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Who Are Protected by the Fundamental Guarantees under International Humanitarian Law? Part 2: Breaking with the Control Requirement in Light of the ICC Case Law

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Abstract

International humanitarian law provides for fundamental guarantees, the content of which is similar irrespective of the nature of the armed conflict and which apply to individuals even if they do not fall into the categories of specifically protected persons under the Geneva Conventions. Those guarantees, all of which derive from the general requirement of human treatment, include prohibitions of specific conduct against persons, such as murder, cruel treatment, torture, sexual violence, or against property, such as pillaging. However, it is traditionally held that the entitlement to those guarantees depends upon two requirements: the 'status requirement', which basically means that the concerned persons must not or no longer take a direct part in hostilities, and the 'control requirement', which basically means that the concerned persons or properties must be under the control of a party to the armed conflict. This study argues in favour of breaking with these two requirements in light of the existing ICC case law. That study is divided into two parts, with each part devoted to one requirement and made the object of a specific paper. The two papers follow the same structure. They start with general observations on the requirement concerned, examine the relevant ICC case law and put forward several arguments in favour of an extensive approach to the personal scope of the fundamental guarantees. The first paper, which was published in the previous issue of this journal, dealt with the status requirement. It especially delved into the ICC decisions in the *Ntaganda* case with respect to the issue of protection against intra-party violence. It advocated the applicability of the fundamental guarantees in such a context by rejecting the requirement of a legal status, on the basis of several arguments. Those arguments relied on IHL provisions

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protecting specific persons as well as on the potential for humanizing IHL on the matter and also on the approach making the status requirement relevant only when the fundamental guarantees apply in the conduct of hostilities. The second paper, which is published here, deals with the control requirement. It examines several ICC cases in detail, including the *Katanga* and *Ntaganda* cases, in relation to the issue of the applicability of the fundamental guarantees in the conduct of hostilities. It is argued that the entitlement to those guarantees is not dependent upon any general control requirement, and that, as a result, some of these guarantees may apply in the conduct of hostilities. This concerns mainly those guarantees whose application or constitutive elements do not imply any physical control over the concerned persons or properties.

Keywords

international humanitarian law (IHL) – international criminal law (ICL) – International Criminal Court (ICC) – fundamental guarantees – control requirement – Geneva Law – conduct of hostility – war crimes

1 Introduction

This paper is part of a broader analysis on the personal scope of application of the fundamental guarantees under International Humanitarian Law (IHL). The first part of that analysis has been presented in a paper published in the previous issue of this journal.[1] That paper provided a definition of the notion of fundamental guarantees for the purpose of this analysis, as covering all the basic protections applicable to any individual, even if they do not fall into the categories of specifically protected persons under the Geneva Conventions and whose content is arguably the same irrespective of the nature of the armed conflict.[2] They include prohibitions of specific conduct against persons, such as murder, cruel treatment, torture, sexual violence and outrages upon personal dignity, or against property, such as pillaging, as well as protections applicable in case of deprivation of liberty and criminal prosecution. The paper also detailed the legal bases providing those fundamental guarantees, including Article 3 common to the four 1949 Geneva Conventions (Common Article

1 R. van Steenberghe, 'Who Are Protected by the Fundamental Guarantees under International Humanitarian Law? Part 1: Breaking with the Status Requirement in Light of the ICC Case Law', 22(3) *International Criminal Law Review* (2022) 347–400, DOI: 10.1163-15718123-bja10111 (accessed 6 December 2021).

2 *Ibid.*, pp. 348–349.

3), Part II of Additional Protocol II (APII) with respect to non-international armed conflicts (NIACs), Article 75 of Additional Protocol I (API) with respect to international armed conflicts (IACs) and customary law with respect to both NIACs and IACs.[3] It then focussed on one of the traditional requirements for the applicability of those guarantees, namely the status requirement, which implies that the guarantees can only benefit those who do not or no longer take a direct part in hostilities. It questioned the existence of that requirement in relation to the issue of intra-party protection, meaning the protection afforded to persons vis-à-vis their own party to the armed conflict.[4] After a review of the relevant case law of the International Criminal Court (ICC), particularly with respect to the decisions in the *Ntaganda* case,[5] it was demonstrated that the only relevant way to ensure such protection is to break with the status requirement. Several arguments have been put forward to that end, including those based on the 'humanization' of IHL[6] and the approach that consists of confining the two constitutive tests of the status requirement to the fundamental guarantees applicable in the conduct of hostilities.[7]

The second part of this analysis on the personal scope of application of the IHL fundamental guarantees deals with the other requirement that is traditionally considered as involved in that scope, namely the control requirement, as expressed by the condition of being 'in the power of' a party to the armed conflict. However, that requirement is debated, mainly in relation to the issue of the applicability of the fundamental guarantees in the conduct of hostilities. Conduct prohibited by certain fundamental guarantees, such as the killing or injuring of civilians, may well occur in the context of the conduct of hostilities, against persons who were not under the control of the attacking forces at the time of the attack. The control requirement would then prevent prosecuting the perpetrator of those acts of violence for having breached the corresponding fundamental guarantees. The ICC case law is relevant in shedding light on that issue, as the Court dealt in several cases with war crimes based on IHL fundamental guarantees alongside war crimes that can only be committed in the conduct of hostilities. Most of its decisions suggest that the fundamental guarantees are not subject to any general control requirement.

3 *Ibid.*, pp. 349–350.
4 *Ibid.*, pp. 352–362.
5 *Ibid.*, pp. 362–384.
6 *Ibid.*, pp. 388–393.
7 *Ibid.*, pp. 393–398.

In accordance with the structure followed in the first paper,[8] this part will start with general observations on that requirement and present the different positions upheld on that matter, in particular, the view supported by the International Committee of the Red Cross (ICRC) in its Updated Commentaries on the Geneva Conventions[9] (Section 2). It then scrutinizes the relevant ICC case law and sets out interpretations of that case law about the control requirement (Section 3). It finally argues in favour of entirely breaking with that requirement, which allows for consideration of fundamental guarantees applicable in the conduct of hostilities (Section 4).

2 General Observations about the Control Requirement

This section is dedicated to general observations on the control requirement. It firstly enquires whether it similarly applies to both IACs and NIACs, since Common Article 3 and APII, unlike Article 75 API, do not expressly provide for that requirement (Section 2.1). It then describes its content, notably by illuminating the meaning of the notion of control (Section 2.2). Finally, it examines the particular issue in relation to which it is debated, namely the applicability of the fundamental guarantees in the conduct of hostilities (Section 2.3).

2.1 *Similarly Applicable to both IACs and NIACs*

Under treaty law, Article 75 API is the only legal basis that expressly refers to the control requirement with respect to the fundamental guarantees. It provides that those guarantees benefit the 'persons who are *in the power of* a Party to the conflict'.[10] In addition, this Article is included in Section III of Part IV, entitled 'Treatment of persons *in the power of a party* to an armed conflict'.[11]

8 *Ibid.*, p. 352.

9 When examining Article 3 common to the four 1949 Geneva Conventions (Common Article 3), only the latest Updated ICRC Commentary on that Article will be quoted with respect to the two requirements, namely the 2020 Commentary on the Third 1949 Geneva Convention (GCIII) (available online at ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096 (accessed 30 January 2021)). However, that commentary is similar to the corresponding ones contained in the 2016 ICRC Commentary on the First 1949 Geneva Convention (GCI) (ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press, Cambridge, 2016), paras 351–907) and the 2017 ICRC Commentary on the Second 1949 Geneva Convention (GCII) (ICRC, *Commentary on the Second Geneva Convention* (Cambridge University Press, Cambridge, 2017), paras 373–934).

10 Emphasis added.

11 Emphasis added.

As emphasized in the 1987 Commentary on API, it was deemed appropriate to repeat that requirement in Article 75, although it already derived from the title of that Section.[12] Such a requirement, as determining the personal scope of Article 75, is expressly mentioned in military manuals dealing with the fundamental guarantees applicable in IACs.[13]

No such express reference is, however, made in Common Article 3 nor in Part II APII, which provide for the fundamental guarantees in NIACs. The control requirement has nonetheless been considered as implicit by the ICRC[14] as well as by certain scholars[15] and international institutions, like the

12 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva/The Hague, 1987), para. 3010 (1987 Commentary).

13 *See, e.g.,* UK Manual, *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford, 2005), p. 215.

14 *See* the 2020 Updated ICRC Commentary on Common Article 3, *supra* note 9, paras 574–577. Some references made by the ICRC to support its view are not conclusive. Firstly, the ICRC refers to the UK military manual (*supra* note 13) when arguing that its reading of the personal scope of Common Article 3 'finds support … in military manuals' (para. 574 of the Updated Commentary). Yet this is the only military manual mentioned by the ICRC and the passage referred to (p. 215 of the UK manual) is not the right one, as it only concerns the fundamental guarantees provided by Article 75 API, applicable in IACs. In addition, regarding NIACs, to which only one Chapter of the UK manual is dedicated (Chapter 15), the manual is not straightforward. Although it speaks about the (human) treatment of '[p]ersons *in the hands of* a party to the armed conflict' (emphasis added) when dealing with the fundamental guarantees under Common Article 3 (p. 397 of the UK manual), the expression 'in the hands of' does no longer appear with respect to the fundamental guarantees applicable in NIACs under APII (p. 401 of the UK manual). Secondly, the ICRC also refers to the preparatory works of GCIV (*Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 407–410) to support its view that the drafters considered the entitlement to the Common Article 3 fundamental guarantees dependent upon the condition of being in the power of a party to the armed conflict. Admittedly, comparisons are made in the relevant discussions between Common Article 3 (Article 2A at the time) and Article 32 GCIV (Article 29A at the time), with the latter providing civilians with certain fundamental guarantees only when they are 'in the hands of' the parties of the armed conflict. However, the comparison has been made by the delegates of only two States and not in the sense suggested by the ICRC: the Mexican delegate supported the Indian amendment proposing the suppression of the terms 'in the hands of' in order to formulate a 'broad and generous' provision, 'as a formal affirmation of principles laid down by the Conference' (*ibid*, p. 408), whereas the French delegate did not speak about the Indian amendment and only shared his anxiety about the discrepancy between the two Articles with respect to their respective material content (*ibid*., p. 409).

15 *See* J. Pejic, 'The protective scope of Common Article 3: more than meets the eye', 93(81) *International Review of the Red Cross* (2011) 189–225, at pp. 203, 205–206 and 219; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff, Leiden, 2009), p. 299.

Inter-American Commission on Human Rights.[16] That view is supported notably by the argument that the purpose of the fundamental guarantees is to ensure the human treatment of their beneficiaries, as indicated in Common Article 3[17] and suggested by the heading of Part II of APII ('Human treatment'), and by the argument that this notion of treatment necessarily 'presupposes a degree of control …'.[18] At least, it has been argued that such control appears as an inherent implication of certain fundamental guarantees, such as those protecting persons against sexual violence like rape.[19] Another related argument, which will be examined further below,[20] is that these guarantees and, in particular, those contained in Common Article 3, are part of Geneva Law, and even express the essence of that law. This law is traditionally conceived as aiming at the protection of persons 'in the hands of' a party to an armed conflict, in opposition to Hague Law, which regulates the conduct of hostilities with respect to persons and properties outside the control of the attacking forces. Finally, under the view upheld by the ICRC in its Study on customary IHL,[21] the condition of being in the power of a party to the armed conflict is required under customary law, irrespective of the nature of the armed conflict.

2.2 *Content and Meaning*

The condition of 'being in the power of' a party to the armed conflict for the entitlement of the fundamental guarantees is not defined in any IHL treaty nor in the ICRC Study on Customary IHL. Although it involves a certain level of control, either over the concerned persons or properties, it remains unsettled which threshold of control is required.

According to the ICRC, such control must be interpreted in a broad sense not as necessarily requiring 'physical control' but also as covering situations of 'territorial control', meaning the control over the territory or areas where the beneficiaries of the guarantees or the concerned properties are located. The 1987 Commentary on Section III, Part IV of API, in which Article 75 is inserted, indeed indicates in that sense that 'the expression ["in the power of a

16 Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137: Argentina, OEA/ Ser/L/V/II.98, Doc. 38, December 6 rev., 1997, para. 176.

17 Common Article 3, 1).

18 L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, Cambridge, 2002), p. 83.

19 *See* the 2020 Updated ICRC Commentary on Common Article 3, *supra* note 9, para. 574, referring to the prohibitions on torture and hostage-taking.

20 *Cf. infra*, Section 2.3.

21 *See* J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press, Cambridge, 2005), p. 299.

Party to the conflict"] covers not only persons who have fallen into the hands of [that] Party …, but also those over whom it exercises, or would be able to exercise, authority, for the sole reason that they live in territory under its control'.[22] Similarly, in its Updated Commentary on Common Article 3, the ICRC states that the condition of being 'in the power of a Party to the conflict … includes civilians living in areas under the control of [that] Party …'.[23] Such a broad interpretation is actually in line with the approach of Pictet to Article 4 of the fourth Geneva Convention (GCIV), concerning the condition of 'finding oneself in the hands of a party to the armed conflict', required for the entitlement to the status of protected civilian under GCIV. That condition has been interpreted in the Pictet Commentary as covering persons 'in territory which is under the control of the Power in question'[24] and is not limited to physical control.

Under such broad interpretations of the control requirement and assuming that it is to be combined with the status requirement, it is questionable whether it would remain meaningful in any circumstance. In particular, the test of being *hors de combat* involved by the status requirement might be considered as normally implying in itself a sufficient degree of control over the concerned persons to make any general control requirement useless. Indeed, as seen in the paper already published in the *Review* on the status requirement,[25] persons may be qualified as *hors de combat* in three circumstances: (1) when they are 'in the power of an adverse Party'; (2) when they 'express the intention to surrender'; or (3) when they are 'rendered unconscious or … otherwise incapacitated by wounds or sickness, and therefore … incapable of defending [themselves]'.[26] It is arguably only in that third circumstance that the control requirement could possibly remain meaningful since persons may be incapacitated and defenceless without necessarily being under the control of a party to an armed conflict, even in the broad meaning of the control requirement supported by the ICRC. By contrast, under the two first circumstances, persons *hors de combat* would necessarily be under a certain degree of control that would meet the low threshold identified by the ICRC. The first circumstance must be construed either as synonymous with the condition of 'falling into the power of the enemy', required for the entitlement to the status

22 1987 Commentary, *supra* note 12, para. 2912.

23 2020 Updated ICRC Commentary on Common Article 3, *supra* note 9, para. 574.

24 *See* J. Pictet (ed.), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilians Persons in Time of War* (ICRC, Geneva, 1958), p. 47.

25 van Steenberghe, *supra* note 1, pp. 368–369.

26 Article 41 API.

or treatment of POW, which implies 'some level of physical control or restraint over the person',[27] or as covering situations of full control over the area where the person is located,[28] the assessment of which may be made through indicia such as the defenselessness of the person,[29] his/her readiness to use his/her weapons[30] or his/her weaponlessness.[31] The second circumstance, when the person expresses 'the intention to surrender', necessarily implies a sufficient degree of control over that person to make the control requirement useless. This might explain why, in its Study on customary IHL, the ICRC considers the control requirement only with respect to the category of civilians who do not take a direct part in hostilities and not with respect to those who are *hors de combat*.[32]

2.3 *The Particular Issue in Relation to the Conduct of Hostilities*

The existence of a control requirement is mainly debated in relation to certain fundamental guarantees and in relation to the issue of the applicability of these guarantees in the context of the conduct of hostilities, alongside the prohibition on attacking civilians. It is controversial whether such guarantees may apply in the context of attacks, which are directed against persons who are not under the control of the attacking party. In its Updated Commentary on Common Article 3, the ICRC emphasizes that the only guarantee that has given rise to doubt in that regard is the prohibition of murder.[33] Since murder implies the killing of persons, such a guarantee may be easily conceived

27 *See* the 2020 Updated ICRC Commentary on Common Article 3, *supra* note 9, para. 961. *See also* the 1987 Commentary on API, *supra* note 12, para. 1612.

28 *See, e.g.,* R. Goodman, 'The Power to Kill or Capture Enemy Combatants', 24(3) *European Journal of International Law* (2013) 819–853, at p. 827; N. Melzer (ed.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009), p. 109; D.M. Banaszewska, '*Hors de Combat*', in F. Lachenmann and R. Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force. The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2016), p. 450.

29 *See, e.g.,* Goodman, *supra* note 28, pp. 833–835; the author mentions the UNSG 'Report on Respect for Human Rights in Armed Conflict', UN Doc. A/8052, 18 September 1970, para. 107. *See also* the 1987 Commentary on Article 41 API, *supra* note 12, paras 1612 and 1614; M. Bothe, K.J. Partsh and W.A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, The Hague, 1982), p. 219.

30 *See, e.g.,* G.S. Corn, L.R. Blank, C. Jenks & E. Talbot Jensen, 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule', 89 *International Law Studies* (2013) 536–626, at p. 587.

31 *See, e.g.,* Banaszewska, *supra* note 28, p. 451.

32 *See* Henckaerts and Doswald-Beck, *supra* note 21, p. 299.

