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## The Legal Fog of an Illusion: Three Reflections on “Organization” and “Intensity” as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict

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Jann K. Kleffner\*

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## I. INTRODUCTION

Albert Einstein famously said “the separation between past, present, and future is only an illusion, although a persistent one.”<sup>1</sup> Einstein’s non-temporal perspective on the universe has not garnered sufficient traction to overcome the temporal mentality ingrained in mainstream physics and social thought. The discipline of law is no exception, nor is international law more specifically. Time is omnipresent in international law and manifests itself in matters as diverse as when treaties enter into force, the occurrence of legally relevant facts, the temporal scope of a given rule of international law, and the jurisdiction of courts and tribunals, to name only a few examples.

In the law of armed conflict, one such quintessential matter is the applicability of the law. Due to international law’s binary distinction between a time of “peace” and a time of “war,” or—in modern terms, “armed conflict”—the applicability of the law of armed conflict is chiefly concerned with the question of when, if at all, an armed conflict has come into existence. An answer to that question will largely determine whether the law of armed conflict applies. Further, that determination is the entry point for virtually all subsequent legal analysis pertaining to the law of armed conflict.

It therefore comes as no surprise that much attention has been paid to the development of analytical parameters for answering that question. Indeed, as far as the notion of an “armed conflict not of an international character” (NIAC) is concerned, an abundance of case law and literature has filled much of the initial void left by an absence of a clear definition in international treaty law.<sup>2</sup> And here, the “organization” of the non-State armed group and the “intensity” of the violence between it and its opponent(s) have emerged as the two key criteria.

While it is beyond dispute that these criteria and their refinement have served to lift the fog of law in some important respects, several aspects of the temporal scope of the law of NIAC remain unsettled. This article addresses three of them. Accordingly, Part II briefly recounts the evolution of organization and intensity, while Part III critically examines the assertion that

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1. Letter from Albert Einstein to Vero Besso and Bice (Beatrice) Besso (Mar. 21, 1955) (Archival Call Number 7-245) (on file with Einstein Archives Online) (“Für uns gläubige Physiker hat die Scheidung zwischen Vergangenheit, Gegenwart und Zukunft nur die Bedeutung einer, wenn auch hartnäckigen, Illusion.”) (translation by author).

2. Noting of course, the NIAC definition found in Article 1(1) of Additional Protocol II. See *infra* note 4 and accompanying text.

the factors for ascertaining organization and intensity that have evolved in the jurisprudence of international criminal courts and tribunals are indicative rather than constitutive (determinative). In turn, this raises two important questions addressed in Parts IV and V. Part IV asks to whom the criterion of organization is to be applied, while Part V examines whether the requisite level of intensity of armed violence can be cumulative when multiple organized armed groups are pitted against each other and government forces. This Part also addresses situations where the armed violence that arises in the bilateral relations between two opposing parties does not reach the requisite level of intensity. Part VI concludes.

## II. THE *TADIĆ* LEGACY

Common Article 3 to the four Geneva Conventions refers to “an armed conflict not of an international character,”<sup>3</sup> but the Conventions do not define this term. The Second Additional Protocol to the Geneva Conventions does define this term, although it is commonly understood that the notion of an armed conflict not of an international character in Common Article 3 is not coextensive with the AP II definition.<sup>4</sup>

The two most significant differences between a Common Article 3 NIAC and an AP II NIAC is that the latter is more limited in its application as it does not apply to NIACs that take place exclusively between non-State organized armed groups (as opposed to between State armed forces and non-State organized armed groups) and requires a significant degree of territorial control of the non-State organized armed group to meet the requisite

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3. *See, e.g.*, Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

4. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[A]rmed conflicts which are not covered by Article 1 of . . . [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement . . . Protocol [II].

threshold (i.e., one that enables it to carry out sustained and concerted military operations and to implement Protocol II).<sup>5</sup> These differences between Common Article 3 NIACs and AP II NIACs mean that the former are left undefined in the conventional law of armed conflict.

