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THE WAR REPORT

ARMED CONFLICTS IN 2018

ANNYSSA BELLAL

THE ACADEMY A JOINT CENTER OF



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ÉTUDES INTERNATIONALES
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GRADUATE INSTITUTE
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**UNIVERSITÉ
DE GENÈVE**
FACULTY OF LAW

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INTRODUCTION

This work identifies, describes and discusses situations of armed violence in 2018 that amounted to armed conflicts in accordance with the definitions recognized under international humanitarian law (IHL) and international criminal law (ICL). The purpose of *The War Report* is to collect information and data in the public domain and provide legal analysis under the framework of international law. The existence of an armed conflict is important because it has far-reaching implications. First and foremost, IHL governing the conduct of hostilities, which is markedly less restrictive in its prohibitions on the use of lethal force than is the international law of law enforcement, applies only in a situation of armed conflict. Notably, IHL does not prohibit the intentional use of lethal force against a member of the armed forces or a civilian ‘participating directly in hostilities’ (for the duration of such participation, see the ‘Summary IHL Rules’ sections in Part I). Second, war crimes may only be committed in connection with an armed conflict. Third, the International Committee of the Red Cross (ICRC) has a formal role in protection only in connection with armed conflicts.

No national or supranational body is authoritative in its determination or implication that a particular situation of armed violence constitutes an armed conflict; a situation threatening international peace and security is not a synonym for an armed conflict (although, unquestionably, the situations may coincide). Moreover, the existence of an armed conflict is an objective test and not a national ‘decision’. Consequently, whether a state affirms that a particular situation does, or does not, amount to an armed conflict is relevant information for the purposes of determining the applicable law, but is certainly not conclusive.

Further, as explained in more detail later, however significant (and tragic) loss of life may be in any state or territory, the qualification of a situation of armed violence as an armed conflict is not simply a numbers game. Indeed, armed violence within a state may claim not only hundreds, but even thousands, of lives – and may constitute crimes against humanity¹ or even genocide² – without necessarily crossing the threshold into armed conflict; other factors are also pertinent, especially the extent of clashes between armed forces, or between armed forces and organized armed groups (or between such groups themselves). Thus, reports detailing ‘wars’ based on, for example, 25 or 1,000 battlefield deaths annually can be valuable for political science purposes, but such categorizations do not, per se, have significance under international law.

1 Crimes against humanity are those crimes that ‘shock the conscience of humanity’. Under the 1998 Rome Statute of the International Criminal Court (Rome Statute), crimes against humanity occur where certain acts are undertaken as part of a widespread or systematic attack against a civilian population, of which attack the perpetrator has knowledge. Such acts are murder, extermination, enslavement, forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts. Art 7(1)(a)–(k), Rome Statute.

2 Genocide ‘means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group.’ Art 6, Rome Statute; see also Art 2, 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

Part I of this work lists and summarizes the armed conflicts that occurred in 2018 on the basis of explicit criteria that, we believe, best reflect existent international law, certain controversies and imprecision notwithstanding.

Part II focuses and details the situations of selected armed conflicts in 2018. For a complete overview of the history of all conflicts, the 2012, 2013 and 2014 editions of *The War Report* are recommended. *The War Report 2018* may also be read in conjunction with the Rule of Law in Armed Conflicts portal of the Geneva Academy (rulac.org), an online database that identifies and classifies all situations of armed violence that amount to an armed conflict under IHL.³

³ At: <http://www.rulac.org/>.

PART I

SUMMARY

In 2018, at least 69 armed conflicts occurred on the territory of 30 states, in Afghanistan, Azerbaijan, The Central African Republic, Colombia, Cyprus, the Democratic Republic of the Congo (DRC), Egypt, Eritrea, Georgia, India, Iraq, Lebanon, Libya, Mali, Mexico, Moldova, Myanmar, Nigeria, Pakistan, Palestine, the Philippines, Somalia, South Sudan, Sudan, Syria, Thailand, Turkey, Ukraine, Western Sahara and Yemen.

Of the 69 conflicts, international armed conflicts have been taking place in the territory of 7 states: between India and Pakistan, Ukraine and Russia, as well as Syria and the different states belonging to the United States-led coalition in Syria. In addition, there have been a series of short-lived international armed conflicts between Libya and Egypt, Israel and Syria, Israel and Iran (on Syrian territory) as well as Turkey and Iraq.

In addition, belligerent occupations continued in parts of 10 states and territories (Azerbaijan, Cyprus, Eritrea, Georgia, Lebanon, Moldova, Palestine, Syria, Ukraine and Western Sahara). These occupations are governed by the law of military occupation that also forms part of the law of international armed conflict.⁴ The occupation of Eritrea by Ethiopia is debatable, as discussed in the section on the conflict (p.37)

At least a total of 51 non-international armed conflicts occurred in 2018 in the territory of 22 states: Afghanistan, the Central African Republic, Colombia, DRC, Egypt, India, Iraq, Libya, Mali, Mexico, Myanmar, Nigeria, Pakistan, the Philippines, Somalia, South Sudan, Sudan, Syria, Thailand, Turkey, Ukraine and Yemen.

4 The Elements of Crimes established under the International Criminal Court (ICC) provide that 'the term "international armed conflict" includes military occupation'. Preparatory Commission for the International Criminal Court., Finalized Draft Text of the Elements of Crimes, UN doc PCNICC/2000/1/Add.2, 2 November 2000, fn 34. See, e.g., A. Cullen, 'The Threshold of Non-International Armed Conflict', in A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, 2010, SSRN, 2008, p 132, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222757 (last accessed 19 March 2019).

1. WHAT IS AN ARMED CONFLICT?

In accordance with IHL (also called the law of armed conflict)⁵ and ICL, there are two categories of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC).⁶ A valuable and widely cited general definition of the two categories was advanced by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in a 1995 decision in the *Tadić* case: '[A]n 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.'⁷

Thus, in the view of the ICTY, an IAC exists whenever there is a resort to armed force between states, while a NIAC exists when there is protracted armed violence between governmental authorities and organized armed groups, or between such groups within a state. This means that the level of violence needed to trigger an IAC differs from – i.e. is, in general, significantly lower than – that necessary to constitute a NIAC. This issue is discussed below.

Furthermore, and even though this understanding is not universally shared, it is not a case of 'either-or' in any given geographical situation. Accordingly, several

⁵ Views differ as to whether international humanitarian law (IHL) is a synonym for the law of armed conflict (LOAC). Today, this is the prevailing view, although it has been argued that 'Geneva' law (on the protection of those in the power of a party to conflict who are not, or no longer, participating directly in hostilities) is better termed IHL while 'Hague' law (on the conduct of hostilities) falls within the broader LOAC framework.

⁶ The European Union (EU) also uses the term 'internal armed conflict' to determine, for the purposes of protection under EU law, whether a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'. Art 2(e), EU Directive 2004/83. According to Art 15(c) of the Directive, serious harm consists of a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. In a decision in January 2014, the Court of Justice of the European Union (CJEU) determined that an internal armed conflict exists 'if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorized as "armed conflict not of an international character" under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.' CJEU, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, Fourth Chamber, Judgment, Case no C-285/12, 30 January 2014, §35, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147061&pagelndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=460406>. This decision has no influence on the IHL/ICL definition of armed conflict (last accessed 17 March 2019).

⁷ ICTY, *Prosecutor v Dusko Tadić* (aka 'Dule'), Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, §70, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (last accessed 17 March 2019). See generally also International Committee of the Red Cross (ICRC), How is the Term Armed Conflict Defined in International Humanitarian Law?, Opinion Paper, 17 March 2008, <https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm> (last accessed 17 March 2019); S. Vitte, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', 91 *International Review of the Red Cross (IRRC)* 873 (March 2009), <https://www.icrc.org/en/international-review/article/typology-armed-conflicts-international-humanitarian-law-legal-concepts> (last accessed 6 March 2018).

different armed conflicts, comprising one or both categories, may be ongoing at the same time and in parallel in any given state. This position, sometimes called the fragmentation of conflict theory, has been supported by the International Criminal Court's (ICC's) Trial Chamber judgment in March 2014 in the *Katanga* case.⁸ Such fragmentation is evidenced in a number of recent armed conflicts.

In any event, the existence of an armed conflict of either category is generally limited to the areas where the parties to the conflict are conducting hostilities against each other. War crimes may, however, be committed by a member of a party to the conflict in other areas that it controls. When an armed conflict is in progress, IHL generally applies throughout the territory of the state or states concerned. As a consequence, a number of fundamental rules, including those set out in Common Article 3 to the 1949 Geneva Conventions, apply throughout the territory of a state engaged in an armed conflict.⁹ Rules governing the conduct of hostilities are, though, limited to areas where combat is occurring. The 2016 ICRC Commentary confirms this interpretation, and notes that

the applicability of humanitarian law in the whole of the territory of a State party to the conflict does not mean that all acts within that territory therefore fall necessarily under the humanitarian law regime. As noted by the ICTY, a particular act must be 'closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict' for that act to be committed in the context of the armed conflict and for humanitarian law to apply ... The applicability of humanitarian law to a specific act therefore requires a certain nexus between that act and the non-international armed conflict. Acts that have no such connection to the conflict generally remain regulated exclusively by domestic criminal and law enforcement regimes, within the boundaries set by applicable international and regional human rights law.¹⁰

2. INTERNATIONAL ARMED CONFLICT

A. CRITERIA FOR THE EXISTENCE OF AN INTERNATIONAL ARMED CONFLICT

According to Common Article 2 to the 1949 Geneva Conventions, each of the four Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.

If understood strictly, the ICTY's definition of an IAC in the *Tadić* case ('whenever

⁸ See, e.g., ICC, *Prosecutor v Germain Katanga*, Trial Chamber II, Judgment, ICC-01/04-01/07, 7 March 2014, §1197.

⁹ See, e.g., Arts 35–46, 1949 Geneva Convention IV. See also R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, 2008, pp 94–96.

¹⁰ ICRC, 2016 Commentary on Art 3 of the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, §460, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDA490736C1C1257F7D004BA0EC#174> (last accessed 6 March 2018).

there is a resort to armed force between States’) is too narrow in its insistence that the armed force be *between* two or more states. It is undoubtedly true that, as Dietrich Schindler observes, ‘the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other ... Any kind of use of arms between two States brings the Conventions into effect.’¹¹ But, consistent with *jus ad bellum* (the law governing interstate use of force), an IAC also exists whenever one state uses armed force against the territory of another state, irrespective of whether the latter state fights back. Thus, as Hans-Peter Gasser explains, ‘any use of armed force by one State against the territory of another triggers the applicability of the Geneva Conventions between the two States ... It is also of no concern whether or not the party attacked resists’.¹²

As underlined by the ICRC Commentary on Common Article 2, ‘for international armed conflict, there is no requirement that the use of force between the Parties reach a certain level of intensity before it can be said that an armed conflict exists ... Even minor skirmishes between the armed forces, be they land, air or naval forces would spark an international armed conflict and lead to the applicability of humanitarian law.’¹³

In addition, an IAC includes any *situation* in which one state invades another and occupies it, even if there is no armed resistance at all. This is set down in Article 2 common to the four 1949 Geneva Conventions. The precise moment at which a belligerent occupation occurs is, though, not finally settled. According to the ICRC, ‘[n]ot only is the definition of occupation vague under IHL, but other factual elements – such as the continuation of hostilities and/or the continued exercise of some degree of authority by local authorities, or by the foreign forces during and after the phase out period – may render the legal classification of a particular situation quite complex.’¹⁴

Article 42 of the 1907 Hague Regulations reads: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’. According to Sylvain Vité, for occupation in the meaning of Article 42 to exist, ‘two conditions must be fulfilled: (a) the occupier is able to exercise

11 D. Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, Hague Academy of International Law (RCADI), Recueil des cours, vol 163, Brill/Nijhoff, 1979, p 131.

12 H.-P. Gasser, ‘International Humanitarian Law: An Introduction’, in H. Haug (ed), *Humanity for All: The International Red Cross and Red Crescent Movement*, Paul Haupt, 1993, pp 510–511.

13 ICRC, 2016 Commentary on Art 2 of the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, §§236–237, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> (last accessed 17 March 2019). See also D. Carron, *L’acte déclencheur d’un conflit armé international*, Schulthess, 2016.

14 ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Report to the 31st International Conference of the Red Cross and Red Crescent, Geneva, October 2011. See, e.g., M. Zwanenburg, M. Bothe and M. Sassòli, ‘Is the Law of Occupation Applicable to the Invasion Phase?’ 94 IRRC 885 (Spring 2012).

effective control over a territory that does not belong to it; [and] (b) its intervention has not been approved by the legitimate sovereign’.¹⁵ Arguably, however, the threshold for the application of the 1949 Geneva Conventions is lower. According to Common Article 2, ‘[t]he 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.’

Of course, where one state uses armed force on the territory of another state with the latter state’s consent, the two states are not engaged in an IAC. This is the case with respect to NATO’s military involvement in Afghanistan, for instance. But there may be factual and legal issues concerning whether and when an occupation occurs.¹⁶ In March 2014, the issue arose of whether or not the Russian Federation was occupying Ukraine, given that deposed Ukrainian President, Viktor Yanukovich, had seemingly authorized Russian military intervention in a letter dated 1 March.¹⁷ However, without prejudice to the legality of his removal under Ukrainian law, Mr Yanukovich did not effectively control the police or armed forces of Ukraine at the time of the letter and could not therefore be considered genuinely to represent the state. Subsequently, however, the facts on the ground demonstrated clearly that Russia had sought to annex part of Ukrainian territory (Crimea).

There may also be an IAC when one state supports an armed non-state actor (ANSA) operating in another state when that support is so significant that the foreign state is deemed to have ‘overall control’ over the actions of the ANSA.¹⁸ More controversially, an IAC may also exist where there is an armed conflict ‘in which peoples are fighting against colonial domination and alien occupation and against

15 Vité, ‘Typology of Armed Conflicts in International Humanitarian Law’, 74.

16 In the *Katanga* case, the ICC Trial Chamber cited with approval the ICTY trial judgment in the case against and identified a non-exhaustive list of factors to consider when determining whether an occupation was occurring: the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; the enemy’s forces have surrendered, been defeated or withdrawn (in this respect, battle areas may not be considered as occupied territory; however, sporadic local resistance, even successful, does not affect the reality of occupation);

the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; a temporary administration has been established over the territory; the occupying power has issued and enforced directions to the civilian population. *Katanga* trial chamber judgment, §1180, citing ICTY, *Prosecutor v Mladen Naletilic, aka ‘Tuta’and Vinko Martinovic, aka ‘Stela’*, Trial Chamber, Judgment IT-98-34-T, 31 March 2003, §217, footnotes omitted.

17 See, e.g., L. Stangret, ‘Russia Provides UN Security Council with Appeal by “Legal President” Yanukovich’, *Euromaidan Press*, 5 March 2014, <http://euromaidanpress.com/2014/03/05/russia-provides-un-security-council-with-appeal-by-legal-president-yanukovich/>.

18 See, e.g., ICTY, *Prosecutor v Tadić*, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, §§84 and 115 et seq; ICTY, *Prosecutor v Blaškić*, Trial Chamber, Judgment, IT-95-14-T, 3 March 2000, §§149–50. See similarly the views of the Trial Chamber of the ICC in its judgment in the 2012 Lubanga case: ICC, *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber, Judgment, ICC-01/04-01/06, 14 March 2012, §541. The Trial Chamber expressly approved the *Tadić* dicta on this issue. In the 2014 *Katanga* judgment, the ICC Trial Chamber further approved this position: ‘Un conflit armé international existe dès lors que des hostilités armées opposent des États à travers leurs armées respectives ou à travers d’autres acteurs agissant en leur nom.’ (‘An international armed conflict exists whenever armed hostilities oppose states through their respective armies or through others acting on their behalf.’ Unofficial translation.) ICC, *Katanga* trial chamber judgment, §§1177 et seq.

racist regimes in the exercise of their right of self-determination'.¹⁹ The threshold of armed violence for such a conflict to occur is not settled, but is probably the same as for an IAC – that is, much lower than it is for an NIAC.²⁰

B. THE GEOGRAPHICAL SCOPE OF AN INTERNATIONAL ARMED CONFLICT

The geographical scope of an IAC is potentially far broader than is the case for a NIAC (see below). Without prejudice to *jus ad bellum*, the rules of which apply in parallel to any IAC, where militarily necessary, states involved in an IAC may potentially target each other's armed forces anywhere.

C. SUMMARY IHL RULES GOVERNING INTERNATIONAL ARMED CONFLICT

The basic principles and rules of IHL applicable to the conduct of hostilities in an IAC are set out in the 1907 Hague Regulations and the 1949 Geneva Conventions and their 1977 Additional Protocols, and represent customary law applicable to all. The basis of the law of armed conflict is the rule of distinction. This rule obliges 'parties to a conflict' (in other words, the warring parties) to target only military objectives and not the civilian population, individual civilians or civilian objects (e.g. homes, hospitals and schools). Deliberately targeting civilians, provided they do not directly participate in hostilities, is a serious violation of IHL, as too is failing to distinguish in military operations between civilians and combatants (i.e. an indiscriminate attack), and both are war crimes under customary international law given the requisite intent (*mens rea*).²¹

Although it is understood that civilian casualties may not always be avoided in the conduct of hostilities, international law also requires that parties to a conflict take all feasible precautions in any attack to minimize civilian deaths and injuries (and damage to civilian objects). In addition, according to the rule of proportionality, attacks against lawful military objectives that may be expected to cause deaths or injuries among the civilian population, or damage to civilian objects, which jointly or severally would be 'excessive' compared to the expected 'concrete and direct' military advantage, are prohibited.

Children must not be recruited into armed forces or armed groups nor allowed to take part in hostilities. Recruiting children under 15 years old is a war crime. The use of indiscriminate weapons,²² or weapons 'of a nature to cause superfluous

¹⁹ See Art 1(4), 1977 Additional Protocol I. The US and a number of other states opposed this provision vociferously when it was adopted. It has never been applied in practice.

²⁰ This is not, though, the position of the UK, which argues that the threshold is the same as for a NIAC regulated by Common Article 3. UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2005, §3.4.2.

²¹ Civilians only lose their 'general protection' against hostilities if, and for such time as, they participate directly in hostilities.

²² Art 8(2)(a)(xx) of the Rome Statute refers to 'inherently' indiscriminate weapons, while the ICJ, in its 1996 Nuclear Weapons Advisory Opinion, referred to 'weapons that are incapable of distinguishing between civilian and military targets'. It has sometimes been claimed that no weapons are 'inherently' indiscriminate, and certainly there is no general agreement as to which weapons might fulfil this criterion.

injury or unnecessary suffering', is prohibited. In addition, among many other provisions, parties to an international conflict must respect and protect combatants who are *hors de combat*, because of sickness, wounds, detention or any other cause. Captured combatants (primarily, members of armed forces) are to be accorded the status of prisoner of war, with the associated rights and obligations.²³ In providing assistance to the civilian population, women and children are to be granted preferential treatment.

D. SUMMARY IHL RULES GOVERNING A SITUATION OF BELLIGERENT OCCUPATION

Subject to the discussion above, during a belligerent occupation of foreign territory, applicable law is set out in the 1907 Hague Regulations (Articles 42–56), the 1949 Geneva Convention IV, the 1977 Additional Protocol I and customary international law. The underpinning of the law of military occupation is that it is supposed to be a temporary situation, which lasts until a political agreement is reached. During this period, the occupant does not enjoy sovereign rights over the territories it occupies and local law that was applicable prior to the occupation remains in force. At the same time, the occupying power is responsible for administering the local life of the population under its control, maintaining it as it was prior to the occupation as closely as possible and providing security (Article 43 of the Hague Regulations). In addition, international human rights law (HRL) is binding on the occupying state extraterritorially with regard to the territories it occupies.

E. WHEN DOES AN INTERNATIONAL ARMED CONFLICT END?

The precise duration of an international armed conflict is a difficult issue. The ICTY in the *Tadić* case suggested that IHL applies 'from the initiation of ... armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached' in the case of an IAC.²⁴ While certain IHL obligations will clearly extend beyond the active cessation of hostilities, including those pertaining to the treatment of detainees, a notion that law of armed conflict rules governing the conduct of hostilities pertain to acts committed after the point at which active hostilities have effectively ceased is too expansive. Nonetheless, there will often be a fluctuation in the regularity and extent of armed violence during a situation of armed conflict without such an oscillation amounting to an active cessation of hostilities. In addition, IHL does not provide clear-cut standards for determining when an occupation starts and when it ends. According to Tristan Ferraro,

the criteria to be met in order to establish the end of occupation, should generally mirror the ones used to determine its beginning. In other words, the criteria should be the same as for the beginning of occupation, but in reverse. Therefore, the physical presence of foreign forces, their ability to enforce authority over the territory concerned in lieu of the existing local governmental authority, and the continued absence

²³ These are set out, in particular, in 1949 Geneva Convention III.

²⁴ *Tadić* appeals chamber decision, §70.

of the local governmental authority's consent to the foreign forces' presence, cumulatively, should be scrutinized when assessing the termination of occupation. If any of these conditions ceases to exist, the occupation should be considered to have ended.²⁵

3. NON-INTERNATIONAL ARMED CONFLICT

A. CRITERIA FOR THE EXISTENCE OF A NON-INTERNATIONAL ARMED CONFLICT

In accordance with the definition in the *Tadić* case, a NIAC is a situation of regular and intense armed violence²⁶ between the security forces of a state, especially the army, and one or more organized non-governmental armed groups. A NIAC will also occur in a situation of intense armed violence between two or more organized armed groups within a state. Situations of 'internal disturbances and tensions', including 'riots, isolated and sporadic acts of violence' and other acts of a similar nature, are explicitly determined not to amount to armed conflicts.²⁷ Although not explicitly foreseen by the *Tadić* decision, a NIAC will also occur where intense armed violence occurs between two or more organized armed groups across an international border.

There are three cumulative requirements for a NIAC, according to the *Tadić* definition. First, there must be 'protracted armed violence'; second, violence must be conducted by government forces and at least one *organized* non-governmental armed group (or between such groups within a state or across a state's borders); and third, the violence must take place *between* the armed forces and at least one organized armed group, or between such groups. These elements are discussed in turn.

The requirement of 'protracted armed violence' means that a certain threshold of armed violence has been reached.²⁸ According to the ICTY, '[i]n an armed conflict of an internal or mixed character, these closely related criteria are 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.'²⁹

Organized armed groups are those with a command-and-control structure, who typically possess and use a variety of weapons and control a significant logistical

capacity that gives them the capability to conduct regular military operations. When engaged in regular and intense armed confrontations with armed forces or other organized armed groups, such groups are 'party' to a NIAC. These groups are sometimes called rebels, insurgents, terrorists, criminal gangs or anti-government elements by states or other entities; such designations have no consequence for the determination of their status under international law with respect to an armed conflict. It is not, however, necessary that an armed group have a particular political or religious agenda for it to be party to a NIAC;³⁰ therefore, an organized armed group whose aim is purely lucrative, such as a drugs cartel or an organized crime network, can be a party to an armed conflict.³¹ This discussion takes place in *The War Report 2017* with regard specifically to the situation in Mexico.

The third criterion is potentially controversial. Inherent in the notion of the words 'conflict' and 'between' is, *The War Report* argues, a requirement that there be actual combat.³² In its judgment in the *Haradinaj* case, the ICTY stated that indicative factors for an armed conflict include 'the number, duration and intensity of individual confrontations'.³³ The *San Remo Manual on the Law of Non-International Armed Conflict* states that NIACs are 'armed confrontations' occurring within the territory of a single state.³⁴ In the *Limaj* case, the ICTY Trial Chamber, in finding that an armed conflict existed in Kosovo before the end of May 1998 between the Kosovo Liberation Army and the Serb forces, stated that

by the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo–Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo–Macedonian border in the south and the municipality of Mitrovica/Kosovka Mitrovica in the north ... The ability of the KLA to engage in such varied operations is a further indicator of its level of organisation.³⁵

Thus, an armed group that constructs and emplaces (or delivers to a target) improvised explosive devices (IEDs), landmines, vehicle-borne IEDs (VBIEDs) or body-borne IEDs (BBIEDs), but which does not engage in direct 'hostilities' with the armed or security forces of a state, is *not* engaged in a NIAC. Such situations appear to fall more accurately within the notion expressed by the ICTY in the *Tadić* case and cited above of 'terrorist activities, which are not subject to international

25 T. Ferraro, 'Determining the Beginning and End of an Occupation Under International Humanitarian Law', 94 IRR 885, 2012, p 156.

26 In the trial judgment in *Tadić* and other cases, the ICTY confirmed that the specific meaning it gave to 'protracted' when qualifying armed violence was an insistence on the intensity of conflict (even though the word's meaning in ordinary parlance is one of duration, not intensity). ICTY, *Prosecutor v Tadić*, Opinion and Judgment, 7 May 1997, §562; see also ICTY, *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Trial Chamber, Judgment, IT-04-84-T, 3 April 2008, §§40 et seq; ICTY, *Prosecutor v Slobodan Milošević*, Trial Chamber, Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004, §17.

27 Art 1(2), 1977 Additional Protocol II; see also Art 8(2)(d), Rome Statute.

28 As the ICRC has noted, 'the violence must reach a certain level of intensity'. ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', p 8.

29 *Tadić* appeals chamber decision, §70.

30 See, e.g., ICTY, *Prosecutor v Fatmir Limaj, Haradin Bala, and Isak Musliu*, Trial Chamber, Judgment, IT-03-66-T, 30 November 2005, §170.

31 Vité, 'Typology of Armed Conflicts in International Humanitarian Law', 78.

32 In cases before the ICTY, the Tribunal has tended to consider the number of clashes as part of the intensity criterion: 'the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time'. See, e.g., ICTY, *Prosecutor v Mile Mrkšić, Miroslav Radić, and Veselin Šijavančin*, Trial Chamber, Judgment, IT-95-13/1-T, 27 September 2007, §407 and sources cited in footnote 1592.

33 *Haradinaj* trial chamber judgment, §49.

34 International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary*, 2006, p 3, <http://stage.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf> (last accessed 16 March 2019).

35 *Limaj* trial chamber judgment, §172, footnote omitted.

humanitarian law'.³⁶ As Sandesh Sivakumaran has noted, upon ratification of the 1977 Additional Protocol I, the UK entered a declaration whereby 'the term "armed conflict" of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation'.³⁷

B. WHEN DOES A NON-INTERNATIONAL ARMED CONFLICT END?

More complicated is the determination of when a NIAC is effectively over. According to the *Tadić* decision, IHL applies 'in the case of internal conflicts [i.e. NIACs], [until] a peaceful settlement is achieved'.³⁸ This is too expansive. Identifying the 'cessation of active hostilities' in armed conflicts of a non-international character is particularly difficult, since an individual attack does not amount to an armed conflict as it may under the classification of IAC.³⁹ Clashes between parties to a NIAC must be frequent but not necessarily daily or even weekly. Further, when an armed group that is party to such a conflict fragments or its senior commanders are killed or captured, the group may, as a consequence, no longer fulfil the criterion of organization. Establishing these situations as fact is clearly challenging, but when either criterion is no longer fulfilled, a NIAC can be said to have ended. This position has been advanced by Rogier Bartels: 'NIACs do not necessarily end only by virtue of a peace settlement being reached, but rather by the more factual circumstance of the level of "organization" and "intensity" falling below the threshold set for the application of IHL'.⁴⁰

The 2016 ICRC Commentary on the Geneva Conventions of 1949 also specifies that a NIAC would end by the mere fact that one of the parties ceases to exist or in case of a lasting cessation of armed confrontations without real risk of resumption, despite the existence of a ceasefire.⁴¹

C. THE GEOGRAPHICAL SCOPE OF A NON-INTERNATIONAL ARMED CONFLICT

Common Article 3 to the 1949 Geneva Conventions refers to a NIAC 'occurring in the territory of one of the High Contracting Parties'. This can be taken to mean that an armed conflict is limited to the territory of a single state or that the provisions

³⁶ These situations are governed by the international law of law enforcement, including, in particular, HRL.

³⁷ Declaration of 28 January 1998, <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (last accessed 16 March 2019), cited in S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, p 233. Sivakumaran refers to the 'understanding' of the UK as a 'reservation', but it is more accurately termed a 'declaration' because it does not seek to modify the terms of the Protocol with respect to the UK, but rather to set out the UK's understanding of the term. See also, e.g., *Milošević* trial chamber decision, §26.

³⁸ *Tadić*, §70.

³⁹ As noted above, in relevant treaties 'isolated and sporadic acts of violence' explicitly do not amount to (non-international) armed conflict.

⁴⁰ R. Bartels, 'Temporal Scope of Application of IHL: When Do Non-International Armed Conflicts End? Part 2', *Opinio Juris*, 19 February 2014, <http://opiniojuris.org/2014/02/19/guest-post-bartels-temporal-scope-application-ihl-non-international-armed-conflicts-end-part-2/> (last accessed 16 March 2019).

⁴¹ ICRC, 2016 Commentary on Art 3 of the First Geneva Convention, §§489–491.

only apply to a situation in which the territory on which an armed conflict is ongoing is governed by the authority of a State Party.⁴² If it is the latter, given that, as of November 2016, all United Nations Member States were party to the Geneva Conventions, there is very little territory that would not be covered by the treaty provisions. Further, under customary law, there is arguably no such strict geographical limitation, at least with respect to 'spill-over' from one territory to another.

This position does not mean, however, that a globalized NIAC exists as a matter of international law. Some arguments were made in the past by the US, that it was engaged in a 'global armed conflict' against 'the Taliban, al-Qaeda, and associated forces'.⁴³ No such conflict exists under IHL/ICL. While a NIAC can certainly cross international borders, it is not possible under existing international law for a NIAC to be simply global. According to Sivakumaran, an armed conflict must 'have a territorial base ... a global non-international armed conflict does not exist, at least, as a matter of law'.⁴⁴

It is not contested here that an armed conflict may exist on 'a single territory',⁴⁵ or that, today, it may have 'a core territory plus overspill onto different territory',⁴⁶ sometimes (unhelpfully) termed a 'transnational armed conflict'. More controversial is the question of whether an armed conflict may exist across 'multiple territories' that are geographically unconnected.⁴⁷ According to one theory, where a NIAC exists on the territory of one state against a non-state armed group, and that conflict involves foreign states intervening on behalf of that state, the law of armed conflict applies to any hostile act by the non-state party on the territory of any of those foreign states.⁴⁸

⁴² For a helpful discussion of this issue, see, e.g., D. Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27–29, 2003, Program on Humanitarian Policy and Conflict Research at Harvard University, 2003, p 8, <https://hhi.harvard.edu/publications/temporal-scope-application-international-humanitarian-law-contemporary-conflicts> (last accessed 16 March 2019).

⁴³ For example, in 2012 John Brennan, then Assistant to the US President, and Deputy National Security Advisor for Homeland Security and Counterterrorism (later, Director of the US Central Intelligence Agency from 2013–2017), stated: 'As a matter of international law, the United States is in an armed conflict with al-Qa'ida, the Taliban, and associated forces, in response to the 9/11 attacks.' 'The Ethics and Efficacy of the President's Counterterrorism Strategy', Remarks of John O. Brennan, Woodrow Wilson International Center for Scholars, Washington, DC, 30 April 2012, <http://www.lawfareblog.com/2012/04/brennans-peech/> (last accessed 6 March 2018). Later, however, the Obama administration started quietly dropping the reference to the Taliban.

⁴⁴ Sivakumaran, *The Law of Non-International Armed Conflict*, p 234.

⁴⁵ Indeed, the text of Common Article 3 refers to 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' (emphasis added).

⁴⁶ Sivakumaran, *The Law of Non-International Armed Conflict*, p 234.

⁴⁷ *Ibid.*

⁴⁸ Vité, 'Typology of Armed Conflicts in International Humanitarian Law', 74.

D. RULES APPLICABLE IN A NON-INTERNATIONAL ARMED CONFLICT

IHL is applicable to all parties to the conflict, whether state or non-state armed groups. This always includes Common Article 3 to the 1949 Geneva Conventions (by virtue of their universal application under customary international law) and all other provisions of the law of armed conflict applicable to a NIAC, as well as, in certain circumstances, the 1977 Additional Protocol II.⁴⁹ States engaged in a NIAC are also bound by both applicable treaty⁵⁰ and customary HRL. In areas where hostilities are being actively conducted, the law of armed conflict is widely regarded as the applicable law, while outside such areas, HRL is arguably the legal framework determining lawful use of force.

There is also increasing acceptance that non-state armed groups are also bound by at least peremptory HRL norms (e.g. prohibitions on summary or arbitrary executions, torture and enforced disappearances).⁵¹ They may also be bound by other customary human rights obligations, for example where they control territory. For instance, the UN Assistance Mission in Afghanistan (UNAMA) stated in February 2012 that '[w]hile non-State actors in Afghanistan, including non-State armed groups, cannot formally become parties to international human rights treaties, international human rights law increasingly recognizes that where non-State actors, such as the Taliban, exercise de facto control over territory, they are bound by international human rights obligations.'⁵²

Accordingly, based on applicable rules of the law of armed conflict, during the conduct of hostilities it is prohibited to attack any civilian taking no direct part in hostilities, or any fighter who has laid down his arms or who is *hors de combat* because of sickness, wounds, detention or any other cause. Children must not be recruited into armed forces or armed groups, nor allowed to take part in hostilities.

49 The scope of application of 1977 Additional Protocol II is set out in Art 1. In its 1987 commentary on the article, the ICRC notes that the Protocol 'only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as Common Article 3, which applies in all situations of non-international armed conflict'. ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, p 1348. Certain criteria are explicitly required for the application of 1977 Additional Protocol II, namely: confrontation between the armed forces of the government and opposing 'dissident' armed forces; that the dissident armed forces are under a responsible command; and that they control a part of the territory so as to enable them to 'carry out sustained and concerted military operations' and to implement the Protocol.

50 Derogations from other human rights in accordance with the 1966 International Covenant on Civil and Political Rights may only occur in 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Any derogation must be only 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.

51 See, e.g., Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/19/69, 22 February 2012, §106: 'In this regard, the commission notes that, at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified.'

52 See, e.g., UNAMA, *Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict*, February 2012, p iv. See also in this regard, A. Bellal, G. Giacca and S. Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan', 93 IRRC 881 (2011).

Recruiting children under 15 years old is a war crime. It is prohibited to attack civilian objects. Civilian objects are any buildings or areas that are not lawful military objectives. Indiscriminate attacks, namely attacks that do not distinguish between military objectives and civilians and/or civilian objects, are prohibited. Use of indiscriminate weapons, or weapons 'of a nature to cause superfluous injury or unnecessary suffering', is prohibited. Violating any of these rules may constitute a war crime.

Attacks against lawful military objectives (military personnel or equipment) are prohibited if they may be expected to cause 'excessive' harm to either civilians or civilian objects, or a combination of both, in relation to the concrete and direct military advantage anticipated. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Enforced disappearances are prohibited. Hostages shall not be taken. Arbitrary deprivation of liberty is prohibited. Anyone detained by a party to an armed conflict must be treated humanely and in accordance with their sex, age, and religious beliefs. Murder, torture, rape, bodily injury or other cruel, humiliating or degrading treatment is prohibited. Summary or arbitrary executions are prohibited. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. This includes a defendant's right to know the charges against him/her, to understand the court proceedings, to have the opportunity to conduct a genuine defence and to be able to appeal against both conviction and sentence. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

4. WHICH ARMED CONFLICTS OCCURRED IN 2018?

The following tables summarize the 18 IACs and 51 NIACs that took place in 2018.

A. INTERNATIONAL ARMED CONFLICTS IN 2018

In addition to the conflict between India and Pakistan, *The War Report* considers, in line with the Rule of Law in Armed Conflicts project (rulac.org), that there is arguably a parallel international armed conflict between Ukraine and Russia, as well as a series of international armed conflicts between Syria and the different states composing the international coalition conducting airstrikes in Syria (the US, Belgium, Canada, Denmark, France, Germany, Italy, Jordan, Morocco, Netherlands, Saudi Arabia, Turkey, the United Arab Emirates and the United Kingdom). In addition, there have been a series of short-lived international armed conflicts between Libya and Egypt, Israel and Syria, Israel and Iran (on Syrian territory) as well as between Turkey and Iraq.

Table 1. Active Conflicts in 2018

Conflict no	Location of conflict	Parties to conflict
1	India and Pakistan	India v Pakistan
2	Ukraine	Ukraine v Russia
3	Syria	International coalition v Syria
4	Syria	Iran v Israel
5	Syria	Israel v Syria
6	Libya	Egypt v Libya
7	Iraq	Turkey v Iraq

Table 2. Belligerent Occupations in 2018

Conflict no	Location of occupation	Occupier
8	Azerbaijan	Armenia
9	Cyprus	Turkey
10	Eritrea	Ethiopia
11	Georgia	Russian Federation
12	Lebanon	Israel
13	Moldova	Russian Federation
14	Palestine	Israel
15	Syria	Israel
16	Syria	Turkey
17	Ukraine	Russian Federation
18	Western Sahara	Morocco

The occupation of Eritrea by Ethiopia is debatable as discussed in the section on the conflict (p.37)

B. NON-INTERNATIONAL ARMED CONFLICTS IN 2018

At least 51 NIACs in 23 states occurred in 2018. Arguably, new conflicts broke out in 2018 between India and four different armed groups in the northeast of the country.

Conflict no	Conflict location	Parties to conflict
19	Afghanistan	Afghanistan and the USA v Quetta Shura Taliban
20	Afghanistan	Afghanistan v Haqqani Network
21	Afghanistan	Afghanistan v Islamic State in Afghanistan (Khorasan branch, IS-K)
22	CAR	MINUSCA v the Coalition (FPRC, RPRC, MPC, Anti-Balaka, MLCJ)

Conflict no	Conflict location	Parties to conflict
23	CAR	MINUSCA v several armed groups, incl. UPC, 3R, RJ MNLC FDPC
24	Colombia	Colombia v National Liberation Army (ELN)
25	Colombia	Colombia v Popular Liberation Army (EPL)
26	Colombia	Colombia v Gaitanista Self-Defense Forces of Colombia (AGC)
27	Colombia	Colombia v Eastern Bloc of the FARC-EP (dissident)
28	DRC	DRC (with support of MONUSCO) v Allied Democratic Forces/Alliance des Patriotes pour un Congo Libre et Souverain (APCLS)
29	DRC	DRC (with support of MONUSCO) v Democratic Forces for the Liberation of Rwanda (FDLR)
30	DRC	DRC (with support of MONUSCO) v The Nduma Defense of Congo (NDC)
31	DRC	DRC (with support of MONUSCO) v The Nduma Defense of Congo-Rénové (NDC-R)
32	DRC	DRC (with support of MONUSCO) v Allied Democratic Forces (ADF-Nalu)
33	DRC	DRC (with support of MONUSCO) v National Council for Renewal and Democracy (CNRD – Ubwiyunge)
34	DRC	DRC (with support of MONUSCO) v National People's Coalition for the Sovereignty of Congo (CNPSC)
35	Egypt	Egypt v Wilayat Sinai ('State of Sinai' or 'Province of Sinai', known as Ansar Beit al-Maqdis)
36	India	India v Naxalite Maoists
37	India	India v The United Liberation Front of Asom (ULFA/ ULFA-Independent)
38	India	India v National Democratic Front of Bodoland (NDFB)/ later NDFB-Songbijit
39	India	India v People's United Liberation Front (PULF)
40	India	India v National Socialist Council of Nagaland (NSCN-IM, and NSCN-K)
41	Iraq	Iraq v Islamic State (IS)
42	Libya	Libya v several armed groups, including Libya Shield and Ansar al-Sharia
43	Libya	Libya (with support of the USA) v IS
44	Mali	Mali, supported by France, the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and by militias of the Movement for the Salvation of Azawad (MSA) and the Imghad Tuareg Self-Defense Group and Allies (GATIA) v Jama'at Nusrat al-Islam wal-Muslimin (JNIM) and the Islamic State in the Greater Sahara (ISGS).
45	Mali	Dan Nan Ambassador v the Alliance for the Salvation of the Sahel
46	Mexico	Mexico v the Jalisco Cartel New Generation
47	Myanmar	Myanmar v various armed groups, incl. KIA, TNLA, MN-DAA, AA, ARSA and DKBA
48	Nigeria	Nigeria, with the support of Bénin, Cameroon, Niger and Chad v Boko Haram
49	Pakistan	Pakistan v Tehrik-e-Taliban Pakistan (TTP), incl. IS-K, Jamaa-ur-Ahrar, Lashkar-e-Jhangvi and TTP splinter groups
50	Philippines	Philippines v various armed groups, incl. Abu Sayyaf Group, BIFF, Maute Group

Conflict no	Conflict location	Parties to conflict
51	Philippines	Philippines v New People's Army (NPA)
52	Somalia	Somalia, AMISOM, Burundi, Djibouti, Ethiopia, Kenya, Uganda and USA v al-Shabaab
53	S. Sudan	South Sudan v Sudan People's Liberation Army (dissident faction)
54	Sudan	Sudan v SPLM/A-North
55	Sudan	Sudan v Justice and Equality Movement (JEM)
56	Syria	Syria, Russian Federation v Free Syrian Army
57	Syria	Syria v Jabhat al-Sham (former al-Nusra Front)
58	Syria	Syria v Ahrar al-Sham
59	Syria	Syria, Russian Federation v IS
60	Syria	YPG-YPJ v IS
61	Syria	Free Syrian Army v Hezbollah
62	Syria	Turkey v YPG-YPJ
63	Thailand	Thailand v Patani Malay National Revolutionary Front (BRN)
64	Turkey	Turkey v Kurdish Worker's Party (PKK)
65	Ukraine	Ukraine v Donetsk People's Republic and Luhansk People's Republic
66	Yemen	Yemen, with the support of Bahrain, Jordan, Egypt, Kuwait, Saudi Arabia, Sudan, UAE, USA v al-Houthi
67	Yemen	al-Houthi v al-Qaeda in the Arabian Peninsula (AQAP)
68	Yemen	Yemen, with the support of USA and UAE v AQAP
69	Yemen	Yemen v the Southern Movement

PART 2

KEY DEVELOPMENTS OF SELECTED ARMED CONFLICTS IN 2018⁵³

⁵³ The selection of armed conflicts has been made according to relevant facts which, we believe, have an impact on the legal situation of the armed conflict concerned. For a complete list of armed conflicts, see pp 32–34 above.

SELECTED INTERNATIONAL ARMED CONFLICTS

1. THE ERITREA-ETHIOPIA ARMED CONFLICT

Tadesse Kebebew

Classification of the Conflict

Eritrea and Ethiopia were engaged in an international armed conflict (IAC), which began in May 1998 and was formally brought to an end by an Agreement on 12 December 2000.⁵⁴ However, the relevant rules of international humanitarian law (IHL), particularly those relating to the treatment of persons, continue to apply for protected persons. On 13 April 2002, the Eritrea-Ethiopia Boundary Commission (EEBC) decided that most of the disputed territory, in particular on the western front, belongs to Eritrea.⁵⁵ Nevertheless, Ethiopia continues to occupy those parts of the territory, and thus, as enunciated under Common Article 2(2) to the Geneva Conventions (GCs) of 1949, the law of occupation applies.

A. HISTORY OF THE CONFLICT

1. Background

From the late 1880s, Italy consolidated its power around the coastal area at Assab and Massawa, and was able to settle in Eritrea without much difficulty.⁵⁶ Between 1889 and 1941, Eritrea remained an Italian colony until Italy joined the Axis powers during World War II, which caused British forces to attack Italian forces and take control of Eritrea in 1941.⁵⁷ Eritrea was then under British military administration until 1952. In 1950, the United Nations resolved to establish Eritrea as an autonomous entity federated with Ethiopia as a compromise between Ethiopian claims of sovereignty and Eritrean aspirations for independence.⁵⁸ On 11 September 1952, with the ratification of the Federal Act by Emperor Haile Selassie of Ethiopia, the Eritrean Constitution entered into force and the Federation was formally established.⁵⁹

⁵⁴ See Eritrea-Ethiopia Claims Commission (EECC), Decision no 1: The Commission's Mandate/Temporal Scope of Jurisdiction, 15 August 2001, <https://pcacases.com/web/sendAttach/769> (last accessed 2 December 2018).

⁵⁵ Eritrea-Ethiopia Boundary Commission (EEBC), Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 13 April 2002, http://www.haguejusticeportal.net/Docs/PCA/Ethiopia-Eritrea%20Boundary%20Commission/Decision_13-4-2002.pdf (last accessed 2 December 2018).

⁵⁶ Historyworld, 'History of Eritrea' <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad18> (last accessed 2 December 2018).

⁵⁷ 'Eritrea Country Profile', BBC News, 15 November 2018, <https://www.bbc.co.uk/news/world-africa-13349078>.

⁵⁸ The details of Eritrea's association with Ethiopia were established by the UNGA Res 390A (V), 2 December 1950.

⁵⁹ *The United Nations and the Independence of Eritrea*, The United Nations Blue Books Series, vol XII, 1996, p 42.

However, 10 years later in 1962, the Federation was abrogated. For some, it was the Ethiopian parliament and Eritrean Assembly which unanimously passed the decision,⁶⁰ while for others it was Emperor Haile Selassie who dissolved the Eritrean parliament and declared Eritrea's federal status void.⁶¹ The dissolution of the Federation resulted in the incorporation of Eritrea into Ethiopia as its fourteenth province.⁶² The dissolution is claimed to have triggered a 32-year armed struggle for the independent state of Eritrea. In fact, it was before the dissolution that the armed resistance groups (the Eritrean Liberation Movement (in Sudan) and Eritrean Liberation Front (in Cairo)) were started in exile by groups who were anti-federation (the Independence Bloc) and others who claimed a systematic erosion of Eritrean rights under the Federation.⁶³

The alliance of the Eritrean People's Liberation Front and a coalition of Ethiopian resistance movements eventually defeated the forces of Haile Selassie's communist successor, Mengistu Haile Mariam, in 1991. Two years later, a referendum was held in which Eritreans voted almost unanimously in favour of independence. Despite the establishment of a new Eritrean state, the boundary demarcation was not properly undertaken, and economic and social relations continued. Initial disputes on economic issues, however, soured the relationship. The porous and unlimited border increasingly became an issue. In May 1998, one of the bloodiest conflicts in Africa broke out between Eritrea and Ethiopia around the town of Badme, which later expanded across all the boundaries.

2. The Ethiopia-Eritrea War, 1998–2000

The referendum of 1993 and the ensuing secession of Eritrea left Ethiopia landlocked. Besides, little was done to develop institutions required to manage important interstate interests including trade, the use of ports and the question of citizenship.⁶⁴ Following the reassertion of Ethiopian sovereignty over Eritrea in 1952 and unification in 1962, the colonial boundary was abolished and became an administrative division. Prior to the conflict, the border was poorly delimited.⁶⁵ Generally, the border had 'an unusually troubled history'.⁶⁶

60 See J. Markakis and G. C. Last, 'Eritrea', last updated 29 November 2018, <https://www.britannica.com/place/Eritrea> (last accessed 2 December 2018); S. Haile, 'The Origins and Demise of the Ethiopia-Eritrea Federation, 15 *African Issues*, 15; Y. Ghebrehiwet, 'Eritrea: The Federal Arrangement Farce', *Awate*, 14 December 14 2013, <http://awate.com/eritrea-the-federal-arrangement-farce/>.

61 See *The United Nations and the Independence of Eritrea*, pp 13, 42; International Crisis Group, *Ethiopia and Eritrea: Preventing War*, Africa Report no 101, 22 December 2005, p 2, <https://www.crisisgroup.org/africa/horn-of-africa/ethiopia-and-eritrea-preventing-war> (last accessed 2 December 2018); Eritrean Human Rights Electronic Archive (EHREA), <http://www.ehrea.org/1952.php> (last accessed 2 December 2018).

62 This occurrence was described by some as the Ethiopian 'annexation' of Eritrea. See, e.g., Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 2.

63 See *The United Nations and the Independence of Eritrea*, p 13.

64 S. Healy and M. Plaut, *Ethiopia and Eritrea: Allergic to Persuasion*, Chatham House, Africa Programme, January 2007, p 2, <https://www.chathamhouse.org/sites/default/files/public/Research/Africa/bpethiopiaeritrea.pdf> (last accessed 2 December 2018).

65 Project Ploughshares, 'Ethiopia-Eritrea (1998–2001)', updated February 2002, http://ploughshares.ca/pl_armedconflict/ethiopia-eritrea-1998-2001/ (last accessed 2 December 2018).

66 Healy and Plaut, *Ethiopia and Eritrea*, p 3.

Gradually, the relationship between Eritrea and Ethiopia became tense, and at times relations deteriorated into open confrontation and clashes, which ruptured all informal channels of communication between the political elites of the two countries.⁶⁷ In 1998, relations worsened unexpectedly and border skirmishes spiralled into a full-fledged war around a border village of Badme. The Eritrea-Ethiopia Claims Commission (EECC) confirmed that, in May and June 1998, Eritrea started the war by forcefully occupying border areas – some contested, others not – in violation of Article 2(4) of the UN Charter.⁶⁸ In February 1999, fighting between the two countries resumed with each deploying hundreds of thousands of troops in trenches along the contested border,⁶⁹ backed by heavy artillery from massive armaments on both sides.⁷⁰

Between May 1998 and 2000, the two countries were involved in a devastating large-scale IAC along their common frontier, which was described by many as being as pointless as 'two bald men fighting over a comb'.⁷¹ Though the figures given in different reports vary, the total number of deaths of both soldiers and civilians is estimated to be around 70,000.⁷² As per reports of international organizations, other war victims included an estimated 75,000 Ethiopians of Eritrean origin whom Ethiopia forcibly expelled on national security grounds without any hearing or appeal. Eritrea expelled and/or repatriated an estimated 70,000 Ethiopian residents, despite its claims that it had no official expulsion policy.⁷³ The UN Secretary-General's (UNSG) report estimates that the Eritrean and Ethiopian war displaced at least 1.2 million people, 70 percent of whom were women, children and the elderly.⁷⁴

3. The Peace Process and the Final Algiers Agreement

a. The Organization of African Unity Framework Agreement and its Modalities

At the Algiers summit in July 1999, the Organization of African Unity (OAU) presented a Framework Agreement based on the following principles: the resolution of the present crisis and any other dispute through peaceful and legal means in accordance with the principles enshrined in the Charter of the OAU; the rejection

67 *Ibid*, p 2.

68 EECC, Partial Award, *Jus Ad Bellum* Ethiopia's Claims 1–8, 19 December 2005, §16. The EECC rightly ruled that since there had been no armed attack against Eritrea, its attack on Ethiopia and the settling of border disputes by the use of force could not be considered lawful self-defence.

69 Project Ploughshares, 'Ethiopia-Eritrea (1998–2001)'.

70 C. Pineau, 'Eritrea-Ethiopia Peace: Seismic Shifts Throughout a Strategic Zone', Center for Strategic and International Studies, 25 July 2018, <https://www.csis.org/analysis/eritrea-ethiopia-peace-seismic-shifts-throughout-strategic-zone> (last accessed 2 December 2018).

71 Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 2.

