

The Classification of Armed Conflicts by International Criminal Courts and Tribunals

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Abstract

This article analyses how international criminal courts and tribunals have pronounced on the contextual elements of their respective war crimes provisions. A comprehensive overview of the way these institutions treated the material scope of application of IHL shows that the *ad hoc* tribunals tended to avoid classification as either international or non-international armed conflict, and merely found that a generic 'armed conflict' existed at the relevant time. The ICC shows a tendency to classify situations as non-international armed conflicts without considering whether the situation concerned may instead (or at the same time) qualify as an international armed conflict. Non-international armed conflict is often, mistakenly, treated as a residual regime. Incorrect conflict classification may affect IHL's scope of application, and negatively impact on an accused's fair trial rights under international criminal law. The author proposes a fresh look at the ICC's legal framework to solve conflict classification problems.

Keywords

international humanitarian law (IHL) – international criminal law (ICL) – International Criminal Tribunal for the former Yugoslavia (ICTY) – Special Court for Sierra Leone (SCSL) – International Criminal Court (ICC) – international armed conflict – non-international armed conflict – war crimes

1 Introduction¹

The typology or classification of armed conflicts is one of the contemporary (legal) challenges facing those working in international humanitarian law (IHL), as well as related fields, such as international criminal law (ICL). As the application of IHL depends on the existence of an international or non-international armed conflict,² knowing when such situations exist is of key importance. Furthermore, since not all rules are applicable to both types of conflict, it is essential to determine what actually constitutes each of the two types of armed conflict. In determining whether IHL applies, one cannot first ask the question whether there is an armed conflict simpliciter, and only then consider whether that conflict is international or non-international in nature. An armed conflict exists when there is an international or non-international armed conflict, not the other way around.³

The core instruments of IHL, the 1949 Geneva Conventions and the 1977 Additional Protocols,⁴ distinguish between situations of international armed conflict (IAC) and ‘conflicts not of an international nature’,⁵ or rather non-international armed conflict (NIAC).⁶ According to Article 2, common to the

1 The views expressed in this article are the author’s and do not necessarily represent those of the International Criminal Court. Parts of this contribution build upon papers presented at the 2013 T.M.C. Asser Institute’s ‘International Humanitarian and Criminal Law Platform’ in The Hague, and the 2017 Annual Minerva Center for Human Rights/International Committee of the Red Cross Conference on International Humanitarian Law, held in Tel Aviv. The author is grateful for the valuable discussions with, or comments by, the following persons on specific parts of this article: Dapo Akande, Simon De Smet, Tristan Ferraro, Katharine Fortin, Terry Gill, Matt Halling, Barbora Hola, Kubo Macak, and Simon Meisenberg.

2 Certain provisions of IHL apply in peacetime or continue to apply after the armed conflict has ended. See, for example, Arts. 47, 49 and 53 of the First Geneva Convention of 1949; Arts. 44, 45, 48 and 50 of the Second Geneva Convention of 1949; and Art. 5 of Additional Protocol II.

3 Marko Milanovic, ‘What Exactly Internationalizes an Internal Armed Conflict?’, *EJIL:Talk!*, 7 May 2010, www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/, accessed 16 January 2020.

4 Besides those mentioned in *supra* note 2, these are the Third and Fourth Geneva Conventions of 1949, and Additional Protocol I.

5 This is the language used in Art. 3, common to the four 1949 Geneva Conventions (Common Article 3).

6 Whilst initially, the scope of application of the 1949 Geneva Conventions and 1977 Additional Protocols related only to the application of these treaties, it has become accepted that by now their scope (and distinction between IAC and NIAC) governs the application of the whole body of IHL, both of the rest of the treaty rules and customary rules – save of course restrictions based on ratification of concerning treaties. For example, updated Art. 1 of the Certain Conventional Weapons Convention (Geneva, 10 October 1980; as amended on

four 1949 Geneva Conventions, the provisions relating to IAC apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties' and to 'all cases of partial or total occupation'.⁷ In 1977, Article 1 of Additional Protocol I further added situations similar to the anti-colonial struggles, which until then had been regarded as non-international, to the realm of IAC.⁸ However, neither the 1949 Geneva Conventions nor Additional Protocol I contain an explanation of what is to be understood as any 'other armed conflict' or the term 'armed conflict' itself. This was no oversight, as 'care was taken to avoid defining armed conflict, because the legal concept of war had given way to a de facto concept of armed conflict'.⁹

The expression 'conflicts not of an international nature', used in Common Article 3, remained similarly undefined.¹⁰ However, for IHL this is not

21 December 2001), which provides that the Convention and its Protocols 'apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions ... [and] shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts'. See further Arts. 18 and 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which deal with the scope of application of the said convention and use language identical to that of Common Articles 2 and 3 of the Geneva Conventions of 1949.

7 Art. 2, common to the Geneva Conventions of 1949 (Common Article 2) reads in relevant part: '... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.

8 Art. 1(4) of Additional Protocol I provides that: 'The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

9 Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Sijthoff, Leiden, 1975), p. 49. Christopher Greenwood understands this to mean that the 'omission' to define the term armed conflict 'was apparently deliberate, since it was hoped that this term would continue to be purely factual and not become laden with legal technicalities as did the definition of war': Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd ed., Oxford University Press, Oxford, 2008), p. 47.

10 In the early 1970s, Farer noted that the only certain aspect about the notion of 'conflicts not of an international nature' was that no-one could say with assurance what it means.

necessarily problematic.¹¹ According to one of the drafters of the 1949 Geneva Conventions, the omission of a definition of NIAC in Common Article 3 was deliberate, as it was believed that such a definition could lead to a restrictive interpretation.¹² Indeed, an inflexible definition of NIAC, or ‘armed conflict’ generally, could exclude some of the contemporary varieties of armed clashes and fighting between States and/or non-State actors.¹³ Yet, at the same time, to ensure an effective extension of the humanitarian rules to these (contemporary) conflict situations, it is necessary to clearly define when IHL applies.¹⁴ Especially since the existence of an IAC, and according to some also of a NIAC, enables States to take more forceful action, such as the use of lethal force against combatants or ‘fighters’ and persons directly participating in hostilities.¹⁵

In recent years, distinguishing between IAC and NIAC is often said to be outdated. Indeed, calls have been made to remove the traditional dichotomy between international and non-international armed conflicts.¹⁶ However, notwithstanding the consideration of the Appeals Chamber of the International

Tom Farer, ‘Humanitarian Law and Armed Conflict: Towards the Definition of “International Armed Conflict”’, 71(1) *Columbia Law Review* (1971) 43.

- 11 An expert on conflict classification of the Legal Division of the International Committee of the Red Cross (ICRC) explains: ‘What is known is that the omission of a definition in Article 3 was deliberate and that there is a “no-definition” school of thought which considers this to be a “blessing in disguise”’. Jelena Pejic, ‘Status of conflict’, in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2007), p. 85.
- 12 Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia, Helsinki, 1966), p. 85.
- 13 Rogier Bartels, ‘A Fine Line Between Protection and Humanisation: The Interplay between the Scope of Application of International Humanitarian Law and Jurisdiction over Alleged War Crimes Under International Criminal Law’, 20 *Yearbook of International Humanitarian Law* (2017) 47.
- 14 Necessary for the purposes of IHL, that is. The need to have clear definitions for the purposes of ICL will be addressed below.
- 15 See e.g., Yuval Shany, ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press, Oxford, 2011), pp. 22–24; Louise Arimatsu, ‘Spatial Conceptions of the Law of Armed Conflict’, in Robert P. Barnidge (ed.), *The Liberal Way of War* (Ashgate, Farnham, 2013), p. 176; and, generally, ICRC, *Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC, Geneva, 2013).
- 16 See, for example, Emily Crawford, ‘Unequal before the law: The case for the elimination of the distinction between international and non-international armed conflict’, 20(2) *Leiden Journal of International Law* (2007) 441–465; Deidre Willmott, ‘Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court’, 5(1) *Melbourne Journal of International Law* (2004) 196–219; James Stewart, ‘Towards a single definition of armed conflict in international humanitarian

Criminal Tribunal for the former Yugoslavia (ICTY) that ‘it is only natural that the aforementioned dichotomy should gradually lose its weight’,¹⁷ the distinction remains very relevant today; both on the battlefield,¹⁸ and after the fact, during (international) criminal trials.¹⁹ As to the latter, war crimes are ‘serious violations of international humanitarian law’.²⁰ Consequently, they can only be committed when this body of law applies,²¹ and when a nexus between the crimes and one of the two types of conflict exists.²² The ICTY, for example, held that the grave breaches regime of the 1949 Geneva Conventions only

law: A critique of internationalized armed conflict’, 85(850) *International Review of the Red Cross* (2003) 313–350.

- 17 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadić* Jurisdiction Decision), para. 97.
- 18 See Andrew J. Carswell, ‘Classifying the Conflict: a Soldier’s Dilemma’, 91(873) *International Review of the Red Cross* (2009) 143–162; Anthony P.V. Rogers, ‘International humanitarian law and today’s armed conflicts’, in Stéphane Kolanowski (ed.), *Proceedings of the Bruges Colloquium: Current Challenges in International Humanitarian Law* (Collegium No. 21, ICRC/College of Europe, Bruges, 2001), p. 20; Robert McLaughlin, ‘Legal-Policy considerations and conflict characterization at the threshold between law enforcement and non-international armed conflict’, 13(1) *Melbourne Journal of International Law* (2012) 1–4; see also, generally, Mike Schmitt, ‘Classification in Future Conflict’, in Elizabeth Wilmshurst (ed.) *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012), pp. 455–477; and United Kingdom Ministry of Defence, *Global Strategic Trends – Out to 2040* (Development, Concepts and Doctrine Centre 2010), p. 83.
- 19 See, e.g., Christine Byron, ‘Armed Conflict: International of Non-International?’, 6(1) *Journal of Conflict and Security Law* (2001) 63–90; and see further below.
- 20 See, e.g., Rule 156 of the ICRC Customary IHL Study, stating ‘[s]erious violations of international humanitarian law constitute war crimes’. See also *Tadić* Jurisdiction Decision, *supra* note 17, para. 94, which refers to a “serious infringement” of a rule of IHL. Art. 8(b) and (e) of the Rome Statute refer to ‘serious violations of the laws and customs applicable in international armed conflict’ and ‘serious violations of the laws and customs applicable in armed conflicts not of an international character’. Both Art. 1 of the ICTY Statute and Art. 1 of the ICTR Statute refer to ‘serious violations of international humanitarian law’, but for the purposes of the jurisdiction of these tribunals, this phrase also encompasses genocide and crimes against humanity.
- 21 As will be explained below, for IHL to apply, and, consequently, for it to be violated, an armed conflict need not necessarily be ongoing.
- 22 The nexus requirement serves to distinguish war crimes from conduct that ought instead to be treated as domestic crimes. It thereby prevents random or isolated criminal occurrences from being characterised as war crimes. See ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Trial Chamber, Judgment, 10 July 2008 (*Boškoski and Tarčulovski* Trial Judgment), para. 293. The elements of crimes, which form part of the International Criminal Court’s legal framework, require for all war crimes included in the Rome Statute that the ‘conduct took place in the context of an was associated with an [international armed conflict/armed conflict not of an international character]’ (ICC Elements of Crimes, Article 8 War Crimes).

applies to international armed conflicts.²³ Moreover, the division between IAC and NIAC is rigidly preserved in the Rome Statute of the International Criminal Court (Rome Statute);²⁴ albeit not without criticism.²⁵ The delineation of each type of conflict has therefore been subject to much debate, especially in cases of (alleged) NIACs. Both with respect to the lower threshold of NIAC (in other words: when a situation becomes a NIAC, as opposed to mere riots or internal disturbances), and as to the moment a non-international situation transforms into an IAC due to outside intervention.

The case law of international criminal courts and tribunals has made a significant contribution to the clarification of IHL. The ICTY, for example, had to – and its successor, the International Residual Mechanism for Criminal Tribunals (IRMCT), still must – assess whether in the specific cases before it, an armed conflict existed, in order to satisfy its jurisdiction²⁶ or to identify the applicable body of law.²⁷ As a result, extensive case law exists in which the

23 *Tadić* Jurisdiction Decision, *supra* note 17, para. 81. The ‘grave breaches’ of the 1949 Geneva Conventions are a limited list of crimes that can be committed against persons specifically protected by these conventions. The 1949 Geneva Conventions establish individual criminal responsibility for those crimes (*see* Arts. 50, 51, 130, and 147 of the four 1949 Geneva Conventions, respectively).

24 Arts. 8(2)(a) and (b) of the Rome Statute list war crimes committed in during IACs, whilst Arts. 8(2)(c) and (e) apply only to violations committed in NIACs. The charges against Thomas Lubanga, the first accused before the International Criminal Court, were confirmed under Art. 8(2)(b)(xxvi) to the conscription/enlistment and use in hostilities of child soldiers in an IAC, but the Trial Chamber re-qualified the situation in Ituri, at the time, as constituting a NIAC. Mr Lubanga was subsequently convicted under Art. 8(2)(e) (vii). *See* ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 (*Lubanga* Trial Judgment), paras. 566–567 (*see further below*).

25 Antonio Cassese, for example, referred to the Rome Statute’s distinction between IAC and NIAC as ‘somewhat *retrograde*’. *See* Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal of International Law* (1999) 150; *see also* Willmott, *supra* note 16.

26 UN Security Council 1993 Resolution 827 (1993). In addition to the need for an armed conflict (either international or non-international) for IHL to apply and thus for war crimes to be committed, the ICTY Statute also requires the existence of an ‘armed conflict’ for crimes against humanity. Art. 5 of the ICTY Statute reads, in relevant part: ‘The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in *armed conflict*, whether international or internal in character, and directed against any civilian population ...’. Later tribunals and courts, such as the ICTR and ICC, do not require crimes against humanity to have a nexus to armed conflict. On this issue, *see, e.g.*, Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2nd ed., Cambridge University Press, Cambridge, 2010), pp. 234–235.

27 *See Tadić* Jurisdiction Decision, *supra* note 17, paras. 79–83.

existence of an armed conflict is discussed. Nonetheless, while the international case law indisputably has been very important for the development of IHL with regards to the typology of armed conflict, one has to be mindful that in ICL the reason to classify conflicts differs from IHL. In ICL it must be established whether a situation exists during which IHL applies, in order to assess whether violations of this body of law could have occurred and international criminal jurisdiction over such alleged war crimes could thus have arisen. One therefore has to remain critical and ensure that conflict determination done for criminal law purposes does not negatively affect the IHL protection on the ground (namely *during* the actual armed conflict).

This contribution discusses the classification of armed conflicts by international criminal court and tribunals. It will not focus on the clarification of IHL on this point, as this has been extensively discussed elsewhere,²⁸ but focus on the relevance of the classification for ICL purposes. First, the practice of the *ad hoc* tribunals is assessed, followed by that of the International Criminal Court (ICC), which each show specific trends. While the case law of the *ad hoc* tribunals is considered thematically, the – relatively few – cases of the ICC dealing with situations of (alleged) international or non-international armed conflict are reviewed one-by-one, in chronological order. The latter is done because the ICC's case law on conflict classification is still developing, and it is worth studying the approach in each of the cases. Common trends are nonetheless distilled thematically, as the article then turns to the potential impact of the approach of these institutions to conflict classification, and of conflict classification generally, on the fair trial rights of the accused, including the problems of classifying situations as NIAC without considering whether the situation concerned may instead (or at the same time) qualify as an IAC – in other words, treating NIAC as a default type. Afterwards, it is explained that there is a difference between the applicability of the rules that govern the conduct of the parties, during either IAC or NIAC, and the existence of either type of armed conflict. This is followed by a proposal for an approach that is in line with the Rome Statute's legal framework, yet does not require a determinative classification of the situation as either an IAC or a NIAC. The contribution ends with concluding remarks on the need for faithful classification of armed conflicts.

28 *E.g.*, Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, Cambridge, 2015), pp. 63–66; and Louise Arimatsu and Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (Chatham House, March 2014), which applies the factors to the situation in Syria.

2 The Practice of the *ad hoc* Tribunals

2.1 *International Criminal Tribunal for the Former Yugoslavia*

After the International Military Tribunals at Nuremberg and Tokyo were set up by the victorious allied powers, shortly after the Second World War, it took until 1993 before the United Nations Security Council set up the next international criminal tribunal, the ICTY.²⁹ The Security Council restricted the ICTY's jurisdiction to crimes committed in times of 'an armed conflict'; not only with respect to war crimes, but also the Tribunal's jurisdiction over crimes against humanity. Determining what qualifies as an armed conflict was therefore vital to the Tribunal's work. In the mid-1990s, in its first case (i.e. the *Tadić* case), the ICTY Appeals Chamber, when considering the 'preliminary issue' of the 'existence of an armed conflict', famously held that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.³⁰ This definition that combined both international and non-international armed conflict should not, however, be misunderstood as presenting a single definition for a generic concept of armed conflict.³¹

Following the *Tadić* ruling on jurisdiction, various ICTY trial chambers have clarified the notion of NIAC, highlighting two requirements: i) the existence of (at least) two parties of an organised nature, that are ii) fighting each other with a certain level of intensity.³² The Appeals Chamber, in its judgment on the

29 UN Security Council Resolution S/RES/827 (25 May 1993).

30 *Tadić* Jurisdiction Decision, *supra* note 17, para. 70. In the same decision, the Appeals Chamber made the ground-breaking finding that war crimes extended to NIAC (*ibid.*, para. 137).

31 Kritsiotis explains that 'by its choice and use of words, the Appeals Chamber might be taken to have been defining the concept of an "armed conflict" as a generic proposition – one that serves as a common denominator for both international and non-international armed conflicts – for it is with this formulation ("an armed conflict exists") that the Appeals Chamber begins its declaration and apparent definition. However, nothing could be further from the truth for it becomes immediately apparent upon reading this dictum in full that the Appeals Chamber was in fact committing itself to the provision of not one but two definitions: it proceeded to define the concept of an international armed conflict ("a resort to armed force between States") – which it interspersed with its definition of the concept of a non-international armed conflict ("protracted violence between governmental authorities and organized armed groups or between such groups within a State"). Dino Kritsiotis, 'The Tremors of *Tadić*', 43(2) *Israel Law Review* (2010) 267–268 (emphasis omitted).

32 *Tadić* Jurisdiction Decision, *supra* note 17, para. 562. The International Criminal Tribunal for Rwanda followed this approach in its first case: ICTR, *Prosecutor v. Akayesu*, Case No.

merits in *Tadić*, further clarified that a NIAC may become international: i) if another State intervenes through its troops, or ii) if some of the parties act on behalf of that State.³³ Internationalisation by way of the second form occurs when an outside State has 'overall control' over an armed group that participates in a *prima facie* NIAC.³⁴ Overall control requires a lower level of control and is 'less rigorous' than 'effective control',³⁵ which was the standard applied some years earlier by the International Court of Justice, albeit dealing with state responsibility rather than individual criminal responsibility.³⁶

In the early years of the ICTY, perhaps in part to guarantee the application of the grave breaches regime, which is only applicable to IAC,³⁷ there was a

ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 620. Subsequently, other chambers of these tribunals concluded that 'protracted' refers more to the 'intensity' of the violence than to its duration. See e.g., ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para 184; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 341; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005 (*Limaj et al.* Trial Judgment), para. 84, ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber, Judgment, 3 April 2008 (*Haradinaj* First Trial Judgment), para 38; ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgment, 27 January 2000, paras. 248–251.

33 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999 (*Tadić* Appeal Judgment), para. 84.

34 *Ibid.*, paras. 120–131 and 145.

35 In the words of the ICTY Appeals Chamber, 'overall control' is a 'less rigorous standard' than the one applied by the ICJ: ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000 (*Aleksovski* Appeal Judgment), paras. 145–146. Robert Cryer *et al.* refer to the overall control test as being 'more flexible': Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd ed., Cambridge University Press, Cambridge, 2014), p. 278. See further Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18(4) *European Journal of International Law* (2007) 653–663; and Malcolm Shaw, *International Law* (5th ed., Cambridge University Press, Cambridge, 2003), pp. 704–705.

36 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (*Nicaragua* Judgment), paras. 105–115. The ICJ reaffirmed its version of the test in *Bosnia Genocide* case (ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (*Bosnia Genocide* Judgment), paras. 402–407. However, in its last judgment, the ICTY Appeals Chamber recently noted 'that the ICJ refrained from taking a position on whether the Overall Control Test employed by the Appeals Chamber in the *Tadić* case was correct', and specifically noted that in the context of the ICTY, 'it may well be that the test is applicable and suitable'; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Appeals Chamber, Judgment, 29 November 2017 (*Prlić et al.* Appeal Judgment), para. 238, referring to the ICJ's *Bosnia Genocide* Judgment, paras. 404–407.

37 Compare, for example, *Tadić* Appeal Judgment, *supra* note 33, para. 104.

tendency to facilitate classification of a situation as international.³⁸ Be that as it may, despite the fact that most of the (trial) chambers³⁹ dealing with alleged crimes committed by members of the *Hrvatsko Vijeće Obrane* (HVO)⁴⁰ found the relevant (part of the) conflict to be international in character, the majority of the trial chamber in *Aleksovski*, shortly before the Appeals Chamber rendered its appeal on the merits in *Tadić*, held that the concerning armed conflict was to be regarded as non-international, because ‘the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina.’⁴¹ As a result, the majority held ‘the Prosecution has failed to establish the internationality of the conflict.’⁴²

However, after those first cases, various ICTY trial chambers declined to (explicitly) classify the situation before it as either an international or a non-international armed conflict.⁴³ Instead, those chambers simply held that the (jurisdictional) requirement of ‘existence of an armed conflict’ was satisfied. The *Halilović* Trial Chamber, for example, held that ‘[w]hen an accused is charged with violation of Article 3 of the Statute, based on a violation of Common Article 3, it is immaterial whether the armed conflict was international or

38 For a critique of this tendency from the perspective of IHL and the suitability of the IAC rules of IHL to the fighting, see Marco Sassòli, ‘The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?’, in Senho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopie* (Routledge, London, 2001), pp. 324–333.

39 E.g., ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Trial Chamber, Judgment, 3 March 2000, paras. 75–76, and 94; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001; and ICTY, *Prosecutor v. Natelić et al.*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 194.

40 Croatian Defence Council: a Bosnian-Croat paramilitary group fighting in Bosnia and Herzegovina.

41 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement, 25 June 1999, para. 27.

42 *Ibid.* See also Henri Decoer, ‘Avoiding Strict Liability in Mixed Conflicts: A Subjectivist Approach to the Contextual Element of War Crimes’, 13(2) *International Criminal Law Review* (2013) 479. He considers this to be a ‘telling’ example of how the truth can be distorted as a result of the different evaluations of evidence by the various (trial) chambers of the ICTY.

