

ANNEX A

Public Annex

Hague Law Interpreted

*The Conduct of Hostilities under
the Law of Armed Conflict*

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crimes by virtue of Article 8(2)(f) of the ICC Statute. By far the most important is the first of these scenarios.

A. The Importance of Common Article 3

As the ICRC observed in its 2016 commentary on the 1949 Geneva Convention I, Common Article 3 'remains the core provision of humanitarian treaty law for the regulation of non-international armed conflicts. As part of the universally ratified 1949 Geneva Conventions, it is the only provision that is binding worldwide and governs all non-international armed conflicts.'¹⁵⁸ It reflects customary international law, and thus the provision, which was already termed a 'Convention in miniature' during its negotiation,¹⁵⁹ is applicable to every NIAC. But Common Article 3 not only represents customary law governing all NIACs; in the words of the ICJ, '[t]here is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.'¹⁶⁰

It is widely accepted (though it is not a consensus position)¹⁶¹ that Common Article 3 does not regulate the conduct of hostilities.¹⁶² In fact, the provision is Geneva law in its purest form, requiring the humane treatment both of those *hors de combat* (albeit by other individuals who may themselves still be conducting hostilities) and of those in the power of a party to a NIAC, such as members of the civilian population or detainees.

B. The Constituent Elements of Non-International Armed Conflict

To amount to a NIAC, any given situation must involve regular and intense armed combat between state armed forces and a non-state armed group, or between two or more non-state armed groups. To be party to an armed conflict, the armed group or groups engaged in fighting must be sufficiently 'organised'. This means that such groups are military or paramilitary forces with a martial-style hierarchy, and that some of the members are equipped with, at the very least, firearms. They must be capable of mounting military operations, but they do not need to possess uniforms, nor do they need to actively or even passively control territory.

i. The Path to a Definition

Beyond referring to 'armed conflict not of an international character', and describing acts that are prohibited and certain acts that are obligatory during a NIAC, Common Article 3 proffers no guidance as to how such a conflict is to be objectively identified. Some further

¹⁵⁸ Ibid, para 354.

¹⁵⁹ Ibid, para 356.

¹⁶⁰ *Nicaragua v US* (n 57), para 218.

¹⁶¹ See, eg, Sivakumaran (n 156) 336, for a discussion of sources that argue for, or oppose, the notion that Common Article 3 also regulates the conduct of hostilities.

¹⁶² See, eg, ICRC commentary on 1949 Geneva Convention I (n 16) para 389. The commentary was published four years after Sivakumaran's excellent work.

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guidance can be found in the 1977 Additional Protocol II, even though its scope of applica-
tion is more limited than is Common Article 3.¹⁶³ Notably, the Protocol affirms that armed
conflicts are not 'situations of internal disturbances and tensions, such as riots, isolated and
sporadic acts of violence and other acts of a similar nature'.¹⁶⁴ While helpful, this exclusion-
ary analysis does not greatly assist in the identification of the constituent elements of a
NIAC.

Faced with this challenge, it was left to the subsidiary means of identifying international
legal rules to seek to plug the gap. As the Statute of the ICJ indicates, these are 'judicial
decisions and the teachings of the most highly qualified publicists of the various nations'.¹⁶⁵
Jean Pictet's commentaries on Common Article 3 are an extremely valuable example of the
latter. Pictet enumerated a series of proposals made by states during the diplomatic confer-
ence that negotiated and adopted the four 1949 Geneva Conventions, suggesting that the
'criteria are useful as a means of distinguishing a genuine armed conflict from a mere act
of banditry or an unorganized and short-lived insurrection or terrorist activities'.¹⁶⁶ The
criteria were as follows:

- (1) That the Party in revolt against the *de jure* Government possesses an organized military
force, an authority responsible for its acts, acting within a determinate territory and having
the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against
insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of
the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General
Assembly of the United Nations as being a threat to international peace, a breach of the
peace, or an act of aggression.
- (4) (a) That the insurgents have an organisation purporting to have the characteristics of a
State.
(b) That the insurgent civil authority exercises *de facto* authority over persons within a
determinate territory.

¹⁶³ According to Art 1(1), 1977 Additional Protocol II, the Protocol only applies to NIACs occurring in the
territory of a state party 'between its armed forces and dissident armed forces or other organized armed groups
which, under responsible command, exercise such control over a part of its territory as to enable them to carry out
sustained and concerted military operations and to implement this Protocol.'

¹⁶⁴ Art 1(2), 1977 Additional Protocol II. That this exclusion applies also to Common Article 3 is implied by the
ICC Statute, which in giving the ICC potential jurisdiction over serious violations of the acts prohibited in the
article, stipulates that this 'applies to armed conflicts not of an international character and thus does not apply to
situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of
a similar nature'. The only textual difference is that the Statute uses 'or' rather than 'and' when referring to 'other acts
of a similar nature'. The older formulation was employed a year later in the Second Hague Protocol on Protection
of Cultural Property: Art 22(2), Protocol to the Hague Convention of 1954 for the Protection of Cultural Property
in the Event of Armed Conflict; adopted at The Hague, 26 March 1999, entry into force, 9 March 2004. Art 22(1)
refers simply to 'armed conflict not of an international character', without offering any definition. This was also
the case in the Convention on Certain Conventional Weapons (CCW). At the Second CCW Review Conference,
which took place in Geneva from 11 to 21 December 2001, states parties adopted an Amendment to Art 1 of the
Convention, extending its scope of application to cover NIACs. See Art 1(3), CCW.

¹⁶⁵ Art 38(1)(d), 1945 Statute of the ICJ.

¹⁶⁶ Pictet Commentary on GC I (n 15) 50.

- (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
- (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.¹⁶⁷

While indeed valuable, these criteria should only be considered as indicative and not probative, much less determinative. Pictet himself asserted that they were 'not obligatory and are only mentioned as an indication'.¹⁶⁸ It is, for example, possible that a situation may be on the agenda of the UN Security Council as being a threat to international peace, or actually claimed by the Council to be an armed conflict, without a NIAC factually being in existence.

A clear example of such a situation was the Central African Republic (CAR) during much of 2013. As Annyssa Bellal has written, 'The NIAC that took place in CAR from December 2012 to 24 March 2013 opposed governmental forces (the Forces armées centrafricaines (FACA) as well as the Presidential Guard) and a coalition of armed groups named "Séléka"'.¹⁶⁹ After this date, however, Bellal strongly doubts whether an armed conflict in fact existed, as those engaged in violence were not sufficiently organised, a criterion discussed in section II.B.iv.¹⁷⁰ This is despite the adoption of UN Security Council Resolution 2127 on 5 December 2013, which strongly condemned 'the continued violations of international humanitarian law' (thereby making clear its view that an armed conflict was in progress). The Council called upon 'all parties to armed conflict in the CAR' to issue clear orders 'prohibiting all violations and abuses committed against children' and 'against sexual violence'.¹⁷¹

Bellal concluded that 'any determination of the existence of a NIAC by the UN Security Council (an intergovernmental body), as in the circumstances prevailing in CAR, needs to be considered with caution'.¹⁷² In November 2014, the Commission of Inquiry whose establishment Security Council Resolution 2127 called for,¹⁷³ concluded that an armed conflict existed in the CAR in 2013 until 'late March' and then, by remarkable coincidence, from 4 December 2013 onwards.¹⁷⁴ No evidence is advanced in support of the assertion that, as a matter of international law, an armed conflict existed from that date.

In his 1952 commentary on the 1949 Geneva Convention I, Pictet distinguished a NIAC from 'a mere act of banditry or an unorganized and short-lived insurrection', which were not armed conflicts. This sets the bar quite high for a NIAC. At the same time, though, he called for Common Article 3 to be applied 'as widely as possible', arguing:

There can be no reason against this. For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party. ... What Government would dare to claim

¹⁶⁷ Ibid, 49–50.

¹⁶⁸ Ibid, 50.

¹⁶⁹ A Bellal, 'Central African Republic: from conflict to chaos and back again?' in Casey-Maslen (ed) (n 61) 412, 414.

¹⁷⁰ See also 'Armed Conflict in the Central African Republic in 2013' in Casey-Maslen (ed) (n 61), 104ff.

¹⁷¹ See UN Security Council Resolution 2127, 5 December 2013, paras 17, 22–23.

¹⁷² Bellal (n 169) 424.

¹⁷³ See UN Security Council Resolution 2127, para 24.

¹⁷⁴ Final report of International Commission of Inquiry on the Central African Republic, para 39, attached to Letter dated 19 December 2014 from the UN Secretary-General to the President of the UN Security Council, UN Doc S/2014/928, 22 December 2014.

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before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages?¹⁷⁵

Pictet's plea for the broadest possible application of the humanitarian elements of Common Article 3 made sense, from a policy perspective, at the time. Indeed, few would argue for the right to be 'entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages.' But suggesting that the provision applies as a matter of law is another thing entirely; one with broader and darker consequences, particularly for civilians as a result of the permissiveness of the law governing the conduct of hostilities during a NIAC. For given that Hague Law rules are, in general, far less restrictive as to when potentially and intentional lethal use of force may be employed, it is right that this extraordinary legal regime should only be applied when an armed conflict is truly in existence. Thus, in its 2016 commentary on Geneva Convention I, the ICRC noted:

While common Article 3 contains rules that serve to limit or prohibit harm in non-international armed conflict, it does not in itself provide rules governing the conduct of hostilities. However, when common Article 3 is applicable, it is understood that other rules of humanitarian law of non-international armed conflict, including those regarding the conduct of hostilities, also apply. Thus, while there may be no apparent need to discern possible limits to the scope of application of common Article 3, it is important that the rules applicable in armed conflicts apply only in the situations for which they were created. ...

The existence of a situation that has crossed the threshold of an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' must therefore be neither lightly asserted nor denied. Humanitarian law standards must be applied only in the situation – armed conflict – for which they were intended and developed, carefully balancing considerations of military necessity and humanity.¹⁷⁶

Perhaps inevitably given the reticence of many states on the issue, the criteria for a NIAC fell to be determined by judges in a trial under international criminal law. After all, the first line of defence for lawyers seeking to have their clients acquitted of war crimes charges is often that there was no armed conflict at the relevant place and time. If they sustain this position successfully, the charges against the defendant must fail. Duško Tadić was the first accused to stand trial before the ICTY, charged with a range of war crimes, including murder, torture and sexual violence, as well as crimes against humanity (which according to the ICTY Statute were limited to those committed during an armed conflict).¹⁷⁷

¹⁷⁵ Pictet Commentary on GC I (n 15) 50. Over the course of the next eight years, Pictet's thinking evolved further. In his 1958 commentary on GC IV, he wrote that 'Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.' Pictet Commentary on GC IV (n 19) 36. The same language was included in his 1960 Commentary on Geneva Convention III on the Treatment of Prisoners of War (Pictet Commentary on GC III (1960) (n 19) 37), but not in his commentary, published the same year, on Convention II on the Wounded, Sick and Shipwrecked at Sea (Pictet Commentary on GC II (1960) (n 19)).

¹⁷⁶ ICRC commentary on 1949 Geneva Convention I (n 16) paras 389–90.

¹⁷⁷ Though, as the US Department of Defense has observed, he was 'a relatively low-level offender who – had he been caught only a few years later – would have been referred to Bosnia for domestic prosecution.' USDOD December 2016 *Law of War Manual* (n 2), para 1.9.1, fn 155.

Mr Tadić's lawyers argued, *inter alia*, that the Tribunal lacked jurisdiction *ratione materiae*, affirming that the Statute of the ICTY was limited to crimes committed in the context of an IAC, or, alternatively, that there was no armed conflict at all in the region where the crimes with which he was charged were allegedly committed.¹⁷⁸

Before the ICTY's Appeals Chamber, Tadić's lawyers claimed that the concept of armed conflict covered only the precise time and place of actual hostilities. They further argued that the conflict in the Prijedor region (where the alleged crimes were said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks were admitted).¹⁷⁹ The Appeals Chamber rejected the argument, holding that 'the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities'.¹⁸⁰ It affirmed, correctly:

Although the Geneva Conventions are silent as to the geographical scope of international 'armed conflicts,' the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties.

