Swedish Case Law on the Contextual Elements Relating to War Crimes

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A war crime may be defined as a serious violation of a rule of international humanitarian law (IHL) which brings about individual criminal liability.[1] To establish whether an act constitutes a war crime it is thus necessary to establish that IHL applied to and regulated the act. Hence, it must also be established that an international or non-international armed conflict existed at the time and place where the act occurred, and that the act had sufficient nexus to the armed conflict. The present article focuses on the classification of conflict and the nexus between the act and the conflict in Swedish legislation and case law in the light of international law.

1 Characterisation of Armed Conflict

International humanitarian law (IHL) distinguishes between international armed conflict (IAC) and non-international armed conflict (NIAC). The characterisation of a conflict determines the applicable law and thus also what is prohibited and in turn what is criminalized. The traditional, state-centred approach of international law has had the consequence that only parts of IHL have applied to NIACs. This limitation concerns both the rules' applicability vis-à-vis states and the individual's criminal responsibility for violations.[2] There has been a development, not least through changes in customary international law that partly fill the previous gap between the two types of conflict. This will be discussed below in section 1.2.

1.1 Swedish Law and the Characterisation of Armed Conflict

The relevant provision on war crimes in Swedish law was replaced by a new law in 2014[3], while the previous provision is still applicable for acts committed before that date. Although the previous provision, in the Swedish Criminal Code chapter 22 section 6, makes no distinction in its text between different types of conflict, this distinction is still relevant since the provision refers to treaties and customary international law that relate to IHL.[4] In the 2014 Act the legislator placed those acts which may amount to war crimes in IAC as well as in NIAC in the same provisions, i.e. sections 3, 4 and 6, while the offences which amount

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1 Prop. 2013/14:146, Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser, p. 32-33; ICRC, *Customary International Humanitarian Law database*, available at: https://ihl-databases.icrc.org/ customary-ihl/eng/docs/v1, rule 156. (ICRC's database of Customary International Humanitarian Law) is a continuously updated digital version of ICRC, Doswald-Beck, Louise, and Henckaerts, Jean-Marie, *Customary International Humanitarian Law: Vol. 1 Rules & Vol. 2 Practice*, Cambridge, Cambridge University Press, 2005). See also (among others) Gaeta, Paola, "War Crimes and Other International 'Core' Crimes", in Clapham, Andrew, and Gaeta, Paola, (ed.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014, p. 744.

2 Prop. 2013/14:146, p. 126.

3 Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) (hereafter Act of 2014 or 2014 Act).

4 See section 1.2 "International Law and Characterisation of Armed Conflict".

to war crimes only in IAC are in sections 5 and 7.[5] This differs from how the provision on war crimes is structured in article 8 of the Rome Statute of the International Criminal Court (Rome Statute). The Rome Statute has lists tied to one of the two types of conflict, with the consequence that acts which are criminalized in both types are listed twice, for example conscripting or enlisting child soldiers.[6] The preparatory works to the 2014 Act explain the divergence in structure:

> The development, on a domestic level and international level, has … gone towards making the two types of armed conflict equal in terms of the applicability of rules in IHL. The need for protection and the interest that the rules are respected is pressing regardless of the type of conflict. Differences in the applicable law between international armed conflicts and non-international armed conflicts should thus, in the Government's view, only be made in those cases when the customary rules of international humanitarian law do not allow anything else or in cases where the act in its nature may only be committed during international armed conflict or during occupation.[7]

The 2014 Act gives no further guidance on what constitutes an armed conflict or the difference between IAC and NIAC. Instead this matter is discussed in the preparatory works of the Act, and the relevant sections refer to treaties as well as to International Criminal Tribunal for the former Yugoslavia (ICTY) case law.[8]

1.2 International Law and the Characterisation of Armed Conflict

As indicated above IHL distinguishes between IACs (an armed conflict between two or several states) and NIACs (an armed conflict between the armed forces of a state and armed non-state actors, or between two armed non-state actors). The characterisation of a situation is crucial since this determines which rules are applicable under IHL. A third type of situation which is beyond the applicable scope of IHL is internal disturbances and tensions, where it is instead the international-law rules of peace that should be applied, i.e. international human rights law (IHRL). Human rights may be applicable in armed conflict, with the caveat that they may be subject to derogations. In addition, individuals may be protected by national, constitutional laws, which may also be subject to derogation. This may be illustrated by the table below which shows the protection for individuals. In the table GC refers to the four Geneva Conventions of 12 August 1949 relating to armed conflicts and AP to the Additional Protocols to the Geneva Conventions of 8 June 1977, all part of IHL.

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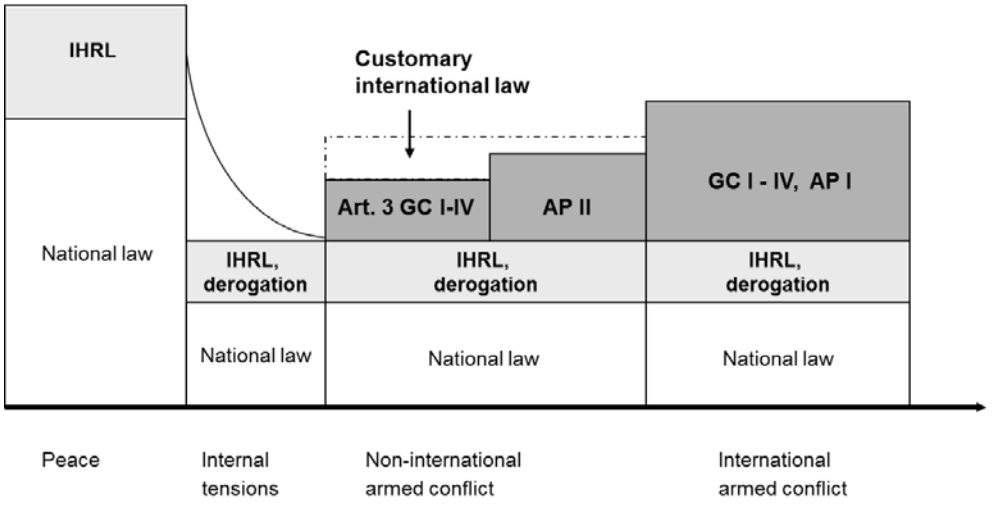
5 Prop. 2013/14:146, pp. 154-159, 162-164, 280.

6 War crimes in IAC, Rome Statute of the International Criminal Court, 1998, article 8(2)(a)+(b); War crimes in NIAC, Rome Statute article 8(2)(c)-(e).

7 Prop. 2013/14:146, p. 127.

8 ibid, pp. 34-38, 125-128.

Table 1 – Type of Conflict and Applicable Law



The threshold when IHL is applicable is thus above situations of internal disturbances and tensions. This follows from article 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II). This article provides that the protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." This means that banditry, unorganized and short-lived insurrections, or terrorist activities, will thus fall below the threshold of armed conflict;[9] instead such violence should be evaluated under the traditional law enforcement paradigm.[10]

To classify an act as a grave breach of IHL – and as an international crime against international law as defined in the Swedish Criminal Code chapter 22 section 6 – it thus becomes crucial to determine the criteria which distinguish situations of internal disturbances and tensions from non-international armed conflicts.

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9 *Prosecutor v. Dusko Tadić*, (Case No. IT-94-1), ICTY T. Ch., Opinion and Judgment, 7 May 1997, para 562.

10 Klamberg, Mark, "International Law in the Age of Asymmetrical Warfare, Virtual Cockpits and Autonomous Robots" in Ebbesson, Jonas and others (eds), *International Law and Changing Perceptions of Security*, *152-170* (Leiden and Boston: Brill Nijhoff, 2014), p. 158; Klamberg, Mark, "Exploiting Legal Thresholds, Fault-Lines and Gaps in the Context of Remote Warfare" available at SSRN: https://ssrn.com/abstract=2848128' in Ohlin, Jens David (ed), *Research Handbook on Remote Warfare*(Cheltenham: Edward Elgar Press, 2017).

1.2.1 Criteria to determine the character of a conflict

The existence of an armed conflict within the meaning of IHL depends on factual criteria and not on formal declarations.[11] Some ambiguity in the term "armed conflict" needs to be clarified. The *intensity* of the conflict and the *organisation* of the parties to the conflict are factors relevant for determining whether it *is* an armed conflict. The *Tadić* Appeals Chamber has stated that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State" and that "intensity requirements applicable to both international and internal armed conflicts" have to be exceeded for IHL to be applicable.[12] International Criminal Court (ICC) Pre-Trial Chamber II has similarly used criteria relating to intensity and organisation.[13]

The assessment of intensity may relate to several factors. The Trial Chamber in *Tadić* used the term "protracted armed violence".[14] The ICTY has in subsequent case law explained that "protracted armed violence" relates to intensity rather than to duration. Indicative factors of the "intensity" criterion include the number, duration and intensity of individual confrontations; the types of weapon and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. Involvement of the UN Security Council may also reflect the intensity of a conflict. Not all factors need be present; they should be perceived as indicative,[15] and used to assess whether the intensity has reached the required level. The ICC has followed ICTY case law and used the same criteria.[16]

The degree of *organisation* means that the groups must have a certain level of organisation. It relates to 1) the ability to plan and carry out military operations for a prolonged period;[17] 2) the armed group must be under responsible

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11 Article 2 of the Geneva Conventions of 1949 (GC I-IV): "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

12 *Prosecutor v. Tadić*, (Case No. IT-94-1), ICTY A. Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

13 *Bemba*, ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 232.