Several attempts were made to fill the definitional void in relation to Common Article 3 NIACs.<sup>6</sup> However, it was not until the establishment of the two international ad hoc tribunals for the Former Yugoslavia and Rwanda that international judicial bodies addressed the issue. Most notably, the International Criminal Tribunal for the former Yugoslavia (ICTY) offered a definition in its 1995 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in *Tadić*, namely, that a NIAC is a situation of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>7</sup> Despite the fact that the prerequisite of protracted armed violence implies a temporal dimension, the subsequent jurisprudence of the ICTY has recoined this prerequisite into an intensity requirement.<sup>8</sup> The other requirement that has been deduced from the *Tadić* definition is the organization of the non-State armed group.

The twin criteria of intensity and organization have since been confirmed in a line of cases, both at the ICTY and ICTR and in other international and domestic courts and tribunals, including the International Criminal Court

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5. For one analysis of the differences between Common Article 3 NIACs and AP II NIACs, see Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 601–10 (Sept. 2, 1998).

6. For a recount of some of these attempts, see INTERNATIONAL COMMITTEE OF THE RED CROSS, 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 ¶¶ 417–21, at 152–53 (2016) [hereinafter COMMENTARY ON THE FIRST GENEVA CONVENTION].

7. Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

8. See, e.g., Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (noting that the “criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration”).

(ICC).<sup>9</sup> These criteria have also been adopted by State's in their military manuals<sup>10</sup> and by the ICRC.<sup>11</sup> Against this background, it is safe to posit that intensity and organization have garnered widespread support and emerged as the two minimum requirements for a Common Article 3 NIAC.

Subsequent jurisprudence has further fleshed out intensity and organization. Indeed, both the ICTY and the ICC have developed detailed lists of factors for determining whether the criteria of intensity of the violence and organization of the non-State armed group are satisfied.

In *Boškoski and Tarčulovski*, the ICTY provided several factors for determining whether the intensity criterion was met. These factors include

the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as

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9. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment (Mar. 7, 2014).

Moreover, an ICC Trial Chamber, noting that Article 8(2)(f) of the Rome Statute refers to “protracted armed conflict between governmental authorities and organized armed groups or between such groups,” found that “protracted armed conflict” has been interpreted to reaffirm the twin criteria of intensity and organization for a non-international armed conflict. *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Judgment, ¶ 138 (Mar. 21, 2016) (footnote omitted). When addressing whether “protracted” establishes a separate requirement for establishing the existence of a NIAC over and above intensity and organization, the Trial Chamber found that it did not.

[T]he concept of “protracted conflict” has not been explicitly defined in the jurisprudence of this Court, but has generally been addressed within the framework of assessing the intensity of the conflict. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court emphasized the duration of the violence as a relevant factor. This corresponds to the approach taken by chambers of the ICTY. The Chamber follows this jurisprudence.

*Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Judgment, ¶ 139 (Mar. 21, 2016) (footnotes omitted).

10. See, e.g., OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 3.4.2.2 (rev. ed., 2016), UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.3 (2004).

11. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 6, at 153–61.

tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organizations to broker and enforce cease fire agreements. At a more systemic level, an indicative factor of internal armed conflict is how organs of the State, such as the police and military, use force against armed groups.<sup>12</sup>

Subsequent case law of the ICTY and of the ICC has by and large endorsed these factors.<sup>13</sup>

For organization, the most detailed list of factors has been provided by the ICTY. In *Boškoski and Tarčulovski*, the Trial Chamber considered these factors by separating them into five groups, stating:

In the first group are those factors signaling the presence of a command structure, such as the establishment of a general staff or high command, which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply, authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit's area of responsibility. Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.

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12. Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-T, Judgment, ¶¶ 177–78 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

13. See, e.g., *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49; *Katanga*, Case No. ICC-01/04-01/07, Judgment, ¶ 1187; *Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶ 538; *Gombo*, Case No. ICC-01/05-01/08, Judgment, ¶ 137.

Secondly, factors indicating that the group could carry out operations in an organized manner have been considered, such as the group's ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units; the capacity of operational units to coordinate their actions, and the effective dissemination of written and oral orders and decisions.

