Conflict characterisation

Caitlin Dwyer and Tim McCormack

After the Prosecution’s closing submissions had concluded in Lubanga, the first trial completed at the International Criminal Court, Professor Ben Ferencz, prosecutor from Nuremberg, who had delivered the final section of the final address, was approached by a young lawyer who said: ‘Professor Ferencz, I just wanted to say how inspiring it was to hear your words today. This is an exciting time for international criminal justice, and to hear you pass on the baton from Nuremberg to the ICC was just magnificent.’

Professor Ferencz responded:

‘Well, did you hear the guy before me? It’s not hard to be inspiring after that — the characterisation of the conflict? Who cares about that stuff?’

It may seem anachronistic that different rules apply to international armed conflicts (IAC) and non-international armed conflicts (NIAC), and that the legal character of an armed conflict can have significant consequences for combatants, civilians and victims of alleged war crimes. The ICRC, in the lead up to the 1949 Diplomatic Conference, had proposed that the Conventions should apply to any situation of armed conflict regardless of its legal character but that proposal was rejected by states.1 Irrespective of the desirability of a simplification in approach, the current state of the law of armed conflict (LOAC) maintains the distinction between the two categories of armed conflict.

Section 1 of this chapter briefly outlines the significance of the distinction between IAC and NIAC. Section 2 outlines the treaty provisions relevant to the characterisation of conflicts and identifies the lack of a treaty definition of an armed conflict. Instead, the threshold criteria for an IAC and a NIAC have been developed in the international criminal jurisprudence and that has created its own issues. Section 3 examines the question of how to characterise armed conflicts, and proposes two key principles: (1) that the legal character of an armed conflict is

---

1 GCIC Commentary 29 reproduces the text of the ICRC’s proposal: ‘The present Convention is applicable between the High Contracting Parties from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take’ (emphasis added).
determined by the nature of the parties to it; and (2) that the only armed conflict which is international is one between two or more opposing states.

1 Significance of the distinction

The body of rules applicable to an IAC is more comprehensive than that applicable to a NIAC. As a consequence, acts that constitute war crimes in the context of an IAC are not necessarily war crimes in a NIAC. To apply different rules in this way may seem arbitrary: why should one civilian be entitled to less protection from the laws of war than another, simply because the conflict he or she is unwittingly caught up in is non-international? This arbitrariness takes on even greater significance given that the majority of conflicts since the Second World War have been non-international and that these conflicts have also created the largest number of victims.

The distinction has its origins in the genesis of LOAC. When negotiating the Geneva Conventions of 1864, 1906, 1929 and finally 1949, states were concerned with securing rights for their own military personnel and civilian population and did so by granting reciprocal rights to other states. States were not concerned with creating rights or protections for non-state armed groups who may one day be fighting against them. Indeed, it was not until 1949, after the Spanish Civil War, that the first multilateral treaty provision even addressed armed conflict not involving two opposing states: Article 3 common to the four Geneva Conventions. Even then, states were careful not to permit that provision to be misinterpreted to give non-state armed groups authority or legitimacy – Common Article 3 declares that its application ‘shall not affect the legal status of the Parties to the conflict’. This is a key concern of states and the main reason why the distinction between IAC and NIAC is unlikely to be dissolved: states will not extend legitimacy to non-state armed groups and, more specifically, they will not commit themselves to granting members of such groups combatant privilege or prisoner of war (POW) status.


3 See eg discussion in Prosecutor v Tadić (Appeal Judgment) (Case no IT-94-1-A, ICTY Appeals Chamber, 15 July 1999) ¶ 97.

4 See: ICRC, Introduction to APII, www.icrc.org/appli/ihl/ihl.nsf/INTRO/475?OpenDocument; M Cherif Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98 Journal of Criminal Law & Criminology 711, 712: ‘Since the end of World War II, an estimated 250 conflicts have taken place on almost every continent in the world, resulting in estimated casualties ranging from seventy million to 170 million, most of whom were non-combatants’; see also ibid 745–748 for examples.

5 At the Diplomatic Conference of 1949 a proposal to prohibit prosecution for taking part in a NIAC failed and at the Diplomatic Conference of 1974–1977, a proposal to grant POW status to those involved in NIAC failed: see Sandesh Sivakumaran, ‘Re-envisioning the International Law of Internal Armed Conflict’ (2011) 22(1) EJIL 219, 244 and the sources cited therein. See also Bassiouni (n 4) 731. For an exposition of the differences in the detention regimes, see Chris Jenks, ‘Detention under the law of armed conflict’ ch 17 in this volume.
Thus, although the gap between the two bodies of law has narrowed significantly\(^6\) and there are many arguments for completely abandoning the distinction,\(^7\) the distinction remains. The absence of combatant privilege and POW status are the most significant and likely the most enduring differences between IAC and NIAC. They also carry significant consequences for individuals which are examined elsewhere.\(^8\) Other distinctions between the two sets of laws include that no rules regulate the occupation of territory by a non-state armed group\(^9\) and that the level of specificity of obligations is far greater in IAC than NIAC. A further consequence of the continued distinction between the two sets of law is the difference in the types of conduct which are criminalised. There are 14 crimes in the Rome Statute which apply only in IAC, including disproportionate attacks and attacks on civilian objects.\(^10\) Even where seemingly the same conduct has been criminalised, there may be significant distinctions in the provisions.

2 The definition of an ‘armed conflict’

2.1 Scope of application and lack of definition

The relevant treaty provisions on scope of application of the Geneva Conventions provide no definition of an ‘armed conflict’. Common Article 2, for example, states that each respective Convention applies 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.

Common Article 3 provides no definitional clarification and simply applies to ‘armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties’.

Additional Protocol II applies by virtue of its Article 1(1) to:

all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under

---

6 See eg the discussion in Sivakumaran (n 5) in particular 222–236.
8 For example, see Emily Crawford, ‘Combatants’ ch 7 in this volume, for a discussion on the status of the members of organised armed groups captured by the US in Afghanistan.
9 Sivakumaran (n 5) 243–244.
10 See Rome Statute, Elements of Crimes, arts 8(2)(b)(iv) and 8(2)(b)(ii) respectively. See also attacking or bombarding undefended locations (art 8(2)(b)(v)); killing or wounding a combatant who has surrendered (art 8(2)(b)(vi)); improper use of emblems/uniforms (art 8(2)(b)(vii)); abolishing rights of nationals of hostile party (art 8(2)(b)(xvi)); compelling nationals to fight against own side (art 8(2)(b)(xv)); poison (art 8(2)(b)(xvii)); gases etc (art 8(2)(b)(xviii)); exploding bullets (art 8(2)(b)(xix)); indiscriminate or disproportionate weaponry (art 8(2)(b)(xx)); use of human shields (art 8(2)(b)(xxi)); directing attacks against Red Cross (art 8(2)(b)(xxii)); and starvation (art 8(2)(b)(xxiii)).
responsible command, exercise such control over a part of its territory as to enable them to carry out sustained military operations.

