Journal of Conflict & Security Law © Oxford University Press 2015; all rights reserved.
For permissions, please e-mail: journals.permissions@oup.com
doi:10.1093/jcsl/krv018
Advance Access published on 17 November 2015

Law, Justice and a Potential Security Gap: The 'Organization' Requirement in International Humanitarian Law and International Criminal law

Rogier Bartels* and Katharine Fortin†

Abstract

This article explores the 'organizational' or 'organization' criterion for both non-international armed conflict under international humanitarian law (IHL) and crimes against humanity under international criminal law (ICL) and considers how it affects the ability to address armed violence carried out by armed non-State actors. It considers whether armed groups operating under a non-conventional structure, or outside the IHL framework, fall outside the reach of ICL, thereby constituting a potential security gap. It concludes that it is important to ensure that the organization requirements under IHL and ICL remain distinct to ensure that in situations outside a non-international armed conflict, the law allows for both sides to be prosecuted.

1. Introduction

Much of today's armed violence is carried out by armed non-State actors. Whereas some of these armed groups, such as the FARC in Colombia[1] or the LTTE in Sri Lanka,[2] are or have been organized along the lines of classic armed forces, many contemporary armed groups lack such a clear conventional structure and vertical hierarchy. Instead, certain armed groups deliberately shun such a centralized vertical chain of command in favour of a looser cellular structure.[3] Moreover, many armed groups are mobile, transnational and frequently move

* Legal Officer in Chambers (Trial Division) at the International Criminal Court and a research-fellow at the Netherlands Defence Academy. Email: rogierbartels@hotmail.com

† Assistant Professor in Human Rights Law and International Law at Utrecht University. Email: k.m.a.fortin@uu.nl. Together the authors edit the legal blog Armed Groups and International Law. The views expressed are those of the authors and do not necessarily represent those of the aforementioned institutions.

1 The *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia).

2 The Liberation Tigers of Tamil Eelam, or Tamil Tigers, was an organized rebel force that fought the Sri Lankan government in a full-scale civil war until 2009, when it was defeated by the Sri Lankan government forces.

3 Such as Jemaah Islamiah, an armed group with a loose cellular structure, operating in South East Asia.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

across State borders.[4] This makes it difficult for them to be opposed or defeated by single States.[5] In addition, many armed groups are conducting their operations in (or from) States that are either unwilling or unable to prevent them from attacking civilians and/or government structures. Examples include the recent situation in northern Mali,[6] as well as the enduring insecurity as a result of armed violence in the Great Lake region and Somalia.[7] The porous borders between Syria and its neighbouring countries further highlight the contemporary problem of transnational and fragmented armed groups. Such armed bands and groups are difficult to counter with existing (often old-fashioned) security forces. In addition, they present an example of the kind of security gap to which this special issue is dedicated. They illustrate that changing conflict dynamics may lead to a disconnect between the legal framework, which is designed to ensure protection and accountability, and the everyday experiences of individuals and communities. In particular, such armed groups pose several problems to the legal framework of criminal accountability, which is the subject of this article. The purpose of this contribution is to consider whether such groups create a 'security gap' because they do not neatly fit the classic category of non-State actors for the purposes of international humanitarian law (IHL) or international criminal law (ICL) and therefore may not fall within the system of security that is partly created by international law.

The idea that such armed groups pose a challenge to the legal framework emerges out of the observation that jurisdiction over serious violations of IHL arises only out of situations of armed conflict, be it international or non-international in character.[8]

[4] Examples are the Lord's Resistance Army (LRA), which operates in Uganda, the Central African Republic (CAR), Sudan, the Democratic Republic of Congo (DRC), and Chad; the Islamic State of Iraq and the Levant, which is in control of large parts of Iraq and Syria, but has expanded its operations to, eg Libya; and Boko Haram, which operates mainly in Northern Nigeria, but regularly crosses the borders and carries out attacks in Cameroon, Chad and Niger.

[5] In order to defeat Boko Haram, Chad, Niger and Cameroon have not only cooperated with Nigeria in fighting the armed group on their respective territories, but Chad and Niger have also launched their own offences on Nigerian territory to combat Boko Haram (see H Regan, 'Nigeria's Allies Launch Joint Offensive Against Boko Haram' *Time* (9 March 2015)).

[6] In 2012, the National Movement for the Liberation of Azawad, a Tuareg armed group, ceased power in Northern Mali before various Islamist armed groups took over control. The Malian government, assisted by an international military intervention, regained control of Northern Mali and signed a ceasefire agreement with an alliance of six armed groups on 20 February 2015.

[7] In Eastern DRC, a multitude of armed groups continue to fight each other, as well as the DRC government troops and MONUSCO, and commit crimes against the civilian population. In Somalia, various military campaigns by the Somali government (assisted by the African Union, the USA, and Kenya) have managed to prevent Al Shabaab from continuing to carry out attacks in Somalia as well as Kenya.

[8] Certain provisions of IHL do apply outside a situation of armed conflict (see eg arts 47 and 53 of the first Geneva Convention of 1949). However, the majority of IHL provisions apply only during international and/or non-international armed conflicts (see arts 2 and 3 common to the 1949 Geneva Conventions).

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

While the notion of non-international armed conflict has been expanded since its legal inception in 1949 and the threshold for a so-called 'Common Article 3 conflict' has been arguably lowered,[9] a minimum level of intensity and organization of the parties is still required before IHL is applied.[10] As a result, an armed group engaged in violence against a State or another armed group needs to have attained a minimal level of organization before it is deemed to be bound by IHL and before its members or anyone else taking part in the violence can be prosecuted for war crimes.[11] In recent years, there have been several notable instances of intense violence where the threshold of IHL has not been met because the armed groups in question have not met the required level of organization. This contribution will discuss one such instance in detail.

The idea that a country may suffer high levels of internalized violence that does not meet the threshold of Common Article 3,[12] often leads commentators to consider whether the violence committed by armed groups amounts to crimes against humanity.[13] Certainly, in recent years, the crimes against humanity charge appears to be the 'crime of choice' for the Office of the Prosecutor of the International Criminal Court (ICC).[14] Be that as it may, as this contribution

[9] See R Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) 91 Intl Rev of Red Cross 66.