72 Project Ploughshares, 'Ethiopia-Eritrea (1998–2001)'.

73 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, Africa Report no 68, 24 September 2003, p 5, <https://d2071andvip0wj.cloudfront.net/68-ethiopia-and-eritrea-war-or-peace.pdf> (last accessed 2 December 2018).

74 UNSC, Report of the Secretary-General on Ethiopia and Eritrea, UN doc S/2000/643, 30 June 2000, §11.

of the use of force as a means of imposing solutions to disputes; and respect for the borders existing at independence, as stated in Resolution AHG/Res16(1) adopted by the OAU summit in Cairo in 1964, and their being determined on the basis of pertinent colonial treaties and applicable international law.⁷⁵

In addition, both countries were required to redeploy their forces outside the territories they occupied after 6 May 1998. The Agreement also called for the demilitarization and delimitation of the entire common border between the two countries.⁷⁶ This was also emphasized in the Modalities for the Implementation of the OAU Framework Agreement on the Settlement of the Dispute between Ethiopia and Eritrea.⁷⁷

After further consultations with the parties concerned, Mr Ahmed Ouyahia, Special Envoy of the then Chairman of the OAU, Ambassador Mohamed Sahnoun and Mr Anthony Lake, representative of the President of the United States, reviewed and finalized the document Technical Arrangements for the Implementation of the OAU Framework Agreement and its Modalities.⁷⁸ The Technical Arrangements also called for the establishment of a neutral commission to determine the precise areas from which the two sides were to redeploy, the deployment of, inter alia, military observers to verify the envisaged redeployments and the demilitarization and delimitation of the entire common border between the two countries.⁷⁹ Both parties accepted the Framework Agreement and the Modalities of Implementation but Ethiopia expressed concern regarding the Technical Arrangements prepared by the OAU, the UN and the US.⁸⁰

Despite all the diplomatic efforts, on 12 May 2000, the fighting erupted again as Ethiopia launched another offensive. Then, the UN Security Council (UNSC) passed a resolution expressing concern over the renewed fighting and noted that the new outbreak of violence had serious humanitarian implications for the civilian populations of both countries.⁸¹ On 17 May 2000, the UNSC imposed measures aimed at preventing the supply of weapons or arms-related assistance to the two countries.⁸² It also demanded the earliest possible reconvening, without preconditions, of substantive peace talks, under the auspices of the OAU, on the basis of the

75 OAU High Level Delegation Proposals for a Framework Agreement for a Peaceful Settlement of the Dispute between Eritrea and Ethiopia, 8 November 8 1998, <http://www.dehai.org/conflict/oau/oau-framework-11-98.htm> (last accessed 2 December 2018).

76 Ibid, paras 3, 5.

77 See Modalities for the Implementation of the OAU Framework Agreement on the Settlement of the Dispute between Ethiopia and Eritrea, endorsed by the the 35th OAU Heads of State and Government Summit in Algiers on Wednesday, 14 July 1999.

78 United Nations Mission in Ethiopia and Eritrea (UNMEE), 'Background', <https://unmee.unmissions.org/background> (last accessed 2 December 2018).

79 Technical Arrangements for the Implementation of the OAU Framework Agreement and its Modalities, 31 August 1999, §8, <http://www.peaceau.org/uploads/technical-arrangements-31-08-1999.pdf> (last accessed 2 December 2018).

80 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, p 4.

81 Preamble, UNSC Res 1297, 12 May 2000, §8.

82 UNSC Res 1298, 17 May 2000, §6(a).

Framework Agreement and its Modalities and the work conducted by the OAU so far, which would conclude a peaceful definitive settlement of the conflict.⁸³

b. The Agreement on Cessation of Hostilities

Ethiopia's massive offensive broke Eritrea's defensive line in numerous places, bombing ports and airports, and disrupting supply lines, including those through which humanitarian aid was flowing, necessitating urgent diplomatic measures.⁸⁴ The efforts culminated in the signing of a ceasefire agreement between Eritrea and Ethiopia on 18 June 2000.⁸⁵

The agreement obliged the parties to immediately cease hostilities and redeploy forces to their positions before 6 May 1998. Eritrea was to maintain its forces at a distance of 25 kilometres from positions to which the Ethiopian forces were expected to be redeployed, creating a zone of separation called the 'temporary security zone'.⁸⁶ The agreement specified that violations of the ceasefire could trigger sanctions against the offending party.⁸⁷ As Ambassador Legwaila Joseph Legwaila, Special Representative of the UNSG, told the International Crisis Group in 2005, 'Ethiopia and Eritrea have been very faithful to their ceasefire'.⁸⁸

The parties also called upon the UN, in cooperation with the OAU, to establish a peacekeeping operation to assist in the implementation of the agreement. They guaranteed free movement and access for the peacekeeping mission and its supplies, as required, through their territories and promised to respect its members, installations and equipment.⁸⁹ On 31 June 2000, the UNSC decided to establish the UN Mission in Ethiopia and Eritrea (UNMEE), consisting of up to 100 military observers and the necessary civilian support staff in anticipation of a peacekeeping operation subject to future authorization.⁹⁰ On 15 September 2000, the UNSC authorized the deployment of 4,200 troops for the UNMEE. In general, this agreement paved the way for the signing of the Algiers Peace Agreement (Algiers Agreement) on 12 December 2000.

c. The Algiers Agreement of December 2000

Following the ceasefire and the initial UNMEE deployment, the representatives of the two countries met for a second time in Algiers and signed a comprehensive

83 Ibid, §4.

84 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, p 4.

85 Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Algiers, 18 June 2000 (Agreement on Cessation of Hostilities), pp 86–88.

86 Ibid, §12.

87 Ibid, §14(a).

88 Cited in Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 1.

89 Agreement on Cessation of Hostilities, §1.

90 UNSC Res 1312, 31 July 2000.

peace agreement on 12 December 2000.⁹¹ Article 1 of the Algiers Agreement states that '[t]he parties shall permanently terminate military hostilities between themselves. Each party shall refrain from the threat or use of force against the other.' Thus, it formally ended the war between the two countries.

Building on the OAU Framework Agreement, the Algiers Agreement made provision for mechanisms to delimit and demarcate the border,⁹² provided for a Claims Commission to address war reparations and compensation claims (Article 5) and an independent commission to determine the root cause of the conflict (Article 3, this part of the agreement was not operationalized).⁹³ The Algiers Agreement was a model of its kind, where parties involved in an armed conflict and their relationships already broken down were able to reach an agreement on setting up a commission to address an issue as sensitive as violations of IHL.⁹⁴ Interestingly, both parties also agreed that the decision on delimitation and demarcation would be final and binding.⁹⁵

The International Committee of the Red Cross (ICRC), which promotes the application of and compliance with the GCs, was entrusted by the Algiers Agreement with the task of supervising the release and repatriation of prisoners of war (POWs) and other persons detained in connection with the conflict.⁹⁶

4. The Deployment of the Peacekeeping Operation

Under the Cessation of Hostilities Agreement, Eritrea and Ethiopia requested the deployment of a UN peacekeeping mission to monitor the cessation of hostilities, the redeployment of Ethiopian forces and the temporary security zone, and to ensure observance of the security commitments agreed to by the two parties.⁹⁷ Welcoming the report of the UNSG, the UNSC decided to establish the UNMEE consisting of up to 100 military observers and necessary civilian support staff in anticipation of a peacekeeping operation subject to future authorization.⁹⁸ Later, the UNSC authorized the deployment of up to 4,300 troops.⁹⁹

As outlined under UNSC Resolution 1320 (2000), the mandates of the UNMEE included, inter alia, the monitoring of the cessation of hostilities, the redeployment of Ethiopian and Eritrean forces and their positions once redeployed and the tem-

91 Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (Algiers Agreement), Algiers, 12 December 2000, pp 94–99.

92 Art 4, Algiers Agreement. Delimitation refers to the process of establishing the course of the border on maps, while demarcation is the physical identification of the border on the ground.

93 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, p 6.

94 Healy and Plaut, *Ethiopia and Eritrea*, p 2.

95 Art 4(15), Algiers Agreement.

96 Art 2(2), *ibid.*

97 Agreement on Cessation of Hostilities, §3.

98 UNSC Res 1312, §1.

99 UNSC Res 1320, 15 September 2000, §2.

porary security zone. Subsequent to the decision of the EEBC in April 2002, the UNSC decided to adjust the mandate of the UNMEE in order to assist the EEBC in the expeditious and orderly implementation of its delimitation decision, and included demining in key areas to support demarcation, and administrative and logistical support for the Field Offices.¹⁰⁰ The subsequent resolution urged the parties to assume their responsibilities, fulfil their commitments under the Algiers Agreement and cooperate fully with the EEBC.¹⁰¹

Although both countries did not formally withdraw their consent, the UNMEE's operational ability was gradually hamstrung due to the explicit and implicit withdrawal of support, which eventually led to untenable restrictions on its ability to perform its core mandate.¹⁰² As clearly pointed out in the report of the UNSG on 3 January 2006, there was a serious deterioration of the security and political situation in the UNMEE area as a result of 'an accumulation of unresolved issues', including the stalemate in the demarcation process caused by Ethiopia's refusal to fully accept, without preconditions, the decision of the EEBC and the increasing restrictions imposed on the UNMEE by the Eritrean authorities, including a ban on all its helicopter flights within Eritrean airspace.¹⁰³ Eritrea also expelled 180 UNMEE staff from the USA, Canada and Europe, including the Russian Federation, in December 2005.¹⁰⁴

On account of the crippling operational and administrative restrictions imposed on the UNMEE, the UNSC unanimously adopted Resolution 1827 and terminated its mandate in 2008. The Resolution also called on both countries 'to show maximum restraint and refrain from any threat or use of force ... and to avoid provocative military activities'.¹⁰⁵ The termination of the UNMEE mandate was contrary to what was contemplated in the Algiers Agreement, i.e. 'the mandate of the Peacekeeping Mission shall terminate when the delimitation-demarcation process of the border has been completed'.¹⁰⁶ The UNMEE did not meet its final goal and a study revealed that the 'UNMEE's lack of a political component ... and its structural detachment from other instruments deemed central to the peace process were detrimental not only to the mission and the perception of UN, but also to the conflict, by shifting the focus from a comprehensive solution to the conflict and border issue'.¹⁰⁷

100 UNSC Res 1430, 14 August 2002, §1.

101 See, e.g., UNSC Res 1466, 14 March 2003.

102 See J. H. Sande Lie, *UNMEE: Deterioration and Termination*, Norwegian Institute of International Affairs, 2009, p 5, https://www.files.ethz.ch/isn/137322/19_2009.pdf (last accessed 2 December 2018); Healy and Plaut, *Ethiopia and Eritrea*, p 5.

103 UNSC, Report of the Secretary-General on Ethiopia and Eritrea, UN doc S/2006/1, 3 January 2006, §2.

104 'UN Relocates Expelled Staff from Eritrea to Ethiopia, IRIN, 15 December 2005, <http://www.irinnews.org/report/57575/horn-africa-un-relocates-expelled-staff-eritrea-ethiopia>.

105 UNSC Res 1827, 30 July 2008, §1.

106 Agreement on Cessation of Hostilities, §5. It was also against the recommendations proposed by the UNSG, see Security Council Report, 'Update Report No. 8: Ethiopia-Eritrea', 28 June 2008, https://www.securitycouncilreport.org/update-report/lookup_c_glkwlemtisg_b_4284791.php (last accessed 2 December 2018).

107 See Sande Lie, *UNMEE*.

5. The Eritrea-Ethiopia Boundary Commission (EEBC)

The establishment of a neutral boundary commission composed of five members was one of the core components of the Algiers Agreement. The EEBC was mandated to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and ‘applicable international law’, but not *ex aequo et bono* (on the basis of justice and equity).¹⁰⁸ The use of colonial treaties as the basis for determining borders is consistent with a regional customary law enshrined in Resolution AHG/Res.16(1) adopted by the OAU in Cairo in 1964. Notably, the Agreement stipulated that ‘the delimitation and demarcation determinations of the EEBC shall be *final and binding*. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party’.¹⁰⁹

The border area between Eritrea and Ethiopia had overlapping and competing influences and the border remains murky. Also, there was confusion over nomenclature, territorial reconfigurations and a variety of contradictory maps.¹¹⁰ As noted by the EEBC, ‘[t]here is no generally agreed map of the area depicting place names with any degree of reliability’,¹¹¹ none of the boundaries were demarcated nor, to varying degrees, fully delimited.¹¹²

After examining the merits of the territorial claims of both countries, the EEBC delivered its delimitation decision on 13 April 2002. Yet, the location of the flash-point town of Badme was initially not manifest, as the ruling failed to indicate it either in its text or accompanying maps (they only gave the coordinates of the line along which the border would run), which led to confusion as both sides claimed victory. The EEBC soon clarified its decision by affirming that Badme belongs to Eritrea.¹¹³ The manner in which the EEBC set aside the explicit text of the 1902 treaty by accepting River ‘Meeteb’¹¹⁴ as a point of reference for border delimitation instead of River ‘Maiteb’, raised some questions about its treaty interpretation.¹¹⁵

Eritrea accepted the decision. Invoking the language of the Algiers Agreement, Eritrea has always maintained that the EEBC’s ruling is final and binding and has to be implemented in full without any precondition.¹¹⁶ It has accordingly repeatedly called on the international community to enforce the Algiers Agreement and its ruling on the boundaries.¹¹⁷

108 Art 4.2, Algiers Agreement, 12 December 2000.

109 Art 4.15, Algiers Agreement (emphasis added).

110 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, p 2.

111 EEBC, Decision Regarding Delimitation of the Border, §4.63.

112 EEBC, Decision Regarding Delimitation of the Border, §2.7.

113 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, p 6 (the area known as the Badme Plains was largely Ethiopian, but the village of Badme was inside Eritrea); Healy and Plaut, *Ethiopia and Eritrea*, p 3.

114 EEBC, Decision Regarding Delimitation of the Border, §5.42.

115 See, e.g., L. Anebo, ‘The Fallacy of Virtual Demarcation as a Primary Scheme of International Land Boundary Setting: Why the Eritrea/Ethiopia Boundary Conflict Remains Unresolvable’, 24 *Willamette J. Int’l L. & Dis. Res.*, 2017, 268–271.

116 See, e.g., Eritrea Ministry of Information, ‘Ethiopia Must Unconditionally Withdraw from Sovereign Eritrean Territories Including the Town of Badme’, 11 April 2017, <http://www.shabait.com/category/blog/23781> (last accessed 2 December 2018).

117 See, e.g., M. Plaut, ‘Are Ethiopia and Eritrea Heading Back to War?’, *BBC News*, 21 March 2012, <https://www.bbc.com/news/world-africa-17433871>.

Yet, Ethiopia denied to honour the award and after some time only accepted the decision ‘in principle’. However, it backtracked from its commitment and insisted on the need for further deliberation before withdrawing troops from the disputed areas.¹¹⁸ Ethiopia showed equivocation over a ‘final and binding’ delimitation by launching a subsequent legal and political campaign to reverse or alter the decision, and started a labyrinthine diplomatic brinkmanship to see if it could extract concessions at the demarcation stage.¹¹⁹ First, it submitted a Request for Interpretation, Correction and Consultation, claiming that errors had been made and adjustments would be required during the demarcation phase.¹²⁰ Eritrea objected to the move, arguing that such a claim was inconsistent with the Algiers Agreement.¹²¹ The EEBC replied that ‘the provisions of Articles 28 and 29 of the Rules of Procedure neither allow substantive amendment nor affect the binding quality of the Decision as rendered on 13 April 2002. Re-argument of the case is not permitted’, and that Ethiopia’s request was inadmissible and no further action was taken upon it.¹²²

Second, on 24 January 2003, Ethiopia submitted a 141-page document to the EEBC explaining that it had only accepted the Commission’s Decision on the understanding that the ‘straight-line segment between Points 6 and 9 (Badme line) would be refined during demarcation’ so as to put Badme inside Ethiopia.¹²³ The Commission emphasized that in ‘a number of significant respects, the comments amounted to an attempt to reopen the substance of the April Decision’.¹²⁴ For the Commission, the ‘main thrust of the Ethiopian comments [was] that the boundary should be varied so as to take better account of human and physical geography’, but went beyond its power as it could not decide matters *ex aequo et bono*.¹²⁵

Third, Ethiopia suspended its cooperation with the EEBC and appealed instead to the UNSC on 19 September 2003. The letter from the Ethiopian Prime Minister, Meles Zenawai, to the UNSG referred to the EEBC’s ‘illegal, unjust and irresponsible decisions on Badme and parts of the Central Sector’ as ‘a blatant miscarriage of justice’. It requested ‘an alternative mechanism to demarcate the contested parts of the boundary in a just and legal manner so as to ensure lasting peace in the

118 Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 14: ‘the gap between acceptance of the Decision “in principle” and in practice remains a significant obstacle to peace’.

119 Crisis Group, *Ethiopia and Eritrea: War or Peace?*, pp 1, 6.

120 The Federal Democratic Republic of Ethiopia, Eritrea/Ethiopia Boundary Arbitration: Request for Interpretation, Correction and Consultation, 13 May 2002, <http://www.aigaforum.com/ethio1.pdf> (last accessed 2 December 2018).

121 See A. Welde Giorgis, *Eritrea at a Crossroads: A Narrative of Triumph, Betrayal and Hope*, Strategic Book Publishing and Rights Co, 2014, p 584.

122 EEBC, Decision Regarding the ‘Request for Interpretation, Correction and Consultation’ Submitted by Federal Democratic Republic of Ethiopia Submitted on 13 May 2002, 24 June 2002, p 4, <http://pcacases.com/web/sendAttach/799> (last accessed 2 December 2018).

123 Cited in Welde Giorgis, *Eritrea at a Crossroads*, p 588.

124 Annex I, Report of the Secretary-General on Ethiopia and Eritrea, Eighth Report of the Eritrea-Ethiopia Boundary Commission, UN doc S/2003/257, §3, 6 March 2003.

125 Ibid, §4.

region'.¹²⁶ The UNSC, however, indicated that 'only the full implementation of the Algiers Agreements will lead to sustainable peace', and called upon Ethiopia to cooperate promptly and in full and with the EEBC and its field officers so that demarcation could proceed in all sectors.¹²⁷ The EEBC described Ethiopia's letter as a repudiation of Ethiopia's repeated acceptance of the Commission's decision.¹²⁸

Finally, on 25 November 2004, Ethiopia came up with a 'five-point peace proposal', which, inter alia, called for an immediate start of a dialogue with a view to implementing the Boundary Commission's decision in a manner consistent with the promotion of sustainable peace and brotherly ties between the two peoples.¹²⁹ Ethiopia also maintained that this 'does not mean going back to the drawing board, and it does not imply that we are introducing a precondition'.¹³⁰ The International Crisis Group observed that there was no 'new substance' in such a proposal, and quoted Eritrea's view on it: 'a public relations exercise designed to gain international support'.¹³¹ The 'reasonable-sounding plan' brushed aside the exclusive mandate of the EEBC enshrined in the Algiers Agreement.¹³² Sir Elihu Lauterpacht, the President of the EEBC, pointed out that 'Ethiopia is dissatisfied with the substance of the Commission's Delimitation Decisions and has been seeking, ever since April 2002, to find ways of changing it'.¹³³ It is worth mentioning that the UNSC passed numerous resolutions demanding that Ethiopia begin the implementation of demarcation by taking the necessary steps to enable the Commission to demarcate the border completely and promptly, without preconditions.¹³⁴

In general, Ethiopia's failure to cooperate, contrary to the Algiers Agreement, and objection in particular to the transfer of Badme, as well as Eritrea's obstinacy during the demarcation stage, set the stage for a stalemate.¹³⁵ When all avenues to progress were blocked, the EEBC, after giving notice to the parties about its in-

126 Letter of Ethiopian Prime Minister Meles Zenawi to UN Secretary General Kofi Annan, 19 September 2003, UN doc S/2010/225, Attachment 2, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20225.pdf> (last accessed 2 December 2018).

127 UNSC Res 1507, 12 September 2003.

128 Letter dated 7 October 2003 from the President of the Eritrea-Ethiopia Boundary Commission to the Secretary-General, UN doc S/2003/1186, Appendix 1, <http://dehai.org/demarcation-watch/articles/EEBC-Oct-7-2003-letter.pdf> (last accessed 2 December 2018).

129 The text of the five-point proposal is included in UNSC, Progress Report of the Secretary-General on Ethiopia and Eritrea, UN doc S/2004/973, 16 December 2004, §14.

130 See Annex to the Letter Dated 31 October 2005 From the Chargé d'affaires a.i. of the Permanent Mission of Ethiopia to the United Nations addressed to the President of the Security Council, UN doc S/2005/690, 1 November 2005.

131 Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 6.

132 Healy and Plaut, *Ethiopia and Eritrea*, p 5.

133 Letter dated 27 November 2006 from the President of the Commission to the Minister of Foreign Affairs of Ethiopia, UN doc S/2007/33, Enclosure, <http://dehai.org/demarcation-watch/eebc/EEBC-Letter-Ethiopia-Nov-27-2006.pdf> (last accessed 2 December 2018).

134 See, e.g., UNSC Resolution 1586, 14 March 2005.

135 Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 1. Note that Art 4(14) of the Algiers Agreement requires the parties to cooperate with the EEBC.

tention to using 'modern techniques of image processing and terrain modelling', proceeded with virtual boundary demarcation, and ruled that the boundary described on the maps would automatically stand as demarcated and the mandate of the Commission would be regarded as fulfilled.¹³⁶ On 30 November 2007, the EEBC sent maps indicating the demarcated boundary points to the Permanent Missions of Ethiopia and Eritrea to the UN and said it had fulfilled its mandate.¹³⁷ While Eritrea accepted the virtual demarcation, Ethiopia, for its part, rejected the decision calling it a 'legal fiction'.¹³⁸

Apart from the reluctance of the parties to cooperate on the demarcation of the boundary, the EEBC also admitted that there were indeed some anomalies in its decision, but stated that it was unable to correct them unless the parties gave it an additional mandate.¹³⁹ Meanwhile, the difficulties in the decision were also noted by Lloyd Axworthy, former Canadian Minister of Foreign Affairs and former UN Special Envoy to Eritrea and Ethiopia, who characterized the decision of the EEBC as 'something that has to be worked at' and 'needs to be developed'.¹⁴⁰ Jendayi Frazer also suggested that 'just and reasonable adjustments' be made to the EEBC's final and binding delimitation decision in demarcating the border.¹⁴¹

6. The Eritrea-Ethiopia Claims Commission (EECC)

Traditionally, claims commissions are rarely used for the disposition of war-related claims.¹⁴² Nevertheless, contemporary politics, with the prominence of human rights and IHL, appears to favour greater means of accountability.¹⁴³ The Algiers Agreement of 2000, in an extraordinary move, included the creation of a Claims Commission with a mandate to 'decide through binding arbitration all claims for loss, damage or injury by one Government against the other and by nationals ... of one party against the Government of the other party' arising from the war, or violations of the GCs or international law.¹⁴⁴ In 2001, both countries filed claims relating to the conduct of military operations, the treatment of POWs and civilians and the impact of the hostilities on civilians and their property.

136 EEBC, Statement by the Commission, 27 November 2006, §22.

137 Twenty-Seventh Report of the Eritrea-Ethiopia Boundary Commission, UN doc S/2008/630, 3 October 2008, §4.

138 African Union Peace and Security Council, Report of the Commission on Conflict Situations in Africa, PSC/HSG/2 (CXXXVIII), 29 June 2008, §31. But Eritrea accepted it, see §30.

139 EEBC, Observations of the Eritrea-Ethiopia Boundary Commission, 21 March 2003, §4.

140 A. Al-Hilweh, 'Interview with UN Special Envoy-Designate Lloyd Axworthy', *IRIN*, 5 January 2004, <http://www.irinnews.org/q-and/2004/01/05/interview-un-special-envoy-designate-lloyd-axworthy>.

141 Cited in Welde Giorgis, *Eritrea at a Crossroads*, pp 597-598.

142 G. H. Aldrich, 'The Work of the Eritrea-Ethiopia Claims Commission', 6 *Yearbook of International Humanitarian Law*, 2003, 435.

143 S. D. Murphy, W. Kidane and T. R. Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission*, Oxford University Press, 2013, p 398.

144 Art 5, Algiers Agreement.

The decisions of the EECC dealt with highly controversial matters and threw more 'light on the conduct of the war than had previously been available'.¹⁴⁵ The issues included the lawfulness of the initial resort to force, the treatment of POWs and civilian internees, the legality of means and methods of warfare used in various localities, the seizure and destruction of private property and the treatment by each side of the nationals of the other.¹⁴⁶ The work of the EECC has been lauded as principled and pragmatic in its approach in interpreting and applying IHL.¹⁴⁷ It only addressed acts which were frequent or pervasive and consequently affected significant numbers of victims,¹⁴⁸ but this approach is at variance with IHL stipulations that all violations shall result in responsibility and accountability.¹⁴⁹ This has also been criticized by some authors.¹⁵⁰

Importantly, the EECC brought to light that IHL rules were mostly respected by both parties to the conflict. It set a good precedent that 'third party establishment of the facts and impartial arbitration can show up wide-spread respect of IHL' and at the same time exonerate parties to an armed conflict from unwarranted accusations of violations of IHL.¹⁵¹ The fact that the EECC had considered issues such as the economic constraints of the parties in assessing their liability is a practical and commendable effort.¹⁵² Locating such commissions closer to the countries whose conduct is being judged, and allowing affected people to participate in the process to increase their sense of ownership, as well as improved media coverage of the proceedings, need to be taken into consideration for the future.¹⁵³

145 Healy and Plaut, *Ethiopia and Eritrea*, p 7.

146 All the rulings by the EECC can be found on the website of the Permanent Court of Arbitration, <https://pca-cpa.org/en/cases/71/> (last accessed 2 December 2018).

147 M. Sassoli, 'The Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law', in A. de Guttry, H. H. G. Post and G. Venturini (eds), *The 1998-2000 War Between Eritrea and Ethiopia*, T. M. C. Asser Press, 2009, p 350; S. Sanna, 'International Humanitarian Law and the Treatment of Protected Persons', in A. de Guttry, H. H. G. Post and Gabriella Venturini (eds), *The 1998-2000 War Between Eritrea and Ethiopia*, T. M. C. Asser Press, 2009; R. Weeramantry, 'International Decisions: Prisoner of War (Eritrea v. Ethiopia), Eritrea's Claim 17/ Ethiopia's Claim 4, Partial Awards: Central Front (Eritrea v. Ethiopia)', *Eritrea's Claims 2, 4, 6, 7, 8 and 22/ Ethiopia's Claim 2, Partial Awards*, 99 *AJIL* 2, 2005, 471.

148 See EECC, Partial Award, Prisoners of War – Eritrea's Claim 17, 1 July 2003, §56. The mandate of the EECC also covers 'all claims for loss, damage or injury ... related to the armed conflict'.

149 See Art 91, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I); Rule 149: Responsibility for Violations of International Humanitarian Law, ICRC Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149 (last accessed 2 December 2018). See also Sassoli, 'The Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law', p 347.

150 See Weeramantry, 'International Decisions', 472; Sanna, 'International Humanitarian Law and the Treatment of Protected Persons', pp 313-316; Sassoli, 'The Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law', p 347.

151 Sassoli, 'The Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law', pp 341-342.

152 Sanna, 'International Humanitarian Law and the Treatment of Protected Persons', pp 317-319.

153 Murphy et al, *Litigating War*, p 401.

7. Ethiopia's Refusal to Withdraw Its Troops From Badme

As mentioned earlier, on 13 April 2002, the EEBC decided that one of the disputed areas and the flashpoint of the war, Badme and the surrounding area, belonged to Eritrea. Ethiopia rejected this decision and, consequently, refused to withdraw its troops from the area. Eritrea accuses Ethiopia of occupying the sovereign territory of Eritrea and has called on the international community to enforce the EEBC's ruling, while Ethiopia insists that further border talks are necessary before the decision is implemented. The EEBC instructed Ethiopia that it should 'remove from Eritrean territory persons of Ethiopian origin who have moved into that territory subsequent to the date of the Delimitation Decision'.¹⁵⁴

Under international law, for a territory to be considered occupied it must be under the authority of the hostile army.¹⁵⁵ It is also generally understood that IHL rules on occupied territories apply whenever, during an armed conflict, a territory comes under the control of the enemy of the power previously controlling that territory.¹⁵⁶ Occupation arises even when the occupier does not encounter armed resistance as such (Article 2(2) common to the GCs). In addition, the fact that the occupied territory is contested or its status is unclear does not have an impact on the test of whether or not it is under military occupation. What matters is that the state whose forces established effective control was not the rightful sovereign of the territory when the conflict broke out or an invasion took place.¹⁵⁷

For an occupation to exist, hostile foreign forces must exercise *effective control*. In this regard, three elements must be fulfilled.¹⁵⁸ First, the armed forces of a foreign state should be physically present in the territory and the territorial state did not consent to their presence. Second, the presence of the foreign forces prevents the effective local government in place at the time of invasion from exercising its powers. Third, the foreign forces establish their own authority.

Despite the EEBC's delimitation decision, Eritrea and Ethiopia remained locked in a stalemate for two decades marked by sporadic skirmishes. The EEBC did not demarcate the border (except the virtual demarcation), and in fact, no territory changed hands. The question is whether this raises the issue of belligerent occupation in the territories adjacent to the border between the two countries. The continued presence of Ethiopian troops in and around the Badme area satisfies the test for occupation, as long as the *title to the territory* belongs to Eritrea, and regardless of whether border is demarcated, the law of belligerent occupation applies to ter-

154 EEBC, Order of the Commission (Made Pursuant to Article 20 and Article 27(1) of the Commission's Rules of Procedure), 17 July 2002, p 5.

155 Art 42, The Hague Regulations, Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907. See also U.S. Department of Defense, *Law of War Manual*, p 748.

156 Art 42, Hague Regulations; Art 2(1) common to the Geneva Conventions of 1949.

157 In this regard, the EECC rightly stated that 'even territory to which Eritrea had a valid claim according to the Boundary Commission, was occupied for the purposes of IHL if it had been invaded during the war', EECC, Partial Award, Central Front – Ethiopia's Claim 2, 28 April 2004, paras 28 and 29.

158 T. Ferraro, 'Determining the Beginning and End of an Occupation Under International Humanitarian Law', 94 *International Review of the Red Cross* 885, 2012, 155.

ritory that belongs to an enemy state.¹⁵⁹ It is worth noting that there is a contrary view to this conclusion, which maintains that as long as the portion of the territory was not individualized through physical demarcation, and defined as ‘enemy territory’, and for instance, allows the ‘occupier’ to know how far to pull back, the situation cannot really be qualified as an occupation (emphasizing that the area under Ethiopia’s control was the same as that which existed before the war – no land changed hands).¹⁶⁰

B. PARTIES TO THE CONFLICTS

The parties to the conflict are Eritrea and the Federal Democratic Republic of Ethiopia.

Eritrea is estimated to have some 200,000 mobilized military personnel,¹⁶¹ while Ethiopia is estimated to have 162,000 active frontline military personnel.¹⁶² A wide array of conventional weaponry is possessed by both states.

C. KEY DEVELOPMENTS IN 2018

1. Joint Declaration of Peace and Friendship, 9 July 2018

Following Ethiopia’s refusal to accept the ‘unconditional’ implementation of the EEBC’s decision, the two countries were locked in a state of ‘no war, no peace’. Until very recently, the border dispute has rumbled on, with sporadic outbreaks of armed hostilities, including an attack on Eritrean military installations in 2012 and another on Tserona, the scene of one of the deadliest battles during the war, in June 2016.¹⁶³

With recent political developments and change of leaders in Ethiopia, the Ethiopian Government made an announcement in June 2018 to fully implement the Algiers Agreement and the rulings of the EEBC, which could involve ceding the disputed town of Badme.¹⁶⁴ The Eritrean Minister of Information has said that ‘peace will indeed be beneficial to the two peoples but obviously, this must be predicated on respect of international law, which Ethiopia continues to flout to-date’.¹⁶⁵ On 9

159 Crisis Group, *Ethiopia and Eritrea: Preventing War*, p 14.

160 Anebo, ‘The Fallacy of Virtual Demarcation as a Primary Scheme of International Land Boundary Setting’, 260–261.

161 ‘Eritrean Defence Forces’, *defenceWeb*, 6 May 2013, http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=30387:eritrea&catid=119:african-militaries&Itemid=255 (last accessed 2 December 2018).

162 Global Firepower, ‘Ethiopia Military Strength’ 2018, https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=ethiopia (last accessed 2 December 2018).

163 Pineau, ‘Eritrea-Ethiopia Peace’.

164 Ethiopian Peoples’ Revolutionary Democratic Front, Statement of Eprdf’s Executive Committee, <http://www.eprdf.org.et/web/en/-/statement-of-eprdf-s-executive-committee> (last accessed 2 December 2018).

165 T. Araia, ‘Remembering Eritrea-Ethiopia Border War: Africa’s Unfinished Conflict’, *BBC News*, 6 May 2018 <https://www.bbc.com/news/world-africa-44004212>.

July, Eritrea and Ethiopia determined to close the very costly chapter of ‘no war, no peace’ and heralded a new era of rapprochement with the Joint Declaration of Peace and Friendship, which brings the state of war to an end.¹⁶⁶ The Joint Declaration also stipulates that ‘the decision on the boundary between the two countries will be implemented’.¹⁶⁷ This is an interesting development, but the scope of this commitment is not clear. Does it mean that the countries are ready to unconditionally withdraw their troops from the disputed areas? Will there be a release of and/or information provided about missing POWs?

In his historic visit to Asmera on 08 July 2018, the Ethiopian Prime Minister, Dr Abiy Ahmed, said ‘we will demolish the wall and, with love, build a bridge between the two countries’,¹⁶⁸ and that Ethiopia is ‘keen to implement the terms laid out in the Joint Declaration to make up quickly for lost opportunities’.¹⁶⁹ The Ethiopian Foreign Minister, Dr Workneh Gebeyehu, provided further details on the agreements reached and indicated that the two sides had already established ‘two commissions headed by the respective foreign ministers of both countries, and sub-committees which will work out in detail when and how each and every issue will be implemented’.¹⁷⁰ He said a technical committee to be set up will ‘resolve the border dispute and help implement the Algiers peace agreement signed in 2000’ and ‘follow-up the implementation of the border decision ... and related issues’.¹⁷¹

Recently, it was reported that Eritrea has started withdrawing its troops from the border lines for the first time in decades.¹⁷² However, there is no information about whether Ethiopia has followed suit and started to withdraw its troops from the contested areas. Hopefully, the declaration will result in implementation of the decision of the EEBC and will end the confrontation over the disputed border areas.

In support of the Joint Declaration, the UN noted that this represents a historic and significant development with far-reaching positive consequences for the Horn of Africa and beyond, and expressed its readiness to facilitate the successful implementation of the five-point plan.¹⁷³

166 Eritrea Ministry of Information, Joint Declaration of Peace and Friendship between Eritrea and Ethiopia, 9 July 2018, §1, <http://www.shabait.com/news/local-news/26639> (last accessed 2 December 2018).

167 Ibid, §4.

168 ‘Ethiopia and Eritrea Declare War “Has Come to an End”’, *Al Jazeera*, <https://www.aljazeera.com/news/2018/07/ethiopia-eritrea-sign-declaration-peace-friendship-180709101214478.html>.

169 The Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, ‘A Week in the Horn’, 13 July 2018, <https://mfaethiopiablog.wordpress.com/2018/07/13/a-week-in-the-horn-13-07-2018/> (last accessed 2 December 2018).

170 Ibid.

171 Ibid.

172 E. Biryabarema and M. Fick, ‘Eritrean Troops Withdraw from Ethiopian Border: Eritrean Press Agency’, *Reuters*, 19 July 2018, <https://www.reuters.com/article/us-ethiopia-eritrea/eritrea-troops-withdraw-from-ethiopian-border-eritrea-press-agency-idUSKBN1K90QR>.

173 UN, Security Council Press Statement on Signing of Joint Declaration of Peace and Friendship Between Eritrea and Ethiopia on 9 July 2018, 10 July 2018, <https://www.un.org/press/en/2018/sc13416.doc.htm> (last accessed 2 December 2018).

2. The Ongoing Discussion Relating to Prisoners of War (POWs)

Under both treaty and customary IHL, the parties to an IAC are under unconditional obligation to release and repatriate POWs without delay upon the cessation of active hostilities.¹⁷⁴ Though Eritrea and Ethiopia had signed the Cessation of Hostilities Agreement in June 2000, the EECC held that Article 118 of GC II came into operation only in December 2000 following the Algiers Agreement, which formally ended the war.¹⁷⁵ Article 2(1) of the December Algiers Agreement states that ‘in fulfilling their obligations under international humanitarian law ... and in cooperation with the International Committee of the Red Cross, the parties shall without delay release and repatriate all prisoners of war’.¹⁷⁶ The position adopted by the EECC regarding the release and repatriation of POWs was subject to criticism.¹⁷⁷

One notable issue regarding POWs was the dispute on the missing Ethiopian pilot Colonel Bazbeh Petros. The EECC established that the pilot was captured and made a POW, but it did not receive any direct evidence concerning his fate (though Eritrea claimed that the pilot had died, without producing evidence of his death).¹⁷⁸ Under IHL, when a POW dies, a state is under obligation to conduct an official inquiry and to take all measures for the prosecution of the person(s) responsible.¹⁷⁹ Moreover, there are detailed procedures to be followed including the issue of a death certificate indicating the date and place of death, the cause of the death, the date and place of burial and all particulars necessary to identify the grave, and a medical examination of the body before burial.¹⁸⁰

There are ongoing negotiations on the exchange of POWs¹⁸¹ and the Ethiopian Foreign Minister was explicit when he stated that ‘one committee would also study and propose solutions over prisoners of war captured during the 1998–2000 war’.¹⁸² It should be remembered that the EECC found Ethiopia in violation of its obligation to promptly repatriate the POWs it held, as required by law, for its delay of three months following Eritrea’s release of Ethiopian POWs in August 2002.¹⁸³

174 Article 118, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (GC III); ICRC Customary IHL Database, Rule 128: Release and Return of Persons Deprived of Their Liberty, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule128 (last accessed 2 December 2018).

175 EECC, Partial Award, Prisoners of War – Eritrea’s Claim 17, §145.

176 Art 2(2), Algiers Agreement.

177 Sassoli, ‘The Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law’, pp 342–344.

178 EECC, Partial Award, Prisoners of War – Eritrea’s Claim 17, paras 154–155.

179 Art 121, GC III.

180 Art 120, GC III; Rule 116: Accounting for the Dead, ICRC Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule116 (last accessed 2 December 2018).

181 S. Gebrekidan, ‘Ethiopia and Eritrea Declare an End to Their War’, *The New York Times*, 9 July 2018, <https://www.nytimes.com/2018/07/09/world/africa/ethiopia-eritrea-war.html>.

182 Ministry of Foreign Affairs of Ethiopia, ‘Prime Minister Dr Abiy’s Historic Visit to Asmara’, 13 July 2018, <https://mfaethiopiablog.wordpress.com/2018/07/13/a-week-in-the-horn-13-07-2018/> (last accessed 2 December 2018).

183 EECC, Partial Award, Prisoners of War – Eritrea’s Claim 17, paras 156–158.

Accordingly, talking about ‘captured POWs’ after almost two decades after the end of the war is legally unjustifiable, and a clear violation of the obligation under IHL to release and repatriate POWs without delay. The POWs continue to benefit from protections under IHL until their final release and repatriation.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

International humanitarian law requires parties to an armed conflict to ensure respect and to conduct an effective investigation and punish serious violations thereof.¹⁸⁴ The EECC has established that both sides were liable for serious violations of IHL regarding material destruction, killings, rape, ill-treatment and expulsions of protected persons during the war.¹⁸⁵ To cite just one example, following Eritrea’s claim that Ethiopian troops committed numerous rapes of Eritrean civilian women, the Commission found Ethiopia liable for failure to take effective measures to prevent rape from occurring against innocent Eritrean civilian women.¹⁸⁶ Though these acts may amount to war crimes, there have been no official reports regarding the measures taken to investigate and prosecute these serious violations. Moreover, as indicated in the preceding section, there are POWs who are not repatriated, and this unjustifiable delay to repatriate POWs is a serious violation of IHL.¹⁸⁷

In addition, in the report of the UNSG, it was indicated that ‘on 25 June 2001, a group of 704 persons of Eritrean descent, mostly long-term residents of the Tigray region in Ethiopia, were sent to Eritrea without the assistance of ICRC. The latter withdrew from the process when it became clear that the manner in which these repatriations were carried out was not in accordance with international humanitarian law’.¹⁸⁸

184 Common Art 1 of the Four Geneva Conventions of August 1949; Art 129, GC III; Rule 144: Ensuring Respect for International Humanitarian Law Erga Omnes’, ICRC Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 (last accessed 2 December 2018); Rule 158: Prosecution of War Crimes, ICRC Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 (last accessed 2 December 2018). Art 85, Protocol I (only Ethiopia is a party to the Protocol).

185 Amnesty International, *Report 2005: The State of the World Human Rights*, pp 102, 104, <https://www.amnesty.org/download/Documents/POL1000012005ENGLISH.PDF> (last accessed 15 March 2019).

186 EECC, Partial Award, Central Front – Eritrea’s Claims 2, 4, 6, 7, 8 and 22, 28 April 2004, paras 80–81.

187 Art 85, Protocol I; Rule 156: Definition of War Crimes, ICRC Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (last accessed 2 December 2018).

188 UNSC, Report of the Secretary-General on Ethiopia and Eritrea, UN doc S/2001/843, 5 September 2001, §35.

2. THE ARMED CONFLICT BETWEEN GEORGIA AND RUSSIA IN ABKHAZIA: THE PREDOMINANCE OF IRRECONCILABLE POSITIONS

Grazvydas Jasutis

Classification of the Conflict

Georgia and the Russian Federation (RF) were involved in an international armed conflict (IAC) in 2018 by virtue of continued Russian occupation of territory in Georgia (Abkhazia and South Ossetia).

A. HISTORY OF THE CONFLICT

Georgia was engaged in an Abkhaz conflict in 1992–2008 with some respites. The Georgian regular Armed Forces and volunteers fought against the Abkhaz from the breakaway territory of Abkhazia and the Confederation of Mountain Peoples of the Caucasus in 1992–1993, which resulted in an Agreement on a Ceasefire and Separation of Forces signed in Moscow on 14 May 1994 (Moscow Agreement). The Moscow Agreement did not prevent further bloodshed and the conflict peaked again in 1998 and 2001, which drove a wedge further between Georgia and Abkhazia and complicated the process of reconciliation. In August 2008, RF forces along with Abkhaz security actors were embroiled in a conflict with Georgian armed forces, which turned the war into an IAC. In the aftermath of the conflict, over 200 civilian monitors were deployed to Georgia by EU Member States to contribute to the stabilization of the situation on the ground.¹⁸⁹ They monitor compliance by all sides with the EU-brokered Six-Point Agreement of 12 August 2008, signed by both Georgia and the RF, and the Agreement on Implementing Measures of 8 September 2008.¹⁹⁰ On 26 August 2008, Abkhazia was recognized as an independent country by the RF, followed by some Pacific and Latin American countries, with recent recognition declared by Syria. On 28 August 2008, the Parliament of Georgia passed a unanimous resolution declaring Abkhazia and South Ossetia to be territories occupied by the RF and the Russian peacekeepers an occupying force.¹⁹¹

Although the conflict is far from a solution, the main actors on the ground remain committed to stability and conflict-related incidents are rare.

The Abkhaz are an ethnic group who live in the Caucasus region. Their language belongs to the Northwest Caucasian family of languages, and while some of them are Sunni Muslims, they belong to the Orthodox Christian Church. The Georgians speak a unique South Caucasian language and the majority belong to the Orthodox Christian Church. The Georgian historian Pavle Ingoroqva claimed that the ‘historical’ Abkhaz – the people to which authors used to refer as Abkhaz in the writings of previous centuries – were in reality Georgian tribes, while the contem-

189 European Union Monitoring Mission in Georgia, Factsheet, https://eumm.eu/data/image_db_innova/EUMM%20Factsheet%20ENG%202018%20MAY.pdf (last accessed 28 August 2018).

190 Ibid.

191 UN Security Council (UNSC), Report of the Secretary-General on the Situation in Abkhazia, Georgia, UN doc S/2008/631, 3 October 2008.

porary Abkhaz descended from Adyghean tribes who had come from the North Caucasus to settle in Abkhazia in the 17th–18th centuries.¹⁹²

The Georgian-Abkhaz conflict stems from the turbulent period at the end of the First World War. On 25 May 1918, Georgian independence was declared, and in June of that year, an Abkhaz delegation went to Tbilisi to sign a treaty of union with Georgia. Abkhaz historians claim that the treaty was invalid because the delegation had not been empowered to sign it.¹⁹³ Following this, on 17–22 June 1918, the Georgian Army with its commander, General Mazniashvili, was deployed to the whole seashore from Tuapse to Sochi to counter the Red Army threat. This aggravated the situation in Abkhazia as the military command of Mazniashvili ignored the local authorities and oppressed the local population,¹⁹⁴ driving the first wedge between Georgia and Abkhazia. On 21 February 1921, the Parliament of Georgia adopted its constitution, which specified that Abkhazia (District of Sukhumi) was an integral part of Georgia that would nevertheless enjoy autonomy in the administration of its affairs.¹⁹⁵

However, after only a few days, on 25 February, Soviet rule was forcibly established in Georgia, and on 31 March 1921, the Soviet Socialist Republic (SSR) of Abkhazia was proclaimed.¹⁹⁶ Both Soviet republics crafted a political union in December 1921, noting that foreign affairs would remain fully within the competence of the Georgian SSR.¹⁹⁷ In 1922, Georgia, Armenia and Azerbaijan formed the Federative Union of the Socialist Soviet Republic of Transcaucasia and Abkhazia entered the Federation as part of Georgia. In 1925, Georgia and Abkhazia adopted Soviet constitutions that again referred to political union: ‘The Abkhaz SSR, united on the basis of Union Treaty with the Georgian SSR, enters Trans-Caucasus Soviet Socialist Federative Republic through the Georgian SSR’¹⁹⁸ underlies the Constitution of the Abkhazian SSR. However, the term ‘autonomy’ in reference to Abkhazia was not used in official documents in the first Soviet decade (1921–1931).¹⁹⁹ Abkhazia’s status was initially downgraded to autonomous republic within the Georgian SSR in 1931 when a resolution was passed on changing the Abkhazian Republic into the Abkhazian Autonomous SSR within the Georgian SSR; this proposal was con-

192 C. Francis, *Conflict Resolution and Status: The Case of Georgia and Abkhazia (1989–2008)*, ASP/VUBPRESS, 2011, p 68.

193 S. Chervonnaya, *Conflict in the Caucasus: Georgia, Abkhazia and the Russian Shadow*, Gothic Image, 1994, p 119.

194 Ibid, p 119.

195 Art 107, Constitution of Georgia, 1921, <https://matiane.wordpress.com/2012/09/04/constitution-of-georgia-1921/> (last accessed 28 August 2018).

196 Chervonnaya, *Conflict in the Caucasus*, p 121.

197 Union Treaty Between the SSR of Georgia and the SSR of Abkhazia – 16 December 1921, Abkhaz World, <http://abkhazworld.com/aw/reports-and-key-texts/601-union-treaty-between-december-1921/> (last accessed 28 August 2018).

198 Art 4, Constitution of the Soviet Socialist Republic of Abkhazia, 1 April 1925, Abkhaz World, <http://abkhazworld.com/aw/reports-and-key-texts/589-constitution-ssr-abkhazia-1april1925/> (last accessed 28 August 2018).

199 Chervonnaya, *Conflict in the Caucasus*, p 121.

firmed by the Stalin Constitution in 1936.²⁰⁰ This period was critically analysed by the Georgian academics, who claimed that the Abkhaz side essentially misinterpreted these facts in their struggle against the homogenous statehood of Georgia and in favour of the creation of an independent Abkhazian state.²⁰¹

Georgian-Abkhaz relations in the Soviet period were tense due to the underlying political atmosphere and the anti-Abkhaz approach employed by the Soviet authorities. From 1933, Lavrenti Beria instituted an anti-Abkhaz policy that was maintained and strengthened until both his and Stalin's deaths in 1953, including the abolition of the of Abkhaz language, the introduction of the Georgian language and script, the forced importation of various nationalities and forced deportation of the Abkhaz intelligentsia.²⁰² The Abkhaz population periodically requested the expansion of their rights and there was continuous low-level mistrust; however, the real schism between the Georgian and Abkhaz communities did not occur until 1989.

1. The Georgian-Abkhaz Schism in the Early 1990s

In 1988, Georgia adopted a programme with regard to the state language that stated that Georgian would be used for all official communication; this was incorporated into law. On 18 March 1989, the Popular Forum of Abkhazia, the Aidgylara, with the support of other Abkhaz groups from the village of Lykhny, gathered Abkhaz elders to sign a declaration demanding secession from Georgia and the upgrade of the region's status to a republic.²⁰³ This led to protests and demonstrations organized by the pro-independence movement in Tbilisi in April, which were brutally dispersed by the Soviet Army.²⁰⁴ In the days following these events, the Soviet Georgian Ministry of Higher Education announced that it was opening a branch of Tbilisi University in Sukhumi, to be based in the Georgian sector of the existing Abkhazian State University. This resulted in a further series of ethnic clashes between Georgian and Abkhaz communities in Sukhumi on 15 July and Ochamchira on 16 July 1989.²⁰⁵

The Abkhaz community continued its efforts to separate from Georgia. On 17 March 1991, Abkhazia participated in a Soviet referendum and voted in favour of remaining within the Soviet Union, while Georgia boycotted the referendum. In November 1991, the Third Congress of the Mountain Peoples of the Caucasus took place in Sukhumi and the participants adopted the Treaty for a Confederate Union of the Mountain Peoples of the Caucasus, the first article of which proclaims the new Confederation to be 'the legitimate successor of the "Mountain Re-

200 Chervonnaya, *Conflict in the Caucasus*, p121.

201 See Z. Papaskiri, 'Another Look at One of the False Historical Postulates of the Abkhazian Separatist Ideology: On the Question of Abkhazia's Political-State Status in 1921-1931', 6 *The Caucasus and Globalization* 2 (2012).

202 G. Hewitt, 'Abkhazia: A Problem of Identity and Ownership', 12 *Central Asian Survey* 3 (1993).

203 C. Francis, *Conflict Resolution and Status*, p 72.

204 Ibid, p 72.

205 Ibid, p 74.

public" created on 11 May 1918, of which Abkhazia was a part.²⁰⁶ Georgia declared its independence in April 1991 and was embroiled in a war with South Ossetia and later in a civil war between those who supported President Zviad Gamsakhurdia and his opponents.