43 See, e.g., ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, paras. 744 *et seq.*; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, para. 22; ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Trial Chamber, Judgment, 17 October 2003 (*Simić et al.* Trial Judgment), para. 38; and ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras. 59–60.

non-international in nature'.⁴⁴ Accordingly, it considered, in such a case 'there is no need for the Trial Chamber to define the nature of the conflict'.⁴⁵ Similarly, despite having analysed the 'existence of an armed conflict' and concluded that 'an armed conflict' took place at the relevant time, the *Mrksić et al.* Trial Chamber stated that it had 'not been called upon to make a finding on the nature of the conflict (international or non-international), as this is not relevant for the applicability of Articles 3 and 5 of the Statute under which the crimes alleged in the Indictment are charged'.⁴⁶

The ICTY used the same reasoning, namely alleged irrelevance of the classification, to refrain from analysing the criteria for application of Additional Protocol II. Given that this protocol has a more limited scope of application than Common Article 3, as it requires that the fighting to 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups',⁴⁷ one would have expected any trial chambers dealing with cases in which alleged violations of Additional Protocol II were charged, to assess its application.⁴⁸ Yet, by considering the nature of the armed conflict to be irrelevant for the application of Article 3 of the ICTY Statute, and at the same time holding that the said article encompasses all serious violations of IHL applicable to NIAC,⁴⁹ the need to consider the criteria for application of Additional Protocol II was avoided.⁵⁰

44 ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-T, Trial Chamber, Judgment, 16 November 2005, para. 25.

45 *Ibid.*

46 ICTY, *Prosecutor v. Mrksić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007 (*Mrksić et al.* Trial Judgment), para. 457. This finding is perhaps surprising as it was made by the exact same judges that were responsible for some of the clearest rulings on matters of IHL, including on the distinction between *hors de combat* and civilians in the specifically on the *Mrksić et al.* Trial Judgment, as well as the (lower) threshold of NIAC, in *Limaj et al.* and *Boškovski and Tarčulovski*.

47 Art. 1 of Additional Protocol I further requires that the organised armed groups are 'under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

48 The lack of analysis or explanation on this point has been called 'unfortunate' and 'surprising': Noëlle Quénivet, 'Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict', in Derek Jinks *et al.* (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (T.M.C. Asser Press, The Hague, 2014), p. 47.

49 All serious violations fulfilling the so-called *Tadić* conditions, that is. After *Tadić*, all ICTY's chambers seized of alleged crimes under Article 3 of the ICTY Statute have applied these four conditions, which according to the Appeals Chamber must be met for criminal conduct to fall within the scope of the said article (*Tadić* Jurisdiction Decision, *supra* note 17, para. 94).

50 Quénivet, *supra* note 48, p. 47.

However, the Tribunal's lax approach to conflict classification is best exemplified in cases where the chambers concerned took judicial notice of the existence of an armed conflict. In *Kvočka et al.*, for example, the Prosecution had requested the Chamber to take notice of an armed conflict, 'whether international or internal in character', but the defence for Mr Kvočka, whilst accepting that an armed conflict existed, had objected to a pronouncement on the nature, submitting that the conflict was not of an international character.⁵¹ The *Kvočka et al.* Trial Chamber considered the parties to have some common ground and took judicial notice of the fact 'that at the times and places alleged in the indictment, there existed an armed conflict'.⁵²

The *Simić et al.* Trial Chamber also took judicial notice of the existence of 'a state of armed conflict', which the parties had also put forward as an 'agreed fact'.⁵³ In doing so, it explicitly rejected the conflict to be an IAC, as earlier in the case, it had dismissed a motion by the Prosecution requesting that judicial notice of the existence of an IAC be taken.⁵⁴ Moreover, in its judgment it excluded the evidence presented on the existence of an IAC, because – in its view – the Prosecution had not properly plead the existence of an IAC and therefore the defence was not given sufficient notice.

In a few cases, the Tribunal did conduct an extensive legal analyses of the existence of an armed conflict, but only when the presence of a NIAC was contested, such as the cases dealing with alleged crimes in Kosovo⁵⁵ and the former Yugoslav Republic of Macedonia.⁵⁶ In the latter case, the accused were only charged with war crimes, meaning that the existence of an armed conflict, or lack thereof, could make the difference between a conviction and an acquittal.⁵⁷ In these cases, the relevant trial chambers assessed the existence of a NIAC by reference to objective indicative factors of intensity of the fighting

51 ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Chamber, Decision on Judicial Notice, 8 June 2000.

52 *Ibid.*

53 *Simić et al.* Trial Judgment, *supra* note 43, para. 173.

54 ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Trial Chamber, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999.

55 See *Limaj et al.* Trial Judgment, *supra* note 32; and *Haradinaj* First Trial Judgment, *supra* note 32.

56 See *Boškoski and Tarčulovski* Trial Judgment, *supra* note 22.

57 The defence teams in this case strongly argued that no armed conflict existed. Given the position of the accused in their home country (i.e., Macedonia), they did not have to fear prosecution back home. If the ICTY would not have had jurisdiction over his alleged war crimes, because no armed conflict existed at the relevant time, they could have escaped accountability for their alleged conduct.

and the organisation of the armed group(s).⁵⁸ These factors have since been referred to by States, academics and the ICC,⁵⁹ thereby showing their relevance.

However, in the ICTY's most recent and largest cases, namely those against Radovan Karadžić and Ratko Mladić, the trial chambers again declined to specifically classify the conflict. The *Karadžić* Trial Chamber, following the Prosecution's submission 'that there was a state of armed conflict at all times relevant to the Indictment',⁶⁰ in a judgment of over 2000 pages, merely held in one single seven-line paragraph that 'there was an armed conflict' in Bosnia-Herzegovina throughout the relevant period.⁶¹ Although the Trial Chamber referred to the NIAC criteria in the applicable law section, by stating that in order '[t]o determine the existence of an armed conflict, both the intensity of the conflict and the organisation of the parties to the conflict must be considered on a case-by-case basis', and thereby suggested that the conflict was treated as non-international in nature, immediately following this statement, it concluded that '[i]t is immaterial whether the armed conflict was international in nature or not'.⁶² In the (one) paragraph where the Trial Chamber applied the law to the facts, it seems to discuss in one sentence that there were organised parties, and in the next sentence that the armed clashes were intense. However, due to the lack of any form of analysis this may also be understood as a mere description of the situation and not a classification of it. Even though the existence of 'an armed conflict' may not have been in dispute in the case, it is surprising that the *Karadžić* Trial Chamber did not explain why it considered that this important jurisdictional requirement and contextual element for the charged war crime was met.

58 *Limaj et al.* Trial Judgment, *supra* note 32, para. 86. In *Haradinaj*, the Trial Chamber conducted an elaborate review of the Tribunal's case law on this matter and listed all the indicative factors that the various chambers had used thus far (*Haradinaj* First Trial Judgment, *supra* note 32, paras. 39–60). The *Boškoski and Tarčulovski* Trial Chamber refined it further by giving a similarly detailed overview, but this time, also looked beyond what was earlier stated by the *ad hoc* tribunals and included case law of other institutions, as well as a review of the relevant literature (*Boškoski and Tarčulovski* Trial Judgment, *supra* note 22, paras. 175–206). The latter Trial Chamber's approach was confirmed by the ICTY's Appeals Chamber (ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Appeals Chamber, Judgment, 19 May 2010, paras. 19–24).

59 *Lubanga* Trial Judgment, *supra* note 24, paras. 537–538; ICC, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Trial Chamber, Judgment, 7 March 2014 (*Katanga* Judgment), paras. 1172–1187; and ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Trial Chamber, Judgment, 21 March 2016 (*Bemba* Trial Judgment), paras. 134 and 137.

60 ICTY, *Prosecutor v. Karadžić*, Case No. T-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 2439.

61 *Ibid.*, para. 2440.

62 *Ibid.*, para. 441.

In the last judgment of the Tribunal,⁶³ making up four volumes totalling more than 2500 pages, the *Mladić* Trial Chamber spent a few more words to assess the existence of an armed conflict,⁶⁴ referring *inter alia* to numerous agreed facts and adjudicated facts, and evidence that – should this have been the Trial Chamber's intention – would certainly have met the organisation and intensity criteria for the existence of a NIAC.⁶⁵ However, as part of the same analysis the Trial Chamber also referred to the JNA (Yugoslav People's Army) as an entity involved in the fighting, and to the independence of Bosnia-Herzegovina.⁶⁶ This would appear to point to a classification of the situation as an IAC rather than a NIAC. Yet, the *Mladić* Trial Chamber merely came to the general conclusion 'that there was an armed conflict in the territory of Bosnia-Herzegovina which included the period from 12 May 1992 to 30 November 1995'.⁶⁷

The very last judgment of the ICTY, by the Appeals Chamber in the *Prlić et al.* case, is worth mentioning, as it made some necessary corrections to the trial judgment, and provided interesting clarifications on the issue of occupation by proxy. As a result of grave breaches having been charged, the *Prlić et al.* Trial Chamber had – somewhat oddly – considered for each of the municipalities where crimes allegedly took place, whether an IAC existed in the relevant municipality, even though all these locations were within one State, namely Bosnia-Herzegovina. To set matters straight, the Appeals Chamber recalled that 'an armed conflict is not limited to the specific geographical municipalities where acts of violence and actual fighting occur, or to the specific periods of actual combat'.⁶⁸ Instead, whether a specific situation constitutes an 'armed conflict' for the purposes of the ICTY Statute requires a holistic evaluation of the parameters of the alleged conflict.⁶⁹ The Appeals Chamber therefore reversed the Trial Chamber's 'erroneous' conclusions that no IAC existed in certain towns and villages where no active combat was taking place.⁷⁰ It further discussed when an occupation exists. After first recalling Article 42 of the

63 The International Residual Mechanism for Criminal Tribunals is seised of the last trial proceedings of the ICTY, namely *Prosecutor v. Stanišić and Simatović*. A pronouncement on the existence of 'an armed conflict' must still follow in this case.

64 Namely, three – albeit very short – paragraphs: ICTY, *Prosecutor v. Mladić*, Case No. T-95-5/18-T, Trial Chamber, Judgment, 22 November 2017 (*Mladić* Trial Judgment), paras. 3018–3020.

65 *Ibid.*, paras. 3018–3019.

66 *Ibid.*, para. 3019.

67 *Ibid.*, para. 3020.

68 *Prlić et al.* Appeal Judgment, *supra* note 36, para. 230.

69 *Ibid.*, para. 230.

70 *Ibid.*, para. 233.

Hague Regulations and the earlier case law setting out the requirements for the establishment and exercise of authority by the occupying power,⁷¹ the Appeals Chamber held that 'States should not be allowed to evade their obligations under the law of occupation through the use of proxies'. Then, while noting that so far the ICTY (and the ICJ) had only implicitly accepted this to be the case, it found that 'such authority may be exercised by proxy through *de facto* organised and hierarchically structured groups'.⁷² A few years earlier, it had been advocated that, as a result of *Tadić*, the law of occupation could apply when an armed group under overall control of a third State exercises effective control over a territory.⁷³ Consequently, the ICTY Appeals Chamber's explicit recognition in this regard is therefore an interesting development of the IHL.

2.1.1 Non-international Armed Conflict by Default?

On the basis of the foregoing, it is evident that at the ICTY a generic concept of armed conflict was adopted and the classification of the relevant armed conflict was only given special attention: i) when for statutory reasons, it was necessary to pronounce on the existence of an IAC; or ii) to the existence of a NIAC, if the existence of any armed conflict was challenged. As to the former, the reasons to retrospectively classify the situation as an IAC were for reasons related purely to ICL. If no grave breaches were charged, or an IAC was not clearly charged, the existence of this type of conflict was not considered. In this regard, it has been questioned whether qualifying a situation as an IAC for ICL purposes, as opposed to a NIAC, has any real impact on the behaviour of those on the battlefield, to whom the IHL rules are applicable. There is, for example, no cogent reason to believe that a military commander could be convinced during a conflict to respect a certain set of rules by arguing that he or she legally is an agent of a third State, of which he is not a national.⁷⁴

It further appears that the *Tadić* Appeal Judgment seems to have been 'misinterpreted as dispensing with the need to decide the internationality of a conflict for war crimes other than grave breaches'.⁷⁵ Indeed, most chambers of the ICTY have treated NIAC as the default type of armed conflict. In addition to the above-discussed rulings, this is most strikingly revealed in the *Hadžihasanović*

71 *Ibid.*, paras. 316–321.

72 *Ibid.*, para. 232.

73 Tom Gal, 'Unexplored Outcomes of *Tadić*: Applicability of the Law of Occupation to War by Proxy', 12(1) *Journal of International Criminal Justice* (2014) 59–80.

74 Marco Sassòli and Laura Olsen, 'Prosecutor v. Tadic (Judgement)', 94(3) *American Journal of International Law* (2000) 576.

75 Alexander Zahar and Goran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, Oxford, 2008), p. 112.

et al. case. This case is best known for being the first case to deal with command responsibility in NIAC,⁷⁶ but actually the Prosecution had not at all wanted this case to be about a NIAC. It had attempted to bring evidence proving the existence of an IAC, but the Trial Chamber had declared any evidence about the international nature of the conflict inadmissible.⁷⁷ The Trial Chamber did so because in an interlocutory appeal the Appeals Chamber had ruled that ‘if the prosecution wishes to rely upon an international armed conflict, even if only in the alternative, it must plead as a material fact that the armed conflict was international in character and state the basis upon which such an assertion is made’.⁷⁸ The Appeals Chamber appears to have reasoned that therefore the indictment should be treated as pleading a NIAC.⁷⁹ Whereas the Appeals Chamber was ambiguous, the Trial Chamber explicitly considered NIAC to be the residual type of conflict: ‘Adopting the reasoning of the Appeals Chamber in a pre-trial decision, the Chamber found that the armed conflict in the case before it was, *by default*, of an internal nature’.⁸⁰

In addition to treating NIAC, incorrectly, as the legal default, the Tribunal also significantly expanded the scope of this very type of conflict. Besides seemingly lowering the threshold for the existence of NIACs, as discussed in detail elsewhere,⁸¹ the ICTY Appeals Chamber innovated⁸² IHL by reasoning that an armed conflict exists whenever there is a resort to armed force between organised armed groups within a State, without any governmental armed forces taking part in the fighting.⁸³ Although the text of Common Article 3, which refers to ‘parties to the conflict’, does not exclude application to fighting between armed groups only, it was not contemplated by the drafters of the 1949

76 See, e.g., Christopher Greenwood, ‘Command Responsibility and the Hadžihasanović Decision’, 2(2) *Journal of International Criminal Justice* (2004) 598–605.

77 ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-T, Trial Chamber, Judgment, 15 March 2006 (*Hadžihasanović et al.* Trial Judgment), para. 28.

78 It specified that ‘[i]n the circumstances of the present case, the prosecution would be obliged to identify the foreign entity under whose overall control one of the parties to that conflict is alleged to have been acting’. ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-T, Appeals Chamber, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003, para. 11.

79 *Ibid.*, para. 1: ‘But it is sufficient for present purposes to treat the Amended Indictment as pleading that the armed conflict was internal in character, or in the alternative that it was international in character’.

80 *Hadžihasanović et al.* Trial Judgment, *supra* note 77, para. 27 (emphasis added).

81 Bartels, *supra* note 13, pp. 59–60.

82 Sonja Boelaert-Suominen, ‘The Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts’, 13(3) *Leiden Journal of International Law* (2000) 622.

83 *Tadić* Jurisdiction Decision, *supra* note 17, para. 70.

Geneva Conventions. To the contrary, the official record shows that the delegations that discussed the matter considered that the notion of ‘conflict not of an international character’ necessarily required a State to be one of the parties.⁸⁴ The United Kingdom, for example, understood the draft text of Common Article 3 to concern ‘situations in which one of the combatants was the lawful government’.⁸⁵

By now, as a result of the ICTY’s ruling, it has become accepted that both IHL and ICL apply to fighting that reaches a certain level of intensity and takes place between two organised armed groups.⁸⁶ The proliferation of armed groups in contemporary conflict shows the significance of this expansion. In Syria, for example, at a certain moment reportedly hundreds of armed groups and militias were active.⁸⁷ In fact, as will be discussed below, the majority of the ICC’s cases relate to fighting between armed groups, in which allegedly no State forces were involved.

2.2 *International Criminal Tribunal for Rwanda and Special Court for Sierra Leone*⁸⁸

Similar issues did not arise at the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (Special Court or SCSL), where

84 See Alain-Guy Tachou-Sipowo, ‘Does International Criminal Law Create Humanitarian Law Obligations? The Case of Exclusively Non-State Armed Conflict under the Rome Statute’, 51 *Canadian Yearbook of International Law* (2013) 294.

85 Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims 1949, Summary Records of the Joint Committee, 1st Meeting (26 April 1949), pp. 10–11.

86 As an example of the wide acceptance, see Rule 23 of the second manual on cyber warfare, prepared by a group of international experts, at the invitation of the North Atlantic Treaty Organization: Mike Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, Cambridge, 2018), p. 84.

87 According to some accounts as many as 1500: see Terry D. Gill, ‘Classifying the Conflict in Syria’, 92 *International Law Studies* (2016) 355; and Christopher M. Blanchard *et al.*, *Armed Conflict in Syria: Overview and U.S. Response* (Congressional Research Service, Report RL33487), p. 9.

88 Beyond the present footnote and an example in relation to the *lex mitior* principle, the present contribution does not separately analyse the case law of the Extraordinary Chambers in the Courts of Cambodia (ECCC). As to the ECCC, it is worth noting, however, that its subject-matter jurisdiction over war crimes was limited to grave breaches of the 1949 Geneva Conventions, which necessitated a finding that an IAC existed at the relevant time. One may wonder why a focus on an IAC was chosen when the majority of the atrocities committed by the Khmer Rouge were in the context of an internal situation, against fellow-Cambodians. Be that as it may, having jurisdiction over grave breaches allowed to address the killing and mistreatment of detained Vietnamese soldiers and Cambodian citizens suspected to have an allegiance with Vietnam, as grave breaches. The existence of

as a result of the foundations of these tribunals only determinations of NIAC were made. Their Statutes and jurisdiction were, *inter alia*, based on violations of Common Article 3 to the 1949 Geneva Conventions, applicable to NIACs.⁸⁹ With respect to the ICTR, the UN Security Council had expressly stated its view that 'given the nature of the conflict as non-international in character', it had incorporated in the Tribunal's subject-matter jurisdiction only violations of Common Article 3 and Article 4 of Additional Protocol II.⁹⁰ In response to the UN Security Council requesting him to set up a court to deal with Sierra Leone, with jurisdiction over, *inter alia*, 'war crimes and other serious violations of international humanitarian law',⁹¹ the UN Secretary-General seemed so certain about the nature of the armed conflict that the SCSL Statute he submitted to the Council for adoption only contained violations of Common Article 3 and Additional Protocol II as war crimes.⁹²

Be that as it may, although both the conflict in Rwanda and the one in Sierra Leone primarily concerned a rebel group opposing the government,⁹³ both these conflicts additionally had certain international aspects. For example, the Tutsi armed opposition group, the *Front Patriotic Rwandais* (Rwandan Republic Front – RPF), which fought the Hutu government of Rwanda at the time of

an IAC between Vietnam and Cambodia was either uncontested by the parties, or swiftly found by the trial chambers dealing with the two cases concerning alleged grave breaches (*e.g.*, Case 001 and Case 002/02), and the matter was not raised on appeal. The trial chambers considered the existence of the IAC and its classification so self-evident that each of the judgments concluded in one single paragraph that the fighting between Democratic Kampuchea and Socialist Republic of Vietnam fulfilled the requirements: ECCC, *Case 0001*, Case No. 001/180-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, para. 74, 423; ECCC, *Case 002/02*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, 16 November 2018, para. 336.

- 89 See UN Security Council Resolution S/RES/955 (8 November 1994) and Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (signed 17 January 2002), respectively. For the drafting history of the SCSL Statute, see also SCSL, *Prosecutor v. Fofana*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict, 25 May 2004, para. 18.
- 90 See *Secretary General's Report on practical arrangements for the effective functioning of the International Tribunal for Rwanda, recommending Arusha as the seat of the Tribunal*, UN Doc. S/1995/134, of 13 February 1995, para. 11.
- 91 UN Security Council Resolution 1315 of 14 August 2000, UN Doc. S/RES/1315 (2000), p. 2.
- 92 *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, UN Doc. S/2000/915, pp. 4, 21–22.
- 93 The ICTR only dealt with the genocide and related conduct, which in effect took place separately from the armed conflict. The Tribunal, which never brought charges against any members of the RPF, did not focus on the fighting between the FRP and the governmental forces.

the genocide, operated from Uganda and reportedly received substantial assistance from this State.⁹⁴ Significantly, at the start of the Rwandan conflict in 1991, most of the RPF fighters were actually – at the same time – part of the Ugandan armed forces.⁹⁵ It is further noted that the Tribunal in fact had jurisdiction over the cross-border, or spillover, aspects of the Rwandan conflict into the neighbouring states.⁹⁶ It is not argued here that the ICTR should have characterised the Rwandan conflict as an IAC, but on the basis of the aforementioned information, one would have expected the judges to have at least given some consideration to this aspect.⁹⁷ However, given that the ICTR Statute did not include grave breaches, a discussion of possible classification as an IAC appears not to have been considered relevant. Moreover, the ICTR Appeals Chamber even ruled that trial chambers could take judicial notice of the existence of a NIAC in Rwanda in 1994.⁹⁸

94 See International Crisis Group, *Uganda and Rwanda: Friends or Enemies?* (Central Africa Report N° 14, 4 May 2000), p. 3. On Uganda's role in the conflict, see also: *Rapport d'information déposé en application de l' article 145 du Règlement par la Mission d'information de la Commission de la Défense nationale et des Forces armées et de la Commission des Affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, (No 1271, Assemblée Nationale (France), 15 December 1998) pp. 126–128. One scholar concludes that 'it is unlikely Ugandan involvement in the RPF invasion would rise to the level of "overall control"' (Heather Alexander, 'Justice for Rwanda: Toward a universal law of armed conflict', 34(2) *Golden State University Law Review* (2004) 444), but another scholar holds that 'despite the ICTR's constant denial of the international character of the conflict in Rwanda in the 1990s, abundant material established connections between Paul Kagame's FPR and Uganda sufficient to raise serious questions as to the existence of an overall control' (Decoeur, *supra* note 42, p. 479). Asking herself 'Was the conflict really non-international?', Van den Herik extensively analyses the situation, concluding that the NIAC-classification was indeed in order. She does, however, appear to use an effect control test, leaving unanswered whether the lower overall control standard would not instead have been met. Larissa J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers, Leiden, 2005), pp. 214–226.

95 International Crisis Group, *supra* note 94, pp. 2–3.

96 Art. 1 of the ICTR Statute states that the Tribunal has 'the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States'. Naturally, this aspect of the ICTR's jurisdiction could also be considered to support the contention that the Rwandan conflict was an example of a NIAC that extended beyond the borders of a single State.

97 See *similarly* Van den Herik, *supra* note 94, p. 226.

98 ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras. 28–29; and ICTR, Appeals Chamber, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Chamber, Judgment, 20 May 2005, para. 192.

The defence before the Special Court, on the other hand, actively challenged the classification of the armed conflict in Sierra Leone as non-international.⁹⁹ According to the defence for Mr Fofana, the facts ‘undoubtedly show that the conflict was of an international nature’.¹⁰⁰ Fofana’s lawyers argued that ‘the jurisdiction of the Special Court under Articles 3 and 4 is limited to internal armed conflicts’ and therefore, if the conflict was found to be international, the Special Court would lack jurisdiction *ratione materiae* over certain of the crimes charged.¹⁰¹ Surprisingly, however, the Special Court’s Appeals Chamber – incorrectly – decided that the nature of the armed conflict in Sierra Leone did not have any bearing on the Special Court’s jurisdiction over the (alleged) war crimes.¹⁰² The Trial Chamber subsequently took judicial notice of ‘the fact that the “armed conflict in Sierra Leone occurred from March 1991 until January 2002”¹⁰³ and therefore did not discuss the matter in detail in its judgment. Nevertheless, the Trial Chamber’s references to the application of Additional Protocol II and to the criteria of organisation and intensity show clearly that it considered the conflict to be non-international.¹⁰⁴

99 In addition to the *Fofana* Defence, discussed below, also the defence team for Mr Kallon contended that the NIAC in Sierra Leone had been transformed into an IAC. It argued that the involvement of peace forces of UNAMSIL, as well as private military security companies, had internationalised the initial NIAC. In addition, the *Kallon* defence, together with the defence team for Mr Sesay, made a similar argument as to the involvement of ECOMOG, an intervention force consisting of forces from various ECOWAS States. See SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009 (*Sesay et al.* Trial Judgment), para. 973.

