6. Exploring the civilian and political institutions of armed non-state actors under IHL in an age of rebel governance

Katharine Fortin

I. INTRODUCTION

Considering the fact that it is estimated that between 60 and 80 million people currently live under the control of armed non-State actors (ANSAs), it is remarkable that legal scholarship has focused so little on their civilian and political institutions. Indeed, outside the discipline of law, a whole field of scholarship has built up analysing the formal and informal structures and practices that ANSAs develop when they control territory and provide welfare and public services. While these institutions are not always separate from the ANSAs' armed forces, they are sometimes (semi-)distinct entities, taking the form of civilian administrations, government ministries (e.g., of religion, health, taxation, education, agriculture, or extractive industries), legislatures, police forces, schools, media outlets and universities. The purpose of this chapter is to investigate the relevance of the non-military part of ANSAs, when they exist, for the purposes of understanding non-State Parties of non-international armed conflicts (NIACs). Adopting historical and contemporary perspectives, the chapter provides insights into how such entities have been dealt with by criminal courts and tribunals when determining whether the threshold of a NIAC has been met for the purposes of prosecuting alleged war crimes. The chapter ends with some closing reflections on why ANSAs' institutions have found themselves in such an ambiguous shadowland in international law, where the legal relevance of their existence is rarely discussed head-on or denied.

II. CIVILIAN AND POLITICAL INSTITUTIONS OF ANSAS: A FACTUAL SKETCH

The growing field of scholarship known as 'rebel governance' offers empirical and theoretical insights into the different ways that some ANSAs provide public goods and services, such as healthcare, education, birth and marriage registrations, justice and security, and how they interact with civilian communities through their civilian and political institutions. Placing a focus on the 'wartime institutions', 'civilian administrations', 'civilian structures', 'rebel governments', 'administrative wing and civilian government' and 'political institutions' of armed groups,[1] this varied body of literature examines the diverse ways in which many ANSAs set up or co-opt (pre-existing) administrative or political structures or bodies (e.g., ministries, committees, courts, police forces) in the territory under their control.[2] It also examines different armed groups' motivations for engaging in governance activities, finding that a group's control of territory and ideology (i.e., 'how the group understands its rebellion and its relation to its territory and population') are key determinates of a group's governance activities.[3] The scholarship shows that ANSAs' attitudes to governance differ greatly per group and over time. The Liberation

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[1] For the term 'wartime institutions', see Ana Arjona, 'Wartime Institutions: A Research Agenda' (2014) 58(8) *Journal of Conflict Resolution* 1361. For 'civilian structures' and 'civil administration' see Nelson Kasfir, 'Rebel Governance – Constructing a Field of Inquiry: Definitions, Scope, Patterns, Order, Causes' in Ana Arjona, Nelson Kasfir, Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015) 27 and 35–6, for 'rebel governments', see Zachariah Mampilly, 'Performing the Nation-State: Rebel Governance and Symbolic Processes', in Arjona, Kasfir and Mampilly, ibid., 74. For the term 'administrative wing and civilian government', see Bert Suykens, 'Comparing Rebel Rule Through Revolution and Naturalization: Ideologies of Governance in Naxalite and Naga India', in Arjona, Kasfir and Mampilly, ibid., 141. For the term 'political institutions' see Zachariah Mampilly and Megan A Stewart, 'A Typology of Rebel Political Institutional Arrangements' (2020) 65(1) *Journal of Conflict Resolution* 15.

[2] See e.g., Cyanne E Loyle, 'Rebel Justice during Armed Conflict' (2020) 65(1) *Journal of Conflict Resolution* 108; Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Oxford University Press 2016); Marta Furlan, 'Understanding Governance by Insurgent Non State Actors: A Multi-Dimensional Typology' (2020) 22(4) *Civil Wars* 478. Territorial control has been defined as the group's ability 'to move freely, access information and resources, and prevent its enemies' movement and access in a particular place and time. Territorial control is a continuous concept: a combatant may have partial control if it can restrict, even if not eliminate, its enemy's movement and access'. Michael A Rubin, 'Rebel Territorial Control and Civilian Collective Action in Civil War: Evidence from the Communist Insurgency in the Philippines' (2020) 64 *Journal of Conflict Resolution* 459, 463.

[3] Suykens (n 1) 154.

Tigers of Tamil Eelam (LTTE) and Islamic State group are often held up as high-water marks of rebel governance and have been amply studied.[4] Both entities have set up and co-opted sophisticated governance structures with government ministries, extensive judiciaries, tax offices and police forces. They have also employed or profited from civilians working in their civilian administrations, who did not necessarily have membership of the group.[5]

The idea that ANSAs govern in territory under their control raises a plethora of important legal questions, some of which have been dealt with in the literature studying the relationship between international humanitarian law (IHL) and international human rights law (IHRL). But perhaps the most fundamental of these questions, which has not been addressed in detail, is how the civilian and political wings of armed movements can and should fit into the legal framework of IHL. Should they be treated as part of the legal entity that is a Party to the armed conflict and bound by international law? And to know this, is it necessary to be in possession of information about the relationship of an armed group's political and civilian institutions, with their armed forces? Discerning such a relationship is often difficult because first, information on this relationship is scarce. Second, ANSAs have very different organizational structures both to each other and to States, and they may change over time. Third, the reality of the relationship on the ground may be different from any available organograms and structural charts publicly available. For example, in Mampilly's study of the LTTE he shows that although the rebel leadership established a government administration that was nominally separate from the military wing, the formal separation was compromised by the fact that political personnel were generally either from the military wing or former combatants.[6] A similar dynamic is seen in Idlib where Hay'at Tahrir al-Sham (HTS) has

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[4] See e.g., Zachariah Mampilly, *Rebel Rules: Insurgent Governance and Civilian Life During War* (Cornell University Press 2015); Niels Terpstra and Georg Frerks, 'Governance Practices and Symbolism: De Facto Sovereignty and Public Authority in "Tigerland"' (2018) 52(3) *Modern Asian Studies* 1001; Kristian Stokke, 'Building the Tamil Ealam State: Emerging State Institutions and Forms of Governance in LTTE-controlled Areas in Sri Lanka' (2006) 27(6) *Third World Quarterly* 1021; Aymenn Al Tamimi, 'The Evolution in Islamic State Administration: The Documentary Evidence' (2015) 9(4) *Perspectives on Terrorism* 117; Matthew Bamber, 'Without Us There Would be No Islamic State: The Role of Civilian Employees in the Caliphate' (2021) 14(9*) CTC Sentinel* 31; Mara R Revkin, 'When Terrorists Govern: Protecting Civilians in Conflicts with State-Building Armed Groups' (2018) 9 *Harvard National Security Journal* 100.

[5] See Bamber (n 4), and Joanne Richards, *An Institutional History of the Liberation Tigers of Tamil Ealam* (CCDP Working Paper Graduate Institute 2014); Stokke (n 4). See also Sobol and Gaggioli, Chapter 4 in this volume for further analysis on the notion of membership in international law.

[6] Mampilly (n 4) 109.

set up and backed the Salvation Government. The Salvation Government is a civilian administration with thousands of employees that work at eight ministries focusing on issues such as interior justice, endowments, education, health and agriculture.[7] While the Salvation Government presents itself as a civilian administration run by technocratic ministers with academic or scientific backgrounds, its independent character is compromised by the fact that several of its ministries are led and staffed by HTS-linked figures.[8] It has been alleged that the Salvation Government is simply a 'technocratic façade' or 'tool' to give the HTS legal and administrative cover.[9] By investigating the relevance of the non-military part of ANSAs for the purposes of understanding non-State Parties of non-international armed conflicts, the chapter will also consider whether and how these questions of independence might be legally relevant.

