

Harvesting vulnerability: The challenges of organ trafficking in armed conflict

Thomas Martial*

Thomas Martial is a law clerk in the International Arbitration Group of Freshfields Bruckhaus Deringer in Frankfurt am Main, Germany.

Abstract

Armed conflicts leave populations vulnerable to organ trafficking, a criminal enterprise with little international regulation when viewed separately from human trafficking. The Council of Europe's Convention against Trafficking in Human Organs is the only instrument to contemplate the responsibility of actors involved in organ trafficking, but traffickers may go unpunished due to its limited scope. Yet in armed conflict, international humanitarian law offers additional protection. The rules protecting the living and the dead against ill-treatment provide the basic level of protection necessary to consider the international responsibility of organ trafficking networks and the individual criminal responsibility of their members.

Keywords: organ trafficking, mutilation, international humanitarian law, non-State armed groups, armed conflict, nexus, international criminal law.

⋮⋮⋮⋮⋮

* The opinions expressed in this article are the author's own and do not reflect the views of his employer.

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

Introduction

With global demand for organs for transplantation far outpacing supply, organ trafficking and transplant tourism¹ have become a lucrative business for criminal organizations, generating up to \$1.7 billion each year.² In 2017, an estimated 140,000 solid organ transplants were performed globally, a significant increase compared to the 118,127 procedures performed in 2013.³ Yet, these figures account for only 10% of the global demand for organ transplants.⁴ Given the severe shortage of living and deceased organ donors, organ traffickers have stepped in to provide desperate patients with an alternative to internationally and domestically regulated organ transplant frameworks.⁵

According to a 2007 study conducted by the World Health Organization (WHO), 5–10% of organ transplants worldwide are conducted illegally,⁶ but despite these estimates, the actual extent of organ trafficking remains elusive. Reliable empirical data is hard to obtain because the crime is clandestine in nature and unreported.⁷

Organ trafficking covers a range of criminal activities, including the recruitment of living or deceased donors, the harvesting of organs, transportation, and transplantation.⁸ It is also understood that this crime “primarily involves the

- 1 According to the Declaration of Istanbul, travelling for transplantation is not in itself unlawful but becomes transplant tourism if it involves trafficking in persons for the purpose of organ removal or trafficking in human organs. Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 2018, p. 2, available at: www.declarationofistanbul.org/ (all internet references were accessed in August 2022).
- 2 Channing May, *Transnational Crime and the Developing World*, Global Financial Integrity, Washington, DC, March 2017, pp. xi–xii; Parliamentary Assembly of the Council of Europe, Res. 2327, 31 January 2020.
- 3 World Medical Association (WMA) General Assembly, “WMA Statement on Measures for the Prevention and Fight Against Transplant-Related Crimes”, Cordoba, 31 October 2020, available at: www.wma.net/policies-post/wma-statement-on-measures-for-the-prevention-and-fight-against-transplant-related-crimes/; United Nations Office on Drugs and Crime (UNODC), *Assessment Toolkit: Trafficking in Persons for the Purposes of Organ Removal*, Vienna, 2015 (UNODC Toolkit), p. 10.
- 4 WMA General Assembly, above note 3; UNODC Toolkit, above note 3, p. 10.
- 5 See C. Rudge, R. Matesanz, F. L. Delmonico and J. Chapman, “International Practices of Organ Donation”, *British Journal of Anaesthesia*, Vol. 108, No. 1, 2012.
- 6 UNODC Toolkit, above note 3, p. 11; Yosuke Shimazono, “The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information”, *Bulletin of the World Health Organization*, Vol. 85, No. 12, 2007, p. 959; Gabriel M. Danovitch *et al.*, “Organ Trafficking and Transplant Tourism: The Role of Global Professional Ethical Standards – The 2008 Declaration of Istanbul”, *Transplantation Journal*, Vol. 95, No. 11, 2013, p. 1307.
- 7 The UNODC recorded twenty-five victims of human trafficking for the purpose of organ removal in 2017, a number which rose to over forty in 2018: UNODC, *Global Report on Trafficking in Persons*, Vienna, 2020, p. 36. See Michael Bos, *Trafficking in Human Organs*, European Parliament, 2015, p. 18; Frederike Ambagtsheer, “Understanding the Challenges to Investigating and Prosecuting Organ Trafficking: A Comparative Analysis of Two Cases”, *Trends in Organized Crime*, 2021, p. 2; Interpol, *Trafficking in Human Beings for the Purpose of Organ Removal in North Africa and West Africa*, July 2021, p. 5. See also Michael P. Heintz, Bo Yu and Duminda Wijesekera, “A Framework to Reveal Clandestine Organ Trafficking in the Dark Web and Beyond” *Journal of Digital Forensics, Security and Law*, Vol. 14, No. 1, 2019, pp. 1–2.
- 8 Congressional Research Service, *International Armed Organ Trafficking: In Brief*, 22 December 2021, p. 1, available at: <https://sgp.fas.org/crs/row/R46996.pdf>; Global Rights Compliance, *Do No Harm: Mitigating Human Rights Risks when Interacting with International Medical Institutions and Professionals in Transplantation Medicine*, Legal Advisory Report, April 2022, p. 7.

movement of people rather than harvested organs”.⁹ Organs are supplied through organized networks linking recipients from “demand countries” (mainly in Europe, North America and the Near East) with “donors”, who often originate from developing countries where organ trafficking networks target vulnerable communities and individuals.¹⁰ Organ traffickers also take advantage of armed conflict, displaced populations and refugees, and the breakdown of the rule of law to harvest and supply organs.¹¹ According to estimates from Syrian officials, up to 20,000 organ sales have occurred across Syria since the start of the Syrian conflict.¹² As explained by Global Financial Integrity’s *Transnational Crime and the Developing World* report:

Conflict zones are ideal for recruitment, as refugees and internally-displaced persons are more vulnerable and desperate. Like other offenses such as human trafficking and sexual assault, organ trafficking compounds the devastation and suffering of those living in refugee camps. These individuals, with limited employment options and having left most of their possessions behind, feel compelled to sell an organ in order to try to support themselves and their family.¹³

While organ traffickers may simply wish to profit from the chaos of armed conflict by promising money and safe passage to those willing to pay the price with their organs, others, such as non-State armed groups, may turn to organ trafficking to treat injured combatants or provide a steady flow of revenue.¹⁴ In Iraq, the so-called Islamic State group (IS) has engaged in the harvest and sale of organs from fighters, captives and hostages.¹⁵ In that context, IS is said to have sanctioned the harvesting of organs from “apostates” for the purpose of “transplanting healthy organs into a Muslim person’s body in order to save the latter’s life or replace a

9 C. May, above note 2, p. 29.

10 UNODC Toolkit, above note 3, pp. 11–12; C. May, above note 2, pp. xii, 32–33; Interpol, above note 7, p. 14. See, e.g., UN General Assembly, *Trafficking in Persons, Especially Women and Children*, UN Doc. A/68/256, 2 August 2013, paras 25–30.

11 Jamille Bigio and Rachel Vogelstein, *The Security Implications of Human Trafficking*, Council on Foreign Relations, New York, October 2019, p. 8; UNODC, *Countering Trafficking in Persons in Conflict Situations*, Vienna, 2018, p. 1.

12 Ahmad Haj Hamdo, “The Underbelly of Syria’s War: A Thriving Trade in Human Organs”, *UPI*, 12 May 2016, available at: www.upi.com/Top_News/World-News/2016/05/12/The-underbelly-of-Syrias-war-a-thriving-trade-in-human-organs/5301462896201/.

13 C. May, above note 2, p. 32.

14 Although in the case of IS, organ trafficking may not account for a significant source of funding compared to IS’s other sources, such as extortion and oil theft. See UN General Assembly, *Trafficking in Persons, Especially Women and Children*, UN Doc. A/71/303, 5 August 2016, para. 24; J. Bigio and R. Vogelstein, above note 11, p. 8; C. May, above note 2, p. 33; Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2016*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, March 2017, p. 37.

15 International Organization for Migration, *Addressing Human Trafficking and Exploitation in Times of Crisis*, Geneva, 2015, p. 15; Ray Sanchez, “United Nations Investigates Claim of ISIS Organ Theft”, *CNN*, 19 February 2015, available at: <https://edition.cnn.com/2015/02/18/middleeast/isis-organ-harvesting-claim/index.html>; Anne Speckhard, “ISIS Defector Reports on the Sale of Organs Harvested from ISIS-Held ‘Slaves’”, *Huffington Post*, 1 January 2016, available at: www.huffpost.com/entry/isis-defector-reports-on-sale-of-organs_b_8897708.

damaged organ”.¹⁶ There are also reports of black markets selling human organs in IS-controlled territory, and corpses have been discovered in IS-controlled areas bearing indications that their organs were forcibly removed.¹⁷ Other conflicts, such as the 1998–99 Kosovo conflict, have also given rise to organ trafficking. An investigation by the Council of Europe has indeed revealed that in the aftermath of the conflict, Kosovo Liberation Army (KLA) militants were using prisoners as a source of organs and killing captives before performing cadaver kidney extractions.¹⁸ These reports show that regardless of the motivations for engaging in organ harvesting and trafficking, this crime has become part and parcel of the risks that the living and the dead must endure during armed conflict.

The link between conflict and organized crime is of such concern that the United Nations (UN) has, in the past years, highlighted the need for a stronger international response.¹⁹ At the global level, the fight against organized crime is coordinated through the United Nations Convention against Transnational Organized Crime (UNTOC),²⁰ adopted in 2000, which requires that States Parties criminalize an individual’s participation in an organized criminal group.²¹ Through its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the UNTOC also obliges States Parties to criminalize trafficking in persons for the purpose of organ removal.²² The Protocol’s definition of trafficking in persons for the purpose of organ removal entails the conjunction of three constituent elements: an act of trafficking in persons, means, and a purpose (i.e., the removal of organs).²³ However, it does not apprehend organ trafficking as a stand-alone offence. The wide international

16 Warren Strobel, Jonathan Landay and Phil Stewart, “Exclusive: Islamic State Sanctioned Organ Harvesting in Document Taken in U.S. Raid”, *Reuters*, 25 December 2015, available at: www.reuters.com/article/us-usa-islamic-state-documents-idUSKBN0U805R20151225.

17 “Islamic State Accused of ‘Harvesting Organs’”, *Sky News*, 18 February 2015 available at: <https://news.sky.com/story/islamic-state-accused-of-harvesting-organs-10370984>; Joint Counterterrorism Assessment Team, *First Responder’s Toolbox: International Partnerships among Public Health, Private Sector, and Law Enforcement Necessary to Mitigate ISIS’s Organ Harvesting for Terrorist Funding*, Directorate of National Intelligence, National Counterterrorism Center, Washington, DC, 11 May 2017, p. 1, available at: www.dni.gov/index.php/nctc-how-we-work/joint-ct-assessment-team/first-responder-toolbox.

18 The events reported by the Council of Europe cover the post-conflict period, but there are also allegations that such events occurred during the conflict. See Dick Marty, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Doc. 12462, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 7 January 2011, paras 136, 162, 166. See also Owen Bowcott, “Kosovo Organ Trafficking Inquiry Chief Vows to Investigate All Evidence”, *The Guardian*, 16 September 2016, available at: www.theguardian.com/world/2016/sep/16/kosovo-organ-trafficking-inquiry-chief-prosecutor-vows-to-investigate-all-evidence.