100 SCSL, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-PT, *Fofana* Defence, Reply to the Prosecution Response to the Preliminary Defence Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict, 30 November 2003, para. 1. In light of the UN Security Council’s statement as to the involvement of Liberia (‘[deeply concerned] at the unequivocal and overwhelming evidence presented by the report of the Panel of Experts that the Government of Liberia is actively supporting the RUF at all levels’), it appears that the Defence’s argument should have been given some *prima facie* weight: see UN Security Council Resolution S/RES/1343 (7 March 2001), p. 1.

101 *Ibid.*

102 SCSL, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-PT, Appeals Chamber, Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict, 25 May 2004, para. 31.

103 SCSL, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Trial Chamber, Annex I to the Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence, 2 June 2004, p. 2.

104 SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Judgment, 2 August 2007, paras. 123-128 (Note: the name of Mr Norman, who died during the trial, was taken off the judgment’s cover page and case name). The Trial Chamber did mention the criteria for the application of Additional Protocol II, but neither applied these criteria, nor appears to have satisfied itself that they were met. See Quénivet, *supra* note 48, p. 52.

In *Sesay et al.*, the Trial Chamber also showed a rather complacent approach to armed conflict classification. It took judicial notice of ‘the armed conflict in Sierra Leone’, thereby summarily dismissing the submission by the *Kallon* defence that no armed conflict existed at the time part of the alleged crimes took place.¹⁰⁵ That the judicial notice taken of the existence of an ‘armed conflict’ was in fact notice of the existence of a *non-international* armed conflict, becomes clear when the Trial Chamber, after quickly dismissing the arguments by the defence teams for Mr Kallon and Mr Sesay about the international nature of the armed conflict, either through the involvement of ECOWAS forces or overall control by Liberia,¹⁰⁶ held that ‘therefore ... the armed conflict in Sierra Leone was of a non-international character’.¹⁰⁷

Strangely, only after having reached this conclusion, the Trial Chamber turned to the criteria for the existence of a NIAC. The accused were charged with specific violations of Additional Protocol II (namely acts of terrorism, pillage and collective punishment). Different from the ICTY, and presumably in light of the different thresholds for the application of Common Article 3 and for Additional Protocol II, the Trial Chamber considered that the Prosecution had to prove the specific elements of Article 1 of Additional Protocol II, namely the exercise of control over territory that enabled the carrying out of sustained and concerted military operations.¹⁰⁸ The Trial Chamber therefore – albeit in a scant manner – considered the material scope of application of the Protocol,¹⁰⁹

105 *Sesay et al.* Trial Judgment, *supra* note 99, para. 969, referring to its ‘Consequential Order on Judicial Notice, Annex 1, Fact A’.

106 In doing so, the *Sesay et al.* Trial Chamber appears to place the burden of proof for the nature of the armed conflict on the accused, holding that ‘the Defence did not at any stage adduce evidence to establish’ its theory ‘that the support extended to the RUF by Charles Taylor was such that the RUF were in fact acting on behalf of, or belonging to, the Republic of Liberia’: *Sesay et al.* Trial Judgment, *supra* note 99, para. 974.

107 *Ibid.*, para. 977.

108 *Ibid.*, para. 966. Likely then, the Trial Chamber would also have concluded that no conviction for Additional Protocol II crimes could have been entered, in case the fighting would have been between two organised armed groups; and in that sense have been more restrictive than the ICTY.

109 Although the *Sesay et al.* Trial Chamber’s analysis of the criteria for material scope of application of Additional Protocol II is far too minimalistic, the Chamber should be given credit for the eloquent and comprehensive manner in which it disposed of the contention by the *Sesay* Defence that even in a NIAC the RUF, an armed group, should be considered as an occupying power (*see ibid.*, paras. 982–988). Although the challenge, as put forward by the *Sesay* defence, was obviously incorrect as it tried to apply the law of occupation directly to NIAC, it is interesting to consider whether, as was concluded to be the case in *Prlić et al.* by the ICTY Appeals Chamber, whether the law of occupation applies as a result of the RUF acting as a proxy, thereby making the situation an IAC.

concluding that the requirements of Additional Protocol II had been proven beyond reasonable doubt.¹¹⁰ It did not assess the criteria for the existence of a Common Article 3 conflict, as a conflict satisfying the higher threshold of Additional Protocol II, 'would necessarily constitute an armed conflict under Common Article 3'.¹¹¹

Strikingly, however, the *Sesay et al.* Trial Chamber had dismissed the defence's appeal for internationalisation of the NIAC, because in the Chamber's view 'the evidence does not establish beyond reasonable doubt that Taylors [*sic*] interactions with the RUF leadership were such that he was in a position to exercise overall control over the RUF as an organization'.¹¹² Yet, the findings made in the judgment in *Prosecutor v. Taylor* on the role of the accused, who at the time of the crimes was head of the neighbouring State Liberia, and on the assistance he provided to the rebel forces in Sierra Leone, shine a different light on the Special Court's findings on the classification of the conflict in the aforementioned cases. After all, the *Taylor* Trial Chamber found that Mr Taylor had

provided arms and ammunition, operational support and military personnel to the RUF/AFRC that were critical in enabling the RUF/AFRC's Operational Strategy. Similarly, the Trial Chamber found that Taylor and Sam Bockarie planned an attack on Freetown and thereby had a substantial effect on the crimes committed during and after the Freetown Invasion. Both of them identified the targets, goals and modus operandi of the campaign.¹¹³

110 *Ibid.*, paras. 978–981. In criticising the way in which the Trial Chamber considered the criteria for application of Additional Protocol II, a scholar notes that the judgment 'conveys the impression that the Trial Chamber applied the Additional Protocol II test with extreme reluctance': Quénivet, *supra* note 47, p. 52.

111 *Sesay et al.* Trial Judgment, *supra* note 99, para. 981.

112 *Ibid.*, para. 976.

113 SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 December 2013, para. 593, referring to paras. 6907–6937 and 6958–6968 of the trial judgment. The *Taylor* Trial Chamber considered whether Mr Taylor himself had effective control over the two rebel groups (RUF and AFRC) and noted that he had 'substantial influence over the leadership of the RUF, and to a lesser extent that of the AFRC', but 'substantial influence over the conduct of others falls short of effective control' (SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012 (*Taylor* Trial Judgment), para. 6979). However, this assessment is part of the Chamber's analysis of the elements of superior responsibility. The threshold for control by a State as set out by the ICTY Appeals Chamber, as can be seen from the analysis quoted above, was clearly met if Mr Taylor's acts would be attributed to the State of Liberia. See *similarly*, albeit written before the *Taylor* Trial Judgment was rendered, and therefore only on the basis of the allegations against Mr Taylor contained in the indictment: Ousman Njikam, *The Contribution of the*

Compared to the ICTY's Appeals Chamber's dictum that 'international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions',¹¹⁴ but rather that a State exercises overall control when it has 'a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group',¹¹⁵ it appears that a strong case for 'overall control' could be made. Nonetheless, the *Taylor* Trial Judgment did not contain any discussion on the type of armed conflict,¹¹⁶ and Mr Taylor was found guilty of having committed violations of Common Article 3 and Additional Protocol II.¹¹⁷ Whereas one could argue that, similar to the findings of the ICTY Appeals Chamber in the *Čelebići* case, violations of Common Article 3 can also occur in IAC, as the content of Common Article 3 is to be seen as a minimum yardstick applicable during all armed conflicts,¹¹⁸ violations of Additional Protocol II can only occur during a NIAC.¹¹⁹ The conviction in *Taylor* therefore necessarily means that the Trial Chamber characterised the

Special Court for Sierra Leone to the Development of International Humanitarian Law (Duncker & Humblot, Berlin, 2013), pp. 146–147 and 151–153.

- 114 *Tadić* Appeal Judgement, *supra* note 33, para. 145. In paragraph 137, the ICTY Appeals Chamber had already stressed that '[u]nder international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law'.
- 115 *Ibid.*, para. 137 (emphasis omitted).
- 116 Similar to the other Special Court cases, the Trial Chamber had taken judicial notice of the existence of an 'armed conflict in Sierra Leone ... from March 1991 until January 2002' (*Taylor* Trial Judgment, *supra* note 113, para. 571). In light of the parties' agreement "that '[d]espite temporary lulls in the fighting occasioned by a 30 November 1996 peace agreement and a 7 July 1999 peace agreement, active hostilities continued in the Republic of Sierra Leone until about 18 January 2002", the Trial Chamber found that it was 'established beyond reasonable doubt that there was an armed conflict in Sierra Leone at all times relevant to the Indictment period', *ibid.*
- 117 See the 'Disposition' of the *Taylor* Trial Judgment, *supra* note 113. The findings of the *Taylor* Trial Chamber as to Mr Taylor's role are particularly striking in light of the following earlier finding by the *Sesay et al.* Trial Chamber: 'Relying on the second requirement for internationalisation, the Kallon and Sesay Defence submit that the support extended to the RUF by Charles Taylor was such that the RUF were in fact acting on behalf of, or belonging to, the Republic of Liberia. The Chamber observes that the Defence did not at any stage adduce evidence to establish this theory'. *Sesay et al.* Trial Judgment, *supra* note 99, para. 974.
- 118 ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001 (*Delalić et al.* Appeal Judgment), paras. 147–152 and 419–420.
- 119 Naturally, all violations of Additional Protocol II are violations of IHL, and almost all violations of the rules of the protocol also violate the rules applicable during IACs (Note: the broader language of use of children under the age of 15 is discussed further below in the present contribution).

situation as a NIAC. Given the subject-matter jurisdiction and the explicit submissions on this issue by some of the accused before the Special Court, this raises – at a minimum – questions about the legality of their convictions. Moreover, given that one of the members of the bench, namely Judge Sebutinde, specifically questioned the Special Court’s Prosecution during the closing arguments on the nature of the armed conflict, and asked whether Mr Taylor’s involvement and control over the RUF amounted to ‘overall control’ and the conflict therefore had been international in nature,¹²⁰ the judgment’s silence on the classification of the conflict is troubling. In response to Judge Sebutinde’s questions, the Prosecution had submitted that even though it alleged that Mr Taylor exercised effective control over the members of the RUF who had committed crimes in Sierra Leone, ‘the conflict in Sierra Leone was not of an international character because Mr Taylor was acting independent and in violation of his duties as President of Liberia’.¹²¹ It argued that it was not the Liberian government, but Mr Taylor, in a private capacity, who controlled the RUF.¹²²

Besides it being unconvincing to argue that conduct by the democratically elected president, who used State organs and State resources,¹²³ could not be ascribed to State of Liberia, the Prosecution’s argument implies that overall control could only exist if some form of constitutional process were to be followed, for example, with parliament voting in favour of assisting (and acquiring control over) an armed group. That would not only politicise conflict classification, something that the introduction of the concept of ‘armed conflict’ had aimed to prevent, it also ignores that overall control will generally not be achieved through public measures but rather by way of covert action, such as the US support to the Contras that was subject to ICJ’s consideration in the *Nicaragua* case.

More recently, one can detect a similar preference for NIAC, and in effect treating NIAC as a residual or default regime, or to ignore conflict classification matters altogether, in the practice of the ICC, which will be considered next.

120 SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Transcript of Hearing of 9 February 2011, pp. 49288–49289.

121 *Ibid.*, p. 49292.

122 *Ibid.*

123 According to the Special Court’s Prosecution, ‘those elements within the government and within the country that [Mr Taylor] used to further his conduct in Sierra Leone were also in violation of their duties in Liberia’. *Ibid.*

3 The Practice of the International Criminal Court

The Rome Statute strictly separates four types of war crimes, reflecting the drafters intention to separate between crimes committed during IAC and those during NIAC:¹²⁴ i) grave breaches of the 1949 Geneva Conventions, included in Article 8(2)(a);¹²⁵ ii) '[o]ther serious violations of the laws and customs applicable in international armed conflict that can be committed in international armed conflicts', listed in Article 8(2)(b); serious violations of Common Article 3 (Article 8(2)(c)); and '[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character', listed in paragraph Article 8(2)(e).

The initial drafts of the Rome Statute had listed all NIAC-war crimes in a single provision,¹²⁶ instead of the current division over two sub-paragraphs. As to the second of the sub-paragraphs, Article 8(2)(f) specifies that paragraph (e) 'applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'. The current wording was proposed in Rome by the Sierra Leone, as a counter proposal to the Additional Protocol II threshold suggested by the Conference Bureau, in reaction to criticism by certain States that wished a higher threshold for the criminalisation of violations of rules not contained in Common Article 3.¹²⁷ In an attempt to obtain agreement for a lower threshold, Sierra Leone proposed this wording, which is similar but not identical to the *Tadić* definition.¹²⁸ Relying on the slight difference between *Tadić* and Article 8(2)(f), it has been suggested by some authors – mostly writing shortly after the adoption of the Rome Statute – that the ICC has two separate NIAC-thresholds: one for application of

124 See *infra* on the question whether Arts. 8(2)(a) and (b) indeed only apply to international armed conflicts.

125 The drafters of the Rome Statute had quickly agreed upon the inclusion of the grave breaches of the universally ratified 1949 Geneva Conventions, but the grave breaches contained in Additional Protocol I, to which a significant number of States are not parties, were subject to more discussion. The latter have (mostly) been included in Art. 8(2)(b) as '[o]ther serious violations of the laws and customs applicable in international armed conflict'. See, e.g., William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010), p. 119.

126 See Discussion paper prepared by the Bureau, A/CONF.183/C.1/L.53 (6 July 1998).

127 For a good overview of the discussions in Rome on this aspect, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012), pp. 192–195.

128 It refers to 'protracted armed conflict' rather than 'protracted violence'. After Sierra Leone's proposal, the current wording was adopted by consensus.

Article 8(2)(c) and one for (e), the latter being higher than the Common Article 3 threshold of the former.¹²⁹ This third threshold for NIAC would lie in between the Common Article 3 and Additional Protocol II thresholds, requiring the relevant NIAC to be protracted.¹³⁰ However, the prevailing, and better view is that the thresholds for Article 8(2)(c) and in (e) are the same.¹³¹ The references to in both Article 8(2)(d) and (f) that the foregoing paragraphs ‘thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence’ further confirms that the threshold should be regarded as the same. Notably, this phrase does not limit the application of Article 8(2)(c) and (e), but simply reaffirms that internal disturbances and tensions exclusively belong to the domestic affairs of a State and are not covered by IHL.¹³² Various chambers of the ICC have confirmed this.¹³³ In this contribution the thresholds will therefore be treated as one of the same.

129 For a detailed discussion, see Anthony Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)’, 12(3) *Journal of Conflict and Security Law* (2007) 419–445.

130 Such as Luigi Condorelli, ‘War Crimes and Internal Conflicts in the Statute of the International Criminal Court’, in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court* (Ashgate, Aldershot, 2001), pp. 107, and 112–113; René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge, 2002), p. 268; and Heike Spieker, ‘The International Criminal Court and Non-International Armed Conflicts’, 13(2) *Leiden Journal of International Law* (2000) 408.

131 It has been convincingly shown by Cullen and Sivakumaran, relying on the discussions held in Rome, that the Rome Conference did not intend to create a new (additional) threshold for NIAC and that the threshold of paragraph (f) is to be regarded as the same as the one for paragraph (c). See Cullen, *supra* note 129, Sivakumaran, *supra* note 126, pp. 192–195; and Sandesh Sivakumaran, ‘Identifying an Armed Conflict Not of an International Character’, in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, Leiden, 2009), pp. 371–373. See further in support, e.g., Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in Wilmshurst, *supra* note 18, p. 212; Cryer *et al.*, *supra* note 35, pp. 283–285; and Jelena Pejic, ‘The protective scope of common Article 3: more than meets the eye’, 93(882) *International Review of the Red Cross* (2011) 192–193.

132 Spieker, *supra* note 130, pp. 407–408.

133 *Lubanga* Trial Judgment, *supra* note 24, para. 536; *Katanga* Judgment, *supra* note 59, para. 1183; and ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Trial Chamber, Judgment, 8 July 2019 (*Ntaganda* Trial Judgment), para. 701. The *Bemba* Trial Chamber, like the Pre-Trial Chamber in that same case, noted the reference in paragraph (f) to ‘protracted armed conflict’, but concluded that the ‘potential distinction’ between the thresholds of NIAC for paragraphs (c) and (e) ‘would only have significance if the Chamber were to reach a conclusion that the conflict in question was not “protracted”’. Given that this was not the case, it found it ‘unnecessary to address the difference further at this point’, *Bemba* Trial Judgment, *supra* note 59, para. 138.

All cases before the ICC concern armed violence and in most of the cases the Prosecution has brought war crime charges. Given that the number of cases before the ICC is still limited, it is more difficult – as compared to the ICTY – to distil a general approach. It is therefore useful to analyse the approach to conflict classification in each of the Court's cases that concern (potential) situations of armed conflict so far,¹³⁴ which is done in the following section.

3.1 Lubanga Case

In the first case before the ICC, the *Lubanga* Trial Chamber stressed that '[t]he existence of an armed conflict, be it international or non-international, is a fundamental requirement of the charges under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute' and that '[i]t follows that if the prosecution has failed to prove the existence of a relevant armed conflict in Ituri from early September 2002 until 13 August 2003, it will have failed to prove the charges against the accused'.¹³⁵ The *Lubanga* Trial Chamber further stressed that, in its view, '[i]n situations where conflicts of a different nature take place on a single territory, it is necessary to consider whether the criminal acts under consideration were committed as part of an international or a non-international conflict'.¹³⁶ Despite the accuracy of that statement, it is of course not only in case of multiple conflicts on a single territory that it has to be considered whether the alleged conduct was part of an IAC or a NIAC. Moreover, the order in which the Trial Chamber's analysis was carried out, clearly shows that similar to the above mentioned unfortunate line of ICTY jurisprudence, the Trial Chamber took a generic concept of armed conflict as a point of departure.¹³⁷

¹³⁴ The present contribution limits the analysis to the cases that have reached the trial stage.

¹³⁵ *Lubanga* Trial Judgment, *supra* note 24, para. 504.

¹³⁶ *Ibid.*, para. 551, referring to Gerhard Werle, *Principles of International Criminal Law* (T.M.C. Asser Press, The Hague, 2009), p. 372 at marginal note 998.

¹³⁷ The Chamber's analysis starts rather ambiguously by the Chamber setting out it has 'to determine whether there was a *relevant* armed conflict, and if so, whether it was international or non-international in character' (*ibid.*, para. 503 (emphasis added)). After giving an overview of the submissions by the parties and participants, the Chamber first analyses the 'Definition of armed conflict' (*ibid.*, paras. 531–533). As part of this section, it quotes the combined *Tadić* definition and considers that the existence of an armed conflict is an element of the war crime of child soldiering. Interestingly, the Trial Chamber merges the specific elements for the Art. 8(2)(b) and the Art. 8(2)(e) versions of the crime, by leaving out the words 'international' and 'non-international' (i.e., the relevant part of para. 531 states: 'The relevant Elements of Crimes require that the alleged criminal conduct "took place in the context of and was associated with an ... armed conflict"'). Doing so, it not only deletes the most essential word of each of the elements, but it also artificially creates the impression that a generic armed conflict concept exists in the Court's legal framework. The next section is named 'Armed conflict not of an international

Even though the Prosecution had alleged in its charging document that the alleged crimes occurred in the context of a NIAC, Pre-Trial Chamber I had confirmed the charges against Mr Lubanga with respect to a NIAC, as well as an IAC, because during part of the temporal scope of the charges Uganda had occupied part of Ituri. According to the Pre-Trial Chamber this transformed the whole conflict during the relevant period into an IAC.¹³⁸ The Prosecution sought re-characterisation of the nature of the armed conflict before the Trial Chamber, which had given the required notice to the parties that such re-characterisation may be done in the judgment. Indeed, in its judgment, the Trial Chamber made the requested re-characterisation.¹³⁹

Noteworthy also is another adoption of ICTY practice with regards to conflict classification. Without providing any explanation, the Trial Chamber's embraced the 'overall control standard' introduced by the ICTY's Appeals Chamber as being the 'correct approach'.¹⁴⁰ During the confirmation stage, Pre-Trial Chamber I had also adopted the overall control standard without the slightest explanation.¹⁴¹ The standard adopted may well be the correct one,¹⁴² but the debate as to best manner to assess attributability of the actions of an armed group for the purposes of conflict classification is still alive in the

character' and only after setting out what constitutes a NIAC, followed by a discussion of 'The distinction between international and non-international armed conflicts' in the section thereafter, the Trial Chamber turns to discuss IAC in the section on 'International armed conflict', *ibid.*, paras. 534–538, 5539–540, and 541–542, respectively.

138 ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Pre-Trial Chamber, Decision on the confirmation of charges, (*Lubanga* Confirmation Decision), para. 220.

139 *Lubanga* Trial Judgment, *supra* note 24, paras. 566–567.

140 The *Lubanga* Trial Chamber merely stated: 'As regards the necessary degree of control of another State over an armed group, acting on its behalf, the Trial Chamber has concluded that the "overall control" test is the correct approach': *ibid.*, para. 541. A scholar, who critically assessed the Trial Chamber's approach to classifying the armed conflict, expresses his surprise about the Trial Chamber's lack of reasoning, because '[o]ne could have expected the [Trial Chamber] to at least consider the ICJ's opinion [in the *Genocide* case] before blindly following the *Tadić* precedent. ... Irrespective of what answer the [Trial Chamber] would have given, considering that all cited authorities predate the ICJ's *Genocide* judgment, one would have expected the [Trial Chamber] to show a minimum degree of awareness of this debate', Thomas R. Liefländer, 'The Lubanga Judgment of the ICC: More than just the First Step?', 1(1) *Cambridge Journal of International and Comparative Law* (2012) 195–196.

141 It had done so merely by reference to the ICTY Appeals Chamber in *Tadić*, stating that it was of the 'view that where a State does not intervene directly on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State', *Lubanga* Confirmation Decision, *supra* note 138, paras. 210–211.

142 The ICRC favours the overall control test over one for effective control: ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press, Cambridge, 2016), para. 273.

academic literature¹⁴³ and in practice,¹⁴⁴ and the lack of reasoning provided in the judgment has therefore caused surprise and attracted widespread academic criticism.¹⁴⁵

The Trial Chamber accepted that a NIAC existed in the Democratic Republic of Congo (DRC) at the relevant time (namely, early September 2002 until 2 June 2003), because sufficient evidence was led for it to conclude that the NIAC criteria of organisation and intensity were met.¹⁴⁶ However, the Trial Chamber also acknowledged that some of the evidence before it could potentially support a conclusion that the conflict was, in fact, international in nature. This included evidence about the occupation by Uganda of part of the Congolese territory,¹⁴⁷ and possible overall control over Mr Lubanga's armed group (*i.e.* the FPLC) by Rwanda, which could have internationalised the situation.¹⁴⁸

143 See the discussion in *ibid.*, paras. 269–273; and Sivakumaran, *supra* note 126, pp. 225–228.

144 The recently published edition of the Law of Armed Conflict Manual of New Zealand, for example, relies on the effective control standard: New Zealand Defence Force, *Manual of Armed Forces Law: Law of Armed Conflict*, Volume 4 (2nd ed., 2019), at 5.3.2b.