III. CIVILIAN ADMINISTRATIONS: THE HISTORICAL FRAMEWORK

Historically, the question of whether an armed group had a civilian government or non-military wing was essential to deciding whether an internal armed conflict would be treated as a 'belligerency' under international law.[10] In 1900, the *Institute de Droit International* indicated that there were three conditions for an armed conflict to be treated as a belligerency by third States: (i) the insurgents had to control a given part of the national territory; (ii) they had to have elements of a regular government *de facto* exercising in that part of the territory the ostensible rights of sovereignty; and (iii) their struggle had to be conducted by organized forces subject to military discipline and complying with the laws and customs of war.[11] According to Oppenheim, for a situation to

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[7] Editorial, 'Syria's Idlib Enclave: How Does it Work?' *France24* (28 June 2019) https://www.france24.com/en/20190628-syrias-idlib-enclave-how-does-it-work accessed 30 November 2022. See Furlan, Chapter 9 in this volume for further analysis on the provision of governance by the Salvation Government.

[8] International Crisis Group, 'The Best of Bad Options for Syria's Idlib', Middle East Report No. 197 (14 March 2019) 10. See also Nasar Alaa, 'After 2 years of governing Syria, HTS "Salvation Government" deepens misery in Idlib', *Syria Direct* (25 January 2020) https://syriadirect.org/after-two-years-of-governing-hts-salvation-government-deepens-misery-in-idlib/ accessed 30 November 2022.

[9] Nisreen Al-Zaraee and Karam Shaar, 'The Economics of Hayat Tahrir al-Sham' (*Middle East Institute*, June 2021) https://www.mei.edu/publications/economics-hayat-tahrir-al-sham#pt2 accessed 30 November 2022; and Nasar Alaa (n 8).

[10] This was important because when conflicts were determined as a 'belligerency' by the parent State, the insurgent force and parent State would both be bound by the laws of war that usually applied to armed conflicts between States.

[11] Desjardins and Marquis Olivart, 'Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconn-

be recognized as a belligerency, the insurgents needed to occupy a substantial part of national territory and hold orderly administration in that part of the territory.[12] For details of what an orderly administration might have looked like in the nineteenth century, the statement of the US President Grant in 1875 is illuminating. Explaining why the United States did not recognize the belligerent status of the Cuban people fighting Spain, President Grant referred to the need for:

> a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government towards its own people and to other states, with courts for the administration of justice, with local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection or occasional skirmishes and place on the terrible footing of war, to which a recognition of belligerency would aim to elevate it to.[13]

The idea that an armed group was *required* to have a civilian administration to gain belligerent status can be explained by the fact that if this status was conferred, it would be treated like a State for the purposes of the laws of war and also inherit obligations of the parent State in relation to the territory under its control, including many that were not linked to the hostilities and required a different sort of capacity, such as those relating to the protection of foreign nationals and assets.[14] It would also be expected that the insurgent belligerent government would broker agreements in relation to practical civilian matters that arose out of the group's control of territory, rather than their military activities, such as postal relations or commercial activities.[15] The belligerent authority would also be required to remedy financial losses suffered by third

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nus qui sont aux prises avec l'insurrection' Institute de Droit International (Institute de Droit International, 8 September 1900) https://www.idi-iil.org/app/uploads/2017/06/1900neu02fr.pdf? accessed 6 October 2022, Article 8.

[12] Lassa Oppenheim, *International Law: A Treatise* (Longman, Harlow 1948) 249.

[13] See George Grafton Wilson, 'Insurgency and International Maritime Law' (1907) 1 *American Journal of International Law* 46, 48. See also the statement by the Spanish minister of State in a letter to the US Government. See Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018) 26, footnote 56.

[14] This would only be the case for all States if the parent State recognized the belligerency. In situations where a third State recognized the belligerency, it would be true for relations between the belligerent group and that third State. Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 95–7.

[15] Ibid.

States and take on more general due diligence obligations relating to the protection of individuals and assets.[16]

With the passing of time, the legal requirement that armed groups should have governmental capacity in addition to military capabilities has completely fallen away. This is not surprising, considering that its previous inclusion was so intimately linked to the belligerency framework which is hardly used anymore.[17] Indeed, the requirement that armed groups had a civilian administration has sometimes been identified as one of the reasons why the belligerency framework was under-employed. Lauterpacht wrote that in many cases 'the rebels, although powerful and persistent, [did] not possess sufficient cohesion to establish governmental agencies of some stability'.[18] When Common Article 3 (CA3) to the 1949 Geneva Conventions was drafted, the extent to which armed groups needed to be 'State-like' before they could be bound by international law was discussed in detail and at length. While some delegates wanted CA3 to codify the belligerency framework (which would then make it appropriate to include a requirement that the armed group had a State-like political and military organization), others aimed to create something completely new. If the article sought to establish a different approach, it made sense that its application could be based on a different set of underlying requirements.[19] In the end, the *travaux préparatoires* show that delegates decided to abandon the 'belligerency' approach in favour of a humanitarian perspective that restricted the obligations of 'each Party' to the most obvious and important rules of the 1949 Geneva Conventions.[20]

It is as a result of this decision, that all the ideas that were circulating during the drafting conference regarding the need for insurgents to have civilian wings were transferred to the Article's commentary, with the note that they were in 'no way obligatory' but could constitute 'convenient criteria' for

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[16] Ibid.

[17] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 20.

[18] Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 183.

[19] See 'Final Record of the Diplomatic Conference of Geneva of 1949', Vol II, Section B (Final Record, Vol II, B), Report for discussions (1949) 121. Compare the First and Second Draft of Common Article 3 (then Article 2a) drawn up by the first Working Party at Annex A and B with Annex C, D, E and F of the Seventh Report drawn up by the Special Committee of the Joint Committee, 124–127.

[20] See later discussion of the rejection of the first and second drafts of the first Working Party in the Report drawn up by the Joint Committee and presented to the Plenary Assembly, Final Record, Vol II, B, 129. See also continued debate on these issues in the 18th and 19th plenary meeting detailed at 325–39. For a good discussion of this see Rodenhäuser (n 13) 36–8.

their interpretation.[21] The commentary states that the insurgent group should possess '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'.[22] It then goes on to note that the:

(a) insurgents should have an organization purporting to have the characteristics of a State;
(b) that the insurgent civil authority exercises *de facto* authority over persons within a determinate territory;
(c) that the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war; and
(d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.[23]

While this text may not have much relevance today in terms of positive law, it can be taken as evidence of an understanding already in 1949 that non-State parties would and could often be more than simply a military force. It also reflects an appreciation on the part of the Geneva Conventions' drafters that when non-State parties did have a civil authority, the armed forces would often act under its direction. The text also provides evidence of an understanding that the insurgent civil authority was capable of binding the group as a whole (including its armed forces) to international humanitarian law.

