

Article

The Relationship Between a State and an Organised Armed Group and its Impact on the Classification of Armed Conflict

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Abstract

When an organised armed group is engaged in an armed conflict with government forces, this is normally classified as a non-international armed conflict under international humanitarian law (IHL). However, the nature and degree of the relationship which the armed group has with a third state become crucial in ascertaining whether the armed conflict is, in fact, an international armed conflict. The standard in the law of state responsibility is often applied to define the nature and degree of the relationship. This article critically analyses the application of the standard in the law of state responsibility and suggests that IHL provides sufficient guidance to define the nature and degree of the relationship between an organised armed group and a third state for the purpose of clarifying the type of armed conflict in which the armed group is engaged.

I. Introduction

States have often provided support to organised armed groups which are engaged in an armed conflict with government forces. In this context, extensive discussions have taken place on the issues of whether such an armed conflict may, under international humanitarian law (IHL), be classified as an armed conflict between states (international armed conflict) and what the nature and degree of the relationship should be between a state and an organised armed group in order to classify the armed conflict as an international armed conflict.

Perhaps a well-known case in this regard is the *Tadic* case at the International Criminal Tribunal for the former Yugoslavia (ICTY). In this case, the Tribunal discussed whether the armed conflict between the Army of the Republic of Srpska, an organised armed group in the territory of Bosnia and Herzegovina, and the Bosnia and Herzegovina armed forces was international or non-international. Normally, such an armed conflict is classified as non-international pursuant to Article 3 common to the 1949 Geneva Conventions, but since the Federal Republic of Yugoslavia provided support to the Army of the Republic of Srpska, the question arose as to whether the armed conflict in question was in fact international.¹

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¹ *Prosecutor v. Tadic*, Judgment (Appeals), Case No. IT-94-1-A, pp. 35-72.

The nature and degree of the relationship between an organised armed group and a state may vary from one case to another. The support provided by a state may be political support, financial aid, or non-combat military aid such as the dispatch of technical counsellors or the granting of logistic support. Such support could also be related more directly to the military operations in which an organised armed group is engaged, such as the dispatch of military commanders who issue orders to members of the armed group or even the dispatch of a state's armed forces which take a direct part in hostilities in support of the armed group. For an armed conflict between government forces and an organised armed group, which is normally classified as a non-international armed conflict, to be classified as an international armed conflict due to the support provided by a state to the organised armed group, what nature and degree of the relationship between the state and the armed group are required? This was the other question addressed by the ICTY in the *Tadic* case.²

One would notice by reading the decisions of the ICTY that the Tribunal quickly resorted to general rules of international law, particularly the law of state responsibility,³ rather than the *lex specialis*, i.e. IHL, when considering the required nature and degree of the relationship between an organised armed group and a state in order for an armed conflict to be classified as an international armed conflict. In particular, the Tribunal examined the situations where a state becomes responsible for acts of a non-state group and concluded that "overall control" of a state over a non-state group, such as general direction, coordination and supervision by a state of the activities and operations of a non-state group, is sufficient to render that state responsible for acts of the non-state group. Based on this conclusion, the Tribunal stated that the armed conflict between the Army of the Republic of Srpska and the Bosnia and Herzegovina armed forces was an international armed conflict since the Federal Republic of Yugoslavia had "overall control" over the Army of the Republic of Srpska.

This article analyses whether IHL, as the *lex specialis* in armed conflict situations, provides sufficient guidance without relying on the law of state responsibility, when:

1. examining the nature and degree of the relationship required between a state and an organised armed group in order to consider that organised armed group as part of an existing international armed conflict and
2. establishing whether the acts of that organised armed group are attributable to the state which is supporting the armed group and hence, whether that state is responsible for the breaches of international law by the armed group.

This article suggests that reliance on the law of state responsibility is not necessary since IHL provides sufficient guidance in dealing with the two points mentioned above. It also suggests that reliance on the law of state responsibility may, in fact, have a negative consequence as such reliance may narrow the original scope of IHL and exclude certain members of organised armed groups who may be entitled to the protection normally given to members of the armed forces under IHL in situations of international armed conflict.

II. Classification of Armed Conflicts in IHL

Before entering into the discussion on the above-mentioned questions, it may be useful to recall the classification of armed conflicts in IHL. IHL, specifically Articles 2 and 3 common

² Ibid. See also, *Prosecutor v. Lubanga*, Judgment (Trial), Case No. ICC-01/04-01/06, pp. 231-260. See also, A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law* 2007-4.

³ *Prosecutor v. Tadic*, Judgment (Appeals), supra note 1, pp. 37-39.

to the 1949 Geneva Conventions,⁴ Article 1 of Additional Protocol I,⁵ and Article 1 of Additional Protocol II,⁶ makes a distinction between international and non-international armed conflict and the applicable rules are differentiated according to the type of armed conflict.

Article 2 common to the 1949 Geneva Conventions provides that the Conventions apply to all cases of declared war, armed conflict between two or more states, or occupation of the territory of a state, which are commonly called “international armed conflict”. In essence, an international armed conflict occurs between two or more states. Article 1 (4) of 1977 Additional Protocol I further states that armed conflict in which peoples are fighting in the exercise of their right of self-determination is also an international armed conflict.

Article 3 common to the 1949 Geneva Conventions provides that it applies to armed conflicts not of an international character and Article 1 (1) of 1977 Additional Protocol II provides that the Protocol applies to armed conflicts between the armed forces of a state and dissident armed forces or organised armed groups, which are commonly called “non-international armed conflicts”. In essence, a non-international armed conflict occurs between a state’s armed forces and an organised armed group or between different organised armed groups.⁷

What becomes immediately apparent is that not all forms of armed conflict that occur in practice are mentioned in the Geneva Conventions and the Additional Protocols.⁸ One particular form of armed conflict that is not explicitly mentioned is an armed conflict where a state intervenes in an on-going non-international armed conflict in support of an organised armed group,⁹ although discussions took place during the preparation for the two Additional Protocols to include a new provision dealing with such armed conflicts.¹⁰ This is precisely the type of armed conflict with which this article is concerned.

