

The applicability of international humanitarian law to acts of violence perpetrated by unidentified armed individuals in the Sahel: The case of Burkina Faso

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Abstract

Burkina Faso has suffered attacks most often attributed to unidentified armed individuals. These attacks occur in an area which is under the influence of terrorist groups as well as criminal groups. Instability does not stem from a prior armed conflict, but from a continuous deterioration resulting from unclaimed attacks. The challenge then is to know whether international humanitarian law (IHL) can apply in a context where the perpetrators of violence are not identified. This requires visiting the conditions of applicability of IHL in non-international armed conflict to assess their relevance in a context of production of violence without identification of the perpetrators.

Keywords: non-identification, applicability, international humanitarian law, non-international armed conflicts, Sahel, violence, armed individuals.

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Introduction

According to a report by the Armed Conflict Location & Event Dataset (ACLED), some 12% of attacks by armed groups are the work of unidentified armed groups.¹ This confirms the impression that violence by unidentified armed groups and individuals is on the increase globally. As far as Africa is concerned, this problem occurs most often in the Central African Republic, Somalia and the Sahel. The media regularly report attacks by unidentified armed men in Burkina Faso.² Elsewhere in the world, Syria also suffers large numbers of attacks by unidentified armed groups. For instance, the Lafarge group has admitted making indirect payments to unidentified armed groups so that it could continue operating its cement plant in an area controlled by the Islamic State group.³

We therefore need to examine the definitions of “unidentified armed group” and “unidentified armed individual”. For the purposes of the present study, these terms refer primarily to groups and individuals that rarely claim responsibility for their attacks on government forces, civilians or other armed groups. This makes it difficult to attribute an attack to a group. Such attacks generally occur in areas experiencing conflict and instability because of the State’s inability to exercise its authority. Multiple weapon bearers operate in such areas, often with divergent aims and relationships that are merely opportunistic. Even if these zones are under the influence of one or more known armed groups, they do not claim responsibility for the vast majority of attacks occurring there. According to a report by the Institute for Security Studies, “In Burkina Faso, where numerous acts are unaccounted for, the expression ‘unidentified armed men’ is also used.”⁴

An armed group may choose to remain unidentified for strategic reasons; it may be engaging in terrorism, or using anonymity to avoid being held responsible

- 1 ACLED, *Unidentified Armed Groups*, July 2012, p. 12, available at: https://www.acleddata.com/wp-content/uploads/2012/07/ACLED_Unidentified-Armed-Groups-Working-Paper_July-2012.pdf (all internet references were accessed in April 2022).
- 2 Nadia Chahed, “Burkina Faso : plus de 2000 personnes ont fui leurs villages après une série d’attaques dans le Sahel”, *Agence Anadolu*, 30 April 2021, available at: <https://www.aa.com.tr/fr/afrique/burkina-faso-plus-de-2-mille-personnes-ont-fui-leurs-villages-apr%C3%A8s-une-s%C3%A9rie-d-attaque-dans-le-sahel/2225741>. According to that article, “A total of 2224 persons (including 438 women and 1308 children) have fled the villages of Koumbri, Yatakou and Sikiré in the commune of Seytenga (which lies in the Sahel region of northern Burkina Faso) following attacks by unidentified armed individuals on Monday that led to 18 deaths, according to an announcement by the regional directorate of the ministry responsible for humanitarian action.” (our translation) In an administrative communiqué dated 7 August 2020, the governor of Burkina Faso’s Est region reported that “today, 7 August 2020, at about 12:00 hrs, unidentified armed individuals burst into the livestock market in Namoungo, a village in the commune of Fada N’Gourma, and attacked the people there”. (our translation) Administrative communiqué No. 2020-024/MATDC/REST/GVRT-FGRM/CAB, 7 August 2020.
- 3 Franceinfo, “Syrie : le groupe Lafarge reconnaît avoir indirectement financé des groupes armés”, 2 March 2017, available at: https://www.francetvinfo.fr/economie/emploi/metiers/droit-et-justice/syrie-le-groupe-lafarge-reconnait-avoir-indirectement-finance-des-groupes-armes_2078359.html.
- 4 William Assanvo *et al.*, “Violent Extremism, Organised Crime and Local Conflicts in Liptako-Gourma”, Institute for Security Studies, *West Africa Report* 26, 10 December 2019, p. 3, available at: <https://issafrica.org/research/west-africa-report/violent-extremism-organised-crime-and-local-conflicts-in-liptako-gourma>.

for abuses.⁵ On the other hand, it is sometimes impossible to identify the perpetrators of an attack because no armed group can say for certain that it is linked with the persons responsible, on account of the proliferation of weapon bearers and the general lack of security.

Reports of the Crisis Group list three groups as operating in Burkina Faso. The first is Ansar ul Islam, founded by Malam Ibrahim Dicko, a radicalized preacher from the province of Soum in the north of the country.⁶ This group is primarily national in origin, although it does have as its mentor Hamadoun Kouffa, founder of the Macina Liberation Front (central Mali).⁷ Ansar ul Islam's zone of influence appears to cover parts of the provinces of Soum, Bam and Sanmatenga in the north-east and north of Burkina Faso.⁸ The second is Islamic State in the Greater Sahara (also known as ISWAP (Islamic State's West Africa Province)). This group is active in the Nord and Est regions of Burkina Faso.⁹ The third is The Support Group for Islam and Muslims (JNIM or GSIM; Groupe de Soutien à l'Islam et aux Musulmans), which appears to be operating in the Nord, Ouest and Est regions of the country.¹⁰ Ansar ul Islam is said to have pledged allegiance to this group, which is said to include nationals of Burkina Faso.¹¹ In Burkina Faso, the provinces most affected by the deteriorating security situation are therefore those in the Nord, Centre-Nord, Est and Boucle du Mouhoun regions.

In Burkina Faso, armed groups claimed responsibility for just nine attacks between 2016 and 2020: the Islamic State group claimed responsibility for four, GSIM for two, Ansar ul Islam for one and the Islamic State group and GSIM jointly claimed responsibility for two.¹² These numbers pale into insignificance when one realize that the Observatoire pour la Démocratie et les droits de l'homme (ODDH) recorded 580 attacks between 4 April 2015 and 31 May 2020.¹³ Clearly, most attacks in Burkina Faso occur without any group claiming responsibility. The fact that no groups are claiming responsibility for these attacks poses a problem, given the large number of players in the regions affected by the deteriorating security situation: bandits; criminals involved in cigarette trafficking, poaching, artisanal gold mining and drug trafficking; armed terror groups who control the area and self-defence militia groups.¹⁴ In such a situation, the fact

5 ACLED, above note 1, pp. 1–2.

6 Crisis Group, "The Social Roots of Jihadist Violence in Burkina Faso's North", *Africa Report No. 254*, 12 October 2017, pp. 3–4, available at: <https://www.crisisgroup.org/africa/west-africa/burkina-faso/254-social-roots-jihadist-violence-burkina-faso-north>.

