

Targeting Individuals Belonging to an Armed Group

Dr. Gloria Gaggioli*

ABSTRACT

In the context of non-international armed conflicts (NIACs), individuals belonging to an organized armed group are generally considered targetable based on their membership in such a group. There would be no need to prove that they are directly participating in hostilities in order to consider their targeting compliant with international humanitarian law (IHL). Targeting based on membership thus requires answering two key questions. First, what is an organized armed group for the purpose of IHL?; and, second, how should one determine membership in such a group? These two crucial questions raise a number of legal and practical challenges, especially with respect to the contemporary “war on terror” that is being waged by a number of states against alleged transnational armed groups such as al-Qaeda and the Islamic State as well as against so-called associated forces. In the light of these challenges, there is a need for further research that is not only legal but also empirical in order to properly clarify the crucial notions of “organized armed groups” and “membership” in such groups under IHL.

TABLE OF CONTENTS

I.	INTRODUCTION	902
II.	PRACTICAL AND LEGAL CHALLENGES IN LIGHT OF THE FIGHT AGAINST TERRORISM	903
III.	THE NOTION OF “ORGANIZED ARMED GROUP” UNDER INTERNATIONAL HUMANITARIAN LAW	905
IV.	THE NOTION OF “MEMBERSHIP” IN AN ORGANIZED ARMED GROUP UNDER INTERNATIONAL HUMANITARIAN LAW	910
V.	CONCLUSIVE REMARKS—FURTHER CLARIFICATION THROUGH A LEGAL-EMPIRICAL APPROACH?	916

* Gloria Gaggioli has a PhD in International Law and is Assistant Professor at the University of Geneva, Law Faculty, Department of Public International Law and International Organization.

I. INTRODUCTION

Nowadays, the prevailing view among IHL specialists and states is that in an NIAC,¹ members of an organized nonstate armed group may be targeted and killed in a similar way as members of state armed forces.² A minority of authors maintain that members of organized armed groups may be targeted only when and for such time as they directly participate in hostilities.³

In other words, members of organized armed groups would generally be considered targetable based on their membership in such groups. There would be no need to prove that they are directly participating in hostilities in order to consider their targeting as compliant with IHL. Members of organized armed groups would thus not benefit from the famous “revolving door” of protection in the same way as civilians—who lose protection against direct attack when they engage in direct participation in hostilities, but regain it as soon as such participation ends, such as when they resume their civilian activities.⁴

This entails that targeting based on membership in an organized armed group requires answering two key questions. First, what is an

1. A non-international armed conflict (NIAC) is a conflict opposing a state to an organized nonstate armed group or an armed conflict between such organized armed groups. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of 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 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; see also Prosecutor v. Tadić, Case No IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

2. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (2009) [hereinafter ICRC DPH GUIDANCE]; SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 359–62 (2012); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 674–680 (2010).

3. See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 152 (2010) (nevertheless adopting a wide interpretation of the temporal aspect of direct participation in hostilities in relation to members of armed groups and recognizing that the membership approach tends to be the prevailing view); DARAGH MURRAY, PRACTITIONERS’ GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT 114, ¶ 5.09 (2016).

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflict (Protocol I), June 8, 1977, art. 51, ¶ 3, 1125 U.N.T.S. 3; Protocol II, *supra* note 1, art. 13, ¶ 3; see also ICRC DPH GUIDANCE, *supra* note 2, at 70.

organized armed group for the purpose of IHL?; and, second, how should one determine membership in such an organized armed group for the purpose of targeting? These two crucial questions raise a number of legal and practical challenges, especially with respect to the contemporary “war on terror” that is being waged by a number of states against alleged transnational armed groups such as al-Qaeda and the Islamic State as well as against so-called associated forces.

This essay will provide an overview of these main practical and legal challenges in defining organized armed groups and membership therein in light of the contemporary fight against terrorism (Part II). Then it will provide an IHL analysis of the notions of “organized armed group” (Part III) and membership in such groups for the purpose of targeting (Part IV) and apply such concepts to entities such as al-Qaeda and the Islamic State and their alleged members. Conclusive remarks (Part V) will suggest the need for further research that is not only legal but also empirical in order to properly clarify the crucial notions of “organized armed groups” and “membership” in such groups under IHL.