The closest the treaty provisions get to a definition occurs in Article 1(2) of Additional Protocol II where we learn what an armed conflict is not: ‘[t]his Protocol 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’.

Unsurprisingly, the Rome Statute follows the terminology of the various treaty provisions, including the qualifications in Article 1(2) of Additional Protocol II, and provides no general definition of ‘armed conflict’. The Elements of the Crimes for each of the war crimes offences in Article 8 of the Rome Statute require the Prosecution to prove that the relevant conduct took place in the context of an armed conflict – either an IAC or a NIAC depending upon the particular offence charged. Again, however, the Elements only impose the requirement and do not offer any definitional clarification.

The ICRC Commentaries on Common Article 2 deal more explicitly with the definition of armed conflict:

It remains to ascertain what is meant by ‘armed conflict’…. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, the provisions of Article 12 observed in his case, and his identity notified to the Power on which he depends. All that can be done by anyone: it is merely a case of taking the trouble to save a human life!

This section of the ICRC’s Commentary constitutes the foundation upon which the requirements for the existence of an armed conflict have been articulated in the jurisprudence of the international criminal courts and tribunals. The seminal declaration comes from the ICTY Appeals Chamber decision in Tadić and draws heavily on the wording in the ICRC Commentary:

An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflict, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States, or, in the case of internal conflict, the whole territory under the control of a party, whether or not actual combat takes place there.
This particular formulation is repeated verbatim in all subsequent ICTY and ICTR jurisprudence as well as in all relevant ICC case law.13

2.2 International armed conflict

It is now well established in international criminal jurisprudence that an IAC exists ‘whenever there is resort to armed force between States’. This is a low threshold. As the ICC Pre-Trial Chamber described in Bemba, using the language of the ICRC Commentary, the threshold is met when any difference between two states leads to the intervention of armed forces and it ‘makes no difference how long the conflict lasts, or how much slaughter takes place’.14 The law applicable to IACs will then apply until a general conclusion of peace is reached. It should be noted that this must be a practical peace. The signing of peace agreements, even if they eventually result in the end of hostilities, will not prevent the laws of war applying if peace has not yet been reached on the ground.15

To demonstrate just how low the threshold for an IAC is, Christopher Greenwood cites the example of a US Air Force pilot shot down over Lebanon’s Bekaa Valley in the early 1980s by a Syrian surface-to-air missile. The pilot safely ejected from the aircraft and parachuted to ground. Washington promptly announced that Geneva Convention III applied to the IAC between the US and Syria and that the pilot was, therefore, entitled to POW status and the legal protections attached to it.16

There is an alternative view that suggests a higher threshold is a more appropriate reflection of what states consider to be the law. For example, the ICJ in its judgment in the Nicaragua case alluded to the possibility that not all resort to armed force between states triggers the application of LOAC. The Nicaragua case dealt principally with the jus ad bellum although there are also important statements by the Court on the jus in bello. In examining the ‘international
Conflict characterisation

humanitarian law applicable to the dispute’ the Court stated that ‘[c]learly, use of force in some circumstances may raise questions of such law’. The implication here is that not all ‘resort to force between States’ will raise questions of LOAC. Katharina Ziolkowski argues that a ‘use of force’ by one state against another triggering the application of the *jus ad bellum* will usually cross the threshold of an IAC and so also trigger the application of the *jus in bello* ‘with the possible exception of quick, discrete and “surgical” use of force in the meaning of Article 2(4) [of the] UN Charter without further retort by the victim’.

The precise delimitation of the threshold for an IAC is complicated. Nils Melzer argues, for example, that ‘while the domestic concentration of troops in a border area is not sufficient to trigger an international armed conflict, mutual hostilities nonetheless are not required’. Instead, Melzer asserts that an IAC requires a ‘minimal transgression which expresses the belligerent intent’ of the acting state against another and any armed interference by one state with another’s ‘sphere of sovereignty’ is sufficient. While for Ziolkowski the quintessential ‘quick, discrete and surgical’ strike not triggering an IAC was the Israeli bombing of Osirak in 1981, presumably Melzer would characterise Israel’s action as triggering an IAC since Israel clearly deployed arms against Iraq’s ‘sphere of sovereignty’.

Perhaps the real answer as to how states view the threshold of an IAC has to do with the consequences that flow from another state’s resort to lethal military force. Perhaps, when an airforce pilot parachutes from a stricken aircraft over enemy territory, when civilians are incidentally killed in large numbers as a result of a strike on a military objective or when civilians are wilfully targeted, states are much more likely to invoke LOAC and to demand its observance or to demand accountability for those who have allegedly violated it. In other situations of resort to lethal military force perhaps states are more willing not to assert the existence of an IAC. It may be a relatively easy thing for an international criminal court or tribunal to speak in absolute terms because, inevitably, by the time a case comes to trial before such a body, the alleged conduct has resulted in extensive injury, damage and loss of life.

If uncertainties persist in relation to the precise threshold for an IAC arising from kinetic force, those uncertainties are exacerbated in resort to virtual force. The Group of Experts responsible for drafting the *Tallinn Manual on the International Law Applicable to Cyber Warfare* were divided on the requisite threshold of violence to constitute an IAC from cyber attacks. For example, some of the experts would consider a cyber operation that resulted in a small fire in a military installation sufficient to constitute an IAC. Other experts disagreed and argued for a higher threshold of extent, duration or intensity of violence.