19 UN General Assembly, above note 14, para. 24; UNSC Res. 2482, 19 July 2019, para. 8. See also UNSC Res. 2462, 28 March 2019; Michael Plachta, “Transnational Organized Crime and Counterterrorism: Security Council Adopts Resolution on Linkages between Organized Crime and Terrorism”, *International Enforcement Law Reporter*, Vol. 35, No. 8, 2019, pp. 309–311.

20 United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, 15 November 2000 (entered into force 29 September 2003) (UNTOC).

21 *Ibid.*, Art. 5.

22 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, 15 November 2000 (entered into force 25 December 2003), Art. 3(a).

23 UNODC Toolkit, above note 3, pp. 17–18.

recognition of trafficking in persons for the purpose of organ removal and the international humanitarian law (IHL) framework and responsibility attached to it has already been discussed elsewhere and does not call for further consideration in this article.²⁴

The crime of organ trafficking is thus distinct from trafficking in persons for the purpose of organ removal.²⁵ To date, the Council of Europe’s Convention against Trafficking in Human Organs,²⁶ known as the Santiago de Compostela Convention (SCC), is the only international instrument to oblige States to adopt measures prohibiting organ trafficking.²⁷ The SCC criminalizes organ harvesting by prohibiting the intentional removal of human organs from living or deceased donors without their consent (or in the case of deceased donors, where the removal is not authorized under domestic law), or where such consent was obtained in exchange for “financial gain or comparable advantage” for the donor or a third party.²⁸ It contemplates the criminal responsibility of every actor – save for the donor and recipient, on the assumption that their conduct is compelled by necessity – involved in organ trafficking, from procurement to transport and transplantation, whether committed individually or as part of a criminal organization.²⁹ This is not to say that patients receiving organs will never be held criminally liable – indeed, almost every country criminalizes the purchase of organs by patients participating in transplant tourism.³⁰ However, such conduct is not regulated by the SCC.³¹

The SCC leaves no stone unturned in its efforts to better apprehend organ trafficking, but its scope is inherently limited to its signatories, the majority of which are members of the Council of Europe. Jurisdiction over organ trafficking offences does not extend to those committed beyond the SCC’s territorial scope by persons who are neither nationals nor residents of a State party.³² Thus, persons committing the act of organ harvesting may very well evade accountability, particularly in States that do not expressly criminalize organ trafficking and prosecute traffickers through domestic rules prohibiting bodily harm or theft.³³ Adding the fact that, at the global

24 See Michael Ramsden, “The International Responsibility of War Profiteers for Trafficking in Persons”, in Nina H. B. Jørgensen (ed.), *The International Criminal Responsibility of War’s Funders and Profiteers*, Cambridge University Press, Cambridge, 2020.

25 UNODC Toolkit, above note 3, p. 17.

26 Convention against Trafficking in Human Organs, CETS No. 2016, 25 March 2015 (entered into force 1 March 2018) (SCC).

27 Alessandra Pietrobon, “Challenges in Implementing the European Convention against Trafficking in Human Organs”, *Leiden Journal of International Law*, Vol. 29, No. 2, 2016, p. 486.

28 SCC, above note 26, Art. 4(1). Article 3 of the SCC states that the Convention applies without discrimination, including on the basis of age, thus granting minors the same protection as adults. However, Article 4(2) permits derogations from Article 4(1) “in exceptional cases and in accordance with appropriate safeguards or consent provisions under its domestic law”.

29 *Ibid.*, Arts. 5–9; A. Pietrobon, above note 27, p. 486.

30 Frederike Ambagtsheer *et al.*, “Cross-Border Quest: The Reality and Legality of Transplant Tourism”, *Journal of Transplantation*, Vol. 2012, 2012, p. 4.

31 A. Pietrobon, above note 27, p. 486.

32 SCC, above note 26, Art. 10; A. Pietrobon, above note 27, pp. 499–500.

33 See, e.g., Seán Columb, “Excavating the Organ Trade: An Empirical Study of Organ Trading Networks in Cairo, Egypt”, *British Journal of Criminology*, Vol. 57, No. 6, 2017, p. 1316.

level, few cases appear to have been identified and prosecuted despite the estimated prevalence of the crime, one can only surmise that organ traffickers will further benefit, in terms of evading accountability, from a breakdown of the rule of law during armed conflict.³⁴ In such a situation, does IHL offer any protection against organ trafficking by criminal organizations?

As will be discussed, IHL imposes an absolute prohibition on the *sine qua non* of organ trafficking – i.e., the act of harvesting organs from the living and the dead. IHL’s protective framework also requires that parties to a conflict take positive measures to protect the dead from organ harvesting. However, in order for IHL’s protection to apply, it is necessary to determine whether it can regulate organ trafficking networks, either directly, as parties to a conflict, or indirectly, by attributing their conduct to a party to a conflict or establishing the international criminal responsibility of their members.

The prohibition of organ harvesting under IHL

IHL imposes an absolute prohibition on organ harvesting during armed conflict. In an international armed conflict (IAC), IHL applies to the entire territory of the parties to the conflict.³⁵ In a non-international armed conflict (NIAC), the geographical reach of IHL is still strongly debated.³⁶ However, it is accepted that the IHL of NIACs applies at least to “the whole territory under the control of a party, whether or not actual combat takes place there”.³⁷

The protective framework against illegal organ harvesting is shaped by several sources and provisions of IHL. These rules protect the living as well as the dead.

Rules protecting the living against organ harvesting

Protection against organ trafficking is achieved through the prohibition of organ harvesting. Elements of this prohibition are found in, firstly, specific provisions of Additional Protocols I and II (AP I, AP II) of 1977 regulating medical procedures; secondly, IHL’s fundamental prohibition against mutilation; and

34 See J. Bigio and R. Vogelstein, above note 11, p. 8; F. Ambagtsheer, above note 7, p. 2.

35 Emily Crawford, “The Temporal and Geographic Reach of International Humanitarian Law”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 65.

36 See, e.g., *ibid.*, pp. 71–75; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham and Northampton, 2019, paras 6.47–6.53.

37 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction (Trial Chamber), 10 August 1995, para. 69; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-04, Judgment (Trial Chamber), 2 September 1998, para. 635. See also M. Sassòli, above note 36, para. 6.47; E. Crawford, above note 35, pp. 71–72.

thirdly, the prohibition of murder. Finally, parties to a conflict also have a positive obligation to protect the wounded, sick and shipwrecked from ill-treatment.

The regulation of medical procedures by the Additional Protocols

Article 11 of AP I and Article 5(2)(e) of AP II regulate the performance of medical procedures by parties to an armed conflict. The protection granted by AP I covers nationals who are in the power of the adverse party,³⁸ as well as any person, regardless of nationality, “interned, detained or otherwise deprived of liberty” as a result of an IAC.³⁹ Due to the impracticality of nationality-based criteria in NIACs, AP II’s protection is more limited in scope and covers only persons interned or detained for reasons related to the armed conflict.⁴⁰ This excludes less stringent means of detention permitted under AP I, such as confinement to a designated residence.⁴¹ Those deprived of liberty for reasons unrelated to the conflict are, of course, excluded from IHL’s scope of protection.⁴²

Importantly, these provisions apply neither to free nationals of the party performing the procedure under AP I⁴³ nor to “free persons” under AP II,⁴⁴ due to a presumption that parties to a conflict will provide the best possible care to their own. Those persons therefore set the benchmark by which the “generally accepted medical standards”⁴⁵ guiding the performance of medical procedures by a party are to be assessed.⁴⁶

In the context of an IAC, Article 11(2)(c) of AP I expressly prohibits the “removal of tissue or organs for transplantation” and rejects the protected person’s consent as a justification for performing the procedure. In contrast, Principle 3 of the WHO *Guiding Principles on Human Cell, Tissue and Organ Transplantation* recognizes the validity of live donations with the informed and

38 The term “in the power of” the adverse party simply requires that a person fall into the hands or be in the territory of the adverse party. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, International Committee of the Red Cross (ICRC), Geneva, 1987 (ICRC Commentary on the APs), paras 468–469.

39 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 1, 11(1).

40 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 3, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 5(1).

41 See ICRC Commentary on the APs, above note 38, paras 470, 4582.

42 The requirement of a link between the deprivation of liberty and the armed conflict excludes “ordinary criminals” prosecuted and detained under normal rules of criminal law from the scope of AP I Article 11 and AP II Article 5. See ICRC Commentary on the APs, above note 38, para. 4568.

43 AP I, Art. 11(1).

44 AP II, Art. 5(2)(e).

45 These standards are neither defined by AP I nor universally codified at the international level and remain scattered across several soft-law instruments such as the WHO Guiding Principles and standards developed by the World Medical Association. Yet, they help to shape a global minimum standard of medical care which may guide the interpretation of “generally accepted medical standards” of IHL. See ICRC Commentary on the APs, above note 38, para. 476.

46 See *ibid.*, para. 477.

voluntary consent of the live donor, “free of any undue influence or coercion”.⁴⁷ As a cornerstone of medical ethics, the validity of a donor’s freely given consent would normally be recognized by domestic regulations on organ transplantation.⁴⁸ Such consent would be valid under international human rights law, although it remains debatable for persons deprived of liberty.⁴⁹ At first glance, this prohibition unduly burdens access to organ transplantation. However, IHL’s categorical prohibition on organ harvesting acts as a *lex specialis* to safeguard protected persons against abuse by parties who might perceive them as a readily available source of organs.⁵⁰ In any event, consent given by enemy aliens and detainees would be invalid due to lack of a real choice under the circumstances.⁵¹

The prohibition against organ harvesting suffers only two exceptions. The first results from AP I Article 11(1) and 11(2)’s authorization of procedures “indicated by the state of health of the person concerned”. However, this exception may never operate in practice, as harvesting healthy organs cannot improve the health of the donor and, indeed, can seriously impact it.⁵² The second exception relates to blood donations for transfusions and the donation of skin for skin grafts, permitted under Article 11(3) provided the procedure is consented to freely.⁵³ Nonetheless, given the limited scope of these exceptions, it is safe to say that harvesting organs from persons protected by IHL is absolutely prohibited during an IAC.⁵⁴

In the context of a NIAC, Article 5(2)(e) of AP II only prohibits medical procedures which are “not indicated by the state of health of the person concerned”. Yet, the mere requirement that medical procedures be performed for the benefit of the donor’s state of health inevitably leads to the prohibition of organ harvesting. Furthermore, even though it is not expressly stated, AP I’s rejection of consent-based justifications and exceptions for blood and skin donations are applicable by analogy to NIACs.⁵⁵ Overall, an equivalent protection

47 WHO, *Guiding Principles on Human Cell, Tissue and Organ Transplantation*, WHO/HTP/EHT/CPR/2010.01, 2010, p. 3.

48 See UNODC Toolkit, above note 3, pp. 15–16.

49 See International Covenant on Civil and Political Rights, 999 UNTS 171, 19 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 7; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976), Art. 21. On the question of prisoner consent to organ donation, see, e.g., Lawrence O. Gostin, “Prisoners Shouldn’t Be Allowed to Donate Their Organs”, *New York Times*, 26 April 2013, available at: www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/prisoners-shouldnt-be-allowed-to-donate-their-organs; Norbert W. Paul *et al.*, “Human Rights Violations in Organ Procurement Practice in China”, *BMC Medical Ethics*, Vol. 18, No. 11, 2017, p. 1; Lainie Friedman Ross and J. Richard Thistlethwaite, “Prisoners as Living Donors: A Vulnerability Analysis”, *Cambridge Quarterly of Healthcare Ethics*, Vol. 7, No. 1, 2018.