II. PRACTICAL AND LEGAL CHALLENGES IN LIGHT OF THE FIGHT AGAINST TERRORISM

Contemporary armed conflicts show that there is a multitude of armed groups, each with very different characteristics, structures, and ways of operating. At one end of the spectrum, there are “traditional” armed groups, such as the Tamil Tigers (LTTE) in Sri Lanka, the FARC in Colombia, or the Hezbollah in Lebanon. These groups are well-organized and have a state army-like structure. They have clear and distinctive uniforms, which allow recognizing them at a distance. At the other end of the spectrum, there are amorphous armed groups, or rather networks, such as al-Qaeda, which continue to rally members and which seemingly have a common strategy despite their decentralized character. The Islamic State is a particularly intriguing organization as it has two faces. It somehow combines a highly-organized state army-like structure in Iraq and Syria notably, while at the same time operating as a worldwide network made of various terrorist cells or individuals operating more or less independently. Territorial losses in Iraq and Syria lead the Islamic State to adapt and to operate in a more decentralized manner while at the same time providing inspiration to followers, or so-called lone wolves, to perpetrate terrorist attacks far away from the battlefield.⁵

5. Margaret Coker, Eric Schmitt & Rukmini Callimachi, *With Loss of Its Caliphate, ISIS May Return to Guerrilla Roots*, N.Y. TIMES, (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/world/middleeast/islamic-state-territory-attacks.html> (last visited Mar. 25, 2018) [<https://perma.cc/98QG-DUNV>] (archived Mar. 19, 2018).

In light of this new reality, an important issue is whether worldwide terrorist networks such as al-Qaeda and the Islamic State (under its second manifestation) may be qualified as transnational “organized armed groups” for the purpose of IHL. As highlighted by Eric Talbot Jensen, there are several “complicating factors” to consider such groups as organized armed groups for the purpose of IHL.⁶ They have no pyramidal structure, but rather decentralized organizational command and control. The leadership provides general instructions—guidance more than clear orders or military command—thus leaving a wide margin of appreciation to those executing the operation. Fighters are geographically dispersed; cells operate in very different contexts and those conducting the attack may be far away from the leadership of the armed group. There are great fluctuations in the functioning of such networks. Groups in the network split, reunite, change, and evolve very quickly. Such organizations, and their leadership, might not precisely know themselves who belongs to them. Such “complicating factors” are multiplied when taking into account notions such as “associated forces” or the UN Security Council terminology of “Al-Qaida, ISIL, or any cell, affiliate, splinter group, or derivative thereof.”⁷

In this context, key legal issues are: what do we really mean by “organized” armed groups under IHL? Are there key organizational factors that must be present to consider an armed group as an “organized armed group” for the purpose of IHL? Should the organization criterion be assessed on a case-by-case basis in a particular state or geographical area (i.e., “territorially-based”) or may a group be organized “transnationally” (i.e., irrespective of state borders)?⁸ Should groups such as al-Qaeda/Islamic State be seen as unitary transnational armed groups or rather as associations made of several armed groups which can be considered “co-belligerents”?

There are also legal and practical challenges in determining membership in an “organized armed group.” Unlike membership in state armed forces, membership in an organized armed group is neither defined by domestic law, nor necessarily immediately visible through the wearing of uniforms.

As a result, a crucial question is: what categories of persons can be considered members of an organized armed group for the purpose of targeting? Should a distinction be made between persons belonging to the military wing versus the political wing? If the answer is affirmative, what about persons who might cumulate or switch from

6. Eric Talbot Jensen, *Targeting of Persons and Property, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 55 (2d ed. 2015).

7. *Id.*; see also, e.g., S.C. Res. 2396 (Dec. 21, 2017).

8. INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 18–19 (2011) [hereinafter ICRC CHALLENGES REPORT].

“political” to “military” functions? In other words, how should one cope with the blurring between civilian and military functions of members of organized armed groups? Moreover, should anyone in the military wing be considered targetable, including, for instance, the cook, or only those assuming a “continuous combat function,” as purported by the International Committee of the Red Cross (ICRC)?⁹ Even if this controversial notion were to be accepted, what does it mean concretely to have a continuous combat function?

Several controversial situations can be raised, especially in the context of the fight against terrorism. Is receiving training from al-Qaeda in the Arabian Peninsula, for instance, for conducting a suicide attack sufficient to establish membership? Is the pledging of allegiance to the Islamic State, for instance, sufficient? If a terrorist group claims responsibility for an attack, is it sufficient to consider the attackers members of the group? What about an individual who merely travels to Syria with the intent to join, for instance, the Islamic State? Is he/she to be considered a member of the group and, if yes, when would membership begin? Is the provision of weapons by a terrorist group to an individual sufficient to establish membership? Is it possible to belong to an armed group through virtual relationships on the internet?

The law does not provide clear-cut answers to these questions, as will be evidenced in the following sections.

III. THE NOTION OF “ORGANIZED ARMED GROUP” UNDER INTERNATIONAL HUMANITARIAN LAW

Surprising as it may be, IHL does not define the notion of “organized armed groups,” despite the fact that the organization of the parties is crucial to determine the existence of an NIAC, together with the criterion of intensity of violence between the parties.