20 Ibid.
21 This hypothetical disagreement ignores the observation of Yoram Dinstein that Israel and Iraq were in 1981 (and still technically are today) in a state of war because Iraq did not sign an armistice agreement with Israel in 1949 – let alone negotiate a final peace treaty. In fact, Iraqi forces have re-engaged in armed hostilities against the state of Israel multiple times since 1949. So, for Dinstein, Osirak was a legitimate military objective and could be targeted in the ongoing IAC between Israel and Iraq. See Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, CUP 2005) 47–48 and 186.
22 See Commentary to Rule 22, ¶ 12. See further Rain Liivoja, Kobi Leins and Tim McCormack, ‘Emerging technologies of warfare’ ch 35 in this volume, s 2.2.3.
2.3 Non-international armed conflict

The threshold for a NIAC is more complex again. The jurisprudence, relying on the seminal statement in Tadić, identifies two requisite elements: (1) the involvement of ‘organised armed groups’ (OAG) and, (2) that the violence reach a certain threshold level of intensity.23 The ICTY Trial Chamber held that both of these criteria should be used ‘solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law’.24 The ICC Trial Chamber has applied this ‘sole purpose’ concept to the requirement of intensity.25

As outlined in the passage from Tadić extracted above, once a NIAC has commenced, LOAC continues to apply until a ‘peaceful settlement’ is reached.26 In this regard, the distinction between hostilities and armed conflict is crucial;27 a reduction in the intensity or scope of the violence will not necessarily amount to peaceful settlement. Indeed, in Lubanga, the ICC Trial Chamber found that the armed conflict continued in Ituri from the end of May 2003 until at least 13 August 2003 without referring to any incidents of hostilities between armed groups during that final stage of the conflict. Instead, to demonstrate that peaceful settlement had not been reached, the Chamber referred to attacks upon civilians, the UN Security Council’s authorisation for a Multinational Force to deploy to the area to restore security and the subsequent provision of a Chapter VII mandate to the UN peacekeepers already on the ground.28

2.3.1 Organised armed groups

In Lubanga, the ICC Trial Chamber held that to be ‘organised’, armed groups must have ‘a sufficient degree of organization, in order to enable them to carry out protracted armed violence’.29 The Chamber noted that the requirement of organisation is a limited one which should be applied flexibly, and outlined a non-exhaustive list of potentially relevant factors including:30

- the group’s internal hierarchy;
- the command structure and rules;
- the extent to which military equipment, including firearms, are available;

23 See eg Lubanga (n 7) ¶¶ 534–538; Prosecutor v Lubanga (Decision on the Confirmation of Charges) (Case no ICC-01/04-01/06, ICC Pre-Trial Chamber I, 29 January 2007) ¶¶ 232–234; Tadić (Trial Judgment) (n 13) ¶ 562; Dordačević (n 13) ¶¶ 1522 and 1526; Limaj (n 13) ¶¶ 84, 94–134; Haradinaj (Trial Judgment) (n 13) ¶¶ 60, 63–88; Prosecutor v Mrkić, Radić and Šljivančanin (Case no IT-95-13-1-T, ICTY Trial Chamber, 27 September 2007) ¶ 407.
24 Tadić (Trial Judgment) (n 13) ¶ 562, citing GCII Commentary 33; GCIII Commentary 37. See also Limaj (n 13) ¶¶ 84 and 89; Haradinaj (Trial Judgment) (n 13) ¶ 38; Dordačević (n 13) ¶ 1522; Boškoski (n 13) ¶ 175.
25 Lubanga (n 7) ¶ 538; citing Dordačević (n 13) ¶ 1522.
26 See also Tadić (Jurisdictional Appeal) (n 7) ¶¶ 67 and 69; Lubanga (n 7) ¶ 548; Prosecutor v Gotovina, Čermak and Markač (Case no IT-06-90-T, ICTY Trial Chamber, 15 April 2011) ¶ 1694.
27 See also Prosecutor v Halilović (Case no IT-01-48-T, ICTY Trial Chamber, 6 November 2005) fn 72.
28 Lubanga (n 7) ¶ 548.
29 Lubanga (n 7) ¶ 536; see also Lubanga (Confirmation Decision) (n 23) ¶ 233–234; Prosecutor v Mbarushimana (Decision on the Confirmation of Charges) (Case no ICC-01/04-01/10, ICC Pre-Trial Chamber I, 16 December 2011) 103; Haradinaj (Trial Judgment) (n 13) ¶ 60; Haradinaj (Retrial Judgment) (n 13) ¶ 197.
30 Lubanga (n 7) ¶ 537. See also Limaj (n 13) ¶ 89–90 and the sources cited therein; Boškoski (n 13) ¶¶ 199–203; Haradinaj (Trial Judgment) (n 13) ¶ 60; Haradinaj (Retrial Judgment) (n 13) ¶ 395; Dordačević (n 13) ¶ 1526 and the cases cited therein.
Conflict characterisation

- the force or group’s ability to plan military operations and put them into effect; and
- the extent, seriousness and intensity of any military involvement.

Consistently with ICTY and ICC jurisprudence, as well as academic commentary, the Chamber discarded any additional requirements that may have been imported from Article 1(1) of Additional Protocol II. The article provides, in part, that the Protocol shall apply to all armed conflicts which:

take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

The rejection by international criminal courts and tribunals of possible additional threshold requirements such as control over physical territory or responsible command is appropriate. Additional Protocol II is not generally regarded as declaratory of customary international law. More specifically, the Protocol was not intended to provide further definition to the notion of an ‘armed conflict not of an international character’ as covered by Common Article 3 but was intended to provide stricter rules to be applied in more limited circumstances. The goal of reducing the likelihood of states ignoring or disputing the Protocol’s application by providing specific, objective criteria was prioritised over the consequence that the rules of Additional Protocol II would only be applied in a more limited range of conflicts. As such, there is no basis on which to import its requirements to the broader notion of NIAC. If any ambiguity about the impact of Additional Protocol II on the scope of customary international legal thresholds for the existence of a NIAC emerged post-1977, it has since evaporated. The drafting history of Article

31 Lubanga (Confirmation Decision) (n 23) ¶ 233; Mbarushimana (Confirmation Decision) (n 29) ¶ 103; Tadić (Jurisdictional Appeal) (n 7) ¶ 70; Đorđević (n 13) ¶¶ 1522 and 1526; Limaj (n 13) ¶¶ 85–87; Haradinaj (Retrial Judgment) (n 13) ¶¶ 393 and 395; Haradinaj (Trial Judgment) (n 13) ¶ 60; Boškoski (n 13) ¶ 197. Cf Prosecutor v Katanga and Ngudjolo (Decision on the Confirmation of Charges) (Case no ICC-01/04-01/07, ICC Pre-Trial Chamber II, 30 September 2008) ¶ 234, noting that a factual finding does not amount to a decision that it is a legal prerequisite.


