Determining the intensity threshold in a mosaic of non-international armed conflicts from *Lubanga* to *Ongwen*: The contribution of the International Criminal Court to a cumulative assessment approach

MM Bradley
LLB LLM LLD (Pret) LLM (Cape Town)
Lecturer in Public Law, University of Pretoria

OPSOMMING

Die vassteling van die intensiteitsvereiste in 'n mosaïek van burgeroorloë van *Lubanga* tot *Ongwen*: Die Internasionale Strafhof se bydrae tot 'n kumulatiewe assesseringsmetode

Die oorgrote meerderheid van hedendaagse konfliksituasies word geken aan 'n mosaïek van geweld waar verskillende rebellemagte gedurende dieselfde tydperk binne dieselfde geografiese ligging oorlog voer. Die toerekening van die gevolge van sodanige geweld om te bepaal of 'n bilaterale konflik, wat deel uitmaak van die mosaïek van geweld, aan die intensiteitsvereiste voldoen om sodanig 'n burgeroorlog daar te stel, is 'n onbegonne taak. Hierdie artikel ondersoek die vraag of 'n kumulatiewe assesseringsmetode gebruik kan word om te bepaal of die totale geweld wat in sekere komplekse burgeroorloë ontstaan, uitgebreide gewapende geweld daarstel, sodat oorlogsreg op sodanige situasie toepassing kan vind. Die relevante regspraak van die Internasionale Strafhof word in hierdie verband ondersoek. Ek voer aan dat daar wel in sekere situasies 'n noodsituasie ontstaan, asook dat dit juridiese ondersteuning is vir die gebruik van 'n kumulatiewe assesseringsmetode in stede van die tradisionele bilaterale metode om gewapende geweld-gebonde komplekse burgeroorloë te assesseer. Die onlangse *Ongwen*-saak, soos op 4 Februarie 2021 deur die Internasionale Strafhof beslis, word ook onder die vergrootglas in dié artikel ontleed.

1 INTRODUCTION

A mosaic of violence in which multiple parties are engaged in fighting along the same time continuum in the same territory is a frequent element in contemporary battle spaces and presents conflict situations of great complexity.[1] The fighting is

1 For a discussion of mixed armed conflicts, see Akande "Classification of armed conflicts: Relevant legal concepts" in Wilmshurst (ed) *International law and the classification of conflicts* (2012) 631; Geiss "Armed violence in fragile states: Low-intensity conflicts, spill-over conflicts, and sporadic law enforcement operations by third parties" (2009) *International Review of the Red Cross* 133; Radin "Global armed conflict? The threshold of extraterritorial non-international armed conflicts" 2013 *International Law Studies* 724. Such complex conflict situations include the mosaic of violence that raged in Yemen in the

continued on next page

often not restricted to opposing forces engaged in a non-international armed conflict but involves non-state actors intentionally launching simultaneous attacks against civilian populations.[2] These territories also are breeding grounds for gang-related activities and organised crime, which add to the sum of violence.[3] Case law supports a conclusion that mixed and multiple armed conflicts can exist simultaneously in a single territory.[4] There are two categories of armed conflict – international armed conflict,[5] and non-international armed conflict.[6] The term "armed conflict" is not defined in the *corpus* of international

---

period around 2017 and the ongoing situation in the Democratic Republic of the Congo (DRC). For an overview of the situation in Yemen up to 2017, see Arraf "The war report 2017: The armed conflict in Yemen: A complicated mosaic" The Geneva Academy of International Humanitarian Law and Human Rights, October 2017, available at The Armed Conflict in Yemen.pdf (geneva-academy.ch) (accessed 25-02-2021). For a mapping of the multiplicity of non-international armed conflicts co-existing in the DRC during 2019, see Rulac Geneva Academy "DRC: A mapping of non-international armed conflicts in Kivu, Kasai and Ituri" (5 February 2019) blog post available at DRC: A Mapping of Non-International Armed Conflicts in Kivu, Kasai and Ituri Rulac (accessed 25-02-2021).

2 The ongoing situation in Cabo Delgado, Mozambique serves as an example. Islamitic insurgents continuously attack the civilian population. For monthly reports on the evolving situation in Mozambique, see the CrisisWatch Database on Mozambique, available at CrisisWatch: February Alerts and January Trends 2021 Crisis Group (accessed 25-02-2021).

3 See the Armed Conflict Location and Event Data Project (ACLED) conflict tracker report "Layered insecurity in North Kivu: Violence and the Ebola response", available at Layered Insecurity in North Kivu: Violence and the Ebola Response ACLED (acleddata.com) (accessed 25-02-2021).

4 In *Prosecutor v Dusko Tadić a/k/a "Dule": Opinion and Judgment* Trial Chamber 1 of the International Criminal Tribunal for the Former Yugoslavia confirmed that mixed armed conflicts or multiple armed conflicts can co-exist on a single territory: "In 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, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." *Prosecutor v Dusko Tadić a/k/a "Dule"* IT-94-1-T 7 May 1997 (Opinion and Judgment) Trial Chamber I, para 561 (emphasis added).

5 Common Article 2 gives content to the notion "international armed conflict" by determining that "[t]he present Convention shall apply to all cases of declared war or of any other *armed conflict* which may arise *between two or more of the High Contracting Parties*, even if the state of war is not recognised by one of them". Common Article 2 is common to all four Geneva Conventions. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

6 The concept of non-international armed conflict is not defined in treaty law. The opposing sides in a non-international armed conflict must be either the armed forces of the territorial state opposing a non-state fighting unit or non-state fighting units opposing one another in the absence of state involvement. In *Prosecutor v Dusko Tadić a/k/a "Dule": Opinion and Judgment* Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia it was determined that a non-international armed conflict in the context of Common Article 3 exists when the fighting unit of the organized armed group involved in the conflict is sufficiently organised and the violence associated with the conflict is protracted in nature; *Tadić (Opinion and Judgment)* fn 4 para 561.

humanitarian treaty law. However, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) delineated what are considered the characteristics of an armed conflict in *Prosecutor v Dusko Tadić a/k/a "Dule"*.[7] The Appeals Chamber phrased its understanding as follows: "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[8] The construct it provides is often referred to as the "*Tadić* formula" and is widely accepted.[9] An international armed conflict occurs when there is fighting between armed forces of a state belonging to two or more different high contracting parties,[10] or in situations as detailed in article 1(4) of Additional Protocol I to the Geneva Conventions.[11] The *Tadić* formula for the existence of a non-international armed conflict is two-fold:[12] the notion of organisation, and the notion of intensity. The existence of both is required. The notion of organisation requires the military wing of a non-state actor party to the conflict to meet a demand for displaying a minimum degree of organisation; the notion of intensity, in turn, asserts that the severity of the fighting between the parties to the conflict must equate to protracted armed violence. It is only once the *Tadić* threshold is met that a situation crosses over from a law-enforcement paradigm to the realm of the law of non-international armed conflict.[13] The importance of conflict classification is that it determines the *corpus* of the law of armed conflict applicable to a specific situation.[14] In a complex conflict situation where multiple non-state actors

7 *Prosecutor v Dusko Tadić aka "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case IT-94-1-A, A.Ch, 19 July 1998, para 70.