[10] See, eg *Prosecutor v Boškoski and Tarčulovski* (Trial Judgment) ICTY-04-82-T (10 July 2008) (*Boškoski* Trial Judgment), paras 175–204; and the Appeals Judgment of 19 May 2010 in this case, at paras 19–24; *Prosecutor v Lubanga* (Trial Judgment) ICC-01/04-01/06 (14 March 2012) (*Lubanga* Trial Judgment), paras 537–38; see also, generally, S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012); A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010).

[11] As the majority of present-day armed conflicts are non-international in character and these conflicts by definition involve at least one non-State, the organizational requirement is very relevant. See Sivakumaran (n 10) 177 for a discussion of the rationale for the 'organization' requirement.

[12] Art 3 common to the 1949 Geneva Conventions.

[13] Leila Sadat, for example, submits 'that crimes against humanity will often be the only offense chargeable in a particular case, as we have seen in the Libya situation, the Kenya situation and, [at the relevant time]..., in Côte d'Ivoire'. L Sadat, 'Crimes Against Humanity in the Modern Age' (2012) 107 AJIL 377. Darryl Robinson recently questioned whether the drug-related violence in Mexico, a country that has ratified the Rome Statute, could qualify as crimes against humanity. D Robinson, 'Mexico: The War on Drugs and the Boundaries of Crimes Against Humanity' *EJILTalk!* (26 May 2015) <http://www.ejiltalk.org/mexico-the-war-on-drugs-and-the-boundaries-of-crimes-against-humanity/> accessed 2 October 2015. On this issue, see Antoine Perret's contribution in this volume.

[14] Having calculated that the ICC has the highest percentage of crimes against humanity charges (vis-à-vis genocide and war crime charges) of all international courts and tribunals, Sadat concludes that 'the ICC, even more than the ad hoc tribunals, is largely going to be a "crimes against humanity" court' (ibid, 374 and 377). Indeed, in the Kenya and Libya situations, only crimes against humanity are alleged. See, eg *Prosecutor v Ruto and Sang* Charges and List of Evidence ICC-01/09-01/11 (2 August 2011); *Situation in the Libyan Arab Jamahiriya* (Warrant of Arrest for Saif

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

will show, crimes against humanity, at least before the ICC, also require a certain level of organization.[15]

This article explains how some of the features of contemporary armed groups may relate to the 'organizational' or 'organization' criterion for both non-international armed conflict (under IHL) and crimes against humanity (under ICL). It discusses the current framework of IHL and ICL and the requirement that an armed group be 'organized' for it to be held accountable under these branches of law. It ends by considering whether such groups fall outside the reach of international law, thereby constituting a potential security gap. While the purpose of this article is not to claim that the ICC has contributed to the prevention of international crimes, it asserts that once a more universal ratification and more effective enforcement is achieved, the Court may indeed play a preventive role and provide (direct) security. Moreover, for the purposes of the current paper 'insecurity' is considered to include the effects of impunity on security and the positive effects providing justice can have on stability and security.[16] As such, the article concludes by considering whether the current legal framework can address the insecurity caused by loosely organized or transnational armed groups.

2. The Organization Requirement as a Requisite for the Existence of an Armed Conflict

Common Article 3 of the 1949 Geneva Conventions lays down minimum humanitarian standards that apply in the case of 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Importantly, the drafters of the conventions did not provide a definition of the term 'armed conflict not of an international character', supposedly

Al-Islam Gaddafi) (27 June 2011) 6. Moreover, in the situation of Ivory Coast, the Prosecution only charged crimes against humanity, even though IHL may actually have been applicable at the time of the alleged crimes. In *Gbagbo*, both the Prosecution and the Defence considered a non-international armed conflict to have been in existence (see *Prosecutor v Gbagbo* (Document amendé de notification des charges) ICC-02/11-01/11 (17 January 2013)) para 14; and (Transcript) ICC-02/11-01/11 (25 February 2013) 15–18; respectively), yet only crimes against humanity were charged. Similarly, Mr Blé Goudé was only charged with crimes against humanity. Yet, Pre-Trial Chamber I held that 'the situation in western Côte d'Ivoire had degenerated into a non-international armed conflict between pro-Gbagbo and pro-Ouattara forces'. *Prosecutor v Blé Goudé* (Decision on the confirmation of charges against Charles Blé Goudé) (11 December 2014) para 105.

15 The ICC's Pre-Trial judges have been divided in their views about the level of organization necessary for a non-State actor to be able to commit crimes against humanity as part of an 'organizational policy' (see detailed discussion below).

16 On the relation between impunity and insecurity see M Theros and I Rangelov, 'Unjust Disorder? Impunity and Insecurity in Post-2001 Afghanistan' (*ECFR Background Paper: International Justice and the Prevention of Atrocities*, London, 2013) <http://www.ecfr.eu/ijp/case/afghanistan> accessed 2 October 2015.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

because they feared that this may restrict its application.[17] A lack of definition notwithstanding, the Final Record of the Diplomatic Conference indicates that many States understood that Common Article 3 would apply at the same rather high threshold as the legal framework of belligerency.[18] However, in recent years, it is notable that the threshold of non-international armed conflicts has been set at a level that is significantly lower than that for a classic civil war akin to a state of belligerency.[19] In particular, while traditionally States have always been reluctant to recognize the existence of an armed conflict within its state borders, lately States seem to have increasingly realized that there may be benefits to recognizing the existence of a non-international armed conflict, especially when the fighting takes place elsewhere.[20] For example, the application of IHL (such as in Yemen or Pakistan's tribal regions) allows States to more easily use war-rhetoric[21] and justify the use of lethal force against 'fighters' and/or those directly participating in hostilities.[22]

Having set out the general background to the threshold test to IHL, the following section will examine the substance of the test in more detail. In its seminal decision on jurisdiction in *Tadić*, the Appeals Chamber of the ICTY found:

> that an armed conflict exists whenever there is a resort to armed force between States or protracted armed 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 . . ., in the case of internal conflicts, [until] a peaceful settlement is achieved.[23]

17 E Castrén, *Civil War* (Suomalainen Tiedeakatemia 1966) 85; see also JS Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, vol I (ICRC 1952) 49.