33 *See* the 2020 Updated ICRC Commentary on Common Article 3, *supra* note 9, para. 575.

as materially applicable in the course of an attack against persons outside the control of the attacking party. However, as we will see when examining the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) on the matter, other guarantees may also be concerned by this issue, including the prohibition of cruel treatment, since it is broadly defined in that case law as involving 'any act or omission that must cause serious pain or suffering, either of physical or mental nature or constitutes a serious attack on human dignity'.[34] Likewise, it is indeed easily conceivable that such pain or suffering and attack against human dignity may result from attacks carried out in the context of the conduct of hostilities.

The general approach followed by the ICRC on that issue, as expressed in its Updated Commentary[35] and supported by reference to scholars[36] and by the preparatory works of the two 1977 Additional Protocols (APs),[37] is to argue for a strict separation between the fundamental guarantees and the regulation of the conduct of hostilities on the basis of a control test. As already mentioned, according to that view, the fundamental guarantees and, more generally, Common Article 3 are seen as the essence of Geneva Law, which only applies with respect to persons in the power/under the control of a party to an armed conflict, in opposition to Hague Law, which only applies on the battlefield when such control is not established (yet). Accordingly, the legality of killings is to be assessed in light of the prohibition of murder or the prohibition of attacking civilians depending upon whether those killed were under or outside the control of the attacking party, respectively. In the latter case, the legality of such killings would have to be assessed in light of the relevant Hague Law regime, including the principles of distinction, proportionality and precaution. This view has been described in legal literature as having 'the benefit of distinctly naming and accounting for the different forms of killing committed in armed conflict'.[38] It has been followed in practice by several bodies,

34 *See, e.g.,* ICTY, *Prosecutor* v. *Dario Kordić et al.*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 16 February 2001 (*Kordić* Trial Judgment), para. 256. Note that the ICC Elements of Crimes use the term 'severe' rather than 'serious' for qualifying the pain and suffering and omit the reference to the 'serious attack on human dignity', since it was considered as embodied in the war crime of outrages upon personal dignity (*see* ICC, *Elements of Crimes* (ICC, The Hague, 2011), available online at www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (accessed 30 January 2021), Article 8), 2), c), i)-3, point 1.

35 *See* the 2020 Updated ICRC Commentary on Common Article 3, *supra* note 9, para. 575.

36 *Ibid.*, footnote 284.

37 *Ibid.*, footnotes 283 and 287.

38 S. Knuckey, 'Murder in Common Article 3', in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press, Oxford, 2015), p. 456.

such as the Independent International Commission of Inquiry on the Syrian Arab Republic.[39] In its 2014 Report, the Commission firstly addressed the '[v]iolations in the treatment of civilians and *hors de combat* fighters',[40] including the violations of a series of IHL fundamental guarantees and, in particular, acts amounting to murder, which resulted from the killings of persons at checkpoints or in the course of house raids or raids in hospital rooms.[41] In a second and distinct step, the Commission dealt with the '[v]iolations concerning the conduct of hostilities',[42] including breaches of the Hague prohibitions on attacking civilians and terrorizing civilian population, which resulted from the sustained shelling and bombardment of towns and villages, sniper attacks as well as car and suicide bombings.[43] The reasoning adopted under that view therefore excludes any overlap of the scopes of application of the fundamental guarantees and the conduct of hostilities prohibition on attacking persons, on the basis of a control test: the former are only applicable outside the conduct of hostilities' context while the latter only applies in that context.

That view is, however, controversial. The concurrent approach mostly supported in legal scholarship and case law consists in arguing that the fundamental guarantees apply in parallel to the prohibition of attacking civilians in the conduct of hostilities.[44] Under that view, the same acts of violence can

39 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/25/65, 12 February 2014. *See also Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* A/HRC/22/59, 5 February 2013, paras 49–50, and Annex, paras 31 and 36.

40 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/25/65, 12 February 2014, p. 7.

41 *Ibid.*, paras 20–28.

42 *Ibid.*, p. 14.

43 *Ibid.*, paras 85–106.

44 For other concurrent approaches, *see* the view that the Hague Law prohibition on attacking civilians or other protected persons can be drawn from the guarantees provided in Common Article 3, in particular from the protection against violence to life and person, including murder, and more generally from the general requirement of human treatment. This entails that the concerned persons are considered as entitled to those protections in the context of the conduct of hostilities, when targeted by a party to an armed conflict, even when that party does not exercise any control over them (*see, e.g.*, A. Cassese, 'The Geneva Protocols of 1977 on the Humanitarian law of Armed Conflict and Customary International Law', 3(1–2) *UCLA Pacific Basin Law Journal* (1984) 55–118; J.E. Bond, 'Application of the Law of War to Internal Conflict', 3(2) *Georgia Journal of International and Comparative Law* (1973) 345–384; Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, 26 February 1999, para. 41; W.H. Boothby, *The Law of Targeting* (Oxford University Press, Oxford, 2012), p. 433; A.P.V. Rogers, *Law on the Battlefield*, 3rd edn. (Manchester University Press, Manchester, 2012), p. 221); *see also* the view that Common Article 3 may regulate the conduct of hostilities by prohibiting attacks against civilians and

be considered as amounting to a violation of both the fundamental guarantees and the Hague Law prohibition of attacking civilians. This view has been applied for the first time by an international tribunal in 2005, in relation to the fundamental guarantees against murder and cruel treatment. Indeed, in its judgment of 31 January 2005 in the *Strugar* case,[45] the ICTY Trial Chamber ruled that the indiscriminate shelling of a town, the Old Town of Dubrovnik, led at the same time to the war crimes of murder[46] and cruel treatment[47] as well as to the war crime of attacking civilians.[48] It held in a well-known statement on the law applicable to murder that 'where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterized as murder …'.[49] The chamber relied to that end on former case law, in particular the trial judgments in the *Kordic* and *Galic* cases issued on 16 February 2001[50] and 5 December 2003,[51] respectively. Those judgments also dealt with acts of shelling of towns and villages but were acknowledged by the chamber itself as not being straightforward on the issue since they did not identify the particular acts amounting to murder, although convicting the accused for that charge in relation to indiscriminate attacks. Later, in its judgment delivered on 23 May 2013 in the *Prlić* case, the ICTY considered that the destruction of houses as well as the killing and wounding of civilians amounted to cruel treatment, although these acts were committed in the context of attacks against villages or towns. It concluded that 'all these events caused great physical and mental suffering to the civilian … population, the victims of such acts, constituting a serious attack on their dignity'.[52] The ICTY case law, in particular the *Strugar* case, was referred to by several bodies, such as the UN Secretary-General's Panel of Experts on

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that such prohibition would be applicable in territories under the control of the attacking party, since, according to such a view, Common Article 3 is only applicable in controlled territories (*see* Bothe *et al.*, *supra* note 29, p. 667, footnote 1).

45 ICTY, *Prosecutor* v. *Pavle Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment, 31 January 2005, paras 237–240.

46 *Ibid.*, paras 250 and 259.

47 *Ibid.*, paras 260–276.

48 *Ibid.*, paras 284–289.

49 *Ibid.*, para. 240.

50 *Kordić* Trial Judgment, *supra* note 34, paras 720–722.

51 ICTY, *Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003 (*Galić* Trial Judgement), paras 331–345.

52 ICTY, *Prosecutor* v. *Jadranko Prlić et al.,* Case No. IT-04-74-T, Trial Chamber, Judgment, 29 May 2013 (*Prlić* Trial Judgment), Vol. 3, para. 1417.

Accountability in Sri Lanka in its 2011 Report.[53] The Panel adopted the ICTY's approach and similarly considered indiscriminate attacks as leading to both murders prohibited under Common Article 3[54] and violations of the prohibition on attacking civilians.[55] Those indiscriminate attacks consisted not only in the shelling of protected persons and objects, like in the *Strugar* case, but also in suicide bombings.[56] A similar reasoning has been followed by other UN missions and commissions of inquiry.[57] Such reasoning arguably involves a partial overlap of the scopes of application of the fundamental guarantees and the conduct of hostilities prohibition on attacking persons: both are applicable during the conduct of hostilities, while only the fundamental guarantees may also apply outside such a context.

3 The ICC Case Law

The ICC case law is particularly worth examining in order to shed new light on that debate and, more generally, on the control requirement, including its meaning and scope. In several cases, the ICC indeed dealt with war crimes based on violations of the IHL fundamental guarantees, which were committed in the course of an attack. Those crimes included war crimes of murder, torture, cruel treatment, mutilation, outrages upon personal dignity, rape and pillaging. Admittedly, other criminal jurisdictions, such as the Special Court for Sierra Leone (SCSL), also ruled on comparable situations, involving similar sets of facts and war crimes, also committed in the context of attacks.[58]

53 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 193, available online at www.securitycouncilreport.org/un-documents/document/poc-rep-on-account-in-sri-lanka.php (accessed 30 January 2021).

54 *Ibid*., paras 193, 206 and 242.

55 *Ibid*., paras 201–203, 207 and 242.

56 *Ibid*., para. 242.

57 *See, e.g., Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya,* A/HRC/17/44, 12 January 2012, para. 140, footnote 174; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, paras 269–283; UN Assistance Mission in Afghanistan, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict 2013*, February 2014, at xii, 24–26; UN Assistance Mission in Afghanistan, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict 2012*, February 2012, p. 22. On those missions and Commission, *see* comments by Knuckey, *supra* note 38, p. 456, footnote 39.

58 *See, e.g.,* SCSL, *Prosecutor* v. *Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, paras 991–1014 (describing the various acts committed in Bo District, in particular in the context of the two attacks on Tikonko, the attack on Sembehum

Their case law may then also appear to be worthy of scrutiny. However, in most of the cases put before the ICC, these war crimes were charged against the accused alongside war crimes related to the conduct of hostilities, such as the war crime of attacking civilians, which are based on violations of the IHL rules on the conduct of hostilities.[59] As a result, these cases, unlike those dealt with by the SCSL, clearly concern situations that the ICC implicitly or expressly recognized as involving aspects pertaining to the conduct of hostilities. They are therefore particularly relevant for examining the issue of the applicability of the fundamental guarantees in the context of the conduct of hostilities and, more generally, whether the scope of application of those guarantees and that of the prohibitions related to the conduct of hostilities diverge or overlap on the basis of a control test.

One must nonetheless enquire whether any relevant lesson on a control test under IHL may be drawn from the ICC case law, since neither the ICC Statute nor the Elements of Crimes contain express indications of such a test. No provision in those texts indeed refers to any control requirement or, on the contrary, requires that no control must be exercised over the concerned persons or properties. In addition, as will be seen in the case law examined below,[60] the Court never expressly referred to IHL in accordance with Article 21 of its Statute, namely as a subsidiary applicable law that would have to be scrutinized in order to fill any potential lacuna left on that issue by the primary applicable law, mainly its Statute and the Elements of Crimes. Nor did it resort to IHL as a means of interpretation to shed light on the content of the concerned war crimes under the guise of the Introduction to the ICC Elements of Crimes for Article 8,[61] which requires that those elements must be interpreted in light of

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and the attack on Gerihun, that the Court qualified as amounting to unlawful killings, pillaging and collective punishment) and paras 1510–1557 (describing the various acts committed in the course of the attack in Freetown and the Western Area, that the Court qualified as amounting *inter alia* to unlawful killings, rape, sexual slavery, outrages upon personal dignity, mutilation, abductions, acts of terrorism and collective punishment).

59 In the SCSL cases involving a similar set of facts (*supra* note 58), the accused were only charged with the war crimes resulting from violations of the underlying IHL fundamental guarantees (in particular violations of Common Article 3 and APII), and not with any conduct of hostilities war crimes, except with respect to the attacks committed in May 2000 on the UNAMSIL personnel. Regarding those attacks, the accused were charged with the war crime of directing attacks against UN peacekeeping missions altogether with the war crime of murder since the attacks resulted in the killings of several peacekeepers (*ibid.*, paras 1884–1943 and 1957–1960). References will therefore be made to that case in the footnotes of that Section when appropriate (*cf. infra* note 127).

60 *Cf. infra*, Sections 3.1 and 3.2.

61 ICC, *Elements of Crimes*, *supra* note 34, p. 13.

IHL, or, except in two cases,[62] under the guise of the chapeaux of Articles 8, 2), b) i)–xxvi) and 8, 2), e) i)–xv), which provide that the Court may prosecute the war crimes listed under those chapeaux 'within the established framework of international law'.[63] This stands in contrast to the ICC decisions specifically dealing with the legal status requirement, examined in the first paper published in the previous issue of this journal. In those decisions, the Court enquired whether any legal status was provided under the relevant IHL norms after having concluded that the corresponding provisions of its Statute and the Elements of Crimes were silent on that issue.[64] In particular, the Court expressly referred to IHL as a result of the application of Article 21 of its Statute and the requirements contained in the Introduction to the ICC Elements of Crimes for Article 8 and the chapeaux of Articles 8, 2), b) xxii) and 8, 2), e) vi) of the Statute. In addition, it dedicated elaborated developments to those mechanisms, which aim at ensuring the compatibility of the war crimes provided in the Statute with IHL. This might suggest at first glance that, as far as the control test is concerned, the ICC only reasoned on the basis of its Statute and the Elements of Crimes and that the ensuing interpretations made by the Court on the matter are only relevant with respect to that applicable law and not IHL.

However, as detailed in the first paper published in the *Review*,[65] this applicable law is intrinsically linked to IHL as far as war crimes are concerned. At least, there is a fundamental requirement, as evidenced notably by the ICTY case law[66] and the aforementioned guarantees contained in the Elements of Crimes and the ICC Statute,[67] that any war crime must necessarily involve the

62 *See* ICC, *Prosecutor* v. *Germain Katanga*, Case No. ICC-01/04-01/07-3436-tENG, Trial Chamber, Judgment, 7 March 2014 (*Katanga* Trial Judgment), para. 797; ICC, *The Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Trial Chamber, Judgment, 8 July 2019 (*Ntaganda* Trial Judgment), para. 916. However, those references to the 'established framework of international law' are very brief and not elaborated.

63 *See* nonetheless such references made by certain judges in their opinion, including by Judges Howard Morrison and Judge Piotr in their separate opinion in the *Ntaganda* case at the appeals stage on the notion of 'attack' in relation to the war crime of attacking protected objects (ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Appeals Chamber, Judgment, 30 March 2021 (*Ntaganda* Appeals Judgment), Annex 1: Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor's appeal (Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański), paras 10–11).

64 van Steenberghe, *supra* note 1, pp. 371 and 377.

65 *Ibid.*, pp. 371 and 376.

66 *See*, *e.g.*, ICTY, *Prosecutor* v. *Dusko Tadić,* Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion Interlocutory Appeal on Jurisdiction (*Tadić* Appeals Decision), 2 October 1995, para. 94.

67 Regarding the meaning of the requirement provided in the Introduction of the ICC Elements of crimes for war crimes and the requirement contained in the chapeaux of Articles 8, 2), b) and e) of the ICC Statute, *see* in particular van Steenberghe, *supra* note 1, p., footnote 145.

violation of a conventional or customary IHL norm, while the reverse is not true. This means that the scope of a war crime cannot be broader than that of the underlying IHL norm, while the reverse is possible. As it will be seen later, the ICC case law examined below shows instances in which the Court seems to have adopted a flexible view on the scope of the concerned war crimes, by not requiring any control test: either, as it did in almost all instances,[68] it concluded that a war crime based on the violation of an IHL fundamental guarantee was established, without requiring that any control must be exercised by the attacking party over the concerned persons or properties; or, as it did in more limited cases,[69] it reached a conclusion on the existence of war crimes based on the violation of IHL conduct of hostilities prohibitions, without indicating that the concerned persons or properties must not be under the control of the attacking forces. As a result, in all these instances where the Court did not require any control test for the establishment of the concerned war crime, such a test cannot similarly be considered as required under the underlying IHL norm, otherwise the scope of that war crime would be broader than that of the IHL norm and a conduct could then amount to such crime without any IHL violation.

Admittedly, the ICC case law examined below also shows certain instances in which the Court expressly required a control test: either, as it appears to have done in one case,[70] it required the existence of such control for the establishment of certain war crimes based on violations of IHL fundamental guarantees; or, as it did in more cases,[71] it required the absence of such control for the establishment of war crimes based on the violation of IHL conduct of hostilities prohibitions. It could be argued that such a restrictive scope of the war crime concerned does not necessarily entail that the corresponding IHL norm must have the same limited scope. The scope of that norm could indeed be broader. In such a case, as it is with respect to several war crimes,[72] the IHL norm could be violated while not amounting to a war crime because

68 The only case in which the ICC might have retained a control requirement for the applicability of war crimes based on the violations of IHL fundamental guarantees is the *Katanga* case, at the pre-trial stage (*cf. infra*, Section 3.1.1).

69 *See* the *Katanga* case at the trial stage (*cf. infra*, Section 3.1.2); the *Banda & Jerbo* and *Mbarushimana* cases (*cf. infra*, Section 3.1.3).

70 *Cf. supra* note 68.

71 *See, e.g.,* the *Katanga* case at the pre-trial stage (*cf. infra*, Section 3.1.1) and the *Ntaganda* case at both the pre-trial and trial stages (*cf. infra*, Sections 3.2.1.2 and 3.2.2.2).