Classification of an armed conflict as international or non-international has often been discussed as if it were an end in itself.¹¹ However, what makes the classification of an armed conflict important is not that it brings intellectual stimulation, but that it defines the body of rules that apply to a particular armed conflict and the scope of protection for persons affected by the armed conflict. In other words, classification has an immense impact on the individuals affected by the armed conflict.

⁴ 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.

⁷ See generally, J. Pejic, ‘The Protective Scope of Common Article 3: More than Meets the Eye’, *International Review of the Red Cross* 2011.

⁸ On the classification of armed conflicts in general, see S. Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’, *International Review of the Red Cross* 2009.

⁹ ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971): Report on the Work of the Conference*, Geneva: ICRC 1971, p. 51, para. 298.

¹⁰ *Idem*, pp. 50-52.

¹¹ See, for example, E. Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford: Oxford University Press 2012.

For example, when an organised armed group belongs to a party to an international armed conflict within the meaning of Article 4 (A) (2) of the Third Geneva Convention, the members therein become entitled to prisoner-of-war status and the extensive protection set out in the Third Geneva Convention. They will also be considered as “combatants” within the meaning of Article 43 (2) of Additional Protocol I and obtain the right to take a direct part in hostilities, and wounded, sick and shipwrecked members of the armed group become entitled to the extensive protection ensured by the First and Second Geneva Conventions. If the armed group is merely a party to a non-international armed conflict, members therein and the members of the opposing armed forces are only protected by the meagre provisions of common Article 3 of the Geneva Conventions or, where applicable, Additional Protocol II.

Admittedly, many of the provisions applicable to international armed conflict are now applicable to non-international armed conflict as a matter of customary international law.¹² Some experts even argue that the distinction between international and non-international armed conflict should be abolished.¹³ However, there is no indication that, for example, the protection accorded to prisoners of war in the Third Geneva Convention now applies, as a matter of customary international law, to members of an armed group engaged in a non-international armed conflict.¹⁴ In this sense, classification of armed conflict still has a critical impact on the protection of persons affected by armed conflicts. This is why it is important to determine whether an organised armed group is part of an international or non-international armed conflict.

III. Two Different Scenarios

Before entering into a substantive discussion on the questions raised in the Introduction, it is also worth distinguishing two scenarios where the relationship between a state and an organised armed group may have a bearing on the classification of an armed conflict.

The first scenario is where state A is engaged in an international armed conflict with state B and an organised armed group is also engaged in a non-international armed conflict with state B. In this case, if state A provides support to the armed group, a question arises as to whether the armed group can now be regarded as a party to an international armed conflict vis-à-vis state B, either alongside state A or as part of state A as the original party to the international armed conflict.

The second scenario is where state A is not engaged in an international armed conflict with state B but an organised armed group is engaged in a non-international armed conflict with state B. In this case, if state A provides support to the armed group, a question arises as to whether state A itself then becomes a party to an international armed conflict vis-à-vis state B, even though there are no direct hostilities taking place between state A and state B. One way to answer this question would be to say that, if there are no direct hostilities between state A and state B, such as an exchange of fire, capture of soldiers of the enemy armed forces, or an invasion by either of the states of the territory of the other state, no armed conflict exists between state A and state B.¹⁵ Therefore, only the armed group and state B are parties to an armed conflict (non-international), even if state A is providing support to the armed group.

¹² J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, Geneva: ICRC and Cambridge: Cambridge University Press, 2005.

¹³ J. Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’, *International Review of the Red Cross* 2003.

¹⁴ See Henckaerts and Doswald-Beck 2005, *supra* note 12, pp. 451-452 and, in addition, pp. 11 and 14.

¹⁵ Unless either of the state declares war against the other in which case an international armed conflict exists even without actual hostilities between those states.

As can be seen, the question of whether an organised armed group has become part of an international armed conflict arises in a specific situation where the state that is providing support to the armed group is already a party to an international armed conflict.

Therefore, this article focuses on the first scenario and discusses when a non-international armed conflict between a state and an organised armed group may develop into an international armed conflict when an organised armed group has a certain relationship with a state. If the required nature and degree of the relationship between an armed group and a state are present, then the non-international armed conflict in which the armed group is involved may develop into an international armed conflict. If such nature and degree of the relationship do not exist, the armed conflict would remain a non-international armed conflict. Therefore, in order to ascertain whether a non-international armed conflict has developed into an international armed conflict, it is crucial to discuss the nature and degree of the relationship between an organised armed group and a state.

IV. Article 4 (A) (2) of the 1949 Third Geneva Convention

As mentioned earlier, the 1949 Geneva Conventions and the 1977 Additional Protocols and, for that matter, other IHL treaties do not explicitly deal with a situation where an organised armed group is supported by a state when fighting another state's armed forces.

In the face of such a situation, it is tempting to rely on the law of state responsibility, which provides rules on the nature and degree of the connection required between a state and a group in order to attribute acts of that group to that state.¹⁶ The assumption here is that if the acts of an armed group can be attributed to a state, the armed group can be considered as acting on behalf of that state and hence to be part of a party to an international armed conflict. It is also tempting to rely on the test of "overall control" or "effective control" by a state over an organised armed group as suggested by the ICTY in the *Tadic* case¹⁷ and the International Court of Justice (ICJ) in the *Nicaragua* case¹⁸ respectively, both of which were based on the law of state responsibility. However, it is curious that an in-depth analysis of the *lex specialis* in times of armed conflict, i.e. IHL, was not undertaken and the primary reference was general international law, particularly the law of state responsibility.

Although IHL does not provide specific rules that define the nature and degree of the relationship between a state and an organised armed group for the specific purpose of classifying an armed conflict, IHL contains two particular provisions which deal with the relationship between an organised armed group and a state: Article 4 (A) (2) of the Third Geneva Convention and Article 43 (1) of Additional Protocol I. These articles will be discussed in turn below.

First, Article 4 (A) (2) of the Third Geneva Convention provides as follows:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
...
Members of other militias and members of other volunteer corps, including those of

¹⁶ Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10 Supplement No. 10, p. 26.

¹⁷ *Prosecutor v. Tadic*, Judgment (Appeals), supra note 1, pp. 58-59.