18 See Bartels (n 9) 61–64.

19 See for example *Hamdan v Rumsfeld*, US Supreme Court, 126 S Ct 2749 (2006) 67–69; and the *Boškoski* Trial Judgment.

20 See, eg P Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings' (UN Doc A/HRC/14/24/Add/6, 28 May 2010) para 47. For the *Boškoski* case, see the discussion below.

21 See, eg US Department of Justice (Office of Legal Counsel), 'Memorandum for the Attorney-General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shayk Anwar al-Aulaqi' (16 July 2010).

22 See, eg Y Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011) 22–24; and, generally, ICRC, 'Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms' (ICRC 2013). For the view that IHL in times of non-international armed conflict does not necessarily confer a 'license to kill' see R Bartels, 'Transnational armed conflict: does it exist?' in S Kolanowski (ed), *Proceedings of the Bruges Colloquium 'Scope of Application of International Humanitarian Law'* (College of Europe/ICRC 2013) 122–23; and D Kretzmer and others, '"Thou Shall Not Kill": The Use of Lethal Force in Non-International Armed Conflicts' (2007) 47 IsrLR 191.

23 *Prosecutor v Tadić* (Jurisdiction Appeal) ICTY-94-1-A (2 October 1995) para 70. The paragraph continues: 'Until that moment, international humanitarian law continues to

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

Later, the *Tadić* Trial Chamber, in its judgment, distilled this test into two 'closely related' criteria for the application of Common Article 3: (i) the intensity of the conflict and (ii) the organization of the parties. This test makes clear that the threshold for Common Article 3 is lower than the threshold for so-called 'Additional Protocol II conflicts', which requires that at least one of the parties is a State and that the armed opposition group controls part of the territory of this State.[24]

The two-pronged definition for the lower threshold of non-international armed conflict given by the Appeals Chamber in *Tadić* has been widely accepted as reflecting customary law.[25] It has been followed subsequently by other chambers at both the ICTY and at the International Criminal Tribunal for Rwanda (ICTR) that have found it necessary to distinguish a situation of armed conflict from 'banditry, unorganized ad short-lived insurrections, or terrorist activities'.[26] In later judgments, other trial chambers have confirmed that the *Tadić* Appeal Chamber's requirement that a non-international armed conflict be 'protracted' refers more to the 'intensity' of the violence, than to its duration.[27]

Soon after the drafting of Common Article 3, the International Committee of the Red Cross (ICRC) provided 'convenient criteria' to clarify the provision's application in practice.[28] However, it described these criteria, which mainly

apply in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.'

24 Art 1 of Additional Protocol II defines the material application as '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 . . .'.

25 See D Kritsiotis, 'The Tremors of Tadić' (2010) 43 IsrLR 262; and M Milanovic and V Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in ND White and C Henderson (eds), *Research Handbook On International Conflict And Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Elgar 2013) 283. See also Cullen (n 10) 137.

26 *Prosecutor v Tadić* (Trial Judgment) ICTY-94-1-T (7 May 1997) para 562; and *Prosecutor v Akayesu*, (Trial Judgment) ICTR-96-4-T (2 October 1998) para 620.

27 See, eg *Prosecutor v Kordić and Cerkez* (Appeals Judgment) ICTY-95-14/2-A (17 December 2004) para 341; *Prosecutor v Limaj et al* (Trial Judgment) ICTY-03-66-T (30 November 2005) (*Limaj* Trial Judgment) para 84; *Prosecutor v Haradinaj et al* (*Haradinaj* Trial Judgment) ICTY-04-84-T (3 April 2008) para 38; *Prosecutor v Musema* (Trial Judgment) ICTR-96-13-T (27 January 2000) paras 248–51.

28 The 'convenient criteria' listed include:
1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

relate to the organization requirement, as being 'in no way obligatory'.[29] Indeed, it is notable that the criteria have since been rarely referred to in case law analysing the threshold of IHL.[30] The ICTY even explicitly rejected the criteria as being too stringent when it considered whether or not the Kosovo Liberation Army fulfilled the organizational requirement in the *Limaj* case.[31] Instead, it assessed the existence of a non-international armed conflict by reference to objective indicative factors of intensity of the fighting and the organization of the armed group(s).[32]

Culminating in the *Boškoski* Trial Judgment, the ICTY case law provides a detailed overview of what constitutes the lower threshold of non-international armed conflict and how the requirements of 'organisation' and 'intensity' are to be understood. This judgment contains the most detailed overview of this threshold because it includes a comprehensive review of the case law of other institutions, as well as a review of the relevant literature.[33] In doing so, it has identified the 'factors' to be taken into account when assessing these elements and identified a number of 'indicators' thereof. The Trial Chamber's approach was confirmed by the Appeals Chamber[34] and many of the factors the Trial Chamber identified have since been adopted by the ICC.[35] While the focus of this article will be primarily on the 'organisation' requirement of the threshold test, the interrelatedness of the two requirements makes it helpful to first briefly set out the factors relevant to the intensity requirement.

In considering the intensity requirement, the *Boškoski* Trial Chamber took note of the seriousness and frequency of attacks.[36] It also paid attention to whether the armed clashes had become more widespread or

(b) That the insurgent civil authority exercises de *facto* authority over persons within a determinate portion of the national territory.
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.
Pictet (n 17) 49–50.

29 ibid 49.

30 This may be because they were only a compilation of the suggestions made by the delegates at the Diplomatic Conference, and were all rejected in formal terms. See Sivakumaran (n 10) 526.

31 *Limaj* Trial Judgment, para 89.

32 ibid para 86; *Boškoski* Trial Judgment, para 176.

33 *Boškoski* Trial Judgment, paras 175–206.

34 *Boškoski* Appeals Judgment, paras 19–24. Although the Appeals Chamber was not called upon to discuss the matter, the bench raised the issue of the lower threshold during the Appeals Hearing, thereby showing a clear interest in getting an Appeals Chamber ruling on this matter that—until that moment—had only been dealt with at the trial level (See ibid para 19 and the Transcript of the *Boškoski* Appeals Hearing (AT40) 63–64 and 94).