It applied the same logic to NIACs, which it termed, a little loosely, 'internal armed conflicts':

The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions ... also suggests a broad scope. First, like common Article 3, it explicitly protects '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities'.¹⁸¹

In concluding its analysis, the Tribunal famously found that a NIAC exists 'whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹⁸² It further held that even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes were alleged to have been committed, international humanitarian law still applied: 'It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.¹⁸³

¹⁷⁸ *Tadić* (n 3) para 65.

¹⁷⁹ *Ibid*, para 66.

¹⁸⁰ *Ibid*, para 67.

¹⁸¹ *Ibid*, para 68.

¹⁸² *Ibid*, para 70.

¹⁸³ *Ibid*.

What is initially striking about the Appeals Chamber's definition of armed conflict is how little legal analysis it offers in support of its wide-reaching affirmations. It does offer textual and logical justification that once an armed conflict exists on the territory of a state, IHL applies throughout the territory, but its twin criteria of 'protracted armed violence' and the need for armed groups to be 'organised' are proffered without supporting evidence. It is true that Article 1(1) of the 1977 Additional Protocol II refers to 'organized armed groups', but the threshold for application of the Protocol is considerably higher than it is for Common Article 3. Organisation of the armed opposition was proposed during the negotiation of Common Article 3, but this was included among indicative criteria rather than prerequisites.

As for the criterion of protracted armed violence, perhaps the best that can be said in support of the formulation is that, *a priori*, it seems to correspond to Pictet's assertion that a 'short-lived' insurrection is not an armed conflict. This is on the basis that protracted tends to mean, in ordinary parlance, 'lasting for a long time or longer than expected or usual'.¹⁸⁴ The term does not seem to speak to intensity, even though this is clearly a relevant criterion. The ICTY was subsequently constrained to clarify that, despite its ordinary meaning, in fact 'protracted' actually meant 'intense' rather than prolonged. Indeed, by the time Mr Tadić came to trial, the Trial Chamber felt able to claim, without a hint of discomfiture:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.¹⁸⁵

Subsequent cases reaffirmed this understanding.¹⁸⁶

The twin criteria have been supported, or at least cited as relevant, by states and in other judicial fora as relevant to determine the existence of a NIAC. Thus, although neither the ICC Statute nor the subsequent Elements of Crimes define 'armed conflict', the introduction to the Elements of Crimes stipulates that the elements for war crimes under Article 8(2) of the Statute 'shall be interpreted within the established framework of the international law of armed conflict'.¹⁸⁷ In its first-ever trial – of Thomas Lubanga – the ICC explicitly 'derived assistance from the jurisprudence of the ICTY' and cited the definition of armed conflict in *Tadić*.¹⁸⁸

State practice tentatively supports the *Tadić* criteria. The US Department of Defense notes, citing *Tadić*, that the 'intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between non-international armed conflict and "internal disturbances and tensions"'.¹⁸⁹ The French Ministry of Defence cites the *Tadić* criteria, noting that 'the jurisprudence of the former Yugoslav Criminal Tribunal has set out the definition of a non-international armed conflict, and specified what distinguishes

¹⁸⁴ *Collins English Dictionary*.

¹⁸⁵ *Prosecutor v Tadić* (n 77) para 562.

¹⁸⁶ ICTY, *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimagaj*, Judgment (Trial Chamber) (Case No IT-04-84-T), 3 April 2008, paras 40 et seq.

¹⁸⁷ *Lubanga* (n 132) para 531.

¹⁸⁸ *Ibid*, para 533.

¹⁸⁹ USDOD December 2016 *Law of War Manual* (n 2), para 3.4.2.2.

it from situations of internal disturbances and tensions.¹⁹⁰ The UK Ministry of Defence cites the *Tadić* definition as 'guidance' but claims, somewhat opaquely, that the criteria do not 'deal with the threshold of an armed conflict'.¹⁹¹ In contrast, the German *Law of Armed Conflict Manual* does not cite *Tadić* but affirms:

A non-international armed conflict is a sustained, intense, violent confrontation, normally carried out on national territory, between the existing governmental authority and an organised armed group as a non-governmental Party to the conflict, or among such armed, organised groups, even when a governmental authority no longer exists ... Through mere internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, the threshold into non-international armed conflict is not crossed; in these situations LOAC [the law of armed conflict] is thus not applicable.¹⁹²

Thus Germany seems to include the protracted (in its ordinary meaning) nature of the violence ('sustained') as well as its intensity. As discussed in section III.B.ii, only one leading commentator appears to agree that the threshold is so high.

Leading commentators generally support the '*Tadić* definition' (at least as later clarified by the ICTY in its trial judgment in the *Tadić* case). Sivakumaran, for instance, thought that the 'core elements that featured in the various definitions that had been posited previously were thus encapsulated in a neat and concise definition'.¹⁹³ Rogers referred to it as 'useful guidance'.¹⁹⁴ Moir opined that the *Tadić* definition might have settled the issue, noting his view that the Appeals Chamber decision had set the threshold for a NIAC 'actually relatively low'.¹⁹⁵ Akande has asserted that the *Tadić* definition was 'determined by criteria which have been fleshed out by customary international law'.¹⁹⁶ Similarly, the International Group of Experts that drafted the *Tallinn Manual on Cyberwarfare* wrote that the 'holding' in *Tadić* 'is widely accepted as setting forth the two criteria for qualification as a non-international armed conflict – intensity of the hostilities and the involvement of an organized armed group'.¹⁹⁷

ii. *A Higher Threshold?*

Yoram Dinstein does not accept the mainstream view of what amounts to a NIAC for the purposes of customary law and Common Article 3, claiming that the criteria of 'protracted' actually does not mean what the ICTY Trial Chamber said that it meant in 1997. He argues instead that there are two separate criteria in addition to organisation of the armed

¹⁹⁰ Author's translation from French original: 'C'est la jurisprudence du tribunal pénal pour l'ex-Yougoslavie qui a précisé la définition d'un conflit armé non international, et ce qui le distingue de situations de tensions internes et troubles intérieurs.'

¹⁹¹ UK Ministry of Defence (n 2) para 3.3.

¹⁹² German Ministry of Defence (n 20) para 210.

¹⁹³ Sivakumaran (n 156) 164.

¹⁹⁴ APV Rogers, *Law on the Battlefield*, 3rd edn (Manchester, Manchester University Press, 2012) 4.

¹⁹⁵ L. Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press, 2002) 43.

¹⁹⁶ Akande (n 88) 51. He goes on to assert, though, that the test is adopted in Art 8(2)(f) of the ICC Statute. In fact, that provision talks of 'protracted armed conflict', not 'protracted armed violence', which is a different and higher threshold than the one relating to the war crimes resulting from serious violations of Common Article 3 (as covered by Art 8(2)(d) of the Statute). This issue is discussed further in section III.B.ii.

¹⁹⁷ Schmitt (ed) (n 32), Commentary on Rule 23, para 6.

group(s) – the intensity of the violence and its protracted nature – asserting that ‘Violence that is protracted but not intense, or intense but not protracted, does not amount to a NIAC.’¹⁹⁸

In so doing, he cites the decision of ICC Pre-Trial Chamber II in the *Gombo* case as evidence.¹⁹⁹ Indeed, the Chamber does refer to the duration of armed violence as a relevant criterion. But it does so not in relation to the definition *simpliciter* of a NIAC,²⁰⁰ but in relation to the requirement set out in Article 8(2)(f) of the ICC Statute that the type of NIAC for which the Court will have jurisdiction over certain serious violations of Hague Law rules must itself be ‘protracted’. No such requirement is set out with respect to serious violations of Common Article 3, potentially punishable under Article 8(2)(d) of the ICC Statute. Thus, the Chamber affirms:

The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2)(d) of the Statute, which requires the existence of a ‘protracted armed conflict’ and thus may be seen to require a higher or additional threshold to be met – a necessity which is not set out in article 8(2)(d) of the Statute. The argument can be raised as to whether this requirement may nevertheless be applied also in the context of article 8(2)(d) of the Statute. However, irrespective of such a possible interpretative approach, the Chamber does not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as ‘protracted’ in any event.²⁰¹

Why should there be, in the ICC Statute, a higher threshold for individual criminal responsibility for war crimes committed in the conduct of hostilities than for the application of Geneva law? One explanation may be found in the widespread reluctance of states to see their military personnel or ordinary citizens liable to prosecution for offences committed ‘in the heat of battle’. This was already evident in the high threshold set for the application of the 1977 Additional Protocol II, which is only legally binding in cases where a NIAC takes place in the territory of a state party

between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.²⁰²

While not all of these cumulative criteria are picked up in the ICC Statute, the reference to ‘protracted armed conflict’ there should be taken to refer to its duration. In the trial judgment in the *Gombo* case, rendered in March 2016, the ICC considered that ‘the intensity and “protracted armed conflict” criteria’ do not require the violence ‘to be continuous and uninterrupted’. Rather, ‘as set out in the first sentence common’ to Article 8(2)(d) and (f), the ‘essential criterion is that it go beyond “isolated or sporadic acts of violence”’.²⁰³ In adducing

¹⁹⁸ Y Dinstein, *Non-International Armed Conflict in International Law*, 1st edn (Cambridge, Cambridge University Press, 2014) 35.

¹⁹⁹ ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Charges (Pre-Trial Chamber II) (Case No ICC-01/05-01/08), 15 June 2009. As already noted, of the state practice cited, only Germany seems to hold the same view.

²⁰⁰ A phrase coined by Sivakumaran to mean a NIAC governed by the threshold for application of Common Article 3.

²⁰¹ *Gombo* (n 199) para 235.

²⁰² Art 1(1), 1977 Additional Protocol II.

²⁰³ ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment (Trial Chamber III) (Case No ICC-01/05-01/08), 21 March 2016, para 140.

support for its position, the Trial Chamber explicitly referred to the *travaux préparatoires* of Article 8(2)(f), noting that, at the 1998 Rome Diplomatic Conference,

the Bureau's initial proposal for the content of Article 8(2)(f) was taken from Article 1(1) of Additional Protocol II, which referred to 'sustained and concerted military operations'. Several delegates were concerned that the use of this provision would set too high a threshold for armed conflicts not of an international character. In the amended text, in addition to other changes, 'sustained and concerted military operations' was replaced by the phrase that now constitutes part of Article 8(2)(f), 'protracted armed conflict'.²⁰⁴

Although the Trial Chamber's explanation of the criterion under Article 8(2)(f) of 'protracted armed conflict' cannot be considered a gem of flawless clarity, at least two main explanations for the use of the wording may exist. The first, ostensibly supported by a majority of commentators, is that it adds nothing substantive to the threshold set out in Article 8(2)(b) of the Statute. Akande, for instance, suggests that the protracted nature of the conflict (meaning its duration) is nothing more than 'a factor to be assessed in determining intensity'.²⁰⁵ This is not persuasive. The better view, albeit one that is supported by a minority of publicists,²⁰⁶ is that prosecutions for serious violations of Hague Law rules committed during a NIAC are only possible in the ICC if they take place within an armed conflict that is ongoing for a prolonged period of time. While this threshold is not expressly quantified, the Pre-Trial Chamber in the *Gombo* case had observed 'that the period in question covers approximately five months and is therefore to be regarded as "protracted" in any event'.²⁰⁷ This implies, correctly, that the threshold is considerably shorter than this.

Dinstein's position that violence does not amount to a NIAC where it is protracted but not intense, or intense but not protracted, is thus not correct in toto as a matter of law. His first assertion that violence that is protracted but not intense is not a NIAC is true, since it is generally uncontested that isolated and sporadic acts of violence do not constitute an armed conflict. But violence that is intense but not protracted may still amount to a NIAC. Multiple instances of combat over the course of several days may thus be sufficient to ground the existence of such a conflict. Imagine a small, land-locked country ruled by a weak, oppressive government. A group of citizens band together in a military structure with ranks and uniforms, arm and equip themselves, and prepare an all-out assault on the main army and air force bases. There is bitter fighting for many hours on each occasion, with a high number of casualties on each side, but the 'freedom fighters' are successful, effectively destroying the state armed forces and taking the capital in a matter of only a few days. In Dinstein's view, it would appear, this would not be an armed conflict, even though it otherwise appears to fulfil all of the conditions and more under international law to be a NIAC.²⁰⁸

²⁰⁴ Ibid, para 140, fn 318.