¹⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at pp. 64-65. See also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 40, at p. 208.

organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

The primary purpose of Article 4 of the Third Geneva Convention is to define who are prisoners of war and hence entitled to the protection of the Third Geneva Convention. However, it is also widely understood that Article 4 has a broader purpose, namely to define who are combatants and as such possess the right to take a direct part in hostilities on behalf of a state which is a party to an international armed conflict.¹⁹

In this connection, Article 4 (A) (2) not only clarifies which persons, while not being members of the regular armed forces, may nevertheless possess the status equivalent to members of the regular armed forces, but also which organised armed groups may possess a status equivalent to the regular armed forces and therefore can be considered as acting on behalf of a state. In this regard, Article 4 (A) (2) refers to “other militias ... and other volunteer corps, including ... organized resistance movements ... belonging to a Party to the conflict”. If a non-state armed group falls under Article 4 (A) (2), it then becomes part of a party to an international armed conflict.

It is noted that the preceding paragraph, Article 4 (A) (1), also refers to “militias or volunteer corps” but militias or volunteer corps in this provision refer to those forming part of the regular armed forces. Article 4 (A) (2) refers to “other” militias and “other” volunteer corps, hence emphasising that they do not form part of the regular armed forces and indicating that they may be non-state armed groups.²⁰

In order for such militias and volunteer corps that are not part of the regular armed forces to be considered as acting on behalf of a state, a number of conditions must be met. The standard characteristics of regular armed forces as set out in sub-paragraphs (a) to (d) of Article 4 (A) (2) must be met and the militias and volunteer corps must “belong to a Party to the conflict”.

The requirements in sub-paragraphs (a) to (d) already require a high degree of organisation and therefore ensure that militias and volunteer corps are equivalent to the regular armed forces. Once they acquire the same degree of organisation as the regular armed forces, they must prove that they “belong to a Party to the conflict”. This second requirement is the key to ascertaining whether an organised armed group is acting on behalf of a state.

¹⁹ See Article 1 of the 1907 Hague Regulations which is located under the heading “The Status of Belligerent” and which formed the basis of Article 4 (A) (1) and (2) of the Third Geneva Convention. See also Article 43 (2) of Additional Protocol I which defines the term “combatants” and Article 44 (1) of the Protocol which provides that “[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war”, thereby making a direct connection between prisoner-of-war status and combatant status.

²⁰ J. de Preux, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. III, Geneva: ICRC, 1960, p. 56.

IV. 1. Scope of the Terms “Other Militias”, “Other Volunteer Corps” and “Organised Resistance Movements”

Before addressing the above question, it may be useful to ask whether “other militias” and “other volunteer corps”, including “organised resistance movements”, in Article 4 (A) (2) of the Third Geneva Convention cover “organised armed groups” (normally non-state armed groups fighting government forces in a non-international armed conflict) within the meaning of modern IHL.²¹

The initial discussions on the draft article which eventually became Article 4 (A) (2) of the Third Geneva Convention envisaged civilians in an occupied territory fighting the occupying power or invading forces, who were organised like regular armed forces (commonly called “partisans”).²² A separate discussion also took place to distinguish between “militias” and “volunteer corps” which were part of the regular armed forces and those which were not.²³ The former were eventually included in Article 4 (A) (1) of the Third Geneva Convention. The latter, militias and volunteer corps not forming part of the regular armed forces, were considered as similar in nature to “partisans” or “resistance movements”, i.e. civilians fighting the occupying power or invading forces. Therefore, a proposal was made to merge the concepts of “militias”, “volunteer corps” and “resistance movements”.²⁴ Consequently, a new draft article, which eventually became Article 4 (A) (2), emerged. The adopted draft which became Article 4 (A) (2) therefore covers “militias” and “volunteer corps”, including “organised resistance movement”, which do not form part of the regular armed forces but “belong to a Party” to an international armed conflict.

As one commentary notes, the terms “militias”, “volunteer corps” and “organised resistance movement” in Article 4 (A) (2) are generic terms to cover “groups of volunteer fighters not enlisted in the regular armed forces but fighting for a Party to the conflict”.²⁵ Therefore, these groups are not organs of a state, i.e. they are non-state in character.

The nature of organised armed groups participating in armed conflicts has evolved since the Second World War, and organised resistance movements fighting against occupying powers or invading forces have become rare after the War. A more frequent type of participants today are civilians forming organised armed groups which fight the government of their own state, often with a view to ousting that government. Therefore, the targets of non-state armed groups have generally shifted from foreign states to their own governments.

In some cases, such organised armed groups may be exercising their right of self-determination against colonial domination, alien occupation and racist régimes. According to Article 1 (4) of 1977 Additional Protocol I, such organised armed groups are not merely rebellious armed groups against a government but are formally parties to an international armed conflict, thereby putting them on an equal footing to a state. However, this provision has never been applied to date.

²¹ The term “organized armed groups” is adopted in Article 1 (1) of Additional Protocol II.

²² ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947), Geneva: ICRC 1947, pp. 107-110.

²³ Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, Berne: Swiss Federal Political Department 1949, pp. 387, 467, and 477.

²⁴ *Idem*, p. 387 and 562.

²⁵ ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, Geneva: ICRC 1973, p. 48.

Therefore, after the Second World War, the most prevalent form of non-state armed groups has been civilians forming organised armed groups fighting their own governments outside the context of self-determination.

In the light of such development in the nature of organised armed groups participating in armed conflicts, it would seem justified today to interpret the terms “militias”, “volunteer corps” or “organised resistance movement” in Article 4 (A) (2) of the Third Geneva Convention to cover organised armed groups fighting their own governments. A commentary to Article 4 (A) (2) also provides an indication to this effect when it states as follows: “Resistance movements must be fighting on behalf of a ‘Party to the conflict’ in the sense of Article 2 [of the Third Geneva Convention], otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a ‘Party to the conflict’.”²⁶ This statement indicates that an organised armed group which is normally a party to a non-international armed conflict can become a party to an international armed conflict if the armed group belongs to a state which is a party to an international armed conflict.

IV.2. Scope of the Term “Belong to a Party to the Conflict”

This article now turns to the term “belong to a Party to the conflict” in Article 4 (A) (2) of the Third Geneva Convention.