7 *Ibid.*, p. 9.

8 *Ibid.*, pp. 10–12.

9 Crisis Group, "Burkina Faso: Stopping the Spiral of Violence", *Africa Report No. 287*, 24 February 2020, p. 12, available at: <https://www.crisisgroup.org/africa/sahel/burkina-faso/287-burkina-faso-sortir-de-la-spirale-des-violences>.

10 *Ibid.*

11 *Ibid.*, p. 11.

12 Ministère de l'Économie, des Finances et du Développement, coopération pour le développement, *Défis sécuritaires et coopération au développement au Burkina Faso*, Rapport 2019, June 2020, p. 68.

13 ODDH, *Burkina Faso, Risque d'un nouveau Rwanda ? Bilan de la Violence au Burkina Faso 04 avril 2015 – 31 mai 2020*, Ouagadougou, 22 June 2020, p. 24.

14 W. Assanvo *et al.*, above note 4, pp. 9–19.

that no group claims responsibility for attacks makes it difficult to say whether an armed group is involved in an armed conflict within the meaning of international humanitarian law (IHL).¹⁵

The situation in Burkina Faso changes rapidly. The present analysis covers the period from 2015 to March 2022 and will examine the applicability of IHL in a context where the State is disintegrating and the security situation is deteriorating. In Mali, the existence of an armed conflict prior to an increase in acts of terrorism makes it quite clear that IHL applies there. In Burkina Faso, however, acts of violence are occurring without any armed conflict having existed beforehand. Given that these acts were initially viewed as a security problem, it was understandable that their perpetrators did not claim responsibility for them. However, the increasing frequency of attacks now raises the question as to whether the conditions for application of IHL have been met, and if so from what date onwards. The fact that no group claims responsibility for the majority of attacks makes it even harder to apply IHL. In most cases, the persons carrying out these attacks are described as “unidentified”. There are doubts as to their degree of organization, for instance, given the general deterioration of the security situation. The question is therefore as follows: can the fact that a group is unidentified constitute an obstruction to the application of IHL in contexts where the security situation is deteriorating?

We must start by assuming that the unidentified armed group is not being supported by a foreign State. If a State were exercising overall control over the unidentified armed group, this would be a case of internationalization of a non-international armed conflict. The hypothesis that interests us here is that under which individuals (possibly in the form of a group) carry out their acts without the support of another State. If such a hypothesis is true, can one state that a non-international armed conflict is taking place, even if the armed group has not been identified?

In the remainder of this article, we shall attempt to show that not being able to identify an armed group makes it difficult to decide whether an armed conflict is taking place. Not being able to identify a group makes it difficult to decide whether two criteria for classifying a situation as a non-international conflict have been satisfied: (I) the group possesses the necessary degree of organization; and (II) the violence has reached a certain level of intensity.

I. The implications of an absence of identification when assessing the organized nature of an armed group

Article 3 common to the Geneva Conventions and Additional Protocol II do not specify what is meant by an “organized” armed group. This task has largely been

15 Claiming responsibility for attacks is not the only means whereby a party to a conflict can be identified, especially in the case of armed groups. Other means of identification include confidential dialogue with the parties, intelligence-gathering by armed and security forces, testimony from witnesses or victims of abuses, judicial measures, the media, research papers, etc.

left to jurisprudence and doctrine. According to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), an armed group can be considered “organized” if it fulfils a number of conditions: the existence of a command structure, the ability to conduct coordinated military operations, the possession of certain logistics capabilities, the ability to respect and ensure respect for IHL, the ability to speak with one voice and the ability to define a unified military strategy and use military tactics.¹⁶ From all these characteristics, Zakaria Dabone extracts three concepts: “three ideas stand out, and it is by no means certain that a group which fails to satisfy any one of them can be classed as a party to an armed conflict. The ideas are those of cohesion, a certain degree of power, and operationality.”¹⁷ “Cohesion” refers to a command structure, discipline, a unified military strategy and the ability to speak with one voice, whereas “power” is the ability to recruit, the fact of having a headquarters or controlling a certain territory and the possession of weapons or other military equipment.¹⁸ “Operationality” means such things as the issuing of military orders, the use of military tactics or the execution of military operations.¹⁹

In the current context of Burkina Faso, it would appear difficult to apply the “organization” criterion (A). As a result, the absence of a command structure makes it difficult to apply IHL (B).

A. The difficulty of applying the “organization” criterion in the context of Burkina Faso

The difficulty of applying the “organization” criterion in the context of Burkina Faso stems from the fact that some evidence indicates that the unidentified armed groups possess a certain degree of organization (1), while other evidence suggests that they do not (2).

1. Evidence for the unidentified armed groups possessing a certain degree of organization

Operations against armed and security forces in Burkina Faso are very often planned, and point to a significant level of military strategy and tactics.²⁰ According to the report compiled by the Burkina Faso minister of finance and development, “The agents of insecurity in the Sahel appear to be better organized and informed regarding the movements of the armed and security forces. They

16 ICTY, *Prosecutor v. Ramush Haradinaj, Idrij Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, para. 60, available at: <https://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>.

17 Zakaria Dabone, *Le droit international public relatif aux groupes armés non étatiques*, Schulthess Médias Juridiques SA, Basle, Geneva and Zurich, 2012, p. 83 (our translation).

18 *Ibid.*

19 *Ibid.*

20 Crisis Group, above note 9, pp. 33–8.

use the effect of surprise and regularly change their *modi operandi*.”²¹ The *modi operandi* of the attacks therefore suggest a degree of organization on the part of the groups carrying them out. That was particularly the case of the attack of 14 November 2021 on the gendarmerie detachment guarding the Inata mine.²² This was the deadliest attack that the army of Burkina Faso has ever experienced. Fifty-three gendarmes out of the 120 who made up the detachment were killed, and at the time of writing twenty are still missing.²³ It is reported that a large number of individuals were using pickups or motorbikes.²⁴ The ability of the terrorists to carry out deadly ambushes against the armed and security forces is further evidence that the attacks are planned. Examples include the ambush of 23 December 2021 that targeted a group of Volunteers for the Defence of the Homeland (VDPs; Volontaires de la patrie) in You (Nord region).²⁵ That ambush claimed the lives of forty-one persons, including Soumaila Ganamé (also known as Ladjji Yoro), the most famous VDP in Burkina Faso.²⁶ It is also worth mentioning the attack of 18 August 2021 at a location 25 km from Gorgadji (Sahel region), on a mixed convoy of military personnel, civilians and VDPs that was moving from Dori to Arbinda.²⁷ That attack resulted in the deaths of eighty people, including sixty-five civilians and fifteen gendarmes.²⁸

What also demonstrates the organized nature of these operations is the clear intention of isolating villages, towns and provinces by destroying mobile phone towers.²⁹ The idea is to facilitate attacks by preventing people from communicating. Destruction of mobile phone towers is often accompanied by the cutting of power lines, with the aim of plunging the target area into darkness.³⁰ Knocking out mobile phone towers and power lines – a method used in several regions and provinces – appears to point to a carefully conceived and methodically executed strategy.