In February 1992, the Parliament of Georgia voted to reinstate the constitution that the independent Georgian republic had adopted in 1921, which referred to Abkhazia as autonomous. In response, the Supreme Council of Abkhazia in Sukhumi voted on 23 July to reinstate the constitution that the Abkhazian SSR had adopted in 1925, which referred to Abkhazia as an equal member of the Georgian-Abkhaz union.²⁰⁷

The first Georgian-Abkhaz conflict began in August 1992. There are two versions of why it started. According to the first, Georgia staged a military operation to ensure security of movement along the railroad connecting Russia with Georgia and Armenia (which passes through Abkhazia), the security of the main highways and the security of objects of strategic importance. The second version claims that Georgian national guards were sent to Abkhazia to release Georgian officials, including Deputy Prime Minister Alexander Kavsadze, who had been abducted by pro-Gamsakhurdia insurgents in western Georgia and were being held somewhere in Gali District. Nevertheless, Georgian Minister of Defence Tengiz Kitovani, who was commanding the operation, ignored clear instructions from President Eduard Shevardnadze and proceeded straight to Sukhumi to suppress the secessionist regime.²⁰⁸ After ferocious fighting, Georgian troops finally reached Sukhumi and the RF sponsored an initial ceasefire agreement, which was signed in Moscow on 3 September 1992. The parties agreed that Georgian territorial integrity would be preserved and the Georgian armed forces present in the conflict zone would not exceed the agreed level required for the protection of railway and strategic installations.²⁰⁹

On 1 October 1992, Abkhaz forces, along with fighters from the Confederation of Mountain Peoples of the Caucasus military, were deployed in operations across Abkhazia and managed to regain control of Gagra, which ensured access to logistical and military support from North Caucasus. Throughout 1993, Abkhaz forces periodically attempted to regain control over Sukhumi, until on 27 July, a new ceasefire agreement was attempted. The agreement set out the non-use of force against each other in the conflict zone, the deployment of international observers and peacekeeping forces, the establishment of the trilateral Georgian-Abkhaz-Russian interim monitoring groups and the phased demilitarization of the conflict

206 G. Hewitt, *Discordant Neighbours: A Reassessment of the Georgian-Abkhazian and Georgian-South Ossetian Conflict*, Brill, 2013, p 85.

207 International Crisis Group, *Abkhazia Today*, Europe Report no 176, 15 September 2006, http://old.crisisgroup.org/_/media/Files/europe/176_abkhazia_today.pdf (last accessed 28 August 2018).

208 D. Shenfield, 'Origins and Evolutions of the Georgian-Abkhaz Conflict', *Abkhaz World*, 15 October 2008, <http://abkhazworld.com/aw/conflict/31-origins-and-evolutions-of-the-georgian-abkhaz-conflict> (last accessed 28 August 2018).

209 UNSC, Moscow Agreement, UN doc S/24523, 8 September 1992, <https://peacemaker.un.org/georgia-moscow-agreement92> (last accessed 28 August 2018).

zone.²¹⁰ On 24 August 1993, the United Nations Security Council (UNSC) decided to establish the UN Observer Mission in Georgia (UNOMIG), comprising up to 88 military observers, plus minimal civilian support staff, to verify compliance with the ceasefire agreement.²¹¹ Despite this, Abkhaz forces launched attacks and took control of Sukhumi on 27 September 1993, and in a few days controlled the whole of Abkhazia except Upper Kodori Gorge. Fierce fighting followed, with serious human rights violations committed by all sides, including civilians who cooperated with military forces.

According to the UN fact-finding mission report,²¹² grave human rights violations are reported to have taken place during each of the phases of the armed conflict, both during and in the aftermath of the attacks. Such violations are said to have included extrajudicial executions, torture, rape, looting, burning of houses and apartments as well as their unlawful occupation, often at gunpoint, and forced deportations. Each party to the conflict has also accused the other of carrying out 'ethnic cleansing' in the areas under its control. Civilians, including women, children and elderly persons, as well as combatants who were no longer actively participating in armed confrontations, were victims of violations of the right to life and physical integrity, the right to personal security and property rights.²¹³

The war resulted in significant casualties which, according to a Human Rights Watch report, included 4,000 Georgian individuals killed, 10,000 wounded and 1,000 reported missing. On the Abkhaz side, 4,040 were killed (2,220 combatants and 1,820 civilians), approximately 8,000 were wounded and 122 were marked as missing in action. The Office of the UN High Commissioner for Refugees has also been supervising the repatriation of some 200,000 displaced persons to Abkhazia since autumn 1994.²¹⁴

In the spring of 1994, Georgia and Abkhazia signed four documents that laid the groundwork for an Agreement on a Ceasefire and Separation of Forces. On 14 May 1994, the agreement was signed in Moscow. It established security zones (no armed forces or heavy military equipment) and restricted-weapons zones (no heavy military equipment). The parties agreed to the deployment of the peacekeeping force of the Commonwealth of Independent States (CIS). Under the supervision of representatives of the CIS peacekeeping force and UN observers, with the participation of representatives of the parties from the Kodori Valley, the troops of the Republic of Georgia would be withdrawn to their places of deployment beyond the frontiers of Abkhazia.²¹⁵

210 Agreement on a Cease-Fire in Abkhazia and Arrangements to Monitor its Observance, UN doc S/26250, 27 July 1993, <https://peacemaker.un.org/georgia-ceasefireobservance93> (last accessed 28 August 2018).

211 UN, 'Georgia – UNOMIG – Background', 2009, <https://peacekeeping.un.org/mission/past/unomig/background.html> (last accessed 28 August 2018).

212 UNSC, Report of the Secretary-General's Fact-Finding Mission to Investigate Human Rights Violations in Abkhazia, Republic of Georgia, UN doc S/26795, 17 November 1993.

213 Ibid.

214 Human Rights Watch, *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict*, March 1997, <https://www.hrw.org/reports/1995/Georgia2.htm> (last accessed 28 August 2018).

215 Agreement on a Ceasefire and Separation of Forces, UN doc S/1994/583, 14 May 1994, <https://peacemaker.un.org/georgia-ceasefire94> (last accessed 28 August 2018).

2. New Violence in 1998 and 2001

New violence sparked between Georgia and Abkhazia in Gali District in May 1998, where Georgian irregular forces (the White Legion and Forest Brothers) clashed with Abkhaz forces.²¹⁶ On 25 May 1998, the Protocol on Ceasefire, Separation of Armed Formations and Guarantees on Inadmissibility of Forcible Activities were signed in Gagra. Both sides agreed to the ceasefire and, separately, Abkhazia committed itself to refraining from unlawful forcible acts against the peaceful population of the Gali region. The Georgian side undertook to take effective measures aimed at preventing the penetration of terrorist and subversive groups, armed formations and individuals into Abkhaz territory, activities that had had detrimental effects on the political processes in the region.²¹⁷ In 1999, Abkhazia held a referendum and proclaimed independence, which profoundly affected attitudes towards the political settlement of the conflict.²¹⁸

Heavy fighting recurred in Abkhazia in October 2001, when the Chechen field commander Ruslan Gelayev, at the request of the Georgian authorities, attempted to advance into Abkhazia through Kodori Gorge.²¹⁹ The operation failed, but it had several serious practical and political implications. Kodori became notorious again in 2006 for a police operation conducted by Georgian security forces. In 2004 and 2005, the Georgian Ministry of Defence took steps to abolish the three paramilitary groups (Monadire, Svaneti and Khevsureti) operating under the region's control in Kodori Gorge. The Monadire leader, Emzar Kvitsiani (the former representative of the Georgian president in Kodori), defiantly announced that he would not disarm, and Tbilisi thus launched an operation to disarm the paramilitary organizations forcefully; Kvitsiani escaped capture, however.²²⁰ The UN acknowledged that the 'new and tense situation' had resulted, at least in part, from the Georgian special operation in the Upper Kodori Valley, and the UNSC urged the country to ensure that no troops unauthorized by the Moscow ceasefire agreement were present in that area.²²¹

3. The August 2008 War

The year 2008 was crucial for Georgian-Abkhaz relations. A declaration of independence in Kosovo affected the entire RF, prompting the development of a more intense relationship between Abkhazia and the RF. On 6 March 2008, the RF lifted the economic sanctions it had imposed on Abkhazia under the collective pressure

216 Author's field interview.

217 Protocol on Ceasefire, Separation of Armed Formations and Guarantees on Inadmissibility of Forcible Activities, 25 May 1998, <https://peacemaker.un.org/georgia-protocol-ceasefire98> (last accessed 28 August 2018).

218 Shenfield, 'Origins and Evolutions of the Georgian-Abkhaz Conflict'.

219 Author's field interview.

220 Crisis Group, *Abkhazia Today*.

221 UN, 'Georgia – UNOMIG – Background'.

of the CIS in 1996²²² and, subsequently, the Russian president issued a decree authorizing the establishment of direct ties with Abkhazia and South Ossetia. Later, in April that year, a remotely piloted Georgian reconnaissance aircraft was destroyed by an air-to-air missile fired from a Russian fighter jet. Russia's military denied any involvement in the episode.²²³ A UN report said the attack was 'fundamentally inconsistent' with Russia's role as a peacekeeper and it criticized the Georgian Government, too, saying that the use of drones over Abkhazia violated the separation of forces agreement.²²⁴ The RF increased the number of peacekeepers in Abkhazia and a battalion of some 400 reportedly unarmed RF Railroad Troops was sent to Abkhazia to repair the railroad on 31 May without warning or the consent of the Georgian Government.²²⁵ The situation in Abkhazia became even more tense in July as a result of a deadly explosion in Gali, a clash between Georgian and Abkhaz forces in Kodori and the suspension of the tripartite meetings that had brought together the Georgians, the CIS peacekeeping force and UNOMIG.

The dramatic escalation of hostilities in South Ossetia on 7 and 8 August 2008 and the subsequent Georgian-Russian conflict profoundly affected the situation in the Georgian-Abkhaz zone of conflict.²²⁶ Following a UN report, on 8 August, the Abkhaz side began introducing heavy weapons into the restricted weapons zone in violation of the 1994 Moscow Agreement and a series of bombardments was carried out in the Upper Kodori Valley. On 12 August, the Abkhaz side launched a ground attack and established control over the Upper Kodori Valley. Meanwhile, on 9 August, Russian forces reportedly carried out aerial attacks in western Georgia, including on the Senaki military base and military targets in the port of Poti, as well as around the town of Zugdidi. On 10 and 11 August, the RF introduced large numbers of troops into the zone of conflict by road, rail and air. While the troops were initially deployed on the Gali side of the ceasefire line, they were later moved into the Zugdidi side of the zone of conflict and adjacent areas in Senaki and Poti. Russian navy ships were deployed along the coast. The RF called this introduction of troops a 'peace enforcement operation'. The Government of Georgia characterized it as 'aggression'.²²⁷

4. The EU Six-Point Agreement and its Implications

The EU Six-Point Agreement was signed on 12 August 2008 by both Georgia and Russia alongside the Agreement on Implementing Measures on 8 September. The principles to which the parties have subscribed are:²²⁸

- (1) Not to resort to force
- (2) To end hostilities definitively
- (3) To provide free access for humanitarian aid
- (4) Georgian military forces withdrawing to their usual bases
- (5) Russian military forces withdrawing to the lines held prior to the outbreak of hostilities; pending an international mechanism, Russian peacekeeping forces implementing additional security measures
- (6) The opening of international talks on the security and stability arrangements in Abkhazia and South Ossetia

Over 200 civilian monitors were sent by EU Member States to contribute to the stabilization of the situation on the ground following the August 2008 conflict through the EU Monitoring Mission in Georgia (EUMM) established in September.²²⁹ The CIS collective peacekeeping force was thus officially terminated on 15 October 2008, and in June 2009, the UNSC failed to extend the mandate of UNOMIG. On 1 October 2009, a UN team was established to support the UN Representative to the Geneva International Discussions. At a later stage, it was transformed into a Special Political Mission of the UN financed through its regular budget. It is also noteworthy that on 26 August, the RF recognized Abkhazia as an independent state. On 28 August 2008, the Parliament of Georgia passed a unanimous resolution declaring that its territories in Abkhazia and South Ossetia were being occupied by the RF, claiming that the Russian peacekeepers constituted an occupying force.²³⁰ The next day, the Government of Georgia declared the 1994 Moscow Agreement null and void.²³¹

Since then, Georgian-Abkhaz relations have reached a stalemate. The period 2008–2012 was marked by a series of murders targeting Abkhaz and RF security actors in Gali District, which made the security situation very tense and unpredictable. Since then, the security situation on the ground has been controlled to avoid conflict, with the exception of a few grave incidents such as the murder of Georgian citizen Giga Otkhazia by an Abkhaz border guard in 2016. Georgia expressed serious concerns with regard to the decision of Abkhaz authorities to close two southernmost controlled crossing points at Nabakevi and Meore Otobaia in early March 2017, which limited its access to Abkhazia.²³² Abkhazia participates in the Geneva International Discussions and is part of the Gali Incident Prevention and Response Mechanism (IPRM), which deals with incidents along the Adminis-

222 Unrepresented Nations and Peoples Organization, 'Abkhazia: Russian Sanctions Lifted', 7 March 2008, <http://unpo.org/article/7700> (last accessed 28 August 2018).

223 C. J. Chivers, 'U.N. Blames Russia for Downed Drone', *The New York Times*, 27 May 2008, <https://www.nytimes.com/2008/05/27/world/europe/27georgia.html>.

224 Ibid.

225 GlobalSecurity.org, 'Railroad Troops / Railway Forces (Zheleznodorozhniki)', <https://www.globalsecurity.org/military/world/russia/railroad-troops.htm> (last accessed 28 August 2018).

226 UNSC, Report of the Secretary-General on the Situation in Abkhazia.

227 Ibid.

228 Council of the European Union, 'Extraordinary Meeting, General Affairs and External Relations Brussels, 13 August 2008', press release, http://eeas.europa.eu/archives/delegations/georgia/documents/eu_georgia/13august2008_en.pdf (last accessed 28 August 2018).

229 European Union Monitoring Mission in Georgia (EUMM), 'About Us', https://eumm.eu/en/about_eumm (last accessed 28 August 2018).

230 UNSC, Report of the Secretary-General on the Situation in Abkhazia.

231 Ibid.

232 Council of Europe, Consolidated Report on the Conflict in Georgia (October 2016–March 2017), 11 April 2017, https://www.ecoi.net/en/file/local/1403135/1226_1499158040_sg-inf-2017-18e.pdf (last accessed 28 August 2018).

trative Boundary Line (ABL). In the political domain, the ties between Russia and Abkhazia have been strengthened, culminating in the signing in November 2014 of a treaty declaring an ‘alliance and strategic partnership’, which discusses closer coordination in the areas of defence, foreign policy, customs and border control, law enforcement, education and social welfare.²³³ However, there is no consensus among either the Abkhaz elite or within Abkhaz society about the area’s future relationship with Russia, nor is a return to Georgia considered a viable option.

B. PARTIES TO THE CONFLICTS

1. Georgian Armed Forces

The number of personnel involved in the Georgian Armed Forces is about 37,000.²³⁴

2. Russian Armed Forces

According to a UN report, 9,000 troops and 350 units of armoured vehicles took part in the 2008 war on Abkhaz territory. The troops were not part of the CIS peace-keeping force and were therefore clearly acting outside the 1994 Moscow Agreement. The RF called this introduction of troops a ‘peace enforcement operation’.²³⁵ On 17 February 2010, the Agreement Between the Russian Federation and the Republic of Abkhazia on an Integrated Russian Military Base on the Republic of Abkhazia’s Territory was signed in Moscow. The agreement’s provisions regulate the respective parties’ jurisdictions regarding the integrated Russian military base on Abkhaz territory.²³⁶ At the present time, Russia’s dominance of Abkhazia has become nearly total, with 4,000–5,000 Russian land, air and naval troops believed to be deployed in the region. There are also approximately 1,000 RF Federal Security Service border guards in Abkhazia.

On 21 November 2015, the Agreement between the Russian Federation and the Republic of Abkhazia on a Joint Group of Armed Forces of the Russian Federation and the Republic of Abkhazia was signed in Moscow. The agreement and the attached provisions set out the purpose of and the procedure for creating, deploying and using the Russian-Abkhazian Joint Group of Armed Forces.²³⁷

3. Abkhaz Forces

The Abkhazian Armed Forces are made up of three armed branches – land forces, the navy and air forces. Land forces are deployed in three military districts: the

233 ‘History: Georgian and Abkhaz Conflict’, Conciliation Resources, <http://www.c-r.org/where-we-work/caucasus/history-georgian-abkhaz-conflict> (last accessed 28 August 2018).

234 ‘Georgian Armed Forces Capacity Retained for 2017’, *Agenda.ge*, 15 September 2016, <http://agenda.ge/en/news/2016/2188>.

235 UNSC, Report of the Secretary-General on the Situation in Abkhazia.

236 Office of the President of Russia, ‘Agreement on a Russian Military Base in Abkhazia Has Been Submitted to the State Duma for Ratification’, 8 August 2011, <http://en.kremlin.ru/events/president/news/12221> (last accessed 28 August 2018).

237 Office of the President of Russia, ‘Law on Ratification of Russia-Abkhazia Agreement on Joint Group of Forces’, 22 November 2016, <http://en.kremlin.ru/acts/news/53291> (last accessed 28 August 2018).

central (Sukhumi), eastern (Ochamichira) and western (Pitsunda). There are 2,200 active personnel, the Abkhazia Air Force is equipped with 5 L-39 jet trainers, 3 transport aircrafts and 6 helicopters. The Abkhazian Navy consists of 1 battalion (350 persons) and 15 motor boats.²³⁸

C. KEY DEVELOPMENTS IN 2018

The release of Georgian prisoner Giorgi Lukava, labeled a ‘war criminal’ by Sukhumi authorities, caused massive protests across Abkhazia in January 2018. The opposition condemned President Raul Khajimba for releasing a war criminal and called for his resignation. Both Georgian and Abkhaz participants have been engaged in the IPRM under the auspices of the UN.²³⁹ The case of the murder of Giga Otkhazia remains high on the agenda and the EUMM reminds participants that justice was not served, underlining that impunity in such grave crimes remains unacceptable.²⁴⁰

Abkhazia continues its cooperation with Russia and, in February 2018, the Abkhaz parliament ratified the agreement with Russia on medical services and assistance. Meanwhile, the Georgian Central Government reaffirmed the principled position of engaging in a direct dialogue with the ‘Abkhazians and Ossetians’,²⁴¹ though no concrete steps have been undertaken to establish a platform for direct communication. Alternatively, in April the Georgian Government adopted a package of legislative amendments in the framework of its peace initiative, ‘A Step to a Better Future’, covering three main objectives: to ease and expand trade across dividing lines; to simplify education opportunities for the population living in Abkhazia and Tskhinvali region/South Ossetia and further ease access for the population of Abkhazia and Tskhinvali region/South Ossetia to the services and benefits created in the course of development and successful cooperation with partners, including in the process of European integration.²⁴² The Abkhaz Ministry of Foreign Affairs regards this as another populist move by the Georgian side in order to impress Georgia’s western partners.²⁴³ Abkhaz-Georgian relations further deteriorated, particularly in June 2018 when the Government of Georgia approved the so-called Otkhazia-Tatunashvili list, a decree authorizing its foreign affairs and justice ministries to work with foreign partners and international organizations on imposing visa restrictions for individuals included in the blacklist, and banning their

238 ‘Russian and Abkhaz Military will be acting as a United Front’, *Parliamentary Gazette*, 2 November 2016, <https://www.pnp.ru/politics/2016/11/02/voennye-rossii-i-abkhazii-budut-deystvovat-edinyim-frontom.html> (in Russian).

239 EUMM, ‘The 55th IPRM Meeting Takes Place in Gali’, 25 April 2018, https://www.eumm.eu/en/press_and_public_information/press_releases/6284/?year=2018&month=5 (last accessed 28 August 2018).

240 Ibid.

241 Council of Europe, Consolidated Report on the Conflict in Georgia (October 2017 – March 2018).

242 K. Tsikhelashvili, ‘Ketevan Tsikhelashvili: “We are Making Open and Determined Peace Statement”’, *Democracy and Freedom Watch*, 4 April 2018, <http://dfwatch.net/ketevan-tsikhelashvili-making-open-determined-peace-statement-50197>.

243 Republic of Abkhazia, ‘The Commentary of the MFA of the Republic of Abkhazia’, 4 May 2018, http://mfaapsny.org/en/allnews/news/statements_speeches/kommentariy-mid-respubliki-abkhaziya-v-svyazi-s-resheniyami-soveta-evropy-/ (last accessed 18 September 2018).

financial and property transactions.²⁴⁴ This has had negative implications for the search for mutually acceptable solutions within the IPRM and Geneva International Discussion frameworks.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

The 2008 war negatively impacted Abkhazia and Georgian residents, who lived predominantly in Gali District and Kodori. The Organization for Security and Co-operation in Europe (OSCE) indicated that there were no reports of deaths from bombing or other combat operations and that few injuries or house destructions occurring in either area during the conflict or its aftermath were reported.²⁴⁵ The Upper Kodori Valley in northeast Abkhazia was taken over by Abkhazian forces during the military operation on 12 August 2008 and, as a consequence, 2,500 individuals, mainly from the Svan ethnic group, fled over the mountains into Georgia proper.²⁴⁶ Of these, only between 100 and 150 are reported to have returned.²⁴⁷ The Abkhaz Ministry of Foreign Affairs stated that there were no obstacles to return; however, the returnees had to understand that they would be returning to the 'State of Abkhazia'.²⁴⁸ In practice, despite efforts undertaken by co-chairs in the framework of the working group addressing humanitarian issues during the Geneva International Discussions, hardly any progress has been made with regard to the return of these displaced persons.²⁴⁹ The situation has fundamentally still not changed. In fact, the Abkhaz authorities have introduced the multiple processes of borderization, fencing and passportization. The restriction of freedom of movement, security measures and irreconcilable positions have increased, creating further tensions in Georgian-Abkhaz relationships. Similarly, the Georgian Law on Occupied Territories imposes targeted restrictions on access, trade and communication in relation to Abkhazia, though the document envisages some flexibility in response to human rights and humanitarian needs.²⁵⁰

Following the OSCE report, ethnic Georgians in the Gali District were increasingly concerned not only about their security, but also about future prospects for preserving their identity, language and culture, as well as maintaining links with Tbilisi; in this regard, the question of passports and citizenship was one of the most

244 'Government Unveils Tatanashvili-Otkhozoria List', *Civil.Ge*, 27 June 2018, <https://civil.ge/archives/245184>.

245 Organization for Security and Co-operation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), *Human Rights in the War-Affected Areas Following the Conflict in Georgia*, 27 November 2008, <https://www.osce.org/odihr/35578?download=true> (last accessed 18 September 2018).

246 UNHCR, Emergency Operation in Georgia, 9 September 2008, <http://www.unhcr.org/uk/48c688c32.pdf> (last accessed 18 September 2018).

247 OSCE, ODIHR, *Human Rights in the War-Affected Areas*.

248 Ibid.

249 Council of Europe, Commissioner for Human Rights, Report on Human Rights Issues Following the August 2008 Armed Conflict by Thomas Hammarberg, Commissioner of Human Rights for the Council of Europe (Tbilisi, Sukhumi and Gali, 8 to 12 February 2009), CommDH(2009)22, 15 May 2009, <https://rm.coe.int/16806db689> (last accessed 18 September 2018).

250 Law on the Occupied Territories of the Republic of Georgia. No 431 – IIS, 23 October 2008, <https://matsne.gov.ge/en/document/download/19132/5/en/pdf> (last accessed 18 September 2018).

troubling current issues for them.²⁵¹ The Law on the Status of Foreign Citizens and the Law on the Procedures for Exit and Entry were adopted simultaneously in December 2015 in Abkhazia, affecting the residents of Gali and possibly slowly resulting in classifying Gali returnees as foreigners.²⁵² Ethnic Georgians living in Gali are strongly advised to obtain Abkhaz passports or resident permits in order to benefit from Abkhaz services and cross the ABL without any hindrance. However, Abkhazia requires an official document issued by the Georgian Ministry of Justice proving that someone has renounced their Georgian citizenship in order to issue them with an Abkhaz passport.²⁵³ The lack of Abkhaz documents has had an impact on the Gali inhabitants' property rights and those without Abkhaz passports have no possibility of making real-estate transactions, even in Gali.²⁵⁴ The majority of those residing in Abkhazia today, except most Georgian returnees to Gali, are simultaneously citizens of the RF.²⁵⁵ Russian citizenship formally entitles them to travel abroad; however, this has in practice been very complicated and has been heavily criticized by the Abkhaz authorities.²⁵⁶ Furthermore, the restrictions placed on ABL crossings continue to have a detrimental impact on access to education and commercial activities. A number of school children have been crossing into Gali on a daily basis, though the numbers have steadily decreased from some 128 in 2009–2010 to around 50 in 2014–2016 and 38 in 2016–2017.²⁵⁷ Currently, only 16 children are reported to be crossing, which is considerably less than in previous years.²⁵⁸ An average of 3,000 crossings per day are reported on the main bridge over the Inguri River, marking an increase that has presumably resulted from the closure of other points.²⁵⁹

Serious problems remain with regard to education in the mother tongue. The Georgian Central Government continued to object to the rules which oblige schools to use Russian as the language of instruction, allowing only for very limited access to the Georgian language.²⁶⁰ Georgian-language schools in the Gali and Tkvarcheli Districts formally shifted to Russian-language instruction in 1994; Georgian was taught as a foreign language or an elective subject.²⁶¹

251 OSCE, ODIHR, *Human Rights in the War-Affected Areas*.

252 T. Hammarberg and M. Grono, *Human Rights in Abkhazia Today*, July 2017, <https://www.palmeconter.se/wp-content/uploads/2017/07/Human-Rights-in-Abkhazia-Today-report-by-Thomas-Hammarberg-and-Magdalena-Grono.pdf> (last accessed 18 September 2018).

253 'Abkhazia Demands Georgians Renounce Citizenship Before Issuing Passport', *Democracy and Freedom Watch*, 24 January 2018, <http://dfwatch.net/abkhazia-demands-georgians-renounce-citizenship-issuing-passport-49812>.

254 Hammarberg and Grono, *Human Rights in Abkhazia Today*.

255 Ibid.

256 Author's field interview.

257 Hammarberg and Grono, *Human Rights in Abkhazia Today*.

258 Council of Europe, Consolidated Report on the Conflict in Georgia (October 2017–March 2018), Document presented by the Secretary General, 11 April 2018, <https://rm.coe.int/consolidated-report-on-the-conflict-in-georgia-october-2017-march-2018/16807b81cc> (last accessed 18 September 2018).

259 Ibid.

260 Ibid.

261 Hammarberg and Grono, *Human Rights in Abkhazia Today*.

The restrictions imposed and number of crossing points reduced by the Abkhaz authorities have had a detrimental effect on cross-ABL trade. In this context, the Georgian Law on Occupied Territories penalizes business dealings with Abkhazia and some foreign companies that have sought to establish links with local counterparts have run into problems with Tbilisi; most have had to leave, given Tbilisi's concerns to not have its sovereignty undermined.²⁶²

Detentions remain an additional key challenge in Abkhazia, and a significant concern. The Georgian authorities continue to resolutely protest against the so-called 'borderization' process and condemn it in strong terms,²⁶³ while Abkhaz authorities detain those who cross the ABL without proper documentation and penalize them for violating the state border.

3. THE ARMED CONFLICT BETWEEN UKRAINE AND RUSSIA IN CRIMEA: BETWEEN ANNEXATION AND REUNIFICATION?

Grazvydas Jasutis

Classification of the Conflict

Ukraine and the Russian Federation (RF) were involved in an international armed conflict in 2018 by virtue of the Russian occupation of territory in Ukraine (Crimea).

A. HISTORY OF THE CONFLICT

The case of Crimea has proven to be a thorny issue for the RF and Ukraine, re-surfacing after the political crisis and internal clashes in Kiev in 2013–2014. The process of annexation or reunification of the Autonomous Republic of Crimea and the city of Sevastopol (henceforth referred to as Crimea) lasted less than a month, from 20 February to 18 March 2014. There are two competing and completely contradictory approaches to classifying the situation in Crimea. The RF claims that Crimea declared independence from Ukraine in a referendum and expressed a wish to reunify with the RF. The RF recognized its independence and agreed to its request for reunification. Meanwhile, Ukraine accuses Russia of aggression against it and of illegally annexing Crimea.

1. Crimea: Historical Facts

Before it was called Crimea, the peninsula was known as 'Taurica' in the Greek and Roman empires, both of which incorporated the region at certain points.²⁶⁴ In the

²⁶² Ibid.

²⁶³ Council of Europe, Consolidated Report on the Conflict in Georgia (October 2017–March 2018).

²⁶⁴ The historical facts given here are based on N. Kent, *Crimea: A History*, Hurst, 2016; A. Taylor, 'To Understand Crimea, Take a Look Back at Its Complicated History', *The Washington Post*, 27 February 2014, https://www.washingtonpost.com/news/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history/?noredirect=on&utm_term=.632aebba0e1e; M. Kramer, 'Why Did Russia Give Away Crimea Sixty Years Ago?', Wilson Centre, 19 March 2014, <https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago> (last accessed 27 August 2018).

tenth century, Kievan Rus dominated the region; it lost control after 200 years and the Mongols settled in. The Tatars established the Crimean Khanate, a protectorate of the Ottoman Empire, and ruled the territory from mid-1400 to 1783. In the wake of the Russian-Ottoman war, Crimea became a part of the Russian Empire in 1783 and the territory underwent serious battles and mayhem.

Following the Russian Revolution and the ensuing turmoil in Russia, the Crimean National Republic was founded by the Tatars and existed from December 1917 to January 1918. The Bolsheviks immediately clashed with the Tatars and defeated them. In March–April 1918, the Taurida Soviet Socialist Republic (SSR) was proclaimed by the Bolsheviks. The troops of the Ukrainian National Republic gained military control over Crimea in April but were forced to hand it over to the German command. A puppet Crimean government was established with the support of the German Empire. From April 1919, Crimea again witnessed the invasion of the Bolsheviks and became a bone of contention between the parties in the Russian Civil War. This finally resulted in the establishment of the Crimean Autonomous Soviet Socialist Republic (ASSR) within the Russian SSR in October 1921. Its status was downgraded to autonomous district (oblast) in May 1945 after the forced deportation of the Crimean Tatars to Central Asia. In 1954, Crimea was transferred to the jurisdiction of the Ukrainian SSR.

After the collapse of the Soviet Union, Crimea remained in the hands of independent Ukraine and its status was upgraded to autonomous republic. In the early 1990s, some controversies and skirmishes occurred in Crimea, including the debate over the Russian Black Sea Fleet, a short-lived pro-Russian movement for independence and claims for the rights of Tatars. Internally, the return of Crimean Tatars, the revival of the pro-Russian movement and the dominance of both in the political landscape in Crimea made the situation difficult to control. Relations between Kiev and Simferopol became edgy in 1992. On 26 February, the Supreme Soviet of the Crimean ASSR, without the consent of the Ukrainian authorities, changed the official name of the land to the Republic of Crimea.²⁶⁵ On 5 May 1992, the Crimean parliament declared independence, and on 6 May 1992, it voted for a constitution establishing independence and providing dual citizenship with Russia for the Crimean population. It also passed a resolution calling for a referendum on independence from Ukraine.²⁶⁶ Though this was not accepted by Kiev, some concessions were made and Crimea was granted autonomy in economic relations. The demand for independence came up again with the election of ethnic Russian Yuri Meshkov as President of Crimea. On 13 May 1994, the Crimean Republic signed a framework agreement on economy and trade with the RF, which was not recognized by Kiev.

²⁶⁵ A. Bebler, 'The Russian-Ukrainian Conflict Over Crimea', International Institute for Middle East and Balkan Studies, 28 June 2015, <http://www.ifimes.org/en/9035> (last accessed 27 August 2018).

²⁶⁶ V. Zaborsky, 'Crimea and the Black Sea Fleet in Russian-Ukrainian Relations', Center for Science and International Affairs (CSIA) Discussion Paper 95-11, Kennedy School of Government, Harvard University, September 1995, <https://www.belfercenter.org/publication/crimea-and-black-sea-fleet-russian-ukrainian-relations> (last accessed 27 August 2018).

Externally, Ukraine was engaged in tense negotiations with the RF on the return of nuclear weapons to the RF and the partition of the Black Sea Fleet, which was based in Crimea. In January 1992, Vladimir Lukin, then Chairman of the Russian parliament's Committee on Foreign Affairs, suggested that in order to pressure Ukraine to give up its claim to the Black Sea Fleet, Russia should question the Ukrainian control over Crimea; in May 1992, the Russian parliament passed a resolution declaring the 1954 transfer of Crimea to Ukraine illegal.²⁶⁷

The conflict culminated on 9 July 1993, when the parliament of the RF issued a decree proclaiming the Ukrainian city of Sevastopol as belonging to the RF. At an urgent meeting of the United Nations Security Council (UNSC), the RF representative stated that this decree diverged from the policy of the President and the Government of the RF and underlined that his country remained dedicated to the principle of the inviolability of borders within the Commonwealth of Independent States.²⁶⁸ The status of the Black Sea Fleet was ultimately resolved through negotiations, which had started between President Yeltsin and the President Kravchuk of Ukraine in 1992. On 28 May 1997, the Partition Treaty (composed of three treaties) was signed between the RF and Ukraine, by which they split the Black Sea Fleet and decided that Russia would lease the ports in and around Sevastopol for 20 years. On 21 April 2010, the Kharkiv agreement was signed, extending the lease until 2042.²⁶⁹

Despite these agreements, a territorial dispute surfaced over the island of Tuzla in 2003. This began with the construction of a dyke by Russia to link the Russian Taman Peninsula with the Ukrainian island of Tuzla in the Kerch Strait on 20 October, when Moscow questioned Ukraine's sovereignty over the tiny island and demanded proof of the country's right to it.²⁷⁰ An agreement was reached after seven years in 2010, when President Yanukovich of Ukraine and President Dimitry Medvedev of the RF signed an agreement to build the Kherch Strait Bridge. In February 2014, the Russian First Deputy Prime Minister, Igor Shuvalov, ordered the Ministry of Transport to begin negotiations with Ukraine on starting construction work and commissioned Avtodor, the Russian Highways State Company, to conduct a feasibility study.²⁷¹

The tension in Russian-Ukrainian relations was rekindled in the wake of the 2008 Georgian-Russian War. The then Ukrainian Minister of Foreign Affairs, Volody-

²⁶⁷ Ibid.

²⁶⁸ United Nations, Complaint by Ukraine Regarding the Decree of the Supreme Soviet of the Russian Federation Concerning Sevastopol, Decision of 20 July 1993 (3256th meeting): Statement by the President, http://www.un.org/en/sc/repertoire/93-95/Chapter%208/EUROPE/93-95_8-22-UKRAINE.pdf (last accessed 27 August 2018).

²⁶⁹ L. Harding, 'Ukraine Extends Lease for Russia's Black Sea Fleet', *The Guardian*, 21 April 2010, <https://www.theguardian.com/world/2010/apr/21/ukraine-black-sea-fleet-russia>.

²⁷⁰ R. Woronowycz, 'Russian-Ukrainian Dispute Over Tuzla Escalates', LXXI *The Ukrainian Weekly* 43 (26 October 2003), <http://www.ukrweekly.com/old/archive/2003/430301.shtml> (last accessed 27 August 2018).

²⁷¹ 'Medvedev Signs Decree Creating Contractor for Kerch Strait Bridge Project', *The Moscow Times*, 4 March 2014, <https://themoscowtimes.com/articles/medvedev-signs-decree-creating-contractor-for-kerch-strait-bridge-project-32624>.

myr Ogryzko, accused Russia's consulate on the Crimean peninsula of distributing Russian passports to the population there.²⁷²

2. The Events in 2014

The situation changed dramatically in the aftermath of the Euromaidan and political crisis in Ukraine from November 2013–February 2014. On 23 February, the President of the RF tasked the security agencies with starting working on the return of Crimea.²⁷³ Clashes between pro-Russian and pro-Ukrainian protesters broke out on 26 February 2014 in front of the parliament building in Simferopol. One day later, the Qurultay (Assembly) of Crimean Tatars voted in favour of the 'Implementation of the Right of Crimean Tatar People to Self-Determination in Their Historical Territory – Crimea' and decided to start political and legal procedures to restore the national-territorial autonomy of the Tatars in Crimea.²⁷⁴

On 27 February 2014, the Russian-speaking security actors without insignias entered the territory of Ukraine in Crimea. They took hold of strategic positions and later established control over the Crimean parliament and Council of Ministers and raised Russian flags. Crimean Berkut units and volunteers seized checkpoints and controlled the traffic.²⁷⁵

On 1 March 2014, the Russian parliament unanimously approved President Vladimir Putin's request for authorization to use Russian armed forces in Ukraine (following a request on 1 March by Sergey Aksyonov, the pro-Russian Prime Minister of Ukraine's Crimea region, for peacekeeping support).²⁷⁶ At the UNSC meeting, the Ukraine representative underlined that RF troops had already been in the country and their numbers were increasing, constituting an act of aggression, and the RF ambassador acknowledged that parliament had approved the use of force on Ukraine's territory but not against Ukraine.²⁷⁷ In the following days, troops in what appeared to be Russian uniforms surrounded Ukrainian military bases and other installations; however, the President of the RF explained that they belonged to pro-Russian self-defence groups.²⁷⁸ This contradicts the report of the Interna-

²⁷² A. Tsukanova, 'Cheney Urges Divided Ukraine to Unite against Russia "threat"', *The Sydney Morning Herald*, 6 September 2008, <https://www.smh.com.au/world/cheney-urges-divided-ukraine-to-unite-against-russia-threat-20080906-4auh.html>.

²⁷³ A. Kondrashev, *Crimea: The Way Home*, <https://www.youtube.com/watch?v=t42-71RpRgI> (in Russian, with subtitles; last accessed 27 August 2018).

²⁷⁴ Bebler, 'The Russian-Ukrainian Conflict Over Crimea'.

²⁷⁵ 'Berkut Units Deployed in Armyansk', *Armyansk Information*, 27 February 2014, <http://armyansk.info/news/news-archive/120-2014/4592-pod-armyansk-styanulis-siloviki-iz-berkuta> (in Russian; last accessed 27 August 2018).

²⁷⁶ 'Parliament OKs Putin Request To Use Russian Forces In Ukraine', *Radio Free Europe/Radio Liberty*, 1 March 2014, <https://www.rferl.org/a/ukraine-crimea-forces-russian/25281291.html>.

²⁷⁷ UN, 'Ukraine, in Emergency Meeting, Calls on Security Council to Stop Military Intervention by Russian Federation', 1 March 2014, <https://www.un.org/press/en/2014/sc11302.doc.htm> (last accessed 27 August 2018).

²⁷⁸ 'Putin: Russia Force Only "Last Resort" in Ukraine', *BBC News*, 4 March 2014, <http://www.bbc.com/news/world-europe-26433309>.

tional Criminal Court, which states that the RF later acknowledged that its military personnel had been involved in taking control of the Crimean peninsula.²⁷⁹

On 16 March, the Crimeans participated in a referendum and voted in favour of joining the RF, which was declared invalid by the Ukrainian authorities. The then Chairperson-in-Office of the Organization for Security and Co-operation in Europe (OSCE), Didier Burkhalter, did not accept an invitation from Crimea's authorities to send observers from the OSCE Office for Democratic Institutions and Human Rights, citing the unconstitutional nature of the referendum.²⁸⁰ The next day, the Crimean parliament declared independence and made an official application for Crimea to join the RF; on 18 March, President Vladimir Putin, Crimea's State Council Chairman, Vladimir Konstantinov, Prime Minister Sergey Aksyonov and the Mayor of Sevastopol, Aleksei Chalyi, signed the treaty of accession to the RF at the Kremlin.²⁸¹ According to the Kremlin, the decision to admit Crimea into Russia was based on the results of the all-Crimea referendum held on 16 March 2014, in which people supported the reunification of Crimea with Russia as a constituent member, the declaration of independence of the Autonomous Republic of Crimea and the city of Sevastopol, and the treaty between Russia and Crimea on the latter's admission into the RF and the formation of new constituent members within it.²⁸² Ukrainian military bases and ships were stormed by RF regular forces and Crimean security actors and, on 26 March, Russian Chief of General Staff, Valery Gerasimov, announced that the territory of Crimea was under full control of RF forces.²⁸³ On 27 March, the UN General Assembly approved a resolution describing the Moscow-backed referendum that led to Russia's annexation of Crimea as illegal;²⁸⁴ however, this had almost no impact on the ground. Since then, Crimea has been under full control of the RF and started the process of reunification by extending Russian legislation and policies to Crimea. Crimea was fully integrated into Russia in July 2015, according to the statement of the RF Prime Minister, Dimitry Medvedev.²⁸⁵

279 The Office of the Prosecutor (OTP), International Criminal Court (ICC), Report on Preliminary Examination Activities 2017, https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (last accessed 27 August 2018).

280 Bebler, 'The Russian-Ukrainian Conflict Over Crimea'.

281 'Russian Federation Council Ratifies Treaty on Crimea's Entry to Russia', *TASS*, 21 March 2014, <http://tass.com/russia/724749>.

282 Ibid.

283 'Russia Reports: All Ukrainian Military Are Captured and Disarmed in Crimea', *Volynsky Novyny*, 26 March 2014, <https://www.volynnews.com/news/authority/rosiia-zvituye-usi-ukrayinski-viyskovi-v-krymu-zakhopleni-i-rozzbrojeni/> (in Ukrainian).

284 'Ukraine: UN Condemns Crimea Vote as IMF and US Back Loans', *BBC News*, 27 March 2014, <http://www.bbc.com/news/world-europe-26776416>.

285 J. McHugh, 'Putin Eliminates Ministry of Crimea, Region Fully Integrated Into Russia, Russian Leaders Say', *International Business Times*, 15 July 2015, <http://www.ibtimes.com/putin-eliminates-ministry-crimea-region-fully-integrated-russia-russian-leaders-say-2009463>.

B. PARTIES TO THE CONFLICTS

1. Russian Armed Forces

The RF forces deployed in Crimea are part of the Southern Military District. The RF authorities admitted that special operations forces and intelligence were deployed in February and March but they did not disclose any figures.²⁸⁶ According to the analytics, an additional 22,000 soldiers of the Special Forces and the Southern Military District of Russia were deployed to engage in the operation of Crimea.²⁸⁷ The number of RF military forces in Crimea in 2018 is 2.7 times more than in 2013, based on the sources of the Ukrainian Ministry of Defence. Manpower has increased from 12,000 in 2013 to 32,000 in 2018; armoured vehicles from 92 to 680; artillery systems from 24 to 174 and aircraft from 22 to 113. The RF has deployed 40 tanks and 8 submarines that had not been there before.²⁸⁸ The Russian sources did not confirm this.

2. Ukrainian Armed Forces

The Ukrainian military personnel stationed in Crimea were not given orders to resist, and thus all 190 military installations and most weapons were surrendered to the RF forces. About 20,000 Ukrainian military personnel capitulated without a shot being fired. The Russian military also captured most of the Ukrainian Navy without resistance.²⁸⁹

3. Self-Defence Crimean Forces

Alexandr Bochkarev, the then head of the pro-Russian self-defence forces of Crimea, claimed in March 2014 that there were 1,500 Crimeans in the self-defence forces ('[this] isn't much, but we don't need more').²⁹⁰ However, Ukrainian sources referred to the interview with Aksyonov, who said that the total number of members of self-defence units reached 11,000.²⁹¹ The Crimean authorities aimed to legitimize them on 11 June 2014 by adopting a Law on the People's Militia.²⁹²

286 'Putin: The GRU Forces Were Sent to Disarm the Ukrainian Units', *TASS*, 15 March 2015, <http://tass.ru/politika/1829681> (in Russian).

287 O. Zadorozhnyi, 'Russia's Annexation of Crimea in the Light of Russian-Ukrainian Agreements on the Black Sea Fleet', 3 *Ukraine Analytica* 5 (2016), <http://ukraine-analytica.org/wp-content/uploads/za-dorozhnyi.pdf>.

288 'The Militarization of Crimea: Within Five Years, Russia Has Increased the Number of Military Forces to 32,000', *Ukrinform*, 24 April 2018, <https://www.ukrinform.ua/rubric-crimea/2448023-militarizacia-krimu-za-pat-rokiv-rosia-zbilsila-kilkist-vijskovih-do-32-tisac.html> (in Ukrainian).

289 Bebler, 'The Russian-Ukrainian Conflict Over Crimea'.

290 'Crimea Creates Own Military by Swearing In Self-Defense Units', *RT*, 16 March 2014, <https://www.rt.com/news/self-defense-oath-crimea-962/>.

291 'Aksionov: Self-Defense Units in Crimea have 11,000 Members', *Kyiv Post*, 4 March 2014, <https://www.kyivpost.com/article/content/war-against-ukraine/aksionov-self-defense-units-in-crimea-have-11000-members-338360.html>.

292 O. Skrypnyk, 'Legalization of "Crimean Self-Defense"', Crimean Human Rights Group, 27 November 2015, <https://crimeahrg.org/en/legalization-of-crimean-self-defense/> (last accessed 27 August 2018).

C. KEY DEVELOPMENTS IN 2018

From 2014–2017, the RF was repeatedly blamed for targeting the Crimean Tatar community, limited free expression, restricted peaceful assembly, the intimidation of those who have opposed Russia's actions in Crimea and the unlawful activities of law enforcement agencies that have been involved in numerous incidents of human rights violations, such as arbitrary arrests and detentions, enforced disappearances, ill-treatment and torture and at least one extrajudicial execution.²⁹³

There have been no direct combat activities between the RF and Ukrainian forces in Crimea. A Ukrainian soldier and one member of the Crimean self-defence unit were shot dead at an army base in Simferopol in March 2014 and a Russian soldier killed a Ukrainian naval officer in eastern Crimea in April 2014.²⁹⁴ It is noteworthy that the Federal Security Service (FSB) of the RF announced that it had engaged in the shootout with alleged Ukrainian infiltrators in the town of Armyansk in northern Crimea in August 2016, which resulted in one FSB officer being killed and at least one Ukrainian being shot dead.²⁹⁵ However, the operation of infiltration was firmly denied by the Ukrainian Ministry of Defence.²⁹⁶

On 18 March, the Crimeans voted for the first time in the Russian presidential election and overwhelmingly supported Vladimir Putin.²⁹⁷

In May 2018, President Putin opened Russia's newly built bridge to the annexed Crimean peninsula, driving a truck across the span and drawing angry condemnation from Kiev, the European Union and the United States.²⁹⁸ Most of the economic links with Ukraine are disrupted, which will ensure land transportation and logistics. According to the Ukrainian sources, the Crimean economy abruptly declined, and sectors such as agriculture, tourism and small business continue to face seri-

293 Amnesty International, *Crimea in the Dark: The Silencing of Dissent*, December 2016, <https://www.amnesty.org/download/Documents/EUR5053302016ENGLISH.PDF> (last accessed 27 August 2018); Human Rights Watch, 'Rights in Retreat: Abuses in Crimea', 17 November 2014, <https://www.hrw.org/report/2014/11/17/rights-retreat/abuses-crimea> (last accessed 27 August 2018); European Parliament, On the Human Rights Situation in Crimea, in Particular of the Crimean Tatars, Joint Motion for a Resolution, 3 February 2016, <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2016-0173&language=EN> (last accessed 27 August 2018); 'Crimean Tatars: UN Report Documents Human Rights Abuses by Russian Agents in Crimea', Unrepresented Nations and People's Organization, 26 September 2017, <http://unpo.org/article/20358> (last accessed 27 August 2018); OTP, ICC, Report on Preliminary Examination Activities 2017.

294 'Russian Marine Kills Ukraine Navy Officer in Crimea, Says Ministry', *Reuters*, 7 April 2014, <https://www.reuters.com/article/us-ukraine-crisis-military/russian-marine-kills-ukraine-navy-officer-in-crimea-says-ministry-idUSBREA360GB20140407>; 'Tribute Paid to Cossack and Military Man in Simferopol, Killed by Sniper', *Ria Novosti*, 22 March 2014, <https://ria.ru/incidents/20140322/1000633150.html> (in Russian).

295 'Russian FSB Foils Terrorist Attacks Plotted by Ukrainian Intel Agents in Crimea', *RT*, 10 August 2016, <https://www.rt.com/news/355385-fsb-ukraine-terrorist-attacks/>.

296 Ibid.

297 'Crimea Votes for First Time in Russian Presidential Election', *TASS*, 18 March 2018, <http://tass.com/politics/994756>.

298 'Putin Opens Crimean Bridge Condemned by Kyiv, EU', *Radio Free Europe/Radio Liberty*, 15 May 2018, <https://www.rferl.org/a/putin-to-attend-opening-of-bridge-linking-russia-to-crimea/29227926.html?lflags=mailer>.

ous problems.²⁹⁹ To the contrary, the Russian media informs us that, in four years, Crimea has become a typical Russian region, which is currently benefiting from the federal budget and experiencing positive economic trends.³⁰⁰

In military terms, it is noteworthy that in January 2018 Russia deployed a new division of S-400 surface-to-air missiles in Crimea.³⁰¹

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

In 2018, the international community continued to condemn the RF for the annexation of Crimea and serious human rights violations.³⁰² A 2018 UNESCO report highlights gross violations, particularly in the field of the protection of cultural heritage.³⁰³

SELECTED NON-INTERNATIONAL ARMED CONFLICTS

1. BRAZIL: HIGH LEVEL OF ARMED GANG VIOLENCE BUT NOT A NON-INTERNATIONAL ARMED CONFLICT

Liliana Muscarella

Classification of the Conflict

The legal classification of the ongoing violence between drug gangs and police forces in the favelas (slums) of Rio de Janeiro, Brazil, is debatable. However, despite the intensity of the violence in the city, *The War Report* considers that the armed groups involved (gangs and militias) do not meet the requisite organization criteria. While it is important to note that there are other regions of Brazil that suffer

299 A. Liev, 'Crimea in Occupation. Four Years Later', *Novoe Vremya*, 22 February 2018, <https://nv.ua/opinion/liev/krym-v-okkupatsii-chetyre-hoda-spustja-2453286.html> (in Russian).

300 O. Merkulova, 'Typical Russian Region: Four Years of Crimea Being a Part of Russia', *EkspertYug*, 16 March 2018, <http://www.expertsouth.ru/novosti/tipichnyi-rossiiskii-region-4-goda-krymu.html> (in Russian).

301 'Russia Deploys More Surface-to-Air Missiles in Crimean Build-Up', *Reuters*, 13 January 2018, <https://www.reuters.com/article/us-ukraine-crisis-crimea-russia/russia-deploys-more-surface-to-air-missiles-in-crimean-build-up-idUSKBN1F20BD>.

302 'Ongoing Violations of International Law and Defiance of OSCE Principles and Commitments by the Russian Federation in Ukraine', As Delivered by Acting Deputy Chief of Mission Michele Siders to the Permanent Council, U.S. Mission to the OSCE, Vienna, 1 February 2018, <https://osce.usmission.gov/on-russias-ongoing-violations-in-ukraine-14/> (last accessed 27 August 2018).

303 UNESCO, Follow-Up of the Situation in the Autonomous Republic of Crimea, Paris, 9 March 2018, <http://unesdoc.unesco.org/ulis/cgi-bin/ExtractPDF.pl?catno=261576&lang=e&from=7&to=36&display=2&ts=1522053780> (last accessed 27 August 2018).

from similar violence, it is mostly present in Rio de Janeiro, which is thus the geographical focus of this analysis.