The Final Record of the Diplomatic Conference at which the 1949 Geneva Conventions were adopted shows that the draft article which later became Article 4 (A) (2) was the subject of one of the longest negotiations during the Conference. However, discussions on the phrase “belong to a Party to the conflict” in Article 4 (A) (2) cannot be found in the Final Record, although it may have been discussed in meetings not recorded therein.²⁷ Therefore, no indication can be ascertained on the nature and degree of the relationship that are required between an organised armed group and a state under the phrase “belong to a Party to the conflict” in Article 4 (A) (2).

However, a commentary to Article 4 (A) (2) provides that, in the past, an “express authorization by the sovereign, usually in writing” was required in order for an organised armed group to be considered as “belong[ing] to a Party to the conflict”.²⁸ However, later, “a *de facto* relationship between the resistance organization and the party to international law which is in a state of war” became sufficient and an express authorisation of the state which is a party to an international armed conflict was no longer an essential requirement.²⁹ The commentary further provides that “if the operations are such as to indicate clearly for which side the resistance organisation is fighting”, such as “deliveries of equipment and supplies, as was frequently the case during the Second World War, between the Allies and the resistance networks operating in occupied territories”, that was sufficient to constitute a tacit agreement and to establish a “*de facto* relationship” between the organised armed group and the state which is a party to an international armed conflict.³⁰

What this commentary suggests is that the minimum requirement to consider an organised armed group as belonging to a party to an international armed conflict is either an express authorisation by a state which is a party to an international armed conflict to the organised

²⁶ De Preux 1960, *supra* note 20, p. 57.

²⁷ See the index in Swiss Federal Political Department 1949, Vol. III, *supra* note 23, p. 217.

²⁸ De Preux 1960, *supra* note 20, p. 57.

²⁹ *Ibid.*

³⁰ *Ibid.*

armed group to act on behalf of that state, or facts that clearly indicate that such state has given a tacit agreement that the organised armed group may act on its behalf. Therefore, an organised armed group can be considered as part of a party to an international armed conflict if a state gives an express authorisation to the armed group to act on its behalf, even if such authorisation is not accompanied by material support such as providing arms and other supplies to the armed group. At the same time, even if there is no express authorisation by a state, the fact that it has provided material support to an organised armed group can constitute a tacit agreement from the state to the armed group that the latter may act on behalf of that state.

There are very few cases where the requirement to “belong to a Party to the conflict” was applied in practice. The ICTY in the *Tadic* case took this requirement as a starting point when it was addressing the question of whether an organised armed group was acting on behalf of a state.³¹ However, the ICTY did not conduct an in-depth analysis of the meaning of “belong to a Party to the conflict” and quickly proceeded to the application of the law of state responsibility to ascertain the nature and degree of the relationship required in order to determine whether an organised armed group was acting on behalf of a state.³²

Another rare instance was the *Kassem* case before the Israel Military Court sitting in Ramallah. One of the questions the Military Court was addressing was whether members of the Popular Front for the Liberation of Palestine (PFLP) were prisoners of war within the meaning of the Third Geneva Convention. The Military Court identified Article 4 (A) (2) of the Third Geneva Convention as the relevant rule for this specific question.³³ It rightly pointed out that “[f]or some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party.”³⁴

The Military Court then stated that “a ‘command relationship’ should exist between such Government and the fighting forces”.³⁵ It also highlighted that “the allegiance of irregular troops to a central Government made it necessary during the Second World War for States and Governments-in-exile to issue declarations as to the relationship between them and popular resistance forces”.³⁶ The Military Court concluded that the relationship between the Government of Jordan and PFLP was not of a nature described above³⁷ and therefore indicated that PFLP cannot be considered as part of a party to an international armed conflict. This conclusion formed the fundamental basis for the Military Court to conclude that the members of PFLP in question were not entitled to prisoner-of-war status.³⁸ It is worth noting that the Military Court did not apply the law of state responsibility in order to clarify the degree of the relationship required by the phrase “belong to a Party to the conflict”.

In the case of the 2006 Israel-Lebanon conflict, the Commission of Inquiry on Lebanon established by the United Nations Human Rights Council considered the type of armed conflict between Israel and Hizbullah, an organised armed group operating in southern Lebanon. The Commission concluded that Hizbullah “constitutes an armed group, a militia, whose conduct and operations enter into the field of application of article 4 paragraph 2 (b),

³¹ *Prosecutor v. Tadic*, Judgment (Appeals), supra note 1, p. 37.

³² *Idem*, p. 38.

³³ *Military Prosecutor v. Omar Mahmud Kassem and Others* [1969], 24 ILR 470, p. 476.

³⁴ *Ibid.* See K. Del Mar, ‘The Requirement of “Belonging” under International Humanitarian Law’, *European Journal of International Law* 2010-1.

³⁵ *Military Prosecutor v. Omar Mahmud Kassem and Others* [1969], 24 ILR 470, p. 477.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Idem*, p. 478.

of the Third Geneva Convention of 12 August 1949” and that Hizbullah was bound by the 1949 Geneva Conventions and customary international law.³⁹

The Commission considered the following elements in arriving to these conclusions: 1) Hizbullah’s effective presence in southern Lebanon suggested that the Government of Lebanon tacitly considered Hizbullah as a resistance movement against Israel’s occupation of the territory of Lebanon; 2) a government policy statement regarded the Lebanese resistance, presumably including Hizbullah, as “a true and natural expression of the right of the Lebanese people in defending its territory”; 3) the President of Lebanon made a statement paying tribute to the “National Resistance fighters”, presumably referring to members of Hizbullah; and 4) Hizbullah assumed *de facto* state authority and control in southern Lebanon.⁴⁰

The Commission therefore considered Hizbullah as “belonging to” Lebanon, which was a party to an international armed conflict vis-à-vis Israel, within the meaning of Article 4 (A) (2) of the Third Geneva Convention. Similar to the *Kassem* case, reference was not made to the law of state responsibility in the analysis of the Commission.

V. Article 43 (1) of 1977 Additional Protocol I

Another point of reference for the purpose of this article is Article 43 (1) of 1977 Additional Protocol I. It provides as follows:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

This article provided, for the first time in an IHL treaty, a definition of “armed forces”. Article 43 (2) went further to state that “[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” Therefore, Article 43 addressed two questions which were only implicitly addressed in Article 4 (A) of the Third Geneva Convention: which organs of a state are entitled to act on behalf of that state in an international armed conflict and which persons could lawfully participate in hostilities?