21 Ministère de l’Economie, des Finances et du Développement, coopération pour le développement, above note 12, p. 69 (our translation).

22 Le Figaro, “Burkina : L’attaque de dimanche contre les gendarmes a fait au moins 53 morts”, 17 November 2021, available at: <https://www.lefigaro.fr/flash-actu/burkina-au-moins-20-morts-dans-une-attaque-contre-un-detachement-de-gendarmerie-20211114>.

23 Jeune Afrique, “Burkina Faso : colère et indignation à l’inhumation de gendarmes tués à Inata”, 24 November 2021, available at: <https://www.jeuneafrique.com/1270246/politique/burkina-faso-colere-et-indignation-a-linhumation-de-gendarmes-tues-a-inata/>.

24 Voice of America, “Burkina Faso : l’attaque d’Inata illustre la déroute de l’armée face aux jihadistes”, 23 November 2021, available at: <https://www.voafrique.com/a/burkina-l-attaque-d-inata-illustre-la-d%C3%A9route-de-l-arm%C3%A9e-face-aux-jihadistes/6324376.html>.

25 Lefaso.net, “Burkina : Un deuil de 48 heures décrété après la mort de 41 personnes dont Ladjji Yoro dans une attaque dans le Nord”, 26 December 2021, available at: <https://lefaso.net/spip.php?article110088>.

26 *Ibid.*

27 Le Point Afrique, “Burkina Faso : l’attaque d’un convoi fait 80 morts”, 19 August 2021, available at: https://www.lepoint.fr/afrique/burkina-faso-l-attaque-d-un-convoi-fait-47-morts-19-08-2021-2439467_3826.php.

28 *Ibid.*

29 Siébou Kansié and Jules Natabzanga Ouédraogo, “Burkina Faso : destruction de pylônes, d’aérodrome, des édifices publics, rien n’échappe à la colère des terroristes”, *Libre info*, 8 February 2022, available at: <https://libreinfo.net/burkina-faso-destruction-de-pylones-daerodrome-des-edifices-publics-rien-echappe-encore-a-la-colere-des-terroristes/>.

30 Hamadou Ouédraogo, “Burkina : Titao se réjouit de retrouver la lumière”, *Minute.bf*, 22 February 2022, available at: <https://minute.bf/burkina-titao-se-rejouit-de-retrouver-la-lumiere/>.

Furthermore, these groups have been able to lay their hands on weapons that sometimes give them more firepower than government forces. While they often use homemade bombs, reports of attacks indicate regular use of Kalashnikov assault rifles, rocket launchers, etc. This ability to make regular acquisitions of weaponry indicates the existence of a command structure.³¹ According to the Institute for Security Studies, “These groups have a varied armament made up of assault rifles (AK-47), light machine guns (PK), heavy machine guns (12.7 mm and 14.5 mm), rocket launchers and mortars. They also use improvised explosive devices.”³²

Furthermore, these groups are able to recruit members of the population, which indicates a certain degree of organization:

For their recruitment drives, jihadists exploit injustices frequently linked to land disputes and coupled with political and community-based issues. Certain situations are conducive to the enlistment of individuals or entire groups; new recruits have no “typical” profile but may be civilians struggling to assert their rights over land, gold miners facing restricted access to mines, or bandits seeking more powerful allies. (...) Jihadists also recruit from groups familiar with handling weapons. In Burkina Faso, a country that has experienced no rebellions, these people include former soldiers, whether discharged or deserters, and highway robbers. Bandits are increasingly enlisting as jihadists in Burkina (...)³³

Armed groups also recruit among ethnic groups who feel a strong sense of injustice, such as Folani herders.³⁴ Armed groups exploit ethnic violence between Folani herders and other, agricultural ethnic groups. The armed groups offer protection, but it comes at a price. The increasing number of perpetrators, in terms of both space and time, indicates that the groups behind the attacks have been able to recruit more personnel. This is confirmed by the Burkina Faso Economic and Social Council, which reports “an almost exponential increase in the number of attacks between 2015 and 2019, from three to 224”.³⁵ This indicates the ability to organize, although it has to be said that some members are recruited against their will, as a result of pressure exerted on them and their families.

That these groups are organized can also be deduced from their ability to use funds from criminal activities to train and retain recruits: “these funds are

31 ICTY, *Prosecutor v. Slobodan Milosevic*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T (Trial Chamber III), 16 June 2004, para. 23, available at: https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm.

32 W. Assanvo *et al.*, above note 4, pp. 9–10.

33 Crisis Group, above note 9, p. 14.

34 Crisis Group, “A Course Correction for the Sahel Stabilisation Strategy”, *Africa Report No. 299*, 1 February 2021, p. 4, available at: <https://www.crisisgroup.org/africa/sahel/299-course-correction-sahel-stabilisation-strategy>.

35 Conseil économique et social, *Mécanismes de lutte contre le blanchiment de capitaux et le financement du terrorisme en zone UEMOA : cas du Burkina Faso, Rapport public 2020*, August 2020, p. 27 (our translation).

necessary to maintain their organizations (or cells) and to recruit and train fighters, and to support combatants and their families where necessary”.³⁶

Furthermore, the media reported negotiations between the authorities of Burkina Faso and these armed men, via intermediaries, aimed at obtaining a pause in these attacks during the elections of October and November 2020.³⁷ If those negotiations did in fact take place, that would indicate that the groups possess a certain level of organization.

All of the above would appear to indicate that those behind the violence in Burkina Faso make up organized armed groups. However, other evidence calls into question the organized nature of these groups.

2. Evidence that calls into question the organized nature of the unidentified armed groups

Various factors make it less certain that Burkina Faso’s unidentified armed groups meet the “organization” criterion.

First of all, the fact that a group is unidentified makes it difficult to verify that it has an internal command structure.³⁸ Having a command structure is one of the most important criteria when it comes to deciding whether an armed group can be classified as “organized”.³⁹ According to the judgment of the International Criminal Tribunal for Rwanda in the case of *The Prosecutor v. Jean-Paul Akayesu*, “the armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces”.⁴⁰ In *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, the trial chamber of the ICTY listed a number of factors to use when assessing the organization of an armed group, including:

the establishment of a general staff or high command, which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply, authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit’s area of responsibility. Also included in this group are factors such as the existence

36 Inter-Governmental Action Group against Money Laundering and Terrorism Financing in West Africa, cited by Elie Kaboré in “Financement du terrorisme: pour recruter, former et entretenir les combattants et leurs familles”, *L’Economiste du Faso*, available at: <https://www.leconomistedufaso.bf/2021/07/19/financement-du-terrorisme-pour-recruter-former-et-entretenir-les-combattants-et-leurs-familles/> (our translation).