In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members; the providing of military training; the organized supply of military weapons; the supply and use of uniforms; and the existence of communications equipment for linking headquarters with units or between units.

In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members.

A fifth group includes those factors indicating that the armed group was able to speak with one voice, such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords.<sup>14</sup>

These groupings were acknowledged in ICTY case law that followed *Boškoški and Tarčulovski*,<sup>15</sup> as well as the subsequent jurisprudence of the ICC, albeit with slight variation.<sup>16</sup> And yet, as helpful as these definitional advances are, they also raise questions, three of which are examined in the following Parts.

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14. *Boškoški & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶¶ 199–203 (footnotes omitted).

15. See, e.g., *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 60.

16. For example, the *Lubanga* and *Katanga* judgments added “the extent, seriousness, and intensity of any military involvement” as a factor in determining whether an armed group is sufficiently organized. See *Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶ 537; *Katanga*, Case No. ICC-01/04-01/07, Judgment, ¶ 1186.



## III. INDICATIVE OR DETERMINATIVE?

Throughout the jurisprudence of the ad hoc criminal tribunals, it is stressed that the factors to be considered when assessing intensity and organization are “indicative.”<sup>17</sup> As stated in *Haradinaj*, “none of . . . [the factors] are, in themselves, essential to establish whether the . . . [organization or intensity] criterion is fulfilled.”<sup>18</sup> Accordingly, none of the factors are individually determinative and they should be applied “flexibly.”<sup>19</sup>

The implication is that, rather than a simple checklist, these factors can, but need not necessarily be present, cumulatively or individually, before concluding a NIAC exists and the law of NIAC applies. Such an assertion reflects an acute awareness by the various tribunals that have addressed the issue that the application of an abstract definition of the factual situation of a NIAC, which centers on the two cumulative requirements of organization and intensity and their further refinement through a list of factors, is—far from surprisingly—a context-specific exercise. The factors are, to put it differently, providing an open-ended and non-limitative framework for making the case for or against the existence of a NIAC. Depending on the mandate and agenda of the actor that is making the determination—a State’s armed forces, non-State armed groups, humanitarian and civil society organizations, judges in domestic or international courts and tribunals, prosecutors, defense lawyers, and so on—the conclusions reached may differ, while the conversation about how these conclusions have been reached will at least partly be informed by the factors that the ad hoc tribunals have developed. With that caveat in mind, the guidance that emanates from the list of factors should not be overstated. They have not produced a situation in which the fog of the law of NIAC has been lifted and the determination of the existence of a NIAC has become an exercise of surgical precision.

It appears doubtful, however, that *all* factors produced in the jurisprudence by the ad hoc tribunals are no more than indicative. Indeed, some of their findings seem to contradict this sweeping assertion and suggest a more nuanced approach, where a distinction can be made between merely indicative factors and determinative factors whose absence *ipso facto* defeats the existence of a NIAC. As regards the latter, the one factor without which one cannot reasonably conclude that an armed group is sufficiently organized is that it displays some form of a command structure and, as an expression of

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17. *Boškoški & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶ 176.

18. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 49, 60.

19. *See, e.g., Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶ 537.

such a command structure, disciplinary rules and mechanisms within the group. The ICTY put it as follows: “[F]or an armed group to be considered organised, it would need to have some hierarchical structure and its leadership requires the capacity to exert authority over its members.”<sup>20</sup> This is not to suggest that an armed group must display a command structure that resembles that of State armed forces. Rather, what is required is that the armed group is organized in a way that allows individual members (superiors) to command, and exert authority over, other individual members (subordinates). Thus understood, a command structure is cause and consequence for the violence to be of a collective nature, which in turn merits the description of a NIAC, provided the intensity requirement is met. What is more, to perceive of a command structure as a determinative factor in assessing the requisite level of organization acknowledges it as a precondition for a group’s ability to ensure compliance with the law of NIAC, as it implies existing rules and disciplinary mechanisms.<sup>21</sup>

As far as intensity is concerned, one can distill the essence that the armed violence leads to the loss of life, injury, and destruction, or damage of objects, while taking the form of “fighting”—understood as armed confrontations of a military nature—between opposing parties. While this is not to suggest that one-sided armed violence—for instance, the killing of civilians or destruction of civilian objects—cannot also feature in the intensity analysis for determining the existence of a NIAC, fighting between the parties is a quintessential precondition, and as such, a determinative factor.

