exists no universally accepted definition of terrorism (or terrorist groups) in international law, although a number of groups have been individually designated as terrorist by States and/or the UN Security Council; these include the Taliban, Al-Qaeda and IS. See, for example, UNSC Res. 1267, 15 October 1999; UNSC Res. 1373, 28 September 2001; UNSC Res. 2253, 17 December 2015. On the lack of a definition of terrorism, see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, pp. 125–126; Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006; Marco Sassòli, “La définition du terrorisme et le droit international humanitaire”, *Revue Québécoise de Droit International*, Special Issue, 2007; Gilles Ferragu, *Histoire du terrorisme*, Éditions Perrin, Paris, 2014; Anthony Richards, *Conceptualizing Terrorism*, Oxford University Press, Oxford, 2015; Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020. For a human rights perspective on counterterrorism, see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011; Martin Scheinin, “Terrorism”, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2018, pp. 585–586. For an overview of existing counterterrorism treaties, see Daniel O’Donnell, “International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 854–856. For international jurisprudence, see, in particular, Special Tribunal for Lebanon, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Decision (Appeals Chamber), 16 February 2011, paras 83–113.

perhaps the most significant one because of the peculiar characteristics of numerous terrorist groups, as outlined above—e.g., opaque, volatile and decentralized structures), and it may equally concern other groups which have not been designated as terrorist. As well as the above points, we believe that there is one additional factor to consider in relation to the over-classification problem: the role that a group’s motives could play in conflict classification. As this matter relates to the criteria of both organization and intensity, we shall deal with it in a separate section.

Our analysis proceeds as follows. First, we examine the organizational requirements and challenges for a designated terrorist group to be considered an OAG for the purposes of IHL; then, we take a look at counterterrorism from an intensity perspective (as understood under IHL) and the conditions under which a situation may evolve from peacetime law enforcement to conduct of hostilities, as well as whether the fact that more than one group is active in the same context could influence the intensity analysis. Finally, we re-evaluate the matter of the impact of a group’s motives for conflict classification.

## Terrorist groups and the criterion of organization

What type and degree of organization is required? The need for fighting forces and accountability structures as minimal requirements

IHL treaties do not establish the threshold for a NIAC in the sense of Article 3 common to the Geneva Conventions, nor do they define the notion of an “organized armed group”. Some elements of the concept may however be inferred from the treaties, namely from common Article 3 itself and from Additional Protocol II to the Geneva Conventions (AP II).

Common Article 3, which is applicable to all NIACs,<sup>21</sup> does not employ the term “organized armed group”. It simply states that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each *Party to the conflict* shall be bound to apply, as a minimum, the following provisions”.<sup>22</sup> The term “Party” has been interpreted as requiring the existence of organized actors, be they States or non-State actors.<sup>23</sup> The ICRC Commentary on Geneva Convention I noted already in 1952 that one possible criterion for determining the existence of a NIAC is that “the Party in revolt against the *de jure* Government possesses an organized military force, an

21 International Court of Justice (ICJ), *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, *ICJ Reports 1986*, para. 218. See also Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, p. 261.

22 Common Article 3, para. 1 (emphasis added).

23 2016 Commentary on GC I, above note 19, paras 422, 429.

authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention”.<sup>24</sup>

In its case law,<sup>25</sup> the ICTY further clarified the content of the criterion of organization. The Tribunal never developed strict standards as to what elements a group would have to meet to be considered an OAG, but simply used a list of indicative factors to that end.

These factors could be classified into two broad categories. The first category, which could be called structural elements, relates to a group’s internal structure. These elements include indicators such as the existence of a responsible command capable of exercising authority and direction over the forces in the accomplishment of the mission; of an organizational chart; and of internal rules, including disciplinary rules and standards. The second category—let us call them operational elements—is important for the group’s operations: its ability to recruit and train new fighters, to control territory, to set up headquarters, and to launch operations bringing together different units. Some indicators, such as a group’s ability to “speak with one voice”, may be both structural and operational.

The ICTY has highlighted that these factors are neither cumulative criteria nor a checklist for demonstrating the existence of the organizational threshold—they are simply indicators.<sup>26</sup> Thus, organization cannot be determined *in abstracto* but requires analysis on a case-by-case basis.

It has rightly been argued that this approach provides little added value for determining the existence of a NIAC. The jurisprudence of the international criminal tribunals is of course fact-driven, but which, or how many, factors need to be present in order to classify a situation of armed conflict remains totally open and unspecified.<sup>27</sup> In jurisprudence subsequent to the *Tadić* case, the ICTY never made an effort to clarify its underlying “classification logic”—namely, why it considered specific factors as relevant and others as not, or whether all of those used carried the same weight in the Tribunal’s deliberation. For example, the Trial Chamber in the *Haradinaj* case made no reference at all to principles underlying its classification of the conflict between Yugoslav forces and the Kosovo Liberation Army (KLA) in the southern Serbian province of Kosovo in 1998–99: it simply regarded the situation *ex post facto* and took up certain elements of that situation in order to say that it had indeed amounted to a NIAC.<sup>28</sup> These elements, the Tribunal found, were also present in the conflicts in

24 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 (1952 Commentary on GC I), p. 49; cf. 2016 Commentary on GC I, above note 19, paras 422–437.

25 Notably in the *Tadić*, *Delalić*, *Haradinaj*, *Limaj* and *Boškoski* cases, on which we focus in this section.

26 See, for example, ICTY, *Limaj*, above note 18, paras 93 ff.

27 See Ilya Sobol, “Judicial Practices of Identifying Non-International Armed Conflicts: An Inquiry into Normative Status and Use of ‘Indicative Factors’”, LLM Thesis, Geneva Academy, 2018, p. 20; cf. Jann 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 ff.

28 ICTY, *Haradinaj*, above note 18, paras 63 ff.

Bosnia and Herzegovina and Croatia, and finally in Kosovo itself.<sup>29</sup> Therefore, because certain indicators existed in one situation which was described as an armed conflict, their presence elsewhere implied that armed conflicts existed in those territories as well. Such a methodology—evidently based on a comparison between various contexts—does not provide clear guidance for classification purposes in contexts which are very different from the ones examined by the ICTY, but which may nevertheless amount to NIACs. Particularly compelling in this regard is the argument that the approach used by the ICTY to classify “conflicts of high intensity ... provides no meaningful guidance in assessment of low-intensity conflicts”.<sup>30</sup>

Another unknown element is the extent/degree of organization required. Should the threshold of organization be high (as for the threshold of intensity), or could armed actors with some rudimentary organization be considered as OAGs for the purposes of IHL? The phrase “minimum” or “minimal level of organization” is occasionally employed, for example in the *Boškoski* case,<sup>31</sup> although it does not seem to have ever become a proper term of art. Even if this concept was taken as a yardstick, it may be given two different meanings: it may set a low threshold, accepting for an OAG any level of organization higher than that of a mob; or it may be seen, to the contrary, as setting a higher standard, namely if “minimum” were interpreted as referring to a certain level of organization, which is not necessarily low.

In its early jurisprudence, the ICTY seemed to adopt a reasoning that was congruent with the latter meaning. In the Appeals Chamber judgment in the *Tadić* case, the Tribunal evoked the notion of “an organised and hierarchically structured group, such as a military unit or ... armed bands of irregulars or rebels”, that has “a structure, a chain of command and a set of rules as well as the outward symbols of authority”.<sup>32</sup> In later jurisprudence, though, the ICTY seemed to be less demanding. In the *Limaj* case, for instance, the ICTY adopted a very flexible approach to qualify the KLA as an OAG despite the fact that the “organisational structure and the hierarchy of the KLA were confusing”.<sup>33</sup> Similarly, in the *Haradinaj* case, the Tribunal found that the KLA did not possess disciplinary rules and mechanisms,<sup>34</sup> and that it had developed “a mainly spontaneous and rudimentary

29 *Ibid.*, paras 32ff.

30 I. Sobol, above note 27, pp. 16 ff.

31 ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 194. See also ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Geneva, 2008, p. 5; 2016 Commentary on GC I, above note 19, para. 423 (“The ICRC has expressed its understanding of non-international armed conflict, which is based on practice and developments in international case-law, as follows: Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organisation*”).

32 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 120.

33 ICTY, *Limaj*, above note 18, para. 132.

34 ICTY, *Haradinaj*, above note 18, para. 69.

military organization at the village level”, but that it nevertheless satisfied the requirement of an OAG for the purposes of IHL.<sup>35</sup>

Of related note is the ICTY’s reluctance to cast the criterion of organization in light of the capacity to respect IHL; this is particularly visible in its handling of the KLA’s lack of disciplinary mechanisms. In fact, when the defence in the *Limaj* case raised that “a party to a conflict must be able to implement international humanitarian law and, at the bare minimum, must possess: a basic understanding of the principles laid down in Common Article 3, a capacity to disseminate rules, and a method of sanctioning breaches”, the Chamber explicitly rejected this argument, finding that “some degree of organisation by the parties will suffice to establish the existence of an armed conflict” and that “[t]his degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation”.<sup>36</sup> A similar approach to the one taken by the *Limaj* and *Haradinaj* chambers was subsequently applied by the chambers of the International Criminal Court (ICC) in the *Lubanga* case, when the Trial Chamber rejected the argument that an armed group needed to be under “responsible command” (no mention is otherwise made of the group’s capacity to respect IHL)<sup>37</sup> – all that was necessary was for the group to be “sufficiently organized” in light of factors that were “potentially relevant”.<sup>38</sup>

The “minimal level of organization”, thus understood, does not seem to have much precedent in earlier practice and discussions, nor is it supported by the International Committee of the Red Cross’s (ICRC) Commentaries to the Geneva Conventions. According to the latter, the organizational element of any non-State armed group, in order for that group to be considered a party to an armed conflict, must be such as to allow it to implement IHL, a “fundamental criterion which justifies the other elements” of the NIAC definition.<sup>39</sup> This understanding is commonly restated in doctrine, and is logically necessary for the application of common Article 3.<sup>40</sup> Thus, “[w]hile the group does not need to have the level of organisation of state armed forces, it must possess a certain level

35 *Ibid.*, para. 89. Beyond international criminal courts and tribunals, the Inter-American Commission on Human Rights (IACHR) in *Abella v. Argentina* – the famous *Tablada* case – also decided that it sufficed for the armed group to be “relatively organized”; see IACHR, *Juan Carlos Abella v. Argentina*, Case No. OEA/Ser.L/V/II.98, 18 November 1997 (*Tablada*), para. 152.