37 Sam Mednick, “Burkina Faso’s Secret Peace Talks and Fragile Jihadist Ceasefire”, *The New Humanitarian*, 11 March 2021, available at: <https://www.thenewhumanitarian.org/2021/03/11/exclusive-burkina-faso-s-secret-peace-talks-and-fragile-jihadist-ceasefire>.

38 Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, p. 72.

39 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 175.

40 International Criminal Tribunal for Rwanda, *The Prosecutor versus Jean-Paul Akayesu*, Case No. ICTR-96-4-I, Judgment (Chamber I), 2 September 1998, para. 626, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MSCI5217R0000619817.PDF>.

of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.⁴¹

The Boskoski judgment enables us to distinguish between criteria that can be assessed against publicly available information, such as communiqués and official statements, and those that require information from less accessible sources, such as the internal regulations of an unidentified armed group. The judgment emphasizes the publication of communiqués and political statements, and the appointment of an official spokesperson enabling the armed group to report on its operations. Publication of a group's communiqués and of reports on its military operations enables it to both claim and take responsibility for them. However, what makes the situation in Burkina Faso unusual is the almost total silence of the perpetrators regarding their attacks. As mentioned above, over 500 attacks took place between 2016 and 2020, but only in nine instances did any group claim responsibility.⁴² This casts a doubt on the existence of a chain of command sufficiently well informed regarding the actions of its fighters in the field. Even in the case of the attack on the gendarmerie detachment at Inata – the most deadly attack that the armed and security forces of Burkina Faso have ever suffered – no group has claimed responsibility, although the media have indicated that GSIM was responsible.⁴³ The Solhan attack, during the night of 4 to 5 June 2021 – the most deadly attack in Burkina Faso to date, resulting in the deaths of 160 civilians⁴⁴ – initially targeted the VDP post, before moving on to the execution of civilians.⁴⁵ No group has claimed responsibility.⁴⁶ While Solhan

41 ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 199, available at: https://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf.

42 Conseil économique et social, above note 35, p. 27.

43 Morgane Le Cam, “Au Burkina Faso, la colère monte après l’attaque meurtrière du poste d’Inata”, *Le Monde*, 19 November 2021, available at: https://www.lemonde.fr/afrique/article/2021/11/19/au-burkina-faso-la-colere-monte-apres-l-attaque-meurtriere-du-poste-d-inata_6102704_3212.html.

44 Nadoun Coulibaly, “Burkina Faso : ce que l’on sait de l’attaque de Solhan”, *Jeune Afrique*, 7 June 2021, available at: <https://www.jeuneafrique.com/1184499/politique/burkina-ce-que-lon-sait-sur-l-attaque-de-solhan/>.

45 *Ibid.*

46 Rose-Marie Bouboutou-Poos, “Violences djihadistes : pourquoi le Burkina Faso a du mal à vaincre les groupes armés ?”, 8 June 2021, *BBC News Afrique*, available at: <https://www.bbc.com/afrique/region-57385879>.

lies within GSIM's zone of influence, the *modus operandi* points rather more to Islamic State in the Greater Sahara.⁴⁷ Both GSIM and Islamic State in the Greater Sahara have denied involvement.⁴⁸

It is difficult to establish whether or not a group has a set of internal regulations, as such groups are less than transparent.

While the attacks on armed and security forces indicate that the perpetrators have some knowledge of military strategy, there is reason to doubt whether there is any leadership planning the vast majority of attacks, or coordinating them at any level. In its judgment in the case of *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, the trial chamber of the ICTY rejected objections regarding the mystery and opacity of the Kosovo Liberation Army (UCK), largely because the group had an official spokesperson and communicated publicly regarding its action in the field. Furthermore, the main leaders of the UCK were known, and its internal disciplinary regulations were accessible.⁴⁹ According to the trial chamber, the General Staff "issued political statements and communiqués which informed the general public in Kosovo and the international community of its objectives and its activities".⁵⁰ In this sense, the UCK represents the armed group that enables one to distinguish between an underground armed group and an unidentified armed group. It is important not to confuse a group that operates in secret to ensure the security of its senior leadership with an unidentified armed group. For instance, the senior leadership of Hezbollah operates in secret, but the Lebanese armed group is identifiable, is represented by a known leader and claims responsibility for its attacks.

As a result, the fact that those responsible for the attacks in Burkina Faso remain unidentified and no groups claim responsibility for them leads one to question the existence of a command structure behind these attacks. This absence of a command structure makes it difficult to apply IHL.

B. The difficulty of applying IHL in the absence of an identified command structure

In Burkina Faso, the absence of a command structure makes it difficult to apply IHL because of (1) the autonomy of the members of the armed groups and (2) the importance of identification in establishing the existence of parties to a conflict.

47 France 24, "Burkina Faso : la tragédie de Solhan 'ne restera pas impunie', assure le Premier ministre", 8 June 2021, available at: <https://www.france24.com/fr/afrique/20210608-burkina-faso-la-trag%C3%A9die-de-solhan-ne-restera-pas-impunie-assure-le-premier-ministre>.

48 RFI, "Massacre de Solhan: entre le GSIM et l'EI, l'enjeu de la réputation", *Radio France Internationale*, 25 June 2021, available at: <https://www.rfi.fr/fr/afrique/20210625-massacre-de-solhan-entre-le-gsim-et-l-ei-l-enjeu-de-la-r%C3%A9putation>.

49 ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, paras 102–3 and paras 110–11, available at: <https://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>.

50 *Ibid.*, para. 101.

1. The autonomy of members of armed groups in Burkina Faso

The wide variety of participants in Burkina Faso's terrorist insurrection is one of its most striking characteristics. As the Crisis Group points out, "Militants are a motley crowd of insurgents motivated by local concerns around a small core of ideologues. They include farmers and herders who are victims of land-related injustices or racketeering, bandits who bring experience in weaponry and fighting, gold miners seeking protection, and stigmatised populations."⁵¹ Not only are those involved in terrorism highly diverse, but the ideological factor is of minor importance, in the sense that local factors are more important than any ostensible religious agenda. This gives terror groups a large measure of autonomy: "The autonomy enjoyed by Burkina Faso's jihadist groups gives room for the fighters to satisfy their local (or even personal) interests."⁵² According to the Crisis Group, terror groups in Burkina Faso enjoy a particularly marked degree of autonomy with regard to GSIM and Islamic State in the Greater Sahara, which have a limited degree of control over the actions of these units.⁵³ These factors no doubt explain why no group has claimed responsibility for the vast majority of attacks. This lends considerable weight to the idea that these attacks are individual rather than collective,⁵⁴ and to the concomitant absence of a command structure controlling those who carry them out. The Solhan attack is typical in this sense. Both Islamic State in the Greater Sahara and GSIM have denied involvement. However, the authorities in Burkina Faso maintain that it was carried out by GSIM, via its presumed *katiba* (unit), Mujahed al-Qaeda. According to researcher Héni Nsaibia:

the Solhan attack is said to have provoked dissent within the group linked to Al-Qaeda in the Islamic Maghreb. The *katiba* Mujahed al-Qaeda – (literally "the fighters of Islam of al-Qaeda"), to which the authorities in Burkina Faso attribute responsibility for the Solhan massacre, is unknown to any specialist in the area, and RFI has spoken to many of them. However, the terminology corresponds to the way in which fighters of Al-Qaeda in the Islamic Maghreb generally refer to themselves. According to Héni Nsaibia, it was indeed a sub-group of GSIM that carried out this attack, and "the leadership chose to disown the group by means of purely strategic communications".⁵⁵