33 Lubanga (n 7) ¶ 536.


8(2)(f) of the Rome Statute demonstrates that states rejected the inclusion of the requirements of Additional Protocol II.36

Nevertheless, in Bemba, Pre-Trial Chamber II determined that ‘responsible command’ was a necessary component of organisation. However, the Chamber then defined this as entailing ‘some degree of organization . . . including the possibility to impose discipline and the ability to plan and carry out military operations’.37 This accords with statements by the ICTY Trial Chambers, both that the ‘leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented’38 and that the degree of organisation ‘need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute’.39 So expressed, such criteria are already implied by the requirement of organisation: when the adjective ‘organised’ is used to describe an ‘armed group’, the word itself denotes a notion of hierarchy. Therefore, while these criteria may be seen as a useful way to further define or describe the requirement of organisation, there is no utility, and indeed a danger, in labelling such a requirement ‘responsible command’ as if it were an additional threshold criterion.

In the Lubanga judgment, the five paragraphs devoted to determining that there were at least three OAG operating in Ituri during the relevant period40 stand in stark contrast with the extensive analysis undertaken by the ICTY in relation to the identification of parties to various Balkan armed conflicts.41 It is acknowledged that the level of analysis in the ICTY decisions went beyond what was necessary to establish organisation. It is also acknowledged that the threshold of organisation is a low one and the fact that an armed group is able to engage in hostilities over a prolonged period of time is of itself significant evidence of organisation. Nevertheless, it may have been appropriate for Trial Chamber I in Lubanga to engage in more than a cursory examination of the question: the Chamber in effect stated its conclusions rather than elucidated its reasoning. This approach is especially surprising as the relevant groups were deemed not to have participated in many of the hostilities referred to as relevant to the intensity analysis.42

2.3.2 Intensity

The intensity of the conflict relates to the requirement that the violence be more than sporadic or isolated. ICC Pre-Trial Chamber II has stated:

36 The precursor to art 8(2)(f) which appeared in a Bureau Proposal on 10 July 1998 included the requirements of APII in the second sentence and these requirements were rejected: see William Schabas, The International Criminal Court: A Commentary on the Rome Statute (OUP 2010) 205 and the sources cited therein.
37 Bemba (Confirmation Decision) (n 14) ¶ 234. See also Katanga and Ngudjolo (n 31) ¶ 234, noting that a factual finding does not amount to a decision that it is a legal prerequisite.
38 Haradinaj (Retrial Judgment) (n 13) ¶ 393; Đorđević (n 13) ¶ 1525; Boškoski (n 13) ¶ 196 citing GCII Commentary 34. However, Haradinaj (Trial Judgment) (n 13) ¶ 60 where no such requirement is outlined.
39 Limaj (n 13) ¶ 89; Mrkšić (n 23) ¶ 408.
40 See Lubanga (n 7) ¶¶ 543–547. See also Mbanushimana (Confirmation Decision) (n 29) ¶¶ 104–106, noting the lower standard of proof at confirmation stage (Rome Statute art 61(7)).
41 See eg Limaj (n 13) ¶¶ 94–134; Haradinaj (Trial Judgment) (n 13) ¶¶ 64–89; Haradinaj (Retrial Judgment) (n 13) ¶¶ 18–170 and 406–411; Đorđević (n 13) ¶¶ 1537–1578; Boškoski (n 13) ¶¶ 250–291.
42 Lubanga (n 7) ¶¶ 547–548.
The Statute requires any armed conflict not of an international character to reach a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.\(^{43}\)

The ICC Trial Chamber found the following factors are relevant to making such an assessment:\(^{44}\)

- the seriousness of attacks and potential increase in armed clashes;
- the spread of attacks over territory and over a period of time;
- the increase in the number of government forces;
- the mobilisation and the distribution of weapons among both parties to the conflict; and
- whether the conflict has attracted the attention of the UN Security Council, and, if so, whether any resolutions on the matter have been passed.

However, in the confirmation decision in *Mbanushimana*,\(^{45}\) Pre-Trial Chamber I did not examine intensity in this way. It concluded that there were ‘substantial grounds to believe that, from at least 20 January 2009 until at least 31 December 2009, an armed conflict not of an international character took place in the North and South Kivus’.\(^{46}\) However, the only assessment of intensity was as follows:

an armed conflict of a certain intensity took place in the Kivu provinces of the DRC between the FDLR and the FARDC-RDF (from 20 January 2009 to 25 February 2009) and between the FDLR and the FARDC, at times in conjunction with the United Nations Organization Mission in the Democratic Republic of the Congo (‘MONUC’) (from 2 March 2009 to 31 December 2009). In particular, the Chamber finds substantial grounds to believe that the relevant armed conflict in the eastern DRC began on 20 January 2009, when the Rwanda Defence Forces (RDF) entered the territory of the DRC for the purpose of participating in a joint operation with the FARDC, known as Umoja Wetu, aimed at forcefully dislodging the FDLR from its bases in the North Kivu and enabling willing FDLR troops to demobilise and reintegrate into civilian life in Rwanda. On 25 February 2009, RDF troops began departing from North Kivu and a follow up military operation, Kimia II, was launched by the FARDC, supported by the MONUC forces, across the North and South Kivus with the purpose of neutralising the FDLR by preventing it from reoccupying former positions, as well as by cutting its lines of economic sustenance. This operation started on 2 March 2009 and lasted until 31 December 2009.\(^{47}\)

This analysis does not establish ‘intensity’ as required by LOAC. The Chamber focused on the existence and purpose of a mission, which contemplated the use of force. Although this may be relevant, it is not of itself sufficient to satisfy the requirement of intensity. Indeed, in *Limaj*, in response to an argument that the purpose of the Serbian army’s presence in Kosovo was to ethnically cleanse and not to engage in hostilities, the ICTY Trial Chamber found that ‘the purpose of the armed forces to engage in acts of violence or also achieve some further objective is ...