50 See ICRC Commentary on the APs, above note 38, paras 468–469, 478.

51 See N. W. Paul *et al.*, above note 49, p. 1.

52 ICRC Commentary on the APs, above note 38, paras 475, 482; Eizuke Nakazawa *et al.*, “Will You Give My Kidney Back? Organ Restitution in Living-Related Kidney Transplantation: Ethical Analyses”, *Journal of Medical Ethics*, Vol. 46, 2020, pp. 144–145.

53 ICRC Commentary on the APs, above note 38, para. 486.

54 *Ibid.*, para. 482.

55 *Ibid.*, paras 4588, 4594.

against organ harvesting is granted in IACs and NIACs, with violations of AP I Article 11 and AP II Article 5(2)(e) amounting to war crimes.⁵⁶

The prohibition against organ harvesting as an essential component of the prohibition against mutilation

As the Geneva Conventions were adopted prior to the first successful organ transplant, their provisions did not contemplate the regulation of organ harvesting.⁵⁷ However, protection against organ harvesting is achieved through the long-standing prohibition against mutilation.⁵⁸ Wide acceptance of this prohibition, along with State practice, has entrenched its status as a rule of customary IHL in both IACs and NIACs.⁵⁹ Surprisingly, IHL does not define “mutilation” and relies on international criminal law (ICL) to fill that gap.⁶⁰ Fortunately, ICL considers mutilation to cover the act of removing an organ or appendage,⁶¹ as would result from organ harvesting, and criminalizes it as a war crime in both IACs and NIACs.⁶²

No matter the source of the prohibition on mutilation, its regime remains the same. Mutilation may only be justified on strict medical grounds, to the same extent as the removal of tissue or organs for transplantation under the Additional Protocols, and consent-based justifications are also unavailing.⁶³ This confirms the absolute character of the prohibition on organ harvesting as a mutilation with no health benefits for the donor.

In IACs, mutilation is expressly prohibited by two specific provisions of Geneva Conventions III and IV (GC III, GC IV):⁶⁴ Article 13 of GC III,

56 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Arts 8(2)(b)(x), 8(2)(e)(ix). AP I, however, does not extend this characterization to a party’s own nationals: see AP I, Art. 11(4).

57 The first successful transplant of a functioning kidney without rejection was in 1954. Henry W. Randle, “The History of Organ Transplantation”, in Clark C. Otley and Thomas Stasko (eds), *Skin Disease in Organ Transplantation*, Cambridge University Press, Cambridge, 2010, p. 9.

58 The first iteration of this prohibition dates back to the Lieber Code of 24 April 1963. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. 321, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), para. 1589.

59 ICRC Customary Law Study, above note 58, Rule 92. p. 320.

60 ICRC Commentary on GC III, above note 58, para. 638.

61 See, e.g., International Criminal Court (ICC), *Elements of Crimes*, adopted by the Assembly of State Parties, First Session, New York, 3–10 September 2002, Official Records ICC-ASP/1/3 (ICC *Elements of Crimes*), Art. 8(2)(b)(x)-1.

62 Rome Statute, above note 56, Arts 8(2)(b)(x), 8(2)(e)(ix). See also Statute of the International Criminal Tribunal for Rwanda, UNSC Res. 955, 8 November 1994 (last amended 13 October 2006), Art. 4; Statute of the Special Court for Sierra Leone, UNSC Res. 1315, 14 August 2000, Art. 3.

63 ICRC Commentary on GC III, above note 58, para. 643; ICRC Commentary on the APs, above note 38, para. 479; ICC *Elements of Crimes*, above note 61, Arts 8(2)(c)(i)-2, 8(2)(b)(x)-1 fn. 46, 8(2)(e)(xi)-1 fn. 69.

64 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); 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) (GC IV).

protecting prisoners of war, and Article 32 of GC IV, protecting enemy civilians in the hands of an adverse party or Occupying Power, as well as those who were refugees or stateless before the beginning of hostilities.⁶⁵ Geneva Conventions I and II (GC I, GC II) do not expressly prohibit mutilation,⁶⁶ but they both impose, in Article 12(2), an obligation of humane treatment of the wounded, sick and shipwrecked, and prohibit violence against persons protected under these two Conventions.⁶⁷ Though organ harvesting is not expressly listed as a prohibited act of violence, the non-exhaustive nature of Article 12(2) undoubtedly extends to this practice.⁶⁸ In particular, it prevents a party from using the wounded and the sick, who may be viewed as disposable, as a readily available source of organs for transplantation.

Furthermore, AP I has expanded the scope of the prohibition on mutilation through two key provisions. Firstly, AP I Article 11's regulation of medical procedures equally prohibits mutilations, primarily to clarify the regime applicable to the wounded, sick and shipwrecked, whether civilian or military.⁶⁹ Secondly, Article 75(2)(iv) of AP I expands the protection against mutilation beyond nationality criteria. This is done by establishing a minimum standard of treatment for "persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions", provided they are affected by an armed conflict.⁷⁰ This applies to a party's own nationals, "unlawful combatants", nationals of co-belligerent or neutral States, and persons who become refugees after the beginning of hostilities.⁷¹ While such an expanded protection against mutilation is welcome, it could also result in a blanket ban on all organ harvesting procedures, were it not for AP I Article 75's express nexus requirement.⁷² Although its exact scope is unclear, the nexus is understood to cover only measures taken against a person because of an armed conflict;⁷³ organ harvesting procedures undertaken in the ordinary course of business would therefore not exhibit the required nexus. The same would apply to organ harvesting by ordinary criminals regardless of the existence of an armed conflict, thus limiting the applicability of IHL. Conversely, Article 75 of AP I would

65 See AP I, Arts 4, 73.

66 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II).

67 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 (ICRC Commentary on GC I), paras 1397–1399.

68 *Ibid.*, para. 1399.

69 AP I, Art. 9; ICRC Commentary on the APs, above note 38, para. 460.

70 ICRC Commentary on the APs, above note 38, para. 3037.

71 *Ibid.*, paras 3024, 3027–3028; Marina Mancini, "Content and Customary Nature of Article 75 of Additional Protocol I", in Fausto Pocar and Gian Luca Beruto (eds), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, Milan, 2018, p. 86.

72 ICRC Commentary on the APs, above note 38, para. 2926; Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 67.

73 ICRC Commentary on the APs, above note 38, para. 3011; M. Mancini, above note 71, p. 85.

prohibit a party from harvesting organs from its own nationals for the purpose of treating wounded soldiers or financing the war effort.

In NIACs, protection against mutilation is ensured by the fundamental obligation of humane treatment found in Article 3 common to the four Geneva Conventions, which also specifically prohibits mutilation.⁷⁴ This prohibition is reiterated in Article 4(2)(a) of AP II, the NIAC counterpart of AP I Article 75.⁷⁵ The purpose of common Article 3 is to protect all persons not actively participating in hostilities, be they civilians or persons *hors de combat*,⁷⁶ and regardless of whose power they are in or which party they identify with.⁷⁷ This is also true of AP II.⁷⁸

The application of common Article 3 “without adverse distinction” to persons taking no active part in hostilities calls for two observations. Firstly, common Article 3’s protection of all civilians could result in a blanket ban on organ harvesting activities during an armed conflict, if one were to disregard the nexus requirement in NIACs.⁷⁹ Contrary to Article 75 of AP I, common Article 3 does not expressly provide for a nexus requirement limiting its application to persons “affected by the armed conflict”. Yet, as will be discussed further below in the section on “International Criminal Responsibility of Members of Organ Trafficking Networks”, the need for a sufficient nexus to characterize a war crime entails that common Article 3 does not automatically apply in all situations.⁸⁰ The result is, therefore, the same as with Article 75 of AP I: organ harvesting procedures unrelated to the armed conflict are not prohibited.

Secondly, cases brought before the International Criminal Tribunals and International Criminal Court (ICC), and specifically the *Ntaganda* case, have shown that parties to a conflict do not shy away from mistreating their own combatants.⁸¹ As a result, common Article 3 has been interpreted to apply to members of a party’s own armed forces.⁸² In *Ntaganda*, the ICC justified this approach in the context of intra-party sexual violence, based on the victim’s inability to directly participate in hostilities “during the specific time when they were [being] subject[ed] to acts of sexual nature”.⁸³ The same could be said of organ harvesting, which inherently requires the temporary immobilization or

74 See, e.g., GC III, Art. 3(1)(a); ICTY, *Tadić*, above note 37, para. 69; ICRC Commentary on GC III, above note 58, paras 552–553.

75 AP II, Arts 4(1), 4(2)(a); ICRC Commentary on the APs, above note 38, paras 4515, 4520.

76 *Hors de combat* covers anyone who (1) is in the power of an adverse party, (2) is defenceless because of unconsciousness, shipwreck, wounds or sickness, or (3) has expressed an intention to surrender and abstains from any hostile acts or escape attempts. ICRC Customary Law Study, above note 58, p. 164.

77 ICRC Commentary on GC III, above note 58, para. 580.

78 AP II, Art. 4(1).

79 See M. Sassòli, above note 36, paras 6.80–6.84.

80 *Ibid.*, paras 6.80–6.84.

81 See, e.g., ICTY, *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment (Appeals Chamber), 28 February 2005, paras 560–561; ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-1962, Judgment (Appeals Chamber), 15 June 2017, para. 65.

82 ICRC Commentary on GC III, above note 58, para. 581.

83 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda (Pre-Trial Chamber), 9 June 2014, para. 79. See also Cóman Kelly and Yvonne McDermott, “The Expanding Protection of

incapacitation of the person whose organs are being removed. This interpretation would ensure that a party's own armed forces are not used as a source of organs to finance the war effort or treat other combatants.

The prohibition on murdering persons to harvest organs

In times of peace, it goes without saying that murdering a person to harvest their organs is prohibited under both ordinary rules of criminal law and as a violation of the right to life under international human rights law.⁸⁴ However, IHL distinguishes between protected persons and combatants for a reason. The former cannot be targeted, while the latter can benefit from combatant immunity, allowing them to target and kill those who directly participate in hostilities without fear of prosecution.⁸⁵ Yet, as will be seen below in the section on “Rules Protecting the Dead”, even deceased combatants are worthy of protection from organ harvesting. In any event, and as can be inferred from the reports on the KLA and IS, organ harvesting is more likely to occur on combatants who have been captured and detained, and who are thus *hors de combat* at the time their organs are removed.

In IACs and NIACs, it is considered a war crime to intentionally target or kill persons *hors de combat*⁸⁶ and civilians not directly participating in hostilities.⁸⁷ This protection is notably ensured by common Article 3, which acts as a “minimum yardstick” in both IACs and NIACs.⁸⁸ These rules are considered customary in nature, which ensures their application to all armed conflicts.⁸⁹ Through the prohibition against murder, IHL protects persons against the gravest forms of abuse such as the removal of vital organs from a living person or killing for the purpose of organ extraction.⁹⁰ This protection is all the more important given the reality of forced organ harvesting on prisoners.⁹¹

Members of a Party's Own Armed Forces under International Criminal Law”, *International and Comparative Law Quarterly*, Vol. 68, No. 4, 2019, p. 947.