The fact that no group claimed responsibility for this attack, and that it has been attributed to a *katiba* not obviously linked to either of the major groups operating in Burkina Faso's part of the Sahel, gives a clear indication of the autonomy enjoyed by those who frequently carry out these attacks, and the very loose nature of their links with transnational terror groups. The fact that people

51 Crisis Group, above note 9, Executive Summary.

52 *Ibid.*, p. 15.

53 *Ibid.*

54 While the absence of any claims of responsibility does not necessarily mean that these attacks were not carried out by armed groups, it does seem to indicate that they were the work of individuals. The author believes that the Burkina Faso attacks were carried out by individuals.

55 RFI, above note 48 (our translation).

with specialist knowledge of the region have never heard of a “katiba Mujahed al-Qaeda” reinforces the impression that these groups are not sufficiently well organized to meet IHL thresholds, in that they lack a chain of command capable of controlling them, and hence of taking responsibility for attacks. Those perpetrating attacks must form a collective entity if they are to qualify as an armed group.

One of the defining features of an armed conflict is its collective character, the idea of an “uprising” on the part of a “community” – State or non-State. It is the collective aspect that distinguishes an armed conflict from individual acts of violence. This does not mean that every hostile act must be collective in nature. It is the entity that must be collective. It could be that a particular mission is carried out by just one member of a group, acting on its behalf. If we see the term “collective” in this sense, we must look at the question of number.⁵⁶

Under this hypothesis, the fact that no group claims an attack stems from the fact that those who carried it out enjoyed such a large degree of autonomy that none of the armed groups mentioned above could accept responsibility for their operation, as they had not been involved in the main phases of it. In other words, there was no effective chain of command exercising control, because of the predominantly local agenda of the persons involved and the disparity between them. Under such circumstances, any links between those persons and one or more of the armed groups mentioned above would be largely circumstantial – as opposed to material or operational – as personal interests are highly significant. This would also indicate that the attacks were opportunistic, rather than organized or planned. Even if one accepts the idea that an armed group might have a decentralized structure, the fact that no group claimed responsibility for these attacks would appear to support the theory of groups with insufficient organization in the structural sense, or even a total absence of any leader capable of assuming responsibility for their actions. If no leader can speak on behalf of these unidentified armed individuals, it is possible that they are not organized as a group. After all, “the organization of an armed group is related to the concept of a unified entity, and presupposes the existence of a chain of command that is responsible for the acts committed. The group has to demonstrate discipline and coordination in its actions.”⁵⁷

As the ICTY Appeals Chamber so rightly pointed out in the *Tadic* case, “Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group.”⁵⁸ The unidentified armed individuals operating in Burkina Faso would generally appear to be answerable only to themselves. The relationships

⁵⁶ Z. Dabone, above note 17, p. 84.

⁵⁷ *Ibid.*, pp. 83–4 (our translation).

⁵⁸ ICTY, *The Prosecutor v. Duško Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 120, available at: <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

between groups of these persons appear to be more horizontal than vertical. It is not possible to say that an individual belongs to a specific group, particularly in view of the fact that the persons concerned are said to frequently transfer between groups.⁵⁹ This situation could also explain why certain very minor attacks have been claimed jointly.

In its judgment in the *Haradinaj* case, the Trial Chamber rightly refused to recognize the existence of a non-international armed conflict in a situation involving village defence units that were independent of each other and had been created without reference to the Kosovo Liberation Army (KLA) General Staff, which exercised no control over them, despite wishing them to become part of a more organized structure, led by the KLA General Staff.⁶⁰ In Burkina Faso, where armed terror groups have to share a zone of influence with many other entities, it has not been possible to establish a definite link between the persons carrying out these attacks and the chains of command of these groups. This leads one to doubt the existence of a group that is truly organized within the meaning of IHL.

In its judgment of 25 February 2019, the Brussels Appeals Court denied Syrian armed group *Majlis Shuran Al Mujahidin* (the *Mujahideen Shura Council*) the status of organized armed group, despite the existence of headquarters, an identified leader and a large number of members, on the grounds that those members enjoyed a considerable measure of autonomy and had to provide their own weapons and equipment.⁶¹ This confirmed the importance of solid links between the members of a group and its chain of command. The conclusion we draw from the above is that if, in a given area, it is not possible to link the perpetrators of the majority of attacks to the command structure of a known or identifiable armed group – either because they do not claim responsibility for the attacks, or because the security situation is deteriorating – it is difficult to say that groups operating in the zone can be classed as “organized”. This in turn makes it impossible to say that an armed conflict is in progress. In Burkina Faso, the fact that no group has claimed responsibility in the case of most attacks makes it difficult to state that the groups responsible are organized, rendering it impossible to state that an armed conflict is occurring in the country. The implication of this is that identification is an essential criterion when it comes to deciding whether parties to a conflict exist.

2. Identification as an essential criterion for determining the existence of parties to a conflict

The notion of “parties to a conflict” presupposes the existence of organized entities. This was confirmed by the 28th International Conference of the Red Cross and Red

⁵⁹ Crisis Group, above note 9, p. 16.

⁶⁰ ICTY, above note 16, para. 68.

⁶¹ Brussels Appeals Court (30th Chamber), 25 February 2019, cited by Marine Wéry, “La jurisprudence relative à la clause d’exclusion prévue à l’article 141 bis du Code pénal : la difficile application du droit international humanitaire par les cours et tribunaux belges”, *Revue de droit militaire et de droit de la guerre*, Vol. 57, 2018–2019, available at: <http://www.ismllw.org/REVIEW/2018-2019%20ART%20Wery.php>.

Crescent, where it was stated that: “a clear consensus seemed to have emerged that the requirement of this minimum threshold of organisation stemmed implicitly from the reference to the term ‘Parties to the conflict’ in Article 3, as it seems difficult to conceive of this qualification being applied to a group without at least a basic hierarchical structure”.⁶²

The fact that no group has claimed responsibility for the vast majority of attacks in Burkina Faso indicates that the groups responsible are not willing to accept such responsibility via their chain of command or leader—if they exist. However, the notion of a “party to the conflict” implies the existence of an identifiable group,⁶³ as an armed conflict can only take place if there are parties to it. The concept of a party to a conflict is closely linked with that of responsible command:

While this is not stated explicitly, the criterion of responsible command presupposes that the members of a group operate under a leader capable of taking responsibility for the group’s actions. That leader plays the role of a belligerent that does not hide itself and is capable of taking responsibility for the actions of the group at an international level. If those conditions are not fulfilled, the group is not a belligerent and its armed operations do not qualify as an armed conflict. In a sense, it is the public nature of this leadership that distinguishes it from a well-organized terrorist group.⁶⁴

In general, one may assume that if no group is claiming responsibility for these attacks, it is because no collectively organized group identifies with them. This implies that the attacks are the work of individuals who are acting on their own behalf and are not capable of being classified as parties to a conflict.