8 *Tadić* (*Decision on the Defence Motion)* (n 7) para 70.

9 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Commentary of 2020 Article 3: Conflicts Not of an International Character para 458, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096 (accessed 18-02-2021).

10 In its *Ntaganda* decision of 8 July 2019 Trial Chamber VI of the International Criminal Court defined an international armed conflict to exist "whenever there is a resort to armed force between states"; *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Bosco Ntaganda* Judgment, Trial Chamber VI, 8 July 2019 Case ICC-01/04-02/06 para 700. For a better understanding of the construct "international armed conflicts", see Sassòli "Scope of application: When does IHL apply?" in Sassòli *International humanitarian law: Rules, controversies, and solutions to problems arising in warfare* (2019) 169–180.

11 See Additional Protocol I which expands the notion of international armed conflict to include armed conflicts in which peoples oppose colonial governments, racist regimes, alien occupation or assert a right to self-determination. Art 1(4) of Additional Protocol I determines: "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3.

12 *Tadić* (*Decision on the Defence Motion)* (n 7) para 70.

13 *Ibid.*

14 For a general overview of the importance of conflict classification, see Bradley "Revisiting the notion of "organised armed group" in accordance with Common Article 3: Exploring the inherent minimum threshold requirements" 2018 *AYIHL* 55–58; Marchand & Beruto

continued on next page

operate in a single territory and not every one of them is sufficiently organised or engaged in protracted armed violence, it is possible for the armed forces belonging to the territorial state simultaneously to operate under the law of non-international armed conflict and a law-enforcement paradigm.[15]

This article focuses on the method of assessment used to determine whether the notion of intensity, as formulated in *Tadić*, has been met. The purpose of the notion of intensity is to require that a minimum level of fighting is present in order to satisfy the threshold of violence of a non-international armed conflict.[16] In *Tadić*, the Appeals Chamber understood "intensity" as necessitating that the level of violence resulting from the fighting between parties to the conflict match that of "protracted armed violence".[17] In *Tadić*, Trial Chamber I considered the use of "protracted armed violence" a threshold to be "used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities which are not subject to international humanitarian law". Protracted armed violence is widely accepted as the minimum threshold of intensity. Several indicative factors have been introduced and developed in the case law of international courts and tribunals that may be used in determining whether or not violence is protracted. These indicators, which are non-constitutive and should be consulted on a case-by-case basis, are listed in the *Haradniaj* case:

> "[T]he number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict."[18]

These indicators of violence, seen as relevant signals of protracted armed violence, are settled in law and have been examined by scholars and so will not be discussed in detail.[19] This article addresses how these indicators are to be assessed in order to determine whether violence resulting from fighting between parties to a conflict can be classified as protracted.

The method of assessment used to determine whether the presence of these indicators of violence equates to protracted armed violence has traditionally been bilateral, although using a bilateral assessment method in a complex conflict situation may prove impossible. There is a paucity of scholarly research on

---

(eds) *International Institute of Humanitarian Law: The distinction between international and non-international armed conflicts: Challenges for IHL? 38th Round Table on Current Issues of International Humanitarian Law (San Remo, 3–5 September 2015)* (2016) 46–49; Sassòli (2019) 168–203.

15 See Dinstein *Non-international armed conflicts in international law* (2014) 37–57 for a discussion of the thresholds and interaction between armed conflicts as well as the applicable legal frameworks.

16 *Tadić* (*Decision on the Defence Motion*) (n 7) para 70.

17 *Ibid.*

18 *Prosecutor v Ramush Haradinaj Idriz Balaj Lahi Brahimaj* Case IT-04-84-T Trial Chamber 3 April 2008 para 52. These factors, however, are indicative only and it has not been clarified whether any of these are constitutive.

19 For an overview of these indicators, see Bradley "Revisiting the notion of 'intensity' inherent in Common Article 3: An examination of the minimum threshold which satisfies the notion of 'intensity' and a discussion of the possibility of applying a method of cumulative assessment" 2017 *International Comparative Law Review* 19–27.

assessing intensity. This article aims to contribute to filling this *lacuna*.[20] The article considers, as an alternative to the bilateral approach, whether a cumulative approach in assessing the intensity requirement is better suited to the facts. In achieving its research objective, the contribution is divided into two parts: part 2 gives content to the assessment of protracted armed violence. In this part of the article, the bilateral approach is explained and the cumulative assessment approach is introduced. Part 3 maps whether evidence for the judicial acceptance of the cumulative approach emerges from the case law of the International Criminal Court (ICC).

I conducted desk-based research using the traditional sources of international law as the point of departure.[21] Traditional sources are the sources of international law listed in article 38(1) of the Statute of the International Court of Justice.[22]

2 ASSESSING PROTRACTED ARMED VIOLENCE

The aim in this part of the article is to determine whether the law of non-international armed conflict places a restriction on the method of assessment to be used to determine whether the violence resulting from a conflict situation equates to purely bilateral protracted armed violence. Part 2.1 explains the traditional method of assessing protracted armed violence known as the bilateral approach. Part 2.2 determines whether an approach to cumulative assessment may be used in determining the minimum threshold of intensity requirement associated with complex conflict situations. Although literature on the topic is limited,[23] I have drawn on the available scholarly contributions to arrive at a basic definition of the cumulative assessment approach and to examine the benefits and risks associated with such an approach.

2.1 A strictly bilateral approach

Neither the chapeau of Common Article 3, nor its drafting history has been instructive as to how the notion of intensity should be assessed.[24] The contemporary understanding of the notion of intensity was initially introduced in

---

20 Scholarly discussion concerned with the cumulative assessment approach, at time of publication, is limited to Bradley 2018 *AYIHL* 27; Kleffner "The legal fog of an illusion: Three reflections on 'organization' and 'intensity' as criteria for the temporal scope of the law of non-international armed conflict" 2019 *International Law Studies* 161; Radin 2013 *International Law Studies*696; Zwanenburg "Double trouble: The 'cumulative approach' and the 'support-based approach' in the relationship between non-state armed groups" in Gill, Geiß, Krieger and Paulussen (eds) *Yearbook of international humanitarian law* (2019).

21 The traditional sources of public international law are listed in art 38 of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS No 993 (ICJ Statute). The primary sources include treaty law, customary international law and general principles of law. Judicial decisions and scholarly work constitute subsidiary sources to aid an interpretation of the primary sources.