Common Article 3 to the four Geneva Conventions does not even use the term “organized armed group.” It simply states that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . (emphasis added).”¹⁰ The term “Party” has been interpreted as entailing the existence of organized actors, be they states or nonstate actors.¹¹ The ICRC Commentaries noted, already in 1952, that one

9. See ICRC DPH GUIDANCE, *supra* note 2, at 27.

10. First Geneva Convention, *supra* note 1, art. 3; Second Geneva Convention, *supra* note 1, art. 3; Third Geneva Convention, *supra* note 1, art. 3; Fourth Geneva Convention, *supra* note 1, art. 3.

11. INT’L COMM. OF THE RED CROSS, COMMENTARIES ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE

possible criterion to determine the existence of an NIAC is that “the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.”¹²

In 1977, Additional Protocol II was adopted and complements Common Article 3 with additional rules that are applicable in NIACs. Article 1, paragraph 1 of Additional Protocol II provides that it applies to armed conflicts:

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 this Protocol.¹³

Article 1, paragraph 2 further specifies that it does “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”¹⁴ Additional Protocol II has a narrower scope of application compared to Common Article 3 and sets a high threshold with respect to organization and intensity,¹⁵ notably by requiring territorial control by the organized armed group.

The case law by the International Criminal Tribunal for the Former Yugoslavia (ICTY) has further specified factors to determine when the criterion of organization is fulfilled.¹⁶ These factors could be classified in two broad categories. The first category relates to the internal structure and includes the existence of a responsible command capable of exercising authority and direction over the forces in the accomplishment of the mission; of an organizational chart; and of internal rules, including disciplinary rules. The second relates to the operations performed by the group: the ability to recruit and train new fighters, to control territory, to set up headquarters, and to launch operations bringing together different units. The ICTY has highlighted that these factors are neither cumulative criteria, nor a checklist for

WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 422, 429 (2d ed. 2016) [hereinafter ICRC COMMENTARIES].

12. INT’L COMM. OF THE RED CROSS, 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); see also ICRC COMMENTARIES, *supra* note 11, at ¶¶ 422–437.

13. Protocol II, *supra* note 1, art. 1, ¶ 1.

14. *Id.* art. 1, ¶ 2.

15. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4453 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987); Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008) [hereinafter Boškoski Trial Judgement].

16. Boškoski Trial Judgement, *supra* note 15, ¶¶ 194–206.

demonstrating the existence of the organizational criterion, but rather useful indicia. In brief, the organizational factor cannot be determined *in abstracto*, but requires an analysis on a case-by-case basis.

Interestingly, judicial practice has interpreted the criterion of organization quite leniently. The Inter-American Commission on Human Rights in *Abella v. Argentina*—the famous Tablada case—has decided that it sufficed for the armed group to be “relatively organized.”¹⁷ The ICTY, in *Prosecutor v. Limaj*, for instance, also adopts a quite flexible approach when it qualifies the Kosovo Liberation Army (KLA) as an organized armed group despite the fact that the “organisational structure and the hierarchy of the KLA were confusing.”¹⁸ On its part, the ICRC opines that what is required is a “minimum” or “sufficient” level of organization.¹⁹ State practice is not extremely clear in this respect. While some states seem prompt to consider that alleged transnational terrorist networks are organized armed groups for the purpose of IHL,²⁰ others have been reluctant to recognize that terrorist groups operating at home are more than criminal bands, but rather organized armed groups for the purpose of IHL.²¹

As evidenced by these various interpretations, the notion of “organization” is flexible enough to adapt to different types of armed groups. Not only traditional, hyperhierarchical, pyramidal armed groups can be considered organized armed groups. There is no one-size-fits-all definition of such groups. Nevertheless, in order not to deprive the criterion of “organization” of its meaning, it is worth recalling the object and purpose of this notion. In other words, some minimum requirements to establish the existence of the organization criterion should be deduced from the “why” question.

There are in fact two main reasons why the “organization” of armed groups is key from an IHL prism. The first reason is to distinguish proper armed conflicts from “isolated,” “sporadic,” or otherwise less serious acts of violence performed by unorganized

17. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 ¶ 152 (1997).

18. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 132 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

19. Int’l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, at 5 (Mar. 2008); see also ICRC COMMENTARIES, *supra* note 11, ¶¶ 423, 429.

20. Consider, for example, the United States’ position in relation to Al Qaeda. Gloria Gaggioli, *The Use of Force in Armed Conflicts: Conduct of Hostilities, Law Enforcement and Self-Defense*, in *COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE* (Christopher M. Ford & Winston S. Williams eds., forthcoming 2018) [hereinafter Gaggioli *COMPLEX BATTLESPACES*].