36 ICTY, *Limaj*, above note 18, paras 88–89.

37 The Trial Chamber held that “Article 8(2)(f) [of the Rome Statute of the ICC] does not incorporate the requirement that the organised armed groups were ‘under responsible command’ .... Instead, the ‘organized armed group’ must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.” ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber), 14 March 2012, para. 536.

38 *Ibid.*, para. 537.

39 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977: Commentary*, ICRC, Geneva, 1987, para. 4470.

40 See, for example, J. Nikolić, T. de Saint Maurice and T. Ferraro, above note 11: “IHL requires that the parties to armed conflicts have the capacity to conduct military operations and to apply IHL rules.” Cf. M. Sassòli, above note 5, p. 56; see also Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups under International Humanitarian Law Really Be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 425–436.

of hierarchy and discipline and the ability to implement the basic obligations of IHL”.<sup>41</sup>

We therefore disagree with the ICTY’s approach in *Limaj* and *Haradinaj*, which in our view does not reflect older and contemporary doctrine, nor indeed the Tribunal’s own earlier position in *Tadić*. We are not saying that the Kosovo War did not amount to a NIAC: we simply disagree with the ICTY’s methodology. This methodology is contrasted by the one chosen by the ICC Trial Chamber in *Katanga*, which found that “‘organised armed groups’ must therefore have a sufficient degree of organisation to enable them to carry out protracted armed violence and to implement the provisions of humanitarian law applicable to that type of conflict”.<sup>42</sup> This is the better view, one which is also supported by doctrine.<sup>43</sup>

We submit that any analysis of whether a particular group meets the criterion of organization must be teleological – namely, looking at the object and purpose of IHL rules – and not simply comparative. There are in fact two main reasons why the “organization” of armed groups is key from an IHL perspective.

1. The first reason is to distinguish proper armed conflicts from “isolated”, “sporadic” or otherwise less serious acts of violence performed by unorganized criminal bands.<sup>44</sup> The armed group needs to be organized *with a view to conducting hostilities* or a continuum of attacks (the ability to launch a “continuum of attacks” seems to us the most precise understanding of the capacity to engage in hostilities, as the group should be able to engage in more than just an isolated incident of violence and should rather be capable of engaging in recurrent and prolonged violence). This is supported by the ICRC’s recent study on *The Roots of Behaviour in War*, which notes that “[a]ll armed groups capable of launching operations with some semblance of a military character have structures of one kind or other – one or more leaders and degrees of organization which, though they may vary, exist and need to be identified”.<sup>45</sup> To engage in a continuum of

41 Cordula Droege, “Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 550; see also 2016 Commentary on GC I, above note 19, para. 429.

42 ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, para. 1185.

43 See, for example, René-Jean Wilhelm, “Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international”, *Recueil des Cours*, Hague Academy of International Law, Vol. 137, 1972, pp. 347–348; Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, *Recueil des Cours*, Hague Academy of International Law, Vol. 163, 1979, p. 147; C. Droege, above note 41, p. 550; Gloria Gaggioli, “Targeting Individuals Belonging to an Armed Group”, *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2020, p. 908.

44 See, for example, 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); 2016 Commentary on GC I, above note 19, para. 431. See also ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 562, stating that the criteria of organization and intensity “are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.

45 Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2020, p. 13.

attacks, the armed group must possess the ability to launch military operations bringing together different units and to confront enemy armed forces in the context of proper armed clashes, and this ability is illusory without proper organization. In other words, there must exist an *armed wing* whose function is to regularly conduct hostilities. The criterion of “continuous combat function” developed by the ICRC to determine individual membership in an OAG is thus also useful to determine whether an OAG exists in the first place.<sup>46</sup>

2. The second reason is to make sure that the group would be able to respect IHL.<sup>47</sup> The existence of an accountability mechanism allows the group to respect IHL. It has been argued by some authors that the existence of a disciplinary mechanism and the ability to implement IHL is merely an indicative element of organization, and not a necessary aspect of an OAG.<sup>48</sup> We disagree with this view. While it is not required of a group to actually respect IHL in order for that body of law to apply, what is required is the existence of some accountability in the group for the acts of its members in general. Such “accountability” could exist even if the group’s fighting forces are given a great deal of initiative in their accomplishment of various missions, but at the very least the armed group, under responsible command, exercises sufficient control over the acts of its members for those acts to be considered as its own. Such an accountability mechanism need not be exclusive to ensuring accountability for IHL violations: indeed, the group might rather be interested in punishing disloyalty or desertion, but the same mechanism could in principle be applied for breaches of IHL. This goes hand in hand with the previous requirement for the existence of sufficiently regular/stable fighting forces (an “armed wing”). Volatile groups whose members participate in hostilities in a sporadic manner, and which possess no accountability mechanisms at all, should not be considered OAGs.

In brief, it is only if a group is capable both of launching a continuum of attacks and ensuring the accountability of its members that it may be considered sufficiently organized for the purposes of IHL. These are in our view minimum requirements and not mere indicative factors.

**What lessons can be derived for classifying groups designated as terrorist? The relevance of the dichotomy between the networked and hierarchical models of terrorist organizations**

Linking these theoretical considerations more specifically to designated terrorist groups, it is first pertinent to recall that scholarship commonly distinguishes

46 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC, Geneva, 2009, pp. 32 ff.

47 See above note 40; AP II, Art. 1(1); 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, pp. 14 ff.

48 See, in particular, R. Bartels, above note 11.

between “networked” and “hierarchical” models of terrorist organization. Thus, Gunaratna and Oreg (as well as a number of other authors<sup>49</sup>) distinguish between groups with a “command-cadre (hierarchical) structure” and those with a “network structure”:

The hierarchical or command-cadre structure is like a terrorist army, where the leadership provides to the middlemen and the members both material as well as non-material (ideological) incentives. A network, on the other hand, is composed of a set of actors (or nodes) connected by ties. Networks are self-organized and self-enrolling.<sup>50</sup>

Hierarchical groups’ functioning may more closely resemble that of armed forces,<sup>51</sup> while networks employ “intermediaries to keep cells isolated from each other but in communication with leadership”.<sup>52</sup> Networked organization allows for greater group resilience to detection and elimination by the authorities, but only a hierarchically organized group is capable of carrying out “complex attacks such as the 11 September attack on New York and Washington, DC”.<sup>53</sup> Although there are different types of terrorist (and, in general, criminal) networking, networks typically have a core (hub) “characterized by dense connections among individuals who, in the case of a directed network, provide the steering mechanism for the network as a whole”, and a periphery featuring “less dense patterns of interaction and looser relationships than the core”.<sup>54</sup>

We submit that this dichotomy is pertinent when classifying armed conflicts as well, although the structural type (hierarchical or networked) should be seen as indicative of a group’s organizational capacity rather than as dictating it. Thus, hierarchical organizations will sooner conform to the notion of “organized armed group” than networks because, essentially, they will be better equipped to launch a continuum of attacks and to ensure the accountability of their members. This dichotomy is similar to the one identified by the ICRC between centralized and decentralized groups in its study *The Roots of Restraint in War*.<sup>55</sup> This study further demonstrates that decentralized groups have looser coordination in military planning and operations and few observable signs of military discipline.<sup>56</sup> In other

49 For example, Patrick B. Johnson *et al.*, *Foundations of the Islamic State: Management, Money and Terror in Iraq, 2005–2010*, RAND Corporation, Santa Monica, CA, 2016, pp. 68–69; Abdulkader H. Sinno, “Armed Groups’ Organizational Structure and Their Strategic Options”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 316.

50 Rohan Gunaratna and Aviv Oreg, “Al Qaeda’s Organizational Structure and Its Evolution”, *Studies in Conflict and Terrorism*, Vol. 33, No. 12, 2010, p. 1045.

51 “Hierarchical terrorist organizations are more akin to conventional armies or guerrilla movements. They use unconventional battlefield tactics, but their organization centralizes authority from the top down”: P. B. Johnson *et al.*, above note 49, p. 69.

52 *Ibid.*, p. 69.

53 R. Gunaratna and A. Oreg, above note 50, p. 1045.

54 Phil Williams, “Transnational Criminal Networks”, in John Arquilla and David Ronfeldt (eds), *Networks and Networks: The Future of Terror, Crime, and Militancy*, RAND Corporation, Santa Monica, CA, 2001, pp. 72–74.

55 Fiona Terry and Brian McQuinn, *The Roots of Restraint in War*, ICRC, Geneva, 2018.

56 *Ibid.*, p. 46.

words, they are less capable of launching a continuum of attacks and of ensuring the accountability of their members—both of which are necessary to fulfil the two minimum requirements of organization described above.

