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# Chapter 8

## Year in Review 2021



James Patrick Sexton, Florent Beurret and Nathan O'Regan

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**Abstract** The Year in Review seeks to provide readers with an overview of developments with significant relevance to international humanitarian law (IHL)/the law of armed conflict (LOAC) that took place during 2021. More specifically, the Year in Review assesses: (i) potential situations of armed conflict, including a classification of them as international or non-international armed conflicts, belligerent occupation, or situations not meeting the relevant legal requirements for the application of IHL; (ii) a summary of relevant proceedings and developments relating to the prosecution of serious violations of IHL—war crimes—at international, hybrid, and domestic courts and tribunals; and, (iii) an overview of developments in the IHL-related fields of arms control and disarmament.

**Keywords** International Humanitarian Law · Law of Armed Conflict · Non-State Armed Groups · Belligerent Occupation · War Crimes · Investigations · Prosecutions · Universal Jurisdiction · Courts and Tribunals · Arms Control · Disarmament · Conventional Weapons · Unconventional Weapons · Outer Space · Cyberspace

## 8.1 Armed Conflicts and Related Developments

Consistent with previous years, 2021 saw the continuation of ongoing situations of armed violence and the beginning of new hostilities.<sup>1</sup> Such developments, among other important considerations, give rise to the question of whether international humanitarian law (IHL)—also known as the law of armed conflict (LOAC)—applies.<sup>2</sup>

In this first section, armed hostilities and situations of occupation that occurred in 2021 are reviewed. In particular, it is assessed whether those situations qualified as international armed conflicts (IACs), non-international armed conflicts (NIACs), or belligerent occupation under IHL, or whether the situations did not reach the respective thresholds for either an IAC, NIAC, or belligerent occupation to exist. Classifying potential armed conflicts is essential as this determines which provisions of IHL apply.<sup>3</sup> IACs are conflicts between two or more states that occur in situations of ‘declared war or of any other armed conflict which may arise’.<sup>4</sup> It is widely accepted that the threshold of violence required for the triggering of an IAC is

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<sup>1</sup> For the Year in Review 2020, see Klonowska and Dubey 2022.

<sup>2</sup> The term ‘IHL’ will be used throughout this chapter; the term ‘law of armed conflict’ is considered synonymous to IHL.

<sup>3</sup> See ICRC 2017.

<sup>4</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (adopted 12 August 1949, entered into force 21 October 1950) (GCI); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (ibid.) (GCII); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (ibid.) (GCIII); Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (ibid.) (GCIV), Article 2.

considerably low, involving any ‘resort to armed force between States’.<sup>5</sup> In situations where a state engages in hostilities against a non-state armed group (NSAG) party on a territory of another state whose consent has not been obtained, we follow the interpretation of the International Committee of the Red Cross (ICRC) that such an act constitutes a breach of that state’s sovereignty and qualifies as an IAC between those two states.<sup>6</sup> Situations of belligerent occupation, where one state effectively controls the territory of another state without the latter state’s consent, also triggers the application of IAC law, including provisions unique to situations of occupation.<sup>7</sup> Under Article 42 of the Hague Regulations, ‘[t]erritory 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’.<sup>8</sup> In addition, under Common Article II of the Four Geneva Conventions of 1949, the law of occupation applies even in situations where ‘the said occupation meets with no armed resistance’.<sup>9</sup>

Qualitatively different from IACs, NIACs are conflicts between either (i) a state (or states) and an NSAG (or multiple thereof); or, (ii) two or more NSAGs. For an NSAG to become a party to a NIAC, it must be sufficiently ‘organized’.<sup>10</sup> Characteristics that can indicate organisation include, but are not limited to, the existence of a ‘command structure and disciplinary rules and mechanisms within the group’, the control of territory, and the ‘ability to plan, coordinate and carry out military operations’, among other factors.<sup>11</sup> In addition, hostilities must be sufficiently intense between the relevant actors for a NIAC to exist, defined as ‘protracted armed violence’.<sup>12</sup> Indications of intensity include the number of civilians that have fled the affected area(s), the types of weapons used, and the control of areas of territory by NSAGs, among other factors.<sup>13</sup> For Additional Protocol II of the Four Geneva Conventions of 1949 (APII)—which extends the treaty law applicable to a particular form of NIACs—to apply to situations of violence, several additional characteristics must be present. These requirements are that: (i) the conflict exists between a state party to APII, and (ii) it exists within their territory: ‘between its armed forces and

<sup>5</sup> ICTY, *The Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, (*Tadić* 1995) para 70; see also Akande and Saul 2020, pp 34–35.

<sup>6</sup> ICRC 2020, para 293.

<sup>7</sup> See Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) U.S.T.S. 539, 2 A.J.I.L. Supp. 90, Annex to the Convention, Article 42. See also GCI-IV, above n 4, Article 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> GCI-IV, above n 4, Article 2.

<sup>10</sup> *Tadić* 1995, above n 5, para 70.

<sup>11</sup> ICTY, *The Prosecutor v. Ramush Haradinaj and others*, Trial Chamber, Judgement, 3 April 2008, IT-04-84-T, para 60.

<sup>12</sup> *Tadić* 1995, above n 5, para 70.

<sup>13</sup> ICTY, *The Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Trial Chamber, Judgement, 10 July 2008, IT-04-82-T, para 177.

dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement' APII.<sup>14</sup> Instances where APII may apply will be indicated throughout this Year in Review where relevant. In general, we take the approach of compartmentalising conflicts, meaning that each NSAG's level of organisation and the intensity of violence between it and each opposing party is assessed independently.<sup>15</sup>

The potential armed conflicts which are examined in this section are not necessarily exhaustive; instead, new conflicts and those which saw significant developments in 2021 are focused upon. It should also be noted that armed conflicts' legal classification can be debated and/or change over time, which will also be identified where relevant. As such, conflict classifications made within this Year in Review should not be considered as absolute claims, but analysis based on the information available. In addition to conflict classification, references to potential violations of IHL within the relevant conflicts are also highlighted. The methodology used to collect information for this section includes the assessment of relevant news sources (both local and international), reports of international organisations and non-governmental organisations, and academic commentary where relevant. In line with the intention that the Year in Review can be a useful resource for further research, open access resources have been prioritised when possible.

### **8.1.1 *Afghanistan***

In 2021, the ongoing armed conflict situation in Afghanistan changed dramatically.<sup>16</sup>

#### **8.1.1.1 Taliban Offensive**

Firstly, following the withdrawal of troops by North Atlantic Treaty Organisation (NATO) states and their allies pursuant to an initial 2019 'agreement in principle' between the US and the Taliban—at that point an NSAG—, Afghanistan's armed forces (the Afghan National Security Forces (ANSF)) fell to concurrent defeats to the Taliban, losing territory in several important regions such as Kandahar Province.<sup>17</sup> These territorial losses continued despite the increased use of airstrikes by several

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<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978), Article 1(1).

<sup>15</sup> Vité 2009, pp 92–93.

<sup>16</sup> Klonowska and Dubey 2022, pp 159–161.

<sup>17</sup> Followed up with a peace agreement. See Maizland L (2020) U.S.-Taliban Peace Deal: What to Know. <https://www.cfr.org/backgrounder/us-taliban-peace-deal-agreement-afghanistan-war>. Accessed 20 May 2022.

NATO and allied states against the Taliban, mainly by the US.<sup>18</sup> The Taliban's assault was initially launched in May 2021, immediately following the beginning of the final withdrawal of US and allied troops.<sup>19</sup> By 15 August, Afghan President Ashraf Ghani had fled Afghanistan and the Taliban were in *de facto* control of the majority of the country. While resistance from ANSF forces continued in some areas in the days after, the Taliban had by this stage effectively defeated the ANSF. Immediately following the Taliban's capture of the capital, Kabul, there was widespread disorder as thousands attempted to flee the country, especially at Kabul airport. In response, US and other NATO state forces assumed security of the airport while diplomatic staff and selected Afghan citizens were evacuated. The last US soldier left Afghanistan on 30 August 2021, following nearly 20 years of US and NATO states' presence.<sup>20</sup>

Regarding the hostilities in the time preceding the Taliban's takeover of governmental functions in Afghanistan, it must be determined whether NIACs existed and between which actors. Firstly, it is highly likely that the Taliban satisfied the organisational requirements for an armed group under IHL. During the relevant time, the Taliban had a clear command structure, engaged in political deals with nation-states, and illustrated their capacity to effectively plan military operations through the rapid advances they made in the summer of 2021.<sup>21</sup> The intensity of the hostilities between the Taliban and the ANSF, which involved fighting across the majority of areas of the country and the use of heavy weapons and airstrikes by the ANSF, also clearly surpassed the threshold required by IHL.<sup>22</sup> Therefore, it can be concluded that the Taliban and Afghanistan continued to be engaged in a NIAC until the capitulation of ANSF forces in August 2021.

Regarding the hostilities between the Taliban and the US and other NATO states during this time, it would need to be individually assessed whether the intensity of hostilities was met or continued to be met between the Taliban and each state. For the US, considering that it continued to utilise airstrikes against the Taliban in support of the ANSF until immediately before the Taliban's capture of Kabul, it can also be concluded that the intensity of violence was met and therefore a NIAC was in existence.<sup>23</sup>

Therefore, during the period in which the Taliban was considered an NSAG in 2021, the hostilities can be classified as parallel NIACs between the Taliban and Afghanistan, the Taliban and the US, and so on. However, it is unclear at which

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<sup>18</sup> The Guardian (2021) Timeline: the Taliban's sweeping offensive in Afghanistan. <https://www.theguardian.com/world/2021/aug/16/timeline-the-talibans-sweeping-offensive-in-afghanistan>. Accessed 29 March 2022.

<sup>19</sup> Ibid.

<sup>20</sup> Ahmed S (2021) He is the Last American Soldier to Leave Afghanistan. <https://www.npr.org/2021/08/30/1032683828/the-last-american-soldier-to-leave-afghanistan?t=1646910349642>. Accessed 29 March 2022.

<sup>21</sup> Sayed A (2021) Analysis: How Are the Taliban Organized? [https://www.voanews.com/a/us-afghanistan-troop-withdrawal\\_analysis-how-are-taliban-organized/6219266.html](https://www.voanews.com/a/us-afghanistan-troop-withdrawal_analysis-how-are-taliban-organized/6219266.html). Accessed 10 June 2022.

<sup>22</sup> See UNAMA 2021.

<sup>23</sup> US CENTCOM 2021.

point in time that the Taliban can be considered to have represented the state of Afghanistan. Once the Taliban gained effective control of the country (which was arguably achieved by late-August/early-September 2021), it is likely that they were bound by Afghanistan's international obligations, including the law applicable in IACs.<sup>24</sup> It is uncertain whether hostilities between the Taliban and states supporting the NATO mission occurred after the Taliban were in effective control of Afghanistan; however, this seems unlikely as by the stage that the Taliban had seized Kabul and assumed control over the country, the US and other states' armed forces did not engage the Taliban while, for instance, guarding Kabul Airport.<sup>25</sup> As such, it is unlikely that an IAC existed between the Taliban (as representing Afghanistan) and any of these states during this time.

### 8.1.1.2 Islamic State-Khorasan

In addition to the conflict between the Taliban and the ANSF/NATO and allied states during 2021, the ANSF and the Taliban have each been engaged in some form of violence with IS-K (Islamic State-Khorasan) since their emergence in 2015. IS-K pledges allegiance to the wider Islamic State (IS) movement, although it is considered to have an independent command structure.<sup>26</sup> IS-K and the Taliban subscribe to different ideologies and interpretations of Islam, with IS-K viewing the Taliban as 'an irreconcilable enemy that needs to be militarily defeated'.<sup>27</sup> Nevertheless, IS-K has previously recruited Taliban defectors.<sup>28</sup> IS-K have mainly been based in Eastern Afghanistan in the provinces of Nangarhar and Kunar which both border Pakistan.<sup>29</sup> On 26 August 2021, a suicide bomb attack on Kabul Airport which killed over 180 people, including 13 US soldiers, was claimed by IS-K.<sup>30</sup> Other notable attacks claimed by IS-K include an 8 October suicide bombing in Kunduz which reportedly killed and wounded over 100 people.<sup>31</sup> The group is reported to have had a fighting strength of around 3000 at its height,<sup>32</sup> but this may have decreased, with the majority

<sup>24</sup> See Saul 2021.

<sup>25</sup> Garamone J (2021) Taliban Take Kabul, U.S. Troops Arrive to Facilitate Departures. <https://www.defense.gov/News/News-Stories/Article/Article/2732900/taliban-take-kabul-us-troops-arrive-to-facilitate-departures/>. Accessed 10 June 2022.

<sup>26</sup> Center for Strategic & International Studies 2018.

<sup>27</sup> Mir 2021.

<sup>28</sup> Ibid.

<sup>29</sup> Gardner F (2021) Afghanistan: Who are Islamic State Khorasan Province militants? <https://www.bbc.com/news/world-asia-58333533>. Accessed 29 March 2022.

<sup>30</sup> Seldin J (2022) Pentagon: Lone Bomber Behind August 2021 Attack on Kabul Airport. <https://www.voanews.com/a/pentagon-lone-bomber-behind-august-2021-attack-on-kabul-airport-/6427383.html>. Accessed 29 April 2022.

<sup>31</sup> Al Jazeera (2021) Afghanistan: Dozens killed in suicide bombing at Kunduz mosque. <https://www.aljazeera.com/news/2021/10/8/blast-hits-a-mosque-in-afghanistans-kunduz-during-friday-prayers>. Accessed 29 March 2022.

<sup>32</sup> Gardner F (2021) above n 29.

of its members divided into cells throughout Afghanistan. In the initial stages of 2021, the group's violence against the ANSF and Taliban resulted in 77 claimed and/or attributed attacks, an increase from 2020.<sup>33</sup> The group's violence against the Taliban increased once they had assumed effective control over the country, with the Taliban also responding heavily.<sup>34</sup>

Regarding the question of whether IS-K constitutes an organised armed group for the purposes of conflict classification, it is generally difficult to accurately assess terrorist groups owing to, among other factors, their unclear structure.<sup>35</sup> Nevertheless, in comparison to some other terrorist groups, IS-K largely remained concentrated in a localised area (Nangahar and Kunar Provinces) with clear communication and coordination between its members. In addition, as highlighted, IS-K was able to plan and carry out multiple attacks against the Taliban and civilian populations that caused high levels of casualties. As such, the organisational threshold was arguably met in 2021.

On the intensity of hostilities, the sustained and concerted attacks carried out by IS-K, especially following the Taliban's takeover of Afghanistan, suggests that protracted armed conflict between the Taliban and IS-K existed during 2021. Indeed, the Taliban were reported to have sent an additional 1300 soldiers to Nangahar province in late 2021 in order to counter the threat of IS-K.<sup>36</sup> The classification of the conflict between IS-K and the Taliban as a NIAC is not affected by the Taliban's assumption of effective control over Afghanistan in August/September 2021 as IS-K remained an NSAG. Nevertheless, it is interesting to note that, although not assessed here, if IS-K was considered to be in a NIAC with Afghanistan during the first half of 2021, this NIAC would have continued once the Taliban assumed effective control over Afghanistan and the previous armed conflict between the Taliban (as an NSAG) and IS-K would have ceased. Determining when this occurred, however, is beyond the scope of this Year in Review.

The US also planned and carried out several drone strikes against IS-K targets within Afghanistan during the latter part of 2021, including one which erroneously killed 10 civilians.<sup>37</sup> However, it is unclear whether the violence between the US and IS-K could be considered to reach the intensity threshold required under IHL. As the intensity threshold is contestable, scholars disagree on the level of violence which should trigger the application of NIAC law. For some, trends in contemporary armed conflicts—including the use of drones—require that IHL is triggered at a lower level of intensity; others advocate that it should remain high.<sup>38</sup> Without discrediting the

<sup>33</sup> UNSC 2021b, p 17.

<sup>34</sup> Jadoon et al. 2022, pp 41–42.

<sup>35</sup> See Gaggiolo and Kilibarda 2022, p 203.

<sup>36</sup> Pakistan Observer (2021) Taliban send hundreds of fighters to eastern Afghanistan to wage war against Islamic State. <https://pakobserver.net/taliban-send-hundreds-of-fighters-to-eastern-afghanistan-to-wage-war-against-islamic-state/>. Accessed 8 May 2022.

<sup>37</sup> Al Jazeera (2021) Drone Attack killed 10 civilians in Kabul, US acknowledges. <https://www.aljazeera.com/news/2021/9/17/drone-strike-killed-10-civilians-in-kabul-us-acknowledges>. Accessed 29 April 2022.

<sup>38</sup> For a summary of the debate, see D'Cunha 2018.



former view, the traditional approach of ‘protracted armed violence’ is followed here and, therefore, in agreement with Milanovic, it is concluded that the international law applicable to such strikes was likely international human rights law and not IHL.<sup>39</sup>

### 8.1.1.3 Afghanistan-Iran Border Conflict

On 1 December 2021, violence broke out between Taliban fighters and Iranian border guards on Afghanistan’s western border.<sup>40</sup> While there are conflicting accounts of what caused the clashes, it is reported that several fighters were killed on each side and that light weapons and artillery were used in the exchanges.<sup>41</sup> Throughout the course of 1 December, it is also alleged that Taliban fighters captured several border crossings on the Iranian side of the border before withdrawing after an agreement was reached later that day.<sup>42</sup> As this armed violence took place between two states, it can be concluded that this constituted an IAC, albeit very limited in scale and duration. Indeed, we follow the ICRC’s interpretation of CAII that ‘[e]ven minor skirmishes between the armed forces (...) would spark an international armed conflict and lead to the applicability of humanitarian law’.<sup>43</sup>

## 8.1.2 Burkina Faso

In 2021, instability and violence in Burkina Faso markedly increased, with the number of attacks carried out by various NSAGs rising from 500 in 2020 to more than 1,150 in 2021.<sup>44</sup>

For more than a decade, the Central Sahel region—which includes Burkina Faso, Mali (see Sect. 8.1.8) and Niger (see Sect. 8.1.11)—has seen violence between numerous actors, including government forces (with the support of certain intervening states, notably France), Islamist armed groups, ethnic militias, and ‘self-defence groups’.<sup>45</sup> These conflicts have been exacerbated by external factors, including desertification.<sup>46</sup>

<sup>39</sup> Milanovic 2021.

<sup>40</sup> Radio Free Europe/Radio Liberty (2021) Iranian Border Guards Clash with Taliban in ‘Misunderstanding’. <https://www.rferl.org/a/iranian-border-guards-taliban-clash/31589279.html>. Accessed 29 March 2022.

<sup>41</sup> Nawabi S (2021) Taliban: Several Iranian guards dead after Minroz border clashes. <https://www.arabnews.com/node/1979871/world>. Accessed 29 March 2022.

<sup>42</sup> Ibid.

<sup>43</sup> ICRC 2020, para 270.

<sup>44</sup> Al Jazeera (2022) Burkina Faso: Military coup prompts fear of further instability. <https://www.aljazeera.com/news/2022/1/27/burkina-faso-military-coup-prompts-fears-of-further-instability>. Accessed 21 April 2022; see also Klonowska and Dubey 2022, pp 163–165.

<sup>45</sup> Global Centre for the Responsibility to Protect 2022.

<sup>46</sup> Mbaye and Signé 2022.

Burkina Faso started witnessing attacks by NSAGs linked to Al-Qaeda and IS in 2015, which spilled over from neighbouring Mali. The major groups that have been involved in the violence are Ansaroul Islam, the Islamic State in West Africa Province (ISWAP), the Islamic State in the Greater Sahara (ISGS), and the Group for the Support of Islam and Muslims (JNIM), which is linked to Al-Qaeda. In 2021, the increase in attacks put further pressure on Burkina Faso's security forces and government, resulting in various protests demanding new leadership to strengthen the security capabilities of the state.<sup>47</sup> These protests were also aimed at international forces, notably France, who have supported Burkina Faso's military forces since 2014.<sup>48</sup>

One of 2021's largest attacks took place in the village of Solhan on 4 June, where at least 160 people were killed, most of whom were civilians.<sup>49</sup> In Burkina Faso, however, it is often unclear which of the multiple Islamist NSAGs are responsible for attacks. With violence spreading from the north and east into the south and west of Burkina Faso during 2021,<sup>50</sup> over 350 civilians were killed by such groups.<sup>51</sup> The groups also targeted Burkinabe military forces, one example being an unclaimed attack that killed 49 military police officers in northern Burkina Faso in November 2021.<sup>52</sup> In addition, 237,000 people were internally displaced in 2021 due to the violence, bringing total internal displacements in Burkina Faso caused since 2016 to 1.4 million.<sup>53</sup>

Owing to the multiple groups operating in Burkina Faso during 2021, it is possible that Burkina Faso was party to multiple overlapping NIACs.<sup>54</sup> These groups also engaged in hostilities amongst each other, such as between JNIM and ISGS, which may also have qualified as NIACs.<sup>55</sup> It is beyond the scope of this Year in Review to analyse each group's organisational structure and the respective intensity of violence between the groups and Burkina Faso or among certain groups themselves. Owing to their prevalence in 2021, here it is assessed whether JNIM and/or ISGS were parties

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<sup>47</sup> Ndiaga T (2021) Burkina Faso protest against militant violence turns violent. <https://www.reuters.com/world/africa/burkina-faso-police-fire-tear-gas-protest-against-militant-violence-2021-11-27/>. Accessed 21 April 2022.

<sup>48</sup> Deutsche Welle (2021) Burkina Faso: French soldiers injure protesters. <https://www.dw.com/en/burkina-faso-french-soldiers-injure-protesters/a-59892337>. Accessed 19 May 2022.

<sup>49</sup> Al Jazeera (2021) 'Kill them all, don't spare anyone': A massacre in Burkina Faso. <https://www.aljazeera.com/features/2021/10/24/kill-them-all-dont-spare-anyone-a-massacre-in-burkina-faso>. Accessed 21 April 2022.

<sup>50</sup> Mednick S (2021) Jihadis expand control to new Burkina Faso fronts. <https://apnews.com/article/africa-religion-government-and-politics-burkina-faso-ab3cc33ca48741adc0d5b33004604b8f>. Accessed 21 April 2022.

<sup>51</sup> Human Rights Watch 2022a.

<sup>52</sup> Al Jazeera (2021) Burkina Faso: Death toll in security post attack jumps to 53. <https://www.aljazeera.com/news/2021/11/17/burkina-faso-death-toll-security-post-attack-jumps-to-53>. Accessed 21 April 2022.

<sup>53</sup> Human Rights Watch 2022a.

<sup>54</sup> In line with the approach of compartmentalising armed conflicts, see Sect. 8.1.

<sup>55</sup> Nsaibia and Duhamel 2021; Kleinfeld 2020.

to NIACs against the Burkinabe government, and perhaps against each other, during 2021.<sup>56</sup>

Beginning with JNIM, with regards to the organisational requirement, the group is a coalition of multiple smaller Al-Qaeda-linked groups, including Ansar Dine, Katibat Macina, al-Mourabitoun and the Sahara branch of Al-Qaeda in the Islamic Maghreb, that work together in a ‘business association’-like structure across the Central Sahel region.<sup>57</sup> While the groups constituting JNIM enjoy a degree of autonomy, JNIM has an overall leadership and, through the coalition, is able to negotiate ceasefires with other armed groups (for instance, in Mali) and is considered as an individual entity by the Malian government, who entered into preliminary peace talks with the group in 2021.<sup>58</sup> Therefore, owing to these factors, it is possible that JNIM constituted an organised armed group for the purposes of IHL during 2021, both in Burkina Faso but potentially elsewhere (see Mali (Sect. 8.1.8) and Niger (Sect. 8.1.11)). It is important to note, however, that the classification of JNIM as an organised armed group does not prevent any of its constituent groups, such as Katibat Macina, also being considered organised armed groups for the purposes of IHL.<sup>59</sup> With regards to the intensity of violence threshold, JNIM regularly attacked Burkinabe security forces in 2021 and was involved in 59 violent events on average per month in 2021 across Burkina Faso, Mali and Niger.<sup>60</sup> As mentioned, however, it is often unclear which groups are responsible for attacks within Burkina Faso and the wider Sahel region. Nevertheless, the fact that overall attacks increased within Burkina Faso, many exhibited the trademarks of JNIM, and JNIM increased its influence across the country in 2021, on the balance of probabilities the violence would be considered protracted and therefore JNIM was likely involved in a NIAC with Burkina Faso during 2021.

Turning to ISGS, the group is officially a subunit of ISWAP after being merged together by IS central leadership in 2019.<sup>61</sup> In practice, however, ISGS enjoys operational autonomy.<sup>62</sup> The number of ISGS members has grown in recent years by attracting fighters from other Salafi-Jihadist groups and, later, JNIM defectors.<sup>63</sup> Especially in Burkina Faso, ISGS’ command structure appears more decentralised than in other states in which ISGS is active, and individual local ISGS units have different levels of autonomy from ISGS’ central leadership.<sup>64</sup> Even though ISGS has a somewhat decentralised structure in Burkina Faso, it regularly reports to IS central leadership and individual cells appear to use similar tactics, which includes

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<sup>56</sup> Nsaibia and Duhamel 2021.

<sup>57</sup> Thompson 2021b.

<sup>58</sup> International Crisis Group 2021b.

<sup>59</sup> An analysis shared by other commentators in previous years. See Diakonia International Humanitarian Law Centre 2019, p 9; see also Thompson 2021b.

<sup>60</sup> Thompson 2021b.

<sup>61</sup> Thompson 2021a.

<sup>62</sup> Beevor and Berger 2020; Thompson 2021a.

<sup>63</sup> Thompson 2021a.

<sup>64</sup> Ibid.

targeting civilians that are deemed to represent opposing religious or state institutions.<sup>65</sup> However, little information is known about the exact command structure of ISGS, making it difficult to determine with certainty the fulfilment of the organisational requirement for the existence of NIAC(s) between ISGS and the Burkinabe government.