Article 43 (1) of Additional Protocol I abandoned the terms “militias” and “volunteer corps”, which were adopted in Article 4 (A) (2) of the Third Geneva Convention, and adopted the term “organized armed forces, groups and units” to cover regular armed forces as well as forces which do not form part of the regular armed forces, including non-state armed groups and forces of national liberation movements.⁴¹ However, such “organized armed forces, groups and units” must be “under a command responsible to that Party [to an international armed conflict]” to be part of the “armed forces” within the meaning of Article 43 (1).

³⁹ United Nations Human Rights Council, ‘Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1’, A/HRC/3/2, 23 November 2006, pp. 22-23, paras. 57 and 60.

⁴⁰ *Idem*, p. 23, para. 57.

⁴¹ Swiss Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. XV, Bern: Swiss Federal Political Department 1978, p. 390; Y. Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC 1987, p. 512.

Similar to Article 4 (A) (2) of the Third Geneva Convention, which requires militias and volunteer corps not forming part of the regular armed forces to “belong to a Party to the conflict”, Article 43 (1) of Additional Protocol I requires “organized armed forces, groups and units” to maintain a relationship with a party to an international armed conflict. While Article 43 (1) adopted the term “under a command responsible to that Party” instead of “belong to a Party to the conflict” as in Article 4 (A) (2) of the Third Geneva Convention, the two terms have no difference in substance and both articles require a “link that should exist between the movement and a Party to the conflict”.⁴²

As will be seen, the preparatory work of Article 43 (1) of Additional Protocol I reveals that the nature and degree of the relationship between an armed group and a state required by the phrase “belong to a Party to the conflict” in Article 4 (A) (2) of the Third Geneva Convention were kept intact in Article 43 (1).

V.1. 1969 ICRC Report to the XXIst International Conference of the Red Cross

A report of the ICRC to the International Conference of the Red Cross held in September 1969 contained a summary of the meeting of experts held in February 1969 which aimed at discussing areas of IHL that require reaffirmation and development.⁴³ During that meeting, the topic of “foreign intervention in the non-international conflict” was discussed. The ICRC’s position was that “[w]hen there is foreign military intervention on the insurgents’ side, there would seem no doubt that the laws and customs considered should be applied as a whole in the conflict, which thus becomes of an international nature”,⁴⁴ a view which was shared by experts participating in the meeting.⁴⁵

In the same 1969 report, discussions on “guerrilla warfare” revealed that the scope of Article 4 (A) (2) of the Third Geneva Convention should be expanded and new provisions should confer prisoner-of-war status to members of various organised armed groups, and not only to traditional resistance movements fighting against an occupying power or invading forces.⁴⁶ In particular, due to the developments since the adoption of the 1949 Geneva Conventions, many organised armed groups which fought on behalf of a state which was a party to an international armed conflict did not wear “a fixed distinctive sign recognizable at a distance” required by Article 4 (A) (2) (c) of the Third Geneva Convention, since the only effective means of combat for such armed groups was to operate clandestinely. However, during the discussion, the experts seemed to assume that an organised armed group must belong to a party to an international armed conflict in order for the armed group to be part of a party to an international armed conflict and the members therein to be entitled to prisoner-of-war status.⁴⁷

V.2. 1971 and 1972 Conferences of Government Experts

During the 1971 Conference of Government Experts, experts again discussed whether Article 4 (A) (2) of the Third Geneva Convention sufficiently covered persons who are not

⁴² *Idem*, Vol. XIV, p. 450.

⁴³ ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, Geneva: ICRC 1969.

⁴⁴ *Idem*, p. 100.

⁴⁵ *Idem*, p. 101.

⁴⁶ *Idem*, 114-117.

⁴⁷ *Idem*, 113 and 115-116.

part of the regular armed forces but are acting on behalf of a party to an international armed conflict, in the light of “guerrilla warfare”.⁴⁸

During the discussions, the requirement to “belong to a Party to the conflict [international armed conflict]” was also addressed. The experts at the Conference were “categoric[al] in demanding a firm link between the guerrilla organization and the State Party to the conflict”⁴⁹ without elaborating on what they meant by “a firm link”. The ICRC interpreted the requirement to “belong to a Party to the conflict” “either as requiring *de facto* liaison with a State; or requiring the movement in question to obtain recognition by one or more States, or even by the international community.”⁵⁰ This interpretation is largely in line with the commentary on Article 4 (A) (2) cited earlier.

This statement by the ICRC confirms that recognition by a state that an organised armed group “belongs” to that state would be sufficient to consider that the armed group is acting on behalf of the state and has become part of a party to an international armed conflict. As a consequence, members of that armed group could be considered as combatants and entitled to prisoner-of-war status. It implies that material support and command structure, such as logistic support, weapons supply, or instructions with respect to specific military operations from a state, are not required for an organised armed group to become part of a party to an international armed conflict.

During the 1972 Conference of Government Experts, it was reported that “[t]wo experts asked that the phrase ‘belonging to’ a Party to the conflict, and the term ‘militia’ and ‘resistance movement’ be more clearly defined”⁵¹ without any further elaboration. Therefore, no in-depth discussion on the degree and nature of the relationship between a state and an organised armed group required by the phrase “belong to a Party to the conflict” in Article 4 (A) (2) of the Third Geneva Convention could be found in the records of the 1972 Conference.

V.3. 1974-1977 Diplomatic Conference

The draft which later became Article 43 (1) of Additional Protocol I was originally divided into two articles. Draft Articles 41 and 42 submitted by the ICRC to the Diplomatic Conference read, in part, as follows:

Article 41. - Organization and discipline

Armed forces, including the armed forces of resistance movements covered by Article 42, shall be organized and subject to an appropriate internal disciplinary system. Such disciplinary system shall enforce respect for the present rules and for the other rules of international law applicable in armed conflicts.

Article 42. - New category of prisoners of war

⁴⁸ ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 24 May-12 June 1971), Vol. VI: *Rules Applicable in Guerrilla Warfare*, Geneva: ICRC 1971 and ICRC 1971, supra note 9, pp. 66-69.

⁴⁹ ICRC 1971, supra note 9, p. 68, para. 374.

⁵⁰ ICRC 1971, supra note 48, p. 17.

⁵¹ ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Second Session, 3 May-3 June 1971): *Report on the Work of the Conference*, Vol. 1, Geneva: ICRC 1972, p. 134.