The hierarchical–networked dichotomy is not a strict categorization but rather a spectrum: some groups may lean more to the poles, while others may be in between, or their internal factions/branches may all levitate between the two models. Some groups exhibit characteristics that do not properly conform to either model, but this is the exception rather than the rule. Crossover types of groups are not exclusive to designated terrorist groups; this is the case, for instance, for the Free Syrian Army (FSA), now known as the Syrian National Army (SNA). The UN Independent International Commission of Inquiry on Syria found that a NIAC erupted in Syria between November 2011 and August 2012, but at the time of its initial report, when some OAGs such as the FSA had already been founded, the Commission was not able to conclude that the intensity and organization criteria had been met as of March 2011.<sup>57</sup> Some months later, it determined that a NIAC had come into existence on the basis that Syrian opposition forces were now engaged in sustained military operations against the government (including in the capital), had organized *local* military councils claiming leadership over fighters in an area, and had access to sufficient weapons, funding and logistics.<sup>58</sup> And yet, it does not appear that the FSA/SNA ever achieved a strong hierarchical model or managed to establish a command structure, despite attempts to that effect.<sup>59</sup> The opposition remains “fractious and deeply divided”,<sup>60</sup> and the group itself is described by one commentator as having “no rules and no military or religious order. Everything happens chaotically. ... The FSA lacks the ability to plan and lacks military experience.”<sup>61</sup> Assuming that the FSA/SNA is indeed a single armed group (as most media tend to do), then it must be seen as a decentralized one made of several structured factions.<sup>62</sup> In such a case, the question of whether such a group is an “organized armed group” for the purpose of IHL may be disconcerting given the absence of an internal disciplinary system.<sup>63</sup> The better view, however, is perhaps to consider

57 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/S-17/2/Add.1, 23 November 2011, paras 97 ff.

58 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August 2012, paras 21 ff.

59 See Geneva Academy, “Non-International Armed Conflicts in Syria”, available at: [www.rulac.org/browse/conflicts/non-international-conflicts-in-syria#collapse3accord](http://www.rulac.org/browse/conflicts/non-international-conflicts-in-syria#collapse3accord).

60 “Guide to the Syrian Opposition”, *BBC News*, 17 October 2013, available at: [www.bbc.com/news/world-middle-east-15798218](http://www.bbc.com/news/world-middle-east-15798218).

61 Ghaith Abdul-Ahad, “Al-Qaida Turns Tide for Rebels in Battle for Eastern Syria”, *The Guardian*, 30 July 2012, available at: [www.theguardian.com/world/2012/jul/30/al-qaida-rebels-battle-syria](http://www.theguardian.com/world/2012/jul/30/al-qaida-rebels-battle-syria).

62 On the decentralized character of the group, see Charles Lister, *The Free Syrian Army: A Decentralized Insurgent Brand*, Brookings Institution, Washington, DC, 2016.

63 See R. Bartels, above note 11 (assuming that the FSA is an OAG and deriving from this assumption the idea that the factor regarding the existence of a disciplinary system is not a must). See also our contrasting opinion above regarding the need to consider the existence of an accountability mechanism as a minimum requirement based on a teleological interpretation of the law.

the FSA/SNA as a network of smaller groups which are merely nominally affiliated to the FSA/SNA and are fighting for a common cause.<sup>64</sup>

In any case, the existence of groups which are difficult to classify on the networked/hierarchical spectrum does not detract from the latter's usefulness as a tool for conflict classification. It would therefore be wise to develop tools – with the help of social scientists – to better understand the structure and functioning of various armed non-State actors and to classify them along the lines of the hierarchical and networked models. This would ensure a more scientific approach to conflict classification while keeping the criterion of organization as the focal point of the exercise. Such classification would need to be conducted over time for each group, as a group may (d)evolve from a hierarchical to a networked model, typically to avoid detection and to act more clandestinely. Obviously, the characterization of such a group as an OAG can and should equally evolve overtime.

Although understanding the structure of clandestine organizations designated as terrorist groups is difficult, a convincing IHL analysis cannot be done without adequate consideration of the structure and functioning of armed non-State actors and their evolution over time. A combined use of minimal requirements for determining the existence of the organization criterion and of typologies of various armed non-State actors would facilitate legal classifications and help predict their evolution.

Consider the structure of Al-Qaeda in the Arabian Peninsula (AQAP) or IS. In its heyday, the latter even claimed statehood and worked hard, in addition to its military efforts, to provide services to the local population in lieu of the Syrian and Iraqi authorities; it began organizing to this effect at least as early as 2006.<sup>65</sup> The expansion of IS and the establishment of its authority over a number of settlements in Iraq allowed the group to build up functioning public services that included oversight of electricity supply, health spending, education, street cleaning and food provision.<sup>66</sup> Its military wing was organized by experienced foreign jihadists who had fought in other conflicts, such as in Chechnya, and who had perhaps even served in State armed forces before joining IS; these individuals created a centralized chain of command to manage the IS paramilitary force,<sup>67</sup> which in 2014 may have numbered as many as 31,000 fighters in Iraq and Syria.<sup>68</sup> The organization kept detailed information on its incoming and permanent fighters, their salaries and duties, and their permission and reasons for leaving, leading Shapiro and Siegel to conclude that “[a]ny human resources manager would want to capture that

64 On the FSA/SNA as a banner organization or a “loose alliance of rebel groups”, see Geneva Academy, above note 59.

65 See Aymenn Al-Tamimi, “The Evolution in Islamic State Administration: The Documentary Evidence”, *Perspectives on Terrorism*, Vol. 9, No. 4, 2015, p. 118.

66 *Ibid.*, p. 123.

67 Guillaume N. Beurpere, “ISIS and Protracted War: Why Violent Extremists Persist in the Face of Defeat”, *Counter Terrorist Trends and Analyses*, Vol. 6, No. 8, 2014, p. 6.

68 See, for example, “Islamic State Fighter Estimate Triples – CIA”, *BBC News*, 12 September 2014, available at: [www.bbc.com/news/world-middle-east-29169914](http://www.bbc.com/news/world-middle-east-29169914).

information”.<sup>69</sup> There can be no doubt that IS, a designated terrorist group,<sup>70</sup> met the requirements for an OAG under IHL in 2015 (and allegedly well before that<sup>71</sup>): this is because it was able to mount sustained attacks and engage in concerted military action guided by a clear strategy. The IS military wing possessed an internal structure and disciplinary system which would allow it to ensure respect for the rules of military discipline – but also IHL, had the responsible command so desired.

This structure of IS is thus very different from that of other jihadist groups, such as the Pakistan-based Al-Qaeda in the Indian Subcontinent (AQIS). AQIS is a smaller group, a loose collection of mujahedeen across the Indian subcontinent which is affiliated to Al-Qaeda Central and which has also pledged allegiance to Mullah Omar, former head of the Afghan Taliban. It does not engage in sustained military action but rather in more “traditional” terrorist conduct such as assassinations and hijackings.<sup>72</sup> The violence projected by such a group can be devastating, but this alone does not make it an OAG under IHL. Although information on the internal functioning of AQIS is admittedly scarce, it seems to resemble that of older terrorist groups such as those functioning in Europe in the second half of the twentieth century (e.g., the Red Army Faction), which demonstrated a complete lack of a military (hierarchical) structure and were not considered armed groups even though they projected high degrees of violence.<sup>73</sup>

Designated terrorist groups also tend to evolve very quickly, and such a group may still be generally perceived as a single OAG even after its structure has changed considerably. For instance, in Nigeria, after the death of Boko Haram’s founder Mohammed Yusuf in 2009, the group split into different factions, of which there were as many as six in 2014, answering to different leaders with limited control over their many cells<sup>74</sup> (some of these later pledged allegiance to IS while others did not, and Boko Haram as a whole seems to have lost its ability to “speak with one voice”).<sup>75</sup> It is difficult, in our view, to speak of a single “organized” armed

69 Jacob N. Shapiro and David A. Siegel, “Moral Hazard, Discipline, and the Management of Terrorist Organizations”, *World Politics*, Vol. 64, No. 1, 2012, p. 51.

70 See UNSC Res. 2253, 17 December 2015.

71 See, for example, A. Al-Tamimi, above note 65; J. N. Shapiro and D. A. Siegel, above note 69.

72 See Alastair Reed, *Al Qaeda in the Indian Subcontinent: A New Frontline in the Global Jihadist Movement?*, International Centre for Counter-Terrorism, 2016, pp. 10 ff. See also Mapping Militants, “Al Qaeda in the Indian Subcontinent”, Stanford University, available at: <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-qaeda-indian-subcontinent-aqis>.

73 For the functioning of the Red Army Faction, its organization and the way it was considered by the West German authorities, see Reinhard Rauball, *Die Baader-Meinhof-Gruppe*, De Gruyter, Berlin, 1973, pp. 29–42; Karrin Hanshew, *Terror and Democracy in West Germany*, Cambridge University Press, New York, 2012, pp. 111 ff., 160 (the latter recalling that State representatives “insisted on trying the members of the RAF as simple criminals rather than grant them special recognition as political combatants”).

74 “The movement, never very hierarchical, is more dispersed than ever, with many leaders in the Adamawa mountains, Cameroon, and Niger. Its isolated leader, the violent Abubakar Shekau, probably has little daily control over cells, and it is fragmenting into factions, including the relatively sophisticated Ansaru, which focuses more on foreign targets.” International Crisis Group, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency*, 3 April 2014, p. ii.

75 *Ibid.*, pp. 21 ff. Notably, the report recalls (p. 22) that “in the past four years [Boko Haram] has split into many factions with varying aims, to the point that some believe it is *too fragmented to present a common front for dialogue*” (emphasis added).

group if the group breaks up into different factions acting separately and using different means.<sup>76</sup>

There are thus various reasons why the ideological, strategic, tactical and organizational workings of designated terrorist groups *in principle* do not correspond to the classical hierarchical OAG model. IS and other terrorist OAGs such as the group's predecessor, Al-Qaeda in Iraq, are therefore quite exceptional in the milieu of groups labelled as jihadist and/or terrorist. Most of them are either decentralized or should be considered as an assemblage of various smaller armed groups.