21. As an illustration, consider Russia’s position in relation to the Chechen rebels, or Turkey’s position in relation to the Kurdistan Workers’ Party (PKK). See *id.*

criminal bands.²² This requires the ability of the armed group to launch military operations bringing together different units and to confront enemy armed forces in the context of proper armed clashes, which is illusory without proper organization. Several lower level attacks may give rise to an armed conflict, but there must be a link, a “continuum,” between various attacks performed by the same group. In other words, the organization of the armed group is a prerequisite for a sufficient intensity of violence, which is the second necessary criterion to fulfill for establishing the existence of an armed conflict.²³

The second reason is to make sure that the group would be able to respect IHL.²⁴ To be sure, this does not mean that the group must respect IHL for the latter to apply. This would be nonsensical because it would mean that IHL does not apply unless it is respected. Rather, this means that the group must have the capacity to respect IHL. Terrorist groups may well be capable of complying with IHL even if the perpetration of serious violations of IHL is part of their strategy.²⁵ What is required is the existence of a certain accountability of the group for the acts of their members. This “accountability” could exist even if fighting forces might be given a lot of initiative in the accomplishment of the mission, but at the very least the armed group, through a responsible command, must exercise sufficient control of the acts of their members for such acts to be considered their own.

From the foregoing, there is little doubt, for instance, that the Islamic State in Syria and Iraq notably corresponds to an organized armed group. It has been able to mount several sustained attacks and concerted military action and there is a clear continuum/strategy behind these attacks. Moreover, it has an internal structure and disciplinary system which would allow it to ensure respect for IHL if the responsible command so wished. The same can be said for instance of al-Qaeda in the Arabian Peninsula.

No sufficient evidence has been adduced however to demonstrate that al-Qaeda or the Islamic State are worldwide unitary transnational organized armed groups. Were attacks mounted by alleged cells of al-Qaeda or the Islamic State all around the world part and parcel of a same “continuum of attacks”? Is there an almighty responsible command able to supervise attacks and to have control over military operations globally? Probably not. The mere fact that various neo-jihadist cells share a common ideology and have loose connections with one another is not enough to consider that they all together constitute an organized armed group for the purpose of IHL.

22. See, e.g., Protocol II, *supra* note 1, art. 1, ¶ 2; ICRC COMMENTARIES, *supra* note 11, ¶431.

23. For discussion on the intrinsic links between the criteria of organization and intensity, see ICRC COMMENTARIES, *supra* note 11, ¶ 434.

24. See *id.* ¶¶ 425, 429; Protocol II, *supra* note 1, art. 1, ¶ 1.

25. See Bošković Trial Judgement, *supra* note 15, ¶¶ 204–05 (explaining that a pattern of LOAC violations does not support inference that group is unable to comply).

Considering al-Qaeda and the Islamic State as single worldwide organized armed groups is probably a fiction; certainly, a useful one from some states' perspectives because it facilitates considerably the classification of situations of violence involving neo-jihadist terrorist groups and because it enables the applicability of IHL with its more permissive rules pertaining to targeting and detention of alleged members of organized armed groups. From a technical-legal perspective as well as from a humanitarian perspective, however, such fictions must be unveiled and discarded.

Nevertheless, nothing in IHL indicates that the existence of organized armed groups must be assessed on a case-by-case basis in a particular state or geographical area ("territorially-based") only.²⁶ And to the extent that the Islamic State has operated as a single entity in the territories of Iraq and Syria, notably, it may certainly be qualified as a "transnational" armed group.²⁷ It is therefore not impossible for an organized armed group to operate in numerous states, and allegedly even without any territorial control, provided that the group is able to perform attacks of a sufficient magnitude and which are linked with one another ("continuum of attacks") and that the responsible command/management exercises a sufficient control over the acts performed by its members. State borders are therefore not necessarily key, although it is in practice difficult (but not impossible) to assess the organization of such groups without adopting a territorial approach.

The terminology used by states, the United Nations, and the media tends to indicate that global jihadi terrorism takes the shape of "networks" (i.e., configurations which have no unitary structure but are made of groups which are loosely linked with one another). Equating "networks" with "organized armed groups" for the purpose of IHL, as is too often the case, is an aberration. A subtler, and more accurate (but equally problematic), way of analyzing this phenomenon under IHL would be to enquire whether al-Qaeda and Islamic State global networks can be considered associations made of several armed groups, which can be considered "allies" or "co-belligerents." This other way of analyzing the phenomenon gives rise to a whole range of new legal questions which remain underexplored.