1. In addition to the persons mentioned in Article 4 of the Third Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfil the following conditions:
 - (a) that they are under a command responsible to a Party to the conflict for its subordinates;
 - (b) that they distinguish themselves from the civilian population in military operations;
 - (c) that they conduct their military operations in accordance with the Conventions and the present Protocol.⁵²

Therefore, draft Article 42 followed the approach in Article 4 (A) (2) of the Third Geneva Convention and required an entity to belong to a party to an international armed conflict, which in turn defined who, among the persons who were not members of the regular armed forces, were entitled to prisoner-of-war status. Article 42 required “organized resistance movements” to “belong to a Party to the conflict” in order for the members therein to be considered as prisoners of war when captured. Draft Article 41 then went one step further and specified that the following entities are also considered as part of the “armed forces” within the meaning of draft Article 41: the armed forces of resistance movements covered by draft Article 42, i.e. “organized resistance movements” which “belong to a Party to the conflict”. Therefore, draft Articles 41 and 42, when read together, expanded the definition of “armed forces” in its traditional sense and included non-state organised armed groups in general (including civilians opposing an occupying power or invading forces) as part of the “armed forces”. The draft Articles therefore recognised that non-state organised armed groups may also be considered as entities acting on behalf of a state in an international armed conflict. The link required between such non-state organised armed groups and a state is reflected by the phrase “belong to a Party to the conflict”, which is identical to the phrase used in Article 4 (A) (2) of the Third Geneva Convention.

Draft Article 41 did not attract much attention, but the negotiations on draft Article 42 were among the most contentious negotiations at the Diplomatic Conference. Their length attests to the controversial nature: the draft article was introduced for the first time on 19 March 1975 during the Second Session of Committee III of the Diplomatic Conference⁵³ and the Committee was only able to adopt the draft article on 22 April 1977 during the Fourth and last Session of the Committee.⁵⁴ By the time the draft article was put to the vote, it was in a significantly modified form compared to the original draft introduced on 19 March 1975. Even after a number of modifications, the draft article was still contentious at the time of voting. The draft article was adopted by Committee III by 66 votes to 2, with 18 abstentions.⁵⁵ 41 representatives expressed their wish to explain their votes immediately after the vote was taken.⁵⁶ At the Plenary Meeting on 26 May 1977, draft article 42 was adopted by 73 votes to one, with 21 abstentions.⁵⁷

⁵² Swiss Federal Political Department 1978, Vol. I, Part Three, *supra* note 41, pp. 13-14.

⁵³ *Idem*, Vol. XIV, pp. 318-319.

⁵⁴ *Idem*, Vol. XV, p. 155-156.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Swiss Federal Political Department 1978, Vol. VI, *supra* note 41, p. 121.

However, despite the long discussions on draft Article 42, there was no substantive discussion on the phrase “belong to a Party to the conflict” or the degree of the relationship required between an organised armed group and a state. The ICRC, in introducing draft Article 42, stated that “the first condition to be fulfilled by the resistance movement as a group was its relationship with a Party to the conflict (article 42, para. 1) which guaranteed that the conflict was an international armed conflict”.⁵⁸ In the written version of this statement, the ICRC stated as follows: “the first condition is the link that should exist between the movement and a Party to the conflict. That is in reality the basic condition reflected also in article 42, paragraph 1 (a). It guarantees, in particular, that an international armed conflict is involved”.⁵⁹ In this connection, draft Article 42 (1) (a) provides the condition that an organised resistance movement should be “under a command responsible to a Party to the conflict for its subordinates”.

These statements of the ICRC show that it considered the phrase “under a command responsible to a Party to the conflict” as a reflection of the requirement of a relationship between an organised armed group and a state which is a party to an international armed conflict, and not the phrase “belong to a Party to the conflict” which appears in the chapeau of draft Article 42. In any case, the ICRC statements implied that if an organised armed group is “under a command responsible to a Party to the conflict”, the armed group could be considered as acting on behalf of a state and hence, part of a party to an international armed conflict. Several states, namely the Netherlands,⁶⁰ Norway,⁶¹ Belgium,⁶² and Brazil,⁶³ also recognised that an organised armed group should have a relationship with a state which is a party to an international armed conflict in order to consider members of the armed group as part of the “armed forces” of a state.

In the course of the discussion, it was suggested that the requirement of a relationship between an organised armed group and a state which is a party to an international armed conflict should be part of the definition of “armed forces” which was dealt with in draft Article 41.⁶⁴ In the amended version of draft Article 41, the phrase “under a command responsible to a Party to the conflict” taken from sub-paragraph (1) (a) of draft Article 42 was adopted, just as the ICRC did in its statements quoted above, instead of the phrase “belong to a Party to the conflict”.

Consequently, Article 43 (1) of Additional Protocol I provides that “[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates”. The drafting history clarifies that the phrase “organized armed forces, groups and units” covers not only organised resistance movements fighting against occupying powers or invading forces but also, more broadly, non-state organised armed groups, and if they have a relationship with a state which is a party to an international armed conflict, they could be considered as part of the “armed forces” within the meaning of Article 43 (1). Such non-state organised armed groups then become part of a party to an international armed conflict.

⁵⁸ Swiss Federal Political Department 1978, Vol. XIV, *supra* note 41, p. 318.

⁵⁹ *Idem*, p. 450.

⁶⁰ *Idem*, p. 327.

⁶¹ *Idem*, p. 333.

⁶² *Idem*, p. 340.

⁶³ *Idem*, p. 352.

⁶⁴ *Idem*, p. 333.

VI. The Relationship between the Phrases “Belong to a Party to the Conflict” and “under a Command Responsible to that Party”

The phrase “under a command responsible to that Party” in Article 43 (1) of Additional Protocol I, at first sight, appears to require a stricter standard than the phrase “belong to a Party to the conflict” in Article 4 (A) (2) of the Third Geneva Convention. In particular, the phrase in Article 43 (1) could be understood as requiring non-state organised armed groups to be formally placed within the chain of command of the regular armed forces of a state which is a party to an international armed conflict, which may involve the dispatch of military commanders by the regular armed forces to the armed groups or appointment of commanders by the regular armed forces from among the members of the armed groups. On the other hand, the phrase “belong to a Party to the conflict” only requires either recognition by a state or a *de facto* relationship with a state to consider a non-state organised armed group as part of a party to an international armed conflict, which appears to be a more flexible standard than placing armed groups within the chain of command of the regular armed forces.