Understood as such, the determinative factors of a command structure and fighting between the parties are closely intertwined and mutually conditioned. Without the armed group having a command structure, it is impossible to issue orders and exercise control over armed forces, hence, to direct them and their operations at the tactical, operational, and strategic levels. It is impossible, in short, to project armed violence that is military in nature.

While the foregoing suggests that one can discern a distinction between determinative and indicative factors when examining intensity and organization, the two constitutive criteria raise further questions. For example, concerning organization, a key question is to whom the concept applies. In other

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20. *Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶ 195.

21. On the role of a command structure, “responsible command,” and the two rationales for requiring organization, namely, that the violence is of a collective nature and that a group is able to comply with the law of NIAC, see SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 174–80 (2012).

words, who or what needs to be organized? In relation to intensity, an important question is whether the requisite level of intensity can be accumulated by several actors. These questions are addressed below.

#### IV. TO WHOM DOES THE REQUIREMENT OF “ORGANIZATION” APPLY?

Organization is commonly assessed only in relation to the non-State actor in question. State armed forces, on the other hand, are presumed to satisfy the requisite level of organization.<sup>22</sup> Yet, it seems to be more befitting of the factual situation of a NIAC to consider that presumption to be rebuttable and to apply the criterion of organization to State armed forces. As a consequence, a NIAC does not come about if a State’s armed force only exists nominally, but does not display the requisite level of organization, even though the opposing non-State armed group might. Likewise, the loss of the requisite level of organization of State armed forces in the course of a NIAC should be treated in the same way as such a loss by a non-State armed group when determining whether the NIAC has come to an end and the law of NIAC ceases to apply.

Another dimension of the “to whom” question is to identify precisely *what* needs to be organized. The generic definition in *Tadić* suggests that the criterion applies to an “armed group.”<sup>23</sup> This is confirmed by subsequent jurisprudence that assesses the factors for organization in relation to an armed group.<sup>24</sup> At other times, the criterion is considered in relation to “the parties to the conflict.”<sup>25</sup> A third approach is to apply the criterion to the

22. In this regard, see, for example, *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 60. See also COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 6, ¶ 156, at 429.

23. *Tadić*, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70.

24. See, e.g., *Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶¶ 199–203.

25. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶ 175; *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 620; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 93 (Dec. 6, 1999).

See also *Lubanga*, where the Trial Chamber noted, “Some of these armed conflicts [in Ituri and in surrounding areas within the DRC] which included the UPC [*Union des Patriotes Congolais*], involved protracted violence.” *Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶ 543. The Trial Chamber then identified the FPLC [*Forces Patriotiques pour la Libération du Congo*] as “the military wing” of the UPC, subsequently referring to the UPC/FPLC “as a

armed forces of such a party.<sup>26</sup> Admittedly, disentangling non-State party, armed group, and armed forces is very difficult, if not impossible, in many contemporary NIACs. This notably holds true in all cases where the party to the armed conflict *is* the armed force of an armed group and there is no distinguishable element of the party to the armed conflict that is not (also) part of the command structure of the military organization. Indeed, the terminological imprecision in the case law and literature may, at least in part, be symptomatic of the lack of distinguishability in many cases. However, this does not necessarily mean that the three terms cannot be distinguished on a conceptual level.

In the law of international armed conflict, “a party to the conflict” and “armed forces” are clearly distinct concepts.<sup>27</sup> The former refers to the political entity in its entirety, that is, the State, whereas the latter refers to the State’s military forces.<sup>28</sup> To draw an analogy from the law of international armed conflict, the term “party to the conflict” in a NIAC could be broader than the term “armed forces,” as the former refers to the entire political entity, such as an opposition movement that comprises a political and military wing. In contrast, “armed forces” would refer only to the military wing that projects force on behalf of the political wing.