84 See, e.g., ICCPR, above note 49, Art. 6(1).

85 Samuel G. Walker, “Lawful Murder: Unnecessary Killing in the Law of War”, *Canadian Journal of Law & Jurisprudence*, Vol. 25, No. 2, 2012, pp. 418–419.

86 GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; AP I, Arts 41(1), 85(3)(e); Rome Statute, above note 56, Arts 8(2)(b)(vi), 8(2)(c)(i).

87 GC IV, Art. 147; AP I, Arts 51(2–3), 85(3)(a); Rome Statute, above note 56, Arts 8(2)(a)(i), 8(2)(b)(i), 8(2)(c)(i), 8(2)(e)(i).

88 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, para. 218.

89 ICRC Customary Law Study, above note 58, pp. 164–170, 313–314.

90 See C. May, above note 2, p. 32; N. W. Paul *et al.*, above note 49; Matthew P. Robertson and Jacob Lavee, “Execution by Organ Procurement: Breaching the Dead Donor Rule in China”, *American Journal of Transplantation*, Vol. 22, No. 7, 2022; UN Office of the High Commissioner for Human Rights, “China: UN Human Rights Experts Alarmed by ‘Organ Harvesting’ Allegations”, 14 June 2021, available at: <https://tinyurl.com/ycksme4k>.

91 Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China, Judgment, 1 March 2020, available at: <https://chinatribunal.com/final-judgment/>.

The positive obligation to protect the wounded, sick and shipwrecked from ill-treatment

Last but not least, IHL imposes that parties to a conflict take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment in both IACs (GC I Article 15, GC II Article 18, GC IV Article 16) and NIACs (AP II Article 8).⁹² This is also customary IHL according to Rule 111 of the International Committee of the Red Cross (ICRC) Customary Law Study.⁹³ The importance of this provision cannot be understated, as it is one of the few that expressly obliges parties to a conflict to protect the wounded against organ harvesting. However, as this is an obligation of means, it is difficult to determine *in abstracto* the extent to which a party could be held responsible for its violation, other than a clear failure to take proactive protective steps.⁹⁴

Importantly, IHL also imposes an obligation of restraint on civilians, who must respect the wounded, sick and shipwrecked.⁹⁵ This duty is not a positive obligation to protect but a duty to refrain from committing acts of violence.⁹⁶ As this rule is applicable to civilians, it also binds members of criminal organizations. Even if the consequences of a breach of this positive obligation remain unclear, the harvesting of organs from a protected person would, in any event, constitute a self-standing violation of IHL.

Rules protecting the dead

AP I and AP II's prohibition on organ removal for transplantation, the prohibition on mutilation, and the prohibition on murder presuppose that the victim is alive at the time the act is committed.⁹⁷ Therefore, these prohibitions cannot be extended to the dead. However, IHL would not provide an effective protection against organ harvesting without a continuing obligation to respect the bodies of those that have died in an armed conflict.

The rules protecting the dead are predominantly found in the four Geneva Conventions and AP I. The only provision explicitly relating to the dead in NIACs is Article 8 of AP II. Any gaps in protection are filled by the customary nature of these rules in both IACs and NIACs – save for Rule 114 on the return of the mortal remains and personal effects of the dead, which has not yet attained customary status in NIACs.⁹⁸

92 See ICRC Customary Law Study, above note 58, pp. 403–404.

93 *Ibid.*, p. 403.

94 ICRC Commentary on GC I, above note 67, para. 1499.

95 AP I, Art. 17; GC I, Art. 18. In NIACs, this protection is effected by the fundamental guarantees given to persons *hors de combat*.

96 ICRC Customary Law Study, above note 58, pp. 404–405.

97 Commentary on GC III, above note 58, paras 647, 1600.

98 There is, however, an increasing recognition of this obligation by parties in NIACs: see ICRC Customary Law Study, above note 58, pp. 411–412. See also Anna Petrig, “The War Dead and Their Gravesites”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 343–344.

The main obligations imposed by IHL in IACs and NIACs are the obligation to search for and collect the dead (Rule 112), the obligation to protect the dead against mutilation and despoliation (Rule 113), the obligation to dispose of the bodies of the dead and to maintain and respect gravesites (Rule 115), and the obligation to identify and record information on the dead (Rule 116).⁹⁹ Among these obligations, the obligation to search for and collect the dead and the obligation to protect the dead against mutilation and despoliation are relevant to the issue of organ harvesting.

The obligation to search for and collect the dead

The starting point for the protection of the dead against organ harvesting is the obligation to search for and collect the dead.¹⁰⁰ This obligation is reflected in Rule 112 of the ICRC Customary Law Study, which provides that “[w]hen circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction”.¹⁰¹ It is in the immediate aftermath of a person’s death that their organs are the most valuable for harvesting, and without collection, the bodies of the deceased cannot be protected. This rule is thus the *sine qua non* of the effectiveness of, and compliance with, all other obligations relating to the dead by parties to a conflict.¹⁰²

The obligation to search for and collect the dead applies without adverse distinction to all conflict-related deaths.¹⁰³ Although not expressly stated, this principle is reflected in various provisions of the Geneva Conventions and their Additional Protocols.¹⁰⁴ For instance, the obligation to search for, collect and prevent the dead from being despoiled applies to deceased military personnel regardless of the party to the conflict to which they belong.¹⁰⁵ Deceased civilians are similarly covered by other provisions in GC IV, AP I, AP II and customary IHL.¹⁰⁶

The search for the dead must be performed as soon as possible after an engagement, as stated in GC I Article 15, GC II Article 18 and AP II Article 8, and implied in GC IV Article 16 and AP I Article 33.¹⁰⁷ From the perspective of organ harvesting, this time frame is essential because organs may only be sourced

99 ICRC Customary Law Study, above note 58, pp. 406, 409, 414, 417.

100 See GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); AP I, Arts 32, 33; AP II, Art. 8; ICRC Customary Law Study, above note 58, pp. 406–408.

101 ICRC Customary Law Study, above note 58, p. 407.

102 *Ibid.*

103 See *ibid.*, p. 408; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (ICRC Commentary on GC IV), p. 136.

104 ICRC Customary Law Study, above note 58, p. 408; A. Petrig, above note 98, p. 346.

105 See GC I, Art. 15(1); GC II, Art. 18(1).

106 GC IV, Art. 16(2); AP I, Arts 33(1), 33(4); AP II, Art. 8; ICRC Customary Law Study, above note 58, pp. 406–408.

107 ICRC Customary Law Study, above note 58, p. 407; ICRC Commentary on GC IV, above note 103, p. 135; ICRC Commentary on the APs, above note 38, para. 1280.

in the immediate aftermath of a person's death, in a race against time to preserve their viability. Therefore, bodies left unattended on the battlefield are at a greater risk of falling prey to organ traffickers. Yet, the obligation to search for the dead is one of means, effectively limiting the protection of the dead to bodies found and collected by parties conducting a search.¹⁰⁸ Therefore, parties to a conflict cannot necessarily be held responsible for a failure to protect the dead against organ harvesting if those bodies remained unaccounted for in spite of a search.

Finally, it is worth noting that while this obligation has a “protective” purpose, it also has a potential for subversion. Indeed, a party to a conflict seeking unlawful sources of funding could, under the guise of a search, endeavour to collect as many bodies as possible, only to better exploit, and profit from, the remains of the deceased. The obligation to collect the dead is, therefore, the *sine qua non* of the protection of the dead but can only prove effective if followed by an obligation to protect the bodies of the dead.

The protection of the dead against mutilation and despoliation

The bodies of the dead are protected against organ harvesting through the prohibition against mutilation and the obligation to prevent the dead from being despoiled.¹⁰⁹

Although IHL does not expressly prohibit the mutilation of the dead, common Article 3 provides an equivalent protection through the prohibition of outrages upon personal dignity.¹¹⁰ This offence has been documented by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in instances where a dead person's body parts were removed or amputated.¹¹¹ According to the ICC *Elements of Crimes*, outrages upon personal dignity against the dead constitute war crimes under the Rome Statute.¹¹² Due to common Article 3's fundamental character, this prohibition covers the dead in IACs and NIACs. Additionally, customary IHL prohibits the “mutilation of dead bodies” in all armed conflicts.¹¹³ As a form of mutilation or outrage upon personal dignity, harvesting organs from the dead is therefore prohibited. However, as in the case of the living, it is safe to assume that there would not be a blanket prohibition on organ sourcing, and that the prohibition would mainly apply to conflict-related deaths and persons that benefited from the rules protecting the living.

Secondly, IHL imposes an obligation to prevent the dead from being despoiled.¹¹⁴ This obligation is common to IACs and NIACs and is stated in GC

108 See GC I, Art. 15; GC II, Art. 18; GC IV, Art. 16; AP II, Art. 8.

109 ICRC Customary Law Study, above note 58, pp. 409–411.

110 ICRC Commentary on GC III, above note 58, para. 647.

111 See, e.g., ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence (Trial Chamber), 16 May 2003, para. 303; ICTY, *Prosecutor v. Delalić*, Case No. ICTR-96-14-T, Judgment (Trial Chamber), 16 November 1998, para. 849.

112 Rome Statute, above note 56, Arts 8(2)(b)(xxi), 8(2)(c)(ii); ICC *Elements of Crimes*, above note 61, Arts 8(2)(b)(xxi) fn. 49, 8(2)(c)(ii) fn. 57.

113 ICRC Customary Law Study, above note 58, Rule 113, p. 409.

114 See GC I, Art. 15; GC II, Art. 18(1); GC IV, Art. 16(2); AP I, Art. 34(1); AP II, Art. 8.

I, GC II, GC IV, AP I, AP II and customary IHL.¹¹⁵ Unlike the prohibition on mutilating the dead, the obligation to prevent despoliation protects the belongings of the deceased rather than their physical remains. It is an application of the general prohibition against pillaging, which protects private property.¹¹⁶ The characterization of organ harvesting as despoliation would therefore call for a discussion of the legal status of human organs and property rights, which exceeds the scope of this article.¹¹⁷ Suffice to say that from the perspective of organ traffickers, the deceased are no longer valued as human beings and their organs are reduced to the status of a commodity waiting to be harvested and profited from.¹¹⁸ Additionally, protection against despoliation is a positive obligation which complements the obligation to search for the dead. Accordingly, once collected by the parties to a conflict, “all possible measures” must be taken to protect the bodies of the deceased against organ harvesting, including by third parties. This would, in effect, require parties and their military command to implement measures to confront organ traffickers during armed conflict. According to the International Court of Justice (ICJ), such a duty to act “arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk”.¹¹⁹ As such, parties to a conflict are expected to act without delay to confront the risk of organ harvesting.¹²⁰

Regulating the activities of organ trafficking networks through IHL

Although IHL protects the living and the dead against organ harvesting, such protection may only be given effect if organ trafficking networks are bound by IHL. Understanding the structure of organ trafficking networks, will help to determine whether such groups can be characterized as parties to an armed conflict, bound to observe IHL. If not, the attribution of their conduct to parties to a conflict and ICL could provide ways to effectively protect victims of organ trafficking.

The structure of organ trafficking networks

Before considering the characterization of organ trafficking networks as parties to a conflict, their organizational structure must be fleshed out. This is relevant to

115 ICRC Customary Law Study, above note 58, p. 409.

116 *Ibid.*, pp. 185, 409.