14 *Tadić*, ICTY T. Ch., 7 May 1997, para. 562.

15 *Prosecutor v. Haradinaj, Balaj, Brahimaj*, (Case No. IT-04-84-T), ICTY T. Ch. I, Judgment 3 April 2008, para. 49.

16 *Prosecutor v. Lubanga*, ICC T. Ch. I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, para. 538 which has a reference to *Prosecutor v. Mrkšić et al.*, (Case No. IT-95-13/1-T), ICTY T. Ch., Judgment, 27 September 2007, para. 407.

17 *Prosecutor v. Lubanga*, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 234; *Prosecutor v. Bemba*, ICC PT. Ch. II, ICC-01/05-01/08-424, 15 June 2009, paras. 233 and 259.

command implying some degree of organisation and have the ability to plan and carry out sustained and concerted military operations. The organisation should have a hierarchical structure and a high level of internal organisation. Groups organised as a conventional army would easily meet this criterion. Guiding documents and knowledge among the members of the group about discipline and military rules are indications that the group has an internal disciplinary system; [18] and 3) logistics. These are also indicative factors, while it is not required that all are present.

The ICTY Appeals Chamber has stated that an armed conflict may be of both international and non-international character depending on what groups and state actors are fighting each other.[19] The ICC has reached a similar conclusion and explained that 1) conflict may change over time;[20] and 2) depending on the particular actors involved, conflicts taking place on a single territory at the same time may be of a different nature. [21] Hence, any determination of the status of an armed conflict must be based on an evaluation of the facts at the relevant time.[22] The International Committee of the Red Cross (ICRC) has recently revised its view on the notion of armed conflict when a foreign state intervenes in an ongoing NIAC.[23]

1.2.2 The relevance of the views of the belligerent parties and external actors' characterisation of the situation

In an asymmetrical conflict the parties involved may for various reasons seek to have it classified under different legal frameworks. A non-state actor may pursue legitimacy and the status of an aspiring and/or future state. For that purpose, the non-state actor may wish to have a situation classified as an armed conflict, with a preference for it to be 'international' since this will grant it status as a state with greater political and legal leverage. In contrast, states pitted against a non-state actor are reluctant to give them such status: for that purpose it is more convenient to have the situation classified as internal disturbances and tensions. This gives the state the largest room for manoeuvre, see table 1. However, states may perceive a need to use violence that is only allowed under the armed-conflict

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[18] *Lubanga*, ICC PT. Ch. I, 29 January 2007, para. 232; *Bemba*, ICC PT. Ch. II, ICC-01/05-01/08-424, 15 June 2009, para. 234, 258, 261; *Prosecutor v. Mbarushimana*, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 104.

[19] *Tadić*, ICTY A. Ch., 2 October 1995, para. 77.

[20] *Prosecutor v. Katanga*, ICC T. Ch. II, Judgment, ICC-01/04-01/07-3436, 7 March 2014, para. 1181.

[21] *Lubanga*, ICC T. Ch. I, 14 March 2012, para. 540; *Katanga*, ICC T. Ch. II, ICC-01/04-01/07-3436, 7 March 2014, paras. 1174 and 1182; *Prosecutor v. Ntaganda*, ICC PT. Ch. II, Decision on the Confirmation of Charges, ICC-01/04-02/06-309, 9 June 2014, para. 33.

[22] Noëlle Quénivet, "Article 8(2)(a)", in Klamberg, Mark (ed.), *The Commentary on the Law of the International Criminal Court*, available at: https://www.cilrap-lexsitus.org/clicc/8-2-a/8-2-a.

[23] Ferraro, Tristan, "The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict", 97, 900 *International Review of the Red Cross* 2015, pp. 1227–1252.

paradigm. These opposing interests tend to push states to advocate that the situation should be classified as a non-international armed conflict where there are fewer rules restraining states: human rights law is derogable and prisoner-of-war status is not available. Moreover, a seemingly internal conflict may be rendered international where it is found that local armed groups are in fact acting on behalf of an external state (see section 2.1). [24]

1.2.3 The consequences of legal characterisation for the scope of criminalized conduct

As illustrated in table 1 above, the legal characterisation of a conflict determines the scope of criminalized conduct. The traditional, state-centred approach of international law has had the consequence that only parts of IHL have been applicable to NIACs. IHL distinguishes between NIACs and IACs where the latter are subject to less protection. The primary field of application for the Geneva Conventions of 1949 (GC I-IV) and Additional Protocol II from 1977 (AP I) is IACs. Common article 3 of GC I-IV and Additional Protocol II from 1977 (AP II) are applicable in NIACs.

The following minimum protection applies in NIACs. Common article 3 of GC I-IV provides, *inter alia*, that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms, shall in all circumstances be treated humanely, with no adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited at any time and in any place whatsoever. The wounded and sick shall be collected and cared for. Article 27 of the fourth Geneva Convention provides that protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Article 4 of AP II provides that all persons who do not take a direct part, or who have ceased to take part, in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely. Certain acts are prohibited at any time and in any place whatsoever: corporal punishment; collective punishments; pillaging and threats to commit any of the foregoing acts. Article 5 of AP II requires that persons deprived of their liberty shall receive treatment if they are wounded or sick. They shall be provided with food and drinking water. It follows from article 13 of AP II that the civilian population shall enjoy general protection against the dangers arising from military operations.

In IACs a significant number of additional protective treaty-based rules and principles are added, for example the principle of distinction between civilians and combatants (AP I articles 48 and 51) and the principle of proportionality (AP

[24] Cryer, Robert and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge University Press, 2014), p. 278; Klamberg, 2017, p. 202.

I article 51(5)(b)).[25] Thus, a gap may appear between the weaker treaty-based protection in NIACs and the more robust protection in IACs. This gap may be partially filled by rules that, on the basis of customary international law, are applicable in NIACs. This is illustrated in table 1 above and will be examined in more detail in section 1.3.4.

1.3 Swedish Case Law

The Swedish courts have in the different cases found the law under NIAC to be applicable.[26]

1.3.1 Internationalised conflicts

Some of the Swedish cases contain elements of mixed or internationalised conflicts. The district court found in the *Arklöv* case that the armed conflict that started after Slovenia and Croatia seceded from Yugoslavia contained both international elements (the relation between Serbia and Croatia) and internal elements (the relation between Bosnian Serbs/Croats and Muslims). The district court concluded that "the circumstances in the case relate to a conflict of the latter kind as they primarily reflected the conflict between Bosnian Croats and Bosnian Muslims." That made common article 3 of GC I-IV, AP II and rules based on customary international law applicable in the case.[27] The *Makitan* case concerned alleged crimes in the same prison camp as in the *Arklöv* case but committed at a different point of time (summer 1992 in Makitan, July 1993 in Arklöv). Makitan was – like Arklöv – a member of HOS, a paramilitary Croatian organisation, with the difference that the victims in *Makitan* were Serbs. The deprivation of the Serbs' liberty was part of the effort to pressurise the Federal Republic of Yugoslavia to exchange prisoners. The district court found that "in the present case there was a military conflict between the Federal Republic of Yugoslavia on the one hand and Croatia with it is formed paramilitary force HOS, which at the relevant time was recognized as part of the regular armed forces and Bosnia-Hercegovina. Both Croatia and Bosnia-Hercegovina had at the time of the outbreak of war in early 1992 declared themselves to be independent states and had also received international recognition as such entities. Thus, the case related to an international armed conflict."[28] In other words, it was the same prison camp run by the same group, but the courts in the two cases characterised the conflict differently, and this had consequences for the applicable law. The difference may be explained by the fact that the parties to the conflict at the time of the alleged acts were different and thus also the

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[25] Klamberg, 2007-08, pp. 132-133.

[26] *Åklagaren ./. Arklöv*, Stockholms tingsrätt, Case B 4087-04, 18 December 2006, p. 52.

[27] ibid, pp. 52-56; Klamberg, 2007-08, pp. 137-138; Klamberg, Mark, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, International Criminal Law Review 2009, vol. 9, 395–409, p. 404.