\(^{43}\) *Bemba (Confirmation Decision)* (n 14) ¶ 225. See also arts 8(2)(d) and (f).
\(^{44}\) *Lubanga* (n 7) ¶ 538 citing *Mksić* (n 23) ¶ 407. See also *Limaj* (n 13) ¶ 90; *Haradinaj (Retrial Judgment)* (n 13) ¶ 394, citing *Dordević* (n 13) ¶ 1523 and the cases cited therein.
\(^{45}\) *Mbanushimana (Confirmation Decision)* (n 29) ¶¶ 95–107.
\(^{46}\) *Ibid* ¶ 107.
\(^{47}\) *Ibid* ¶ 95 (citations omitted).
irrelevant’ because the ‘determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties’. 48

The proper approach to determine the existence of a NIAC is to assess the intensity of the violence or hostilities between the parties. 49 In Bemba, for example, it was not when the rebel leader Bozize planned the coup against the incumbent President Patasse but when Bozize launched an attack on the city of Bangui, which was followed by further hostilities, that the NIAC began. 50 Certainly, when there is a stated mission which contemplates the use of force against a particular group, the degree of violence or scale of the hostilities needed to meet the intensity requirement may be less than in other situations. However, the criterion remains the same – there must be an outbreak of hostilities of a certain intensity before a NIAC can be said to exist.

Unfortunately, the Rome Statute is not clearly drafted in this regard. Article 8(2)(f) refers to ‘protracted armed conflict between governmental authorities and organized armed groups or between such groups’. Although this is useful insofar as it identifies the requirement of ‘organised armed groups’, the use of the adjective ‘protracted’ does nothing to clarify the definition of ‘armed conflict’. In this sense, it can be contrasted with the phrase ‘protracted violence’ used in Tadić. 51 Nevertheless, the Court is to apply, subject to the words of the Statute, the ‘established principles of the international law of armed conflict’ 52 which include the jurisprudential definition of NIAC. 53

2.3.3 Is there a distinction between Articles 8(2)(c) and 8(2)(e) of the Rome Statute?

A question remains as to whether Article 8(2)(c) and (e) of the Rome Statute have a different scope of application. The second sentence in Article 8(2)(f), stating that the offences in Article 8(2)(e) apply ‘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’, does not appear in Article 8(2)(d). The only phrase in the sentence which may modify or add some further requirement to the criteria for a NIAC is ‘protracted armed conflict’ which implies a minimum temporal period. In Lubanga, the ICC Trial Chamber did not discuss this phrase, only assessing the requirements of OAG and intensity. 54 In Bemba, the ICC Pre-Trial Chamber refrained from determining whether ‘protracted’ required any further threshold to be met, finding only that, if so, five months was sufficient. 55 The Pre-Trial Chambers have stated that protracted ‘focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time’. 56 This in itself, introduces no new element to the Chambers’ treatment of the requirement that the armed groups be organised. The best interpretation of ‘protracted armed conflict’ is that it is a reference

48 Limaj (n 13) ¶ 170.
49 Tadić (Jurisdictional Appeal) (n 7) ¶ 70; Limaj (n 13) ¶ 93. See eg the assessments in Lubanga (n 7) ¶¶ 547–548; Đorđević (n 13) ¶¶ 1532–1536 and Haradinaj (Retrial Judgment) (n 13) ¶¶ 402–405 and 410 and in particular Haradinaj (Trial Judgment) (n 13) ¶¶ 40–49 where the Trial Chamber conducts a review of the application of the intensity requirement in previous decisions.
50 Bemba (Confirmation Decision) (n 14) ¶ 243.
51 Tadić (Jurisdictional Appeal) (n 7) ¶ 70; Tadić (Trial Judgment) (n 12) ¶¶ 561–562.
52 Rome Statute art 21(1)(b).
53 Bemba (Confirmation Decision) (n 14) ¶ 234.
54 See Lubanga (n 7) ¶ 538.
55 Bemba (Confirmation Decision) (n 14) ¶¶ 235 and 255.
56 Lubanga (Confirmation Decision) (n 23) ¶ 234. See also Mbarushimana (Confirmation Decision) (n 29) ¶ 103.
Conflict characterisation

to the Tadić phrase ‘protracted violence’, and adds nothing beyond the requirement of intensity imported by that phrase.57

The structure of Article 8 does not suggest that there should be a distinction between the meaning of ‘conflict not of an international character’ in Article 8(2)(c) and (e). Article 8(2)(c) criminalises ‘serious violations of article 3 common to the four Geneva Conventions’ and applies only to those taking no active part in hostilities.58 Article 8(2)(e) criminalises ‘other serious violations of the laws and customs applicable in armed conflicts not of an international character’. These ‘other serious violations’ derive largely from the 1899 and 1907 Hague Regulations and from Additional Protocol II and victims include both fighters as well as civilians.59 The ICTY referred to the same definition of NIAC whether it was considering violations of Common Article 3 or of the laws and customs of war outside the scope of that provision.60 Although some of the acts prohibited by Article 8(2)(e) derive from Additional Protocol II,61 many do not, and, as mentioned above, the drafting history of that article makes clear that the provision was not intended to reflect the Protocol’s narrow scope of application.62

Given that the content of any additional requirement imposed by Article 8(2)(f) is difficult to discern and that there is no theoretical or historical basis for a distinction between Articles 8(2)(c) and (e), the same definition of NIAC should be applied to both provisions, despite the principle that the words of a treaty should be given meaning.63 The approach of the ICC Chambers has been to apply the same requirements for NIACs in respect of both Articles 8(2)(c) and (e) and this approach is supported by a majority of academic commentators.64

3 Characterising conflicts

The key determining principle for the legal character of an armed conflict is the nature of the parties to that conflict: conflicts between two or more states are international and all other conflicts are properly characterised as non-international. This is the approach of the Geneva

---

57 This was the approach adopted in Boškoski (n 13) ¶ 197; Prosecutor v Milosević (Decision on Motion for Judgment of Acquittal) (Case no IT-02-54-T, ICTY Trial Chamber, 16 June 2004) ¶ 20. See also Michael Cottier, William J Fenrick, Patricia Viseur Sellers and Andreas Zimmerman, ‘Article 8 War Crimes’ in Otto Triftner (ed), Commentary on the Rome Statute of the International Criminal Court (Beck 1999) 285.

58 Bemba (Confirmation Decision) (n 14) ¶ 237.

59 Schabas (n 36) 197, 205.


61 See eg the discussion in Lubanga (n 7) ¶ 542.

62 Above (n 36).

63 Corfu Channel (UK v Albania) [1949] ICJ Rep 4, 24; Anglo-Iranian Oil Co (Jurisdiction) (UK v Iran) [1952] ICJ Rep 93, 105.