117 See, e.g., B. Björkman and S. O. Hansson, “Bodily Rights and Property Rights”, *Journal of Medical Ethics*, Vol. 32, No. 4, 2006; Jesse Wall, “The Legal Status of Body Parts: A Framework”, *Oxford Journal of Legal Studies*, Vol. 31, No. 4, 2011; Carlo Petrini, “Ethical and Legal Considerations Regarding the Ownership and Commercial Use of Human Biological Materials and Their Derivatives”, *Journal of Blood Medicine*, Vol. 3, 2012.

118 Interpol, above note 7, p. 8. See Nancy Scheper-Hughes, “The Ends of the Body: Commodity Fetishism and the Global Traffic in Organs”, *SAIS Review*, Vol. 22, No. 1, 2002, p. 62.

119 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, para. 431.

120 See ICRC Commentary on GC I, above note 67, para. 1487.

determining whether such groups display the level of organization required to constitute a non-State armed group in an armed conflict (see the section below on “Organ Trafficking Networks as Parties to an Armed Conflict”). Although the UNTOC is not a prerequisite for the application of IHL, its definition of organized criminal groups constitutes an internationally accepted standard by which to assess the structure of organ trafficking networks.¹²¹ The UNTOC defines organized criminal groups as

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹²²

According to this definition, organized criminal groups display two key elements: a structure and a purpose. Firstly, a “structure” entails a certain level of organization, and the UNTOC captures a spectrum of criminal organizations in this regard.¹²³ According to a 2002 survey by the UN Office on Drugs and Crime (UNODC), organized criminal groups can be classified into five structures. Two of these are vertical hierarchies (the “standard” and “regional” models).¹²⁴ Another one, the “clustered hierarchy”, is considered sufficiently rare so as not to warrant further discussion here.¹²⁵ The remaining two structures are more consistent with traditional organ trafficking models, where donors, recipients and health-care professionals are recruited by brokers operating through “sophisticated and specialized networks”.¹²⁶ These structures are:

- A “core group”, usually horizontally structured and consisting of a tight and organized core within a loose network.¹²⁷ The small size of the core (usually up to twenty individuals) facilitates the maintenance of internal discipline.¹²⁸ Criminal operations are controlled by the core members, who also reap the biggest profits, while the loose network at the core’s periphery allows for fluid membership.¹²⁹
- Criminal networks made of several key individuals in shifting alliances, each contributing their skills to a criminal project, and who may not consider

121 With over 190 States Parties, the UNTOC has attracted near-universal participation. Cecily Rose, “The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols”, *American Journal of International Law*, Vol. 114, No. 1, 2020, p. 51.

122 UNTOC, above note 20, Art. 2(a).

123 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Vienna, September 2002 (UNODC Survey), pp. 15–18; Jay S. Albanese, “Transnational Organized Crime”, in Mangai Natarajan (ed.), *International Crime and Justice*, Cambridge University Press, Cambridge, 2014, pp. 233–234.

124 UNODC Survey, above note 123, pp. 34–37.

125 *Ibid.*, pp. 37–39.

126 C. May, above note 2, p. xii.

127 UNODC Survey, above note 123, p. 39. See also Phil Williams, “Transnational Criminal Networks”, in John Arquilla and David Ronfeldt (eds), *Networks and Netwars: The Future of Terror, Crime and Militancy*, RAND Corporation, Santa Monica, CA, 2001, pp. 72–74.

128 UNODC Survey, above note 123, p. 39.

129 *Ibid.*, pp. 39–40.

themselves as members of a criminal group.¹³⁰ Cohesion is maintained through personal loyalties and ties rather than discipline because the various parts of the network may not work closely enough to know each other.¹³¹

Article 2(c) of the UNTOC clarifies that a group need not “have formally defined roles for its members, continuity of its membership or a developed structure”.¹³² Thus, core groups within a loose network and criminal networks are covered by the UNTOC.¹³³ For instance, networked structures are typical for human trafficking groups, where members each have a role and carry out their part of the crime without knowing the full composition of the group.¹³⁴ However, groups “randomly formed for the immediate commission of an offence”, such as *ad hoc* groups in riots, are excluded from the UNTOC.¹³⁵

Secondly, with respect to its purpose, the organized criminal group must seek to “obtain, directly or indirectly, a financial or other material benefit”. This precludes groups primarily driven by political motives from constituting organized criminal groups.¹³⁶ As will be seen below in the section on “Organ Trafficking Networks as Parties to an IAC”, this feature may be particularly relevant when attempting to characterize an IAC involving a non-State armed group under Article 1(4) of AP I.

Organ trafficking networks are undoubtedly organized criminal groups under the UNTOC. They typically involve brokers, recruiters, donors/sellers, recipients/buyers, and health-care professionals and facilities (such as transplant surgeons, hospitals and laboratories).¹³⁷ Brokers are responsible for connecting donors and recipients, and are organized in small, specialized syndicates.¹³⁸ They operate within an established network, which includes local recruiters and health-care professionals and facilities, to harvest, supply and transplant organs.¹³⁹ All strategic decisions regarding the operation of the network are handled by brokers who take the biggest cut of the profits.¹⁴⁰ Organ trafficking networks are, therefore, akin to core groups with dense connections among brokers and looser

130 *Ibid.*, p. 41.

131 *Ibid.*

132 UNTOC, above note 20, Art. 2(c).

133 UNODC Survey, above note 123, p. 5.

134 *Ibid.*, p. 39; G. Vermeulen, Y. Van Damme and Wendy De Bondt, “Perceived Involvement of “Organised Crime” in Human Trafficking and Smuggling”, *International Review of Penal Law*, Vol. 81, No. 1–2, 2010, p. 256.

135 UNODC, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, New York, 2006, p. 15.

136 Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 422; UNODC, *Legislative Guides for the Implementation of the United Conventions against Transnational Organized Crime and the Protocol Thereto*, New York, 2004, p. 13, para. 26.

137 M. Bos, above note 7, pp. 20–21; C. May, above note 2, p. 31; M. P. Heintz, B. Yu and D. Wijesekera, above note 7, pp. 3–4; Interpol, above note 7, p. 13. See also S. Columb, above note 33, pp. 1307–1308.

138 C. May, above note 2, p. 31; M. Bos, above note 7, pp. 20–21.

139 C. May, above note 2, p. 31; M. Bos, above note 7, pp. 20–21. See, e.g., F. Ambagtsheer, above note 7, p. 7 (discussing the *Netcare* and *Medicus* cases, which both exposed global organ trafficking networks of brokers, recruiters, and health-care professionals and facilities).

140 M. Bos, above note 7, p. 20.

relationships with, and among, other members of the network, all acting with the purpose of benefiting financially from trafficking. For their part, recipients benefit materially from soliciting brokers to procure organs and could thus be included in the group. They may be acting out of necessity, but their situation is not comparable to that of organ donors, who fall victim to organ harvesting out of coercion or necessity and who suffer a clear physical detriment.¹⁴¹ These compelling circumstances would weigh heavily against classifying victim donors as part of an organ trafficking network.¹⁴²

Organ trafficking networks as parties to an armed conflict

The application of IHL is triggered by the existence of an armed conflict, defined by the *Tadić* case as “a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.¹⁴³ The *Tadić* definition covers both NIACs and IACs, and organ trafficking networks must fall within the scope of one or the other to constitute parties to an armed conflict.

Organ trafficking networks as parties to a NIAC

NIACs are characterized by armed violence between a non-State organized armed group (OAG) and a State or another OAG.¹⁴⁴ According to *Tadić*, a NIAC requires, cumulatively, (1) a certain level of organization within the OAGs and (2) protracted armed violence between the parties.¹⁴⁵ The political purpose of the OAGs is irrelevant, a feature shared by organized criminal groups under the UNTOC and which allows criminal organizations to rise to the level of OAGs.¹⁴⁶ However, whereas the IHL of NIACs is conditioned on the existence of a group carrying out acts of armed violence, such acts are not characteristic of an organized criminal group under the UNTOC.

With respect to the organizational requirement, OAGs must display a minimum level of organization. The requisite level of organization is confirmed through the assessment of several factors, identified by the ICTY in the *Haradinaj* case as:

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

141 See A. Pietrobon, above note 27, p. 486; C. May, above note 2, p. 31.

142 See UNTOC, above note 20, Art. 11(6).

143 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion to Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

144 *Ibid.*

145 *Ibid.*

146 See ICRC Commentary on GC III, above note 58, paras 481–485.

logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.¹⁴⁷

In the view of the ICRC, an OAG essentially requires (1) a command structure, with “a certain level of hierarchy and discipline and the ability to implement the basic obligations of IHL”, and (2) the capacity to sustain military operations.¹⁴⁸ These criteria are supplemented for NIACs falling within the scope of AP II by the requirement of territorial control by the non-State armed group.¹⁴⁹

Organ trafficking networks do not have a hierarchical structure, but the lack of a rigid hierarchy is not dispositive of the existence of an OAG.¹⁵⁰ For instance, the ICTY considered the KLA to be an OAG, operating underground, notwithstanding its apparently horizontal command structure.¹⁵¹ In fact, the majority of non-State armed groups today, including terrorist groups such as IS, operate as networks rather than centralized armed groups with a strict hierarchy and a clear command and control structure.¹⁵² These networks are organized horizontally, are composed of “small armed groups, whose individual commanders retain considerable decision-making power and responsibility over group members”, and form loosely coordinated alliances with few signs of military discipline.¹⁵³

The possibility of characterizing a network as a non-State OAG makes it conceivable for organ trafficking networks to satisfy the organizational requirement of a NIAC, but this status would likely not encompass the totality of the network.¹⁵⁴ For instance, the hierarchically structured factions of IS operating in Iraq and Syria, with territorial control, a command structure, and disciplinary rules, have been recognized as OAGs.¹⁵⁵ However, IS cells incapable of sustaining

147 See ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84, Judgment (Trial Chamber), 3 April 2008, para. 60. See also ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Trial Chamber), 21 March 2016, para. 134.

148 ICRC Commentary on GC III, above note 58, para. 463; ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, Geneva, 2008, p. 3. See also Jelena Pejic, “Status of Armed Conflicts”, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 85–86; Gloria Gaggioli and Pavle Kilibarda, “Counterterrorism and the Risk of Over-Classification of Situations of Violence”, *International Review of the Red Cross*, Vol. 103, No. 916–917, 2021, p. 215.

149 See AP II, Art. 1. However, AP II does not apply to NIACs occurring between non-State armed groups only. ICRC, *How Is the Term “Armed Conflict” Defined?*, above note 148, p. 4.

150 See Peter Margulies and Matthew Sinnott, “Crossing Borders to Target Al-Qaeda and Its Affiliates: Defining Networks as Organized Armed Groups in Non-International Armed Conflicts”, in Terry D. Gill et al. (eds), *Yearbook of International Humanitarian Law 2013*, T. M. C. Asser Press, The Hague, 2015, p. 337.

151 ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, paras 131–133.

152 Fiona Terry and Brian McQuinn, *The Roots of Restraint in War*, ICRC, Geneva, 2018, pp. 38, 46.

153 *Ibid.*, pp. 46–47.