²⁰⁵ Akande (n 88) 56. See similarly T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 260; M Bothe, 'War Crimes' in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002) 423; A Cullen, 'The Definition of Non-international Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)' (2007) 12(3) *Journal of Conflict and Security Law* 445.

²⁰⁶ See Vité (n 3) 82 (and the sources he cites).

²⁰⁷ *Gombo* (n 199) para 235.

²⁰⁸ But compare the *Abella* case, discussed in section III.B.iii, which fails to meet the threshold.

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In sum, therefore, the two primary criteria to determine whether or not a NIAC exists are the intensity of the combat between state armed forces and a non-state armed group (or between two or more non-state armed groups) and the level of organisation of the armed group or groups engaged in the fighting. These criteria are now discussed in more detail.

iii. Intense Armed Violence

The intensity of the fighting is the first criterion to assess in any situation of armed violence. As we have seen, it is generally agreed that situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, are not armed conflicts. In its commentary on this provision of the 1977 Additional Protocol II, the ICRC stated:

The concept of internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive: riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions.²⁰⁹

Further, as a matter of law, it would appear that violence must be more intense than is the case with banditry or sporadic terrorist activities, and even an unorganised and short-lived insurrection, since these are also not armed conflicts. This phrasing, which, as noted above, originated in Pictet's 1952 commentary on 1949 Geneva Convention I, was picked up and endorsed by the ICTY in the *Tadić* trial judgment.²¹⁰ This sets quite a high threshold.

For there to be a NIAC, the violence does not need to be widespread across a country, nor does it need to continue for many weeks (much less months), though should these occur in any given scenario they may constitute evidence of both intensity and in all likelihood also organisation.²¹¹ In cases before the ICTY, the Tribunal has tended to consider especially the number and severity of clashes in deciding whether armed violence is sufficiently intense for an armed conflict to exist. In its judgment at trial in the *Mrkšić* case, an ICTY Trial Chamber referred to 'the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time'.²¹² In its judgment in the *Haradinaj* case, the ICTY stated that indicative factors for an armed conflict include 'the number, duration and intensity of individual confrontations'.²¹³ This notion of combat – direct conflict between two opposing armed groups – is particularly important, helping to distinguish a situation of armed conflict from terrorist and counterterrorism activities.²¹⁴

²⁰⁹ ICRC commentary on Art 1(2), 1977 Additional Protocol II, in 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* (Geneva, Martinus Nijhoff, 1987) para 4474.

²¹⁰ *Tadić* (n 77) para 562.

²¹¹ At the same time, of course, a late-night mass brawl at a pub or an afternoon fight at a football match between rival groups of supporters, however vicious it may be, is not even close to reaching the threshold for the existence of an armed conflict.

²¹² See, eg, ICTY, *Prosecutor v Mile Mrkšić, Miroslav Radić, and Veselin Šljivančinić*, Judgment (Trial Chamber II) (Case No IT-95-13/1-T), 27 September 2007, para 407, and sources cited in fn 1592.

²¹³ ICTY, *Prosecutor v Haradinaj*, Judgment (Trial Chamber) (Case No IT-04-84-T), 3 April 2008, para 49.

²¹⁴ *The War Report* argued that the requirement that there be actual combat was a third criterion for a NIAC to exist. Here it is subsumed into the criterion of intensity, as per the approach of the ICTY. See Casey-Maslen (ed) (n 61) 19.

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The aim of this series is to publish important and original pieces of research on all aspects of international law. Topics that are given particular prominence are those which, while of interest to the academic lawyer, also have important bearing on issues which touch upon the actual conduct of international relations. Nonetheless, the series is wide in scope and includes monographs on the history and philosophical foundations of international law.

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Resistance Army' (LRA).⁹⁰ The parties to the conflict, and the means and methods resorted to, remained the same in Sudan as they were in Uganda, and both the intensity of the confrontation and the extent of the devastation remained those of an armed conflict.⁹¹ As a result of the consent of Sudan, there was no *animus belligerendi* between the Governments involved, so that the confrontation between the Ugandan Government and the LRA remained an 'armed conflict not of international character' even when conducted on Sudanese territory. This example is not exceptional. For instance, throughout the 1980s, South African Government forces conducted military operations against the African National Congress (ANC) in Botswana, Mozambique, and Zimbabwe and, in 1991, Liberian rebels started major military operations in Sierra Leone.⁹² In the late 1990's, the Rwandan non-international armed conflict spread to the territory of the Democratic Republic of Congo, particularly to the Kivu Province, with devastating consequences for the civilian population.⁹³ In Southeast Asia, during the Vietnamese conflict of the 1960's and 1970's, North Vietnamese, Viet Cong and US forces conducted military operations on Cambodian territory and, in 1984, the secessionist struggle of the Free Papua Movement in Irian Jaya led to military operations by both the insurgents and the Indonesian Government in neighbouring Papua New Guinea.⁹⁴ More recently, Karen rebels in Myanmar (Burma) have conducted military operations from, and have been pursued by governmental armed forces onto, Thai territory.⁹⁵ In the Middle East, massive Turkish military operations conducted against Kurdish insurgent positions in northern Iraq in 1995 even led to the establishment of Turkish military outposts in the neighbouring State⁹⁶ and, in 2006, Israel invaded Southern Lebanon in an effort to counter cross-border attacks by the Hezbollah.⁹⁷

Admittedly, some of the conflicts described have simultaneously led to parallel international confrontations between the intervening and the invaded State and, arguably, some of them could even be regarded as entirely international. The multitude of available examples illustrates, however, that contemporary non-international armed conflict regularly involves extraterritorial military operations without necessarily transforming the entire confrontation into an

⁹⁰ See, for example: HRW, *LRA Conflict 2002*. US Department of State, Human Rights Report 2002 (Uganda); US Department of State, Human Rights Report 2003 (Uganda).

⁹¹ Qualification of the confrontation between Uganda and LRA as an 'armed conflict', see IFRC, News Release, 6 May 2004. For a description of the devastating consequences of the Ugandan conflict within Sudan, see, for example: HRW, *LRA Conflict 2002*.

⁹² Stedman, *Conflict and Conciliation*, p. 245.

⁹³ ICRC, Annual Report 2000, p. 60.

⁹⁴ Findlay, *Turning the Corner*, pp. 178, 182.

⁹⁵ Brown, *Causes and Regional Dimensions*, p. 593 f.

⁹⁶ Bronson, *Cycles of Conflict in the Middle East and North Africa*, p. 227; Brown, *Causes and Regional Dimensions*, p. 594.

⁹⁷ ICRC, Annual Report 2006, p. 335.

international armed conflict.⁹⁸ While the above examples primarily describe domestic armed conflicts that were subsequently 'exported' or at least 'extended' to a neighbouring State, nothing excludes the qualification as a non-international armed conflict of a situation where organized non-State actors engage in armed confrontations with State armed forces from outside, or entirely outside, the confines of that State.⁹⁹ Conversely, no confrontation that would not be regarded as an armed conflict if it took place entirely within the territory of a State would become a non-international armed conflict simply by the fact that it takes place outside that State's territory.¹⁰⁰ The fact alone that a State is unable or unwilling to exercise extraterritorial jurisdiction over non-State actors which it perceives as a security threat does not entitle that State to switch from the law enforcement paradigm to the paradigm of hostilities.¹⁰¹

e) *The Resulting Concept of Non-International Armed Conflict*

The preceding observations suggest that the modern concept of non-international armed conflict includes all situations of sufficiently intense or protracted armed violence between identifiable and organized armed groups regardless of where they occur, as long as they are not of interstate character. Outside the context of interstate relations, the ability of identifiable parties to sustain a structured campaign of armed violence against each other, and to fulfill their basic obligations under IHL, appear to be sufficient to create a situation of armed conflict.¹⁰² While additional criteria, such as status, origin or territorial control may trigger the applicability of Additional Protocol II, they remain irrelevant for the qualification of a situation as an armed conflict. Conversely, any situation remaining below this minimum threshold would be too elusive and intangible to allow the identification of the involved parties and the conduct of a coordinated collective campaign. In any case, it would certainly go beyond what is conceivable today to assume that the concept of armed conflict could be stretched to include armed violence between individuals or between individuals and State authorities.

⁹⁸ The scenario of 'guerrilla activity from State A, directed against State B, eventually leads to a military action within State A's territory by which State B hopes to destroy the guerrilla bases[...]' was described as a 'classic case' already in 1972 (see Bowett, *Reprisals*, p. 3).

⁹⁹ The (erroneous) claim that the legal qualification of such a situation as 'armed conflict' legitimizes the use of force by the involved non-State actors confuses several distinct fields of international and domestic law, in particular the *jus ad bellum*, the *jus in bello* as well as international and domestic criminal law. See Paust, *No Need to Revise the Laws of War*, p. 2.

¹⁰⁰ While cross-border operations of one State on the territory of another may lead to an international armed conflict between the States involved, such operations do not automatically elevate the confrontation with the pursued non-State actors to the level of a non-international armed conflict.

¹⁰¹ Kremnitzer, *Preventive Killings*, p. 14.

¹⁰² According to Pictet (ed.), *Commentary GC III* (Art 3), p. 37: 'Speaking generally, it must be recognized that the conflicts referred to in Art 3 GC I to IV are armed conflicts, with "armed forces" on either side engaged in "hostilities".'

The Law of Non-International Armed Conflict

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To this end, the following acts are and shall remain prohibited with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.
- (3) No adverse discrimination shall be practised on the basis of differences of race, colour, religion or faith, sex, birth or wealth.

Paragraph 2.—An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Paragraph 3.—The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

Paragraph 4.—The application of the preceding provisions shall not affect the legal status of the parties to the conflict.²⁸

The principal criticism of this proposal, and more generally the approach adopted by the second Working Party, was that it failed to take into account those situations that 'resembled international wars sufficiently close to justify, in the general interest, the application to them of the provisions' of the Geneva Conventions.²⁹

Nevertheless, after some modification in the Special Committee, a vote was taken on the text of the second Working Party as modified. It was rejected by five votes in favour and five votes against, with the delegate presiding over the meeting abstaining; the rules of the Diplomatic Conference being unclear as to whether, in such cases, the tie could be broken by the vote of the presiding delegate. The presiding delegate did indicate, however, that had he not been presiding over the meeting, he would have voted in favour of the text.³⁰ A vote was then taken on the second proposal of the first Working Party. This, too, was rejected, this time by seven votes to four.³¹ In light of this outcome, the Special Committee put before its parent body, the Joint Committee, the second proposal of the first Working Party, the proposal of the second Working Party, as modified, and a proposal of the USSR that had also been rejected.³² In the Joint Committee, the modified proposal of the second Working Party was adopted by 21 votes in favour, 6 votes against, and 14 abstentions.³³ At plenary, after much discussion, the proposal was adopted by 34 votes to 12, with one abstention,³⁴ and became the famous 'common Article 3'.

Having reviewed the drafting history of common Article 3, it is easy to understand why leading commentators have opined that '[n]o one has been completely sure as to what factual situations the article applies' and '[i]t is difficult to know where the border line should properly be drawn'.³⁵ The phrase 'armed conflict not of an international

²⁸ Ibid, 125–6.

²⁹ Ibid, 124 (Report of the Special Committee to the Joint Committee).

³⁰ Ibid, 127.

³¹ Ibid, 123–4.

³² For the text of the proposal of the USSR, see *ibid*, 127. This was rejected, with one vote in favour and nine against. See *ibid*, 100.

³³ Ibid, 37.

³⁴ Ibid, 339.

³⁵ DP Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 *AJIL* 272, 273; GIAD Draper, 'The Geneva Conventions of 1949' (1965-I) 114 *RdC* 63, 82.

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: ibid, 127. This was rejected, with one vote in favour

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character' was introduced into the legal lexicon without explanation. Indeed, the drafting history suggests that this was deliberate and the scope of application of common Article 3 left open on purpose, as every attempt to elaborate or to provide guidance led to disagreement and lack of consensus. It was only through creative ambiguity that agreement could be reached.

It does not follow from the lack of definition that the notion of an armed conflict not of an international character and the scope of application of common Article 3 is entirely uncertain. Even if a precise definition did not prove forthcoming, a range of situations to which common Article 3 is applicable can be discerned.