Conventions: Common Article 2 provides that the Conventions apply to any ‘conflict which may arise between two or more of the High Contracting Parties’, that is, states. Common Article 3 applies to ‘armed conflict not of an international character’, meaning that it applies to all armed conflicts not covered by Article 2, that is all conflicts which do not involve two (or more) states opposed to each other.65 This key principle was correctly identified in the Bemba (Confirmation Decision) where Pre-Trial Chamber II held that the only conflicts which are international are those in which states oppose each other ‘through their respective armed forces or other actors acting on behalf of the State’.66

When assessing the character of a conflict, there is a tendency to rely upon the concept of the ‘internationalisation’ of a pre-existing NIAC. This concept rose to prominence in the jurisprudence of the ICTY67 and was described in the Lubanga (Confirmation Decision) as follows:

The Chamber considers an armed conflict to be international in character if it takes place between two or more States. . . . In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in

65 The only exception to this is API art 1(4) which is not a customary rule. It treats as international, conflicts which involve non-state forces fighting against ‘colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination’.
67 Although this concept was already identified in the scholarship, see Hans-Peter Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon’ (1983) 33 American University LR 145.
that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).68

So expressed, it suggests a temporal element or a change to the status quo which is not necessarily accurate. For example, the conflict between the state of Bosnia and Herzegovina and the non-state armed group of the VRS (Vojska Republike Srpske – Serb forces within Bosnia and Herzegovina) was always international because the VRS was either under the control of the rump-state of Yugoslavia or under Serbian control.69

3.1 Direct intervention by a foreign state’s forces

The concept of internationalisation of an armed conflict has been misinterpreted and misapplied. For example, in Katanga and Ngudjolo, Pre-Trial Chamber I found that the intervention of Ugandan Government forces in the conflict between OAG in the territory of the DRC rendered that conflict international.70 The Trial Chamber seemed to rely upon the passage just extracted. However, the Tadić judges stated that an internal armed conflict may become international when either direct or indirect intervention by states’ armed forces occurs. The proper approach is to apply the key principle to this concept – direct and indirect intervention will internationalise a conflict where it results in two states opposing each other. As Uganda did not oppose any other state, its trans-border involvement in the conflicts in Ituri did not create an IAC, as found in Lubanga.71

The ICTY never faced this precise scenario as all instances of direct trans-border intervention by state armed forces involved two (or more) states opposed to each other.72 However, in the context of discussing the test for indirect intervention, the ICTY Appeals Chamber made the following relevant statement:

This question is not a generalised one as to whether an armed conflict has become ‘internationalised’ in any broad sense of the term; nor is it to be determined by reference to criteria of unmanageable plasticity. The question is a precise one as to whether there is an ‘armed conflict . . . between two or more of the High Contracting Parties . . .’ to the Fourth Geneva Convention. Barring a ‘declared war’ between them, it is only if there is such a conflict that the Convention applies. But whether or not there is such a conflict turns ex hypothesi, on whether one state is using force against the other.73

68 Lubanga (Confirmation Decision) (n 23) ¶ 209, referring to Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168. However, the passage derives from the Tadić (Appeal Judgment) (n 3) ¶ 84 and was widely applied by that tribunal. See also Katanga and Ngudjolo (n 31) ¶ 238; Bemba (Confirmation Decision) (n 14) ¶ 220.
70 Katanga and Ngudjolo (n 31) ¶ 240.
71 Lubanga (n 7) ¶ 567. Cf Katanga and Ngudjolo (n 31) ¶ 240.
72 See eg Prosecutor v Kordić and Ćerkez (Case no IT–95–14–2–T, ICTY Trial Chamber, 26 February 2001) ¶¶ 109, 145, where Croatian Government forces both directly and indirectly intervened in a conflict between the Bosnian Croats (HVO) and the forces of the state of Bosnia and Herzegovina; Brd–anin (n 69) ¶ 154 where the Former Republic of Yugoslavia had effective control of the VRS who was fighting against the forces of the state of Bosnia and Herzegovina.
73 Tadić (Jurisdictional Appeal) (n 7) ¶ 26.
That extra-territorial military activity will only create an IAC if it pits two states against each other is supported in the literature and evidenced by state practice. As outlined in the Prosecution Closing Brief in Lubanga, in 1971, states rejected a proposal by the ICRC to apply the whole of LOAC to a NIAC where one or both of the parties is assisted by the armed forces of a third state; the drafters of the ICTR Statute determined in Articles 1 and 7 that the law of NIAC was to apply to the acts of Rwandan nationals even outside the physical territory of Rwanda; and states whose troops are currently, or were recently, deployed in Afghanistan to assist the Afghan Government in its armed conflict against the Taliban, such as the US, UK, Australia and Germany consider themselves to be (or to have been) engaged in a NIAC.

### 3.2 Indirect intervention by a foreign state

As foreshadowed, a state does not have to be directly engaged in the conflict through its official armed forces in order to be a party to an armed conflict. OAG that are acting under the ‘overall control’ of a state will be treated as an organ of the state for the purposes of the legal characterisation of an armed conflict. The test has been expressed as follows: ‘it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity’.

The threshold of ‘overall control’ is high. In Lubanga, the Trial Chamber found that the evidence of influence by states over armed groups did not establish ‘overall control’. In that particular case, evidence of Kinshasa sending trainers and weapons to the APC, and of Rwanda

---


75 Cf Public Committee against Torture in Israel et al v the Government of Israel et al (Case no HCJ 769/02, Supreme Court of Israel, 13 December 2006) ¶ 18, stating that the conflict between Israel and terrorist organisations in places which are not subject to Israeli belligerent occupation is an international armed conflict because inter alia an armed conflict of an international character is ‘one that crosses the borders of the state’.

76 ICC Office of the Prosecutor, Prosecution’s Closing Brief in *Prosecutor v Lubanga* (Doc no ICC-01/04-01/06, ICC Trial Chamber I, 1 June 2011) ¶ 34.


79 Tadić (Appeal Judgment) (n 3) ¶ 131. See also ibid 137; *Lubanga* (n 7) ¶ 541; *Lubanga (Confirmation Decision)* (n 23) ¶ 211; *Bemba (Confirmation Decision)* (n 14) ¶ 223; *Prosecutor v Aleksovski* (Case no IT-95-14/1-A, ICTY Appeals Chamber, 24 March 2000) ¶¶ 131–134; *Prosecutor v Delalić, Mući, Delić and Landžo* (Case no IT-96-21-A, ICTY Appeals Chamber, 20 February 2001) ¶ 26; Kordić (Appeal Judgment) (n 13) ¶¶ 306–307.