Furthermore, so-called self-defence groups, which have existed in Burkina Faso for decades but have recently become more prominent due to the weakening of government forces, were also involved in confrontations with other armed groups in Burkina Faso during 2021. However, their generally low level of organisation is unlikely to qualify them as organised armed groups, and, as such, IHL likely does not apply to these instances of violence.<sup>66</sup>

Finally, regarding the involvement of French military forces in Burkina Faso, as France was invited by Burkina Faso to assist in their fight against the multiple NSAGs present in Burkina Faso, there was no armed conflict between Burkina Faso and France.<sup>67</sup> For France to have been party to an armed conflict in Burkina Faso with any of the NSAGs during 2021, the intensity of violence would have to be met between it and the relevant armed group(s) it was in confrontation with. As France's operations in Burkina Faso during 2021 was limited, it is therefore unclear whether the intensity threshold was met between France and any NSAGs in Burkina Faso.<sup>68</sup>

### 8.1.3 *Central African Republic*

In 2021, armed hostilities between military forces of the Central African Republic (CAR) and the *Coalition des patriotes pour le changement* (Coalition of Patriots for Change (CPC)) continued.<sup>69</sup>

Since the outbreak of violence in the CAR, when the Séléka-movement, a coalition of mostly Islamist armed groups under the leadership of Michel Djotodia, led an insurgency against the CAR government and succeeded in removing François Bozizé as President of the CAR in March 2013,<sup>70</sup> there have been seven peace accords between the CAR's government and different NSAGs.<sup>71</sup> The latest peace

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<sup>65</sup> Ibid.

<sup>66</sup> RULAC 2021a.

<sup>67</sup> Ibid.

<sup>68</sup> Al Jazeera (2021) French army convoy blocked by Burkinabe protestors reaches Niger. <https://www.aljazeera.com/news/2021/11/26/french-army-convoy-blocked-by-burkinabe-protesters-reaches-niger>. Accessed 23 May 2022.

<sup>69</sup> See Klonowska and Dubey 2022, pp 167–168.

<sup>70</sup> Center for Preventive Action 2022b; Human Rights Watch (2013) Central African Republic: Rampant Abuses After Coup. <https://www.hrw.org/news/2013/05/10/central-african-republic-rampant-abuses-after-coup>. Accessed 21 April 2022.

<sup>71</sup> France24 (2019) Central African Republic inks peace deal with armed groups. <https://www.france24.com/en/20190205-central-african-republic-peace-deal-armed-groups-conflict>. Accessed 21 April 2022.

deal, signed in 2019 between the CAR government and fourteen NSAGs, definitively collapsed in December 2020 in the run-up to the 2020/2021 Presidential and legislative elections.<sup>72</sup> By launching attacks on the major towns outside the capital, Bangui, a new coalition of six major NSAGs—the CPC—prevented hundreds of thousands of people from voting in the elections.<sup>73</sup> While President Faustin-Archange Touadéra had been re-elected on 27 December 2020, the violence surrounding the elections intensified during the start of 2021.<sup>74</sup>

In 2021, the majority of hostilities in the CAR occurred between the CAR military—supported by the Wagner Group, a Russian private military company (PMC), and the UN’s Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)—and the CPC. The CPC consists of Islamist NSAGs that succeeded the groups that formed the Séléka coalition in 2013, such as the Central African Patriotic Movement (MPC), the Popular Front for the Renaissance in the Central African Republic (FPRC), the Union for Peace in the Central African Republic (UPC) and Return, Reclamation, Rehabilitation (3R), as well as some Christian anti-Balaka groups that were initially formed to combat the former Séléka groups in 2013.

While large amounts of the CAR’s territory, especially in the east and northwest of the country, was controlled by the CPC at the beginning of 2021, the CPC’s failed attack on the CAR’s capital, Bangui, in January marked the start of a counteroffensive by the CAR’s military, supported by MINUSCA, private soldiers linked to the Wagner Group,<sup>75</sup> and Rwanda.<sup>76</sup> This counteroffensive marked the first time in several years that the CPC had retreated, with the CAR’s military and the Wagner group recapturing several CPC-held towns in March, April and May.<sup>77</sup> In the first

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<sup>72</sup> Human Rights Watch 2021c.

<sup>73</sup> Ibid.

<sup>74</sup> UN News (2021) UN condemns back-to-back attacks in Central African Republic. <https://news.un.org/en/story/2021/01/1081282>. Accessed 21 April 2022.

<sup>75</sup> Center for Civilians in Conflict 2021; Human Rights Watch 2022b.

<sup>76</sup> Ashimwe E (2021) Rwanda Deploys More Troops to Central African Republic. <https://allafrica.com/stories/202108040261.html>. Accessed 19 May 2022.

<sup>77</sup> Political Geography Now 2021; Corbeaunews Centrafrique (2021) RCA : la sous-préfecture de Aba (nord-ouest) reprise par l’armée nationale et ses alliés. <https://corbeaunews-centrafrique.org/rca-la-sous-prefecture-de-aba-nord-ouest-reprise-par-larmee-nationale-et-ses-allies/>. Accessed 21 April 2022; Corbeaunews Centrafrique (2021) RCA : après la ville de Kaga-Bandoro, c’est le tour de Batangafo d’être reprise par l’armée nationale. <https://corbeaunews-centrafrique.org/rca-apres-la-ville-de-kaga-bandoro-cest-le-tour-de-batangafo-detre-reprise-par-larmee-nationale/>. Accessed 21 April 2022; Corbeaunews Centrafrique (2021) RCA : la ville de Kabo, dans l’Ouham-Fafa, est reprise par l’armée nationale et ses alliés. <https://corbeaunews-centrafrique.org/rca-la-ville-de-kabo-dans-louham-fafa-est-reprise-par-larmee-nationale-et-ses-allies/>. Accessed 21 April 2022; Corbeaunews Centrafrique (2021) RCA : la ville de Markounda, dans l’Ouham, est reprise par l’armée nationale et ses alliés. <https://corbeaunews-centrafrique.org/rca-la-ville-de-markounda-dans-louham-est-reprise-par-larmee-nationale-et-ses-allies/>. Accessed 21 April 2022; Corbeaunews Centrafrique (2021) RCA : reprise de la ville de Kémbé, mais aussi de Dimbi, de Pombolo et de Gambo par les forces loyalistes. <https://corbeaunews-centrafrique.org/rca-reprise-de-la-ville-de-kembe-mais-aussi-de-dimbi-de-pombolo-et-de-gambo-par-les-forces-loyalistes/>. Accessed 21 April 2022.

two months of the year, 200,000 people are estimated to have been displaced due to the increased hostilities, of which 92,000 crossed the border to the Democratic Republic of Congo (DRC) and 13,200 others to Cameroon, Chad and the Republic of Congo.<sup>78</sup> In March, the number of UN peacekeepers was increased by 2,750 soldiers and 940 police personnel.<sup>79</sup> Also in March, former-President Bozizé was appointed as coordinator of the CPC. A month later, in April, 3R leader Sidiki Abass was killed and the UPC decided to withdraw from the CPC.<sup>80</sup> In September 2021, the UN Secretariat repatriated the entire Gabonese contingent from MINUSCA—consisting of 450 soldiers—following allegations of serious sexual abuse by unidentified members of the Gabonese military.<sup>81</sup> On 15 October 2021, President Touadéra declared a unilateral ceasefire against the multiple NSAGs in the CAR, to which the CPC initially reacted that it would respect the ceasefire if the government did so too.<sup>82</sup> Nevertheless, violence continued at the end of 2021. In addition, on 7 January 2021, a former Séléka militia leader—Mahamat Saïd Abdel Kani—was handed over by CAR authorities to the ICC (see Sect. 8.2.1.1).<sup>83</sup>

Regarding the classification of the conflict situation in CAR during 2021, it is beyond the scope of this Year in Review to categorise every potential armed conflict. Regarding the CPC, similar to other situations involving coalitions of NSAGs (see Burkina Faso (Sect. 8.1.2), and Myanmar (Sect. 8.1.10)), it is unclear to what extent each NSAG constituting the CPC retained autonomy and whether the CPC could have been considered an organised armed group in its own right during 2021. Nevertheless, as the individual groups forming the CPC—for instance, the FPRC—were generally capable of planning, coordinating and carrying out military operations and showed the ability to negotiate and conclude (peace) agreements, it is likely that they fulfilled the organisational thresholds during 2021. Furthermore, the high number of fighters within the individual groups that make up the CPC, the large number of casualties caused, the amount of civilians fleeing from the violence, as well as the involvement of the UN Security Council through MINUSCA, indicates that the intensity threshold

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<sup>78</sup> UN News (2021) Central African Republic: 200,000 displaced in less than two months. <https://news.un.org/en/story/2021/01/1083332>. Accessed 21 April 2022.

<sup>79</sup> Reliefweb (2021) Security Council Increases Size of Central African Republic Stabilization Mission, Adopting Resolution 2566 (2021) by 14 Votes in Favour, with 1 Abstention. <https://reliefweb.int/report/central-african-republic/security-council-increases-size-central-african-republic>. Accessed 21 April 2022.

<sup>80</sup> Human Rights Watch 2022b; Kum P (2021) Major group quits Central African Republic rebel bloc. <https://www.aa.com.tr/en/africa/major-group-quits-central-african-republic-rebel-bloc/2199821>. Accessed 22 April 2022.

<sup>81</sup> Al Jazeera (2021) UN withdraws Gabon peacekeepers from CAR over sex abuse claims. <https://www.aljazeera.com/news/2021/9/15/un-withdraws-gabon-peacekeepers-from-car-over-sex-abuse-claims>. Accessed 21 April 2022.

<sup>82</sup> Al Jazeera (2021) CAR declares unilateral ceasefire in fight with armed groups. <https://www.aljazeera.com/news/2021/10/15/central-african-republic-declares-unilateral-ceasefire-with-rebels>. Accessed 21 April 2022.

<sup>83</sup> UN News (2021) Central African Republic: Rights expert welcomes transfer of war crimes suspect to ICC. <https://news.un.org/en/story/2021/01/1083112>. Accessed 21 April 2022.

was also likely met between the CAR and many of the groups constituting the CPC, if not the CPC itself.

Regarding the substantive IHL in operation in 2021, at the end of March, the UN's Human Rights Commission published allegations of several human rights and IHL violations by alleged Russian mercenaries from the Wagner Group who are believed to have a close working relationship with CAR troops (for a more detailed analysis on the legal position of PMCs during armed conflict, see Mozambique (Sect. 8.1.9)).<sup>84</sup>

### 8.1.4 Colombia

During 2021, armed hostilities continued in several different areas of Colombia.<sup>85</sup>

Despite a historic peace agreement between the Colombian government and the *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* (Revolutionary Armed Forces of Colombia—People's Army (FARC-EP)) in 2016, which ended one of the longest internal conflicts of recent times, the Colombian government remained engaged in hostilities with several NSAGs during 2021.<sup>86</sup> Furthermore, several of these groups fought amongst each other.<sup>87</sup> The groups most active in Colombia in 2021 included: the *Ejército de Liberación Nacional* (National Liberation Army (ELN)), one of the oldest Marxist and largest remaining NSAGs in the country;<sup>88</sup> the *Autodefensas Gaitanistas de Colombia* (Gaitanista Self-Defence Forces of Colombia (AGC)), a far-right paramilitary group involved in drug trafficking; the *Bloque Oriental* (Eastern Bloc) of the FARC-EP, a group of FARC-EP units that did not sign the peace agreement in 2016; the *Segunda Marquetalia* (Second Marquetalia), another group of former FARC-EP fighters who refused to demobilise after the peace agreement;<sup>89</sup> and *Los Comandos de la Frontera* (Border Command (BC)), a group that controls drug trafficking in the Bajo Putumayo region and operates on the border between Colombia and Ecuador.<sup>90</sup>

During the beginning of 2021, Eastern Bloc, Second Maquetalia, AGC, ELN and the Colombian military were involved in armed violence for control of territory in multiple rural areas, including the regions of Cauca and Norte de Santander.<sup>91</sup> For example, in February the ELN and FARC-EP dissidents were involved in intense clashes in Cauca.<sup>92</sup> According to the ICRC, the impact of armed conflict within

<sup>84</sup> Deutsche Welle (2021) UN concerned over Russian mercenaries in CAR. <https://www.dw.com/en/un-concerned-over-russian-mercenaries-in-car/a-57066877>. Accessed 21 April 2022.

<sup>85</sup> See Klonowska and Dubey 2022, pp 168–170.

<sup>86</sup> RULAC 2020.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Insight Crime 2022.

<sup>90</sup> Insight Crime 2021.

<sup>91</sup> International Crisis Group 2021a.

<sup>92</sup> Ibid.



Colombia in 2021 reached the highest level since the 2016 peace agreement between the Colombian government and the FARC-EP,<sup>93</sup> with killings and forced displacement due to armed violence both increasing.<sup>94</sup> For example, in 2021, 60,700 people were internally displaced due to armed violence compared to 27,000 in 2020.<sup>95</sup> Direct attacks against civilians also rose by 37% compared to 2020,<sup>96</sup> with a 24% increase in victims of explosive hazards.<sup>97</sup>

It is beyond the scope of this Year in Review to analyse each of the NSAGs mentioned above, their organisational structures, and the respective intensity of violence between them and other groups and/or Colombia. Of all the NSAGs active in Colombia in 2021, however, ELN appears to have been the most active—having been involved in regular clashes with government forces throughout 2021 resulting in a high number of displacements—and remained highly organised.<sup>98</sup> Indeed, with more than 2,300 fighters active in 2021 and a clear hierarchy, the ELN can be considered an organised armed group for the purposes of IHL.<sup>99</sup> As such, it can be concluded that Colombia and the ELN were involved in a NIAC (or NIACs) during 2021.

Regarding the smaller FARC-EP dissident factions (excluding the Eastern Bloc) that were involved in clashes with the Colombian military, the ELN and the AGC during 2021, little is known about their level of organisation and the respective intensity of these confrontations.<sup>100</sup> As such, it cannot be accurately concluded whether a NIAC (or multiple, overlapping NIACs) existed between these groups and Colombia during 2021. The existence of a NIAC between the ELN and AGC during 2021 seems highly likely due to the aforementioned high level of organisation of the ELN, and the AGC, which is a paramilitary group in control of a large percentage of Colombia's drug trade, also likely meeting the threshold of organised armed group.<sup>101</sup> These factors, in combination with the heavy clashes between the groups throughout 2021, militates in favour of a NIAC existing between them during 2021.<sup>102</sup>

Related to the topic of conflict classification, in the beginning of April 2021 Colombia downgraded the domestic threat level of another NSAG, the *Ejército Popular de Liberación* (Popular Liberation Army (EPL)), from a '*Grupos Armados*

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<sup>93</sup> ICRC 2022b.

<sup>94</sup> Human Rights Watch 2022c.

<sup>95</sup> OCHA 2021a.

<sup>96</sup> Al Jazeera (2022) Forced displacement in Colombia more than doubled in 2021: Report. <https://www.aljazeera.com/news/2022/2/16/forced-displacement-in-colombia-more-than-doubled-in-2021-report>. Accessed 28 April 2022.

<sup>97</sup> ICRC 2022b.

<sup>98</sup> International Crisis Group 2021a.

<sup>99</sup> Grattan S (2021) Colombia's ELN rebels warn of 'reprisals' after commander killed. <https://www.aljazeera.com/news/2021/10/1/colombia-eln-rebels-warn-of-reprisals-after-commander-killed>. Accessed 19 May 2022.

<sup>100</sup> International Crisis Group 2021a.

<sup>101</sup> Colombia Reports 2021.

<sup>102</sup> International Crisis Group 2021a.



*Organizados*’ (Organised Armed Group)—a term used by the Colombian government to describe groups that in its view must comply with IHL<sup>103</sup>—to a *Grupo Delictivo Organizado*’ (Organised Criminal Group).<sup>104</sup> Nevertheless, Colombia’s determination under domestic law of whether a group is bound to comply with IHL does not impact the classification of NSAGs under IHL: as noted, determining the application of IHL is an objective exercise not contingent on the views of states and/or other actors.

### 8.1.5 Ethiopia

During 2021, the ongoing ‘Tigray Conflict’ continued in Ethiopia.<sup>105</sup>

Since November 2020, there have been extensive hostilities between the Tigray People’s Liberation Front (TPLF) and the Ethiopian government.<sup>106</sup> The violence began in 2020 after the TPLF held elections deemed unconstitutional by the central Ethiopian government, which subsequently led to government forces moving into the Tigray region.<sup>107</sup> As such, the violence has taken on certain ethnic dimensions.<sup>108</sup> Eritrea, which borders the Tigray region to the north, has also been involved in hostilities on the side of Ethiopia, although this was initially denied by both states.<sup>109</sup> The situation experienced many developments during 2021, with each side making significant gains and losses over the course of the year.

In June 2021, the TPLF re-captured the capital of the Tigray region, Mek’ele, from Ethiopian forces and then launched an offensive beyond the Tigray region, advancing close to the Ethiopian capital of Addis Ababa.<sup>110</sup> In a further development, the TPLF formed military partnerships with other NSAGs, for instance, the Oromo Liberation Army.<sup>111</sup> Nevertheless, by the end of 2021 Ethiopian forces had largely pushed back TPLF advances, with the Ethiopian President Abiy Ahmed Ali personally leading his

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<sup>103</sup> Agencia EFE (2017) Disidencia de las FARC tienen unos 700 integrantes. <https://www.efe.com/efe/america/politica/disidencias-de-las-farc-tienen-unos-700-integrantes/20000035-3425113>. Accessed 28 April 2022.

<sup>104</sup> Insight Crime (2021) Colombia Decides EPL is No Longer Major Threat. <https://insightcrime.org/noticias/colombia-decides-epl-no-longer-major-threat/>. Accessed 28 April 2022.

<sup>105</sup> See Klonowska and Dubey 2022, pp 172–174.

<sup>106</sup> Africa Center 2021.

<sup>107</sup> International Crisis Group 2020.

<sup>108</sup> Africa Center 2021.

<sup>109</sup> Al Jazeera (2021) Ethiopia PM admits Eritrean soldiers entered Tigray region. <https://www.aljazeera.com/news/2021/3/23/ethiopia-pm-abi-ahmed-says-atrocities-committed-in-tigray>. Accessed 29 March 2022.

<sup>110</sup> Deutsche Welle (2021) Tension in Ethiopia as Tigrayan forces advance. <https://www.dw.com/en/tension-in-ethiopia-as-tigrayan-forces-advance/a-59747997>. Accessed 3 May 2022.

<sup>111</sup> Anna 2021.

forces in the field.<sup>112</sup> The Ethiopian government forces' advance halted at the border of the Tigray region on 21 December 2021, in a potential indication of a political settlement to the violence.<sup>113</sup> By the end of 2021, however, it was unclear whether an agreement between the opposing sides could be reached.

Firstly, it must be assessed whether the TPLF and Ethiopia were engaged in a NIAC during 2021. Regarding the organisation threshold, the TPLF is considered to be a well-structured force with many available fighters—almost 250,000 at the beginning of the conflict in 2020.<sup>114</sup> In addition, the TPLF's ability to plan and execute successful military operations, including nearly launching an assault on the Ethiopian capital of Addis Ababa far from the Tigray region, indicates that they clearly satisfy the organised armed group requirement. Regarding the intensity of the violence between the TPLF and Ethiopia, the overall conflict has caused thousands of fatalities, over 2.5 million internal and cross-border displacements, and severe famine.<sup>115</sup> As such, and also considering the extent and amount of the military confrontations engaged in between the TPLF and Ethiopia, it can be safely assumed that the intensity threshold was also met during 2021. Therefore, it can be concluded that there was a NIAC between the TPLF and Ethiopia during the whole of 2021. It is also possible that APII applies to the conflict as Ethiopia is a state party to the treaty. As indicated above (Sect. 8.1), APII's application has requirements additional to general NIACs. In Ethiopia, several requirements laid down in Article 1(1) of APII are clearly met, namely: the TPLF is sufficiently organised and controls a significant amount of territory enabling them to 'carry out sustained and concerted military operations and to implement' APII. However, it is open to interpretation whether the TPLF are 'under responsible command'. The 1987 ICRC commentary to APII opines that this requirement means 'an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority'.<sup>116</sup> Owing to the high level of organisation of the TPLF identified above, it is therefore likely that APII also applied to the NIAC between the TPLF and Ethiopia during 2021.

In addition, despite several regional state-aligned 'special forces' existing throughout Ethiopia owing to its federal constitution, as state organs these will also constitute members of the armed forces of Ethiopia and therefore do not constitute (potentially) individual armed groups requiring separate conflict classification(s).

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<sup>112</sup> Feleke B (2021) Ethiopia's Nobel Peace Prize-winning leader says he'll lead troops on front lines against rebels. <https://www.france24.com/en/live-news/20211204-ethiopia-s-war-in-uncertain-phase-after-abiy-s-advance>. Accessed 29 March 2022; France24 (2021) Ethiopia's war in uncertain phase after Abiy's advance. <https://www.france24.com/en/live-news/20211204-ethiopia-s-war-in-uncertain-phase-after-abiy-s-advance>. Accessed 29 March 2022.

<sup>113</sup> Felbab-Brown 2022.

<sup>114</sup> International Crisis Group 2020.

<sup>115</sup> Burgess A (2021) A year of bloodshed, famine and civilian torture. Why is Ethiopia on the brink of all-out civil war? <https://www.abc.net.au/news/2021-11-14/ethiopia-conflict-civil-war-tigray-addis-ababa/100612326>. Accessed 29 March 2022.

<sup>116</sup> Zimmermann et al. 1987, para 4463.

Regarding Eritrea's involvement in the situation, while there are credible reports of their involvement on the side of Ethiopian forces throughout 2021—which President Abiy admitted in March 2021—,<sup>117</sup> there is less available information to accurately classify whether hostilities between the TPLF and Eritrea constituted a NIAC during 2021. Eritrea and the TPLF have remained fiercely opposed since the TPLF led Ethiopia in its border war with Eritrea in 1998–2000. In fact, it seems that one of Eritrea's main goals in intervening in Ethiopia against the TPLF was to target Eritrean refugees within the Tigray region who are regarded as traitors by the Eritrean government.<sup>118</sup> As such, much of this violence did not constitute armed hostilities between Eritrea and the TPLF, but Eritrean violence against civilians. Nevertheless, a number of battles have been reported between the TPLF and Eritrea.<sup>119</sup> As such, it can be concluded that Eritrea and the TPLF were also most likely involved in a NIAC during 2021.

Moving to the substantive IHL implicated in the conflicts, there have been numerous allegations of the commission of violations of IHL by all sides during 2021, including those that appear to constitute war crimes. A joint investigation by the Ethiopian Human Rights Commission and the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) detailing many of these allegations was released in November 2021.<sup>120</sup> Furthermore, in December 2021, Human Rights Watch and Amnesty International reported 'mass detentions, killings, and forced expulsions of ethnic Tigrayans' by Amhara security forces, irregular forces fighting with Ethiopian government forces.<sup>121</sup>

### 8.1.6 *Israel/Palestine*

2021 saw the most amount of violence in Israel and Palestine since the 2014 'Gaza War'.<sup>122</sup>

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<sup>117</sup> Al Jazeera (2021) Eritrea confirms its troops are fighting in Ethiopia's Tigray. <https://www.aljazeera.com/news/2021/4/17/eritrea-confirms-its-troops-are-fighting-ethiopia-tigray>. Accessed 29 March 2022.

<sup>118</sup> Mersie et al. 2021.

<sup>119</sup> Human Rights Watch 2022d.

<sup>120</sup> Ethiopian Human Rights Commission and OHCHR 2021; Sabbagh D (2021) Possible war crimes on all sides in Ethiopian conflict, says report. <https://www.theguardian.com/world/2021/nov/03/possible-war-crimes-on-all-sides-in-ethiopian-conflict-report-tigray>. Accessed 2 May 2022.

<sup>121</sup> Human Rights Watch 2021a.

<sup>122</sup> Rumley and Zilber 2021.

### 8.1.6.1 Belligerent Occupation

Firstly, in 2021, Israel maintained its *de facto* control over Palestinian territory.<sup>123</sup> In the Gaza Strip, Israel continued its naval and air blockade which began in 2007. In the West Bank, despite the Palestinian Authorities continuing to exercise governmental control in some areas as envisioned in the 1995 Oslo Interim Agreement (notably in Areas A and B),<sup>124</sup> in 2021 Israel regularly entered the area for law enforcement purposes, used military courts in the area, and continued to operate over 700 checkpoints that hindered the freedom of movement of Palestinians.<sup>125</sup> Many areas of the West Bank, including East Jerusalem, also continued to be *de facto* annexed by Israeli settlers with the toleration of the Israeli government.<sup>126</sup>

As established above (see Sect. 8.1), belligerent occupation exists wherever a state operates effective control over the territory of another state. Since Palestine's declaration of independence in November 1988, 138 member states of the UN have recognised Palestine's statehood and it was, in 2012, recognised by the UN General Assembly as a 'non-member observer state'.<sup>127</sup> Therefore, Palestine is considered within this Year in Review to constitute a state for the purposes of international law. As determining the existence of belligerent occupation is a factual exercise, a state can arguably still be considered to operate effective control (therefore triggering the law of belligerent occupation) without the presence of their troops on such territory provided that they still satisfy the effective control test over another state's territory without that state's consent.<sup>128</sup> As Israel controls many fundamental aspects of the Palestinian territories and continues the *de facto* annexation of areas of the West Bank through 'settlers', it can be concluded that Israel continued to be in belligerent occupation of the West Bank and the Gaza Strip during 2021. As such, Israel was bound by the relevant applicable law—namely, the Fourth Geneva Convention and the Hague Regulations—during 2021.<sup>129</sup>

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<sup>123</sup> Klonowska and Dubey 2022, pp 174–175.

<sup>124</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II). <https://peacemaker.un.org/israelopt-osloII95>. Accessed 29 April 2022.

<sup>125</sup> Al Jazeera (2021) Mapping Israeli occupation. <https://www.aljazeera.com/news/2021/5/18/mapping-israeli-occupation-gaza-palestine>. Accessed 14 April 2022.