It has been suggested in the literature that common Article 3 operates in situations that are at the level of a 'civil war',³⁶ or in conditions akin to belligerency.³⁷ However, each of the two suggestions has the potential to mislead. Although the terminology of civil war was used by the Joint Committee to describe the threshold at which common Article 3 applies,³⁸ it was used as a means of distinguishing the requisite degree of violence from riots and disturbances. It was not used as a term of art or to describe a situation equivalent to the recognition of belligerency. Thus, the same report of the Joint Committee goes on to query 'at what point should the suppression of the rising be regarded as a civil war? What criterion should be adopted?'³⁹ Accordingly, common Article 3 was not intended to apply only at the level of a civil war in the legal sense of the term.

Likewise, the threshold of common Article 3 is not the same as that at which belligerency could be recognized. The possibility of recognizing a situation as belligerency continued even after the conclusion of the Diplomatic Conference. This was made clear through a resolution passed by the Diplomatic Conference, which provided that '[t]he Conference considers that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions'.⁴⁰ Furthermore, the text, '[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict', was introduced into common Article 3 precisely so as to prevent the claim that the operation of common Article 3 amounted to recognition of belligerency.⁴¹ Proposals to regulate non-international armed conflict through recognition of belligerency, along the lines of the Australian proposal, also failed.⁴² All this, coupled with the approach of reducing the applicable provisions in order to broaden the scope of application of the Article,⁴³ demonstrates that common Article 3 was not intended to apply only in situations in which belligerency could be recognized.⁴⁴

³⁶ JAC Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 *BYIL* 294, 300; Cullen, *Concept of Non-International Armed Conflict*, above note 5, 26-7, 49, and 54.

³⁷ Cullen, *ibid*, 49; JE Bond, *The Rules of Riot* (Princeton University Press, 1974) 53.

³⁸ *Final Record*, above note 6, Vol II-B, 129 (Report drawn up by the Joint Committee and presented to the Plenary Assembly).

³⁹ *Ibid*. Cf Cullen, *Concept of Non-International Armed Conflict*, above note 5, 49-51.

⁴⁰ Resolution 10, in *Final Record*, above note 6, Vol I, 362.

⁴¹ Gutteridge, *Geneva Conventions*, above note 36, 301; F Siordet, 'The Geneva Conventions and Civil War' (1950) 3 *IRRC Supplement* 201, 212; E Castrén, *Civil War* (Suomalainen Tiedeakatemia, 1966) 88. See also below, 207.

⁴² See above, 157.

⁴³ See above, 159-60.

⁴⁴ Cf the view of Cullen, *Concept of Non-International Armed Conflict*, above note 5, 49-51.

Rather, common Article 3 operates at a lower level and includes situations of insurgency.⁴⁵ As the Inter-American Commission on Human Rights observed in *Tablada*, '[i]t is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory'.⁴⁶

At the other end of the spectrum, it is equally evident that common Article 3 was not designed to operate at the level of internal tensions and disturbances. Although this is nowhere to be found in the text of common Article 3 itself, states indicated that an armed conflict did not include 'a mere riot or disturbances caused by bandits',⁴⁷ situations of 'disorder, anarchy or brigandage',⁴⁸ an 'uprising',⁴⁹ or 'mere strife'.⁵⁰ Indeed, a clause in a later instrument, Additional Protocol II, which provides that it 'shall not apply to situations of internal disturbances and tensions',⁵¹ is considered to be designed more for common Article 3 than the Additional Protocol.⁵² Accordingly, it is difficult to agree with the exhortation in the ICRC Commentaries, subsequently adopted by various courts and tribunals,⁵³ that common Article 3 should be applied 'as wide[ly] as possible' including in situations of banditry.⁵⁴ It is equally difficult to agree with the 'convenient criteria' set out in the ICRC Commentaries for the identification of a non-international armed conflict, despite the fact that they too are repeated in the jurisprudence of international courts and tribunals,⁵⁵ for the reasons set out above.⁵⁶ Nonetheless, they do play a useful, evidentiary role in that, while their absence does not suggest that a non-international armed conflict does not exist, their presence suggests the existence of an armed conflict.

2.2 Advantages and disadvantages of the lack of definition

The lack of definition of an armed conflict not of an international character, and the associated lack of clarity surrounding precisely when the law of non-international armed conflict applies, has been the subject of considerable criticism. It has been suggested that the absence of a definition has allowed states to deny the existence of

⁴⁵ See *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958) 6; L Kortsch, *The Concept of War in Contemporary History and International Law* (Droz, 1956) 238 fn 73.

⁴⁶ *Juan Carlos Abella v Argentina*, Case 11.137, 18 November 1997, OEA/Ser.L/V/II.98, Doc.6 rev, 13 April 1998, para 152 (emphasis omitted).

⁴⁷ *Final Record*, above note 6, Vol II-B, 129 (Report of the Joint Committee to the Plenary Assembly).

⁴⁸ *Ibid*, 10 (France).

⁴⁹ *Ibid*, 11 (Norway).

⁵⁰ *Ibid*, 121 (various unnamed delegations).

⁵¹ Additional Protocol II, Article 1(2).

⁵² G Abi-Saab, 'Non-International Armed Conflicts', in UNESCO (ed), *International Dimensions of Humanitarian Law* (UNESCO, 1988) 217, 229. See also *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)* (Federal Political Department, 1978) Vol 7, 239 (GDR).

⁵³ *Prosecutor v Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para 19; *Abella*, above note 46, para 152.

⁵⁴ JS Pictet (ed), *The Geneva Conventions of 12 August 1949, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958) 36. See also Moir, *Internal Armed Conflict*, above note 5, 35-6; C Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *JCSL* 245, 261.

⁵⁵ See eg *Prosecutor v Boškoski and Tarčulovski*, IT-04-82-T, Judgment, 10 July 2008, para 176.

⁵⁶ See also below, 180-1.

an armed conflict,⁵⁷ and has prevented the application of common Article 3.⁵⁸ There is certainly truth in these propositions, although it is equally true that the lack of definition has allowed for a broad interpretation of the notion of a non-international armed conflict.⁵⁹

Indeed, there are advantages in not defining a non-international armed conflict. The difficulties that are inherent in drawing up a definition are avoided, for example the dangers of over- and under-inclusivity, potentially leading to borderline cases falling outside the scope of the definition.⁶⁰ As one of the experts at the 1972 Conference of Government Experts noted, 'all definitions contained ambiguities; the more they were defined and reaffirmed the more difficult it would become to have the [law] applied and the easier it would become to avoid applying it'.⁶¹ A definition, in this context at least, would also serve to shift the debate rather than resolve it in its entirety. In deciding whether or not a situation amounts to an armed conflict, the discussion would move from the definition of an armed conflict to whether the elements of that definition have been satisfied. A government that denies the existence of an armed conflict will not accept its existence were a definition to exist; rather, it will deny the existence of the requisite elements of the definition.

The question is, then, whether the advantages of the absence of a definition outweigh the disadvantages. To the extent that there remains debate following the existence of a definition, the debate becomes circumscribed by the definition; it is forced to take place within the framework of the definition. Thus, a definition of a non-international armed conflict leaves less room for the parties to argue that such a conflict does or does not exist; it 'diminish[es] the arbitrary evaluation left to each government',⁶² and at a certain point, plausible deniability is lost. A definition is particularly important when seeking to challenge the characterization of one of the parties to the violence. It is more difficult to challenge a determination that a situation does not amount to a non-international armed conflict when there is no agreement as to its definition. For example, the lack of definition allowed Portugal to declare at the time of signing the Geneva Conventions:

As there is no actual definition of what is meant by a conflict not of an international character, and as, in case this term is intended to refer solely to civil war, it is not clearly laid down at what moment an armed rebellion within a country should be considered as having become a civil war, Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law, in all territories subject to her sovereignty in any part of the world.⁶³

⁵⁷ Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May–12 June 1971): Submitted by the International Committee of the Red Cross (1971) Part V: Protection of Victims of Non-International Armed Conflicts, 43.

⁵⁸ Minimum Humanitarian Standards: Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21, E/CN.4/1998/87, 5 January 1988, para 74; Moir, *Internal Armed Conflict*, above note 5, 34; Cullen, *Concept of Non-International Armed Conflict*, above note 5, 57.

⁵⁹ Draper, Geneva Conventions, above note 35, 87; Moir, *Internal Armed Conflict*, above note 54, 32.

⁶⁰ D Ciobanu, 'The Concept and the Determination of the Existence of Armed Conflicts Not of an International Character' (1975) 58 *Rivista di Diritto Internazionale* 43, 48.

⁶¹ 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Conference of Government Experts [Second Session]' (1973) 13 *IRRC* 61, 65.

⁶² Protection of Victims of Non-International Armed Conflicts, above note 57, 41.

⁶³ *Final Record*, above note 6, Vol I, 351. Portugal did not enter this reservation at the time of ratification.

The absence of a definition thus proved unfortunate.

3. The definition approach

The inability to define precisely and authoritatively what was meant by an armed conflict not of an international character lasted up until 1995. Various definitions had been posited in the interim, and certain core elements were common to the various definitions, but each failed to gain sufficient traction to make it sufficiently authoritative. Treaties concluded in the period between 1949 and 1995 simply adopted the 'armed conflict not of an international character' formula of common Article 3 without more.⁶⁴ For its part, Additional Protocol II, concluded in 1977, referred to the notion of a non-international armed conflict, which it left undefined, but also required certain criteria additional to that concept in order for the Protocol to apply.⁶⁵ In this way, Additional Protocol II is of the same mould as other treaties concluded during the period, aside from the additional criteria that are required to exist in order for the instrument to apply.

The requirement of Additional Protocol II that additional criteria be satisfied also introduced the idea of different types of non-international armed conflict for the purposes of international humanitarian law: the 'ordinary' non-international armed conflict (ie a common Article 3 conflict, which is described in the section that follows as a 'non-international armed conflict *simpliciter*'),⁶⁶ and the Additional Protocol II-type armed conflict. Things would become even more complex with the adoption of the Rome Statute of the International Criminal Court (Rome Statute) in 1998 and the possible existence of a third type of non-international armed conflict. These issues are considered further in Section 4 below. For now, the notion of a non-international armed conflict *simpliciter* will be considered.

In 1995, a precise definition of a non-international armed conflict was set out by the ICTY Appeals Chamber in the *Tadić* Decision on Interlocutory Appeal on Jurisdiction. In that Decision, the Appeals Chamber observed that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.⁶⁷ The core elements that featured in the various definitions that had been posited previously were thus encapsulated in a neat and concise definition. An armed conflict not of an international character is, then, 'protracted armed violence between governmental authorities and organized armed groups or between such groups'. Whether the conflict has to be fought 'within a state' is considered below.⁶⁸

⁶⁴ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 19.

⁶⁵ Article 1. The Additional Protocol II threshold is considered more fully below, 182 et seq.

⁶⁶ The terminology of non-international armed conflict *simpliciter* is used in order to distinguish the 'ordinary' non-international armed conflict from the non-international armed conflict that is required to satisfy certain additional elements in order for particular rules to apply. A non-international armed conflict *simpliciter* is the same as a common Article 3 conflict. However, it is not described in that way, given that it would suggest that it applies only to common Article 3 and not to other bodies of international law. In subsequent chapters, when a distinction does not need to be drawn between different types of non-international armed conflict, the simpler language of 'non-international armed conflict' will be used.

⁶⁷ *Tadić* Decision on Interlocutory Appeal on Jurisdiction, above note 2, para 70.

⁶⁸ Chapter 6, 228–32.

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The *Tadić* definition thus singles out two particular characteristics of the situation in order for it to be considered a non-international armed conflict *simpliciter*—the violence and the actors taking part in the violence.⁶⁹ When the *Tadić* Trial Chamber came to apply the definition of the Appeals Chamber to the facts of the case, it noted that '[t]he test applied by the Appeals Chamber . . . focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties' and that it was these two aspects that differentiated a non-international armed conflict from internal tensions and disturbances.⁷⁰ The dual concepts of intensity of violence and organization of the armed group have since been a constant refrain in the jurisprudence of the ad hoc international criminal tribunals.⁷¹

These two concepts have a long and distinguished history. According to Vattel: '[w]hen a party is formed within the State which cease to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a civil war.'⁷² Likewise, a former British Foreign Secretary, George Canning, once described belligerency as 'a certain degree of force and consistency acquired by a mass of population engaged in war'.⁷³ An influential report of a 1962 Conference of Government Experts convened by the ICRC also provided that the existence of a non-international armed conflict cannot be denied if:

the hostile action, directed against a legal government, is of a collective character and consists of a minimum amount of organization. In this respect and without these circumstances being necessarily cumulative, one should take into account such factors as the length of the conflict, the number and framework of the rebel groups, their installation or action on a part of the territory, the degree of the insecurity, the existence of victims, the methods employed by the legal government to re-establish order, etc.⁷⁴

Likewise, in 1972, the ICRC suggested to the Conference of Government Experts the language: 'hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority.'⁷⁵ Along similar lines, the ICRC

⁶⁹ See also International Law Association Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law (2010).