[28] *Åklagaren ./. Makitan*, Stockholms tingsrätt, Case B 382-10, judgment, 8 April 2011, pp. 6, 42-43.

conflict was different. An alternative explanation is that the district court in the *Arklöv* case viewed HOS as more independent from the Croatian state than did the district court in the *Makitan* case.[29]

1.3.2 References to international case law

There are no references in the *Arklöv* case to specific international cases, but there a general reference runs "as it has been construed by the special tribunal for former Yugoslavia – ICTY". [30] Moreover, the district court's key reasoning on what treaty-based rules are also applicable based on customary international law relies on the ICRC study on customary international law.[31] In other cases before Swedish courts relating to crimes in former Yugoslavia, Syria and Iraq, there are multiple references to ICTY case law, e.g. *Makitan*[32], *M.M.*,[33] *Droubi*,[34] *Mandlawi* and *Sultan*,[35] and *Abdullah*.[36] In *Abdulkareem* there is no reference to an international court or specific case, but there is an unspecified one to international case law in general.[37] Similarly, there are no references to international case law in *Sakhanh*, although references are made, in Klamberg's brief to the court, to cases from the ICTY and the ICC.[38] There are references in *Mbanenande* and *Berinkindi* to ICTY case law, both in relation to the legal criteria to be used and to the assessment of the factual circumstances in Rwanda

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[29] See the discussion on the difference in classification between Engdahl, Ola, *Dom för folkrättsbrott visar på kunskapsbrister hos rättens aktörer*, Advokaten: Tidskrift för Sveriges advokatsamfund 2011, vol. 77, no. 6 (Engdahl, 2011 a); Elving, Magnus, *Svepande och felaktig kritik kan skapa rädsla hos rättens aktörer*, Advokaten: Tidskrift för Sveriges advokatsamfund 2011, vol. 77, no. 7; Engdahl, Ola, *Vi behöver en fortsatt debatt*, Advokaten: Tidskrift för Sveriges advokatsamfund 2011, vol. 77, no. 8 (Engdahl, 2011 b).

[30] *Arklöv*, Stockholms tingsrätt, 18 december 2006, p. 12.

[31] Henckaerts and Doswald-Beck, 2005; *Arklöv*, Stockholm tingsrätt, 18 december 2006, p. 56.

[32] *Makitan*, Stockholms tingsrätt, 8 April 2011, p. 42 refers to *Tadić*, ICTY A. Ch., 2 October 1995, para. 70.

[33] *Åklagaren ./. M.M.*, Stockholms tingsrätt, Case B 5373-10, judgment 20 January 2012, pp. 47-48 refers to *Tadić*, ICTY A. Ch., 2 October 1995, para. 70.

[34] *Åklagaren ./. Droubi*, Södertörns tingsrätt, Case B 13656-14, judgment, 26 February 2015, pp. 25-31, 37-40; *Åklagaren ./. Droubi*, Södertörns tingsrätt, Case B 2639-16, judgment, 11 May 2016, pp. 25-26, 37, 38 refers to *Tadić*, ICTY A. Ch., 2 October 1995, para. 70, *Prosecutor v. Kunarac et al.*, (Case No. IT-96-23-T and 23/1-A) "Foča", ICTY A. Ch., Judgment, 12 June 2002, para. 55; *Prosecutor v. Limaj et al.*, (Case No. IT-03-66-T), ICTY T. Ch. II, Judgment 30 November 2005, paras. 83-90.

[35] *Åklagaren ./. Al-Mandlawi and Sultan*, Göteborgs tingsrätt, Case B 9086-15, judgment, 14 December 2015, p. 30 has a general reference to the ICTY.

[36] *Åklagaren ./. Abdullah*, Södertörns tingsrätt, Case B 11191-17, judgment, 25 September 2017 refers to *Tadić,* ICTY A. Ch., 2 October 1995, para. 70; *Haradinaj, Balaj, Brahimaj*, ICTY T. Ch. I, 3 April 2008, paras. 37-38; *Limaj et al.*, ICTY T. Ch. II, 30 November 2005, paras. 83-90.

[37] *Åklagaren ./. Abdulkareem*, Blekinge tingsrätt, Case B 569-16, judgment, 6 December 2016, p. 5.

[38] *Åklagaren ./. Sakhanh*, Stockholms tingsrätt, Case B 3738-16, judgment, 16 February 2017, pp. 10, 18 and 19.

made by the international tribunal for Rwanda (ICTR).[39] The same phenomena may be observed in *M.M.* where the district court makes references to case law from the ICTY to assess the factual circumstances in Kosovo.[40] Thus, it appears that the district courts in the mentioned cases note as facts – or evidence – what has been adjudicated by international tribunals. Taking notice of adjudicated facts is a mechanism explicitly provided for in the rules of procedure and evidence of the ICTY and the ICTR but not in the Swedish Code of Judicial Procedure.[41]

1.3.3 The relevance of the view of the belligerent parties and the external actors' characterisation of the situation

As indicated above, IHL provides that it is the factual circumstances that determine whether there is an armed conflict, not formal declarations made by the belligerent parties. What considerations should be made in relation to reports of actors – for example the ICRC – which are not parties to the conflict? In *Droubi* the district court heard two experts who had different opinions on a crucial issue in the case, namely when the armed conflict started and thus whether IHL was applicable. Engdahl stated the following in relation to the description of the situation by the belligerent parties:

> Even the Syrian regime stated during the summer 2012 that there was an armed conflict. States rarely make such statements early in a conflict because they show that they lack control over their territory. If they make such a statement the state of armed conflict may have been present for a long time. However, it is difficult to know the regime's reasons. By stating that there is an armed conflict one concedes that one has lost the control one should have had; on other hand, the state can use more violent force. When one enters the state where IHL applies some violence that was previously prohibited, becomes permitted … To state that armed conflict is at hand has political significance. It means that the state lacks control of its territory, and one grants a certain recognition to the other parties to the conflict.[42]

In relation to the relevance of the ICRC assessment, Engdahl stated the following (as recapitulated by the court):

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[39] *Åklagaren ./. Mbanenande*, Stockholms tingsrätt, Case B 18271-11, judgment, 20 June 2013, p. 36, para. 6, refers to *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), ICTR T. Ch., judgement, 2 September 1998, paras. 619-621 and 627; *Åklagaren ./. Berinkindi*, Stockholms tingsrätt, Case B 12882-14, judgment, 16 May 2016, pp. 36, 136-137 refers to *Akayesu*, ICTR T. Ch., 2 September 1998. Compare with *Berinkindi*, Stockholms tingsrätt, 16 May 2016 p. 36 where the court does not reference a specific case but uses the same criteria as in *Tadić*, ICTY A. Ch., 2 October 1995, para. 70.

[40] *M.M.*, Stockholms tingsrätt, 20 January 2012, pp. 47-48 *Limaj et al.*, ICTY T. Ch. II, 30 November 2005, paras. 171-173; *Prosecutor v. Đorđević*, (Case No. IT-05-87/1-T), ICTY T. Ch., Judgment, 23 February 2011, para. 1579; *Prosecutor v. Milutinović et al.*, (Case No. IT-05-87), ICTY T. Ch., Judgment, 26 February 2009, para. 1217.

[41] ICTY Rules of Procedure and Evidence as amended 8 December 2010, rule 94(B); ICTR Rules of Procedure and Evidence as amended 9 February 2010, rule 94(B); Klamberg, Mark, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Leiden: Martinus Nijhoff Publishers, 2013, pp. 474-476.

[42] *Droubi*, Södertörns tingsrätt, 26 February 2015, pp. 26-27, cf. Mahmoudi p. 30.

> His impression is that the ICRC is cautious. At the same time, it wants to hold the belligerent parties responsible for protecting civilians. The overarching purpose is to enjoy trust from the parties. They are careful not to spread information that could hurt that trust. … He has a different view than Said Mahmoudi's in relation to statements made by the ICRC. One should make an objective assessment of the facts (intensity and level of organisation). The COI [Independent International Commission of Inquiry on the Syrian Arab Republic] report appears to strive to accomplish this. The reason why the ICRC has not made a statement earlier may be political concerns. The ICRC has as its purpose to keep functioning relations with the parties. It is possible that they [the ICRC] have awaited a suitable time, for example after the state concerned has made its position known. However, a non-international armed conflict exists regardless of such [political] concerns. The assessment of the ICRC is without legal effect. It could have had relevance if the ICRC had stated that there was no non-international armed conflict prior to a certain date.[43]

Mahmoudi had a different view and stated the following (as recapitulated by the court):

> … crucial importance should be afforded to what the ICRC has stated on these matters. One ICRC task is to examine what is happening during a non-international armed conflict, a civil war, and to assist the parties. The ICRC relies upon the world's foremost experts on IHL. The Commission [COI] has been established by the UN Human Rights Council and consists of four experts on human rights. … There are significant differences in how the two organs work. The ICRC is normally present on the ground when unrests erupt. Thus, they may observe on the ground what is happening and assess accordingly. This is not the normal working method of commissions established by the UN Human Rights Council, instead they get their information through informal sources … The fact that the ICRC has determined that a non-international armed conflict is at hand entails that IHL applies. If another organ, for example a commission established by the UN Human Rights Council, makes a statement one should be more cautious.[44]

The point of time for the start of the armed conflict in Syria also became a crucial issue in the *Sakhanh* case. Klamberg expressed a view which was similar to Engdahl's, namely one must assess the facts; an ICRC statement on the existence of an armed conflict at a certain point of time does not preclude the possibility that the conflict may have a started at an earlier point of time. Klamberg stated the following:

> From this follows that the determination of the character of a conflict must be based on an assessment of the facts at the relevant point of time. … The three reports [by Human Rights Watch (HRW), ICRC and COI] have different scope and depth and appear to have used different methodology. They still appear to be compatible. The COI report appears to be the most thorough, especially that presented to the UN Human Rights Council on June 26, 2012. It not only contains conclusions, it also

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43 ibid, pp. 27-28.