A. HISTORY OF THE CONFLICT

1. Favela Violence: Gang Origins

Brazil's gangs are deeply rooted in the history of Brazil itself, particularly in Rio de Janeiro. Through years of military dictatorship, political opposition groups emerged seeking representation and recognition. This phenomenon was particularly salient in the prison system of the 1960s, when the oldest and largest gang, the Red Command (CV), was born of the union of various inmates and political prisoners who banded together while in jail and discovered their shared origins in poverty and lack of political representation.³⁰⁴ At first, the CV's profits went directly into supporting incarcerated members and their home communities with social services, although this would not always be the case.³⁰⁵ Since its conception, the CV has expanded to nearly 6,000 members in Rio, with offshoot gangs – Friends of Friends (ADA).³⁰⁶ Its arch rival is the Pure Third Command (TCP).³⁰⁷ Most importantly, the first gangs' leftist, grassroots origins, while not always recognized as such, afforded them ironclad social ties with favela communities.³⁰⁸ Coming from the favelas and suffering from similar poverty, racism, police targeting and lack of political representation initially allowed gang members some degree of community protection and the possibility of expansion.

2. The Transition to Drugs

While the first gangs were born of sociopolitical motives, in recent decades funding has increasingly relied on drug trafficking, which has now become the defining feature of Brazil's armed groups. Such operations are buoyed by ties with former police (militias) and police benefiting from the drug trade via exploitation or bribery.³⁰⁹ Brazilian gangs are also known to have ties with Colombia's infamous yet largely demobilized Revolutionary Armed Forces of Colombia (FARC).³¹⁰ In 2017, it was determined that the majority of the cocaine flowing out of Latin America at some point passed through Brazil, often in exchange for weapons.³¹¹ Despite the FARC's reputation for trafficking, Brazil has in fact surpassed Colombia in its involvement with coca production.³¹²

304 InSight Crime, 'Red Command', 18 May 2018, <https://www.insightcrime.org/brazil-organized-crime-news/red-command-profile/> (last accessed 30 January 2019).

305 Ibid.

306 Ibid.

307 InSight Crime, 'Pure Third Command', 26 April 2018, <https://www.insightcrime.org/brazil-organized-crime-news/pure-third-command/> (last accessed 23 February 2019).

308 InSight Crime, 'Red Command'.

309 InSight Crime, 'Pure Third Command'.

310 InSight Crime, 'Red Command'.

311 M. LaSusa, 'Brazil Is Top Cocaine Transshipment Country for Europe, Africa, Asia', InSight Crime, 24 June 2016, <https://www.insightcrime.org/news/brief/brazil-is-top-cocaine-transshipment-country-for-europe-africa-asia/> (last accessed 13 December 2018).

312 Ibid.

3. Drug Trafficking and the *Mão Dura* Crackdown under Temer

As drug trafficking and community extortion proved to be lucrative for gang affiliates, numbers swelled. Favelas were the ideal territory for such groups because they are impassable for police cars and often even motorcycles, with little order or predictability.³¹³ They are also amenable hosts due to their populations' historical poverty and marginalization; favela residents are almost entirely people of colour, as are the gang members they host.³¹⁴ This makes for easy targeting by police who, according to Human Rights Watch, allegedly not only kill more blacks than is proportionate to their population, but also shoot to kill more often than when their targets are white.³¹⁵ Rio police have also been accused of taking corpses to hospitals in a farcical attempt to save them, thus shielding themselves from accusations of homicide,³¹⁶ and planting weapons on dead black men,³¹⁷ one case of which has led to prosecution.³¹⁸

According to the Brazilian Forum of Public Security, as of 2017 the homicide rate in Rio de Janeiro is 40 per 100,000³¹⁹ people, compared to Brazil's overall homicide rate of 30.8 per 100,000.³²⁰ Of people aged under 29 killed each year in Brazil, according to Amnesty International, 77 percent are black;³²¹ blacks make up half the population of Rio de Janeiro, but three-quarters of the victims of extrajudicial killings.³²² If drug busts do not immediately lead to violence, police may take bribes³²³

313 E. Pramendorfer, 'Favela Wars – Between Law Enforcement and Armed Conflict: The Legal Implications for Rethinking Intensity and Organisation of Urban Violence in Latin America. The Case of Rio de Janeiro, Brazil', Dissertation, Graduate Institute of International and Development Studies, Geneva, 2018, p 4.

314 H. N. Barbosa de Gusmão, 'Mapa Racial De Pontos', in W. Carless, A Brazilian Student Mapped out Rio's Racial Segregation. What He Found Was Startling, *PRI*, 5 November 2015, <https://www.pri.org/stories/2015-11-02/brazilian-student-mapped-out-rios-racial-segregation-what-he-found-was-startling>.

315 Human Rights Watch (HRW), "'Good Cops Are Afraid': The Toll of Unchecked Police Violence in Rio De Janeiro", 7 July 2016, <https://www.hrw.org/report/2016/07/07/good-cops-are-afraid/toll-unchecked-police-violence-rio-de-janeiro#> (last accessed 21 February 2019).

316 Ibid.

317 Ibid.

318 J. Watts, 'Rio Police Arrested Over Video Showing Them Altering Scene of Shooting', *The Guardian*, 1 October 2015, <https://www.theguardian.com/world/2015/sep/30/brazil-rio-police-arrested-video-altering-crime-scene>.

319 Instituto de Segurança Pública, 'Séries históricas anuais de taxa de letalidade violenta no estado do Rio de Janeiro e grandes regiões', January 2019, p 3, <http://www.ispdados.rj.gov.br/Arquivos/SeriesHistoricasLetalidadeViolenta.pdf> (last accessed 11 December 2018).

320 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro De Segurança Pública 2018', 2018, <http://www.forumseguranca.org.br/publicacoes/anuario-brasileiro-de-seguranca-publica-2018/> (last accessed 11 December 2018).

321 A. Roque, 'Young, Black, Alive: Breaking the Silence on Brazil's Soaring Youth Homicide Rate', Amnesty International, 26 November 2014, <https://www.amnestyusa.org/young-black-alive-breaking-the-silence-on-brazils-soaring-youth-homicide-rate/> (last accessed 12 December 2018).

322 HRW, "'Good Cops Are Afraid'".

323 D. Gonzalez, 'In Brazil's Favelas, Caught Between Police and Gangsters', *The New York Times*, 12 July 2018, <https://www.nytimes.com/2018/07/12/lens/in-brazils-favelas-caught-between-police-and-gangsters.html>.

or in some cases even work with gangs,³²⁴ thus themselves benefiting from the trafficking business.

Rio de Janeiro's more than 1,000 favelas have always been notable for their high murder rates. However, after several years of improvement during Workers' Party presidencies, the irregular assumption of power by conservative President Michel Temer in 2016 was accompanied by a spike in homicide rates. The number of murders surpassed 60,000, having remained below that threshold for several years, thus bringing homicide rates back to 2009 levels.³²⁵ This was at least partially caused by Temer's signing an emergency decree handing Rio's police over to the military, the first policy of its kind since the end of the last military dictatorship in 1985.³²⁶ Temer's decision was in principle inspired by the 2016 Olympic Games hosted by Brazil, seen as an opportunity to lower street crime in the city through 'social pacification' missions. It instead resulted in increased police presence and a *mão dura* (heavy-handed) police and military crackdown³²⁷ on favela residents, whether or not they were criminals.³²⁸ In the first six months alone of the military intervention in 2018, there were a total of 3,479 murders, an increase of nearly 5 percent from the previous year.³²⁹

Militias, or paramilitary groups,³³⁰ have also increased in numbers, having first emerged in the 1990s. They are composed of rent-seeking former or active police or penitentiary officers,³³¹ who banded together to fill the opportunity gap between gang members and the over-zealous police and military. While initially achieving some legitimacy in protecting communities from gangs, today's militias are in practice identical to trafficking groups, exploiting locals in exchange for protection and basic services.³³² Today, an estimated 2 million people live under militia control in Rio de Janeiro, and there are more complaints from residents about these mafia-type

324 'Over 50 Sao Paulo Police Arrested, Accused of Ties to Drug Gang', *VOA*, 18 December 2018, <https://www.voanews.com/a/over-50-sao-paulo-police-arrested-accused-of-ties-to-drug-gang-/4706877.html>.

325 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro De Segurança Pública 2018'.

326 S. Cowie, 'Michel Temer Signs Security Decree to Stem Rio Violence', *Al Jazeera*, 16 February 2018, <https://www.aljazeera.com/news/2018/02/michel-temer-signs-security-decree-stem-rio-violence-180216183747559.html>.

327 D. Phillips, 'Brazilian Army to Take Control of Security in Rio as Violence Rises', *The Guardian*, 16 February 2018, <https://www.theguardian.com/world/2018/feb/16/brazilian-army-rio-de-janeiro-michel-temer>.

328 J. Watts, 'Police Killings of Favela Residents Continue as Games Go on in Rio', *The Guardian*, 19 August 2016, <https://www.theguardian.com/world/2016/aug/19/rio-police-killings-favela-residents-olympic-security-segregation>.

329 G. Stargardt, 'Murders, Killings by Cops Rise in Rio De Janeiro, Six Months into Intervention', *Reuters*, 16 August 2018, <https://www.reuters.com/article/us-brazil-security/murders-killings-by-cops-rise-in-rio-de-janeiro-six-months-into-intervention-idUSKBN1L12A6>.

330 It is difficult to distinguish these groups as either militias or paramilitaries, since they are composed of both civilians and trained officers. Thus, they may be technically classified as paramilitary militias, although they are referred to as 'militias' in this section.

331 R. Muggah, R. Giannini, D. Tinoco and A. P. Pellegrino, 'Rio De Janeiro's Militia on the Rise (Again)', *OpenDemocracy*, 22 May 2018, <https://www.opendemocracy.net/ana-paula-pellegrino-dandara-tinoco-renata-giannini-robert-muggah/rio-de-janeiros-militia-on-rise-ag>.

332 Ibid.

organizations than about drug trafficking gangs.³³³ Police sweeps and security policies have been ineffective against the militias because they provide communities with services and protection that the local authorities are unable to offer.³³⁴

4. The Intensity of Violence

The intensity of the violence in Rio de Janeiro can be measured by several factors such as homicide rate, material damage, impact on civilians and access to weapons. Given that Brazil is one of the countries with the highest homicide and murder rates, and Rio de Janeiro's statistics are even worse, this challenge to the applicability international humanitarian law (IHL) is easily met. In 2017, in Rio alone, an estimated 1,115 people lost their lives as a direct result of 'opposition to police intervention'.³³⁵ The intensity of violence may also be considered to have risen in 2018 due to the 35 percent increase in people killed by police in Rio state between February and July, compared to the same period in 2017.³³⁶ These statistics are unsurprising considering that the weapons used are not the small arms perhaps usually associated with armed drug gangs: in the past two years, a rising number of AK-47s and other military-grade arms have been confiscated or recorded as being imported from embattled Venezuela³³⁷ or the United States.³³⁸ These heavy-grade weapons total more than 4,000 for 15,000 gang members, and are often used in shootouts, firing thousands of rounds of ammunition at a time and indiscriminately killing their targets and passersby.³³⁹

Even if these events are sporadic, they leave residents in constant fear of leaving their homes,³⁴⁰ disrupt their daily lives and leave bullet holes to remind them of the state of violence in which they live. It is a normal occurrence for gangs to order schools and businesses to close,³⁴¹ especially during heightened conflict with police, and studies show lower scores and higher teacher absenteeism with exposure

333 Ibid.

334 Ibid.

335 D. Phillips and J. Carvalho, 'Police Operation in Rio Favela Leaves At Least Eight People Dead', *The Guardian*, 25 March 2018, <https://www.theguardian.com/world/2018/mar/25/police-operation-in-rio-favela-leaves-at-least-eight-people-dead>.

336 Stargardt, 'Murders, Killings by Cops Rise in Rio De Janeiro'.

337 InSight Crime, 'Brazil's PCC Expands Criminal Activity, Trafficking Arms From Venezuela', 21 February 2018, <https://www.insightcrime.org/news/brief/brazil-pcc-expands-criminal-activity-trafficking-arms-venezuela/> (last accessed 31 January 2019).

338 T. Waldron, 'How Brazil's "Lord of Guns" Armed Rio's Drug War With U.S. Weapons', *HuffPost*, 8 March 2018, https://www.huffingtonpost.com/entry/weapon-smuggling-us-brazil_us_5aa053d8e4b0d4f5b66d14e8

339 Ibid.

340 D. Mendes, 'View from the Rio Favelas: "We're Often Scared to Leave the House in Case We're Hit by a Stray Bullet"', *The Guardian*, 19 August 2017, <https://www.theguardian.com/global-development/2017/aug/19/rio-voices-view-from-the-favelas-olympics-they-promised-a-legacy-of-peace-but-brazil-is-now-at-war>.

341 B. Brooks, "'They Do Not Really Want to Come After Us': Rio's Gangs Say Brazil's Historic Military Deployment Won't Interrupt Their Business", *Business Insider France*, 24 April 2018, <https://www.businessinsider.fr/us/r-unfazed-by-brazils-army-rio-drug-gangs-willing-to-wait-out-occupation-2018-4>.

to drug wars.³⁴² Considering that on average in Brazil, 175 people are killed per day, and the toll is much higher and less measurable in the favelas of Rio, the intensity of the situation, especially in terms of civilian protection, is undeniable.³⁴³ Civilian deaths are also difficult to measure, and thus more intense, because of the aforementioned tactics employed by officers to cover up the murder of those caught in police-gang (or militia) shootouts.

B. MAIN ACTORS

The major actors in Rio de Janeiro's armed violence are the leaders and members of various gangs – the three primary ones being the CV, TCP and ADA – and the state police and military forces.³⁴⁴ A crucial third party is the officers and dissidents that have branched off into paramilitary militias, such as the League of Justice.³⁴⁵ It is difficult to ascertain these groups' status as potential paramilitary or non-state armed groups because of their composition of both civilians and state forces personnel.³⁴⁶ Since 2016, the military and state police have operated within the same institutional framework dominated by the executive branch.³⁴⁷

1. The Level of Organization of the Armed Actors

It is difficult to determine the organization and hierarchical composition of the armed gangs due to both the general lack of information and the broad range of such groups. Rather than there being just one or even two major groups, there are three (the CV, TCP and ADA), plus smaller offshoots and rogue factions. In general, the largest armed groups, such as the CV, have been described as 'a network of independent actors'³⁴⁸ with warlords overseeing drug trafficking, several key officers upholding the business and the rest of the members acting as foot soldiers, patrolling favelas to exercise control and intimidation.³⁴⁹ There is no rigid command structure or ranking system. However, it is not uncommon for armed groups to hire former police or military officers as military advisors,³⁵⁰ thus meeting to some extent the level of organization required to coordinate military offences and defence. According to Rio's public prosecutor, the militias are better organized than

342 J. Monteiro and R. Rocha, 'Drug Battles and School Achievement: Evidence from Rio De Janeiro's Favelas', 99 *Review of Economics and Statistics* 2 (May 2017), https://www.mitpressjournals.org/doi/abs/10.1162/REST_a_00628?journalCode=rest (last accessed 23 February 2019).

343 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro De Segurança Pública 2018'.

344 'Facções', *Folha de S.Paulo*, 15 April 2004, <https://www1.folha.uol.com.br/folha/especial/2004/traficonorio/faccoes.shtml>.

345 V. Barbara, 'The Men Who Terrorize Rio', *The New York Times*, 22 May 2018, <https://www.nytimes.com/2018/05/22/opinion/rio-janeiro-terrorize-militias.html>.

346 Muggah et al, 'Rio De Janeiro's Militia on the Rise (Again)'.

347 Cowie, 'Michel Temer Signs Security Decree'.

348 InSight Crime, 'Red Command'.

349 Pramendorfer, 'Favela Wars', p 16.

350 D. Phillips, "'Lesser Evil': How Brazil's Militias Wield Terror to Seize Power From Gangs", *The Guardian*, 12 July 2018, <https://www.theguardian.com/world/2018/jul/12/brazil-militia-paramilitary-wield-terror-eize-power-from-drug-gangs>.

the drug gangs themselves,³⁵¹ including in their intimidation tactics,³⁵² although still relatively little is known about any hierarchical structure.

One could argue that the *comandos* exercise territorial control. While they do not have established headquarters, barracks or command offices, they effectively rule the favela(s) in which they work, living, working and conducting business from that zone.³⁵³ Different favelas and neighbourhoods are known by locals to be territorially controlled, though this is a de facto situation that evolves over time. As for an established set of rules guiding the groups' actions, little information is available – perhaps a sign in and of itself of the groups' lack of legitimacy. Any rules that guide militias' activities are also unknown, though given the fact that 2 million people live under their control, they can also be said to exercise substantial territorial control, through military organization, over Rio residents.³⁵⁴

Since the different *comandos* are numerous and often fight each other, it is unlikely that in the event of a peace agreement or negotiations with the state, they could speak with one voice and negotiate a certain political or social goal. Militias, meanwhile, are an entity that is hard to define: they work outside the law and yet law enforcement officials are often involved or complicit. At the same time, due to their organization, they cannot be considered merely haphazard gangs. Another problem is that the goal for both groups of actors can only be said to be financial gain and territorial control, since the days of the CV's political stance are long gone. If the government were to launch peace negotiations, the other groups would have little to gain politically and would have too few commonalities to leverage any monetary or territorial demands. That said, nothing of the sort has been tried in Brazil, and the different drug gangs are often misunderstood to be one force, so only a negative result can be anticipated. Despite some doubts regarding the organization requirements of IHL, some scholars such as Sven Peterke suggest that even if all of the characteristics laid out by case law are not fulfilled,³⁵⁵ a 'convincing combination of these indicators' may be sufficient to trigger IHL, although such a claim cannot be made definitively at present.³⁵⁶

351 Ibid.

352 Muggah et al, 'Rio de Janeiro's Militia on the Rise (Again)'.

353 Pramendorfer, 'Favela Wars', p 8.

354 Muggah et al, 'Rio De Janeiro's Militia on the Rise (Again)'.

355 ICTR, *The Prosecutor v Musema*, Trial Chamber, 27 January 2000, §248; ICTY, *The Prosecutor v Hadzihasanovic and Kubura*, Trial Chamber, 15 March 2006, p 177.

356 S. Peterke, 'Regulating 'Drug Wars' and Other Gray Zone Conflicts: Formal and Functional Approaches', Humanitarian Action in Situations Other Than War (HASOW), Discussion Paper no 2, October 2012, <https://igarape.org.br/wp-content/uploads/2016/04/Regulating-Drug-Wars.pdf> (last accessed 31 January 2019).

C. KEY DEVELOPMENTS IN 2018

1. Activist's Murder Highlights Overlooked Urban Violence

Perhaps the most important development in the political fabric of Brazil in the past year was the assassination in March 2018 of Rio activist Marielle Franco, which contributed not only to the political fervour in the country but also to the perception of war being waged against favela residents and activists. Franco was an outspoken, black, lesbian, feminist politician, known for being highly critical of police brutality and the extrajudicial killing of favela residents by militias and state forces. Her death, widely considered to be politically motivated due to her activism and the fact that the bullets were from a batch bought by the federal police, prompted protests around the world.³⁵⁷ The associated media coverage shed harsh light on the deterioration of the security situation in Brazil since 2016, yet no conclusion has been reached. In November 2018, eight months after Franco's murder, the Brazilian Secretary of Public Security confirmed suspicions that the perpetrators were likely to be involved with militias and that the crime was politically motivated, but no arrests have been made.³⁵⁸

2. The Uptick in Violence and Army Powers Under Temer and Bolsonaro

Since Michel Temer assumed the presidency in 2016, the police forces have steadily settled into the hands of the army, taking over swaths of poor urban areas in Rio and exacerbating the violence. In November 2018, it was found that Brazil once again broke its own record for murders in 2017, up 3 percent from 2016.³⁵⁹ The security situation has intensified over the past three years, leading to the October 2018 election of President Jair Bolsonaro, on a campaign platform even more precarious than Temer's. It is reasonable to assume that, given the new president's open admiration for the brutal military dictatorship, torture, shoot-to-kill policing and racist comments,³⁶⁰ the violence in Rio will only worsen, taking more lives than ever and escalating in severity, building on the 30,000-strong military presence launched by Temer.³⁶¹ Furthermore, legal recourse for extrajudicial police killings is sure to remain limited given that appeals to challenge the continued use of military tribunals have not yet been heard and could potentially be blocked again.³⁶²

357 D. Phillips, 'Marielle Franco: Brazil's Favelas Mourn the Death of a Champion', *The Guardian*, 18 March 2018, <https://www.theguardian.com/world/2018/mar/18/marielle-franco-brazil-favelas-mourn-death-champion>.

358 'Secretário Diz Que Polícia Identificou Participantes Do Assassinato De Marielle', *Folha de S.Paulo*, 22 November 2018, <https://www1.folha.uol.com.br/cotidiano/2018/11/secretario-diz-que-policia-identificou-participantes-do-assassinato-de-marielle.shtml>.

359 T. Embury-Dennis, 'Brazil Breaks Own Record for Number of Murders in Single Year as Deaths Hit 63,880', *The Independent*, 10 August 2018, <https://www.independent.co.uk/news/world/americas/brazil-murder-rate-record-homicides-killings-rio-de-janeiro-police-a8485656.html>.

360 A. Forrest, 'Jair Bolsonaro: The Worst Quotes From Brazil's Far-Right Frontrunner', *The Independent*, 8 October 2018, <https://www.independent.co.uk/news/world/americas/jair-bolsonaro-who-is-quotes-brazil-president-election-run-off-latest-a8573901.html>.

361 HRW, 'Brazil: An Urgent Call to Protect Rights', 29 October 2018, <https://www.hrw.org/news/2018/10/28/brazil-urgent-call-protect-rights#> (last accessed 12 December 2018).

362 A. DelRío and J. Cesario 'Military Justice, Intervention and Human Rights in Brazil', *openDemocracy*, 5 July 2018, <https://www.opendemocracy.net/democraciaabierta/andr-s-del-r-o-juliana-cesario-alvim-gomes/military-justice-intervention-and-human>.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

The lack of investigations into the violence in Rio's favelas is notable given the urban violence's sheer intensity and longevity. According to the Igarapé Institute, a Brazilian think tank specializing in security issues, just 10 percent of homicides lead to arrest and only 4 percent result in charges.³⁶³ Importantly, even if charged with extrajudicial killing or other severe crimes, officers have in the past been able to return to the force³⁶⁴ or otherwise make a stable living by joining extrajudicial militias or collaborating with drug traffickers as advisors.³⁶⁵ In regard to the militias of Brazil, in 2018, 159 suspected members were arrested during a police raid, but no more than 20 were held due to supposed lack of evidence.³⁶⁶ Meanwhile, the police and military forces enjoy immunity from homicide convictions due to the fact that the Brazilian constitution has traditionally allowed military tribunals to carry out investigations of their own ranks (a legal vestige unaltered since the last dictatorship of the 1980s).³⁶⁷ In the 1990s, more attention was brought to the human rights concerns evoked by this judicial practice, inspiring a turn toward civilian tribunals, but appeals were left in limbo and military courts retained their oversight.³⁶⁸ President Temer's expansion of military capacities in the 'social pacification' missions of Rio in 2016/2017 (extended through 2018), reversed any progress in this area since the enforcement of Law 13491, which gives military tribunals jurisdiction in cases of intentional homicide, including with intention to kill.³⁶⁹ Appeals regarding the constitutionality of this law are pending and have not yet been heard by the Federal Supreme Court.³⁷⁰ Civilians and victims of the violence are in the meantime left with little to no recourse.

The Brazilian judicial system is known to be inefficient in general, and the narrowing division between it and the other branches of government are worrying. Besides failing to properly regulate Rio police and prosecute most extrajudicial killings for decades, the judiciary has also neglected to fully investigate even a high-profile killing like that of Marielle Franco. Franco's assassination was inescapably political in nature, yet there has been limited response from the government despite (or because of) potential evidentiary links between the branches of government, including state forces and militia allies. Meanwhile, violence in its

363 D. Phillips, "'A Devastating Scenario': Brazil Sets New Record for Homicides at 63,880 Deaths', *The Guardian*, 9 August 2018, <https://www.theguardian.com/world/2018/aug/09/brazil-sets-new-record-for-homicides-63880-deaths>.

364 R. Gay, 'Between Drug Gangs, the Police and Militias: An Anatomy of Violence in Rio De Janeiro', *Revista: Harvard Review of Latin America* (Winter 2008), <https://revista.drclas.harvard.edu/book/between-drug-gangs-police-and-militias> (last accessed 23 February 2019).

365 Phillips, "'Lesser Evil'".

366 Muggah et al. 'Rio De Janeiro's Militia on the Rise (Again)'.

367 Del Río and Cesario, 'Military Justice, Intervention and Human Rights in Brazil'.

368 C. Harig and P. Scuticchio, 'As Dilma Rousseff Stumbles, How Will Brazil's Military React?', *The Conversation*, 7 December 2015, <https://theconversation.com/as-dilma-rousseff-stumbles-how-will-brazils-military-act-51088> (last accessed 23 February 2019).

369 Del Río and Cesario, 'Military Justice, Intervention and Human Rights in Brazil'.

370 Ibid.

political and military forms continues to intensify, leading Amnesty International to consider Franco's assassination, at best, further evidence of the judicial branch's inadequacy, or at worst, a police cover-up.³⁷¹ The intimate political ties between police, army, militias and the executive and judiciary branches of government therefore both sustain impunity and complicate the potential of international law to aid Brazil's recovery as a stable, democratic state. As put by the founder of Rio-based NGO, Fight for Peace, 'This is not a war, but certainly not peace either.'³⁷²

2. CENTRAL AFRICAN REPUBLIC: SECTARIAN AND INTERCOMMUNAL VIOLENCE CONTINUES

Giulia Marcucci

Classification of the Conflicts

Turmoil in the Central African Republic (CAR) has continued since the 2013 coup d'état. Attacks against civilians increased again in 2017, with armed groups controlling around 80 percent of the country and often competing for natural resources.³⁷³ Clashes occur between anti-Balaka groups, mostly Christian militias, and the ex-Seleka, a predominantly Muslim umbrella group, as well as between and within factions of the Seleka coalition itself. Thus, the situation in the country remains a series of non-international armed conflicts (NIACs).

A. HISTORY OF THE CONFLICTS

The current violence in CAR, often referred to as the 'forgotten' conflict, has its most recent roots in 2013, when Muslim rebels from the Seleka umbrella group organized a coup d'état seizing power in a Christian-majority country.³⁷⁴

From the end of 2012 to the beginning of 2013, the Seleka coalition, mainly composed of armed groups from northeastern CAR, including the Union of Democratic Forces for Unity (UFDR), Democratic Front of the Central African People (FDPC), the Patriotic Convention for the Country's Salvation (CPSK) and the Convention of Patriots for Justice and Peace (CPJP), strongly opposed President François Bozizé for his failure to implement the disarmament, demobilization and reintegration

programme³⁷⁵ in the northeast, investigate rebel and government crimes that had occurred since 2005, when Bozizé was officially elected, and for the general lack of governance in the region. After gaining control over some strategic towns in early 2013, it soon became clear that the Seleka's purpose was to seize the capital, Bangui; nonetheless, neighbouring Chad along with the Economic Community of Central African States (ECCAS) managed to persuade the Seleka to negotiate with Bozizé's government.³⁷⁶ The negotiations led to the Libreville Agreement of January 2013, establishing a three-year power-sharing agreement. Furthermore, it provided that Bozizé would remain in power until 2016 but could not run for a third term.

However, the Libreville Agreement was mainly negotiated by regional heads of state while the leaders of the warring parties in CAR and the African Union (AU) itself played a marginal role.³⁷⁷ Thus, its actual implementation immediately proved to be a failure and the reforms required under the transition were never undertaken by Bozizé's government.³⁷⁸ This generated frustration within the Seleka coalition, which decided to take action and, by 24 March 2013, gained control over Bangui and 15 of the country's 16 provinces. As a result, Bozizé fled to Cameroon while the Seleka leader, Michel Djotodia, proclaimed himself President of CAR and suspended the constitution. ECCAS called for the creation of a Transitional National Council aimed at creating a new constitution and organizing elections within 18 months; Djotodia was eventually selected as Interim President on 13 April 2013. In May, his government seemed to take a positive step by indicting Bozizé for crimes against humanity allegedly committed during his time in office;³⁷⁹ however, he was soon criticized at the international level as his Seleka fighters were also accused of serious crimes (i.e. the recruitment of child soldiers) allegedly committed while overthrowing Bozizé's government, but were not brought to justice.

In September 2013, President Djotodia officially called for the dissolution of the Seleka coalition, stating that anyone acting in its name would be punished.³⁸⁰ Nonetheless, violence continued and, in response, many civilians decided to form primarily Christian self-defence militias known as the anti-Balaka ('anti-machete'),

375 The disarmament, demobilization and reintegration programmes for former combatants formed part of the peace deals known as the Birao Peace Agreement and the Libreville Comprehensive Peace Agreement, respectively signed in 2007 and 2008, between the government of CAR and several rebel groups.

376 International Coalition for the Responsibility to Protect (ICRtoP), 'Crisis in the Central African Republic', <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-the-central-african-republic> (last accessed 7 August 2018).

377 See Council on Foreign Relations, 'The Growing Crisis in Central African Republic', 20 March 2013, <https://www.cfr.org/blog/growing-crisis-central-african-republic> (last accessed 9 August 2018).

378 ICRtoP, 'Crisis in the Central African Republic'.

379 'Central African Republic Issues Arrest Warrant for Ex-President', *Chicago Tribune*, 31 May 2013, http://articles.chicagotribune.com/2013-05-31/news/sns-rt-centralafrica-presidentwarrant15n0ec39h-20130531_1_michel-djotodia-seleka-crimes.

380 'CAR President Djotodia Bans Former Seleka Rebel Backers', *BBC News*, 13 September 2013, <https://www.bbc.co.uk/news/world-africa-24088995>.

371 Amnesty International, 'Brazil: Failure to Identify Marielle Franco's Killers after Six Months Is Unacceptable', 14 September 2018, <https://www.amnesty.org/en/latest/news/2018/09/brazil-failure-to-identify-marielle-francos-killers-after-six-months-is-unacceptable/> (last accessed 12 December 2018).

372 A. Sampaio, 'Urban Security: When Gangs and Militias Run the Streets', International Institute for Strategic Studies, 16 October 2018, <https://www.iiss.org/blogs/analysis/2018/10/urban-security-gangs-militias-streets> (last accessed 23 February 2019).

373 W. Baxter, 'Widows in CAR: "I Was Kicked Out of Our House by his Parents"', *The Guardian*, 12 June 2018, <https://www.theguardian.com/global-development/2018/jun/12/widows-in-car-i-was-kicked-out-of-our-house-by-his-parents>.

374 'Central African Republic Country Profile', *BBC News*, 1 August 2018, <https://www.bbc.co.uk/news/world-africa-13150040>.

loyal to former president Bozizé, as a means of counterattack.³⁸¹ Intercommunal clashes between former Seleka fighters and the anti-Balaka began in late September 2013 and quickly escalated. According to a Human Rights Watch report issued in December that year, the anti-Balaka specifically targeted Muslim communities and committed widespread abuses, particularly in Ouham province, north of Bangui.³⁸² In retaliation, the ex-Seleka forces attacked Christian residents in the area.³⁸³ The fighting fueled longstanding rivalries between the Christian majority and the Muslim minority in CAR, thus adding a sectarian element to a conflict already characterized by lawless competition for natural resources among different armed groups.³⁸⁴

On 10 January 2014, Djotodia resigned over criticism of his failure to stop the increasing violence and instability. A week later, Catherine Samba-Panza, former mayor of Bangui, took over as Interim President. A 2014 United Nations report found that Chadian citizens and peacekeepers were also responsible for mass killings in the country³⁸⁵ and for facilitating Seleka regroupings in northeastern CAR.³⁸⁶ In addition, Amnesty International also accused international peacekeepers of having failed to prevent the ethnic cleansing of Muslim civilians carried out in the western part of the country by anti-Balaka militias.³⁸⁷ In response, the interim government arrested 11 anti-Balaka officers and charged them with war crimes. By March 2014, more than 650,000 people had been internally displaced, with more than 232,000 in Bangui alone.³⁸⁸ Over 290,000 people had also fled to neighbouring Cameroon, Chad, the Democratic Republic of the Congo (DRC) and the Republic of Congo.³⁸⁹ In April 2014, the UN Security Council (UNSC), through Resolution 2149, established the UN Multidimensional Integrated Stabilization Mission in the CAR (MINUSCA) acting under Chapter VII of the UN Charter. This transformed the previous AU-led International Support Mission to the Central African Republic, known as MISCA, into a UN peacekeeping mission composed of

381 'Briefing: Who Are the Anti-Balaka of CAR?', *IRIN*, 12 February 2014, <http://www.irinnews.org/analysis/2014/02/12/who-are-anti-balaka-car>.

382 Human Rights Watch (HRW), 'They Came to Kill': Escalating Atrocities in the Central African Republic, 18 December 2013, <https://www.hrw.org/report/2013/12/18/they-came-kill/escalating-atrocities-central-african-republic> (last accessed 7 August 2018).

383 Ibid.

384 R. Ratcliffe, "'The Future is Very Dark': Central African Republic's Relentless Cycle of Suffering', *The Guardian*, 18 December 2017, <https://www.theguardian.com/global-development/2017/dec/18/the-future-is-very-dark-central-african-republics-relentless-cycle-of-suffering>.

385 T. Miles, 'U.N. Points to Chadian Collusion in Central African Republic Killings', *Reuters*, 14 January 2014, <https://uk.reuters.com/article/uk-centralafrican/u-n-points-to-chadian-collusion-in-central-african-republic-killings-idUKBREA0D0VL20140114>.

386 HRW, 'Central African Republic: Seleka Fighters Regroup in North', 5 February 2014, <https://www.hrw.org/news/2014/02/05/central-african-republic-seleka-fighters-regroup-north> (last accessed 7 August 2018).

387 Amnesty International, 'Central African Republic: Ethnic Cleansing and Sectarian Killings', 12 February 2014, <https://www.amnesty.org/en/latest/news/2014/02/central-african-republic-ethnic-cleansing-sectarian-violence/> (last accessed 7 August 2018).

388 MINUSCA, 'About', <https://minusca.unmissions.org/en/about> (last accessed 7 August 2018).

389 Ibid.

10,000 military personnel, which became operational on 15 September 2014. On 30 May 2014, the Government of CAR referred the situation in its territory since 1 August 2012 to the International Criminal Court (ICC).³⁹⁰

In July 2014, ex-Seleka factions and anti-Balaka representatives signed a ceasefire agreement in Brazzaville leading, by the end of the year, to a de facto territorial partition of CAR with the Seleka controlling the north and anti-Balaka militias the south. Accordingly, hostilities slowly decreased but government control outside of the capital, Bangui, was very limited. In August, in the wake of this deal, the Muslim politician Mahamat Kamoun was appointed the first Muslim prime minister of CAR by President Samba-Panza; his appointment, however, was rejected by the Seleka group itself as he was not a Seleka member.³⁹¹ Ex-Seleka fighters formed new militias, often fighting each other, and on 14 December 2015 the rebel leader Noureddine Adam declared the Autonomous Republic of Logone,³⁹² which was immediately denounced by CAR's interim government. General elections were held in December 2015 and former prime minister Faustin-Archange Touadéra was elected President in February 2016. The elections marked the return to constitutional order after two years of transitional government, and the newly appointed government immediately emphasized the importance of the disarmament, demobilization, reintegration and repatriation, and the security sector reform processes as well as the need to set up the Special Criminal Court (SCC).³⁹³ However, the appointment also led to discontent within the Muslim community and among armed groups because of their insufficient representation in the institutions; the security situation in Bangui deteriorated significantly from June 2016 onwards.³⁹⁴

At the end of 2016, tensions erupted in Bambari and the surrounding region of Ouaka within the Seleka group, divided into two main branches: on one side, the Ali Darassa Union for Peace in Central Africa (UPC)³⁹⁵ and, on the other, a coalition of Adam's Popular Front for the Rebirth of Central Africa (FPRC)³⁹⁶ and Ali Katim's Central African Patriotic Movement (MPC), aimed at defeating the UPC in order to establish the capital of their future northeastern CAR state in Bambari.³⁹⁷ By the beginning of 2017, violence again rose to the levels of the 2013 crisis. MINUSCA reinforced its troops to prevent the FPRC taking the city and, in February 2017,

390 See International Criminal Court (ICC), 'Central African Republic II', ICC-01/14, <https://www.icc-cpi.int/carII> (last accessed 7 August 2018).

391 'Central African Republic Crisis: Rebels Reject New Muslim PM Kamoun', *BBC News*, 11 August 2014, <https://www.bbc.com/news/world-africa-28738994>.

392 'Central African Rebel Leader Declares Autonomus Republic', *Reuters*, 15 December 2015, <https://www.reuters.com/article/us-centralafrica-politics-idUSKBN0TY1F620151215>.

393 MINUSCA, *Report on the Human Rights Situation in the Central African Republic (CAR): from 1 April 2016 to 31 March 2017*, pp 8–9, https://minusca.unmissions.org/sites/default/files/20171228_minusca_third_public_report_on_car_hrd_final.pdf (last accessed 7 August 2018).

394 Ibid.

395 Mainly composed of Muslims from the Fulani ethnic group of Bambari.

396 Mainly composed of Muslims from the Gula and Runga ethnic communities.

397 L. Larcher, 'The Battle of Ouaka in Central African Republic', *La Croix International*, 27 February 2017, <https://international.la-croix.com/news/the-battle-of-ouaka-in-central-african-republic/4756#>.

the FPRC's Chief of Staff, Joseph Zoundeko, was killed by the Blue Helmets. At the same time, MINUSCA negotiated the UPC leader Ali Darassa's removal from Bambari so as to create an 'armed group-free zone' in CAR's second largest city.³⁹⁸ The UPC departure meant that MINUSCA was no longer obliged to protect the Muslim community against the anti-Balaka forces of Gaëtan Boade;³⁹⁹ however, it also caused the fighting to spread from urban to rural areas. Additionally, MINUSCA relied on Ugandan and American special forces deployed in the country to eliminate the Lord's Resistance Army in order to keep the peace in the southeast, but their mission ended in April 2017 after five years of fighting.

By the second half of 2017, the fighting shifted to the southeast where the UPC reorganized and clashed with the FPRC as well as anti-Balaka groups.⁴⁰⁰ On 19 June 2017, an 'immediate ceasefire' mediated by the Roman Catholic peace group Sant'Egidio was signed in Rome between the CAR Government and 14 armed groups. Under the agreement, armed groups were to be given representation in the political arena in exchange for an end to attacks.⁴⁰¹ A day after its signing, however, around 100 people were killed in fighting involving mainly an anti-Balaka militia and the FPRC in the major town of Bria.⁴⁰² A pattern of reprisal killings targeting ethnic Muslim Fulani on one side and Christians on the other became evident; thus, the UN stated that 'the early warning signs of genocide'⁴⁰³ were present. In October 2017, another ceasefire was signed between the UPC, the FPRC and anti-Balaka groups.⁴⁰⁴

In November 2017, the leader of the Christian Revolution and Justice (RJ), Clément Bélanga, was killed by members of the National Movement for the Liberation of the Central African Republic (MNLRC),⁴⁰⁵ allegedly backed by Fulani fighters from Chad. Accordingly, tensions between the two groups erupted in northwestern CAR, around Paoua. Meanwhile, the UPC and the FPRC keep battling for control in the Ouaka and Hautte-Koto regions. Finally, most armed groups including the anti-Balaka and the FPRC have been boycotting president Touadéra's disarming efforts.⁴⁰⁶

398 P. Kleinfeld, "People Are Dying Every Day" – CAR Refugees Fleeing War Suffer in Congo', *IRIN*, 30 October 2017, <http://www.irinnews.org/feature/2017/10/30/people-are-dying-every-day-car-refugees-fleeing-war-suffer-congo>.

399 Larcher, 'The Battle of Ouaka in Central African Republic'.

400 'Red Cross: 115 bodies Found in CAR's Bangassou', *Al Jazeera*, 17 May 2017, <https://www.aljazeera.com/news/2017/05/red-cross-115-bodies-car-bangassou-170517114611855.html>.

401 'CAR Government Signs Peace Deal With Rebel Groups', *Al Jazeera*, 19 June 2017, <https://www.aljazeera.com/news/2017/06/car-government-signs-peace-deal-rebel-groups-170619175516668.html>.

402 'CAR Violence: Deadly Clashes in Bria Despite Ceasefire Deal', *BBC News*, 21 June 2017, <https://www.bbc.com/news/world-africa-40350057>.

403 'UN Sees Early Warning Signs of Genocide in CAR', *Al Jazeera*, 7 August 2017, <https://www.aljazeera.com/news/2017/08/sees-early-warning-signs-genocide-car-170807215828039.html>.

404 Kleinfeld, "People Are Dying Every Day".

405 'Centrafrique: au moins 25,000 nouveaux déplacés dans le nord-ouest', *Le Monde*, 9 January 2018, https://www.lemonde.fr/afrique/article/2018/01/09/centrafrique-au-moins-25-000-nouveaux-de-places-dans-le-nord-ouest_5239303_3212.html.

406 Council on Foreign Relations, 'Violence in the Central Africa Republic', Global Conflict Tracker, <https://www.cfr.org/interactives/global-conflict-tracker?co=C042701#!/#/conflict/violence-in-the-central-african-republic> (last accessed 8 August 2018).

B. PARTIES TO THE CONFLICTS⁴⁰⁷

Within the current context of lawlessness characterizing the violence among different armed groups in the country, rebuilding a mixed army – Central African Armed Forces (FACA)⁴⁰⁸ – representing the diversity of CAR's ethnic groups, is among President Touadéra's most urgent tasks.⁴⁰⁹ As the army still has limited power and control outside of the capital, Bangui, it is not considered to be a party to the current conflict in the following analysis.

1. MINUSCA

The increasing involvement of MINUSCA in joint operations with the FACA in order to dismantle militia bases in Bangui led, in April 2018, to some direct fire confrontation between the UN mission and armed groups in the PK5 neighbourhood. One could argue that the confrontation reached the intensity threshold required for MINUSCA to be considered a party to the conflict with PK5 groups. This nevertheless remains controversial.

2. Non-State Parties

Currently, a wide array of armed groups characterized by different degrees of organization control most of the country. The following list attempts to identify the most important and active ones: among these, some (i.e. the Coalition, the UPC and Return, Reclamation, Rehabilitation (3R)) seem to reach the organizational threshold required for the application of international humanitarian law of NIACs, while the same claim for the others is not unequivocal.

a. The Coalition

The Coalition formed in September 2016 to strengthen the negotiating power of its members, expand the de facto partition of the country and allow for the exploitation of its resources to benefit its leaders. It has systematically targeted the UPC, which refused to join it, as well as the Peuhl/Fulani communities accused of being foreigners. The Coalition is composed of various armed groups, including ex-Seleka factions (i.e. the FPRC, Assembly for the Renaissance of Central Africa (RPRC) and the MPC) and an anti-Balaka group (anti-Balaka – Mokom wing) associated with former president Bozizé:

- **Popular Front for the Rebirth of Central Africa (FPRC)**

The FPRC was created in August 2014 from the previous Seleka coalition and Nourredine Adam and Michel Djotodia, the previous Seleka leader and

407 See N. Dukhan, *Splintered Warfare: Alliances, Affiliations, and Agendas of Armed Factions and Politico-Military Groups in the Central African Republic*, The Enough Project, August 2017, https://enoughproject.org/wp-content/uploads/2017/08/SplinteredWarfare_August2017_Enough_final.pdf (last accessed 9 August 2018).

408 FACA is currently estimated to have 5,825 active military personnel. See Global Firepower, 'Central African Republic Military Strength', https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=central-african-republic (last accessed 9 August 2018).

409 GlobalSecurity.org, 'Central African Republic Army', <https://www.globalsecurity.org/military/world/africa/car-army.htm> (last accessed 9 August 2018).

president of CAR, are among its main leaders. Together with other affiliated groups, its strategy is to manipulate the threat of anti-Balaka violence against the Muslim community in order to justify its reprisals.

- **Assembly for the Renaissance of Central Africa (RPRC)**
The RPRC formed in November 2014 having been previously affiliated with the FPRC. Its main leaders are Gontran Djono Ahaba and Zakaria Damane, both from the Gula ethnic group, and its main objective is to overthrow the central government in order to re-establish a Seleka regime or, alternatively, have an official partition of the country with Bambari as the new capital of its own state.
- **Central African Patriotic Movement (MPC)**
The MPC emerged in July 2015 and was until then affiliated with the FPRC. One of the MPC leaders, Mahamat al-Khatim, has been the Coalition's Chief of Staff since May 2017. Additionally, since 2016 the MPC has also had an alliance with RJ, mainly based on sharing economic revenue in areas they both control. They share the same political agenda as the Coalition, which they are members of, and also seek to ensure the inclusion of CAR citizens with Chadian origin in the political system.
- **Anti-Balaka – Mokom wing (associated with Bozizé)**
The Anti-Balaka – Mokom wing formed in 2015 and is mainly composed of previous members of Bozizé's presidential guard as well as army officers under his regime and in self-defence groups. Its main leaders are François Bozizé and Maxime Mokom and its particular aim is to bringing Bozizé back to power. It is part of the Coalition and, since January 2015, the Mokom wing has also formed an alliance, the so-called 'Alliance of the Nairobiists', with the FPRC so as to increase their leverage against the central government and the international community.

b. Movement of Central African Liberators for Justice (MLCJ)

The MLCJ dates back to 2008, when it splintered from the UFDR, and was then part of the Seleka coalition in 2012 and 2013. Its leaders support the FPRC's agenda and, according to some, the MLCJ is unofficially part of the Coalition.

c. Union for Peace in Central Africa (UPC)

The UPC was formed in October 2014 by Ali Darassa and is mainly composed of Muslims from the Fulani ethnic group of Bambari. In 2016, it was the strongest armed group in CAR, thus creating tensions with other ex-Seleka factions. It then became the main target of the Coalition's attacks and, in March 2017, was forced to leave its stronghold in Bambari. It now occupies the Alindao area, the southeast part of the country, and remains strong thanks to its military command and access to arms from the region, particularly Sudan and the Democratic Republic of the Congo. The leaders of the UPC declare that their purpose is not to overthrow the central government but rather to maintain and expand their territorial control as well as be integrated within the government and the national armed forces.

d. Return, Reclamation, Rehabilitation (3R)

3R was formed towards the end of 2015 by General Sidiki Abass with the initial purpose of protecting the minority Muslim Peuhl populations from attacks by Christian anti-Balaka militias.⁴¹⁰ It is made up of mostly Muslim cattle herders and has no known links with Seleka rebels. 3R also claims to fight against RJ combatants threatening the Fulani/Peuhl communities who live in southwest CAR. However, it seems to be a Cameroonian or Central African group⁴¹¹ whose real purpose is to maintain the de facto partition of the country so as to keep benefiting from its resources through taxation and kidnapping.

e. Revolution and Justice (RJ)

RJ was created in 2015 with other self-defence groups located in northwestern CAR, mostly by members of the presidential guard of former president Patassé. It has built its power on a system of taxation and de facto partition of the territories under its control. In such territories, RJ cohabitates with the MPC.

f. National Movement for the Liberation of the Central African Republic (MNLRC)⁴¹²

The MNLRC was founded in October 2017 under the command of Mahamat Bahar, a former member and co-founder of the FPRC and MPC, and is allegedly backed by Fulani fighters from Chad. It divided the territory in the northwest with RJ, but tensions erupted after the killing of RJ leader Clément Bélanga in November 2017.

g. Muslim Self-Defence Groups in Bangui

These groups emerged in December 2013 in Bangui's Muslim neighbourhood PK5 (also known as KM5) to protect the Muslim community from anti-Balaka attacks. In 2015, ex-Seleka leaders took control of the PK5 area and Muslim self-defence groups were used for political gain. In August 2016, after the departure of the FPRC leaders from PK5, four self-defence groups remained active but became less powerful. In April 2018, they were involved in violent fire confrontations with MINUSCA.

h. Anti-Balaka Local Groups

Such groups were initially created around 1980–1990 in northern CAR and have joined the anti-Balaka movement since 2013 to counterattack the Seleka. They do not have a specific political agenda, nor specific military training.

i. National Coordination of the Ex-Anti-Balaka

The National Coordination of the Ex-Anti-Balaka emerged in 2014 to protect the non-Muslim community from the threat of ex-Seleka factions. Thus, it refuses to

410 A. Essa, 'Newly Formed 3R Rebel Group Inflicts Horrors in CAR: UN', *Al Jazeera*, 23 December 2016, <https://www.aljazeera.com/news/2016/12/newly-formed-3r-rebel-group-inflicts-horrors-car-161223035217671.html>.

411 Ibid.

412 'Centrafrique: au moins 25,000 nouveaux déplacés dans le nord-ouest'.

disarm as long as the Seleka groups remain armed. It is led by Patrice-Edouard Ngaiïssona, whose candidacy was rejected by the transitional government.

j. Democratic Front of the Central African People (FDPC)

The FDPC first emerged in 2003 with the main purpose of overthrowing Bozizé's regime, then briefly joined the Seleka coalition in 2013. Its military stronghold is in western CAR, near the border with Cameroon. Currently, it does not have a specific political agenda.

C. KEY DEVELOPMENTS IN 2018

At the beginning of 2018, around 60,000 people fled northern CAR ending up in the town of Paoua to escape clashes between RJ under the command of Armel Nintatoulou Sayo and the MNLC under the command of Mahamat Bahar,⁴¹³ thus provoking a humanitarian crisis in the sub-prefecture of Paoua. According to MINUSCA's investigations, members of RJ have intentionally killed civilians, specifically targeting the Muslim and Peuhl communities. The MNLC, on the other hand, was believed to be responsible for the destruction of several villages north of Paoua and the resulting displacement of populations in such areas.⁴¹⁴ Accordingly, MINUSCA conducted an operation to oust the armed groups around Paoua in order to establish a secure area and enable the return of displaced populations.⁴¹⁵ Furthermore, in January 2018 the UNSC extended the CAR arms embargo against non-state actors⁴¹⁶ for another year, threatening further sanctions.⁴¹⁷ In March 2018, a deadly confrontation between the anti-Balaka and elements of the UPC occurred in the village of Tagbara, located 70 km from Bambari, left an unspecified number of people dead and resulted in several injuries and significant displacement of the civilian population.⁴¹⁸

During the night of 7–8 April 2018, following continued violence and abuses against civilians perpetrated by self-defence groups controlling the predominantly Muslim neighbourhood of PK5 in Bangui, MINUSCA and the FACA conducted a joint operation aimed at dismantling the militia bases in the area. This quickly

413 MINUSCA, 'Minusca Denounces the Violence by RJ and MNLC Armed Groups That Provoked a Humanitarian Crisis in the Sub-Prefecture of Paoua', press release, 20 January 2018, <https://minusca.unmissions.org/en/minusca-denounces-violence-rj-and-mnlc-armed-groups-provoked-humanitarian-crisis-sub-prefecture> (last accessed 9 August 2018).