IV. CIVILIAN AND POLITICAL WINGS IN CONTEMPORARY CONFLICT CLASSIFICATION

The criteria that are used today to determine whether internal violence has reached the level of a NIAC have very little in common with the 'convenient criteria' that was relegated to the 1950 ICRC commentary of CA3. The most influential contemporary case law laying out the foundation for the application of IHL is still that of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the much-cited Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in *Tadić*, the ICTY Appeals Chamber indicated that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government

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[21] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary, Vol. I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 49. This is also repeated in the commentary for Geneva Conventions III and IV.
[22] Ibid., 49–50.
[23] Ibid.

authorities and organized armed groups or between such groups within a State'.[24] In later case law, the ICTY developed a new set of 'convenient criteria', also in no way obligatory, to determine whether an armed group is 'organised' for the purposes of applying international humanitarian law. This criteria is still broadly applied at the International Criminal Court (ICC).[25] The criteria is divided into five broad categories:

(i) factors signalling the presence of a command structure;
(ii) factors indicating that an armed group can carry out operations in an organized manner;
(iii) factors indicating a level of logistics;
(iv) factors relevant to determining whether an armed group possesses a level of discipline and the ability to implement the basic obligations of CA3; and
(v) factors indicating that the armed group is able to speak with one voice.[26]

The indicators given under each of these five categories evidence that, unlike their 1950s predecessors, they enquire mainly into the group's military organization. The only two indicators that require (possible) incidental note to be taken of an ANSA's non-military parts are found in the first and fifth category, i.e., the recognition that that armed groups may issue political statements and communiqués and engage in political negotiations intended to end the conflict.[27]

The fact that the ICTY did not find it relevant to examine the place of an armed group's civilian or political institutions is not surprising when it is considered that it was determining the threshold for CA3 to be applicable, as well as customary international law, neither of which require a high degree of 'organisation' – or civilian wing – to be fulfilled. As stated by the International Court of Justice (ICJ), the norms contained in CA3 constitute a minimum yardstick reflecting the 'elementary considerations of humanity'.[28] It is also

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[24] *Prosecutor v Tadić* (Jurisdiction) IT-94-I-T, App Ch (ICTY, 2 October 1995) [70].

[25] *Prosecutor v Boškoski and Tarčulovski* (Trial Judgment) IT-04-82-T, T Ch II (ICTY, 10 July 2008) [194–206]; *Prosecutor v Bosco Ntaganda*, Judgment pursuant to Article 74 of the Statute (8 July 2019) ICC-01/04-02/06 (ICC Trial Chamber VI) [704]; and *Prosecutor v Dominic Ongwen*, Judgment pursuant to Article 74 of the Statute (4 February 2021) ICC-02/04-01/15 (ICC Trial Chamber IX) [2685].

[26] ICTY (n 25) [194–206].

[27] Ibid., [199] and [203].

[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* Merits, Judgment (1986) I.C.J. Reports 1986, 14 [114] also citing *Corfu Channel case*, Merits, Judgment (1949) I.C.J. Reports 1949, 22 [215].

not surprising when it is remembered that the two main armed groups that were assessed by the ICTY Trial and Appeals Chambers when developing the most detailed and oft-cited case law on the 'organisation criteria', were little more than guerilla groups that progressed into more formal army structures during the course of their lifetime.[29] Although the Kosovo Liberation Army (KLA) was found to satisfy the organization requirement, it was essentially an 'underground organization' whose operations were largely reactive to the constant threat of military action from Serbia. While the group controlled about 40 per cent of Kosovo at some point, its focus was not on governance activities or exercising civilian authority but on demonstrating that it constituted 'a real army'.[30] The National Liberation Army (NLA) in Macedonia, out of which the oft-cited *Boškoski* judgment emerged, was even less organized than the KLA. Many of the NLA's organizational features were modelled from the KLA. Its disciplinary code was taken over from the KLA, which was a much larger fighting force.[31] Rather than controlling territory in a manner that was 'governmental' in character, the NLA's control and military strategy was mainly disruptive, in that its main aim was to prevent the Macedonian forces from being present in particular areas of the country.[32] The factual nature of these groups provide a partial explanation for why the very formative case law that is often referred to define what an 'organised armed group' is under international law (i.e., the *Boškoski* judgment) does not contain any reference at all to ANSAs' governance or civilian wings.[33] The civilian structures of non-State parties were in fact not discussed in the case law from the ICTY at all, except to confirm that the convenient criteria mentioned by the ICRC in its 1950s commentary was not applicable.

Yet, it is interesting to note that in many of the recent cases before the ICC, the ANSAs under consideration had both military and non-military institutions. While the non-military institutions of these ANSAs were not nearly as organized and extensive as the administrative structures of the armed groups mentioned at the beginning of this chapter (i.e., the LTTE or Islamic State group), they were significant enough to be part of the ICC's analysis.

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[29] While the *Boškoski* case was based on the armed conflict in Macedonia, it relied heavily on the case of *Prosecutor v Limaj et al.* (Trial Judgment) IT-03-66-T, T Ch II (ICTY, 30 November 2005) for its elaboration of the 'organisation requirement'. The *Limaj* case related to the armed conflict in Kosovo.

[30] Henry Perritt, *Kosovo Liberation Army: The Inside Story of an Insurgency* (University of Illinois Press 2008) 86.

[31] ICTY (n 25) [272–3].

[32] Ibid., [242].

[33] It is noted that the criteria employed in *Limaj* also finds its roots in earlier case law studying Croatian forces, where governance was also not assessed.

For instance, in the *Lubanga* case, the accused belonged to the *Union des Patriotes Congolais* (UPC), a movement located in the Democratic Republic of Congo (the DRC) that had the *Forces Patriotiques pour la Libération du Congo* (FPLC) as its military wing. Lubanga was both the President of the UPC and the Commander in Chief of the FPLC. The ICC Trial Chamber noted that although many witnesses referred to the UPC, they treated the terms UPC and FPLC interchangeably. The Trial Chamber also referred to these entities interchangeably, regularly using the compound label UPC/FPLC, which it described as the 'political and military organization […] in charge of Bunia'.[34] When assessing whether the group met the organizational requirement, the Trial Chamber made little distinction between the different parts of the group, assessing them as a single entity. Applying the exclusively military criteria put forward in the ICTY jurisprudence cited above, it concluded that the UPC/FPLC 'as an armed force or group', was a 'Party' to the armed conflict.[35] Interestingly, the mixed civilian/military nature of the organization only became a matter of explicit legal relevance in the judgment when the Trial Chamber considered the individual criminal responsibility of the accused. Accepting that Lubanga was jointly president of the UPC and Commander in Chief of the FPLC, the Defence claimed that the latter's military position was purely a *de jure* appointment akin to the position of many heads of State. It went on to argue that Lubanga played a purely political role in the group, did not intervene in its military affairs and did not hold control over the military leadership.[36] The Chamber rejected this argument, finding that Lubanga, as President of the UPC-RP, endorsed a common plan to build an effective army to ensure UPC/FPLC's domination of Ituri and was actively involved in its implementation.[37] These findings were upheld by the ICC Appeals Chamber.[38]

A more detailed account of the founding and organization of the UPC/FPLC is found in the later *Ntaganda* judgment, which addressed the same conflict and time-period in the DRC. This later judgment provides more detailed information regarding the Executive wing of the UPC/FPLC and the emergence and structure of its military apparatus, the FPLC.[39] Just as the

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[34] *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute (14 March 2012) ICC-01/04-01/06 (ICC Trial Chamber I) [543].

[35] Ibid., [537], [550] and [563].

[36] Ibid., [81] and [1107–8]. See Defence Closing Statement, Friday, 26 August 2011, 29–33.

[37] Ibid., [1134].

[38] *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (1 December 2014) ICC-01/04-01/06 A-5 (ICC Appeals Chamber) [474–484].

[39] ICC (n 25 *Ntaganda*) [285–320].