Which level of granularity is needed to determine that a group is a single organized armed group? If a group splits into two units which retain links, should we consider these groups two branches of the same armed group or as two armed groups? Wouldn't too much granularity render the classification of situations of violence an unsurmountable

26. The ICRC adopts such a case-by-case, territorial approach. See ICRC CHALLENGES REPORT, *supra* note 8, at 10.

27. Pavle Kilbarda & Gloria Gaggioli, *Globalization of Non-International Armed Conflicts*, in THE GREY ZONE: CIVILIAN PROTECTION BETWEEN HUMAN RIGHTS AND THE LAWS OF WAR (Mark Lattimer & Philip Sands eds., forthcoming July 2018) (manuscript at 13).

task? If a new “cell,” for instance a small organized armed group of thirty people, emerges and joins the network of al-Qaeda, does this group immediately become a “co-belligerent” even if it has never conducted an attack on its own?²⁸ What if terrorist cells provide military support to the wider network, can these cells be considered belligerent parties involved in a pre-existing NIAC? In other words, could the “support-based approach” advocated by the ICRC be considered applicable not only among states but also among nonstate actors?²⁹ Would this not constitute a dangerous slippery slope insidiously expanding the so-called global war on terror? How should one justify the acceptance of the “support-based approach” for states but not for nonstate actors, taking into account the principle of equality of belligerents? All these issues require further analysis and conceptualization.

IV. THE NOTION OF “MEMBERSHIP” IN AN ORGANIZED ARMED GROUP UNDER INTERNATIONAL HUMANITARIAN LAW

While IHL provides a few indications regarding the meaning of “organized armed groups,” the notion of membership in an armed group for the purpose of targeting is totally absent from IHL treaties. Additional Protocol II refers to the notion of “direct participation in hostilities”³⁰ but it does not contain a single provision relating to targeting based on membership in an organized armed group.

The current mainstream interpretation, whereby targeting of nonstate actors in NIAC is not only based on direct participation in hostilities but also on membership in an armed group, is the result of an analogy: if members of state armed forces are always targetable unless they are *hors de combat*, it should be the same regarding the members of nonstate organized armed groups. The principle of equality of belligerents may be further adduced to support such an interpretation.

28. See Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining “Organized Armed Group”*, 89 INT’L L. STUD. 75 (2013) (justifying the targeting of Al Qaeda’s affiliates based on the notion of strategic influence of Al Qaeda over affiliates). For criticism of the “affiliates” or “co-belligerency” theories, see generally Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. 67 (2017) (discussing the emergence of a reliance on co-belligerency evolving from conflict with Al Qaeda and other groups). See also Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations against Armed Groups*, 93 INT’L L. STUD. 214, 240–43 (2017) (discussing the rise of the term “co-belligerents” in legal discourse).

29. See generally 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*, 97 INT’L REV. RED CROSS 1227 (2015) (discussing the ICRC’s legal position and the theory that support provided by a third power makes the latter a party to a pre-existing armed conflict).

30. Protocol II, *supra* note 1, art. 13, ¶ 3.

Now, if we accept this (not uncontroversial) analogy,³¹ membership in an armed group for the purpose of targeting could be understood in three different ways: based on conduct, status, or function.

1) Should membership be a notion that is attached only to individuals whose conduct is to “continuously” directly participate in hostilities? If that were the case, the added value of the notion of “membership” compared to “direct participation in hostilities” would be greatly reduced. It is submitted that if membership entirely depends on actual conduct, this notion becomes useless and should simply be abandoned. In other words, if targeting based on “membership” has to mean something, it has to be more permissive than just direct participation in hostilities. According to the ICRC,

this approach [i.e., considering that membership in armed groups is simply a continuous form of civilian direct participation in hostilities] would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.³²

2) Should membership be based on status? From an IHL perspective, members of organized armed groups (also called fighters) precisely have no right to participate directly in hostilities and therefore no combatant immunity and no prisoner of war status if captured.³³ From an international law perspective, status is definitely not an appropriate concept or wording to define membership in an armed group. Status could however be understood more broadly as everyone who is considered a member of the group from the armed group’s perspective.³⁴ In some instances, armed groups keep lists of their members and develop organigrams. These documents could constitute evidence of membership. Such an approach (at least if adopted as the single definition of membership) is, however, objectionable under two limbs: first, it may be extremely difficult for belligerents to know who is a member of the group they are fighting against, unless they wear a distinctive sign; second, it would be particularly formalistic to only rely on the armed group’s subjective appraisal of membership. As indicated by *ex post* acknowledgment of attacks by groups such as the Islamic

31. See LUBELL, *supra* note 3, at 152 (discussing the controversy surrounding the notion of “continuous combat function”); MURRAY, *supra* note 3, at 114, ¶ 5.09 (saying that under IHL for NIAC “all individuals are protected from direct attack, ‘unless and for such time as they take a direct part in hostilities’”).