44 ibid, pp. 29-30.

provides accounts of the facts on the ground, which makes it possible to assess intensity and level of organisation.[45]

The courts in *Droubi* and *Sakhanh* took a more independent stance, apparently assessing the factual circumstances based on the totality of the information available to them. The district court in *Droubi* states that it "has made its own and combined assessment of the material presented". The appeals court handling the same case also states that it would make an "independent assessment" while still "relying on the findings made by international and recognised organs, in this case primarily the ICRC and COI".[46]

1.3.4 The consequences of the legal characterisation for the scope of criminalized conduct in Swedish case law

The consequences of the legal characterisation for the scope of criminalized conduct became an issue in the *Arklöv* case. The district court found that the circumstances in the case amounted to a NIAC.[47] Referring to the study on customary international humanitarian law of the International Committee of the Red Cross (ICRC), other studies, and UN Security Council resolutions 808 and 827 from 1993, the court held that "several rules in international humanitarian law, of which the primary scope is international armed conflicts are, on the basis of custom, applicable in the case."[48] The court further stated that Article 78 of Geneva Convention IV "should on the basis of custom be applicable in a non-international conflict of the present kind." [49] The court noted the grave breaches of the regime prescribed in article 130 of Geneva Convention III, article 147 of Geneva Convention IV, and article 85 of AP I, which includes murder, torture, inhuman treatment, unlawful deportation or transfer or unlawful confinement of a protected person.[50] In other words, the district court partially filled the gap between the treaty-based rules in NIAC and IAC by imposing individual criminal responsibility based on customary international law.

The district court in *Makitan* appears to have relied upon common article 3 of GC I-IV even though it had earlier concluded that the acts were committed in an IAC.[51] This triggered a debate between Engdahl and prosecutor Elving.[52]

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45 Klamberg, Memo to the Prosecutor, 9 January 2017, pp. 3 and 6. Klamberg also gave an account of the memo to the district court during the trial.

46 *Droubi*, Södertörns tingsrätt, 11 May 2016, pp. 38-40; *Åklagaren ./. Droubi*, Svea hovrätt, Case B 4770-16, judgment, 5 August 2016, pp. 5-6; *Sakhanh*, Stockholms tingsrätt, 16 February 2017, pp. 18-19, paras. 12-13; *Åklagaren ./. Sakhanh*, Svea hovrätt, Case B 2259-17, judgment, 31 May 2017, pp. 2-3 considers, *inter alia*, the statement made by Klamberg.

47 *Arklöv*, Stockholms tingsrätt, 18 December 2006, p. 52.

48 ibid, p. 54.

49 ibid, p. 55.

50 ibid, p. 56.

51 *Makitan*, Stockholms tingsrätt, 8 April 2011, p. 77.

52 Engdahl, 2011 a; Elving, 2011; Engdahl, 2011 b. See also Österdahl, Inger, "Folkrättsbrott i svenska domstolar: En våldsam utveckling" in Samuelsson Kääntä, Jenny, Almkvist, Gustaf,

One question is whether "serious violations" of the Swedish Criminal Code's chapter 22 section 6 are limited to the "grave breaches"-regime in the Geneva conventions and AP I which only apply in IACs. The district court in *M.M.* explained that it follows from the preparatory works that "an explicit limitation to grave breaches was never made" and that "the design of the legislation which refers to "serious violations of the Swedish Criminal Code chapter 22 section 6 cannot be deemed to limit the applicability of the law to include only the grave breaches specified in the Geneva conventions".[53]

1.4 Analysis

The reference to IHL in the previous law, the present law's design, and the preparatory works suggest that Swedish courts should adopt the same criteria as used in the case law from international tribunals and courts to determine the character of an armed conflict. This is actually what Swedish courts have done. The fact that Swedish courts afford such weight to international case law is interesting since case law is not a primary source in international law. One way of understanding this is that the Swedish courts perceive international case law as correct understandings of the relevant treaty provisions. The district courts have in addition, as illustrated in *Mbanenande* and *M.M.*, accepted as facts – or evidence – what international courts have ruled upon regarding circumstances in Rwanda and Kosovo. Taking notice of adjudicated facts is a mechanism explicitly provided for in the rules of procedure and evidence of the ICTY and the ICTR but not in the Swedish Code of Judicial Procedure.[54] It also appears that Swedish courts have made independent assessment of whether an armed conflict existed at the time of the commission of alleged crimes. A court cannot mechanically accept what the parties have stated or the conclusions of a specific organisation.

2 The Nexus between the Act and the Armed Conflict

Since war crimes are criminalized violations of IHL, it follows that there must be a link between the act and the armed conflict: a nexus. Although IHL has a broad scope of application it does not regulate everything that occurs at the same time as an armed conflict exists, and accordingly, not all crimes committed in wartime are war crimes. During conflict, civilian life goes on (how far varies between conflicts) and domestic crime does not cease. Also other international crimes may be committed during armed conflict. The distinguishing feature of a war crime is that it has this nexus, that it is "shaped by or dependent upon" the

Svensson, Erik & Skarhed, Anna (eds), *Vänbok till Lena Holmqvist*, 357-381, Uppsala: Iustus Förlag, 2019, p. 361.

53 *M.M.*, Stockholms tingsrätt, 20 January 2012, p. 53; Österdahl, 2019, p. 363.

54 ICTY Rules of Procedure and Evidence as amended 8 December 2010, rule 94(B); ICTR Rules of Procedure and Evidence as amended 9 February 2010, rule 94(B); Klamberg, Mark, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Leiden: Martinus Nijhoff Publishers, 2013, pp. 474-476.

armed conflict.[55] The nexus is an inherent element of a war crime, and distinguishes war crimes from other international and domestic crimes. It is thus important to determine what level of nexus between the act and the armed conflict is required for the act to constitute a war crime. This part of the article examines how Swedish legislation and case law have dealt with this nexus, in the light of international law.

2.1 Swedish Law on the Nexus between the Act and the Armed Conflict

The previous provision on war crimes in the Swedish Criminal Code chapter 22 section 6 does not explicitly require a nexus between the armed conflict and the act alleged to constitute a war crime. However, a requirement of nexus arguably forms part of this provision as a constitutive element, since the provision refers to treaty and customary international law that relate to IHL, as explained above. The Act of 2014 includes a specific requirement of nexus, which is common to all war crimes and forms an integral part of the war crimes provisions in sections 4-10. The first joint part of these sections reads: "A person is guilty of a *war crime* if the act is part of or otherwise connected with an armed conflict or occupation." (In sections 5 and 7 the word international is added before armed conflict.) Guidance on what the nexus requirement in the Act of 2014 involves may be sought in the preparatory works to this act. These explain that:

> when the armed conflict constitutes the motive itself for the act, or when the act constitutes a part of or otherwise directly contributes to the armed conflict, i.e. when the act *is part of the armed conflict*, the nexus is in most cases obvious. … It is, however, not necessary that the act in all contexts can be considered to be part of the hostilities or even have a direct link with these. It is sufficient that the act is *otherwise connected with an armed conflict* ("was associated with an armed conflict"). This requirement is fulfilled already by the armed conflict constituting an underlying condition that enables implementation of the violation.[56]

Further, the preparatory works demonstrate that the nexus requirement is based on the Elements of Crimes to the Rome Statute and case law, e.g. from the ICTY, and reference is in particular made to the *Tadic* and *Kunarac* cases.[57] It is also emphasized generally that the law be interpreted and applied with significant consideration to international law and international case law.[58] The Act of 2014 has similarities with the nexus requirement in the Elements of Crimes to the Rome Statute but uses an 'or' in comparison to the 'and' in the Elements of Crimes. This difference is not addressed or explained in the preparatory works.

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55 *Kunarac*, ICTY A. Ch., 12 June 2002, para. 58.

56 Prop. 2013/14:146, p. 124 (author's translation).

57 ibid, pp. 122-124.

58 ibid p. 71.