22 Statute of the International Court of Justice (n 21).

23 See n 20.

24 Common Article 3 (Geneva Conventions) (n 5); Final Record of the Diplomatic Conference of Geneva of 1949, Vol II, Section B (Federal Political Department Berne) https://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html (accessed 25-02-2021). For an examination of the drafting history in the context of the assessment of intensity, see Bradley 2017 *International Comparative Law Review* 30–31 nn 175–176.

the *Tadić* formulation.[25] The *Tadić* formulation is examined to determine whether it offers insight as to how to assess the *Haradinaj* indicators[26] so as to declare whether the severity of fighting in a particular situation constitutes protracted armed violence. The instructive part of the *Tadić* formulation explains that an armed conflict exists "whenever there is a resort to armed force between states or protracted armed violence *between* governmental authorities and organised armed groups, or *between* such groups within a state".[27] As argued elsewhere, I view the use of "between" in this formula instructive.[28] The preposition has the meaning of "by the common action of" or "jointly engaging".[29] Violence must be protracted as a result of the common action of fighting by the organised armed group and the state or owing to the organised armed groups jointly engaging in fighting, which results in protracted armed violence. The usage asserts a bilateral approach to the assessment of the notion of intensity. Indeed, it is the violence that results from fighting *vis-à-vis* two parties to the non-international armed conflict that must equate to protracted armed violence. Other scholars have confirmed that the traditional assessment approach is bilateral in nature and that this is in keeping with the *Tadić* formulation.[30] Kleffner frames the bilateral approach as assessing violence resulting from the bilateral relationship *vis-à-vis* a single armed group and its opponent (the state armed forces or government authorities).[31]

A strictly-applied bilateral approach, however, is out of touch with the reality of complex conflicts, situations where multiple non-state actors operate in the same territory at the same time (for example, in the Democratic Republic of Congo (DRC) over 120 organised armed groups operate),[32] or where mixed armed conflicts share a geographic footprint and time frame (for example, the recent conflict in Syria where arguably multiple non-international armed conflicts took place alongside an internationalised armed conflict).[33] Applying the traditional bilateral assessment approach to a theatre of complex conflict situations means that, for example, if organised armed group A engages in a military operation against organised armed group B in the same territorial state at

25 *Tadić (Decision on the Defence Motion)* (n 7) para 70.
26 *Haradinaj* (n 18) para 49.
27 *Tadić (Decision on the Defence Motion)* (n 7) para 70 (emphasis added).
28 Bradley 2017 *International Comparative Law Review* 31–33.
29 "Between" *Merriam-Webster online dictionary* https://www.merriamwebster.com/dictionary/between?src=search-dict-box (accessed 21-02-2021).
30 Zwanenburg (2019) 47; Kleffner 2019 *International Law Studies* 172.
31 Kleffner 2019 *International Law Studies* 161.
32 Verweijen and Wakenge "Understanding armed group proliferation in the Eastern Congo" (December 2015) http://riftvalley.net/publication/understanding-armed-groupproliferation-eastern-congo#.XA1KknRKjIU (accessed 25-02-2021); Stearns and Vogel "The landscape of armed groups in the Eastern Congo" (December 2015) http://congoresearchgroup.org/wp-content/uploads/2015/11/The-Landscape-of-Armed-Groups-in-EasternCongo1.pdf (accessed 25-02-2021). To track the armed groups active in the DRC and to obtain information regarding conflict and other situations of violence, see https://kivusecurity.org/map as well as the *UCPD Conflict Encyclopedia* http://www.ucdp.uu.se/#country/490 (accessed 25-02-2021). See also Stearns and Vogel "The landscape of armed groups in Eastern Congo: Fragmented, politicised networks" (December 2017) https://kivusecurity.org/reports (accessed 25-02-2021).
33 For an overview of a classification of the situation in Syria in the period around 2016, see Gill "Classifying the conflict in Syria" (2016) *International Law Studies: US Naval War College* 353–380.

the same time, organised armed group A and organised armed group B are also engaged in fighting the government armed forces of the territorial state in which they operate, then, according to the bilateral assessment approach, the intensity of violence needs to be assessed separately for the organised armed group A fighting against organised armed group B; for the intensity resulting from the fighting between organised armed group A and the armed forces of the territorial state; and a further unique determination of the severity of fighting between organised armed group B and the state armed forces. Being able to attribute indicators of violence, such as the internal displacement of persons or injured parties to the actions of a specific actor in the fog of war, is unrealistic and perhaps impossible. This reality makes the bilateral approach an inadequate assessment method for determining whether the notion of intensity is met by complex conflict situations.

2.2 Possibility of a cumulative approach

In response to the shortcomings of the strict bilateral assessment approach, Radin and Kleffner were the first critics to ask if in certain complex conflict situations, a cumulative approach to the assessment of the notion of intensity offers a solution, and whether this method is legal.[34] In response to the problem of assessing situations where multiple organised armed groups are simultaneously engaged in conflict in a single territory, such as in the DRC, Kleffner observes as follows regarding the essence of a cumulative assessment approach:

> "One of the questions that arise in such contexts is whether the requisite level of intensity can be met cumulatively by the actions of more than one organized armed group that act independently against governmental authorities or against each other, even though the actions of each one of them in their respective bilateral relations, taken in isolation, do not reach that threshold. An answer to that question is highly significant for the temporal scope of the law of NIAC. If one were to require intensity in the bilateral relations between armed force A and armed force B, armed force A and armed force C, armed force B and armed force C and so on, it would mean that several NIACS may come into existence at different points in times. In contrast, a cumulative approach to assessing intensity would mean that a *single* NIAC begins once the requisite level of intensity of the violence caused by all armed forces is reached."[35]

In its 2019 International Committee of the Red Cross (ICRC) Challenges Report *International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions,* the ICRC acknowledged the need for a cumulative approach and explained how it would be implemented: "When several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together."[36]

---

34 Radin 2013 *International Law Studies*; Kleffner 2019 *International Law Studies*.

35 Kleffner 2019 *International Law Studies* 172–173.

36 ICRC "International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions" 51, available at 4427_002_ International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions; 10.2019; 500 (icrc.org) (accessed 25-02-2021).

The cumulative assessment approach totals the degree of violence generated in each conflict (as evidenced by the presence of the *Haradinaj* indicators) between the different actors simultaneously fighting on a single territory.[37] If the sum of the combined violence equals the notion of protracted armed violence, then the notion of intensity will have been satisfied.[38] There is some scholarly support for such an approach.[39] The benefit of the cumulative assessment approach is that it resolves the predicament where a complex conflict situation clearly constitutes non-international armed conflicts but evades the application of international humanitarian law as in such situations it is impossible to attribute violence to a specific organised armed group. This renders the traditional bilateral approach unsuitable.[40] The nature of complex conflict situations in which a multiplicity of non-state actors simultaneously engaging in military operations in a single territory makes the application of national laws by the government and the enforcement of human rights law impossible, as, for the most part, a government tends to have lost control over a part of its territory. The application of international humanitarian law in complex conflict situations offers some protection for the most vulnerable.