414 Ibid.

415 Ibid.

416 In December 2013, the UN Security Council unanimously adopted Resolution 2127 imposing an arms embargo on non-state actors in CAR, which has since been extended annually. It bans all supplies of arms and related material to the country except to its security forces, if previously approved by the relevant UN Sanctions Committee. See Stockholm International Peace Research Institute, 'UN Arms Embargo on the Central African Republic', https://www.sipri.org/databases/embargoes/un_arms_embargoes/Central-African-Republic/un-arms-embargo-on-the-central-african-republic (last accessed 9 August 2018).

417 'UN Security Council Renews CAR Arms Embargo, Threatens More Sanctions', *VOA News*, 30 January 2018, <https://www.voanews.com/a/security-council-renews-central-african-republic-arms-embargo/4232352.html>.

418 O. Mbiko, 'Scores Killed in Renewed CAR Rebellion', *Caj News Africa*, 26 March 2018, <http://cajnewsafrika.com/2018/03/26/scores-killed-in-renewed-car-rebellion/>.

turned into a violent fire confrontation between the UN stabilization mission and the armed groups,⁴¹⁹ resulting in at least 18 people dead, among whom was one peacekeeper, and 46 wounded.⁴²⁰ On 11 April, protestors placed the bodies of 17 people who died during the fire confrontation in front of the UN headquarters in Bangui, claiming they were civilians killed by UN peacekeepers; a UN spokesman denied the accusations, arguing that they were armed criminals who had been targeting peacekeepers and government forces.⁴²¹ On 1 May 2018, at least 15 people, including a priest, were killed and 99 were injured in an attack directed against the Notre-Dame de Fatima church in Bangui, near the PK5 area. According to a MINUSCA spokesperson, violence renewed after a suspected member of a PK5 rebel group was arrested.⁴²² Furthermore, attacks against aid workers are drastically increasing. According to the UN Office for the Coordination of Humanitarian Affairs, from April to June 2018, 118 incidents affected humanitarian workers (including armed robberies, murder and kidnapping), compared with 63 in the first quarter of the year.⁴²³

On 15 November 2018, the UPC, together with large numbers of armed Muslim civilians, carried out an attack on an internally displaced people's camp in the town of Alindao in the Basse-Kotto region. According to a growing perception within the Muslim community, this camp was used by anti-Balaka fighters as a refuge.⁴²⁴ Between 70 and 100 camp residents including women, children, older people and people with disabilities have been killed and the UN peacekeepers mandated to protect civilian lives on the site have been harshly criticized for their failure to contain the violence.⁴²⁵

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

CAR ratified the Rome Statute on 3 October 2001 and has twice referred the situation in its territory to the ICC.

419 'Regain de tension à Bangui après le début d'une opération militaire contre des groupes armés', *Le Monde*, 9 April 2018, https://mobile.lemonde.fr/afrique/article/2018/04/09/regain-de-tension-a-bangui-apres-le-debut-d-une-operation-militaire-contre-des-groupes-armes_5282835_3212.html.

420 'Le regain des violences à Bangui fait au moins 18 morts, dont un casque bleu', *Le Monde*, 11 April 2018, https://mobile.lemonde.fr/afrique/article/2018/04/11/regain-de-violences-a-bangui-ou-un-casque-bleu-a-ete-tue_5283837_3212.html.

421 'UN: Central African Republic Corpse Protest Was Propaganda', *BBC News*, 12 April 2018, <https://www.bbc.com/news/world-africa-43735333>.

422 'Bangui Church Attack: 15 Killed in Central African Republic', *BBC News*, 1 May 2018, https://www.bbc.com/news/world-africa-43964817?intlink_from_url=https://www.bbc.com/news/topics/cd18n2ede23t/central-african-republic&link_location=live-reporting-story.

423 N. Peyton, 'Attacks on Aid Workers Rise in Central African Republic', *Reuters*, 29 July 2018, <https://af.reuters.com/article/topNews/idAFKBN1KJ06N-OZATP>.

424 Amnesty International, 'Everything Was in Flames': *The Attack on a Displaced Persons Camp in Alindao*, <https://www.amnesty.org/download/Documents/AFR1995732018ENGLISH.PDF> (last accessed 16 December 2018).

425 Ibid.

The first ICC investigation in CAR (CAR I)⁴²⁶ focused on alleged war crimes and crimes against humanity committed within the context of a NIAC between the government and rebel forces since 1 July 2002, with a peak of violence in 2002 and 2003. It has produced one main case against Jean-Pierre Bemba Gombo,⁴²⁷ President and Commander-in-Chief of the Movement for the Liberation of Congo, also operating in CAR and allied with the then president, Ange-Félix Patassé, but he was acquitted on 8 June 2018 by a majority decision of the ICC Appeals Chamber, which reversed Trial Chamber III's decision of 21 March 2016.⁴²⁸

The second ICC investigation in CAR (CAR II)⁴²⁹ was opened in September 2014 and currently focuses on war crimes (i.e. murder, rape, pillaging, attacks against humanitarian missions and the use of child soldiers under 15) and crimes against humanity (i.e. murder, rape, forced displacement and persecution) allegedly committed by both the Muslim Seleka coalition and Christian anti-Balaka groups in the context of renewed violence since 1 August 2012. The only case opened so far is against Alfred Yekatom, alleged commander of a group of 3,000 members which operated within the anti-Balaka movement.⁴³⁰ Furthermore, on 12 December 2018, Patrice-Edouard Ngaïssona, leader of the National Coordination of the Ex-Anti-Balaka, was arrested by the French authorities pursuant to an ICC arrest warrant.⁴³¹

On 3 June 2015, the then interim President of CAR, Catherine Samba-Panza, promulgated organic law 15/003 establishing the SCC, a hybrid tribunal integrated into the Central African justice system.⁴³² The SCC is authorized to investigate, prosecute and try serious human rights and humanitarian law violations (i.e. the crime of genocide, crimes against humanity and war crimes) allegedly committed in CAR since 1 January 2003. It officially launched its investigations on 22 October 2018.⁴³³

426 See ICC, 'Central African Republic', ICC-01/05, <https://www.icc-cpi.int/car> (last accessed 9 August 2018).

427 See ICC, *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

428 ICC, *The Prosecutor v Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber's III 'Judgment Pursuant to Article 74 of the Statute', ICC-01/05-01/08 A, 8 June 2018.

429 See ICC, 'Central African Republic II'.

430 See ICC, *Situation: Central African Republic, The Prosecutor v Alfred Yekatom*, Questions and Answers, https://www.icc-cpi.int/itemsDocuments/181117-qa-yekatom_ENG.pdf (last accessed 16 December 2018).

431 ICC, 'Situation in Central African Republic II: Patrice-Edouard Ngaïssona Arrested for Crimes Against Humanity and War Crimes', press release, 12 December 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=PR1425> (last accessed 16 December 2018).

432 P. Labuda, 'The Special Criminal Court in the Central African Republic', 22 *ASIL Insights* 2 (22 January 2018), <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic> (last accessed 9 August 2018).

433 'RCA: inauguration de la Cour pénale spéciale', *RFI Afrique*, 23 October 2018, <http://www.rfi.fr/afrique/20181023-rca-justice-lancement-cour-penale-speciale-bangui-cps>.

3. DEMOCRATIC REPUBLIC OF THE CONGO: CONFLICT IN THE EASTERN REGIONS

Giulia Marcucci

Classification of the Conflict

Violence in the Democratic Republic of the Congo (DRC) involving the Armed Forces of DRC (FARDC), supported by the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), and a wide array of rebel groups has escalated in the last two years, especially in the eastern regions (Ituri and North and South Kivu provinces). Thus, the situation in DRC remains a series of non-international armed conflicts (NIACs).

A. HISTORY OF THE CONFLICT⁴³⁴

The current violence in DRC, qualified as one of the world's worst active humanitarian crises, has its origins in the massive refugee crisis that resulted from the 1994 genocide in Rwanda.⁴³⁵ After Rwanda's genocidal regime was overthrown in June 1994, more than 2 million Hutus fled to neighbouring DRC fearing reprisals by the newly established Tutsi government led by Paul Kagame. They allied themselves with Mobutu Sese Seko, military dictator and President of DRC since 1965, and began to attack the Tutsi population who had been living in the country for generations.⁴³⁶ In response, Rwanda's Tutsi government started to back Tutsi militias led by Laurent Kabila, thus marking the beginning of the so-called First Congo War (1996–1997). Kabila gained support from neighbouring countries such as Uganda, Rwanda and Burundi, which merged into the Alliance of Democratic Forces for the Liberation of Congo-Zaire (ADFL), allowing him to lead a full-scale rebellion against President Mobutu. In December 1996, he began a slow movement westward, taking control of border towns and mines. By mid-1997, the ADFL marched on Kinshasa, overthrew Mobutu's government and installed Kabila as President.

However, Kabila immediately faced substantial obstacles to governing the country. He failed to expel the Hutu militia and his foreign allies in the ADFL proved to be unwilling to leave the country when asked. By 1998, his allies supported new rebellions, this time with the aim of ousting him: Rwanda backed the Rally for Congolese Democracy (RCD) while the Movement for the Liberation of Congo (MLC) was backed by the Government of Uganda. Kabila, on the other hand, man-

434 'Democratic Republic of Congo Profile – Timeline', *BBC News*, 14 May 2018, <https://www.bbc.com/news/world-africa-13286306>.

435 Council on Foreign Relations, 'Violence in the Democratic Republic of Congo' Global Conflict Tracker, <https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/violence-in-the-democratic-republic-of-congo> (last accessed 12 July 2018).

436 'Q&A: DR Congo Conflict', *BBC News*, 20 November 2012, <https://www.bbc.com/news/world-africa-11108589>.

aged to obtain support from other countries, i.e. Angola, Namibia and Zimbabwe⁴³⁷ and, accordingly, for the following five years a war involving all six countries was fought on Congolese land, the so-called Second Congo War (1998–2003). In addition, other foreign armies and at least 16 armed groups took part in the conflict.⁴³⁸ The conflict was thus categorized as a combination of internal conflicts (i.e. RCD against Kabila's government and MLC against Kabila's government) and international conflicts (i.e. the conflict between Uganda and Rwanda on Congolese territory as well as the clashes between the Rwandan and Ugandan armies on one side and the Congolese army on the other).⁴³⁹

In July 1999, the six main African countries involved in the conflict signed a ceasefire accord in Lusaka, which was then also signed by the MLC and RCD rebel groups. By 2000, the UN authorized a force of 5,537 troops, known by the French acronym MONUC, to monitor the ceasefire;⁴⁴⁰ nonetheless, fighting continued between rebels and government forces as well as between Rwandan and Ugandan forces. Furthermore, in January 2001, Kabila was shot dead by a bodyguard and his son, Joseph Kabila, was sworn in as President to replace him. The new president and the Rwandan President Kagame met in Washington and agreed, along with Uganda and the rebels, to a UN pullout plan. In April of the same year, a UN panel of experts conducted an investigation concluding that the warring parties, i.e. Rwanda, Uganda and Zimbabwe, were deliberately prolonging the conflict in the country in order to exploit its resources (diamonds, cobalt, coltan and gold) and recommended that the UN Security Council (UNSC) impose sanctions.

In 2002, under the auspices of South Africa, a series of peace talks were held in the country from April to December. In April, the DRC Government signed a power-sharing deal with Ugandan-backed rebels, according to which the MLC leader was to be the premier. Rwandan-backed RCD rebels, on the other hand, rejected the deal. In July, Rwanda and DRC signed a peace deal known as the Pretoria Accord, focused on two main issues: the withdrawal of Rwandan soldiers from the east, and the disarmament and arrest of the Hutu militia known as Interahamwe, which took part in the Rwandan genocide and continued to operate in eastern Congo.⁴⁴¹ In September, a peace deal between DRC and Uganda including the withdrawal of Ugandan troops was signed as well. Finally, in December a global and all-inclusive

437 They intervened in the conflict in support of the Congolese army by invoking the inherent right of individual or collective self-defence, as set out in Article 51 of the UN Charter, and as recalled in UNSC Res 1234, 1999. See International Committee of the Red Cross (ICRC), 'Case Study: Armed Conflicts in the Great Lakes Region (1994–2005)', https://casebook.icrc.org/case-study/case-study-armed-conflicts-great-lakes-region-1994-2005#congo_part3 (last accessed 12 July 2018).

438 Ibid.

439 Ibid.

440 UNSC Res 1279, 30 November 1999.

441 See C. McGreal, 'Rwanda and Congo Sign Peace Accord', *The Guardian*, 31 July 2002, <https://www.theguardian.com/world/2002/jul/31/congo.chrismcgreall>.

agreement was signed between the DRC Government and the main rebel groups.⁴⁴² This agreement marked the formal end of the Second Congo War and put in place a plan for transitional governance with the purpose of reunifying the country, disarming and integrating the warring parties and holding democratic elections within two years.

However, the transitional government formed by President Kabila to lead until the upcoming elections, had to face continuous instability: the former warring parties refused to give up their power and elections had to be postponed. Three main areas of conflict remained between government forces and rebel groups: North and South Kivu, Ituri and Northern Katanga. The DRC Government decided to refer the situation in the eastern part of the country (the Ituri region and North and South Kivu provinces) to the International Criminal Court (ICC) in April 2004.⁴⁴³ Moreover, in December 2005, the International Court of Justice ruled that DRC's sovereignty had been violated by Uganda during the Second Congo War and, accordingly, the latter had to compensate the Kinshasa government.⁴⁴⁴ The first free elections in four decades were held in July 2006 but there was no clear winner in the presidential vote between Kabila and the opposition candidate, Jean-Pierre Bemba. After the second round held in October of the same year, Kabila was declared the winner with the general approval of international monitors.⁴⁴⁵

In January 2008, the DRC Government and the rebel militias signed a peace deal with a view to ending years of violence in the east⁴⁴⁶ but renewed waves of conflict kept destabilizing the wider Great Lakes region. Therefore, In July 2010, the UNSC, through Resolution 1925,⁴⁴⁷ re-established the peacekeeping operation as MONUSCO, adding 'stabilization' to its previous mandate so as to reflect the new phase reached in the country. In March 2013, the UNSC created, through Resolution 2098,⁴⁴⁸ a specialized Force Intervention Brigade (FIB) with the mandate of neutralizing armed groups and contributing to reducing their threat to state authority and civilian security in eastern DRC. Indeed, the M23, a rebel group composed of ethnic Tutsis and allegedly backed by the Rwandan Government, was fighting the Congolese army and, in November 2012, successfully took the major city of Goma

442 See Global and Inclusive Agreement on Transition in the DR Congo: Inter-Congolese Dialogue – Political Negotiations on the Peace Process and on Transition in the DRC, ReliefWeb, 16 December 2002, <https://reliefweb.int/report/democratic-republic-congo/global-and-inclusive-agreement-transition-dr-congo-inter-congolese>.

443 See International Criminal Court (ICC), 'Democratic Republic of the Congo', ICC-01/04, <https://www.icc-cpi.int/drc> (last accessed 15 January 2019).

444 International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, <https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf> (last accessed 15 January 2019).

445 See C. McGreal, 'Opposition Objects as Kabila Named Congo Election Winner', *The Guardian*, 16 November 2006, <https://www.theguardian.com/world/2006/nov/16/congo.chrismcgreall>.

446 L. Polgreen, 'Congo Agrees to Peace Deal With Rebels', *The New York Times*, 22 January 2008, <https://www.nytimes.com/2008/01/22/world/africa/22congo.html>.

447 UNSC Res 1925, 28 May 2010.

448 UNSC Res 2098, 28 March 2013.

located in North Kivu province, forcing civilians to flee.⁴⁴⁹ Only a strong offensive conducted by the Congolese army, significantly supported by the FIB, caused the M23 rebels to ultimately surrender and a peace deal was signed in December 2013. Other rebel groups such as the Democratic Forces for the Liberation of Rwanda (FDLR) nonetheless took the opportunity to regroup and strengthen their power.

Recent violence was mainly linked to the country's worsening political crisis and turmoil. Since the 2005 constitutional referendum, the Congolese Constitution limits the presidential term to a maximum of two consecutive periods of five years in office. In December 2016, Kabila was approaching the end of his second and final five-year term; however, he refused to step down and showed determination to postpone the organization of democratic elections. Accordingly, a series of negotiations between Kabila's ruling coalition and the opposition took place under the aegis of the influential Catholic Church and the Saint Sylvester Agreement, envisaging a political transition with presidential elections to be held by the end of 2017, was signed on 31 December 2016. The compromise also called for the implementation of 'confidence building measures' such as the release of political prisoners, the return of political leaders living in exile, a more open access to media and the lifting of the ban on peaceful political protests and meetings.⁴⁵⁰ In November 2017, however, the national electoral commission announced a new calendar, scheduling elections for 23 December 2018 and thus extending Kabila's rule for at least another year.⁴⁵¹ The growing frustration of this political impasse led several armed groups to ally their forces, with the overarching goal of ousting Kabila.

B. PARTIES TO THE CONFLICT

Given the continuous proliferation of different armed groups in eastern DRC (most of which do not meet the level of organization required for the application of international humanitarian law of NIACs),⁴⁵² determining the parties to the conflict is not straightforward. Around 120 armed groups have been counted in North and South Kivu provinces alone.⁴⁵³ The following list attempts to identify the most prominent.

449 'Goma: M23 Rebels Capture DR Congo City', *BBC News*, 20 November 2012, <https://www.bbc.com/news/world-africa-20405739>.

450 See Human Rights Watch (HRW), 'DR Congo: Repression Persists as Election Deadline Nears', <https://www.hrw.org/news/2018/06/29/dr-congo-repression-persists-election-deadline-nears> (last accessed 12 July 2018).

451 See 'DRC Sets Elections for December 2018', *Africanews*, 6 November 2017, <http://www.africanews.com/2017/11/06/drc-sets-elections-for-december-2018/>.

452 See ICTY, *The Prosecutor v Dusko Tadić*, Trial Chamber, Judgment, IT-94-1-T, 7 May 1997, §562. For a series of indicative factors further developed by the ICTY in order to assess the degree of organization of non-state armed groups, see also ICTY, *The Prosecutor v Ramush Haradinaj and others*, Trial Chamber, Judgment, IT-04-84-T, 3 April 2008, §60; ICTY, *The Prosecutor v Ljube Bošković and Johan Tarčulovski*, Trial Chamber, Judgment, IT-04-82-T, 10 July 2008, §§194–203.

453 J. Stearns and C. Vogel, *The Landscape of Armed Groups in Eastern Congo*, Kivu Security Tracker, December 271, <https://reliefweb.int/sites/reliefweb.int/files/resources/Landscape%20of%20Armed%20Groups%20Essay%20KST.pdf> (last accessed 12 July 2018).

1. Armed Forces of the Democratic Republic of Congo (FARDC)

The FARDC is the state organization responsible for defending DRC, and it is currently estimated to have 144,625 active military personnel.⁴⁵⁴ It was rebuilt as part of the peace process following the end of the Second Congo War in July 2003 through a process called *brassage* ('mixing up') in which soldiers from formerly warring rebel groups are placed together in order to enhance integration. However, there have been many investigations and reports on human rights abuses, especially sexual violence, perpetrated by FARDC recruits.⁴⁵⁵

2. United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO)⁴⁵⁶

MONUSCO was established by UNSC Resolution 1925 on 1 July 2010, taking over from the earlier UN peacekeeping operation known as MONUC. The new mission was authorized to use all necessary means to carry out its mandate relating, among other things, to the protection of civilians, humanitarian personnel and human rights defenders under imminent threat of physical violence, and to support the DRC Government in its stabilization and peace-consolidation efforts. Future re-configurations of the mission would be determined according to the evolution of the situation on the ground. This mandate was further detailed by UNSC Resolution 2053. As continuous conflict in eastern DRC kept destabilizing the country and the wider Great Lakes region, on 28 March 2013 the UNSC decided to create, through resolution 2098, a specialized 'Force Intervention Brigade' (FIB), operating under direct command of the MONUSCO Force Commander with the mandate of neutralizing armed groups and reducing their threat to state authority and civilian security. Thus, the FIB has provided military support to the FARDC against offensives conducted by several armed groups; this active involvement in combat activity led to MONUSCO's qualification as a party to the conflict. It also represented a radical change in UN peace efforts: a shift away from traditional peacekeeping towards active peace enforcement and even beyond.⁴⁵⁷

3. Ugandan Allied Democratic Forces–Nalu (ADF–Nalu)⁴⁵⁸

The ADF originally emerged as an armed group in opposition to the Ugandan Government. After the union with the National Army for the Liberation of Uganda (NALU) under the leadership of Jamil Mukulu, it transformed into an Islamist movement mainly based in DRC. Its main military camps are located in Beni ter-

454 Global Firepower, 'Democratic Republic of the Congo Military Strength', https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=democratic-republic-of-the-congo (last accessed 13 July 2018).

455 See UNSC, Final Report of the Group of Experts on the Democratic Republic of the Congo, UN Doc S/2009/603, 23 November 2009.

456 See MONUSCO, 'Mandate', <https://monusco.unmissions.org/en/mandate> (last accessed 13 July 2018).

457 S. Sheeran and S. Case, *The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo*, International Peace Institute, November 2014, https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_legal_issues_drc_brigade.pdf (last accessed 15 January 2019).

458 Kivu Security Tracker, *Armed Groups*, <https://kivusecurity.org/about/armedGroups> (last accessed 13 July 2018).

ritory, close to the Ituri Rainforest. During the Sukola I operation launched by the FARDC in 2014 against the ADF, many of its camps were destroyed and its combatants decimated. In 2015, its leader, Jami Mukulu, was arrested in Tanzania and extradited to Uganda, leaving the group under Seka Musa Baluku's command.

4. Democratic Forces for the Liberation of Rwanda (FDLR)⁴⁵⁹

The FDLR was formed in 2000 through an amalgamation of Hutu groups, including the former Army for the Liberation of Rwanda (ALiR), with the original purpose of casting aside their association with the Rwandan genocide. The FDLR is the political wing of the organization, while the armed wing is the Abacunguzi Fighting Forces (FOCA). It reached the peak of its military and economic strength in the early 2000s and then suffered some defections as well as a series of anti-FDLR military operations conducted by the Congolese army, although the latter was on many occasions hampered by collusion with the FARDC. On 13 July 2012, the ICC issued an arrest warrant against FDLR military commander, Sylvestre Mudacumura, for nine counts of war crimes allegedly committed in the Kivu provinces of DRC from 20 January 2009 to the end of September 2010; however, he is still at large.⁴⁶⁰ In 2016, a significant internal split led to the creation of another faction, the National Council for Renewal and Democracy (CNRD–Ubwiye), which took over all the FDLR's South Kivu units. Since then, the FDLR's activities and capacity have been limited, and its strength in late 2017 was estimated to be between 500 and 1,000 fighters.

5. National Council for Renewal and Democracy (CNRD–Ubwiye)⁴⁶¹

The CNRD is the group that emerged in May 2016 after the split with the FDLR due to longstanding disagreements over political issues, i.e. the fate of the Rwandan refugee community in eastern Congo. Initially, it supported negotiations with the Rwandan Government, calling for the immediate repatriation of Rwandan refugees. Such a moderate stance allowed the CNRD to gain the favour of various groups as well as the FARDC itself against the FDLR; however, it recently lost such support as well as some territories in North Kivu, the FARDC arrested several of its senior leaders and it is now estimated to have around 500 fighters.

6. Nduma Defense of Congo (NDC–R)⁴⁶²

The NDC–R was created in 2015 by Guidon Shimiray, a former FARDC officer, then deputy commander of the NDC armed group,⁴⁶³ which he deserted along with most

459 Ibid.

460 ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v Sylvestre Mudacumura*, ICC-01/04-01/12, Case Information Sheet, <https://www.icc-cpi.int/iccdocs/pids/publications/mudacumu-raeng.pdf> (last accessed 13 July 2018).

461 Kivu Security Tracker, *Armed Groups*.

462 Ibid.

463 The NDC, emerging from the Nyanga community, was one of the main Mai-Mai groups, local and community-based militias active in Congo and formed to defend its local territory. It was created by Sheka Ntabo Ntaberi, a former mineral trader in Walikale territory (North Kivu), who surrendered himself to MONUSCO in mid-2017. It is unclear whether the original group still exists and operates.

of the group's combatants to form the NDC–R. After taking over NDC's former strongholds in Walikale territory (North Kivu), the NDC–R began attacking the FDLR and gained control over numerous mining sites. In coalition with other rebel groups under the umbrella term Mai-Mai Mazembe, Guidon's faction managed to push the FDLR out of most of northeastern Walikale; nonetheless, the coalition broke up by mid-2017, thus resulting in several clashes between the NDC–R and various Mazembe factions. Since 2016, it has expanded its influence and become involved in the lucrative gold trade in areas previously controlled by the FDLR, among other groups. It has also consistently been accused of receiving FARDC support in its military campaigns.

7. National People's Coalition for the Sovereignty of Congo (CNPSC)⁴⁶⁴

The CNPSC emerged towards the end of 2016 as an umbrella group formed by over 10 armed militias sharing the overarching goal of ousting president Kabila after his refusal to step down in December 2016. Currently, it represents one of the broadest Mai-Mai coalitions active in eastern Congo (i.e. Fizi territory) and is led by veteran militia commander William Amuri Yakutumba. Since June 2017, it has repeatedly clashed with the FARDC, taking control of several villages along Lake Tanganyika. In September 2017, it managed to carry out a serious offensive in Uvira territory; however, joint FARDC–MONUSCO operations caused considerable losses for the group and pushed it back into Fizi territory.

C. KEY DEVELOPMENTS IN 2018⁴⁶⁵

Within the context of Kabila's government's lack of legitimacy and consequent political disorder due to the continuous delay of democratic elections, security forces have been repeatedly accused of using unnecessary and excessive force against civilians and interethnic conflict has intensified.

The end of 2017, marking one year since the signing of the Saint Sylvester Agreement between the government and the opposition, was particularly characterized by protests against the government harshly repressed by the police. Demonstrations in Kinshasa were organized by the Collective of Lay Catholics, while smaller protests taking place in the Kivus were often led by youth groups and civil society. During nationwide protests organized by Catholic Church lay leaders on 31 December 2017, 21 January and 25 February 2018, Congolese security forces fired live bullets and tear gas into Catholic Church grounds.⁴⁶⁶ On 25 April 2018, they also brutally repressed a protest led by the citizens' movement Struggle for Change (LUCHA) in Beni, arresting 42 people and injuring 4 others. A few days later, 27 activists were arrested during another LUCHA protest in Goma. According to Human Rights Watch, ruling party officials also recruited 100 youths to infiltrate

464 Kivu Security Tracker, *Armed Groups*. See also HRW, 'Democratic Republic of Congo: Events of 2017', *World Report 2018*, <https://www.hrw.org/world-report/2018/country-chapters/democratic-republic-congo> (last accessed 15 January 2019).

465 See Kivu Security Tracker, 'Reports', <https://kivusecurity.org/reports>.

466 HRW, 'DR Congo: Repression Persists as Election Deadline Nears'.

churches, arrest priests attempting to organize marches and generally spread chaos so as to justify any repression.⁴⁶⁷

The conflict remains a decentralized one, with over 120 armed groups active especially in the eastern regions without an overarching narrative. The ADF and other armed groups have increasingly targeted UN and government installations, including Kabila's private residence, in Beni territory. An attack against the UN operating base in Beni occurred on 7 December 2017, widely attributed to the ADF, and resulted in the death of 17 UN peacekeepers. Following several attacks carried out in the second half of 2017 by armed groups against security forces in Beni, Lubero, Uvira and Fizi territories, the FARDC decided to launch large-scale military operations. On 13 January 2018, it conducted 'Usalama II' operations in Beni territory against the ADF and affiliated armed groups. These operations were immediately followed by counterattacks, the deadliest of which took place on 19 January 2018 in Parkingi and resulted in at least 24 dead and 13 wounded among the FARDC and the ADF.

In April 2018, 20 people were killed in attacks allegedly perpetrated by a combination of several armed groups including the ADF, Mai-Mai groups and other local militias. The FARDC, on the other hand, killed leaders of two armed groups in South Kivu province. On 19 January 2018, the FARDC also launched the 'Kamatamata' operations in Fizi territory, which resulted in violent clashes between the latter and Mai-Mai Yakutumba.⁴⁶⁸ A further consequence of such operations was the significant influx of Congolese refugees into Burundi across Lake Tanganyika. In June 2018, the FARDC pursued its operations against the ADF in the northeastern part of the Beni territory while targeting other Mai-Mai groups in the southeastern part. As a result, these groups seem to have strengthened their alliance with the ADF. Additionally, the NDC-R arrived in the area south of Beni allegedly to support the FARDC and protect Kabila's ranch in Kabasha. However, in August, the dynamic shifted as the FARDC launched an offensive against the NDC-R in the territory of Lubero.

Finally, tensions have risen as the historic presidential elections approach. In the first half of December 2018, a fire destroyed about 7,000 of the 10,000 voting machines due to be used in Kinshasa for the elections on 23 December. Opposition supporters have accused Kabila's regime of trying once again to postpone the vote.⁴⁶⁹

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

The DRC Government ratified the Rome Statute in April 2002, and in April 2004 it referred the situation in its territory since the entry into force of the Rome Statute

⁴⁶⁷ Ibid.

⁴⁶⁸ This was created in 2006 by former FARDC officer William Amuri (aka Yakutumba), and soon became one of the major and brutal Congolese armed groups in South Kivu. In late 2016, it joined the CNPSC.

⁴⁶⁹ J. Burke, 'Tensions Rise as Arsonists Burn 7,000 Voting Machines Ahead of DRC Elections', *The Guardian*, 13 December 2018, <https://www.theguardian.com/world/2018/dec/13/fire-destroys-new-voting-machines-ahead-of-drc-election-kabila>.

to the ICC, thus giving the Court jurisdiction over crimes listed in the Rome Statute committed in the territory of DRC or by its nationals from 1 July 2002 onwards.⁴⁷⁰

The ICC investigations have focused on alleged war crimes and crimes against humanity including, among others, enlisting and conscripting child soldiers under the age of 15, murder, attacking civilians, rape, sexual slavery, mutilation and forcible transfer of populations, committed mainly in eastern DRC, in the Ituri region and the North and South Kivu provinces. As a result of such investigations, six cases were opened against: Thomas Lubanga, former President of the Union of Congolese Patriots/Patriotic Forces for the Liberation of Congo (UPC/FPLC); Bosco Ntaganda, alleged Deputy Chief of Staff and Commander of Operations of the FPLC; Germain Katanga, Commander of the Patriotic Resistance Force in Ituri (FRPI); Callixte Mbarushimana, alleged Executive Secretary of the Democratic Forces for the Liberation of Rwanda–Abacunguzi Fighting Forces (FDLR–FOCA); Sylvestre Mudacumura, alleged Supreme Commander of the FDLR, and Mathieu Ngudjolo Chui, leader of the National Integrationist Front (FNI). While Lubanga and Katanga were convicted, the charges against Mbarushimana were not confirmed by Pre-Trial Chamber I, Ngudjolo Chui was acquitted, Mudacumura is still at large and the Ntaganda trial is still ongoing.⁴⁷¹

In March 2017, the current ICC Prosecutor Fatou Bensouda expressed her concerns⁴⁷² regarding several reports issued by human rights NGOs such as the International Federation for Human Rights,⁴⁷³ alleging serious acts of violence in DRC, i.e. a large number of killings of civilians not directly participating in hostilities, kidnappings and summary executions mainly committed by the FARDC but also by the Kamuina Nsapu militia, particularly in the Kasai provinces. She emphasized that as an ICC investigation into DRC has been open since 2004, the Office of the Prosecutor continues to carefully monitor the situation in the country, including current acts that could constitute crimes within the jurisdiction of the ICC.⁴⁷⁴

In May 2018, the ICC Prosecutor visited DRC to begin an investigation into possible crimes against humanity allegedly committed during the country's ongoing political and ethnic violence, exacerbated by president Kabila's refusal to step down.⁴⁷⁵ This investigation, however, seems to be still on hold. In September 2018, the DRC Government officially threatened to withdraw from the ICC.⁴⁷⁶

⁴⁷⁰ ICC, 'Democratic Republic of the Congo'.

⁴⁷¹ Ibid.

⁴⁷² See ICC, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, Regarding the Situation in the Kasai Provinces, Democratic Republic of the Congo, 31 March 2017, <https://www.icc-cpi.int/Pages/item.aspx?name=170331-otp-stat> (last accessed 15 January 2019).

⁴⁷³ See International Federation for Human Rights, *Massacre au Kasai: des crimes contre l'humanité au service d'un chaos organisé*, December 2017, https://www.fidh.org/IMG/pdf/massacres_au_kasai_rapportfidh_dec2017.pdf (last accessed 15 January 2019).

⁴⁷⁴ ICC, Statement of the Prosecutor of the International Criminal Court.

⁴⁷⁵ 'ICC Prosecutor Bensouda Launches Probe in DR Congo', *Africa Times*, 2 May 2018, <https://africatimes.com/2018/05/02/icc-prosecutor-bensouda-launches-probe-in-dr-congo/>.

⁴⁷⁶ 'RD Congo: le pays menace de quitter la Cour pénale internationale', *Le Soir*, 16 September 2018, <https://www.lesoir.be/178645/article/2018-09-16/rd-congo-le-pays-menace-de-quitter-la-cour-penale-internationale>.

4. MALI: THE OVERLAP AND COMBINATION OF SEPARATIST, JIHADIST AND INTERCOMMUNAL CONFLICTS

Alessandro Mario Amoroso

Classification of the Conflict

Mali, supported by France, the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and by militias of the Movement for the Salvation of Azawad (MSA) and the Imghad Tuareg Self-Defense Group and Allies (GATIA), continued to be involved in a non-international armed conflict (NIAC) on its territory against Jama'at Nusrat al-Islam wal-Muslimin (JNIM) and the Islamic State in the Greater Sahara (ISGS). According to the War Report, intercommunal clashes between Dan Nan Ambassagou and the Alliance for the Salvation of the Sahel also reached the threshold of a NIAC during the last year.

A. HISTORY OF THE CONFLICT

Mali has been plagued since 2012 by a series of consecutive and overlapping NIACs. Originally a Tuareg rebellion for the independence of the northern regions, the insurgency was quickly hijacked by Islamist groups aiming to impose Sharia law across the country. It recently unleashed a hitherto unknown level of community violence, which extended the fight to the central regions and contributed to keeping the conflict active in 2018. The Mali civil war was marked, in rapid progression, by a failed secession, a military coup, the emergence of Salafi jihadism, the destruction of a UNESCO World Heritage site, a foreign intervention, a regional peace enforcement operation, a robust UN peacekeeping mission, two war crimes trials before the International Criminal Court (ICC) and, eventually, the creation of a regional task force in the Sahel with a counter-terrorism mandate.

Despite repeated Tuareg uprisings, the unprecedented combination of separatist claims with jihadist extremism and intercommunal clashes represents a novelty in Mali and stands in stark contrast to the recent past of the country. The history of the conflict can be divided into four phases.⁴⁷⁷

1. The Tuareg Rebellion in Azawad and Military Coup in Bamako

The Mali civil war was triggered by a Tuareg insurgency in the north, the fourth in the country's history since its independence from France in 1960.⁴⁷⁸ Previous peace agreements led to the creation of a self-governing Kidal region in the northeast,

477 Unless otherwise indicated, background facts provided in this section are based on 'Mali', Uppsala Conflict Data Program, <http://ucdp.uu.se/#country/432> (last accessed 20 January 2019). A timeline of main events can be read (in French) in 'Mali Chronologie', *Jeune Afrique*, 16 January 2018, <https://www.jeuneafrique.com/pays/mali/chronologie/>, and 'Mali', RFI, August 2018, <http://www.rfi.fr/pays/mali-chronologie-demographie-chiffres-economie-geographie>.

478 For an account of previous rebellions, see G. Chauzal and T. van Damme, *The Roots of Mali's Conflict: Moving Beyond the 2012 Crisis*, Clingendael: Netherland Institute of International Relations, March 2015, pp 30–36, https://www.clingendael.org/sites/default/files/pdfs/The_roots_of_Malis_conflict.pdf (last accessed 20 January 2019).

populated primarily by Tuareg,⁴⁷⁹ and committed the central government to investing in the development of the new region.⁴⁸⁰ The inadequate implementation, however, failed to remove the root causes of Tuareg resentment towards Bamako, which lay largely in a feeling that the north was politically and economically marginalized to the benefit of southern dominance in the aftermath of decolonization.⁴⁸¹ In late 2011, political and economic factors combined with the return from Libya of well-equipped Tuareg fighters who had been trained in Gaddafi's Islamic Legion and/or fought on both sides of the Libyan civil war.⁴⁸² They coalesced in October 2011 with former separatist rebels to found the National Movement for the Liberation of Azawad (MNLA), claiming the independence of Azawad, the northern territory of Mali comprised of the regions of Gao, Timbuktu and Kidal.

The conflict in northern Mali started on 17 January 2012 when the MNLA attacked the small town and military garrison of Ménaka.⁴⁸³ During the following weeks, two Islamist groups known as al-Qaeda in the Islamic Maghreb (AQIM), already active in the region, and Ansar Dine, which appeared in late 2011, joined the conflict, conducting simultaneous attacks, sometimes in coordination with the MNLA.⁴⁸⁴ By the end of March 2012, the Malian Armed Forces (FAMA) were pushed out of key centres and lost control of nearly one-third of the country's territory. At this point in the conflict, the conditions for the applicability of the 1977 Additional Protocol II (AP II) to the 1949 Geneva Conventions seemed to be met.⁴⁸⁵

On 20 March, the African Union Peace and Security Council (PSC) held an emergency ministerial-level meeting in Bamako.⁴⁸⁶ The following night, a mutiny in the military barracks of Kati, outside the capital, turned into a military coup against President Amadou Toumani Touré, just one month before the scheduled presidential elections. On 22 March, it was announced that the armed forces, led by Captain Amadou Sanogo, had seized power, suspended the Constitution of 1992 and

479 Accord sur la cessation des hostilités (Accord de Tamanrasset), 6 January 1991, <https://peacemaker.un.org/mali-accordcessationhostilites91> (last accessed 20 January 2019).

480 Accord d'Alger pour la Restauration de la Paix, de la Sécurité et du Développement dans la région de Kidal (Accord d'Alger), 4 July 2006, <https://peacemaker.un.org/mali-accordalger2006> (last accessed 20 January 2019).

481 Chauzal and van Damme, *The Roots of Mali's Conflict*, pp 17–29.

482 Ibid, p 45. See also O. Ba, *Tuareg Nationalism and Cyclical Pattern of Rebellions: How the Past and Present Explain Each Other*, Sahel Research Group Working Paper no 007, University of Florida Center for African Studies, March 2014, p 7, https://sites.clas.ufl.edu/sahelresearch/files/Ba_Tuareg-Nationalism_final.pdf (last accessed 20 January 2019).

483 P.-F. Naudé, 'Nord-Mali: «plusieurs morts» dans des affrontements avec des rebelles Touaregs', *Jeune Afrique*, 18 January 2012, <https://www.jeuneafrique.com/177681/politique/nord-mali-plusieurs-morts-dans-des-affrontements-avec-des-rebelles-touaregs/>.

484 T. Oberlé, 'AQMI épaulé les rebelles Touaregs', *Le Figaro*, 14 March 2012, <http://www.lefigaro.fr/international/2012/03/14/01003-20120314ARTFIG00773-att-aqmi-epaule-les-rebelles-touaregs.php>.

485 Art 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.

486 African Union Peace and Security Council (PSC), Communiqué of the 314th Meeting of the Peace and Security Council at Ministerial Level, 20 March 2012, PSC/MIN/COMM.(CCCIV), <http://www.peaceau.org/uploads/psc.mali.20-03-2012.pdf> (last accessed 20 January 2019).

established a National Committee for the Restoration of Democracy and State. The declared remit of the junta was to remedy the government's incapacity to tackle the conflict in the north and save the country from dissolution before handing over power to new democratically elected institutions.⁴⁸⁷

The coup immediately revealed 'a spectacular own-goal'.⁴⁸⁸ Besides being unanimously condemned at the international level, leading to the suspension of Mali from the African Union (AU)⁴⁸⁹ and the imposition of sanctions and an embargo by the Economic Community of West African States (ECOWAS),⁴⁹⁰ the putsch provoked the final collapse of the FAMA, who abandoned all the main centres in the north. On three consecutive days (30 March–1 April 2012), the rebels entered Kidal, Gao and Timbuktu, the three regional capitals and biggest cities of Azawad. The balance of power on the ground at that moment appears blurred, with the Islamists of AQIM and Ansar Dine, joined by a splinter faction of AQIM known as the Movement for Oneness and Jihad in West Africa (MUJAO), in control of the main centres, where they started to impose Sharia law.

On 6 April 2012, a Framework Agreement was brokered with the mediation of ECOWAS, achieving a political transition in Bamako. Captain Sanogo and President Touré agreed to resign and transfer power to the National Assembly's Speaker, Diounounda Traoré, appointed interim President.⁴⁹¹ On that same day, in an interview with France 24, an MNLA spokesman declared the entire north liberated and proclaimed the independence of Azawad.⁴⁹²

2. The Jihadist Takeover and Planned Regional Operation

The proclaimed independence of Azawad and the power transition in the capital could have reasonably led to a resurgence of violence between Bamako and the MNLA. However, the following months were marked by internal chaos on both fronts.

In the aftermath of the declaration of independence, a new Arab militia, the National Liberation Front of Azawad (FNLA), was formed in Timbuktu to fight the MNLA and oppose the secession. On 26 May 2012, however, the MNLA and Ansar Dine announced a Memorandum of Understanding, according to which both

487 'Communiqué du Comité National pour le Redressement, la Démocratie et la Restauration de l'État', *MaliJet*, 22 March 2012, <http://malijet.com/actualite-politique-au-mali/40599-communique-du-comite-national-pour-le-redressement%2C-la-democrati.html> (last accessed 20 January 2019).

488 C. Dioura and A. Diarra, 'Mali Rebels Assault Gao, Northern Garrison', *HuffPost*, 31 March 2012, https://www.huffingtonpost.com/2012/03/31/mali-rebels-assault_n_1393415.html.

489 PSC, Communiqué of the 315th Meeting of the Peace and Security Council, PSC/PR/COMM.(CCCXV), 23 March 2012, <http://www.peaceau.org/uploads/psc-comm-mali-23-03-2012-eng.pdf> (last accessed 20 January 2019).

490 ECOWAS, Emergency Mini-Summit of ECOWAS Heads of State and Government on the Situation in Mali, press release, 30 March 2012, <http://news.ecowas.int/presseshow.php?nb=092&lang=en&annee=2012> (last accessed 20 January 2019).

491 Accord cadre de mise en œuvre de l'engagement solennel du 1^{er} Avril 2012, 2 April 2012, <https://peacemaker.un.org/mali-accord-cadre2012> (last accessed 20 January 2019).

492 'Tuareg Rebels Declare Independence in North Mali', *France24*, 6 April 2012, <https://www.france24.com/en/20120406-france-24-exclusive-tuareg-rebels-declare-independence-mlna-mali-ansar-dine-azawad>.

agreed to dissolve and found the Transitional Council of the State of Azawad, the first step towards the creation of an Islamic State of Azawad. The deal crumbled a few days later. On the one hand, most of the MNLA leadership refused to disavow the group's traditional secularism by signing off the imposition of Sharia law in Azawad. On the other, the Islamists had strengthened their ranks while moving south to territories populated by other ethnic groups more sensitive to jihadist propaganda than to the independentist agenda of the MNLA.

The first clashes between the MNLA and Ansar Dine reportedly occurred on 8 June 2012, in the surroundings of Kidal,⁴⁹³ triggering a parallel NIAC between Tuareg and Islamist rebels. By the end of the month, Ansar Dine, MUJAO and AQIM expelled the MNLA from major cities in the north. On 30 June, members of Ansar Dine began the systematic destruction of the ancient mausolea and Muslim shrines of the World Heritage site Timbuktu.⁴⁹⁴

During the same months, the fragile interim institutions established by the 6 April Framework Agreement remained under permanent threat from the military. At the end of April, the ex-junta repelled a counter-coup led by the Red Berets, an elite unit of paratroopers loyal to ousted President Touré. Allegations of torture, enforced disappearances and extrajudicial killings of detained Red Berets⁴⁹⁵ were later confirmed by the discovery of mass graves outside the capital.⁴⁹⁶ On 21 May, pro-junta demonstrators stormed the presidential palace and wounded President Traoré. In December 2012, Prime Minister Cheick Modibo Diarra, chairing a government of national unity, was arrested by soldiers of the ex-junta and forced to resign. He was replaced by Django Sissoko, appointed by President Traoré.

With the political and military institutions of Mali in a state of disarray, ECOWAS and the AU prepared to intervene militarily to eradicate the jihadist menace in Mali. On 12 June 2012, the PSC authorized the deployment of a peace operation led by the ECOWAS Standby Force.⁴⁹⁷ The expected deployment of the mission within three weeks, subject to authorization by the UN Security Council (UNSC), was slowed down by the initial refusal of the UNSC to endorse the operation and provide UN funding. The stalemate lasted until December, when all conditions imposed by the UNSC concerning mandate, planning, mission management and

493 'Mali Rebel Groups "Clash in Kidal"', *BBC News*, 8 June 2012, <https://web.archive.org/web/20121223052848/http://www.bbc.co.uk/news/world-africa-18377168>.

494 'Ansar Dine Fighters Destroy Timbuktu Shrines', *Al Jazeera*, 1 July 2012, <https://www.aljazeera.com/news/africa/2012/06/2012630101748795606.html>.

495 Human Rights Watch (HRW), 'Mali: Security Forces "Disappear" 20, Torture Others', 25 July 2012, <https://www.hrw.org/news/2012/07/25/mali-security-forces-disappear-20-torture-others> (last accessed 20 January 2019).

496 'Mali: deux fosses communes découvertes aux environs de Kati', *RFI*, 24 February 2014, <http://www.rfi.fr/afrique/20140224-mali-deux-fosses-communes-decouvertes-environs-kati/>.

497 PSC, Communiqué of the 323rd Meeting of the Peace and Security Council, PSC/PR/COMM.(CCCXIII), 12 June 2012, <http://www.peaceau.org/uploads/psc-323-mali-12-06-2012.pdf> (last accessed 20 January 2019).

accountability were met.⁴⁹⁸ In Resolution 2085 of 20 December 2012, the UNSC invoked Chapter VII of the UN Charter to authorize the African-led International Support Mission to Mali (AFISMA). With a strength of 3,300 personnel, AFISMA was tasked with a peace enforcement mandate '[t]o support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups'.⁴⁹⁹

3. French Intervention and The UN's Robust Peacekeeping Mission

Preparations for AFISMA were expected to take several months. In the first days of 2013, however, the situation in Mali changed once again. On 10 January, militants of Ansar Dine captured the city of Konna and advanced to within a few kilometres of Mopti and Ségou, a strategically important military garrison and airport in the centre of Mali. When the fall of Bamako appeared imminent, President Traoré resolved to request immediate French military intervention.⁵⁰⁰

On 11 January 2013, France launched Operation Serval, progressively deploying more than 4,000 personnel within a few days. Backing the FAMA with air and ground support, the French troops swiftly managed to repel the Islamist offensive and disband the rebels. On 28 January, Islamists fleeing Timbuktu from approaching French and Chadian forces set fire to the Ahmed Baba Institute, but fortunately only a limited number of its manuscripts were destroyed.⁵⁰¹ On 30 January, after Gao and Timbuktu, French soldiers entered Kidal. On 2 February, French President François Hollande and President Traoré appeared together in Timbuktu to celebrate the recapture of the north.

By reversing the power balance on the ground, the French intervention seemed to bring the conflict close to a military and political solution. The rapid territorial gains obtained by France induced ECOWAS and the AU to accelerate AFISMA's deployment in order to help the Malian army retain control over the recaptured areas. The first troops – contributed by Nigeria – arrived on 17 January. On the same date, the European Union established a multinational military Training Mission in Mali (EUTM Mali).⁵⁰² On the following day, Chad joined the conflict with a contingent of 2,000 soldiers – the Chadian Armed Forces Intervention in Mali

498 For a full account of the planning and authorization process, see W. Lotze, 'United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)', in J. A. Koops, T. Tardy, N. MacQueen and P. D. Williams (eds), *The Oxford Handbook of United Nations Peacekeeping Operations*, Oxford University Press, 2015, p 858.

499 UNSC Res 2085, 20 December 2012. For the qualification of AFISMA as a peace enforcement operation, see Lotze, 'United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)', p 858.

500 Identical letters dated 11 January 2013 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN doc S/2013/17, 11 January 2013.

501 T. Ralph, 'Islamists Have Destroyed One-Tenth of Timbuktu's Ancient Manuscripts, UN Finds', *PRI*, 3 July 2013, <https://www.pri.org/stories/2013-07-03/islamists-have-destroyed-one-tenth-timbuktus-ancient-manuscripts-un-finds>.

502 Council of the European Union, 'EU Training Mission in Mali Established', press statement 5428/13, 17 January 2013, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134748.pdf (last accessed 13 February 2019).

(FATIM) – who initially fought under national command alongside French troops, only being integrated into AFISMA in March.⁵⁰³

At this point, the conflict entered a guerrilla phase. Ansar Dine and AQIM retreated to the Adrar des Ifoghas in the northeast, chased by French and Chadian troops. MUJAO remained in the Gao region, conducting sporadic attacks. A splinter group of Ansar Dine calling itself the Islamic Movement for Azawad (MIA) declared its rejection of terrorism and demanded the start of negotiations for a peaceful settlement of the conflict.⁵⁰⁴ The Tuareg front was not immune from realignments either. The MNLA, which at the end of 2012 had dropped its separatist claims, declared its readiness to cooperate with France in the fight against jihadism. In the following weeks, episodes of actual clashes were reported, along with France's willingness to favour a political solution which involved the Tuareg.⁵⁰⁵ On 2 May, the High Council for the Unity of Azawad (HCUA) was founded by the Tuareg to facilitate peace talks with the government.⁵⁰⁶ The MIA decided to join the HCUA, while the MNLA refused.

Despite AFISMA's anticipated deployment, the interim Government of Mali, France, ECOWAS and the AU agreed to request AFISMA's transition into a UN peacekeeping operation.⁵⁰⁷ On 25 April 2013, UNSC Resolution 2100 authorized the deployment of MINUSMA, comprising up to 11,200 military and 1,440 police personnel. Established under Chapter VII of the UN Charter, MINUSMA was provided with a widely robust mandate including the authorization to 'stabilize key population centers ... and deter threats and take active steps to prevent the return of armed elements to those areas'.⁵⁰⁸ Given the security situation in Mali, the UNSC also authorized French troops to operate as a parallel force alongside MINUSMA, using 'all necessary means ... to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General'.⁵⁰⁹

On 18 June 2013, the government and the Tuareg rebels of the MNLA and the HCUA signed a preliminary peace agreement in Ouagadougou, which paved the

503 'Mali: le contingent tchadien rejoint officiellement la MISMA', *RFI*, 10 March 2013, <http://www.rfi.fr/afrique/20130310-mali-le-contingent-tchadien-integre-misma>.