72 *See, e.g.,* the war crime resulting from damage to the environment (Article 8, 2), b), iv), which is much more restrictive than the underlying IHL prohibition (*see, e.g.*, Articles 35 and 55 API).

of the narrower scope of that war crime. Yet, the case law examined below shows that, in most instances, such an express requirement of a control test by the ICC is supported by references to IHL. In particular, the ICC referred to underlying IHL provisions in its reasoning,[73] and also resorted to IHL terminology, like when using the notion of 'conduct of hostilities crimes',[74] or to the IHL definition of certain concepts, like that provided by Pictet about the key expression 'in(to) the hands of'.[75]

All of this explains why it is, arguably, particularly relevant to focus on the ICC case law in order to draw lessons about the IHL control test, whether or not that test has been required by the Court. That being said, it will be seen that the view upheld by the ICC on that matter substantially evolved around two main cases, namely the *Katanga* (3.1) and *Ntaganda* (3.2) cases.

3.1 *The Katanga Case*

In the *Katanga* case, the ICC dealt with an attack conducted in the village of Bogoro on 24 February 2003, a village located in the Ituri district of the Democratic Republic of Congo (DRC). The attack was carried out by armed groups of Lendu ethnicity, the *Force de résistance patriotique en Ituri* (FRPI) and the *Front des nationalistes et intégrationnistes* (FNI), against another armed group, predominantly of Hema ethnicity, the *Forces patriotiques pour la libération du Congo* (FPLC), as well as against civilians belonging to the Hema ethnic group, considered by the attackers as supporting the FPLC. Germain Katanga and Mathieu Ngudjolo Chui, the case against whom was joined to the *Katanga* case until the end of the pre-trial stage,[76] were leaders of the respective attacking armed groups. They were charged with several war crimes, including the war crime of attacking civilians altogether with the war crimes of wilful killing/murder, rape, inhumane/cruel treatment, outrages upon personal dignity

73 *See e.g.* the references made by the ICC in several cases to the IHL notion of attack (contained in Article 49 API) in order to shed light on the notion of attack as part of the constitutive elements of the war crime of attacking civilians or the war crime of attacking protected objects: in addition to the reference made under the guise of the 'established framework of international law' in the *Ntaganda* Trial Judgment (*cf. supra* note 62), *see* the references made in the *Katanga* Confirmation Decision (*cf. infra* note 81) and in the *Ntaganda* Confirmation Decision (*cf. infra* note 142).

74 *See, e.g.,* the *Katanga* case at the pre-trial stage (*cf. infra*, Section 3.1.1) as well as the *Ntaganda* case at the pre-trial stage (*cf. infra* 3.2.1.2) and at the trial stage (*cf. infra*, Section 3.2.2.2).

75 *Cf. infra* note 93.

76 The cases against Katanga and Ngudjolo were joined on 10 March 2008. They were severed on 21 November 2012. Ngudjolo was acquitted by Trial Chamber II on 18 December 2012, mainly for lack of proofs. The acquittal was confirmed by the Appeals Chamber on 27 February 2015.

and pillaging.[77] All these war crimes were charged irrespective of the international or non-international nature of the armed conflict. The Prosecution considered 'that, for the purpose of this criminal case, it [was] immaterial whether the conflict, [was] characterized as non-international or international'.[78] This explains why the suspects were charged, alternatively, with wilful killing *or* murder, and inhuman treatment *or* cruel treatment, since the qualifications of wilful killing and inhuman treatment are specific to IACs, even though they refer to the same conduct as those characterizing murder and cruel treatment in NIACs, respectively.

We will see that the decisions delivered in that case at the pre-trial stage (Section 3.1.1) contrast with the trial judgment (Section 3.1.2) and other decisions issued between these two stages in other relevant cases (Section 3.1.3).

3.1.1 *Katanga* Pre-Trial Stage: a Control Test for both the Fundamental Guarantees and the Conduct of Hostilities Prohibitions?

In its decision on the confirmation of charges of 30 September 2008,[79] the Pre-Trial Chamber concluded that the armed conflict in the context of which the indicted war crimes were associated was of an international nature, because of Uganda's involvement in the military operations of the armed groups fighting against each other.[80]

When examining the war crime of attacking civilians and after having defined the notion of attack in light of IHL, in particular Article 49 API, the Chamber expressly qualified that crime as the first in the series of the 'conduct of hostilities crimes' provided in its Statute.[81] In its view, this meant that it was applicable 'only to attacks (acts of violence) directed against [civilians], or a civilian population, *that has not yet fallen into the hands of the adverse or hostile party* ….'[82] The Chamber had already briefly alluded to the specific condition of 'not having yet fallen into the hands of the enemy' in its decision of

77 See ICC, *Prosecutor* v. *Germain Katanga et al.*, Case No. ICC-01/04-01/07, Office of the Prosecutor, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, 26 June 2008, pp. 30–34. The accused were also charged with crimes against humanity and the war crimes of destruction of properties, of sexual slavery and of using children to participate actively in hostilities in an armed conflict.

78 *Ibid.*, para. 38.

79 ICC, *Prosecutor* v. *Germain Katanga et al.*, Case No. ICC-01/04-01/07-717, Pre-Trial Chamber, Decision on the confirmation of charges, 30 September 2008 (*Katanga* Confirmation Decision).

80 *Ibid.*, para. 240.

81 *Ibid.*, para. 267.

82 *Ibid.* (emphasis added).

5 November 2007 on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Katanga.[83]

Conversely, the Chamber considered the other above-mentioned war crimes as applying only with respect to persons or properties that have already fallen into the hands of the enemy. This included, in particular, the war crimes of wilful killing, rape, inhumane treatment, outrages upon personal dignity and pillaging. Such a position may be inferred from the combination of three following elements: (i) from the Chamber's general statement that, 'after an individual civilian not taking an active part in the hostilities or the civilian population falls into the hands of … an adverse or hostile party to the conflict, an act of violence against them does not fall under [the war crime of attacking civilians] but under other provisions of the Statute, which are addressed below':[84] the 'other provisions addressed below' in the Decision refer to all the war crimes other than that of attacking civilians; (ii) from the Chamber's scrutiny of the legal ingredients of each of those war crimes: except with respect to rape,[85] it expressly conditioned the establishment of these war crimes on the existence of control over the concerned persons or properties, resulting from the requirement of being 'in the hands of' the enemy;[86] (iii) from the Chamber's considerations on the relevant facts for its legal findings on those war crimes: the Chamber only examined acts that occurred in relation to civilians or civilian property that it considered as being under the control of the enemy in the context of the attack on Bogoro village.[87]

The condition of 'falling into the hands of' the enemy party was therefore pivotal in determining the applicability of the foregoing war crimes prosecuted in this case. The Pre-Trial Chamber understood this condition as meaning 'in the control of' the members of the adverse or hostile party.[88] It is clear from the Chamber's legal findings, in particular concerning the war crimes of

83 ICC, *Prosecutor* v. *Germain Katanga*, Case No. ICC-01/04-01/07-55, Pre-Trial Chamber, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, para. 38.

84 *Katanga* Confirmation Decision, *supra* note 79, para. 69.

85 However, the Chamber only examined the acts of rape that it considered as having been committed 'following the attack to the village' (*ibid.,* p. 112).

86 With respect to wilful killing, *see ibid*., paras 289–292; pillaging, *see ibid*., para. 330; inhuman treatment, *see ibid*., paras 357–358; outrages upon personal dignity, *see ibid*., para. 368.

87 It expressly referred to acts occurring after the overall attack has ended with respect to some of those crimes: with respect to wilful killing, *see ibid*., paras 298–305; pillaging, *see ibid*., para. 334; rape, *see ibid*., paras 347–348; inhuman treatment, *see ibid*., para. 362; outrages upon personal dignity, *see ibid*., para. 374.

88 *Ibid.*, para. 268.

inhumane treatment,[89] outrages upon personal dignity,[90] and pillaging,[91] that such a control must at least be considered as established in case of 'physical control' over the concerned persons or properties. This is the case when the prohibited conduct, like inhumane treatment or outrages upon personal dignity, is committed against persons having been captured or being detained or when the prohibited conduct, like pillaging, involves physical control over the properties as a necessary prerequisite.[92]

On the other hand, it is also clear that this test has been construed as extending beyond mere physical control and also covers any control over the area where the concerned persons or properties were located. The Chamber indeed referred in that regard to the interpretation given by Pictet in his commentary of Article 4 GCIV to the terms 'in the hands of', conditioning the entitlement to the status of protected person under that Convention.[93] The extent of such 'territorial control' is however unclear, especially in light of the Chamber's findings concerning wilful killing. When dealing with this war crime, the Chamber stated that the condition of being 'in the hands of' the attacking party was established not only when 'the *overall attack has ended*, and *defeat* or *full control* of the targeted village has been secured'[94] but also when, during the attack, 'the attacking forces … *gradually gain control* of targeted village, [with respect to the] civilians in these successive areas'.[95] Although the temporal test based on 'the end of the overall attack' is clear-cut,[96] the other tests are more obscure. On the one hand, in some of its findings, the Chamber suggested that the control was established once the attacking party had defeated the enemy in the concerned locality, even if the attack and killings against the civilians continued in that locality and these civilians were not under the physical control of the attacking forces (yet). Among the facts relevant for the establishment of the war crime of wilful killing, the Chamber

89 *Ibid.*, paras 362–363.

90 *Ibid.*, paras 374–375.

91 *Ibid.*, para. 330.

92 It is illustrative that the Pre-Trial Chamber stated that '[w]hereas the war crime of destruction of property under article 8(2)(b)(xiii) of the Statute can take place before the destroyed property has fallen into the hands of the party to the conflict to which the perpetrator belongs, the war crime of pillaging occurs when the enemy's property has come under the control of the perpetrator'. In the Chamber's view, '[o]nly then is the perpetrator in a position to "appropriate" such property' (*ibid.*).

93 *Ibid.*, footnotes 371, 399 and 475.

94 *Ibid.*, para. 294 (emphasis added).

95 *Ibid.*, para. 293 (emphasis added).

96 *Cf. supra* note 87 for the war crimes with respect to which that test seems to have been applied.

referred to the fact that 'attacks on the civilian population continued through the day and *even after the* [*adversary*] *military camp had been taken over by the* [*attacking forces*] when the [enemy soldiers] ran out of ammunition and fled the camp'.[97] On the other hand, in other findings, the Chamber appears to have endorsed a very low control threshold, since it considered as relevant a series of killings that were committed even before the enemy military camp had been taken over in the targeted village.[98] These killings resulted from attacks of unarmed civilians with firearms or machetes and from the burning of their houses while being inside. In fact, the Chamber's approach to the notion of control proved to be so extensive as to include any killing during the whole attack. It is not therefore surprising that, quite inconsistently, the Chamber considered some of those acts, in particular the killing of unarmed civilians and the burning of their houses while being inside, as relevant to the establishment of the war crime of attacking civilians, although, in its view,[99] that war crime was only applicable to attacks directed against persons who were not under the control of the attacking forces.

That being said, the Chamber seems to have endorsed the approach favouring a strict separation between the IHL fundamental guarantees and the IHL prohibitions related to the conduct of hostilities on the basis of a control test. Such a conclusion is not however straightforward. The armed conflict was indeed qualified as an IAC and certain war crimes, namely the war crimes of wilful killing and inhumane treatment, constituted IHL grave breaches and then required to be committed against specifically protected persons, in accordance with Article 8, 2, a) of the ICC Statute. Those war crimes are therefore based on violations of IHL guarantees that only benefit such persons, in particular civilians entitled to the status of protected persons under Article 4 GCIV,[100] and not on violations of the IHL fundamental guarantees as previously defined, namely those applicable to individuals even if they do not fall into the categories of specifically protected persons under the Geneva Conventions.[101] As a result, the Chamber was constrained by its Statute to establish that the concerned persons were 'in the hands of' the enemy in accordance with Article

97 *Katanga* Confirmation Decision, *supra* note 79, para. 301.

98 *Ibid*., para. 300. It is at least clear from the trial judgment that those killings were committed before the attacking forces took over the enemy military camp; *see Katanga* Trial Judgment, *supra* note 62, paras 810–817.

99 *Katanga* Confirmation Decision, *supra* note 79, paras 281 and 282.

100 The Chamber did not enquire whether the criminalized conduct was committed against other specifically protected persons, such as prisoners of war (POWs), since this did not appear in the Prosecution charges (*ibid*., para. 288).

101 *Cf. supra* 1 and van Steenberghe, *supra* note 1, pp. 348–349.

4 GCIV and logically relied, as the ICTY usually did in such cases,[102] on the relevant Pictet Commentary to provide those terms with a broad understanding.[103] One may not therefore infer from these Chamber's considerations that it necessarily considered the IHL fundamental guarantees as being subject to a control requirement.

However, the Pre-Trial Chamber also dealt with other war crimes than the grave breaches, in particular, with outrages upon personal dignity and pillaging. Yet, the Chamber also expressly conditioned these war crimes to the requirement of being 'in the hands of' the enemy and relied on the same Pictet Commentary to interpret those terms, although it was not constrained to do so under its Statute. Such a condition is not mentioned either in Article 8, 2, b) of the Statute, under which those war crimes are listed, nor in the relevant provisions of the ICC Elements of Crimes.[104] Unlike the grave breaches, those

102 *See, e.g.,* ICTY, *Prosecutor* v. *Dusko Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997 (*Tadić* Trial Judgment), para. 579; ICTY, *Prosecutor* v. *Zejnil Delalić et al.,* Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998 (*Delalić* Trial Judgment), para. 246, footnote 270.

103 That constraint is specific to the ICC and, more particularly, to the flawed structure of the lists of war crimes provided in its Statute. Once the armed conflict is qualified as an IAC, conduct such as unlawful killing can only be prosecuted as a grave breach. If the victim cannot be qualified as a protected person under the Geneva Conventions, the Court is then unable to prosecute the said conduct. Two main reasons explain this unsatisfying result. Firstly, such conduct is not criminalized under any other war crime applicable in IACs. Secondly, although it is criminalized under war crimes applicable in NIACs, in particular as murder, and those war crimes do not require to be committed against specifically protected persons, they are not available to the Court since they exclusively apply in NIACs. By contrast, the TPIY did not suffer such constrain. Under Article 2 of its Statute, the Tribunal was also competent to prosecute conduct amounting to grave breaches. However, when the specifically protected status of the victim could not be established, the accused could alternatively be charged and prosecuted for a violation of the laws and customs of war, such as murder, under Article 3 of its Statute (*see, e.g.,* ICTY, *Prosecutor* v. *Zejnil Delalić et al.,* Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 479; *Kordić* Trial Judgment, *supra* note 34, paras 817 and 820). Article 3 of the ICTY Statute did not require establishing the status of 'protected person' and applied irrespective of the nature of the armed conflict, thus even in IACs (*see, e.g., Tadić* Appeals Decision, *supra* note 66, para. 94; ICTY, *Prosecutor* v. *Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 120; *Prlić* Trial Judgment, *supra* note 52, Vol. 1, para. 141). This seems to be more in line with IHL itself. Article 75 API that provides for the fundamental guarantees in IACs, including the prohibition of unlawful killing under the qualification of murder, is indeed a residual clause in IACs, which applies alternatively to persons when they are not entitled to the status of protected persons under the Geneva Conventions.

104 *See* ICC, *Elements of Crimes*, *supra* note 34, p. 26 regarding the war crime of pillaging and p. 27 regarding the war crime of outrages upon personal dignity.

war crimes may therefore be seen as criminalizing the underlying IHL fundamental guarantees as defined in this paper and set forth in Article 75 API and customary IHL. Does that then mean that the Chamber truly intended to limit the scope of application of those 'fundamental guarantees crimes' to situations where the concerned persons or properties are under the control of the attacking party, and therefore intended to distinguish them from the 'conduct of hostilities crimes' on the basis of a control test? This may well be the case but the Chamber's reasoning could also merely result from a certain confusion with its developments on the grave breaches regime.[105]

3.1.2 *Katanga* Trial Stage: No Control Test for either the Fundamental Guarantees or the Conduct of Hostilities Prohibitions?

The judgment delivered by the Trial Chamber on 7 March 2014 in the *Katanga* case does not seem to be in line with the confirmation decision.[106] The Trial Chamber recharacterized the armed conflict in the context of which the Bogoro attack took place as a NIAC. This was mainly on the grounds that the Uganda foreign intervention in support of the armed group responsible for the attack was directed against another armed group and not a State, and that the Uganda intervention took place with the consent of the Congolese authorities.[107] The Chamber emphasized, in line with the view expressed by the Prosecution in its Indictment,[108] that '[this] new characterisation of the armed conflict [did] not prompt it to modify the legal elements of the alleged crimes in substance'.[109] However, contrary to what is suggested by the Chamber, such recharacterization necessarily involved a major change: the Chamber was no longer constrained — and was even barred — to prosecute the prohibited conduct as grave breaches, since such breaches are specific to IACs. In that sense, the war crime of wilful killing, the only grave breach the charge of which was

105 If it is established that its reasoning was not puzzled by such confusion, it is unfortunate anyway that the Chamber resorted to the terms 'in the hands of', specific to Article 4 GCIV, and to the meaning of those terms derived from the Pictet Commentary, as a key criterion for determining the personal scope of the war crimes other than the grave breaches. It could have indeed delved into a more proper expression 'in the power of' as used in Article 75 API and the ICRC Study on Customary IHL. One must not, however, exclude that the implicit aim pursued by the Chamber was to provide a consistent approach and then to propose the same test for delimiting the scope of application of all the war crimes dealing with the treatment of persons, be those persons specifically protected or not, and for distinguishing them from the war crimes related to the conduct of hostilities.