However, there are risks associated with a broad cumulative assessment approach and with the over-application of the approach.[41] Zwanenburg cautions against too liberal an application of the cumulative assessment method. He states that it should not apply to all low-intensity situations that arise between multiple organised armed groups engaged in conflict in a single territory.[42] He argues that the ICRC's 1960 *Pictet* commentary to Common Article 3, which encourages the broad application of international humanitarian law as a means of strengthening protection, must be considered in the context of the time of its drafting.[43] At the time, the commentaries asserted: "We think, on the contrary, that the scope of application of the Article must be as wide as possible."[44] Zwanenburg explains that this assertion was made before the majority of human rights instruments were adopted and, consequently, that in certain situations the application of international humanitarian law actually may weaken the protection of individuals by providing an opening or gap for the argument that international humanitarian law displaces the protection offered by international human rights law.[45]

In a similar vein, Kleffner warns against a routine application of a blanket cumulative assessment approach which allows the application of international humanitarian law to all low-intensity conflicts where multiple organised armed groups are engaged in fighting in a single territory.[46] In support, Kleffner offers

37 Bradley 2017 *International Comparative Law Review* 30.
38 *Ibid.*
39 Kleffner 2019 *International Law Studies* 174; Bradley 2017 *International Comparative Law Review* 27–29.
40 Bradley 2017 *International Comparative Law Review* 27–29.
41 Zwanenburg (2019) 50–53.
42 *Idem*, 50.
43 *Ibid.*
44 Zwanenburg citing the 1960 Pictet Commentaries. Zwanenburg (2019) 50. Pictet (ed) *Commentary on the Geneva Conventions of 12 August 1949 (1960) International Committee of the Red Cross* 36.
45 Zwanenburg (2019) 50.
46 Kleffner 2019 *International Law Studies* 176.

an extreme example.[47] He explains that the cumulative approach could be misapplied to take into account the existence of a non-international armed conflict where the sporadic acts of violence attributable to one or to multiple organised armed groups, which takes place over an extended period of time and across a wide geographical area, satisfy the notion of protracted armed conflict.[48] Kleffner is of the view that such an "unrestrained accumulation" would generate a situation similar to the Global War on Terror which has been widely criticised as an over-application of the law of armed conflict.[49] In order to prevent an "unrestrained" cumulative assessment approach and the risk of over-application, Kleffner suggests that the cumulative assessment approach be applied in a nuanced and careful fashion,[50] and that it be restricted to complex conflict situations where acts of violence by several organised armed groups occur along a geographical and temporal continuum.[51] Kleffner explains that the purpose of the continuum requirement is to safeguard that the cumulative assessment approach is not applied to situations where there is a "loose series of acts of violence by different organized armed groups occur over a wide geographical area".[52] The continuum requirement determines that only acts of violence that can reasonably be grouped together because they occur in an identifiable location and in sufficient temporal proximity to one another, justify the application of the cumulative assessment approach.[53] Both the ICRC[54] and Radin[55] support the view that the cumulative violence approach is used only in cases where organised armed groups display a degree of coordination and cooperation. Radin proposes that there is a "link" that renders multiple armed groups a part of a single party to a conflict, and it is in such a situation that a cumulative approach should be used.[56] Radin acknowledges that little attention has been given to determining the type of link required in respect of the coordination and cooperation between parties.[57] The limited scholarly writing on this subject are abstract and speculative, probably as a result of the limited judicial practice available, the difficulty in establishing state practice, and the practice of those tasked with conflict classification. In the next part of this article I shall examine recent case law of the ICC which, to some extent, provides evidence of the cumulative approach being used to assess intensity in certain complex conflict situations.

3 THE CONTRIBUTION OF THE INTERNATIONAL CRIMINAL COURT

The aim in this part of the article is to examine the contribution of the case law of the ICC to the evolution of the cumulative assessment of violence approach.

47 *Idem*, 176–177.
48 *Ibid.*
49 *Ibid.*
50 Kleffner 2019 *International Law Studies* 177.
51 *Ibid.*
52 *Ibid.*
53 *Ibid.*
54 ICRC Report (n 36) 51.
55 Radin 2013 *International Law Studies* 723.
56 *Idem* 725.
57 *Ibid.*

To this end, the *Lubanga*,[58] *Katanga*,[59] *Bemba*,[60] *Ntaganda*[61] and *Ongwen*[62] decisions are examined. In each of these judgments the ICC was tasked with classifying complex conflict situations where multiple organised armed groups were engaged in fighting in the same territory and at the same time.[63] The fact that non-state actors were party to these conflicts signalled the possible existence of a non-international armed conflict, and thus a need to examine whether the *Tadić* requirements had been satisfied.[64] These cases are examined in the sequence in which they were adjudicated in order to draw a comparison between the manner in which each of the Trial Chambers approached the assessment of the notion of intensity in the situation before it.

The suitability may be questioned of assessing case law of the ICC in an article concerned with conflict classification an area of the law regarded as falling exclusively within the ambit of international humanitarian law. The response is simple: conflict classification is a concern in relation to the prosecution of alleged war criminals under the Rome Statute.[65] The war crime provisions in the Rome Statute[66] create an enforcement platform in the form of the ICC to adjudicate the most serious violations of international humanitarian law (criminalised and codified in the Rome Statute as war crimes).[67] Conflict classification is preliminary to the application of all international humanitarian law and, equally, it is a preliminary issue in the war crime adjudication by international criminal courts and tribunals in the sense that war crimes are committed only during armed conflict.[68] This link between international humanitarian law and international criminal law in the context of conflict classification is why the case law of the ICC is a valuable source of interpretation when it comes to issues of conflict classification.[69] Furthermore, international judicial decisions are a subsidiary source of public international law.[70]

---

58 *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* judgment pursuant to Article 74 of the Statute, Case ICC-01/04-01/00, Trial Chamber I, 14 March 2012.

59 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Germain Katanga* trial judgment, Case ICC-01/04-01/07, Trial Chamber II, 7 March 2014.

60 *Situation in the Central African Republic in the Case of The Prosecutor v Jean-Pierre Bemba Gombo* judgment pursuant to Article 74 of the Statute, Trial Chamber III, Case ICC-01/05-01/08, 21 March 2016.

61 *Ntaganda* (n 10).