Lubanga Trial Chamber, the *Ntaganda* Trial Chamber refers to both the FPLC and UPC somewhat interchangeably, often using the compound label 'FPLC/UPC'. In its analysis of whether the threshold of IHL had been met, the Trial Chamber takes no real note of the Executive branch of the FPLC/UPC, and pays attention only to aspects of the group that relate to its military wing and function (i.e., the military structure, training camps, units, commanders, ability to devise a military strategy and carry out coordinated operations, weapons, etc.).[40] The only non-exclusively military function of the group that the Trial Chamber notes relates to the 'UPC' (note: UPC, not FPLC or FPLC/UPC) entering into agreements with private companies on the exploitation of natural resources.[41] Despite hardly paying any attention to the UPC-part of the group, the Trial Chamber concludes that it was the FPLC/UPC which was the 'organised armed group' for the purposes of the IHL threshold test. The fact that both the *Lubanga* and *Ntaganda* Trial Chambers found that it was the UPC/FPLC that was engaged in the armed conflict in the DRC makes the relevance of the UPC to the 'organisation requirement' somewhat ambiguous. This is because, on the one hand, the UPC seems to have been considered a relevant part of the 'Party' to the conflict, but on the other hand, it was ignored during the analysis of the Party's 'organisation'. It is noteworthy, however, that the same two Trial Chambers take a slightly different approach when analysing the armed group against which the UPC/FPLC was fighting, the *Armée Populaire Congolaise* (APC). The *Ntaganda* Trial Chamber states unequivocally that it was 'the APC, as the armed wing of the RCD-K/ML, [that is the] organised armed group for the purpose of the present assessment'.[42] Seemingly, it considered the RCD-ML part of the group (i.e., the non-military part) to fall outside its analysis of 'organised armed group'.

In the *Bemba* case, the ICC Trial Chamber adopted a slightly different strategy again. In this case, the armed group in question was the *Mouvement de Libération du Congo* (MLC), originating in the DRC and fighting in the Central African Republic (CAR) on behalf of its government.[43] The MLC is described in the judgment as a 'rebel movement' which 'gradually transformed into

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[40] Ibid., [704–709].
[41] Ibid., [709].
[42] Ibid., [713].
[43] When looking at the *Bemba* case, it is important to be aware that the MLC was fighting on behalf of the government of the Central African Republic, meaning that its status as an organized armed group was not really determinative of the NIAC. For discussion of this, see Rogier Bartels, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals' (2020) *International Criminal Law Review* 20, 595 and 628.

a political party'.[44] It was a movement made up of four organs: the President, the Political and Military Council, the General Secretariat and its military branch, the *Armée de Libération du Congo* (ALC). Bemba was the President of the MLC, the leader of its political branch and the Commander in Chief of the ALC. He also held the position of Divisional General and held broad functions and powers under the MLC Statute, including over internal organization and policy in the MLC's military and political wings.[45] According to the ICC judgment, Bemba ensured that there was a clear division between the political and military wings, though his own authority covered both spheres.[46] The military wing – the ALC – was a considerable fighting force, comprising of 20,000 soldiers and structured in a manner similar to States' armed forces. It was divided into sections, brigades, battalions, companies and platoons, with brigades ranging from 1,500 to 2,000 men and battalions from 400 to 700.[47] Perhaps surprisingly when considering the apparently clear organizational parameters of the ALC as a distinct military entity (a fact presumably increased by the fact that the ALC was acting extraterritorially, i.e., in CAR), the term ALC features very little in the judgment.[48]. Instead, the Trial Chamber refers mainly to the actions of the 'MLC troops', 'MLC soldiers', 'MLC Commanders' and 'MLC forces' in CAR.[49] Likewise, the Trial Chamber considered it to be the 'MLC contingent in the CAR' that was the 'organised armed group', on the basis that it had an internal hierarchy, command structure, rules and available military equipment and the ability to impose discipline and plan and carry out military operations.[50] Again, this leaves some uncertainty when seeking to summarize the ICC's approach on this issue. On the one hand, one might conclude that the Court took an approach that was prepared to treat the MLC as a compound entity consisting of its political and military components. But on the other hand, the addition of the words 'contingent in the CAR' may be taken as an

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[44] *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute (21 March 2016) ICC-01/05-01/08 (ICC Trial Chamber III) [382].

[45] Ibid., [706].

[46] Ibid., [385].

[47] Ibid., [390].

[48] Ibid., footnote 3.

[49] The Trial Chamber explains the use of this label in an early footnote stating that the Trial Chamber considers the MLC to 'incorporate' the ALC. See ibid. This is also perhaps not surprising when one remembers that it mirrors the practice of referring to a State's troops (e.g., Dutch troops), rather than using the official name for that State's army (e.g., Royal Netherlands Army).

[50] Ibid., [658] and [661].

indication that for all factual purposes, the group's political wing back in the DRC was largely irrelevant.[51]

In this process of surveying how the jurisprudence has taken account of armed groups' non-military parts when applying IHL, the Mali cases before the ICC are probably the most interesting ones to study. This is because they are the most classic rebel governance cases to yet come before an international criminal tribunal. The crimes committed occurred largely in the context of the governance arrangements set up by the Ansar Dine and al-Qaeda in the Islamic Maghreb (AQIM) groups during the nine-month period that these armed groups were in control of Timbuktu. As noted in the short trial judgment in the *Al Mahdi* case and the longer confirmation of charges decision in *Al Hassan*, the groups put in place institutions that made up 'a local government' through which they imposed their ideology on the civilian population.[52] These institutions included a security organ, an Islamic police force responsible for civil and criminal matters, including the resolution of disputes, a morality brigade (*Hesbah*), an Islamic Tribunal, a Sharia Committee, detention centres and a media office.[53] In its Confirmation of Charges decision, the Pre-Trial Chamber in *Al Hassan* found that there was no real division between the military and civilian institutions of the group.[54] Its organs were made up of individuals belonging to Ansar Dine and AQIM. Abou Zeid, who was previously the head of one of AQIM's military battalions, was appointed governor of the region and the town of Timbuktu.[55] He appointed the emirs at the head of all the group's institutions and gave instructions to the Islamic Police, the *Hesbah* and fighters. Abou Zeid and Iyad Ag Gahly were said to be able to intervene in the activities of the Islamic Court. Local inhabitants of Timbuktu – such as Mr Hassan, the defendant – joined Ansar Dine and AQIM on the groups' arrival in the city, taking up roles in these institutions.[56]

Considering the Pre-Trial Chamber's detailed analysis of the institutions set up by Ansar Dine/AQIM in the *Al Hassan* case, it is interesting to note that like previous Trial Chambers in the *Ntganda, Lubanga* and *Bemba* cases, it made no reference at all to these various institutions when analysing the 'organisa-

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[51] It also seems to suggest that the Trial Chamber took the view that one part of an organized group could satisfy the organization requirement.

[52] *Prosecutor v Al Mahdi Al Faqi Al Mahdi*, Judgment and Sentence (27 September 2016) ICC-01/12-01/15 (ICC Trial Chamber VIII) [31] and [53] and *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Confirmation of Charges Decision (13 November 2019) ICC-01/12-01/18, public redacted version (ICC Pre-Trial Chamber I) [75].

[53] ICC (n 52 *Al Hassan*) [75].

[54] Ibid., [225].

[55] Ibid., [80].

[56] Ibid., [75].

tion' requirement. Instead, when undertaking such examination the Pre-Trial Chamber focused entirely on the groups' military capacities, assessing whether the groups had an internal hierarchy, a clearly identified command, enacted rules and instructions, the capacity to recruit and train new members, obtain arms and financing, communicate to the public and ability to speak with one voice through a spokesperson, diplomatic representation abroad and whether they used or wore distinctive flags and emblems.[57] It also took note of whether the groups controlled territory.[58] The Pre-Trial Chamber clarified that it used the term 'Ansar Dine/AQIM' to refer partly to the governance institutions that the groups had set up in Timbuktu.[59] It also clarified that it used the term 'members' to refer to individuals who had joined Ansar Dine or AQIM, or worked for these groups, irrespective of which organ they served for and of whether or not they had formally pledged allegiance to these ANSAs.[60] Here again, we see the same ambiguity as in the *Ntaganda* and *Lubanga* cases with the UPC. On the one hand, the governance institutions of the armed groups are included as part of the 'Party' to the conflict, but on the other hand, they are ignored when analysing that Party's 'organisation'. This raises some legal and conceptual questions that are considered below.