35 See *Lubanga* Trial Judgment, paras 537–38; and *Prosecutor v Katanga* (Trial Judgment (in French)) ICC-01/04-01/07 (7 March 2014) (*Katanga* Judgment), paras 1172–87.

36 *Boškoski* Trial Judgment, para 177.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

protracted.[37] It considered how many government forces had been deployed and the type of weapons used.[38] Particularly relevant was an analysis of whether heavy weapons and military hardware were being used, such as tanks and other heavy vehicles.[39] Consideration was also given to whether the situation had attracted the attention of the UN Security Council.[40] The Trial Chamber noted how many civilians had fled the area, the extent of the destruction, the blocking or besieging of towns and the number of casualties.[41] It also paid attention to the configuration of frontlines, the occupation of territory, issuance of ceasefire orders and the involvement of international organizations in seeking a solution to the conflict.[42]

The *Boškoski* Trial Chamber also found it instrumental to analyse the manner in which the State treated the armed group. For example, it assessed whether the State was operating under IHL rules or applying human rights standards on the right to life and the freedom from arbitrary detention.[43] In the *Lubanga* Judgment, the ICC explicitly adopted the *Boškoski* approach to the intensity criterion.[44] The next paragraphs will further discuss the organization criterion and set out the factors and indicators for these criteria as they were identified by the *Boškoski* Trial Chamber.

A. Indicators for the Organization Requirement

For the organization criterion, the factors identified in *Boškoski* can be grouped into the following five categories:

1. The existence of a command structure;
   Indicators: eg the existence of headquarters; a general staff or high command; internal regulations; the issuing of political statements or communiqués; spokespersons; identifiable ranks and positions.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

[37] ibid.
[38] ibid.
[39] ibid. Some of the indicators are arguably specific to the fighting in the former Yugoslavia (eg the type of weaponry) and would not necessarily be assessed in the same manner in situations in central Africa, for example, where limited heavy weaponry is used. The fact that in such a situation no use is made of tanks, for example, would then not necessarily impact on the intensity analysis.
[40] ibid. Interestingly, the Trial Chamber was satisfied that the intensity requirement had been met, even though it was estimated that (only) a total number of 168 people had been killed during the 9 months in which the alleged armed conflict had existed (ibid para 244).
[41] ibid para 177.
[42] ibid.
[43] ibid para 178.
[44] *Lubanga* Trial Judgment para 538.

2. The existence of military (operational) capacity;
   Indicators: eg the ability to define a unified military strategy; to use military tactics; to carry out (large scale or coordinated) military operations; the control of certain territory and territorial division into zones of responsibility;

3. The existence of logistical capacity;
   Indicators: eg the existence of supply chains (to gain access to weapons and other military equipment); ability for troop movement; ability to recruit and train personnel;

4. The existence of an internal disciplinary system and the ability to implement IHL;
   Indicators: eg the existence of disciplinary rules or mechanisms within the group; training;

5. The ability of the group to speak with one voice;
   Indicators: eg the capacity to act on behalf of its members in political negotiations; the capacity to conclude cease fire agreements.[45]

When examining the organization requirement, it is important to note that it relates only to armed groups. When one side to a non-international armed conflict is a government, the organization of this side can be assumed without further assessment of its organized nature.[46]

In *Lubanga*, the ICC relied on the factors as set out in *Boškoski* in relation to the organization requirement. It held that

> [w]hen deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and

45 *Boškoski* Trial Judgment, paras 194–203.

46 See R Bartels, 'From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?' in Stahn and others (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 306; and *Haradinaj* Trial Judgment, para 60. For that reason, in the ICC case of the *Prosecutor v Bemba*, for example, it need not be assessed whether the armed group of the accused fulfilled the organizational requirement. This case concerns fighting between the government forces of the CAR, supported by Bemba's armed group (MLC), against rebel and dissident forces led by François Bozizé. As the MLC intervened on the part of the government, that side could already be considered to be organized. Any analysis of the organized nature of two opposing sides (for the purposes of the existence of an armed conflict) would thus only have to focus on Bozizé's forces.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

put them into effect; and the extent, seriousness, and intensity of any military involvement.[47]

It then applied these factors to the situation in Ituri (DRC) to conclude that a non-international armed conflict existed at the time of the alleged crimes.[48] The *Katanga* Trial Chamber conducted a similar review of the organization of the relevant parties (and intensity) to determine whether a non-international armed conflict existed during the relevant period.[49]

B. Relevance of the Organization Requirement

It is argued that at a fundamental level one of the main functions of the organization requirement is to determine whether the armed group is sufficiently organized to be treated as a separate entity from its members under international law.[50] The implicit need for such a test stems from the fact that Common Article 3 can only be applied to a particular factual situation if it can be applied by both parties to the armed conflict, namely the State and the armed group or both armed groups. This is a key feature of IHL and rooted in the principle of equality.[51]

Indeed, when the organization test is viewed from this perspective, it can be seen that the five sets of indicators identified by the *Boškoski* Trial Chamber all contribute towards proving that the armed group has achieved a level of organization that allows it to be treated as a separate legal entity with obligations under IHL, rather than a loose aggregate of individuals.

[47] *Lubanga* Trial Judgment, para 537.

[48] ibid paras 548–50 and 567.

[49] *Katanga* Judgment, paras 1212–15 and 1229. It should be noted that the Prosecution, in its presentation of evidence and closing arguments, only sought to prove the degree of organization of the groups allegedly under control of the accused, but did not discuss any group on the opposing side, while for a non-international armed conflict to exist (as was alleged by the Prosecution), a minimum of two (organized) parties is needed at all times. Nevertheless, all the Prosecution's references in its final brief on the organization of the parties only referred to one side of the (alleged) conflict, namely to the armed groups allegedly headed by the two accused: the FRPI and the *Bedu-Ezekere*, respectively. See Version publique expurgée: Corrigendum du mémoire final—ICC-01/04-01/07-3251-Conf (3 July 2012).

[50] See also Sivakumaran (n 10) 177 for a discussion of the rationale of the organizational requirement.