62 *Situation in Uganda in the Case of The Prosecutor v Dominic Ongwen* trial judgment, Case Icc-02/04-01/15, Trial Chamber IX, 4 February 2021.

63 *Lubanga* (n 58) paras 543–567; *Katanga* (n 59) paras 1216–1218; *Bemba* (n 60) paras 662–663; *Ntaganda* (n 10) paras 716–725; *Ongwen* (n 62) paras 142–204.

64 *Tadić* (*Decision on the Defence Motion)* n 7) para 70.

65 Bradley "'Protracted armed conflict': A conundrum. Does article 8(2)(f) of the Rome Statute require an organised armed group to meet the organisational criteria of Additional Protocol II?" 2019 *South African Journal of Criminal Justice* 299–300.

66 Art 8 of the Rome Statute lists the war crimes over which the International Criminal Court may exercise jurisdiction. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 (ICC Statute).

67 Sassòli (2019) para 9.5.4.

68 Bradley 2019 *South African Journal of Criminal Justice* 299–300.

69 *Ibid.*

70 ICJ Statute (n 66) art 38(1)(d).

3.1 Lubanga (2012): *A coordination requirement*

Kleffner interprets the opening lines of paragraph 543 of the *Lubanga* judgment as evidence that Trial Chamber I of the ICC introduced the cumulative assessment approach when it made a determination of whether or not the situation before it satisfied the criterion of "protracted armed violence".[71] The instructive part of paragraph 543 of this judgment reads as follows:

> "The evidence in the case demonstrates beyond reasonable doubt that during the entire period covered by the charges there *were a number of simultaneous* armed conflicts in Ituri and in surrounding areas within the DRC, *involving various different groups. Some* of these armed conflicts which included the UPC, *involved protracted violence*…."[72]

Kleffner interprets Trial Chamber I's reference to armed conflicts taking place within the same time frame (September 2002 and August 2003)[73] in the Ituri region, and orchestrated by many organised armed groups, in its assessment of the notion of intensity, as indicative of a cumulative assessment approach in that the fighting among these groups was assessed collectively as occurring in a single territory and on a single time continuum, to arrive at the conclusion that "some" of these non-international armed conflicts did meet the minimum threshold for protracted armed violence.[74] I share Kleffner's view. In its assessment of the facts in order to determine whether the violence generated by the situation in Ituri in the period between September 2002 and August 2003 was sufficiently protracted, Trial Chamber I arrived at a collective assessment of the *Haradinaj* indicators being present from the engagement of the Union of Congolese Patriots (UPC/FPLC) and various other organised armed groups.[75] The assessment of facts by Trial Chamber I in paragraph 547 is a case in point:

> "Extensive evidence has been given during the trial concerning the UPC/FPLC's involvement in the fighting involving rebel militias (namely the RCD-ML and Lendu militias, including the FRPI) that took place in Ituri between September 2002 and August 2003. The Chamber heard evidence that the UPC/FPLC, assisted by the UPDF, fought the RCD-ML in Bunio in August 2002. In November 2002, the UPC/FPLC fought the Lendu combatants and the APC in Mongbwalu. The UPC/FPLC fought the APC and Lendu militias in Lipri, Bambu and Kobu (in February and March 2003), Mandro (March 2003), and Mahagi, among other areas. In early March 2003, fighting between the UPC/FPLC and the UPDF and several Lendu militias, including the FRPI, ended in the withdrawal of the UPC/FPLC from Bunia. However, in May 2003 the UPC/FPLC army returned to Bunia where it clashed with Lendu militias, again including the FRPI, resulting in a number of casualties."[76]

It is clear from the above that Trial Chamber I did not use the bilateral assessment approach. The engagement between the UPC/FPLC and numerous other groups was assessed collectively. The conclusion as to the nature of the conflict in paragraph 567 confirms that a cumulative assessment approach was used.[77] Paragraph 567 of the *Lubanga* judgment reads: "The Trial Chamber therefore

71 Kleffner 2019 *International Law Studies* 173.
72 *Lubanga* (n 58) para 543.
73 Para 547.
74 Kleffner 2019 *International Law Studies* 173.
75 *Lubanga* (n 58) para 547.
76 Para 546.
77 Para 567.

finds that the armed conflict *between* the UPC/FPLC *and other armed groups* between September 2002 and 13 August 2003 was non-international in nature."[78] The use of "other" and the plural "armed groups" confirms their collective or holistic assessment of the notion of intensity.[79]

Scholars observe a linkage between the organised armed groups opposing the UPC/FPLC.[80] For example, in the factual assessment of the notion of intensity Trial Chamber I observed that the APC cooperated with the Lendu armed militias, including the FRPI, to launch co-ordinated military operations against the UPC/FPLC.[81] The Popular Congolese Army (APC) and Lendu militias co-ordinated attacks against the UPC/FPLC in Mongbwalu during November 2002 and in Bogoro in March 2003.[82] The manner in which Trial Chamber I in *Lubanga* employed the cumulative approach corresponds to the ICRC's view that this approach must apply in situations where the organised armed groups oppose a common enemy and there are organised armed groups that display a form of co-ordination and cooperation.[83]

3.2 Katanga *(2014): A holistic dimension*

In its assessment of the hostilities in the Ituri region of the Congo between August 2002 and May 2003, Trial Chamber III applied the cumulative approach in assessing whether the violence resulting from the hostilities were sufficiently protracted to meet the notion of intensity.[84] In order to pursue a proper classification of the complex conflict situation before it, Trial Chamber III mapped the presence of multiple organised armed groups engaging in military operations in the Ituri region between August 2002 and May 2003.[85] Trial Chamber III specifically referred to the UPC,[86] the APC (the armed wing of the Rally for Congolese Democracy (RCD-ML)),[87] and the Ngiti militia.[88] In its assessment of the notions of organisation and intensity the Chamber did not consider the possibility of "coordination or cooperation" between the UPC, the APC and/or the Ngiti militia.[89] It is clear from paragraphs 1216 to 1218 of the *Katanga* judgment that a cumulative assessment method was adopted in determining that hostilities between the various armed groups were sufficiently serious constitute protracted armed violence.[90] Trial Chamber III holistically considered that the attack on Bogoro,[91] the fighting between Ngiti and the UPC, which it described as a cycle of violence that "extended beyond isolated attacks",[92] as well as the nature, volume and duration of attacks in Ituri between January 2002 to May

78 *Ibid.*
79 *Ibid.*
80 Kleffner 2019 *International Law Studies* 173–174); Zwanenburg (2019) 48.
81 *Lubanga* (n 58) para 546.
82 *Ibid.*
83 ICRC Report (n 36) 51.
84 *Katanga* (n 59) paras 1216–1218.
85 Paras 1196 and 1207–1211.
86 Para 1207.
87 Para 1208.
88 Para 1209.
89 Paras 1207–1212.
90 Paras 1216–1217.
91 Para 1216.
92 *Ibid.*