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political and military organization” that was in control of Bunia. *Id.* ¶¶ 27, 543 (footnotes omitted). The Trial Chamber then seemed to apply the organizational criterion to the UPC/FPLC, noting that “[t]he UPC/FPLC was organised with a leadership structure that was capable of training troops as well as imposing discipline, and it carried out sustained military operations in Ituri during the relevant timeframe.” *Id.* ¶ 543 (footnotes omitted); *see also* International Committee of the Red Cross, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?* 5 (International Committee of the Red Cross, Opinion Paper, 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> (stating “the parties involved in the conflict must show a *minimum of organisation*”).

26. International Committee of the Red Cross, *supra* note 25, at 3 (noting “non-governmental groups involved in the conflict must be considered as ‘parties to the conflict,’ meaning that they possess organized armed forces”); COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 49 (Jean Pictet ed., 1952) (“That the Party in revolt against the *de jure* Government possesses an organized military force.”).

27. *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 13(1)–(2), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (III) Relative to the Treatment of Prisoners of War arts. 4A(1)–(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

28. *Cf.* COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 6, ¶ 1452, at 520 (using the phrase “all military personnel”).

It is less clear where the concept “organized armed group” sits in relation to these two concepts. AP II can be read to mean that it comprises non-State armed forces, since Article 1(1) identifies “dissident armed forces” as a subcategory of “organized armed groups” that in turn are “under responsible command” and “exercise such control over a part of [a State’s] territory as to enable them to carry out sustained and concerted military operations and to implement [AP II].”<sup>29</sup> Similarly, the *Tadić* definition of a NIAC suggests that organized armed groups are those engaged in protracted armed violence against governmental forces (or other organized armed groups). The foregoing suggests that the concepts “organized armed groups” and “non-State armed forces” are largely interchangeable, but clearly distinguishable from the concept of a non-State “party to the conflict,” with the former two referring to the organized fighting force of the latter. For the purposes of examining the organization of non-State actors, it means that the relevant object of analysis is the armed group/non-State armed force, rather than the party to the conflict.

## V. CUMULATIVE INTENSITY

Several of the cases that were instrumental in developing the criteria of organization and intensity were concerned with situations in which both had to be assessed vis-à-vis *one* armed group and vis-à-vis the violence that occurred in the *bilateral* relationship between that group and governmental authorities. Yet, there are a number of situations involving multiple armed groups and the government that could qualify as a NIAC. Examples include the situation in Syria, the Democratic Republic of the Congo (DRC), Libya, and Colombia. In cases such as these, several organized armed groups fight against governmental authorities *and* against each other, or they confront a common enemy but operate independently and individually, or they forge fragile alliances that later collapse. One of the questions that arise in such contexts is whether the requisite level of intensity can be met cumulatively by the actions of more than one organized armed group that act independently against governmental authorities or against each other, even though the actions of each one of them in their respective bilateral relations, taken in isolation, do not reach that threshold. An answer to that question is highly significant for the temporal scope of the law of NIAC. If one were to require intensity in the bilateral relations between armed force A and armed

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29. Additional Protocol II, *supra* note 4, art. 1(1).

force B, armed force A and armed force C, armed force B and armed force C and so on, it would mean that *several* NIACs may come into existence at different points in times. In contrast, a cumulative approach to assessing intensity would mean that a *single* NIAC begins once the requisite level of intensity of the violence caused by all armed forces is reached.

The jurisprudence of international courts and tribunals is somewhat ambivalent on the issue. In the armed conflict in eastern DRC—a situation that is perhaps at the extreme end of complexity regarding actors, with at times as many as seventy armed groups being reported to have been active<sup>30</sup>—an ICC Trial Chamber found in *Lubanga* that “there were a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups.”<sup>31</sup> The Trial Chamber also found that some of these armed conflicts “involved protracted violence.”<sup>32</sup> While this wording may appear circular, as reference is made to armed conflicts that “involved protracted violence,” whereas armed conflicts, at least those of a non-international character, presuppose intensity (or in the words of the Trial Chamber, “protractedness”) of the violence, the Trial Chamber seems to suggest that intensity is to be assessed in each of the various armed conflicts simultaneously.