Moreover, no sufficient evidence has been produced to demonstrate that either Al-Qaeda or IS are worldwide, unitary, transnational OAGs. Should terrorist attacks conducted by IS cells or adherents around the world be considered part of the same "continuum of attacks" as the conflicts involving the group in Iraq or Syria? Do their perpetrators find themselves within the same chain of command as the IS fighters in the Middle East? The answer is probably no, and simply sharing an ideology is not enough to replace proper organizational links as required by IHL.

It may be tempting for States to consider jihadist networks such as Al-Qaeda or IS as forming part of the same OAG, but a deeper analysis shows this to be little more than a fiction, one which allows the use of more permissive rules on targeting than those governing simple law enforcement operations.<sup>77</sup> Some OAGs may also pledge allegiance to – or pretend to belong to – a broader terrorist network, such as IS, in order to attract financial resources and manpower, even though such links are not (yet) in existence. Such a phenomenon has been recorded in the Philippines in relation to the Maute group pretending to belong to the Islamic State of Iraq and Syria (ISIS) without any actual linkages to this terrorist network.<sup>78</sup> In any case, the mere fact that various jihadist groups share a common ideology and have loose connections with one another is not enough to consider that they together constitute an OAG for the purposes of IHL. Certainly, there is nothing in IHL to limit OAGs to a particular State or geographical area,<sup>79</sup> and to the extent that IS operates as a single entity in the territories of Iraq and Syria, notably, it clearly qualifies as a "transnational" armed group.<sup>80</sup> What matters is that the group is able to perform attacks of a sufficient magnitude and which are linked with one another in a single continuum, and that the

76 According to the International Crisis Group report, "[l]ately [Boko Haram] has evolved into pure terrorism, with targeting of students attending secular state schools, health workers involved in polio vaccination campaigns and villages supporting the government": *ibid.*, p. ii.

77 See, in this regard, G. Gaggioli, above note 43, p. 901.

78 Trishia Billiones, "Maute Group Not Accredited by Terror Group ISIS, Says Analyst", *ABS-CBN News*, 25 May 2017, available at: <https://news.abs-cbn.com/focus/05/25/17/maute-group-not-accredited-by-terror-group-isis-says-analyst>.

79 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*, Geneva, 2019 (2019 Challenges Report), p. 10.

80 See Pavle Kilibarda and Gloria Gaggioli, "Globalization of Non-International Armed Conflicts", in Mark Lattimer and Philip Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War*, Hart Publishing, London, 2018.

responsible command/management exercises sufficient control over the acts performed by subordinates. Only such parts of a broader organization/network that correspond to a group which can perform attacks with sufficient magnitude and in a single continuum can be equated with OAGs for the purposes of IHL. In other words, the ISIS/Al-Qaeda networks are to be understood as ideological/political organizations that contain various distinct groups, some of which correspond to OAGs for the purposes of IHL.

## Terrorist groups and the criterion of intensity

What degree and type of violence is required? The existence of proper armed clashes and the necessity of moving away from law enforcement means as a benchmark

Besides organization, the other criterion used to establish the existence of a NIAC is that of intensity. Violence between a State and individuals under its jurisdiction is a matter of domestic law and IHRL “as long as such violence does not rise to a certain level”.<sup>81</sup> The intensity requirement should therefore be understood as an indicator that a certain situation can no longer be resolved through law enforcement means, allowing governments to use force under the conduct of hostilities paradigm.

The ICTY has considered a number of factors to be indicative of the existence of a level of violence sufficiently intense for fighting involving non-State armed groups to be described as a NIAC. For instance, in the *Haradinaj* case, it first recalled that the criterion of “protracted armed violence” as discussed in the *Tadić* case referred “more to the intensity of the armed violence than to its duration”<sup>82</sup> (the duration of a conflict may, in any event, only be gleaned retrospectively,<sup>83</sup> and international bodies have not given it much relevance in their practice),<sup>84</sup> before providing a non-exhaustive list of indicators to be taken into consideration when evaluating the intensity of armed violence. These included

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.<sup>85</sup>

81 Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 181; cf. 2016 Commentary on GC I, above note 19, para. 415.

82 ICTY, *Haradinaj*, above note 18, para. 49.

83 See M. Sassòli, above note 81, p. 182.

84 In the *Tablada* case, the IACHR found that armed violence lasting no more than two days amounted to a NIAC between Argentinian forces and an insurgent group; see IACHR, *Tablada*, above note 35.

85 ICTY, *Haradinaj*, above note 18, para. 49. For comparison, see similar factors used in other ICTY case law, such as ICTY, *Limaj*, above note 18, paras 135 ff.; ICTY, *Boškoski*, above note 31, paras 177 ff.; ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 188 ff.; ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), 17 December 2004, paras 333–341.

As mentioned earlier, these indicators are depicted as indicative and not determinative of a NIAC. Contrary to the organization criterion, there appears to be consensus that the level of intensity needs to be high. In terms of classification, this is one of the distinguishing features between the IHL of international armed conflicts (IACs) (where there is no threshold of violence, at least according to the “Pictet theory”<sup>86</sup>) and the IHL of NIACs (where the level of intensity needs to be high<sup>87</sup>).

While the focus is generally put on degree, more thought should be given to the type of violence required. This matter is not discussed in IHL treaties, other than to exclude internal tensions or disturbances from the category of NIACs.<sup>88</sup> However, the fact that the violence should be of a specific nature is implicit in the ICTY’s list of factors.

All of the ICTY’s indicators focus on the military, and not law enforcement, nature of the State’s response, implying that the State *in casu* is no longer capable of containing the situation, which has consequently escalated into an armed conflict. This view is echoed in the ICRC’s position on the scope of application of common Article 3 – namely, that the threshold of intensity may have been reached “when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces”.<sup>89</sup>

Terrorist violence can doubtless leave a horrifying number of casualties, but this does not in itself qualify it for regulation by IHL: the violence must be of a specific nature and not just of a specific degree. We propose that two aspects be taken into consideration when classifying a situation from an intensity perspective: whether the violence under examination amounts to armed clashes, and whether those armed clashes reach such a degree that they may no longer be resolved through law enforcement means.

1. The “armed clashes” requirement has been raised several times in doctrine.<sup>90</sup> The existence of such clashes is a necessary requirement for a NIAC to arise. We understand “armed clashes” to mean an exchange of violence or individual confrontations between organized parties. The violence cannot be committed only by one side; it must be projected mutually, which requires an exchange of violence between at least two sides. The ICRC’s 2019 Challenges Report states that “confrontations must take place between at least two organized parties” for a NIAC to arise.<sup>91</sup> Unilateral violence,

86 See 2016 Commentary on GC I, above note 19, para. 236.

87 See in this regard the theory advanced by Jean Pictet in the 1952 Commentary on Common Article 3, which also takes into account a list of exigent factors to establish the existence of a “genuine” armed conflict. 1952 Commentary on GC I, above note 24, pp. 49 ff.

88 AP II, Art. 1(2).

89 ICRC, above note 31, p. 3.

90 See, for example, J. K. Kleffner, above note 27, p. 2169: “While this is not to suggest that one-sided armed violence – for instance, the killing of civilians or destruction of civilian objects – cannot also feature in the intensity analysis for determining the existence of a NIAC, fighting between the parties is a quintessential precondition, and as such, a determinative factor.”

91 2019 Challenges Report, above note 79, p. 51.

however shocking, does not amount to an armed conflict. Although arguments have been made in favour of a unilateral trigger for a NIAC,<sup>92</sup> this does not conform to the traditional understanding of an armed conflict and could lead to an over-classification of such situations.

2. The armed clashes (and related violence) must achieve a sufficient level to amount to an armed conflict. In cases of violence between a State and a non-State actor, which are primarily governed by the State's human rights obligations, this means that a resort to military force and conduct of hostilities rules must be justified by the State's law enforcement mechanisms no longer being able to maintain order in the relevant territory.<sup>93</sup> This analysis presupposes an underlying principle of necessity, which is both objective and situational. It is objective in the sense that it depends not on the State's will but on whether, as a matter of fact, its law enforcement authorities can be expected to cope with the matter. It is situational as it involves an *in situ* analysis, and not just a theoretical capacity-based analysis. This means that even States with very powerful law enforcement and police forces can become a party to a NIAC if in a part of their territory (or when acting abroad) they have no choice but to take more severe measures, such as deploying the military.<sup>94</sup>

The lack of a central monitoring body responsible for independent conflict classification becomes particularly problematic with respect to internal tensions and disturbances, namely "other situations of violence" (OSVs) that could evolve into NIACs. It is often practically impossible to pinpoint the exact moment when OSVs become NIACs, even though this point entails a crucial shift of legal frameworks. This problem is compounded by the fact that international jurisprudence typically does not take into consideration the reasons for which armed forces and military-grade weapons are deployed to contain an OSV, and simply takes these as retrospectively indicative of an armed conflict. Yet States should not resort to such measures unless it seems impossible to cope with the situation by means of law enforcement—otherwise, the door could be left wide open to abuse as a State could take wartime measures and claim that the conduct of hostilities paradigm applies as a direct result of its own excessive measures. In other words, a State cannot "create" the required level of intensity if the situation does not require it. It is therefore crucial to consider whether such measures were necessary in the first place, rather than simply being taken in order to determine the beginning of a NIAC. It is only when the bilateral violence has reached such

92 A. A. Haque, above note 11.

93 "[L]e conflit armé interne, aux yeux des experts, est celui qui met en présence les forces armées organisées du gouvernement établi et du parti insurgé. Cette dernière notion implique que le gouvernement établi, pour faire face aux hostilités dirigées contre lui, doit recourir non seulement aux forces de police normalement chargées du maintien de l'ordre, mais à de véritables forces armées": R.-J. Wilhelm, above note 43, pp. 347–348.