154 See G. Gaggioli and P. Kilibarda, above note 148, p. 220; P. Margulies and M. Sinnott, above note 150, p. 337.

155 G. Gaggioli and P. Kilibarda, above note 148, pp. 217–218; Eurojust, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences*, The Hague, 2020, p. 10; Tom Gal, “Legal Classification of the Conflict(s) in Syria”, in Hilary Moodrick-Even Khen, Nir

military operations or enforcing compliance with IHL by subordinates would not qualify as OAGs.¹⁵⁶ The same logic would apply to organ trafficking networks. A core group of organ brokers, maintaining discipline and cohesion internally, could satisfy the organizational requirement (subject to the group's ability to sustain military operations), but members of the wider network, such as health-care professionals, would not. Their looser organizational links to the core preclude them from forming part of the same OAG, and they are unlikely to display the attributes of OAG membership themselves, especially recruiters acting opportunistically and alone.¹⁵⁷ Crucially, organ trafficking networks would have no interest in ensuring compliance with IHL by members of the group¹⁵⁸ – in fact, that would be entirely inconsistent with the network's activities, which inherently involve violations of IHL when organs are harvested during armed conflict.

Furthermore, while OAGs are not characterized by a political motive, the purpose of such groups is to plan and carry out military operations.¹⁵⁹ This is an essential and objectively verifiable characteristic.¹⁶⁰ For instance, IS is organized with a view to challenging governmental forces and exercising territorial control in Iraq and Syria.¹⁶¹ By contrast, organ trafficking networks are not organized to conduct hostilities.¹⁶² They are structured for the benefit of brokers, are clandestine and profit-oriented, and remain invisible by avoiding confrontation with law enforcement.¹⁶³ They do not need to control territory to carry out their operations; in fact, their lack of attachment to territory and infrastructures is also their strength, because it reduces their visibility and vulnerability to law enforcement.¹⁶⁴ Additionally, any use of armed force would only be in reaction to law enforcement attempts to repress their activities, rather than to carry out

T. Boms and Sareta Ashraph (eds), *The Syrian War: Between Justice and Political Reality*, Cambridge University Press, Cambridge, 2020, pp. 49–50; Agnes Callamard, “Towards International Human Rights Law Applied to Armed Groups”, *Netherlands Quarterly of Human Rights*, Vol. 37, No. 1, 2010, pp. 87–90.

156 G. Gaggioli and P. Kilibarda, above note 148, pp. 219–220.

157 See *ibid.*, p. 219; Interpol, above note 7, p. 13.

158 See P. Hauck and S. Peterke, above note 136, p. 433.

159 *Ibid.*

160 *Ibid.* IHL is therefore traditionally concerned with “[a]ll armed groups capable of launching operations with some semblance of a military character”. See Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2020, p. 13.

161 G. Gaggioli and P. Kilibarda, above note 148, p. 235.

162 Similarly, although gangs and drug cartels might receive military training and weapons and engage in open violence against the State or a rival in order to maintain their influence and territory, their ability to plan, coordinate and carry out military operations is questionable. P. Hauck and S. Peterke, above note 136, p. 432.

163 See M. Bos, above note 7, p. 25; Stasis N. Kalyvas, “How Civil Wars Help Explain Organized Crime – and How They Do Not”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015, p. 1520. However, organized criminality is not always motivated by profit. For instance, gangs in El Salvador maintain a “criminal subsistence economy” which supports their activities, without generating major profit revenue. Kirsten Ortega Ryan, “‘Urban Killing Fields’: International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador”, *International and Comparative Law Review*, Vol. 20, No. 1, 2020, p. 116.

164 See P. Williams, above note 127, p. 71.

military operations as part of a defined military strategy.¹⁶⁵ Organ trafficking networks thus have no interest in going head-to-head with either the State or another non-State armed group.¹⁶⁶ In short, a political motive may not be a requirement, but the lack of a “military” purpose *de facto* precludes organ trafficking networks from constituting OAGs.¹⁶⁷

With respect to the existence of protracted armed violence, NIACs must display a minimum level of intensity.¹⁶⁸ According to the ICTY in the *Haradinaj* case, the intensity of the conflict can be assessed based on a non-exhaustive list of indicators, including:

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. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.¹⁶⁹

Anything below the required intensity threshold would only amount to internal disturbances and tensions to which IHL would not apply.¹⁷⁰ Implicit in the ICTY’s list of indicators is the idea that armed violence between the parties has reached such a high level that it can no longer be contained by law enforcement and requires the intervention of military force.¹⁷¹ Such can be the case in confronting terrorist groups,¹⁷² and potentially gangs,¹⁷³ which can generate violence of sufficient intensity for a NIAC. For instance, armed violence by IS, considered a terrorist organization, has created a NIAC in Iraq and Syria, while violence by drug cartels in Mexico is sufficiently destabilizing to call for military intervention.¹⁷⁴ Organ trafficking networks, however, are not reported to engage in acts of violence against States or OAGs, let alone at a level intense enough to amount to protracted armed violence. The success of their illegal trade relies on discretion and on evading law enforcement, not confronting it.¹⁷⁵ Furthermore, organ trafficking does not need an armed conflict to operate. Conflict may be a

165 P. Hauck and S. Peterke, above note 136, p. 432.

166 *Ibid.*, p. 433.

167 G. Gaggioli and P. Kilibarda, above note 148, p. 234.

168 *Ibid.*, p. 221.

169 ICTY, *Haradinaj*, above note 147, para. 49. See also ICC, *Bemba*, above note 147, para. 137.

170 Rome Statute, above note 56, Art. 8(f). See also AP II, Art. 1(2).

171 See P. Hauck and S. Peterke, above note 136, p. 431; G. Gaggioli and P. Kilibarda, above note 148, pp. 221–223, 234; ICRC, *How Is the Term “Armed Conflict” Defined?*, above note 148, p. 3.

172 ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 190; G. Gaggioli and P. Kilibarda, above note 148, pp. 220–224.

173 P. Hauck and S. Peterke, above note 136, p. 431. In the case of El Salvador, it has been argued that widespread gang violence and its effects on the civilian population has met the threshold of protracted armed violence. See K. Ortega Ryan, above note 163, pp. 107–114.

174 Eurojust, above note 155, p. 7. See Carina Bergal, “The Mexican Drug War: The Case for Non-International Armed Conflict Classification”, *Fordham International Law Journal*, Vol. 34, No. 4, 2011, p. 1084. But see Andrea Nill Sanchez, “Mexico’s Drug “War”: Drawing a Line between Rhetoric and Reality”, *Yale Journal of International Law*, Vol. 38, No. 2, 2013, pp. 468, 491.

175 Interpol, above note 7, p. 30; P. Hauck and S. Peterke, above note 136, p. 431.

catalyst for the exploitation of vulnerabilities such as poverty, injury and desperation, but opportunities to harvest organs abound outside of war.¹⁷⁶ Therefore, organ traffickers would have little need to engage in armed violence.

Although organ trafficking networks make a poor case for OAGs, non-State armed groups have been known to engage in organized crime to generate revenue by establishing “in-house” capabilities and links to the criminal underworld.¹⁷⁷ The cases of IS and the KLA engaging in organ trafficking are a clear demonstration of this phenomenon, and by harvesting organs during armed conflict, these OAGs would have committed violations of IHL. Therefore, organ trafficking is more likely to fall within the scope of IHL as a subsidiary activity of OAGs than as the main activity of organ trafficking networks.¹⁷⁸

Organ trafficking networks as parties to an IAC

When it comes to IACs, the protection against organ trafficking faces an important limit because the IHL of IACs applies only between States party to the conflict.¹⁷⁹ A clear statement of this rule is provided by common Article 2, according to which the Geneva Conventions apply to all armed conflicts between the High Contracting Parties.¹⁸⁰ By exception to this principle, the IHL of IACs would apply to non-State armed groups in either of the two following scenarios: (1) the regime of AP I Article 1(4) applies, or (2) a non-State armed group is fighting a State on behalf of another State.

The first scenario is the extension, by Article 1(4) of AP I, of the regime of IACs to non-State armed groups “fighting against colonial domination or occupation and against racist regimes in the exercise of the right to self-determination” (i.e., wars of liberation).¹⁸¹ To benefit from this provision, organ trafficking networks would need to (1) engage in armed violence against a State and (2) do so with a political motive described by Article 1(4). However, organ trafficking neither entails nor requires a political motive or the use of armed force against a State. If organ trafficking networks had such a motive, they would no longer be considered as organized criminal groups by the UNTOC.¹⁸² In addition, the conditions for invoking Article 1(4), its reservations, and the fact

176 C. May, above note 2, para. 32.

177 Emilio C. Viano, “Unholy Alliances and Their Threat: The Convergence of Terrorism, Organized Crime and Corruption”, *International Annals of Criminology*, Vol. 58, No. 1, 2020, p. 92. See, generally, Laura Adal, *Organized Crime in the Levant: Conflict, Transactional Relationships and Identity Dynamics*, Global Initiative against Transnational Organized Crime, Geneva, 2021. It was estimated in 2016 that IS had raised up to \$2 billion worth of assets, through smuggling, extortion and the seizure of oil fields: A. Bellal (ed.), above note 14, p. 37.

178 See Regina Menachery Paulose, “Towards a New Framework in the Law of War: Incorporating Transnational Organised Crime”, *University of Western Sydney Law Review*, No. 17, 2013, p. 70.

179 M. Sassòli, above note 36, para. 6.61.

180 See, e.g., GC IV, Art. 2.

181 See also Sven Peterke and Joachim Wolf, “International Humanitarian Law and Transnational Organised Crime”, in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime*, Oxford University Press, Oxford, 2020, pp. 383–390.

182 See P. Hauck and S. Peterke, above note 136, p. 422.

that, if successful, organ trafficking networks would be prohibited by IHL from harvesting organs, against their profit-driven interests, make the application of this Article unlikely.¹⁸³

The second scenario is a matter of armed conflict internationalization, the parameters of which are still subject to debate.¹⁸⁴ On the one hand, the ICJ considers that acts of non-State armed groups may only be attributable to a State if the groups are either *de facto* organs, acting in complete dependence on a State, or under a State's *effective control*.¹⁸⁵ On the other hand, ICL accepts that *overall control* may be sufficient to attribute the acts of groups to a State.¹⁸⁶ However, the ICJ has acknowledged the relevance of the overall control test for purposes of conflict classification only, and has thus created the possibility of conflicts being classified as IACs with no possibility of attributing State responsibility for lack of effective control.¹⁸⁷ Putting aside this debate for now, the question of State control and attribution is nevertheless essential to establishing responsibility for organ harvesting by organ trafficking networks.

Establishing responsibility for violations of IHL by organ trafficking networks

IHL addresses not only parties to an armed conflict but also individuals who commit violations. It is binding on States and is also admitted to be binding on non-State armed groups.¹⁸⁸ While parties to a conflict may engage in organ harvesting directly, organ trafficking networks may also take advantage of an armed conflict to carry out their activities with greater impunity. As IHL does not seek to regulate “ordinary” criminality, organ harvesting by private actors may only amount to a violation of IHL and give rise to reparations if it is attributable to the parties to a conflict. However, even if attribution is not feasible, individuals responsible for these violations could still incur criminal responsibility for war crimes.¹⁸⁹

183 See Julie Gaudreau, “The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 147; Dapo Akande, “Classification of Armed Conflict”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 39. See also S. Peterke and J. Wolf, above note 181, pp. 383–390.

184 D. Akande, above note 183, pp. 44–47. See also Djemila Carron, “When Is a Conflict International? Time for New Control Tests in IHL”, *International Review of the Red Cross*, Vol. 98, No. 903, 2016.