106 *Katanga* Trial Judgment, *supra* note 62.

107 *Ibid.*, paras 1219–1228.

108 *Cf. supra* note 78.

109 *Katanga* Trial Judgment, *supra* note 62, para. 1230.

confirmed against Katanga under Article 8, 2, a) i) of the ICC Statute,[110] had to be requalified as murder under Article 8, 2, c), i) of that Statute. Unlike the grave breach of wilful killing, the war crime of murder is based on the violation of the IHL fundamental guarantee prohibiting murder, which benefits any individuals even if they do not fall into the category of protected persons under the Geneva Conventions.

Murder was not the only war crime prosecuted before the Chamber. Almost all the other war crimes charged against Katanga were dealt with by the Chamber, including the war crime of attacking civilians as well as the war crimes of rape and pillaging. While dealing with the war crime of attacking civilians, the Chamber resorted to IHL to define the notion of attack,[111] as the Pre-Trial Chamber did in its decision.[112] However, unlike in that decision, the Chamber did not afterwards qualify the war crime of attacking civilians as a 'conduct of hostilities crime' and did not subject the applicability of that war crime to the condition that the targeted civilians must not have fallen into the hands of the attacking forces yet. Likewise, it did not refer to the condition of 'being in the hands of' the enemy or any other similar requirement, such as 'being in the power of' a party to an armed conflict, with respect to the applicability of the other war crimes based on the violations of IHL fundamental guarantees, including pillaging.

The Chamber therefore did not enquire whether the concerned persons or properties, victims of the acts of violence committed in relation to the assault on Bogoro, were under the control of the attacking forces. In particular, the Chamber relied on the same facts for establishing the commission of both the war crime of attacking civilians and the war crime of murder. Those facts indistinctly included the killings of civilians in flight or at the start of the attack, when being in their houses or in the adverse military camp where they took refuge, when they fled from that camp, or when hiding in the bushes close to the village.[113] Unlike the confirmation decision, the Chamber did not attempt

110 The charge of inhuman treatment was not confirmed against the two suspects by the Pre-Trial Chamber, as neither Katanga nor Ngudjolo could be held responsible for the acts amounting to that crime although these acts were materially committed by members of the armed group that they commanded (*Katanga* Confirmation Decision, *supra* note 79, p. 211).

111 *Katanga* Trial Judgment, *supra* note 62, para. 797.

112 *Cf. supra* note 81.

113 *Katanga* Trial Judgment, *supra* note 62, paras 856–866 and paras 871–875.

to make a distinction between these various forms of killing on the basis of any type of control exercised by the attacking forces over the victims.[114]

As the Chamber did not rely on any control test to determine the applicability of the prosecuted war crimes, it therefore appears to have departed from the approach adopted at the pre-trial stage, at least if one assumes that the Pre-Trial Chamber's reasoning on the war crimes of outrages upon personal dignity and pillaging has not been confused by its consideration of the grave breaches. In particular, as making no attempt to distinguish between the acts relevant to the establishment of the war crime of attacking civilians and those constitutive to the war crime of murder, the Chamber suggests that the personal scopes of the underlying IHL prohibitions on attacking civilians and committing murder entirely overlap. The same persons are considered as protected by both prohibitions. Moreover, the Chamber also suggests that the prohibition of murder was applicable to the conduct of hostilities, without determining if, in such a circumstance, the killings nonetheless had to be committed against persons who must not be under the control of the attacking forces.

One may enquire whether such a discrepancy between these approaches seemingly followed by the two Chambers might be explained by their different views on the nature of the armed conflict. If this were the case, it would logically follow that the scope of the application of the fundamental guarantees would be more restrictive in IACs than in NIACs, since the control requirement would only be applicable in IACs. This would have the merit of being in line with the terms of Article 75 API, which expressly limits its scope of application to persons 'in the power of' a party to the armed conflict, unlike Common Article 3 and APII.[115] However, it would be hard to reconcile this interpretation with the well-established view that the protections available in Common Article 3 armed conflicts, especially the fundamental guarantees listed in that Article, reflect 'elementary considerations of humanity', applicable as a minimum standard during any type of armed conflicts on the basis of customary law.[116]

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114 It is also worth observing that the Chamber indifferently relied on acts of rape committed either during the battle or after the takeover of the village as relevant facts for its legal findings on the war crime of rape (*ibid.*, paras 985 and 991, 993 and 995).

115 *Cf. supra*, Section 2.1.

116 *See, e.g.,* ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*), Judgment, 27 June 1986, *I.C.J. Reports 1986*, para. 218. There is also a strong argument that the guarantees afforded by Common Article 3 even apply to specifically protected persons in IACs, including POWs, although they are not expressly mentioned with respect to those persons. *See, e.g.,* with respect to the prohibition of hostage-taking, D. Tuck, 'Taking of Hostages', in Clapham, Gaeta and Sassòli (eds.), *supra* note 38, pp. 303–304.

Similarly, this would contradict the ICTY case law[117] and, as already seen,[118] the ICRC Study on Customary IHL, which provide fundamental guarantees with a similar personal scope of application in both IACs and NIACs. In other words, it seems that, under customary IHL, persons must be equally protected against the violations of the fundamental guarantees, regardless of the international or non-international nature of the armed conflict. The approaches seemingly adopted by the two Chambers thus appear contradictory, as the discrepancy cannot be justified by the different characterization of the conflict.[119]

3.1.3 Other Relevant Cases between the *Katanga* Pre-Trial and Trial Stages: Confirmation of the *Katanga* Trial Approach?

The decisions on the confirmation of charges in the *Banda & Jerbo* case as well as in the *Mbarushimana* case, both delivered between the *Katanga* pre-trial and trial stages, dealt with acts of violence committed in armed conflicts qualified as NIACs by the respective Chambers. It seems that both decisions already went in the direction of the approach subsequently followed by the Trial Chamber in the *Katanga* case.

3.1.3.1 *The Banda & Jerbo Case*

In the *Banda & Jerbo* case, the Chamber dealt with an attack conducted by Sudanese armed groups, including the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), against an African Union peacekeeping mission (African Union Mission in Sudan – AMIS) on 29/30 September 2007 in a village (Haskanita) in North Darfur. The attack was only conducted against the AMIS camp and not against any enemy military bases located in that camp. The AMIS personnel could not indeed be considered itself as an enemy, but merely as civilians, since they were peacekeepers only authorized to use force to defend themselves and they acted in conformity with that authorization on the ground.[120] That being said, the peacekeepers engaged in

117 The ICTY considered that the protections afforded by Common Article 3 and the war crimes criminalizing the violations of those protections under Article 3 of its Statute were applicable regardless of the nature of the armed conflict; *see, e.g.,* ICTY, *Prosecutor* v. *Milan Martić*, Case No. IT-95-11-T, Trial Chamber, Judgment, 12 June 2007 (*Martić* Trial Judgment), para. 42; *cf.* also van Steenberghe, *supra* note 1, p. 355, footnotes 23–24.

118 *Cf. supra* note 21.

119 In any case, they are indisputably contradictory with respect to their approach to the war crime of attacking civilians, since it is indisputable that the scope of application of the underlying IHL prohibition on attacking civilians does not vary according to the nature of the armed conflict.

120 *See* ICC, *Prosecutor* v. *Abdallah Banda Abakaer Nourain et al.*, Case No. ICC-02/05-03/09-121-Corr-Red, Pre-Trial Chamber, Corrigendum of the 'Decision on the Confirmation of Charges', 7 March 2011 (*Banda* Confirmation Decision), paras 101–104.

defensive measures, which prevented the attackers from taking control over the camp and led them to withdraw a few hours after launching the attack.

That attack resulted in the death and wounding of several peacekeepers and other AU personnel as well as in the looting of numerous items, including vehicles belonging to the mission and weapons.[121] The two accused in this case were charged with the war crime of attacking peacekeeping missions,[122] along with the war crimes of murder and pillaging. In its decision on the confirmation of charges,[123] the Chamber did not expressly qualify the war crime of attacking peacekeeping missions as a 'conduct of hostilities crime' and did not refer to any control test when determining the scope of application of all the prosecuted war crimes. In particular, although the Chamber dealt with the war crime of attacking peacekeeping missions separately from the war crimes of murder and pillaging,[124] the Chamber did not make the latter crimes dependent upon any condition that the peacekeepers[125] or the plundered properties[126] had to have fallen into the hands of the attacking forces.[127] More significantly, it emphasized that murders and pillaging 'were allegedly committed during and in the context of the attack on the MGS Haskanita'[128] and that '[t]he Chamber's findings in relation to the [war crime of attacking peacekeeping missions would] thus have legal consequences for its findings in relation to the alleged murders [and] pillaging'.[129]

121 *See, e.g.,* UN Security Council, *Report of the Secretary General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur*, S/2007/596, 8 October 2007, para. 19; African Union, *Investigation Report on the Attack on MGS Haskanita on 29/30 Sep 2007 by Armed Faction to the Darfur Conflict*, AMIS/FHQ/INTSY/G/002, 9 October 2007.

122 More precisely, this is the war crime of 'intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations', provided in Article 8, 2, e), iii) of the ICC Statute. A similar war crime is provided in Article 8, 2, b), iii) with respect to IACS.

123 *Banda* Confirmation Decision, *supra* note 120.

124 *Ibid.*, paras 57–58.

125 *See ibid.*, paras 88–104.

126 *See ibid.*, paras 110–117.

127 A similar finding may be made about the SCSL case in which the accused were charged with both the war crime of attacking a UN peacekeeping mission for the attacks committed against UNAMSIL on May 2000 and the war crime of murder for the killings of certain UNAMISL personnel committed in the context of those attacks (*cf. supra* note 59). Those who were killed had been fired upon during the fighting, although not having been previously captured. In addition, the camps in which they were located had not already been taken over by the attacking party.

128 *Banda* Confirmation Decision, *supra* note 120, para. 58.

129 *Ibid.*

3.1.3.2 *The Mbarushimana Case*

In the *Mbarushimana* case, the Pre-Trial Chamber dealt with a range of attacks carried out in a series of villages in the North Kivu province of the DRC. Those attacks were conducted by an armed group, the *Forces démocratiques de la libération du Rwanda* (FDLR), indiscriminately against the Congolese army and civilians located in those villages. They involved various acts of violence, with many of them reaching a high level of cruelty.[130] The accused was accordingly charged with numerous war crimes, including the war crime of attacking civilians together with the war crimes of murder, torture, cruel treatment, mutilation, rape and pillaging. Like in the *Banda* case, the Pre-Trial Chamber did not expressly qualify the war crime of attacking civilians as a 'conduct of hostilities crime' nor did it make any reference to any control test when determining the scope of application of all the charged war crimes.

Interestingly, as in the *Katanga* case at the trial level, the Chamber dealt with both the war crime of attacking civilians and the war crime of murder in the same section, separately from the other war crimes. This was for every attack with respect to which both crimes were charged against the accused and not rejected for mere lack of proof.[131] The Chamber then took into account the same facts in order to establish the commission of both crimes, including the fact that 'civilians were killed by being directly fired upon, cut into pieces with hooks and machetes or burnt alive inside their houses', without distinguishing whether they occurred 'during [or] in the aftermath of the attack'.[132] More particularly, it did not make any distinction between the killings committed when the attacking forces were fighting to defeat the enemy and to take over the enemy military positions and those still committed after the enemy had been defeated or chased from the targeted village.[133]

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130 *Cf.* in particular *infra* footnote 133.

131 *See, e.g.*, the attack conducted in Busurungi and surrounding villages on or about 9–10 May 2009, ICC, *Prosecutor* v. *Callixte Mbarushimana,* Case No. ICC-01/04-01/10, Pre-Trial Chamber, Decision on the confirmation of charges, 16 December 2011 (*Mbarushimana* Confirmation Decision), paras 137–160; the attack in Manje in 2009, *ibid.*, paras 184–191; the attack in Mianga on or about 12 April 2009, *ibid*., paras 214–221.

132 *Ibid*., para. 149 regarding the attack conducted in Busurungi and surrounding villages on or about 9–10 May 2009.

133 *Ibid.* It is also worth observing that no such distinctions were made either with respect to the other war crimes, such as mutilation or rape. Regarding mutilation, s*ee, e.g.,* the atrocious acts referred to in *ibid.*, para. 155, concerning 'pregnant women [who] had their stomachs cut open and the fœtus removed from their bodies' and in *ibid*., para. 159, concerning men who genital organs had been cut off and held by the perpetrator. Regarding rape, *see, e.g.,* the very brutal rapes considered by the Chamber in relation to the attack conducted in Busurungi and surrounding villages on or about 9–10 May 2009, committed both during and after the attack (*ibid*., paras 161–163).

3.2 *The Ntaganda Case*

In the *Ntaganda* case, the accused was charged with several war crimes in relation to a series of attacks conducted in villages of the DRC Ituri district by the armed group that he commanded, the FPLC, against other armed groups, mainly the *Armée populaire congolaise* (APC), indiscriminately with civilians located in the targeted villages. As discussed in detail in a paper published in a previous issue of the *Review* on the status requirement,[134] these war crimes included acts of rape and sexual slavery committed by members of the Ntaganda's armed group against other members of that group, in particular children. Ntaganda was nonetheless also prosecuted for a series of other war crimes, including the war crime of attacking civilians and the war crime of attacking protected objects, together with war crimes, such as those of murder, rape and pillaging. All those war crimes were considered as having been committed in the context of a NIAC.[135] In this case, the main aspects of the Pre-Trial Chamber's approach (Section 3.2.1) appear to have been followed at the trial level (Section 3.2.2) and arguably in decisions made before and after the trial judgment in other cases (Section 3.2.3).

3.2.1 *Ntaganda* Pre-Trial Stage: a Control Test only for the Conduct of Hostilities Prohibitions

The decision on the confirmation of charges delivered in the *Ntaganda* case on 9 June 2014 contains the most detailed and expanded developments on the issue at stake.[136] As will be seen, its reasoning sits halfway between the approaches seemingly adopted at the trial (Section 3.2.1.1) and pre-trial (Section 3.2.1.2) levels in the *Katanga* case, and further elaborates on those respective approaches.

3.2.1.1 *No Control Requirement for the Fundamental Guarantees*

On the one hand, the *Ntaganda* confirmation decision appears to be in line with the *Katanga* trial judgment concerning one fundamental aspect. It admitted the

134 van Steenberghe, *supra* note 1, pp. 362–363.

135 Ntaganda was also charged with crimes against humanity as well as other war crimes, including attempted murder, sexual slavery, displacement of civilians, enlistment and conscription of children under 15 and their use to participate actively in hostilities; *see* ICC, *Prosecutor* v. *Bosco Ntaganda*, Annex A: Prosecution's submission of document containing the charges and the list of evidence, 10 January 2015, ICC-01/04-02/06-203-AnxA, pp. 56–60.

136 ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06-309, Pre-Trial Chamber, 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 (*Ntaganda* Confirmation Decision).

applicability of the war crimes based on violations of IHL fundamental guarantees, namely, the war crimes of murder, rape and pillaging, irrespective of any control requirement. In its legal findings on those war crimes, the Chamber did not refer to any control test and concluded on their commission without examining whether the victims or properties concerned had fallen into the hands of the attacking party.[137] When examining the relevant acts of violence amounting to such crimes, including the killings of persons with respect to the war crime of murder, it took into account those committed against persons captured by the attacking forces[138] and those committed against other persons or against properties either during the takeover of the targeted villages[139] or after that takeover or the end of active fighting in those villages.[140]

3.2.1.2 *A Control Test for the Conduct of Hostilities Prohibition*

On the other hand, the *Ntaganda* confirmation decision proves to be in line with the *Katanga* pre-trial decision since, while quoting that decision,[141] it expressly qualified the war crime of attacking civilians as belonging to the realm of the conduct of hostilities. It asserted that this war crime accordingly involved the directing of an attack against civilians and that this notion of attack, as interpreted in light of IHL, in particular Article 49 API,[142] meant '*one or more acts of violence* (an "attack") against civilians not taking direct part in hostilities, *before the civilians have fallen into the hands of the attacking party*'.[143]

That being said, the Chamber seems to have adopted a higher control threshold below which acts of violence may be considered as falling into the notion of attack for the purpose of the applicability of the war crime of attacking civilians (Section 3.2.1.2.1). Moreover, unlike in the *Katanga* confirmation

137 *Ibid.*, paras 38–44 regarding murder; *ibid.,* paras 49–52 regarding rape; *ibid.,* paras 59–63 regarding pillaging.

138 *Ibid.*, paras 38 and 43 regarding murder; *ibid.,* paras 49–51 regarding rape.