145 Liefänder, *supra* note 140, pp. 195–196; Kai Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', 12(2) *International Criminal Law Review* (2012) 115–153; Akande, *supra* note 131, pp. 58–60; Manual J. Ventura, 'Two Controversies in the *Lubanga* Trial Judgment of the International Criminal Court: The Nature of Co-perpetration's Common Plan and the Classification of the Armed Conflict', in Stuart Casey-Maslen (ed.), *The War Report 2012* (Oxford University Press, Oxford, 2013), pp. 483–491; Anthony Cullen, 'The Characterization of Armed Conflict in the Jurisprudence of the ICC', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015), pp. 762–777; Remy Jorritsma, 'Where General International Law meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts', 23(3) *Journal of Conflict and Security Law* (2018) 405–431. Earlier, the then ICJ Judge Bruno Simma had already questioned the *Lubanga* Pre-Trial Chamber's lack of explanation, or even reference to the existence of the *Nicaragua* Judgment, in the *Lubanga* Confirmation Decision: Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner', 20(2) *European Journal of International Law* (2009) 280.

146 *Lubanga* Trial Judgment, *supra* note 24, paras. 548–549, 550, and 567.

147 *Ibid.*, paras. 563–565.

148 As to Rwanda's role, the Trial Chamber considered that 'there is ample evidence it provided support to the UPC/FPLC. There is evidence that Rwanda supplied uniforms and weapons to the UPC/FPLC, including dropping weapons by air to Mandro, and it provided training to UPC/FPLC soldiers, in the DRC and in Rwanda', *ibid.*, para. 554. Furthermore, a witness (Witness P-0055) had testified that he had been told, with regard to the UPC/FPLC's objective of taking military control of the town of Mongbwalu, 'they had received orders from Rwanda' and Rwanda had indicated 'if they took the town of Mongbwalu it would be a good thing and they were going to receive everything they needed', *ibid.*, para. 555. However, the Trial Chamber held that '[w]ith regard to Rwanda, although P-0055 gave evidence that the UPC/FPLC wanted to take the town of Mongbwalu because it had been directed to do so by Rwanda, this statement has not been corroborated by

Although the Chamber's finding on the impact of the occupation¹⁴⁹ and on the lack of overall control¹⁵⁰ may be questioned, based on the evidence or even on the actual situation on the ground its finding that the relevant situation was a NIAC may well have been correct,¹⁵¹ but – as will be further discussed below – it is unsatisfactory that the conclusion was, in part, based on the lack of corroboration, or insufficiency of evidence for overall control by an outside State.

This is so, because characterisation of the conflict as a NIAC was preferable for the Prosecution,¹⁵² because Article 8(2)(b)(xxvi), applicable to IACs, may have required proving that the accused conscripted or enlisted children into 'the national armed forces', whereas Article 8(2)(e)(vii), relevant to NIACs, refers to conscripting or enlisting 'into armed forces or groups'.¹⁵³ As the children

other evidence and it is insufficient, taken alone or together with the other evidence above, to prove that Rwanda had overall control of the UPC/FPLC and the latter acted as its agent or proxy. Thus, there is insufficient evidence to establish (even on a *prima facie* basis) that either Rwanda or Uganda exercised overall control over the UPC/FPLC', *ibid.*, para. 561.

- 149 Akande questions the finding that the occupation by Uganda did not impact on the classification of the conflict on a legal basis. As the UPC was fighting the Ugandan government forces in March 2003, in his view the conflict between the occupying State (Uganda) and the armed group, (UPC) 'should ... be governed by the law of international armed conflicts', Dapo Akande, 'ICC Delivers Its First Judgment: The Lubanga Case and Classification of Conflicts in Situations of Occupation', *EJIL:Talk!* (16 March 2012), www.ejiltalk.org/icc-delivers-its-first-judgment-the-lubanga-case/, accessed 16 January 2020. The role of Rwanda is discussed more in detail below.
- 150 Ambos states in his analysis of the *Lubanga* Trial Judgment that he is 'not fully convinced by the Chamber's rejection of the PTC's conclusion that there was an international (or internationalized) conflict (at least) until the withdrawal of Ugandan armed forces; in fact, even after the withdrawal, the Ugandan involvement did not completely stop and much less the one of Rwanda'. Ambos mentions an email of Phil Clark, correctly referred to as 'a renowned expert on the Great Lakes region', in which Clark reportedly stated that '[e]ven after Uganda officially withdrew from Bunia in June 2003, some remnants of the Ugandan armed forces remained behind and continued assisting the UPC (mainly in Bunia but also elsewhere in Ituri). The Ugandan government also continued supporting the UPC from Kampala (with intelligence, finance, equipment etc.) thereafter, and it's a problematic interpretation of the nature of the DRC conflict to ignore the international use of proxy forces on Congolese soil': Ambos, *supra* note 145, p. 131.
- 151 Arimatsu concludes, for example, that the conflict in eastern DRC at the relevant time is to be classified as non-international in character: Louise Arimatsu, 'Democratic Republic of the Congo', in Wilmshurst, *supra* note 18, pp. 189–191.
- 152 See, e.g., Tim McCormack, 'Challenges in Applying Article 8 of the Rome Statute', in Suzannah Linton, Gerry Simpson and William A. Schabas (eds.), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Brill, Leiden, 2015), p. 353.
- 153 Pre-Trial Chamber I had concluded that the term 'national armed forces' (as used in Art. 8(2)(b)(xxvi)) was not limited to 'governmental armed forces' or the 'armed forces of a

were alleged to have been recruited into an armed group (the FPLC), the language of Article 8(2)(b)(xxvi) would have been problematic: it would have required the Trial Chamber to consider that the FPLC was analogous to national armed forces, or – as the Pre-Trial Chamber had done – take a flexible approach to the wording of the crime, thereby creating tension with the *lex certa* principle enshrined in Article 22(2) of the Rome Statute.¹⁵⁴ Indeed, the defence team for Mr Lubanga argued that the involvement of other States rendered the conflict international in nature.¹⁵⁵ However, both the legal representatives for victims, who generally would be expected to be siding with the Prosecution,¹⁵⁶ also contended that the conflict should be classified as international.¹⁵⁷

3.2 Katanga Case

The second case before the ICC, *Prosecutor v. Katanga*,¹⁵⁸ concerned an attack carried out by a collectivity of armed groups on a military base and the

State' and could include armed groups such as the FPLC (*Lubanga* Confirmation Decision, *supra* note 138, paras. 268–285), but it was, of course, not certain that Trial Chamber I would share this view.

- 154 The Pre-Trial Chamber did so by reasoning that the phrase national armed forces was not limited to the armed forces of the government (*ibid.*, para. 285). However, it is questionable whether this is correct: *see, for example*, Werle, *supra* note 136, p. 332. The Pre-Trial Chamber's finding has therefore been criticised as incorrect by various scholars: *e.g.*, Matthew Happold, 'Prosecutor v. Thomas Lubanga', Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007, 56(3) *International and Comparative Law Quarterly* (2007) 721–722; and Gauthier de Beco, 'War Crimes in International Versus Non-International Armed Conflicts: "New Wine in Old Wineskins"?' 8(1–2) *International Criminal Law Review* (2008) 327–328.
- 155 *Lubanga* Trial Judgment, *supra* note 24, paras. 516–517. The Defence submitted that the conflict only extended until late May 2003.
- 156 *See, for example*, Hakan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?', 22(3) *Leiden Journal of International Law* (2009) 492–498; American University Washington College of Law, *Victim Participation at the Case Stage of Proceedings*, (War Crimes Research Office February 2009); and the views of a then-ICC judge in Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44(1) *Case Western Reserve Journal of International Law* (2011) 488.
- 157 *Lubanga* Trial Judgment, *supra* note 24, paras. 519–521. The so-called 'legal representatives Vo2' argued that the conflict was an IAC, whilst the 'legal representatives Voi' submitted that besides an IAC, alongside a NIAC also existed.
- 158 The case against Germain Katanga was initially joined with the case against Mathieu Ngudjolo Chui. The Trial Chamber severed the cases against Mr Ngudjolo and Mr Katanga on 21 November 2012 and delivered its judgment in the case against Mr Ngudjolo on 18 December 2012 (*see* ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12, Trial Chamber, Judgment pursuant to article 74 of the Statute, 18 December 2012 (*Ngudjolo* Judgment)). However, in the *Ngudjolo* judgment, no findings on the character of the armed conflict are made

neighbouring village of Bogoro, in the same Ituri District of eastern DRC. Like in *Lubanga*, charges were confirmed for an IAC, but at trial the Prosecution had requested re-characterisation to a NIAC, which the defence for Mr Katanga suggested was 'because of prosecutorial strategy'.¹⁵⁹ During its presentation of evidence, the Prosecution had not led (specific) evidence on the involvement of an outside State, in this case Rwanda or Uganda, and in its closing brief, the Prosecution did not give the classification of the conflict much attention.¹⁶⁰ Although it did not specify that it considered the situation in Ituri to be a NIAC, it is clear from the elements the Prosecution alleged to be fulfilled (intensity and organisation of armed groups), and its contestation of the involvement of two or more States, that it proposed a NIAC-classification.¹⁶¹ However, even though it is clear that for an (non-international) armed conflict to exist a minimum of two parties is needed at all times, no reference was given for the alleged intensity of the violence, and – perhaps more curiously – the Prosecution only sought to prove the degree of organisation of the groups allegedly under control of the accused, but did not discuss any group on the opposing side.¹⁶² The lack of specific attention for the threshold criteria is surprising indeed, as the criteria for the existence of either type of armed conflict are not the same, and for a NIAC the required level of intensity and organisation of both sides would have to be separately proven.

Like in *Lubanga*, the Prosecution also submitted that the nature of the armed conflict was irrelevant for the case, including for the charges of recruitment and use of child soldiers.¹⁶³ The *Katanga* Defence responded that it did matter and criticised the Prosecution for failing to prove the existence of an IAC, which it suggested had 'more to do with failures in the prosecution

because the acquittal was based on a lack of credible evidence. Whilst *Katanga* thus started off as the 'second case', the 'Judgment pursuant to Article 74', rendered 7 March 2014, was in fact the third ICC trial judgment.

159 ICC, *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07, *Katanga* Defence, Defence Observations Pursuant to Regulation 55(3)(b) of the Regulations of the Court, 1 May 2012 (*Katanga* Defence Observations), para. 2.

160 The Prosecution spent only a few paragraphs of its 300-page closing brief on the existence of an armed conflict (see ICC, *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07, Office of the Prosecutor, Version publique expurgée: Corrigendum du mémoire final – ICC-01/04-01/07-3251-Conf, 3 July 2012, para. 20). In addition to a mere paragraph addressing the proof for the existence of a NIAC, the next seven paragraphs were spent on the submissions why the conflict could not be considered an IAC.

161 *Ibid.*, paras. 20, and 24–30.

162 The references to the organisation of the parties only referred to one side of the conflict, namely to the armed groups allegedly headed by Mr Katanga and Mr Ngudjolo: the FRPI and the Bedu-Ezekere, respectively.

163 *Ibid.*, para. 24.

investigations than a reflection of the reality'.¹⁶⁴ However, the *Katanga* Trial Chamber, by majority, found there to have been a NIAC.¹⁶⁵ Correctly, and contrary to the Prosecution's submissions, the Trial Chamber assessed whether both sides of the alleged NIAC were organised. Interestingly, however, in finding that this was the case, it construed the organisation of the armed groups on one side of the conflict mainly by relying on human rights reports and evidence led by the Defence.¹⁶⁶ In addition, as in *Lubanga*, the Trial Chamber held that on the basis of a single witness, it could not find beyond reasonable doubt that the actions of one party to the conflict were attributable to Rwanda.¹⁶⁷ It therefore did not consider it necessary to determine whether the DRC government controlled the other party.¹⁶⁸ The Chamber's conclusions on the nature of the conflict were, as feared by the Defence, thus not based on the *strength* of the Prosecution's evidence, but rather on the *lack thereof*. Arguably then, NIAC was legally treated as a residual regime, but rather as a factual residual regime.

It must be noted, however, that the Chamber's legal analysis of the conflict classification was significantly better than the one carried out in *Lubanga*, or by any of the Pre-Trial Chambers that preceded it, including an acknowledgement of the separate criteria for IAC and NIAC, and without a reference to any generic concept of armed conflict.¹⁶⁹ Yet, like in *Lubanga*, the overall control standard was accepted by the majority without discussion or explanation.¹⁷⁰

164 ICC, *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07, *Katanga* Defence, Second Corrigendum to the Defence Closing Brief, 29 June 2012, para. 746. The Defence's submissions on the nature of the armed conflict are not entirely clear, but it appears to argue that although an IAC existed, the Prosecution failed to prove such existence.

165 *Katanga* Judgment, *supra* note 59, paras. 1212–1215 and 1229.

166 *Ibid.*, paras. 1207–1211. As to the reliance on human rights reports, see the *Lubanga* Trial Judgment, *supra* note 24, paras. 129–131; and *Ntaganda* Trial Judgment, *supra* note 133, footnote 1473.

167 In other words, it found that no overall control by Rwanda existed. *Katanga* Judgment, *supra* note 59, para. 1214.

168 *Ibid.*, para. 1215.

169 *Ibid.*, paras. 1172–1187.

170 *Ibid.*, para. 1178. Carsten Stahn suggests that '[w]hile the result may be defensible, the methodology of the judgment requires critical scrutiny [as] the Katanga majority fails to engage with two disputed questions, namely (i) to what extent the internationalization of internal armed conflict depends on formal attribution under the law of state responsibility (i.e. agency or control), rather than on criteria relating to non-intervention and use of force; and (ii) on what grounds the "overall control" test remains the correct test after the International Court of Justice ruling in *Bosnia v. Serbia*'. Stahn correctly observes that '[f]uture decisions should engage more deeply with this justification, before this reasoning becomes standard vocabulary in ICC jurisprudence': Carsten Stahn, 'Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment', 12(4) *Journal of International*

However, Judge Van den Wyngaert, who was in the minority, considered in her dissenting opinion that the question of overall versus effective control 'is far from settled'. With respect to this issue and conflict classification generally, she noted that 'the facts of this case are particularly complex on this point' and the evidence 'not sufficient to arrive at any conclusions beyond reasonable doubt'.¹⁷¹

3.3 Bemba Case

In *Prosecutor v. Bemba*, the third ICC case, the classification of the armed conflict concerned appeared relatively straightforward:¹⁷² Mr Bemba was charged with alleged crimes committed by an armed group under his control that assisted the then president of the Central African Republic in resisting a coup d'état. As such, Bemba's intervention could not affect the nature of the conflict, because a non-State actor intervened on the side of the government. Purportedly the fighting did have international features, however. Various non-governmental organisations reported that the dissident or rebel forces, led by the later president Bozizé, received considerable backing from Chad and other central African States, and was assisted by Chadian troops,¹⁷³ but the NIAC-classification by Pre-Trial Chamber II was never subject to litigation.

Notwithstanding the foregoing, the Prosecution's approach in this case reveals a lack of specificity similar to its submissions in *Katanga*, as evidenced by its contention in the (updated) document containing the charges that 'it is immaterial whether the conflict that involved Bozizé and Pro-Patassé forces be characterized as international or non-international'.¹⁷⁴ Similar to its argument

Criminal Justice (2014) 819). The academic criticism referred to above in relation to the *Lubanga* Trial Judgment (see note 145) applies equally here.

171 *Katanga* Judgment, Minority Opinion of Judge Christine Van den Wyngaert, para. 276.

172 The *Bemba* Trial Judgment was reversed on appeal, but not in relation to the contextual elements of war crimes.

173 The International Crisis Group, wrote that the President of Chad 'placed personnel from his "Force 4" Presidential Guard at Bozizé's disposal; Joseph Kabila, head of state of Congo-Kinshasa, supplied the necessary armaments; and his neighbour on the other bank of the Congo, President Denis Sassou Nguesso, funded the operation to the tune of 3 billion FCFA (about €4.6 million)'. It further reported that Bozizé acknowledged that he 'took power with Chad's help' in an interview the organization (International Crisis Group, *Central African Republic: Anatomy of a Phantom State* (Africa Report N°136, 13 December 2007) pp. 15–17. Human Rights Watch similarly reported that the rebel forces may have consisted of troops sent by the president of Chad (see Human Rights Watch, *State of Anarchy: Rebellion and Abuses against Civilians* (September 2007), p. 27).

174 ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Office of the Prosecutor, Public Redacted Version Of the Amended Document containing the charges filed on 30 March 2009, 30 March 2009 (*Bemba* Document Containing the Charges), para. 44. As noted by

in *Lubanga* and *Katanga*, the Prosecution viewed that this immateriality of the conflict classification arose from the fact that '[e]ach of the proposed counts specifying war crimes arise from conduct which consists of a war crime regardless of characterization'.¹⁷⁵ This statement was correct as regards the alleged conduct in *Bemba*, but as discussed below, in addition to the difference between the IAC and NIAC versions of recruitment and use of children under the age of 15, several war crimes do not exist for NIAC.

3.4 Al Mahdi Case

In a case concerning the destruction of cultural property in Mali, the accused, Mr Al Mahdi, had – as became public later – confessed in an interview with the Prosecution to have engaged in the destruction of the mausoleums in Timbuktu and indicated his intent to plead guilty. This reduced the need for extensive findings in the decision on the confirmation of charges. Pre-Trial Chamber I found that on the basis of the (unspecified) evidence submitted, it was satisfied that a NIAC existed during the temporal scope of the charges.¹⁷⁶ Although the two armed groups concerned, the Tuareg movement *Ansar Dine* and Al-Qaeda in the Islamic Maghreb (AQIM), did not confine themselves to one State, this classification is, on the basis of the publicly available information, almost certainly correct.

At the trial stage, as a result of the guilty plea, the *Al Mahdi* Trial Chamber only had to verify whether 'the admission of guilt [was] supported by the facts of the case',¹⁷⁷ and the information before the Chamber in relation to the contextual elements of war crimes was therefore, as compared to other cases, very limited.¹⁷⁸ Based on the limited information, the Chamber was satisfied that

Pre-Trial Chamber II, in the confirmation decision, it requested the Prosecution on 4 November 2008, 'to clarify the nature of the armed conflict' and that the Prosecution clarified in filing ICC-01/05-01/08-214-Conf on 6 November 2008 that it 'was able to establish that the conduct occurred as part of a non-international armed conflict'. ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Pre-Trial Chamber, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, p. 75, footnote 288.

175 *Bemba* Document Containing the Charges, *supra* note 174, para. 44.

176 ICC, *The Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Pre-Trial Chamber, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, para. 31. The confirmation decision refers to the 'occupation of Timbuktu' in the context of what was found to be a NIAC, which is somewhat unfortunate language given its legal meaning under IHL, but it is clear that Pre-Trial Chamber I merely meant to indicate that 'Timbuktu was under the control of the armed groups' concerned, *ibid.*

177 ICC, *The Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Trial Chamber, Judgment and Sentence, 27 September 2016 (*Al Mahdi* Judgment), para. 29.

178 *Ibid.*, para. 29.

the alleged acts occurred in the context of and were associated with a NIAC between the Malian government forces and organised armed groups, including Ansar Dine and AQIM.¹⁷⁹

Interestingly, however, seemingly as a result of having so few facts available to it to rule on the alleged existence of a NIAC, the *Al Mahdi* Trial Chamber, and faced with a situation where no actual hostilities were taking place – or at least no such information was placed before the Chamber – at the time the alleged crime was committed, made a rather novel finding on the intensity criterion. It noted ‘that the fact that these groups exercised control over such a large part of Mali for such a protracted period – with the resulting effect on the civilian population concerned – clearly demonstrates a sufficient degree of intensity of the conflict’.¹⁸⁰ As referred to next, the *Ntaganda* Trial Chamber expanded on this aspect.

3.5 Ntaganda Case

The most recent case regarding the Eastern DRC, *Prosecutor v. Ntaganda*, concerns, in part, the same fighting as the *Lubanga* case.¹⁸¹ Pre-Trial Chamber II’s reliance on findings in *Katanga*, as opposed to those in the sister-case *Lubanga*, was therefore somewhat surprising. Not unforeseen, however, was its classification of the situation as a NIAC, thereby accepting the determinations made by the *Lubanga* and *Katanga* Trial Chambers with respect to the impact of Uganda’s occupation on the classification of the conflict.¹⁸² Given the similarities to *Lubanga* and the allegedly close relationship between Mr Ntaganda and the Rwandan government,¹⁸³ it was likely that possible international aspects of the conflicts would be addressed at trial.

Indeed, during its opening statements, the Defence foreshadowed that the evidence would show that the conflict was international in nature,¹⁸⁴ and during a mid-trial decision on jurisdictional aspects, the Trial Chamber had

179 *Ibid.*, para. 49.

180 *Ibid.*

181 The initial arrest warrant concerned Mr Lubanga and Mr Ntaganda together. For Ntaganda a second arrest warrant was issued a few years later. See, respectively, ICC, *Situation in the Democratic Republic of Congo*, Situation No. ICC-01/04, Pre-Trial Chamber, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, 10 February 2006; and Decision on the Prosecutor’s Application under Article 58, 13 July 2012.

182 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, paras. 31–34.

183 See, for example, *Lubanga* Confirmation Decision, *supra* note 138, paras. 176, 190, and 223.

184 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Transcript of Hearing of 3 September 2014, pp. 59–60.

indicated that due to the circumstances of the case it was ‘appropriate to analyse the applicable law with respect to both non-international and international armed conflicts’.¹⁸⁵ At the end of the trial, in its closing brief, the Defence argued that ‘contrary to the [Pre-Trial Chamber]’s finding, the events leading to the charges laid in this case took place in the context of an international armed conflict’. However, it indicated that, ‘at this time’, it would not make submissions on the character of the conflict.¹⁸⁶ The Prosecution merely submitted that a NIAC existed and only addressed the alleged organisation of the parties and intensity of the violence.¹⁸⁷

The Trial Chamber considered that there was ‘no evidence before the Chamber of clashes involving directly the armed forces of *two or more* States, nor [was] such a factual situation alleged or submitted to have taken place’.¹⁸⁸ Before analysing whether a *prima facie* NIAC was in fact international in nature as a result of internationalisation,¹⁸⁹ it therefore considered the organisation and intensity criteria of NIAC.¹⁹⁰

As to the latter, as referred to above, it was found in *Al Mahdi* that *in lieu* of armed violence, control over territory could also be relied on for the intensity requirement. The *Ntaganda* Trial Chamber, while recalling that exercise of control over a part of the territory is not required to fulfil the organisation requirement, held that in the absence of active hostilities, such control ‘may be a

185 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Trial Chamber, Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, para. 34.

186 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, *Ntaganda* Defence, Public redacted Defence Closing Brief, 2 July 2018, para. 563.