94 This is not to say that law enforcement officials cannot engage in hostilities, but the continued deployment of the police using force according to law enforcement standards seems indicative of the fact that the State does not believe that there is as of yet a need for more extreme measures to contain the situation.

an intensity that law enforcement measures have proven inadequate, or would be inadequate, to maintain or restore order that a situation of violence may be considered a NIAC and may allow the State to resort to the conduct of hostilities.

Specific problems may arise in relation to NIACs taking place between OAGs with no State involvement (“non-State NIACs”). States, and not armed groups, are obliged by international law to ensure law and order in a given territory, and the principle of necessity related to the maintenance of order discussed above would therefore not make sense when applied to a non-State actor directly. However, NIACs usually take place within the territory of a State,<sup>95</sup> and regardless of whether that State is a party to the armed clashes in question, the conflict classification must take place on the basis of its own capacity to maintain order. Gasser writes that “[a]nother case [of NIAC] is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power”<sup>96</sup> (the implication is that the “non-state NIAC” emerges in the absence of State authority, not in spite of it). Thus, whether armed clashes between rival drug cartels in Mexico or Colombia have reached the threshold of an armed conflict cannot be considered in isolation from those States’ ability to contain the clashes. Non-State, “private” violence is normally much better regulated by domestic law and IHRL than by IHL.

In the counterterrorism context, a specific problem may arise when States act against terrorist groups abroad. Unless the intervening State is joining a pre-existing NIAC on the side of the territorial State (in which case the criterion of intensity will have already been fulfilled for the “domestic” NIAC), the requirement to exhaust possibilities for maintaining order may be problematic for the foreign State. For example, State A can only be in a NIAC against armed group X in the territory of State B (which is itself a non-belligerent) if the armed clashes are of a sufficient degree for law enforcement means to no longer be able to resolve the matter. The fact that X is not situated in A’s territory will have to be taken into account for establishing whether the criterion of necessity – as defined above – is met (namely, A is probably not in a position to maintain order in B).<sup>97</sup> However, there still need to be armed clashes between A and X, which is to say bilateral violence. If A were to simply launch air strikes or drone strikes against X, which is not capable of defending itself against such strikes, such unilateral force will be inadequate to be considered a NIAC. The situation may be different if B invites A to take care of X in its stead: assuming that B is not already involved in a NIAC, it would be absurd not to consider B’s capacity to maintain order in its own territory when determining the intensity of the conflict

95 Some NIACs have historically involved naval confrontations on the high seas, and confrontations could hypothetically take place in outer space as well; however, the asymmetry characterizing most conflicts between States and non-State actors largely confines them to land warfare in territories belonging to one or more States.

96 Hans-Peter Gasser, “International Humanitarian Law: An Introduction”, in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, Geneva, 1993, p. 555.

97 The question of consent by the territorial State may figure in this analysis as a factual consideration, but unlike for *jus ad bellum*, it is not constitutive of the intervening State’s obligations under IHL or IHRL.

between A and X. This would create a loophole wherein it would be possible for intervening States to engage in conduct otherwise prohibited to the territorial State.<sup>98</sup> Nevertheless, the existence of such an invitation should probably be taken as indicative that the necessity criterion has been met (although it should not be definitive).

We recall that the above arguments are not imported from *jus ad bellum* but are rather derived from the necessity of demonstrating that law enforcement measures are inadequate or unavailable before considering IHL applicable. If States were to wage war against armed non-State actors without demonstrating the necessity of doing so (e.g., when the group is disorganized or does not project a sufficient level of violence), such use of force would almost certainly amount to a serious violation of human rights law. IHL should not be considered applicable before there exist violent armed clashes between two or more parties. The application of IHL should never become a reward for States opting to employ extreme measures, but can only ensue from an objective state of necessity in a given moment.

To summarize, the simple enumeration of indicative factors by the jurisprudence is not sufficient to ascertain whether the criterion of intensity has been met in each situation. The intensity criterion should be proven considering the existence of armed clashes and the related necessity of resorting to hostilities because law enforcement measures would be inadequate or have proven to be inadequate.

**Who should project violence, and can intensity be accumulated in cases of alliances or coalitions between armed groups labelled as terrorist? Assessing theories pertaining to “co-belligerency”, the “support-based approach” and “cumulated/aggregated intensity”**

Numerous jihadist groups around the world function with a certain degree of cooperation and mutual assistance. This does not necessarily make them part of the same supranational group, but it does raise the problem of whether such cooperation can impact the classification of a particular situation of violence. Jihadist groups are often perceived as entertaining various levels of interaction with other factions espousing a common ideology. These dynamics can become very intricate. For example, the Mali-based Nusrat Al-Islam, described as an Al-Qaeda “affiliate”, is apparently a merger of several other jihadist groups in the

98 See Oona A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu and Sarah Weiner, “Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict”, *University of Pennsylvania Law Review*, Vol. 165, No. 1, 2016, pp. 23 ff. and 40 in particular (arguing that, if intensity were not required for an intervening State, it would be allowed to use force in a way that would be impossible for the territorial State; if, however, the intervening State is acting upon the invitation of the territorial State regarding an existing “domestic” NIAC, there is no need for this criterion to be met separately by the intervener). For the idea that the intensity criterion for an extraterritorial NIAC may be higher in order to respect the territorial State’s sovereignty, see Sasha Radin, “Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts”, *International Law Studies*, Vol. 89, 2013, pp. 736–737.

region, most of which are also former individual “affiliates”; the group’s leaders apparently swore oaths of fealty to Al-Qaeda leadership following the merger.<sup>99</sup> Depending on the relationships between its constituent elements, Nusrat Al-Islam may be either a unitary group or a coalition of different groups (as understood by Nikolić, de Saint Maurice and Ferraro, who describe it as an “umbrella organization”: a coalition of “various armed groups operat[ing] with different structures and motives”<sup>100</sup>). Nusrat Al-Islam has also been active in Burkina Faso, where it has allegedly been “cooperating” with the Islamic State in the Greater Sahara (ISGS) even though IS and Nusrat Al-Islam are rivals elsewhere.<sup>101</sup> In Libya, various jihadist and Islamist militias banded together in the Shura Council of Benghazi Revolutionaries, a coalition of separate groups with a common purpose of defending themselves against anti-Islamist operations by other groups.<sup>102</sup> It is less common for non-jihadist groups to be perceived as working in a coalition, but such examples do exist, for example in Mali, where a coalition of nationalist groups works under the aegis of the Coordination of Azawad Movements.<sup>103</sup> Therefore, although there is a tendency to link designated terrorist groups into coalitions (a term that is seldom defined by authors), inter-group cooperation in any form is not restricted to such groups. Our analysis here, therefore, has broader implications than just counterterrorism.

Legally, the question boils down to the following: if State A is in a NIAC with armed group B, and B cooperates with group C, could there *ipso facto* be a NIAC between A and C (and in the absence of direct clashes between A and C)? If our answer to this question is yes, then we can only conclude that the intensity of violence between A and B may be extended to cover C as well. There are several strains of thought arguing for such a possibility in doctrine.

We may call the oldest such position the co-belligerency approach. Scholars of the law of armed conflict rarely feel compelled to define “co-belligerency”, which is certainly an old IHL concept. Traditionally, “[c]o-belligerency is a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes”.<sup>104</sup> The concept has been used historically to describe members of a common alliance (which may

99 See Center for Strategic & International Studies, *Backgrounder: Jama’at Nasr al-Islam wal Muslimin (JNIM)*, 2018, available at: <https://tinyurl.com/fvnxvhmp>.

100 J. Nikolić, T. de Saint Maurice and T. Ferraro, above note 11.

101 Philip Kleinfeld, “Jihadis, Vigilantes, and Demoralised Troops: A Who’s Who in Burkina Faso’s Spiralling Crisis”, *The New Humanitarian*, 9 March 2020, available at: [www.thenewhumanitarian.org/analysis/2020/03/09/who-is-who-burkina-faso-crisis](http://www.thenewhumanitarian.org/analysis/2020/03/09/who-is-who-burkina-faso-crisis).

102 See Jason Pack, Rhiannon Smith and Karim Mezran, *The Origins and Evolution of ISIS in Libya*, Atlantic Council, 2017, pp. 12 ff.; Henrik Gråtrud and Vidar Benjamin Skretting, “Ansar al-Sharia in Libya: An Enduring Threat”, *Perspectives on Terrorism*, Vol. 11, No. 1, 2017.

103 See Andrew McGregor, “Anarchy in Azawad: A Guide to Non-State Armed Groups in Northern Mali”, *Terrorism Monitor*, Vol. 15, No. 2, 2017.

104 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/68/382, 13 September 2013, para. 60; “Co-Belligerents”, in John P. Grant and J. Craig Barker (eds), *Encyclopaedic Dictionary of International Law*, Oxford University Press, Oxford, 2009 (“In strictness, co-belligerents are simply States engaged in a conflict with a common enemy, whether in alliance with each other or not”); Rebecca Ingber, “Co-Belligerency”, *Yale Journal of International Law*, Vol. 42, No. 1, 2017.

be formal or informal) vis-à-vis a specific armed conflict wherein States could be considered belligerent parties regardless of whether or not they actually took part in hostilities (for example, one or more co-belligerent States may simply have declared war against the common enemy without themselves engaging in battle). Geneva Convention IV refers to the concept when establishing who may become a protected person when in the hands of a belligerent party.<sup>105</sup> As a relation of co-belligerency between States may usually be inferred from formal treaties, declarations and other public sources, international law does not spell out the conditions for co-belligerency.