<sup>126</sup> BBC News (2021) Israel advances plans for 3,000 new homes in West Bank settlements. <https://www.bbc.com/news/world-middle-east-59062909>. Accessed 3 May 2022.

<sup>127</sup> UNGA (2012) Resolution 67/19 on the Status of Palestine in the United Nations A/Res/67/19.

<sup>128</sup> Ferraro 2012, pp 157–158.

<sup>129</sup> See, among other provisions, GCIV, above n 4, Articles 47–78. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 136, paras 123–129.

### 8.1.6.2 May 2021 Hostilities

In addition to the ongoing occupation of Palestinian territory, significant armed violence broke out between the Israel Defense Forces (IDF) and Hamas—the Islamist NSAG that controls the Gaza Strip—in May 2021. On 7 May 2021, during the month of Ramadan, protests broke out at the al-Aqsa Mosque compound in Jerusalem, a site of religious significance for both Muslims and Jews.<sup>130</sup> These protests followed weeks of demonstrations against an Israeli court ruling that determined that Palestinian families were to be evicted from homes in the East Jerusalem neighbourhood of Sheikh Jarrah.<sup>131</sup> After days of violence between the Israeli police and Palestinian protestors, Hamas and other Palestinian armed groups launched rockets from the Gaza Strip into Israel.<sup>132</sup> The majority of these rockets were intercepted by Israel's 'Iron Dome' missile defence system.<sup>133</sup> In response, the IDF launched air, artillery, and ground attacks on targets within the Gaza Strip. On 21 May, after 11 days of hostilities, a ceasefire was agreed between Hamas and Israel, a deal which was brokered by Egypt. During these 11 days, at least 261 Palestinians and ten Israelis were killed with many more injuries on both sides, according to the UNOHCHR.<sup>134</sup> The severity of the fighting was noted by several stakeholders including the ICRC, whose director-general, Robert Mardini, stated: '[t]he intensity of the conflict is something we have not seen before, with non-stop airstrikes in densely populated Gaza and rockets reaching big cities in Israel'.<sup>135</sup>

Regarding the classification of the conflict, the militant group Hamas is known to be well-organised and operates quasi-governmental functions in the Gaza Strip; however, Hamas is not considered to represent the Palestinian state, thereby ruling out the conflict existing as an IAC.<sup>136</sup> In addition, Hamas has a clear command structure in both its political and military wings, clearly qualifying it as an organised armed group.<sup>137</sup> Regarding the intensity of the May hostilities, Hamas is thought to have fired over 4000 rockets, mortars, and suicide drones into Israel.<sup>138</sup> The IDF, on the other hand, launched numerous airstrikes and other attacks, causing a large amount of damage to infrastructure in the Gaza Strip and causing over 72,000 estimated

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<sup>130</sup> Council on Foreign Relations 2022b.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Deutsche Welle (2021) Israel's Iron Dome proves successful against Gaza rockets. <https://www.dw.com/en/israels-iron-dome-proves-successful-against-gaza-rockets/a-57513596>. Accessed 14 April 2022.

<sup>134</sup> Bachelet 2021.

<sup>135</sup> ICRC 2021b.

<sup>136</sup> BBC News (2021) Hamas: the Palestinian militant group that rules Gaza. <https://www.bbc.com/news/world-middle-east-13331522>. Accessed 3 May 2022.

<sup>137</sup> Council on Foreign Relations 2021.

<sup>138</sup> Federman J and Akram F (2021) Israel, Hamas agree to cease-fire to end bloody 11-day war. <https://apnews.com/article/israel-palestinian-cess-fire-hamas-caac81bc36fe9be67ac2f7c27000c74b>. Accessed 14 April 2022.

internal displacements.<sup>139</sup> As such, it can be concluded that the hostilities in May 2021 were of a sufficient intensity and therefore constituted a NIAC between Hamas and Israel.

During the hostilities, there were allegations of the commission of violations of IHL, including war crimes, by both the IDF and Hamas.<sup>140</sup> A notable incident occurred on 15 May 2021 when the IDF targeted the al-Jalaa Tower in Gaza city. The attack stimulated extensive debate among IHL scholars regarding its legality, centring on the question of whether the tower constituted a military objective and, if so, whether the attack was proportionate, among other issues.<sup>141</sup> As the tower housed several news agencies—including Al Jazeera and the Associated Press—along with family homes, many argued that the strike constituted an attack against a civilian object in contravention of IHL.<sup>142</sup> The IDF, on the other hand, justified the attack on the basis that the alleged presence of Hamas equipment in the building made the entire tower a military objective.<sup>143</sup> Also relevant was that the IDF contacted the building’s occupants an hour in advance to warn them about the strike, a measure required by IHL where possible.<sup>144</sup> Note, however, that the provision of advance warning does not alter the status of a building as a military objective or civilian object. The mass use of unguided missiles by Hamas during the conflict also clearly constituted a violation of the requirement to distinguish between military objectives and civilian objects during IHL.<sup>145</sup> These alleged war crimes, since the opening of an investigation into the situation in Palestine by the International Criminal Court’s Office of the Prosecutor in March 2021, may come within the jurisdiction of the ICC (see Sect. 8.2.1.1).

### 8.1.6.3 Other Hostilities

In addition to the May 2021 hostilities, there were other sporadic instances of violence between Hamas and the IDF throughout the year. For instance, in August, the IDF used aircraft to target Hamas military compounds in the Gaza Strip in response to the

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<sup>139</sup> Lazaroff T (2021) UN: There is no ‘safe place’ in Gaza, 72,000 people displaced. <https://www.jpost.com/middle-east/un-there-is-no-safe-place-in-gaza-72000-people-displaced-668489>. Accessed 3 May 2022.

<sup>140</sup> See Human Rights Watch (2021) Palestinian Rockets in May Killed Civilians in Israel, Gaza. <https://www.hrw.org/news/2021/08/12/palestinian-rockets-may-killed-civilians-israel-gaza>. Accessed 22 April 2022; Human Rights Watch (2021) Gaza: Israel’s May Airstrikes on High-Rises. <https://www.hrw.org/news/2021/08/23/gaza-israels-may-airstrikes-high-rises>. Accessed 22 April 2022.

<sup>141</sup> E.g., see Cohen and Shany 2021; Haque 2021.

<sup>142</sup> Haque 2021.

<sup>143</sup> Cohen and Shany 2021.

<sup>144</sup> See ICRC undated; Hague Convention (IV), above n 7, Article 26; Al Jazeera (2021) ‘Give us 10 minutes’: How Israel bombed Gaza media tower. <https://www.aljazeera.com/news/2021/5/15/give-us-10-minutes-how-israel-bombed-gaza-media-tower>. Accessed 22 April 2022.

<sup>145</sup> Human Rights Watch (2021) above n 140.

alleged sending and use of ‘incendiary balloons’ by Hamas into southern Israel.<sup>146</sup> While brief lulls in fighting between parties to an armed conflict do not terminate the application of IHL, when the intensity of violence falls below ‘protracted armed violence’ for a certain amount of time, IHL is considered to no longer apply. Therefore, unlike the May 2021 hostilities, lower levels of violence such as this likely did not reach the intensity threshold required to trigger NIAC law.

In addition, there were exchanges of fire between Hezbollah, the armed group that operates governmental functions in parts of Lebanon, and Israel in August 2021.<sup>147</sup> Although Hezbollah and Israel were engaged in an armed conflict in 2006, it is unlikely that the exchanges of fire during 2021 reached the intensity threshold required of a NIAC.<sup>148</sup>

Furthermore, Israel launched several attacks on targets in Syria throughout the year. While some of these targeted Hezbollah fighters located in Syria, some also directly targeted Syrian forces.<sup>149</sup> Israel justified some of these attacks on the funding of Hezbollah by Iran, a fierce opponent of Israel’s.<sup>150</sup> Regardless of the intended target, as such attacks were made without the permission of Syria, it can be concluded that an IAC existed between Israel and Syria during these periods, albeit limited in time.

### 8.1.7 *Libya*

In 2021, the amount of armed violence in Libya largely decreased from previous years,<sup>151</sup> notwithstanding isolated attacks by IS-Libya.

Libya’s contemporary instability began with the 2011 revolution against former leader Muammar al-Gaddafi which began a decade-long multilateral civil war, first between Gaddafi loyalists and anti-Gaddafi forces and, since 2014, mostly between two competing groups each claiming to represent the legitimate government of Libya, and numerous other NSAGs.<sup>152</sup> The two rivalling governments—the Government of

<sup>146</sup> France24 (2021) Israeli military attacks two Hamas sites in Gaza after fire balloons. <https://www.france24.com/en/middle-east/20210829-israeli-military-attacks-two-hamas-sites-in-gaza-after-fire-balloons>. Accessed 5 April 2022.

<sup>147</sup> Al Jazeera (2021) Hezbollah launches rocket fire in response to Israeli air raids. <https://www.aljazeera.com/news/2021/8/6/hezbollah-says-fired-rockets-into-israel-in-response-to-air-raids>. Accessed 14 April 2022.

<sup>148</sup> On the question of whether Hezbollah can be considered to represent Lebanon and thereby bring IAC law into play, see Bloom 2008, p 61.

<sup>149</sup> BBC News (2021) Syria blames Israel for rare air strike on main port of Latakia. <https://www.bbc.com/news/world-middle-east-59561148>. Accessed 7 May 2022.

<sup>150</sup> Khoury J and Reuters (2021) Iranian Munitions Were Israel’s Target in Syria Port Strike, Sources Say. <https://www.haaretz.com/israel-news/iranian-munitions-were-israel-s-target-in-syria-port-strike-sources-say-1.10499629>. Accessed 25 May 2022.

<sup>151</sup> See Klonowska and Dubey 2022, pp 176–177.

<sup>152</sup> Center for Preventive Action 2022a.

National Accord (GNA) based in Tripoli and the House of Representatives (HoR) based in Tobruk and supported by General Haftar's Libyan National Army (LNA)—agreed to a ceasefire on 23 October 2020, ending large-scale hostilities between the two.<sup>153</sup> However, certain aspects of the ceasefire agreement, especially the withdrawal of foreign fighters from Libya, remained unfulfilled in 2021.<sup>154</sup> Thousands of foreign fighters from, among other states, Chad, the Russian Federation, Syria, Sudan, and also from certain PMCs had, as of the end of 2021, not left Libya.<sup>155</sup> In October, however, the 5+5 Libyan Joint Military Commission (JMC), which consists of five senior military officers chosen by the GNA and five chosen by the LNA, met in Geneva, Switzerland, and agreed on an 'Action Plan' for the withdrawal of PMCs, foreign fighters and foreign forces.<sup>156</sup>

After years of UN-brokered peace talks, partially through the UN Support Mission in Libya (UNSMIL), a new unified interim government constituted of both the GNA and HoR was sworn in on 15 March 2021. The new Government of National Unity (GNU) had the task of implementing the 2020 ceasefire and organising presidential and parliamentary elections on 24 December 2021.<sup>157</sup> These elections did not take place, however, owing to disputes over the eligibility of presidential candidates and laws governing the elections.<sup>158</sup> These delays resulted in a rising of tensions and concerns that the interim government could collapse and hostilities might resume.<sup>159</sup> Owing to the lack of hostilities between the GNA and HoR throughout 2021, however, it can be concluded that no armed conflict existed between them during 2021.

Regarding IS-Libya, after losing its footholds in the cities of Derna and Sirte in 2016, the group had not, by 2021, fully recovered, with many members fleeing to the Fezzan, a region in the southwest of Libya, to join criminal gangs involved in human, weapons and drugs trafficking.<sup>160</sup> In June 2021, IS-Libya fighters committed their first attacks in Libya since May 2020, carrying out a suicide bombing on 6 June and a bombing on 14 June that killed six LNA soldiers overall.<sup>161</sup> In response to these attacks, both the LNA and the GNA deployed security forces to the Fezzan in June 2021 to counter IS-Libya.<sup>162</sup> Nevertheless, despite these two attacks, there was a lack of notable confrontations between IS-Libya and the GNA and/or LNA, making it highly unlikely that violence between the groups could be considered

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<sup>153</sup> OCHA 2021b; ICRC 2021a.

<sup>154</sup> OCHA 2021b.

<sup>155</sup> Human Rights Watch 2022e.

<sup>156</sup> UN News (2021) Libya: UN lauds mercenary withdrawal plan on 'path towards peace and democracy'. <https://news.un.org/en/story/2021/10/1102642>. Accessed 10 May 2022.

<sup>157</sup> Human Rights Watch 2022e.

<sup>158</sup> Al Jazeera (2022) Libya's parliament to appoint new PM amid rise in tensions. <https://www.aljazeera.com/news/2022/2/8/libya-parliament-to-appoint-new-pm-amid-rise-in-tensions>. Accessed 9 May 2022.

<sup>159</sup> International Crisis Group 2022a.

<sup>160</sup> Mezran 2021.

<sup>161</sup> International Crisis Group 2022a.

<sup>162</sup> Tyson 2021.



‘protracted’ for the purposes of IHL, also making a determination of whether IS-Libya constituted an organised armed group unnecessary. It should be noted, however, that IS-Libya allegedly continued to integrate with other IS networks in West Africa during 2021—most notably ISWAP (see also Burkina Faso, Sect. 8.1.2)—meaning that it could merge with other IS-affiliated groups, or become more organised itself, beyond 2021.<sup>163</sup>

### 8.1.8 Mali

The ongoing insurgency within Mali involving several Islamist NSAGs continued in 2021. In addition, there was a *coup d'état* in May 2021—the third in ten years—carried out by members of the Malian military.

During 2021, there were several Islamist NSAGs active within Mali, similar to other states within the Central Sahel region (see Sect. 8.1.2 for Burkina Faso and Sect. 8.1.11 for Niger). The two most active groups in 2021 were the Islamic State in the Greater Sahara (ISGS) and the Al-Qaeda-linked Jama'at Nusrat Al Islam Wal Muslimin (JNIM).<sup>164</sup> Furthermore, in June 2021, France announced that it was ending Operation Barkhane, its ‘counterterrorism’ operation which had been present in Mali since 2013, and would withdraw its troops by the first quarter of 2022.<sup>165</sup> In addition, the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) continued in its attempt to fulfil its role in Mali.<sup>166</sup> MINUSMA’s mandate includes: ‘security, stabilization and protection of civilians’; ‘support to national political dialogue and reconciliation’; and, ‘support to the re-establishment of State authority throughout the country, the rebuilding of the Malian security sector, the promoting and protection of human rights and the support for humanitarian assistance’.<sup>167</sup> In addition, in December, the Wagner Group, a Russian PMC, reportedly began deploying to Mali following an invitation from the new Malian government (the Wagner Group were also allegedly active in, among other states, the CAR (see Sect. 8.1.3)).<sup>168</sup>

On 24 May 2021, Colonel Assimi Goïta, leader of the *coup d'état*, used his forces to detain the transitional President of Mali, Bah N'Daw, and the Prime Minister, Moctar Ouane.<sup>169</sup> Goïta was then appointed Head of State in June.<sup>170</sup> The *coup* and

<sup>163</sup> Ibid.

<sup>164</sup> Thompson 2021a, b.

<sup>165</sup> France24 (2021) Emmanuel Macron annonce la fin de l'opération Barkhane au Sahel. <https://www.france24.com/fr/afrique/20210610-op%C3%A9ration-barkhane-emmanuel-macron-va-annoncer-une-restructuration-des-troupes>. Accessed 28 April 2022.

<sup>166</sup> Established pursuant to UNSC Resolution 2100 (2013), UN Doc S/RES/2100(2013).

<sup>167</sup> UNSC Resolution 2164 (2014), UN Doc S/Res/2164(2014), para 13.

<sup>168</sup> Thompson et al. 2022.

<sup>169</sup> Human Rights Watch 2022f.

<sup>170</sup> Ibid.

subsequent change of leader was largely non-violent, although there were demonstrations against the takeover by many within Mali and an unsuccessful attempt was made on Goïta's life in June.<sup>171</sup> In response to the *coup*, the Economic Community of West African States (ECOWAS) created sanctions against over 140 members of Interim President Goïta's government.<sup>172</sup>

Regarding the classification of the various potential conflicts in Mali, owing to many of the same NSAGs operating in Mali as in elsewhere in the Central Sahel region, much of the previous analysis (especially relating to Burkina Faso, Sect. 8.1.2) is also applicable here. Firstly, as it has already been determined that JNIM constituted an organised armed group in Burkina Faso and the group's presence in Mali during 2021 was extensive, it can also be considered an organised armed group within Mali. Regarding the intensity of violence between JNIM and Malian forces, several large attacks, with casualties on both sides, occurred throughout 2021.<sup>173</sup> In addition, JNIM's attacks in Mali also appear more easily attributable to the group than within Burkina Faso, where it is often unclear which NSAG is responsible for violent conduct.<sup>174</sup> As such, it can be concluded that the intensity threshold between Mali and JNIM was met in 2021 and, therefore, the two parties were involved in a NIAC. While, by the end of 2021, a lasting peace agreement between JNIM and the Malian government seemed a possibility, the continuation of hostilities between the two means that the NIAC was likely still ongoing by the end of the year.<sup>175</sup> Again, as conflict classification is a factual exercise, ceasefires and/or peace negotiations are not determinative; instead, the organisation of the parties and the intensity of violence remain the key thresholds for determining whether a NIAC exists.

Regarding France's involvement in Mali during 2021, similar to in Burkina Faso (Sect. 8.1.2), the intensity threshold would have had to be met between France and one (or several) of the organised armed groups active in Mali during 2021 for France to be involved in a NIAC (or NIACs) there. As France remained highly active in combatting alleged terrorists during 2021 in Mali, including using fighter jets, heavy artillery, and special forces, it is likely that the intensity threshold was met with the

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<sup>171</sup> Deutsche Welle (2021) Mali says President Assimi Goita survives assassination attempt. <https://www.dw.com/en/mali-says-president-assimi-goita-survives-assassination-attempt/a-58376438>. Accessed 3 May 2022.

<sup>172</sup> Cham K (2021) Mali: Over 140 officials named in Ecowas sanctions list. <https://www.theeasatfrican.co.ke/tea/rest-of-africa/mali-over-140-officials-named-in-ecowas-sanctions-list-3624676>. Accessed 2 May 2022.

<sup>173</sup> HumAngle Media (2021) JNIM: Coalition of Terrorists Intensifying Attacks in The Sahel. <https://humanglemedia.com/jnim-coalition-of-terrorists-intensifying-attacks-in-the-sahel/>. Accessed 20 May 2022.

<sup>174</sup> E.g., Reuters (2021) Five gendarmes killed in attack on mining convoy in Mali - army. <https://www.reuters.com/world/africa/five-gendarmes-killed-attack-mining-convoy-mali-army-2021-09-29/>. Accessed 20 May 2022.

<sup>175</sup> International Crisis Group 2021b.

most active groups, such as JNIM.<sup>176</sup> Thus, France was likely engaged in at least one NIAC in Mali during 2021.

Finally, as the military *coup* was largely non-violent, these events cannot be considered to have risen to the level of an armed conflict. Furthermore, the change of leadership of the Malian government—while potentially far-reaching in political and policy terms—did not affect the classification of any armed conflicts involving Mali in 2021. Obligations under IHL—and international law more generally—accrue to the state (e.g., Mali) and are therefore usually unaffected by changes of government.<sup>177</sup> Therefore, any armed conflicts already ongoing between Mali and NSAGs prior to the May 2021 *coup*, for instance between Mali and JNIM, continued despite Mali's change of leadership in May 2021.

### 8.1.9 Mozambique

In 2021, similar to previous years, Mozambique continued to suffer from a growing insurgency in the northern region of Cabo Delgado, an area that borders Tanzania.<sup>178</sup>

The NSAG Al-Shabaab, which purports to subscribe to global jihadist ideologies, has been active in Cabo Delgado since 2017.<sup>179</sup> While the IS movement claims responsibility for many of Al-Shabaab's attacks, the link between the two groups is unclear.<sup>180</sup> In 2021, it was estimated that Al-Shabaab had up to 4000 active members and access to increasingly sophisticated weaponry, including mortars and rocket-propelled grenades.<sup>181</sup> Although 2021 began with relatively low levels of violence in the Cabo Delgado region, in March, approximately 100–200 members of Al-Shabaab assaulted and gained control over the large town of Palma, causing up to 30,000 internal displacements.<sup>182</sup> These fighters controlled the town for four days, killed dozens of civilians, and destroyed large amounts of the town's infrastructure.<sup>183</sup> In response to the attack, Mozambique requested and gained the assistance of other states, including Rwanda and South Africa, and the Dyck Advisory Group (DAG), a PMC, to retake the town and suppress the wider insurgency.<sup>184</sup> This outside assistance

<sup>176</sup> Rédaction Africanews (2021) French Barkhane troops kill senior jihadist fighter in Mali. <https://www.africanews.com/2021/10/21/french-barkhane-troops-kill-senior-jihadist-fighter-in-mali/>. Accessed 10 June 2022.

<sup>177</sup> Noonan 1984.

<sup>178</sup> See Klonowska and Dubey 2022, pp 178–179.

<sup>179</sup> International Crisis Group 2021c, p 1.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid., pp 17–21.

<sup>182</sup> UNHCR (2021) Nearly 30,000 people displaced by March attacks in northern Mozambique. <https://www.unhcr.org/news/briefing/2021/4/608bb1be4/nearly-30000-people-displaced-march-attacks-northern-mozambique.html>. Accessed 29 March 2022.

<sup>183</sup> Lister 2021, p 19.

<sup>184</sup> De Cherisey E (2021) Mozambique's bush war from the sky. <https://www.timesaerospace.aero/features/defence/mozambiques-bush-war-from-the-sky>. Accessed 3 May 2022.

proved successful, with Al-Shabaab being displaced from many of its strongholds; it is thought, however, that many of their fighters simply assimilated with local civilians rather than renouncing their allegiance to Al-Shabaab.<sup>185</sup> By late 2021, almost 800,000 people had been displaced in Cabo Delgado since the fighting began in 2017.<sup>186</sup>

Assessing the weapons used, number of displacements caused, and the amount of casualties caused, it is highly likely that the intensity threshold was met between Al-Shabaab and Mozambique in 2021. Furthermore, the sophisticated tactics shown by Al-Shabaab, especially during the attack on the town of Palma, indicate that the group was sufficiently organised to be considered a party to the conflict. Therefore, Mozambique and Al-Shabaab were likely involved in a NIAC during 2021. It is unclear whether the respective threshold of violence between the intervening states (e.g., Rwanda and South Africa) and Al-Shabaab was also met during the relevant time, so it cannot be determined whether a NIAC existed between Al-Shabaab and those states during 2021. Furthermore, the status of the DAG under IHL is complicated. Generally, PMCs cannot be party to an armed conflict; instead, their members are considered to be civilians taking a 'direct participation in hostilities' (DPH) on the side of an existing party to the conflict, meaning that for such time as they participate in hostilities, they lose the protections afforded to civilians under IHL and also cannot be eligible for prisoner of war (POW) status during IACs.<sup>187</sup> However, even reaching the legal threshold of 'mercenary' under IHL and related fields is difficult, as individuals must satisfy several characteristics.<sup>188</sup> Therefore, individuals from the DAG group involved in hostilities against Al-Shabaab are best characterised as civilians taking direct participation in the hostilities between Mozambique and Al-Shabaab.

Finally, there have been numerous allegations of violations of IHL within Mozambique during 2021. For instance, Al-Shabaab is thought to have captured and used child soldiers against Mozambican forces<sup>189</sup> in contravention of IHL and the Optional Protocol to the Convention on the Rights of the Child, to which Mozambique is a

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<sup>185</sup> International Crisis Group 2022b.

<sup>186</sup> Eick M (2021) Mozambique: humanitarian crisis grows in Cabo Delgado as conflict continues. <https://reliefweb.int/report/mozambique/mozambique-humanitarian-crisis-grows-cabo-delgado-conflict-continues#:~:text=Almost%20800%2C000%20people%20have%20been,the%20province's%20capital%20of%20Pemba>. Accessed 29 March 2022.

<sup>187</sup> On DPH, see Melzer 2009 and Schmitt 2010; see also Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (adopted 8 June 1977, entered into force 7 December 1978) (API), Article 47(1).

<sup>188</sup> E.g., API Article 47; although this is only applicable in IACs.

<sup>189</sup> Human Rights Watch (2021) Mozambique: ISIS-linked Group Using Child Soldiers. <https://www.hrw.org/news/2021/09/29/mozambique-isis-linked-group-using-child-soldiers>. Accessed 3 May 2022.

state party.<sup>190</sup> Mozambican forces are also accused of carrying out torture and extra-judicial killings in its campaign against Al-Shabaab.<sup>191</sup> In addition, in response to a 2021 Amnesty International report<sup>192</sup> which alleged that the DAG were responsible for attacking civilian objects and for carrying out indiscriminate attacks by, among other actions, throwing hand grenades from helicopters into crowds of people, the founder of DAG, Lionel Dyck, stated that the PMC would establish an external investigation into the allegations.<sup>193</sup> This investigation was finalised and published in June 2021, opining that the majority of the claims detailed in Amnesty International's report were false; the extent to which DAG's investigation was adequate, however, has been disputed.<sup>194</sup>

### 8.1.10 Myanmar

In 2021, similar to previous years, there were several different areas of Myanmar in which armed conflicts may have been occurring between government forces and regional ethnic armed groups (EAGs).<sup>195</sup> In addition, there was a military *coup d'état*.

On 1 February 2021, Myanmar's military, also known as the Tatmadaw, staged a *coup d'état* following November 2020 democratic elections which were overwhelmingly in favour of the National League for Democracy (NLD) party, headed by Aung San Suu Kyi.<sup>196</sup> The military immediately arrested members of the NLD, including Aung San Suu Kyi, and other political figures and declared a year-long state of emergency.<sup>197</sup> In response, large scale protests and civil disobedience occurred, to which the Tatmadaw responded by firing on protestors with live rounds and heavy weapons.<sup>198</sup> It is estimated that, overall, more than 1000 protestors were killed by

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<sup>190</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2173 UNTS 222 (opened for signature 25 May 2000, entered into force 12 February 2002), Article 4(1).