187 See *Ntaganda* Trial Judgment, *supra* note 133, para. 699.

188 *Ibid.*, para. 700. In this regard, it is noted that the Prosecution, in its oral closing arguments, referred to an incident that occurred during the relevant period, during which ‘the UPC with Ugandan forces attacked Bunia and drove out the RCD-K/ML. Yet, notwithstanding the ICTY’s ruling in *Tadić* that another State intervenes through its troops internationalizes a situation (*Tadić* Appeal Judgement, *supra* note 33, para. 84) and without addressing the impact, if any, of the involvement of the Ugandan national armed forces (i.e. the UPDF) on the classification of the armed conflict, the Prosecution immediately continued to state that ‘the crimes charged occurred within the context of a non-international armed conflict’, ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Transcript of Hearing of 28 August 2018, pp. 14–15.

189 *Ntaganda* Trial Judgment, *supra* note 133, para. 700.

190 *Ibid.*, paras. 701–725, referring to the indicators and factors as set out in *Boškoski and Tarčulovski* Trial Judgment (approved by the ICTY Appeals Chamber in that same case), and group these into five categories for the organisation criterion (see *Ntaganda* Trial Judgment, *supra* note 133, para. 704) and eight categories for the intensity criterion (*ibid.*, para. 716).

determinative factor in assessing whether the intensity threshold is fulfilled'.¹⁹¹ It clarified that 'in the absence of any direct clashes during certain periods', control by an organised armed group indicates that the government or any other opposing armed groups 'were either unable or unwilling to challenge the [group]'s control over the areas concerned'.¹⁹² The present author agrees that IHL must continue to apply to situations that would have qualified as occupation if the party exercising effective control would have been a State instead of an armed group. Indeed, although the concept of occupation does not exist in NIAC, by controlling part of a State's territory to the detriment of the governmental authorities in such a manner that the government could only regain its authority and (effective) control over that territory through the use of armed force, the intensity requirement ought to be considered as being fulfilled, also if no armed confrontations take place for a prolonged period.¹⁹³ Namely, 'the absence of armed clashes between government forces and the armed group are likely to be due to the government's inability to challenge the armed group's control over part of its territory, for example, because the armed group is considered too strong to be ousted militarily'.¹⁹⁴

As to the existence of an IAC, the Trial Chamber considered that Uganda's occupation of part of the DRC territory meant that Uganda and the DRC were engaged in an IAC, but that since it had not been established that the clashes between the relevant armed group and the Ugandan forces took place within the occupied part of the territory, the fighting between these two constituted a NIAC.¹⁹⁵ With regards to possible internationalisation, the Trial Chamber, like its ICC predecessors, applied the overall control test.¹⁹⁶ Despite finding that a

191 *Ibid.*, para. 717.

192 *Ibid.*, para. 721.

193 Rogier Bartels, 'When Do Terrorist Organisations Qualify as Parties to an Armed Conflict under International Humanitarian Law', 56 *Military Law and Law of War Review* (2017–2018) 471–472.

194 *Ibid.*

195 *Ntaganda* Trial Judgment, *supra* note 133, para. 728. For a partial critique of this finding, arguing that 'whether the fighting between them takes place inside or outside the occupied territory is immaterial for its classification under IHL', Kubo Macak, 'The Ituri Conundrum: Qualifying Conflicts between an Occupying Power and an Autonomous Non-State Actor', *EJIL:Talk!* (15 July 2019), www.ejiltalk.org/the-ituri-conundrum-qualifying-conflicts-between-an-occupying-power-and-an-autonomous-non-state-actor/, accessed 16 January 2020. For a similar view as the one applied by the *Ntaganda* Trial Chamber, see Akande, *supra* note 149.

196 *Ntaganda* Trial Judgment, *supra* note 133, para. 727. The Trial Chamber acknowledges the existence of the ICJ's effective control test, but other than noting that three other Trial Chambers of the ICC also applied the overall control test, it does not explain why it chose the said test over the one adopted by the ICJ.

third State, namely Rwanda, had assisted the relevant organised armed group with, *inter alia*, weapons and ammunition, and had been ‘involved in its activities to a certain level’, on the basis of the evidence on the record the Chamber held that it could not ‘conclude beyond reasonable doubt that the involvement of Rwanda with the UPC/FPLC rose to the level of overall control’. As a result, it found that the fighting in which Mr Ntaganda’s armed group was engaged ‘must be classified as a [NIAC].’¹⁹⁷

Below, it will be discussed more in detail whether requiring overall control to be established beyond reasonable doubt is appropriate. As regards the conflict in Ituri, one must remain mindful, however, that classifying the conflicts in these first ICC cases was no easy task. As the Prosecution correctly observed in its closing brief in *Lubanga*, ‘[t]he issue in a given case is the nature of the conflict to which the particular army or militia is a party’.¹⁹⁸ The conflicts in Eastern DRC were notoriously messy, fought by a multitude of parties, and characterised by the continuously shifting alliances.¹⁹⁹ For legal reasons, it is nonetheless important that the relevant conflict is correctly classified. If the Prosecution fails to prove the existence of an IAC, a NIAC cannot serve as a fallback option.²⁰⁰

3.6 Other Cases

In the judgment of acquittal in the case against Mr Katanga’s initial co-accused, Mr Ngudjolo, the existence of an armed conflict was not discussed beyond the chamber recalling that the Prosecution alleged the existence of a NIAC.²⁰¹ As

197 *Ibid.*, para. 717.

198 ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Office of the Prosecutor, Prosecution’s Closing Brief, 1 June 2011 (Prosecution *Lubanga* Closing Brief), para. 27 (emphasis in original).

199 A Human Rights Watch report that is also referred to in the ICC’s judgments on Ituri describing the situation as ‘one of the world’s most complex conflict areas’, *Human Rights Watch*, ‘Ituri: “Covered in Blood” – Ethnically Targeted Violence In Northeastern DR Congo’, (July 2003), p. 15.

200 Amann also appears to consider NIAC to the standard or residual regime, at least at the ICC, since she commented on Pre-Trial Chamber I’s decision to confirm the charges in *Lubanga* for IAC that this ‘decision enlarged both the potential scope of the case and the prosecution’s burden of proof’ and that ‘adding more sides to the [many-sided litigation] model were the pretrial judges, who ordered the presentation of evidence of an international armed conflict that prosecutors had argued could not be proved’: Dianne M. Amann, ‘*Prosecutor v. Lubanga*’, 106(4) *American Journal of International Law* (2012) 811, 815.

201 *Ngudjolo* Judgment, *supra* note 158, in which only the Prosecution’s submission that a NIAC existed, and the Legal Representative’s submission that this was in fact an IAC, are referred to.

no war crimes were charged, classification was not an issue either in the *Ruto and Sang* and *Kenyatta and Muthaura* cases, which ended in the vacating and withdrawal of the charges, respectively.²⁰² Similar to the two *Kenya* cases, the initial arrest warrants in the Libya situation only included allegations of crimes against humanity. Although indeed the first stage of the violence in Libya did not yet rise to the level of NIAC, it is evident that rapidly afterwards, a NIAC existed (later joined by a parallel IAC, after the NATO led coalition engaged Ghaddafi's forces).²⁰³ Some years later, arrest warrants for other persons were issued for alleged war crimes, so the classification of the fighting in Libya in 2016–2017 may become an issue in the future.²⁰⁴

In various other cases, which either did not proceed to trial or are still ongoing, a determination as to existence and character of the relevant armed conflict was made at the pre-trial level. Some of those are highlighted next.

In relation to one of the situation referred to the Court by the UN Security Council, there can be little doubt that a NIAC existed in the Darfur region of Sudan at the relevant time. In the various arrest warrants in connection to this situation, Pre-Trial Chamber I saw no reason to elaborate on this issue and merely found that there were reasonable grounds to believe that a NIAC

202 According to Human Rights Watch, a NIAC existed and war crimes did occur in Kenya at the time (see Human Rights Watch, *All the men have gone. War crimes in Kenya's Mt. Elgon conflict* (2008)), whilst others have held that no NIAC existed (see Carey Shenkman, 'Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Outside Armed Conflict', 87(4) *New York University Law Review* (2012) 1228–1229; although that author appears to rely on an erroneous interpretation of 'protracted', incorporating a time element). As Kenya's post-electoral violence was a purely national matter, the question could arise whether the fighting had transcended internal disturbances and could potentially be a NIAC, but without any indication of external involvement, it need not be considered whether the Kenya situation could potentially have been an IAC.

203 See, e.g., Kubo Macak and Noam Zamir, 'The Applicability of International Humanitarian Law to the Conflict in Libya', 14(4) *International Community Law Review* (2012) 403–436; see for a similar conclusion: Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire', 60(3) *International and Comparative Law Quarterly* (2011) 770–772. Another scholar suggests – less convincingly – that the entire conflict transformed into an IAC due to the foreign intervention (albeit not as a result overall control over the rebels, but due her conclusion that the NATO led coalition's use of its forces against the Libyan government forces internationalised the NIAC as a whole, which followed from her rejection of the parallel conflict theory), after which it 're-internalised' to a NIAC, Katie A. Johnston, 'Transformations of Conflict Status in Libya', 17(1) *Journal of Conflict and Security Law* (2012) 81–115. It shows, however, how views can differ as to the classification of certain situations.

204 ICC, *Prosecutor v. Al-Werfalli*, Case No. ICC-01/11-01/17, Pre-Trial Chamber, Warrant of Arrest, 15 August 2017.

existed.²⁰⁵ The confirmation decisions in the two cases concerning the attack on a base of the African Union Peacekeeping Mission, *Abu Gharda* and *Banda and Jerbo*, merely had to note that the parties agreed that a NIAC existed at the relevant time.²⁰⁶ While on occasion it has been submitted that the involvement of peace forces would internationalise a NIAC,²⁰⁷ there was no need for the Court to analyse the nature of the armed conflict. If the parties agree on a situation being either an IAC or a NIAC, there appears to be no reason why the relevant chamber should not adopt the agreed fact. Indeed, such agreements are to be welcomed, as they save the Court valuable resources.²⁰⁸ It is nonetheless important to recognise that the determination as to the nature of the conflict resulted from an agreement of parties in a criminal case does not necessarily comport with the reality on the ground, or indeed the correct classification under IHL.

In the first of the two (current) cases dealing with the 2011 post-election violence in Côte d'Ivoire, against Laurent Gbagbo, the former president of the aforementioned country, the Prosecution submitted that the violence in Ivory Coast had reached the level of a NIAC during the period of the charges.²⁰⁹ The defence for Mr Gbagbo, whilst at the same time contesting that the Prosecution had shown that the criteria for a NIAC were met,²¹⁰ did acknowledge that a NIAC existed in Ivory Coast.²¹¹ In fact, the Defence argued that the NIAC had been in existence since well before the moment identified by the

205 See, e.g., ICC, *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 (*Al Bashir* Arrest Warrant), p. 4.

206 ICC, *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Pre-Trial Chamber, Decision on the Confirmation of Charges, 8 December 2010, paras. 56–57; and ICC, *Prosecutor v. Banda and Jerbo*, Case No. ICC-02/05-03/09, Pre-Trial Chamber, Corrigendum of the "Decision on the Confirmation of Charges", 8 March 2011, para. 50.

207 See, for example, Eric David, *Principes de droit des conflits armés* (5th ed., Bruylant, Brussels, 2012), paras. 1.68 *et seq.*

208 Compare Cryer *et al.*, *supra* note 35, pp. 278–279.

209 ICC, *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Office of the Prosecutor, Document amendé de notification des charges, 13 January 2014 (*Gbagbo* Document Containing the Charges), para. 14; in which the Prosecution alleges that from 25 February 2011 onwards 'la Côte d'Ivoire était devenu le théâtre d'un conflit armé ne revêtant pas un caractère international entre les forces pro-GBAGBO et les forces fidèles à OUARTARA'.

210 The Prosecution indeed did not substantiate its claim that the situation after 25 February 2011 was a NIAC, but – as opposed to the *Katanga* case discussed above – it was under no obligations to do so since the existence of an armed conflict is not a prerequisite for crimes against humanity, as included in the Rome Statute, and no war crimes were charged.

211 See ICC, *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Transcript of hearing, ICC-02/11-01/11-T-18-Red-ENG, 25 February 2013, pp. 15–18.

Prosecution.²¹² The Prosecution nevertheless only charged Mr Gbagbo with crimes against humanity.²¹³ The Pre-Trial Chamber seized of the case, in deciding whether the charges should be confirmed, thus did not need to assess whether a NIAC indeed existed at the relevant time.

While in the other case concerning the Ivorian post-election violence, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I similarly could have refrained from pronouncing on the existence of an armed conflict, as Mr Blé Goudé was also only charged with crimes against humanity, it held that '[b]y 23 February 2011, ... the situation in western Côte d'Ivoire had degenerated into a non-international armed conflict between pro-Gbagbo and pro-Ouattara forces'.²¹⁴ Since no war crimes were charged the pre-trial judges did not need to delve into the matter.²¹⁵ However, if the contextual elements of war crimes would have been scrutinised, the impact of the military intervention by French and international forces on the nature of the conflict should have been considered, and it can be debated whether by the time of the 12 April 2011 attack on Yopougnon, the armed conflict in Ivory Coast had become international or remained non-international in nature.²¹⁶

²¹² *Ibid.*

²¹³ Also when allowed to provide an updated document containing the charges after the Defence had expressed its agreement that a NIAC existed, the Prosecution only charged crimes against humanity. See *Gbagbo* Document Containing the Charges, *supra* note 209.

²¹⁴ ICC, *Prosecutor v. Blé Goudé*, Case No. ICC-02/11-02/11, Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, para. 105.

²¹⁵ At trial, the issue could have been revisited, as the defence generally argues that an armed conflict existed as this could allow for the legitimate use of armed force against persons participating in hostilities, but as described below, the case ended after the presentation of evidence by the Prosecution.

²¹⁶ Depending on who was considered to represent the State of Ivory Coast (and whether it matters in such a contested situation who is the legitimate president) at the time of the French intervention in assistance of former opposition leader Alassane Ouattara, who by then was recognised by the majority of the international community as the elected president (see, e.g., UN Security Council Resolution, S/RES/1975 (2011), 30 March 2011, paras. 1 and 4), the intervention by France to help oust President Gbagbo could be considered to have internationalised the initial NIAC. Part of the charges in the case concern acts allegedly committed after French forces joined in the fighting, namely the alleged attack on Yopougnon was confirmed as having taken place 'on or around 12 April 2011', ICC, *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, paras. 64–69 and 72. The UN and French forces were fighting pro-Gbagbo forces from at least 4 April 2011 onwards (see, e.g., Statement by the Secretary-General on the situation in Côte d'Ivoire, New York, 4 April 2011). Arguably, the French intervention would not impact on the type of conflict for the purposes of war crimes under the Rome Statute, for any IAC between France and Ivory Coast would not change the character of the NIAC between the pro-Gbagbo and pro-Ouattara forces, unless the latter acted as a proxy for France (see, for example, the questions raised

In January 2019, the *Gbagbo and Blé Goudé* Trial Chamber, by majority, decided that after the Prosecution's presentation of evidence, the Defence had no case to answer, and acquitted both the accused of all charges.²¹⁷ In July of the same year, in the Chamber's subsequently provided 'reasons', one of the judges of the majority reflected that 'at all times relevant to the charges in this case, there appears from the evidence to have been an ongoing armed conflict in Côte d'Ivoire'.²¹⁸ Judge Henderson critically notes that '[b]y ignoring or downplaying this reality, the Prosecutor casts a different light on many of the events. While this fits her narrative, it does not correspond with reality on the ground'.²¹⁹ The existence of an armed conflict, and consequential application of IHL, informed his analysis of the alleged conduct.²²⁰ Indeed, if any attacks by government forces allegedly directed against civilians were instead legitimate under IHL, such conduct cannot support charges of crimes against humanity.²²¹ In addition, despite the contextual elements of the charged crimes against humanity not having been met, since 'none of the parties or participants has made a serious effort to raise the question of the existence of an armed conflict during the period relevant to the charges', the majority did not wish to *proprio motu* consider whether the conduct should instead be recharacterised as war crimes.²²²

Currently, only one case is still in the trial phase, *Prosecutor v. Ongwen*, concerning alleged crimes against humanity and war crimes by the Lord's

in Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in Nigel D. White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing, Cheltenham, 2013), p. 381). However, this does not seem to have been the case.

217 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Transcript of Hearing of 16 January 2019, pp. 1–6.

218 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Trial Chamber, Annex B (Reasons of Judge Geoffrey Henderson) to 'Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée', 16 July 2019, para. 72.

219 *Ibid.*; see also para. 2036.

220 *Ibid.*, paras. 1374–1375, and 1829–1830.

221 See the consideration in *ibid.*, para. 1829, noting that 'those who allegedly decided to fire a 120mm mortar in Abobo on 17 March 2011 may well have violated the cardinal humanitarian law principles of distinction and, especially, precaution'. It is correctly observed that this raises the question whether 'the use of a weapon whose effect could not be limited to legitimate military objectives or whose effect could be expected to be clearly excessive in relation to the expected military advantage, automatically qualify as being "directed against" the civilian population'.

222 This would have required the Chamber to 'recharacterise' the charges, pursuant to Regulation 55 of the Regulations of the Court, from crimes against humanity to war crimes.

Resistance Army (LRA). The *Ongwen* Pre-Trial Chamber spend only one paragraph on the contextual elements of war crimes charged, when it concluded that a NIAC existed between 2002 and 2005 in Uganda between the Ugandan government forces and the LRA, as it considered the existence of the relevant criteria to be ‘notorious’ facts.²²³ The conflict had many cross-border aspects, as during those years the LRA still mostly operated from Sudanese territory, but it was not anymore – as it had been before – assisted by the Sudanese government.²²⁴ In addition, the attacks by the Ugandan armed forces on LRA camps in the southern parts of Sudan were carried out with the permission of the government of Sudan.²²⁵ Unless any – as of yet unknown – evidence indicating a different role of the Sudanese or a third government would emerge, a classification as NIAC thus seems undisputable; despite the cross-border activities.

Nevertheless, with respect to the LRA and jurisdiction over war crimes, it is worth noting that in the period post-dating the charges in the *Ongwen* case, the LRA has been moving through the territories of several central African States and is more or less rampaging villages, but in doing so it directs its attacks exclusively against the civilian population, not against any governmental or military infrastructure. Even though it was for a while chased by a multinational force, no armed confrontations took place. It can therefore be argued that the LRA’s later operations do not necessarily take place in the context of an international or non-international armed conflict.²²⁶ Being outside the IHL framework, the conduct could not amount to war crimes, but may obviously still be considered as crimes against humanity. However, it has been argued that the fact that such an armed group successfully manages to avoid clashes with government forces ought not to be determinative for the question whether the situation qualifies as a non-international armed conflict, because when

223 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Pre-Trial Chamber, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, para. 61.

224 Earlier, Kony and his soldiers were reportedly seen as ‘hired guns’, ‘used by the Sudanese government to destabilise Uganda, as a tit-for-tat of Uganda support for the Sudan People’s Liberation Army’: Kevin C. Dunn, ‘Uganda: The Lord’s Resistance Army’, 31(99) *Review of African Political Economy* (2004) 139.

225 Between 2002 and 2006, on the basis of a bilateral agreement between Sudan and Uganda, the UPDF was allowed entry into southern Sudan to carry out military operation against the LRA, referred to by the UPDF as ‘Operation Iron Fist’: Mareike Schomerus, “They forget what they came for”: Uganda’s army in Sudan’, 6(1) *Journal of Eastern African Studies* (2012) 124–153.

226 See the question raised in this regard in Rogier Bartels and Katharine Fortin, ‘Law, Justice and a Potential Security Gap: The “Organization” Requirement in International Humanitarian Law and International Criminal Law’, 21(1) *Journal of Conflict and Security Law* (2015) 46.

an organised armed group not aligned with the government employs violence against civilians of a State, such force must be considered as being directed against 'a State'.²²⁷

The above overview, in addition to the discussion of the case law of the *ad hoc* tribunals, shows that conflict classification as part of criminal trials does not always reflect the reality on the ground, and on occasion may be at odds with the relevant legal framework for such classification, namely IHL. Having discussed the specific cases, the analysis now turns to general challenges and aspects of conflict classification, as exemplified by the above reviewed practice.

4 Considerations to Be Taken into Account when Classifying Situations

4.1 *Potential Impact on Fair Trial Rights*

The importance in ICL to properly classify situations as either IAC or NIAC is not merely a matter of correct labelling and upholding the integrity of IHL. Correctly classifying conflict situations during international criminal trials is also important for ICL itself, namely, to guarantee fair trial rights. As the ICJ held, it is preferred to have a rather high threshold of attributability for the purposes of determining State responsibility for actions of an armed group. On the other hand, the ICTY considered that a low threshold of internationalisation is preferred to bring into force the most comprehensive regime, both for humanitarian reasons during the conflict, and afterwards when determination criminal responsibility for atrocities committed during the conflict.

Notwithstanding that application of the more extensive law of IAC generally provides greater protection to those affected by armed conflict, the same does not automatically hold true during international criminal trials.²²⁸ In

227 Bartels, *supra* note 192, pp. 470–471, referring, *inter alia*, to the ICRC's 2016 Commentary on the First Geneva Convention, para. 262.

228 See, e.g., Natalie Wagner, 'A Critical Assessment of Using Children to Participate Actively in Hostilities in *Lubanga*: Child Soldiers and Direct Participation', 24(2) *Criminal Law Forum* (2013) 180. Natalie Wagner, in criticising the explanation given by the *Lubanga* Trial Chamber to the notion of 'active' with respect to the crime of using child soldiers to actively participate in hostilities, suggests that in case of re-characterisation by a chamber (pursuant to Regulation 55 of the Regulations of the Court) of the nature of the armed conflict, 'an accused person would be facing a charge different in scope, on the basis of the nature of the armed conflict. Whilst from the perspective of IHL this is surely not strange or *per se* undesirable, this cannot be a welcomed development from an international criminal law (ICL) perspective, and from fair trial rights in particular'. See also

cases where an IAC classification would benefit one side (i.e., the prosecution), finding that a situation is an IAC may provide less protection to the accused. In such cases, the principles of criminal law may therefore demand a reverse approach. On the other hand, in cases where an NIAC classification would be detrimental to the accused, one can wonder whether in case of uncertainty as to the classification of a situation as either IAC or NIAC, the situation at hand can be considered as a NIAC 'by default', without this resulting in a violation of the *in dubio pro reo* and *favor rei* principles.²²⁹ It is submitted here it cannot.

For its part, the ICTY required, and IRMCT still requires, IAC to be specifically pleaded and proven, because of the impact on the criminal responsibility of the accused for certain crimes.²³⁰ Care should therefore also be taken that a situation is correctly classified as IAC or NIAC.²³¹ A situation that does not fulfil

Elizabeth Wilmshurst, 'Conclusions', in Wilmshurst, *supra* note 18, p. 498, noting that 'the criminalization of the conscription and enlistment of child soldiers ... has a slight but crucial difference in the terminology between the two respective crimes, which may render the classification of the conflict necessary in order to choose the correct charge'. Compare, however, with Pre-Trial Chamber 1's consideration in *Lubanga* that '[t]he drafters of the Rome Statute wanted to include under article 8 of the Statute a larger array of criminal conduct committed in the context of an international armed conflict', *Lubanga Confirmation Decision*, *supra* note 138, para. 284).

229 These principles dictating that in case of uncertainty or ambiguity, the law shall be interpreted in favour of the accused, are included in Arts. 22(2) and 66(2) of the Rome Statute, respectively. The principle of *in dubio pro reo*, as included in the Rome Statute, relates only to the definition of a crime. However, as the ICTY Appeals Chamber has clarified, this principle is 'a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, [and therefore] applies to findings required for conviction, such as those which make up the elements of the crime charged, ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Appeals Chamber, Judgment, 27 September 2007, para. 21.