V. INCLUSION OF CIVILIAN AND POLITICAL WINGS IN THE CONCEPT OF 'PARTY'

The first question is whether the civilian and political wings of an armed group should be considered part of the non-State entity that constitutes the Party to a NIAC. It is argued here that in circumstances where an ANSA has non-military institutions, there are good reasons for them to be included in the concept of Party to the conflict.[61] First, there is some support for such an approach in the *travaux préparatoires* of the 1949 Geneva Conventions. It is recalled that their drafters considered the civilian wing of an armed group (when it existed) to be part of the legal entity forming the non-State 'Party' referred to in CA3. Even though the 'convenient criteria' referring to the

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57 Ibid., [212–3].
58 Ibid., [214].
59 Ibid., [76].
60 Ibid.
61 This is an argument that has also been made by Jann Kleffner in his article, 'The Legal Fog of an Illusion: Three Reflections on "Organisation" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 *International Law Studies* 161, 172. It was the sentence in this article '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' that made me wish to investigate this issue more fully.

civilian institutions has not been used in modern case law, the legal principle that it reflects (i.e., that the civil authority is a component part of the Party) has never been overruled. There are also suggestions that during the drafting of the 1977 Additional Protocol II (AP II) to the 1949 Geneva Conventions, it was understood that the non-State Party might comprise of both civilian and military authorities. In this context, for instance, the ICRC delegate indicated that the fundamental guarantees section of the draft protocol 'was designed to protect all persons who took no direct part or had ceased to take a part in hostilities against abuse of power and inhuman and cruel treatment by the *military or civilian authorities* of the Parties to the armed conflict in whose power they may be' (emphasis added).[62]

While the final text of Article 1 of AP II holds significant ambiguities, it can be read as supporting a view that the Party to such a conflict is more than the 'organised armed group' referred to in this provision. Article 1 of AP II refers to an armed conflict taking place between the 'armed forces of the High Contracting Party' and 'organized armed groups'.[63] On the one hand, this wording might confirm a view that the 'organised armed groups' referred to in Article 1 *are* the equivalent of the High Contracting Party mentioned, i.e., the non-State Parties. On the other hand, the fact that the article differentiates between the High Contracting Party and its armed forces makes it also possible to understand the organized armed group mentioned in Article 1 of AP II as an organ of a (potentially) greater non-State *Party* that is not mentioned in the text. Such a reading would mirror the distinctions made in the original *Tadić* test which states 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State'.[64] Here too, it is seen that the analogous entity to the 'organised armed group' on the State-side in a NIAC is the 'government authorities' (i.e., not the State), leaving room for the High Contracting Party and the bigger non-State actor to exist in the background as the Parties. Such a reading is also supported by the fact that when assessing an armed group's organization, the ICTY has indicated that it does not need to be as organized as the 'armed forces of

[62] Geneva Conference 1974–1977 Vol VIII, CDDH/I/SR.33, 323. See also Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017)196–7.

[63] It is acknowledged that Article 1 also indicates that it will apply to armed conflicts between a State's armed forces and dissident armed forces.

[64] ICTY (n 24).

a State'; again noting that the armed forces of the State – not the State itself – should be considered as the organized armed group's natural comparator.[65]

Further support for such a reading is found in the recent commentary to CA3 in the Geneva Convention III, which distinguishes between 'non-State Parties to a non-international armed conflict' and the 'fighting forces' that fight on their 'behalf'.[66] It also comments that it is the 'forces' fighting on the behalf of a non-State Party that 'require a certain level of organization', i.e., not the non-State Party.[67] It then goes on to say that 'such organized armed groups constitute the "armed forces" of a non-State Party to the conflict in the sense of common Article 3'.[68] Similar support for the notion that a non-State Party may be a more comprehensive entity as a matter of law, than its armed forces, can be found in the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, which is referenced in this paragraph of the commentary. The Interpretative Guidance indicates that 'the armed forces of the States party to a non-international armed conflict are referred to as "State armed forces", whereas the armed forces of non-State parties are described as "organized armed groups"'.[69] The guidance indicates that it is 'crucial' to distinguish between a non-State party to a conflict and 'its armed forces (i.e., an organized armed group)', stating that '[a]lthough Art. 1 APII refers to armed conflicts "between" State armed forces and dissident armed forces or other organized armed groups, the actual parties to such a conflict, are, of course, the High Contracting Party and the opposing non-State party, and not their respective armed forces'.[70] It goes on to clarify that just as State Parties to an armed conflict, non-State Parties comprise of both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. It clarifies that the 'term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense'.[71]

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[65] See ICTY (n 25) [197], citing *Prosecutor v Orić* (Trial Judgement) IT-03-68-T, T Ch II (ICTY, 30 June 2006) [254].

[66] ICRC, *Commentary on the Third Geneva Convention (III) Relative to the Treatment of Prisoners of War* (Cambridge University Press 2020) para 568.

[67] Ibid.

[68] Ibid.

[69] Nils Melzer, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities' (ICRC 2009) 30 and 36.

[70] Ibid., 32, footnote 48.

[71] Ibid. See also in non-international armed conflicts, organized armed groups constitute the armed forces of a non-State Party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function').

When it is accepted that the term 'organized armed group' in Article 1 of AP II does not necessarily refer to the non-State Party but instead its armed forces, several further observations can be made. First, it is striking to realize that the non-State entity that has had most words devoted to it in the specialized scholarship and case law that has developed around the term 'organized armed group', may not in every instance be equated to the non-State Party to the NIAC. In some cases, the term 'organized armed group' may simply be the internal military organ of a bigger non-State Party. Equally remarkable is the fact that the contours of the non-State Party beyond the organized armed groups remains so minimally sketched out in the case law and so rarely addressed in legal scholarship on armed groups and IHL.[72]

VI. IF THE CIVILIAN AND POLITICAL WINGS BE INCLUDED IN THRESHOLD DETERMINATIONS

The observations just made raise several important questions. The first is whether the civilian and political parts of a non-State Party could or should have a greater presence in the jurisprudence on 'threshold', especially when it is remembered that the existence of that test is very often understood to be implicitly identifying the Party to the NIAC and the holder of obligations under IHL. In order to consider this question properly, it is important first to acknowledge that in many of the instances of NIACs that have been considered by international courts and tribunals, the non-State Party and its armed forces (i.e., the organized armed group) have been the same entity *as a matter of fact*. This can be observed, for example, in the earlier comments regarding the KLA and the NLA being guerilla groups that did not have prolonged control of territory and consisted mainly of military forces. Indeed, in many instances, it is true that armed groups do not have civilian or political wings. Moreover, even when they do, as Kleffner states, it may be hard to disentangle them from their military wings.[73] The truth of this can be observed in the *Lubanga* and *Ntaganda* cases in which it seems hard to unravel the FPLC and UPC from each other. In these instances, an assessment of whether the armed entity

[72] It is noteworthy that recent far-reaching studies dealing with armed groups hardly address or analyse the 'civilian wings' of armed groups in much detail. See e.g., Rodenhäuser (n 13); Fortin (n 14) 373; Laura Iñigo Alvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 124–5; Liesbeth Zegveld, *Accountabilitiy of Armed Opposition Groups in International Law* (Cambridge University Press 2002); Gloria Gagglioli, 'Targeting Individuals Belonging to an Armed Group' (2018) 51(3) *Vanderbilt Journal of Transnational Law* 901.