32. ICRC DPH GUIDANCE, *supra* note 2, at 27–28.

33. The discussions preceding the adoption of the 1949 Geneva Conventions and 1977 Additional Protocols to the Geneva Conventions clearly demonstrate that states did not want to afford privilege or immunity from prosecutions to members of organized armed groups. See Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT’L L. 219, 244 (2011).

34. See SIVAKUMARAN, *supra* note 2, at 360 (referring to the notion of “*de jure* membership”).

State, for instance, armed groups might have various incentives to exaggerate their membership. True, regarding state armed forces, one relies on the state's definition of its armed forces, but domestic law supports this characterization and, to that extent, membership remains the result of a legal appreciation and is not merely subjective.

3) The last option is to rely on the notion of function. As a member of an organized armed group, an individual is given a specific function or role in such a group. But not every function in a nonstate party to a conflict should suffice to allow targeting. Clearly, membership for the purpose of targeting implies that the individual has a function in the armed wing of the nonstate party to a conflict. Belonging to the political or humanitarian wings of a nonstate party, in the same way as belonging to the political apparatus of a state, does not turn an individual into a military objective for the purpose of IHL.³⁵ In the practice of armed groups, it is not rare that some members hold both civilian and military functions. In other words, the lines between military and civilian functions are blurred. If there is overlap between the two functions, a possible solution would be to examine which is the predominant function, although this determination might not always be evident from the facts. Regarding members who are switching roles, a solution might be to determine the function of the individual at the moment of targeting. In any case, completely removing the distinction between the civilian wings of an armed group and the military wings on the grounds that it is increasingly difficult to make such a distinction is a slippery slope that might lead to the targeting of actual civilians.

An additional question is how to define who constitutes the military wing of a nonstate party to a conflict (i.e., who constitutes the organized armed group *sensu stricto*). The ICRC has been the first to attempt to conceptualize this notion of membership in an organized armed group. It developed the notion of "continuous combat function" and held that the "decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities."³⁶ In other words, this definition excludes individuals who support an organized armed group, but whose function does not involve direct participation in hostilities, such as "recruiters, trainers, financiers and propagandists"³⁷ or those in charge of "purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature."³⁸ A famous example is the situation of the organized armed group's cook. This person is not to be considered targetable in the ICRC's view. Some have criticized this

35. See ICRC DPH GUIDANCE, *supra* note 2, at 32.

36. *Id.* at 33.

37. *Id.* at 34.

38. *Id.* at 35.

approach by submitting that it would be unfair and contrary to the principle of equality of belligerents since a cook (or anyone else with a support function) incorporated in state armed forces is targetable, while his or her homologue belonging to a nonstate party to a conflict would be protected against attacks (unless and for such time as he/she directly participates in hostilities).³⁹ Nevertheless, to the extent that the military necessity of targeting cooks and other individuals with support functions is nonexistent (or at least very much reduced), the approach adopted by the ICRC in this respect seems reasonable.

The ICRC notion of continuous combat function is not, however, as restrictive as one might think. It does not only include individuals who are actually fighting or involved in the execution of attacks. It involves also individuals in charge of planning attacks or commanding acts amounting to direct participation in hostilities. Any function that involves direct participation in hostilities as part of the group is sufficient to establish membership in the organized armed group.⁴⁰

The continuous notion in “continuous combat function” may also be confusing. The continuous character of the function is not related to combat activities. The ICRC Guidance on direct participation in hostilities highlights that “[a]n individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”⁴¹ Thus, for instance, a person trained and hired to conduct a single suicide attack can be considered as having a continuous combat function even before the attack, and the fact that the attacker would in all likelihood die during his first attack has no bearing on the continuity of his function in the group. Duration of membership is not required. What matters is continuity regarding membership, which merely means that the person that has been given a specific function in the group has not disengaged from his/her fighting function.⁴² The member must become part of a group and his/her acts are not performed outside the organization in a sporadic or unorganized manner.

Assuming that the notion of continuous combat function and its theoretical conceptualization as proposed by the ICRC were to be generally accepted, a problem remains: how concretely may states and other external actors determine in practice that a person has assumed a particular function in an organized armed group? Which factors, or factual elements, need to be taken into account and/or fulfilled to

39. Watkin, *supra* note 2, at 676.

40. See ICRC DPH GUIDANCE, *supra* note 2, at 34.

41. *Id.*

42. *Id.* at 28 (interpreting Article 3’s requirement that members of armed forces are considered as “taking no active part in the hostilities”, and therefore protected, once they have disengaged from their fighting function by “hav[ing] laid down their arms” or once they are placed *hors de combat*).

establish functional membership in the absence of clear intelligence to that effect?