⁷⁰ *Prosecutor v Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para 562.

⁷¹ See eg *Prosecutor v Haradinaj, Balaj and Brahimaj*, IT-04-84-T, Judgment, 3 April 2008, para 38; *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Judgment, 2 September 1998, para 620; *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-T, Judgment, 20 June 2007, para 244; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T, Judgment, 2 August 2007, para 124. See also *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para 233.

⁷² E de Vattel, *The Law of Nations or the Principles of Natural Law*, Volume 3 (CG Fenwick trans) (Carnegie Institution, 1916) 338 (emphasis removed).

⁷³ Statement by the British Foreign Secretary to its Ambassador in Constantinople in the context of the 1825 Greek rebellion, quoted in WE Hall, *A Treatise on International Law* (A Pearce Higgins ed) (Clarendon Press, 1924) 38 fn 1.

⁷⁴ ICRC, 'Humanitarian Aid to the Victims of Internal Conflicts: Meeting of a Commission of Experts in Geneva' (1963) 3 *IRRC* 79, 82–3 (emphases added). This formulation was adopted in Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts: Report submitted by the International Committee of the Red Cross (May 1969) 99–100; Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, A/8052, 18 September 1970, para 134; Protection of Victims of Non-International Armed Conflicts, above note 57, 45–8; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May–12 June 1971): Report on the Work of the Conference (ICRC, August 1971) 39, para 170.

⁷⁵ ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972 (second

Commentary on Additional Protocol II notes that 'the expression "armed conflict" ... introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree'.⁷⁶ Expressed in different ways, then, the requirements of intensity and organization are central features of definitions of non-international armed conflict and are of longstanding origin.⁷⁷ Thus, even though the precise *Tadić* formulation was set out in 1995, its component elements are steeped in history. What the ICTY managed to do was to encapsulate in a brief sentence the core elements of a definition that had been recognized decades and centuries earlier.

What is particularly important about the *Tadić* definition, over and above those of previous definitions, is the authority of the entity from which it emanated and the traction it has since gathered. The definition caught on, and in the years since it was adumbrated, it has been widely recited. The precise formulation set out in the *Tadić* Decision has been adopted by other international criminal courts such as the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC).⁷⁸ Importantly, it has also been utilized outside of international criminal law circles, such as by international commissions of inquiry and fact-finding missions,⁷⁹ special procedures mechanisms of the Human Rights Council,⁸⁰ the International Law Commission,⁸¹ national courts,⁸² national legislation,⁸³ state military manuals,⁸⁴ and the ICRC.⁸⁵ It has been used to define a non-international armed conflict for the purposes of *inter alia* asylum law and the law of treaties.⁸⁶ Thus, the definition is as pertinent for international humanitarian law, international human rights law, international refugee law, and general public international law, as it is for international criminal law.

session): II Commentary, Part Two, Documentary Material Submitted by the International Committee of the Red Cross (Geneva, January 1972) 4.

⁷⁶ 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, 1987) 1319. See also Pictet (ed), *Commentary on the Fourth Geneva Convention*, above note 54, 36.

⁷⁷ See also the various definitions of commentators. For example, D Ciobanu, 'The Concept and the Determination of the Existence of Armed Conflicts Not of an International Character' (1975) 58 *Rivista di Diritto Internazionale* 43, 56; S Junod, 'Additional Protocol II: History and Scope' (1983-4) 33 *American University Law Review* 29, 30; C Greenwood, 'Scope of Application of Humanitarian Law', in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) 39, 47-9.

⁷⁸ See eg *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, 2 March 2009, para 95; *Lubanga* Decision on the Confirmation of Charges, above note 71, para 233.

⁷⁹ See eg Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para 181; 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, 1 June 2011, para 63.

⁸⁰ See eg Report on the Situation of Human Rights in Somalia, E/CN.4/1997/88, 3 March 1997, paras 53-4; Final Report of the Special Rapporteur on Terrorism and Human Rights, E/CN.4/Sub.2/2004/40, 25 June 2004, fn 23. See also Children and Armed Conflict: Report of the Secretary-General, A/62/609-S/2007/757, 21 December 2007, para 5 fn 2.

⁸¹ First Report on the Effects of Armed Conflicts on Treaties, A/CN.4/627, 22 March 2010, para 30 (Draft Article 2(b)).

⁸² See eg *HH and Others v Secretary of State for the Home Department* [2008] UKAIT 22.

⁸³ See eg [Philippines] Act on Crimes against International Humanitarian Law, Genocide, and other Crimes against Humanity, section 3(c).

⁸⁴ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 29.

⁸⁵ 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?: International Committee of the Red Cross (ICRC) Opinion Paper', March 2008, 4.

⁸⁶ *HH and Others v Secretary of State for the Home Department* [2008] UKAIT 22; First Report on the Effects of Armed Conflicts on Treaties, A/CN.4/627, 22 March 2010, para 30 (Draft Article 2(b)).

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that 'the expression "armed conflict" ... of open hostilities between armed forces ...'.⁷⁶ Expressed in different ways, then, are central features of definitions of non-international armed conflict.⁷⁷ Thus, even though the component elements are steeped in history, they can be encapsulated in a brief sentence the core of which has been in place for decades and centuries earlier.

The *Tadić* definition, over and above those of international law, is the source of the definition from which it emanated and the source of the law on which it is based. It was brought on, and in the years since it was brought on, a precise formulation set out in the *Tadić* Trial Chamber I. International criminal courts such as the Special Tribunal for Lebanon (STL),⁷⁸ the International Criminal Court (ICC),⁷⁹ the International Criminal Tribunal for Rwanda (ICTR),⁸⁰ and the International Criminal Tribunal for the former Yugoslavia (ICTY).⁸¹ Importantly, the definition is as pertinent for international humanitarian law, international refugee law, and international criminal law.

Material Submitted by the International Committee of the Red Cross (ICRC).

See, e.g., *Commentary on the Additional Protocols to the Geneva Conventions of 1949* (ICRC, 1987) 1319. See also Pictet (ed.), *Commentary on the Geneva Conventions of 1949*, note 54, 36.

For example, D Ciobanu, 'The Concept and Scope of Non-International Armed Conflict' (1975) 58 *International and Comparative Law Quarterly* 581; International Protocol II: History and Scope' (1983-4) 10 *International and Comparative Law Quarterly* 1000; Wood, 'Scope of Application of Humanitarian Law in Armed Conflicts' (Oxford University Press, 2004) 15-17.

See, e.g., *Tadić* Trial Chamber I, Judgment, 2 March 1997, paras 641-642, 644-645, 647-648, 650-651, 653-654, 656-657, 659-660, 662-663, 665-666, 668-669, 671-672, 674-675, 677-678, 680-681, 683-684, 686-687, 689-690, 692-693, 695-696, 698-699, 701-702, 704-705, 707-708, 710-711, 713-714, 716-717, 719-720, 722-723, 725-726, 728-729, 731-732, 734-735, 737-738, 740-741, 743-744, 746-747, 749-750, 752-753, 755-756, 758-759, 761-762, 764-765, 767-768, 770-771, 773-774, 776-777, 779-780, 782-783, 785-786, 788-789, 791-792, 794-795, 797-798, 799-800, 802-803, 805-806, 808-809, 811-812, 814-815, 817-818, 820-821, 823-824, 826-827, 829-830, 832-833, 835-836, 838-839, 841-842, 844-845, 847-848, 850-851, 853-854, 856-857, 859-860, 862-863, 865-866, 868-869, 871-872, 874-875, 877-878, 880-881, 883-884, 886-887, 889-890, 892-893, 895-896, 898-899, 901-902, 904-905, 907-908, 910-911, 913-914, 916-917, 919-920, 922-923, 925-926, 928-929, 931-932, 934-935, 937-938, 940-941, 943-944, 946-947, 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conflicts that did not involve government forces. The involvement of governmental forces is not, then, integral to the concept of a non-international armed conflict, although it is an important aspect of an Additional Protocol II conflict.²⁰⁵

A third requirement that is sometimes cited is that an armed group should fight with a particular motive in mind, usually a political motive. In this context, it should be noted that the motives of the armed group, as indeed the motives of the state, are irrelevant to the decision as to whether or not a non-international armed conflict exists.²⁰⁶ Armed groups may, and do, fight for different reasons. Some seek to create a new state, others to overthrow the government, still others for greater autonomy. Some fight to claim a share of natural resources; others wish to engage in ethnic cleansing, to pillage, or to terrorize. The reasons that motivate the fighting are irrelevant insofar as the existence of a non-international armed conflict is concerned.

4. Prerequisites for particular rules to apply

A non-international armed conflict *simpliciter* is judged by reference to two elements: the intensity of the violence and the organization of the non-state armed group. Once a non-international armed conflict *simpliciter* exists, a body of international law comes into force that regulates the conflict.²⁰⁷ However, as alluded to in the previous section, in order for particular rules of conventional international humanitarian law to come into force, certain additional conditions need to be satisfied. The additional criteria are the subject of this part.

4.1 Protocol II, Additional to the Geneva Conventions of 1949

Two decades after the adoption of the 1949 Geneva Conventions, it became apparent that non-international armed conflicts were in need of further regulation.²⁰⁸ The ICRC commenced work on the subject and a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law was convened in 1974. The text of the Protocol that was put before the Diplomatic Conference and drafted by the ICRC provided that it would apply 'to all armed conflicts not covered by Article 2 common to the Geneva Conventions of 12 August 1949, taking place between armed forces or other organized armed groups under responsible command'.²⁰⁹ The Protocol was intended to have the same scope of application as common Article 3. The only requirement explicitly set out in the text, namely that the armed groups be organized and under responsible command, spelt out what was implicit in the notion of an armed conflict not of an international character.²¹⁰

However, a number of states took the view that the scope of application of the Protocol would benefit from further elaboration. Some states pushed for a definition of the term 'non-international armed conflicts'.²¹¹ Others suggested adding 'elements such as duration, degree of intensity of the conflict, and area of occupation by the

²⁰⁵ On which, see below, 184.

²⁰⁶ *Limaj* Trial Judgment, above note 87, para 171.

²⁰⁷ For the content of that body, see Chapters 8 and 9. For its scope of application, see Chapter 7.

²⁰⁸ The issue is considered in greater detail in Chapter 2, 42 et seq.

²⁰⁹ Draft Protocol Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Article 1(1), in *Official Records*, above note 52, Vol I, Part Three, 33.

²¹⁰ See above, 174-5.

²¹¹ *Official Records*, above note 52, Vol 8, 209, para 40 (France). See also 212, para 57 (Viet-Nam).

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²²² Ibid, Vol 10, 40, para 92.

1. The present Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by article 1 of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol.
2. The present 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 was ultimately adopted by 58 votes in favour, 5 votes against, and 29 abstentions.²²³

The scope of application clause of Additional Protocol II is a much misunderstood provision. Bearing in mind the counsel of the chairman of the working group that 'it would be extremely inadvisable to seek to interpret' the provision as it 'represented a very fragile consensus reached only after lengthy consideration',²²⁴ this section will do precisely that. In particular, it will consider the extent to which Additional Protocol II contains requirements additional to those required for a non-international armed conflict *simpliciter* to exist in order for the Protocol to be applicable.