<sup>191</sup> Human Rights Watch 2022g.

<sup>192</sup> Amnesty International 2021a.

<sup>193</sup> Reuters (2021) South African company to investigate after Amnesty says it shot at civilians in Mozambique. <https://www.reuters.com/article/uk-mozambique-insurgency-idUSKCN2AU0P3>. Accessed 4 May 2022.

<sup>194</sup> Zitar News (2021) Cabo Ligado Analysis: DAG's internal investigation into human rights allegations. <https://zitar.com/cabo-ligado-analysis-dag-internal-investigation-into-human-rights-alleations/>. Accessed 5 May 2022.

<sup>195</sup> See Klonowska and Dubey 2022, pp 179–181.

<sup>196</sup> BBC News (2021) Myanmar coup: Military take control of the country, as leader Aung San Suu Kyi detained. <https://www.bbc.com/news/av/world-asia-55892986>. Accessed 12 April 2022.

<sup>197</sup> Ibid.

<sup>198</sup> Amnesty International 2021e.

the military and police during 2021.<sup>199</sup> On 5 May, the National Unity Government (NUG), created by those opposed to the Military government, announced the creation of armed ‘People’s Defence Unit(s)’ (PDUs) to protect civilians from the Tatmadaw.<sup>200</sup> Many civilians opposed to the military *coup*—especially the youth—left the cities for the remote countryside to join PDUs, some of which received combat and weapons training from several of the multiple EAGs spread throughout Myanmar.<sup>201</sup> The military *coup* and subsequent resistance movement also complicated the position of ongoing violence between the Tatmadaw and the various EAGs in Myanmar, which number over 20.<sup>202</sup> While the NUG called for unity between the EAGs and the PDUs in their fight against the Tatmadaw, each EAG has their own motivations and goals not easily assimilated with the PDUs.<sup>203</sup> The violence between the Tatmadaw and the EAGs during 2021 was especially pronounced in Karen and Chin states.<sup>204</sup>

It must first be determined whether the PDUs and Myanmar can be considered to have been involved in a NIAC during 2021. Firstly, the Tatmadaw is known to be one of the largest and well-equipped militaries in Asia with around 407,000 personnel.<sup>205</sup> The various PDU units, on the other hand, are thought to have risen to around 25,000 in number during 2021. However, the PDU is not a unified NSAG with a clear institutional structure but is rather composed of many smaller localised groups. As such, unless there are clearly identifiable links between individual PDUs, each must be considered on its own for the purposes of IHL.<sup>206</sup> The organisational requirement of NSAGs is therefore difficult to apply to the PDU.<sup>207</sup> While the NUG announced in October 2021 that it had established a ‘Central Command and Coordination Committee’ in order to integrate the various PDUs under one hierarchical structure, it is unclear the extent to which this materialised during 2021.<sup>208</sup> Depending on the development of the conflict beyond 2021, however, it is a distinct possibility that the PDUs may merge to create one NSAG for the purposes of IHL in future. Regarding the intensity of violence between the various PDUs and the Tatmadaw, there were many skirmishes during 2021. The Tatmadaw used airstrikes, helicopter

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<sup>199</sup> Al Jazeera (2021) Myanmar army helicopter attacks ‘force thousands to flee’. <https://www.aljazeera.com/news/2021/12/1/myanmar-army-helicopter-attacks-force-thousands-to-flee>. Accessed 22 April 2022.

<sup>200</sup> Insecurity Insight 2021.

<sup>201</sup> Picard 2022.

<sup>202</sup> International Crisis Group 2022c.

<sup>203</sup> Ong 2021.

<sup>204</sup> See Human Rights Watch (2021) Myanmar: Another Wave of Atrocity Crimes in Chin State: UN Security Council Must Act Now to End Juntas’ Campaign of Terror. <https://www.hrw.org/news/2021/11/04/myanmar-another-wave-atrocity-crimes-chin-state>. Accessed 28 April 2022.

<sup>205</sup> Picard 2022.

<sup>206</sup> Selth 2022.

<sup>207</sup> Ibid.

<sup>208</sup> Myanmar Now (2021) NUG establishes ‘chain of command’ in fight against regime. <https://www.myanmar-now.org/en/news/nug-establishes-chain-of-command-in-fight-against-regime>. Accessed 7 May 2022.

attacks, and other methods against the PDUs and civilians, causing many thousands of internal displacements.<sup>209</sup> Multiple PDU units also inflicted losses on the Tatmadaw in different instances, with the NUG claiming that hundreds of Tatmadaw soldiers had been killed since the *coup*.<sup>210</sup> However, it is similarly unclear whether the intensity threshold between the Tatmadaw and each PDU could be said to be reached. While some commentators have suggested that the actions of NSAGs can be ‘aggregated’ in situations where they ‘have objectively and effectively adopted a collective approach to fighting against a common enemy’ to fulfil the intensity threshold required under IHL, it is unclear whether this is widely accepted and representative of *lex lata*.<sup>211</sup> Therefore, the combination of the fragmented nature of the PDUs and a lack of specific information about the confrontations between PDUs and the Tatmadaw in general means that it cannot be concluded that the organisational requirements and the intensity of violence were met regarding all if not any of the PDUs formed after the *coup* in February 2021.<sup>212</sup>

Regarding Myanmar’s multiple EAGs, it is beyond the scope of this Year in Review to classify each potential conflict between them and Myanmar; however, it can be assumed that several continued from previous years. Many of the EAGs, for instance the Kachin Independence Army (KIA), operate government-like functions in their respective regions and have structured and well-armed forces.<sup>213</sup> As such, the most pertinent question for the application of IHL to these groups is whether the violence between them and the Tatmadaw reached (or continued to reach) the intensity threshold required during 2021. For the KIA, considering its high level of organisation and its many recorded confrontations with the Tatmadaw during 2021—including the seizure of multiple Tatmadaw military bases—this likely constituted a NIAC.<sup>214</sup> Overall, the UN Human Rights Council opined that NIACs existed between Myanmar and the EAGs located in Chin, Kachin, Kayah, Kayin, Rakhine and Shan regions.<sup>215</sup>

### 8.1.11 Niger

Similar to other states in the Central Sahel region, namely Burkina Faso (Sect. 8.1.2) and Mali (Sect. 8.1.8), several Islamist NSAGs, notably ISGS and JNIM, were

<sup>209</sup> E.g., Al Jazeera (2021) above n 199.

<sup>210</sup> The Irrawaddy (2021). Myanmar Shadow Govt Claims 580 Junta Troops Killed Last Month. <https://www.irrawaddy.com/news/burma/myanmar-shadow-govt-claims-580-junta-troops-killed-last-month.html>. Accessed 28 April 2022.

<sup>211</sup> Nikolic et al. 2020.

<sup>212</sup> Also concluded in UN Human Rights Council 2022, pp 4–5.

<sup>213</sup> The Irrawaddy (2021) Fighting Continues Between KIA, Tatmadaw in Northern Myanmar. <https://www.irrawaddy.com/news/burma/fighting-continues-kia-tatmadaw-northern-myanmar.html>. Accessed 7 May 2022.

<sup>214</sup> Ibid.

<sup>215</sup> UN Human Rights Council 2022, pp 4–5.

engaged in insurgencies in Niger during 2021, with the number of attacks carried out by these groups increasing dramatically from previous years.<sup>216</sup> France also remained active in Niger as part of its wider counterterrorism efforts in the Sahel region.<sup>217</sup>

The NSAGs active in Niger in 2021 mostly spilled over from those active in Mali and Burkina Faso. As such, the majority of attacks by these groups occurred in the west of Niger during 2021.<sup>218</sup> Most of these attacks targeted civilian communities that resisted the strict rule of ISGS and/or JNIM who both operationalise extreme interpretations of the Islamic faith.<sup>219</sup> The Nigerien military—the *Forces Armées Nigériennes* (FAN)—were accused of regularly reacting slowly to these groups during 2021 and of failing to protect Nigerien civilians.<sup>220</sup> A significant attack occurred in November 2021 when ISGS militants on motorbikes killed 69 people, including a mayor, in the south-western town of Banibangou.<sup>221</sup> In another attack in December, at least 12 Nigerien soldiers were killed in a confrontation with hundreds of fighters from either JNIM or ISGS.<sup>222</sup> France also engaged members of both groups several times throughout 2021, including via drone strikes.<sup>223</sup>

As established above (Burkina Faso, Sect. 8.1.2) JNIM can be considered as an organised armed group for the purposes of IHL during 2021. As such, even though JNIM also operate in Niger, this organisational requirement still applies. Therefore, the determinative factor is whether the intensity of hostilities can be considered ‘protracted’ between Niger and JNIM during 2021. As the violence between JNIM and Niger seems to have escalated beyond ‘isolated and sporadic’ violence, it is suggested here that Niger was involved in a NIAC with JNIM during 2021. This view has also been suggested by other bodies, including Amnesty International.<sup>224</sup> Regarding France’s involvement, considering that its activities increased in Niger during 2021 as it withdrew from Mali, it is also likely that France’s involvement in a NIAC with at least JNIM (see Mali, Sect. 8.1.8) extended to Niger.<sup>225</sup>

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<sup>216</sup> Human Rights Watch (2021) Niger: Surging Atrocities by Armed Islamist Groups. <https://www.hrw.org/news/2021/08/11/niger-surging-atrocities-armed-islamist-groups>. Accessed 3 May 2022.

<sup>217</sup> Deutsche Welle (2021) Niger: France ‘kills’ suspect in murders of aid workers. <https://www.dw.com/en/niger-france-kills-suspect-in-murders-of-aid-workers/a-60206381>. Accessed 13 June 2022.

<sup>218</sup> Ibid.

<sup>219</sup> Aksar et al. 2021.

<sup>220</sup> Amnesty International 2021c.

<sup>221</sup> Al Jazeera (2021) Niger declares two days of mourning after nearly 70 killed. <https://www.aljazeera.com/news/2021/11/4/dozens-dead-in-west-niger-village-attack-officials>. Accessed 7 May 2022.

<sup>222</sup> The Guardian (2021) ‘Ferocious’ Niger battle leaves dozens of soldiers and militants dead. <https://www.theguardian.com/world/2021/dec/06/ferocious-niger-battle-leaves-dozens-of-soldiers-and-militants-dead>. Accessed 7 May 2022.

<sup>223</sup> Deutsche Welle (2021) above n 217.

<sup>224</sup> Amnesty International 2021c.

<sup>225</sup> The Guardian (2021) Niger: two killed and 17 injured in clash with French military convoy. <https://www.theguardian.com/world/2021/nov/27/niger-two-killed-and-17-injured-in-clash-with-french-military-convoy>. Accessed 13 June 2022.



### 8.1.12 South Sudan

Instability in South Sudan continued in 2021.

Since December 2013, South Sudan has been engaged in several potential armed conflicts on its territory against different NSAGs, notably the Sudan's People's Liberation Movement-in-Opposition (SPLM-IO).<sup>226</sup> Nevertheless, fighting has decreased since the 2018 peace deal between President Salva Kiir Mayadit and Riek Machar, leader of the SPLM-IO.<sup>227</sup> The agreement was eventually finalised in February 2020 and led to the formation of a national unity government.<sup>228</sup> However, instances of intercommunal violence and violence against civilians continued to occur throughout 2021.

A 2021 UN Report noted that slow-moving reforms under the peace agreement were contributing to the widening of the political, military and ethnic divisions in South Sudan, leading to multiple violent incidents.<sup>229</sup> The United Nations Mission in South Sudan (UNMISS) also noted in June 2021 that community based 'civilian defence groups' had killed and injured hundreds of civilians.<sup>230</sup> The UN also reported further cases of killings, abductions, conflict-related sexual violence, arbitrary arrests and detention, torture, ill-treatment and the destruction of civilian property by civil defence groups, government forces and rebel forces.<sup>231</sup> From June to October 2021, conflict erupted in Western Equatoria state between competing local groups affiliated to the government's South Sudan People's Defence Forces (SSPDF) and the Sudan People's Liberation Army-in-Opposition (SPLA-IO)—the military forces of the SPLM-IO.<sup>232</sup> In addition, in August 2021, Vice-President Riek Machar was deposed as leader of the SPLM-IO and the SPLA-IO armed forces.<sup>233</sup> This led to a violent splinter within the SPLM-IO's forces which left dozens dead.<sup>234</sup> Chief of Staff First Lieutenant General Simon Gatwech Dual was thereafter declared interim leader of the SPLM/A-IO.<sup>235</sup> In September, the Deputy UN High Commissioner for Human Rights highlighted the rising levels of localised violence between

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<sup>226</sup> RULAC 2021b.

<sup>227</sup> BBC News (2020) South Sudan rivals Salva Kiir and Riek Machar strike unity deal. <https://www.bbc.com/news/world-africa-51562367>. Accessed 6 May 2022.

<sup>228</sup> Ibid.

<sup>229</sup> Al Jazeera (2021) South Sudan at risk of 'large scale conflict': UN report. <https://www.aljazeera.com/news/2021/4/27/south-sudan-at-risk-of-large-scale-conflict-un-report>. Accessed 6 May 2022; UNSC 2021a.

<sup>230</sup> UNSC 2021c.

<sup>231</sup> Ibid.

<sup>232</sup> Amnesty International 2021d.

<sup>233</sup> Al Jazeera (2021) South Sudan's Vice President Machar deposed by party. <https://www.aljazeera.com/news/2021/8/4/south-sudans-vp-machar-deposed-by-party-military-wing>. Accessed 16 May 2022.

<sup>234</sup> Dumo D (2021) Rival South Sudanese factions clash, two sides report dozens of soldiers killed. <https://www.reuters.com/world/africa/clashes-kill-least-30-south-sudanese-soldiers-says-vp-spokesman-2021-08-07/>. Accessed 16 May 2022.

<sup>235</sup> Al Jazeera (2021) above n 233.

community-based militias who were responsible for killings, injuries, abductions and sexual violence.<sup>236</sup> Other reports noted that the government and SSPDF had failed to take appropriate measures to reform its abusive national security agency (NSS) who have been accused of arbitrarily detaining critics, including members of civil society and journalists.<sup>237</sup>

It is difficult to determine whether IHL applied to the intercommunal violence which took place in South Sudan during 2021. Although violence increased in the second half of the year,<sup>238</sup> the localised and *ad hoc* nature of the groups involved in the violence—in combination with an overall lack of information about their respective structures—makes it hard to determine whether they could constitute organised armed groups for the purposes of IHL.<sup>239</sup> As such, it is unclear whether the multiple and overlapping situations of violence in South Sudan during 2021 could be categorised as a NIAC (or several thereof).

Nevertheless, Amnesty International claimed that there was evidence to suggest that war crimes were committed in South Sudan during 2021, ostensibly demonstrating their view that there was at least one armed conflict in occurrence in South Sudan during 2021.<sup>240</sup>

### 8.1.13 Ukraine

The ongoing conflict situation in Ukraine, which originally escalated following the Maidan Revolution of late 2013/early 2014, continued into 2021.<sup>241</sup>

Firstly, the Russian Federation remained in control of the Crimean Peninsula that it *de facto* annexed from Ukraine in 2014. In addition, the relatively static situation in the Luhansk and Donetsk Oblasts (commonly referred to as the Donbas region) in eastern Ukraine continued. Opposing the Ukrainian Armed Forces during 2021 were the fighters of the self-proclaimed People's Republic of Donetsk (DPR) and the People's Republic of Luhansk (LPR)—NSAGs that control territory in the Donetsk and Luhansk Oblasts (respectively) within the Donbas region directly adjacent to Russia. It is widely alleged that the Russian Federation has directly supported the DPR and LPR financially and militarily since 2014 and during 2021, although the extent of the support is unclear.<sup>242</sup> Many in Ukraine and elsewhere consider both the DPR and LPR to be proxy forces of the Russian Federation, similar to the breakaway

<sup>236</sup> UN News (2021) South Sudan plagued by violence and corruption, Human Rights Council hears. <https://news.un.org/en/story/2021/09/1100932>. Accessed 6 May 2022.

<sup>237</sup> Human Rights Watch 2020.

<sup>238</sup> International Crisis Group 2021d.

<sup>239</sup> Amnesty International 2021d.

<sup>240</sup> Amnesty International 2021d.

<sup>241</sup> See Klonowska and Dubey 2022, pp 187–188.

<sup>242</sup> For instance, see Statement by the Delegation of Ukraine at the 988th FSC Plenary Meeting 2021.

regions of Transnistria (Moldova) and Abkhazia/South Ossetia (Georgia).<sup>243</sup> In 2021, there was a dramatic increase of recorded violations of the Minsk ceasefire agreement between Ukraine and the DNR/LPR from the previous year.<sup>244</sup> Nevertheless, the frontlines did not dramatically change, a trend that has largely continued since 2015. Some have compared the stalemate in the Donbas region as similar in nature to the trench warfare of World War I, with a 160-mile-long frontline stretching from the Russian border in the north to the Sea of Azov in the south.<sup>245</sup> In March 2021, the Russian Federation began to build up troop numbers around its official border to Ukraine and in occupied Crimea, sparking fears of an escalation of the conflict in the Donbas region.<sup>246</sup> While these troops were withdrawn in April/May 2021, in October the Russian Federation again began to build up troops around its border with Ukraine, in occupied Crimea, and within Belarus bordering Ukraine, drawing alarm from Ukraine and NATO states.<sup>247</sup>

As the Russian Federation clearly remained in effective control of the Crimean Peninsula during 2021, this can be categorised as an ongoing belligerent occupation of Ukrainian territory by the Russian Federation.<sup>248</sup> The classification of the conflict between Ukraine and the LPR/DPR in the Donbas region is more complicated owing to the unclear relationship of the Russian Federation to these groups. Firstly, owing to their command structures, number of fighters, and ability to hold territory, it is evident that both the DPR and LPR satisfy the organisational requirement. Regarding the intensity of the violence between Ukrainian armed forces and the DPR/LPR, although the conflict has decreased in intensity since 2014/2015, once an armed conflict has begun the end of applicability of IHL will only occur once the thresholds (in the case of NIACs, organisation and intensity) are no longer met.<sup>249</sup> Therefore, it can be safely assumed that a NIAC continued between Ukraine and the LPR and Ukraine and the DPR during 2021.

For the conflict in the Donbas region to constitute an IAC during 2021, the Russian Federation would have to be considered to operate 'overall control' over either or both of the DPR/LPR.<sup>250</sup> While allegations of Russia's control over the LPR and DPR have been made by many reputable sources, there is simply not enough concrete evidence to determine whether this would reach the threshold of overall control and therefore transform the NIACs into an IAC between Ukraine and Russia during 2021.

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<sup>243</sup> Ibid.

<sup>244</sup> SwissInfo (2021) OSCE says ceasefire agreement reached for eastern Ukraine. <https://www.swissinfo.ch/eng/osce-says-ceasefire-agreement-reached-for-eastern-ukraine/47212776>. Accessed 7 May 2022.

<sup>245</sup> Peterson 2021.

<sup>246</sup> Reuters (2021) Russia moves warships to Black Sea for drills: Interfax. <https://www.reuters.com/article/us-ukraine-crisis-russia-defence-idUSKBN2BV14M>. Accessed 7 May 2022.

<sup>247</sup> NATO (2021) Press conference with NATO Secretary General Jens Stoltenberg and the Minister of Foreign Affairs of Ukraine, Dmytro Kuleba. [https://www.nato.int/cps/en/natohq/opinions\\_188554.htm](https://www.nato.int/cps/en/natohq/opinions_188554.htm). Accessed 7 May 2022.

<sup>248</sup> See, for instance, Dinstein 2019, p 13.

<sup>249</sup> For instance, see Milanovic 2014, p 163.

<sup>250</sup> *Tadić* 1995, above n 5, para 70.

### 8.1.14 Yemen

The ongoing conflict situation in Yemen continued into 2021.<sup>251</sup>

The current situation escalated in 2014 when Ansar Allah (commonly referred to as the ‘Houthis’), an NSAG, captured Yemen’s capital, Sana’a, from the internationally recognised Yemeni government. The Houthis are known to receive military and financial backing from Iran.<sup>252</sup> Since 2015, the United Arab Emirates (UAE) and Saudi Arabia have led a military coalition of states against the Houthi group in Yemen following a request from the internationally recognised government of Yemen (commonly referred to as the ‘Hadi’ government, owing to the name of its leader, Abdrabbuh Mansur Hadi).<sup>253</sup> In addition, the UAE has supported a group in the south of Yemen—the Southern Transitional Council—which also challenges the authority of Yemen’s Hadi government, despite the UAE also supporting the Hadi government in their fight against the Houthis.<sup>254</sup> Owing to the involvement of multiple states of the region, the ongoing conflicts in Yemen are often referred to as a ‘proxy war’.<sup>255</sup> In February 2021, President Biden announced an end to US support for Saudi-led ‘offensive operations’ and to work to end the war in Yemen, however the US is alleged to have continued other forms of support to the Saudi-led coalition.<sup>256</sup>

Fighting between the various groups and states within Yemen continued in 2021. In February 2021, the Houthis launched an attack on the city of Marib, referred to as ‘the last stronghold’ of Yemen’s Hadi government.<sup>257</sup> Hundreds of fighters from both the Houthis and the Hadi government were killed during the assault.<sup>258</sup> The Houthis also struck targets within Saudi Arabia with missiles and suicide drones, including oil facilities and international airports.<sup>259</sup> The Saudi-led coalition also led an intense bombing campaign on the Houthi controlled capital, Sana’a, in 2021.<sup>260</sup> Overall, in a continuation of previous years, the conflicts in Yemen during 2021 had a devastating impact on the civilian population. Issues such as lack of access to food, water, and healthcare have led to the deaths of hundreds of thousands of

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<sup>251</sup> See Klonowska and Dubey 2022, pp 189–191.

<sup>252</sup> Glenn 2015.

<sup>253</sup> Council on Foreign Relations 2022d.

<sup>254</sup> Human Rights Watch 2021d.

<sup>255</sup> Council on Foreign Relations 2022d.

<sup>256</sup> Far TS (2022) Biden Doubles Down on a Failed Yemen Policy. <https://www.hrw.org/news/2022/02/15/biden-doubles-down-failed-yemen-policy>. Accessed 28 April 2022.

<sup>257</sup> Council on Foreign Relations 2022a.

<sup>258</sup> Ghobari M and El Yaakoubi A (2021) Yemen’s Houthis raise stakes in Marib ‘blood bath’, sources say. <https://www.reuters.com/article/us-yemen-security/yemens-houthis-raise-stakes-in-marib-blood-bath-sources-say-idUSKBN2AM1ER>. Accessed 28 April 2022.

<sup>259</sup> Council on Foreign Relations 2022c.

<sup>260</sup> Al Jazeera (2021) Saudi-led coalition bombs Sanaa after Houthi attacks. <https://www.aljazeera.com/news/2021/12/7/saudi-led-coalition-bombs-sanaa-in-retaliation-for-houthi-attacks>. Accessed 26 May 2022.

people, with a UNDP report finding that, on average, a child under the age of five died every nine minutes during 2021 in Yemen.<sup>261</sup> Furthermore, a 2021 OCHA report estimated that 20.7 million people were in need of humanitarian assistance and over 4 million were internally displaced in Yemen.<sup>262</sup> During 2021, both the Houthis and the Hadi government were accused of blocking humanitarian access and the Saudi-led coalition also continued its land, sea, and air blockade of Houthi controlled areas.<sup>263</sup>

It must first be determined whether the ongoing conflict between the Houthis and the Yemeni government continued to exist as a NIAC. Firstly, the Houthis continued to demonstrate a high level of organisation as an NSAG during 2021. They controlled a large amount of territory in Yemen, including the capital, had a clear command structure, and showed the capacity to mount sustained military operations.<sup>264</sup> In addition, as indicated, the intensity of the conflict in 2021 continued to be at a high level and actually increased compared to the previous year. As such, it can be concluded that a NIAC continued to exist between the Houthis and Yemen. Although Iran is known to support the Houthis, the threshold of ‘overall control’ required to transform the conflict into an IAC between Iran and Yemen is unlikely to have been met owing to the Houthis’ large degree of independence.<sup>265</sup>

Regarding the conflict between the states in the Saudi Arabian-led coalition and the Houthis, it is harder to determine the intensity of violence between the Houthis and each state owing to the unclear role that each state plays in the coalition’s military operations. While it is possible for an international organisation to be a party to an armed conflict, the *ad hoc* nature of the Saudi-led coalition (e.g., it does not have an independent legal personality) and the unclear command-and-control arrangements means that this will not apply in these circumstances.<sup>266</sup> Owing to the intensity of the violence between the Houthis and the Saudi-led coalition, however, it can be safely assumed that the majority, if not all, of the states involved were also involved in a NIAC with the Houthis during 2021. It should be noted that the extension of hostilities beyond the borders of Yemen—for instance, through the Houthis’ use of missile and suicide drone strikes within Saudi Arabian territory—does not automatically change the conflict classification; the Houthis remain an NSAG so they cannot be party to an IAC.<sup>267</sup>

In a related development, despite continued allegations of violations of IHL from all parties to the conflicts in Yemen, the UN Human Rights Council voted against

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<sup>261</sup> UNDP 2021.

<sup>262</sup> OCHA 2021c.

<sup>263</sup> Associated Press (2021) Officials in Yemen: Houthi Blockade Restricts Aid, Movement. <https://www.voanews.com/a/officials-in-yemen-houthi-blockade-restricts-aid-movement/6274697.html>. Accessed 28 April 2022; Human Rights Watch (2021) Yemen: Coalition Blockade Imperils Civilians. <https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians>. Accessed 28 April 2022.

<sup>264</sup> Council on Foreign Relations 2022c.

<sup>265</sup> *Tadić* 1995, above n 5, para 70.

<sup>266</sup> ICRC 2020, para 278.