2.2 International Law and the Nexus Requirement

As indicated above, the conditions that an armed conflict exists, that IHL applies, and that the act that violated IHL has a nexus to the armed conflict are constitutive elements defining a war crime. War crimes are international crimes that concern the international community and all of mankind, even when a crime takes place in an NIAC without involving external actors. The nexus requirement is a distinctive feature of a war crime, i.e. an international crime with its own special protective interests. This requirement differentiates it from other international crimes and domestic crimes.[59] The determination of nexus is crucial since it ensures that IHL regulates the act. The act cannot constitute a (criminalized) violation of IHL if this nexus is missing.[60] This does not mean that the act will not necessarily go unpunished if the nexus is missing. It may be relevant to examine whether the act constitutes another international crime or a domestic crime, since several acts listed as war crimes correspond to, or overlap with, other crimes. Genocide and crime against humanity require no such nexus when committed at the same time as an armed conflict exists. They may also be committed in situations that do not meet the threshold for armed conflict.[61]

The next part will examine the nexus requirement in international law. Section 2.2.1 will examine how international courts have dealt with the required level of nexus. Section 2.2.2 discusses the jurisdictional limitations of international courts and the impact they may have for nexus in international case law.

2.2.1 The level of nexus required

Temporal, geographical and material links between the act and the armed conflict need to be established to ensure that IHL applies and regulated the act. To establish the required level of nexus between the act and the conflict under international law, international case law provides important guidance. The ICTY held in *Tadic* that IHL is applicable in the whole territory under control of the parties during the course of the armed conflict. An act need not occur during or in temporal or geographical proximity to armed hostilities to constitute a war crime, but it is not sufficient that it occurred at the time and place where an armed

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[59] Cassese, Antonio, *The Nexus Requirement for War Crimes*, Journal of International Criminal Justice, 2012, vol. 10, no. 5, p. 1395; Mettraux, Guénaël. "Nexus with Armed Conflict", in Cassese, Antonio, Acquaviva, Guido, Akande, Dapo, Baig, Laurel, Bing Bing, Jia, (eds), *Oxford Companion to International Criminal Justice, Oxford: Oxford University Press*, 2009, p. 435.

[60] Hathaway, Oona A., Strauch, Paul K., Walton, Beatrice A., Weinberg, Zoe A. Y., *What is a War Crime?*, The Yale Journal of International Law, vol. 4, issue 1, 2019, p. 109.

[61] See Rome Statute articles 6 and 7 with respective elements of crimes. On crimes against humanity (that historically required a nexus to an armed conflict while contemporary ICL does not), see also *Kunarac*, ICTY A. Ch., 12 June 2002, para. 83; *Prosecutor v. Seselj*, (Case No. IT-03-67-AR72.1), ICTY A. Ch., Decision on Motion for Reconsideration of the Decision on the Interlocutory Appeal concerning Jurisdiction dated 31 August 2004, 15 June 2006, para. 20-21; *First report of the Drafting Committee for the seventy-first session of the International Law Commission, on Crimes against Humanity*, 20 May 2019, UN doc. A/CN.4/L.935, draft article 3(2).

conflict took place: the act needs to be "closely related" to the conflict.[62] The Elements of Crimes to the Rome Statute provide a common nexus requirement to each war crime, which requires that the act "took place in the context of and was associated with" an armed conflict of international or non-international character.[63] The first part relates to the temporal and geographical application of IHL and the second to the material relation with the armed conflict. The Elements of Crimes were drafted with the aim of implementing the case law of the *ad hoc* tribunals on nexus,[64] and the ICC has endorsed the understanding of nexus expressed by the tribunals, especially in *Kunarac*, in its application of this element.[65]

The temporal applicability of IHL extends from the moment an armed conflict exists (see above) until a "general conclusion of peace" or, in NIAC, a "peaceful settlement";[66] or as long as the conflict de facto exists if armed violence continues beyond such settlement.[67] For the temporal aspect, it is sufficient that an act takes place at the same time as, and as long as the armed conflict exists and IHL applies. Concerning the geographical aspect, IHL applies "in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there".[68] Notably, it is to the armed conflict that the nexus should be established,[69] as it is sufficient that the act was "closely related to hostilities

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62 *Tadić*, ICTY A. Ch., 2 October 1995, para. 70; *Tadić*, ICTY T. Ch., 7 May 1997, para. 573; *Kunarac*, ICTY A. Ch., 12 June 2002, paras. 55 and 65.

63 The only difference is thus the character of the conflict. See for NIAC: Elements of Crimes, article 8(2)(c)(i)-1 War crime of torture, para. 4: "The conduct took place in the context of and was associated with an armed conflict not of an international character." For IAC: Elements of Crimes, article 8(2)(a)(ii)-1 War crime of torture, para 5: "The conduct took place in the context of and was associated with an international armed conflict."

64 Dörmann, Knut, "War crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", in von Bogdandy, Armin and Wolfrum, Rüdiger (eds), *Max Planck Yearbook of United Nations Law*, vol. 7, Koninklijke Brill N.V. 2003, pp. 358–359.

65 *Ntaganda*, ICC A. Ch., 15 June 2017, para. 68. See also *Judgment on the authorisation of an investigation into the situation in Afghanistan*, ICC A.Ch., 5 March 2020, para. 69; *Ntaganda*, ICC T. Ch., 8 July 2019, para. 731; *Bemba*, ICC T. Ch., 21 March 2016, para. 142 and 664-666; *Katanga*, ICC T. Ch., 7 March 2014, para. 1176.

66 *Tadic*, ICTY A. Ch., 2 October 1995, para 70; *Kunarac*, ICTY A. Ch., 12 June 2002, para 57.

67 *Prosecutor v. Boskoski and Tarculovski*, (Case No. IT-04-82-T), ICTY T. Ch., Judgment, 10 July 2008, para. 293.

68 *Kunarac*, ICTY A. Ch., 12 June 2002, para. 57.

69 It was first held in the decision on jurisdiction that the act should be "closely related to the hostilities" ongoing somewhere on the parties' territories, *Tadić*, ICTY A. Ch., 2 October 1995, para. 70. However, when the case was decided on the merits, the Trial Chamber held that the nexus concerned the armed conflict and not necessarily hostilities, *Tadić,* ICTY T. Ch., 7 May 1997, para 573. This was later confirmed by the Appeals Chamber in *Kunarac* and has been repeated in subsequent decisions both by the ICTY and other international courts and tribunals. See *Kunarac*, ICTY A. Ch., 12 June 2002, para. 55 and 65*; Prosecutor v. Vasiljević,* (Case No. IT-98-32-T), ICTY T. Ch., Judgment, 29 November 2002, para. 25; *Akayesu*, ICTR A. Ch., 1 June 2001, para. 438 and 444; *Prosecutor v. Al Mahdi*, ., ICC T. Ch., Judgment, ICC-01/12-01/15, 27 September 2016, para. 18: "The Chamber understands

occurring in other parts of the territories controlled by the parties to the conflict".[70] The ICC Appeals Chamber has held that the fact that a person was captured and subjected to prohibited treatment outside of the territory in which hostilities were taking place, but on the territory of the parties to the conflict does not preclude a nexus with the armed conflict.[71]

In *Kunarac*, the ICTY Appeals Chamber elaborated when an act is "closely related" to an armed conflict. The Chamber held that there need not be a causal connection but that "the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict".[72] When the act is aimed at furthering a party, it need not have resulted in any actual military advancement or benefit for that party. "Under the guise of the armed conflict" indicates that even privately motivated acts may constitute war crimes if the armed conflict played a substantial role in the perpetrator's ability or decision to commit it or the manner in which it was committed. As in *Katanga*, nexus is clear if a person with a combat function pillages the civilian population for personal profit during an attack, since the attack is part of the armed conflict.[73] It is, though, sufficient that it is closely related to the hostilities: the pillaging need not be part of the military operation.[74]

Naturally, combatant status indicates that his/her actions in the military function have a nexus to the conflict, but not everything wrongful that a combatant does is necessarily a war crime, in particular not everything done in a private capacity. While a nexus may be easier to establish when the perpetrator is a combatant, both military personnel and civilians may perpetrate war crimes,[75] and nexus is often more complicated to establish when the perpetrator is not a combatant or does not have a continuous combat function. Care must be taken so that an act is not considered a war crime (which is generally considered

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that … what this element requires is not a link to any particular hostilities but only an association with the non-international armed conflict more generally". This also follows from the fact that an occupation may exist without armed hostilities (which an NIAC cannot), see article 2 GC I-IV.

70 *Kunarac*, ICTY A. Ch., 12 June 2002, para. 57.

71 *Judgment on authorisation of an investigation into the situation in Afghanistan,* ICC A.Ch., 5 March 2020, para. 74. Contrary to the Pre-Trial Chamber, the Appeals Chamber found that article 3 GC I-IV "does not suggest that the requisite nexus with the armed conflict in Afghanistan cannot exist if the criminal conduct occurred outside Afghanistan and the victim was not captured in Afghanistan. … such a conclusion would also be contrary to the purpose of Common Article 3".