4.1.1 State armed forces

One very real prerequisite of Additional Protocol II is that governmental forces must be a party to the conflict. Additional Protocol II requires that the conflict be between the armed forces of a High Contracting Party and 'dissident armed forces or other organized armed groups'.²²⁵ Thus, the Protocol applies to a conflict that is fought between the armed forces of a state and that part of the armed forces that rises up against it, as well as to a conflict between the armed forces and a non-state armed group. An armed conflict between armed groups is not covered by the Protocol. Indeed, Austria found it 'hard to see how Protocol II could be applied without Government forces being involved'.²²⁶ However, it is the Austrian position that is difficult to understand. If the Protocol can be applied by an armed group that is fighting against the state, there would seem to be no reason why it cannot be applied by an armed group that is fighting against another armed group. The inapplicability of the Protocol to such conflicts is a major failing of the Protocol.

4.1.2 Organized armed groups and responsible command

As discussed above,²²⁷ both the requirement of organization and the associated idea of 'responsible command' are fundamental to the very notion of a non-international armed conflict. Thus, during the 1974-7 Diplomatic Conference, Norway opined that 'there could not be an armed conflict in the sense of [common Article 3] except in cases where hostilities broke out between armed forces or other organized groups under responsible command'.²²⁸ Nonetheless, there is a difference in the *degree* of

²²³ Ibid, Vol 7, 70, para 65.

²²⁴ Ibid, 66, para 38.

²²⁵ Article 1.

²²⁶ *Official Records*, above note 52, Vol 8, 216, para 9.

²²⁷ See above, 170-80.

²²⁸ *Official Records*, above note 52, Vol 8, 217, para 13.

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organization required of an armed group for the purposes of the existence of a non-international armed conflict *simpliciter* and for a non-international armed conflict to which Additional Protocol II applies. Additional Protocol II requires a higher degree of organization on the part of the armed group as compared with a common Article 3 conflict, the difference in organization being 'logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts... By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application'.²²⁹ There is thus a close nexus between the organization of the armed group and the content of the applicable law. As the substantive law of non-international armed conflict increases, presenting more numerous and greater obligations on armed groups, the degree of organization required of them also increases.²³⁰

4.1.3 Territorial control

A second additional requirement for the applicability of the Protocol relates to territorial control on the part of the armed group. The orthodox view holds that the non-state armed group must exercise control over a sizeable part of territory in order for Additional Protocol II to apply.²³¹ In terms of the amount of territory required to be in the hands of the armed group, views at the Diplomatic Conference ranged from 'non-negligible' through to 'fairly-large', 'substantial', and 'considerable'.²³² Some states, such as Indonesia, took the view that the opposition forces should 'exercise continuous and effective control over a substantial or non-negligible part of its territory for such a prolonged period as to enable them to carry out sustained and concerted military operations of a high intensity and to implement this Protocol'.²³³ By contrast, others considered that a requirement of territorial control was 'useless' as it 'opened the door to conflicting interpretations which would make it impossible to implement' the Protocol.²³⁴ For Egypt, the requirement of territorial control:

was too restrictive in view of the nature of modern, and particular guerrilla, warfare. In armed conflict situations characterized by high mobility, territorial control continuously changed hands, sometimes alternating between day and night, to the point of becoming meaningless. Other forms of intense armed conflict, such as urban guerrilla armed conflict would not fulfil the requirement of territorial control. Such a requirement would then exclude from the ambit of Protocol II many, if not most, of the contemporary types of internal armed conflict and would confine it to the relatively rare cases of characterized civil war; it would thus severely limit its real significance and usefulness.²³⁵

So how much territory is required to be under the control of the armed group? To phrase the question in this manner, and to focus on the quantitative dimension of territorial control, is to misconstrue the nature of the requirement. As the wording of the provision makes clear, there is no requirement of territorial control in and of itself; rather, what is required is that the armed group 'exercise such control over a part of its

²²⁹ *Boškoski Trial Judgment*, above note 55, para 197.

²³⁰ See above, 66–8.

²³¹ See eg International Law Association Report on Armed Conflict, above note 69, 12.

²³² *Official Records*, above note 52, Vol 8, 213, para 60 (Vietnam); Vol 7, 71, para 71 (Indonesia); Vol 4, 8 (Brazil); Vol 7, 84 (Cameroon).

²³³ *Ibid*, Vol 7, 71, para 71 (Indonesia).

²³⁴ *Ibid*, 67, para 47 (Syria). See also 82 (Kenya).

²³⁵ *Ibid*, Vol 8, 235, para 32.

²²⁵ Article 1.

52, Vol 8, 217, para 13.

territory as to enable [it] to carry out sustained and concerted military operations and to implement the . . . Protocol'.²³⁶ The key phrase is 'exercise *such control* over a part of its territory *as to enable*' the group. Thus Vietnam considered that territorial control 'was proof of the seriousness and high degree of intensity of the hostilities', while Canada observed that '[t]he key to the height of threshold . . . lies in the expression "to implement this Protocol"'.²³⁷ Territorial control is, then, an enabling element, one that demonstrates the ability of the armed group. It is a qualitative issue rather than a quantitative one.²³⁸ The *Akayesu* Trial Judgment reflects the position best in noting that the armed group 'must be able to dominate a *sufficient* part of the territory *so as to* maintain sustained and concerted military operations and to apply Additional Protocol II'.²³⁹ Although 'sufficient' is a less clear descriptor than 'substantial', for sufficiency is not an objective standard, it is precisely this inherently variable quality of the term that best fits the rationale behind the requirement and reflects the language of the Protocol. It serves to refocus attention away from the territorial control and towards the military operations and the ability of the armed group to apply the Protocol. It is the intensity of the violence and the ability to comply with the substantive law that is determinative, and not the quantum of territory controlled.

Insofar as implementation of the Protocol is concerned, only two Protocol rules require some form of territorial control—those relating to the detention and internment of persons and the requirement of due process guarantees in the convening of courts. Other rules, such as the fundamental guarantees and the prohibition on attacks against the civilian population, are not dependent on the armed group exercising territorial control. Yet both rules are also rather nuanced. In certain cases, the armed group will not take any prisoners, releasing them instead after confiscating their weapons and providing them with a lecture.²⁴⁰ In other cases, detainees will be transferred across a border to a friendly state in which the armed group is located.²⁴¹ With respect to due process guarantees, the law of non-international armed conflict does not require courts to be convened; only that persons are not to be sentenced prior to a fair trial. Mobile courts may also be used. Furthermore, if an armed group decides not to detain or intern persons and not to sentence individuals, they will be able to implement the Protocol without exercising any territorial control. In this situation, despite the absence of territorial control on the part of the armed group, it is submitted that the Protocol requirement would be met. It follows from the requirement that the armed group 'exercise such control over a part of its territory *as to enable* [it] to carry out sustained and concerted military operations and to implement the . . . Protocol' that if the armed group can do so without the enabling element, the requirement is still satisfied. The defining aspect of the Protocol is the intensity of the violence and the implementation of the Protocol and not the territorial control.²⁴²

²³⁶ Additional Protocol II, Article 1.

²³⁷ *Official Records*, above note 52, Vol 8, 213, para 60; Vol 7, 77.

²³⁸ See S Junod, 'Additional Protocol II: History and Scope' (1983–4) 33 *American University Law Review* 29, 37; M Bothe, KJ Partsch, and WA Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff, 1982) 627. See also, hinting at this approach, C Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook on Human Rights* 103, 120; Kress, East Timor, above note 110, 417–18. The point is recognized in, but criticized by, Moir, *Internal Armed Conflict*, above note 5, 108.

²³⁹ *Akayesu* Trial Judgment, above note 71, para 626 (emphasis added).

²⁴⁰ See below, 297 and 300–1.

²⁴¹ See below, 297.

²⁴² In a number of cases, ICTR and SCSL Trial Chambers have de-linked territorial control from the ability to implement the Protocol. See eg *Akayesu* Trial Judgment, above note 71, para 623; *Musema* Trial Judgment, above note 147, para 254; *RUF* Trial Judgment, above note 78, para 97.

concerted military operations and to 'exercise *such control* over a part of its considered that territorial control 'was a necessity of the hostilities', while Canada's threshold... lies in the expression "to control is, then, an enabling element, one that reflects the position best in noting a *sufficient* part of the territory *so as to* control and to apply Additional Protocol II or than 'substantial', for sufficiency is an entirely variable quality of the term that reflects the language of the Protocol. territorial control and towards the military to apply the Protocol. It is the intensity of substantive law that is determinative,

concerned, only two Protocol rules relating to the detention and internment process guarantees in the convening of detainees and the prohibition on attacks are relevant on the armed group exercising territorial control. In certain cases, the armed group must instead after confiscating their property. In other cases, detainees will be held in which the armed group is located.²⁴¹ Rules of non-international armed conflict apply to persons are not to be sentenced prior to a trial. Furthermore, if an armed group decides to detain individuals, they will be able to exercise territorial control. In this situation, the control of the armed group, it is submitted follows from the requirement that the armed group's territory *as to enable* [it] to carry out to implement the... Protocol' that if territorial control is an enabling element, the requirement is still the intensity of the violence and the territorial control.²⁴²

Should armed groups choose to detain prisoners or convene courts, as they often do, the amount of territory needed to be under the control of the armed group in order to enable them to do so will be minimal. Thus, the *RUF Trial Chamber* held that 'the RUF had the capacity to implement the provisions of Additional Protocol II on the territory that they seized and controlled'.²⁴³ Large swathes of the country need not be controlled by the armed group in order for it to be able to house prisoners or to convene courts. In this respect, the Protocol requirement will be satisfied with even minimal territorial control. Likewise, the actual territory that is under the control of the armed group need not be fixed but could vary, with one village being controlled one day and a neighbouring village the next. Thus, when the International Commission of Inquiry on Darfur noted that, in 2005, the Sudan Liberation Movement/Army (SLM/A) exercised control over 'certain rural areas' but 'given its operation as a mobile guerrilla group, these areas of control are not fixed',²⁴⁴ such control may very well suffice for the purposes of the Protocol. Provided the armed forces of the state are prevented from controlling the relevant area, as with the declaration of 'no go areas' which have their intended effect and which allow the group to carry out hostilities and implement the Protocol, the Additional Protocol II requirement would also be satisfied.²⁴⁵ As the ICRC Commentary on Additional Protocol II indicates, 'the extent of territory' the non-state armed group 'can claim to control will be that which escapes the control of the government armed forces',²⁴⁶ a statement that was followed by the *Akayesu Trial Chamber*.²⁴⁷ Complete and effective control over territory is thus not required of the armed group.²⁴⁸ Accordingly, it is by no means the case that, as '[g]uerrilla troops... mostly lack any air forces... more often than not guerrilla troops cannot pretend to be in control of a given area in the sense required by Article 1' of the Protocol.²⁴⁹

The essential point is that it is the ability to carry out sustained and concerted military operations and to implement the Protocol that is the crucial feature of the Protocol and not the quantum of territory controlled by the armed group. The territorial control is an enabling element for the operations and the implementation of the Protocol. Thus, it is linked to the substance of the rules themselves. This is evident from Switzerland's assessment in 1987 as to the applicability of the Protocol to the armed conflict in El Salvador. Switzerland indicated that the Protocol was applicable 'because the guerrilla movement exercises a level of control over certain parts of the territory which enable it to take care of the sick and wounded, treat prisoners humanely and also comply with the other provisions contained in Article 4 of the Protocol'.²⁵⁰

²⁴³ *RUF Trial Judgment*, *ibid*, para 978.

²⁴⁴ Darfur Commission Report, above note 194, para 132.

²⁴⁵ Cf LC Green, 'Low-Intensity Conflict and the Law' (1996-7) 3 *ILSA Journal of International and Comparative Law* 493, 506, who takes the view that 'no go areas' are insufficient.

²⁴⁶ ICRC, *Commentary on the Additional Protocols*, above note 76, 1353. See also, in the context of national liberation movements, G Abi-Saab, 'Wars of National Liberation and the Laws of War' (1972) 3 *Annales d'Etudes Internationales* 93, 97.

²⁴⁷ *Akayesu Trial Judgment*, above note 71, para 626.

²⁴⁸ Cf H McCoubrey, *International Humanitarian Law* (Dartmouth, 1990) 172, who takes the view that 'quasi-governmental control of territory' is required.

²⁴⁹ C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2008) 305-6.

²⁵⁰ 'Law of Armed Conflicts: Conditions Governing the Application of Protocol II Additional to the 1949 Geneva Conventions (case of El Salvador)' (1987) 43 *Annuaire Suisse de Droit International* 185, reproduced and translated in M Sassòli, AA Bouvier, and A Qunitin, *How Does Law Protect in War? Volume II* (ICRC, 2011) 1330.