[73] Kleffner (n 61) 171.

constitutes an 'organised armed group' for the purposes of the IHL will be sufficient to determine the identity of the Party to the NIAC, i.e., an entity capable of bearing rights and obligations under international law. Yet, there are also factual instances – such as with the LTTE, Islamic State and HTS mentioned above – where armed groups do have sophisticated civilian and political institutions which are at least nominally separate from their military wings, and in these situations it becomes important to understand their legal relevance.

First, I will provide a few arguments why the approach of international criminal courts need not change too radically in these instances. A first argument is that the modern commentary of CA3, wording of AP II and the *Tadić* test make clear that it is the armed forces of the group that is most relevant when assessing whether an ANSA is organized for the purposes of applying IHL. While a focus on the military part of an armed group may at first glance seem inadequate if one of the purposes of the test is to appraise the full legal personality of the holder of the legal obligations (i.e., the non-State Party), even then there retains some merit to this approach. Indeed, the fortunes of the LTTE and the Islamic State group highlight the fact that ANSAs are inherently protean entities, whose governance capacities wax and wane over time.[74] This makes it sensible to build a core conceptual understanding of the legal personality of armed groups around their military core (i.e., their armed forces). It is often a group's military core that defines an armed non-State Party's *raison d'être* and operations. It is also this military core that often survives losses or gains of territory and changes of strategy regarding governance or military tactics.[75] Perhaps most importantly for the purposes of IHL, it is this military core that will generally be capable of adhering to its most basic obligations under CA3 and almost immediately required to do so. This means that an assessment of a non-State armed group's military forces is very often sufficient to determine whether an organization exists that engages in intense violence and is capable of adhering to IHL.

While taking such an inside-out approach to legal personality (i.e., starting with what may in some armed group be an internal organ) may seem illogical when we compare it to the manner in which Statehood is conceived, it has advantages when it comes to armed groups. It has the virtue of injecting stability into the legal framework and preventing the organization requirement having to be continually reassessed during the course of the conflict, as a group changes its operations towards and then away from governance. It facilitates the identification of a core organized entity with legal personality that might expand its operations at some point but might also scale them back again too.

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[74] See Richards (n 5) 60 and Bamber (n 4) 34.
[75] See (n 74).

Perhaps most importantly, it also does not overstate what is legally relevant for the purposes of the international criminal processes and the IHL norms that translate into 'war crimes' in this context. In order to respect the basic obligations of CA3, an ANSA does not need the existence of a civilian wing. If criminal tribunals start paying attention to the civilian structures of an armed group as part of the organization requirement, it might over time create the impression that a civilian wing is once more a requirement for the threshold of IHL, which is not the case.

However, when an armed group does have separate political or civilian institutions, there are also important reasons why it would be beneficial if it was more clearly recognized by international criminal courts and tribunals that, while the 'organised armed group' is the entity that needs to be scrutinized for the purposes of determining whether the threshold of IHL has been met, the 'Party' to the NIAC is the broader non-State armed actor that includes its civilian wing. The first reason is that there is evidence that this is likely the correct reading as a matter of law, as evidenced by the *travaux préparatoires* to CA3, the text of Article 1 of AP II and the referenced commentaries above. But there are also some policy reasons. First, the civilian administration or political offices of a non-State armed group may have an important influence on the organized armed group's military components. Indeed, just as it was noted in the convenient criteria included in the original ICRC commentary to CA3, that the armed forces of an insurgent group should act under the direction of its organized civil authority, it may often be that it is the political wing or executive wing of an armed group that has the vision to sign declarations or special agreements on humanitarian issues, sometimes on the military armed group's behalf.[76] Second, and again as noted in the original ICRC commentary to CA3, an armed group's civilian wing may be an important means of achieving accountability over affiliated military elements by providing independent

[76] For an example of a civilian wing co-signing a Deed of Commitment see 'Syria: Kurdish Armed Forces Demobilize 149 Child Soldiers' (*Geneva Call*, 7 July 2014) https://www.genevacall.org/syria-kurdish-armed-forces-demobilize-149-child-soldiers/ accessed 30 November 2022. For another interesting example, see the action plan signed by the SDF with the UN in which it is the SDF that commits to end the recruitment and use of children under 18. Fight for Humanity, the NGO supporting the action plan, indicated in a press release that the SDF had committed to the action plan 'with the support of the Self-Administration in North East Syria'. See 'Syria: First Information Session with the SDF about the UN Action Plan on the Protection of Children' (*Fight for Humanity*, 4 February 2020) https://www.fightforhumanity.org/post/syria-first-information-session-with-the-sdf-about-the-un-action-plan-on-the-protection-of-children#:~:text=In%20June%202019%2C%20the%20Syrian,partners%20implementing%20this%20Action%20Plan accessed 6 October 2022.

investigatory bodies or civilian control.[77] Recent research shows that armed groups with a political wing are more likely to adhere to IHL, than those without.[78] Third, an examination of factual situations where armed groups have had strong institutions makes clear that it may well be an armed group's *civilian* (or at least non-military) institutions that are responsible for the welfare of the civilian population *as a matter of fact* through the provision of governance functions, such as a police force, the administration of prisons for common crime, education, health, justice, licensing for TV and media and the regulation of extractive industries.

Indeed, there seems no doubt that when armed groups set up civilian or political institutions, they will have a large degree of power over the civilian population in that area. This underlines the importance of ensuring that these institutions are understood to be also bound by IHL as they may often be responsible for implementing some IHL obligations that often rely on a control of territory. Examples of these can be found in those AP II obligations that deal with the obligation to provide children with an education, and to provide food and drinking water and safeguards regarding health and hygiene. Indeed, it is important to note that it is precisely these positive obligations in AP II that may require the involvement of ANSAs' non-military branches, which are not mirrored by corresponding provisions in international criminal law.[79] As a matter of legal doctrine, this means that it is doubly important to be able to argue that the armed group's civilian institutions are bound to these provisions as a result of the wider entity to which they belong being bound *as a Party*.[80]

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[77] For an example of a civilian wing conducting investigations into violations of a commitment, see 'Syria: new measures taken by the Kurdish People's Protection Units to Stop Recruiting Children under 18' (*Geneva Call*, 22 June 2018) https://www.genevacall.org/syria-new-measures-taken-by-the-kurdish-peoples-protection-units-to-stop-using-children-under-18/ accessed 30 November 2022. For another example of the same civilian administration responding to allegations of human rights obligations, see Foreign Relations body of Democratic Self-rule Administration – Rojava, 'The Democratic Self-Rule Administration's Response to the Report of Human Rights Watch Organization' (Foreign Relations body of Democratic Self-rule Administration – Rojava, 19 June 2014) https://www.hrw.org/sites/default/files/related_material/The%20Democratic%20Self-Rule%20Administration%E2%80%99s%20Response%20to%20the%20Report%20of%20Human%20Rights%20Watch%20Organization.pdf accessed 30 November 2022.

[78] Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 239.

[79] Fortin (n 14) 194–5.

[80] This is because it is harder to find evidence that these particular IHL obligations are binding upon the non-State Party by virtue of being binding upon its individual members (i.e., the legislative jurisdiction theory). See ibid for an explanation of these theories and this argument.