80 *Lubanga* (n 7) ¶ 553.
supporting the UPC/FPLC by supplying uniforms and weapons, providing training and, on the word of one witness, ‘issuing orders and making Rwanda’s support conditional with compliance’ still did not reach the requisite threshold of ‘overall control’. In *Brdanin*, where the ICTY Trial Chamber found that the VJ (*Vojska Jugoslavije* – the army of the Federal Republic of Yugoslavia) had overall control of the VRS, the evidence was overwhelming:

- the VRS was made up of ex-VJ soldiers who remained when the VJ withdrew from the territory;
- their salaries were still paid by Belgrade;
- the aim and objectives of the groups were identical;
- the VJ provided equipment, fuel, ammunition and reserves if they were requested; and
- the UN Security Council acknowledged the ‘continued involvement and control of Belgrade over the Bosnian Serb Army and demanded the cessation of all forms of outside interference’.

In creating the test of ‘overall control’ in the *Tadić* jurisdictional appeal, the ICTY Appeals Chamber sought to ‘overrule’ the test of ‘effective control’ formulated by the ICJ in *Nicaragua*. Although there has been debate about the proper interpretation of the ‘effective control’ test, the Court seemed to require that for the acts of paramilitary groups to be attributable to a state, the paramilitaries must ‘act in “complete dependence” on the State, of which they are ultimately merely an instrument’ and must be ‘so closely attached [to the state] as to appear to be nothing more than its agent’. In the *Bosnian Genocide Case*, the ICJ found that the test of ‘effective control’ was not met in respect of FRY control of the VJ, despite the *Tadić* findings of FRY ‘overall control’ of the VJ described above. In *Nicaragua* the Court held that US:

participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.

This ‘effective control’ test clearly sets a higher threshold than the ‘overall control’ test articulated by the ICTY Appeals Chamber in *Tadić* and consistently applied by both the ICTY and the ICC since. An obvious question arises as to how to reconcile the disparate tests for the requisite level of control (and which of them takes precedence)? It is clear that the ICJ and the ICTY/ICTR/ICC are considering different issues: the ICJ is deciding on issues of state respons-

81 *Lubanga* (n 7) ¶¶ 554–555.
82 *Brdanin* (n 69) ¶¶ 145–153.
83 *Tadić* (Appeal Judgment) (n 3) ¶¶ 115–145.
85 *Bosnian Genocide* (n 84) ¶ 394.
86 Ibid 402.
87 *Nicaragua* (n 17) ¶ 115.
ibility – whether or not the respondent state in contentious legal proceedings can be held to be in violation of certain international legal obligations; and the international criminal courts and tribunals are deciding individual criminal responsibility. In 2007, in *Bosnian Genocide*, the ICJ explained that different tests are applied as a result of different judicial purposes, stating:

the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.\(^{88}\)

The ICJ’s ‘effective control’ test requires proof of an extraordinary level of control, to the point that some commentators query whether it is ever likely to be met.\(^{89}\) To require such a level of control to determine that an armed conflict is international may unduly restrict the application of the law of IAC.\(^{90}\) However, the ICTY Appeals Chamber has disagreed with the ICJ’s ‘different tests for different purposes’ approach and found that there is no distinction between the questions of attribution for state responsibility and internationalisation for conflict characterisation.\(^{91}\) Whichever rationale is applied for its continued use, the ‘overall control’ test is now the preferred basis for characterisation of an armed conflict in which one state is involved indirectly through the proxy of a non-state organised armed group. There was an opportunity for states to reject the ‘overall control’ test and adopt a different formulation in the drafting of the Rome Statute, but that opportunity was not seized.\(^{92}\)

### 3.3 Concurrent conflicts

If the only conflicts which are international are those in which two states oppose each other through their official or de facto armed forces, the question arises as to how to characterise a conflict which involves multiple state and non-state parties? One possibility involves multiple separate armed conflicts occurring in the same region at the same time, each being characterised by reference to the parties to it. That one state may be subject to different regimes depending

---


89 See Tyner (n 88) 845 and the sources cited therein.

90 See *Alekosvki (Appeal Judgment)* (n 79) ¶ 146; *Delalić (Appeal Judgment)* (n 79) ¶ 23–24; Meron (n 88) 241–242; Stefan Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58(3) *ICLQ* 493, 513–517 (advocating for the use of the overall control test); Tyner (n 88) 880–885 advocating for a lower standard than effective control. However, he does not link this to any threshold for IAC, seemingly arguing that as long as not all international involvement is sufficient to internationalise a conflict then the test will be appropriate.


Conflict characterisation

on the party it is fighting is contemplated in Common Article 2 to the Geneva Conventions. The concept of concurrent conflicts was first judicially recognised in Nicaragua where the ICJ held that:

The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character.’ The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.

In Lubanga, the Trial Chamber found that Ugandan direct intervention and military occupation of part of the physical territory of the Ituri District of the DRC did not alter the fact that the UPC was a party to a concurrent NIAC. The Chamber stated:

The Appeals Chamber of the ICTY has recognized that, depending on the particular actors involved, conflicts taking place on a single territory at the same time may be of a different nature. The Chamber endorses this view and accepts that international and non-international conflicts may coexist.

In Đorđević, the ICTY trial Chamber found that a NIAC existed in Kosovo between Serbian forces and the KLA, at the same time that an IAC existed between NATO and the FRY. Similarly, it is assumed that when NATO forces commenced their aerial bombing campaign in Libya, there was an IAC between the various NATO member states involved in the bombing and Libya, concurrent with the separate NIAC occurring between Libyan Government forces and Libyan rebel groups.

Any armed conflict fought by an organised armed group will be non-international unless the group is under the ‘overall control’ of a state and fighting against the forces of another state. When those conditions are met, Article 4A(2) of Geneva Convention III provides that members of groups ‘belonging to a Party to the conflict’ will be entitled to POW status if they fulfil certain criteria such as wearing a distinctive sign and carrying arms openly.