Furthermore, the absence of control over the actions of a group of individuals makes it impossible for groups who are under the authority of a leader to openly associate themselves with their actions, as they risk being disowned if they do. Government forces therefore have no counterpart with whom they could communicate. The concept of party to a conflict is connected with the ability of an armed group to comply with IHL and hence with its being “organized”.⁶⁵ There are serious reasons to doubt the ability of a group to comply with IHL if it does not claim responsibility for its attacks, as it is questionable

62 International Committee of the Red Cross (ICRC), *Supplement to the Report Prepared by the International Committee of the Red Cross Entitled “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”*. *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*, available at: <https://www.icrc.org/en/doc/resources/documents/report/5ubcvx.htm>.

63 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts. Document Prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007”, *International Review of the Red Cross*, Vol. 89, No. 867, 2007, p. 4, available at: <https://international-review.icrc.org/articles/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

64 Éric David, “Le concept de conflit armé : enjeux et ambiguïtés”, in Vincent Chetail (ed.), *Permanence et mutation du droit des conflits armés*, Bruylant, Brussels, 2013, p. 5 (our translation).

65 Martha M. Bradley, “Revisiting the Notion of ‘Organized Armed Group’ in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements”, *African Yearbook of International Humanitarian Law*, Vol. 2018, No. 1, 2018, pp. 65–6.

whether such a group possesses a system of internal discipline that would allow its commanders to give orders and verify that they were carried out. That is also the view taken by Pre-Trial Chamber II of the International Criminal Court, which stated that an armed group can be classified as a party to a conflict if it has a hierarchical structure that allows it to act under responsible command, with operational and disciplinary powers.⁶⁶ In the *Tadic* case, the ICTY Appeals Chamber stated that “an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority.”⁶⁷ In that sense, “The term ‘responsible command’ indicates an exercise of command authority that produces this broader notion of a disciplined and effective fighting force. Thus, an *effective* military unit is by implication a *responsible* military unit: a unit competent in tactically executing combat operations *in a manner* that manifests respect for and compliance with IHL.”⁶⁸

Clearly, there is a connection between “responsible command”, discipline and compliance with IHL. The existence of responsible command makes it possible to distinguish between a party to the conflict and loosely organized groups of individuals.⁶⁹ Such groups are not capable of ensuring that their members comply with IHL. Is there any value in applying IHL to groups or individuals who are incapable of ensuring compliance with it? The primary aim of requiring that a group be under responsible command before classifying it as “organized” is to ensure that its leadership has the authority required to prevent or punish IHL violations. If it is impossible to identify the group or its commander, it is impossible to apply IHL to any acts of violence it may carry out. The concept of “party to a conflict” in a non-international armed conflict is clearly intended to have a functional role: “the organization criterion implies that the actions are best understood as those of a group and not its individual members. This structural requirement is fundamental, for absent structure there is no identifiable enemy to treat as the other party to the conflict.”⁷⁰

If the leaders of an armed group cannot be identified, and if it does not formally claim responsibility for its attacks, it is doubtful whether it can be described as “organized” within the meaning of IHL. This is confirmed by jurisprudence in Belgium. The Brussels Appeals Court concluded that Syria’s Al-Nusra Front was not “organized” in this sense:

66 International Criminal Court, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, 13 July 2010, para 49, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-36-Red>.

67 ICTY, above note 58, para. 120.

68 Geoffrey S. Corn, “Contemplating the True Nature of the Notion of ‘Responsibility’ in Responsible Command”, *International Review of the Red Cross*, Vol. 96, No. 895/896, December 2015, p. 906 (emphasis in the original), available at: <https://international-review.icrc.org/articles/contemplating-true-nature-notion-responsibility-responsible-command>.

69 Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart Publishing, Oxford, 2011, p. 107.

70 Michael N. Schmitt, “Classification of Cyber Conflict”, *International Law Studies*, Vol. 89, No. 233, 2013, p. 255, available at: <https://digital-commons.usnwc.edu/ils/vol89/iss1/12/>.

This applies to the secrecy – or at least partial secrecy – in which they operate; secrecy between the members of the groups and secrecy and anonymity with regard to the leaders. In each instance, we are dealing with a complex web of scattered groups. While these are indeed affiliated to a “mother” group, they often operate autonomously, without common aims. They have no common structures and no common discipline. They have no leadership with the ability to implement the rules of IHL – assuming they wished to – and the ability or obligation to take responsibility for any breaches of that branch of law.⁷¹

The Appeals Court merely confirmed the original judgment, which found that the members of the Al-Nusra Front “operate in secrecy by their very nature, both towards each other and towards the leadership and third parties, and the leadership is not formally identified or identifiable”.⁷² The decisions of the Belgian courts were criticized because they appeared to support the objectives of the Syrian armed groups⁷³ and demand proof of a certain degree of hierarchical organization within the groups concerned.⁷⁴ The Belgian courts’ analysis of the aims and objectives of the armed groups was certainly clumsy. However, examination of their decisions shows that the actual basis for rejecting the claim that the Al-Nusra Front was “organized” was the fact that its leadership was unidentified, together with the nature of the links between its members. We believe that in this sense, the Belgian courts applied IHL perfectly.⁷⁵

If we transpose this approach to Burkina Faso, it implies that the failure by the perpetrators of attacks to claim responsibility for them, and the anonymity of the main leaders of the armed individuals operating in the country, mean that we cannot conclude that any organized armed group (within the meaning of IHL) actually exists. One might ask whether this absence of identification also has implications when it comes to determining the intensity of hostilities.

II. The consequences of the non-identification of the perpetrators of attacks on assessments of the intensity of hostilities

In Burkina Faso, a number of factors indicate that hostilities have reached a sufficient level of intensity (A). However, those factors lose some of their weight where it is not possible to identify the group responsible (B).

71 Brussels Appeals Court, 12th Chamber, Criminal Cases, Judgment No. 2016/1262, 9 FC 2015, 14 April 2016, cited by Vaios Koutroulis, “How Have the Belgian Courts Dealt with the Interplay between IHL and Counter-Terrorism Offences?”, in *Proceedings of the Bruges Colloquium, Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium, 20–21 October 2016*, Collegium No. 47, College of Europe/ICRC, 2017, p. 115 (our translation), available at: <https://www.coe-icrc.eu/en/previous-editions>.