185 ICJ, *Genocide*, above note 119, para. 406.

186 This position is shared by the ICRC: 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, 2016, p. 1238. See, generally, Rogier Bartels, “The Classification of Armed Conflicts by International Criminal Courts and Tribunals”, *International Criminal Law Review*, Vol. 20, No. 4, 2020.

187 ICJ, *Genocide*, above note 119, para. 404; D. Akande, above note 183, p. 47.

188 M. Sassöli, above note 36, paras 6.67–6.71; Ezequiel Heffes and Brian E. Frenkel, “The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules”, *Goettingen Journal of International Law*, Vol. 8, No. 1, 2017, pp. 46–55.

189 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.

Attributing responsibility for organ harvesting to parties to an armed conflict

Parties to an armed conflict may call upon organized criminal groups for a variety of purposes. For instance, non-State armed groups are known to cooperate with criminal organizations in order to generate revenue.¹⁹⁰ The *Nicaragua* case also shows that using criminal groups may form part of a military strategy, as evidenced by the United States' recommendation that the Contras hire "professional criminals" "to carry out specific selective 'jobs'".¹⁹¹ Therefore, an alternative to the direct application of IHL to organ trafficking networks would be to attribute their actions to a party to an ongoing armed conflict, whether it be a State or a non-State armed group. Unfortunately, the strict application of the prevailing rules of attribution severely limits the possibility of holding parties accountable.

Firstly, although non-State armed groups are bound to respect IHL, there is a protection gap preventing IHL from being enforced against them.¹⁹² Indeed, the rules of international responsibility, reflected in the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),¹⁹³ do not contemplate the collective responsibility of non-State armed groups.¹⁹⁴ The ILC has only recognized that a non-State armed group in the form of an insurrectional movement could be responsible for breaches of IHL to the extent that it has succeeded in establishing a new State capable of bearing responsibility for the movement's actions.¹⁹⁵ Yet, even if the responsibility of non-State armed groups could be argued, including by analogy to States,¹⁹⁶ its consequence remains unclear.¹⁹⁷ IHL is generally silent on the

190 For instance, the Taliban has generated revenue by taxing entities involved in the production, manufacture and trafficking of illicit opiates in Afghanistan. In 2016, non-State armed groups raised around \$150 million from that illicit trade. UNODC, *The Drug Problem and Organized Crime, Illicit Financial Flows, Corruption and Terrorism*, Vienna, 2017, p. 10; E. C. Viano, above note 177, p. 92.

191 ICJ, *Nicaragua*, above note 86, para. 118.

192 ICRC Customary Law Study, above note 58, pp. 497–498, 536.

193 ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001 (ARSIWA).

194 ICRC Commentary on GC III, above note 58, para. 931; ICRC Customary Law Study, above note 58, p. 536; E. Heffes and B. E. Frenkel, above note 188, pp. 57–59; Katharine Fortin and Jann K. Kleffner, "Responsibility of Organized Armed Groups Controlling Territory: Attributing Conduct to ISIS: *Liber Amicorum* Terry D. Gill", in Rogier Bartels et al. (eds), *Military Operations and the Notion of Control under International Law*, T. M. C. Asser Press, The Hague, 2020, p. 314. See, generally, Kirsten Schmalenbach, "International Responsibility for Humanitarian Law Violations by Armed Groups", in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law*, Cambridge University Press, Cambridge, 2015.

195 ARSIWA, above note 193, Art. 10, p. 50; K. Schmalenbach, above note 194, p. 503; Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 5, 2010, p. 9.

196 This can be done by drawing on the characteristics shared by non-State armed groups and States: K. Fortin and J. K. Kleffner, above note 194, pp. 318–325.

197 ICRC Customary Law Study, above note 58, p. 550; Olivia Herman, "Beyond the State of Play: Establishing a Duty of Non-State Armed Groups to Provide Reparations", *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1037.

issue of reparations and provides only a right to reparation against States.¹⁹⁸ Therefore, while IS may have sanctioned organ harvesting¹⁹⁹ and potentially relied on organ trafficking networks to carry out these actions, international law does not yet provide a mechanism for holding it responsible and liable for reparations.²⁰⁰

Secondly, the threshold for State attribution is an exacting one and may not be adapted to the structure of organ trafficking networks. Such networks are unlikely to constitute *de facto* organs under Article 4 of the ARSIWA because they would need to act in complete dependence on the State and under its complete control.²⁰¹ In this situation, organ trafficking networks would be “nothing more than [the State’s] agent[s]” with no real autonomy or independence, such that all of their acts would be attributable to the State.²⁰² The level of dependence and control required is such that the ICJ found it to be lacking in both the *Nicaragua* case and the *Genocide* case.²⁰³ For instance, any evidence of autonomy or independence on the part of an organ trafficking network, including in cases where it is created by the State which selects and finances its members, would prevent the network from qualifying as a *de facto* organ.²⁰⁴ Given that organ trafficking networks are loosely structured, with fluid membership, it is doubtful that complete dependence from the entire network could ever be established.

In the absence of complete dependence, violations by organ trafficking networks could be attributable to a State under the effective control test, provided that the group or its members were acting “on the instructions of, or under the direction or control of”, that State under Article 8 of the ARSIWA.²⁰⁵ Violations of IHL are successfully attributed by establishing that in each operation where they occurred, the State issued specific instructions or controlled the perpetration

198 See AP I, Art. 91; ICRC Customary Law Study, above note 58, Rule 150, p. 537; Luke Moffett, “Violence and Repair: The Practice and Challenges of Non-State Armed Groups in Engaging in Reparations”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1062.

199 See W. Strobel, J. Landay and P. Stewart, above note 16.

200 K. Fortin and J. K. Kleffner, above note 194, pp. 324–325; Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law*, Intersentia, Cambridge, Antwerp and Chicago, IL, 2020, p. 71.

201 ICJ, *Nicaragua*, above note 88, para. 109; ICJ, *Genocide*, above note 119, paras 392–393; K. Fortin and J. K. Kleffner, above note 194, p. 320.

202 ICJ, *Genocide*, above note 119, paras 384, 392–393. See Marko Milanović, “State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken”, *Leiden Journal of International Law*, Vol. 22, No. 2, 2009, pp. 316–317; Vladyslav Lanovoy, “The Use of Force by Non-State Actors and the Limits of Attribution of Conduct”, *European Journal of International Law*, Vol. 28, No. 2, 2017, p. 575.

203 ICJ, *Nicaragua*, above note 88, para. 110; ICJ, *Genocide*, above note 119, paras 394–395; V. Lanovoy, above note 202, p. 575.

204 In the *Nicaragua* case, the ICJ notably considered that approving the organization’s name and selecting and paying its leaders, as well as “the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided”, was not sufficient to prove complete dependency. In the *Genocide* case, the ICJ could not find complete dependence where the non-State actor had “some qualified, but real, margin of independence”. See ICJ, *Nicaragua*, above note 88, paras 111–112; ICJ, *Genocide*, above note 119, para. 394.

205 K. Fortin and J. K. Kleffner, above note 194, pp. 322–323.

of these acts.²⁰⁶ The difficulty of proving effective control over organ trafficking networks speaks for itself. Their organizational structure is horizontal and their members are loosely connected, save perhaps within the core of the network, such as a syndicate of brokers. Unlike military or paramilitary groups, there is no overarching hierarchy which will ensure that orders are carried out throughout the wider network.²⁰⁷ Brokers connect with donors through local recruiters but must collaborate with the health-care professionals charged with harvesting and transplanting organs. Crucially, however, it is those performing organ harvesting procedures that directly violate IHL, not the brokers. Instructing the head, or core, of an organ trafficking network would not necessarily imply that all the members of the network were acting on these specific instructions, especially health-care professionals, who may be left in the dark with respect to the true nature of their actions.²⁰⁸ Compliance with specific instructions at a given time is made all the more difficult by the fluid membership of the network.²⁰⁹ Therefore, effective control would require proof that the persons performing organ harvesting are personally acting on the specific instructions of a State.

Organ harvesting also poses difficulties in operational terms because it is committed on an individual basis, donor by donor. This raises the question of the specificity of State instructions: can organ trafficking be viewed as a single operation, allowing each instance of organ harvesting to fall within the scope of a State's instructions, or should each instance of organ harvesting be considered as a separate operation? A global approach might be conceivable whereby organ harvesting is repeatedly performed in the same facilities and by the same persons, as this would ensure some continuity in both instructions and operations. However, isolated occurrences would likely require an individual set of instructions. Finally, proving that an organ trafficking network acted under the effective control of a State will be all the more difficult where the network has an established history of organ harvesting, separate from any State instructions that might have been issued. These challenges make attribution under the effective control test far from evident.

A much more pragmatic alternative would be the ICTY's overall control test, which, despite not governing matters of State responsibility, better apprehends the interactions between States and non-State armed groups.²¹⁰ According to the *Tadić* Appeals Chamber, the effective control test allows the attribution of acts of private individuals or "a group that is not militarily organised" to the State specifically ordering the performance of the acts.²¹¹ By contrast, the overall control test addresses acts of "organised and hierarchically

206 See ICJ, *Nicaragua*, above note 88, para. 115; ICJ, *Genocide*, above note 119, paras 399–400; Antonio Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18, No. 4, 2007, pp. 650, 653.

207 See K. Fortin and J. K. Kleffner, above note 194, p. 321.

208 M. Bos, above note 7, p. 21; Interpol, above note 7, p. 13. See K. Fortin and J. K. Kleffner, above note 194, p. 321; K. Schmalenbach, above note 194, p. 500.

209 See K. Schmalenbach, above note 194, pp. 499–500.

210 See ICJ, *Genocide*, above note 119, para. 406; A. Cassese, above note 206, p. 657.

211 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 137.

structured groups”, such as military or paramilitary units.²¹² Acts of these groups can be attributed to a State without the need for specific instructions or control over an operation.²¹³ Rather, overall control would only require that a State equip, finance and organize an armed group, in addition to generally coordinating and planning its actions.²¹⁴ In the case of organ trafficking networks, this level of control is appealing. Overall control could indeed be established through a State’s designation of targets for organ harvesting, such as the wounded, and its provision of medical personnel, facilities and equipment. However, the *Tadić* Appeals Chamber expressly stated that the overall control test does not benefit groups which are not militarily organized.²¹⁵ Here again, organ trafficking networks would fall short of the level of organization required for overall control, due to their lack of military structure. However, military or paramilitary groups like IS or the KLA would display the requisite level of organization.²¹⁶

Finally, a criminal organization’s conduct could potentially be attributed through a State’s acknowledgment and adoption of that conduct under Article 11 of the ARSIWA.²¹⁷ This could allow statements such as those made by IS, when officially sanctioning organ harvesting from “apostates”, to be used as a hook for purposes of attribution.²¹⁸ However, the acknowledgment and adoption of conduct must be clear and unequivocal, going beyond mere approval or endorsement, and must reflect an intent to accept responsibility.²¹⁹ In that sense, IS’s statements would be too broad and unspecific to be taken as an admission of responsibility.²²⁰ Furthermore, conduct can only be adopted subsequent to the violation of IHL, meaning that, in any event, future acts of organ harvesting would not be covered by those statements.²²¹

International criminal responsibility of members of organ trafficking networks

Given the limited success in characterizing organ trafficking networks as parties to an armed conflict or attributing their acts to States or non-State armed groups, ICL might be the only way to ensure that persons engaged in organ trafficking are held accountable. Establishing the criminal responsibility of these persons would also allow for reparations to be made to victims of organ trafficking under Article 75 (2) of the Rome Statute of the ICC.²²²

212 *Ibid.*, paras 120, 131, 137.