In this respect, few responses can be found in the ICRC Guidance (which appears at times contradictory⁴³) as well as in legal scholarship. State practice on this remains largely classified, although publicly available information, regarding the targets of drone strikes for instance, tends to indicate that membership for the purpose of targeting is sometimes understood very broadly. Certainly, a case-by-case approach is required and there is no one-size-fits-all approach to establish functional membership. Nevertheless, the notion deserves to be further delimited and framed. At a minimum, it has to be highlighted that mere ideological bounds with an organized armed group cannot be equated with functional membership. More broadly, functional membership shall not rely on subjective factors, but on objectively verifiable ones only. The notion of functional membership should also be understood as requiring that an individual has been given a mission *ex ante* and that this individual has assumed it. It somehow requires a “contractual” relationship (whether free or coerced) involving both the group and recruit. In other words, the mere pledging of allegiance by an individual to an organized armed group should not be considered sufficient without more to establish functional membership. In the same vein, *ex post* acknowledgment by an organized armed group of isolated and sporadic acts of violence should not be sufficient to establish membership, at least retroactively (unless they are unequivocal and unqualified).⁴⁴

The standard of proof required to allow targeting based on functional membership should also be sufficiently high. In this respect, the notion of “pattern of life” that is being used in the context of so-called signature strikes is worrying.⁴⁵ The mere facts, for instance, for

43. The ICRC DPH Guidance devotes just one paragraph on how to identify functional membership in practice. *Id.* at 35. Strangely enough, it mentions that “[a] continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.” *Id.* Wearing a uniform is taken as an indication of membership irrespective of the function performed in the group. The “conclusive behaviour” seems to be closer to a conduct-based understanding of membership rather than functional membership. In other words, none of the examples provided actually relate to function. See SIVAKUMARAN, *supra* note 2, at 362 (criticizing the ICRC DPH Guidance and highlighting possible contradictions in this document).

44. For more information, see the commentary to Article 11 of the Draft Articles on State Responsibility. *Report of the International Law Commission on the Work of its fifty-third session*, [2001] 2 Y.B. Int'l L. Comm'n 32, 52–54, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

45. U.N. Secretary-General, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 74, U.N. Doc. A/68/389 (Sept. 18, 2013) [hereinafter U.N. *Protection of Human Rights*].

individuals to stay a few days in terrorist guest houses, to entertain family links or friendships with several persons belonging to an organized armed group, to live in certain areas controlled by organized armed groups, or to visit certain places (e.g., extremist mosques) should in no way be considered sufficient evidence to allow targeting based on membership. Such vague circumstantial evidence may be sufficient in the context of security detention as a preventative measure and with a view notably to gather further information, but not for targeting.

It is also concerning that notions of “association” with terrorist groups, widely used for instance in the framework of UN counter-terrorism sanctions and in the domestic criminal law spheres, seem to be indiscriminately copy-pasted and transposed in IHL for the purpose of targeting. In brief, the notion of membership in an organized armed group for the purpose of targeting has to be even more narrowly defined than membership in an organized armed group as a justification for security detention or membership/association with a terrorist group for the purpose of criminal prosecution or international sanctions. Even an episodic attack by a particular individual is not evidence of functional membership, but should rather be seen as an instance of direct participation in hostilities.

A relevant piece of evidence to establish functional membership in an organized armed group for the purpose of targeting may include information to the effect that the organized armed group has provided training to an individual in relation to direct participation in hostilities as part of the group, that the organized armed group has provided weapons to an individual, that it has selected targets that the individual should strike, or otherwise that it has helped an individual to plan an attack. Some of these elements may arguably be carried out even through web relationships.

Lastly, it should be recalled that even when an individual can be held to have a continuous combat function, this does not necessarily mean that this person is targetable whenever and wherever the person is located. Consider, for instance, the case of a French so-called foreign terrorist fighter who travels to Syria and is trained in conducting terrorist attacks in Islamic State camps. May he or she be targeted when he or she travels back to France or to a neighboring state, such as Switzerland? The geographical scope of application of IHL needs to be taken into account. This issue remains highly controversial, but the ICRC’s approach, which is probably the most protective, is that IHL applicability is limited to the territory controlled by the belligerent parties (which in our scenario includes France, but not Switzerland).⁴⁶

46. ICRC Challenges Report, *supra* note 8, at 22; Jelena Pejić, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, Int’l Comm. Red Cross, at 31–39 (May 7, 2015). *Contra* Nils Melzer, *European Parliament, Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* 21 (2013) (“Once

In Switzerland, thus, force against the “foreign fighter” may only be used in accordance with the human rights law enforcement paradigm.