139 *Ibid.*, paras 38, 39 and 44 regarding murder; *ibid.,* para. 49 regarding rape; *ibid.,* paras 60–63 regarding pillaging.

140 *Ibid.*, para. 42 regarding murder.

141 *Ibid.*, footnote 170.

142 *Ibid.*, para. 45 and footnote 173. Relying on the 1987 Commentary on APII, the Chamber considered that the notion of attack in NIACs had to be construed in light of the definition provided under Article 49 API with respect to IACs.

143 *Ibid.*, para. 45 (emphasis added). It is worth observing that it similarly resorted to the expression 'into the hands of', although ruling on war crimes committed in the context of a NIAC. In addition, like the *Katanga* pre-trial decision that it quoted again (*ibid.*, footnote 176), the Chamber also emphasized that this was 'without prejudice to [the acts of violence committed against civilians outside of the scope of the conduct of hostilities] being classified as war crimes under other appropriate legal provisions', (*ibid.*, para. 47), which implicitly referred to war crimes such as murder, rape and pillaging.

decision,[144] it gave specific indications on its broad view on the nature of the acts of violence falling into that notion (Section 3.2.1.2.2). Those views on these two constitutive elements of the notion of attack in relation to the conduct of hostilities actually had the effect of significantly increasing the scope of the war crime of attacking civilians.

3.2.1.2.1 Level of the Control Threshold

In the Chamber's view, an attack in the context of the conduct of hostilities meant that the concerned persons or properties must not be under the control of the attacking party when the attack is launched. It seems that the Chamber adopted in that respect a high control threshold, concerning the two dimensions of that control, namely the 'physical' and 'territorial' dimensions. With respect to the former dimension, it is true that, as in the *Katanga* confirmation decision, the Chamber considered certain situations of 'physical control' as enough to reach the control threshold, in particular when acts of violence, such as the acts of killing, were committed against civilians captured and/or detained.[145] However, it may be implicitly inferred from its considerations on the nature of the acts of violence falling into the notion of attack that, in its view, other situations of 'physical control' would not reach the control threshold and could therefore qualify for the underlying conduct of the war crime of attacking civilians. As will be seen in the next developments,[146] the Chamber indeed considered that acts of violence such as rape and pillaging, which necessarily presuppose a physical control over the concerned persons or properties when committed, could be constitutive of an attack for the purpose of the applicability of the war crime of attacking civilians. In particular, it referred to 'rapes committed *during* the takeover of [the targeted village]',[147] which could fall into the notion of attack, contrary to 'rapes committed *after* the takeover of [that village]'.[148] What mattered for the Chamber in relation to those acts was therefore whether a territorial control existed at the time they were committed

144 The confirmation decision does not contain any general consideration on the types of acts of violence falling into the notion of attack (*Katanga* Confirmation Decision, *supra* note 79, paras 264–274). In addition, when considering the relevant facts for the establishment of the war crime of attacking civilians, the Pre-Trial Chamber did not insist on any specific act. Only brief references were made to 'the killing and/or displacement of the civilian population, together with destruction of civilian property' (*ibid.*, para. 277; *see also* para. 279).

145 *Ntaganda* Confirmation Decision, *supra* note 136, para. 47 and footnote 175.

146 *Cf. infra*, Section 3.2.1.2.2.

147 *Ntaganda* Confirmation Decision, *supra* note 136, footnote 177 (emphasis in the judgment).

148 *Ibid.*, footnote 175 (emphasis added).

and not the existence of any physical control over the concerned persons or properties.

With respect to the 'territorial dimension' of the required control, the Chamber also seems to have adopted a restrictive view, recognizing the existence of a territorial control only when the attacked forces have been defeated and the village has been taken over, which might even mean only when the overall attack has ended. This interpretation is confirmed by its abovementioned statements on the acts of rape but also by other findings. In particular, the Chamber emphasized that civilians could be considered as being under the control of the attacking forces in 'the case of violent acts committed … at a location that has fallen under the control of the attacking party following an actual combat action against the adversary party'.[149] It also referred to the situation where the attacking forces 'take control of a certain location'[150] or to acts of violence committed 'after the takeover of the [targeted village]'.[151]

The adoption of such high control threshold by the Chamber might arguably be explained by the fact that, unlike in the *Katanga* confirmation decision, it did no longer subject the applicability of the war crimes based on violations of the IHL fundamental guarantees to any control requirement. As a result, this high control threshold enabled it to rely on many acts of violence as possible for the establishment of the war crime of attacking civilians without this preventing itself to rely on the same acts of violence for the establishment of the 'fundamental guarantees crimes'.

3.2.1.2.2 Nature of the Acts of Violence

Quite interestingly, the Chamber also enquired which types of acts of violence could fall into the notion of attack and therefore into the scope of the war crime of attacking civilians. It considered that this notion included not only the classical methods of warfare, like shelling or bombarding, but also any other act of violence such as 'murder, rape, pillage …'.[152] According to the

149 *Ibid.*, para. 47.

150 *Ibid.*

151 *Ibid.*, footnote 175.

152 *Ibid.*, para. 46. The Chamber used a confusing terminology when referring to 'murder' rather than 'killing' while enumerating the acts that fall into the notion of attack. This might give the impression that the war crime of murder, like the war crimes of rape, pillaging and destruction of property, would themselves be constitutive of an attack. This interpretation could be reinforced by the fact that the Chamber relied on its findings on these war crimes in order to establish the commission of the war crime of attacking civilians. Such interpretation would however lead to an odd result. Although the commission of the war crimes of murder, rape, pillaging and destruction of property would be established by the Chamber, such war crimes would nonetheless lose their autonomy and could not

Chamber, all these acts could therefore be seen as methods of warfare, as illustrated by several military manuals expressly quoted by the Chamber to support its view,[153] provided that 'a sufficiently close link to the conduct of hostilities [exists]'.[154]

This shows that the Chamber adopted a particularly broad view on the nature of the acts of violence falling into the notion of attack. As a result, according to that view, the material conduct that was relevant not only for the establishment of the war crimes of murder but also for the establishment of the war crimes of rape and pillaging would be at the same time relevant for the establishment of the war crime of attacking civilians, as constitutive elements of the notion of attack, when committed against persons or properties that have not yet fallen into the hands of the adversary. In that sense, the Chamber mentioned as relevant acts of violence for the establishment of the war crime of attacking civilians not only 'the killings of 7 persons by a bomb fired from [a neighbouring] village' but also, as already seen, rapes, such as those 'committed during the takeover of [a locality]',[155] and acts of pillaging committed during the assaults.[156]

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be charged against the accused when committed in the conduct of hostilities, since they would be 'absorbed' by the war crime of attacking civilians, as constitutive elements of the notion of attack. In addition, that interpretation would run against the view that the notion of attack under Article 49 API is a matter of fact and does not entail any consideration of legality: an attack as such is neither legal nor illegal, and cannot therefore be defined be reference to legal concepts, such as war crimes, which constitute unlawful acts *per se*. It therefore seems more reasonable to overlook the unfortunate terminology used by the Chamber and to interpret the Chamber's considerations as referring to the underlying material conduct of those war crimes, like the killing of persons with respect to the war crime of murder, as relevant acts falling into the notion of attack. See also, in that sense, in relation to a similar issue of terminology, ICC, *Prosecutor* v. *Dominic Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Judgment, 4 February 2021 (*Ongwen* Trial Judgment), para. 2823: 'The Chamber holds that any discussion […] to "use" one crime as the underlying conduct for another charge (as opposed to the qualification of a fact) is legally and methodologically unsound. The charges [in the indictment] do not contain any such language; they refer – correctly – to the relevant underlying conduct of the different crimes charged, rather than to other crimes as such.'

153 *Ntaganda* Confirmation Decision, *supra* note 136, footnote 174.

154 *Ibid.*, para. 46.

155 *Ibid.*, footnote 177 (emphasis omitted).

156 *Ibid.* (emphasis added). By contrast, it rejected as not relevant, because committed against persons who have fallen into the hands of the attacking forces, not only the 'killings of civilians held prisoners [and those] that took place after the [attacking party] took control [over the village]', but also, as already seen, 'rapes committed after the takeover [of the attacked village]'. Accordingly, those acts could only amount to the war crimes of murder and rape, respectively, but not to that of attacking civilians; *see ibid.*, footnote 175.

This suggests that the debate on the applicability of the IHL fundamental guarantees in the conduct of hostilities does not merely concern the prohibition of murder, as classically held and asserted by the ICRC in its Updated Commentary,[157] nor even the prohibition of cruel treatment, as evidenced by the ICTY case law.[158] It also concerns other guarantees, such as the prohibitions of rape and pillage, since the material element of their underlying conduct could also be considered as part of an attack in the Chamber's view. In any case, since those fundamental guarantees are also applicable outside the conduct of hostilities, this shows that their personal scope is broader than that of the conduct of hostilities prohibition on attacking civilians.

3.2.2 *Ntaganda* Trial Stage: a Control Test only for the Conduct of Hostilities Prohibitions

In its judgment of 8 July 2019,[159] the Trial Chamber confirmed the view upheld at the pre-trial stage that the war crimes based on violations of IHL fundamental guarantees were applicable irrespective of any control requirement (Section 3.2.2.1). The Chamber also confirmed the view that the war crime of attacking civilians 'belong[ed] to the category of offences committed during the actual conduct of hostilities'[160] and therefore excluded from its scope any act of violence committed against persons after '[these persons] have fallen into the hands of the attacking party' (Section 3.2.2.2).[161]

3.2.2.1 *No Control Requirement for the Fundamental Guarantees*

Regarding the first view, like the confirmation decision, the trial judgment dealt with the war crimes of murder, rape and pillaging without enquiring whether the concerned person or properties had fallen into the hands of the attacking party and, more generally, whether those war crimes had been committed outside or during the conduct of hostilities. In its finding on these war crimes, the Chamber made little effort to distinguish between the acts committed during the assault on the localities *versus* those committed in the aftermath of the takeover of those localities.[162]

157 *See* the 2020 ICRC Updated Commentary, *supra* note 9, para. 575.

158 *Cf. supra* notes 45–52.

159 *Ntaganda* Trial Judgment, *supra* note 62.

160 *Ibid.*, para. 904.

161 *Ibid.*

162 *See*, regarding murder, *ibid.,* paras 873 and 883–899; rape, *ibid.,* paras 940 and 943–946; pillaging, *ibid.,* para. 1032 and paras 1034–1039.

3.2.2.2 *A Control Test Only with Respect to the Conduct of Hostilities Prohibitions*

The other view of the confirmation decision that the Trial Chamber also endorsed is the classification of the war crime of attacking civilians as a conduct of hostilities crime.[163] As in the confirmation decision, it emphasized that this crime involved an attack against civilians, with the notion of attack to be understood in light of IHL,[164] and that the acts of violence constitutive to the attack had to be directed against persons who have not fallen yet into the hands of the adversary.[165] Interestingly, the Chamber also adopted such a classification with respect to the war crime of attacking protected objects, another war crime based on the violations of conduct of hostilities prohibitions, namely the IHL prohibition on attacking specific civilian objects such as hospitals and cultural, historic or religious monuments. While the confirmation decision did not contain any general consideration of that war crime and only examined a series of relevant facts,[166] this Chamber consistently classified it in the same category as the war crime of attacking civilians, by emphasizing that '[a]s the war crime of attacking civilians, [the war crime of attacking protected objects] belongs to the category of offences committed during the actual conduct of hostilities'.[167] This implicitly meant that it was applicable only to acts of violence directed against objects that have not yet fallen into the hands of the attacking party.

That being said, the Trial Chamber does not seem to have endorsed the particular views adopted at the pre-trial stage on both the level of the control threshold (Section 3.2.2.2.1) and the nature of the acts of violence (Section 3.2.2.2.2) falling into the notion of attack. It is however uncertain whether it aligned with those views only with respect to the crime of attacking specific cultural objects, while such views seem to have been endorsed by certain judges at the appeals stage in relation to any war crime involving protection against attacks (Section 3.2.2.2.3).

3.2.2.2.1 Level of the Control Threshold

Admittedly, the Trial Chamber was less expansive than its pre-trial counterpart about the meaning of the condition of not having yet fallen into the hands of the attacking party. The judgment does not contain any general consideration

163 *Ibid.*, para. 904.
164 *Ibid.*, para. 916.
165 *Ibid.*, para. 904.
166 *Ntaganda* Confirmation Decision, *supra* note 136, paras 69–71.
167 *Ntaganda* Trial Judgment, *supra* note 62, para. 1136.

of the notion of control involved by that condition. However, it does not seem to have espoused the high control threshold adopted at the pre-trial level. This is particularly apparent with respect to the 'physical dimension' of that control. Admittedly, as in the confirmation decision, the Chamber excluded acts of violence, such as the killings of civilians, committed against captured persons from the scope of the war crime of attacking civilians. In the Chamber's view, those acts could not indeed qualify as an attack for the purpose of that war crime.[168] However, by contrast to the Pre-Trial Chamber, it did not consider acts of violence that necessarily involve physical control over persons or properties when committed, like rape and pillaging, as acts that could possibly fall into the notion of attack. This may be inferred from the acts that it mentioned for the establishment of the war crime of attacking civilians. Unlike the confirmation decision, it referred mainly to acts of violence such as the killings of civilians during the assaults against the targeted villages,[169] and not to any act of rape or pillaging, although it concluded later in the judgment, when dealing with the war crimes of rape and pillaging, that such acts also occurred during the assaults. This may also be inferred from its considerations related to the nature of the acts of violence constitutive of an attack, in particular, as will be explained below,[170] from the fact that the Chamber expressly excluded the pillaging of an hospital from the notion of attack as the underlying conduct of the war crime of attacking protected objects.

Regarding the 'territorial dimension' of the control, it seems that such control might be said to exist, in the Chamber's view, at least when the acts of violence are committed after the assault. The Chamber indeed excluded the attack against a church in Sayo from the scope of application of the war crime of attacking protected objects because it took place 'sometimes after the

168 The Chamber excluded the 'acts of violence visited upon the civilians attending the "pacification meeting" at Sangi, and the subsequent killing of at least 49 [captured] persons in Kobu [as they] occurred after the civilians had already fallen into the hands of the [attacking armed group]'; *ibid*., para. 920.The 'pacification meeting' was a meeting proposed by Ntaganda's armed group to the civilians representatives of the perceived adverse ethnicity, the Lendu, officially in order to discuss 'on an alleged cease-fire and pacification plan' but in reality in order 'to arrest as many Lendu dignitaries as possible' (*see* ICC, *Prosecutor* v. *Ntaganda*, Case No. ICC-01/04-611-Red Prosecutor's Application under Article 58 filed on 14 May 2012, 14 May 2012, paras 87–88).

169 When dealing with the war crime of attacking protected objects, it referred to the attack against a health centre '*during* the [attackers'] advance into [the targeted location]'; *Ntaganda* Trial Judgment, *supra* note 62, para. 1138 (emphasis added).

170 *Cf. infra*, Section 3.2.2.2.2.

assault',[171] during *ratissage* operations, and therefore, in the Chambers' view, 'not during the actual conduct of hostilities'.[172]

3.2.2.2.2 Nature of the Acts of Violence

The Chamber was also less expansive on the types of acts of violence that can be considered as falling into notion of attack as the underlying conduct of both the war crime of attacking civilians and the war crime of attacking protected objects. Although the judgment does not contain any general consideration of that issue, various elements nonetheless strongly suggest that it did not espouse the broad view adopted in the confirmation decision. Unlike in that decision, it did not state that the material elements for the establishment of the war crimes of murder, rape and pillaging might serve as relevant elements for the definition of the notion of attack. In addition, as already seen, it mainly referred to the killings of civilians regarding the establishment of the war crime of attacking civilians, which suggests that only such acts of violence were relevant for the notion of attack. That being said, the most illustrative elements suggesting that the Chamber espoused a more restrictive view on the nature of the acts falling into the notion of attack are the express exclusions of certain acts of violence from that notion, such as the capturing of persons in relation to the war crime of attacking civilians[173] and, as already noted, the pillaging of properties in relation to the war crime of attacking protected objects.[174] With respect to pillaging, it is worth observing that, although the pillaging of the hospital in Mongbwalu occurred after the assault on that location, during *ratissage* operations, the Chamber did not mention this temporal element to exclude it from the notion of attack, as it did with respect to the attack on the church in Sayo, which was also committed during such operations.[175] It rather seems to have based that exclusion only upon the specific nature of the act of pillaging.[176]

171 *Ntaganda* Trial Judgment, *supra* note 62, para. 1142.

172 *Ibid.*

173 *Ibid.*, para. 919.

174 *Ibid.*, para. 1141. It is also illustrative that, contrary to the Pre-Trial Chamber, it rightly enquired whether the acts of pillaging could be constitutive of an attack not in relation to the war crime of attacking civilians but only in relation to the war crime of attacking protected objects.

175 *Cf. supra*, Section 3.2.2.2.1.