72 Brussels Francophone Trial Chamber, Case Nos. FD35.97.15-12, FD35.97.5-13 and FD35.98.144-15, 29 July 2015, cited by V. Koutroulis, *ibid.*, p. 114 (our translation).

73 M. Wéry, above note 61, pp. 123–7.

74 V. Koutroulis, above note 71, pp. 116–17.

75 The ICRC took a different approach, stating that the Al-Nusra Front could be classified as an armed group that had participated in non-international armed conflict in Syria.

A. Factors indicating sufficient intensity of hostilities

One can take a number of factors into account when assessing the intensity of a conflict: the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, the number of violent incidents, the number of dead and wounded, the extent of damage to property, the number of persons involved in the clashes, the weapons used, etc.⁷⁶ Attacks in Burkina Faso take the form of: threats and physical aggression; targeted kidnappings and assassinations; armed attacks on the police, gendarmerie and army; destruction of infrastructure (schools, administrative buildings, bridges, etc.); the burning down of markets and the use of improvised explosive devices on roads.⁷⁷ According to the government, 3280 schools were closed because of terrorism as of 5 January 2022—13.09% of the country's educational facilities.⁷⁸

Factors supporting the contention that clashes in Burkina Faso have attained the threshold of intensity required to constitute a non-international armed conflict include the declaring of a state of emergency in several regions and provinces, especially in the Nord and Est regions.⁷⁹ This indicates that in the government's view, an emergency regime is required in order to deal with the situation. Furthermore, the defence forces have been deployed to the areas where the security situation has deteriorated, and have installed permanent camps in those areas. The need to resort to the defence forces⁸⁰ to respond to the attacks indicates that the clashes are of a certain intensity. As pointed out above, the weapons used by the insurgents (rocket launchers, AK-47 assault rifles, improvised bombs, etc.) is evidence for a high level of intensity, as the defence and security forces have been obliged to adopt more powerful weaponry. The clashes and the deteriorating security situation have had consequences for civilians: as of 31 January 2022, 1,741,655 people were displaced within the borders of Burkina Faso.⁸¹

As of 31 January 2021, terror attacks had claimed the lives of over 2000 people,⁸² including almost 500 members of the armed and security

76 ICTY, above note 41, para. 177; S. Sivakumaran, above note 39, p. 167.

77 Ministère de l'Économie, des Finances et du Développement, coopération pour le développement, above note 12, p. 69.

78 Nadia Chahed, "Burkina Faso : 3 280 écoles fermées à cause du terrorisme", *Anadolu Agency*, 5 January 2022, available at: <https://www.aa.com.tr/fr/afrique/burkina-faso-3-280-%C3%A9coles-ferm%C3%A9es-%C3%A0-cause-du-terrorisme-gouvernement/2466211#>.

79 The state of emergency was proclaimed on 31 December 2018.

80 In the context of the Sahel, "defence forces" include both security forces (police, gendarmes and the national guard) and armed forces.

81 Action contre le faim, "Burkina Faso: Second Biggest Spike in Displacement Since Crisis Began", 10 March 2022, available at: <https://www.actioncontrelafaim.org/en/press/second-biggest-spike-in-displacement-since-crisis-began/>.

82 Eléonore Abou Ez, "Au Burkina Faso, le pouvoir semble dépassé par l'insécurité grandissante", *France info*, 17 November 2021, available at: https://www.francetvinfo.fr/monde/afrique/politique-africaine/au-burkina-faso-le-pouvoir-semble-depasse-par-linsecurite-grandissante_4847285.html.

forces.⁸³ Of those killed, almost 300 had fallen victim to improvised explosive devices.⁸⁴ The number of deaths among armed and security forces personnel does not include VDPs. According to the ODDH, more than 580 attacks took place between 4 April 2015 and 31 May 2020.⁸⁵ According to the same source, 221 of those attacks targeted the armed and security forces.⁸⁶ However, the ODDH statistics do include VDPs in the figure for armed and security forces personnel. One could include clashes between VDPs and armed individuals when deciding whether the intensity threshold has been reached, as VDPs are civilians who form volunteer groups at village level, with the task of maintaining peace. According to Article 2 of the law governing VDPs,⁸⁷ “a Volunteer for the Defence of the Homeland is a natural person of Burkina Faso nationality, auxiliary to the armed and security forces, serving the security interests of his village or sector of residence on a voluntary basis, under a contract concluded between the Volunteer and the State”. VDPs receive basic training and financial assistance from the State, and must obey the military chain of command.⁸⁸

As of June 2020, almost 1500 of Burkina Faso’s 2000 VDPs were located in the Nord region. It was taking rather longer to recruit and deploy them in other regions,⁸⁹ but the objective was to recruit a total of 13,000 VDPs.⁹⁰ While the statute of VDPs may be open to debate as regards the IHL applicable in a non-international armed conflict, it would currently appear that they can be included when assessing the intensity of clashes with unidentified armed groups.

This does not apply to the *kolg-weogo* self-defence groups, which operate on the margins of the State. They receive no training from the armed forces and have no links with them. If we take account of clashes between VDPs and soldiers on one side, and unidentified armed individuals on the other, the level of hostilities has been very high since 2018 at the latest. There is a degree of regularity in these clashes at certain times. Since June 2021, they have become almost daily occurrences. We can therefore conclude that there is a certain intensity of violence in the Nord and Est regions of Burkina Faso, at least during some periods. However, one might question such a conclusion, given the impossibility of identifying the perpetrators of the attacks.

83 Lassaad Ben Ahmed, “Burkina Faso : 478 militaires tués depuis 2015 dans des attaques (Armée)”, *Anadolu Agency*, 1 November 2021, available at: <https://www.aa.com.tr/fr/afrique/burkina-faso-478-militaires-tue%20C3%A9s-depuis-2015-dans-des-attaques-arm%20C3%A9e/2409045>.

84 Voice of America, “Une dizaine de gendarmes tués; plusieurs portés disparus”, 14 March 2022, available at: <https://www.voafrique.com/a/une-dizaine-de-gendarmes-burkinab%20C3%A8-tu%20C3%A9s-plusieurs-port%20C3%A9s-disparus-/6483737.html>.

85 ODDH, above note 13, p. 27.

86 *Ibid.*, p. 24.

87 Law No. 002-2020/AN concerning volunteers for the defence of the homeland of 21 January 2020.

88 Articles 7, 8, 9 and 15 of Law No. 002-2020/AN concerning volunteers for the defence of the homeland of 21 January 2020.

89 Antonin Tisseron, *Pandora’s Box. Burkina Faso, Self-Defense Militias and VDP Law in Fighting Jihadism*, Friedrich Ebert Stiftung, Dakar-Fann, 2021, p. 23, available at: <http://library.fes.de/pdf-files/bueros/fes-pscc/17590.pdf>.