But even on the territory controlled by the belligerent parties (here France), a targeted killing operation would appear to most military commanders as completely excessive and inadequate and certainly difficult to justify in front of a court such as the European Court of Human Rights. Two legal justifications may be adduced to reach the conclusion that the “foreign fighter” may not be targeted and killed. A first legal reasoning would be to rely on the famous Recommendation IX of the ICRC Guidance on Direct Participation in Hostilities on the notions of military necessity and humanity as additional legal principles under IHL, which may further constrain the conduct of hostilities in relation to any person who is *a priori* a legitimate target under IHL.⁴⁷ Another possibility would be that—for some reason (which deserves to be better elaborated)—human rights law would prevail over IHL in such a specific scenario.⁴⁸ These issues remain highly disputed as evidenced by the clarification process led by the ICRC on the Use of Force in Armed Conflicts,⁴⁹ but it is to be hoped that whatever the legal reasoning adopted, capture/arrest operations are preferred in such cases.

V. CONCLUSIVE REMARKS—FURTHER CLARIFICATION THROUGH A LEGAL-EMPIRICAL APPROACH?

The criterion of organization of armed groups, together with the criterion of intensity, is crucial for the classification of a situation of violence as an NIAC. In terms of targeting, it is also increasingly admitted that members of organized armed groups are legitimate targets because of their membership in an organized armed group. However, the criteria of organization for the purpose of defining armed groups under IHL and the notion of membership in such groups are not clearly defined under international law. In light of contemporary armed conflicts involving particular types of entities, such as transnational terrorist networks or transnational criminal gangs, these notions of organization and membership deserve to be further clarified or even revisited.

the objective criteria for the existence of an armed conflict are met, the applicability of humanitarian law is not territorially delimited but governs the relations between the belligerents irrespective of geographical location.”); Michael N. Schmitt, Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law, 52 Colum. J. Transnat'l L. 77, 99 (2013) (discussing the possible negative effects of a rule that does not allow States to target individuals in a non-belligerent territory).

47. See ICRC DPH GUIDANCE, *supra* note 2, at 77–82.

48. For further exploration of this issue, see generally Gaggioli COMPLEX BATTLESPACES, *supra* note 20.

49. See generally GLORIA GAGGIOLI, INT'L COMM. OF THE RED CROSS, EXPERT MEETING: THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS (2013).

A classical interpretation of IHL based on the text, context, object, and purpose of IHL treaties as suggested above is useful and necessary but may be insufficient. It should be complemented by a robust empirical analysis aimed at better understanding the structure and functioning of contemporary entities such as transnational terrorist networks, which are often assumed to be organized armed groups for the purpose of IHL without much elaboration. Comparing such groups with more traditional organized armed groups (such as the LTTE) based on some key organizational factors that have already been identified based notably on the jurisprudence of international criminal tribunals⁵⁰ may further help to identify differences and commonalities between such entities and to draw the line between those that may be deemed sufficiently organized for the purpose of IHL and those which are not. Empirical methods such as a Social Network Analysis, which aims at analyzing the types of links between certain individuals/entities, may further contribute to such an understanding.

It would also be immensely useful to analyze and compare the practice of several states in order to understand how they determine the existence of an organized armed group and, most importantly, how they establish membership in such groups. Obviously, a methodological issue in this respect is the classified character of much of this information and a number of commentators have already criticized this lack of transparency, which may at times be excessive and not entirely justified by security considerations.⁵¹ For instance, states could indicate the types of factors taken into account to establish membership in an organized armed group without endangering their military operations. In any case, many relevant indications can already be deduced from publicly available information in relation, for instance, to the targets of drone strikes.

A legal-empirical approach is needed to clarify key concepts of IHL, such as organization of and membership in armed groups, and therefore to enhance the legal analysis under IHL. Such approaches—based on the realities of armed groups and state practice—may also ensure that exercises aimed at clarifying the law are realistic and operationally relevant and not merely the fruit of elaborated legal constructs that are disconnected from reality. Contemporary armed conflicts have shown that when the definitions of key legal concepts such as “direct participation in hostilities” or “continuous combat function” remain disputed and/or difficult to operationalize, military circles tend to replace them with other (inappropriate) concepts, such as self-defense, which may (wrongly) appear more straightforward.⁵² Reaching consensus on such important IHL concepts should thus be a priority for the international community.

50. See Boškoski Trial Judgment, *supra* note 15, ¶¶ 194–206.

51. See U.N. *Protection of Human Rights*, *supra* note 45, ¶¶ 41–50.

52. Gaggioli COMPLEX BATTLESPACES, *supra* note 20.