504 'New Mali Rebel Faction Calls for Negotiations', *Al Jazeera*, 25 January 2013, <https://www.aljazeera.com/news/afrika/2013/01/2013124223130722857.html>.

505 C. Diouara, 'French Battle Mali Islamists as Tuareg Problem Looms', *Reuters*, 6 February 2013, <https://www.reuters.com/article/us-mali-rebels/french-battle-mali-islamists-as-tuareg-problem-looms-idUSBRE9150LR20130206>.

506 P.-F. Naudé, 'Mali: des Touaregs créent un Haut conseil de l'Azawad pour négocier avec Bamako', *Jeune Afrique*, 6 May 2013, <https://www.jeuneafrique.com/170970/politique/mali-des-touaregs-cr-ent-un-haut-conseil-de-l-azawad-pour-n-gocier-avec-bamako/>.

507 Lotze, 'United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)', p 859.

508 UNSC Res 2100, 25 April 2013, §16.

509 Ibid, §18.

way for presidential elections and inclusive peace talks.⁵¹⁰ The agreement created the political conditions for the deployment of MINUSMA, which started on 1 July 2013 with the transfer of authority over AFISMA's personnel. MINUSMA's first task was to oversee the two turns of the 2013 presidential elections in July and August, which saw the victory of Ibrahim Boubacar Keïta. A few months later, Captain Sanogo, leader of the March 2012 military coup, was arrested and charged with crimes committed during the putsch.⁵¹¹

4. The End of the Tuareg Rebellion Alongside Relentless Jihadist Violence

The fragile ceasefire signed in June 2013 fell apart rapidly. In September, the MNLA, the HCUA and the Arab Movement of Azawad (MAA, the new designation of the FNLA) suspended negotiations with Bamako, faced with the government's refusal to discuss the autonomy of Azawad.⁵¹² In November, the MNLA announced its resumption of the fight. The truce finally broke down in May 2014, when the Tuareg recaptured Kidal and, repelling an army counter-offensive, occupied Ménaka, Léré and other cities in the north.⁵¹³ Following the recent debacle of the FAMA, in August 2014 Tuareg of the Imghad tribe announced the creation of the GATIA, aligned with the government to oppose the rebels. The GATIA joined the loyalist wing of the MAA and other organizations of the Platform, a coalition of loyalist armed groups created in June 2014. In the second half of 2014, the Platform started a campaign against the MNLA, the HCUA and the rebel faction of the MAA, who in turn formed a military alliance: the Coordination of Azawad Movements (CMA).

Facing a different configuration of forces on the ground, with the Islamists no longer controlling a fixed territory but taking advantage of desert areas to operate across the borders, France announced the conclusion of Operation Serval and its replacement with Operation Barkhane as of 1 August 2014. With 3,000 personnel, later increased to 4,500, Operation Barkhane was not limited to Mali but tasked with fighting Salafi jihadism in the entire Sahel.⁵¹⁴

In 2015, the northern Mali conflict seemed to move forward towards a solution. After negotiating a ceasefire in February, an Agreement for Peace and Reconciliation was finally reached in Algiers, granting more autonomy to the north, providing for rebels' reintegration in the national security forces and promising better represen-

510 Accord préliminaire à l'élection présidentielle et aux pourparlers inclusifs de paix au Mali (Accord de Ouagadougou), 18 June 2013, <https://peacemaker.un.org/mali-accord-preliminaire-elections2013> (last accessed 20 January 2019).

511 FIDH, 'Mali: General Sanogo Arrested and Taken into Custody in the "Missing Red Berets" Case', 29 November 2013, <https://www.fidh.org/en/region/Africa/mali/14323-mali-general-sanogo-arrested-and-taken-into-custody-in-the-missing-red> (last accessed 20 January 2019).

512 P.-F. Naudé, 'Les négociations avec les rebelles achoppent sur l'autonomie du Nord', *Jeune Afrique*, 27 September 2013, <https://www.jeuneafrique.com/168211/politique/mali-les-n-gociations-avec-les-rebelles-achoppent-sur-l-autonomie-du-nord/>.

513 'Chassé de Kidal, le gouvernement malien décrète un cessez-le-feu', *RFI*, 22 May 2014, <http://www.rfi.fr/afrique/20140522-mali-kidal-cessez-feu-instaure-gouvernement-malien/>.

514 Ministère des Armées, Dossier de presse – Opération Barkhane, December 2018, file:///C:/Users/amoroa/Download/20181218_NP_EMA%20CABCOM_DP%20BARKHANE_vf.pdf.

tation. Initially accepted only by loyalist groups and international mediators on 15 May, the agreement was finally signed by the CMA on 20 June 2015.⁵¹⁵

In the same period, the jihadist front registered instead a recrudescence of violence, partly due to a reorganization of Islamist forces. Victims of many jihadist attacks were peacekeepers, who remained the sole regular force with a constant presence throughout northern Mali.⁵¹⁶ The whole of 2015 was marked by continuous attacks. On 20 November, two Islamist militants took 170 hostages in the Radisson Blu hotel in Bamako and killed 20 of them before the intervention of the Malian Special Forces.⁵¹⁷ Al-Mourabitoun, a jihadist organization created in late 2013 from the merger of MUJAO and the Signataires par le sang ('signatories in blood'), claimed responsibility for the attack.⁵¹⁸ The Macina Liberation Front (MLF), another Salafi group that emerged in mid-2015, spread terror in the central regions.⁵¹⁹

On 31 March 2016, the National Assembly of Mali passed a law establishing interim authorities in the north. Yet, hopes of a smooth implementation of the peace deal were shattered in 2016 by a reawakening of past tensions and the appearance of new threats. The state of emergency, having expired on 31 March, was restored on 19 July after an attack by the MLF on the Nampala army base, which killed 17 soldiers. In the same month, a report by the International Crisis Group drew attention to the escalation of violence in central Mali, the first intercommunal clashes between Bambara and Fulani self-defence militias.⁵²⁰ In August, the conflict between rival Tuareg factions broke out again, with frequent confrontations between the CMA and the GATIA. As a result, in September former members of the MNLA, the HCUA and the MAA founded the MSA, seeking to strengthen the peace process and halt community violence.⁵²¹

At the beginning of 2017, the peace process came under attack. On 18 January, a suicide bombing claimed by AQIM hit a military camp in Gao, killing 77 people. The base housed government troops and former rebels of the CMA and the Platform taking part in joint patrols under the Operational Coordination Mechanism,

515 Accord Pour la Paix et la Réconciliation au Mali – Issu du Processus d'Alger (Accord d'Alger), 20 June 2015, <https://peacemaker.un.org/node/2681> (last accessed 20 March 2019).

516 Report of the Secretary-General on the Situation in Mali, UN doc S/2015/219, 27 March 2015, §69.

517 'Mali Hotel Attack: "No More Hostages" After Special Forces Raid', *BBC News*, 20 November 2015, <https://www.bbc.com/news/world-africa-34879955#>.

518 C. Muratet, 'Mali: qui sont les nouveaux chefs des katibas jihadistes?', *RFI*, 14 May 2014, <http://www.rfi.fr/afrique/20140514-mali-etat-jihadistes-apres-mort-emir-al-mourabitoune-aqmi-al-qaida-mujao-belmokhtar/>.

519 K. Caulderwood, 'Macina Liberation Movement: New Terror Group In Mali Threatens Peace Agreement', *International Business Times*, 14 May 2015, <https://www.ibtimes.com/macina-liberation-movement-new-terror-group-mali-threatens-peace-agreement-1915290>.

520 International Crisis Group, *Central Mali: An Uprising in the Making?*, Africa Report no 238, 6 July 2016, <https://www.crisisgroup.org/africa/west-africa/mali/central-mali-uprising-making> (last accessed 20 January 2019).

521 R. Carayol, 'Mali – Moussa Ag Acharatoumane: «Nous avons créé le MSA pour représenter tous les Azawadiens»', *Jeune Afrique*, 9 September 2016, <https://www.jeuneafrique.com/355863/politique/mali-moussa-ag-acharatoumane-avons-cree-msa-representer-azawadiens/>.

established in the framework of the peace agreement.⁵²² On 1 March 2017, Ansar Dine, Al-Mourabitoun, the MLF and the Saharan branch of AQIM merged to form Jama'at Nusrat al-Islam wal-Muslimin (JNIM), which became the official branch of Al-Qaeda in Mali.⁵²³ At the same time, a series of attacks on civilians were claimed by ISGS, a splinter group of Al-Mourabitoun professing allegiance to the Islamic State.⁵²⁴ More than five years after the beginning of the conflict, the threat posed by Salafi jihadism had reached a new level and required the enhancement of military efforts. On 6 February, Burkina Faso, Chad, Mali, Mauritania and Niger, which in 2014 had established an institutional framework for cooperation known as G5 Sahel, agreed to establish a Joint Force (G5SJF) operating under a clear counter-terrorism mandate. On 1 November 2017, the G5SJF launched its first mission, codenamed Hawbi.

On 20 September 2017, after months of escalating tensions, the CMA and the Platform signed a 'document of commitments', providing for a definitive cessation of hostilities and the finalization of the peace process.⁵²⁵ Their demobilization and integration in the security forces followed soon thereafter.

B. PARTIES TO THE CONFLICT

1. Malian Armed Forces (FAMA)

The FAMA are comprised of the army and the air force, as well as two paramilitary corps, the Gendarmerie and National Guard. All forces are under the control of the Ministry of Defence and Veterans. Their current estimated strength is 17,800 troops – 10,000 military and 7,800 paramilitary personnel.⁵²⁶ The defence budget is around 2 percent of the GDP.⁵²⁷ The FAMA suffered a collapse after the Tuareg rebellion and the military coup of March 2012. They have since been reorganized with the support of French troops, EUTM Mali and the EU Capacity Building Mission in Mali.

2. French Armed Forces

French military engagement in Mali started on 11 January 2013 with Operation Serval, deploying up to 4,500 troops in the country. Although different legal justifications were cited by French authorities,⁵²⁸ the operation relied on the invitation

522 'Death Toll From Suicide Blast at Gao Army Base Rises', *Al Jazeera*, 19 January 2017, <https://www.aljazeera.com/news/2017/01/suicide-blast-gao-army-base-17011911255093.html>.

523 C. Gaffey, 'African Jihadi Groups Unite and Pledge Allegiance to Al-Qaeda', *Newsweek*, 3 March 2017, <https://www.newsweek.com/al-qaeda-groups-unite-sahel-563351>.

524 'Mali: le groupe Etat islamique officialise sa présence au Sahel', *RFI*, 31 October 2016, <http://www.rfi.fr/afrique/20161031-mali-groupe-etat-islamique-officialise-presence-sahel-Abou-Walid-Sahraoui>.

525 Report of the Secretary-General on the Situation in Mali, UN doc S/2017/811, 28 September 2017, §5.

526 International Institute for Strategic Studies, 'Chapter 9: Sub-Saharan Africa', *The Military Balance 2018*, p 473.

527 Ibid.

528 For an exhaustive analysis of the legality of French intervention in Mali, see K. Bannelier and T. Christakis, 'The Intervention of France and African Countries in Mali – 2013', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach*, Oxford University Press, 2018, p 812.

of the Malian Government. After the adoption of UNSC Resolution 2100, the use of force by France in Mali also rests on UNSC authorization, when French troops 'intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General'.⁵²⁹ Operation Serval was replaced on 1 August 2014 by Operation Barkhane. Aiming to fight terrorism in the entire region, Operation Barkhane keeps 1,000 of its 4,5000 troops in Mali.⁵³⁰ It was designed to cooperate at the military level with forces of the G5 Sahel, and to coordinate with MINUSMA and EUTM Mali. It also conducts joint actions with Tuareg militias of the MSA and the GATIA. French as well as Chadian intervention in an early stage of the conflict supported the Government of Mali and did not turn the NIAC into an international armed conflict.

3. UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)

Established under Chapter VII of the UN Charter by UNSC Resolution 2100 of 25 April 2013, MINUSMA was formed on 1 July 2013. On that date, the 6,500 troops of AFISMA were re-hatted as a UN force.⁵³¹ With an initial authorized strength of 12,640 uniformed personnel, MINUSMA's troops were later increased to the current 13,883, making it the third biggest ongoing UN mission. MINUSMA is also the most dangerous ongoing operation, having suffered 177 fatalities in five and a half years.⁵³²

The robustness of MINUSMA's mandate is one example of the evolution of the traditional peacekeeping principles of impartiality and limited use of force. Resolution 2100 authorized MINUSMA, inter alia, 'to stabilize the key population centres, especially in the north of Mali and, in this context, to deter threats and take active steps to prevent the return of armed elements to those areas'.⁵³³ Nevertheless, MINUSMA's mandate did not match the extent of authorized use of force granted one month earlier to the Force Intervention Brigade (FIB) within the UN Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). Responding to Russia's concerns that the FIB's peace enforcement mandate might become standard practice, the UNSC carefully avoided any reference to the 'neutralization' of armed groups.⁵³⁴ MINUSMA's mandate was therefore understood as excluding offensive or counter-terrorism operations.⁵³⁵ In 2016, Resolution 2295 requested MINUSMA 'to move to a more proactive and robust posture to carry out its mandate'.⁵³⁶ To this end, MINUSMA was authorized 'to anticipate, deter and counter threats, including asymmetric threats, and to take robust and active steps to pro-

529 UNSC Res 2100, §18.

530 Ministère des Armées, Dossier de presse – Opération Barkhane.

531 UNSC Res 2100, §7.

532 UN Peacekeeping, 'Peacekeeping Operations Fact Sheet', 31 October 2018, https://peacekeeping.un.org/sites/default/files/pk_factsheet_10_18_eng.pdf (last accessed 18 January 2019).

533 UNSC Res 2100, §16.

534 UNSC Res 2098, 28 March 2013, §9.

535 Bannelier and Christakis, 'The Intervention of France and African Countries in Mali', p 813.

536 UNSC Res 2295, 29 June 2016, §18.

tect civilians ... and to prevent the return of armed elements to those areas, engaging in direct operations pursuant only to serious and credible threats'.⁵³⁷ MINUSMA's mandate makes it a party to the conflict in Mali following a support-based approach.⁵³⁸ Indeed, MINUSMA intervened in a pre-existing NIAC to support one party to the conflict (the Government of Mali), pursuant to official UNSC authorization, and its logistical and intelligence assistance to Malian and French troops constitute activities related to the conduct of hostilities.⁵³⁹

4. The G5 Sahel Joint Force (G5SJF)

The G5 Sahel was established in 2014 by five countries (Burkina Faso, Chad, Mali, Mauritania and Niger) as an institutional framework for regional cooperation based on a common understanding of the bonds between economic development and security. In February 2017, member countries announced the creation of a Joint Force to fight jihadist organizations in their territories, often operating across the borders. The G5SJF, strongly encouraged by France to progressively hand over security in the region to local authorities, was authorized by the PSC.⁵⁴⁰ With Resolution 2359 of 21 June 2017, the UNSC welcomed the G5SJF, but fell short of providing it with a UN mandate to use force.⁵⁴¹ Despite the initial difficulty in gathering the necessary funding, the G5SJF was eventually deployed and launched its first operation in November 2017. It currently comprises 5,000 troops, divided into seven battalions.⁵⁴² Whether G5SJF is as of 2018 yet a party to the armed conflicts in Mali.

5. Jama'at Nusrat al-Islam wal-Muslimin (JNIM)

JNIM ('the group for the support of Islam and Muslims') is a Salafi jihadist organization created in March 2017, when Iyad Ag Ghaly, leader of Ansar Dine, announced the merger with the MLF, Al-Mourabitoun and the Saharan branch of AQIM.⁵⁴³ After swearing allegiance to Ayman al-Zawahiri, JNIM became the official Al-Qaeda affiliate in Mali. Bringing together an estimated strength of 800 fighters,⁵⁴⁴ the

537 Ibid, §19.

538 T. Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 95 *International Review of the Red Cross* 891/892 (2013) 584-586.

539 Since the establishment of the All Source Information Fusion Unit (ASIFU) in April 2014, MINUSMA is the first UN mission equipped with a centralized military intelligence structure acting at operational level under the control of the Force Commander.

540 PSC, Communiqué of the 679th Meeting of the Peace and Security Council, 13 April 2017, PSC/PR/COMM.(DCLXXIX), <http://www.peaceau.org/uploads/679th-com-g5sahel-13-04-2017.pdf> (last accessed 20 January 2019).

541 UNSC Res 2359, 21 June 2017, §1.

542 J. G. Cook, 'Understanding the G5 Sahel Joint Force: Fighting Terror, Building Regional Security?', Center for Strategic and International Studies, 15 November 2017, <https://www.csis.org/analysis/unders-tanding-g5-sahel-joint-force-fighting-terror-building-regional-security> (last accessed 20 January 2019).

543 Gaffey, 'African Jihadi Groups Unite and Pledge Allegiance to Al-Qaeda'.

544 R. Browne, 'US Warns of Growing African Terror Threat', *CNN*, 19 April 2018, <https://edition.cnn.com/2018/04/19/politics/africa-isis-al-qaeda-threat/index.html>.

merger was supposedly aimed at containing the expansion of ISGS in Mali.⁵⁴⁵ The UNSC ISIL and Al-Qaida Sanctions Committee added JNIM to its sanctions list on 4 October 2018.⁵⁴⁶ All its founding organizations, with the exception of the MLF, were already on the list.⁵⁴⁷

6. Islamic State in the Greater Sahara (ISGS)

Despite its early appearance in May 2015 as a splinter group of Al-Mourabitoun,⁵⁴⁸ ISGS was only officially recognized as an affiliate by the Islamic State of Iraq and the Levant on 30 October 2016.⁵⁴⁹ Initially counting on a few dozen active fighters,⁵⁵⁰ in 2017 and 2018 the group proved its remarkable capacity to conduct attacks on both the FAMA and civilians. It is mainly active in the region of Gao. Its leader, Adnan Abu Walid al-Sahraoui, was the spokesperson of MUJAO before joining Al-Mourabitoun.

7. Movement for the Salvation of Azawad (MSA)

The MSA emerged in September 2016 when a group of Tuareg fighters abandoned the CMA, the military alliance reuniting Tuareg rebels, to found an independent group supporting the Algiers peace process. The MSA condemned intercommunal conflicts and has lent its support to the FAMA since its inception. It is today one of the main counter-insurgency partners in Operation Barkhane.⁵⁵¹ It claims to have 3,000 fighters.⁵⁵²

8. Imghad Tuareg Self-Defense Group and Allies (GATIA)

The GATIA was founded in August 2014 as a Tuareg self-defence group after the Malian army again lost control over large parts of the northern regions. It joined the conflict against the CMA, alongside the Platform, a coalition of loyalist groups supporting Bamako. The GATIA remained active after the end of the Tuareg re-

545 M. Zerrouky, 'Les groupes djihadistes s'unissent au Sahel', *Le Monde*, 4 March 2017, https://www.le-monde.fr/international/article/2017/03/04/les-groupes-djihadistes-s-unissent-au-sahel_5089337_3210.html.

546 UNSC, 'Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee Adds One Entry to Its Sanctions List', press release, 4 October 2018, <https://www.un.org/press/en/2018/sc13531.doc.htm> (last accessed 20 January 2019).

547 UNSC, ISIL and Al-Qaida Sanctions Committee, Consolidated United Nations Security Council Sanctions List, <https://www.un.org/securitycouncil/sanctions/un-sc-consolidated-list> (last accessed 20 January 2019).

548 'Sahel: un chef d'Al-Mourabitoun prête allégeance à l'organisation de l'État islamique', *France 24*, 14 May 2015, <https://www.france24.com/fr/20150514-sahel-groupe-jihadiste-prete-allegeance-organisation-etat-islamique-belmokhtar-sahraoui-mourabitoun>.

549 'Mali: le groupe Etat islamique officialise sa présence au Sahel'.

550 M. Mémier, *AQMI et Al-Mourabitoun: Le djihad sahélien réunifié?*, Institut Français des Relations Internationales, January 2017, https://www.ifri.org/sites/default/files/atoms/files/memier_aqmi_et_al-mourabitoun_fr_2017.compressed.pdf (last accessed 20 January 2019).

551 C. Macé, 'Au Sahel, «je n'ai pas besoin de canons supplémentaires, mais il nous faut gagner en mobilité», *Libération*, https://www.liberation.fr/planete/2018/07/09/au-sahel-je-n-ai-pas-besoin-de-canons-supplementaires-mais-il-nous-faut-gagner-en-mobilite_1665186.

552 'Mali: le Mouvement pour le salut de l'Azawad, nouveau groupe politico-militaire', *RFI*, 11 September 2016, http://www.rfi.fr/afrique/20160911-mali-creation-msa-nouveau-mouvement-politico-militaire?ref=tw_i.

bellion as a counter-insurgency force partnering with French troops in the fight against Salafi jihadists.

9. Dan Nan Ambassagou

Dan Nan Ambassagou ('the hunters who confide in God') is a self-defence group founded in late 2016 to protect the Dogon, a community of hunters living in the central region of Mopti. The group brought together several self-defence militias after the murder of Théodore Soumbounou, head of the Dogon hunting society.⁵⁵³ Claiming to count on several hundred fighters, Dan Nan Ambassagou has a clear military hierarchy.⁵⁵⁴ It gained prominence in 2018, after clashing with the Fulani group, the Alliance for the Salvation of the Sahel. A report of the International Federation for Human Rights indicates that Dan Nan Ambassagou received logistical and financial support from Bamako and collaborated with the FAMA in the past.⁵⁵⁵

10. Alliance for the Salvation of the Sahel (ASS)

The ASS emerged in May 2018 as a self-defence group protecting Fulani from the attacks of Dogon hunters. Its intention to gather existing village-based self-defence militias was only partly fulfilled. Although the group claimed several attacks in late 2018, its agenda and real strength are currently disputed.⁵⁵⁶ Like Dan Nan Ambassagou, the ASS is also reported to have links with the government, as some leaders held senior positions in the public administration.⁵⁵⁷

C. KEY DEVELOPMENTS IN 2018

Despite the end of the armed conflict against and between Tuareg armed groups in 2017, in 2018 the Mali civil war continued against jihadist groups and acquired a new dimension when intercommunal clashes in the central regions reached the threshold of a separate NIAC.

French troops of Operation Barkhane helped the FAMA secure the region of Ménaka and control the area of Liptako, located on the border between Mali, Niger and Burkina Faso and, for this reason, used as a refuge by the Islamists.⁵⁵⁸ Military operations coordinated with the MSA and the GATIA sought to neutralize JNIM and

553 HRW, "We Used to be Brothers": Self-Defense Group Abuses in Central Mali, 7 December 2018, <https://www.hrw.org/report/2018/12/07/we-used-be-brothers/self-defense-group-abuses-central-mali> (last accessed 20 January 2019).

554 Ibid.

555 FIDH, *In Central Mali, Civilian Populations Are Caught Between Terrorism and Counterterrorism*, November 2018, pp50–51, https://www.fidh.org/IMG/pdf/fidh_centre-of-mali_population-sized-between-terrorism-and-counter-terrorism_727_en_november2018.pdf (last accessed 20 January 2019).

556 HRW, "We Used to be Brothers".

557 FIDH, *In Central Mali, Civilian Populations Are Caught Between Terrorism and Counterterrorism*, p 51.

558 V. Hugué, 'Face à Barkhane, un ennemi aux abois', *L'Express*, 20 April 2018, https://www.lexpress.fr/actualite/monde/afrique/face-a-barkhane-un-ennemi-aux-abois_2001343.html.

ISGS.⁵⁵⁹ Islamist groups no longer exercise stable control over portions of Malian territory – one condition for the applicability of AP II is therefore no longer met.⁵⁶⁰ Yet, they were able to carry out a long series of attacks targeting Malian, French and UN troops, as well as civilians.⁵⁶¹ On 26 and 27 April, two attacks by ISGS on the Tuareg camps of the MSA and the GATIA in Andéramboukane killed more than 40 people. Since ISGS fighters are mainly Fulani, the attacks were also explained as motivated by intercommunal hatred.⁵⁶²

This event showed how the use of ethnic-based militias and the exploitation of ethnic grievances eventually contributed to igniting a new NIAC between community-based armed groups. Violence grew exponentially in the region of Mopti in central Mali, a territory which was not covered by the Algiers agreement and where MINUSMA was not present. At the end of March 2018, the UN Secretary-General expressed concern over increasing civilian casualties caused by community violence.⁵⁶³ In the second half of 2018, two ethnic-based self-defence groups started clashing and quickly became the 'main perpetrators of recent violence' in Mali:⁵⁶⁴ Dan Nan Ambassagou, a Dogon militia, and the ASS, protecting the Fulani community. Intercommunal violence intensified in the run-up to the presidential elections in July and was the root of the lowest turnout registered in the central regions.⁵⁶⁵ A first peace agreement signed by Dogon and Fulani village chiefs on 28 August was rejected by Dan Nan Ambassagou.⁵⁶⁶ A unilateral ceasefire announced by the same group on 27 September was crushed by its military wing in late November.⁵⁶⁷

President Ibrahim Boubacar Keïta sought and obtained a second term in the presidential elections held in July–August 2018. A complaint filed by the opposition candidate, Soumaïla Cissé, was rejected by the Constitutional Court.⁵⁶⁸ All the main political forces agreed to postpone parliamentary elections to 2019 and to extend the state of emergency, in place since 20 November 2015, until 31 October 2019.⁵⁶⁹

559 ACLED, 'Targeting of the Islamic State in the Greater Sahara (ISGS)', 21 March 2018, <https://www.acleddata.com/2018/03/21/targeting-of-the-islamic-state-in-the-greater-sahara-isgs/>.

560 See C. Pilloud, Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, 1987, p 1352.

561 Report of the Secretary-General on the Situation in Mali, UN doc S/2018/273, 29 March 2018, §35 ff; Report of the Secretary-General on the Situation in Mali, 28 September 2017, §34 ff.

562 'Mali: deux attaques font une quarantaine de morts dans le nord-est', *RFI*, 28 April 2018, <http://www.rfi.fr/afrique/20180428-deux-attaques-region-menaka-quarantaine-morts>.

563 Report of the Secretary-General on the Situation in Mali, 27 March 2015, §40.

564 Report of the Secretary-General on the Situation in Mali, UN doc S/2018/866, 25 September 2018, §42.

565 ACLED, 'Neighbors in Arms: Intercommunal Violence and Targeting of Civilians in Mali in 2018', 19 November 2018, <https://www.acleddata.com/2018/11/19/neighbors-in-arms-intercommunal-violence-and-targeting-of-civilians-in-mali-in-2018/> (last accessed 20 January 2019).

566 Report of the Secretary-General on the Situation in Mali, 25 September 2018, §46.

567 'Un groupe de chasseurs dogons met fin à une trêve au centre du Mali', *VOA*, 21 November 2018, <https://www.voafrique.com/a/un-groupe-de-chasseurs-dogons-met-fin-%C3%A0-une-tr%C3%Aave-au-centre-du-mali/4668362.html>

568 Report of the Secretary-General on the Situation in Mali, 25 September 2018, §20.

569 Report of the Secretary-General on the Situation in Mali, UN doc S/2018/1174, 28 December 2018, §12.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

Mali ratified the Rome Statute of the ICC on 16 August 2000. The ICC therefore has jurisdiction over crimes in its Statute committed on the territory of Mali or by its nationals from 1 July 2002 onwards, provided national courts are inactive, or unwilling or unable to prosecute.

On 18 July 2012, the Malian Government referred ‘the Situation in Mali since January 2012’ to the ICC, with no end date. Based on the outcome of its preliminary examination, the Office of the Prosecutor determined that there was a reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed in the country.⁵⁷⁰ The ICC has so far heard two cases originating from the situation in Mali.

On 18 September 2015, the ICC Pre-Trial Chamber I (PTC I) issued a warrant of arrest against Ahmad al-Faqi al-Mahdi. An alleged member of Ansar Dine, al-Mahdi was accused of being involved in the destruction of nine mausoleums and one mosque in Timbuktu, between 30 June and 10 July 2012. He was charged with the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion. Surrendered to the ICC by the authorities of Niger on 26 September 2015, he pleaded guilty at the trial’s opening on 26 August 2016. On 27 September, Trial Chamber VIII unanimously convicted al-Mahdi as a co-perpetrator and sentenced him to nine years’ imprisonment.⁵⁷¹ His case was the first before the ICC to deal with the destruction of cultural property.

A second warrant of arrest was issued by the ICC PTC I on 27 March 2018 against Al-Hassan Ag Abdoul Aziz, suspected of committing crimes against humanity and war crimes in Timbuktu between April 2012 and January 2013. Considered the de facto chief of the Islamic police in Timbuktu, Al-Hassan was allegedly involved in the work of the Islamic court in the city and participated in the execution of its decision. Mali surrendered him to the ICC on 31 March 2018. The confirmation of charges hearing is scheduled for 6 May 2019.⁵⁷²

5. THE SOUTH SUDAN ARMED CONFLICT: A NEW PEACE DEAL

Marija Sulce

Classification of the Conflict

The South Sudanese Government has been involved in a series of non-international armed conflicts (NIACS) with various armed opposition groups since December 2013.

570 Office of the Prosecutor, International Criminal Court (ICC), Report on Preliminary Examination Activities 2013, November 2013, §§230–231.

571 ICC, *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Case Information Sheet, 20 March 2018, <https://www.icc-cpi.int/CaselInformationSheets/Al-MahdiEng.pdf> (last accessed 20 January 2019).

572 ICC, *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case Information Sheet, October 2018, <https://www.icc-cpi.int/CaselInformationSheets/al-hassanEng.pdf> (last accessed 20 January 2019).

As South Sudan has ratified the Geneva Conventions of 1949 and Additional Protocols II (1977) and III (2005), the parties are bound by the law set out in them – namely Article 3 of the Geneva Conventions and Additional Protocol II on non-international armed conflicts – as well as customary international humanitarian law (IHL).⁵⁷³

A. HISTORY OF THE CONFLICT

South Sudan became independent from Sudan in 2011, making it the youngest country in the world. The young country did not enjoy peace for long as it descended into civil war in December 2013, when forces loyal to South Sudanese President, Salva Kiir, clashed with the then Vice President, Riek Machar’s, opposition. The confrontation took place following Machar’s criticism in early 2013 of Kiir’s leadership and his announcement that he would run against Kiir in the 2015 presidential elections.⁵⁷⁴ These comments led to the eventual ousting of Machar from office. The country remained calm for most of the year but clashes erupted in December. It is unclear what really happened: Kiir claimed that Machar had attempted a coup, while Kiir’s side was accused of trying to disarm guards on the ex-Vice President’s side.⁵⁷⁵ It should be noted that the ethnic dimension is crucial to this conflict. South Sudan is ethnically very diverse with the two largest ethnicities being Dinka (around 35.8 percent of the population) and Nuer (around 15.6 percent). President Kiir is of the majority Dinka ethnicity, while Machar is Nuer.⁵⁷⁶ The war has inflamed the ethnic tensions in the country, feeding on long-existing differences.

The latest reports suggest that since the beginning of the five-year-long conflict, around 383,000 people have been killed – a shocking increase from the previously estimated 50,000.⁵⁷⁷ Furthermore, around 4 million people have been displaced, while the conflict has also led to severe food shortages for at least 5 million people, greatly devastating the South Sudanese economy.⁵⁷⁸ In 2017, the United Nations declared a famine in the country, warning that around 100,000 people were facing starvation and 1 million were classified as being on the brink of famine, while 4.9 million people were in urgent need of food, agriculture and nutritional assistance.⁵⁷⁹ Although humanitarian aid reversed the 2017 famine, currently around

573 International Committee of the Red Cross, ‘South Sudan’, IHL Database, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SS (last accessed 29 August 2018).

574 J. Williams, ‘South Sudan’s Civil War Has Raged for 5 Years. Now the Leaders of the Two Sides Are Meeting’, *Vox*, 20 June 2018, <https://www.vox.com/world/2018/6/20/17483232/south-sudan-civil-war-meeting-ethiopia-riek-machar-salva-kiir-peace-talks>.

575 Ibid.

576 ‘South Sudan Fast Facts’, *CNN*, 14 August 2018, <https://edition.cnn.com/2013/07/10/world/africa/south-sudan-fast-facts/index.html>.

577 M. Specia, ‘383,000: Estimated Death Toll in South Sudan’s War’, 26 September 2018, *The New York Times*, <https://www.nytimes.com/2018/09/26/world/africa/south-sudan-civil-war-deaths.html>.

578 E. Igunza, ‘South Sudan War: The Handshake That May End a Recurring Nightmare’, *BBC News*, 13 September 2018, <https://www.bbc.com/news/world-africa-45511352>; ‘South Sudan Fast Facts’.

579 United Nations, ‘Famine Declared in Region of South Sudan – UN’, 20 February 2017, https://news.un.org/en/story/2017/02/551812-famine-declared-region-south-sudan-un#.WKx_qVUrldU (last accessed 25 August 2018).

70 percent of families in the country go hungry. Even more people (6.3 million) are food insecure and the number is not expected to decrease any time soon.⁵⁸⁰ Furthermore, the rainy season and conflict have made it difficult to deliver food aid, with Oxfam reporting that people have started to eat weeds and grass out of desperation, making themselves sick.⁵⁸¹

B. PARTIES TO THE CONFLICT

Though the conflict started off as a confrontation between the forces of President Kiir and ex-Vice President Machar, it has become more complex with groups splintering and fighting more and more based on ethnicity.

1. Sudan People's Liberation Army (SPLA)

On the one side are the government forces, known as the official SPLA, standing behind President Kiir. It was estimated in 2013 that the SPLA had a troop strength of 210,000.⁵⁸² Nevertheless, throughout the war the group has suffered losses and defections, bringing the current number of troops down to around 197,500.⁵⁸³

The SPLA has its roots in Sudan's civil war, during which it fought for the self-determination of South Sudan. It was formed in the 1980s and was originally a rebel group fighting for the independence of Sudan's southern region. After independence, it became the official South Sudanese military; nevertheless, as already mentioned, the current South Sudanese civil war has seen other armed groups claiming to stem from the SPLA as well, questioning the legitimacy of the national forces.⁵⁸⁴

2. SPLA-in-opposition or SPLA-IO/RM and SPLA-IO/TD

The opposition is split into two groups: one supporting ex-Vice President Riek Machar (SPLA-in-opposition or SPLA-IO/RM), and the second loyal to First Vice President Taban Deng (SPLA-IO/TD).

Around these main parties are various armed groups, supporting their chosen organization, such as the Dinka Mathiang Anyoor and the Nuer White Army.⁵⁸⁵ It is not known how many troops the opposition has. It is estimated that there are around 40 smaller armed groups fighting in the region, but none as big and as organized as the main three.⁵⁸⁶

580 T. Jenssen, 'Five Things You Should Know About the Conflict in South Sudan', Norwegian Refugee Council, 5 June 2018, <https://www.nrc.no/news/2018/june/five-things-you-should-know-about-the-conflict-in-south-sudan/> (last accessed 25 August 2018).

581 J. Lu, "'Unimaginable' Suffering In South Sudan. Is There Any Hope?", *NPR*, 5 July 2018, <https://www.npr.org/sections/goatsandsoda/2018/07/05/620184859/unimaginable-suffering-in-south-sudan-is-there-any-hope?t=1534848271167&t=1535177813098>.

582 International Institute for Strategic Studies, 'Middle East and North Africa', 113 *The Military Balance* 1 (2013).

583 Global Firepower, 'South Sudan Military Strength', https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=south-sudan (last accessed 25 August 2018).

584 'South Sudan Fast Facts'.

585 Human Rights Council (HRC), Report of the Commission on Human Rights in South Sudan, UN doc A/HRC/37/71, 14 March 2018.

586 Ibid.

C. KEY DEVELOPMENTS IN 2018

There is a sense of the tide changing in the South Sudanese conflict. At the end of June 2018, the parties to the conflict signed a ceasefire, agreeing to open passages for humanitarian aid, release war prisoners and disengage their forces. These measures seemed to be paving the way for an eventual peace agreement.⁵⁸⁷ Though the ceasefire appears to have been violated within hours,⁵⁸⁸ the conflict has still moved towards a peace agreement and the summer was dedicated to brokering a permanent peace deal. An agreement was finally reached and a power-sharing deal was signed at the beginning of August, while the peace deal was signed in September by President Salva Kiir and Riek Machar. Under the power-sharing agreement of 5 August, Riek Machar will return to the capital, Juba, as one of the five vice presidents and the opposition forces will merge with government forces to form one national army.⁵⁸⁹ Once the final deal is signed, the two sides will have three months to form a transitional government, which will be in power for 36 months, at the end of which elections will be held.⁵⁹⁰ The president has commented that he believes in this peace deal more than in any in previous years as it has come from South Sudan itself and has not been imposed on the country by foreign powers.⁵⁹¹ The signing ceremony of the final agreement took place on 12 September. Called the 'final final' peace deal, it was mediated by Sudan and signed in Ethiopia's Addis Ababa.⁵⁹² The President of Sudan, Omar Hassan Ahmed al-Bashir, and Yoweri Museveni, the President of Uganda, are the guarantors of the agreement. The agreement itself is a sharing of power among the many tribes of South Sudan – the two major tribes of Dinka and Nuer, followed by the smaller ones.⁵⁹³ Under it, each area of South Sudan will have to be marked as belonging to one of the tribal homelands. Even areas with several tribes will have to be defined as belonging to one of the tribes, most likely the largest.⁵⁹⁴

A promising development a few days after the power-sharing deal was signed on 5 August could be a sign of a real change of tide in the conflict – President Kiir

587 J. Doubek, 'Warring Parties Sign Cease-Fire in South Sudan', *NPR*, 28 June 2018, <https://www.npr.org/2018/06/28/624172059/warring-parties-sign-cess-fire-in-south-sudan>.

588 Lu, "'Unimaginable' Suffering In South Sudan'.

589 S. Mednick, 'South Sudan Claims Civil War Is Over but Skepticism Abounds', *AP*, 20 August 2018, <https://apnews.com/e63fdb1275fc423e98625692af05c501>.

590 'South Sudan's Rival Leaders Sign Power-Sharing Agreement', *Al Jazeera*, 6 August 2018, <https://www.aljazeera.com/news/2018/08/south-sudan-rival-leaders-sign-power-sharing-agreement-180805172347086.html>.

591 A. Abdelaty, 'South Sudan Government and Rebels Reach Peace Deal', *Reuters*, 5 August 2018, <https://www.reuters.com/article/us-southsudan-politics/south-sudan-government-and-rebels-reach-peace-deal-idUSKBN1KQJIV>; 'South Sudan Factions Sign Peace Deal, Riek Machar to Return to a VP Post', *DW*, 5 August 2018, <https://www.dw.com/en/south-sudan-factions-sign-peace-deal-riek-machar-to-return-to-a-vp-post/a-44962462>.

592 'South Sudan President Signs Peace Deal with Rebel Leader', *Al Jazeera*, 12 September 2018, <https://www.aljazeera.com/news/2018/09/south-sudan-president-signs-peace-deal-rebel-leader-180912185452831.html>.

593 M. Mamdani, 'The Trouble With South Sudan's New Peace Deal', *The New York Times*, 24 September 2018, <https://www.nytimes.com/2018/09/24/opinion/south-sudan-peace-agreement.html>.

594 Ibid.

offered an amnesty to all involved in the conflict and granted a pardon to Riek Machar. He also reminded his forces to observe the new peace deal and cease all action.⁵⁹⁵ It remains to be seen whether this deal will be able to end the conflict and allow the country to rebuild itself.

Nevertheless, criticism of the ability of this deal to end the conflict abounds. There have been previous failed efforts to bring peace to the country, the most notable being the 2015 peace deal. In August 2015, the UN threatened South Sudan with sanctions in order to encourage peace. President Kiir signed a peace deal with the rebels, committing to stop the fighting immediately, order military forces to leave Juba and let rebels take up the post of 'first vice-president'.⁵⁹⁶ Nevertheless, the deal collapsed a year later, leading to Machar fleeing Juba. Some analysts see the current deal as being the same as the 2015 agreement.⁵⁹⁷ Another significant attempt at a ceasefire was in December 2017, encouraged by the Intergovernmental Authority on Development, an African trade block of eight states that South Sudan is part of. That called for the freezing of troops in their locations, ceasing actions that could lead to confrontation, and the release of political detainees, women and children. Nevertheless, the agreement was violated within a few days.⁵⁹⁸ Regarding the latest peace deal, the UN is already investigating reported clashes that violated the agreement just a few days after it was signed in September.⁵⁹⁹ It has also been criticized as being imposed on South Sudan by foreign countries and making the young nation an informal protectorate of Sudan and Uganda. Their role of official 'guarantors' of the South Sudanese peace deal shows how strategically important the two countries are to the future of South Sudan. Uganda's troops are physically present in South Sudan in support of Kiir's faction, while Sudan has provided significant support to opposition groups, including Machar's efforts.⁶⁰⁰ Another sticking point will probably be the requirement to define the country's areas by dominant tribes. This could inflame ethnic grievances even more and infringe on minority rights.⁶⁰¹

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

South Sudan is party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the Elimination of All Forms of Discrimination Against Women and its Option-

595 'South Sudan's Kiir Grants Rebel Leader Machar, Others Amnesty', *Al Jazeera*, 9 August 2018, <https://www.aljazeera.com/news/2018/08/south-sudan-kiir-grants-rebel-leader-machar-amnesty-180809062138199.html>.

596 'South Sudan Government, Rebels Sign Security Deal', *DW*, 6 July 2018, <https://www.dw.com/en/south-sudan-government-rebels-sign-security-deal/a-44563345>.

597 'South Sudanese Celebrate Peace Deal Signed by Kiir and Machar', *BBC News*, 6 August 2018, <https://www.bbc.com/news/world-africa-45077389>.

598 HRC, Report of the Commission on Human Rights in South Sudan.

599 S. Wilson, 'South Sudan's Latest Peace Deal Faces Early Test', *Financial Times*, 15 September 2018, <https://www.ft.com/content/c78908d0-b83d-11e8-bbc3-ccd7de085ffe>.

600 Mamdani, 'The Trouble With South Sudan's New Peace Deal'.

601 Ibid.

al Protocol; the Convention on the Rights of the Child and the African Charter on Human and People's Rights.⁶⁰² Nevertheless, this participation in an array of international treaties and conventions has not helped to make the South Sudanese war less horrible for civilians. The conflict has been marred by human rights abuses and war crimes committed by both sides.

1. Attacks on Aid Workers

The UN has described South Sudan as one of the most dangerous places in the world for aid workers. The Aid Worker Security Database put South Sudan at the top of the list of the most violent countries in which to deliver aid.⁶⁰³ Around 100 aid workers have been killed since the conflict started in 2013 and 22 have been abducted since December 2017.⁶⁰⁴ Detention of aid workers, physical assaults and armed robberies of aid are also an issue.⁶⁰⁵ Aid workers are protected against attacks under customary IHL and harming them or raiding aid supplies is a violation of the law. It not only affects the aid workers, but also people who depend on their supplies. The danger of being attacked or the aid being stolen can mean that aid workers have to withdraw from certain areas and are unable to help people in need of medical help, food and water. Aid was key in relieving the famine in 2017, but experts have warned that the country is once again on the brink of starvation and that humanitarian aid could again be crucial in avoiding famine.⁶⁰⁶

2. Attacks on Civilians and Civilian Property

There is evidence to suggest that the SPLA – the government forces – have directed many attacks against civilians and civilian buildings, where no opposition forces were present to justify an attack. The evidence has suggested that civilians have been targeted simply because they lived in opposition-controlled areas, were sympathetic to the opposition or were of a different ethnicity.⁶⁰⁷ For example, a recent report by the UN Office of the High Commissioner for Human Rights and UN Mission in South Sudan documents the violations in southern Unity, where it has found the SPLA to have attacked at least 40 villages or settlements between April and the end of May 2018, raping around 120 girls and women, killing 232 civilians and burning 63 individuals alive, among whom were numerous children and elderly and disabled people. Almost 2,000 people are estimated to have been displaced due to this vio-

602 UN Office of the High Commissioner for Human Rights (OHCHR), 'Ratification Status for South Sudan', https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=215&Lang=en (last accessed 29 August 2018).

603 Norwegian Refugee Council, 'South Sudan Declared Most Violent for Aid Workers for Third Straight Year', <https://www.nrc.no/news/2018/august/south-sudan-declared-most-violent-for-aid-workers-for-third-straight-year/> (last accessed 29 August 2018).

604 Janssen, 'Five Things You Should Know About the Conflict in South Sudan'.

605 Norwegian Refugee Council, 'South Sudan Declared Most Violent for Aid Workers for Third Straight Year'.

606 Ibid.

607 HRC, Report of the Commission on Human Rights in South Sudan.

lence.⁶⁰⁸ Looting by the SPLA has also been common and there is evidence to suggest that the forces carried out a scorched-earth strategy, looting villages and then destroying them by taking cattle and burning homes and food supplies.⁶⁰⁹

The SPLA-IO(RM) also carried out attacks on civilians and might have also employed a scorched-earth policy, burning homes and stealing thousands of cattle, especially in Koch. Nevertheless, it is not as clear how many civilians have been killed by the opposition, as people are not always able to recognize different armed groups and their fighters.⁶¹⁰

3. Child Soldiers

Recruiting children as soldiers appears to be a common practice by both the government and opposition forces. This is illegal under the law of conflict and was condemned in May 2018 by the European Parliament, which called for accountability in the South Sudanese conflict and supported establishing a hybrid court to review the abuses. It also called for the European Union to pursue an international arms embargo.⁶¹¹ In April 2018, the United Nations Children's Fund (UNICEF) organized a symbolic 'laying down of arms' ceremony, during which 112 boys and 95 girls of various ages, some as young as 14, were freed. At that point, UNICEF had already freed around 500 child soldiers in 2018 and was planning to release 1,000 more. According to the organization, there are around 19,000 children serving in the armed forces of the government and various armed groups in the country.⁶¹²

4. Sexual Violence

Sexual violence has been central to the South Sudanese civil war. The UN has documented numerous accounts of rape, gang rape, forced stripping, castration and mutilation of genitalia, perpetrated by both the government and most of the armed groups. The areas with the highest rates of sexual violence have been the Greater Upper Nile, the Equatoria region and Greater Bahr el Ghazal.⁶¹³ It appears that sexual violence has been used as a weapon to terrorize and oppress civilians. According to UNICEF, around 1,000 children were sexually assaulted in the first three years of the conflict. Around 72 percent of women, residing in protected sites or areas for displaced people, say they have been raped.⁶¹⁴

608 OHCHR and UN Mission in South Sudan, *Indiscriminate Attacks Against Civilians in Southern Unity April-May 2018*, 10 July 2018, <https://reliefweb.int/report/south-sudan/indiscriminate-attacks-against-civilians-southern-unity-april-may-2018> (last accessed 1 September 2018).

609 Ibid.

610 'South Sudan Troops, Allies Killed Hundreds in Recent Attacks: UN', *Al Jazeera*, 10 July 2018, <https://www.aljazeera.com/news/2018/07/south-sudan-troops-allies-killed-hundreds-attacks-180710095811167.html>;

611 Human Rights Watch (HRW), 'South Sudan: Events of 2017', *World Report 2018*, <https://www.hrw.org/world-report/2018/country-chapters/south-sudan> (accessed 25 August 2018).

612 B. Adebayo, 'More than 200 Child Soldiers Freed in South Sudan', *CNN*, 18 April 2018, <https://edition.cnn.com/2018/04/18/africa/south-sudan-child-soldiers-freed/index.html>.

613 HRW, 'South Sudan: Events of 2017'.

614 'In South Sudan's War, Thousands Suffer Rape and Sex Attacks', *Al Jazeera*, 19 June 2018, <https://www.aljazeera.com/news/2018/06/relief-chief-rampant-sexual-abuse-violence-south-sudan-180619110209366.html>.

The situation is aggravated by the fact that no one is held accountable for the crimes committed as the policing of sexual crimes is non-existent – police and soldiers often being the ones perpetrating sexual violence. In September 2018, 10 government soldiers were sentenced to prison for murders and rapes they carried out in July 2016. The soldiers attacked the Terrain Hotel in Juba, murdered a journalist and raped foreign aid workers, while attacking others.⁶¹⁵ The case was seen as a breakthrough for human rights and humanitarian law in the country; nevertheless, many argue that the compensation for the victims was not sufficient.⁶¹⁶

According to the March 2018 report of the Commission on Human Rights in South Sudan, there is sufficient evidence to conclude that the SPLA, both SPLA-IO groups and other armed groups that support the parties to the conflict are 'deliberately targeting civilians on the basis of their ethnic identity and by means of killings, abductions, rape and sexual violence, as well as looting and the destruction of villages'.⁶¹⁷ The ethnic dimension has led the conflict to become a war of 'them against us', dehumanizing the other side. Certain acts during the conflict point to evidence of persecution on ethnic grounds, meaning that the parties have carried out war crimes and crimes against humanity under IHL.⁶¹⁸ Furthermore, the sexual violence during the conflict, which has included rape and mutilations of sexual organs, and has targeted girls, boys, women and men, has eroded the social fabric. The acts, often carried out in front of family and community members, have traumatized people and could lead to even more conflict in the future.⁶¹⁹ Because of these horrific crimes, it will take a long time for the South Sudanese communities to heal.

6. THE SYRIAN ARMED CONFLICT: NEARING THE END?

Marija Sulce

Classification of the Conflict

There are many parallel armed conflicts taking place in the Syrian war, which began as a civil war in 2011 between the Assad regime and rebel groups. Currently, the Syrian Government, with the support of Russia and Iran, is engaged in non-international armed conflicts (NIACs) with various rebel groups, while the rebel groups are also engaged in conflicts with each other, as well as with Turkey, Israel and the United States-led coalition. There is also an international armed conflict (IAC) between the US-led coalition and the Syrian Government as Syria did not consent to the coalition being on its territory. The US together with the UK and France have attacked alleged chemical weapon and research facilities of the Syrian Government, following an alleged chemical attack.

615 D. Dumo, 'South Sudan Soldiers Sentenced to Jail for Murder, Rape in 2016 Hotel Raid', *Reuters*, 6 September 2018, <https://www.reuters.com/article/us-southsudan-security/south-sudan-soldiers-sentenced-to-jail-for-murder-rape-in-2016-hotel-raid-idUSKCN1LMOXK>.

616 Ibid.

617 HRC, 'Report of the Commission on Human Rights in South Sudan', §126.

618 Ibid.

619 Ibid.

There is also arguably an international armed conflict between Israel and Iran on Syrian territory.

A. HISTORY OF THE CONFLICT

The War Report 2016 provides a more detailed history of the conflict. Here, only the most important points are discussed regarding the beginning and evolution of the war.