However, when the two phrases are read in context, there is no difference in substance between the two. The discussion at the 1971 Conference of Government Experts indicated that the requirement of a relationship between an organised armed group and a state was derived from Article 4 (A) (2) of the Third Geneva Convention,⁶⁵ which employs the phrase “belong to a Party to the conflict”. Draft Article 42 proposed by the ICRC also adopted that term to reflect the requirement of a relationship between an organised armed group and a state.⁶⁶ The ICRC’s commentary to draft Article 42 also clarified that “[t]he condition of *belonging to a Party to the conflict* ... is borrowed from Article 4 (A) (2) of the Third Convention”.⁶⁷

Draft Article 42 (1) (a) of draft Additional Protocol I stated that an organised armed group should be “under a command responsible to a Party to the conflict for its subordinates” which derives but is slightly different from Article 4 (A) (2) (a) of the Third Geneva Convention which provides “commanded by a person responsible for his subordinates”. The ICRC’s commentary clarifies that, although draft Article 42 (1) (a) was based on Article 4 (A) (2) (a), the different wording in draft Article 42 was employed to emphasise that the command of an organised armed group was “answerable for them [the acts of its subordinates] to the Party to the conflict which bears the responsibility on an international plane.”⁶⁸ There is no indication that the phrase “under a command responsible to a Party to the conflict” in draft Article 42 (1) (a) was intended to modify the scope of the phrase “belong to a Party to the conflict” in Article 4 (A) (2) of the Third Geneva Convention. The phrase “under a command responsible to a Party to the conflict” was rather to ensure that the state which is a party to an international armed conflict ultimately bore international responsibility, such as making compensation, for the acts of organised armed groups belonging to that state.⁶⁹

A commentary to Article 43 (1) of Additional Protocol I also shows that the phrase “under a command responsible to a Party to the conflict” was not intended to modify the scope of the phrase “belong to a Party to the conflict” in Article 4 (A) (2), but was rather intended to clarify the responsibility of the party to the conflict vis-à-vis members of the armed forces, including members of organised armed groups belonging to that party. The commentary states that “[t]he Protocol ... subordinates every combatant, even combatants belonging to a

⁶⁵ ICRC 1971, *supra* note 48, pp. 9-10 and 17.

⁶⁶ Swiss Federal Political Department 1978, Vol. I, Part Three, *supra* note 41, p. 13.

⁶⁷ ICRC 1973, *supra* note 25, p. 50.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*; Sandoz 1987, *supra* note 41, p. 512.

resistance movement, to a Party to the conflict, which is not the case in the Third Geneva Convention, in Article 4A(2).⁷⁰

In this connection, it is noted that Article 4 (A) (2) of the Third Geneva Convention merely states that, when an organised armed group belongs to a party to an international armed conflict, members of such armed group would be considered as prisoners of war when captured. However, it does not clarify whether those members are considered to be placed within the chain of command of a state which is a party to an international armed conflict, and whether that state ultimately bears international responsibility for the acts of members of the armed group. Article 43 (1) went one step further and clarified that such members of an armed group which belongs to a party to an international armed conflict are considered to be assimilated into the chain of command of a state which is a party to the conflict, thereby clarifying the direct relationship between members of a non-state armed group and a state which is a party to an international armed conflict.

Therefore, the phrase “under a command responsible to a Party to that conflict” in Article 43 (1) of Additional Protocol I did not modify the standard “belong to a Party to the conflict” but rather inherited it, and even clarified the command responsibility of a party to the conflict over members of organised armed groups, which was absent from Article 4 (A) (2) of the Third Geneva Convention.

VII. The Notion of “Transformation” of a Non-International Armed Conflict into an International Armed Conflict

It has sometimes been suggested that when an armed group is supported by state A, the non-international armed conflict between the organised armed group and state B is “transformed” into an international armed conflict.⁷¹ The Conference of Government Experts held in 1971 discussed the topic of transformation of a non-international armed conflict into an international armed conflict under the heading “Outside aid in the non-international armed conflict”.⁷² The experts discussed various forms of aid by a state to an organised armed group, such as political support, financial aid, military aid such as the dispatch of technical counsellors or the granting of logistic support, and dispatch of armed forces taking regular part in hostilities in support of the organised armed group.⁷³ According to the experts, only the last type of aid “transformed” a non-international armed conflict into an international armed conflict.⁷⁴

However, even if state A took part in hostilities against state B in support of an organised armed group, the type of armed conflict between the armed group and state B does not necessarily change from non-international to international. The armed group can still be engaged in a non-international armed conflict with state B while state A can be engaged in a separate armed conflict, an international armed conflict between state A and state B.

It is only when an organised armed group “belongs” to state A that the armed group can be considered as part of a party to an international armed conflict. The question is, when an organised armed group “belongs” to state A, can the armed group and state A be considered as two separate entities engaged in two separate international armed conflicts against state B?

⁷⁰ Sandoz 1987, *supra* note 41, p. 513.

⁷¹ ICRC 1969, *supra* note 43, p. 101.

⁷² ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971)*, Vol. V: *Protection of Victims of Non-International Armed Conflicts*, Geneva: ICRC 1971, pp. 17-22.

⁷³ *Idem*, pp. 18-19.

⁷⁴ *Idem*, p. 19.

In other words, can two international armed conflicts exist in parallel, i.e. one between the armed group and state B and the other between state A and state B?

Article 2 common to the Geneva Conventions makes it clear that at least two states must be involved in an international armed conflict. Therefore, it seems clear that an organised armed group cannot independently become a party to an international armed conflict. The armed group must “belong” to state A which is already a party to an international armed conflict in order to become “part” of a party, as opposed to a “party”, to an international armed conflict. When an armed group “belongs” to state A, what happens is that the armed group is assimilated into the term “Party” within the meaning of Article 4 (A) (2). What remains is only state A and state B which are the sole “Parties” to the international armed conflict.