176 *See*, however, the Prosecutor's view that it was 'unclear whether the Chamber only excluded the incident at Mongbwalu hospital because it did not consider that the "pillaging" of a protected object may constitute an "act of violence" for the purpose of article 8(2)(e)(iv), or because in any event …, it would also have excluded this incident because it occurred in the immediate aftermath of the takeover and thus did not occur in the conduct of hostilities …'

As a result, according to the Chamber's approach, it does not seem that the fundamental guarantees whose prohibited conduct involves physical control over persons or properties, such as rape and pillaging, may be said to be applicable in the conduct of hostilities since such conduct could not be part of an attack. This is not however the case of fundamental guarantees such as the prohibition of murder, where the prohibited conduct, like the killing of civilians, may fall into the notion of attack for the purpose of the applicability of the prohibition on attacking civilians. In any case, as in the confirmation decision, the fundamental guarantees have a broader personal scope of application than that of the prohibitions on attacking civilians and protected objects, since only these prohibitions are subject to a control test.

3.2.2.2.3 Any Specific Other View on the Notion of Attack?

As already noted, the Trial Chamber qualified the war crime of attacking protected objects as a conduct of hostilities war crime and defined the notion of attack for the purpose of that war crime as any act of violence against the adversary, meaning that the targeted object must not have fallen (yet) into the hands of the attacking party. It nonetheless admitted an exception to such qualification but only in relation to the protection of certain objects. In a footnote of its judgment, it indeed stated that 'in respect of the war crime of protected object, the Chamber's findings do not relate to the interpretation of an 'attack' under Article 8(2)(e)(iv) [of the Rome Statute, which provides for such war crime,] when cultural objects enjoying a special status are the object of the attack [since, according to the Trial Chamber, the protection] of such objects under IHL is based on different underlying rules'.[177] It did not however elaborate on the special status that a cultural object must enjoy in order to fall into that exception and be protected against attacks even when the attacks take place after the object has fallen into the hands of the attacking party. In any case, the mere qualification as a cultural object was not seen sufficient by the Chamber since the latter considered that the attack on the church in Sayo could not amount to a war crime as it took place after the assault,[178] when the church was presumably under the control of the Ntaganda's armed group.

This has nonetheless been much more discussed at the appeals stage, since the Prosecution appealed the Trial Chamber's findings that the attack against the church in Sayo and the pillaging of the hospital in Mongbwalu, two acts

(ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Appeals Chamber, Prosecution Appeal Brief, 7 October 2019 (Prosecution Appeal Brief), para. 108).

177 *Ntaganda* Trial Judgment, *supra* note 62, para. 1136, footnote 3147.

178 *Ibid.*, para. 1142.

of violence that occurred during *ratissage* operations, did not amount to war crimes.[179] In the Prosecution's view, the notion of attack had to be understood more broadly with respect to objects protected under Article 8(2)(e)(iv), including any cultural property or hospital. That notion was supposed to mean any act of violence by a party to an armed conflict, including the appropriation of objects like pillaging,[180] irrespective whether that act occurs during the conduct of hostility or when the protected object is under the control of that party.[181] According to the Prosecution's reasoning, the notion of attack had therefore to be dissociated from the context of the conduct of hostilities with respect to the war crime of attacking protected objects. This war crime had to be considered as applicable in any context, even when the objects were under the full control of the attacking party. Such approach is however clearly presented by the Prosecution as an exception to the general and more restrictive understanding of the notion of attack applicable to all the other war crimes involving protection against attacks, including the war crime of attacking civilians.[182] In order to support her approach, the Prosecutor relied on the underlying specific IHL rules protecting cultural and medical objects as well as on two cases before the ICC.[183] The first is the *Al Madhi* case, where the Trial Chamber held in its judgement of 27 September 2016, before the *Ntaganda* Trial Judgement, that 'the element of "direct[ing] an attack" encompasses any act of violence against protected objects and will not make any distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.'[184] The second is the *Al Hassan* case,[185] where the Pre-Trial Chamber briefly recalled, in its decision of 13 November 2019, after the *Ntaganda* Trial Judgment, that the war crime of attacking protected objects had been qualified as a 'conduct of hostilities crime' in that judgement, with the exception of attacks against cultural objects

179 Prosecution Appeal Brief, *supra* note 176.

180 *Ibid.*, paras 127–145.

181 Regarding cultural objects, *see ibid.*, paras 21–68; regarding hospitals, *see ibid.*, paras 112–130.

182 *Ibid.*, para. 9.

183 For two other cases, in which decisions supporting that approach were issued after the Prosecution Appeal Brief, *cf. infra* note 241.

184 ICC, *Prosecutor* v. *Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15–171, Trial Chamber, Judgment and Sentence, 27 September 2016 (*Al Mahdi* Trial Judgment), para. 15 (footnotes omitted).

185 ICC, *The Prosecutor* v. *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-461-Corr-Red, Pre-Trial Chamber, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019 (*Al Hassan* Confirmation Decision).

enjoying a special status.[186] However, the Chamber emphasized afterwards that it nonetheless fully agreed with the Trial Chamber in the *Al Madhi* case and quoted the entire reasoning of that Chamber on that point.[187]

In its judgement of 30 March 2021 in the *Ntaganda* case, the Appeals Chamber rejected the Prosecutor's appeal.[188] It is, however, unclear whether it rejected a broad approach to the notion of attack. Indeed, only two out of the five sitting judges expressly supported a restrictive approach to that notion, similar to the one endorsed by the Trial Chamber with respect to the war crime of attacking protected objects as well as the war crime of attacking civilians. The two judges indeed stated that 'the term "attack" used in article 8(2)(e)(iv) of the Statute means "combat action" and that the Trial Chamber did not err by not applying a different definition of 'attack'".[189] They also asserted that this term had to have presumably the same meaning as the term 'attack' found in other war crimes protecting other objects or persons against attacks, including the war crime of attacking civilians.[190] The three other judges nonetheless agreed with a more extensive approach to the notion of attack, the effect of which was to include in that notion both the attack on the church in Sayo and the pillaging of the hospital in Mongbwalu.[191] According to these judges, the notion of attack had to be broad enough to include operations taking place in the immediate aftermath of an assault,[192] such as the *ratissage* operations conducted by Ntaganda's armed group in Sayo and Mongbwalu. The judges actually considered those operations as part of securing the capture of/control over the concerned area,[193] the take-over of which was still incomplete before such operations.[194] Quite interestingly, this broad approach did not espouse the Prosecution's view. Firstly, unlike the Prosecutor, the three judges did not clearly limit that approach to the notion of attack in relation to the war crime of attacking protected objects, since they developed their reasoning by considering the notion of attack in general. Their approach therefore seems to be

186 *Ibid.*, para. 521.
187 *Ibid.*, para. 522.
188 *Ntaganda* Appeals Judgment, *supra* note 63, para. 1164.
189 *Ibid.*, para. 1164.
190 Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański, *supra* note 63, para. 8.
191 *See Ntaganda* Appeals Judgment, *supra* note 63, paras 1164–1168.
192 *See ibid.*, para. 1168, regarding Judge Ibáñez Carranza; *ibid.*, Annex 4: Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor's appeal (Opinion of Judge Balungi Bossa), para. 8.
193 *See* especially *ibid.*, Annex 5: Partly concurring opinion of Judge Chile Eboe-Osuji (Opinion of Judge Eboe-Osuji), paras 130–131.
194 *See* especially Opinion of Judge Balungi Bossa, *supra* note 192, para. 9.

relevant to the notion of attack as used in any war crime protecting persons or objects against attacks, including the war crime of attacking civilians.[195] Secondly, by contrast to the Prosecutor's reasoning, the three judges did not feel the need to dissociate the notion of attack, as they interpreted it, from the context of the conduct of hostilities. Actually, they did not support, as the Prosecutor did in relation to the war crime of attacking objects, that the notion of attack applies to acts of violence even when those acts are committed after full control by the attacking party over the concerned objects or locations, including a long time after the combat operation. They rather merely argued that the notion of attack extended to acts of violence the aim of which was to secure the control over a location and that were not committed later than in the immediate aftermath of the combat operations.[196] Accordingly, those acts may therefore still be considered as committed in the conduct of hostilities.

All of this and, more generally, the inclusion of the assault on the church in Sayo and the pillaging of the hospital in Mongbwalu in the notion of attack therefore suggest that the approach of the three judges actually comes close to that supported at the pre-trial level with respect to both the control threshold[197] and the types of acts of violence falling into the notion of attack for the purpose of the applicability of the war crime of attacking civilians.[198] That conclusion must however be called into question. Firstly, those judges merely focussed on the temporal test for the determination of the 'territorial dimension' of the control threshold, namely whether the operations conducted in the immediate aftermath of the assault could be considered as part of the attack. Unlike in the *Ntaganda* confirmation decision, they did not give any general indication on the nature of the act of violence falling into that notion, especially in relation to pillaging. In particular, they seem to have included the act of pillaging in the notion of attack merely because it took place in the immediate aftermath of the assault. Secondly, the judges' reasoning was supposed

195 Regarding Judge Eboe-Osuji, *see* Opinion of Judge Eboe-Osuji, *supra* note 193, paras 110–132; regarding Judge Balungi Bossa, *see* Opinion of Judge Balungi Bossa, *supra* note 192, paras 2–10; regarding Judge Ibáñez Carranza, *see Ntaganda* Appeals Judgment, *supra* note 63, paras 1166–1167. *See also* in that sense G.J. Abhimanyu, 'The Ntaganda appeal judgement and the meaning of 'attack' in conduct of hostilities war crimes', *EJIL Talk!* (2 April 2021), available online at https://www.ejiltalk.org/the-ntaganda-appeal-judgment-and-the-meaning-of-attack-in-conduct-of-hostilities-war-crimes/ (accessed 30 August 2021).

196 *See* especially *Ntaganda* Appeals Judgment, *supra* note 63, para. 1164 regarding Judge Balungi Bossa; *see* especially Opinion of Judge Eboe-Osuji, *supra* note 193, paras 128–130, regarding Judge Eboe-Osuji (who merely argues for extending the notion of attack to acts occurring beyond the actual conduct of hostilities but not beyond such conduct).

197 *Cf. supra*, Section 3.2.1.2.1.

198 *Cf. supra*, Section 3.2.1.2.2.

to relate only to the war crime of attacking protected objects and not to the notion of attack in general, as this was not raised by the Prosecutor before the Appeals Chamber. Thirdly, although endorsing a broad approach to the notion attack, two out of the three judges nevertheless rejected the Prosecutor's Appeal. They notably considered that the assaults on the church and the hospital would have been more appropriately charged under other more specific war crimes,[199] such as the war crime of destruction or seizure of enemy property.[200] This is quite confusing and seriously calls into question the whole relevance of their broad approach to the notion of attack and the scope of the war crimes protecting objects or persons against attacks. In any case, no clear conclusion may be inferred from the Appeals Judgment about the meaning of that notion in general or in relation to the war crime of attacking protected objects.[201]

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199 *See* Opinion of Judge Eboe-Osuji, *supra* note 193, para. 136; Opinion of Judge Balungi Bossa, *supra* note 192, paras 12 and 15.

200 It is moreover questionable whether that war crime is appropriate to prosecute the destruction or seizure of protected objects such as cultural, medical or religious objects. That war crime indeed requires that the destructed or seized properties must belong to the adversary. Yet, it might be difficult to establish such condition in relation to those objects, even though that condition is broadly construed in the ICC case law (*cf.* van Steenberghe, *supra* note 1, footnote 58). In the *Yekatom and Ngaïssona* case, in which destructions of two Mosques were prosecuted under the war crime of attacking protected objects, and not under the war crime of destruction of property (*see* ICC, *Prosecutor* v. *Alfred Yekatom et al.*, Case No. ICC-01/14-01/18-403-Red-Corr, Pre-Trial Chamber, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 14 May 2020 (*Yekatom* Confirmation Decision), p. 104, (iv), a) and b)), the Pre-Trial Chamber expressly stated that 'attacks against buildings dedicated to religion are specifically criminalized under article 8(2)(e)(iv) of the Statute [which provides for the war crime of attacking protected objects] and [that] … such buildings do not constitute the "property of an adversary" within the meaning of article 8(2)(e)(xii) of the Statute [which provides for the war crime of destruction of property]' (*ibid.*, para. 96). This might precisely explain why the Prosecution usually preferred to charge the accused with the war crime of attacking protected objects rather the war crime of destruction of property in case of destruction of objects like cultural or religious objects, even if such destruction occurred just after the assault against the concerned area (*see* the *Ntaganda* case) or when the area was under the firm control of the attacking party (see *Al Mahdi* Trial Judgment, *supra* note 184, para. 31 and *Al Hassan* Confirmation Decision, *supra* note 185, paras 70–71) or when it was unclear whether it occurred during or after the assault (*see Yekatom* Confirmation Decision, *supra*, para. 91 and p. 104 (iv), b)). This potential unavailability of the war crime of destruction of property with respect to such objects might also explain why, in the *Al Mahdi* and *Al Hassan* cases, the Chambers expressly supported as a matter of exception that the war crime of attacking protected objects could extend to attacks occurring in areas controlled by the attacking party (*cf. supra* notes 184–185).

201 *See also* in that sense P. Clancy, 'Ntaganda and the "Conduct of Hostilities Crimes"', *EJIL Talk!* (20 August 2021), available online at https://www.ejiltalk.org/ntaganda-and-the-conduct-of-hostilities-crimes/ (accessed 30 August 2021).

3.2.3 Relevant Decisions Before and After the *Ntaganda* Trial Stage: Confirmation of the *Ntaganda* Approach?

Three decisions issued after the *Ntaganda* confirmation decision are relevant for assessing whether the ICC adopted the approach followed in the *Ntaganda* case. One of them was issued before the *Ntaganda* judgment, on 23 March 2016, namely, the confirmation decision of the Pre-Trial Chamber in the *Ongwen* case.[202] The two others were issued after the *Ntaganda* judgment. They include the confirmation decision issued in the *Yekatom & Ngaïssona* case on 14 May 2020[203] and the judgment ruled by Trial Chamber IX on 4 February 2021 in the *Ongwen* case.[204] All those decisions also dealt with the war crime of attacking civilians, together with other war crimes, such as murder, torture, cruel treatment, rape and pillaging. In addition, the war crime of attacking protected objects was also examined by the Pre-Trial Chamber in the *Yekatom & Ngaïssona* case.

Certain aspects of those decisions suggest that they espoused the two common views upheld at the pre-trial and trial levels in the *Ntaganda* case: no control requirement with respect to the war crimes based on violations of IHL fundamental guarantees, but requirement of a control test with respect to the war crimes based on violations of the relevant IHL rules on the conduct of hostilities. However, other aspects of the decisions make that conclusion unclear, especially in relation to the scope of the rules on the conduct of hostilities.

3.2.3.1 *The Ongwen Case*

In the *Ongwen* case, both in the confirmation decision and the judgment, the ICC did not expressly refer to any control test, be that with respect to the war crimes of murder, torture, cruel treatment, rape and pillaging or with respect to the war crime of attacking civilians. However, it could be argued that, while it considered the former war crimes as applicable irrespective of any control requirement, it nonetheless conditioned the latter to the requirement that the victims were not under the control of the attacking forces.

In that case, the ICC had indeed to deal with acts of violence committed in two main types of events.[205] The first consisted of attacks, most often very

202 ICC, *Prosecutor* v. *Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red, Pre-Trial Chamber, Decision on the confirmation of charges against Dominic Ongwen (*Ongwen* Confirmation Decision), 23 March 2016.

203 *Yekatom* Confirmation Decision, *supra* note 200.

204 *Ongwen* Trial Judgment, *supra* note 152.

205 *See also* however the conscription of children under the age of 15 and their use to participate actively in hostilities, *Ongwen* Confirmation Decision, *supra* note 202, paras 141–149; *Ongwen* Trial Judgment, *supra* note 152, paras 222–225.

brief, directed against internally displaced person (IDP) camps,[206] that were not taken over by the attacking forces. By contrast, the second consisted in sexual and other abuses against women abducted from those camps, taken into custody in an area under the control of the attacking party and placed at the disposal of the suspect or his subordinates.[207] Both the Pre-Trial and the Trial Chambers reached a conclusion on the commission of the war crime of attacking civilians only with respect to the first type of event, namely the attacks. On the other hand, they reached a conclusion on the commission of the war crimes based on violations of IHL fundamental guarantees with respect to both types of events, when these war crimes were charged in relation to these events.[208] In particular, as apparent in the judgement, the ICC relied on similar facts, such as that civilians 'were shot, burnt and beaten [to death]'[209] for the establishment of both the war crime of murder and the war crime of attacking civilians committed in the course of the attacks.

That being said, it is not entirely clear whether the Chambers so intended to limit the scope of application of the war crime of attacking civilians to situations where the concerned persons are not under the control of the attacking forces. Other reasons could easily explain why they did not apply it with respect to the acts of violence against the abducted women, notably, that they considered that all the material elements were not met, including that no attack had been launched or no killing had occurred.[210] More significantly, unlike in the *Ntaganda* confirmation decision[211] and judgment,[212] the Chambers never expressly qualified the war crime of attacking civilians as a 'conduct of hostilities crime'. It is true that, as in the *Ntaganda* and other cases,[213] the Appeals Chamber defined the notion of attack in light of IHL when dealing with that

206 *Ongwen* Confirmation Decision, *supra* note 202, paras 65–85; *Ongwen* Trial Judgment, *supra* note 152, paras 144–204.