The Syrian armed conflict began in 2011 as a civil war, stemming from the Arab Spring protests. The Syrian people started protesting in March 2011 in Daara against the corruption of President Bashar al-Assad's government, lack of political freedom and unemployment. The demonstrations took an ugly turn when the regime tried to crush the dissent by force.⁶²⁰ After the forceful response to the demonstrations, protests against the regime erupted nationwide. The regime's opponents started taking up arms and the unrest began its descent into civil war in July 2011, when a group of defectors from the Syrian military began forming the Free Syrian Army (FSA) with the aim of overthrowing President Assad's regime.⁶²¹ During the almost eight years of ensuing civil war, many parties have joined the conflict, including many rebel groups as well as other states, highly complicating the war. The FSA with other opposition groups have controlled vast areas of Syrian territory, including the strategically important city of Aleppo, throughout most of the civil war. An important change came when Aleppo was retaken by the government in 2016.⁶²²

The political unrest revealed the great religious divisions within Syrian communities, of which the largest are Sunni Muslims, representing around 74 percent of the population in 2011. Other Muslim religions, such as the Alawites, Ismailis and Shia, represented 13 percent, while Christians constituted 10 percent, and Druze 3 percent.⁶²³ Religious differences have fueled the conflict and have provided a platform for hardline groups, such as Islamic State (IS) to become key players. In 2013 and 2014, IS controlled more than 88,000 square kilometers across Iraq and Syria.⁶²⁴ Since then, its power has greatly declined and the group is now a shadow of its former self in Syria.

There has also been a lot of international involvement in the conflict, with many players pursuing their own goals and interests amid the unrest. The struggle for power in the region has drawn into the conflict countries such as the US, Russia,

620 'Why Is There a War in Syria', *BBC News*, 7 September 2018, <https://www.bbc.com/news/world-middle-east-35806229>.

621 'Syria's Civil War Explained from the Beginning', *Al Jazeera*, 14 April 2018, <https://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>.

622 *Ibid.*

623 U.S. Department of State, *Syria: July–December, 2010 International Religious Freedom Report*, 13 September 2011, https://www.state.gov/j/drl/rls/irf/2010_5/168276.htm (last accessed 15 August 2018).

624 'ISIS Fast Facts', *CNN International Edition*, 3 September 2017, <https://edition.cnn.com/2014/08/08/world/isis-fast-facts/index.html>.

Turkey, Iran, Israel and many others. To a degree, the conflict has become more international in character, rather than remaining faithful to its non-international civil war roots. The conflict is no longer only about Syria's government and Assad's corruption; in recent years, it has become a pawn in the geopolitical struggles of the Middle East.⁶²⁵ Having said that, the international community has played an important role in trying to facilitate peace talks between the Assad regime and the opposition groups. One example is the Astana talks in 2017, which managed to set up de-escalation zones in Syria, sponsored by Russia, Turkey and Iran,⁶²⁶ as well as the demilitarized zone brokered by Turkey and Russia in the last remaining rebel stronghold in Idlib in September 2018.⁶²⁷

Approaching its eighth year, the Syrian war is one of the most devastating conflicts of the twenty-first century. So far, it has taken the lives of around half a million people, produced around 5.6 million refugees and displaced roughly 6.6 million people within Syrian territory.⁶²⁸ Nevertheless, as the year 2018 unfolded, there appeared to be a flicker of light at the end of the dark seven-year tunnel, suggesting that the conflict might be entering its final stages.

B. PARTIES TO THE CONFLICTS

i. International Armed Conflicts

a. US-led Coalition

The US-led coalition of 77 states was formed in 2014 to combat IS in Iraq and Syria.⁶²⁹ The most notable states in the coalition are: Belgium, Canada, Denmark, France, Germany, Italy, Jordan, Morocco, the Netherlands, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom and, of course, the US. Though the coalition's purpose is to fight terrorism, since the Syrian Government has not consented to this foreign-troop presence, there is an IAC between the US-led coalition and the Assad government, as established by *The War Report 2016*.⁶³⁰ There are currently around 2,000 US troops on Syria's territory.⁶³¹

625 U. Friedman, 'Syria's War Has Never Been More International', 14 February 2018, *The Atlantic*, <https://www.theatlantic.com/international/archive/2018/02/syria-civil-war-next/553232/>.

626 'Syria's Civil War Explained from the Beginning'.

627 'Russia, Turkey Agree on Borders of Demilitarised Zone in Idlib', *Al Jazeera*, 22 September 2018, <https://www.aljazeera.com/news/2018/09/russia-turkey-agree-borders-demilitarised-zone-idlib-180921142500450.html>.

628 A. Mohammed and P. Stewart, 'Exclusive: Despite Tensions, Russia Seeks U.S. Help to Rebuild Syria', *Reuters*, 3 August 2018, <https://www.reuters.com/article/us-usa-russia-syria-exclusive/exclusive-despite-tensions-russia-seeks-u-s-help-to-rebuild-syria-idUSKBN1K02JP>.

629 Global Coalition, '79 Partners United in Defeating Daesh', <http://theglobalcoalition.org/en/partners/> (last accessed 15 August 2018).

630 A. Bellal, *The War Report: Armed Conflicts in 2016*, Geneva Academy of International Humanitarian Law and Human Rights, 2017, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202016.pdf> (last accessed 26 November 2018).

631 M. Kranz, 'Trump Reportedly Wants to Get Out of Syria – Here's How Many Troops the US Has in the Country', *Business Insider*, <http://uk.businessinsider.com/troop-levels-in-syria-trump-2018-4>.

Direct confrontation between Syria and the coalition took place for the first time in April 2017 when the US carried out a missile strike on a Syrian Government air base after the government had used chemical weapons on its own population.⁶³² Another direct confrontation took place almost exactly a year later in April 2018, when the US, Britain and France launched airstrikes against Syrian chemical weapon storage, military and research facilities after another suspected chemical attack by President Assad near Damascus.⁶³³

Though the US has been playing with the idea of withdrawing from Syria for a while, its most recent stance has shifted as the Trump administration has vowed to stay in Syria until the end of the war as a way to halt Iran's expansion across the Middle East.⁶³⁴

b. Turkey

Turkey is part of the US-led coalition, but it is also acting unilaterally against the Syrian Kurds, thus arguably meriting a separate mention for being in a NIAC with Kurdish militant groups, and also in an IAC with Syria as the government has not accepted Turkish presence on its soil. Turkey has been present in the conflict since 2016 and President Erdoğan has recently said that Turkish troops will remain until a general election is held in Syria.⁶³⁵

c. Syrian Government

At the beginning of the war, the Syrian Army numbered between 250,000 and 300,000 troops; nevertheless, over the years of the conflict, due to casualties, defections and desertions, this number has greatly decreased.⁶³⁶ It is difficult to know the current number of the troops, but according to Global Firepower rankings, the number of active Syrian military personnel is currently around 154,000.⁶³⁷

d. Israel Versus Iran on Syrian Territory

There is arguably an IAC between Israel and Iran within Syrian territory, further complicating the situation. Iran is on Syrian territory to aid the Assad government's fight against rebel groups. In February 2018, an Iranian drone went into Israeli air-

632 H. Cooper, M. R. Gordon and M. D. Shear, 'Dozens of U.S. Missiles Hit Air Base in Syria', *The New York Times*, 6 April 2017, <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>.

633 H. Cooper, T. Gibbons-Neff and B. Hubbard, 'U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack', *The New York Times*, 13 April 2018, <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.

634 M. Ryan, P. Sonne and J. Hudson, 'In Syria, Trump Administration Takes On New Goal: Iranian Retreat', *The Washington Post*, 30 September 2018, https://www.washingtonpost.com/world/national-security/in-syria-us-takes-on-new-goal-iranian-retreat/2018/09/30/625c182a-c27f-11e8-97a5-ab1e46bb3bc7_story.html?utm_term=.a6c0b089ff13.

635 'Erdogan: Turkey Will not Leave Syria Until an Election Is Held', *Al Jazeera*, 4 September 2018, <https://www.aljazeera.com/news/2018/10/erdogan-turkey-leave-syria-election-held-181004174206836.html>.

636 S. Dagher, 'Assad Is Desperate for Soldiers', *The Atlantic*, 14 May 2018, <https://www.theatlantic.com/international/archive/2018/05/syria-assad-conscription-refugees-lebanon/560282/>.

637 Global Firepower, '2018 Syria Military Strength', https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=Syria (last accessed 15 August 2018).

space from Syria and prompted a subsequent Israeli strike on the Iranian command centre, which had allegedly launched the drone. As this triggered Syrian anti-aircraft fire, Israel resorted to a broader wave of strikes on Syrian and Iranian targets.⁶³⁸ There was another alleged Israeli airstrike on Syria's air base at the beginning of April that killed 7 Iranian military personnel, which Israel has not confirmed.⁶³⁹ At the end of April, there were more strikes targeting Syrian military positions in Hama and Aleppo, reportedly hitting two Iran-linked bases. It is not clear where the attack came from, but US officials have pointed the finger at Israel, warning that this is 'the latest sign that Israel and Iran are moving closer to open warfare'.⁶⁴⁰

2. Non-International Armed Conflicts

There are various parallel NIACs, the main players in which are the Syrian Government, assisted by Russia and Iran, the US-led coalition and various rebel groups, the most important being the FSA, IS, Hay'at Tahrir al-Sham and the YPG-YPJ. Turkey should also be mentioned separately as it is engaged in a NIAC with the Kurdish militias, which are supported by the US, putting great strain on US-Turkish relations.

a. Free Syrian Army (FSA)

The first organized opposition to the Syrian Government, the FSA, came into being in 2011 when defectors from the Syrian Army organized themselves into a militant group. Since its beginnings, the FSA has expanded and become a loose umbrella term for many armed groups, with little coordination, organized military planning or cohesive ideology. Without support from the Turkish military through intelligence, aerial support and logistics, the FSA would be unable to overpower other militant groups.⁶⁴¹ The FSA together with Turkey have been heavily involved in fighting the Kurdish militia in northern Syria, also known as the People's Protection Units (YPG) who are backed by the US. In March, the FSA took the YPG-controlled city of Afrin.⁶⁴² Though several FSA branches have shifted alliances, one of their goals is to reduce the influence of the Syrian Democratic Force (SDF) at Turkey's southern border.⁶⁴³ As the FSA is a very loose organization with no clear coordination, it is not possible to know how many troops it has.

638 M. Alami, 'The Ongoing Israel-Iran Proxy War in Syria', Atlantic Council, 8 March 2018, <http://www.atlanticcouncil.org/blogs/menasource/the-ongoing-israel-iran-proxy-war-in-syria> (last accessed 15 August 2018).

639 'Seven Iranians Were Killed in Strike on Syrian Air Base: Tasnim', *Reuters*, 10 April 2018, <https://www.reuters.com/article/us-mideast-crisis-syria-iran/seven-iranians-were-killed-in-strike-on-syrian-air-base-tasnim-idUSKBN1HH0U2>.

640 C. Kube, 'Israel Seems to Be Preparing for War with Iran, U.S. Officials Say', *NBC News*, 1 May 2018, <https://www.nbcnews.com/news/mideast/israel-seems-be-preparing-war-iran-say-u-s-officials-n870051>.

641 S. Abboud, 'Who Are Syria's Opposition Alliances?', *Al Jazeera*, 10 October 2017, <https://www.aljazeera.com/news/2017/10/syria-opposition-alliances-171010075809951.html>.

642 'Turkish Forces and Free Syrian Army Capture Afrin City', *Al Jazeera*, 18 March 2018, <https://www.aljazeera.com/news/2018/03/free-syrian-army-group-captures-afrin-city-180318081430817.html>.

643 F. Najjar, 'What Is the Future of the Syrian Democratic Forces?', *Al Jazeera*, 25 November 2017, <https://www.aljazeera.com/news/2017/11/future-syrian-democratic-forces-171124110417741.html>.

The most recent attempt to unite the splintering FSA as well as some other rebel groups has come from Turkey with the creation of the United National (or Syrian) Army (UNA) in mid-2017.⁶⁴⁴ The various groups that comprise the army are widely dispersed across Syria and are located in such areas as the South, Ghouta and around Aleppo and Idlib. The UNA has repeatedly clashed with other rebel groups, namely the SDF, IS and Hay'at Tahrir al-Sham. Though the purpose of the union was to unite different rebel groups under one banner, it has not been successful as infighting between different groups continues.⁶⁴⁵

b. Islamic State (IS)

The Islamic State in Iraq and Syria (ISIS), or simply IS, is an extremist group that detached itself from al-Qaeda in 2014 to form its own organization with the aim of creating an Islamic state (caliphate) across Iraq and Syria, which would be governed by Sharia law. It has been extremely successful in recruiting members from across the world with the help of the internet and social media to diffuse its ideas and propaganda. In its prime, IS controlled 34,000 square miles in Iraq and Syria in 2014 and, in 2015, it was believed to be holding around 3,500 people as slaves.⁶⁴⁶ It is also one of the wealthiest militant groups in terrorist organization history – in 2014 alone, it earned around \$2 billion from its oil fields, mineral mines, taxes and the banks it controlled.⁶⁴⁷

By 2017, the group had lost most of its territory, leading to proclamations that the end had come for IS. In October 2017, after the last of the group's strongholds – Raqqa – had fallen to Kurdish fighters, Brett McGurk, US Special Presidential Envoy for the Global Coalition to Defeat ISIS, tweeted that IS 'once purported as fierce, now [is] pathetic and a lost cause'.⁶⁴⁸ However, this claim could have been premature as the latest reports claim that there remain anywhere between 20,000 and 30,000 IS troops in Iraq and Syria.⁶⁴⁹ Therefore, it remains a significant threat in both these countries.

c. Ahrar al-Sham

Ahrar al-Sham or Harajat Ahrar al-Sham al-Islamiyya (the Islamic Movement of the Free Men of the Levant) is a Sunni Salafist armed group that aims to replace Assad's regime with an Islamic government. It was formed in 2011 with its first attack taking place in 2012. The group worked together with IS until internal fighting pit-

644 'Turkey-Backed Opposition to Form New Army in Northern Syria', *TRT World*, 30 May 2017, <https://www.trtworld.com/mea/turkey-backed-rebels-to-form-new-army-in-northern-syria-367931>.

645 Abboud, 'Who Are Syria's Opposition Alliances?'

646 'ISIS Fast Facts'.

647 J. Pagliery, 'Inside the \$2 Billion ISIS War Machine', *CNN Money*, 11 December 2015, <https://money.cnn.com/2015/12/06/news/isis-funding/index.html>.

648 J. Burke, 'Rise and Fall of Isis: Its Dream of a Caliphate Is Over, So What Now?', *The Guardian*, 21 November 2017, <https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqa-iraq-islamist>.

649 R. Pickrell, 'As Many as 30,000 ISIS Fighters May Still Be Crawling Across Iraq and Syria – as Many as at the Height of Their Power', 14 August 2018, *Business Insider*, <http://www.businessinsider.fr/us/as-many-as-30000-isis-fighters-still-in-iraq-and-syria-2018-8>.

ted them against each other at the beginning of 2014.⁶⁵⁰ It has been one of the more powerful and persevering opposition groups throughout the conflict, boasting an estimated 20,000 troops.⁶⁵¹

In February 2018, the group merged with Nour al-Din al-Zenki to form the Syrian Liberation Front (SLF) in the governorate of Idlib. This is thought to be an attempt by the two groups to counter Hay'at Tahrir al-Sham's influence in Idlib.⁶⁵²

d. Hay'at Tahrir al-Sham

Hay'at Tahrir al-Sham is a union of five different rebel Islamist organizations, which aims to overthrow the Assad regime and introduce Sharia law in Syria. It is based primarily in the northwestern region of Syria and emerged roughly at the end of 2016/beginning of 2017 when Jabhat Fath al Sham (previously the Al Nusrah Front) merged with four other Islamist groups in the summer of 2016.⁶⁵³ It is currently emerging as one of the strongest opposition groups to Assad's government. It has also been at war with IS in Idlib and Aleppo, announcing in March 2018 that it had taken 25 villages from IS and was in control of most of the area.⁶⁵⁴ The group has between 7,000 and 11,000 troops.⁶⁵⁵

e. Syrian Democratic Forces (SDF)

Dominated by the YPG, the SDF is a US-backed alliance of Arab, Turkmen, Armenian and Kurdish fighters. Founded in 2015 to fight IS and other rebel groups, its stated aim is the establishment of a democratic and federal Syria in the northern Rojava region. The Kurdish YPG and its allies pushed IS out, took over a large northern area during 2017 and now controls almost a quarter of Syria.⁶⁵⁶ In an interview with Russia Today in May 2018, President Assad stated that 'the only problem left in Syria is the SDF'. He continued by saying that there are two options to deal with the SDF: negotiations, which the government claims to have started, or retaking SDF-controlled areas by force. Assad sounded a warning that the US, which is backing the SDF, should learn from Iraq and remove its troops from Syr-

650 'Ahrar al-Sham', Mapping Militants Project, Stanford University, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/523> (last accessed 16 August 2018).

651 'German Prosecutors Charge Two Syrians for Ahrar al-Sham Membership', *DW*, 18 November 2016, <https://www.dw.com/en/german-prosecutors-charge-two-syrians-for-ahrar-al-sham-membership/a-36444080>.

652 'Ahrar Al-Sham and Nour Al-Din Al-Zenki Merge to Form New Armed Group in Northern Syria', *SouthFront*, 18 February 2018, <https://southfront.org/ahrar-al-sham-and-nour-al-din-al-zenki-merge-to-form-new-armed-group-in-northern-syria/> (last accessed 16 August 2018).

653 B. Brimelow 'A New Terrorist Group Is Popping Up in Syria and Capitalizing on ISIS' Defeat', *Business Insider*, 19 April 2018, <http://www.businessinsider.fr/us/syria-terrorist-group-hayat-tahrir-al-sham-2018-4>.

654 Ibid.

655 F. Brinley Bruton and A. Cheikh Omar, 'Syria's Civil War Has Been Raging for 7 Years. What's Behind it?', 21 February 2018, *NBC News*, <https://www.nbcnews.com/news/mideast/syria-s-civil-war-has-been-raging-7-years-what-n849851>.

656 A. Chugthai, 'Syria's War: Who Controls What?', *Al Jazeera*, 7 June 2018, <https://www.aljazeera.com/indepth/interactive/2015/05/syria-country-divided-150529144229467.html>.

ia.⁶⁵⁷ There is no confirmed information on the number of fighters within the SDF, but rough estimates put the number at 60,000–75,000 personnel.⁶⁵⁸

f. YPG-YPJ

The most important part of the SDF, the Kurdish People's Protection Units, are separated into two groups: the People's Protection Units – Yekîneyên Parastina Gel (YPG) – and the Women's Protection Units – Yekîneyên Parastina Jinê (YPJ). The YPG was created in July 2012 and the YPJ in April 2013. They prefer to be referred to as two separate entities and the YPJ joined the SDF separately from the YPG. Both groups aim to 'protect the Kurdish people and their cultural, political, and social existence'.⁶⁵⁹ The forces of the two groups are estimated to stand at around 20,000–30,000 fighters. They have generally depended on the Kurdistan Worker's Party (PKK) for their training and military planning.⁶⁶⁰

C. KEY DEVELOPMENTS IN 2018

1. The Decline of Islamic State

Islamic State territory has changed immensely since the peak of the group's power in 2014, when it controlled 34,000 square miles of land across Syria and Iraq. By 2016, 13,000 square miles had already been taken from the group.⁶⁶¹ In July 2017, the Iraqi Government retook Mosul from IS, which had been part of the latter's territory since 2014.⁶⁶² But the most important moment was the fall of Raqqa – the heart of the IS-proclaimed caliphate – in October 2017. Part of IS territory since 2014, the city was cleared of the group through heavy airstrikes by the US-led coalition and SDF troops.⁶⁶³ The airstrikes left the city in ruins.

Currently, almost 96 percent of IS-held territory has been retaken.⁶⁶⁴ Iraq's government announced that its war against IS was over in December 2017, while President Trump followed suit, declaring the group 'militarily defeated' in January 2018.⁶⁶⁵ At

657 'Syria's Assad Vows to Retake Areas Held by US-Backed Kurds', *Al Jazeera*, 31 May 2018, <https://www.aljazeera.com/news/2018/05/syria-assad-vows-retake-areas-held-backed-kurds-180531072938002.html>.

658 B. M. Rashid, *Military and Security Structures of the Autonomous Administration in Syria*, Special Report, Omran Center for Strategic Studies, 24 January 2018, p 7, <http://omranstudies.org/publications/reports/military-and-security-structures-of-the-autonomous-administration-in-syria.html> (last accessed 16 August 2018).

659 Ibid, p 15.

660 Ibid, p 4.

661 A. Bendaoudi, *After the 'Almost 100 Percent' Defeat of ISIS, What About Its Ideology?*, *Al Jazeera Centre for Studies* 8 May 2018, <http://studies.aljazeera.net/en/reports/2018/05/100-percent-defeat-isis-ideology-180508042421376.html> (last accessed 16 August 2018).

662 'Islamic State and the Crisis in Iraq and Syria in Maps', *BBC News*, 28 March 2018, <https://www.bbc.com/news/world-middle-east-27838034>.

663 'US-Backed Forces Clear Up Raqqa After ISIS's Crushing Defeat', *Business Insider*, 18 October 2017, <https://www.businessinsider.com/us-backed-forces-clear-up-raqqa-after-isis-crushing-defeat-2017-10>.

664 Bendaoudi, *After the 'Almost 100 Percent' Defeat of ISIS, What About Its Ideology?*

665 Ibid.

the start of 2018, IS was holding a small part of the Jazeera Desert and a few towns along the Euphrates River in Syria, a total of around 1,900 square miles.⁶⁶⁶

Nevertheless, the threat of IS has not been dissipated and claims that the group no longer poses a threat could be premature. Between 20,000 and 30,000 IS fighters may still exist across Syria and Iraq according to the U.S. Department of Defense and a United Nations panel of experts.⁶⁶⁷ It has been suggested that though IS has become less present on the battlefield, it is simply moving underground and switching to more insurgency-like practices rather than open fighting and governing, which it exercised during most of the Syrian conflict. The strength and attractiveness of IS ideology appears to have allowed the group to survive and remain great in number even after decisive losses on the battlefield. This means that ISIS could remain a problem for many years to come, moving underground when it becomes weak and coming back when its strength is replenished.⁶⁶⁸

2. Assad's Territorial Gains

Currently, Assad appears to be emerging as the winner of the Syrian conflict. Of course, the conflict is not over and more battles are probably still to come; nevertheless, the Syrian Government, with the help of Iran-backed militias and Russian aerial bombings, has reclaimed most of Syrian territory from the rebels. Between February and May 2018, the Syrian Government cleared the cities of Homs and Damascus. Meanwhile, between February and April, it retook Eastern Ghouta, ending its five-year siege, the longest in modern history. The campaign was based on continuous bombardment, which reportedly killed more than 170,000 of the 400,000 civilians that resided in the city within eight weeks.⁶⁶⁹ As this was the last rebel stronghold near the capital Damascus, it is an important achievement for Assad. Finally, in July 2018, Assad managed to retake control of the southern Syrian district of Deraa, which has been under rebel control since the beginning of the war. This is an important strategic and symbolic win for Assad as Deraa is considered to be the 'birthplace' of the 2011 revolt against him. Strategically, reclaiming all these areas has meant that the government has regained its border with Israel and Jordan, which will facilitate international trade.⁶⁷⁰

Assad's government's territorial gains have been huge and the Syrian as well as Russian and US governments appear to be slowly shifting towards discussions

666 Ibid.

667 Pickrell, 'As Many as 30,000 ISIS Fighters May Still Be Crawling Across Iraq and Syria'.

668 Bendaoudi, *After the 'Almost 100 Percent' Defeat of ISIS, What About Its Ideology?*

669 Human Rights Council (HRC), *The Siege and Recapture of Eastern Ghouta*, Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, 18 June–6 July 2018, UN doc A/HRC/38/CRP.3; M. Patience, 'Syria War: Fall of Eastern Ghouta Pivotal Moment for Assad', *BBC News*, 13 April 2018, <https://www.bbc.com/news/world-middle-east-43631838>.

670 S. Al-Khalidi, 'Jordan Says Not Yet Ready to Open Border Crossing with Syria', *Reuters*, 2 August 2018, <https://www.reuters.com/article/us-mideast-crisis-syria-jordan-border/jordan-says-not-yet-ready-to-open-border-crossing-with-syria-idUSKBN1KN2MJ>; 'What Is Happening in Syria? Assad Forces Retake Rebel Stronghold', *The Week*, 13 July 2018, <http://www.theweek.co.uk/syrian-civil-war/91922/what-is-happening-in-syria-assad-forces-retake-rebel-stronghold>.

on how to rebuild Syria and when and how to start sending Syrian refugees back home.⁶⁷¹ At this year's UN General Assembly, Syria's Deputy Prime Minister, Walid al-Moallem, claimed that Syria's fight with terrorism is almost over and the country is getting ready to welcome back more than 5 million refugees who fled during the seven-year war.⁶⁷²

The remaining pockets of rebel control are the Idlib province in the northwest, parts of the northeast and the southwest, which looks the most vulnerable as there are no foreign forces stationed there.⁶⁷³ Still, Idlib, a stronghold of Hay'at Tahrir al-Sham, is the key area for Assad in order to end the war, but reclaiming it threatens to be a Ghouta-style disaster for the roughly 2 million civilians that have fled there in search of a safer place.⁶⁷⁴ Luckily, a demilitarization deal was struck in September over Idlib's control in order to avoid the humanitarian catastrophe that would have ensued if there had been a Syrian military assault. The brokers of the agreement – Russia and Turkey, who are on opposite sides in the conflict – stated that all fighters should leave a designated demilitarization zone and pull out their equipment by mid-October.⁶⁷⁵ A retreat by rebel forces from the zone has already started.⁶⁷⁶ It remains to be seen if the agreement will hold.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

The Syrian conflict has been marred by human rights abuses and crimes committed by many of the parties involved.

The Syrian Government has been accused of using chemical weapons on several counts. The first accusation came in 2013 when Assad's government used a sarin nerve agent in Eastern Ghouta, near Damascus, killing 1,400 people. The US president pushed for a strike but could not convince Congress. Nevertheless, the UN Security Council decided on a diplomatic solution, ordering Assad to destroy Syria's chemical weapons and sign the 1993 Chemical Weapons Convention (CWC).⁶⁷⁷ Syria agreed to sign the CWC, which prohibits countries from using, stockpil-

671 Mohammed and Stewart, 'Exclusive: Despite Tensions, Russia Seeks U.S. Help to Rebuild Syria'.

672 'Syria FM: Our Battle Against Terrorism "Almost Over"', *Al Jazeera*, 29 September 2018, <https://www.aljazeera.com/news/2018/09/syria-fm-battle-terrorism-180929150446410.html>.

673 International Crisis Group, *Keeping the Calm in Southern Syria*, Middle East & North Africa Report no 187, 21 June 2018, <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/187-keeping-calm-southern-syria> (last accessed 21 March 2019).

674 S. Tisdall, 'Putin Holds Winning Cards as Syrian War Nears Idlib Showdown', *The Guardian*, 21 July 2018, <https://www.theguardian.com/world/2018/jul/21/syria-idlib-putin-assad-winners-iran>.

675 A. Higgins and R. Gladstone, 'Russia and Turkey Announce Demilitarized Zone in Last Rebel-Held Part of Syria', *The New York Times*, 17 September 2018, <https://www.nytimes.com/2018/09/17/world/middleeast/idlib-syria-russia-turkey.html>.

676 'Syria Rebels Begin Moving Heavy Arms from Idlib Buffer Zone', *Al Jazeera*, 07 October 2018, <https://www.aljazeera.com/news/2018/10/idlib-rebels-shifting-heavy-arms-planned-buffer-zone-18100711324444.html>.

677 A. Erickson, '6 Basic Questions About the War in Syria', *The Washington Post*, 15 April 2018, https://www.washingtonpost.com/news/worldviews/wp/2018/04/12/syria-explained/?noredirect=on&utm_term=.70004f866cbe.

ing or developing chemical weapons. Around 1,300 tonnes of chemical weapons were destroyed; nevertheless, not all the stockpile was eliminated, leaving Syria with the possibility of replenishing its stores. Since then, chemical attacks have not stopped, the most notable of which took place in April 2017, leading to US airstrikes in retaliation and, in April 2018, leading to strikes by the US, France and Britain. IS has also used chemical weapons on at least two counts in 2015 and 2016.⁶⁷⁸ The Commission of Inquiry on the Syrian Arab Republic has counted, as of January 2018, at least '34 documented incidents of the use of chemical weapons by various parties to the conflict'.⁶⁷⁹

In July 2018, the Syrian Government published documents with the names of prisoners that have died while in government custody. No comment on how the prisoners died and how many there are overall has been made. The Syrian Network for Human Rights has confirmed 312 recent cases but claims that the government has detained at least 800,000 people, so more names will follow. Most of the documents show that these people died years ago, at the beginning of the conflict. Human rights groups say that since the conflict began, many people have disappeared in the government's jails, where torture and mistreatment are rife.⁶⁸⁰

Furthermore, a recent report on human rights violations during the siege and recapture of Eastern Ghouta has been produced by the Commission of Inquiry on the Syrian Arab Republic.⁶⁸¹ According to the report, when recapturing the city, which was subject to the longest siege (five years) in modern history, government forces carried out war crimes, such as launching indiscriminate attacks and attacking protected objects. Government missiles have fallen on homes, markets and hospitals. It is estimated that between 18 February and 11 March 2018, attacks by pro-government forces killed around 1,100 civilians and injured 4,000. For example, on 19 March, pro-government forces launched an airstrike, hitting a school and killing at least 17 children, 4 women and 1 man. Access to food and medicine for the citizens under siege has also been denied, which the Commission has called a 'crime against humanity of inhumane acts causing serious mental and physical suffering'. Hospitals have been targeted so often that it has been suggested that the forces intend to completely erode the health services in opposition areas. Collective punishment was carried out by the government by deliberately starving the besieged civilians and denying them humanitarian aid. Between July 2014 and February 2017, citizens mostly survived because of the existence of a manmade tunnel, which enabled the smuggling of food and medicine. The report concludes that the government's attacks aimed to instil terror in civilians as well as the opposition.⁶⁸²

678 P. Wintour, 'Why Does Syria Still Have Chemical Weapons?', *The Guardian*, 18 April 2018, <https://www.theguardian.com/world/2018/apr/18/why-does-syria-still-have-chemical-weapons>.

679 HRC, Independent International Commission of Inquiry on the Syrian Arab Republic, Press Statement on the Alleged Use of Chemical Weapons in Eastern Ghouta, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22939&LangID=E> (last accessed 17 August 2018).

680 B. Hubbard and K. Shoumali, 'Hundreds Died in Syrian Custody, Government Acknowledges', *The New York Times*, 26 July 2018, <https://www.nytimes.com/2018/07/26/world/middleeast/syria-detainees-dead.html?rref=collection%2Ftimestopic%2FSyria>.

681 HRC, The Siege and Recapture of Eastern Ghouta.

682 Ibid.

The report also discusses the indiscriminate attacks carried out by armed groups, especially between February and April 2018. As the government regained more and more territory, these acts only increased in number and severity. On 20 February, opposition attacks killed 13 civilians; on 20 March, a rocket landed in a food market, killing 44 civilians and injuring hundreds. Arbitrary arrests were also prevalent, often leading to 'cruel treatment and torture, and outrages upon personal dignity'. The report concludes that just like the government, opposition forces also aimed to instil fear in civilians.

The US-led coalition has also been accused by human rights groups of having committed war crimes during the conflict. During the campaign to retake Raqqa in 2017, the coalition used more than 30,000 artillery rounds and several thousand airstrikes between June and October 2017. The destruction left the city in ruins; nevertheless, the coalition claimed to have only killed 23 civilians, which Amnesty International, for example, does not consider 'accurate, credible, [or] serious'.⁶⁸³ After conducting an investigation on the ground, the organization argues that the strikes killed hundreds and injured thousands and were disproportionate and indiscriminate. While British and French forces were involved, most (around 90 per cent) of the strikes came from US forces.⁶⁸⁴

1. The International, Impartial and Independent Mechanism of Syria

In December 2016, the UN General Assembly adopted a resolution establishing an International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011 (the Mechanism). According to the resolution, the purpose of the Mechanism is 'to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses' in order to prepare files and facilitate trials in courts or tribunals that have or may in the future have jurisdiction over these crimes.⁶⁸⁵

In its second report to the General Assembly, the Mechanism reported having already collected around 4 terabytes of evidence consisting of almost 900,000 records.⁶⁸⁶ Material that could assist ongoing national criminal justice processes is prioritized. The Mechanism is also collecting information and evidence to try to 'map crime patterns, examine the contextual elements of core international crimes and understand the links between crimes and individuals, ranging from

683 Amnesty International, 'Syria: US-Led Coalition "Deeply in Denial" About Civilian Casualties in Raqqa', 17 July 2018, <https://www.amnesty.org/en/latest/news/2018/07/syria-us-led-coalition-deeply-in-denial-about-civilian-casualties-in-raqqa/> (last accessed 17 August 2018).

684 'Did US-Led Coalition Commit War Crimes in Syria's Raqqa?', *Al Jazeera*, 5 June 2018, <https://www.aljazeera.com/programmes/insidestory/2018/06/led-coalition-commit-war-crimes-syria-raqqa-180605175041277.html>.

685 International, Impartial and Independent Mechanism, 'Mandate', <https://iiim.un.org/mandate/> (last accessed 26 November 2018).

686 Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011, UN doc A/73/295, 3 August 2018, pp 4, 1-16.

direct physical perpetrators to perpetrators wielding power and authority over the events'.⁶⁸⁷ Some of its other work has focused on developing strategies to address sexual and gender-based violence and gender issues more broadly.⁶⁸⁸ The Mechanism has been engaging extensively with civil society and has been receiving requests for assistance from national criminal justice actors.⁶⁸⁹

7. THAILAND'S DEEP SOUTH: A CONTINUOUS NON-INTERNATIONAL ARMED CONFLICT

Laura Baron-Mendoza

Classification of the Conflict

Thailand and its armed forces continued to be involved in a non-international armed conflict (NIAC) with, at least, the Patani Malay National Revolutionary Front (BRN) and the coalition of armed groups, the Patani Consultative Council (Mara Patani).

A. HISTORY OF THE CONFLICT

The most recent waves of intense violence in Southern Thailand have their starting point in 2004; however, the origin of the conflict can be traced back to 1909 and the Anglo-Siamese Treaty.⁶⁹⁰ With its signature, the Malay Sultanate of Pattani, historically governed by Muslim rulers who paid tribute to Siam, was placed under the direct rule of Bangkok.⁶⁹¹

This subjugation was reflected in forcible assimilation policies⁶⁹² in the southern provinces. It increased when a military-led nationalistic regime came to power in the late 1930s. As a result, public resentment grew, the government removed local laws and discriminated against the use of the Pattani Malay language,⁶⁹³ and

687 Ibid, p 4.

688 Ibid, p 7.

689 Ibid, p 6.

690 This determines the current Thailand-Malaysia border. See I. Klein, 'Britain, Siam and the Malay Peninsula, 1906-1909', 12 *The Historical Journal* 1 (1969).

691 'The region has been claimed as a vassal state by Thai kingdoms since the 15th century', D. Wyatt, *Thailand: A Short History*, 2nd edn, Yale University Press, 2003, p 220; T. Aphornsuwan, 'History and Politics of the Muslims in Thailand', December 2003, p 14, <https://seap.einaudi.cornell.edu/sites/seap/files/MuslimThailand.pdf> (last accessed 11 February 2019).

692 J. Chandran, 'The Provincial Administration of Siam, 1892-1915: The Ministry of the Interior Under Prince Damrong Rajanubhab. By Tej Bunnag. East Asian Historical Monographs. Kuala Lumpur: Oxford University Press, 1977. Pp. xii, 322', 11 *Journal of Southeast Asian Studies* 2 (1980); M. Morch, 'The Slow Burning Insurgency in Thailand's Deep South', *The Diplomat*, 6 February 2018, <https://thediplomat.com/2018/02/the-slow-burning-insurgency-in-thailands-deep-south/>.

693 'There is a long-standing government policy to allow only Thai in all communication with government officials. Since Pattani Malay is distinctively different from Thai, this creates a significant barrier for interaction with the state and its representatives where Thai is the only accepted language', W. Smalley, *Linguistic Diversity and National Unity: Language Ecology in Thailand*. University of Chicago Press, 1994, pp 220.

armed campaigns – separatist movements – did not take long to appear in the mid-1950s with ongoing tensions over the following 60 years.⁶⁹⁴ By the same token, the current military regime’s denial of Muslim Malay identity, conservative linguistic policies⁶⁹⁵ and its condemnation of the population’s resistance to assimilation should be acknowledged.⁶⁹⁶

The history of the south of Thailand has thus been marked by attempts at dialogue, coups d’état and sporadic incidents that suggest that the NIAC is not about to end, despite its relative diminution. In fact, 2018 revealed that the active armed non-state actors (ANSAs) have the military capacity to destabilize the region and coordinate strikes to push towards their goals.

1. Understanding the Area

The Deep South of Thailand is the battleground of the interplay between the Thai forces and a variety of ANSAs. It borders Malaysia and encompasses three Thai southern provinces (Pattani, Yala and Narathiwat), as well as parts of the neighbouring Songkhla Province.⁶⁹⁷

An important cultural, religious, ethnic and linguistic frontier, it is also among the poorer regions of Thailand. What is more, these provinces have historically been unstable and predisposed to periodic insurgencies that have escalated ‘at times when central control over the area has increased’.⁶⁹⁸ The region’s proclivity for clashes is explained by its ethnic composition, the lack of will to be part of Thailand and the central government’s non-recognition of Malay identity. Malay Muslims constitute a majority in the area, representing 80 percent of its population, though they are a small minority in a largely Buddhist country.⁶⁹⁹

Policies for assimilation through language, for instance, as well as the persistent economic cleavages within the area,⁷⁰⁰ are some reasons, among others, why the NIAC is said to be ethnically motivated.⁷⁰¹ It is the ‘desire of the Pattani-Malay people to maintain their unique cultural and linguistic identities and live autonomously’.⁷⁰²

694 C. Quinley, ‘The Artists Promoting Peace in Thailand’s Conflict-Plagued South’, *Al Jazeera*, 8 January 2019, <https://www.aljazeera.com/news/2019/01/artists-promoting-peace-thailand-conflict-plagued-south-190108061040496.html>.

695 The only language in which people can communicate with government officials is Thai.

696 Z. Abuza, ‘No End in Sight for Thailand’s Deadly Southern Insurgency’, *The Diplomat*, 18 July 2017, <https://thediplomat.com/2017/07/no-end-in-sight-for-thailands-deadly-southern-insurgency>.

697 J. Küng, ‘Thailand’s Muslim Rebellion Has Army Living in “Constant Fear”’, *DW*, 6 November 2018, <https://www.dw.com/en/thailands-muslim-rebellion-has-army-living-in-constant-fear/a-46177073>.

698 A. Engvall and M. Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 13 *Asian Economic Papers* 3 (2014) 173.

699 A. Horiba, ‘Overview and Context of Thailand’s Deep South Conflict’, Asia Peacebuilding Initiatives, 23 January 2014, <http://peacebuilding.asia/1226/> (last accessed 19 November 2018).

700 The Sino-Thai merchants that dominate the urban economy and the Thai Buddhists ‘enjoy higher standards of living than Malay Muslim villagers’, Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 173.

701 M. Jerryson, ‘Appropriating a Space for Violence: State Buddhism in Southern Thailand’, 40 *Journal of Southeast Asian Studies* 1 (2009).

702 Horiba, ‘Overview and Context of Thailand’s Deep South Conflict’.

Thus, in order to comprehend the complex setting of the Thai Deep South, it is vital to outline the dynamics of these longstanding tensions, while pinpointing the multiple periods of increased violence, the active parties to the conflict, the latest developments during 2018 and the alleged violations of international rules these gave rise to.

2. The Start of a Long-Simmering Insurgency and the Increase in Violence Since 2004

Armed separatist movements in Thailand’s Deep South surfaced in the 1960s and went under in the late 1980s. The conflict resurfaced and escalated again in mid-2001, but was not officially acknowledged until 2004 when insurgents raided an army depot in Narathiwat on 4 January.⁷⁰³ This was followed by more violence: on 28 April 2004, when a dozen checkpoints throughout the region were subject to concurrent attacks, in addition to a symbolic storming of the Kru Se Mosque⁷⁰⁴ and the Tak Bai massacre in October of the same year, ‘where 78 unarmed Malay Muslims demonstrators died from suffocation after they were stacked one on top another in the back of military transport tracks’.⁷⁰⁵ Nonetheless, most casualties resulted from daily acts of violence using small arms, explosives and arson attacks, which also contributed to the steady escalation of the conflict,⁷⁰⁶ reaching its peaks in 2007 and 2010.⁷⁰⁷

The situation worsened around 2012 when ANSAs began deliberately targeting civilians from differing minorities as well. They intentionally planned attacks that caused distrust and hate towards the majority Muslim population and retaliation by Thai forces.⁷⁰⁸

Later, in 2014 the Thai army staged its thirteenth coup, claiming to resolve the decade-long political conflict.⁷⁰⁹ Still, almost five years after the coup, Thailand’s junta continues to delay elections, which are currently scheduled for March 2019.⁷¹⁰

703 D. Pathan, ‘In Goodwill Move, BRN Rebels Halt Violence in Deep South District’, *BenarNews*, 4 June 2018, <https://www.benarnews.org/english/commentaries/far-south-view/violence-halt-06042018142131.html>.

704 Human Rights Watch (HRW), ‘Thailand: Investigate Krue Se Mosque Raid’, 28 April 2006, <https://www.hrw.org/news/2006/04/28/thailand-investigate-krue-se-mosque-raid> (last accessed 26 December 2018).

705 HRW, ‘Thailand: No Justice 10 Years After Tak Bai Killings’, 25 October 2014, <https://www.hrw.org/news/2014/10/25/thailand-no-justice-10-years-after-tak-bai-killings> (last accessed 28 December 2019); Pathan, ‘In Goodwill Move, BRN Rebels Halt Violence in Deep South District’.

706 Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 179.

707 Child Soldier International and Cross Cultural Foundation, *Southern Thailand: Ongoing Recruitment and Use of Children by Armed Groups*, September 2014, p 7, <https://www.child-soldiers.org/Handlers/Download.ashx?DMF=c425bed3-5864-4e00-9963-d11427fb1ba5> (last accessed 11 February 2019).

708 Quinley, ‘The Artists Promoting Peace in Thailand’s Conflict-Plagued South’.

709 ‘There have been thirteen successful military coups and seven coup attempts in Thailand between 1932 and 2016, with twenty constitutions and charters’, J. Sombatpoonsiri, ‘The 2014 Military Coup in Thailand: Implications for Political Conflicts and Resolution’, 5 *Asian Journal of Peacebuilding* 1 (2017) 131.

710 J. Johnson, ‘Thai Insurgents Revive Ahead of New Polls’, *Asia Times*, 2 January 2019, <http://www.atimes.com/article/thai-insurgents-revive-ahead-of-new-polls/>.

In 2014, the level of violence remained consistently high, even with large-scale counter-insurgency measures taken by government forces over the year. Notwithstanding the government's crackdowns, ANSAs have proved to be innovative, adaptive, unpredictable and heavily reliant on the use of improvised explosive devices such as car bombs, which have become larger and more sophisticated since 2012. Attacks have generally focused on security force patrols,⁷¹¹ thus mostly featuring targeted killing and attacks on police and army bases, but also including civilian targets. In 2013 and 2014, the average toll claimed by conflict was 50 lives per month, with an even higher number of people injured.⁷¹²

Even though 2017 saw a record low of 235 people killed, 2018 led to a finale of numerous bouts of violence. Armed violence has continued over the years and persists to this day, with civilians often caught in the middle.⁷¹³ Since 2004, the conflict has resulted in more than 6,000 deaths, with some 20,000 documented attacks.⁷¹⁴

B. PARTIES TO THE CONFLICT

Economic and political concerns, linked with harsh policies of suppression and assimilation, have helped fuel local resistance, the demands of which have been 'mostly limited to some degree of autonomy and improved respect for minority rights'.⁷¹⁵ This resistance was non-violent until the 1960s.⁷¹⁶

Armed violence *sensu stricto* surfaced with the appearance of three main ANSAs: the Patani National Liberation Front (BNPP), the BRN and the Patani United Liberation Organization (PULO). Along with other smaller actors, these three carried out low-level armed activities until the 1980s, when they started to dwindle. Nevertheless, factions and therefore new actors emerged and reorganized underground, leading to the aforementioned intensification of military operations on both sides from 2004.⁷¹⁷

The structure and composition of currently active ANSAs in Southern Thailand are difficult to determine.⁷¹⁸ On the whole, none claim responsibility for attacks carried out during the last decade 'and the rationale for their struggle has been articulated mainly through word of mouth, banners, leaflets and graffiti in public

711 Child Soldier International and Cross Cultural Foundation, *Southern Thailand*, p 6.

712 Ibid.

713 Quinley, 'The Artists Promoting Peace in Thailand's Conflict-Plagued South'.

714 See the Cumulative Incidents from January 2004 to December 2008 reported by Deep South Watch, <https://deepsouthwatch.org/en/node/11892> (last accessed 15 March 2019)

715 Child Soldier International and Cross Cultural Foundation, *Southern Thailand*, p. 5.

716 Ibid.

717 Ibid.

718 The Thai Government's official reports and the fieldwork of different organizations have provided key guidance.

places'.⁷¹⁹ Moreover, the identified strategies are based on clandestine methods and systems of secrecy in which not all members are aware of the name of the group they belong to or the names of their leaders, and their knowledge of counterparts is too restricted for direct channels of communication.⁷²⁰

Yet, it is generally stressed that the BRN is the dominant ANSA currently active, while other minor actors have decided to take part in peace talks since 2015. Therefore, the struggle is largely between the Thai Government and the highly fractured ANSAs, embodied by two main groups: the BRN and the Mara Patani, an umbrella entity.

1. The Royal Thai Armed Forces

Since the thirteenth military coup on 22 May 2014,⁷²¹ Thailand has remained under the rule of the military junta, the National Council for Peace and Order (NCPO). This is headed by Prayut Chan-o-cha, who also serves as the Prime Minister of Thailand.

Consequently, the state armed forces have a pivotal role not only in public security, but also in politics. By the beginning of 2018, 61,000 troops were present in Thailand's Deep South and it was promised that 3,000 would be withdrawn from February 2018.⁷²² Alongside these estimations, it is vital to highlight the ethnic composition of the military forces. According to a 1964 study, 94 percent of soldiers in the army were Buddhist, while 6 percent were Muslim,⁷²³ and there is no evidence of any growth since then in the number of Muslim soldiers in the military.

Moreover, the Royal Thai Armed Forces have received extra military support from an array of irregular forces engaged in parallel military activities. These forces, along with village militias, were mainly formed by volunteers with better local knowledge – of the terrain, language and culture – who were the protagonists in policing and counter-insurgency, particularly against communist and separatist guerrillas during the 1970s and 1980s.⁷²⁴ However, during the early 2000s these actors took on new roles including 'the suppression of separatist violence in the South',⁷²⁵ and since the eruption of violence in 2004, the army enhanced the strength of the Thahan Phran (Rangers). Still, as in the case of the regular forces,

719 Child Soldiers International and the Cross Cultural Foundation carried out confidential interviews with militants in Narathiwat, from October to December 2013, see Child Soldier International and Cross Cultural Foundation, *Southern Thailand*, p.6.

720 Ibid.

721 'As It Happened: Thailand Coup', *BBC News*, 22 May 2014, <https://www.bbc.com/news/world-asia-27519940>; 'Thailand Army's Pivotal Role in Politics', *BBC News*, 22 May 2014, <https://www.bbc.com/news/world-asia-27483816>; 'Why is Thailand Under Military Rule?', *BBC News*, 22 May 2014, <https://www.bbc.com/news/world-asia-25149484>.

722 Morch, 'The Slow Burning Insurgency in Thailand's Deep South'.

723 R. M. White, *Anthropometric Survey of the Royal Thai Armed Forces*, U.S. Army Natick Laboratories, June 1964, p 18, <https://apps.dtic.mil/dtic/tr/fulltext/u2/450836.pdf> (last accessed 19 December 2018).

724 International Crisis Group, *Southern Thailand: The Problem with Paramilitaries*, Asia Report no 140, 23 October 2007, <https://d2071andvip0wj.cloudfront.net/140-southern-thailand-the-problem-with-paramilitaries.pdf> (last accessed 29 December 2019).

725 Ibid, p 2.

no more than 30 percent of recruits are local Malay Muslims; the force is almost exclusively Buddhist.⁷²⁶

The second most well-known irregular force is the Or Sor (Volunteer Defence Corps), established by the Volunteer Corps Act 1954 and under the command of the Ministry of Interior (MOI). Yet, the largest force since 2004 is the Chor Ror Bor (Village Defence Volunteers), which has been the main security force in most villages.⁷²⁷ As a result, the Thai military has been supported by local villagers across the region, working in isolated teams.⁷²⁸

In late 2017, the NCPO began to re-organize the Tambon Defense Force in the border region.⁷²⁹ In contrast to the abovementioned bodies, a *tambon* is an administrative subdivision below the district and provincial levels. It is a local government unit that comprises a group of villages, and is commanded by a *kamnan* who falls under the MOI chain of command. In other words, the *kamnan* and his/her team – all receiving salaries from the MOI – ‘will connect all 262 tambons in the Deep South under the army’s security grid’.⁷³⁰

2. Armed Non-State Actors

The presence of ANSAs continues, particularly in rural villages, despite their weakening over the last few years.⁷³¹

a. The Patani Malay National Revolutionary Front (BRN)

The BRN is an ANSA operating in Southern Thailand, being based in northern Malaysia. It was originally established on 13 March 1963 by Haji Abdul Karim Hassan⁷³² as a splinter group of the BNPP. Although the latter is alleged to be founded by Tengku Abdul Jalal in 1959,⁷³³ it traces its origin to a local revolt which took place in 1947 in Narathiwat Province.

The BRN was active in the 1970s and early 1980s. However, in the 1980s it split into three political factions:

⁷²⁶ Ibid, pp 4–12.

⁷²⁷ M. Oishi (ed), *Contemporary Conflicts in Southeast Asia: Towards a New ASEAN Way of Conflict Management*, Springer, 2016, pp 75–76.

⁷²⁸ D. Pathan, Thai Military Re-Organizes Tambon Defense Initiative in Deep South, *BenarNews*, 22 September 2017, <https://www.benarnews.org/english/commentaries/far-south-view/tambon-defense-09222017161932.html>.

⁷²⁹ Ibid.

⁷³⁰ Ibid.

⁷³¹ Morch, ‘The Slow Burning Insurgency in Thailand’s Deep South’.

⁷³² Z. Abuza, ‘A Breakdown of Southern Thailand’s Insurgent Groups’ 4 *Terrorism Monitor* 17 (2006), <https://jamestown.org/program/a-breakdown-of-southern-thailands-insurgent-groups/> (last accessed 29 December 2018).

⁷³³ HRW, *No One Is Safe: Insurgent Attacks on Civilians in Thailand’s Southern Border Provinces*, August 2007, p 15, <https://www.hrw.org/sites/default/files/reports/thailand0807.pdf> (last accessed 30 December 2018).