[51] In that sense, the assessment made by criminal tribunals of whether an armed group meets the organization requirement appears to have similarities with the International Court of Justice's assessment whether the Mauritanian entity was a 'legal entity' under international law. In doing so, it considered whether there was enough internal unity amongst the entity's peoples, institutions and organs to treat it as having 'the character of a personality or corporate entity distinct from the several emirates and tribes which composed it'. See *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 63, para 149.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

C. The Situation in Syria in 2012

The examination of the threshold test above highlights the fact that the non-fulfilment of the organization requirement may cause the threshold test of IHL not to be met, even when the intensity threshold has been reached. The following section shows how such a situation can manifest itself in practice by providing details of the situation in Syria in the early months of 2012.

In the early months of 2012, it was probably the Free Syrian Army's (FSA) lack of organization that prevented the ICRC from considering the situation to be a non-international armed conflict, despite heavy fighting in Syria.[52] Similarly, in February 2012, the Independent International Commission of Inquiry on the Syrian Arab Republic (International Commission of Inquiry) reported its 'grave concern' that while the violence in certain areas of Syria had reached the requisite level of intensity, it was unable to verify that the FSA had reached the necessary level of organization for IHL to apply.[53] It was only from around July 2012 onwards that the FSA was considered sufficiently organized to fulfil the organization requirement.[54]

As the FSA was the largest armed opposition group in 2012, the following paragraphs will focus on this group for the present discussion of the organization criterion. Indeed one of the main problems of the Syrian opposition in 2012 was that it was 'fractious and deeply divided'.[55] In the beginning of 2012, there were frequent reports of a concerning lack of organization within the FSA. In particular, it was reported that there was no uniform disciplinary system within the organization and that 'no rules and no military . . . orders' existed.[56] Moreover, the International Commission of Inquiry reported that the FSA leadership did not issue centralized orders, but commanders in the field 'made their own rules of engagement'.[57] When considering these comments, it becomes particularly relevant to note that around the same time the media reported a plethora of acts that would have constituted violations of IHL if it had applied, such as summary executions.[58]

52 See, eg 'Bashar al-Assad could face prosecution as Red Cross rules Syria is in civil war' *The Guardian* (15 July 2012).

53 Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69 para 13.

54 See R Chesney, 'Guest Post from the ICRC's Daniel Cahen Responding to My Post on Syria/LOAC' *Lawfare Blog* (17 July 2012) <http://www.lawfareblog.com/2012/07/guest-post-from-the-icrcs-daniel-cahen-responding-to-my-post-on-syrialoac/> accessed 2 October 2015.

55 'Guide to the Syrian opposition' *BBC News* (17 October 2013).

56 G Abdul-Ahad, 'Al-Qaida turns tide for rebels in battle for eastern Syria' *The Guardian* (30 July 2012).

57 See Human Rights Council (n 53) para 107.

58 See Address of High Commissioner of Human Rights, Navi Pillay, to United Nations Security Council (3 July 2012) <http://www.ohchr.org/EN/NewsEvents/Pages/HCSecurityCouncil.aspx> accessed 2 October 2015. See also Human Rights Watch

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

When considering these reports, it should be remembered that an armed group's violation of IHL does not *per se* indicate a lack of 'ability to implement IHL'—the fourth requirement identified in *Boškoski*.[59] However, in the Syria case, the atrocities perpetrated by fighters did indeed serve to confirm that the FSA was organizationally incapable of implementing IHL obligations. Relevant here is the fact that the FSA leadership had announced that it wished to apply the 1949 Geneva Conventions and wished to adhere to IHL, but apparently had trouble making its members do so in practice.[60] Of course, drawing conclusions from such media reports is difficult, but the following quote is illustrative and striking:

> Some rebel leaders have attempted to impose order on their units with mixed results. In mid-March [2012], Captain Amjad al-Hamid, one of the founding members of the Khalid bin Walid Brigade and the leader of the Rijal Allah Battalion, gave a speech in Rastan denouncing a spate of muggings and kidnappings perpetrated by insurgent groups in the area. "We have armed men among our civilians that are a burden to our revolution. They are just thieves . . . no different from Bashar al-Assad." He also distanced himself from conservative Islamists in the speech. Unknown assailants killed Hamid the next day.[61]

Again, this demonstrates that, in the early months of 2012, there were multiple indications that the FSA lacked an effective internal disciplinary system or the ability to implement IHL. Indeed, in February 2012, the International Commission of Inquiry stated that it could not discern the existence of a functioning chain of command between the highest leadership of the FSA and local units. In a similar vein, the Commission expressed scepticism about the extent to which the leadership abroad was really in control of the FSA groups operating on the ground. In the beginning of 2012, the FSA was reported to have a headquarters and command structure with ranks and positions.[62] It also regularly issued statements and communiqués via spokespersons.[63] However, the relevance of these outward symbols of unity was clearly undermined by reports that local groups on the ground did not communicate with the FSA leadership

(HRW), 'Syria: Armed Opposition Groups Committing Abuses: End Kidnappings, Forced Confessions, and Executions' (20 March 2012).

59 *Boškoski* Trial Judgement, para 205.

60 K Fortin, 'Free Syrian Army announce that they will apply Geneva Conventions and welcome ICRC visits' *Armed Groups and International Law* (31 July 2012) <http://armedgroups-internationallaw.org/2012/07/31/free-syrian-army-announce-they-will-apply-geneva-conventions-and-welcome-icrc/> accessed 2 October 2015.

61 J Holliday, 'Syria's Maturing Insurgency' (Institute for Studies of War, July 2012) 28.

62 ibid 19.