The same approach seems to underlie the subsequent analysis by the Trial Chamber of an increase in the “‘rapidity of the alliance switches,’ the ‘multi-directionality’ of the fighting and the nature of the violence against the civilian population.”<sup>33</sup> Here, the Trial Chamber examined some of the armed groups opposing the FPLC (*Force Patriotique pour la Liberation du Congo*), the military wing of the UPC. These groups included the APC (*Armee Populaire Congolaise*), the armed wing of the RCD-ML (*Rassemblement Congolais pour la Democratie – Kisangani/Mouvement de Liberation*), and a number of Lendu militias.<sup>34</sup> It also considered the nature of the violence in which they were involved, including where and when it occurred.<sup>35</sup> The Trial Chamber then concluded “that the UPC/FPLC, as an armed force or group, participated

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30. See JASON K. STEARNS & CHRISTOPH VOGEL, CONGO RESEARCH GROUP, THE LANDSCAPE OF ARMED GROUPS IN THE EASTERN CONGO 5 (2015), <http://congo-researchgroup.org/wp-content/uploads/2015/11/The-Landscape-of-Armed-Groups-in-Eastern-Congo1.pdf>.

31. *Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶ 543.

32. *Id.*

33. *Id.* ¶ 544–47.

34. *Id.* ¶ 548.

35. *Id.*

in protracted hostilities and was associated with an armed conflict throughout the relevant timeframe of the charges.”<sup>36</sup> This choice of words adds to the confusion, as it refers to “armed conflict” in the singular.

However, in *Katanga*, a different Trial Chamber employed a more global assessment of intensity to the same situation in eastern DRC. That Trial Chamber examined whether, and to what extent, armed groups that were active in Ituri, including the UPC, the APC, and the Ngiti militia/FRPI (*Force de Résistance Patriotique d’Ituri*) satisfied the organizational requirement.<sup>37</sup> The Trial Chamber also assessed the involvement of other States in the violence.<sup>38</sup> It then turned to intensity and noted that the parties “accepted that the fighting, *inter alia*, between the Ngiti militia and the UPC, was part of a cycle of violence that extended far beyond isolated acts falling outwith international humanitarian law.”<sup>39</sup> The words “*inter alia*” are significant, in as much as fighting between other groups does not seem to be categorically excluded from the Trial Chamber’s assessment of intensity. The following statement by the Trial Chamber supports this conclusion:

With specific reference to its foregoing review of the attacks that followed [the] assault on Bogoro, the Chamber finds that the armed conflict was both protracted and intense owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003. Thus, in the Chamber’s view, the evidence before it suffices to fulfil the intensity of the conflict requirement.<sup>40</sup>

Here, the court found that the “attacks that followed [the] assault on Bogoro” included those conducted by Lendu militias<sup>41</sup> and Ngiti and Lendu combatants<sup>42</sup> against a Uganda Peoples’ Defence Forces (UPDF) base, and an attack by the Biva of Andisoma *collectivité*, with UPDF and Hema support, on the Ngiti and Lendu of Nyskunde village.<sup>43</sup> In determining whether the intensity criterion was fulfilled, the Trial Chamber drew on these attacks cumulatively within the referenced territorial (Ituri) and temporal (January 2002

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36. *Id.* ¶ 550.

37. *Katanga*, Case No. ICC-01/04-01/07, Judgment, ¶¶ 1207–11.

38. *Id.* ¶¶ 1212–15.

39. *Id.* ¶ 1216.

40. *Id.* ¶ 1217 (footnotes omitted).

41. *Id.* ¶ 464.

42. *Id.* ¶ 466.

43. *Id.* ¶ 467.

to May 2003) confines. It refrained from disentangling the level of violence that the bilateral confrontations between individual opponent groups entailed. Instead it shifted its focus to a specified area and period.