2003, where multiple organised armed groups engaged in fighting one another,[93] equated to "protracted armed conflict between organised armed groups" and fully met the criteria for an non-international armed conflict.[94] Trial Chamber III departed from *Lubanga* in that it introduced a holistic dimension to the cumulative assessment approach – it examined the violence generated by the organised armed groups fighting in a single territory during a specific time frame holistically, and decided that an aggregation of violence if protracted, would satisfy the notion of intensity.[95] Kleffner phrases this manifestation of the cumulative approach (which does not depend on the co-ordination and cooperation requirement) as a "more global assessment of the notion of intensity".[96]

Kleffner specifically highlights paragraph 1216 as evidence that in *Katanga* a "global" cumulative approach was followed that differs from that in *Lubanga*:

> "With specific reference to its foregoing review of the attacks that followed assault on Bogoro, the Chamber finds that the armed conflict was both protracted and intense, owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003. Thus, in Chamber's view, the evidence before it suffices to fulfil the intensity of the conflict requirement."[97]

Kleffner considers the use of "*inter alia*", in the above paragraph significant.[98] He explains that "*inter alia*" signals that in its assessment of intensity, Trial Chamber III did not categorically exclude the fighting of other groups.[99] Kleffner further observes from paragraph 1217 that the attacks that followed on Bogoro included the attacks that were conducted by Lendu militias and Ngiti and Lendo combatants against the Uganda People's Defence Force (UPDF) base, as well as an attack by the Biva of Andisoma *Collectivité* with the support of the UPDF and Hema against the Ngiti and Lendu of Nyskunde villages.[100] These attacks involve various organised armed groups engaging different enemies during the same period in close geographical proximity.[101] Kleffner concludes that from his analysis of paragraph 1217 that it is evident that Trial Chamber III "drew on these attacks cumulatively within the referenced territorial (Ituri) and temporal (January 2002 to May 2003) confines".[102] He observes that Trial Chamber III refrained from attempting to disentangle the level of violence generated by the bilateral engagement among individual organised armed groups, and instead focused attention on the violence resulting from fighting (among multiple groups) in a specific area and period.[103] The *Katanga* formulation signals the presence of a geographical as well as a temporal restriction prior to the use of the cumulative approach.

---

93 Para 1217.
94 Para 1218.
95 Cf *Lubanga* (n 58) paras 543–567; *Katanga* (n 59) paras 1216–1218.
96 Kleffner 2019 *International Law Studies* 174.
97 *Katanga* (n 59) para 1217.
98 Kleffner 2019 *International Law Studies* 174.
99 *Ibid.*
100 *Ibid.*
101 *Katanga* (n 59) paras 1207–1212, 1216–1218.
102 Kleffner 2019 *International Law Studies* 174–175.
103 *Ibid.*

3.3 Bemba *(2016): Following* Lubanga

In its assessment of whether the notion of intensity was satisfied in the *Bemba* case, Trial Chamber III considered the severity of fighting between General Bozize's rebels, on the one hand, and the organised armed groups that supported President Patassé, on the other.[104] Trial Chamber III did not follow a bilateral approach; it identified a linkage or evidence of coordination which pitted one grouping of OAGS against another grouping of OAGS.[105] The first "grouping" consisted of the Central African Armed Forces (FACA), the Presidential Security Unit (USP), the Movement for the Liberation of Congo (MLC), some Libyan Troops and militias supporting President Patassé,[106] the second (opposing the first grouping) being General Bozizé's rebels.[107] These non-state actors who were party to the conflict satisfied the necessary degree of organisation required to trigger the application of Common Article 3.[108]

An examination of the intensity of violence as a result of the attacks launched was conducted in respect of the two groupings, for example, the fact that "President Patassé's forces responded with a bombing campaign against General Bozizé's rebels".[109] The cumulative approach is confirmed by the wording in paragraphs 662 and 663 of the *Bemba* judgment, which reads as follows:

> "[T]he armed conflict commenced with hostilities between General Bozizé's rebels *and forces supporting President Patassé*. President Patassé's forces responded with a bombing campaign against General Bozizé's rebels … *Throughout the armed conflict, the forces supporting President Patassé, including the MLC, mobilised and distributed weapons and other logistics*. The armed conflict covered a large geographical area of the CAR, lasted more than four and a half months, and was characterised by regular hostilities, resulting in numerous casualties, including hundreds killed and wounded in action. The armed conflict attracted the attention of the UN, local and international media, and NGOs, such as FIDH…."[110]
>
> In light of the above, the Chamber finds beyond a reasonable doubt that the armed conflict reached a sufficient level of intensity for purposes of Articles 8(2)(*d*) and 8(2)(*f*), namely one exceeding "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature …"[111]

The above is confirmation that in *Bemba*, Trial Chamber III endorsed the cumulative assessment method, and that it followed the *Lubanga* approach. In *Lubanga*, as explained in part 3.1 of this article, the cumulative assessment approach was employed in a situation where a linkage of "coordination and cooperation" existed between the parties to the conflict. The factual assessment by Trial Chamber III in *Bemba* shows that coordinated military attacks were launched by the first grouping (the organised armed groups supporting President Patassé),[112] that these organised armed groups cooperated logistically and

104 *Bemba* (n 60) para 657.
105 Deduced from the facts discussed in *Bemba* (n 60) paras 657–663.
106 *Bemba* (n 60) para 657.
107 *Ibid.*
108 For an assessment of the degree of organisation of the non-state actors involved, see *Bemba* (n 60) paras 657–661.
109 *Bemba* (n 60) para 662.
110 *Ibid* (emphasis added). Zwanenburg also interprets para 662 to make it clear that Trial Chamber III employed the cumulative approach (Zwanenburg (2019) 50.
111 *Bemba* (n 60) para 663 (emphasis added).
112 Para 662.

coordinated the distribution of armament to those organised armed groups aligned with President Patassé.[113]