90 *Ibid.*

B. The difficulty of determining the intensity of the violence in view of the non-identification of those perpetrating attacks

According to the Appeals Chamber of the ICTY, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.⁹¹ In the International Committee of the Red Cross’s (ICRC’s) view, “The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria; the term ‘armed conflict’ presupposes the existence of hostilities between armed forces *organised to a greater or lesser extent*; there must be the opposition of armed forces and a *certain intensity* of the fighting.”⁹² The non-identification of the perpetrators of attacks in Burkina Faso raises questions regarding the nature of the acts of violence and their continuity.

Firstly, attacks in Burkina Faso very often directly and deliberately target civilians, in markets, villages, places of worship, etc. However, direct and deliberate attacks on civilians – important as they may be – provide no basis for deciding whether the intensity criterion has been met unless they are directly linked to a clash with the armed forces. Any assessment of intensity must be based primarily on clashes involving the armed forces. Damage and harm to civilians can be taken into account as the consequence of clashes between the armed group and government forces, or between armed groups. While it is undeniable that forced displacement in Burkina Faso is partly the result of clashes between unidentified armed groups and the armed and security forces, it is also undeniable that – for at least the last two years – armed individuals have been directly ordering people to leave their villages if they do not wish to be killed.⁹³ The purpose of these threats is to acquire the villagers’ livestock and the produce they have harvested; people are unable to take their property with them when they undergo forced displacement. As a result, illicit livestock trading has become a major activity in areas where security conditions are deteriorating.

The difficulty caused by the non-identification of the perpetrators becomes apparent when one attempts to decide whether the violence has reached the intensity threshold; as we do not know who is carrying out the attacks, and as the perpetrators do not claim responsibility for them, it is difficult to say whether they are the work of groups with a sufficient degree of connection between them, or of armed individuals pursuing their own aims in a geographical area from which the State is absent. If the perpetrators are unidentified, the question is

91 ICTY, *The Prosecutor v. Dusko Tadic a/k/a “DULE”*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, available at: <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

92 Cited in ICTY, above note 49, para. 89 (emphasis in the original).

93 Armand Kinda, “Nouna : les terroristes donnent dix jours aux populations de Soin pour quitter le village”, *Minute.bf*, 15 March 2022, available at: <https://minute.bf/nouna-les-terroristes-donnent-10-jours-aux-populations-de-soin-pour-quitter-le-village/>.

whether all the attacks are carried out by a single armed group, by a number of armed groups or by unconnected individuals. The problem is that we need to measure the intensity of clashes between government forces and each armed group, separately.⁹⁴ In other words, to decide whether the level of violence meets the intensity criterion, we must look not at the overall intensity but at the violence perpetrated by each armed group in its clashes with the government forces of Burkina Faso. This is not possible if one cannot attribute each attack to a specific group.

The difficulty is exacerbated by the fact that these acts of violence may be committed by bandits and others who have long been active in the areas currently subject to deteriorating security conditions. These individuals generally have mainly opportunistic and *ad hoc* connections with armed terror groups, depending on their interests at any given time.

Given the impossibility of measuring the intensity of the fighting, it is tempting to combine all acts of violence committed in Burkina Faso, so as to draw the conclusion that the intensity criterion has been met, or to say that the deteriorating security situation that is obliging officials to flee and causing the forced displacement of the population is sufficient to show that the criterion has been satisfied. While the idea of making a global assessment of intensity is attractive, it does run up against the fact that those behind the violence clearly do not necessarily constitute a homogeneous, cohesive group. The absence of reports and statements regarding the operations carried out against the armed and security forces of Burkina Faso by those responsible for them must not lead one to assess intensity globally. To do so would imply that the mere existence of violence – even if perpetrated by anarchic groups or by individuals following their own whims – would be sufficient to classify a situation as an armed conflict.

One other major difficulty in measuring the intensity of violence in Burkina Faso is the duration of the attacks. While the criterion of an armed conflict being prolonged was introduced by the ICTY in the *Tadic* case, and adopted by the Rome State of the International Criminal Court, one should see this criterion not as a third condition that must be fulfilled in order to classify a situation as a non-international armed conflict, but rather as a factor that should be taken into account when assessing the intensity of violence. The difficulty of measuring the intensity of the fighting in Burkina Faso also results from the fact that these attacks are occurring against the background of a progressive deterioration in the security situation, in the absence of any pre-existing armed conflict.⁹⁵ The difficulty lies in the irregular nature of the attacks; periods of frequent attacks

94 Annyssa Bellal, “ICRC Commentary of Common Article 3: Some Questions Relating to Organized Armed Groups and the Applicability of IHL”, *EJIL:Talk!*, 5 October 2017, available at: <https://www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/>.

95 Robin Geiß, “Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties”, *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, available at: <https://international-review.icrc.org/articles/armed-violence-fragile-states-low-intensity-conflicts-spillover-conflicts-and-sporadic-law>.

alternate with periods of calm. The attacks are discontinuous in both time and space, and the fact that the armed groups responsible remain unidentified makes it impossible to say whether the intensity criterion has been met.

Several months – or even a year – can elapse between two attacks for which a group does indeed claim responsibility. Attacks for which no group claims responsibility (which account for the majority of attacks in Burkina Faso) may be concentrated into a limited period, such as the year 2018 – indicating that the intensity criterion has been met – and then become less frequent; Burkina Faso is experiencing a low-intensity conflict. Furthermore, the attacks do not all take place in the same area. Most occur in the Nord, Centre-Nord and Est regions. However, they do not necessarily take place continuously in a given region. An attack may occur in the Nord region, followed by an attack next day in the Est, followed by another in the Centre-Nord a few days later. As we do not know who is carrying out the attacks, and as the perpetrators do not claim responsibility for them, it is difficult to say whether they are the work of groups with a sufficient degree of connection between them, or of armed individuals pursuing their own aims in a geographical area from which the State is absent.

Conclusion

This analysis has shown that the impossibility of identifying the perpetrators of attacks in Burkina Faso very much calls into question the applicability of IHL, in terms both of the level of organization of the unidentified armed individuals and of the intensity of the fighting, despite the deterioration in the security situation in the Nord and Est regions of the country. The fact that no identified or identifiable group is claiming responsibility for these attacks makes it difficult to say that a party to the conflict exists with which the Burkina Faso armed forces could enter into contact, and which could take on rights and obligations. The conclusion that would appear to emerge is that in Burkina Faso – where the majority of attacks cannot be objectively attributed to an armed group, and where no group claims responsibility for them – one cannot claim that the conditions have been fulfilled for classifying the situation as a non-international armed conflict. It is very tempting to apply IHL to any situation of generalized violence. However, such an approach would be mistaken, as IHL presupposes that the parties to a conflict are capable of applying IHL and of punishing breaches. Furthermore, human rights law is always applicable in such situations, and constitutes a far stricter regime than IHL as regards the rules on use of lethal force. Having said that, the government of Burkina Faso could decide unilaterally to apply IHL to the situations of violence described above.