At times, the ICRC follows a similar approach in complex situations. Thus, in relation to Syria, the ICRC concluded that a NIAC had come into existence because fighting occurred between “Government Forces and a number of organised armed opposition groups operating in several parts of the country (including, but not limited to, Homs, Idlib and Hama),”<sup>44</sup> but without delving into the issues of whether, when, and where the bilateral violence between government forces and individual organized armed groups, or violence between such groups, reached the requisite level of intensity. A more global, cumulative approach to intensity is also echoed in the practice of a number of bodies<sup>45</sup> and in legal scholarship that addressed the questions of whether and when a NIAC had come into existence in Syria.<sup>46</sup>

It is submitted that there are good grounds for applying a cumulative approach to the determination of whether the requisite level of intensity has been met in complex situations such as the ones in eastern DRC or Syria. Where a situation of violence in a given area during a given period is characterized by a high fluctuation in the number and strength of organized armed groups, including shifting alliances, hastily assembled coalitions, and their break-up, a bilateral approach runs the risk of defeating the purpose of the law of armed conflict: to ensure a proper balance between considerations of military necessity and humanity. As such, the law is fact-driven and designed to apply only in situations that involve the requisite level of violence. The necessity—both in military and humanitarian terms—for the law of armed conflict to govern a given situation does not depend on the question of whether the violence between two parties in their bilateral relationship reaches the required threshold or whether that violence occurs between several opposing parties in their mutual relations. If the accumulation of death,

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44. *Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting*, ICRC (July 17, 2012), <https://www.icrc.org/en/doc/resources/documents/update/2012/syria-update-2012-07-17.htm>.

45. For a consideration of relevant practice, see Christopher Phillips, *Syria*, in LOUISE ARIMATSU & MOHBUBA CHOUDHURY, CHATHAM HOUSE, *THE LEGAL CLASSIFICATION OF THE ARMED CONFLICTS IN SYRIA, YEMEN AND LIBYA* 7–19 (2014), [https://www.chatham-house.org/sites/default/files/home/chatham/public\\_html/sites/default/files/20140300-ClassificationConflictsArimatsuChoudhury1.pdf](https://www.chatham-house.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300-ClassificationConflictsArimatsuChoudhury1.pdf).

46. See Terry D. Gill, *Classifying the Conflict in Syria*, 92 *INTERNATIONAL LAW STUDIES* 353, 375 (2016).



injury, and destruction caused by several organized armed groups and governmental authorities is such that it can reasonably be described as “sufficiently intense,”<sup>47</sup> victims in that situation should not be deprived of the protection accorded by the law of armed conflict merely because the violence that characterizes the bilateral relations between any two of its authors stays below the requisite level of intensity. Nor should parties to such a situation be deprived of the rights, privileges, and authorizations that the law provides to allow them to submit their opponents.

The problematic consequence of bilateralizing intensity would be that sporadic acts of violence by one organized armed group (party A) against another organized armed group or governmental authorities (party B), which is also involved in a pre-existing NIAC against a third organized armed group or governmental authorities (party C) in the same geographical area and during the same period, would fall outside the ambit of the law of NIAC. This would give rise to a significant regulatory void, particularly in light of the controversies surrounding the applicability of human rights law to organized armed groups.<sup>48</sup> Furthermore, to bilateralize intensity would entail that the disappearance of the requisite level of violence in the bilateral relation between party B and party C could entail that the NIAC between the two comes to an end, whereas the co-existing (in geographical and temporal terms) bilateral NIAC between either party and a fourth party (party D) continues for as long as the requisite level of intensity is reached in their bilateral relations. After such a cessation of intense violence, sporadic acts of violence between party B and party C would thus fall outside the regulatory ambit of the law of NIAC in a factual situation that remains a NIAC between party B and party D as well as a NIAC between party C and party D.

While complex situations of violence may justify a cumulative approach to assessing intensity, such an approach entails significant risks if applied routinely to all situations of violence in which organized armed groups are involved. Taken to its extreme, such an approach could be misunderstood to allow for the determination that a NIAC has come into existence because

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47. For a review of ICTY jurisprudence describing the level of violence between two parties as sufficiently intense, see *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 41, 45, 47–48.