72 *Kunarac*, ICTY A. Ch., 12 June 2002, para. 58.

73 *Katanga,* ICC T. Ch., 7 March 2014, paras. 1231-1233.

74 *Prosecutor v. Hadžihasanović & Kubura* (Case No. IT-01-47-T), ICTY T.Ch., Judgment, 15 March 2006, paras. 26 and 54.

75 *Akayesu*, ICTR A. Ch., 1 June 2001, para. 444; *Prosecutor v. Musema*, (Case No. ICTR-96-13), ICTR T. Ch. I, judgment, 27 January 2000, para. 274; *Vasiljevic*, ICTY T. Ch., Judgment, 29 November 2002, para. 57; *Bemba*, ICC T. Ch., 21 March 2016, para. 143.

a grave crime involving serious sanctions) when it is, rather, a domestic crime; in particular when the perpetrator is not a participant in the conflict. The ICTR dealt with this in *Rutaganda,* where the Appeals Chamber endorsed the ICTY's finding in *Kunarac* but elaborated on its understanding of the term "under the guise of the armed conflict". The Chamber held that this does not mean that the mere fact that an act takes place at the same time as an armed conflicts is sufficient, nor that taking advantage of "any circumstances created in part by the armed conflict" is sufficient.[76] The Appeals Chamber further emphasized that a determination of whether an act is closely related to an armed conflict needs to address several factors and that "Particular care is needed when the accused is a non-combatant."[77] Factors that may demonstrate nexus include the involved persons' respective status under IHL, whether the act was committed in an official or private capacity, whether the act aimed at furthering one party to the armed conflict or its overall goal with the conflict, whether the perpetrator and victim belonged to different parties to the conflict (based on formal or informal grounds),[78] and where a victim was captured.[79]

Traditionally, war crimes have been considered as crimes committed against the enemy party, while criminal acts by a member of an armed force against another member of the same force or against a member of an allied party have been considered as military-disciplinary or national crimes.[80] This understanding has, however, been challenged over the past few years, at least concerning crimes against child soldiers recruited contrary to IHL and who belong to the same force as the perpetrator. The traditional view is natural as IHL focuses on the conflict, which exists between enemies, and many IHL rules are based on an enemy-relationship. For example, article 4 GC III establishes that a combatant must be in *enemy hands* in order to be a prisoner of war and entitled to GC III protection. However, IHL does not only regulate the enemy relationship. Examples of rules without an enemy-relationship requirement include bans on certain weapons and minimum rules for humane treatment. Article 3 GC I-IV and article 75 AP I, states no requirement that a person protected by the provision must be in enemy hands but only in the hands of *a party*. The issue of whether (certain) war crimes may be committed within one's own force was tried and answered in the affirmative in *Ntaganda*. *Ntaganda* was charged (and later convicted[81]) of e.g. war crimes in the form of rape against child soldiers recruited in violation of IHL. The defence argued that crimes committed by members of armed forces against members of the same force do not fall within IHL or ICL, i.e. do not constitute war crimes; and that the Court therefore lacked jurisdiction for those charges. This is essentially an argument that an enemy relationship (or "status requirement") is a precondition for war

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76 *Rutaganda,* ICTR A. Ch., 26 May 2003, para. 570.

77 ibid, para. 570.

78 *Kunarac,* ICTY A. Ch., 12 June 2002, para. 59.

79 *Judgment on authorisation of an investigation into the situation in Afghanistan,* ICC A.Ch., 5 March 2020, para. 76. The Appeals Chamber also endorsed the factors listed in *Kunarac,* see para. 69.

80 See e.g. Cassese, 2012, p. 1397.

81 *Ntaganda,* ICC T. Ch., 8 July 2019, para. 1199.

crimes. The ICC Appeals Chamber rejected this argument, as it found that neither IHL generally nor articles 8 (2) (b) (xxii) and (2) (e) (vi) of the Rome Statute exclude members of an armed force or group from protection from rape and sexual slavery by members of the same force or group. Further, the Appeals Chamber emphasized that it is the nexus requirement in the Elements of Crimes that distinguishes war crimes from domestic crimes (and not an enemy relationship), and that "any undue expansion of the reach of the law of war crimes can be effectively prevented by a rigorous application of the nexus requirement".[82] The Appeals Chamber presented no further guidance in *Ntaganda* on the nexus requirement but referred to the non-exhaustive factors mentioned above, which include belonging to different parties. [83] An enemy relationship is thus not a precondition for war crimes, but it may be a relevant factor to address in the determination of nexus.

In conclusion, an act shall be closely related to an international or non-international armed conflict to constitute a war crime. The close relation does not mean that there needs to be a causal relationship, but the conflict must have played a substantial part in the perpetrator's motive, mode of procedure or ability to commit the act. Several factors may indicate nexus: status under IHL, formal or informal affiliation with opposite parties, where and how the act was committed, in an official or private capacity, whether the act aimed at furthering a party to the armed conflict or the party's overall goal, etc. Since war crimes are serious crimes that often involve serious sanctions it is important that care is taken so that only acts that do indeed qualify as war crimes are considered as such. Particular care should be taken and several factors addressed when the perpetrator is a civilian or belongs to the same force as the victim. A careful determination of nexus ensures that the crime is correctly categorized and war crimes are adequately delimitated against domestic crime.

2.2.2 The jurisdictional consequences of nexus

For international (and hybrid) criminal courts and tribunals, the question of whether an act has a sufficient nexus to an armed conflict may be linked to the court's jurisdiction. International courts and tribunals, such as the ICC, the ICTY and the ICTR, have jurisdiction *ratione materiae* over (certain) international crimes exclusively and lack jurisdiction over domestic crimes.[84] Hybrid courts, such as the Special Court for Sierra Leone (SCSL), have broader material jurisdiction that covers both international and domestic crimes but the same question may appear there too as they tend to have jurisdiction only over a limited number of domestic crimes.[85] Concerning the ICC, some level of nexus between an act and a situation often needs to be established to ensure that the crime will fall within the Court's jurisdiction already when an investigation is to

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82 *Ntaganda*, ICC A. Ch., 15 June 2017, para. 68.

83 ibid, para. 68.

84 Rome Statute article 5, ICTY Statute article 1, ICTR Statute article 1.

85 SCSL Statute article 1.

be authorized or before a case is tried on its merits.[86] The link between jurisdiction and nexus to the armed conflict was brought to the fore in the ICC decision on the authorisation of an investigation into the situation in Afghanistan, where the Pre-Trial Chamber held that persons captured outside of Afghanistan lacked nexus and thereby fell outside the Court's jurisdiction.[87] The Appeals Chamber amended this decision. It held that it is not excluded that a criminal act occurring outside Afghanistan could still have the required nexus with the armed conflict in Afghanistan. This was based on the geographical scope of article 3 GC I-IV, which extends to the territories of all parties to a conflict.[88] The Chamber further held that, instead, "a careful analysis of the circumstances of each case will need to be carried out to establish whether there is a sufficient nexus. The place of capture of the alleged victim may be a relevant factor for this analysis, but it does not settle the matter."[89] Considerations of whether the alleged crime is sufficiently linked to the relevant situation and falls within the material jurisdiction of the Court also form part of the Office of the Prosecutor's (OTP's) case selection process.[90] This is not the same as establishing the nexus between the act and the armed conflict required for war crimes. However, it demonstrates that some sort of preliminary nexus consideration needs to be done at an early stage. This may involve that cases with more complex nexus determinations, where it is unclear whether the act constitutes a war crime or a domestic crime – "borderline" cases – seldom reach international courts.

2.3 Swedish Case Law

Domestic courts may also have jurisdictional issues by a lack of jurisdiction over crimes committed abroad or a lack of jurisdiction over international crimes. As demonstrated by van der Wilt, a lack of jurisdiction for crimes that overlap with acts covered by war crimes may influence domestic courts' approach to nexus.[91] Nevertheless, domestic courts' findings on nexus are interesting to highlight and discuss outside the country in question as they may help develop and clarify understanding of the nexus-requirement in complex "borderline" cases.[92]

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86 See e.g. *The Prosecutor v. Mbarushimana*, ICC PT. Ch. I, Decision on the "Defence Challenge to the Jurisdiction of the Court", Case No. ICC-01/04-01/10, 26 October 2011, para. 21.

87 *Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*(, ICC PT. Ch., Decision, Case No. ICC-02/17, 12 April 2019, para. 55.

88 *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, ICC A. Ch., Judgment, ICC-02/17 OA4, 5 March 2020, paras. 74 and 76.

89 ibid, para. 76.

90 Office of the Prosecutor, *Policy paper on case selection and prioritisation*, ICC-OTP, 15 September 2016, para. 26.

91 van der Wilt, Harmen, *War Crimes and the Requirement of a Nexus with an Armed Conflict*, Journal of International Criminal Justice, 2012, vol. 10, no. 5, pp. 1126-1127.