63 See, eg 'Free Syria Army "committed" to April 10 ceasefire' *The Telegraph* (9 April 2012). However, see also M Weaver and B Whitaker, 'Syrian rebels urge Annan to declare end of ceasefire' *The Guardian* (31 May 2012), in which the spokesmanship of the person concerned is contested by other members of the FSA.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

very regularly.[64] Likewise, it was reported that many groups on the ground did not receive specific orders from the leadership at all.[65] As a result, while the opposition's military operations often appeared to be large scale and coordinated, there remained doubt that the FSA *per se* was 'organized'. Furthermore, the Commission of Inquiry commented that many affiliated groups were calling themselves 'FSA' without necessarily being affiliated with the FSA.[66]

When the five indicators identified by the *Boškoski* Trial Chamber are seen as indicators of the group's unity as a whole, it is understandable why the factors mentioned by the Chamber are not to be considered determinative or exhaustive. Instead, they are merely intended to constitute a 'practical guide' to assist a determination of whether the organization requirement has been met.[67] Indeed, the Syrian example above shows that it is more important to demonstrate that the group is 'organised' in an overall sense than to demonstrate that each indicator has been fulfilled. It also illustrates that indicators of a fundamental lack of unity within the group may undermine the value or relevance of outward and possibly superficial symbols of unity, such as the existence of headquarters, a formal hierarchy and the use of a spokesperson or unified channels of communication.[68] As a matter of caution, it is important to note that the Syrian example above also demonstrates the difficulties of conducting a proper review of the factors on the basis of news articles and public reports. This is especially the case since reports in the news are often contradictory and do not always make clear to which group they are referring.

Other situations, such as the fighting in the CAR in 2013, further illustrate the fact that there may be situations where the intensity requirement may be met but the satisfaction of the organization requirement is less certain. Here, the organized character of the Seleka and Anti-Balaka militias also remained questionable, despite a high level of violence in the country.[69]

Ultimately, the fact that there may be situations where there is considerable violence, but where the armed group in question is not organized, highlights the interrelatedness of the two criteria making up the threshold requirement for IHL. The Syria situation demonstrates that it is not sufficient for there to be (only) widespread atrocities in a country for the threshold to non-international armed conflict to be met. The atrocities that constitute the 'intensity' require-

[64] The International Commission of Inquiry stated in February 2012 that it 'was unable to ascertain the extent to which the FSA leadership abroad commanded and controlled the various FSA groups operating in the Syrian Arab Republic .... Some local groups seem to recognize the leadership, yet may not communicate with it regularly or receive specific orders from it'. Human Rights Council (n 53) para 108.

[65] ibid, stating that '[t]he FSA leadership abroad indicated to the commission that groups on the ground did not receive orders from it'.

[66] ibid paras 11 and 108.

[67] *Boškoski* Trial Judgment, para 206.

[68] See n 63 above.

[69] See S Casey-Maslan (ed), *The War Report: Armed Conflict in 2013* (OUP 2014) 423.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

ment must be able to be linked to one or the other party to the conflict to 'count' towards the intensity requirement.[70] It is argued that it is this linkage that elevates the violence to the level of military hostilities and justifies deference to the principle of military necessity.

The foregoing has shown the effect the (lack of) organization of armed groups may have on the application of IHL and prosecution of war crimes. The discussion now turns to the relevance of the organization of armed groups for another type of international crime within the material jurisdiction of the ICC: crimes against humanity.

3. The Organization Requirement for Crimes against Humanity

The potential for there to be a gap between the accountability of armed groups under IHL and ICL becomes clear when the organization requirement under both bodies of law is viewed side-by-side. In particular, the section below demonstrates that if the organization requirement for the two legal frameworks would be the same, the ICL framework will not be able to address systematic or widespread attacks by armed groups falling outside the IHL framework.

While it was once thought that crimes against humanity could only be committed by State actors, today it is largely accepted that they can be committed by members of armed groups too. In 2009, three Revolutionary United Front leaders were convicted of crimes against humanity by the Special Court for Sierra Leone.[71] Likewise, in that same year, the Liberian Truth and Reconciliation Commission found that all parties to the non-international armed conflict had committed such crimes.[72] There have also been numerous instances in which fact-finding missions have found evidence to suggest that members of armed groups have committed crimes against humanity.[73] Indeed, it is noteworthy that out of the 31 individuals against whom the ICC has publicly issued arrest warrants or issued summonses to appear for,[74] 10 have been members of armed

[70] This is not stated explicitly in ICTY jurisprudence, but is implied in paras 177–78 of the *Boškoski* Trial Judgment.

[71] All three were convicted of crimes against humanity of extermination, murder, rape, sexual slavery, other inhumane acts (namely, forced marriage and physical violence) and enslavement. See *Prosecutor v Sesay, Kallon and Gbao* (Trial Judgment) SCSL-04-15-T (2 March 2009). These convictions were upheld on appeal.

[72] Consolidated Report of the Republic of Liberia Truth and Reconciliation Commission, Vol II (30 June 2009) 7–9.

[73] Such as: UNCHR, 'Summary of fact finding missions on alleged human rights violations committed by the Lord's Resistance Army (LRA) in the districts of Haut-Uélé and Bas-Uélé in Orientale province of the Democratic Republic of Congo (December 2009); UNCHR, 'Report of the United Nations Joint Human Rights Office on Human Rights Violations committed by the M23 in North Kivu Province' (April 2012–November 2013).

[74] This is the number of arrest warrants for the core crimes within the jurisdiction of the ICC (ie genocide, crimes against humanity and war crimes). A further eight (public)

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

groups that are or were facing charges of crimes against humanity.[75] In the third ICC judgment to date, Germain Katanga, member of an armed group called the *Force de Résistance Patriotique en Ituri*, was found to be individually criminally responsible for the crime against humanity of murder committed in the Ituri district of the DRC.[76]

Despite what seems to be a general acceptance that armed groups and their members can commit crimes against humanity, there remains an important ongoing discussion about what kinds of armed groups and in what circumstances.[77] In recent years, debate on this topic has been particularly sparked by decisions from the ICC seeking to define the Rome Statute's reference to 'organization' in its definition of crimes against humanity. Article 7(1) of the Rome Statute defines crimes against humanity as 'acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Paragraph 2(a) of Article 7 specifies that '"[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of [the aforementioned] acts . . . against any civilian population, pursuant to or in furtherance of a State or *organizational* policy to commit such attack'.[78] The inclusion of the words 'organizational policy' in Article 7(2)(a) has prompted a debate about what kinds of entities the phrase 'organizational' was intended to cover.