A further reason why it is important to conceive the non-State Party widely is that it means that if at the end of a NIAC, the civilian entity is the organ that is left, then it is at least possible to argue that that entity has continuity of legal personality. This will make it more likely that it can be held responsible for the acts of its sister-military authority that existed during the armed conflict and comprised part of the same overarching entity.[81] It is noteworthy however, that because it is not necessary for the court or tribunal to establish a link between the individual on trial and the armed group in order for them to be prosecuted, it is not legally relevant for the court or tribunal to study the relationship between the civilian wing and the military armed group. It can consider the individual's culpability for violations of international humanitarian law, even when this relationship has not been established.[82]

As a final point, it is important to be clear that defining the non-State Party widely for the purposes of understanding the identity of a non-State Party in no way suggests a move to define its armed forces (i.e., the 'organized armed group') more widely for the purposes of targeting. Indeed, while international criminal trial chambers may sometimes merge the military wing with the civilian one for the purposes of conflict classification without any real negative consequences and talk about 'members' of both, this cannot be done in other areas of IHL. In discussions of targeting, it is essential for the protection of the civilian population to determine the clear boundaries of an armed group's 'armed forces' (i.e., its 'organized armed group') and to distinguish them from any wider elements, such as its political and humanitarian wing, its civilian administration and supportive segments of the civilian population. In its Interpretative Guidance on the Notion of Direct Participation in Hostilities, the ICRC was careful to deal with the borderline cases making clear that civilians accompanying or supporting organized armed groups are not considered members of the group for the purposes of IHL.[83] It would have been also helpful if the ICRC had explicitly stated that members of a group's civilian and political administration cannot be considered members of its organized armed group for targeting assessments. These may include individuals such as judges, police officers, civil servants, teachers, politicians, (supportive) citizens: all of

[81] For discussions of this dilemma see Olivia Herman, 'Beyond the State of Play: Establishing a Duty of Non-State Groups to Provide Reparations' (2020) 102(915) *International Review of the Red Cross* 1033, 1047.

[82] It is generally accepted that common Article 3 applies to everyone without discrimination, irrespective of whether they have a special link with one of the parties to the conflict. See *Prosecutor v Akayesu* (Judgment) ICTR-96-4-A, App Ch (ICTR, 1 June 2001) [437–44].

[83] Melzer (n 69) 34–5.

whom retain their civilian status under IHL because they are not members of the armed forces of the non-State Party.

VII. WHY THE SHADOWLAND?

Acknowledging that there are good reasons in both law and policy to define a non-State Party to an armed conflict widely, thus including parts of it that are not military in nature (i.e., political or civilian parts) in the concept of 'Party' prompts a further question regarding why these entities have remained so relatively invisible in the analysis of armed groups and their legal personality under international law. Some explanations can be easily identified and have already been stated above. Most important among these is that international criminal tribunals and courts in which these IHL definitions have been established have not needed to define these institutions for their jurisdiction to be established. As it was said before, many of the IHL obligations in Additional Protocol II which may most easily be adhered to when a civilian administration is in place, are not mirrored by 'war crimes', meaning that they have been subject to less judicial scrutiny. Indeed, it is also fair to note that international criminal jurisprudence on war crimes also does not spend time sketching the contours of States as legal subjects when they are engaged in armed conflicts as High Contracting Parties. Of course, this latter omission may be explained by the fact that when States are under the legal microscope, much can be taken for granted regarding their structures, internal organs and legal personality rendering their legal analysis unnecessary. Long-established treaties and deeply entrenched legal projects, such as the Montevideo Convention, the Vienna Convention on the Law of Treaties and the Articles on State Responsibility, have clarified what a State is, how it can bind itself legally, who its representatives are and their various functions.

The fact that there is a collective understanding among practitioners and scholars of international law relating to Statehood makes it unnecessary for international criminal courts and tribunals to persuade us that a State is a State, as these facts are known. Readers of case law emerging out of Mali know that Mali is a State without having to be persuaded that it is so, as a matter of law.[84] In this sense, the rules on Statehood inject a stability into the legal framework applying to international armed conflict. They make it possible for the terms High Contracting Party and Party, both of which are repeat-

[84] A pertinent exception is of course the Palestine case before the ICC. See e.g., *Situation in the State of Palestine*, Decision on the 'Prosecution Request pursuant to Article 19(3) for a Ruling the Court's Territorial Jurisdiction in Palestine' (5 February 2021) ICC-01/18 (ICC Pre-Trial Chamber I). Yet even in this case, the Court held that it did not have to determine whether an entity was a State.

edly included in the legal framework of international armed conflicts, to be both widely understood. This internal legal scaffolding of rules surrounding Statehood also allow the Geneva Conventions to easily employ different terms to refer to States (i.e., High Contracting Parties, Parties, Occupying Powers, Protecting Power, Detaining Powers), their internal organs (i.e., the military authorities, detaining authorities as enshrined in Article 62 GC III) and their agents (i.e., members of the armed forces) in the treaties without there being any confusion about the entities being referred to or their legal relevance. Yet, none of this common terminology or internal legal scaffolding exists when it comes to the NIAC framework. This makes casual references to any part of armed groups' organization (i.e., members, representatives, organs) either in the treaties or discourse problematic, as the meaning of many of these terms remain contested.[85]

These difficulties of discourse partly explain why these concepts (e.g., member, civilian wing, organ) remain so problematic in the legal framework of IHL. They ultimately reflect profound uncertainties of law, which have only been exacerbated by the fact that the drafters' strategy to deal with many of the controversies that arose during the various IHL drafting processes was simply to delete 'offending' provisions relating to armed groups. Article 1 of AP II epitomizes this attitude referring explicitly only to one Party involved in a NIAC: the High Contracting Party, i.e., the State. Indeed, the drafters' avoidance of the term 'Parties' in this treaty, coupled with the passive form that runs throughout it, can be argued to have had the effect of intensifying the problem that caused the avoidance of these terms in the first place. Article 1 compounds and confirms the reality that armed groups inhabit a difficult shadowland between legality and illegality in international law. It does not contribute to giving form or clarity to the non-State Party's legal personhood and their internal organs and representatives thus remain almost entirely invisible. It is also relevant to note at this point that the civilian and political institutions of non-State parties have also only sketchily been acknowledged in scholarship and practice in other areas of law, even that on armed groups' membership.[86] While human rights law is the obvious place for more attention to be given to the civilian wing of armed groups considering that many of its provisions rely upon the existence of civilian institutions, the fact that the application of human rights law to armed groups remains contested has meant that an explicit

[85] See Sobol and Gaggioli, Chapter 4 in this volume for further analysis on the notion of membership in international law.

[86] See (n 72) above.

analysis of an armed group's civilian and political institutions has also only remained rudimentary in that body of scholarship and practice.[87]

Stepping back and reflecting on these dynamics, it is worth considering whether the lack of attention given to civilian wings in legal understandings of armed groups emerging from case law and scholarship might also be part of a wider trend in international law to apply a solely military filter to armed groups and their activities. Indeed, it is argued that a similar dynamic is at play in States' continued discomfort with the notion that armed groups have human rights obligations – and also recent suggestions to take an expansive approach to the scope of IHL vis-à-vis human rights law via the nexus criteria. When armed groups are defined as primarily military entities and a position is put forward that everything they do, also in the area of governance, has a 'nexus' to the armed conflict, there is a risk that an armed group's civilian and political institutions become unnecessarily conflated with the group's military goals.[88] There is an irony to this approach not only because it runs counter to conflict trends but also because it is arguably exactly in the situations that armed groups are exercising governance activities that their non-military institutions and activities are most relevant to civilian populations on the ground. The application of a similar military lens can be discerned in national case law relating to counter-terrorism, where courts have been reluctant to acknowledge that an armed group's operations can ever truly be civilian in character. This is seen in the US Supreme Court's refusal to accept the notion that there can ever be a 'firewall' between a terrorist group's humanitarian and violent activities.[89] It is also seen in case law that deems that persons travelling to provide health assistance to populations living under the control of armed groups are providing material support to the group.[90] A similar dynamic is present in

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[87] Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury 2016) and Fortin (n 14). In the widespread practice by special rapporteurs and UN Commissions of Inquiry there has been very little attention given to the civilian wings of armed groups.