92 See e.g. ibid, p. 1113; Cassese, 2012, in particular pp. 1401-1404.

Swedish courts have universal jurisdiction over war crimes,[93] as well as jurisdiction over several other (domestic) crimes committed abroad, including those involving persons who are not citizens and lack other links to Sweden but are present in the country.[94] Hence, Swedish courts have broad jurisdiction and can try persons for both international and domestic crimes committed abroad. In situations like this, when jurisdiction is no significant hurdle, it is possible that the domestic courts are presented with other nexus issues than international courts. Among war crimes cases adjudicated in Sweden, one case stands out with a complex nexus issue (see below).

2.3.1 How Swedish courts have dealt with the nexus

A nexus between the act and the armed conflict is not mentioned or dealt with in the cases of *Arklöv* and *Makitan*, the first two war crimes cases adjudicated in Sweden. In *Abdullah,* it is mentioned that a nexus between the act and the armed conflict is required, but this is not dealt with in the case.[95] In *Abdulkareem,* the Act of 2014's nexus requirement is mentioned in passing. [96] It is not discussed in relation to the facts of the case, but the appellate court's statement that it shares the district court's finding that the act "has been part of or otherwise connected with an armed conflict in the region" indicates that both courts consider that nexus is evident from the establishment of the conflict and the facts of the case.[97] A similar situation is at hand in *Saeed*.[98]

It is in the third case, *M.M.*, that the issue of nexus was first raised. All subsequent cases have at least mentioned the nexus requirement, and several have dealt with it more extensively. The district court in *M.M.* held that "For an act to be considered a crime against the rules of IHL and considered as a war crime under international law it is required that it has a link to the armed conflict (nexus). Privately motivated crimes without link to the armed conflict are thus not to be considered as war crimes."[99] This was repeated by the district court in *Sakhanh*, which also added that the nexus requires that the conflict has played a substantial role for the perpetrator's ability or decision to execute the act, the manner or the purpose.[100] The court found that the armed conflict played a

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93 Chapter 2 section 3 para. 6 of the Swedish Criminal Code.

94 Chapter 2 section 2 paras. 1-2 of the Swedish Criminal Code. See further Martinsson, Dennis and Klamberg, Mark, *Jurisdiction and Immunities in Sweden when Investigating and Prosecuting International Crimes,* Scandinavian Studies in Law, 2020, vol. 66.

95 *Abdullah*, Södertörns tingsrätt, 25 September 2017, p. 5.

96 *Abdulkareem,* Blekinge tingsrätt, 6 December 2016, p. 5.

97 *Åklagaren ./. Abdulkareem*, Hovrätten över Skåne och Blekinge, Case B 3187-16, judgment, 11 April 2017, p. 2 (author's translation).

98 *Åklagaren ./. Saaed*, Göta hovrätt, Case B 939-19, judgment, 24 September 2019, p. 4.

99 *M.M.*, Stockholms tingsrätt, 20 January 2012, pp. 54-55 (author's translation). The appellate court did not deal with nexus since the court found that it was not proved without reasonable doubt that the accused had been present at the place of the crime when the crime was committed. The appellate court therefor exonerated *M.M.* and dismissed the charges. *Åklagaren./.. M.M.*, Svea hovrätt, Case B 1248-12, judgment, 19 December 2012.

100 *Sakhanh*, Stockholms tingsrätt, 16 February 2017, p. 16, para. 9.

decisive role for Sakhanh's ability and decision to undertake the act so that it was completely clear that a nexus existed. This was based on several factors; the victims were soldiers of the Syrian armed forces, the enemy party to the conflict, the perpetrator performed the acts in his capacity as a member of an organised armed group, and the acts served a specific purpose that coincided with the group's objective in the conflict.[101]

In both *Mbanenande* and *Sakhanh* the district court held that, in NIAC, war crimes may be committed by civilians and that this requires a nexus between the act and the conflict.[102] This should not be understood to mean that civilians can only commit war crimes in NIAC and not in IAC. No such limitation can be derived from the Swedish law or the preparatory works; on the contrary, the preparatory works explain that both military personnel and civilians may commit war crimes, without limitation to a particular type of conflict.[103] The statement by the district court may however, be understood as to highlight the difficulty of determining nexus when civilians are charged with war crimes. In such situations, the precaution that was warranted in *Rutaganda* should be addressed.

The cases concerning Rwanda, *Mbanenande*, *Berinkindi* and *Tabaro*, concern acts that were committed when a NIAC existed between the armed forces of Rwanda and allied militia groups, and the Rwandan Patriotic Front (RPF) in parallel to the genocide. The courts have in these cases first tried if the acts constitute genocide and subsequently whether they have had nexus to the armed conflict and constitute war crimes.

In the analysis of relevant factors in *Mbanenande*, the district court found that the perpetrator had some connection to a party to the conflict while the civilian victims were affiliated, through ethnicity, with the enemy party. Further, that the perpetrator had "committed the acts in a leading informal role on a lower level and the acts have served a specific purpose" and that his actions were not based on a private motive but that he had committed them "within the framework of the armed conflict that played a decisive role for Mbanenande's ability and decision to execute the acts".[104] Accordingly, the district court concluded that it was "completely clear" that there was a nexus between the acts and the armed conflict. [105] In *Berinkindi* one of the prosecuted acts was found not to form part of the genocide and, for that act, the question of war crimes (and thus nexus) was independent of the ongoing genocide. With reference to the preparatory works to the Act of 2014 (while applying the previous provision in the Criminal Code that was in force at the time of the commission of the crimes), the appellate court explained:

> Concerning the requirement that there shall be a connection between the criminal act and the armed conflict … the act may not have been prompted by a private reason. What instead distinguishes the crime is the context in which it is committed. The armed conflict need not be the reason for a person to commit the act in question but

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[101] *Sakhanh*, Stockholms tingsrätt, 16 February 2017, p. 40, para. 67.

[102] *Mbanenande*, Stockholms tingsrätt, 20 June 2013, p. 37, para. 12; *Sakhanh*, Stockholms tingsrätt, 16 February 2017, p. 16, para. 9.

[103] Prop. 2013/14:146, p. 126.

[104] *Mbanenande*, Stockholms tingsrätt, 20 June 2013, p. 105, para. 205.

[105] ibid, p. 105, para. 205 (author's translation).

> it shall at least have played a substantial role in the person's opportunity to commit it, the manner in which it was committed and the purpose or motive for this. The act would probably not have occurred if the armed conflict had not existed. There is, however, no requirement for a direct connection with the hostilities but, rather, it is sufficient that the conflict is an underlying condition that enables the crime to be committed.[106]

The appellate court used status under IHL as an important factor to establish a nexus and stressed that all victims, including the man who was not included in the acts of genocide because he was not of Tutsi ethnicity, were civilian protected from direct attack under IHL. Based on this, the court found that the acts had nexus to the armed conflict, that the acts constituting genocide therefore also constituted war crimes, and that the killing of the person that was excluded from genocide constituted a war crime.[107] In a similar manner, the district court held in *Tabaro* that the nexus did not require that the conflict be the reason why an act was committed but that it should have played a substantial role for the opportunity or decision to commit it, how it was executed or the purpose or motive for it.[108] The only significant difference from the formulation in *Berinkindi* was the "or" rather than "and". The appellate court did not deal with nexus.[109]

In most Swedish cases, it appears relatively uncomplicated to establish nexus between the prosecuted acts and the armed conflict. However, in *Droubi* the central issue was whether there was a sufficient nexus to consider the crime a war crime. The case concerned the NIAC in Syria and involved several persons with a combat function. The victim had tried to obtain weapons for his group and in this connection had argued about weapons with a person in a leading position in a group he belonged to or used to belong to. After this argument, the victim was abducted and tortured by a group of men, including the person prosecuted in Sweden for the offence. It is unclear whether the group the victim commanded was an independent group or a subgroup to the group commanded by the person referred to as the leader: they did at least appear to be on the same side in the conflict. It appears that there was a causal connection between the abduction and torture and the argument with the leader; and that the leader had ordered the abuse.

In the nexus examination, the district court attached weight to the shared objective of the groups to participate in the conflict, and that they appeared to be allied and not enemies. It understood the motive as revenge and underlined that a temporal and geographical link is not enough to establish nexus.[110] It concluded that sufficient nexus between the torture and the armed conflict did not exist and thus the offences could not be war crimes. Instead, Droubi was

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[106] *Berinkindi*, Svea hovrätt, Case B 4951-16, judgment, 5 February 2017, p. 50 (author's translation).

[107] ibid, p. 51.

[108] *Åklagaren ./. Tabaro*, Stockholms tingsrätt, Case B 13688-16, judgment, 27 June 2018, pp. 177-178.