<sup>267</sup> Note, there is an exception for independence movements under API, Article 1(4), but that is arguably not applicable here.

renewing the mandate of the Group of Eminent Experts on Yemen, an impartial body established to investigate alleged violations of human rights law and IHL.<sup>268</sup> It is alleged that Saudi Arabia used ‘incentives and threats’ to convince several states to vote against its renewal or to abstain from the vote.<sup>269</sup>

### 8.1.15 *Other Potential Armed Conflicts*

In addition to the states and territories assessed in this Year in Review where armed conflicts may have taken place, there were several other potential situations of armed conflict and/or belligerent occupation occurring throughout the world in 2021. As indicated, the situations focused on in the preceding sections were chosen due to either: (i) a new conflict or conflicts arising; or, (ii) significant developments occurring during 2021. Additional possible situations not examined include within Chad,<sup>270</sup> the Democratic Republic of Congo,<sup>271</sup> Mexico,<sup>272</sup> the Philippines,<sup>273</sup> Syria,<sup>274</sup> Morocco/Western Sahara,<sup>275</sup> Senegal,<sup>276</sup> and Sudan,<sup>277</sup> among others.

## 8.2 Courts and Tribunals

This section seeks to highlight notable developments within and in relation to judicial bodies with a direct bearing on the interpretation and understanding of IHL in 2021.

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<sup>268</sup> UNOHCHR 2021.

<sup>269</sup> Kirchgaessner S (2021) Saudis used ‘incentives and threats’ to shut down UN investigation in Yemen. <https://www.theguardian.com/world/2021/dec/01/saudi-arabia-yemen-un-human-rights-investigation-incentives-and-therats>. Accessed 28 April 2022.

<sup>270</sup> Al Jazeera (2021) Who are Chad’s FACT rebels and what are their goals? <https://www.aljazeera.com/news/2021/4/21/who-are-chads-fact-rebels-and-what-are-their-goals>. Accessed 10 June 2022.

<sup>271</sup> See Center for Preventive Action 2022c.

<sup>272</sup> See Redaelli C (2021) La guerra contra las drogas: desafíos para el derecho internacional humanitario. <https://www.unisabana.edu.co/programas/unidades-academicas/facultad-de-derecho-y-ciencias-politicas/anuariodih/articulos/articulos-segunda-edicion/la-guerra-contra-las-drogas-desafios-para-el-derecho-internacional-humanitario/>. Accessed 11 May 2022.

<sup>273</sup> World Food Programme 2021.

<sup>274</sup> Human Rights Watch 2021e.

<sup>275</sup> Human Rights Watch 2021b.

<sup>276</sup> Africa News (2021) Senegalese army promises to resettle displaced people on reclaimed territory. <https://www.africanews.com/2021/02/11/senegalese-army-promises-to-resettle-displaced-people-on-reclaimed-territory/>. Accessed 11 May 2022.

<sup>277</sup> Human Rights Watch (2021) Sudan: New Wave of Attacks in Darfur. <https://www.hrw.org/news/2021/12/15/sudan-new-wave-attacks-darfur>. Accessed 11 May 2022.

Such developments include, among others, ongoing investigations and the adjudication of substantive war crimes—defined here as serious violations of IHL that give rise to individual criminal responsibility under international law.<sup>278</sup>

The section is divided into three subsections. The first subsection addresses in detail developments that took place at international courts, particularly those of the International Criminal Court (ICC) and the International Residual Mechanism for Criminal Tribunals (IRMCT). The next subsection focuses on jurisprudential developments from hybrid criminal tribunals—such as those established in response to alleged crimes in, among other contexts, Kosovo, Lebanon, and Cambodia—and regional human rights courts, such as the European Court of Human Rights (ECtHR), which also sometimes interpret and apply IHL. Finally, the third subsection provides a selection of notable war crimes cases brought before national courts, a number of which were brought under the principle of universal jurisdiction. As with Sect. 8.1, this section is not intended to provide an exhaustive account of judicial developments relating to IHL in 2021 but aims to highlight the most salient and provide resources for further research.

## 8.2.1 *International Courts*

The following section details significant developments relating to IHL which occurred at the international courts during 2021. These developments include cases and situations at the ICC and the IRMCT. The scope of this section will also attempt to give a succinct background to case developments that occurred prior to 2021.

### 8.2.1.1 **International Criminal Court**

#### **Overview**

As it has jurisdiction over a wide range of war crimes, the ICC regularly interprets and applies IHL. In a general development, Ms Fatou Bensouda's mandate as ICC Prosecutor ended on 15 June 2021.<sup>279</sup> Ms Bensouda had served at the Court since 2004, first as Deputy Prosecutor before being elected by the Assembly of State Parties as Prosecutor of the ICC in 2012. Her successor, Mr Karim Asad Ahmad Khan QC of the United Kingdom of Great Britain and Northern Ireland (UK), was

<sup>278</sup> See *Tadić* 1995, above n 5, para 94.

<sup>279</sup> ICC (2021) Mrs Fatou Bensouda finishes her mandate as ICC Prosecutor. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1597#:~:text=In%20the%20past%20week%2C%20a,today%2C%20on%2015%20June%202021>. Accessed 10 March 2022.

sworn in as Prosecutor on 16 June 2021 following election.<sup>280</sup> Mr Khan was formerly an Assistant Secretary-General of the United Nations and was also the head of the United Nations Investigative Team to promote accountability for crimes committed by Da'esh/ISIL in Iraq.<sup>281</sup> Mr Khan is a qualified barrister in England and Wales with more than 25 years of professional experience as an international criminal and human rights lawyer.<sup>282</sup> In his opening speech as Prosecutor, Mr Khan emphasised his view that the ICC should be a court of last resort and that domestic and regional trials of international crimes should be prioritised.<sup>283</sup> He further noted that the Office of the Prosecutor (OTP) should make full use of Article 54 of the Rome Statute of the International Criminal Court<sup>284</sup> to investigate incriminating and exculpatory evidence equally to strengthen cases before the Court.<sup>285</sup>

The following section will examine developments at the ICC relating to IHL in the preliminary examination, investigation, and cases at the trial and appeal stages.

### **Preliminary Examinations and Investigations**

In 2021, the OTP continued a number of ongoing preliminary examinations. The major developments relating to IHL are outlined below.

#### *Colombia*

The situation in Colombia had been under preliminary examination since June 2004 in the context of the armed conflict between and among government forces and NSAGs (see Sect. 8.1.4). The crimes alleged include crimes against humanity and war crimes. The outgoing Prosecutor, Ms Bensouda, released a report on 15 June 2021 outlining her decision to keep the situation in Colombia under preliminary examination.<sup>286</sup> The report outlined developments which would be necessary within the Colombian legal framework for the preliminary examination to be closed. These included changes in the national legislative framework, domestic proceedings, and the enforcement of sentences.<sup>287</sup>

In October 2021, however, the new Prosecutor, Mr Khan, concluded a Cooperation Agreement with the Government of Colombia which reinforced the respective roles

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<sup>280</sup> ICC (2021) Mr Karim Asad Ahmad Khan QC sworn in today as the Prosecutor of the International Criminal Court. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1598#:~:text=Today%2C%2016%20June%202021%2C%20Mr,in%20The%20Hague%2C%20The%20Netherlands>. Accessed 10 March 2022.

<sup>281</sup> ICC (2022) Karim A.A. Khan QC. <https://www.icc-cpi.int/about/otp/who-s-who/Pages/karim-khan.aspx>. Accessed 10 March 2022.

<sup>282</sup> *Ibid.*

<sup>283</sup> Journalists for Justice 2021.

<sup>284</sup> Rome Statute of the International Criminal Court (as amended) 2187 UNTS 90 (signed 17 July 1998, entered into force 1 July 2002) (Rome Statute).

<sup>285</sup> Journalists for Justice 2021.

<sup>286</sup> The Office of the Prosecutor (2021) Situation in Colombia: Benchmarking Consultation. <https://www.icc-cpi.int/itemsDocuments/20210615-COL-Benchmarking-Consultation-Report-eng.pdf>. Accessed 19 April 2022.

<sup>287</sup> *Ibid.*



that the OTP and the Colombian Government will take to ensure that the progress achieved within Colombia's domestic framework is sustained and strengthened.<sup>288</sup> Following his assessment, the Prosecutor was satisfied that Colombia's domestic system was committed to genuinely investigate and prosecute crimes within the Rome Statute, including war crimes, and that the principle of complementarity was working in Colombia. Central to the Prosecutor's decision was the establishment and functioning of the Colombian 'Special Jurisdiction for Peace' (see below at Sect. 8.2.4.3). In light of these findings, the Prosecutor decided to close the Colombia preliminary examination.<sup>289</sup>

### *State of Palestine*

On 2 January 2014, Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General.<sup>290</sup> The Statute entered into force for Palestine on 1 April 2015. Subsequently, on 16 February 2015, the then-Prosecutor, Ms Bensouda, opened a preliminary examination into the situation in Palestine.<sup>291</sup> The preliminary examination aimed to assess the jurisdiction of the ICC over alleged crimes committed in the occupied Palestinian territories, including East Jerusalem, since 13 June 2014 (see also Sect. 8.1.6).<sup>292</sup> The OTP concluded its preliminary examination in December 2019, determining that all the statutory criteria under the Rome Statute for the opening of an investigation had been met.<sup>293</sup> Given a number of unique and contested legal and factual issues concerning the situation and the territory within which the investigation may be conducted, the Prosecutor requested a jurisdictional ruling on the scope of the territorial jurisdiction of the ICC under Article 12(2)(a) of the Rome Statute from Pre-Trial Chamber I.<sup>294</sup>

Pre-Trial Chamber I issued its decision on 5 February 2021, holding that the ICC was not constitutionally competent to determine matters of statehood that would bind the international community and thus the Chamber's ruling only served the purpose

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<sup>288</sup> ICC (2021) ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1623>. Accessed 11 March 2022.

<sup>289</sup> Ibid.

<sup>290</sup> ICC (2015) The State of Palestine accedes to the Rome Statute. [https://www.icc-cpi.int/Pages/item.aspx?name=pr1082\\_2](https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2). Accessed 14 March 2022.

<sup>291</sup> ICC (2015) The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>. Accessed 14 March 2022.

<sup>292</sup> Ibid.

<sup>293</sup> ICC (2012) ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566>. Accessed 14 March 2022.

<sup>294</sup> ICC, *Situation in the State of Palestine*, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18.

of defining the Court's territorial jurisdiction.<sup>295</sup> The Chamber found that Palestine's accession to the Rome Statute followed the correct and ordinary procedure and that Palestine had thus bound itself to the terms of the Statute.<sup>296</sup> The Chamber held that Palestine therefore has the right to be treated as any other state party for matters relating to the implementation of the Statute. The majority held that the Court's territorial jurisdiction in the *Situation in Palestine* case extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem, in light of Resolution 67/19 of the General Assembly of the United Nations (UNGA).<sup>297</sup>

In light of this decision, the Prosecutor announced the opening of the investigation into the situation in the State of Palestine on 3 March 2021.<sup>298</sup> Now that jurisdiction has been established, the OTP can investigate and prosecute any war crime, crime against humanity, or crime of genocide which has been committed within Palestine since they acceded to the Rome Statute in January 2014, including those war crimes allegedly committed during 2021's hostilities (see Sect. 8.1.6).

## Cases before the Court

### *Cases Arising from the Situation in the Central African Republic*

On 30 May 2014, the OTP received a referral from CAR authorities regarding crimes allegedly committed in their territory since 1 August 2012. The Prosecutor subsequently commenced an investigation into the situation in CAR regarding crimes against humanity and war crimes committed by both the Séléka and anti-balaka groups (on the conflict, see Sect. 8.1.3).<sup>299</sup>

A warrant of arrest was issued against Mr Mahamat Said Abdel Kani on 30 October 2018.<sup>300</sup> Mr Said is alleged to have been a senior member of the Séléka coalition and is suspected of having committed crimes against humanity and war crimes at the *Office Central de Répression du Banditisme* in Bangui between April and August 2013. On 24 January 2021, Mr Said was surrendered to the Court by the authorities of the CAR.<sup>301</sup> On 9 December 2021, Pre-Trial Chamber II partially

<sup>295</sup> ICC, *Situation in the State of Palestine*, Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, ICC-01/18, para 108.

<sup>296</sup> *Ibid.*, para 121.

<sup>297</sup> UNGA 2012.

<sup>298</sup> ICC 2021.

<sup>299</sup> ICC 2014.

<sup>300</sup> ICC, *Situation in the Central African Republic II*, Public Redacted Version of 'Warrant of Arrest for Mahamat Said Abdel Kani', 7 January 2019, ICC-01/14-01/21-2-US-Exp', 17 February 2021, ICC-01/14 (*Said Abdel Kani* 2019).

<sup>301</sup> ICC (2021) *Situation in Central African Republic II: Mahamat Said Abdel Kani surrendered to the ICC for crimes against humanity and war crimes*. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1559>. Accessed 19 March 2022.

confirmed the charges brought against Mr Said by the OTP.<sup>302</sup> The Chamber held that sufficient evidence was present to establish substantial grounds that Mr Said was a senior member of the Séléka coalition and is criminally responsible under Articles 25(3)(a) and 25(3)(b) of the Rome Statute for crimes against humanity and war crimes (torture, cruel treatment and outrages upon personal dignity) committed between 12 April and 30 August 2013 against detained persons perceived as supporters of the former President Bozizé.<sup>303</sup> Mr Said's trial is scheduled to open in September 2022.

A second case from the situation in the CAR, that of Yekatom and Ngaïssona, experienced developments in 2021. An arrest warrant for Alfred Yekatom was issued on 11 November 2018; he is alleged to have committed several war crimes, including murder and intentionally directing attacks against buildings dedicated to religion, and crimes against humanity between December 2013 and August 2014.<sup>304</sup> An arrest warrant was also issued for Patrice-Edouard Ngaïssona on 7 December 2018 who is also accused of committing several war crimes and crimes against humanity between December 2013 and at least December 2014.<sup>305</sup> Both are accused of holding commanding positions within the Anti-Balaka movement. Yekatom was surrendered to the ICC on 17 November 2018 and Ngaïssona was surrendered on 23 January 2019. On 20 February 2019, Pre-Trial Chamber II joined the Yekatom and Ngaïssona cases together.<sup>306</sup> On 11 December 2019, Pre-Trial Chamber II partially confirmed the charges of war crimes and crimes against humanity against Yekatom and Ngaïssona.<sup>307</sup> The Prosecutor initially requested that the Court reconsider the charges against Yekatom and Ngaïssona but this was rejected by Pre-Trial Chamber II on 11 March 2020.<sup>308</sup> Their trial opened on 16 February 2021 before Trial Chamber V.<sup>309</sup>

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<sup>302</sup> ICC, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021, ICC-01/14-01/21 (*Said Abdel Kani* 2021).

<sup>303</sup> *Ibid.*

<sup>304</sup> ICC, *The Prosecutor v. Alfred Yekatom*, Public Redacted Version of 'Warrant of Arrest for Alfred Yekatom', ICC-01/14-01/18-1-US-Exp, 11 November 2018, 17 November 2018, ICC-01/14-01/18 (*Yekatom* 2018).

<sup>305</sup> ICC, *Situation in the Central African Republic II*, Public Redacted Version of 'Warrant of Arrest for Patrice-Edouard Ngaïssona', 13 December 2018, ICC-01/14-02/18 (*Ngaïssona* 2018).

<sup>306</sup> ICC, *The Prosecutor v. Alfred Yekatom*, Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters, 20 February 2019, ICC-01/14-01/18 (*Yekatom and Ngaïssona* 2019).

<sup>307</sup> ICC, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 14 May 2020, ICC-01/14-01/18 (*Yekatom and Ngaïssona* 2020).

<sup>308</sup> ICC, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 11 March 2020, ICC-01/04-01/18 (*Yekatom and Ngaïssona* 2020).

<sup>309</sup> ICC (2021) Opening of the Yekatom and Ngaïssona trial postponed to 16 February 2021. <https://www.icc-cpi.int/Pages/item.aspx?name=ma259>. Accessed 20 March 2022.

The Court's eventual judgement may clarify several important issues relating to the interpretation of IHL, including regarding attacks on religious buildings.

*Cases Arising from the Situation in the Democratic Republic of Congo*

The situation in the DRC was referred to the ICC by the DRC's government in 2004 and the Prosecutor chose to open an investigation.<sup>310</sup> In 2021, there were notable developments in the case of Mr Bosco Ntaganda.

Following investigation, an arrest warrant was submitted for Mr Ntaganda in January 2006 under allegations that, in his role as Deputy Chief of General Staff for Military Operations of the *Forces patriotiques pour la libération du Congo* (FPLC),<sup>311</sup> he committed the war crimes of enlistment and conscription of children under the age of 15 and of using them to participate actively in hostilities between July 2002 and December 2003.<sup>312</sup> A second warrant for his arrest was issued on 12 July 2012.<sup>313</sup> Mr Ntaganda was surrendered to ICC custody on 22 March 2013,<sup>314</sup> with charges of war crimes and crimes against humanity being confirmed on 9 June 2014.<sup>315</sup>

On 8 July 2019, Trial Chamber VI found Mr Ntaganda guilty beyond reasonable doubt of 18 counts of war crimes and crimes against humanity committed in Ituri, DRC in 2002–2003.<sup>316</sup> He was found guilty of war crimes including murder, intentionally directing attacks against civilians, rape, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 to participate actively in hostilities, amongst others. These crimes were committed against the civilian population pursuant to an FPLC policy to which Mr Ntaganda was found to hold an important military function. Mr Ntaganda was sentenced on 7 November 2019 to a total of 30 years of imprisonment.<sup>317</sup>

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<sup>310</sup> ICC (2004) The Office of the Prosecutor of the International Criminal Court opens its first investigation. <https://www.icc-cpi.int/Pages/item.aspx?name=the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation>. Accessed 30 March 2022.

<sup>311</sup> ICC, *The Prosecutor v. Bosco Ntaganda*, Warrant of Arrest – Redacted Version, 7 March 2007, ICC-01/04-02/06 (*Ntaganda* 2007).

<sup>312</sup> *Ibid.*

<sup>313</sup> ICC, *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58, 12 July 2012, ICC-01/04-02/06 (*Ntaganda* 2012).

<sup>314</sup> ICC (2012) Bosco Ntaganda in the ICC's custody. <https://www.icc-cpi.int/Pages/item.aspx?name=pr888>. Accessed 30 March 2022.

<sup>315</sup> ICC, *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06 (*Ntaganda* 2014).

<sup>316</sup> ICC, *The Prosecutor v. Bosco Ntaganda*, Judgement, 8 July 2019, ICC-01/04-02/06 (*Ntaganda* 2019).

<sup>317</sup> ICC, *The Prosecutor v. Bosco Ntaganda*, Sentencing Judgement, 7 November 2019, ICC-01/04-02/06.

Both the defence and prosecution submitted appeals against the judgement, whilst the defence also submitted an appeal against the sentence.<sup>318</sup> On 30 March 2021, the Appeals Chamber delivered its judgement confirming by majority the decision of Trial Chamber VI which found Ntaganda guilty of the 18 counts of war crimes and crimes against humanity, as well as the judgement on sentencing delivered on 7 November 2019.<sup>319</sup> The Appeals Chamber found that Mr Ntaganda did not demonstrate that his right to a fair trial had been violated and determined that the Trial Chamber did not exceed the facts and circumstances set out in the charges. Mr Ntaganda will remain in the ICC detention centre in The Hague until the ICC Presidency determines where he will serve his sentence.

#### *Cases Arising from the Situation in Sudan*

In 2005, the ICC opened an investigation into allegations of genocide, war crimes and crimes against humanity committed in Darfur, Sudan, since 1 July 2002. The investigation began following a referral from the UN Security Council in March 2005 which noted that the situation in Sudan threatened international peace and security.<sup>320</sup> In 2021 there were notable developments in the case of Mr Ali Muhammad Ali Abd-Al-Rahman.

Mr Abd-Al-Rahman is suspected of being a senior leader of the Militia/Janjaweed in the Wadi Salih and Mukjar Localities in Darfur, Sudan. An original warrant was issued for his arrest in 2007 with a second warrant being issued in 2018.<sup>321</sup> Mr Abd-Al-Rahman is suspected of 31 counts of war crimes and crimes against humanity allegedly committed between August 2003 and 2004, including the war crimes of pillaging, destruction of the property of an adversary, other inhumane acts, outrages upon personal dignity, rape, torture, cruel treatment and attempted murder.<sup>322</sup> Mr Abd-Al-Rahman was transferred to the ICC's custody on 9 June 2020, after surrendering himself voluntarily in the CAR.<sup>323</sup> The confirmation of charges hearing took

<sup>318</sup> ICC (2021) Ntaganda Case: ICC Appeals Chamber to deliver appeals judgement on 30 March 2021 - Practical information. <https://www.icc-cpi.int/Pages/item.aspx?name=MA263>. Accessed 30 March 2022.

<sup>319</sup> ICC, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgement on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgement', 30 March 2021, ICC-01/04-02/06 A A2 (*Ntaganda* 2021).

<sup>320</sup> ICC (2005) Security Council refers situation in Darfur to ICC Prosecutor. <https://www.icc-cpi.int/Pages/item.aspx?name=security%20council%20refers%20situation%20in%20darfur%20to%20icc%20prosecutor>. Accessed 22 March 2022.

<sup>321</sup> ICC, *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Public redacted version of Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 16 January 2018, ICC-02/05/05-01/07-7-Secret-Exp, 11 June 2020, ICC-02/05-01/07 (*Ali Kushayb* 2018).

<sup>322</sup> ICC, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb"), Prosecution's submission of the Document Containing the Charges, 29 March 2021, ICC-02/05-01/20 (*Ali Kushayb* 2021).

<sup>323</sup> ICC (2020) Situation in Darfur (Sudan): Ali Kushayb is in ICC custody. <https://www.icc-cpi.int/Pages/item.aspx?name=PR1525>. Accessed 23 March 2022.

place from 24 to 26 May 2021.<sup>324</sup> On 9 July 2021, Pre-Trial Chamber II confirmed all the charges of war crimes and crimes against humanity brought against Mr Abd-Al-Rahman by the Prosecutor.<sup>325</sup> On 8 September, Trial Chamber I scheduled his trial to begin on 5 April 2022.<sup>326</sup>

### *Cases Arising from the Situation in Uganda*

An investigation was opened into the situation in Uganda in July 2004, following a referral from the government of Uganda. In 2021, significant developments occurred in the case of Mr Dominic Ongwen.

An arrest warrant was issued against Mr Ongwen on 18 May 2005 following an investigation into the situation in northern Uganda.<sup>327</sup> Mr Ongwen was accused of being a commander of the Lord's Resistance Army (LRA) where he is alleged to have committed crimes against humanity and war crimes against civilians in Uganda. Mr Ongwen was surrendered to the ICC on 21 January 2015.<sup>328</sup>

Pre-Trial Chamber II confirmed the charges against Mr Ongwen on 23 March 2016.<sup>329</sup> The Court confirmed 70 charges against Mr Ongwen, finding substantial grounds to believe that Ongwen was responsible for war crimes (including, amongst others, attacks against the civilian population; murder; rape; torture; pillaging; the conscription and use of children under the age of 15 to participate actively in hostilities); and crimes against humanity.<sup>330</sup>

The trial against Mr Dominic Ongwen opened on 6 December 2016 before Trial Chamber IX.<sup>331</sup> On 4 February 2021, Trial Chamber IX found Dominic Ongwen guilty for a total of 61 charges of crimes against humanity and war crimes committed in northern Uganda between 1 July 2002 and 31 December 2005.<sup>332</sup> These crimes included attacks against the civilian population, murder, attempted murder, torture, enslavement, outrages upon personal dignity, pillaging, destruction of property and

<sup>324</sup> ICC (2021) ICC concludes confirmation of charges hearing in Abd-Al-Rahman case. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1593>. Accessed 23 March 2022.

<sup>325</sup> ICC, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Corrected version of "Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 9 July 2021, ICC-02/05-01/20-433", 23 November 2021, ICC-02/05-01/20 (*Ali Kushayb* 2021).

<sup>326</sup> ICC (2021) Abd-Al-Rahman case: Trial to open on 5 April 2021. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1806>. Accessed 24 March 2022.

<sup>327</sup> ICC, *Situation in Uganda*, Public redacted version – Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04 (*Ongwen* 2005).

<sup>328</sup> ICC (2015) Dominic Ongwen transferred to The Hague. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1084>. Accessed 30 March 2022.

<sup>329</sup> ICC, *The Prosecutor v. Dominic Ongwen*, Public redacted with public annex: List of participating victims, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15 (*Ongwen* 2016).

<sup>330</sup> *Ibid.*

<sup>331</sup> ICC (2016) Ongwen trial opens at International Criminal Court. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1262>. Accessed 30 March 2022.

<sup>332</sup> ICC, *The Prosecutor v. Dominic Ongwen*, Public Redacted: Trial Judgement, 4 February 2021, ICC-02/04-01/15 (*Ongwen* 2021).

persecution, as well as a number of sexual and gender based crimes and the crime of conscripting children under the age of 15 into armed forces and using them to participate actively in hostilities.<sup>333</sup> Ongwen was sentenced to 25 years of imprisonment on 6 May 2021, mitigated to an extent by the fact that Ongwen himself had been abducted by the LRA and used as a child soldier.<sup>334</sup> Debate and controversy arose relating to Ongwen's criminal liability given these facts.<sup>335</sup> While some argued that, as a former child soldier, Ongwen should have been granted amnesty or a reduced sentence, others maintain that the punishment was necessary, among other reasons, to deter other former child soldiers from committing similar war crimes with the expectation of amnesty.<sup>336</sup>

On 21 May 2021, Mr Ongwen submitted a Notification of Appeal against the Trial Judgement.<sup>337</sup> The Defence submitted its appeals briefs against the conviction and the sentence on 21 July and 26 August 2021, respectively. It is expected that the Appeals Chamber will hold a hearing in February 2022.