²⁴² Vol 7, 77.

²⁴³ *Scope* (1983-4) 33 *American University Law Review* 100, 101. See also, *Rules for Victims of Armed Conflicts* (Martinus Nijhoff, 1988) 100, 101. Kress, 'War Crimes Committed in Non-International Criminal Justice' (2000) 30 *Journal of International Criminal Justice* 100, 101. The point is emphasized, above note 5, 108. (emphasis added).

²⁴⁴ *ibid*, above note 71, para 623; *ibid*, above note 78, para 97.

4.1.4 Sustained and concerted military operations

Given that territorial control is required, in part, in order that the armed group be enabled to carry out 'sustained and concerted military operations', it is important to understand what that phrase means. On one view, sustained and concerted military operations require a higher level of intensity of violence than that required for an armed conflict *simpliciter*. Thus, the requirement has been described as '[p]erhaps the most significant' of the Protocol criteria.²⁵¹ Indeed, according to the *Boškoski* Trial Chamber, 'the degree of organization required to engage in "protracted violence" is lower than the degree of organization required to carry out "sustained and concerted military operations"'.²⁵² There is also some suggestion that the operations must be 'continuous and planned'.²⁵³

Whether the notion of sustained and concerted military operations does indeed presuppose a higher level of violence than protracted armed violence depends in large part on the meaning attributed to the latter concept.²⁵⁴ Sustained is an element of duration and means ongoing rather than non-stop; and this notion is covered by the idea of protraction. Thus, it is not entirely clear that the Additional Protocol II notion does require a greater level of violence than that required for a non-international armed conflict *simpliciter*. This view is supported implicitly by a number of ICC pre-trial chamber decisions, which have utilized the language of Additional Protocol II, referring to notions of sustained and concerted military operations,²⁵⁵ even though the Additional Protocol II standard need not be met for the purposes of the ICC.²⁵⁶ This suggests that the level of violence required for a non-international armed conflict *simpliciter* is the same as that required by Additional Protocol II, namely sustained and concerted military operations or protracted armed violence.

A final uncertainty surrounding sustained and concerted military operations relates to whether the armed group has to be in a position to carry out sustained and concerted military operations or whether it actually has to carry out the relevant operations. The phrase 'to enable' could be interpreted in either manner: either the territorial control assists the group with its actual carrying out of operations, or it imbues it with the ability to do so.

4.1.5 Implementation of the Protocol

The same question arises in relation to the implementation of the Protocol. The language 'as to enable [the armed group] to implement this Protocol' could be

interpreted as requiring the armed group to require its actual implementation. The Diplomatic Conference, which was convened by the armed group 'possessed the ability to do so', to which France proposed that the acts acting within a defined area should enforce the Convention'.²⁵⁷ The Military Manual considers that the armed group must be able to implement the Protocol that it is required to implement. The Protocol to be applicable to the armed group requires it. One domestic court has held that of international humanitarian law, the purposes of Additional Protocol II are not covered by the Protocol. However, great care may simply be that the Protocol is not applied in other approach too readily.

Ability to implement the Protocol reflects the drafting history of the Protocol. The Experts, which led to the Protocol, were made, including the Experts, observing and ensuring the implementation of this Protocol',²⁶¹ and that the Experts desire and ability to ensure the implementation. Likewise, in early drafts of the Protocol, reciprocity might... render the Protocol that its adversary disregard.

Subsequent practice is that the question is one of the Experts. Frente Farabundo Martí for the Defenseless effectively is of little importance. The actual implementation is of the armed group possesses the ability to implement of international humanitarian law.

²⁵¹ Cullen, *Concept of Non-International Armed Conflict*, above note 5, 103.

²⁵² *Boškoski* Trial Judgment, above note 55, para 197. See also A Zimmermann, 'Preliminary Remarks on para 2(c)-(f) and para 3: War Crimes Committed in an Armed Conflict not of an International Character', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck, 2008) 475, 501; Cullen, *Concept of Non-International Armed Conflict*, above note 5, 128 and 142.

²⁵³ *Akayesu* Trial Judgment, above note 71, para 626. See also *Niyonteze*, Military Court of Cassation, Decision of 26 May 2000, reproduced in M Sassòli, AA Bouvier, and A Quintin, *How Does Law Protect in War? Volume III* (ICRC, 2011) 2233, 2208. Cf M Bothe, 'Article 3 and Protocol II: Case Studies of Nigeria and El Salvador' (1981-2) 31 *American University Law Review* 899, 906.

²⁵⁴ On which, see above, 167-70.

²⁵⁵ *Katanga* Decision on the Confirmation of Charges, above note 128, para 239; *Al-Bashir* Decision on Arrest Warrant, para 59.

²⁵⁶ See below, 192-3.

²⁵⁷ *Final Record*, above note 5, 103.

²⁵⁸ UK Ministry of Defence, *International Humanitarian Law* (2004) 32 fn 22.

²⁵⁹ *Peru v Guzmán* *Reino Unido* Chamber, 13 October 2006.

²⁶⁰ See *Boškoski* Trial Judgment, above note 55, para 197.

²⁶¹ Proposal CE/COM II, and Development of International Humanitarian Law, 3 May-3 June 1972: Report.

²⁶² Proposal CE/COM II, and Development of International Humanitarian Law, 3 May-3 June 1972: Report.

²⁶³ ICRC, Draft Revised Rules of International Humanitarian Law, 1987, paras 1-3. See also Remarks and Proposals for the Consideration of the Diplomatic Conference on the Draft Revised Rules of International Humanitarian Law, 1987, paras 1-3.

²⁶⁴ 'Law of Armed Conflict' the 1949 Geneva Convention.

²⁶⁵ *Boškoski* Trial Judgment, above note 55, para 197.

interpreted as requiring the ability of the group to implement the Protocol or it could require its actual implementation. The equivalent issue was considered during the 1949 Diplomatic Conference, with the United States querying the position whereby the armed group 'possessed the means for enforcing the Convention but was not disposed to do so', to which France proposed the requirement of 'an authority responsible for its acts acting within a defined territory, and declaring their readiness to observe and to enforce the Convention'.²⁵⁷ However, these proposals came to nothing and the UK Military Manual considers the matter 'unclear'.²⁵⁸

Despite this purported lack of clarity, it is submitted that it must be the ability to implement the Protocol that is decisive. It would be circular, to say the least, were the Protocol to be applicable only in situations in which the armed group actually implements it. One domestic court has taken this position, holding that systematic violations of international humanitarian law suggested a lack of responsible command for the purposes of Additional Protocol II,²⁵⁹ and by implication an inability to implement the Protocol. However, great care needs to be taken before reaching such a conclusion, as it may simply be that the Protocol is being violated rather than not being in force.²⁶⁰ Any other approach too readily excuses the parties for their wrongful conduct.

Ability to implement the Protocol rather than its actual implementation also best reflects the drafting history of the provision. During the 1972 Conference of Government Experts, which led to the drafting of Additional Protocol II, various proposals were made, including that 'the Parties to the conflict have the material means of observing and ensuring the observance of the obligations of common Article 3 and of this Protocol',²⁶¹ and that the responsible command has 'effective authority ensuring its desire and ability to ensure observance of the rules of Humanitarian Law in force'.²⁶² Likewise, in early drafts of common Article 3, it was stated that, '[t]he condition of reciprocity might . . . render [application] . . . valueless, as one Party could always allege that its adversary disregarded some specific clause of the Convention'.²⁶³

Subsequent practice is along similar lines. For example, Switzerland took the view that the question is one of ability to implement the Protocol; 'whether or not they [the Frente Farabundo Martí para la Liberación Nacional (FMLN) of El Salvador] do so effectively is of little importance'.²⁶⁴ Ability to implement the Protocol rather than its actual implementation is also evident from the *Boškoski* Trial Judgment, which speaks of the armed group possessing 'the organisational *ability* to comply with the obligations of international humanitarian law'.²⁶⁵

²⁵⁷ *Final Record*, above note 6, Vol II-B, 43.

²⁵⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 32 fn 22.

²⁵⁹ *Peru v Guzmán Reinoso and Others*, No 650-03, Peru, Judgment of the National Criminal Chamber, 13 October 2006 [ILDC 670 (PE 2006) para 470].

²⁶⁰ See *Boškoski* Trial Judgment, para 205.

²⁶¹ Proposal CE/COM II/14, in ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, 3 May–3 June 1972: Report on the Work of the Conference: Volume II (Geneva, July 1972) 35–6.

²⁶² Proposal CE/COM II/18, in *ibid*, 36.

²⁶³ ICRC, Draft Revised or New Conventions for the Protection of War Victims (ICRC, 1948) 6. See also Remarks and Proposals submitted by the International Commission of the Red Cross: Document for the Consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva (April 21, 1949) (1949) 38.

²⁶⁴ 'Law of Armed Conflicts: Conditions Governing the Application of Protocol II Additional to the 1949 Geneva Conventions (case of El Salvador)', above note 250.

²⁶⁵ *Boškoski* Trial Judgment, para 205.

4.1.6 Concluding thoughts

The scope of application clause of Additional Protocol II gave rise to negative reaction at the Diplomatic Conference. Some states considered that the conditions set out were 'so numerous and so stringent' as to make the Protocol govern 'only a very limited number of internal conflicts',²⁶⁶ and others took the view that the scope of application clause rendered the Protocol 'worthless'.²⁶⁷ Indeed, the report of the US delegation to the Diplomatic Conference provided that, '[g]iven all of these qualifications, it will be a dull and unimaginative government that will be unable to find an excuse not to apply the Protocol to its own international [*sic*: non-international] armed conflict'.²⁶⁸ Other states, however, took the view that the clause served the purpose of limiting regulation of conflicts that were of a 'significant intensity',²⁶⁹ while others yet expressed the position that the 'qualifications are a reflection of the factual and practical circumstances that would in fact have to exist if a Party to the conflict could be expected to implement the provisions of the Protocol'.²⁷⁰ So many different opinions were expressed on the threshold that it has been suggested that 'it is impossible to trace any common understanding'.²⁷¹

It is thus unfortunate that the scope of application clause has been interpreted in the manner that it has, higher than some at the Diplomatic Conference intended it to be, and contrary to the wording of the provision itself. While the scope of application clause of the Protocol certainly has its disadvantages, such as the requirement that a state's armed forces be a party to the conflict, it is the subsequent and unnecessary interpretation of the clause that has limited its scope of application. This interpretation of Additional Protocol II has had a negative impact on the practice of states. For example, for many years Colombia refused to ratify Additional Protocol II for fear that to do so would be to recognize the armed groups as belligerents and grant them status.²⁷² This followed the commonly held view that the Additional Protocol II threshold presupposed the existence of the conditions required for the recognition of belligerency.²⁷³ Yet that is not the case and while it is certainly true that some states at the Diplomatic Conference took this view,²⁷⁴ many others did not.²⁷⁵

In light of the numerous eminent views to the contrary, it is worth reiterating the salient point that has been submitted: what is required is not that the armed group

²⁶⁶ *Official Records*, above note 52, Vol 7, 100 (Italy). See also Vol 7, 84 (Cameroon).

²⁶⁷ *Ibid*, Vol 7, 199, para 30 (Syria).

²⁶⁸ 'Report of the US Delegation to the 1974-77 Diplomatic Conference to the Secretary of State' (1978) 72 *AJIL* 405, 407.

²⁶⁹ *Official Records*, above note 52, Vol 7, 304, para 121 (United Kingdom).

²⁷⁰ *Ibid*, 77 (Canada).

²⁷¹ Cullen, *Concept of Non-International Armed Conflict*, above note 5, 101.

²⁷² H Valencia Villa, 'The Law of Armed Conflict and its Application in Colombia' (1990) 30 *IRRC* 5, 10; D García-Peña Jaramillo, 'Humanitarian Protection in Non-International Conflicts: A Case Study of Colombia' (2000) 30 *IYHR* 179, 182-3.