The very fact that the ICTY Appeals Chamber treated the legal character of the conflict as a matter for the Trial Chambers, constitutes an acceptance of the importance of the factual realities in any given situation, in favour of a generic approach which may not adequately

93 Which reads in part:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

94 Nicaragua (n 17) ¶ 219.
95 Lubanga (n 7) ¶¶ 563–565.
97 Đorđević (n 13) ¶¶ 1579, 1580.
reflect nuances at any given moment. While some have argued, for example, that the whole of the armed conflict in the Balkans should have been characterised as international because the war was a result of the breakdown of one state and the emergence of several others, such an approach fails to take into account two important considerations. First, in many conflicts, an overarching characterisation will simply not be possible. In Ituri, for example, multiple non-state armed groups were fighting for control of the region, with DRC, Uganda and Rwanda all having various interests and influences in the conflict. Such a complex factual situation is not susceptible to characterisation by any intuitive process. Second, OAGs often lack the capacity, training and history of state armed forces and are perhaps less likely to be able to understand and implement the laws of IAC. Requiring compliance with only the simpler laws of NIAC may increase the likelihood of compliance.

Even if this is inaccurate, compliance with the law must be achievable for it to be relevant.

The question then arises as to how a state fighting both an IAC and NIAC simultaneously is to apply the law. Once an armed conflict breaks out: ‘international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there’. However, the rejection of the idea that a war between two states will automatically internationalise all armed conflicts occurring within the physical territory in which the hostilities occur, means that the law of NIAC must govern relations between the state and the non-state armed group. This does not mean that the state will be absolved of all obligations which arise purely from the law of IAC when it engages with the OAG. For example, it will still be bound by Additional Protocol I during these engagements and therefore activity which would be in breach of this Protocol – such as disproportionate attack and attacks on civilian objects – will remain unlawful and punishable, even if not prohibited in NIAC. However, it would be hoped that the state would apply the higher standards of the law of IAC as a matter of policy. The absurdity of civilians gaining greater protection from a state’s military activities against an OAG simply because there is a simultaneous IAC occurring reinforces the need to homogenise certain areas of LOAC.
3.4 Military occupation

The second paragraph of Common Article 2 to the Geneva Conventions clarifies that, in addition to armed conflicts between sovereign nation states, the Conventions 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’. The inclusion of this paragraph in Common Article 2 has resulted in the entrenching of the proposition that the law (both conventional and customary) applicable to IACs also applies to situations of military occupation. Even if there is no exchange of military hostilities and so no armed conflict involving the forces of the occupying power, the law applicable to IACs nevertheless applies. In such situations, for example, the occupying power will still owe Geneva Convention IV obligations to the occupied civilian population.

One prominent, albeit contested, example of the application of Geneva Convention IV in the context of a military occupation is Israel’s administration of East Jerusalem and the West Bank.104 The official Israeli Government position is that the Convention does not apply de jure. Israel’s argument – centring on the second paragraph of Common Article 2, which requires that the occupation pertain to the ‘territory of a High Contracting Party’ – is that in the 1967 war in which Israel conquered and subsequently occupied East Jerusalem and the West Bank, Jordan was not sovereign over that territory.105 In the Wall advisory opinion, the ICJ dismissed the Israeli interpretation of paragraph 2 by applying a purposive test to its reading of paragraphs 1 and 2 of Common Article 2.106 The Court also explained that the majority of states, the UN Security Council, the UN General Assembly and the ICRC all agree that Geneva Convention IV does apply de jure to the Israeli occupation.107

The effect of military occupation on the legal characterisation of an armed conflict has been judicially considered by the ICC. The ICJ in the DRC v Uganda case found that Uganda had occupied a substantial part of the physical territory of the Ituri District in the DRC until the withdrawal of Ugandan forces in June 2003.108 The ICC Pre-Trial Chamber in the Confirmation of Charges Decision against Thomas Lubanga followed the lead of the ICJ and decided that, because the Ugandan Armed Forces were in occupation of part of the District of Ituri at the relevant time, the armed conflict in which the UPC participated was an IAC ab initio.109

The Prosecution challenged the blanket conflict characterisation of the Pre-Trial Chamber in the closing submissions of the Lubanga Trial. In its judgment, the ICC Trial Chamber considered the facts of the relevant armed conflict and, particularly, that Lubanga’s UPC (an OAG) was involved in an armed conflict with other OAGs. The Chamber found that ‘the Ugandan military occupation of Bunia airport did not change the legal nature of the conflict’ between the UPC and other OAG which occurred some physical distance from the area occupied by Ugandan forces and did not involve sovereign nation states opposed to each other.110 Consequently, the

104 The legal situation with Gaza is more complicated. Israel withdrew its armed forces from Gaza in 2005 but continues to enforce strict controls over sea, air and land access into and out of all of Gaza except for the southern border (which Gaza shares with Egypt) and the Rafah land-crossing into and out of Egypt.
105 See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, ¶¶ 90 and 93.
106 Ibid ¶ 95.
108 DRC v Uganda (n 68) ¶ 177.
109 See Lubanga (Confirmation Decision) (n 23) ¶ 220.
110 Lubanga (n 7) ¶ 565.
Trial Chamber altered the Pre-Trial Chamber’s characterisation of the armed conflict and found that the UPC was engaged at all relevant times in a NIAC.\footnote{Ibid \S\S 566 and 567.}

4 Concluding remarks

The key findings from our framework of analysis are that: an armed conflict is characterised by reference to the parties to it; there may be armed conflicts of different legal characters occurring on the same territory contemporaneously; and a state may be engaged in both an IAC and a NIAC concurrently. The lack of a treaty definition of ‘armed conflict’ has resulted in the formulation of a definition and the identification of relevant threshold criteria through international criminal jurisprudence. Sometimes the tests for the relevant thresholds for IACs and NIACs have been misconstrued. There are also some ‘grey areas’, such as whether there is a requirement of ‘responsible command’ for a group to be party to a NIAC and there are some ‘black spots’, that is, questions which have not been addressed in the jurisprudence, such as whether the Rome Statute creates two different thresholds for NIACs. Despite these ongoing uncertainties, the international jurisprudence has provided greater clarity around issues of characterisation than has hitherto been the case.

There are some pragmatic and compelling arguments in favour of a unitary set of rules applicable in both IACs and NIACs but the ICC can hardly facilitate such a development. The Rome Statute reflects the prevailing multilateral view that the distinction still has its place and the organs of the Court are not in a position to challenge the treaty parameters that have been set. Any removal of the distinction will only occur through multilateral negotiation.