### 8.2.1.2 International Residual Mechanism for Criminal Tribunals

#### Overview

A number of developments relating to IHL occurred at the International Residual Mechanism for Criminal Tribunals (IRMCT) during 2021. From an administrative point of view, a number of changes occurred within the roster of judges who serve at the IRMCT. Serving Judge Gberdao Gustave Kam of Burkina Faso died in February 2021.<sup>338</sup> Judge Kam was sworn in as a judge of the IRMCT in May 2012 and had served on a number of important matters before the IRMCT including the review of the case of *Augustin Ngirabatware* and in the appeal of the case of *Ratko Mladić*, as discussed below. On 12 August 2021, the UN Secretary-General appointed Judge Fatimata Sanou Touré of Burkina Faso to the roster of Judges of the IRMCT.<sup>339</sup> In addition, on 17 November 2021, Judge Theodor Meron resigned

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<sup>333</sup> Ibid.

<sup>334</sup> ICC (2021) Dominic Ongwen sentenced to 25 years of imprisonment. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1590>. Accessed 30 March 2022.

<sup>335</sup> Africa News (2021) Mixed reactions in Uganda over ex-child soldier Dominic Ongwen's ICC sentencing. <https://www.africanews.com/2021/05/07/mixed-reactions-in-uganda-over-ex-child-soldier-dominic-ongwen-s-icc-sentencing/>. Accessed 19 April 2022.

<sup>336</sup> Kersten 2016.

<sup>337</sup> ICC, *The Prosecutor v. Dominic Ongwen*, Defence Notification of its Intent to Appeal the Trial Judgement, 21 May 2021, ICC-02/04-01/15 (*Ongwen* 2021).

<sup>338</sup> IRMCT (2021) Mechanism Mourns the Loss of Judge Gberdao Gustave Kam. <https://www.irmct.org/en/news/21-02-18-mechanism-mourns-loss-judge-gberdao-gustave-kam>. Accessed 5 April 2022.

<sup>339</sup> IRMCT (2021) Secretary-General appoints Judge Fatimata Sanou Touré of Burkina Faso to serve as Mechanism Judge. <https://www.irmct.org/en/news/21-08-13-secretary-general-appoints-judge-fatimata-sanou-toure-burkina-faso-serve-mechanism>. Accessed 5 April 2022.



from the IRMCT having served there since its opening in 2012.<sup>340</sup> Prior to this, Judge Meron served on the Appeals Chamber of both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). During his career, Judge Meron has made several key contributions to the interpretation and development of IHL.<sup>341</sup>

During 2021, two major developments occurred in the jurisprudence of the IRMCT relating to IHL.

### Cases in the Trial Stage

#### *The Prosecutor v. Jovica Stanišić and Franko Simatović*

The trial against Mr Jovica Stanišić and Mr Franko Simatović was originally held before the ICTY between 9 June 2009 and 31 January 2013.<sup>342</sup> The two defendants were accused of participating in a joint criminal enterprise (JCE) with the objective to forcibly and permanently remove the majority of Croats, Bosnian Muslims and Bosnian Croats from Serb-claimed areas of Bosnia and Herzegovina and Croatia. Mr Stanišić and Mr Simatović were accused of committing via the JCE the crimes against humanity of persecution, murder, deportation and inhumane acts (forcible transfer) and the war crime of murder.<sup>343</sup> On 30 May 2013, a majority of the ICTY Trial Chamber acquitted the two on all charges.<sup>344</sup> The Chamber held that it was unable, on the evidence presented, to conclude that both parties had the shared intent to further the common criminal purpose of the JCE, nor was it able to conclude that the two planned or ordered the crimes or that they aided or abetted them.<sup>345</sup>

On appeal from the Prosecution in 2015, the ICTY Appeals Chamber granted, in part, the appeal and quashed the acquittals on all counts.<sup>346</sup> The majority of the Appeals Chamber held that the Trial Chamber erred in law by failing to adjudicate and provide a reasoned opinion on essential elements of JCE liability.<sup>347</sup> The Appeals Chamber also found, by majority, that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission

<sup>340</sup> IRMCT (2021) Judge Theodor Meron steps down from Judicial Roster of the International Residual Mechanism for Criminal Tribunals. <https://www.irmct.org/en/news/judge-theodor-meron-steps-down-judicial-roster-international-residual-mechanism-criminal>. Accessed 5 April 2022.

<sup>341</sup> For instance, see Meron 2000.

<sup>342</sup> ICTY (2013) Trial Chamber Judgement in the Stanišić and Simatović case to be rendered on 30 May 2013. <https://www.icty.org/en/sid/11299>. Accessed 5 April 2022.

<sup>343</sup> Ibid.

<sup>344</sup> ICTY (2013) Jovica Stanišić and Franko Simatović acquitted of all charges. <https://www.icty.org/en/sid/11329>. Accessed 5 April 2022.

<sup>345</sup> Ibid.

<sup>346</sup> ICTY (2015) Appeals Chamber Orders Retrial of Jovica Stanišić and Franko Simatović. <https://www.icty.org/en/press/appeals-chamber-orders-retrial-jovica-stani%C5%A1i%C4%87-and-franko-simatovi%C4%87>. Accessed 5 April 2022.

<sup>347</sup> ICTY, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Judgement, 9 December 2015, IT-03-69-A (*Stanišić and Simatović* 2015).



of a crime.<sup>348</sup> In December 2015, Mr Stanišić and Mr Simatović were brought before the IRMCT where they both pleaded not guilty.<sup>349</sup> This is the first retrial held before the IRMCT.

The trial commenced before the IRMCT on 13 June 2017 and closed on 14 April 2021.<sup>350</sup> A total of 51 witnesses were heard for the Prosecution, while the Defence case heard 29.<sup>351</sup> On 30 June 2021, the Trial Chamber delivered its judgment, finding Mr Stanišić and Mr Simatović responsible for aiding and abetting the crime of murder, as a violation of the laws or customs of war and a crime against humanity, and the crimes of deportation, forcible transfer, and persecution as crimes against humanity.<sup>352</sup> These crimes were found to have been committed by Serb forces following the takeover of Bosanski Šamac in Bosnia and Herzegovina in April 1992.<sup>353</sup> Accordingly, both Mr Stanišić and Mr Simatović were sentenced to 12 years of imprisonment.<sup>354</sup>

On 6 September 2021, notices of appeal were filed by Mr Stanišić, Mr Simatović and the Prosecution.<sup>355</sup> As of the end of 2021, the case remains in pre-appeal proceedings.

### Cases in the Appeal Stage

#### *The Prosecutor v. Ratko Mladić*

Mr Ratko Mladić was initially charged in 1995 with the perpetration of genocide, crimes against humanity, and violations of the laws or customs of war in Bosnia and Herzegovina between 1992 and 1995.<sup>356</sup> The violations of the laws of war alleged include murder, terror, unlawful attacks on civilians, and the taking of hostages. Mr Mladić was arrested in Serbia in May 2011 and transferred to the ICTY for trial.<sup>357</sup> The trial opened before the Trial Chamber on 16 May 2012 and heard 377 in-court

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<sup>348</sup> Ibid.

<sup>349</sup> IRMCT (2015) Initial appearance of Stanišić and Simatović before the Mechanism. <https://www.irmct.org/en/news/initial-appearance-stani%C5%A1i%C4%87-and-simatovi%C4%87-mechanism>. Accessed 5 April 2022.

<sup>350</sup> IRMCT (2021) Conclusion of closing arguments in Prosecutor v. Jovica Stanišić and Franko Simatović. <https://www.irmct.org/en/news/21-04-23-conclusion-closing-arguments-prosecutor-v-jovica-stanistic-and-franko-simatovic>. Accessed 5 April 2022.

<sup>351</sup> Ibid.

<sup>352</sup> IRMCT, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Judgement, 30 June 2021, MICT-15-96-T (*Stanišić and Simatović* 2021).

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> IRMCT 2021.

<sup>356</sup> ICTY (1995) Milan Martić, Radovan Karadžić and Ratko Mladić indicted along with 21 other accused. <https://www.icty.org/en/sid/7237>. Accessed 5 April 2022.

<sup>357</sup> ICTY (2011) Ratko Mladić in Tribunal's Custody. <https://www.icty.org/en/sid/10678>. Accessed 5 April 2022.

testimonies.<sup>358</sup> The Trial Chamber issued their judgment on 22 November 2017, finding Mr Mladić guilty of the crimes of genocide, crimes against humanity, and multiple violations of the laws or customs of war.<sup>359</sup> Mr Mladić was sentenced to life imprisonment.<sup>360</sup> The Trial Chamber found that Mr Mladić had committed these crimes through his leadership role in four JCEs.<sup>361</sup> It was the final case heard before the ICTY before its closure at the end of 2017.

Between August and September 2018, both the Prosecution and Mr Mladić filed appeals.<sup>362</sup> On 18 June 2018, Mr Mladić requested the disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun from the Appeals bench on the basis of actual or apparent bias.<sup>363</sup> This was granted by the President of the IRMCT, Judge Jean-Claude Antonetti, on 3 September 2018.<sup>364</sup>

The Appeal hearing took place on 25 and 26 August 2020 and the Appeals Chamber delivered its judgment on 8 June 2021.<sup>365</sup> The Appeals Chamber dismissed Mladić's appeal in relation to all four of the JCEs.<sup>366</sup> As such, the Appeals Chamber affirmed Mr Mladić's convictions pursuant to Article 7(1) of the ICTY Statute for genocide, for persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war.<sup>367</sup> The Appeals Chamber also dismissed the Prosecution's appeal in its entirety. Mr Mladić therefore had his life imprisonment sentence reaffirmed.

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<sup>358</sup> ICTY (2017) Trial Judgement in the case of Ratko Mladić to be rendered on 22 November 2017. <https://www.icty.org/en/press/trial-judgement-in-the-case-of-ratko-mladic-to-be-rendered-on-22-november-2017>. Accessed 5 April 2022.

<sup>359</sup> ICTY, *The Prosecutor v. Ratko Mladić*, Judgement Volume IV of V, 22 November 2017, IT-09-92-T (*Mladić* 2017).

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

<sup>362</sup> IRMCT, *The Prosecutor v. Ratko Mladić*, Defence Notice of Filing of Public Redacted Appeal Brief on Behalf of Ratko Mladić, 11 September 2018, MICT-13-56-A (*Mladić* 2018).

<sup>363</sup> IRMCT, *The Prosecutor v. Ratko Mladić*, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018, MICT-13-56-A (*Mladić* 2018).

<sup>364</sup> *Ibid.*

<sup>365</sup> IRMCT (2021) Appeal Judgement in Prosecutor v. Ratko Mladić scheduled for 8 June 2021: Accreditation procedure now closed. <https://www.irmct.org/en/news/21-06-08-appeal-judgement-prosecutor-v-ratko-mladic-scheduled-8-june-2021-accreditation#:~:text=The%20Appeal%20Judgment%20is%20scheduled,accreditation%20and%20collection%20details%20today>. Accessed 5 April 2022.

<sup>366</sup> IRMCT, *The Prosecutor v. Ratko Mladić*, Judgement, 8 June 2021, MICT-13-56-A (*Mladić* 2021).

<sup>367</sup> *Ibid.*

## 8.2.2 Hybrid and Regional Courts and Tribunals

### Overview

A number of important developments relating to IHL also occurred at hybrid criminal tribunals during 2021. Hybrid tribunals are defined here as criminal tribunals that contain both national and international features.<sup>368</sup> This section focuses on the following three tribunals due to the most relevant developments: the Kosovo Specialist Chambers (KSC), the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia ('ECCC').

#### 8.2.2.1 Kosovo Specialist Chambers and Specialist Prosecutor's Office

The Kosovo Specialist Chambers (KSC) was established with a specific mandate and jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law, which were commenced or committed in Kosovo between 1 January 1998 and 31 December 2000 by or against citizens of Kosovo or the Federal Republic of Yugoslavia.<sup>369</sup> Two key developments relating to IHL occurred at the KSC in 2021. Firstly, in April 2021, Mr Pjetër Shala was transferred to The Hague where his initial appearance in the courtroom of the KSC occurred on 19 April 2021.<sup>370</sup> Mr Shala was originally arrested in March 2021.<sup>371</sup> Mr Shala is accused of committing four counts of war crimes including arbitrary detention, cruel treatment, torture and murder.<sup>372</sup> Mr Shala was a member of the Kosovo Liberation Army (KLA) and these crimes allegedly took place between May and June 1999 against persons detained at the Kukës Metal Factory, Albania, allegedly used by the KLA. In April 2021, he pleaded not guilty to all counts of the indictment. His case remained in the pre-trial phase as of the end of 2021.

Secondly, the trial against Mr Salih Mustafa opened in 2021. Mr Mustafa was a Commander of a guerrilla unit operating in the Llap Operational Zone of the KLA.<sup>373</sup> Mr Mustafa is charged with four counts of war crimes including arbitrary detention, cruel treatment, torture and murder against persons detained at the Zllash Detention Compound on the basis of both individual criminal responsibility and

<sup>368</sup> See Asser Institute Nexus on Conflict and Crime 2022.

<sup>369</sup> KSC 2021.

<sup>370</sup> KSC (2021) Public Hearing: Initial Appearance of Pjetër Shala on 19 April. <https://www.scp-ks.org/en/public-hearing-initial-appearance-pjeter-shala-19-april>. Accessed 11 April 2022.

<sup>371</sup> KSC (2021) Pjetër Shala Arrested in Belgium Pursuant to Arrest Warrant of the Kosovo Specialist Chambers. <https://www.scp-ks.org/en/pjetyor-shala-arrested-belgium-pursuant-arrest-warrant-kosovo-specialist-chambers>. Accessed 11 April 2022.

<sup>372</sup> KSC, *Specialist Prosecutor's Office v. Counsel for Pjetër Shala*, Public Redacted Version of Corrected Indictment, 16 November 2021, KSC-BC-2020-04 (*Shala* 2021).

<sup>373</sup> KSC, *Specialist Prosecutor's Office v. Mr Salih Mustafa*, Public Redacted Version of Arrest Warrant for Mr Salih Mustafa, 12 June 2020, KSC-BC-2020-05 (*Mustafa* 2020).

superior criminal responsibility.<sup>374</sup> Superior criminal liability is somewhat unique at the international level given that a similar mode of liability does not usually exist in domestic jurisprudence.<sup>375</sup> It is therefore relatively underdeveloped as a concept but essentially covers situations when a commander fails to take action to prevent or punish their subordinates for committing criminal offences, i.e. liability for omissions.<sup>376</sup> Mr Mustafa was initially arrested and transferred to the KSC in September 2020. He pleaded not guilty to all counts of the indictment on 28 October 2020. His trial commenced on 15 September 2021 with opening statements from the Specialist Prosecutor and the Victims' Counsel.<sup>377</sup> His trial remained ongoing at the close of 2021.

### 8.2.2.2 Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) also saw a number of developments related to IHL in 2021. The STL was established to investigate and prosecute those responsible for the assassination of Prime Minister Rafik Hariri in 2005 and the deaths of 21 others, as well as those responsible for connected attacks.<sup>378</sup> The STL is a tribunal of international character which applies domestic Lebanese law, notably terrorism.<sup>379</sup> It is of relevance insofar as, in general, those responsible for terrorism may also be responsible for war crimes.<sup>380</sup>

In February 2021, the UN Secretary-General extended the STL's mandate from 1 March 2021 for a further two years.<sup>381</sup> On 2 June 2021, however, the STL announced that it was facing a funding crisis which impacted its ability to fulfil its current mandate and to conclude the existing proceedings before the Tribunal.<sup>382</sup> While the STL continued to operate throughout the rest of 2021, the court's future was uncertain at the end of 2021.

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<sup>374</sup> Ibid.

<sup>375</sup> Boas et al. 2007, pp 143–145.

<sup>376</sup> Ibid.

<sup>377</sup> KSC (2021) Opening of the Trial of Salih Mustafa Before the Kosovo Specialist Chambers. <https://www.scp-ks.org/en/opening-trial-salih-mustafa-kosovo-specialist-chambers>. Accessed 11 April 2022.

<sup>378</sup> UNSC 2007.

<sup>379</sup> Ibid.

<sup>380</sup> On the crossover between terrorism and IHL, see ICRC 2019, pp 57–63.

<sup>381</sup> STL (2021) UN Secretary General extends mandate of the Special Tribunal for Lebanon. <https://www.stl-tsl.org/en/media/press-releases/un-secretary-general-extends-mandate-of-the-special-tribunal-for-lebanon>. Accessed 11 April 2022.

<sup>382</sup> STL (2021) Severe financial crisis threatens the STL's ability to fulfil its mandate. <https://www.stl-tsl.org/en/media/press-releases/severe-financial-crisis-threatens-the-stls-ability-to-fulfil-its-mandate>. Accessed 19 April 2022.

Regarding judicial developments, on 12 January 2021, the filing of notices of appeal marked the beginning of the Appeals phase in the *Ayyash et al.* case.<sup>383</sup> This case relates to three attacks committed between 2004 and 2005 which were found to be related to the 14 February 2005 attack that killed the Lebanese Prime Minister Rafik Hariri. On 18 August 2020, the Trial Chamber unanimously found Mr Ayyash guilty beyond reasonable doubt as a co-perpetrator of conspiracy aimed at committing a terrorist act and intentional homicide in five counts.<sup>384</sup> The Trial Chambers found the other defendants, Mr Messrs Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra not guilty of all counts charged in the amended consolidated indictment.<sup>385</sup> The trial was conducted *in absentia*. In December 2020, Mr Ayyash was sentenced to five concurrent sentences of life imprisonment.<sup>386</sup> In a decision issued in March 2021, the Appeals Chamber dismissed the Defence Appeal holding that given Mr Ayyash's absence, an appeal could not go ahead due to a lack of standing.<sup>387</sup> The Chamber did, however, allow for an appeal hearing related in the case of *Prosecutor v. Mehri and Oneissi*, which split from the original *Ayyash et al.* case.<sup>388</sup> The appeal is expected to take place on 10 March 2022.<sup>389</sup>

### 8.2.2.3 Extraordinary Chambers in the Courts of Cambodia

A number of key developments also occurred at the Extraordinary Chambers in the Courts of Cambodia (ECCC) during 2021. The ECCC was established by the Cambodian government in 2001 and made an agreement with the UN in 2003 to secure international assistance in its running. Its jurisdiction includes 'senior leaders' of the former Khmer Rouge regime who committed international crimes recognised under Cambodian domestic law, including violations of IHL, between 17 April 1975 and 6 January 1979.<sup>390</sup> The Khmer Rouge refers to members of the former Communist

<sup>383</sup> STL (2021) Filing of notices of Appeal marks the start of the Appeals phase in the *Ayyash et al.* case. <https://www.stl-tsl.org/en/media/press-releases/filing-of-notice-of-appeal-marks-the-start-of-the-appeals-phase-in-the-ayyash-et-al-case>. Accessed 11 April 2022.

<sup>384</sup> STL, *The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi and Assad Hassan Sabra*, Judgement, 18 August 2020, STL-11-01/T/TC (*Ayyash et al.* 2020).

<sup>385</sup> *Ibid.*

<sup>386</sup> STL, *The Prosecutor v. Salim Jamil Ayyash*, Sentencing Judgement, 11 December 2020, STL-11-01/S/TC (*Ayyash* 2020).

<sup>387</sup> STL (2021) Appeals Chamber rules that Defence for Salim Ayyash have no standing to appeal his conviction in his absence in the *Ayyash et al.* case. <https://www.stl-tsl.org/en/media/press-releases/appeals-chamber-rules-that-defence-for-salim-ayyash-have-no-standing-to-appeal-his-conviction-in-his-absence-in-the-ayyash-et-al-case>. Accessed 11 April 2022.

<sup>388</sup> STL (2021) STL Appeals Chamber schedules an Appeals hearing in the Merhi and Oneissi case for the week of 4 October 2021. <https://www.stl-tsl.org/en/media/press-releases/stl-appeals-chamber-schedules-an-appeals-hearing-in-the-merhi-and-oneissi-case-for-the-week-of-4-october-2021>. Accessed 11 April 2022.

<sup>389</sup> *Ibid.*

<sup>390</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Party of Kampuchea (CPK). The CPK formed a Marxist-Leninist government and controlled Cambodia from 1975 to 1979, renaming the country as the Democratic Kampuchea.<sup>391</sup>

In December 2021, the Supreme Court Chamber (SCC) dismissed a request by the International Co-Prosecutor to send Case 003 against Meas Muth to trial before the ECCC due to the absence of a definitive and enforceable indictment.<sup>392</sup> Closing orders were issued against Meas Muth in 2018, holding that the ECCC lacked personal jurisdiction over his case.<sup>393</sup> The SCC upheld this decision in the appeal case.<sup>394</sup> As a result, the Cambodian domestic courts will instead determine whether Meas Muth is criminally liable for the alleged crimes, including genocide, crimes against humanity, and grave breaches of the Geneva Conventions including the confinement of civilians, wilful killing, wilfully causing great suffering or serious injury to body or health, and torture.

On a similar note, on 28 December 2021, the SCC also dismissed the International Co-Prosecutor's request to send Case 004 against Yim Tith to trial for the absence of a definitive and enforceable indictment.<sup>395</sup> Yim Tith was charged with genocide of the Khmer Krom, crimes against humanity and other inhumane acts as well as grave breaches of the Geneva Conventions including wilful killing, wilfully causing great suffering or serious injury to body or health, unlawful deprivation or transfer, and unlawful confinement of a civilian.<sup>396</sup>

The Appeal Hearing in Case 002 of Khieu Samphan occurred in August 2021.<sup>397</sup> Khieu Samphan is the former President of the Presidium of the Democratic Kampuchea. Khieu Samphan was sentenced by the Trial Chamber in November 2018 on charges of genocide, crimes against humanity and war crimes which occurred in

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(2004), Article 2. [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_ amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_ amended_27_Oct_2004_Eng.pdf). Accessed 12 May 2022.

<sup>391</sup> Elander 2018, p 38.

<sup>392</sup> ECCC (2021) ECCC Supreme Court Chamber Dismisses Request to Send Case 003 to Trial. <https://www.eccc.gov.kh/en/articles/eccc-supreme-court-chamber-dismisses-request-send-case-003-trial>. Accessed 13 April 2022.

<sup>393</sup> ECCC (2018) Co-Investigating Judges Issue Two Separate Closing Orders in the Case Against Meas Muth. <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-meas-muth#:~:text=Today%2C%20the%20Co%2DInvestigating%20Judges,the%20period%20of%20Democratic%20Kampuchea>. Accessed 13 April 2022.

<sup>394</sup> ECCC, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, Case File No. 002/19-09-2007-ECCC-SC (*Case 003* 2021).

<sup>395</sup> ECCC, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 28 December 2021, Case File No. 004/23-09-2021-ECCC/SC (06) (*Case 004* 2021).

<sup>396</sup> ECCC, Written Record of Initial Appearance, 9 December 2015, Case File No. 004/07-09-2009-ECCC-OCIJ.

<sup>397</sup> ECCC (2021) The Supreme Court Chamber Resumes Appeal Hearings on its Second Day. <https://www.eccc.gov.kh/en/articles/supreme-court-chamber-resumes-appeal-hearings-its-second-day>. Accessed 12 April 2022.

various places in Cambodia between April 1975 and January 1979.<sup>398</sup> The Appeals Hearing concluded on 19 August 2021. The judgement is expected at some point in 2022.<sup>399</sup>

## 8.2.3 Human Rights Courts and Bodies

### Overview

This section outlines developments of particular relevance to IHL that occurred during 2021 at human rights courts and bodies, namely the European Court of Human Rights (ECtHR) and the UN Human Rights Council.<sup>400</sup>

#### 8.2.3.1 European Court of Human Rights

The ECtHR saw a number of interesting IHL-related developments over the course of 2021.

Firstly, the *Georgia v. Russia (II)* judgement was handed down on 21 January 2021.<sup>401</sup> The original application to the Court was brought by Georgia against the Russian Federation on 11 August 2008.<sup>402</sup> The case relates to alleged violations of the European Convention on Human Rights (ECHR) committed by Russia and/or non-state armed forces in August 2008 in two areas of Georgia under the control of NSAGs, Abkhazia and South Ossetia, as well as the so-called buffer zone between the areas controlled by Georgia and the regions controlled by the NSAGs. Several acts were alleged to amount to violations of the ECHR, including unlawful killing (Article 2), torture (Article 3), and arbitrary detentions (Article 5), during the hostilities in 2008.<sup>403</sup> Many commentators had hoped that the *Georgia v. Russia (II)* judgement would clarify the ECtHR's approach to extraterritorial jurisdiction—i.e., determining when a state's obligations under the ECHR are triggered when it acts abroad—which had proved controversial since the 2001 *Banković and others v. Belgium and others*

<sup>398</sup> ECCC, Case 002/02 Judgement, 16 November 2018, Case File No. 002/19-09-2007/ECCC/TC (Case 002/2 2018).

<sup>399</sup> Cheang S and Rising D (2021) Khmer Rouge official on appeal denies complicity in genocide. <https://apnews.com/article/war-crimes-cambodia-phnom-penh-khieu-samphan-a5caeac37b5bccba422e05db5d19dedd2>. Accessed 12 May 2022.

<sup>400</sup> Other human rights law courts and institutions were assessed by the authors but no salient developments were identified.

<sup>401</sup> ECtHR, *Georgia v. Russia (II)*, Judgement, 21 January 2021, Application No. 38263/08 (*Georgia v. Russia (II)*).

<sup>402</sup> *Ibid.*, para 1.