In this sense, when an organised armed group which is engaged in a non-international armed conflict with state B “belongs” to state A, which is already a party to an international armed conflict, that non-international armed conflict between the armed group and state B ceases to exist. What remains is the international armed conflict between state A and state B.

In this sense, the notions of “transformation” of a non-international armed conflict to an international armed conflict and an organised armed group becoming a “party” to an international armed conflict are misleading. Such notions imply that an armed group can become a party to an international armed conflict independently and two parallel international armed conflicts could, as a consequence, exist, i.e. one between the armed group and state B and the other between state A and state B. Such notions run counter to the fundamental requirement in Article 2 common to the Geneva Conventions that at least two states must be involved in an international armed conflict.

VIII. State Responsibility

It is worth noting that Article 55 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the United Nations International Law Commission provides as follows:

Article 55. Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.⁷⁵

Therefore, IHL is the first point of reference in establishing the responsibility of a state which is a party to an international armed conflict for acts of members of an organised armed group. The general rules of state responsibility, as reflected in the Draft Articles, are only relevant when IHL is silent or is not sufficiently specific.

In this regard, Article 91 of 1977 Additional Protocol I provides as follows:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁷⁶

⁷⁵ A/56/10 Supplement No. 10, p. 30.

⁷⁶ See also Article 3 of the 1907 Convention (IV) Respecting the Laws and Customs of War on Land, 187 CTS 227.

It is worth highlighting that the second sentence of Article 91 refers to “persons forming part of its armed forces”. As discussed earlier, the term “armed forces” is defined in Article 43 (1) of Additional Protocol I, which clarifies that even non-state organised armed groups, if they belong to a state which is a party to an international armed conflict, can be assimilated into the term “armed forces”. Therefore, it follows that, once it is established that a non-state organised armed group belongs to a party to an international armed conflict, acts of the members of such armed group are automatically attributable to the state which is a party to the international armed conflict.

The rationale behind the requirement of “belonging to a Party to the conflict” in draft Article 42 of Additional Protocol I was explained in a commentary to that article as follows:

The condition of *belonging to a Party to the conflict*, which is borrowed from Article 4 (A) (2) of the Third Convention, is essential to the interplay of international responsibility, for alone the fact of belonging to a Party to the conflict creates the link whereby a subject of international law can be held internationally responsible for acts carried out by the members of resistance movements. Failing that these acts involve at best the individual responsibility of the authors.⁷⁷

Although the phrase “belong to a Party to the conflict” did not appear in the definition of “armed forces” in Article 43 (1), it has been clarified above that this phrase was reflected in the phrase “under a command responsible to a Party to that conflict”. Therefore, the decisive criterion to attribute acts of the members of an organised armed group to a state is whether the armed group belongs to a state which is a party to an international armed conflict. In this regard, as discussed above, such relationship between an armed group and a state can be established either by requiring a “*de facto* liaison with a State”, such as “deliveries of equipment and supplies” by a state to an organised armed group, or requiring the armed group in question to obtain “recognition by one or more States”.⁷⁸

Neither Article 4 (A) (2) of the Third Geneva Convention nor Article 43 (1) of Additional Protocol I requires a higher standard, such as “overall control” employed by the ICTY⁷⁹ and the International Criminal Court⁸⁰ or “effective control” employed by the ICJ.⁸¹

IX. Conclusions

This article suggests that the application of the law of state responsibility is not necessary, and IHL, as the *lex specialis* in armed conflict situation, provides sufficient guidance to:

1. examine the nature and degree of the relationship required between a state and an organised armed group in order to consider that organised armed group as part of an existing international armed conflict and
2. establish whether the acts of that armed group are attributable to the state which is supporting the armed group and hence, that state is responsible for the breaches of international law by the armed group.

⁷⁷ ICRC 1973, *supra* note 25, p. 50.

⁷⁸ ICRC 1971, *supra* note 48, p. 17.

⁷⁹ *Supra* note 17.

⁸⁰ *Prosecutor v. Lubanga*, *supra* note 2, p. 248.

⁸¹ *Supra* note 18.

This article clarified that IHL, particularly Article 4 (A) (2) of the Third Geneva Convention and Article 43 (1) of Additional Protocol I, only requires an organised armed group to “belong” to a party to an international armed conflict, which requires either a “*de facto* liaison with a State”, such as “deliveries of equipment and supplies” by a state to an organised armed group, or “recognition by one or more States” that the armed group may act on behalf of a state.⁸² Once such a relationship between the armed group and a state is established, the non-international armed conflict between the armed group and the opposing state ceases to exist. The armed group is now assimilated into the state which is a party to an international armed conflict, and only the international armed conflict between that state, to which the armed group belongs, and the opposing state remains.

A higher standard of “overall control” suggested by the ICTY, which is based on the standard in the law of state responsibility, appears to narrow the scope of the phrase “belong to a Party to the conflict” in Article 4 (A) (2) of the Third Geneva Convention. The consequence is that persons who may well be entitled to prisoner-of-war status would be excluded. Such an approach is contrary to the intention of the drafters and the original scope of Article 4 (A) (2).

The drafters of Article 4 (A) (2) of the Third Geneva Convention had in mind civilians during the Second World War who were confronting an occupying power or foreign invading forces, who organised themselves like regular armed forces, and who were fighting on behalf of the occupied or invaded state, or even a state which was an ally of such an occupied or invaded state. For such civilians to be considered as prisoners of war, Article 4 (A) (2) merely required the organised armed groups of which they are members to obtain a recognition from a state to act on behalf that state or, in the absence of such recognition, a *de facto* link with that state. If the standard of “overall control” had been applied at the time, many of the civilians who would have been entitled to prisoner-of-war status at the time would have been excluded and the extensive protection under the Third Geneva Convention would not have applied. Likewise, if a situation similar to that in the Second World War occurs today or in the future, in which civilians confront an occupying power or foreign invading forces and who fight on behalf of an occupied or invaded state, the application of the “overall control” standard will exclude many persons from prisoner-of-war status and the corresponding protection under the Third Geneva Convention.

The foregoing amply demonstrates that any attempt to narrow the scope of Article 4 (A) (2) would be unwise and fatal to the expanded protection achieved after lengthy negotiations at the 1949 and 1977 Diplomatic Conferences.

⁸² De Preux 1960, *supra* note 20, p. 57; ICRC 1971, *supra* note 48, p. 17.