It is very controversial whether the concept can be applied by analogy in a NIAC, in particular as regards relationships between different armed groups. The US judiciary has notably understood the term “associated forces” to be synonymous with co-belligerency and has applied it to OAGs. In *Hamlily v. Obama*, the Columbia District Court accepted that “[a] ‘co-belligerent’ in an international armed conflict context is a state that has become a ‘fully fledged belligerent fighting in association with one or more belligerent powers’”, and proceeded to apply the concept to associated forces of Al-Qaeda.<sup>106</sup> This interpretation of co-belligerency would require the co-belligerent to actually fight alongside one of the principal belligerents, excluding situations where no such fighting takes place.<sup>107</sup> As the concept is here used with respect to OAGs and not States, it makes sense that the US government and judiciary are referring to co-belligerency in this more narrow sense. Therefore, the co-belligerency approach as advanced by some governments and scholars in relation to OAG coalitions requires, perforce, that each “associated force” is itself engaged in hostilities, and does not simply profess a common worldview or pay lip service to the same ideological crusade—an OAG may not simply “declare war” on a State and thereby trigger a NIAC or become a co-belligerent in the same way as this may happen in an IAC.

We are not convinced that co-belligerency, a concept imported from the law of IACs and the law of neutrality, may be applied by analogy in a NIAC, for two main reasons: (1) unlike IACs, NIACs require that a threshold of intensity be reached, and there is no reason why violence perpetrated by a third OAG in a NIAC should not first be evaluated *separately* when classifying the conflict;<sup>108</sup> and (2) even when it comes to States, not every violation of the law of neutrality

105 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 4(2): “Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

106 Columbia District Court, *Hamlily v. Obama*, 616 F Supp 2d 63, 2009, pp. 74–75.

107 See Nathalie Weizmann, “Associated Forces and Co-belligerency”, *Just Security*, 24 February 2015, available at: [www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/](http://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/); A. Deeks, above note 11; V. Koutroulis, above note 11, p. 13; M. Zwanenburg, above note 11, p. 27.

108 It may be argued that the necessity requirement which we discussed for intensity would be met *ipso facto* for another group if it has already been met for one group, but this may not necessarily be the case: for example, the other group might be active in a part of a State’s territory where the State’s capacity to maintain law and order is unhampered by the ongoing NIAC against a different group elsewhere. And

would result in the third State becoming a party to the conflict<sup>109</sup> (as wrongly suggested by the Court in *Hamlily*<sup>110</sup>). It also goes without saying that the notion of “association” or “support” required for co-belligerent status is completely undefined for a NIAC. Even authors arguing in favour of the co-belligerency approach (under one name or another) have trouble ascertaining the requisite standard to be applied in such cases. Thus Koutroulis, who argues that non-State armed group (NSAG) “coalitions” should be treated as a single party to a NIAC if they have a person or a group (e.g., a joint council) that exercises the overall leadership of the groups in terms of operational coordination and strategic authority,<sup>111</sup> admits that it would be difficult to distinguish such coalitions from decentralized NSAGs.<sup>112</sup> If the existence of a coalition depends on the existence of common leadership, even on a purely strategic level, then we do not see the added value compared to analyzing the coalition as a single OAG (other than, perhaps, lowering the organization threshold, which we disagree with). Finally, the co-belligerency approach does not resolve the problem of a higher threshold for the application of AP II (namely, it may apply to some groups, but not to others). Although a “cumulative approach” has been suggested to apply AP II to all groups involved in the coalition if just one of them fulfils its criteria, this does not seem to correspond at all with positive law.<sup>113</sup> It is also problematic in practice because an OAG which does not have territorial control will simply not be able to fulfil all the obligations foreseen in AP II.

A second position regarding OAG coalitions/alliances relies on the ICRC’s support-based approach. This approach was developed by the ICRC with regard to NIACs involving foreign intervention, in order to determine whether “the nature of the intervening power’s involvement in the pre-existing NIAC could mean that it is considered a ‘co-belligerent’, making it a party to the conflict”.<sup>114</sup> Because a NIAC already exists, a third party’s involvement would need to be evaluated not against the general NIAC criteria, but according to its relationship with one of the belligerent parties. Under this approach,

[o]nly activities that have a direct impact on the *opposing* Party’s ability to carry out military operations would turn multinational forces into a Party to a pre-

most importantly, the bilateral projection of violence (armed clashes) would still have to exist separately, in addition to necessity.

109 For example, before the United States entered the Second World War in 1941, it had already lost its neutrality for commercially favouring the United Kingdom, but was still not considered a belligerent itself: see R. Kolb and R. Hyde, above note 21, pp. 277 ff.

110 “One only attains co-belligerent status by violating the law of neutrality, i.e., the duty of non-participation and impartiality. ... If those duties are violated, then the adversely affected belligerent is permitted to take reprisals against the ostensibly neutral party”: Columbia District Court, *Hamlily*, above note 106, p. 75.

111 V. Koutroulis, above note 11, pp. 18–19.

112 *Ibid.*, p. 18.

113 See Raphaël van Steenberghe and Pauline Lesaffre, “The ICRC’s ‘Support-Based Approach’: A Suitable but Incomplete Theory”, *Questions of International Law*, Vol. 59, 2019, pp. 16–18; see also M. Zwanenburg, above note 11, p. 31 (Zwanenburg disagrees with the “cumulative approach” regarding AP II application).

114 Tristan 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”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1231.

existing non-international armed conflict. ... [A]ctivities such as those that enable the Party that benefits from the participation of the multinational forces to build up its military capacity/capabilities would not lead to the same result.<sup>115</sup>

The main difference between the co-belligerency and support-based approaches is that the latter does not require potential coalition members to engage in hostilities themselves.<sup>116</sup> In this respect, it sets a lower threshold for an external party to become a belligerent party to a conflict. Zwanenburg summarizes the criteria under the support-based approach as follows:

First, there needs to be a pre-existing NIAC taking place on the territory where the third power intervenes. Second, actions related to the conduct of hostilities need to be undertaken by the intervening power in the context of that pre-existing conflict. Third, the military operations of the intervening power should be carried out in support of one of the parties to the pre-existing NIAC. Last, the action in question should be undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.<sup>117</sup>

The criticism levelled at the co-belligerency approach may equally be applied to the support-based approach, at least when applied to OAG coalitions. We may add for good measure that the ICRC examines the intervention and involvement of foreign States, not armed groups.<sup>118</sup> However, some international lawyers, such as van Steenberghe and Lesaffre, argue that “no logical reason prevents the ICRC’s ‘support-based approach’ from applying to other types of interventions in pre-existing NIACs, in particular to the support provided by armed groups to one party to a pre-existing NIAC”.<sup>119</sup> These authors submit that the requirements of the support-based approach are better defined than those of co-belligerency, and are thus a viable alternative to the broad interpretation given by the United States to the concept of “associated forces”. If one group, however well-organized, does not engage in acts of violence (a traditional prerequisite for determining the existence of a NIAC), but simply provides material and logistical support to another, why would we accept *ipso facto* that it has become a party to an armed conflict and that lethal force may be employed against the group according to the conduct of hostilities paradigm? Doesn’t this approach unduly expand the categories of targetable individuals? Isn’t the concept of “support” too elastic, and

115 2016 Commentary on GC I, above note 19, para. 446 (emphasis in original).

116 “[A]ctions such as logistical support involving the transportation of the troops of one of the belligerents on the front line, the provision of intelligence used immediately in the conduct of hostilities and the involvement of members of the third power in planning and coordinating military operations conducted by the supported party are all types of support that fall within the scope of application of the ICRC’s position—in the same way as direct involvement by the intervening power in combat operations does—because they have a bearing on the applicability *ratione personae* and *ratione materiae* of IHL”: T. Ferraro, above note 114, p. 1231. See also M. Zwanenburg, above note 11, pp. 26–27.

117 M. Zwanenburg, above note 11.

118 T. Ferraro, above note 114, p. 1231; the ICRC refers to the involvement of a “third power”.

119 R. van Steenberghe and P. Lesaffre, above note 113, p. 11.

what would be its source in the context of conflict classification? Isn't the notion of direct participation in hostilities enough to deal with individuals who support one party to the conflict to the detriment of another's military operations? It is worth recalling that the Columbia District Court in *Hamilly* has already dismissed the US government's similar arguments with respect to individuals providing "substantial support" to the Taliban or Al-Qaeda.<sup>120</sup> Is the support-based approach workable in practice for OAGs? For instance, the last criterion, the existence of an official decision by the intervening "power", would in practice be quite difficult to establish for fluid OAGs. The idea of applying the support-based approach to OAGs therefore causes more problems than it could ever solve.

Several authors<sup>121</sup> also contend that NSAG coalitions may be inferred on the basis of the ICRC's approach to direct participation in hostilities. This position produces similar results to those of the support-based approach, but the criteria are rather based on the ones for direct participation in hostilities as developed by the ICRC (namely, the existence of a threshold of harm, direct causation and a belligerent nexus).<sup>122</sup> It is debatable whether this interpretation is more restrictive or more permissive than the support-based one, but as direct participation in hostilities normally pertains to individual rather than group conduct, the fact that it finds a place in discussions of NSAG coalitions is somewhat perplexing. Deeks writes:

[T]here may be some utility in considering the DPH [direct participation in hostilities] factors in evaluating associations between groups in their adverse relationship to the state. This is because the DPH factors are intended to assess the links between military-like acts by an actor who does not fall within the core of a NSAG, and an existing NIAC (or IAC) itself.<sup>123</sup>

If the nature of Group Y's support to Group X in its hypothetical NIAC with State A meets certain cumulative criteria, then Y is a "functional co-belligerent" of X. The test of functional co-belligerency requires positive answers to three questions, cumulatively: "Was Group Y's participation or action likely to adversely affect the military options of State A? Did Group Y's participation directly lead to tangible harm to State A? Was Group Y's participation intended to benefit Group X and harm State A?"<sup>124</sup> This approach raises many challenges, not least because of the difficulty inherent in determining whether any of these criteria have been met by a group (Zwanenburg remarks that the question of whether the act was intended to harm State A will be very difficult to answer in practice<sup>125</sup>), but also because direct participation in hostilities, developed primarily to determine whether civilians lose protection from direct attack at a given moment, is always

120 See Columbia District Court, *Hamilly*, above note 106, pp. 68 ff.

121 See, *inter alia*, A. Deeks, above note 11; M. Zwanenburg, above note 11, p. 28; R. van Steenberghe and P. Lesaffre, above note 113, pp. 19 ff.