207 *Ongwen* Confirmation Decision, *supra* note 202, paras 102–140; *Ongwen* Trial Judgment, *supra* note 152, paras 205–221.

208 For instance, murder was only charged in relation to the two attacks.

209 Regarding the war crime of attacking civilians, *see, e.g., Ongwen* Trial Judgment, *supra* note 152, para. 2929; regarding the war crime of murder, *see, e.g., ibid.*, para. 2931.

210 The confirmation decision does not mention any killing of abducted women, against whom Ongwen directly or indirectly perpetrated sexual and gender-based crimes (*Ongwen* Confirmation Decision, *supra* note 202, paras 102–140), while the Trial Chamber stated that '[t]he abducted women and girls were threatened with death if they attempted to escape [and that in] some cases, women and girls were in fact killed for attempted escape' (*Ongwen* Trial Judgment, *supra* note 152, para. 215).

211 *Cf. supra* note 143.

212 *Cf. supra* note 163.

213 *Cf. supra* notes 62 and 73.

war crime. However, as in the *Katanga* Trial judgement, to which it referred,[214] it did not infer from such definition that this war crime had to be qualified as a 'conduct of hostilities crime' and to be subject to a control test, requiring that the targeted civilians must not have fallen (yet) into the hands of the attacking party.

Finally, since no express reference was made to such test, no useful indication may be found in the confirmation decision nor in the judgment on the control threshold, which might have potentially guided the ICC in the application of the war crime of attacking civilians. Similarly, no meaningful lessons can be drawn from the decision or the judgement about the nature of the acts of violence falling into the notion of attack. The only interesting elements in that respect are the few facts to which the Trial Chamber briefly referred in its considerations specific to the establishment of the war crime of attacking civilians. The Chamber notably referred to the facts of 'shooting, burning and beating [civilians in the camp], and burning several hundred civilian homes',[215] without elaborating on them.

3.2.3.2 *The Yekatom & Ngaïssona Case*

Similar observations may be made with respect to the *Yekatom & Ngaïssona* confirmation decision. In that case, the Chamber also dealt with acts of violence committed in two main types of events. The first consisted of two attacks carried out on 3 December 2013 in Central African towns, in Bangui and in Bossongoa. By contrast, the second consisted of mistreatment committed in places under the firm control of the attacking party, in particular the killings, torturing and cruel treatment of persons in the Yamara school — a school in which the attacking party had established its military base — and the killing of one person in the locality of Mbaïki — that this party took over without any fighting. The Chamber reached a conclusion on the commission of the war crimes based on violations of the underlying IHL fundamental guarantees with respect to both type of events. In particular, it reached a conclusion on the commission of murder, torture and cruel treatment regarding the acts of violence committed in the Yamara school[216] and in

214 *Ongwen* Trial Judgment, *supra* note 152, para. 2758, footnote 7225. Admittedly, it also referred to the *Ntaganda* Trial Judgement, but only to the paragraph of that judgement that provides for a definition of the notion of attack and not to the paragraph (para. 904) in which the Chamber qualified the war crime concerned as a 'conduct of hostilities crime' and conditioned that war crime to a control test.

215 *Ibid.,* para. 2975. *See also ibid.*, paras 2876 and 2929.

216 For the killings, *Yekatom* Confirmation Decision, *supra* note 200, para. 123; p. 100, ii), b) regarding Yekatom and p. 104, ii), c) regarding Ngaïssona; for cruel treatment and torture,

Mbaïki,[217] and on the commission of murder,[218] rape,[219] and pillaging regarding the acts of violence committed during the two attacks. In the latter case, the Chamber broadly referred to these acts as having been committed 'in the context of', 'during' or 'in the course of' these attacks. On the other hand, the Chamber reached a conclusion on the commission of the war crime of attacking civilians only with respect to the two attacks.[220]

That being said, again, this does necessarily mean that the Chamber intended to limit the scope of that war crime to persons who were not under the control of the attacking forces. In particular, as in the *Ongwen* case, the Chamber did not qualify the war crime of attacking civilians as a 'conduct of hostilities crime' and did not expressly subject it to a control test. However, the confirmation decision is confusing in that regard as it contains a footnote in relation to this war crime, in which the Chamber invites to look at the *Ntaganda* confirmation decision, paragraphs 45–47, '[f]or the notion of "attack"'.[221] These paragraphs are those in which the Pre-Trial Chamber developed its understanding of the war crime of attacking civilians, including, as already seen in detail,[222] the qualification of that crime as a 'conduct of hostilities crime' as well as its particular views on the notion of attack. It would nonetheless be quite audacious to infer from this unelaborated quotation that the Pre-Trial Chamber in the *Yekatom & Ngaïssona* case intended to adopt the whole approach supported in the *Ntaganda* confirmation decision.

Another confusing aspect concerns the acts of violence falling into the notion of attack. The Chamber did not provide any general indications on that issue. In addition, unlike in the *Ongwe*n trial judgment, no specific part of the decision was devoted to the establishment of the war crime of attacking civilians. However, when listing in one paragraph the various war crimes that it considered as the proper qualifications for all the facts that it previously

ibid., paras 114–115; p. 101, v) and vi) regarding Yekatom and p. 104, v) and vi) regarding Ngaïssona.

217 For the killings, *ibid.*, para. 136; p. 101, iii), c) regarding Yekatom and p. 104, ii), d) regarding Ngaïssona.

218 *Ibid.*, paras 87–89 and p. 100, ii), a) regarding Yekatom (the confirmed charge only concerned the attack in Bangui); paras 87–89 and para. 106 as well as p. 103, ii), a) and b) regarding Ngaïssona (the confirmed charged only concerned the two attacks).

219 *Ibid.*, para. 106 and p. 105, ix), the charge being confirmed only with respect to Ngaïssona.

220 *Ibid.*, paras 86–92 and p. 100, i) regarding Yekatom (the confirmed charge only concerned the attack in Bangui); paras 86–92 and paras 105–109 as well as p. 103, i), a) and b) regarding Ngaïssona (the confirmed charged only concerned the two attacks).

221 *Ibid.*, para. 97, footnote 236.

222 *Cf. supra*, Section 3.2.1.2.

described,[223] the Chamber indicated after each war crime the paragraphs of its decision referring to the relevant facts. Intriguingly, the paragraphs mentioned for the war crime of attacking civilians included all the facts that the Chamber considered as relevant for the other war crimes, including murder, rape and pillaging. This might suggest at first glance that the Chamber considered the underlying material conduct of those war crimes as relevant for the establishment of the war crime of attacking civilians and therefore as falling into the notion of attack. Under such an interpretation, the Chamber would have espoused a broad approach to the acts of violence falling into the notion of attack, similar to that adopted by the Pre-Trial Chamber in the *Ntaganda* case. It would have, accordingly, envisaged the applicability of the corresponding IHL fundamental guarantees in the conduct of hostilities, including not only the prohibitions of murder but also the prohibition of rape and pillage. Such an interpretation is nonetheless most likely going too far. According to the confirmation decision, the paragraphs mentioned with respect to the war crime of attacking civilians also included facts that the Chamber considered as relevant for the establishment of other crimes, such as the crime against humanity of 'severe deprivation of physical liberty' or the war crime of attacking protected objects. Yet these crimes and, in particular, their constitutive elements are clearly distinct from those of the war crime of attacking civilians.

4 Breaking with the Control Requirement

As with any new Court system, the ICC is still in the process of building up its own jurisprudence, and certain contradictions or discrepancies between its decisions or judgments are unavoidable at this stage. This was also the case with respect to the ICTY during its early stages.[224] The ICC case law on the current issue is no exception to that phenomenon. It is nonetheless hoped that it will become more systematic and consistent in the near future on the subject.

That being said, at least one general trend may be drawn from that case law. Except the *Katanga* confirmation decision, all the ICC decisions and judgments on the matter suggest that the IHL fundamental guarantees are not subject to

223 *Yekatom* Confirmation Decision, *supra* note 200, paras 97 and 110.

224 *See, e.g.,* the evolution of the notion of rape throughout its case law, in particular from the *Furundzija* case (ICTY, *Prosecutor* v. *Anto Furundžija*, Case No. IT-95-17-I, Trial Chamber, Judgment, 10 December 1998, para. 185) to the *Kunarac* case (ICTY, *Prosecutor* v. *Drogoljub Kunarac et al.,* Case No. T-96-23 & IT-96-23/1-A, Trial Chamber, Judgment, 22 February 2001, pp. 145 *et seq.*).

any control requirement and that they could then apply in the conduct of hostilities, alongside prohibitions such as the prohibition of attacking civilians. The meaning of that conclusion must nonetheless be well understood. Firstly, it does not entail that the applicability of the IHL fundamental guarantees is no longer dependent upon any element of control but rather that the exercise of a control can no longer be required as a general condition, applicable to any of these guarantees (Section 4.1). Secondly, this does not mean that all those guarantees may be said to be applicable in the conduct of hostilities but that only some of them may apply in such context (Section 4.2). Thirdly, this implies that, when applying in the conduct of hostilities, the IHL fundamental guarantees must take into account the regime of the rules that specifically apply in such context, including the regime pertaining to the prohibition of attacking civilians (Section 4.3).

Before elaborating on these three issues, one must nonetheless first of all enquire whether breaking with the control requirement for the applicability of the IHL fundamental guarantees would not contradict the legal bases affording such guarantees. No difficulty apparently arises with respect to Common Article 3 and APII, since none of them expressly provides for such a requirement.[225] It is possible, however, that those provisions were traditionally interpreted as implicitly entailing it. It may nonetheless be argued that such an interpretation has evolved, especially in light of recent practice and case law, including the several ICC decisions examined above. Having said that, the most problematic legal basis is Article 75 API. As already stated,[226] this is the only provision that expressly refers to 'persons who are *in the power of* a Party to the conflict'[227] to determine those entitled to the fundamental guarantees contained therein. However, it may be argued that this reference does not preclude Common Article 3 from supplementing Article 75 API, as reflecting 'elementary considerations of humanity' applicable in any type of armed conflict[228] and therefore as also offering its protections in IACs, irrespective of any control requirement. This would be in line with the ICTY case law, which, as already seen,[229] did not feel the need to enquire whether the protective regime provided under Article 75 API in IACs fell into the scope of Article 3 of its Statute, an Article qualified by the Tribunal as a residual clause for prosecuting any serious violations of IHL. The Tribunal indeed argued that this Article already covered the protective regime provided by Common Article 3.

225 *Cf. supra*, Section 2.1.
226 *Ibid.*
227 Emphasis added.
228 *Cf. supra* note 116.
229 *Cf. supra* note 117.

4.1 *No General Control Requirement*

Breaking with the control requirement for the applicability of the fundamental guarantees, as suggested by the ICC case law in most of its decisions, means that these guarantees merely apply once the material constitutive elements of their prohibited conduct are fulfilled, irrespective of any control exercised over the concerned persons or properties. Such control could nonetheless be said to exist in fact or even be required. Actually, most of the fundamental guarantees, such as the prohibitions of rape, pillage and mutilation or the protections applicable in case of deprivation of liberty and criminal prosecution, necessarily involve such control and cannot therefore be applied without it. However, this control does not result from the application of any general control requirement, which would condition the applicability of all the fundamental guarantees, but only from the constitutive elements of the conduct that they prohibit.

Breaking with such control as a general requirement therefore enables considering the applicability of some fundamental guarantees, which do not necessarily involve a physical control over persons or properties, in situations where the attacking party does not exercise such a control. This is for instance the case of the prohibition against murder, since persons may well be killed either under the control of the attacker, such as when killed while detained/captured, or outside such a control, for example when killed during a bombardment. This is particularly with respect to such fundamental guarantee that the ICC case law shows the flaws of an approach supporting a strict separation between the IHL fundamental guarantees and the conduct of hostilities prohibitions, in particular the prohibition of attacking civilians, on the basis of a control test.

Indeed most of the cases examined above concerned attacks against locations, which involved various forms of killings and, in particular, killings with respect to which it is hard to establish whether they occurred outside or under the control of the attacking forces.[230] Such killings notably included the firing of houses with civilians inside, the killing of civilians with machetes and small hoes or through beating them, the firing upon them after the attackers entered their houses or while they were fleeing or hiding in the bush. Those acts are clearly of different nature than the more clear-cut and 'traditional killings', such as those that occur in the bombing or shelling of towns.[231] Those various forms of killings are also specific to situations dealt with by other criminal

230 *See also* in that sense Knuckey, *supra* note 38, p. 456.

231 *See* nonetheless, in the *Ntaganda* case, the use of heavy weapons, including mortars and rockets, by the attacking party before its incursion on foot in the attacked locality (*Ntaganda* Confirmation Decision, *supra* note 136, para. 26).

jurisdictions, including, as already seen, the SCSL.[232] No definite criteria may be easily used to establish whether the victims were under or outside the control of the attacking party. For example, it would be artificial to make any distinction based on the distance from which the killings occurred. This would indeed imply arbitrarily establishing a minimum distance at which control may be said to exist.[233] In any case, it would be inconsistent to qualify differently, as committed either outside or under the control of the attacking forces, all these various forms of killing, such as the killing of civilians in their houses or of those fleeing, since they were intertwined and belonged to a same series of acts committed in the course of the same attack.

This situation therefore gives rise to a dilemma under a strict separation approach. The first option is to adopt a low control threshold, similar to that identified in the *Katanga* confirmation decision or submitted by scholars, who argue that such a threshold is reached not only in case of physical control but also when 'the attacking party … is in control—*through force and proximity*—of civilians during … an attack, including where civilians are rounded up and deliberately shot, or [when] the attackers enter a camp for internally displaced persons (IDPs) and kill its residents'.[234] The various abovementioned forms of killings would then be considered as committed under the control of the attacking party and, therefore, as amounting to violations of the fundamental guarantee against murder. However, this may have a strong negative effect on the applicability of the conduct of hostilities prohibitions, in particular the prohibition of attacking civilians. None of those killings could then be qualified as being part of an attack for the purpose of that prohibition, since they would not be committed outside the control of the attacking forces. This would also be the case with respect to all the other acts of violence committed during the attack that necessarily involve a physical control over persons or properties, such as rape, mutilation or pillaging. As a result, under that first option, it might be difficult to find relevant acts of violence for the establishment of the violation of the conduct of hostilities prohibitions. The Pre-Trial Chamber in the *Katanga* case actually faced such difficulty and it could not overcome it without developing an inconsistent reasoning. As emphasized above,[235]

232 *Cf. supra* note 58.

233 Moreover, such control could not be established on the basis of the defencelessness test submitted by scholars in order to determine when persons taking an active part in the hostilities are in the power of the adversary and therefore *hors de combat* (*cf. supra* note 29). In the situation at stake, the victims are not such persons but civilians who do not take a direct part in the hostilities and who are by definition defenceless.

234 Knuckey, *supra* note 38, p. 454 (emphasis added).

235 *Cf. supra*, Section 3.1.1.

although having asserted that the war crime of attacking civilians, unlike the war crime of wilful killing, required that the victims were not under the control of the attacking party, it nonetheless relied on similar acts of violence, such as the killing of unarmed civilians and the burning of their houses while being inside, for the establishment of both crimes.

The other option is by contrast to adopt a high control threshold which would allow for considering the various forms of killings as constitutive of an attack and therefore making the relevant conduct of hostilities prohibitions applicable. However, this would at the same time prevent the qualification of those killings as violations of the fundamental guarantee against murder. This would lead to the odd result that no murder could then be established even if killings were the only acts of violence committed during the attack. In addition, if one adopted a high control threshold similar to that identified in the *Ntaganda* confirmation decision, no violation of other fundamental guarantees whose prohibited conduct, such as rape or pillaging, would be committed in the conduct of hostilities could be established. Indeed, as already seen, according to that threshold, even physical control exercised over persons or properties like in the case of rape or pillaging used as a method of warfare, cannot been considered as enough to reach the control threshold. As a result, this second option, although significantly enlarging the scope of the relevant conduct of hostilities prohibitions, would be detrimental to the applicability of the IHL fundamental guarantees.

One way to get out of this dilemma is to break with the general control requirement for the applicability of the fundamental guarantees. This means that it is no longer needed to establish whether the various forms of killing were committed under the control of the attacking party in order to conclude on the violation of the prohibition of murder. The ICC unambiguously adopted such an approach. That being said, it did not clearly position itself on whether and, in the affirmative, to which extent the victims had to be considered outside the control of the attacking party in order to count those killings as relevant acts for the applicability of the prohibition on attacking civilians. In most decisions, it considered various forms of killings as relevant to the establishment of both the war crime of murder and the war crime of attacking civilians.[236] However, with respect to the latter crime, it did so either while not mentioning any control test or while requiring such a test and therefore considering that the victims were not in fact under the control of the attacking party. In any case, as will be explained below when examining the fundamental guarantees

236 *Cf., e.g., supra* notes 113 (in the *Katanga* Trial Judgment); notes 131–132 (in the *Mbarushimana* Confirmation Decision) and note 209 (in the *Ongwen* Trial Judgment).

applicable in the conduct of hostilities, it is submitted that at least acts of violence involving a physical control over persons or properties, either because of their constitutive elements or the particular circumstances in which they are committed, can never qualify for the establishment of a violation of a conduct of hostility prohibition. In other words, a control test must still be required, at least to exclude such acts from the scope of this type of prohibition.