<sup>403</sup> Duffy 2021.

case.<sup>404</sup> Significantly, the Court found that Russia's jurisdiction was not triggered during the period of active hostilities. Dismissing that the 'effective control' over an area jurisdictional basis could apply, the Court stated:

[i]n that connection it can be considered from the outset that in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot generally speak of “effective control” over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a *context of chaos* means that there is no control over an area.<sup>405</sup>

Furthermore, the Court dismissed the possibility of establishing jurisdiction through the 'state agent authority and control over individuals' test that it had developed in previous cases.<sup>406</sup> These developments are relevant insofar as the Court drew a distinction between violations of international human rights law and IHL, something which had been less clear in its prior jurisprudence.<sup>407</sup> The Court effectively deemed that the Convention does not apply to active phases of armed conflict, where IHL should remain to a large extent *lex specialis*. Undoubtedly, many questions remained unanswered in the judgement, such as how the Court determines when there is an 'active phase of hostilities'. As such, the judgement has been heavily criticised.<sup>408</sup>

Another notable judgement handed down by the Court in 2021 was that of *Hanan v. Germany*. The facts of this case relate to an allegedly inadequate investigation carried out by German authorities into a 2009 airstrike near Kunduz, Afghanistan, which was ordered by Colonel Klein of the German Bundeswehr and carried out by US Air Force F-15s.<sup>409</sup> The airstrike resulted in the death and injury of over 100 people, including many civilians. The complaint before the Court related to the manner in which the German authorities investigated the conduct, citing ineffective investigation, impartial and one-sided gathering of evidence, lack of reasonable expedition and a lack of involvement on the part of the applicant.<sup>410</sup> The Court found that the investigation did not amount to a violation of Germany's obligations under the ECHR.<sup>411</sup> Nonetheless, the Court made a notable finding relating to military operations abroad. The Court found that Germany was obliged, under customary IHL, to investigate the airstrike.<sup>412</sup> Moreover, the Court held that Germany was also obliged under its own domestic law to institute a criminal investigation. Effectively,

<sup>404</sup> ECtHR, *Banković and Others v. Belgium and Others*, Admissibility, 12 December 2001, Application No. 52207/99 (*Banković v. Belgium*).

<sup>405</sup> *Georgia v. Russia (II)*, above n 401, para 126 (emphasis added).

<sup>406</sup> For instance, ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgement, Application No. 55721/07.

<sup>407</sup> Dzehtsiarou 2022.

<sup>408</sup> *Ibid.*

<sup>409</sup> ECtHR, *Hanan v. Germany*, Judgement, 16 February 2021, Application No. 4871/16 (*Hanan v. Germany*).

<sup>410</sup> *Ibid.*

<sup>411</sup> European Center for Constitutional and Human Rights 2021.

<sup>412</sup> *Hanan v. Germany*, above n 409.



the ruling in *Hanan* demonstrates that states' obligations to investigate under the ECHR (in this case, Article 2, the right to life) can be triggered even where a violation of the substantive right is not before the Court.<sup>413</sup> In future, states party to the ECHR will need to take this into account and perform adequate investigations in similar circumstances to comply with the Convention.

### 8.2.3.2 United Nations Human Rights Council

A number of resolutions were adopted by the Human Rights Council (HRC) in 2021 which relate to IHL. Some of the more prominent resolutions are briefly outlined below.

Resolution S-29/1 relating to the human rights implications of the crisis in Myanmar was adopted on 12 February 2021.<sup>414</sup> This was in response to the *coup d'état* carried out in Myanmar by the Tatmadaw on 1 February 2021 (see Sect. 8.1.11). Among its provisions, this resolution called for the relief of those arbitrarily detained, the provision of humanitarian access and for the military to refrain from violence.

Resolution 46/1 on promoting reconciliation, accountability and human rights in Sri Lanka was also adopted on 23 March 2021.<sup>415</sup> This resolution made a number of calls on Sri Lanka to respect their obligations under IHL. The reconciliation process has been ongoing in Sri Lanka since 16 May 2009 following the end of the 26-year-long conflict with the Tamil Tigers NSAG.

Resolution 46/3 on the human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice was adopted on 23 March 2021 (see Sect. 8.1.6.1).<sup>416</sup> This resolution makes a number of references to IHL related to the ongoing Israeli occupation of Palestinian territory including East Jerusalem, calling on all parties to the conflict to adhere to their obligations under the Geneva Conventions of 1949 and for all states to fulfil their obligation under Common Article 1 of the GCs of 1949 (the obligation to respect and to ensure respect for IHL) and under Articles 146, 147 and 148 of GC IV relating to the criminalisation of grave breaches of the GCs.<sup>417</sup>

Resolution 46/23 on the situation of human rights in South Sudan was adopted on 24 March 2021.<sup>418</sup> The UN HRC expressed concerns at the findings of the Commission on Human Rights in South Sudan highlighting violations against civilians including abduction of children, murder, rape and other forms of sexual violence

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<sup>413</sup> Meloni 2021.

<sup>414</sup> HRC 2021d.

<sup>415</sup> HRC 2021b.

<sup>416</sup> HRC 2021c.

<sup>417</sup> *Ibid.*, para 15.

<sup>418</sup> HRC 2021a.

by organised armed militias (see Sect. 8.1.12).<sup>419</sup> The HRC emphasised the obligations of South Sudan to protect its civilians from genocide, war crimes, ethnic cleansing and crimes against humanity.

## 8.2.4 Domestic Courts

### Overview

This section briefly outlines notable developments in IHL found in the investigation and prosecution of war crimes in selected domestic courts and tribunals during 2021. In addition to addressing judicial developments, other noteworthy changes in domestic justice systems are discussed. Many of the cases described below were tried under the principle of universal jurisdiction, which allows national courts to prosecute international crimes regardless of the territory in which they were committed.<sup>420</sup>

#### 8.2.4.1 Bosnia and Herzegovina

Bosnian authorities continued to charge and try individuals alleged to have committed war crimes in the 1992–1995 conflict in the country. By the end of December 2021, the State Prosecution Service had filed 15 indictments relating to alleged war crimes against 39 individuals.<sup>421</sup> Such cases include that of Goran Viskovic, a wartime member of the Bosnian Serb Army military police, who was sentenced for participating in crimes against humanity against non-Serb civilians between April 1992 and the end of 1993.<sup>422</sup>

Also of note is that in July 2021 the Bosnian Criminal Code was amended to criminalise the act of glorifying war criminals and denying genocide, crimes against humanity or war crimes.<sup>423</sup> This move came in response to the increasingly prevalent act of denying past genocidal acts and war crimes in some parts of Bosnian society.<sup>424</sup>

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<sup>419</sup> Global Centre for the Responsibility to Protect 2021.

<sup>420</sup> Amnesty International 2001.

<sup>421</sup> Rovcanin H (2021) Bosnia Prosecution Maintains Trend of Accusing Previously Convicted Persons. <https://balkaninsight.com/2021/12/30/bosnia-prosecution-maintains-trend-of-accusing-previously-convicted-persons/>. Accessed 12 May 2022.

<sup>422</sup> Pekmez I (2021) Bosnian Serb Ex-Serviceman Tried for Killing Civilian Prisoners. <https://balkaninsight.com/2021/08/25/bosnian-serb-ex-serviceman-tried-for-killing-civilian-prisoners/>. Accessed 16 May 2022.

<sup>423</sup> Trial International (2021) Denying Wartime Horrors Is Now a Criminal Offence In BiH. <https://trialinternational.org/latest-post/denying-wartime-horrors-is-now-a-criminal-offence-in-bih/>. Accessed 2 May 2022.

<sup>424</sup> Memišević 2021.

### 8.2.4.2 Central African Republic

In November 2021, the Special Criminal Court (SCC) in the CAR secured the arrest and brought charges of war crimes and crimes against humanity against Hassan Bouba Ali.<sup>425</sup> Hassan Bouba is a government minister and former leader of the Union for Peace in the Central African Republic (UPC), a NSAG.<sup>426</sup> The UPC is accused of committing murders of civilians, the commission of sexual assaults and the burning of civilian homes in the Ouaka province from 2014 to 2017.<sup>427</sup> No specific information relating to his trial has been released at the time of writing.

The SCC was established by the CAR in 2015 to try serious international crimes committed during conflicts in the state since 2003.<sup>428</sup> In September 2021, the SCC's substitute prosecutor, Alain Tolmo, announced that the SCC intended for the court to begin its first trials before the end of 2021.<sup>429</sup> However, by the end of 2021, trials were yet to begin.

### 8.2.4.3 Colombia

November 2021 marked five years since the signing of the peace accords between Colombia and the FARC-EP which saw the establishment of the Special Jurisdiction for Peace (JEP) (see Sect. 8.1.4).<sup>430</sup> The JEP was designed to investigate, prosecute and punish those responsible for the most serious human rights violations committed during the armed conflict in Colombia.<sup>431</sup> For the purposes of the JEP, this includes war crimes. Two major cases experienced developments at the JEP during 2021.

In January, eight high-ranking officials of the FARC-EP were charged with war crimes, including depriving people of their liberty and the taking of hostages, as well as crimes against humanity and 'other war crimes related to the treatment of hostages, such as murder, torture, cruel treatment, attacks on personal dignity, sexual violence

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<sup>425</sup> Cour Penale Speciale de la Republique Centrafricaine 2021.

<sup>426</sup> Human Rights Watch (2021) Central African Republic: Minister Faces Atrocity Charges. <https://www.hrw.org/news/2021/11/24/central-african-republic-minister-faces-atrocity-charges>. Accessed 2 May 2022.

<sup>427</sup> Ibid.

<sup>428</sup> MINUSCA (2021) CAR Special Criminal Court (SCC) Now Fully Operational. <https://minusca.unmissions.org/en/car-special-criminal-court-scc-now-fully-operational>. Accessed 2 May 2022.

<sup>429</sup> RFI (2021) Les premiers procès de la Cour pénale spéciale pour la Centrafrique prévus pour fin 2021. <https://www.rfi.fr/fr/afrique/20210908-les-premiers-proc%C3%A8s-de-la-cour-p%C3%A9nale-sp%C3%A9ciale-pour-la-centrafrique-pr%C3%A9vues-pour-fin-2021>. Accessed 2 May 2022.

<sup>430</sup> France24 (2021) Colombia marks five years since signing of historic peace deal. <https://www.france24.com/en/americas/20211125-colombia-marks-five-years-since-signing-of-historic-peace-deal>. Accessed 9 May 2022.

<sup>431</sup> International Commission of Jurists 2019.

and forced displacement'.<sup>432</sup> Testimony in the case was heard from 257 ex-fighters and more than 1,000 kidnapping victims.

In July 2021, in two separate decisions, 25 former Colombian military officials were charged with the murder of at least 247 civilians who were alleged to have been falsely presented as rebels killed in combat.<sup>433</sup> The accused allegedly gave orders which were essential to the systematic commission of the murders in order to inflate so-called 'body counts' between January 2007 and August 2008.<sup>434</sup>

The JEP employs a transitional justice model in which the accused can receive more lenient sentences if they fulfil three conditions: they must acknowledge their responsibility, tell the survivors the truth and personally redress them.<sup>435</sup> This approach has been taken in an attempt to strike a balance between retribution and redress, although it has also been criticised.<sup>436</sup>

#### 8.2.4.4 Democratic Republic of Congo

In March 2021, Mr Nsumbu Katende, a commander of the Kamuina Nsapu armed insurrection, was found guilty of war crimes committed in Kasai, DRC, in 2017.<sup>437</sup> Nsumbu was arrested in 2018 and was charged with war crimes, terrorism, insurrection and criminal association for murders, beheadings, looting, burning of houses and other inhumane acts.<sup>438</sup> The verdict against Katende was accompanied by an order of reparations to over 200 victims registered in the case.<sup>439</sup> Furthermore, the Congolese State was also found responsible for the crimes, with the judiciary holding that the state had not done everything in its power to protect the civil population.<sup>440</sup>

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<sup>432</sup> France24 (2021) Colombia tribunal charges former FARC members with war crimes. <https://www.france24.com/en/americas/20210129-colombia-tribunal-charges-former-farc-members-with-war-crimes>. Accessed 9 May 2022.

<sup>433</sup> Bermúdez Liévano A (2021) Colombia: 25 Army Officials Charged with War Crimes and Crimes Against Humanity. <https://www.justiceinfo.net/en/80040-colombia-25-army-officials-charged-war-crimes-crimes-against-humanity.html>. Accessed 10 May 2022.

<sup>434</sup> The Guardian (2021) Colombian court accuses soldiers of murdering at least 120 civilians. <https://www.theguardian.com/world/2021/jul/06/colombia-court-military-civilians-killed-false-positives>. Accessed 9 May 2022.

<sup>435</sup> Bermúdez Liévano A (2021) A first in Colombia: Eight FARCS charged with War Crimes and Crimes Against Humanity. <https://www.justiceinfo.net/en/69281-first-colombia-eight-farcs-charged-war-crimes-crimes-against-humanity.html>. Accessed 10 May 2022.

<sup>436</sup> Ibid.

<sup>437</sup> Trial International (2021) DRC: Life Sentence for a Kamuina Nsapu Commander, Victims Acknowledged and Satisfied. <https://trialinternational.org/latest-post/drc-life-sentence-for-a-kamuina-nsapu-commander-victims-acknowledged-and-satisfied/>. Accessed 2 May 2022.

<sup>438</sup> Mbuyi J (2021) Accused Faces Victims in First Kasai War Crimes Trial. <https://www.justiceinfo.net/en/74897-accused-faces-victims-first-kasai-war-crimes-trial.html>. Accessed 2 May 2022.

<sup>439</sup> Trial International (2021) above n 437.

<sup>440</sup> Ibid.

### 8.2.4.5 Finland

In January 2021, the Finnish Prosecution Service issued an indictment against Mr Gibril Massaquoi.<sup>441</sup> Massaquoi is accused of responsibility for crimes committed between 1999 and 2003 as a senior member of the Revolutionary United Front (RUF), an NSAG based in Sierra Leone that also fought in Liberia.<sup>442</sup> He is accused of war crimes and crimes against humanity, including murders, sexual violence and the recruitment and use of child soldiers.<sup>443</sup>

The trial against Massaquoi opened in Tampere, Finland, on 1 February 2021.<sup>444</sup> Between February and December 2021, members of the Finnish court travelled to Liberia and Sierra Leone to conduct site visits and collect witness testimonies.<sup>445</sup> A verdict is expected in early 2022.

### 8.2.4.6 France

On 2 January 2021, the Office of the Prosecutor of the French Specialised Unit for the prosecution of genocide, crimes against humanity, war crimes and torture within the Paris Tribunal, issued an indictment against Mr Roger Lumbala.<sup>446</sup> Lumbala is accused of crimes that took place between 2000 and 2003 in the DRC whilst he was a leader of the *Rassemblement congolais pour la démocratie-National* (RCD-N).<sup>447</sup> The RCD-N has been implicated in crimes including rape, executions, mutilation and cannibalism during the second civil war in the DRC.<sup>448</sup>

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<sup>441</sup> Trial International (2021) Gibril Massaquoi. <https://trialinternational.org/latest-post/gibril-massaquoi/>. Accessed 2 May 2022.

<sup>442</sup> France24 (2021) Hearings begin in landmark Liberia war-crimes trial. <https://www.france24.com/en/live-news/20210223-hearings-begin-in-landmark-liberia-war-crimes-trial>. Accessed 2 May 2022.

<sup>443</sup> Trial International (2021) above n 441.

<sup>444</sup> Rédaction Africanews (2021) Liberia war crimes suspect Gibril Massaquoi's trial begins in Finland. <https://www.africanews.com/2021/02/03/liberia-war-crimes-suspect-gibril-massaquoi-s-trial-begins-in-finland/>. Accessed 2 May 2022.

<sup>445</sup> Trial International (2021) above n 419.

<sup>446</sup> Trial International (2021) Roger Lumbala. <https://trialinternational.org/latest-post/roger-lumbala/>. Accessed 2 May 2022.

<sup>447</sup> Ibid.

<sup>448</sup> UN News (2003) DR of Congo: UN reports instances of cannibalism, systematic killing and rape. <https://news.un.org/en/story/2003/07/75822-dr-congo-un-reports-instances-cannibalism-systematic-killing-and-rape>. Accessed 2 May 2022.

### 8.2.4.7 The Gambia

On 25 November 2021, the Gambian Truth, Reconciliation, and Reparations Commission (TRRC) delivered its final report to the President of The Gambia.<sup>449</sup> The TRRC was established in December 2017 and was tasked with investigating the alleged violations and abuses of human rights committed between July 1994 and January 2017 during the rule of former President Yahya Jammeh.<sup>450</sup> The TRRC, in its November 2021 report, identified and recommended for prosecution those most responsible for gross human rights violations and abuses and that ‘the individuals involved in perpetrating the violations and abuses must be held accountable for their crimes’.<sup>451</sup> The report documented witness testimony tying Jammeh to the killing and torture of political opponents, the murder of over 50 migrants from West Africa, the arbitrary detention of hundreds of people, and a sham treatment program forcing HIV-positive Gambians to give up their medication.<sup>452</sup>

### 8.2.4.8 Germany

A number of cases relating to the Syrian conflict were brought in the German domestic courts over the 2021 period. Germany regularly utilises universal jurisdiction to prosecute the most serious crimes allegedly committed in Syria.

On 21 April 2021, the Higher Regional Court of Dusseldorf found Nurten J. guilty of being a member of a foreign terrorist organisation, war crimes against property, and aiding and abetting a crime against humanity.<sup>453</sup> Nurten J. is a German national who travelled to Syria with her three-year old daughter in 2015 to join IS and subsequently married a high-ranking IS member.<sup>454</sup>

On 26 August, the Higher Regional Court of Dusseldorf also found Khedr A.K. guilty of the war crime of murder in conjunction with membership in a foreign terrorist organisation. Jointly, the Court also found Sami A.S. guilty of aiding and abetting these crimes in conjunction with supporting a terrorist organisation

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<sup>449</sup> Human Rights Watch (2021) The Gambia: Truth Commission Calls for Prosecuting Ex-Officials. <https://www.hrw.org/news/2021/11/25/gambia-truth-commission-calls-prosecuting-ex-officials>. Accessed 2 May 2022.

<sup>450</sup> Amnesty International 2021b.

<sup>451</sup> Trial International (2021) The Gambia: Truth Commission Calls for Prosecution of Ex-Officials. [https://trialinternational.org/wp-content/uploads/2021/11/CP\\_Gambie\\_TRRC\\_Novembre\\_2021-1.pdf](https://trialinternational.org/wp-content/uploads/2021/11/CP_Gambie_TRRC_Novembre_2021-1.pdf). Accessed 2 May 2022.

<sup>452</sup> Truth Reconciliation and Reparations Commission 2021.

<sup>453</sup> Doughty Street Chambers (2021) ISIS member convicted of crimes against humanity for aiding and abetting enslavement of a Yazidi woman. <https://www.doughtystreet.co.uk/news/isis-member-convicted-crimes-against-humanity-aiding-and-abetting-enslavement-yazidi-woman#:~:text=This%20week%2C%20the%20Higher%20Regional,and%20three%20months%20in%20prison.> Accessed 3 May 2022.

<sup>454</sup> Trial International (2021) Nurten J. <https://trialinternational.org/latest-post/nurten-j/>. Accessed 3 May 2022.

abroad.<sup>455</sup> Khedr A.K. joined the Ghurabaa Muhassan group, the Syrian branch of Al-Qaeda, in 2012.<sup>456</sup> Both Khedr A.K. and Sami A.S. are Syrian nationals.

### 8.2.4.9 The Netherlands

In April 2021, the District Court of The Hague found Ahmad al-Y, who had come to the Netherlands as an asylum seeker in 2019, guilty of the war crime of outrages upon personal dignity.<sup>457</sup> He was found to have committed this war crime by kicking and humiliating the dead bodies of deceased Syrian soldiers which was recorded and found on a YouTube video.<sup>458</sup>

In June, the District Court of The Hague also found a 32-year old woman guilty of the war crime of outrages upon personal dignity and sentenced her to six years imprisonment and ordered her to undergo compulsory psychiatric treatment.<sup>459</sup> She was found guilty of the war crime for distributing a video showing prisoners of IS being burned alive and adding derogatory comments; the woman did this from her home near Amsterdam.<sup>460</sup>

In July, the District Court of The Hague also found Ahmad al Khedr, a former member of an anti-government NSAG in Syria who had settled in the Netherlands, guilty of complicity in the war crime of killing a person *hors de combat* in the context of a NIAC and sentenced him to 20 years in prison.<sup>461</sup> Ahmad al Khedr was found to have participated in the execution of a Syrian government official in 2012.<sup>462</sup> Al Khedr was prosecuted under Dutch universal jurisdiction law.

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<sup>455</sup> Yadav M (2021) Germany court sentences two Syrians for war crimes and terrorism. <https://www.jurist.org/news/2021/08/germany-court-sentences-two-syrians-for-war-crime-and-terrorism/> Accessed 3 May 2022.

<sup>456</sup> Ibid.

<sup>457</sup> District Court of The Hague, ECLI:NL:RBDHA:2021:5336, Judgement, 21 April 2021. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBDHA%3A2021%3A5336>. Accessed 10 May 2022.

<sup>458</sup> Ibid.

<sup>459</sup> District Court of The Hague, ECLI:NL:RBDHA:2021:9933, Judgement, 29 June 2021. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBDHA%3A2021%3A9933>. Accessed 10 May 2022.

<sup>460</sup> AP News (2021) Dutch court convicts woman for spreading IS propaganda. <https://apnews.com/article/islamic-state-group-europe-middle-east-1b2931f4b6330ee768cc6e395175d9ff>. Accessed 10 May 2022.

<sup>461</sup> District Court of The Hague, ECLI:NL:RBDHA:2021:7533, Judgement, 16 July 2021. ECLI:NL:RBDHA:2021:7533. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:7533>. Accessed 10 May 2022; Quell M (2021) Syrian Refugee Convicted of War Crimes in Dutch Court. <https://www.courthousenews.com/syrian-refugee-convicted-of-war-crimes-in-dutch-court/>. Accessed 3 May 2022.

<sup>462</sup> Quell M (2021) *ibid*.

In October 2021, Dutch police arrested a 55-year old man on suspicion of the war crime of killing a civilian or someone *hors de combat* during the Surinamese ‘Interior War’ of 1986–1992.<sup>463</sup>

#### 8.2.4.10 Sweden

In July 2021, the Swedish Prosecution Authority announced that it had taken the decision to prosecute Hamid Nouri, an Iranian citizen suspected of committing war crimes and murder in Iran during the 1981–1988 IAC between Iraq and Iran.<sup>464</sup> The accused is suspected of participating in mass executions of Iranian prisoners who were loyal to a political organisation, the Iranian People’s Mujahedin, between July and August 1988.<sup>465</sup> This trial is the first in relation to the 1988 massacre of political prisoners in Iran.<sup>466</sup> The trial opened on 10 August 2021 under Swedish universal jurisdiction legislation.<sup>467</sup>

#### 8.2.4.11 Switzerland

On 18 June 2021, the Swiss Federal Criminal Court convicted Alieu Kosiah, a former commander of the United Liberation Movement of Liberia for Democracy (ULIMO) NSAG, for war crimes committed during the so-called First Liberian Civil War (1989–1996).<sup>468</sup> Kosiah is the first person to be tried for war crimes in a non-military criminal court in Switzerland. Kosiah’s trial in Switzerland was possible due to Switzerland’s recognition of universal jurisdiction.<sup>469</sup> Kosiah was found guilty of ordering murder and the cruel treatment of civilians, rape and pillage.<sup>470</sup>

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<sup>463</sup> Netherlands Public Prosecution Service (2021) Dutch Police arrest man on suspicion of war crimes Surinamese Interior War. <https://www.prosecutionservice.nl/latest/news/2021/10/29/dutch-police-arrest-man-on-suspicion-of-war-crimes-surinamese-interior-war>. Accessed 10 May 2022.

<sup>464</sup> Swedish Prosecution Authority (2021) Prosecution for War Crimes in Iran. <https://via.tt.se/pressmeddelande/prosecution-for-war-crimes-in-iran?publisherId=3235541&releaseId=3303709>. Accessed 3 May 2022.

<sup>465</sup> Ibid.

<sup>466</sup> Radio Farda (2019) Sweden Jails Iranian Prosecutor Implicated In Mass Execution In Prisons. <https://www.hrw.org/news/2021/08/09/sweden-iran-war-crimes-trial-opens>. Accessed 3 May 2022.

<sup>467</sup> Human Rights Watch (2021) Sweden: Iran War Crimes Trial Opens. <https://www.hrw.org/news/2021/08/09/sweden-iran-war-crimes-trial-opens>. Accessed 3 May 2022.

<sup>468</sup> Human Rights Watch (2021) Liberia: Landmark Swiss Conviction for Wartime Atrocities. <https://www.hrw.org/news/2021/06/18/liberia-landmark-swiss-conviction-wartime-atrocities>. Accessed 3 May 2022.

<sup>469</sup> Open Society Justice Initiative 2019.

<sup>470</sup> Office of the Attorney General of Switzerland (2019) International criminal law: first indictment filed in the context of the Liberian civil war. <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-74457.html>. Accessed 3 May 2022.



### 8.2.4.12 Ukraine

In May 2021, Ukraine's parliament adopted Draft Law No. 2689 (On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law) which seeks to incorporate international crimes, including war crimes, into domestic law in line with international standards.<sup>471</sup> As of the end of 2021, however, the Draft Law had not received the signature of Ukrainian President Volodymyr Zelensky needed for it to enter into force.

Furthermore, in November, Ukrainian authorities arrested Denis Kulikovskyy. He is alleged to be a senior-level member of the self-proclaimed DNR (see Sect. 8.1.13) and is accused of multiple crimes, including under Article 438 of the Ukrainian criminal code 'violations of the laws and customs of war'.<sup>472</sup>

## 8.3 Arms Control, Disarmament and Other Developments

In this section, developments relating to arms control and disarmament during 2021 are summarised. These areas are important to the understanding of IHL as technological developments in the arms industry can challenge the way in which IHL applies during armed conflict. IHL is particularly implicated regarding the selection of means or methods of warfare. In addition, developments within new domains that challenge IHL's application, e.g., outer space and cyberspace, are also briefly examined.

### 8.3.1 Arms Trade

From 2017 to 2021, the volume of international transfers of major arms was 4.6 per cent lower than in the period 2012–2016, but 3.9 per cent higher than in the period 2007–2011.<sup>473</sup> The US, Russian Federation, France, China and Germany were the largest arms exporters in 2017–2021, accounting for 77 per cent of all arms exports globally.<sup>474</sup> Arms transfers increased to Europe and the Middle East by 19 per cent and 2.8 per cent respectively, while arms transfers decreased by 36 per cent to the Americas, 34 per cent to Africa, and 4.7 per cent to Asia and Oceania.<sup>475</sup> The five largest arms importers in 2017–2021 were India, Saudi Arabia, Egypt, Australia and

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<sup>471</sup> Information Department of the Office of the Verkhovna Rada of Ukraine (2021) The Law "On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Norms of International Criminal and Humanitarian Law" was adopted. <https://www.rada.gov.ua/news/Povido mlennya/208710.html>. Accessed 10 May 2022.