3.4 Ntaganda *(2019): Following* Katanga

In its assessment of the notion of intensity in the *Ntaganda* judgment, Trial Chamber VI considered the ferocity of the fighting between the UPC/FPLC troops and other organised armed groups present in the Ituri region during the period 6 August 2002 to 31 December 2003.[114] A close reading of paragraphs 719 to 725 supports the view that a cumulative approach, akin to the holistic approach applied in *Katanga*, was used to assess the notion of intensity in the *Ntaganda* case.[115] For example, in establishing its assessment of violence, Trial Chamber VI cited a violent encounter between the UPC/FPLC and the UPDF in Bunia against the APC and Lendo fighters in early August 2002, and in the same paragraph Trial Chamber VI took account of the military operations launched by the UPC/FPLC against Lendu fighters in October 2002. Trial Chamber VI further considered the November 2002 attacks where "intense fighting" took place between the UPC/FPLC and the PAC, Ngiti, and Mai Mai fighters. The prolonged military operations on the Banyali-Kilo and Walendu Djatsi collectivities were also considered.[116] Finally, Trial Chamber VI looked at the conflict that raged between the UPC/FPLC and the APC along the Beni-Komanda-Bunai Road during the period between July 2002-2003.[117] Trial Chamber VI found that this resulted in civilian deaths as well as large numbers of internally-displaced individuals.[118] The fighting furthermore prompted calls for peace negotiations by the international community[119] as well as the deployment of peacekeepers to Ituri.[120] These indicators of protracted armed violence (death toll, internal displacement, calls for peace negotiations, and United Nations (UN) involvement) were assessed cumulatively not bilaterally;[121] a conclusion supported by the wording of paragraph 725 of the *Ntaganda* judgment:

> "On the basis of the foregoing, the Chamber concludes beyond reasonable doubt that the fighting between the UPC/FPLC and UPDF, as well as the fighting between the UPC/FPLC and the opposing organised armed groups, specifically the APC and its allies, the FNI/FRPI and the Lendu fighters, met the relevant intensity requirement. Accordingly, the Chamber finds beyond a reasonable doubt that the UPC/FPLC was, at all times during the relevant period, namely between on or about 6 August 2002 and 31 December 2003, involved in at least one non-international armed conflict with an opposing party."[122]

In my view, the first sentence of paragraph 725 confirms that the assessment of the severity of fighting between the various parties to the conflict and the consequences measured according to the *Haradinaj* indicators were cumulative.[123] Any form of linkage between organised armed groups was not considered in this

113 *Ibid.*
114 *Ntaganda* (n 10) para 725.
115 Paras 719–725.
116 Para 719.
117 Para 720.
118 Para 722.
119 Para 723.
120 Para 724.
121 Paras 716–725.
122 *Ntaganda* (n 10) para 725 (emphasis added).
123 *Ibid*; *Haradinaj* (n 18) para 49.

assessment.[124] The final sentence of the passage quoted above confirms the aggregate or holistic nature of the cumulative approach in that Trial Chamber VI did not identify multiple, unique, co-existing non-international armed conflicts but rather came to the conclusion that the UPC/FPLC was engaged in at least one non-international armed conflict during the relevant time frame with "an opposing party".[125] The use of the phrase "an opposing party" is not specific and reflects the reality that in complex conflicts such as the situation in the DRC between 6 August 2002 and 31 December 2003, the multiplicity of non-state actors, together with the fog of war, do not allow for a bilateral intensity assessment. Perhaps it is also indicative that in a complex conflict situation (at the time more than 70 organised armed groups were operating in Ituri)[126] the *Lubanga* approach to cumulative assessment, which demands a degree of co-ordination or linkage between the organised armed groups, is not practical. In summary, the intensity of multiple military operations between the UPC/FPLC and various organised armed groups was assessed holistically. It is, therefore, reasonable to conclude that in *Ntaganda*, Trial Chamber VI echoed the "holistic" cumulative approach introduced by Trial Chamber II in *Katanga*.

3.5 Ongwen *(2021): An entwining of military operations and simultaneous civilian attacks*

The *Ongwen* judgment of 4 February 2021 offers valuable insight into navigating the complexities in the possible use of a cumulative violence approach in assessing the notion of intensity in a situation where the organised armed group not only is engaged in fighting government forces or enemy fighters, but frequently also launches attacks against civilians.[127] An assessment of the facts considered by Trial Chamber IX in *Ongwen* reveals two phases to the military operations of the Lord's Resistance Army (LRA): in the first instance, the LRA launched attacks against civilians (in the main, confined in internally-displaced person (IDP) camps) and, secondly, simultaneously against the Ugandan armed forces in their barracks in close proximity to the IDP camps.[128] As the military operations were two-fold, and not strictly to be described as fighting among the parties to the conflict, it is difficult to disentangle the consequences of the conflict in order to make a separate assessment of the indicative factors of armed violence. For example, civilians, fighters, and soldiers may be killed in a single territory on the same time continuum. Those tasked with conflict classification, in this case Trial Chamber IX of the ICC, cannot determine how many of the dead bodies can be attributed to an attack on civilians and how many are the result of military operations between the parties to the conflict.

In *Ongwen*, Trial Chamber IX had to assess whether a non-international armed conflict existed on the territory of Uganda during the time relating to the charges – from 1 July 2002 to 31 December 2005.[129] After confirming that the LRA was sufficiently organised to fulfil the minimum threshold of organisation demanded

124 *Ntaganda* (n 10) paras 719–725.
125 Para 725.
126 *Ibid.*
127 See the court's account of attacks launched by the LRA from 1 July 2002 to 31 December 2005 at *Ongwen* (n 62) paras 142–204.
128 Cf *Ongwen* (n 62) paras 142–204.
129 *Ongwen* (n 62) para 123.

under Common Article 3,[130] Trial Chamber IX had to assess whether the ferocity of fighting between the parties to the conflict equated to "protracted armed violence".[131] Attributing violence to specific parties to the conflict proved problematic, akin to the situation in Ponto Delgado where the LRA regularly engaged in military operations against the armed forces of the Ugandan government, and in the same period launched attacks on civilians.[132] Trial Chamber IX documented certain key attacks, including the attacks on the Pajule IDP camp,[133] the Odek IDP camp,[134] the Lukodi IDP Camp,[135] and, finally, the Abok IDP camp.[136] In the attack on the Pajule IDP camp, the LRA fighters specifically targeted the Pajule IDP camp where between 15 000 and 30 000 internally-displaced civilians lived.[137] Another facet of this military operation was an onslaught by the LRA against the military barracks of the Ugandan armed forces.[138] The *Haradinaj* indicators of violence – death toll, property damage, injuries, and so forth – can be seen to exist but in this scenario it is impossible to attribute the consequences of the fighting to the attack on civilians or to the fighting between the LRA and Ugandan armed forces.