[88] Here, I refer to the debate over where the nexus line should be drawn that has been addressed in Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life under Rebel Control' (2016) 61 *Netherlands International Law Review* 161; 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions' (ICRC 2019); Tilman Rodenhäuser, 'The Legal Protection of Persons Living under the Control of Non-State Armed Groups' (2020) 102(915) *International Review of the Red Cross* 991.

[89] *Holder, Attorney General v Humanitarian Law Project et al.*, 561 U.S. 1 (2010) [25].

[90] See e.g., Dustin A Lewis and Naz K Modirzadeh, 'Taking Into Account the Potential Effects of Counter Terrorism Measures on Humanitarian and Medical

overly wide definitions of an armed group's membership, either for targeting or counter-terrorism purposes.[91]

Reflecting on these trends, it is illuminating to remember the argument made by Merry and Coutin that the indicators of measurement that are used to construct legal definitions and measurements are constitutive in nature.[92] This sounds a warning that there may be consequences to applying a legal lens that sees armed groups as solely devoted to 'war', both in the discourse and on the ground in instances when this is not necessary.[93] And when reflecting on this dynamic, it is helpful to recall Merry and Coutin's further argument that the creation of legal subjects very often matches a power agenda by the makers of international law. This power agenda dictates which actors, objects and qualities international law deems to be relevant or irrelevant, visible or invisible and says something about the priorities and perspectives that are entrenched in the international law project.[94] International law's blind-spots are often indicative of framings built into international law that exclude, deprioritize or make invisible certain narratives, characters and characteristics that are deemed outside the international law project.[95] Indeed, it cautions that it is important to be mindful of the fact that there are sometimes advantages for States when they portray armed groups as purely military in their operation, as it takes attention away from their own failures of governance in the areas under the armed group's control. It is less confronting for States to grant armed groups' legal personality on the basis of the military challenges they pose to their sovereignty than on the basis of their governance challenges.

In that sense, tendencies to see armed groups as solely military entities, to frame rebel governance as part of an armed group's military strategy or exclude it from the legal frame entirely may be seen as part of the dynamic that Mégret

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Activities', Harvard Law School Program on International Law and Armed Conflict Legal Briefing (May 2021) 8–9.

[91] See e.g., OHCHR, 'Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL' (August 2020) 9–11; and on targeting see Revkin (n 4) and Katharine Fortin, 'Armed Groups and the DOD Manual: Shining a Light on Overlooked Issues' in Michael A Newton (ed) *The United States Department of Defense Law of War Manual* (Cambridge University Press 2019) 383.

[92] Sally Engle Merry and Susan Bibler Coutin, 'Technologies of Truth in the Anthropology of Conflict' (2014) 41(1) *American Ethnologist* 1, 3.

[93] Elvina Pothelet, 'Life in Rebel Territory: Is Everything War?' (*Armed Groups and International Law*, 20 May 2020) https://www.armedgroups-internationallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war/ accessed 30 November 2011.

[94] Merry and Coutin (n 92) 8.

[95] Ibid. See also Fleur Jones, *Non-Legality in International Law* (Cambridge University Press 2015) 11.

labels as the 'return of the savage'.[96] By creating an evaluative lens which solely sees (and then constitutes) armed groups as 'savage', their 'otherness' is confirmed and the *de jure government* is bolstered in their counter-image of nominal civility, giving legitimacy to the employment of military force against the armed group. Indeed, when it is accepted that law and legal categorizations are also 'legal communication tools', it is seen that images constructed by legal discourse may be used to 'accomplish what might have once been done with bombs and missiles'.[97] Additionally, it is important to acknowledge that a repeated reluctance of the international legal framework to acknowledge that armed groups are also involved in civilian governance projects may bring with it subtle dangers. Continually identifying armed groups as solely 'military' or 'terrorist' in character and ignoring their governance roles may lead to a temptation to assume that the solution to armed groups should be always 'military', whereas this is often not the case. In many cases, the existence of insurgent groups in a country can be traced to systemic corruption or governance failures on the part of the government that will not be solved by military intervention. By describing armed groups as *purely* military entities and not paying sufficient attention to their governance projects, there is also a danger that not enough attention will be paid to the embeddedness of armed groups in civilian populations and what that embeddedness means from a legal, military and political perspective. A failure to see and understand the inevitability of a degree of embeddedness may have serious consequences because it could mean that everyday interactions between armed groups and civilians or the exercise of agency by civilian populations are taken as evidence of their membership.[98] It may also mean that whole civilian populations living under the control of armed groups are seen to be unjustly affiliated with them.[99]

VIII. CONCLUSIONS

Considering the number of people currently living under the control of armed non-State actors, it is becoming increasingly important to know how their

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[96] Frédéric Mégret, 'From "savages" to "unlawful combatants": A Postcolonial Look at International Law's Others' in Anne Orford (ed) *International Law and its Others* (Cambidge University Press 2009).

[97] David Kennedy, 'Modern War and Modern Law' (2006) 12 *Int'l Legal Theory* 55, 78.

[98] Katharine Fortin, 'Dancing with Whoever is There: Civilian Agency, Neutrality and the Principle of Distinction' (*Armed Groups and International Law*, 3 February 2022) https://www.armedgroups-internationallaw.org/2022/02/03/dancing-with-whoever-is-there-civilian-agency-neutrality-and-the-principle-of-distinction/ accessed 6 October 2022.

[99] Ibid.

governance institutions fit within the IHL framework. This chapter has sought to achieve clarity on this issue by studying the jurisprudence of the ICTY and ICC on the threshold of IHL. It has put forward the argument that while it is correct for international criminal tribunals to determine whether this legal regime applies to a NIAC by virtue of an appraisal of an armed group's military wing (i.e., its 'organised armed group'), it is important for courts, tribunals, scholars and practitioners to give some attention to their civilian and political wings where they exist and identify those entities as part of the non-State Party. A greater acknowledgment of this fact would ensure that there is a greater chance that the armed group can be held responsible for the full scope of violations committed by its agents (whether civilian and military) under IHL or IHRL. It would also contribute to a situation where humanitarian organizations can more easily approach both the civilian, political and military parts of an armed group to remind them of their obligations under international humanitarian law.[100] It is also important so that at any moment after the hostilities have ceased and the military part of the group has demobilized, the residual civilian structures can remain responsible for the military wing's actions as representatives of the compound entity. In addition to these legal arguments, the chapter has pointed out a number of conceptual reasons why it is important not to too-readily apply the law in a manner that applies an exclusively military filter to armed non-State actors or their actions. Perhaps most importantly, it argues that to do so might not only misdiagnose the problem the existence of such groups represents, but also misdiagnose the solution.

[100] For an example of a humanitarian organization engaging with political movements affiliated with armed groups, see 'Seven Leaders of a Syrian Kurdish Political Movement Discuss Humanitarian Norms in Geneva' (*Geneva Call*, 28 July 2016) https://www.genevacall.org/syrian-kurdish-humanitarian-norms-geneva/ accessed 30 November 2022.