4.2 *Certain Fundamental Guarantees Applicable in the Conduct of Hostilities*

Breaking with the control requirement for the applicability of the fundamental guarantees does not necessarily mean that all those guarantees might properly be said to be applicable in the conduct of hostilities. This can only be the case if the acts of violence prohibited by those guarantees may be qualified as falling into the notion of attack for the purpose of the applicability of the conduct of hostilities prohibitions, in particular the prohibition on attacking civilians. Yet the content of the notion of attack, including the existence of a control test, the level of the control threshold if such a test is required and the nature of the acts of violence falling within that notion, is not clearly settled by the ICC. Firstly, no meaningful or definite indication on that notion may be found in the series of decisions in which the ICC did not qualify the war crime on attacking civilians as a 'conduct of hostilities crime' and did not enquire whether the applicability of that crime was subject to any control test.[237]

Secondly, certain decisions focussed on the notion of attack but their findings prove to be irrelevant. Admittedly, in the *Al Mahdi*[238] and *Al Hassan*[239] cases, two cases referred to by the Prosecutor before the Appeals Chamber in the *Ntaganda* case,[240] the ICC expressly admitted that an attack might involve acts of violence against an object, including acts of pillaging, irrespective whether that object is under the (full) control of the attacking party.[241]

237 *See, e.g.,* the *Katanga* Trial Judgment, *supra* note 62 (*cf. supra*, Section 3.1.2); the *Banda* Confirmation Decision, *supra* note 120 (*cf. supra*, Section 3.1.3.1); *Mbarushimana* Confirmation Decision, *supra* note 131 (*cf. supra*, Section 3.1.3.2); the *Ongwen* Confirmation Decision, *supra* note 202 and the *Ongwen* Trial Judgment, *supra* note 152 (*cf. supra*, Section 3.2.3.1); the *Yekatom* Confirmation Decision, *supra* note 200 (*cf. supra*, Section 3.2.3.2).

238 *Cf. supra* note 184.

239 *Cf. supra* note 185.

240 *Cf. supra* note 182.

241 See also the references made to those developments in footnotes in the *Ongwen* Trial Judgment (*supra* note 152, footnote 7225, which refers to the *Al Mahdi* Trial Judgement, paras 15–16) and in the *Yekatom* Confirmation Decision (*supra* note 200, footnote 235, which refers to the *Al Hassan* Confirmation Decision, para. 522). Moreover, in the latter case, the Chamber reached a conclusion on the commission of the war crime of attacking

However, that case law merely concerns the exceptional case of attacks against protected objects, including cultural, religious or medical objects, and not the notion of attack in general, including that underlying the prohibition on attacking civilians. More fundamentally, in those two cases as well as in the Prosecutor's Appeal, the notion of attack has been dissociated from the context of the conduct of hostilities. Its meaning is not therefore relevant to shedding light on the meaning of that notion in relation to the conduct of hostilities. In addition, such a view has been vigorously criticized in legal scholarship[242] as not conform to the IHL underlying norms and the ICC preparatory works.[243]

Thirdly, regarding the relevant and meaningful case law dealing with the notion of attack, including the *Katanga* confirmation decision[244] and the decisions in the *Ntaganda* case at the three levels,[245] discrepancies still remain. Admittedly, all agreed that an attack only involved acts of violence directed against persons or properties that are not (yet) under the (full) control of the attacking forces.[246] However, they did not adopt the same view on the control threshold and, when addressing it, on the nature of the acts of violence falling into the notion of attack. In particular, it is clear that, in the *Ntaganda* case, unlike the Trial Chamber,[247] its pre-trial counterpart[248] and arguably certain Appeals judges[249] admitted that acts of violence like rape or pillaging might

protected objects, as a result of the destructions of mosques in Bangui and Bossongoa in the context of the two attacks, although this destruction likely occurred after these attacks, when the attacking forces presumably had already taken control over the targeted localities. Regarding the Mosque in Bangui, the Chamber held that it had been destroyed by the 20 December 2013, more than fifteen days after the launching of the attack (*ibid.*, para. 91), when all members of the adverse party as well as all civilians affiliated to that party had left the area. Concerning the Mosque in Bossangoa, it ambiguously referred to its destruction as having taken place 'in the context of the attack on Bossangoa on 5 December 2013 and in the week following the attack' (*ibid.*, p. 104 (iv), b) (emphasis added).

242 *See, e.g.,* W. Schabas, 'Al Mahdi Has been Convicted of a Crime He Did Not Commit', 49 *Case Western Reserve Journal of International Law* (2017) 77–93.

243 Moreover, it is worth recalling that this extended approach might merely result from the difficulty of invoking another charge, especially the war crime of destruction of enemy property, in order to prosecute 'attacks' directed against protected objects under the (full) control of the attacking party (*cf. supra* note 200).

244 *Cf. supra*, Section 3.1.1.

245 *Cf. supra*, Sections 3.2.1.2; 3.2.2.2 and 3.2.2.3.

246 *See* nonetheless the ambiguous and unclear exception mentioned in a footnote of the *Ntaganda* trial judgment regarding the notion of attack in relation to the war crime of attacking certain cultural objects (*cf. supra* note 177).

247 *Cf. supra*, Section 3.2.2.2.2.

248 *Cf. supra*, Section 3.2.1.2.2.

249 *Cf. supra*, Section 3.2.2.2.3.

fall into the notion of attack when those acts are committed in the conduct of hostilities, which entails that the concerned persons or properties had to be considered as being outside of the control of the attacking party in such context.

The approach adopted in that respect in the *Ntaganda* trial judgement appears the most convincing. Not only because it seems artificial and it runs against common sense to assert that acts such as rape and pillaging do not involve any physical control, even when they are committed as means of warfare in combat operation. But, more generally, it is submitted that acts of violence cannot in any case be part of an attack in the context of the conduct of hostilities when they necessarily involve physical control when committed. Indeed, this would not fit with the Hague Law regime on targeting. One cardinal rule of that regime is the principle of distinction, according to which, only lawful targets may be the object of an attack. With respect to individuals, only (i) civilians taking a direct part in hostilities and (ii) members of armed forces who are not *hors de combat* may be targeted. As demonstrated in detail in the paper published in the previous issue of this journal on the status requirement,[250] these two tests do not make any sense when the person is under the physical control of the adversary, since those tests could then never be met. They cannot therefore play any useful role in such case. Similarly, regarding objects, the cardinal distinction between civilian objects and military objectives would no longer make any sense. The object fully controlled by the 'attacking' party could never constitute a military objective since it could never 'make any effective contribution to [the adversary's] military action'. Such a test would become meaningless.[251]

As a result, the fundamental guarantees whose prohibited conduct materially involve a physical control over the concerned persons or properties should not be considered as applicable in the conduct of hostilities, since that conduct could not fall into the notion of attack. Such fundamental guarantees are various since, as already emphasized,[252] they include not only the prohibitions against rape or pillage but also other prohibitions, such as the taking of hostages or the specific guarantees applicable in case of deprivation of liberty or criminal prosecution. Similarly, fundamental guarantees whose application in particular circumstances necessarily involves a physical control, such as

250 van Steenberghe, *supra* note 1, p. 397.

251 *See, e.g.,* in that sense M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare* (Cheltenham/Northampton: Edward Elgar Publishing, 2019), p. 567.

252 *Cf. supra*, Section 4.1.

the killings of captured/detained persons, should not be considered either as applicable in the conduct of hostilities.

4.3 *Parallel Application of the Fundamental Guarantees with the Conduct of Hostilities Prohibitions*

The fundamental guarantees that may then be seen as applicable in the conduct of hostilities might include certain prohibitions such as the prohibition of murder, cruel treatment or torture, provided that the concerned persons are not under the physical control of the attacking forces at the time of the commission of the prohibited conduct. Since they are applicable in the conduct of hostilities, they may apply in parallel with the relevant conduct of hostilities prohibitions. One must then enquire whether such simultaneous applicability may give rise to any problem of compatibility between the two regimes. It is submitted that no contradiction may actually arise from this simultaneous application in the realm of the conduct of hostilities. Only mere articulations between the two regimes might sometimes be needed. Certain guarantees protecting persons, in particular the prohibition of murder, contain the necessary ingredient to proceed to that articulation in their own constitutive elements. Indeed, murder only applies to *unlawful* killings.[253] That 'lawfulness test' is also part of other prohibitions under IHL, including other fundamental guarantees.[254] That test must be assessed in light of any rule of international law, including IHL. In the case of the prohibition of murder, the lawfulness of the killings will have to be assessed in light of the IHL rules on the conduct of hostilities when those killings occur as part of an attack. No murder

253 *See* K. Dörman, *Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary* (Cambridge University Press, Cambridge, 2009), pp. 40–41; ICTY, *Prosecutor* v. *Milan Kovačević*, Case No. IT-97-24-PT, Prosecutor's Pre-trial Brief, 24 February 1997, p. 17.

254 This is the case of the prohibition of pillage as defined by the ICTY; *see* in that sense the ICTY case law, which defined pillaging (plunder) as '*unlawful* appropriation of property' (emphasis added): *see, e.g.*, *Delalić* Trial Judgment, *supra* note 102, para. 591; ICTY, *Prosecutor* v. *Goran Jelisić*, Case No. IT-95-10-T, Trial Chamber, Judgment, 14 December 1999, para. 48; ICTY, *Prosecutor* v. *Tihomir Blaškić*, Case No. IT-95-14, Trial Chamber, Judgment, 3 March 2000 (*Blaškić* Trial Judment), para. 184; *Kordić* Trial Judgment, *supra* note 34, para. 352; Appeals Chamber, Judgment, 17 December 2004 (*Kordić* Appeals Judgment), para. 79; ICTY, *Prosecutor* v. *Mladen Naletilić et al.*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 612; ICTY, *Prosecutor* v. *Milan Simić*, Case No. IT-95–9/2-S, Trial Chamber, Judgment, 17 October 2002, para. 99; ICTY, *Prosecutor* v. *Enver Hadžihasanović et al.*, Case No. IT-01-47-A, Trial Chamber, Judgment, 15 March 2006, para. 49; *Martić* Trial Judgment, *supra* note 117, para. 101; ICTY, *Prosecutor* v. *Ante Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber, Judgment, 15 April 2011, para. 1777; *Prlić* Trial Judgment, *supra* note 52, Vol. 1, para. 180.

could then be said to have been committed if killings are the result of a lawful attack in accordance with those rules. It is in that sense that the ICRC Updated Commentary on Common Article 3 must be understood when the ICRC states:

> [If the prohibition of murder was applicable in the conduct of hostilities, that prohibition] would have to be interpreted in the light of the specific rules [regulating such conduct], in particular the rules on distinction, proportionality and precautions. A taking of life in compliance with the rules on the conduct of hostilities would not amount to murder under common Article 3.[255]

The same 'lawfulness test' must be applied with respect to the other fundamental guarantees whose prohibited conduct can be considered as constitutive of an attack and that would therefore apply in the conduct of hostilities. For example, it should determine whether the prohibition of cruel treatment has been violated when any act 'causing serious or severe pain or suffering, either of physical or mental nature'[256] has been committed against persons in the conduct of hostilities. Such a test would have to take into account not only the well-established principles of distinction, proportionality and precaution, but also any other relevant rules related to the conduct of hostilities, like the principle of superfluous injury or unnecessary suffering,[257] when the persons affected by the prohibited conduct are lawful targets under IHL.

Finally, the parallel applicability of certain fundamental guarantees with the relevant prohibitions related to the conduct of hostilities does not mean that those two types of protections are redundant. The very object of their regulation is different. The conduct of hostilities prohibitions intend to regulate the *launching* of an attack, whereas the fundamental guarantees bear on the *consequences* (killing, physical suffering, etc.) of the attack. This distinction has been quite obscured by the ICTY, which made the consequences of an attack, to either persons or objects, a constitutive element of the war crimes based on the violation of the conduct of hostilities prohibitions.[258] The ICC made clear

255 *See* the 2020 Updated ICRC Commentary, *supra* note 9, para. 575.

256 *Cf. supra* note 34.

257 *See* Article 35, 2) API; rule 70 of the ICRC Study on Customary IHL, applicable in both IACs and NIACs (Henckaerts and Doswald-Beck, *supra* note 21, pp. 237–244).

258 *See Kordić* Trial Judgment, *supra* note 34, para. 328; *Kordić* Appeals Judgment, *supra* note 254, paras 55–67; *Blaškić* Trial Judment, *supra* note 254, para. 180.

in several cases that such consequences were not part of these war crimes.[259] This approach has been followed by other international criminal jurisdictions, especially the SCSL.[260] This has been commended in legal scholarship, which emphasized that this 'brings the international criminal law standard in line with that of international humanitarian law'.[261] This means that the two regimes must be seen as complementary, though separate. In that sense, although both may be applicable in a given situation, one regime could apply but not the other. In two cases before the ICC, the accused was found guilty of the war crime of attacking civilians, but not of any murder, because the inhabitants of the attacked locality had already fled upon the arrival of the attacking forces[262] or because it was not proven that the killed people were not taking a direct part in the hostilities.[263]

5 Conclusion

The applicability of the IHL fundamental guarantees, which benefit any person or property irrespective of the nature of the armed conflict, have traditionally been seen as dependent upon a control requirement. This means that these persons or objects are entitled to those guarantees only provided that they are under the control of a party to an armed conflict. That position is still upheld by the ICRC in its Updated Commentaries, which consider such control as a test for distinguishing between the applicability of the fundamental guarantees, applicable only if such control is established, and the applicability of the relevant conduct of hostilities prohibitions, especially the prohibition of attacking civilians, applicable only when such control does not exist. This view is however controversial. Certain scholars, practice and case law support a broader approach to the personal scope of application of the fundamental guarantees, by admitting their applicability irrespective of any general control requirement and, therefore, as also applicable in the conduct of hostilities. Such an extensive view especially concerns the prohibitions of murder and cruel treatment. Killings or causing great suffering to persons in the conduct

259 S*ee Katanga* Trial Judgment, *supra* note 62, para. 799; *Ntaganda* Trial Judgment, *supra* note 62, paras 904 and 1136.

260 SCSL, Prosecutor v. *Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 220.

261 S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012), p. 339.

262 *See Mbarushimana* Confirmation Decision, *supra* note 131, paras 200–202.

263 *See Ntaganda* Trial Judgment, *supra* note 62, para. 923.

of hostilities, as a result of indiscriminate attacks against civilians, were considered as amounting to murder or cruel treatment, respectively, although the victims were not under the control of the attacking forces.

The ICC case law goes in the same direction. Admittedly, the Pre-Trial Chamber in the *Katanga* case adopted an ambiguous position, seemingly favouring a strict separation between the fundamental guarantees and the prohibition on attacking civilians on the basis of a control test. However, the relevant remaining ICC case law appears in favour of a broader personal scope of application of the fundamental guarantees, as it does not condition these guarantees to any control requirement. Such control may well exist in fact, because of the specific situation in which the prohibited conduct occurs, such as the killing of an individual who has been previously captured/detained, or because of the material elements of the prohibited conduct itself, like those constitutive of rape or pillaging. However, this does not result from any general control requirement, applicable to any fundamental guarantee at any time. In other words, as a matter of principle, the fundamental guarantees are not subject to such a control requirement.

This does not however mean that all the fundamental guarantees may be said to be applicable in the conduct of hostilities, as this requires that the acts prohibited by those guarantees may fall into the notion of attack. Yet, it is submitted that this may only be possible if the prohibited conduct does not involve any physical control over the concerned persons or properties. That view therefore limits the number of IHL fundamental guarantees that might apply in the conduct of hostilities. They might include prohibitions such as those of murder, cruel treatment or torture when the prohibited conduct is not committed against captured/detained persons. The simultaneous applicability of these guarantees and the relevant conduct of hostilities prohibitions cannot lead to any redundancy, since the former focus on the consequence of an attack, while the latter focus on the launching of the attack. This cannot lead either to any problem of legal compatibility between the two types of protections. Certain mechanisms exist and are even provided by the legal ingredients of the fundamental guarantees applicable in the conduct of hostilities in order to coherently articulate these guarantees with the relevant conduct of hostilities prohibitions.

The foregoing considerations call for refining the traditional understanding of Geneva Law. That Law, the essence of which is constituted by the fundamental guarantees, can no longer be seen as exclusively dealing with the treatment of persons 'in the power' of a party to the armed conflict. Under that refined understanding, the fundamental guarantees actually return to the philosophy underlying the initial protections provided under modern IHL in

1864, namely, those afforded to wounded and sick soldiers,[264] since those protections are not all subject to a general control requirement. At the same time, this goes towards meaningfully extending the protection granted to persons involved in armed conflicts in Geneva Law.

264 *See, e.g.*, certain obligations embodied in Arts 12, 1) and 15, 1) GCI; *see also* the 2016 Updated ICRC Commentary on Article 15 GCI, *supra* note 9, para. 1481.