The question of how the term 'organizational' should be interpreted has been particularly addressed in the Kenya cases. These were the first cases before the ICC that exclusively focused on crimes against humanity and did not concern a situation of armed conflict (nor was it argued by anyone that an armed conflict existed, despite the existence of heavy fighting by—arguably—relatively organized groups).[79] In particular, in the 2010 decision by Pre-Trial Chamber II authorizing the Prosecutor's investigation into the Kenya situation there was a

arrest warrants have been issued for persons who allegedly committed offences against the administration of justice.

75 Germain Katanga, Bosco Ntaganda, Callixte Mbarashimana, Mathieu Ngudjolo Chui, Jean-Pierre Bemba Gombo, Joseph Kony, Dominic Ongwen, Vincent Otti, Okot Odhiambo and Ali Kushayb.

76 *Katanga* Judgment (n 35) para 1123.

77 See, eg C Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 *Kenya* Decision' (2010) 23 LJIL 855; WA Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 LJIL 847; M Halling, 'Push the Envelope–Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity' (2010) 23 LJIL 827; G Werle and B Burghardt, 'Do Crimes against Humanity Require the Participation of a State or a "State-like" Organization?' (2012) 10 JICJ 1.

78 Emphasis added.

79 Interestingly, with respect to the Kenya situation, HRW suggested that a non-international armed conflict did exist and war crimes occurred in Kenya at the relevant time (see HRW, 'All the men have gone. War crimes in Kenya's Mt.Elgon conflict' (2008). Others have held that no armed conflict existed (see C Schenkman, 'Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Outside Armed Conflict' (2012) 87 NYU Law Review 1228.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

lengthy discussion about whether it is possible for an armed group to further a policy to commit crimes against humanity and, if so, in what circumstances.[80] Importantly, all three judges agreed that crimes against humanity can be committed in furtherance of a policy formulated by non-State actors, as well as States. The point on which the judges disagreed was the question of which non-State actors could fulfil the organization requirement and what characteristics such groups should have. The Majority found that an assessment should be made not of a group's 'formal nature' or its 'level of its organization', but should instead focus on its 'capability to perform acts which infringe on basic human values'.[81] In doing so, the two Majority judges emphasized that the only characteristic of the group with any importance was its capacity to do harm on the scale and gravity necessary for the acts to be considered crimes against humanity.[82]

The late Judge Kaul, dissenting, took a much narrower view of the term 'organizational' in Article 7(2)(a). According to Judge Kaul, crimes against humanity can only be committed by groups which 'partake of some characteristics of a State'.[83] In his dissent, Judge Kaul listed the characteristics which in his view would turn a private organization into an entity which 'may act like a State or has quasi-State abilities'.[84] They included the following characteristics: (i) a collectivity of persons; (ii) which was established and acts for a common purpose; (iii) over a prolonged period of time (iv) under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (v) with the capacity to impose the policy on its members and to sanction them; and (vi) which has the capacity and means available to attack any civilian population on a large scale.[85]

80 *Situation in The Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) (*Kenya* Art 15 Decision).

81 ibid para 90.

82 ibid.

83 *Kenya* Art 15 Decision, Dissenting Opinion of Judge Hans-Peter Kaul (31 March 2010) (Dissenting Opinion of Judge Kaul) para 51. It is noteworthy that Judge Kaul also expressed similar arguments on the meaning of the term 'organizational' in art 7(2)(a) in later decisions (see *inter alia Prosecutor v Ruto, Kosgey and Sang* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) ICC-01/09-01/11 (15 March 2011) paras 4–13) but his Article 15 dissent remains the most elaborated. Prior to Judge Kaul's dissenting opinion on 31 March 2010, the view that a State-like organization is required had also been expressed by several influential international criminal law scholars: WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 152; and MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999) 244–45; and K Ambos, *Internationales Strafrecht* (CH Beck 2006) 215.

84 Dissenting Opinion of Judge Kaul, para 51.

85 ibid.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

It is not clear what course the future cases will take. No judgment has yet been rendered in the *Ruto and Sang* case, which emerged out of the facts in relation to which Judge Kaul first advocated the narrow view.[86] Pre-trial chambers seized of other cases in which crimes against humanity are charged, namely *Ntaganda*, *Gbagbo* and *Blé Goudé*, have also not pronounced on the matter.[87] In *Katanga*, Trial Chamber II did adopt the aforementioned Majority approach based on capability.[88] Nevertheless, the narrow approach deserves to be given attention, not only because future ICC chambers may decide differently on this point, but also because Judge Kaul's dissenting opinion precipitated a considerable academic debate about the circumstances in which non-State actors can commit crimes against humanity. Most notably, Judge Kaul's opinion received praise from influential ICL scholars, such as Claus Kress and William Schabas, who supported his narrow reading of the 'organization(al)' for the purpose of Article 7(2)(a).[89]

However, when Judge Kaul's dissent is studied carefully, it appears that his interpretation of the word 'organization' is hard to justify.[90] It is argued here that his argument that the term 'organization' should be interpreted as State-like, 'because it is placed next to the word State' in Article 7(2)(a),[91] is particularly unreasonable.[92] Additionally, his factual argument that only State-like entities are capable of committing 'widespread' or 'systematic' crimes fails to take sufficient account of the systematic injustices which have been perpetrated and continue to be perpetrated by armed groups in the 20th and 21st centuries. Also, Judge Kaul's argument that it is the State's involvement in crimes against

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

86 *Prosecutor v Ruto and Sang*, ICC-01/09-01/11.

87 In *Gbagbo*, Pre-Trial Chamber I noted the two opposing views, but considered that since 'the organisation alleged by the Prosecutor and satisfactorily established by the available evidence would meet the threshold under either interpretation . . ., it is unnecessary for the Chamber to dwell any further on this point'. *Prosecutor v Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014) para 217.

88 *Katanga* Judgment (n 35) paras 1119–22. Trial Chamber II explicitly rejected the argument that an 'organisation' must possess State-like or quasi-State, and concluded that: 'l'organisation concernée doit disposer des moyens suffisants pour favoriser ou encourager l'attaque sans qu'il y ait lieu d'exiger plus' (ibid 1119). As both Mr Katanga and the Prosecution withdrew their appeals, the Appeals Chamber is no longer called upon to pronounce on the substantive crimes, including the scope of their contextual elements.