122 N. Melzer, above note 46, pp. 46 ff.

123 A. Deeks, above note 11.

124 *Ibid.*

125 M. Zwanenburg, above note 11, p. 28.

provisional: when a civilian is no longer directly participating in hostilities, he or she may no longer be targeted. By implication, this would mean that Group Y as a “functional co-belligerent” could only be targeted when it is directly participating in hostilities, but not afterwards or in between such acts, which is counterintuitive.<sup>126</sup>

The last approach we examine here may be labelled as cumulative or aggregated intensity. This theory takes several different forms, all of which have in common the notion that violence projected by separate OAGs could be evaluated jointly for the purposes of conflict classification. For example, Nikolić, de Saint Maurice and Ferraro observe that, in some complex situations of violence,

it might be both practically impossible and legally illogical to look at bilateral confrontations and disentangle the level of violence by each of the armed groups involved. In such situations ... it might therefore be more legally sound to consider aggregating the intensity of identified organized NSAGs for ... classification purposes.<sup>127</sup>

These authors invoke in this regard the ICRC’s 2019 Challenges Report, which finds that “[w]hen several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together”.<sup>128</sup> The prerequisite for aggregating intensity would be to have a number of groups that fulfil the criterion of organization separately but work together to form a “coalition”. Clearly the problem remains of how to define such a coalition and the nature of inter-group relations necessary for it to arise: Nikolić *et al.* offer a number of indicative factors in this regard, but beyond excluding merely ideological and political similarities between coalition members, they ultimately do not provide a clear instruction on how to identify them. They also refer to notions such as “coordination and cooperation” almost interchangeably with the notion of coalition, even though the former conveys the idea that the relationship between the groups is even more fluid and unstable than in a coalition. Writing separately on the same issue a few years earlier, Kleffner had developed the “cumulative intensity” theory, but divorced from the notion of coalition. He suggested that the violence projected by *all* armed forces in a “geographical and temporal continuum” should be added to the equation of determining whether a NIAC exists, regardless of whether various OAGs are fighting together or against each other<sup>129</sup> (this is the key difference between Kleffner’s view and the aggregated intensity approach suggested by Nikolić *et al.*, which does not require the existence of such a continuum, merely a “coalition”). A modification of Kleffner’s view is also advocated by Redaelli, who finds that

126 Van Steenberghe and Lesaffre examine this issue and, while arguing in favour of this approach, accept that it should in such situations have a broader scope than when discussing individuals and targeting: see R. van Steenberghe and P. Lesaffre, above note 113, pp. 19 ff.

127 J. Nikolić, T. de Saint Maurice and T. Ferraro, above note 11.

128 2019 Challenges Report, above note 79, p. 51.

129 J. K. Kleffner, above note 27, pp. 172 ff.

the coalition ought to be fighting against a “common enemy” as an additional requirement.<sup>130</sup> Again, these interpretations are based on theoretical constructions driven by the desire to facilitate conflict classification in situations where the facts are difficult to ascertain.

The cumulative/aggregated intensity approach presents an easy way out of persistent and frustrating legal headaches, but is it justifiable to loosen legal standards simply because this is more easily done than collecting and evaluating data from the field? Is it even legally sound to do so?

Ultimately, like the other approaches we examine here, cumulative/aggregated intensity suffers from the same problem of potentially leading to an over-classification of situations of violence. An armed conflict, whether international or non-international, is an objective, factual state, one which in principle exists independently of the perception of external observers—and it is also a legal state, in the sense that it triggers the applicability of a certain body of law. While the question of whether IHL or IHRL provides greater protection to human beings is more grey than black and white, when it comes to fundamental issues such as the use of force or deprivation of liberty, the latter is clearly preferable to IHL. By simplifying conflict classification, each of the above theories effectively creates a presumption (in case of doubt) in favour of IHL, when there should rather be a presumption against it. As aptly noted by Sivakumaran, “[t]he default presumption for international human rights law is that it applies, and for international humanitarian law that it does not”.<sup>131</sup>

It may be submitted that there is a humanitarian interest in facilitating conflict classification in order to bind an armed non-State actor by rules of international law (specifically, IHL). We do not find this argument convincing for several reasons. As stated above, IHL contains not only protective rules but also a “license to kill” (or at least an absence of prohibition to intentionally kill legitimate targets) in a manner which is very foreign to human rights law—it is extremely difficult to conclude whether the interest of binding a non-State actor by IHL outweighs the loss of human rights protection vis-à-vis the State. The growing body of doctrine holding that non-State actors, including OAGs, have human rights obligations should also not be disregarded.<sup>132</sup> At any rate, if an armed conflict exists, then every individual (whether civilian or combatant/fighter) within its geographical scope may violate IHL if they engage in prohibited or criminalized conduct with a nexus to it—it is not necessary for them to first belong to an OAG in order for them to be bound by IHL. Above all, the interests underlying the aggregating/cumulating intensity cannot make up for

130 See Chiara Redaelli, “A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts”, *Humanitarian Law and Policy Blog*, 22 April 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>.

131 Sandesh Sivakumaran, “International Humanitarian Law”, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2018, p. 508.

132 See, in particular, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017.

any organizational deficiencies in the groups involved: to combine the violence projected by such groups could even lead to a situation where all the violence projected in a territory, including isolated acts of criminal violence, might be considered for conflict classification. If that were the case, the distinction between other situations of violence and proper armed conflicts would tend to disappear.

Accordingly, we submit that less is sometimes better than more, and that when classifying violence projected by and against armed groups, a bilateral approach should be taken to determine which groups are belligerent parties. This remains without prejudice to the possibility that one or more individuals who do not clearly belong to one of the belligerent parties may be considered as direct participants in hostilities and thereby lose their protection from attack for such time as they directly participate in hostilities.

An analogy may be made here with the “internationalization” of NIACs through third-State intervention. Both the International Court of Justice (ICJ)<sup>133</sup> and the ICTY<sup>134</sup> have treated the acts of an OAG and a third State intervening on its behalf separately for purposes of conflict classification and determination of the applicable law—Robert Kolb refers to this as the theory of “bilateral bundles” (*faisceaux bilatéraux*).<sup>135</sup> It has never been suggested that the acts of violence projected by the OAG could be cumulated with the acts of violence projected by the intervening State; even the view that the conflict should be considered “internationalized” as a whole has been abandoned despite its practicality and humanitarian value.<sup>136</sup> It is therefore all the more disconcerting that a cumulative approach should be advanced for relations between OAGs (which would result in the extension to one or more of them of the law of NIACs, instead of considering human rights law applicable to them), when the notion of internationalization (which would merely transform a NIAC into an IAC) is itself losing favour. If a bilateral approach is adopted for a foreign State intervention on behalf of an OAG, there is no good reason why the same should be abandoned when two groups operate in the same area or when they loosely coordinate their actions.

Although a situation of violence may be colloquially described as a single “war”, there may be many armed conflicts, all of which represent a bilateral *legal* relationship between individual belligerent parties. Only on a bilateral level may the content of these parties’ legal obligations be fairly ascertained. Of course, such bilateral legal relations do not exist in a factual vacuum, and an ongoing NIAC with one group may influence the evaluation of the NIAC criteria in

133 ICJ, *Nicaragua*, above note 21, para. 219.

134 ICTY, *Tadić*, above note 32, paras 84, 162 (here, the Tribunal does not even consider the NIAC threshold once it has attributed the conduct of an OAG to a foreign State—the conflict is *ipso facto* an IAC).

135 Robert Kolb, *Ius in bello: Le droit international des conflits armés*, Helbing & Lichtenhahn, Basel, 2003, paras 175 ff.

136 For positions advocating internationalization, see Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 152; James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003. For an opposing view, see the current ICRC position on conflicts with “double classification” in T. Ferraro, above note 114.

relation to fighting against another (for example, the State's capacity to maintain law and order could be impacted by the ongoing NIAC and thus create a situation where the criterion of intensity for another NIAC may be more easily met), but the classification analysis itself should always be done on a bilateral level. Otherwise, if the facts are unclear or insufficient to establish the existence of an armed conflict between specific belligerent parties, then human rights law is the applicable legal framework, not IHL.

### Further reflections on the importance of an OAG's motives for conflict classification

In the previous sections, we scrutinized separately the criteria of organization and intensity in relation to "counterterrorist NIACs". We believe that there is one further transversal issue important for over-classification that could impact both the criteria of organization and intensity. We speak of the influence of an OAG's motives on its structure and activities.