- **BRN-Congress (BRN-K)**
- **BRN-Coordinate (BRN-C)**
- **BRN-Ulema**

At present, the only active faction in the Deep South is the BRN-C, whose ideology is Salafism.⁷³⁴ It claims that the annexation with Siam was the end of both national sovereignty and Malay identity.⁷³⁵ Thus, its primary aim was to drive out the Thai state from what was the Sultanate of Pattani.⁷³⁶ Some analysts assert that the BRN-C’s objective of seeking an independent Pattani state has evolved, which has brought autonomy into the discussion.⁷³⁷

Since its emergence, the BRN-C has altered its strategies following the mistakes of its precursors. Consequently, its main focus has been ‘a systematic mass indoctrination of the local southern population to build a solid political base before eventually launching its violent struggle’.⁷³⁸ Thus, BRN-C’s political strategy is primarily centred on building mass support to gain control over the population and destroy the state’s legitimacy⁷³⁹ while provoking violent reactions from the security forces.⁷⁴⁰ Allegedly, it has control over part of a secessionist youth movement, Pemuda, which is believed to be liable for day-to-day sabotage, shootings and bombing attacks.⁷⁴¹

With no social media, except for self-promoted videos,⁷⁴² a key principle of BRN-C is to maintain total secrecy and usually never claim responsibility for its actions. As proved by former Pattani ANSAs, claiming responsibility is lethal as it enabled security agencies to target them successfully.⁷⁴³

On 4 January 2004, the BRN-C attacked the Chulaporn military army camp in Narathiwat. This was its largest attack in three decades and led to the escalation of armed violence in the region.⁷⁴⁴

⁷³⁴ ‘Salafism ... represents those Sunni Muslims who claim to be “like the salaf” and, as such, say they emulate the “pious predecessors” as closely and in as many spheres of life as possible’, J. Wagemakers, ‘Salafism’, *Oxford Research Encyclopaedias*, August 2016, <http://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-255> (last accessed 11 February 2019); T. M. Möller, ‘Insurgency in Southern Thailand: A Quest for Identity’, 29 *Sicherheit und Frieden/Security and Peace* 1 (2011).

⁷³⁵ Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 179.

⁷³⁶ Ibid.

⁷³⁷ S. Kam, ‘Thailand’, in R. Gunaratna and S. Kam (eds), *Handbook of Terrorism in The Asia-Pacific*, Imperial College Press, 2016, p 98.

⁷³⁸ Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 179.

⁷³⁹ Ibid, 181–182.

⁷⁴⁰ Ibid, 179.

⁷⁴¹ N. Jungamm, ‘The Secessionist Movement in the Southernmost Provinces of Thailand: A View From the New Haven School of International Law’, 20 *Asia Pacific Law Review* 2 (2012) 242–243.

⁷⁴² See, e.g., the Information Departement-BRN channel on YouTube, <https://www.youtube.com/channel/UCOFbP7gZsKTKHzFW7U2mKA> (last accessed 11 February 2019).

⁷⁴³ Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, p 181.

⁷⁴⁴ Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, 2009, p 7. <https://www.amnesty.org/download/Documents/48000/asa390012009eng.pdf> (last accessed 11 February 2019).

In terms of organizational structure, the BRN is far from having a guerrilla style. Some analysts maintain that it is decentralized, composed of autonomous cells which operate independently.⁷⁴⁵ Meanwhile, Thai military intelligence analysts argue that it has a well-organized structure with a leadership council known as the Dewan Pimpinan Parti (DPP) and two main chains of command – political and military – serving as a nexus between leaders and the general population at the local level.⁷⁴⁶ According to this, the military chain of command is divided into three military areas based in the three southern provinces, each led by a military commander.⁷⁴⁷ The DPP is responsible for foreign relations as its seven councils are in charge of the military, the economy, youth, foreign affairs, propaganda, religious and political-administrative functions.⁷⁴⁸

At the February 2013 peace talks, the BRN representative referred to a ‘shura council’ as a body that makes collective decisions on the movement’s direction.⁷⁴⁹ In spite of the existence of the DPP, according to the movement’s Indonesia-based Information Department, some members act on their own and without the DPP’s consent.⁷⁵⁰ In fact, it has been asserted that members are organized in squads operating as small-group units and as independent cells for small operations.⁷⁵¹ Undoubtedly, ‘this mode of operation provides a challenge to state security agencies in separating friend from foe while employing traditional counterinsurgency tactics’.⁷⁵²

Given the secretive nature of the ANSA and its strategies, it is difficult to estimate the number of individuals involved in the BRN.⁷⁵³ Until 2011, the military wing was estimated to have around 3,000 fighters.⁷⁵⁴ Yet, Thai military officials claim the number has recently risen towards 6,000.⁷⁵⁵ The accuracy of the estimates is open to question.

745 D. McCargo, *Tearing Apart the Land: Islam and Legitimacy in Southern Thailand*, Cornell University Press, 2008, pp 174–175; J. Chinyong Liow and D. Pathan, *Confronting Ghosts: Thailand’s Shapeless Southern Insurgency*, Lowy Institute for International Policy, 2010, pp 8–10, https://www.files.ethz.ch/isn/115176/2010_04.pdf (last accessed 3 January 2019).

746 See S. Helbardt, *Deciphering Southern Thailand’s Violence: Organization and Insurgent Practices of BRN Coordinate*, ISEAS – Yusof Ishak Institute, 2015, Ch 2; M. Askew and S. Helbardt, ‘Becoming Patani Warriors: Individuals and the Insurgent Collective in Southern Thailand’, 35 *Studies in Conflict & Terrorism* 11 (2012) 784–785.

747 Helbardt, *Deciphering Southern Thailand’s Violence*, p 38.

748 Ibid, pp 38–40.

749 Child Soldier International and Cross Cultural Foundation, *Southern Thailand*, p 7.

750 D. Pathan, ‘Where Next for Peace Talks in Thailand’s Deep South?’, *BenarNews*, 8 January 2018, <https://www.benarnews.org/english/commentaries/far-south-view/more-talks-01082018131535.html>.

751 Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, p 174.

752 Ibid, 179.

753 ‘Army Chief Says Thailand Facing 3,000 Militants’, *AsiaOne*, 2 April 2012, <http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120402-337305.html>.

754 Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 174.

755 ‘Ex-Headmaster Becomes Top BRN Rebel Leader in Deep South: Thai Officials’, *BenarNews*, 20 March 2017, <https://www.benarnews.org/english/news/thai/brn-leader-03202017163737.html>.

Following the death of Masae Useng⁷⁵⁶ in May 2016 and death of Sapae-ing Basoe in January 2017,⁷⁵⁷ the BRN endured its first full change of leadership since its inception. Abdullah Wan Mat Noor (Doonloh Wae-Mano), former military commander, was designated the new Chairman on 17 January.⁷⁵⁸

b. The Patani Consultative Council (Mara Patani)⁷⁵⁹

Mara Patani, created in 2014, is an umbrella actor encompassing, as a sole unified voice, six political liberation organizations in the Deep South: the the BRN Action Group, the Islamic Liberation Front of Patani (BIPP), the three factions of the PULO (PULO-P4, PULO-DSPP and PULO-MKP) and the Pattani Islamic Mujahideen Movement (GMIP).⁷⁶⁰

Its aim is to achieve effective dialogue with the Thai Government.⁷⁶¹ Even though it was an initiative of pro-dialogue BRN members as a proactive step towards the negotiation table, today it is unclear how much support this group has from the mainstream BRN or its military wing.⁷⁶²

- **The BIPP:** Known as the former BNPP, it changed its name to BIPP in 1986, accentuating its own commitment to Islam. Its main channel of recruitment was religious teachers, followed by basic military training in local areas or overseas.⁷⁶³ Its armed strategies started to shift towards political efforts, with it ceasing its operations in 1990 and re-emerging in 2002.⁷⁶⁴
- **PULO-P4, PULO-DSPP and PULO-MKP:** These are alleged factions of the PULO. This was created in 1968 and distinguishes itself from other organizations by its attempt to create an independent Muslim state through armed struggle based on religion, nationalism, homeland and humanitarianism.⁷⁶⁵ The 1970s and 1980s saw its extended separatist campaign, relying on traditional guerrilla warfare conducted from jungle bases.⁷⁶⁶

756 Presumably, the ideologue of the organization.

757 BRN’s spiritual leader.

758 Abuza, ‘No End in Sight for Thailand’s Deadly Southern Insurgency’.

759 See P. Kularb, *Reporting Thailand’s Southern Conflict: Mediating Political Dissent*, Routledge, 2016.

760 Ibid, pp 15–25.

761 Morch, ‘The Slow Burning Insurgency in Thailand’s Deep South’.

762 A. Hafez Al-Hakim, ‘What is Mara Patani?’ Deep South Watch, 26 May 2015, <https://deepsouthwatch.org/en/node/7211> (last accessed 26 December 2018).

763 Libya, Syria, and Afghanistan for advanced training.

764 P. Chalk, *The Malay-Muslim Insurgency in Southern Thailand: Understanding the Conflict’s Evolving Dynamic*, RAND, National Defense Research Institute, 2008, p 5, https://www.rand.org/content/dam/rand/pubs/occasional_papers/2008/RAND_OP198.pdf (last accessed 11 February 2019); see also ‘Chapter IV: Melayu-Muslim Movements in Southern Thailand’, Shodhganga, 2015, pp 144–146, <http://shodhganga.inflibnet.ac.in/bitstream/10603/127211/6/chapter%204.pdf> (last accessed 2 January 2019).

765 See Abuza, ‘A Breakdown of Southern Thailand’s Insurgent Groups’.

766 Engvall and Andersson, ‘The Dynamics of Conflict in Southern Thailand’, 179.

- **The GMIP:** Formed in 1995 by Nasoree Saesaeng and Cheku Mae Abdul Rahman, the GMIP is a splintered faction of the earlier, now inactive, Pattani Mujahideen Movement (GMP).⁷⁶⁷ With aspirations for a Muslim Pattani state, it is inspired by widespread international jihad.⁷⁶⁸

3. Stalled Peace Talks

On 28 February 2013, the Thai Government agreed to hold talks in Malaysia with the BRN to seek an end to the armed conflict.⁷⁶⁹ The talks began under the democratically elected government of Prime Minister Yingluck Shinawatra, ousted in 2014 by the military in the name of ending political turmoil.⁷⁷⁰

Although there was no sharp drop in violence and casualties, 2013 saw the lowest rate of civilian deaths since the resurgence of violence in 2004.⁷⁷¹ However, the talks failed with the retirement of the BRN in 2015, purportedly due to the government's lack of concessions,⁷⁷² and the negotiations with Mara Patani, which were made public.⁷⁷³

At present, Mara Patani, along with a minority of BRN members who do not have the support of their top leaders,⁷⁷⁴ and the Thai Government are engaged in a stalled Malaysian-facilitated peace process,⁷⁷⁵ still at a confidence-building stage. Even though Mara Patani wanted to discuss measures like the recognition of the distinct identity of the Pattani people or granting some level of self-government to the provinces, the focal point during the process has been the establishment of several safety zones which it was not possible to develop until now.⁷⁷⁶

767 'Southern Thailand: A Non-International Armed Conflict Between the Thai Military and Armed Groups', RULAC, 29 November 2018, <http://www.rulac.org/news/southern-thailand-a-non-international-armed-conflict-between-the-thai-milit> (last accessed 26 December 2018); Lintner, 'Who's Who in Thailand's Muslim Insurgency?'

768 'Chapter IV: Melayu-Muslim Movements in Southern Thailand', p 150.

769 K. Rustici, 'Peace Talks Announced to Address the Conflict in Southern Thailand', Center for Strategic & International Studies, 1 March 2013, <https://www.csis.org/analysis/peace-talks-announced-address-conflict-southern-thailand> (last accessed 26 December 2018).

770 P. Tanakasempipat and P. Thepgumpanat, 'Southern Thailand Attacks Reflect Tension Over Peace Talks, Conflict Monitor Says', *Reuters*, 19 April 2017, <https://www.reuters.com/article/us-thailand-south-attacks-idUSKBN17L243>.

771 Child Soldier International and Cross Cultural Foundation, *Southern Thailand*, p 7.

772 Abuza, 'No End in Sight for Thailand's Deadly Southern Insurgency'; Morch, 'The Slow Burning Insurgency in Thailand's Deep South'.

773 W. Watcharasakwet, P. Rakkanam and M. Mustafa, 'Southern Thai Peace Talks: Malaysian Broker Says Violence Can End in 2 Years', *BenarNews*, 4 January 2019, <https://www.benarnews.org/english/news/thai/official-meeting-01042019161241.html>.

774 D. Pathan, 'Thailand: Junta Has Little to Show for Deep South Peace Efforts', *BenarNews*, 3 August 2018, <https://www.benarnews.org/english/commentaries/far-south-view/philippines-militants-08032018161110.html>.

775 Johnson, 'Thai Insurgents Revive Ahead of New Polls'.

776 J. M. Royo Aspa, J. Urgell García, P. Urrutia Arestizábal, A. Vilellas Ariño and M. Vilellas Ariño, *Peace Talks in Focus 2018: Report on Trends and Scenarios*, Escola de Cultura de Pau, 2018, p 74, <https://reliefweb.int/sites/reliefweb.int/files/resources/negociaciones18i.pdf> (last accessed 13 January 2019).

C. KEY DEVELOPMENTS IN 2018

At the beginning of 2018, the situation in the Thai Deep South seemed to be improving, given the withdrawal of troops since 2016, the apparent decline in violence in 2017 and the promise of the withdrawal of more than 3,000 troops in 2018.⁷⁷⁷ The year passed with ups and downs, witnessing violent actions in parallel with peace negotiations with Mara Patani. Armed violence even spiked compared to some months in 2017, while the faint indicators of the BRN's connections with the Islamic State continued to be part of the debate.⁷⁷⁸

One event that offered hope of a decline in armed violence was the announcement in mid-February 2018 of the agreement to create safety zones in order to launch a ceasefire in five districts in the three Deep Southern provinces (two each in Yala and Narathiwat and one in Pattani).⁷⁷⁹ These are meant to be designated areas where state forces and ANSAs have agreed to a ceasefire. However, simultaneously, an incident took place injuring three school girls, three defence volunteers and four civilians when a bomb was set off near the road leading to the Pracha-utit school in Muang district.

In April 2018, the Cho-I-rong district in Narathiwat Province was announced the first territory to create a pilot safety zone to aid the peace talks.⁷⁸⁰ However, this announcement led to the suspension of the talks by Mara Patani in August, which felt belittled by the way the Thai Government had gone about it.⁷⁸¹ Subsequently, the peace process suffered its second setback of the year when the armed wing of the BRN ratified its refusal to participate in the peace talks.⁷⁸²

The most recent incidents occurred during the last week of 2018: the detonation of a roadside bomb hidden in a gas cylinder; two bomb explosions in a popular tourist site near Songkhla Province and, on Friday 28 December, seven separate events in three districts of Narathiwat Province (two bomb attacks in Sri Sakhon district, four in Chanae district and a base ambush in Rangae district using grenades).⁷⁸³

777 'South Safest in 14 Years, Army Boasts', *Bangkok Post*, 5 January 2018, https://www.bangkokpost.com/news/security/1390370/south-safest-in-14-years-army-boasts#cxrecs_s.

778 E.Mark, 'WhattoMakeofRecurringFearsOfJihadismInSouthernThailand?', *The Diplomat*, 30 March 2018, <https://thediplomat.com/2018/03/what-to-make-of-recurring-fears-of-jihadism-in-southern-thailand/>.

779 M. Ahmad and M. Ismail, 'Thailand Announces "Safety Zone" Agreement With Rebels in Deep South', *BenarNews*, 15 February 2018, <https://www.benarnews.org/english/news/thai/safety-zone-02152018163957.html>; 'Framework Agreed for Safety Zones in Deep South', *Prachatai*, 1 March 2018, <https://prachatai.com/english/node/6961>.

780 M. Ahmad, 'Thai Leader Reveals New Deep South Safety Zone', *BenarNews*, 17 April 2018, <https://www.benarnews.org/english/news/thai/Thailand-militants-04172018150934.html>; W. Nanuam, 'Joint Panel to Oversee Safety Zone Plan', *Bangkok Post*, 20 April 2018, <https://www.bangkokpost.com/news/security/1454846/joint-panel-to-oversee-safety-zone-plan>.

781 Pathan, 'Thailand: Junta Has Little to Show for Deep South Peace Efforts'.

782 'Efforts to Continue With Southern Thailand Peace Talks Suffer Setback', *New Strait Times*, 2 December 2018, <https://www.nst.com.my/news/nation/2018/12/436550/efforts-continue-southern-thailand-peace-talks-suffer-setback>.

783 'Spike in Bomb and Grenade Attacks in South Thailand', *The Phnom Penh Post*, 31 December 2018, <https://www.phnompenhpost.com/international/spike-bomb-and-grenade-attacks-south-thailand>.

According to Zachary Abuza, a specialist on the ongoing conflict and a professor at the National War College, 'one reason why the fighting continues today is due to a lack of meaningful dialogue or compromise between the military and the separatists'.⁷⁸⁴

There has been no indication of the conflict becoming less intense in 2019. The first week of the year saw multiple incidents that warned of an escalation of armed violence ahead of the general election on 24 March.⁷⁸⁵ Meanwhile, the new chief of the Thai negotiation team, General Udomchai Thammasaroraj, began the official dialogue with a variety of meetings, mainly with Malaysian peace facilitator Abdul Rahim Noor, appointed in August 2018. While it has been stressed that independence is not a possible solution, other forms of power decentralization are on the table.⁷⁸⁶

The incidents at the end of 2018 and the beginning of 2019, as well as the recent attempts by the government to move the peace process out of the deadlock, are signs of a new moment for Southern Thailand: an escalation of armed violence or the attempt to convince the armed wing of the BRN-C to come to the negotiating table, which has been futile thus far.⁷⁸⁷

While the delegates at the table talk about how to move forward, the 15-year anniversary of the official escalation of violence in the area has been marked by an announcement by the BRN-C confirming its willingness to continue the fight for freedom if the will of the Thai state to achieve peace proves to be absent.⁷⁸⁸ Despite the unrelenting refusal of the hardcore elements of the BRN to stay away from the Mara talks, it must be acknowledged that it is the most influential and well-armed ANSA in the southern provinces, which has demonstrated the capability of its leadership to exercise control over local commanders on the ground.⁷⁸⁹

The last violent episode registered, at the time of writing, was reported on 10 January 2019: four civil defence volunteers guarding a school were shot to death.⁷⁹⁰ In this incident, six people were killed and seven were injured in attacks carried out across the region since 1 January 2019.⁷⁹¹

From January 2004 to December 2018, there were 20,163 incidents, in which 6,921 people died and 13,511 were injured. From December 2018 to 4 January 2019 alone, there were 54 incidents, with 41 casualties, 18 dead and 23 injured. Of these inci-

784 Quinley, 'The Artists Promoting Peace in Thailand's Conflict-Plagued South'.

785 Johnson, 'Thai Insurgents Revive Ahead of New Polls'.

786 W. Nanuam, 'Southern Peace Talks Rev Up', *Bangkok Post*, 4 January 2019, <https://www.bangkokpost.com/news/security/1604914/southern-peace-talks-rev-up>.

787 Watcharasakwet, Rakkhanam and Mustafa, 'Southern Thai Peace Talks'.

788 Johnson, 'Thai Insurgents Revive Ahead of New Polls'.

789 S. Jitpiromsri and A. Engvall, 'A Meaningful Peace: Ramadan Ceasefire Assessment', Deep South Watch, 9 September 2013. <http://www.deepsouthwatch.org/node/4720> (last accessed 5 January 2019).

790 M. Ahmad and I. Matahari, 'Gunmen Kill 4 Guards at School in Thailand's Deep South', *BenarNews*, 10 January 2019, <https://www.benarnews.org/english/news/thai/Deep-South-violence-01102019132014.html>.

791 Ibid.

dents, 23 are alleged to have a nexus with separatism, 24 are unclear, 6 are connected with organized crime and 1 with drugs; 19 of these incidents were bombings and 12 were shootings.⁷⁹²

The persistence of violence is demonstrated by the 548 incidents in 2018 (killing 218 and injuring 265), of which 240 are related to separatism/independence and 241 remain unclear. The coordinated attacks and the normal tit-for-tat violence between the BRN and Thai security forces⁷⁹³ evidence the clear existence of violence, despite the fact that such acts have been commonplace for years and a decline has been reported since the 2010 peak, when there were a total of 2061 incidents.⁷⁹⁴

In sum, the events in 2018, along with several episodes during the first month of 2019, cannot be disregarded. This is a stark reminder that a NIAC not only continues to be a reality, taking its toll mostly on the civilian population, but that it can easily worsen and threaten to reach a tipping point as in 2004 and subsequent years.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTION

The context in Thailand's Deep South has been characterized by alleged international humanitarian law (IHL) and human rights violations, carried out by all parties. These allegations include torture, extrajudicial killings, deliberate attacks on civilians, the recruitment and use of children and the use of landmines.

While the Internal Displacement Monitoring Centre recorded 35,000 people displaced due to violence and conflict as of April 2015,⁷⁹⁵ approximately 6,800 people have been killed in the ongoing armed conflict in Thailand's southern border provinces, the majority of whom are civilians.⁷⁹⁶ Religious leaders have become targets of violence for both parties. There have been decapitations of unarmed Buddhist monks,⁷⁹⁷ and Islamic leaders taken into custody by security agencies have disappeared or have been extrajudicially executed.⁷⁹⁸ Security agencies or irregular forces, such as the Rangers, also resorted to extrajudicial killings and abductions,⁷⁹⁹ mainly in 2007.

792 Deep South Watch, 'Summary of Incidents in Southern Thailand, 2018', 7 January 2019, <https://deepsouthwatch.org/en/node/11892> (last accessed 10 January 2019).

793 Pathan, 'Where Next for Peace Talks in Thailand's Deep South?'

794 J. Blaxland, *Has Thailand's Deep South Insurgency Reached a Tipping Point?*, East Asia Forum, 12 September 2018, <http://www.eastasiaforum.org/2018/09/12/has-thailands-deep-south-insurgency-reached-a-tipping-point/> (last accessed 1 January 2019).

795 See Thailand's IDP figures, Internal Displacement Monitoring Centre, <http://www.internal-displacement.org/countries/thailand/> (last accessed 12 February 2019).

796 HRW, *World Report 2018: Events of 2017*, p 546, https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf (last Accessed 1 January 2019).

797 HRW, *No One is Safe*.

798 HRW, *'It Was Like Suddenly My Son No Longer Existed': Enforced Disappearances in Thailand's Southern Border Provinces*, 19 March 2007, <https://www.hrw.org/report/2007/03/19/it-was-suddenly-my-son-no-longer-existed/enforced-disappearances-thailands#> (last accessed 29 December 2018).

799 Amnesty International, *Thailand: Torture in the Southern Counter-Insurgency*, pp 29–32.

Similarly, the renewed bombings against civilians in 2016, 2017 and 2018 may amount to crimes against humanity due to their widespread and systematic nature.⁸⁰⁰ In addition, reports of attacks on health workers and health facilities emerged in the course of 2016.⁸⁰¹

One of the main alleged situations that remains a concern due to the lack of appropriate responses is the recruitment and use of children by ANSAs. In fact, different UN bodies have reported the training of children as young as 13 years old in the use of weapons, and the detention of children for alleged association with ANSAs;⁸⁰² NGO's have reported how ANSAs 'used them to participate in hostilities, either in active fighting or in supporting roles, such as lookouts and informers'.⁸⁰³ Nevertheless, no direct evidence has been found of under-18s being forcibly recruited into the ranks of the BRN.⁸⁰⁴

Last but not least, both victim-activated and command-detonated landmines have been used over the past decade and reports in 2018 accused the BRN of using landmines and placing them near civilians and civilian objects. Allegedly, civilians have been increasingly affected by landmines with some casualties reported in rubber plantations.⁸⁰⁵

In sum, based on the continuance of hostilities and the persistent presence of ANSAs such as the BRN-C, it must be said that the situation in the Thai Deep South still amounts to a NIAC, even if the Thai Government denies its existence.⁸⁰⁶ This said, all parties to the conflict are bound by IHL rules including the prohibition of an-

800 HRW, 'Thailand: Insurgents Target Civilians in the South', 25 August 2016, <https://www.hrw.org/news/2016/08/25/thailand-insurgents-target-civilians-south> (last accessed 27 December 2018).

801 Safeguarding Health in Conflict, *No Protection, No Respect: Health Workers and Health Facilities Under Attack 2015 and Early 2016*, May 2016, pp 9, 40, <https://www.safeguardinghealth.org/sites/shcc/files/SHCC2016final.pdf> (last accessed 12 February 2019).

802 Watchlist on Children and Armed Conflict, *2017 Annual Report: Putting Children's Rights up Front*, March 2017, p 45, https://watchlist.org/wp-content/uploads/watchlist_2017-annual-report-putting-childrens-rights-up-front_lr.pdf (last accessed 29 December 2018); see also Second Periodic Report of Thailand to the UN Committee on the Rights of the Child, 31 May 2005, UN doc CRC/C/83/Add.15; UN Security Council and UN General Assembly, Children and Armed Conflict – Report of the Secretary-General, UN doc A/68/878-S/2014/339, 15 May 2014, §§ 200–204; UN Security Council and UN General Assembly, Children and Armed Conflict – Report of the Secretary-General, UN doc A/72/865-S/2018/465, 16 May 2018, §§ 250–252.

803 Child Soldier International and Cross Cultural Foundation, *Southern Thailand*, pp 9–10.

804 Ibid.

805 HRW, 'Thailand: Insurgents Use Landmines in South', 4 July 2018, <https://www.hrw.org/news/2018/07/04/thailand-insurgents-use-landmines-south> (last accessed 20 December 2018); 'By July 2017, the Kingdom of Thailand had an estimated 410km² of suspected mined area. In 2016, a total of 28.19km² was released, of which 98% (27.72km²) was cancelled by non-technical survey. Just over 0.07km² was reduced by technical survey and 0.39km² was cleared, with the destruction of 1,231 antipersonnel mines. Land release results for 2016, including clearance, were a decrease from 2015', 'Thailand Mine Action', Landmine & Cluster Munition Monitor, 11 December 2017, <http://www.the-monitor.org/en-gb/reports/2017/thailand/mine-action.aspx> (last accessed 12 February 2019).

806 UN Committee on the Rights of the Child 59th Session, Reply to List of Issues Concerning Additional and Updated Information Related to the Consideration of the Initial Report of Thailand, UN doc CRC/C/OPAC/THA/1, 20 January 2012.

ti-personnel landmines banned by the Ottawa Treaty,⁸⁰⁷ along with customary IHL rules prohibiting child recruitment and the use of children in hostilities, and ratified treaties on the subject such as Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁸⁰⁸

8. THE CONFLICT IN EASTERN UKRAINE (DONBASS): DIRE CONSEQUENCES AND ZERO RECONCILIATION

Grazvydas Jasutis

Classification of the Conflict

Georgia and the Ukraine were involved in a non-international armed conflict in 2016 in which the armed forces of the Government of Ukraine were fighting against pro-Russian separatist armed groups, which proclaimed themselves the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR), in the east of the country. The conflict meets the threshold for applicability of the 1977 Additional Protocol II.

Ukraine clearly states that the Russian Federation (RF) is directly participating in the conflict.⁸⁰⁹ This is denied by Moscow, though the occasional detention of RF security actors,⁸¹⁰ the alleged appearance of RF military equipment,⁸¹¹ the flow of Russian military volunteers,⁸¹² the constant economic support provided to separatists and the case of Crimea might imply Russian engagement in the conflict. It is noteworthy that, speaking at an annual televised press conference in 2015, President Vladimir Putin denied that Russian regular forces were involved in the Donbass conflict, but conceded that people dealing with tasks in the military sphere had been present.⁸¹³

807 Thailand ratified this treaty on 27 November 1998.

808 See Rules 136 and 137, International Committee of the Red Cross, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39 (last accessed 12 February 2019); Thailand is also part of OPAC, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified on 27 February 2006.

809 'Ukraine Passes Bill to Get Occupied Regions Back From Russia', U.S. News, 18 January 2018, <https://www.usnews.com/news/world/articles/2018-01-18/ukrainian-parliament-passes-bill-on-occupied-territories#close-modal>.

810 G. Garanich, 'Moscow Admits Two Fighters Captured in Ukraine Are Ex-Russian Soldiers', *Moscow Times*, 19 May 2015, <https://themoscowtimes.com/articles/moscow-admits-two-fighters-captured-in-ukraine-are-ex-russian-soldiers-46657>.

811 M. R. Gordon, 'Russia Sent Tanks to Separatists in Ukraine, U.S. Says', *The New York Times*, 13 June 2014, https://www.nytimes.com/2014/06/14/world/europe/russia-has-sent-tanks-to-ukraine-rebels-us-says.html?emc=edit_na_20140613&nlid=13240517.

812 G. Pereborshchikov, 'Life After Ukraine: The "Invisible" Russian Fighters Struggling to Return to Normal', *The Guardian*, 29 February 2016, <https://www.theguardian.com/world/2016/feb/29/ukraine-russia-fighters-donbass>.

813 'Putin Denies the Presence of Russian Troops in Donbass', *Vesti*, 17 December 2015, <https://www.vesti.ru/doc.html?id=2699315> (in Russian).

In its November 2018 Report on Preliminary Examination Activities, the Office of the Prosecutor of the International Criminal Court (ICC) reminded 'that direct military engagement between the respective armed forces of the Russian Federation and Ukraine, indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict'.⁸¹⁴

A. HISTORY OF THE CONFLICT

In Donbass, Russian-speaking residents and Ukrainians did not have prior conflicts and deadly clashes. They cohabitated peacefully during the Soviet period and the communities did not face significant ethnic challenges. In the early 1990s, small numbers of fringe intellectuals championed the establishment of Novo Rossiya (New Russia) as an ethnic state, and an organization formed advocating that Donetsk and other Russian-speaking areas join Russia;⁸¹⁵ however, the eruption of war in Donbass is predominantly explained through geopolitical narratives.

A well-coordinated attack on local administrative buildings by pro-Russian activists in the eastern Ukrainian cities of Donetsk, Kharkiv and Lugansk began on 6 April 2014.⁸¹⁶ Local police forces did little to stop the rioting, while local government buildings and the Security Service headquarters were ransacked and occupied.⁸¹⁷ The next day, Donetsk separatists proclaimed the establishment of the DPR. Following instability and unrest in other towns in Donbass, the acting President of Ukraine, Oleksandr Turchynov, announced the beginning of an anti-terrorist operation (ATO) against pro-Russian separatists.⁸¹⁸ However, this did not bring the expected results and the instituting of the LPR, another breakaway entity, took place on 28 April 2014.⁸¹⁹

By the end of April, Turchynov announced that the Ukraine Government was no longer in full control of the provinces of Donetsk and Luhansk, declared that the country was on 'full combat alert' and reinstated conscription to the armed forces by decree.⁸²⁰ Both the LPR and DPR pledged to hold a referendum regarding their self-determination. On 11 May, the referendums were held and, in both, an

814 The Office of the Prosecutor (OTP), International Criminal Court (ICC) Report on Preliminary Examination Activities 2018, §72. <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (last accessed 15 March 2019).

815 C. Harris, 'Ethnic Tensions in the Successor Republics in 1993 and Early 1994', 35 *Post-Soviet Geography* 4 (2014).

816 P. Felgenhauer, 'Armed Pro-Russian Activists in Lugansk May Trigger a Russian Invasion' 11 *Eurasia Daily Monitor* 68 (10 April 2014), <https://jamestown.org/program/armed-pro-russian-activists-in-lugansk-may-trigger-a-russian-invasion/> (last accessed 27 August 2018).

817 Ibid.

818 'Ukraine Says Donetsk "Anti-Terror Operation" Under Way', *BBC News*, 16 April 2014, <https://www.bbc.com/news/world-europe-27035196>.

819 'Federalization Supporters in Luhansk Proclaim People's Republic', *TASS*, 28 April 2014, <http://tass.com/world/729768>.

820 OTP, ICC, Report on Preliminary Examination Activities 2017, <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-ENG.pdf> (last accessed 27 August 2018).

overwhelming majority voted in favour of independence and sovereignty.⁸²¹ On 12 May, both regions declared independence, while Donetsk appealed to Moscow to be incorporated into the RF.⁸²² The same day, Donetsk separatist leaders announced they would take control of all armed and security forces in the oblast, expelling those who refused to pledge allegiance to the new state and destroying any armed groups that resisted.⁸²³ By the end of May, both the Donetsk and Luhansk Republics officially announced that they had formed a confederation called the Federal State of New Russia (Novo Rossiya),⁸²⁴ which was abandoned in May 2015. On 25 May, the Ukrainians elected Petro Poroshenko as President; however, the election did not take place in the eastern part of the country. The intense fighting continued in Donbass during the summer, including the shooting down of a civilian air jet on 17 July. A report by the Dutch-led Joint Investigation Team said there was 'no doubt' the missile that downed the plane was brought in from Russia and fired from rebel-controlled territory,⁸²⁵ which led to European Union and United States sanctions against the RF.⁸²⁶ The fierce fighting persisted on the ground and the battle in Illovaik in August was particularly cruel. It was further fueled by the Russian decision to send humanitarian convoys to Donbass without the express permission of the Ukrainian authorities.⁸²⁷

1. Two Ceasefire Agreements: Quo Vadis?

In On 5 September 2014, the Minsk Protocol was signed, which included, inter alia, the immediate bilateral cessation of the use of weapons; monitoring and verification by the Organization for Security and Co-operation in Europe (OSCE) of the non-use of weapons; decentralization of power, including by means of enacting the Law of Ukraine '[w]ith respect to the temporary status of local self-government in certain areas of the Donetsk and the Lugansk regions' (Law on Special Status); permanent monitoring of the Ukrainian-Russian state border; the holding of early local elections in accordance with the Law on Special Status and the removal of unlawful military formations, military hardware and militants and mercenaries

821 S. Walker, O. Grytsenko and H. Amos, 'Ukraine: Pro-Russia Separatists Set for Victory in Eastern Region Referendum', *The Guardian*, 11 May 2014, <https://www.theguardian.com/world/2014/may/11/eastern-ukraine-referendum-donetsk-luhansk>.

822 'Birth of the Donetsk Republic', *Donetsk*, <http://donetsk.tilda.ws/> (in Russian).

823 International Crisis Group, *Ukraine: Running out of Time*, Europe Report no 231, 14 May 2014, <https://d2071andvip0wj.cloudfront.net/ukraine-running-out-of-time.pdf> (last accessed 27 August 2018).

824 E. Giuliano, 'The Social Bases of Support for Self-determination in East Ukraine', 14 *Ethnopolitics* 5 (2015).

825 L. Dearden, 'MH17 Shot Down by Rebels With Missile From Russia, Say Investigators', *The Independent*, 28 September 2016, <https://www.independent.co.uk/news/world/europe/mh17-russia-ukraine-rebels-responsible-downing-malaysia-airlines-plane-prosecution-charges-vladimir-a7334246.html>.

826 J. Pawlak and E. Beech, 'EU and U.S. Announce New Sanctions on Russia Over Ukraine', *Reuters*, 29 July 2014, <https://www.reuters.com/article/us-ukraine-crisis-east/eu-and-u-s-announce-new-sanctions-on-russia-over-ukraine-idUSKBN0FY00X20140729>.

827 A. Luhn and D. Roberts, 'Ukraine Condemns "Direct Invasion" as Russian Aid Convoy Crosses Border', *The Guardian*, 22 August 2014, <https://www.theguardian.com/world/2014/aug/22/russian-convoy-crosses-border-ukraine-without-permission>.

from the territory of Ukraine.⁸²⁸ The implementation parameters were laid down in the follow-up memorandum.⁸²⁹

However, the ceasefire agreement was immediately violated and skirmishes continued. Additional problems surfaced with regard to the elections organized by the DPR and LPR on 2 November, which infringed the norms of the Minsk Protocol.⁸³⁰ Following these elections, the Government of Ukraine ordered the temporary relocation of all state institutions and enterprises, as well as their personnel, from all areas not under the control of the government to territory controlled by it. On 1 December 2014, the government halted funding to these institutions.⁸³¹ The continued violence brought the conflicting parties to the negotiation table and a new ceasefire agreement was signed on 11 February 2015.⁸³² The so-called Minsk II began with a ceasefire and the withdrawal of heavy weapons from the frontlines, to be monitored by the OSCE. An ‘all-for-all’ prisoner exchange, local elections and amnesty for fighters are to follow; both sides are to ensure the safe delivery of humanitarian aid and to work toward the socio-economic reintegration of the separatist-held territories. Ukraine promises to implement constitutional changes to provide for ‘decentralisation’; in exchange, all ‘foreign armed formations’ will be withdrawn and Ukraine will regain control of its state borders.⁸³³ Nevertheless, the rebels advanced on Debaltseve in spite of the recent ceasefire agreement and Ukrainian troops had to make an organized withdrawal.⁸³⁴ The ICC’s assessment attributed the increased fighting from August 2014 to February 2015 to alleged corresponding influxes of troops, vehicles and weaponry from the RF to reinforce the positions of the armed groups.⁸³⁵

Small-scale skirmishes continued after the battle of Debaltseve and, again, fierce fighting occurred in Avdiivka and Yasynuvatain in January–February 2017. Alexander Hug, the Principal Deputy Chief Monitor of the OSCE Special Monitoring Mission to Ukraine, said that this level of fighting in Ukraine had not been seen since 2014–2015.⁸³⁶ In February 2017, the RF issued a decree temporarily recogniz-

828 Organization for Security and Co-operation in Europe (OSCE), Protocol on the Results of Consultations of the Trilateral Contact Group, Signed in Minsk, 5 September 2014, <https://www.osce.org/home/123257> (last accessed 27 August 2018).

829 OSCE, ‘Memorandum on Stabilizing Ceasefire Another Important Step Towards De-Escalation, OSCE Chairperson-in-Office says’, 20 September 2014, <https://www.osce.org/cio/123808> (last accessed 27 August 2018).

830 OSCE Special Monitoring Mission to Ukraine, Findings on Formerly State-Financed Institutions in the Donetsk and Luhansk Regions, Thematic Report, 30 March 2015, <https://www.osce.org/ukraine-smm/148326?download=true> (last accessed 27 August 2018).

831 Ibid.

832 OSCE, Package of Measures for the Implementation of the Minsk Agreements, 12 February 2015, <https://www.osce.org/cio/140156>.

833 Ibid.

834 ‘Ukraine Troops Retreat From Key Town of Debaltseve’, *BBC News*, 18 February 2015, <https://www.bbc.com/news/world-europe-31519000>.

835 OTP, ICC, Report on Preliminary Examination Activities 2017.

836 C. Borys, ‘Losing Everything in Avdiivka’, *Al Jazeera*, 5 February 2017, <https://www.aljazeera.com/indepth/features/2017/02/losing-avdiivka-170205121126909.html>.

ing identity documents, diplomas, birth and marriage certificates and vehicle registration plates issued in the eastern Ukraine regions of Donetsk and Luhansk.⁸³⁷ The decision was highly criticized by the Ukrainian authorities. In mid-March 2017, President Poroshenko signed a decree temporarily banning the movement of goods across the demarcation line in the ATO zone.⁸³⁸

In July 2017, the DPR leader came up with the idea of establishing Malorossiya (Little Russia), a word that came into widespread use during the Russian Empire in the nineteenth century, when it was used to describe the land that now makes up Ukraine. The idea was received negatively, even by local Donetsk politicians and the RF.⁸³⁹ It is noteworthy that the members of parliament in the DPR had passed a resolution in February 2015 stating that the territory was the legitimate successor to the Donetsk–Krivoy Rog Republic, a short-lived independent territory founded in 1918 by a close associate of Joseph Stalin.⁸⁴⁰ Meanwhile, the LPR faced internal elite changes. Local separatist leader Igor Plotnitsky fled to Russia when armed men in unmarked uniforms took up positions in the centre of Luhansk in November 2017.⁸⁴¹

Throughout 2017, the international community attempted to reintroduce a truce between the conflicting parties, with little success. From 14 April 2014 to 15 November 2017, the United Nations Office of the High Commissioner for Human Rights recorded 35,081 conflict-related casualties in Ukraine among Ukrainian armed forces, civilians and members of the armed groups. This included 10,303 people killed and 24,778 injured.⁸⁴²

B. PARTIES TO THE CONFLICTS

1. Ukrainian Armed Forces

In early 2015, Ukrainian President Petro Poroshenko decreed an increase in the maximum size of the military from 184,000 to 250,000; as of 2016, Ukraine was thought to have more than 200,000 active-service military personnel, including

837 ‘Putin Orders Russia to Recognize Documents Issued in Rebel-Held East Ukraine’, *Reuters*, 18 February 2017, <https://www.reuters.com/article/us-ukraine-crisis-russia-documents/putin-orders-russia-to-recognize-documents-issued-in-rebel-held-east-ukraine-idUSKBN15X0KR>.

838 I. Orel, ‘Ukrainian Energy Industry: Thorny Road of Reform’, *UNIAn*, 10 January 2018, <https://economics.unian.info/2338645-ukrainian-energy-industry-thorny-road-of-reform.html>.

839 A. Taylor, ‘Ukrainian Separatists Claim to Have Created a New Country: Malorossiya, or “Little Russia”’, *The Washington Post*, 19 July 2017, https://www.washingtonpost.com/news/world-views/wp/2017/07/19/ukrainian-separatists-claim-to-have-created-a-new-country-malorossiya-or-little-russia/?utm_term=.8163364e2c14.

840 T. Parfitt, ‘Ukraine Crisis: No Breakthrough in Talks Between Hollande, Merkel and Putin’, *The Telegraph*, 7 February 2015, <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11397591/Ukraine-crisis-No-breakthrough-in-talks-between-Hollande-Merkel-and-Putin.html>.

841 ‘Kremlin “Following” Situation In Ukraine’s Russia-Backed Separatist-Controlled Luhansk’, *Radio Free Europe/Radio Liberty*, 22 November 2017, <https://www.rferl.org/a/ukraine-russia-following-situation-separatists-luhansk/28869751.html>.

842 Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the Human Rights Situation in Ukraine 16 August to 15 November 2017, https://www.ohchr.org/Documents/Countries-UA/UARreport20th_EN.pdf (last accessed 27 August 2018).

145,000 in the army, 45,000 in the air force, 8,000 in the commando force and 6,000 in the navy.⁸⁴³ Conservative estimates put the number of volunteers who fought in the east at 15,000 in as many as 50 units.⁸⁴⁴ In 2018, Ukraine shifted from an ATO to a Joint Forces Operation in Donbass and its defence chief explained that during the first stage, the number of troops in Donbass would remain unchanged, but admitted that a decision on a military build-up may be made later.⁸⁴⁵

2. Russian Armed Forces

The Ukraine Government estimates that at least 6,000 Russian soldiers are operating in Donbass, with tens of thousands more stationed along the Russian-Ukrainian border since June 2017.⁸⁴⁶ According to different sources cited in a Royal United Services Institute report,⁸⁴⁷ Russian troops in Ukraine numbered between 3,500 and 6,000–6,500 by the end of August 2014. That number fluctuated, reaching approximately 10,000 at the peak of direct Russian involvement in mid-December 2014. The Russian Ministry of Defence had to involve 117 combat and combat-support units to generate the approximately 42,000 troops rotating in the vicinity of the Russo-Ukrainian border – either stationed there, delivering artillery fire against Ukrainian territory from Russian soil or directly participating in combat operations on Ukrainian sovereign territory.⁸⁴⁸

Recently, the Ukrainian military prosecutor underlined that the number of Russian nationals fighting alongside the separatists in Ukraine's Donbass region now totals 11,000, including 3,000 regular combat troops.⁸⁴⁹ The RF has never admitted that its regular troops were operating in Donbass.

3. Non-State Armed Groups: The Self-Proclaimed Donetsk People's Republic and Luhansk People's Republic

According to Franklin Holcomb's report published in September 2017,⁸⁵⁰ separatist units are primarily comprised of Russian mercenaries, intelligence and military personnel; marginalized locals from economically distressed areas; radical groups

843 V. Akimenko, 'Ukraine's Toughest Fight: The Challenge of Military Reform', Carnegie Endowment for International Peace, 22 February 2018, <http://carnegieendowment.org/2018/02/22/ukraine-s-toughest-fight-challenge-of-military-reform-pub-75609> (last accessed 27 August 2018).

844 Ibid.

845 'Ukrainian Defense Chief Hints that Kiev May Ramp Up Use of Force in Donbass Conflict', *TASS*, 23 April 2018, <http://tass.com/world/1001232>.

846 F. Holcomb, *The Kremlin's Irregular Army: Ukrainian Separatist Order of Battle*, Institute for the Study of War, Russia and Ukraine Security Report 3, September 2017, http://www.understandingwar.org/sites/default/files/ISW%20Separatist%20ORBAT%20Holcomb%202017_Final.pdf (last accessed 27 August 2018).

847 I. Sutyagin, *Russian Forces in Ukraine*, Royal United Services Institute, Briefing Paper, March 2015, https://rusi.org/sites/default/files/201503_bp_russian_forces_in_ukraine.pdf (last accessed 27 August 2018).

848 Ibid.

849 R. Johnson, 'Russian Forces "Now 11,000 Strong in the Donbass"', *IHS Jane's Defence Weekly*, 6 October 2017, <http://www.janes.com/article/74682/russian-forces-now-11-000-strong-in-the-donbass> (last accessed 27 August 2018).

850 Holcomb, *The Kremlin's Irregular Army*.

from Russia and the former Soviet Union, including Cossack bands, Russian Orthodox Christian radicals, Russian nationalists and communists; sports hooligans; defectors from Ukrainian security forces. There are about 40,000 separatists in Donbass according to the Ukrainian armed forces.⁸⁵¹

C. KEY DEVELOPMENTS IN 2018

On 18 January 2018, Ukraine's parliament passed a bill that aims to reintegrate the eastern territories. The bill describes the areas in Ukraine's Donetsk and Luhansk regions as 'temporarily occupied' by the 'aggressor country' Russia. The Russian Ministry of Foreign Affairs said in a statement, 'You cannot call this anything but preparation for a new war', and warned that the bill 'risked a dangerous escalation in Ukraine with unpredictable consequences for world peace and security'.⁸⁵² On 16 March, President Poroshenko noted that, according to the Donbass reintegration law, the ATO format was changing to a Joint Forces Operation and thereby terminated the ATO.⁸⁵³

The security situation on the ground remains challenging and fragile. On 26 March, the Trilateral Contact Group on the settlement of the situation in Donbass agreed on a comprehensive, sustainable and unlimited ceasefire starting from 30 March.⁸⁵⁴ The ceasefire parameters were immediately violated and fighting persisted. The OSCE Special Monitoring Mission voiced concern over skirmishes near Horlivka, where the Ukrainian army retook Chihari village in May.⁸⁵⁵ It is noteworthy that the US has confirmed its delivery of Javelin antitank missile systems to Ukraine.⁸⁵⁶

On 11 June, the foreign ministers of Russia, Ukraine, Germany and France met in Berlin to discuss the implementation of a fragile ceasefire for Ukraine and the deployment of a UN peacekeeping mission in the country's conflict zone. Russia and Ukraine agreed in principle to a UN peacekeeping mission, but their ideas about how to implement it were still 'very much apart'.⁸⁵⁷

851 'Kyiv Says There Are About 6,000 Russian Soldiers, 40,000 Separatists in Donbas', *Kyiv Post*, 11 September 2017, <https://www.kyivpost.com/ukraine-politics/kyiv-says-6000-russian-soldiers-40000-separatists-donbas.html>.

852 'Ukraine Passes Bill to Get Occupied Regions Back From Russia', *U.S. News*, 18 January 2018, <https://www.usnews.com/news/world/articles/2018-01-18/ukrainian-parliament-passes-bill-on-occupied-territories#close-modal>.

853 'Poroshenko: ATO Over, Joint Forces Operation Starting', *UNIAN*, 16 March 2018, <https://www.unian.info/war/10045583-poroshenko-ato-over-joint-forces-operation-starting.html>.

854 '«Easter Ceasefire» in Donbas Fails on Its First Day With Attacks on Ukrainian Positions', *UNIAN*, 30 March 2018, <https://www.unian.info/war/10062323-easter-ceasefire-in-donbas-fails-on-its-first-day-with-attacks-on-ukrainian-positions.html>.

855 International Crisis Group, 'Ukraine', May 2018, <https://www.crisisgroup.org/crisiswatch/may-2018#ukraine>.

856 C. Miller, 'U.S. Confirms Delivery Of Javelin Antitank Missiles To Ukraine', *Radio Free Europe/Radio Liberty*, 30 April 2018, <https://www.rferl.org/a/javelin-missile-delivery-ukraine-us-confirmed/29200588.html>.

857 M. Nienaber, 'Ukraine, Russia Fail To Agree on U.N. Peacekeeping Mission', *Reuters*, 12 June 2018, <https://www.reuters.com/article/us-ukraine-crisis/ukraine-russia-fail-to-agree-on-un-peacekeeping-mission-idUSKBN1J726I>.

D. WAR CRIMES ALLEGATIONS, INVESTIGATIONS AND PROSECUTIONS

On 17 April 2014, the Government of Ukraine lodged a declaration under Article 12(3) of the Rome Statute of the ICC accepting the jurisdiction of the ICC over alleged crimes committed in its territory from 21 November 2013 to 22 February 2014.⁸⁵⁸ On 25 April 2014, the ICC Prosecutor, Fatou Bensouda, opened a preliminary investigation into allegations of war crimes and crimes against humanity in the country.⁸⁵⁹

In its report on the human rights situation in Ukraine covering the period from 16 November 2018 to 15 February 2019, the Office of the United Nations High Commissioner for Human Rights (OHCHR) documented 315 human rights violations during the reporting period, which affected 202 victims. According to the OHCHR, this represented an increase of documented violations compared with those documented during the previous reporting period of 16 August to 15 November 2018. Of the violations, the OHCHR underlined that the Government of Ukraine was responsible for 126 violations and the self-proclaimed Donetsk People's Republic and Luhansk People's Republic were responsible for 154.⁸⁶⁰

Finally, three inter-state cases initiated by Ukraine concerning Russia's actions in Crimea and Eastern Ukraine are currently pending before the European Court of Human Rights.⁸⁶¹

858 See ICC, Ukraine, <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (last accessed 15 March 2019)

859 K. Bennett, 'ICC Opens Preliminary Investigation Into Alleged Ukraine Crimes', JURIST, 25 April 2014, <http://jurist.org/paperchase/2014/04/icc-opens-preliminary-investigation-into-alleged-ukraine-crimes.php>.

860 OHCHR, Report on the Human Rights Situation in Ukraine 16 November 2018 to 15 February 2019, <https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf> (last accessed 15 March 2019).

861 See M. Milanovic, 'A Quick Holiday Update on Ukraine/Russia Litigation before the ECtHR', *EJIL: Talk!*, 24 December 2018, <https://www.ejiltalk.org/a-quick-holiday-update-on-ukraine-russia-litigation-before-the-ecthr/> (last accessed 15 March 2019).

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