230 As discussed above, the Appeals Chamber had ruled that the grave breaches listed in Article 2 of the ICTY Statute could only be committed in times of IAC.

231 Proving the existence of an IAC or a NIAC requires reliance on two different sets of evidence. On the one hand, for an IAC it merely needs to be shown that two States used force against each other. This may be easy to prove in cases where the armed forces of the relevant States are directly engaging each other, or hard(er) when one of the States is secretly sending its troops to fight against the other State, alongside an armed group, or it supports and controls the armed group, through covert actions. What is not necessary to prove, however, is the existence of a certain intensity. On the other hand, establishing that a NIAC existed requires proving a far more elaborate fact pattern. Evidence has to be presented on the indicators that assist in determining whether the intensity threshold has been met. Furthermore, evidence needs to be placed before the relevant chamber to show that one (in case government forces form the other party) or two or more (in case armed groups are fighting each other) of the alleged parties was/were sufficiently organised to be a 'party to the conflict'. This may require the leading of significantly more evidence. That being the case, it may also be easier to obtain. In *Katanga*, for example, the Trial Chamber relied on public reports from human rights organisations to find that

the criteria for IAC does not automatically qualify as NIAC, or the other way around, as these are ‘separate legal categories, neither of which is residual in nature’.²³² However, treating one of the two, namely NIAC, as such a residual or ‘rest category’ appears to be precisely what was done in the ICC’s first cases, *Lubanga* and *Katanga*.

In its judgment, the *Ntaganda* Trial Chamber found that while there was some evidence that suggesting that Rwanda had overall control over the UPC/FPLC, it could not conclude beyond reasonable doubt that such overall control indeed existed.²³³ As such, the Trial Chamber concluded, ‘the fighting that the UPC/FPLC was engaged in during the temporal scope of the charges must be classified as a non-international armed conflict’.²³⁴

Mindful that an armed conflict is either an IAC or a NIAC, and that – as set out above and as correctly noted by the *Ntaganda* Trial Chamber²³⁵ – each conflict requires a different set of factors to be proven, arguably the fact that overall control could not be proven beyond reasonable doubt, even though there was evidence that pointed towards such third State control, indicates that there was in fact doubt as to the classification of the conflict as a NIAC. If so, even if overall control could not be established beyond a reasonable doubt, there would have been reason to doubt that the situation was a NIAC instead of an IAC. The NIAC the Prosecution alleged to have been in existence would then not have been proven to the requisite standard. Unless, of course, the bench considered that the doubt created by the evidence on Rwanda’s involvement did not amount to ‘reasonable doubt’. Then its initial finding that the NIAC organisation and intensity criteria had been met (and a NIAC was therefore in existence so long as it had not internationalised as a result of third State involvement) was therefore not affected. In *Ntaganda*, the Trial Chamber must therefore have considered that the evidence on Rwanda’s involvement did not cast doubt to the extent that it rose to the level of reasonable doubt, as otherwise its approach raises the question whether the Prosecution’s burden of

the intensity requirement had been met. Moreover, the indicators developed in the jurisprudence of the *ad hoc* tribunals appear to allow for consideration of the lower threshold on the basis of sources other than through insider witnesses. For example, establishing the existence of UN Security Council interest in the situation requires only a simple review of the debates held in the Council at the relevant time. Similarly, assessing the scale of displacement and number of refugees caused by the fighting is possible by consulting the public and readily available reports of humanitarian organisations such as the Office of the United Nations High Commissioner for Refugees.

232 Milanovic, *supra* note 3.

233 *Ntaganda* Trial Judgment, *supra* note 133, para. 730.

234 *Ibid.*

235 *Ibid.*, para. 702.

proof for this contextual element of war crimes was met. Even so, one may wonder whether – as discussed above in relation to the *Katanga* case – a finding that is reached as a result from the insufficiency, or limited credibility, of the evidence presented by the Prosecution on third State involvement is compatible with the accused's right to fair trial.

Moreover, if the Prosecution does not lead the evidence on overall control, for example, or on other factors that may impact on the classification, and the Defence wishes to argue that the conflict should be differently characterised, it would befall to the Defence to present evidence to convince the Chamber, which may be seen as a reversal of the burden of proof. At the Special Court, the *Sesay et al.* Trial Chamber did in fact reverse the burden of proof as regards the nature of the armed conflict when it placed the duty to prove the existence of an IAC on the Defence, rather than on the Prosecution. In its judgment, it held that the Defence had not adduced evidence to establish that Charles Taylor had overall control over the RUF and that consequently there was no reason to classify the conflict other than as a NIAC.²³⁶

4.1.1 Overall Control versus Effective Control

Given that the overall control standard requires less third State involvement than effective control, less evidence has to be presented to prove said control to the relevant standard. As regards fair trial rights, it is worth considering a situation opposed to the one at the Special Court (i.e. where classification as an IAC would have affected the Special Court's jurisdiction over part of the conduct of the accused). If classification of the conflict as an IAC is more beneficial to the Prosecution than to the accused, this also raises interesting questions about the test used to assess third State involvement (namely, effective vs overall control) and its consequential impact on the rights of the accused. At the ICC, for example, jurisdiction over certain crimes, such as knowingly causing excessive collateral damage, only exists for IAC situations and not when the attacks would have been launched as part of a NIAC. Conflict classification is a primary aspect of IHL, but the concept of overall control was created to determine the nature of armed conflict for the purposes of international criminal proceedings. Since criminal law generally requires the law, or – as the case may be – standard, to be applied that is most beneficial to the accused, the following finding of the ICTY Appeals Chamber in *Aleksovski* may come as a surprise. In considering whether the armed conflict at the time of the charged conduct was international or non-international, the Appeals Chamber held:

236 *Sesay et al.* Trial Judgment, *supra* note 99, para. 974.

The 'overall control' test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadić* Judgement arrived at this test against the background of the 'effective control' test set out by the decision of the ICJ in *Nicaragua*, and the 'specific instructions' test used by the Trial Chamber in *Tadić*, the Appeals Chamber considers it appropriate to say that the standard established by the 'overall control' test is not as rigorous as those tests. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure 'protection of civilians to the maximum extent possible'.²³⁷

This consideration by the ICTY Appeals Chamber shows the clash between the different principles and presumptions that govern IHL and ICL, namely the presumption of protection and the presumption of innocence, respectively. The ICTY Appeals Chamber focused on the humanitarian goals of IHL and its purpose to protect those affected by armed conflict. However, it did so in the context of a criminal trial. International criminal courts and tribunals must not lose sight of IHL as the basis for war crimes, and whereas the plight of victims of war is an important reason for the prosecution of atrocities, international cases are in their very essence criminal trials. During these trials, the rights of the accused persons must be safeguarded. Naturally, at the basis of any criminal process must be the presumption of innocence. A corollary of the presumption of innocence is the criminal law principle of *in dubio pro reo*, which requires that in case of doubt as to what the evidence establishes, a determination shall favour the accused.²³⁸ Another safeguard under ICL is the legality principle, which includes the concept of *favor rei*, according to which criminal rules have to be interpreted in favour of the accused. In light of these principles, international courts and tribunals should arguably be more restrictive in their determinations that a certain type of armed conflict existed.

Offering a different perspective than the ICTY ruling in *Aleksovski*, and seemingly more aware of the opposing rationales of IHL and ICL, the ECCC's trial judgment in Case 002/2 provides an interesting reflection on fair trial rights and the applicable set of IHL rules, namely those applicable to IAC or

²³⁷ *Aleksovski* Appeal Judgment, *supra* note 35, paras. 145–146.

²³⁸ *E.g.*, Art. 66 of the Rome Statute; and ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Appeals Chamber, Judgment, 27 September 2007, para. 21.

instead the ones applicable to NIAC. The defence team for Mr Nuon Chea had relied on Additional Protocol I in its submissions on the treatment of members of the armed forces of the opposing party. As the alleged crimes occurred in 1975, the Trial Chamber noted that Additional Protocol I, which had not yet been drafted, let alone entered into force at the relevant time,²³⁹ did not bind the accused's party to the conflict at the relevant time.²⁴⁰ The Chamber further considered that there was no indication that the provision relied on by the *Nuon Chea* Defence 'reflected customary international law by 1975'.²⁴¹ Nevertheless, because the protocol 'purports to afford greater protection to the Accused', the Chamber considered that it should give regard to the provisions of Additional Protocol I due to the principle of *lex mitior*.²⁴²

The importance to consider during war crime cases which part of IHL applies is discussed next.

4.2 *Difference between the Applicable Legal Framework and the Existence of an International or Non-International Armed Conflict*

It should be noted that discussions on classification of conflicts are often clouded by confusion about the rules applicable to the relevant type of conflict. A large set of rules applies to IACs, and a smaller set applies to NIACs. The development of customary law has significantly diminished the distinction between the two sets, but important differences remain. A so-called 'law of international armed conflict' and 'law of non-international armed conflict' thus exist – each, in principle, applicable to the respective types of armed conflict.²⁴³ '[I]n principle', because during a situation of occupation, for example, an IAC exists since all belligerent occupations are a form of IAC.²⁴⁴ That does

239 Moreover, Cambodia did not become a party to protocol until 1998.

240 ECCC, *Case 002/2*, Trial Chamber, Judgment, 16 November 2018, para. 333.

241 *Ibid.*

242 *Ibid.*

243 Various phrases are used to refer to the two sets. The present contribution uses the same wording as, *inter alia*, Dinstein: see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2004) pp. 2–4; and Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press, Cambridge, 2014) pp. 3–4. Sivakumaran refers to the part related to NIAC as 'international law of internal armed conflict': Sandesh Sivakumaran, 'Re-envisioning the International Law of Internal Armed Conflict', 22(1) *European Journal of International Law* (2011) 225. Another scholar uses yet different terms for the two parts of IHL: 'international humanitarian law for international armed conflicts' and 'international humanitarian law for non-international armed conflicts' (Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing, Oxford, 2013)).

244 This is clear from Common Article 2 of the 1949 Geneva Conventions. Clearer even is Art. 1 of Additional Protocol I on the scope of application of said protocol, which refers to the

not mean, however, that the entire body of the law of IAC applies. It does so *de jure*, but as the law of occupation only constitutes part of it, in practice only this specific part of the law of IAC applies.²⁴⁵ Conversely, during an IAC without occupation, the law of IAC does not apply in its entirety, as the part that is triggered by one party gaining effective control over the territory of the other (i.e. a state of occupation) do not (yet) apply; and once the law of occupation applies, it only does within the occupied territory. With regards to NIAC, during any such conflict, Common Article 3 applies. However, as binding treaty law, the provisions of Additional Protocol II only apply during situations that meet the specific threshold criteria for this protocol *and* where the relevant State has ratified the protocol. The rules that form the customary law of NIAC, on the other hand, apply equally to Common Article 3 and Additional Protocol II conflicts.²⁴⁶

At a time that the laws and customs of war were only applicable to wars (i.e. IAC),²⁴⁷ the Nuremberg Charter defined war crimes as ‘violations of the laws or customs of war’.²⁴⁸ Reflecting on the Tribunal’s work, it was shortly afterwards recognised that a ‘general aspect of the definition of war crimes as violations of the laws or customs of war is that it makes the determination of what acts are war crimes dependent on the development of these laws and customs’.²⁴⁹ When soon after the 1949 Geneva Conventions extended part of IHL to NIAC,

situations mentioned in Common Article 2 and – also according to the protocol’s name – relates to only IAC; *see also* International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory* (2014), p. 4, stating that ‘belligerent occupation is regarded as a species of international armed conflict and treated as such by the relevant instruments of IHL, particularly the Hague Regulations of 1907 and the Geneva Conventions of 1949’. *See also* Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, Oxford, 2008), pp. 74–77.

245 *See* the Fourth Geneva Convention of 1949.

246 However, some scholars argue that two thresholds for the application of customary NIAC rules exist. *See*, for example, Françoise Hampson, ‘Personal Scope of IHL Application in NIAC: Legal and Practical Challenges’, in Stéphane Kolanowski (ed.), *Proceedings of the 2012 Bruges Colloquium on Scope of Application of International Humanitarian Law* (College of Europe/ICRC, 2013), p. 63.

247 Other than in the rare occasion of recognition of belligerency, it was not until 1949, with the inclusion of Common Article 3 into the 1949 Geneva Conventions, that IHL became applicable to a situation of NIAC. *See, e.g.*, Rogier Bartels, ‘Timelines, Borderlines and Conflicts: The historical evolution of the legal divide between international and non-international armed conflicts’, 91(873) *International Review of the Red Cross* (2009) 35–67.

248 Art. 9(b) of the Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, (London, 8 August 1945).

249 Memorandum submitted by the UN Secretary-General, ‘The Charter and Judgment of the Nürnberg Tribunal – History and Analysis’ (Document A/CN.4/5, 1949), p. 62.

a similar development of war crimes law did not take place. Also in 1979, the grave breaches regime remained reserved for IAC only, as it was included in Additional Protocol I,²⁵⁰ but not in Additional Protocol II. In fact, even until shortly before the rendering of the *Tadić* Jurisdiction Decision it was still 'widely accepted' that the law of war crimes did not apply to NIACs.²⁵¹ But then, in 1995, the ICTY Appeals Chamber – as discussed above – considered war crimes law to have developed so as to encompass NIAC. The *Tadić* ruling was generally accepted and since then, in essence, war crimes are regarded as serious violations of both of the law of IAC and the law of NIAC.

Any crime, domestic or international, requires a violation of a rule applicable to the person who allegedly enters into the unlawful conduct. For alleged war crimes, i.e. violations of IHL, this body of law must first be applicable, and if so, then one must determine what part of IHL was applicable at the relevant time. The answer to that inquiry may often be reached by considering the type of armed conflict, but this will not in all instances provide the correct answer. Indeed, it appears onerous to keep the two sets of rules apart. Consider, for example, the ICJ ruling of 1986 in *Nicaragua* that the *rules* contained in Common Article 3, 'in the event of international armed conflicts ... also constitute a minimum yardstick', because 'they are *rules* which ... reflect "elementary considerations of humanity"'.²⁵² The ICJ merely stated that the substantive content of Common Article 3 is to be considered as the basic rules of IHL; as a minimum standard applicable during all armed conflicts.²⁵³ It never stated that Common Article 3 *itself* is applicable to international armed conflicts. Indeed, such a *dictum* would have been incorrect, as the language of the first sentence of Common Article 3, dealing with its material scope, refers only to

250 See Art. 85 of Additional Protocol I.

251 Cryer *et al.*, *supra* note 35, p. 276. See also Provost, *supra* note 130, p. 95. Both Cryer *et al.* and Provost, refer, *inter alia*, to an ICRC document of 25 March 1993, entitled 'Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia', which was cited in Judge Li's separate opinion to the *Tadić* Jurisdiction Decision. The ICRC was quoted as stating that 'according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict' (ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeals Chamber, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 9).

252 *Nicaragua* Judgment, *supra* note 36, para. 218 (emphasis added).

253 See also the clarification given by the ICJ in *ibid.*, para. 219: 'Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict'.

non-international armed conflicts.²⁵⁴ However, while the Court's ruling was accurately reflected in the *Tadić* Jurisdiction Decision,²⁵⁵ the ICTY's initial correct understanding of it was misunderstood or misrepresented in later cases,²⁵⁶ as well as – more controversially – by the US Supreme Court in *Hamdan*. In that case, the Supreme Court held that Common Article 3 as such was applicable to the United States' fight against Al-Qaeda.²⁵⁷ The Prosecution in the *Taylor* case similarly argued, in response to the Defence's contention the

254 Another way of reading the scope of application of the 1949 Geneva Conventions would be to take the phrase included in Common Article 2 that 'the present Convention shall apply to all cases of declared war or of any other armed conflict' literally. Common Article 3 is part of the 'present Convention', which would then make Common Article 3 also applicable to IAC. However, this construction would clearly go against the intention of the drafters, as the reason why Common Article 3 was included in the 1949 Geneva Conventions was to serve as a 'mini-convention' applicable only to NIAC. Moreover, the ICJ's reason to conclude that the content of Common Article 3 applies also in times of IAC results from the customary status of this content, not because of the aforementioned literal way of reading Common Article 2.

255 In the *Tadić* Jurisdiction Decision, the ICTY's Appeals Chamber held that 'States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The ICJ has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (*Nicaragua* Judgment, *supra* note 36, para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant'. (*Tadić* Jurisdiction Decision, *supra* note 17, para. 102).

256 The *Karadžić* Trial Chamber, in dismissing challenges against the Tribunal's jurisdiction, considered that '[i]t has been held by the Appeals Chamber that the protections in common article 3 are now part of Article 3 of the [ICTY] Statute'. Yet, after this reference to the substantive content of Common Article 3, it continued by stating that 'the Appeals Chamber has also found, relying on the International Court of Justice in the 1986 *Nicaragua* case, that common article 3 of the Geneva Conventions applies to both international and non-international armed conflicts, thereby making the nature of the conflict irrelevant for the purposes of that provision', ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Trial Chamber, Decision on six preliminary motions challenging jurisdiction, 28 April 2009, para. 59.

257 *Hamdan v. Rumsfeld*, US Supreme Court, 548 U.S. (2006), 126 S. Ct. 2749; 2006 U.S. LEXIS 5185 Judgment, pp. 67–69. The Supreme Court did not explicitly state that it considered the fight with Al-Qaeda to be a NIAC, but this follows from the reasoning of the Court. Also, the US government has interpreted the ruling to have reached this conclusion. See Marko Milanovic, 'Lessons for human rights and humanitarian law in the war on terror: Comparing *Hamdan* and the Israeli *Targeted Killings* case', 89(866) *International Review of the Red Cross* (2007) 377–381.

conflict in Sierra Leone should be classified as an IAC, that 'Common Article 3, of course, applies regardless of the characterisation of the conflict'.²⁵⁸

On one reading of *Nicaragua*, the ICJ can be understood as having held that the minimum rules included in Common Article 3 in effect also form part of the law of IAC.²⁵⁹ Similarly, *Tadić* can be read as making certain parts of the law of IAC also applicable to the law of NIAC.²⁶⁰ However, what the ICJ and ICTY really did was no more than stating that certain rules (such as those included in Common Article 3) were to be considered as 'elementary considerations of humanity'²⁶¹ and that the 'general essence'²⁶² of certain rules of the law of IAC amount to customary IHL and as such also form part of the law of NIAC.²⁶³ There is no full assimilation of the two sets, and the sets are not interchangeable.

4.2.1 Consequences of the Difference between the Applicable Law and the Type of Conflict

As emphasised earlier, several important differences between the two sets of rules remain. For example, with respect to the rules related to combatant

258 SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Transcript of Hearing of 9 February 2011, p. 49290.

259 See, e.g., Zahar and Sluiter, *supra* note 75, p. 112: when discussing ICTY's approach to conflict classification, it is stated that 'Common Article 3 can be used to regulate international armed conflict'.

260 Note, however, that in the same decision, the Appeals Chamber softened its sweeping statement that '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife', when it clarified that 'only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts', *Tadić* Jurisdiction Decision, *supra* note 17, paras. 119 and 126, respectively.

261 *Nicaragua* Judgment, *supra* note 36, para. 218.

262 *Tadić* Jurisdiction Decision, *supra* note 17, para. 126.

263 As the President of the ICTY, Judge Cassese clarified 'his' *Tadić* Jurisdiction Decision in 1996, stating in a memorandum by his office to the members of the Preparatory Committee for the Establishment of the ICC that 'internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts'. Antonio Cassese, 'Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence', *Memorandum to the Preparatory Committee for the Establishment of the International Criminal Court* (ICTY, 22 March 1996), para. 11.

privilege, detention and occupation.²⁶⁴ These differences are not only of relevance to IHL,²⁶⁵ but continue to impact on the material jurisdiction in ICL.²⁶⁶ The ICTY considered that grave breaches can only be committed in times of IAC, and Article 8(2)(a) of the Rome Statute, which lists the grave breaches of the 1949 Geneva Conventions, is similarly understood as being limited to IAC.²⁶⁷ Furthermore, Article 8(2)(e), which lists war crimes that can be committed in times of NIAC, may be similar to its IAC counterpart, but as it does not contain all the crimes included in Article 8(2)(b), crucial parts are missing.²⁶⁸ Indeed, the *Lubanga* Trial Chamber correctly held that despite the fact that ‘some academics, practitioners, and a line of jurisprudence from the *ad hoc* tribunals have questioned the usefulness of the distinction between international and non-international armed conflicts’, for the purposes of the ICC the distinction is ‘not only an established part of the international law of

264 See, e.g., Kolb and Hyde, *supra* note 244, pp. 69–70; Cryer *et al.*, *supra* note 35, p. 278; and Lawrence Hill-Cawthorne, ‘Humanitarian law, Human Rights Law and the Bifurcation of Armed Conflict’, 64(2) *International and Comparative Law Quarterly* (2015) 293–325. See in this regard also the warning against using the law of IAC by analogy for NIAC situations: Kevin J. Heller, *The Use and Abuse of Analogy in IHL*, in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press, Cambridge, 2016), pp. 232–286.

265 René Provost, for example, notes that although ‘[t]he jurisprudence of the ICTY and ICTR and the ICC Statute have eliminated some differences among the regimes associated with each category of armed conflict ...; fundamental differences remain, however, making it as essential as ever to characterise situations of armed conflict’. Provost, *supra* note 130, p. 269.

266 It is recognised that some States have implemented the Rome Statute in such a manner as to create a uniform system that prohibits certain conduct in both IAC and NIAC and therefore only includes one crime (see e.g., the *Völkerstrafgesetzbuch* of Germany, and the relevant section (Art. 609 *et seq.*) of the Spanish *Código Penal*), but such a uniform system is not presently in place on the international level.

267 The war crimes listed in Art. 8(2)(a) all include the element that ‘[t]he conduct took place in the context of and was associated with an international armed conflict’ (Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B).

268 Art. 8(2)(b)(iv), dealing with the crime of causing excessive collateral damage, is not repeated in Art. 8(2)(e), although the principle of proportionality also applies in times of NIAC. The intentional starvation of civilians is amongst the IAC-war crimes (Art. 8(2)(b)(xxv) of the Rome Statute), but despite the inclusion in 1977 Additional Protocol II of an explicit prohibition of starvation of civilians as a method of warfare (Art. 14), no corresponding war crime was adopted for Art. 8(2)(e). In addition, Arts. 8(2)(b)(viii), (xiv) and (xv) do not have a NIAC-counterpart in the Rome Statute. However, given that these articles deal with occupation and ‘the nationals of the hostile party’, it is obviously not possible to have the same crime in NIACs.

armed conflict, but more importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework, which ... must be applied'.²⁶⁹

Care should therefore be taken in ICL not to confuse the concept 'non-international armed conflict' (or 'conflict not of an international character') with the concept 'law of non-international armed conflict', and vice versa, since the previous sub-section showed that applying the content of Common Article 3, which forms only a (small) part of the law of NIAC,²⁷⁰ does not mean that the situation during which said content is applicable necessarily has to be classified as a NIAC. Conversely, if a chamber or party to criminal proceedings in a case that concerns a NIAC wishes to rely on provisions that form part of the law of IAC, it can only do so if the relevant provisions are part of customary IHL applicable in times of NIAC,²⁷¹ or were applicable to the fighting concerned as a result of an agreement between the warring parties, which is discussed next.