Although it has been suggested that OAGs need to act towards achieving specific *political* purposes (to differentiate them from criminal groups),<sup>137</sup> this has largely been rejected in doctrine<sup>138</sup> as well as by the ICRC, which finds that "introducing political motivation as a prerequisite for non-international armed conflict could open the door to a variety of other motivation-based reasons for denying the existence of such armed conflicts", and that "[w]hat counts as a political objective ... might be controversial; non-political and political motives may co-exist; and non-political activities may in fact be instrumental in achieving ultimately political ends".<sup>139</sup> This position seems indisputable today, and even groups which do not exist to fulfil an overtly political purpose (such as drug

137 See, for example, H.-P. Gasser, above note 96, p. 555: "The members of [OAGs] – whether described as insurgents, rebels, revolutionaries, secessionists, freedom fighters, terrorists, or by similar names – are fighting to take over the reins of power, or to obtain greater autonomy within the State, or in order to secede and create their own State." For similar views, see Claude Bruderlein, *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars*, Centre for Humanitarian Dialogue, 2000, pp. 8 ff.; David Petrasek, *Ends & Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000, p. 6; Jann K. Kleffner, "The Applicability of International Humanitarian Law to Organized Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 450; Juan E. Ugarizza and Matthew J. Craig, "The Relevance of Ideology to Contemporary Armed Conflicts: A Quantitative Analysis of Former Combatants in Colombia", *Journal of Conflict Resolution*, Vol. 57, No. 3, 2012.

138 See, for example, Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 78: "Some observers add a further condition to the notion of non-international armed conflict. They suggest that account needs to be taken of the motives of the non-governmental groups involved. This type of conflict would thus cover only groups endeavouring to achieve a political objective. 'Purely criminal' organizations such as mafia groups or territorial gangs would thus be eliminated from that category and could in no way then be considered as parties to a non-international armed conflict. However, in the current state of humanitarian law, this additional condition has no legal basis." Cf. Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012.

139 2016 Commentary on GC I, above note 19, para. 484.

cartels) may be considered an OAG if they possess the organizational capacity to engage in hostilities. Classification is fact-based, and motivation and ideology are not facts that are relevant for the assessment of whether a NIAC exists.

It would nevertheless be unwise to deny a group's motives any importance, as the reason for which a group is constituted has implications for its structure, functioning and choice of means and methods. Just as the structure of an organized crime syndicate would *prima facie* be conducive to its illegal activities (for financial gain) and not to the conduct of hostilities, so too will the structure of terrorist organizations reflect their primary purpose in the commission of acts of terrorism that may be quite different from the sort of armed clashes arising in an armed conflict. For example, the functioning of the group will be different if its objectives are to coerce State authorities into complying with political demands through violence rather than overtaking governmental authority, seceding or creating a new State, which would involve a prolonged armed struggle against State forces.

Accordingly, the reasons for which a group is constituted may *de facto* have a bearing on both the organization and intensity criteria. With respect to the former, they may influence whether the group has a capacity to conduct hostilities as a necessary component for the applicability of IHL; regarding the latter, they will influence, or even dictate, the group's activities, which may or may not involve armed clashes of a certain intensity with opposing armed forces.

Consider the working of the infamous Cali drug cartel, originating in southern Colombia, which was organized so as to have "a set of key figures at the core and a periphery that included not only those directly involved in the processing and transportation of cocaine, but also taxi drivers and street vendors who were an invaluable source of information at the grass-roots level";<sup>140</sup> the authorities apparently even maintained that "the Cali group isn't a cartel, really, but rather a consortium of loosely affiliated and cooperating trafficking groups".<sup>141</sup> The nature of the drug trade dictated the group's organizational structure as a networked organization (with a preference for secrecy and survivability to impact) and distribution of autonomous cadres in a cell-based layout, with individual members avoiding direct confrontation with the authorities. A "quieter, smarter, more businesslike group of traffickers" than the Medellín cartel,<sup>142</sup> the Cali cartel shunned political violence, judging the threat of violence as sufficient for its purposes to be achieved. Different drug cartels may of course opt for different means of ensuring the drug trade, and may even develop more explicitly political objectives,<sup>143</sup> but they should not *a priori* be considered, because of their principal purpose, as possessing a capacity to conduct hostilities or engage in armed clashes against governmental forces of a

140 P. Williams, above note 54, p. 74.

141 Linda Robinson, Gordon Witkin, Matthew Cooper and Scott Minerbrook, "New Target: The Cali Cartel", *US News & World Report*, 23 December 1991.

142 *Ibid.*

143 For example, the United Self-Defence Forces of Colombia, apart from being a drug trafficking group, was specifically created to fight left-wing paramilitaries threatening drug cartel interests in the country.

degree necessary for the existence of a NIAC.<sup>144</sup> In terms of intensity, the violence perpetrated by criminal groups is usually clandestine, taking the form of assassinations, kidnappings, torture and, exceptionally, armed clashes with law enforcement or other gangs; this does not, however, so fundamentally impair a State's capabilities to maintain order as to justify a conduct of hostilities response.

Even between terrorist groups such as Al-Qaeda and IS (which are normally classified under the same *chapeau* of jihadist terrorism), ideological nuances spell out different ways of organizing themselves and acting to achieve their goals. For example, whereas "IS wants the caliphate, a theocracy for all Muslims under the leadership of the Prophet's successor, straightaway", Al-Qaeda "sees the caliphate as the end state of a lengthy development", and "[a]ccordingly, [it] is committed to this day to the fight against the distant enemy .... IS can be seen more as a revolutionary regime that is attempting to establish a state according to its principles and to aggressively enforce and expand its ideology and claim to power."<sup>145</sup> The motives (ideology) of IS necessitate engaging in hostilities with governmental forces and rival non-State actors; those of Al-Qaeda do not necessarily require such actions, and rather focus on clandestinely planning, organizing and carrying out acts of terrorism.

We therefore submit that a group's objectives, purposes and goals exert a significant influence on the NIAC criteria of organization and intensity. A non-State actor's motives are not an independent or decisive factor in conflict classification, but they may be considered as setting a (rebuttable) presumption regarding a group's structure and functioning. Thus, if a group's motives do not imply that it intends to conduct hostilities and unless it is conclusively demonstrated that its structure and functioning are nevertheless conformant to the NIAC criteria, the presumption should be against determining that a NIAC exists.

## Conclusion

The over-classification phenomenon we describe in this article is complex because of both its multifaceted nature and its capacity for "shapeshifting" (beyond its basic form involving conflict classification, it has occasionally expanded to the scope

144 The lively discussion on "drug wars" and IHL is still ongoing in academic circles, with many controversies as to whether such conflicts may amount to NIACs: on this topic, see, for example, Andrea Nill Sánchez, "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality", *Yale Journal of International Law*, Vol. 38, No. 2, 2013, p. 467; Carrie A. Comer and Daniel M. Mburu, "Humanitarian Law at Wits' End: Does the Violence Arising from the 'War on Drugs' in Mexico Meet the International Criminal Court's Non-International Armed Conflict Threshold?", *Yearbook of International Humanitarian Law*, Vol. 18, 2015; Geneva Academy, "Two New Non-International Armed Conflicts in Mexico Involving the Sinaloa Drug Cartel", 10 March 2020, available at: [www.geneva-academy.ch/news/detail/314-two-new-non-international-armed-conflicts-in-mexico-involving-the-sinaloa-drug-cartel](http://www.geneva-academy.ch/news/detail/314-two-new-non-international-armed-conflicts-in-mexico-involving-the-sinaloa-drug-cartel); "Do the Laws of Armed Conflict Apply to Drug-Related Violence?", debate held at Colombia Law School, 11 February 2013, available at: <https://www.hr-dp.org/print/206>.

145 Ulf Brüggenmann, *Al-Qaeda and the Islamic State: Objectives, Threat, Countermeasures*, Federal Academy for Security Policy, 2016, p. 3.

*ratione loci* and *ratione personae* of IHL), as well as its numerous causes, none of which may be singled out as the principle one.

Although the primary responsibility to ensure respect for international law is upon States, the problem cannot be attributed to them exclusively. There are incentives for some States to resort to IHL rather than IHRL, as the former gives more room for manoeuvre. For this reason, more and more States adopt flexible standards and invoke blurry concepts such as “associated forces”, “networks” or “sleeper cells”. All of these different euphemisms facilitate the classification of situations of violence that are located in a grey zone as armed conflicts and thus lead to a deviation from human rights obligations, notably to employ lethal force as an *ultima ratio*. Additionally, terrorist groups themselves may have an interest in being considered as OAGs, as this magnifies the menace they pose to society and may facilitate recruitment as well as attracting funding and weapons.<sup>146</sup>

Even international criminal tribunals and courts, as well as humanitarian organizations and experts, have had a role to play in shaping the current over-classification tendency. In the context of the *ex-post* fight against impunity, expanding the scope of application of IHL opens the door for war crimes prosecutions, which are more straightforward than prosecutions for crimes against humanity or acts of genocide. For some humanitarian organizations, there may be a professional interest in describing a situation as having reached the threshold of a NIAC for operational reasons and to engage in a humanitarian dialogue with belligerent parties. Lastly, the desire of eminent legal scholars to clarify and facilitate conflict classification – having in mind particularly complex situations that often involve groups designated as terrorist – may further contribute to creating the over-classification phenomenon. Various theories such as those pertaining to “co-belligerency”, the “support-based approach” and “aggregate intensity” have been developed to fill in perceived gaps in conflict classification.

All these reasons are understandable and may be seen as legitimate, but they may ultimately decrease the legal protections afforded to victims of situations of violence. We would therefore like to conclude this piece on a cautionary note, recalling that IHL is a framework reserved for exceptional circumstances, to be applied under restrictive conditions. The threat of terrorism, however intimidating, will often not fulfil these conditions. International law requires that conflict classification be undertaken with the greatest scrutiny, and that situations of internal disturbances and tensions reach not only a certain degree, but also a specific *quality*, before they may be described as a NIAC. In case of doubt, IHRL is the legal framework that is presumed to apply and to protect individuals, not IHL.

146 See Hamilton Bean and Ronald J. Buikema, “Deconstituting Al-Qa’ida: CCO Theory and the Decline and Dissolution of Hidden Organizations”, *Management Communication Quarterly*, Vol. 29, No. 4, 2015.