48. See, e.g., Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INTERNATIONAL LAW JOURNAL 21 (2013); Tilman Rodenhäuser, *International Legal Obligations of Armed Opposition Groups in Syria*, INTERNATIONAL REVIEW OF LAW 3–7 (2015); SIVAKUMARAN, *supra* note 21, at 95–99.

sporadic acts of violence of one or several organized armed groups that occur over an extended period of time and across a wide geographical area satisfy the requisite level of intensity. Such an unrestrained accumulation of intensity would result in a situation similar to the much-criticized over-application of the law of armed conflict that characterizes the “Global War on Terror.”<sup>49</sup> There, clearly distinct terrorist acts separable in temporal and geographical terms were lumped together and elevated to an armed conflict to justify responses within a conduct of hostilities paradigm, rather than law enforcement measures governed by applicable human rights law.

In order to avoid the risks of over-application, a cumulative approach to assessing intensity has to be applied in a nuanced and careful fashion. In practice, this would mean that it is only to be applied in complex situations where acts of violence by several organized armed groups occur on a geographical and temporal continuum. That continuum serves the purpose of distinguishing acts of violence that are reasonably grouped together because they occur in an identifiable location and within sufficient temporal proximity of one another from a loose series of acts of violence by different organized armed groups that occur over a wide geographical area (perhaps even in several non-adjacent States). While the exact contours of the suggested geographical and temporal continuum will be context-specific, the analysis of the ICC Trial Chamber in *Katanga*<sup>50</sup> may be indicative of how this approach can be applied. Ultimately, the legitimacy of the suggested approach that allows for cumulative intensity will depend on a good faith application centered on the exigencies of the factual situation as requiring—in both humanitarian and military terms—the application of the law of NIAC.

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49. The George W. Bush administration adopted the phrase “Global War on Terror” soon after the September 11, 2001 attacks against the United States. In an address to Congress on September 20, 2001, President Bush stated, “Our war on terror . . . will not end until every terrorist group of global reach has been found, stopped, and defeated.” Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1348 (Sept. 20, 2001). The use of the phrase ceased under the Obama administration. See, e.g., Scott Wilson & Al Kamen, “Global War on Terror” Is Given a New Name, WASHINGTON POST, Mar. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

For an analysis of the substantial legal criticism of the Global War on Terror, see Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 349 (2004).

50. *Katanga*, Case No. ICC-01/04-01/07, Judgment, ¶¶ 464–67.

## VI. CONCLUSION

While intensity and organization have evolved to become the undisputed criteria for determining the temporal scope of the law of NIAC, their exact contours remain somewhat uncertain. Yet, the following conclusions can be drawn. First, the assertion that the factors that have been developed in order to assess whether the requisite levels of intensity and organization are met are merely indicative does not hold true for all these factors. Rather, one can discern determinative factors that condition the existence of a NIAC. For an armed group to be considered “organized,” it needs to possess a command structure and, as an expression of such a command structure, disciplinary rules and mechanisms within the group. For the violence to be “intense,” it needs to involve the loss of life, injury, destruction, or damage of objects in the form of “fighting” between opposing parties. Second, the criterion of organization applies equally to the armed forces of States and non-State actors, rather than to them as “party” to a NIAC. Third, in complex situations where several organized armed groups and State armed forces are pitted against each other, the requisite level of intensity can be met by an accumulation of violence that arises between all such actors, provided that the violence occurs on a temporal and geographical continuum.

These three findings lift the fog surrounding the temporal scope of the law of NIAC to some extent in as much as they assist in further refining the framework for analyzing the facts. At the same time, it may be useful to remind ourselves of the fluidity of the concept of time, which is situated somewhere between the precision of an atomic clock and Einstein’s assertion that it is an illusion. Time also remains somewhat indeterminate in the context of the temporal scope of the law of NIAC. The assessment as to whether the degree of organization and intensity are such to trigger the applicability of the law of NIAC will not be free of subjectivity. It remains a context-specific exercise that reflects the perspective, bias, and agenda of the person or institution engaged in making the assessment. As such, a high degree of objective precision when determining the temporal scope of the law of NIAC is perhaps as much an illusion as the concept of time according to Einstein.