<sup>472</sup> Human Rights Watch (2021) Ukraine War Crimes Arrest a Step Toward Justice. <https://www.hrw.org/news/2021/11/12/ukraine-war-crimes-arrest-step-toward-justice>. Accessed 10 May 2022.

<sup>473</sup> Stockholm International Peace Research Institute (SIPRI) 2022, p 1.

<sup>474</sup> Ibid.

<sup>475</sup> Ibid.

China, accounting for 38 per cent of all arms imports globally.<sup>476</sup> 2021 was also the first year where total military expenditure passed 2 trillion US dollars, with the US, China, India, the UK and Russia being the highest spenders.<sup>477</sup>

The seventh Conference of the States Parties (CSP7) of the Arms Trade Treaty (ATT) was held in hybrid form at the end of August 2021, with some delegates joining in-person in Geneva and others online. A total of 86 out of 110 states parties participated in the conference, with China being the notable newcomer since ratifying the ATT in 2020.<sup>478</sup> The main topics of the conference, as chosen by the president of CSP7, Ambassador Lansana Gberie of Sierra Leone, were small arms, light weapons, and stockpile management. One of the main outcomes of the discussions surrounding these topics was that states parties need to ‘better utilise existing guidance and tools developed under relevant international and regional instruments on preventing the illicit trade in [small arms and light weapons] and strengthening stockpile management and security in order to prevent diversion [of weapons] as a way to strengthen ATT implementation’.<sup>479</sup> The CSP also stressed that ‘transparency is a key purpose of the Treaty’ in response to the worrying trend, similar to during 2020, that less states parties submitted the required annual reports on arms transfers to the ATT Secretariat during 2021.<sup>480</sup> Since no new states acceded to the ATT in 2021, by the end of year, the ATT had the same 110 state parties and 31 additional signatory states as in 2020.<sup>481</sup>

### 8.3.2 *Conventional Weapons*

Following the cancelled Meeting of the High Contracting Parties in 2020 due to the COVID-19 pandemic,<sup>482</sup> the Conventional Weapons Convention (CCW) held its Sixth Review Conference of the High Contracting Parties, a conference held every five years, in December 2021 in Geneva. In preparation for the conference, the third session of the CCW Group of Governmental Experts (GGE) finalised its report on lethal autonomous weapon systems (LAWS) earlier that month (see Sect. 8.3.3.4 below). While there was a significant number of states in support of including a mandate within the report to negotiate a new legally binding instrument on LAWS, a small group of states, including the UK, US, Russian Federation and India, used the

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<sup>476</sup> Ibid.

<sup>477</sup> SIPRI (2022) World military expenditure passes \$2 trillion for first time. <https://www.sipri.org/media/press-release/2022/world-military-expenditure-passes-2-trillion-first-time>. Accessed 4 May 2022.

<sup>478</sup> Abramson J (2021) ATT Members Highlight Small Arms, Light Weapons. <https://www.armscontrol.org/act/2021-10/news/att-members-highlight-small-arms-light-weapons>. Accessed 29 April 2022.

<sup>479</sup> ATT Secretariat 2021, para 21-a.

<sup>480</sup> Ibid., para 26 a-c.

<sup>481</sup> ATT 2022; Abramson J (2021) above n 478.

<sup>482</sup> Conventional Weapons Convention (CCW) 2022, para 6.

consensus rule to block any move towards regulation.<sup>483</sup> Instead, at the conference, the High Contracting Parties agreed on a ten-day meeting in 2022 during which the GGE will ‘consider proposals and elaborate, by consensus, possible measures’ on the regulation of LAWS.<sup>484</sup> The consensus rule also prevented the adoption of a widely supported proposal to review the CWC’s Protocol III on incendiary weapons, with Cuba and the Russian Federation blocking the move.<sup>485</sup> Nevertheless, the use of incendiary weapons against civilians was condemned by the Review Conference.<sup>486</sup> In 2021, no new states acceded to the CCW, keeping the total at 125 states parties and 4 signatories.<sup>487</sup>

### 8.3.2.1 Cluster Munitions

In 2021, the Cluster Munition Monitor reported that 360 new cluster munition casualties were recorded in 2020 compared to the 317 casualties in 2019. Consistent with previous years, all casualties were civilians.<sup>488</sup> According to the 2021 Monitor, new cluster munition attacks occurred in the conflicts in Syria and Nagorno-Karabakh between August 2020 and July 2021, with Syria seeing the highest number of casualties (182) caused by both cluster munitions remnants and cluster munition attacks, while Azerbaijan saw the highest number of casualties (107) directly from cluster munition attacks in 2020.<sup>489</sup>

The Second Review Conference of the Convention on Cluster Munitions, held every five years, was split into two parts due to the COVID-19 pandemic. The first part of the Conference was held online in November 2020, while the second part was held in a hybrid format in September 2021 in Geneva. In Geneva, states parties reviewed the implementation of the Convention in the years 2015–2020, while also adopting the Lausanne Action Plan which aims to help states achieve progress towards universalisation and implementation of the Convention in the period 2021–2026.<sup>490</sup> Furthermore, states parties adopted the Lausanne Declaration: Protecting Lives, Empowering Victims, Enabling Development, in which they expressed their

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<sup>483</sup> Stop Killer Robots (2021) GGE pushes decisions to critical Review Conference. <https://www.stopkillerrobots.org/news/gge-pushes-decisions-to-critical-review-conference/>. Accessed 29 April 2022.

<sup>484</sup> Stop Killer Robots (2021) Historic opportunity to regulate killer robots fails as a handful of states block the majority. <https://www.stopkillerrobots.org/news/historic-opportunity-to-regulate-killer-robots-fails-as-a-handful-of-states-block-the-majority/>. Accessed 29 April 2022.

<sup>485</sup> Humanitarian Disarmament 2021.

<sup>486</sup> Ibid.

<sup>487</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, opened for signature 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983).

<sup>488</sup> Cluster Munition Coalition 2021, p 1.

<sup>489</sup> Ibid., p 2.

<sup>490</sup> Convention on Cluster Munitions (CCM) 2021a.

firm commitment to achieve the Convention's goal of ending the suffering and casualties caused by cluster munitions.<sup>491</sup> During the conference, Bulgaria and Peru requested and received extensions to their deadlines regarding the destruction of their cluster munition stockpiles. Afghanistan, Chile, and Mauritania also requested and received extensions to their deadlines for clearing contaminated areas due to cluster munitions.<sup>492</sup> While 2020 saw four states join the Convention—Maldives, Niue, St. Lucia and São Tomé and Príncipe—no new states acceded to the Cluster Munitions Convention in 2021.<sup>493</sup> Therefore, as in 2020, the Convention had a total of 110 states parties and 13 signatories by the end of 2021.<sup>494</sup>

### 8.3.2.2 Landmines

The Landmine Monitor 2021 documented that from mid-2020 to October 2021, antipersonnel mines were used by the military of Myanmar (see Sect. 8.1.11), which is not a party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Anti-Personnel Mine Ban Convention) and therefore has no obligations under the Convention but is still bound by the rules of IHL banning the use of indiscriminate means of warfare,<sup>495</sup> and by NSAGs in Cameroon, Egypt, Niger, the Philippines, Thailand, Tunisia, and Venezuela, which are likewise bound by IHL.<sup>496</sup> There were also strong indications that landmines were used in the six-week conflict between Azerbaijan and Armenia in 2020.<sup>497</sup> According to the 2021 Monitor, at least 7,073 landmine casualties were recorded, with 2,492 people killed. This was an increase on the 5,853 casualties recorded in 2019.<sup>498</sup>

The Nineteenth Meeting of the States Parties (19MSP) of the Anti-Personnel Mine Ban Convention, which is held annually, was presided by the Netherlands and took place in November 2021 in The Hague. States parties reviewed the progress made since the adoption of the Oslo Action Plan in 2019, which provided a framework for states parties to guide their implementation of the Convention in the period 2020–2024,<sup>499</sup> and discussed the deadline extension requests by Cyprus, DRC, Guinea-Bissau, Mauritania, Nigeria, Somalia and Turkey for completing the destruction of

<sup>491</sup> Convention on Cluster Munitions (CCM) 2021b, para 27.

<sup>492</sup> Cluster Munition Coalition 2021, p 2.

<sup>493</sup> Convention on Cluster Munitions (CCM) 2021b, para 29.

<sup>494</sup> Convention on Cluster Munitions (CCM) 2022.

<sup>495</sup> See, e.g., ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (*Nuclear Weapons case*) ICJ Reports 226, p 226, para 78, where the ICJ recognised that the prohibition on indiscriminate weapons was one of the cardinal principles of IHL.

<sup>496</sup> International Campaign to Ban Landmines 2021, p 1.

<sup>497</sup> Ibid.; Cookman L (2021) Nagorno-Karabakh: Land still laced with mines, year after war. <https://www.aljazeera.com/news/2021/11/9/nagorno-karabakh-a-land-still-laced-with-mines-a-year-after-war>. Accessed 29 April 2022.

<sup>498</sup> International Campaign to Ban Landmines 2021, p 2.

<sup>499</sup> Anti-Personnel Mine Ban Convention 2019, p 3, para 2.

anti-personnel mines in mined areas, which is obligatory for states parties within 10 years of ratifying the Convention.<sup>500</sup> These requests were all granted. The 19MSP also took a decision on Eritrea which, unlike the above states, failed to request a deadline extension for completing the destruction of anti-personnel mines in mined areas, and therefore has been in violation of its treaty obligations since the original deadline in December 2020. The Meeting urged Eritrea to re-engage in a cooperative dialogue regarding its obligations under the Convention, while other states parties were called on to ask for clarification on Eritrea's compliance through the Secretary-General of the UN.<sup>501</sup> No states ratified or acceded to the Anti-Personnel Mine Ban Convention in 2021; therefore, the Convention still had 164 states parties and one signatory state by the end of 2021.<sup>502</sup>

### 8.3.3 *Non-conventional Weapons*

#### 8.3.3.1 *Chemical Weapons*

Due to the COVID-19 pandemic, the Twenty-Fifth Session of the annually held Conference of the States Parties (CSP-25) to the Chemical Weapons Convention (CWC) organised by the Organisation for the Prohibition of Chemical Weapons (OPCW), was split into two sessions, with the first part organised in 2020 and the second part in April 2021 in The Hague.<sup>503</sup> In November 2021, the Twenty-Sixth Session of the Conference of the States Parties to the CWC (CSP-26) was also organised in The Hague.<sup>504</sup>

The main decision taken during the second part of the CSP-25 in April 2021 was the suspension of certain rights and privileges of Syria under the CWC.<sup>505</sup> After the OPCW's Investigation and Identification Team (ITT) concluded that there were reasonable grounds to believe that Syria used chemical weapons in March 2017 in Ltamenah,<sup>506</sup> the CSP expressed its deep concern that the use of chemical weapons necessarily implies that Syria failed to declare and destroy all of its chemical weapons as required by the CWC.<sup>507</sup> The CSP also expressed grave concern for the lack of Syrian cooperation with the OPCW's Director-General and the ITT,

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<sup>500</sup> Anti-Personnel Mine Ban Convention 2021, paras 42–90.

<sup>501</sup> *Ibid.*, para 91.

<sup>502</sup> International Campaign to Ban Landmines 2021, p 1.

<sup>503</sup> Organisation for the Prohibition of Chemical Weapons (OPCW) 2021d, p 1.

<sup>504</sup> *Ibid.*

<sup>505</sup> OPCW News (2021) Conference of the States Parties adopt Decision to suspend certain rights and privileges of the Syrian Arab Republic under the CWC. <https://www.opcw.org/media-centre/news/2021/04/conference-states-parties-adopts-decision-suspend-certain-rights-and>. Accessed 29 April 2022.

<sup>506</sup> OPCW 2021a, para 2.

<sup>507</sup> *Ibid.*, para 4.

which was required by UN Security Council Resolution 2118 (2013), on declaring its chemical weapons stockpile and chemical weapons production facilities.<sup>508</sup> The CSP's decision denies Syria of its rights to vote in the Conference and the OPCW Council, stand for election to the Council, and to hold any office of the Conference, the Council or any subsidiary organs.<sup>509</sup> Simultaneously, the Director-General shall regularly report on whether Syria has abided by the measures on declaring its chemical weapons stockpile and production facilities.<sup>510</sup>

During the CSP-26, the Director-General in his Opening Statement underlined that even though 'we are close to achieving the goal of eliminating all of the declared chemical weapons stockpiles (...) the OPCW's mission will be far from finished. For the past years, the Secretariat has been adapting to face new threats posed by the evolving security landscape'.<sup>511</sup> Furthermore, the CSP's main decision provided clarity on whether the aerosolised use of Central Nervous System (CNS)-acting chemicals are inconsistent with the 'Purposes not Prohibited' of the CWC, in particular for law enforcement purposes.<sup>512</sup> Under the CWC, the use of Riot Control Agents (RCAs) for law enforcement purposes is not prohibited. However, since CNS-acting chemicals, among other factors, 'have resulted in permanent harm and death due to an irreversible action on life processes',<sup>513</sup> the aerosolised use of CNS-acting chemicals within law enforcement purposes was deemed to no longer constitute a 'Purpose not Prohibited' under the CWC.<sup>514</sup>

There were no new ratifications or accessions to the CWC in 2021 to complement the 193 states party to the CWC. Israel is the only state to have signed but not ratified the Convention, while Egypt, North Korea and Sudan have neither signed nor ratified as of the end of 2021.<sup>515</sup>

### 8.3.3.2 Biological Weapons

The global effort against the COVID-19 virus was significantly boosted by scientific and technological advances, for example through the use of synthetic biology for

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<sup>508</sup> *Ibid.*, paras 5–6.

<sup>509</sup> *Ibid.*, paras 7–8.

<sup>510</sup> OPCW 2021c, para 5.

<sup>511</sup> *Ibid.*, para 44.

<sup>512</sup> OPCW News (2021) Decision on aerosolised use of Central Nervous System-acting chemicals adopted by OPCW Conference of States Parties. <https://www.opcw.org/media-centre/news/2021/12/decision-aerosolised-use-central-nervous-system-acting-chemicals-adopted>. Accessed 29 April 2022.

<sup>513</sup> OPCW Scientific Advisory Board (SAB) 2018, para 101.

<sup>514</sup> OPCW 2021b, p 1.

<sup>515</sup> Arms Control Association 2018.

vaccine development and gene editing tools, such as CRISPR, for rapid test development.<sup>516</sup> While such biological techniques can have transformative societal benefits, the risk of them being used irresponsibly or for unpeaceful purposes increases simultaneously. The emergence of complex synergies between biological techniques and chemistry, artificial intelligence (AI) and cyber technologies, could see the development of new harmful biological agents that could be turned into biological weapons. These new types of biological weapons may even challenge the scope of the Biological Weapons Convention (BWC), since synergies between multiple disciplines were not as common at the time of the Convention's adoption.<sup>517</sup> Debates on the security of safety level-4 labs, where the most dangerous pathogens are researched, and on the transparency of what exactly happens within those labs, have emerged since the beginning of the COVID-19 pandemic.<sup>518</sup> The threat of new types of biological weapons following the COVID-19 pandemic was identified by NATO, which released a report in 2021 on the importance of creating a collective biodefence against new biothreats and bioterrorism.<sup>519</sup> Currently, the BWC lacks an implementation agency like the OPCW for the CWC, meaning that there is no verification mechanism that checks whether states parties are using (new) biological techniques to create new weapons.<sup>520</sup>

The Meeting of the State Parties to the BWC Meeting of 2020 (MSP20) was postponed to November 2021 due to the COVID-19 pandemic and was held in Geneva.<sup>521</sup> Since no new states have joined the convention in 2021, the BWC still has 183 states parties and four signatory states.<sup>522</sup>

### 8.3.3.3 Nuclear Weapons

Since the adoption of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1968, the five nuclear-weapon states (NWS) officially recognised by the treaty—China, France, the Russian Federation, the UK and the US—committed to ending the nuclear arms race of the Cold War and, from 2000, have publicly undertaken to eliminate their nuclear arsenals.<sup>523</sup> While this has not been achieved as of 2021, the total of nuclear weapons has diminished drastically compared to the tens of thousands of nuclear weapons the US and the Soviet Union possessed at the height of the nuclear arms race. At the end of 2021, the nine states that are known to possess

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<sup>516</sup> Saunders 2021.

<sup>517</sup> Ibid.

<sup>518</sup> Lentzos F and Koblenz G D (2021) Fifty-nine labs around world handle the deadliest pathogens – only a quarter score high on safety. <https://theconversation.com/fifty-nine-labs-around-world-handle-the-deadliest-pathogens-only-a-quarter-score-high-on-safety-161777>. Accessed 13 May 2022.

<sup>519</sup> Science and Technology Committee of NATO 2021.

<sup>520</sup> Ibid.

<sup>521</sup> UN ODA 2021.

<sup>522</sup> Arms Control Association ODA 2022a.

<sup>523</sup> Arms Control Association ODA 2022b.

nuclear weapons—US, the Russian Federation, France, UK, China, Israel, Pakistan, India and North Korea—had approximately 13,000 nuclear warheads in total.<sup>524</sup> The Russian Federation and the US lead this group with approximately 6,257 and 5,550 nuclear warheads respectively, significantly more than the other states with the most nuclear weapons—China with 350 and France with 290.<sup>525</sup>

After Honduras became the 50th state to join the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) on 24 October 2020, the minimum number of member states was reached for the treaty to enter into force. Following Article 15 of the TPNW, which reads ‘this Treaty shall enter into force 90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited’, the TPNW entered into force on 22 January 2021.<sup>526</sup> The treaty most notably prohibits the development, testing, production, acquisition, possession, stockpiling and the use or threats of the use of nuclear weapons.<sup>527</sup> Under Article 2 of the Treaty, states parties must submit declarations on their past and current status of nuclear weapons on their territory within 30 days of the Treaty’s entry into force.<sup>528</sup> The first meeting of the states parties will be held in June 2022 in Vienna. In 2021, eight states joined the TPNW: Cambodia, Chile, Comoros, Guinea-Bissau, Mongolia, Peru, the Philippines, and the Seychelles.<sup>529</sup> As of 2021, the TPNW has 59 states parties and 26 signatories.<sup>530</sup> None of the states that possess nuclear weapons have joined the Treaty.

### 8.3.3.4 Lethal Autonomous Weapons Systems

Firstly, as highlighted above (Sect. 8.3.2), LAWS were the main topic at the Sixth Review Conference of the High Contracting Parties of the CCW. Debates on regulating LAWS have become more frequent in recent years, with the rapid development of technology and the autonomisation of certain weapons creating uncertainties as to (i) the position of LAWS under IHL, (ii) who is criminally responsible if serious violations of IHL are carried out by LAWS, and, (iii) the risk that LAWS pose to (certain groups of) civilians. The GGE’s report advising the creation of a new legally binding instrument that regulates LAWS is therefore supported by many experts and a majority of states parties to the CCW. The ICRC furthermore urged states to adopt a

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<sup>524</sup> Ibid.

<sup>525</sup> Ibid.

<sup>526</sup> Treaty on the Prohibition of Nuclear Weapons, CN.478.2020 (opened for signature 7 July 2017, entered into force 22 January 2021).

<sup>527</sup> UN Office for Disarmament Affairs, Treaty on the Prohibition of Nuclear Weapons. <https://www.un.org/disarmament/wmd/nuclear/tpnw/>. Accessed 29 April 2022.

<sup>528</sup> UN Office for Disarmament Affairs, Declarations pursuant to Article 2 of the TPNW. <https://www.un.org/disarmament/wmd/nuclear/tpnw/article-2-of-the-tpnw/>. Accessed 29 April 2022.

<sup>529</sup> UN Office for Disarmament Affairs, Treaty on the Prohibition of Nuclear Weapons: Status of the treaty. <https://treaties.unoda.org/t/tpnw>. Accessed 29 April 2022.

<sup>530</sup> Ibid.



treaty on LAWS, highlighting the ‘acute risks that such weapons pose to civilians’.<sup>531</sup> However, as mentioned before, major military powers—the Russian Federation, US, Israel and India—blocked this first step to the formation of a treaty, criticised by Human Rights Watch as ‘a wholly inadequate response to the concerns raised by killer robots’.<sup>532</sup> Instead, there were proposals calling for voluntary measures—for example the US proposed a ‘code of conduct’ for the development and use of LAWS. However, the ICRC warned that such non-legally binding measures ‘will not offer an effective or timely response to the many serious challenges posed by autonomous weapons’.<sup>533</sup> Therefore, by the end of 2021, LAWS remained without specific legal regulation.

### 8.3.4 Other Developments

#### 8.3.4.1 Outer Space

In the midst of the Cold War, the Soviet Union and the US agreed on the drafting of the 1967 Outer Space Treaty which explicitly prohibited the use of weapons of mass destruction in space and banned the placement of weapons on celestial bodies (for instance, the Moon). However, the use of satellites for military purposes, and the militarisation of space in general, does not fall within the scope of the Treaty.<sup>534</sup> Generally, there is a distinction to be made between space-based weapons (weapons that are fired from space) and earth-based weapons (weapons that can reach or pass through outer space on their way to their targets).<sup>535</sup> While Russia and China have always heavily contested the development of space-based weapons and have, in the past, urged the UN General Assembly First Committee on Disarmament and International Security to lead negotiations on a new treaty aimed at preventing the weaponisation of outer space, they both tested space weapons in 2021, albeit these were earth-based.<sup>536</sup> In August, China tested a nuclear-capable hypersonic missile with a glider attached to it.<sup>537</sup> The weapon circled the Earth’s orbit before descending to its target somewhere in China.<sup>538</sup> When the hypersonic glider came back into the earth’s atmosphere, it flew at lower altitudes to hide from radar and missile defence

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<sup>531</sup> ICRC 2022a.

<sup>532</sup> Human Rights Watch (2021) Killer Robots: Military Powers Stymie Ban. <https://www.hrw.org/news/2021/12/19/killer-robots-military-powers-stymie-ban>. Accessed 3 May 2022.

<sup>533</sup> ICRC 2022a.

<sup>534</sup> Paikowsky 2021.

<sup>535</sup> Mehta 2020.

<sup>536</sup> Paikowsky 2021.

<sup>537</sup> Sevastopulo D and Hille K (2021) China tests new space capability with hypersonic missile. <https://www.ft.com/content/ba0a3cde-719b-4040-93cb-a486e1f843fb>. Accessed 6 May 2022.

<sup>538</sup> Buono S (2021) Fear about China’s new space weapon echoes older worries about war from space. <https://www.washingtonpost.com/outlook/2021/10/26/fear-about-chinas-new-space-weapon-echoes-older-worries-about-war-space/>. Accessed 6 May 2022.

systems.<sup>539</sup> Some reports indicated that the missile missed its target by about 24 miles.<sup>540</sup> In October, Russia tested a new anti-satellite weapon which destroyed one of its own old satellites. While Russia claimed that the missile hit the satellite with ‘razor-sharp precision’, it created a debris field in low-Earth orbit that the US claims could pose a risk to the International Space Station (ISS).<sup>541</sup> These types of tests and weapons are not new, with the US, China and India already having tested similar weapons in the past.<sup>542</sup> However, the use of weapons in Outer Space raises questions of whether IHL can apply outside of Earth,<sup>543</sup> and, if so, how the *sui generis* nature of Outer Space affects the core principles of IHL, for instance, proportionality in attack.<sup>544</sup> As such, the ICRC published a position paper on the topic of IHL and outer space in 2021.<sup>545</sup> In addition, the Woomera Manual Project, which aims to create a non-binding military manual on international law’s application to military operations in outer space, continued to be developed in 2021.<sup>546</sup> As of the end of 2021, however, it remained uncompleted.

In October 2021, the UN General Assembly First Committee on Disarmament and International Security approved five draft resolutions aimed at preventing an arms race in outer space.<sup>547</sup> The main resolution, adopted by a recorded vote of 163 in favour to 8 against (including China) and 9 abstentions (including India and Israel), was the draft resolution ‘Reducing space threats through norms, rules and principles of responsible behaviour’. This resolution, named L.52, urges states to conduct all of their outer space activities in conformity with international law and the UN Charter.<sup>548</sup>

### 8.3.4.2 Cyberspace

In June 2021, the UN ‘Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security’ published a report dealing with how international law, including IHL, applies to cyberspace.<sup>549</sup>

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<sup>539</sup> Ibid.

<sup>540</sup> Sevastopulo D and Hille K (2021) above n 537.

<sup>541</sup> Balmforth T (2021) ‘Razor-sharp precision’: Russia hails anti-satellite weapons test. <https://www.reuters.com/business/aerospace-defense/russia-dismisses-us-criticism-anti-satellite-weapons-test-2021-11-16/>. Accessed 6 May 2022.

<sup>542</sup> Ibid.

<sup>543</sup> Stephens 2018, p 75.

<sup>544</sup> Žilinskas and Marozas 2022.

<sup>545</sup> ICRC 2021c.

<sup>546</sup> The Woomera Manual Project 2022.

<sup>547</sup> UNGA First Committee (2021) Delegates Approve 5 Draft Resolutions, as First Committee Takes Action on Peaceful Use, Non-Weaponization of Outer Space, Chemical Weapons. <https://www.un.org/press/en/2021/gadis3676.doc.htm>. Accessed 6 May 2022.

<sup>548</sup> Ibid.

<sup>549</sup> Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security 2021.

The report ‘recognised the need for further study on how and when these [IHL] principles apply’ to cyberspace.<sup>550</sup> Many states and organisations set out their respective positions on the application of IHL cyberspace in the discussions underlying this report.<sup>551</sup>

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<sup>551</sup> See, for instance, Cyber Law Interactive Toolkit 2021.

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