213 *Ibid.*

214 *Ibid.*, paras 131, 137.

215 *Ibid.*, para. 137.

216 See ICTY, *Limaj*, above note 151, paras 131–133; G. Gaggioli and P. Kilibarda, above note 148, pp. 217–218.

217 See ARSIWA, above note 193, p. 53; K. Fortin and J. K. Kleffner, above note 194, p. 323.

218 See W. Strobel, J. Landay and P. Stewart, above note 16.

219 ARSIWA, above note 193, p. 53.

220 See K. Fortin and J. K. Kleffner, above note 194, p. 324.

221 *Ibid.*

222 Rome Statute, above note 56, Art. 75(2).

As organ trafficking networks are not parties to an IAC or a NIAC, their members are not combatants but civilians.²²³ Importantly, however, war crimes are not limited to the actions of combatants and can also be committed by civilians.²²⁴ Given that organ trafficking networks do not operate exclusively during armed conflict, a distinction must be made between organ harvesting as an ordinary crime and as a war crime.²²⁵ This function is fulfilled by the nexus requirement, which “prevents random or isolated criminal occurrences from being characterised as war crime[s]”.²²⁶ This is why the ICC *Elements of Crimes* consistently require that war crimes be “associated with an international armed conflict [or a NIAC]”.²²⁷ In *Ntaganda*, the ICC Trial Chamber explained that in order to satisfy the nexus requirement,

[t]he existence of an armed conflict must have, at a minimum, played a substantial part in the perpetrator’s ability to commit the crime, the decision to commit it, the purpose of the commission, or the manner in which the crime was committed.²²⁸

The Trial Chamber also articulated a non-exhaustive list of factors, similar to those used by the ICTY and ICTR in the *Kunarac* and *Rutaganda* cases respectively, to establish the existence of a nexus:

[T]he Chamber may take into account, *inter alia*: (i) the status of the perpetrator and victim, and whether they had a role in the fighting; (ii) whether the act may be said to serve the ultimate goal of a military campaign; and (iii) whether the crime is committed as part of, or in the context of, the perpetrator’s official duties.²²⁹

While it is undeniable that an armed conflict may increase an organ trafficking network’s ability to harvest organs and influence or facilitate its *modus operandi*, it would be difficult for its members to satisfy, *in abstracto*, the *Ntaganda* factors. As previously explained,²³⁰ organ trafficking networks are mainly for-profit criminal organizations, which conduct their activities covertly. Their members do not inherently engage in hostilities and are likely to be non-combatants, especially health-care professionals responsible for harvesting organs. They are also likely to

223 See ICRC Customary Law Study, above note 58, Rule 3, p. 11.

224 *Ibid.*, p. 573; Robert Cryer, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 275. See, e.g., ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32, Judgment (Trial Chamber), 29 November 2002, paras 57–60.

225 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgment (Trial Chamber), 8 July 2019, para. 731; Antonio Cassese, “The Nexus Requirement for War Crimes”, *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, pp. 1395, 1397.

226 *Ibid.* See also ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, para. 293.

227 See, generally, ICC *Elements of Crimes*, above note 61. See also ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, paras 57–59.

228 ICTY, *Ntaganda*, above note 225, para. 731; ICTY, *Kunarac*, above note 227, para. 58.

229 ICTY, *Ntaganda*, above note 225, para. 732. See also ICTY, *Kunarac*, above note 227, para. 59; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgment (Appeals Chamber), 26 May 2003, para. 570.

230 See the above section on “Organ Trafficking Networks as Parties to a NIAC”.

have no relation to the armed conflict or its goals. It is indeed doubtful that organ harvesting could be said to serve the ultimate goal of a military campaign, unless it were performed specifically to fund that campaign; that could be the case for members of a non-State armed group searching for new sources of revenue. However, already established organ trafficking networks would be more likely to act out of self-interest, increasing their profits by seizing the new opportunities created by armed conflict.²³¹ As for the commission of a crime in the context of a perpetrator's official duties, the 1947 *Medical Trial* confirms that members of civilian medical services can be prosecuted for war crimes²³² – for instance, a physician harvesting organs while treating conflict-related injuries suffered by combatants and civilians would, without doubt, be acting in the context of his or her official duties. The nexus would be much weaker in the case of a physician performing organ harvesting procedures in a private setting.

Crucially, the ICTY Appeals Chamber in *Kunarac* also considered that the nexus could be satisfied by “establishing that the perpetrator acted in furtherance of or under the guise of the armed conflict”.²³³ The “under the guise of the armed conflict” formula suggests that war crimes may result from privately motivated acts, for instance between non-combatants taking advantage of the breakdown of the rule of law during an armed conflict.²³⁴ This would permit members of organ trafficking networks to more easily fall within the purview of ICL. However, this interpretation of the nexus requirement has been criticized for its broadness and could cause “parasitical criminality” to boil over into war crimes.²³⁵ In particular, the ICTR Appeals Chamber in *Rutaganda*, rejecting a broad interpretation of the *Kunarac* nexus, stated that acting “under the guise of the armed conflict” does not allow any circumstance which would not satisfy several of the *Kunarac* (or *Ntaganda*) factors to constitute a war crime.²³⁶

Fortunately, the nexus requirement may be subject to evolutive interpretation. For instance, the *Kunarac* factors suggested that war crimes could only be committed against combatants or civilians belonging to, or identifying with, the opposing party,²³⁷ but this assumption has since been rebutted by the *Ntaganda* case's admission of intra-party war crimes. This indicates that the

231 See Christina Steenkamp, “The Crime-Conflict Nexus and the Civil War in Syria”, *Stability: International Journal of Security & Development*, Vol. 6, No. 1, 2017, p. 2.

232 United States, Military Tribunal at Nuremberg, *The Medical Trial*, Judgment, 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 2, 1950, p. 186.

233 ICTY, *Kunarac*, above note 227, para. 58.

234 See Harmen van der Wilt, “War Crimes and the Requirement of a Nexus with an Armed Conflict”, *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, p. 1125.

235 ICTR, *Rutaganda*, above note 229, para. 570; Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford, 2005, p. 44; H. van der Wilt, above note 234, pp. 1125, 1127; K. Fortin, “The Application of Human Rights Law to Everyday Civilian Life under Rebel Control”, *Netherlands International Law Review*, Vol. 63, 2016, p. 176. See also Gloria Gaggioli, “Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014, p. 516.

236 ICTR, *Rutaganda*, above note 229, para. 570.

237 ICTY, *Kunarac*, above note 227, para. 59; ICTR, *Rutaganda*, above note 229, para. 569. See A. Cassese, above note 225, pp. 1397, 1413.

nexus requirement is by no means set in stone. In this context, the UN's increasing attention to the links and interplay between organized crime and armed conflict could pave the way to a broadening of the nexus requirement.²³⁸ Organ harvesting by members of an organ trafficking network, taking advantage of the wounded, refugees and displaced civilians under the cover of war, could eventually be considered to be sufficiently associated with the armed conflict as to constitute a war crime. Nevertheless, close attention would still need to be paid to the wording of the Geneva Conventions and their Additional Protocols, which may require that a protected person be in the hands of an enemy for a violation of IHL or a war crime to occur.²³⁹ For instance, Article 11(4) of AP I does not characterize as war crimes organ harvesting procedures performed by a party on its own nationals, even if detained in relation to the conflict.²⁴⁰

Assuming that members of organ trafficking networks could be held criminally responsible, several additional hurdles would still need to be overcome before organ harvesting could be successfully prosecuted. Firstly, ICL only contemplates as a war crime the act of organ harvesting.²⁴¹ Unlike the Santiago de Compostela Convention, it does not criminalize organ trafficking as a stand-alone offence covering all members of a network. Only the persons physically performing organ harvesting would be responsible as principal perpetrators. Many actors of the network could thus avoid prosecution, including brokers, recruiters, and physicians charged only with transplanting organs. Yet, their responsibility in the commission of organ harvesting could still be established through the Rome Statute's various modes of liability. These are covered by Article 25(3) of the Statute, which extends criminal responsibility to those that have aided, abetted, ordered, solicited or induced the commission of the crime.²⁴² Under Article 25(3), brokers could be prosecuted based on their responsibility in structuring organ trafficking networks and organizing their operations. It is also worth noting that these modes of liability could expand criminal responsibility beyond the scope of the SCC. For instance, the SCC does not criminalize an organ recipient's solicitation of a network to obtain a compatible organ, but Article 25(3) could.²⁴³ Secondly, and most importantly, organ trafficking is a transnational crime involving participants and acts taking place across various jurisdictions, including beyond the geographical scope of IHL.²⁴⁴ Therefore, there would be significant evidentiary challenges and jurisdictional difficulties for both the ICC and States wishing to prosecute.²⁴⁵

238 UN General Assembly, above note 14, para. 24; UNSC Res. 2482, 19 July 2019, para. 8.

239 ICC, *Ntaganda*, above note 81, paras 23–24. See, e.g., GC III, Art. 13; GC IV, Art. 32.

240 ICRC Commentary on the Additional Protocols, above note 38, para. 493.

241 See the above section on "The Prohibition of Organ Harvesting under IHL".

242 Rome Statute, above note 56. See Global Rights Compliance, above note 8, pp. 29–30.

243 See Rome Statute, above note 56, Art. 25(3)(b); Interpol, above note 7, pp. 13–14.

244 See M. Ramsden, above note 24, p. 249.

245 *Ibid.*, pp. 248–251.

Conclusion

IHL undeniably protects persons against illegal organ harvesting during armed conflict. The various elements of the prohibition against organ harvesting – i.e., the regulation of medical procedures, the prohibitions against mutilation and murder, and the obligation to protect the wounded against ill-treatment – seek to prevent the exploitation of those living through armed conflict. Together with rules protecting the bodies of the dead, the rules protecting the living guarantee the right of persons impacted by armed conflict not to fall prey to abuse.

These rules place the acts of organ trafficking networks within the reach of IHL. Unfortunately, these networks are unlikely to constitute parties to an armed conflict due to an insufficient organizational structure and the nature of their activities, which do not require the use of armed force. Organ trafficking networks would also not benefit from being bound by IHL as this would interfere with the very purpose for which they are established. Furthermore, the prevailing rules of international responsibility are of little use for attributing the harvesting of organs by trafficking networks to parties to a conflict. The effective control test is too demanding, and the overall control test does not apply to non-militarily organized groups. Additionally, the rules regarding the responsibility of non-State armed groups and their obligation to make reparations are still unclear. In short, greater consideration of the role played by organized criminal groups in armed conflict is needed.

Presently, ICL remains the only viable option for holding members of organ trafficking networks accountable. Yet even there, the requirement of a nexus between organ harvesting and an armed conflict causes a rift that is likely to relegate organ harvesting to the status of an “ordinary” crime. A renewed interpretation of the *Kunarac* nexus, in light of the linkages between organized crime and armed conflict, could be the key to unlocking the international criminal responsibility of organ trafficking networks. Until then, the international community should consider supplementing the UNTOC to criminalize organ trafficking itself, much in the way of the SCC. This would be a welcome first step towards cracking down on organ trafficking, although it might still fail to capture the gravity of the violation suffered by conflict-related victims of organ harvesting.