89 See Kress (n 77) 855–72; and Schabas (n 77) 847–53.

90 See in support: G Werle and B Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organization?' (2012) 10 JICJ 1151.

91 Dissenting Opinion of Judge Kaul, para 51.

92 It is interesting to note that Bassiouni has previously argued that the term 'State' should govern the word 'organization'. See MC Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Martinus Nijhoff 2005) 151–52. For discussion of this view, see WA Schabas, 'Crimes against Humanity: The State Plan or Policy Element' in L Sadat and M Scharf, *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff 2008) 359.

humanity that elevates them to an 'international level' fails to take account of the international dimension of atrocities by armed groups, which often pose a considerable threat to international peace and security.[93] Moreover, it does not acknowledge the international dimensions of a State's failure to protect its population from widespread or systematic harms by armed groups.[94]

Furthermore, although not stated explicitly, Judge Kaul's dissent contains the strong implication that, in his view, crimes against humanity can never be committed by armed groups in situations of violence that fall below the threshold of Common Article 3 or even Additional Protocol II.[95] In defining the term 'organizational', he repeatedly refers to this Protocol and the notion of 'organized armed group' that has been specifically developed in IHL.[96]

An argument that crimes against humanity can never be committed by armed groups in situations that fall below the threshold of IHL would constitute a departure from the position under customary international law, which recognizes that crimes against humanity can be committed in peacetime as well as in times of armed conflict. Indeed, if the term 'organizational' in Article 7(2)(a) of the Rome Statute is interpreted too narrowly, it will leave the Court unable to address any situation in which armed groups—although far from being State-like and not necessarily even involved in an armed conflict—are nevertheless capable of committing widespread or systematic abuses against the civilian population.[97] There would then be an impunity gap, which would make it impossible for the Court to address violence by, for example, the Syrian opposition before the threshold of non-international armed conflict was met. It would also make it impossible for ICL to address armed groups whose *modus operandi* does not fit that of an armed group operating within the context of an armed conflict, such as the LRA. The fact that the LRA currently operates across borders and directs its attacks almost exclusively against the civilian population, rather than against State military infrastructure, makes its operations hard to reconcile with the IHL framework.

Of course one can debate whether the Court should have jurisdiction over these acts as crimes against humanity, but it is submitted here that there are strong reasons why it should. Judge Kaul's remark that 'a demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes' is similar to the view of various

93 Dissenting Opinion of Judge Kaul, para 63.

94 L Zegveld, *The Accountability of Armed Opposition Groups in International Law*(CUP 2002) 182–207 for the extent of a State's obligation to protect civilians (legally and physically) from the effects of armed groups.

95 Dissenting Opinion of Judge Kaul, footnotes 55 and 56.

96 ibid.

97 Leila Sadat, for example, observes that 'crimes against humanity today, at least if the situations before the ICC are any guide, are typically *not* driven by totalitarian states planning hegemonic domination but instead by internecine struggles for political power in which political groups and their armed followers target civilians in their bid for domination. These "amorphous" or "tribal" groups (in Judge Kaul's words) are capable of inflicting terrible violence and horrific suffering on civilians and undermining the human values the Court was established to protect'. Sadat (n 14) 375.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

academics and certain States that fear too much interference by institutions like the ICC.[98] However, the very fact that the acts, namely 'human rights infractions', took place at a widespread or systematic level shows a State failure that justifies 'interference' by way of international criminal jurisdiction being exercised over the acts.[99] Moreover, while it is right to be cautious about the demarcation between international crimes and ordinary crimes, the designation of a perpetrator as a State actor or a non-State actor is rarely the basis upon which international crimes are distinguished from domestic crimes. International crimes such as genocide, war crimes and torture are all subject to universal jurisdiction, irrespective of whether the perpetrator belongs to the government or is a member of an armed group.[100] Furthermore, it is only if a State has proved itself unwilling or unable to prosecute such crimes that the ICC can exercise jurisdiction over the crimes.[101]

In short, there are good reasons to argue that the 'organization' threshold for crimes against humanity should be lower than that required under IHL. In particular, there should be no requirement that the armed group is operating within the context of a non-international armed conflict.[102] Likewise, while it seems likely in the 'crimes against humanity' context that it will still have to be proved that the armed group does in fact constitute an 'organization' rather than simply a loose collection of individuals, there is no immediate need to prove this with relation to features such as responsible command or established hierarchy. Instead, there seems to be a compelling argument that the 'organization' requirement in the crimes against humanity context should be proved by the group's ability to organize coordinated widespread or systematic action.

4. Conclusion

In the case of fighting of a certain intensity between government forces and armed groups, or between such groups, international humanitarian law, for

[98] See Dissenting Opinion of Judge Kaul, para 65. H Van der Wilt, 'War Crimes and the Requirement of a Nexus with an Armed Conflict' (2012) 10 JICJ 1113.

[99] See H Van der Wilt, 'Crimes against Humanity: A Category Hors Concours in (International) Criminal Law' in B van Beers and others (eds), *Humanity across International Law and Biolaw* (CUP 2014) for a discussion of Larry May's 'harm' and 'security' principle in relation to crimes against humanity.

[100] See *Prosecutor v Kunarac et al* (Trial Judgment) ICTY-96-23 (12 June 2002) para 470(i), where the Trial Chamber explains that there is no need for State participation in the war crime of torture. See also art IV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which states 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rules, public officials or private individuals'.

[101] See art 17 of the Rome Statute.

[102] Cryer and others observe that '[t]he law of crimes against humanity was initially created to fill certain gaps in the law of war crimes'. R Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 230.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016

good reasons, is only applicable when the armed group(s) possesses a minimum level of organization. It is important that in situations that may fall below the threshold of non-international armed conflict, acts of a sufficiently widespread and systematic scale can be prosecuted as crimes against humanity; not only when carried out by government forces, but also when committed by non-State actors. International criminal law should therefore not require that armed actors have to attain a State-like level of organization before their members can be held accountable for crimes against humanity. In situations where both the government and armed groups are allegedly responsible for abuses, the law should allow for both sides to be prosecuted—not just one of the two.

Downloaded from http://jcsl.oxfordjournals.org/ at Universiteitsbibliotheek Utrecht on May 13, 2016