In its assessment of the intensity threshold, Trial Chamber IX further assessed the level of intensity by examining the attack on the Odek IDP camp.[139] The LRA fighters again launched simultaneous military operations, the first being an attack on civilians and the second an attack on the Ugandan armed forces.[140] In the first phase of the military operation the LRA fighters again specifically targeted a civilian IDP camp.[141] The consequence of this attack was at least 52 civilians dead, 10 injured, and 40 abducted.[142] In the second phase of the military operation the LRA engaged the Ugandan armed forces at their military barracks in close proximity to the Odek IDP camp.[143] During this attack, members of the Ugandan armed forces lost their lives and their barracks were burnt down.[144]

Trial Chamber IX further assessed the attack by the LRA on the Lukodi IDP camp on or around 19 May 2004.[145] Again the strategy of the LRA involved a two-phase attack. Some fighters attacked the civilian areas of the IDP camp, while others engaged with government soldiers in their barracks,[146] and, outnumbered, the government soldiers fled, leaving the civilians defenceless.[147] The

130 For an assessment of the organisational structure of the LRA, see *Ongwen* (n 62) paras 123–141.
131 *Ongwen* (n 62) paras 142–204 and 2810.
132 See Crisis Watch Database reports (n 2).
133 *Ongwen* (n 62) paras 144–158.
134 Paras 159–177.
135 Paras 178–189.
136 Paras 190–204.
137 Para 144.
138 Para 147.
139 Paras 159–177.
140 Para 164.
141 Para 159.
142 Paras 167–176.
143 Para 164.
144 *Ibid.*
145 *Ongwen* (n 62) paras 178–189.
146 Para 181.
147 *Ibid.*

report of fatalities as a result of this attack was at least, 59 civilians.[148] The attack resulted in burning down approximately 210 civilian huts.[149] The final attack assessed by Trial Chamber IX in the *Ongwen* case was that on the Abok IDP camp.[150] The same two-phase approach was used. In the engagement between the Ugandan armed forces and the LRA, the Ugandan armed forces managed to protect their barracks but those defending the camp were overpowered by the LRA, leaving the civilians in the camp defenceless.[151] The LRA burned down civilian huts and destroyed food stocks.[152] At least 28 civilians died as a result of this attack.[153] The facts do not indicate the death toll as resulting from the actions of either the LRA or the Ugandan armed forces.[154]

The assessment of whether or not the violence resulting from the above attacks constituted protracted armed violence sufficient to trigger the existence of a non-international armed conflict offers no evidence that, in *Ongwen*, Trial Chamber IX attempted to disentangle the indicators of violence resulting from the warring parties' engagement with each other, and violence arising from attacks on civilians (admittedly, this is impossible). Instead, Trial Chamber IX assessed that the violence throughout the period covered by the charges was, seen holistically, sufficient to exceed the minimum threshold of intensity.[155]

The ICC has not provided clear guidance as to the contours of the cumulative assessment approach,[156] but three slightly varied manifestations of these have emerged from the case law. In the first instance, the approach followed in *Lubanga* and *Bemba* corresponds to the ICRC's construction of the cumulative approach which seeks to uncover a linkage of "coordination or cooperation" between the organised armed groups involved in the conflict. Secondly, *Katanga* and *Ntaganda* employ a holistic approach in applying the cumulative assessment method akin to Kleffner's approach. In *Katanga* and *Ntaganda* the Trial Chambers did not pursue a notion of linkage to justify the use of the cumulative assessment approach. However, the International Criminal Tribunal found adequate justification for using a cumulative assessment approach in complex conflict situations where multiple organised armed groups fight on a determinable territory, in close spatial proximity, and during a specific time continuum. Thirdly, in *Ongwen* the cumulative approach was used to assess whether violence resulting from military operations launched by an organised armed group, which could not be disentangled from attacks launched by the same organised armed group against the civilian population, equated to protracted armed violence. Perhaps *Ongwen* merely followed the examples in *Katanga* and *Ntaganda*, but the co-existence of attacks against civilians that seem to generate greater violence than military operations, could mean that *Ongwen* establishes the application of the cumulative approach in a situation where an organised armed group attacks civilians and the armed forces tasked with protecting them simultaneously.

148 Paras 182 and 184.
149 Paras 62 and 186.
150 Paras 190–204.
151 Para 194.
152 Para 196.
153 Para 197.
154 Cf *Ongwen* (n 62) paras 190–204.
155 *Ongwen* (n 62) para 2810.
156 Zwanenburg (2019) 50; Kleffner 2019 *International Law Studies* 177.

4 CONCLUSION

The purpose of this article was to examine whether the cumulative assessment approach in determining the intensity of violence requirement needed to trigger the application of international humanitarian law offers a resolution where a mosaic of complex conflict situations cannot be disentangled to an extent which allows the violence be attributed to a single organised armed group as is proposed in order to employ a traditional bilateral assessment approach. Before the ICC turned to using the cumulative assessment approach, it had been an abstract and theoretical scholarly formulation merely proposed as offering a solution to the failure of the bilateral approach in the assessment of the notion of intensity in a complex conflict situation. The application of the cumulative approach by the ICC, in my view, is a necessary and welcome development. If the ICC had not used the cumulative approach but rather relied on a bilateral assessment, it would have been unable to classify the conflicts it adjudicated and the prosecution of alleged war criminals would be impossible.

An exploration of the *Lubanga*, *Katanga*, *Bemba*, *Ntaganda* and *Ongwen* decisions has not provided a strict formulation or set of criteria that circumscribes the cumulative assessment approach, but it has shown its benefit in complex conflict situations where a bilateral approach fails and the most vulnerable do not benefit from the protection offered by international humanitarian law, and those most responsible for the commission of war crimes are not prosecuted as the international criminal courts are unable to match the notion of intensity in order to trigger the war crime provisions.

An examination of the *Lubanga*, *Katanga*, *Bemba*, *Ntaganda* and *Ongwen* decisions demonstrates judicial practice in support of the application of the cumulative violence assessment. Three variations in the application of this approach are identified. In the first instance, in *Lubanga* and *Bemba* the cumulative assessment approach employed depended on the identification of coordination and cooperation among organised armed groups fighting a common enemy. Secondly, in *Katanga* and *Ntaganda* a holistic or, in the language of Kleffner, a "global" cumulative assessment approach was used. The use of this approach was justified by inserting a temporal and a geographic requirement to the violence resulting from fighting by multiple actors in a complex conflict situation that took place in a specific territory during the same time period. Thirdly, *Ongwen* applied the cumulative approach in a situation where an organised armed group practised a two-fold military strategy: to attack the civilian population held in IDP camps and to attack the armed forces tasked with protecting the civilian population.

Disentangling responsibility for the consequences of violence that inform the indicator of violence in these situations is impractical. In my view, a broader use of the cumulative approach is welcome. A consideration of the case law shows that the cumulative approach demonstrates flexibility by being able to address a mosaic of armed conflicts or violence that take place in the same time frame in a determined territory. In my view, a minimum of criteria allowing flexibility is a *desideratum* akin to Kleffner's formulation that there is a geographic dimension of proximity to where attacks occur and a temporal continuum. These criteria are sufficient to avoid a risk of over applying the cumulative assessment approach in a manner that elevates low-intensity, sporadic, and isolated attacks to the realm of the law of non-international armed conflict.