With regard to classification of conflicts during international criminal trials, it is similarly important to realise that the applicability of the law of IAC does not necessarily mean that an IAC exists. The distinction between the existence of an IAC and the applicability of the law of IAC to a situation can be illustrated by looking at special agreements concluded by the warring parties. Common Article 3 encourages the parties to the conflict to 'endeavour to bring into force, by means of special agreements, all or part of the other provisions of the 1949 Geneva Conventions'. The parties to the Bosnian conflict agreed on 22 May 1992 to make certain provisions of the 1949 Geneva Conventions and Additional Protocol I applicable.²⁷² At the ICTY, various chambers relied on the 22 May 1992 Agreement to conclude that, for example, Article 51 of Additional Protocol I, which codifies the IHL principles of distinction and proportionality and, *inter alia*, prohibits indiscriminate attacks, was applicable to the fighting

269 *Lubanga* Trial Judgment, *supra* note 24, para. 539.

270 An important part, but nonetheless only a portion of the law of NIAC.

271 The ICRC concluded that most but not all of rules of customary IHL are applicable during both IAC and NIAC. Out of the 161 rules, 16 were found to be applicable only during IAC, and eight as being applicable in IAC and 'arguably' also in NIAC. Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge University Press, Cambridge, 2005).

272 The parties, *inter alia*, agreed to apply Arts. 13 to 34 of the 1949 Geneva Convention IV and Arts. 35 to 42 and 48 to 58 of 1977 Additional Protocol I. See ICTY, *Prosecutor v. Galić*, Case No IT-98-29-T, Trial Chamber, Judgement and Opinion, 5 December 2003 (*Galić* Trial Judgment), para. 22. On the specifics of the 22 May 1992, see also the information contained in ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005.

between these parties.²⁷³ As a consequence of the agreement, parts of the law of IAC had become applicable to fighting, but the agreement did not turn the situation into an IAC. In fact, in *Galić*, for example, no classification of the conflict was made, despite other chambers previously having found the same fighting between the armed forces of the central authorities of Bosnia and Herzegovina (ABiH) and the armed forces of the *Republika Srpska* (VRS) to constitute an IAC because the latter were under overall control of the Federal Republic of Yugoslavia.²⁷⁴ Nevertheless, the majority of the *Galić* Trial Chamber held that it was ‘not called upon to decide whether Additional Protocol I came at any time into effect in the State of Bosnia-Herzegovina through fulfilment of the Protocol’s inherent conditions of application (Article 1 of the Protocol); because ‘[t]he implementing instrument, on the evidence in this case, was the 22 May Agreement’.²⁷⁵

A similar situation would occur in case of recognition of belligerency of an armed group involved in a NIAC. Albeit a rare phenomenon that has not occurred for many years,²⁷⁶ the doctrine of belligerency is still valid and can be applied.²⁷⁷ More importantly for the present analysis, it helps to show how the classification of the relevant armed conflict and identification of the applicable rules do not always go hand in hand. In a NIAC, when a government recognises its armed opposition as belligerents, it brings into force the law of IAC.²⁷⁸

273 The *Galić* Trial Chamber concluded that ‘Article 51, along with Articles 35 to 42 and 48 to 58 of Additional Protocol I, undoubtedly applied as conventional law between the parties to the conflict, including the VRS and the ABiH’ (*Galić* Trial Judgment, *supra* note 272, para. 22).

274 *Tadić* Appeal Judgment, *supra* note 33, paras. 156 and 162; and *Delalić et al.* Appeal Judgment, *supra* note 118, paras. 33, 48, 50.

275 *Galić* Trial Judgment, *supra* note 271, para. 95. The majority thus declined to rule on the classification of the conflict and merely held that ‘an armed conflict’ existed at the time.

276 Gurmendi identifies the Andean Pact Declaration of 16 June 1979, in which the Nicaraguan rebel group *Sandinista National Liberation Front* was recognised as a belligerent, Alonso Gurmendi, ‘The Last Recognition of Belligerency (and Some Thoughts on Why You May Not Have Heard of It)’, *Opinio Juris*, 10 December 2019, www.opiniojuris.org/2019/12/10/the-last-recognition-of-belligerency-and-some-thoughts-on-why-you-may-not-have-heard-of-it/, accessed 16 January 2020.

277 See Sasha Radin, ‘The Current Relevance of the Recognition of Belligerency’, in Marielle Matthee *et al.* (eds.), *Armed Conflict and International Law: In Search of the Human Face* (T.M.C. Asser Press, The Hague, 2013), pp. 115–149; Sivakumaran, *supra* note 127, pp. 19–20; Akande, *supra* note 131, p. 50; Kubo Macak, *Internationalized Armed Conflicts in International Law* (Oxford University Press, Oxford, 2018), pp. 74–85; Yair M. Lootsteen, ‘The Concept of Belligerency in International Law’, 166 *Military Law Review* (2000) 109–141.

278 On recognition of belligerency and its requirements, see generally Chapters XII to XV in Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, Cambridge, 1947), pp. 175–269.

Yet, the nature of the conflict does not change and fighting continues to take place as part of a NIAC,²⁷⁹ albeit regulated by a larger set of rules.²⁸⁰

The principle of legality, which is included in all major human rights treaties²⁸¹ and was described by the European Court of Human Rights as 'an essential element of the rule of law',²⁸² forms part of both IHL²⁸³ and ICL.²⁸⁴ The necessity to include the *nullum crimen sine lege* part of the principle in the Rome Statute appeared to have been viewed 'self-evident' to most delegates to the Rome Conference.²⁸⁵ With regards to the above discussion, and mindful of the principle of legality, it appears evident that if the relevant IHL prohibition was applicable, and thus had to be abided by, the relevant rule of IHL could

279 Felicity Szesnat and Annie R. Bird, 'Colombia', in Wilmshurst, *supra* note 18, p. 223, noting: 'Although recognition of belligerency has the same effect as classifying hostilities as an international armed conflict, that is, it determines that the rules of international humanitarian law applicable to international armed conflict must be implemented, it does not itself alter the classification of the armed conflict ..., as recognition does not bestow statehood'. See also Dinstein 2014, *supra* note 243, pp. 108–110. For a contrary view, see Macak, *supra* note 277, section 2.5.1.2, according to whom, in case of recognition by the territorial state of insurgent 'both parties will be subject to the norms of IHL applicable to IACS'. However, he submits 'that it is preferable to regard recognition as a demonstration of a view that a conflict is to be treated as international'.

280 See, e.g., Bartels, *supra* note 247, pp. 50–52; and generally Lootsteen, *supra* note 277.

281 Namely, Art. 15 of the International Covenant on Civil and Political Rights, Art. 7 of the European Convention on Human Rights and Fundamental Freedoms, Art. 9 of the American Convention on Human Rights, and Art. 7(2) of the African Charter on Human and Peoples' Rights.

282 ECtHR, *Kafkaris v. Cyprus*, Judgment, 12 February 2008, para. 137.

283 See, e.g., Art. 75(4)(c) of Additional Protocol I, Art. 6(2)(c) of Additional Protocol II, and Rule 101 of the ICRC Customary IHL Study.

284 The Appeals Chamber of the Special Tribunal for Lebanon (STL) even held that the principle is *jus cogens* and that, as such, a peremptory norm demands observance on both the national and international level. STL, *Prosecutor v. Salim Jamil Ayyash et al.*, Case No. STL-11-01, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 87. See also Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', 6(1) *International Criminal Law Review* (2006) 125.

285 Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. II* (Oxford University Press, Oxford, 2002), pp. 734–735. Per Saland, the chairman of the working group in charge of the section of the Rome Statute that Art. 22 is part of (Working Group on the General Principles of Criminal Law), observed that '[t]he material content of the principle of legality (that a person is not criminally responsible unless the act constitutes a crime under the Statute) was never a contentious issue'. Per Saland, 'International Criminal Law Principles', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999), pp. 194–195.

therefore be violated. At the ICC, it should therefore be possible to prosecute someone for violations of the law of IAC, if this body of law was applicable at the relevant time, as a result of an agreement between the warring parties, to a situation that continued to constitute a NIAC for conflict classification purposes.

4.2.2 Temporal Scope and the Nexus Requirement

The previous examples pertained to situations in which the law developed for one type of conflict applies to the other type of conflict. However, another reason why international courts and tribunals should consider the applicable rules of IHL and not the type of conflict, is that certain rules of IHL are also applicable *after* the relevant conflict ends. Notwithstanding the ICTY Appeals Chamber's ruling in *Tadić* that IHL in IAC applies only 'until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved',²⁸⁶ IHL does in fact continue to protect (and thus apply to) those persons who remain in the hands of the (former) enemy after an armed conflict ends. For example, someone taken prisoner of war in an IAC is to be repatriated after cessation of active hostilities,²⁸⁷ but history has shown that it may take months or even years before the prisoners of war are actually released. Until such time, the provisions of the Third Geneva Convention of 1949 remain applicable to their captivity.²⁸⁸ Similarly, both the Fourth Geneva Convention of 1949 and Additional Protocol II mandate that after an IAC and NIAC, respectively, persons detained for reasons related to the conflict remain under the protection of the Protocol until they are released.²⁸⁹ Even though Common Article 3 does not explicitly refer to it, it is submitted here that it would be unreasonable to argue that those who benefit from the protection afforded by Common Article 3 *during* a NIAC are not similarly protected by the scope of this article until their release and repatriation; even if this occurs only *after* the NIAC ended.²⁹⁰ Consequently, the killing of or other harm done to a prisoner of war prior to his repatriation, or to a civilian whose detention continues after the conflict, constitutes a violation of IHL, even though no armed conflict existed at the time of the offence. Evidently, prosecution of such a violation of IHL as a war crime must be possible.

286 *Tadić* Jurisdiction Decision, *supra* note 17, para. 70.

287 Art. 118 of the Third Geneva Convention of 1949.

288 Art. 5 of the Third Geneva Convention of 1949, dealing with the 'Beginning and End of Application', clearly states that the 'Convention shall apply to [POWs] from the time they fall into the power of the enemy and until their final release and repatriation'.

289 Art. 6 of the Third Geneva Convention of 1949 and Art. 2(2) of Additional Protocol II.

290 See the 2016 commentary by the ICRC, *supra* note 142, para. 501.

The foregoing is another reason to disentangle the concept of armed conflict from the law applicable to it. In relation to IHL's temporal scope, if such a situation would arise before the ICC, it is submitted here that the ICC Elements of Crimes would not pose a problem as they provide for criminality of conduct that was 'in the context of and was associated with' an IAC or a NIAC. Although 'in the context of' could be understood as meaning that any relevant conduct must take place *during* an armed conflict, the drafting history of the Elements of Crimes shows that 'in the context of' related to the general scope of application of IHL and not the temporal scope of armed conflicts.²⁹¹ Moreover, understanding these words to only refer to conduct that took place before an armed conflict ended would go against their ordinary meaning.²⁹² Even if the ordinary meaning is considered to be ambiguous, a restrictive interpretation that would limit war crimes to the temporal scope of armed conflicts instead of to the temporal scope of IHL clearly goes against the intent and purpose of war crimes law. Treaty interpretation of the Rome Statute, which was adopted to counter impunity for perpetrators of, *inter alia*, serious violations of IHL, therefore also supports the proposed approach. As to the second part of the nexus element,²⁹³ evidently also after the end of an armed conflict, such crimes can remain *associated* with it.²⁹⁴ It is submitted here that the chapeau

291 See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, 2003), p. 19. Cryer et al. explain that '[t]he term "in the context of" refers to the temporal and geographic context in a broad sense' (Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (4th ed., Cambridge University Press, Cambridge, 2019), p. 274). As discussed next, this should be understood as the temporal and geographic reach of the law that is allegedly violated.

292 See Art. 32(1) of the Vienna Convention on the Law of Treaties, which mandates that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The Oxford English Dictionary defines 'in the context of' as meaning 'in connection with', while 'associated with' is defined as 'placed or found in conjunction with'.

293 At the *ad hoc* tribunals, these two parts of the nexus element were considered separately. The words 'in the context of' were meant to indicate the concept that IHL had to be applicable, while 'in association with' refers to the need for an actual nexus between the offence and the armed conflict, as acts unrelated to an armed conflict should not be considered as war crimes. See Dörmann, *supra* note 291, pp. 19–20.

294 Furthermore, also conduct taking place outside the area where the fighting is taking place, or even outside the territory of the parties to the conflict, may still be clearly *associated* with an armed conflict. A person who was detained in the course of an armed conflict and subsequently is brought to a different State, which is not a party to the conflict, obviously remains under the protection of IHL. Torturing such a person therefore evidently was 'in the context of and associated with' the armed conflict during which he or she was captured, and thus qualifies as a war crime. The ICC Pre-Trial Chamber dealing

of Article 8(2)(c) ('[i]n case of ...') and the qualifiers of Article 8(2)(d) and (f) of the Rome Statute ('... applies to ...') may be read in the same manner.²⁹⁵ The ICC's legal texts therefore need not form an obstacle to the prosecution of violations of IHL committed after the end of an IAC or NIAC.

Such an approach does not negatively affect the accused's right to a fair trial. The conduct in question had to be criminalised at the time it took place,²⁹⁶ and that crimes be strictly construed,²⁹⁷ but these elements of the principle of legality are both fulfilled so long as the law that is being violated, i.e. IHL, included a prohibition of the conduct and was applicable at the relevant time.

4.3 *Internationalised Non-international Armed Conflict or International Armed Conflict Only?*

The terms 'internationalised non-international armed conflict' or 'internationalised armed conflict' cannot be found in the relevant rules governing the application of IHL, nor do they appear in the statutes of international courts or tribunals. It may be that a conflict started out as a NIAC by fulfilling the relevant criteria of intensity and organisation of the parties, but once it would become 'internationalised',²⁹⁸ for the purposes of the applicable rules, as well

with the Afghanistan situation therefore was wrong to restrict the Court's jurisdiction in such instances (ICC, *Situation in the Islamic Republic of Afghanistan*, Situation No. ICC-02/17, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, para. 54). See, however, the *Ntaganda* Trial Judgment, *supra* note 133, footnote 2271, for a correct interpretation of the geographical scope of application of IHL, and thus the nexus.

295 Of course, the Rome Statute has precedence over the Elements of Crimes, but the latter are meant to clarify concepts and terms included in Arts. 6 to 8 of the former. As such they may be seen as an 'agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' (Art. 31(2)(a) of the Vienna Convention on the Law of Treaties).

296 The *nullum crimen sine lege* principle is incorporated in the Rome Statute in Art. 22(1).

297 This element of the principle of the legality principle is reflected in Art. 22(2) of the Rome Statute.

298 The term 'internationalised non-international armed conflict' has also been used to refer to any NIAC situation in which some form of international intervention takes place, including intervention by a third State on the side of the government and the involvement of peacekeeping forces (see, for example, Hans-Peter Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon', 33(1) *American University Law Review* (1982) 145–159). As Jelena Pejic observes: 'To refer colloquially to an internal conflict as being "internationalised" does not, however, always mean that the hostilities will amount to an international armed conflict in the legal sense' (Pejic, *supra* note 11, p. 92). In (international) criminal trials, terminology, of course, has to be precise. In the present contribution, the term solely refers to a NIAC that has been

as the relevant war crime provisions of the Rome Statute, the legal classification of such a situation would be IAC. In commenting on the *Lubanga* Trial Judgment, it has been suggested by one scholar that as part of the determination whether a conflict is to be considered international due to foreign intervention,

the characterization of the situation as an international armed conflict requires the following two steps: first, it must be shown that the conditions of ‘organization’ and ‘intensity’ necessary to establish the existence of a non-international armed conflict have been met; second, it must be demonstrated that the level of control exercised by foreign forces over an organized armed group is sufficient to conclude that the conflict is, in fact, a confrontation between States. In other words, the classification of such a situation as an international armed conflict supposes a pre-existing non-international armed conflict, which in turn implies that the required threshold of intensity has been met.²⁹⁹

It indeed appears that in *Lubanga*, these two steps were followed.³⁰⁰ The *Ntaganda* Trial Judgment appears to follow the same reasoning by first analysing whether a NIAC, as charged, existed and only after concluding that the organised armed group of the accused was ‘at all times during the relevant period ... involved in at least one non-international armed conflict with an opposing party’,³⁰¹ considering ‘[w]hether the non-international armed conflict was instead international in nature’.³⁰²

transformed into an IAC as a result of intervention by a third State on the side of the rebels/armed opposition group.

299 Sylvain Vité, ‘Between Consolidation and Innovation: The International Criminal Court’s Trial Chamber Judgment in the *Lubanga* Case’, 15 *Yearbook of International Humanitarian Law* (2012) 69.

300 See *Lubanga* Trial Judgment, *supra* note 24, paras. 541, and 546–567. Prior to analysing the facts of the case, and in fact in referring to the same scholar (i.e., Vité) in doing so, the *Lubanga* Trial Chamber did note: ‘It is widely accepted that when a State enters into conflict with a non-governmental armed group located in the territory of a neighbouring State and the armed group, acting under the control of its own State, “the fighting falls within the definition of an international armed conflict between the two States”’ (*Ibid.*, para. 541, referring to Sylvain Vité ‘Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations’, 91(873) *International Review of the Red Cross* (2009) 69–94).

301 *Ntaganda* Trial Judgment, *supra* note 133, para. 725.

302 *Ibid.*, para. 725. The *Ntaganda* Trial Chamber explained that ‘there is no evidence before the Chamber of clashes involving directly the armed forces of two or more States, nor is

However, this suggested two-step determination is not founded on treaty or (prior) case law. If an armed group taking up arms against a government is in fact an agent of another State, or its actions are controlled by that other State, the ensuing conflict, from the very beginning, is to be classified as an IAC.³⁰³ From the start two States would be pitted against each other, thereby fulfilling the IAC requirement that 'resort to armed force between States'.³⁰⁴ The intensity threshold required for the existence of a NIAC would not thus have to be met, as any use of force by one State against another triggers an IAC.³⁰⁵ On the

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- such a factual situation alleged or submitted to have taken place'. It therefore considered the situation to be a *'prima facie* conflict not of an international character', *ibid.*, para. 700.
- 303 In support, *see* Schmitt, *supra* note 18, pp. 464–465. This view would appear to be supported by Lubell, who – as part of his enquiry into extraterritorial use of force against non-State actors – writes that '[i]f, from the start, it was clear that the individuals/group was part of the state structure, then we would not be dealing with a non-state actor, and the issue would thus be outside the scope [of the enquiry], which is concerned only with measures against non-state actors', Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, Oxford, 2010), p. 97.
- 304 *Tadić* Jurisdiction Decision, *supra* note 17, para. 70. Or, in the words of Common Article 2: 'between two or more of the High Contracting Parties'.
- 305 *See, e.g.*, Jean Pictet (ed.), *Commentary to the Third Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Geneva, 1960), p. 23, famously stating that '[a]ny difference between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application'; and the ICTY's *Tadić* definition, which stresses that 'an armed conflict exist whenever there is a resort to armed force between States', *Tadić* Jurisdiction Decision, *supra* note 17, para. 70. It is acknowledged that it has been argued that an intensity threshold exists also for IAC (*see mainly* International Law Association Committee on the Use of Force, *Final Report of the Meaning of Armed Conflict in International Law* (2010); and O'Connell, who chaired the ILA committee that produced the aforementioned report: Mary Ellen O'Connell, 'Defining Armed Conflict, 13(3) *Journal of Conflict and Security Law* (2008) 393–400). However, the better view, supported by the majority of academics and the ICRC, is that no such intensity threshold exists for IAC: *see, e.g.*, Hans-Peter Gasser, 'International Humanitarian Law: an Introduction', in Hans Haug (ed.), *Humanity for All: the International Red Cross and Red Crescent Movement* (Paul Haupt Publishers, Bern, 1993), pp. 510–511; Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008), pp. 251–252; Vité, *supra* note 300 p. 72; Lubell, *supra* note 303, pp. 94–95; Akande, *supra* note 131, pp. 41–42; Schmitt, *supra* note 18, pp. 459–460; Kolb and Hyde, *supra* note 244, p. 76; Jann K. Kleffner, 'Scope of Application of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edition, Oxford University Press, Oxford, 2013), pp. 44–45; and ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', *Opinion Paper* (March 2008), pp. 2–3.

other hand, in a situation where ‘armed groups engage in organized violence without belonging to a State’ and their conduct cannot be imputed to a State, ‘it must be determined whether the hostilities are sufficiently intense or protracted for that group to become an independent party to a non-international armed conflict’.³⁰⁶ The *Al Mahdi* Trial Chamber was therefore on point when it considered ‘that there is no evidence that the armed conflict became internationalised or should have been classified as international from the outset’.³⁰⁷

In addition to the possibility that a conflict involving a non-State actor is already international from the start (and there is thus no NIAC to internationalise), it should be noted that war crime cases generally only concern a specific period of an armed conflict. Hostilities will often already have been ongoing before the specific period that is subject to the charges of alleged war crimes, as was the case with the DRC cases before the ICC.³⁰⁸ Namely, without the existence of an armed conflict (international or non-international), there can be no serious violation of IHL. Similarly, hostilities may well continue after the temporal scope of the war crime charges ends, because the selected timeframe depends on the existence of alleged violations of IHL, not on the start or end of the application of this body of law. It is therefore possible that a conflict started out as a NIAC, but through intervention by a third State had already transformed into an IAC by the start of the timeframe relevant to the charges. If third State intervention is proven from the start of the relevant timeframe, there would be no need to also prove the intensity and organisational criteria that are only a pre-requisite for the existence of a NIAC.

In light of the foregoing, the approach advocated by the ICC Prosecution, and adopted in the *Lubanga*, appears to be an incorrect application of IHL. Under ICL, such an approach is also unsatisfactory. The *Lubanga* and *Katanga* Trial Chambers’ conclusions about character/nature of the armed conflict was, in part, based on the lack of corroboration of (limited) evidence for overall control by an outside State.³⁰⁹ In a war crimes case, a chamber’s finding on the

306 Melzer, *supra* note 305, pp. 249–250.

307 *Al Mahdi* Judgment, *supra* note 177, para. 50 (emphasis added).

308 See, e.g., the overview of the DRC conflicts in Arimatsu, *supra* note 151.

309 One can wonder whether corroboration of P-0055’s testimony was necessary for a finding on overall control. It can be debated whether the standard of proof for the existence of an IAC must be the same as for the ‘guilt of the accused’, which – pursuant to Art. 66(3) of the Rome Statute – is ‘beyond reasonable doubt’. The various ICC trial judgments so far have indeed all held that for a conviction, each element of the particular offence charged must be established beyond reasonable doubt (*Ntaganda* Trial Judgment, *supra* note 133, para. 44; ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 185; *Bemba* Trial Judgment, *supra* note 59, para. 215; *Katanga* Judgment, *supra* note 59, para. 68; *Ngudjolo* Judgment,

nature of the relevant armed conflict should not be subject to a (partial) leading of evidence on only one type of conflict.³¹⁰ Naturally, in a criminal trial the prosecution need not lead evidence about facts that do not need to be proven, are not disputed,³¹¹ or pertain to events that realistically did not or could not exist or take place. Yet, as mentioned above, in *Lubanga* and in *Ntaganda*, in addition to the existence of (some) evidence of third State intervention, the nature of the armed conflict was in dispute.