[109] *Åklagaren ./. Tabaro*, Svea hovrätt, Case B 6814-18, judgment, 29 April 2019.

[110] *Droubi*, Södertörns tingsrätt, 11 May 2016, p. 43.

found guilty of gross assault.[111] The prosecutor appealed, arguing that the crime should be considered as a war crime. The appellate court evaluated nexus differently. It understood the motive differently and made a holistic determination based on all relevant indicative factors, holding that "all explanations or combinations of explanations that have been relevant in the case are such that they have their origin in, or a connection with, the armed conflict, regardless of whether there may also have been personal dislike or conflict between the persons involved".[112] Hence, the appellate court found that neither a private motive nor the absence of an enemy relation precluded that a nexus might exist based on other factors, and that several factors should be evaluated in the nexus examination. The appellate court's examination of nexus in *Droubi* is in line with international case law. This case and the differing findings of the district and appellate courts also demonstrate that the understanding of nexus is broad and may result in different conclusions. Both courts deserve merit for engaging in the complex nexus issue based on the standards of international case law. Unfortunately, the appellate court did not pronounce further on how nexus should be understood in complex cases; but it is clear that the motive should not be considered decisive, and all relevant factors should be addressed. Interestingly, the appellate court's finding also means that crimes within the same force or against members of an allied armed force or group are not excluded from consideration as war crimes.

Different legal systems have different jurisdictional grounds and lack of a legal basis to try other crimes that overlap with the acts included in the relevant war crime may, as discussed by van der Wilt, indirectly influence domestic courts' approach to nexus and risk unduly widening the scope of war crimes when the alternative is impunity.[113] The broad jurisdiction of Swedish courts and the prosecutor's possibility to argue domestic crime as the alternative to war crimes have in several cases meant that establishing a war crime was not a question of 'war crime or impunity'. This is clear in *Droubi*, where the district court did not consider the act sufficiently linked to the conflict to be a war crime, and instead found the accused guilty of gross assault based on Chapter 3 section 6 of the Swedish Criminal Code. Other cases also reveal that relevant domestic crimes have overlapped with the war crime, of which the perpetrator could have been found guilty should the constitutive elements of war crimes not have been met.[114]

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111 ibid, pp. 36 and 43.

112 *Droubi,* Svea hovrätt 5 August 2016, pp. 6-7 (author's translation).

113 van der Wilt, 2012, p. 1120-1121.

114 For example, in *Mbanenande* , the district court holds that the perpetrator was an accomplice to murder, attemped murder, instigation of murder and kidnapping in the manner they are criminalized in Swedish law. *Mbanenande,* Stockholms tingsrätt, 20 June 2013, para. 199, p. 103. Another example is *Arklöv,* where the district court mentions that torture (that forms part of the war crime sentenced for) is covered by chapter 3 and 4 of the Swedish Criminal Code, *Arklöv*, Stockholm tingsrätt, 18 December 2006, p. 15.

2.3.2 References to international case law

As mentioned above in section 1.3.2, in the *Arklöv* case there is only a general reference to "as it has been construed by the special tribunal for former Yugoslavia – ICTY" but no specific reference to nexus.[115] In *M.M.*, *Droubi*, *Mbanenande* and *Sakhanh*, the district courts make explicit reference to ICTY case law, in particular *Tadic* and *Kunarac,* and list the level of required nexus expressed therein, how it has been understood and factors that may indicate nexus.[116] In *Berikindi* and *Tabaro*, the appellate court explained the nexus requirement in a manner almost identical to the ICTY's in *Kunarac* but with reference to the preparatory works to the Act of 2014,[117] which in turn refer to the *Kunarac* case.[118] This reflects the general weight of preparatory works in Swedish law.

Hence, in several cases the courts use the case law of international tribunals to explain the level of nexus required. This tallies with the emphasis in the preparatory works that international crime be interpreted and applied with significant consideration to international law and international case law.[119] In other words, the court relied on the preparatory works explanation of nexus, which implies an indirect reference to international case law since the preparatory works are based on ICTY case law as regards nexus.[120] It thus appears that the preparatory works to the Act of 2014 assisted the courts in developing the nexus requirement in Swedish law both for the previous provision in the Criminal Code and for the Act of 2014.

The above thus demonstrates that the understanding of nexus has developed over time. This follows the general trend, as demonstrated by Österdahl, that knowledge of IHL has developed within the Swedish judicial system through the war crimes cases, which have been decided over a relatively short time period.[121] While the first judgment in 2006 demonstrated solid knowledge, it was followed by a case where this did not appear to have been shared within the court (both cases were decided by the same court though different judges) and where evident mistakes of (international humanitarian) law were made, mistakes which sparked

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[115] *Arklöv*, Stockholms tingsrätt, 18 December 2006, p. 12 (author's translation).

[116] *M.M.*, Stockholms tingsrätt, 20 January 2012, pp. 54-55 with references to *Tadic*, ICTY A. Ch., 2 October 1995, para. 70; *Kunarac*, ICTY A. Ch., 12 June 2002, paras. 58-59. *Droubi*, Södertörns tingsrätt, 26 February 2015, p. 42 makes references to *Tadić*, ICTY T. Ch., 7 May 1997, para. 572–573; *Kunarac,* ICTY A. Ch., 12 June 2002, paras. 58-59; *Limaj et al.*, ICTY T. Ch. II, 30 November 2005, para. 91. *Mbanenande*, Stockholms tingsrätt, 20 June 2013, p. 37, para. 12 makes reference to *Kunarac*, ICTY A. Ch., 12 June 2002, paras. 58. *Sakhanh*, Stockholms tingsrätt, 16 February 2017, p. 16, para. 9 makes a reference to *Kunarac*, ICTY A. Ch., 12 June 2002, paras. 58.

[117] *Berinkindi*, Svea hovrätt, 5 February 2017, p. 50 makes reference to Prop. 2013/14:146 p. 123-124; *Tabaro*, Stockholms tingsrätt, 27 June 2018, pp. 177-178 makes reference to Prop. 2013/14:146 p. 123.

[118] See section 2.1 "Swedish Law on the Nexus between the Act and the Armed Conflict" above.

[119] Prop. 2013/14:146, p. 71.

[120] ibid, p. 122-124.

[121] Österdahl, 2019, p. 381.

debate.[122] However, later cases reflect deep knowledge and understanding of international law.[123] It is possible that the references to international case law are both a demonstration of and a source of this knowledge and understanding.

2.4 Analysis

The special form of the previous Swedish provision on war crimes with its general reference to IHL suggest that Swedish courts had a situation similar to the *ad hoc* tribunals concerning nexus between the act and the armed conflict, with little guidance from the legal text. The present law's explicit requirement of nexus and its preparatory works strongly suggest that Swedish courts should examine whether an act is sufficiently related to an armed conflict in the same manner as international courts and tribunals, including the ICC, do, despite some difference between the texts of the Swedish provision and the Elements of Crimes to the Rome Statute. The manner in which nexus is examined and explained and the references made in Swedish cases to international case law also demonstrate that Swedish courts have sought guidance in and attached significant weight to the case law from international tribunals on the level of nexus required and what factors may indicate nexus.

The Swedish courts have, as illustrated in e.g. *Mbanenande* and *Sakhanh*, understood the nexus requirements (implicit in the previous law and explicit in the 2014 Act) in the same way as the ICTY formulated them in *Kunarac*. That the appellate court in *Berikindi* used the preparatory works to the 2014 Act rather than referring directly to international cases to explain nexus in the previous provision in the Criminal Code is interesting and reflects the weight of preparatory works in Swedish law. It may indicate that a court perceives the insertion of an explicit nexus requirement in the Act of 2014 as a codification of practice based on treaty and customary law that was an integral part of the old provision – an implicit nexus requirement. It also appears that the preparatory works to the 2014 Act have assisted the courts more generally in their understanding of the constitutive elements of war crimes.

Both the district court's and the appellate court's (differing) findings of nexus (and thereby categorization of the crime) in the *Droubi* case were based on the understanding of nexus in international cases. This demonstrates that the understanding of nexus in international law provides important guidance, but that it is also broad and admits of divergent conclusions. The relative broad understanding of nexus in international case law may result from the fact that international courts only have jurisdiction over international crimes, and that they therefore seldom try complex "borderline" nexus situations. National legal systems may provide a broader jurisdictional basis than international and hybrid courts, so that domestic courts may try whether an act constituted a domestic crime as well as an international crime. Hence, complex nexus-situations might be more likely to appear before domestic courts than before international ones. Domestic courts' case law may therefore be useful to develop further the understanding of nexus, especially if they concern more complex "borderline"

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[122] Engdahl, 2011 a; Elving, 2011; Engdahl, 2011 b.

[123] Österdahl, 2019, p. 381.

situations and if they engage in a discussion on the nexus required. Hopefully, the understanding of nexus as a constitutive element of war crimes may be continuously informed by domestic courts as well as by international courts.

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