4.4 *Mixed Conflicts*

A further aspect to be mindful of when classifying armed conflicts for the purposes of criminal trials is the existence of multiple armed conflicts at the same time. The Trial Chambers in *Lubanga* and *Katanga* correctly held that an IAC and a NIAC can exist alongside each other on the same territory. Both appeared

supra note 158, para. 34; and *Lubanga* Trial Judgment, *supra* note 24, para. 92). If the existence of a specific type of armed conflict, as opposed to just ‘an armed conflict’ (as at the ICTY), constitutes a ‘contextual element’ of war crimes, the proof beyond reasonable standard would apply; at least, if the ICC’s Appeals Chamber determination in the *Kenya* cases, albeit with respect to crimes against humanity, that contextual elements need to be proven according to that standard is followed. See ICC, *Prosecutor v. Kenyatta and Muthaura*, Case No. ICC-01/09-02/11, Appeals Chamber, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 24 May 2012, paras. 33–36. According to Judge Van den Wyngaert, who touched upon this issue in her dissent in *Katanga*, this standard applies also for the armed conflict element of war crimes (Minority Opinion of Judge Christine Van den Wyngaert, *supra* note 170, para. 276). The *Ntaganda* Trial Chamber also seems to indicate that its finding on the existence of a NIAC was made beyond reasonable doubt (*Ntaganda* Trial Judgment, *supra* note 133, para. 730). It has, however, been argued that the existence of an IAC (or NIAC) is a pure jurisdictional requirement that need not be proven to the same standard (see the discussion on the drafting of the elements of war crimes in Kress, *supra* note 28, pp. 125–127). The ICTY’s case law does not provide guidance in this regard, as it is inconsistent on standard of proof for the existence of an IAC or NIAC: see Gideon Boas *et al.*, *International Criminal Law Practitioner Library Volume 11: Elements of Crimes under International Law* (Cambridge University Press, Cambridge, 2008), pp. 237–239.

310 The *Katanga* Defence noted that ‘it is for the prosecution to prove beyond reasonable doubt that the alleged war crimes at Bogoro were committed either in an international armed conflict, if it relies on Articles 8(2)(a) and 8(2)(b), or in a non-international armed conflict, if it relies on Articles 8(2)(e) and 8(2)(c). Because the burden to establish the foregoing rests – and indeed remains – with the prosecution, it is for the prosecution to have called that evidence’, *Katanga* Defence Observations, *supra* note 159, para. 3.

311 Parties may agree to certain facts. If their agreement is accepted by the trial chamber, these facts are considered as proven for the purposes of the trial. See, *e.g.*, Rule 69 of the ICC Rules of Procedure and Evidence.

to have said that as a result for each alleged conduct it must be determined with which conflict it was associated. However, while this is a sensible approach, the challenge with the mixed conflict theory is that it is difficult to determine which framework applies to which operations, i.e. which ones are carried out against the other State and which ones solely against the armed groups. However, in addition to regulating the fighting between warring parties, IHL's protective regime also aims to limit the effects of the fighting for those not taking part in it. As such, IHL also applies to violence by the warring parties employed outside the battlefield (i.e. not necessarily directed against its opponent) that affects the civilian population. Indeed, many of the crimes prosecuted on the international level are committed against civilians and not against members of the opposing forces.³¹² If armed group A is supported by State C in its fight against State B and certain actions by A would be considered part of a NIAC and some others part of an IAC, what regime what then govern a raid by A of a village during which no fighting with the forces of B takes place, but civilians are killed and raped? Or what to think of the recruitment of children under the age of 15? By looking at the belligerent party being confronted by the armed group or force that the children are part of, it is possible to assess whether specific instances of their active participation in hostilities relate to conduct that fell within the IAC or instead was part of the NIAC. However, their enlistment or conscription would be done for the purposes of both conflicts.³¹³

Similarly, if an IAC between State X and Z exists in parallel to a NIAC between Z and armed group Y, which resides on the territory of X, every act of targeting by Z directed against positions or members of Y will necessarily fall within both the IAC and the NIAC. Indeed, the important point here is that the conflict between Y and Z is so 'bound up' with the IAC between the two States X and Z that it is impossible to separate the two conflicts.³¹⁴

In these situations, it would be advisable to bring charges for both IAC and NIAC war crimes, but one may wonder how the chamber seized of the case can fairly decide on what crime, i.e. the IAC or the NIAC version, to apply. In light

³¹² Such as the crimes of pillage, rape and sexual slavery. Some crimes, such as pillage, can by definition only be committed against civilians.

³¹³ Although in theory it is possible that an armed group, or armed force, adopts a formal policy of recruiting children under the age of 15 only for the purposes of its fighting against one party, this is highly unlikely. Moreover, one of the core reasons of prohibiting the recruitment of children is to limit their exposure to the dangers of warfare. By incorporating them into an armed group, or force that is involved in more than one conflict, they become targetable and are exposed to danger as a result of each of the conflicts.

³¹⁴ Akande, *supra* note 131, pp. 70–79.

of the various issues identified above, the present author makes some proposals for the ICC about conflict classification and related matters.

5 Proposals for the Future

As explained above, the *Lubanga* Trial Judgment considered that '[i]n situations where conflicts of a different nature take place on a single territory, it is necessary to consider whether the criminal acts under consideration were committed as part of an international or a non-international conflict'.³¹⁵ This is a reasonable finding, and the current jurisprudential approach of the ICC, as set out in this contribution, is indeed in line with this finding. Yet, more correct would have been for the *Lubanga* Trial Chamber to note that a chamber must consider whether the acts under consideration violated the law of IAC or the law of NIAC, as this is what makes the conduct criminal, at least for the purposes of ICL – and what, as discussed above, is relevant for the principle of legality.

In all cases that the law of NIAC is violated, the conduct would – if the situation was instead determined to be an IAC – also violate a similar provision protecting the same value, person, or object that is part of the law of IAC. Similarly, in most cases, conduct that violates the law of IAC would also violate a provision (of treaty law of customary law) protecting against the same kind of conduct in situations of NIAC. However, as a result of the way the drafters agreed upon Article 8, there is a difference between the scope of war crimes law for IAC and the one for NIAC. Besides the obvious difference between protected persons for the purposes of the four Geneva Conventions of 1949 and persons protected under Common Article 3, and the absence of occupation during NIACs, and thus of the related war crime of transferring part of the civilian population into occupied territory, certain IAC war crimes are – for either cogent³¹⁶ also for unclear reasons³¹⁷ – not included for NIACs. Notwithstanding the addition of war crimes concerning the use of specific weapons or ammunition to Article 8(2)(e), thereby closing the gap between the IAC and NIAC

³¹⁵ *Lubanga* Trial Judgment, *supra* note 24, para. 551.

³¹⁶ See Rogier Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials', 46(2) *Israel Law Review* (2013) 271–315.

³¹⁷ See Rogier Bartels, 'Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future', 48(3) *Israel Law Review* (2015) 281–307.

crimes, important differences persist.³¹⁸ However, the IAC part of Article 8 is not in all instances broader than the NIAC part: the NIAC crime of enlistment and conscription of children under the age of 15, and using them to participate actively in hostilities (Article 8(2)(e)(vii)) is broader than its IAC counterpart (Article 8(2)(b)(xxvi)).³¹⁹

If at the end of a trial, on the basis of the evidence available to the chamber, conclusively determine whether an IAC or a NIAC existed at the relevant time (for example, because of ambiguous evidence on potential overall control by a third State), the chamber could – instead of pronouncing on the nature of the armed conflict – check for each alleged crime whether the IAC or the NIAC version, or lack of a NIAC version, is most advantageous for the accused.³²⁰ In practice, this could mean that acquittals would have to be entered for those charges that concern war crimes that are only included in the Rome Statute for IACs, for example, charges of intentional attacks against general civilian objects³²¹ or alleged disproportionate attacks. In most cases, and provided the Prosecution has correctly charged, and the Pre-Trial Chamber correctly confirmed, certain conduct in the alternative, there would be no risk of impunity. It is submitted here that so long as the State Parties do not streamline the IAC and NIAC war crimes, any partial acquittals³²² resulting from selecting the

318 For example, the war crime of intentionally directing attacks against civilian objects is only included as an IAC war crime (Art. 8(2)(c)(ii)). The articles mentioned in the two previous footnotes discuss other examples, namely the fact that the war crime of starvation of civilians only exists for IAC, and that the war crime of knowingly launching an attack that is expected to cause excessive damage, in violation of the proportionality in IHL rule, is not included for NIACs either. The war crime of killing or wounding persons *hors de combat* (Art. 8(2)(b)(vi)) also does not exist for NIACs, but this conduct is sufficiently covered by the war crime of killing persons protected under Common Article 3, which includes ‘members of the armed forces who have laid down their arms and those placed *hors de combat*’ (Art. 8(2)(c)(i)). Similarly, while perfidious conduct is included for IACs in two war crimes (i.e. Arts. 8(2)(b)(vii) and (xi)), only the latter one also exists for NIAC. However, any act of perfidy, including those separately criminalised in Art. 8(2)(c)(vii) (i.e. the improper use of protected emblems or neutral flags or uniforms), also amounts to treacherously killing or wounding a ‘combatant adversary’ (Art. 8(2)(e)(ix)).

319 See the above discussion of the *Lubanga* case in Section 3.

320 Naturally, this can only be done if the charges are confirmed in the alternative, for both IAC and NIAC, or if the chamber has given notice of possible recharacterisation pursuant to Regulation 55 of the Regulations of the Court.

321 ‘General’ as in, not also falling under the war crime of intentionally directing attacks at specific civilian objects, namely ‘buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected’ (Art. 8(2)(e)(iv)).

322 Partial since it is very unlikely that in a case solely those crimes would have been charged that only exist for IACs.

version of the crime (or lack thereof) most favourable to the accused are justified in order to ensure fair trials, as well as to ensure that IHL is not distorted by ICL.

Moreover, the proposed approach does not curtail the Prosecution and may actually enhance the possibility to fairly label alleged criminal conduct. Indeed, the proposed distinction between the law applicable to either type of conflict and the existence of that type of conflict itself on the prosecution of war crimes before the ICC also has the following positive impact. Even though the application, by way of special agreement, of (parts of) the law of IAC to a NIAC does not change that conflict's non-international nature, as a result of such an agreement, it may be more appropriate to prosecute (and adjudicate) violations of the relevant provisions of the law of IAC as crimes under Article 8(2)(b) of the Rome Statute.³²³

The Rome Statute allows for such an approach, as Article 8(2)(b) merely mentions that it concerns 'serious violations of the laws and customs applicable in international armed conflict'. Albeit somewhat ambiguously, it thus refers to violations of the laws of IAC, rather than violations of IHL committed during an IAC. The requirement of the existence of an IAC is only introduced by the elements of crimes pertaining to Article 8(2)(b), which pursuant to Article 9(1) of the Rome Statute, in principle, only serve to 'assist' the judges in their interpretation and application of the crimes under the Rome Statute.³²⁴

323 An agreement could arguably even include application of the grave breaches regime to a NIAC. If the parties agree to apply the relevant provisions of the 1949 Geneva Conventions and/or 1977 Additional Protocol I (Arts. 50, 51, 130, and 147, respectively of the four 1949 Geneva Conventions and Arts. 1 and 85 of the 1977 Additional Protocol I), as submitted by Zahar and Sluiter, *supra* note 74, p. 112, footnote 14. Arguably then, prosecution for acts constituting grave breaches could also take place with respect to a NIAC in which the parties have made the regime available. Indeed, the limitation highlighted by the ICTY, when determining that Art. 2 of its Statute only applied to IAC, was necessary 'in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represent' (*Tadić* Appeal Judgment, *supra* note 33, para. 80) does not apply, because prosecution before the ICC is not dependent on the *aut dedere aut judicare* requirement of the grave breaches regime, as the Court's jurisdiction is not universal but treaty-based. However, such prosecution for grave breaches committed during a NIAC is unrealistic. As a minimum, all the relevant provisions related to the various protected persons, against whom grave breaches can be committed, would have to apply. But even then, it would still be impossible for members of an armed group to commit the grave breach of forcing member of the opposition 'to serve in the forces of a hostile Power'.

324 It is acknowledged that the various chambers of the Court have so far diligently applied the elements of crimes. Moreover, the Pre-Trial Chamber held by majority in *Al Bashir* that the Elements of Crimes 'must be applied unless the competent Chamber finds an irreconcilable contradiction with the Statute', following which 'the provisions in the Statute must prevail', *Al Bashir* Arrest Warrant, *supra* note 205, 4 March 2009, paras. 117–120,

Moreover, Article 9(3) mandates that the elements of the crimes 'shall be consistent' with the Rome Statute.³²⁵ If the elements are not taken into account, it could be argued that for charges under paragraphs 2 (b), the Prosecution would not have to prove the existence of an IAC, but instead would have to prove the applicability of the law of IAC to the relevant situation. Arguments that undercut the system of IHL, such as the Prosecution's submission in *Lubanga* that a belligerent occupation is not necessarily an IAC,³²⁶ would then not need to be made.³²⁷

131. However, strict application will not always be possible. The first element for the war crime of perfidy (Art. 8(2)(e)(ix) of the Rome Statute), for example, refers to 'one or more combatant adversaries'. Since no combatants exist in times of NIAC, this element cannot be fulfilled.

325 Art. 21(1) of the Rome Statute requires the ICC chambers to apply 'in the first place, this Statute, Elements of Crimes and ...'. However, Dörmann observes that Art. 9 appears to be the *lex specialis* with regard to this provision. Moreover, during the Rome Conference, the majority of the delegations considered it unacceptable to make the elements of crimes binding and thereby unduly restrict judicial discretion. Dörmann, *supra* note 291, p. 8.

326 Prosecution *Lubanga* Closing Brief, *supra* note 198, para. 49; and the Prosecution's closing statements in ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Transcript of 15 August 2011 (ICC-01/04-01/06-T-356-ENG) 45–46. The Prosecution tried to argue that an occupation does not equal IAC. It submitted: 'The law of international armed conflict applies to a military occupation, but there is no legal basis on which to find that an occupation automatically determines the legal character of an armed conflict. A military occupation is not ipso facto an armed conflict. An occupation often results from an armed conflict, but as Common Article 2 to the Geneva Conventions clearly states an occupation can also materialise in the complete absence of military hostilities'. This is a misstatement of Common Article 2 and evidently wrong (*see, e.g.*, International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory* (2014) pp. 61 and 111). Whilst it is true that an IAC is not the same as occupation, every belligerent occupation is in fact a form of IAC. During occupation additional rules apply, which specifically take into account the special relation between the occupying power and the civilians in the occupied territory. Indeed, the sources that the Prosecution erroneously referred to conclude that one cannot equate the existence of an IAC with occupation, because the occupation requires the effective control of the occupier over the relevant territory. The Prosecution incorrectly flipped that reasoning around. It therefore tried to turn syllogism that all A is B, but not every B is A, on its head, for it is evident that every belligerent occupation is in fact an IAC.

327 The fact that the Prosecution in *Lubanga* made party-driven submissions, rather than trying to faithfully set out IHL, is strikingly shown by the fact that it submitted in later circumstances, where the existence of an IAC would be the preferred classification due to the additional available war crimes, it submitted exactly the opposite, namely, that occupation amounts to an IAC. With regards to the Russian occupation of the Crimea, it stated, for example, that '[f]or purposes of the Rome Statute an armed conflict may be international in nature if one or more States partially or totally occupies the territory of another State, whether or not the occupation meets with armed resistance'. *See* ICC Office of the Prosecutor, *Report on Preliminary Examination Activities* (14 November 2016),

It would have been preferable for the contextual elements of war crimes to refer to the law of IAC, similar to the provision of the Statute that they pertain to. For example, as follows: *The conduct took place at a time that the relevant part of the law of international armed conflict applied and The perpetrator was aware of factual circumstances that made the relevant part of the law of international armed conflict applicable.* Any future modification to the elements of war crimes could be made along those lines.

Unfortunately, paragraphs (2)(c) and (e),³²⁸ on a *prima facie* reading, do require the existence of specifically a NIAC, rather than the application of the law of NIAC. The phrase '[i]n the case of an armed conflict not of an international character' in Article 8(2)(c) may be read and understood as only applying to NIACs.³²⁹ Notwithstanding the present author's above criticism of the SCSL's prosecution in relation to conflict classification, it is worth noting that this prosecutor's office submitted during the Taylor case that war crimes based on violations of Common Article 3 'would be applicable whether you would consider this conflict to be internal or international'.³³⁰ In its view, therefore, despite Article 3 of the SCSL Statute referring to serious violations of Common Article 3 and Additional Protocol II, the Special Court also would have had jurisdiction in case the Sierra Leonean conflict had been found to be international in character.

Naturally, to avoid any discussion, it would assist if the language of Article 8 be changed to no longer require conduct having taken place '[i]n the case of' a NIAC but instead for the alleged conduct only needing to be in violation of the law applicable to NIACs, but if the State Parties were to review the language of Article 8, more important modifications should also be given attention – and arguably be addressed first.

Prior to any changes to Article 8, it is suggested to always charge and confirm crimes for both types of conflict.³³¹ The confirmation stage is a preliminary part of the proceedings during which only part of the evidence is lead. Therefore, it may be that only during the actual trial, it becomes clear that

para. 158. See also ICC Office of the Prosecutor, *Report on Preliminary Examination Activities* (5 December 2019), p. 270.

328 Paragraph (2)(e) by virtue of the requirement spelled out in paragraph (2)(f).

329 See, however, the above discussion on 'in the context of and associated with', as included in the Elements of Crimes.

330 SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Transcript of Hearing of 9 February 2011, p. 49291.

331 Safe, for example, in situations that the alleged conduct concerns a violation that can only be committed in IAC, such as the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies (see Art. 8(2)(b)(viii) of the Rome Statute).

evidence establishes facts that point to one of the two types of conflict. Confirming war crime charges in the alternative, that is under both (2)(a)/(2)(b) and under (2)(c)/(2)(e) means that the relevant trial chamber need not recharacterise the legal characterisation of the facts pursuant to Regulation 55 of the Regulations of the Court, should the facts indicate a different classification as charged. This is important since recharacterisation remains a contention issue at the Court and having charges in the alternative allows the Chamber to choose the classification that best matches the facts as they appear from the evidence without being criticised for having opted for the more convenient category of armed conflict, or for the one was charged merely to ensure a conviction. It also allows the chamber to select the crime that is most fair for the accused in case of doubt as to the correct classification of the conflict.

As to any (rigorous) changes to Article 8 of the Rome Statute, the distinction between IAC and NIAC crimes could be eliminated altogether. Indeed, it has been submitted that '[t]he call to eliminate the legal characterisation of the conflict – that if there is an armed conflict it is irrelevant what type of armed conflict it is – and to replace Article 8 with a unitary set of war crimes over which the ICC has jurisdiction in all armed conflicts, is appealing on multiple levels'.³³² From an ICL perspective, it would 'simplify the investigation of alleged offences and bring clarity to the parties to proceedings, as well as to the Trial and Appeals Chambers'.³³³ However, there may be insufficient political will to do so.³³⁴ Moreover, from an IHL perspective, a unitary set of war crimes would ignore those aspects of the law of IAC that do not form part of the law of NIAC.³³⁵

Other proposals for reform of Article 8 as concerns the distinction between IAC and NIAC, include an option to retain Article 8(2)(a) and 8(2)(c), as these paragraphs represent 'the explicit treaty regimes of offences applicable in international and non-international armed conflicts respectively', and replace (2)(b) and 8(2)(e) with a provision similar to Article 3 of the ICTY Statute, namely 'other serious violations of the laws and customs of war' without specification of the type of conflict, either containing an exhaustive list of offences or – like the ICTY Statute – only an indicative list of offences. The latter would allow the Prosecution to argue that an alleged war crime not included in the indicative list nonetheless exists in treaty or customary law.³³⁶ In such a case,

332 McCormack, *supra* note 152, p. 354.

333 *Ibid.*

334 *Ibid.*

335 *Compare ibid.*

336 *See ibid.*, p. 355. McCormack observes that the latter approach of the ICTY 'has contributed some important jurisprudence on the laws and customs of war'.

the relevant chamber would have to conduct an exercise similar to the ICTY did in assessing the 'Tadić conditions' and consider whether the conduct entailed individual criminal responsibility at the relevant time.³³⁷

Ideally, any full revision of the war crimes provisions would include rearranging of the 'complicated structure' of Article 8.³³⁸ The crimes could be categorised from a substantive point of view, taking into account the rights or values the underlying prohibitions aim to protect. It has been observed that '[p]articularly useful would be a distinction between protection of persons and property, on the one hand (essentially the law of Geneva), and forbidden means and methods of warfare on the other hand (essentially the law of The Hague)'.³³⁹ Most of the crimes could then be framed as violations of both the law of IAC and the law of NIAC (and as such committed during both types of conflicts), with a few crimes that can only be committed when the relevant law of IAC applies. If needed, the elements of crimes could make a distinction between a particular element to be proven in the context of an IAC or NIAC. Such a system would assist faithful conflict classification and provide clearer notice for the accused. It would therefore be beneficial for both IHL and ICL.

6 Conclusions

During contemporary armed conflicts, (military) lawyers, policy makers, and international organisations are all faced with a challenge when trying to classify these situations as either an international armed conflict or a non-international armed conflict. International (and national) courts and tribunals have to deal with a similar challenge when considering alleged violations of international humanitarian law after such conflicts, or if the conflict is still ongoing, after alleged crimes occurred.

The willingness of States to extend the scope of application of the law of non-international armed conflicts to previously contentious situations³⁴⁰ is a promising development. However, when considering as part of a (retrospective) criminal trial whether the level of organisation of the parties and the intensity of the fighting fulfils the minimum threshold requirements for the existence of a non-international armed conflict, one should remember that international humanitarian law does not only afford protection, but it is also

337 See the discussion in *supra* note 47.

338 See Werle, *supra* note 136, p. 363.

339 *Ibid.*, pp. 363–364.

340 Such as the approach by the US government following *Hamdan*.

used to justify the use of deadly force against fighters, as well as the causing of collateral damage. Moreover, even though many of the rules previously only considered to be applicable to international armed conflicts are now recognised to also apply during non-international armed conflicts,³⁴¹ a difference in the level of regulation and protection remains; whereas for transnational situations, one can even identify gaps in protection.³⁴² Differences also persist in the criminalisation of conduct in each type of conflict. It is therefore essential for both those working in both international humanitarian law and those working in international criminal justice to determine what situations actually constitute an international armed conflict and which ones are to be characterised as a non-international armed conflict.

The *lex certa* principle requires the applicable law to be clear before it can be violated. Although the *post facto* determinations as to the type of conflict made during criminal trials would normally not affect the classification of the conflict concerned, practice has shown that the findings of international courts and tribunals do have a significant impact on the policy and legal reasoning by governments and international organisations. As set out above, care should be taken during international trials to properly classify conflicts as either international or non-international armed conflicts, to ensure a proper application of international humanitarian law, and to prevent negative impact on this body of law as a result. The rights of the accused under international criminal law similarly demand that the classification exercise to be conducted with the requisite scrutiny.³⁴³

341 See, *inter alia*, the ICRC's conclusion that 146 out of 161 rules of customary IHL are applicable during both IAC and NIAC, Henckaerts and Doswald-Beck, *supra* note 263. However, see also the critique by the US Government in John Bellinger, 'A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law', 89(866) *International Review of the Red Cross* (2007) 443–471.

342 See, *e.g.*, Akande, *supra* note 131, pp. 72–78.

343 See Bartels, *supra* note 13, p. 66.