²⁷³ See eg T Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 *AJIL* 589, 599; LC Green, *The Contemporary Law of Armed Conflict* (Manchester University Press, 2000) 66-7; GH Aldrich, 'The Laws of War on Land' (2000) 94 *AJIL* 42, 60; R Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 264; La Haye, *War Crimes*, above note 190, 44. Rare exceptions are J Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff, 1985) 48; Abi-Saab, *Non-International Armed Conflicts*, above note 52, 228; A Carrillo-Suárez, 'Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict' (1999) 15 *American University International Law Review* 1, 67-90.

²⁷⁴ See eg *Official Records*, above note 52, Vol 7, 300, para 104 (Switzerland).

²⁷⁵ See eg *ibid*, 79 (Ecuador).

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²⁸⁰ See eg Meron, I
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note 5, 105-6.

exercise territorial control in and of itself but that it exercises such territorial control as to enable it to carry out hostilities and implement the Protocol. The requirement is a qualitative one rather than a quantitative one. Furthermore, Additional Protocol II is in no way tantamount to recognition of belligerency. As was seen in Chapter 1, one of the conditions that have to be satisfied before belligerency could be recognized is the existence of a government or quasi-government on the part of the armed group. At the very least, there had to be a civil administration in place.²⁷⁶ Additional Protocol II does not require any of this; it only requires a responsible command on the part of the armed group. This, in turn, would mean that conflicts such as those between the Federal Republic of Yugoslavia and the KLA between 1998 and 1999, or between Sudan and the Justice and Equality Movement (JEM) and the SLM/A in Darfur during the late 2000s, would satisfy the Additional Protocol II requirements.

Accordingly, if read properly, aside from the requirement of governmental forces, the Protocol does not contain any criteria that are not inherent in a non-international armed conflict *simpliciter*; heightened the criteria may be, but they are not *qualitatively* different. Indeed, the then Legal Advisor of the US State Department stated: 'I believe that the United States should make clear when it ratifies Protocol II that it will apply the Protocol to all conflicts covered by common article 3 of the 1949 Geneva Conventions, and only such conflicts, which will include all non-international armed conflicts as traditionally defined, but of course not internal disturbances, riots or sporadic acts of violence.'²⁷⁷ One of the 'Recommended Understandings and Reservations' in the President's transmittal of the Protocol to the Senate, read: '[t]he United States declares that it will apply this Protocol only to those conflicts covered by Article 3 common to the Geneva Conventions of 12 August 1949 and to all such conflicts, and encourages all other States to do likewise.'²⁷⁸ Although the United States did not become party to Additional Protocol II, its position on point is an important one, for it suggests that the Protocol can be implemented in a non-international armed conflict *simpliciter*.

The Protocol also contains one very real advantage. For the first time, it explicitly includes the requirement that the armed group be able to comply with the relevant rules of international humanitarian law. It also makes clear the inextricable link between the scope of application of the rules and their substantive content.²⁷⁹ Thus, contrary to many a view,²⁸⁰ the threshold of Additional Protocol II is a positive one and should be welcomed.

²⁷⁶ See above, 12.

²⁷⁷ 'The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D Sofaer, Legal Adviser, United States Department of State, January 22, 1987' (1987) 2 *American University Journal of International Law and Policy* 460, 462. See also 'The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions: Remarks of Michael J Matheson' (1987) 2 *American University Journal of International Law and Policy* 419, 430.

²⁷⁸ *Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977* (US Government Printing Office, 1987) 7.

²⁷⁹ See above, 185–7. Cf Moir, *Internal Armed Conflict*, above note 5, 108, who considers this to be a difficulty with the Protocol.

²⁸⁰ See eg Meron, *Inadequate Reach*, above note 273, 599; Moir, *Internal Armed Conflict*, above note 5, 108; Provost, *International Human Rights and Humanitarian Law*, above note 273, 264; La Haye, *War Crimes*, above note 190, 46; Cullen, *Concept of Non-International Armed Conflict*, above note 5, 105–6.

The scope of application of Additional Protocol II is of lesser importance today, given the fact that the majority of norms contained in the Protocol are of customary status and are considered to be of customary status even in conflicts below the Protocol threshold. Thus, both the ICTY and the Customary International Humanitarian Law study take the view that the customary norms of Additional Protocol II apply to all non-international armed conflicts and that numerous other norms also apply to all non-international armed conflicts.²⁸¹ However, that position is not altogether clear,²⁸² and the 'correct' Additional Protocol II threshold remains important for the applicability of the conventional instrument as well as to assist in ratification of the instrument.

4.2 Rome Statute of the International Criminal Court

The second conventional instrument that may require that certain criteria be satisfied over and above the requirements for a non-international armed conflict *simpliciter* is the Rome Statute of the International Criminal Court (Rome Statute or Statute). The Rome Statute uses a combination of the definition and non-definition approaches discussed above. Article 8(2)(c) of the Statute, which essentially reproduces the rules contained in common Article 3, applies to armed conflicts not of an international character.²⁸³ Article 8(2)(e) of the Statute, which contains certain other rules that are applicable in non-international armed conflicts, applies to 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.²⁸⁴ The reference to non-international armed conflict in Article 8(2)(c) of the Statute must be understood and interpreted along the lines set out above.²⁸⁵ Accordingly, it refers implicitly to the elements of organization and intensity with all that those elements entail.²⁸⁶ More difficult is whether the reference to 'protracted armed conflict' in Article 8(2)(f) of the Statute was intended to introduce an additional qualifying element of duration or whether it was simply poor drafting.²⁸⁷

In order to address this question, it is necessary to consider how the phrase found its way into the Statute at all. Early drafts of the Statute contained all war crimes applicable in non-international armed conflicts in a single provision.²⁸⁸ Violations of common Article 3 were not separated out from violations of other rules of non-international armed conflict and consequently there was no distinction between their respective spheres of application. However, not all delegations at the Rome Diplomatic Conference viewed this in a positive light, with some states preferring a higher threshold for violations of the rules that were not contained in common Article 3, a threshold along the lines of that set out in Additional Protocol II.²⁸⁹ Accordingly, the Conference Bureau proposed raising the threshold for those rules to that of Additional Protocol

²⁸¹ See above, 66–7.

²⁸² Ibid.

²⁸³ Rome Statute, Article 8(2)(d).

²⁸⁴ Ibid, Article 8(2)(f).

²⁸⁵ See above, 164–82.

²⁸⁶ Ibid.

²⁸⁷ See for a more detailed consideration of this issue, S Sivakumaran, 'Identifying an Armed Conflict Not of an International Character', in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 363; A Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2008) 12 *JCSL* 419.

²⁸⁸ This was the position as late as the Bureau discussion paper of 6 July 1998, the statute being adopted some 11 days later. See A/CONF.183/C.1/L.53.

²⁸⁹ A/CONF.183/C.1/SR.26, para 115 (Egypt); A/CONF.183/C.1/SR.28, para 64 (Sudan); A/CONF.183/C.1/SR.27, para 21 (Bahrain).

II.²⁹⁰ This, in turn, led to a high threshold had been between armed groups and territorial control.²⁹² Other Leone expressed reservation: relevant provision apply to there is protracted armed armed groups or between number of states,²⁹⁵ and u

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²⁹⁰ A/CONF.183/C.1/L.53, ment: A/CONF.183/C.1/SR.3

²⁹¹ A/CONF.183/C.1/SR.3 A/CONF.183/C.1/SR.35, par (Estonia).

²⁹² A/CONF.183/C.1/SR.3 Union); A/CONF.183/C.1/S Southern African Developmen (Tanzania); A/CONF.183/C. 2 (ICRC).

²⁹³ A/CONF.183/C.1/SR.3

²⁹⁴ A/CONF.183/C.1/SR.3

²⁹⁵ A/CONF.183/C.1/SR.3 SR.36, para 30 (Slovenia); par

²⁹⁶ L Condorelli, 'War Cri Court', in M Politi and G Ne 2001) 107, 112–13; M Sassòli 110; Provost, *International H*

²⁹⁷ A/CONF.183/C.1/SR.3

²⁹⁸ K Dörmann, *Elements of Sources and Commentary* (Cam

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II.²⁹⁰ This, in turn, led to criticism by a number of states, which took the view that too high a threshold had been set,²⁹¹ a threshold that would exclude conflicts fought between armed groups and conflicts in which the armed group did not exercise territorial control.²⁹² Other states, however, welcomed the new threshold.²⁹³ Sierra Leone expressed reservations about the newly posited threshold and proposed that the relevant provision apply to 'armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.²⁹⁴ This proposal received the support of a number of states,²⁹⁵ and ultimately found its way into the Statute.

Aside from the discrepancy between the phrase 'protracted armed violence' and the phrase 'protracted armed conflict', the proposal of Sierra Leone, as subsequently used in the Statute of the International Criminal Court, is the very same definition of a non-international armed conflict as set out in the *Tadić* Decision on Interlocutory Appeal. Were it not for this discrepancy, it could be said without controversy that the *Tadić* definition, Article 8(2)(c), and Article 8(2)(e) all have the same material scope of application.

The discrepancy makes such a conclusion slightly more difficult. On one view, the language creates a new threshold, distinguishing the 'mere' armed conflict from the 'protracted' armed conflict.²⁹⁶ On this view, the change was a deliberate one, precisely so as to distinguish the material scope of application of Article 8(2)(c) from Article 8(2)(e). Thus, Bosnia and Herzegovina expressed its concern over the raising of the threshold, but opined that 'if a different threshold had to be established, the wording proposed by the delegation of Sierra Leone would be acceptable'.²⁹⁷

However, a number of points tend toward the conclusion that the Diplomatic Conference did not intend to create a new threshold. There is no question that the Sierra Leonean proposal is taken from the *Tadić* definition, and the deliberate substitution of the phrase 'protracted armed violence', as used in *Tadić*, with 'protracted armed conflict', as used in the Statute, makes little sense. To define an 'armed conflict' by reference to a 'protracted armed conflict' is singularly unhelpful, for if an armed conflict is defined, in part, as protracted armed violence, then a protracted armed conflict is simply protracted, protracted armed violence.²⁹⁸ The additional 'protracted' adds little or no value. The manner in which the text came about should also be recalled. The

²⁹⁰ A/CONF.183/C.1/L.59, 7. See also the remarks of the Coordinator, introducing that document: A/CONF.183/C.1/SR.33, para 7.

²⁹¹ A/CONF.183/C.1/SR.33, para 18 (Switzerland); para 24 (United States); para 68 (Germany); A/CONF.183/C.1/SR.35, para 37 (Finland); para 67 (Canada); para 68 (Denmark); para 76 (Estonia).

²⁹² A/CONF.183/C.1/SR.33, para 14 (Austria on behalf of the Member States of the European Union); A/CONF.183/C.1/SR.34, para 60 (South Africa on behalf of the Member States of the Southern African Development Community); para 107 (Australia); A/CONF.183/C.1/SR.35, para 49 (Tanzania); A/CONF.183/C.1/SR.36, para 2 (Norway); para 52 (ICRC); A/CONF.183/INF/11, 2 (ICRC).

²⁹³ A/CONF.183/C.1/SR.33, para 40 (China); A/CONF.183/C.1/SR.35, para 73 (Portugal).

²⁹⁴ A/CONF.183/C.1/SR.35, para 8. See also the written proposal at: A/CONF.183/C.1/L.62.

²⁹⁵ A/CONF.183/C.1/SR.35, para 23 (Uganda); para 80 (Solomon Islands); A/CONF.183/C.1/SR.36, para 30 (Slovenia); para 42 (Bosnia and Herzegovina).

²⁹⁶ L Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court', in M Politi and G Nesi (eds), *The Rome Statute of the International Criminal Court* (Ashgate, 2001) 107, 112–13; M Sassòli and AA Bouvier, *How Does Law Protect in War? Volume I* (ICRC, 2006) 110; Provost, *International Human Rights and Humanitarian Law*, above note 273, 268–9.

²⁹⁷ A/CONF.183/C.1/SR.36, para 42.

²⁹⁸ K Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2003) 441.

proposal of Sierra Leone was a response to the Bureau draft, which reproduced the higher threshold of Additional Protocol II and which was, in turn, a reaction to the views of a few states. It was not in and of itself an attempt to create a new threshold.²⁹⁹ This is evident from the speech during which the proposal was introduced:

Mr. Dabor (Sierra Leone) said that his delegation urged that sections C and D should be included in the new article 5 *quater*,^[300] but it had reservations, for example, regarding the *chapeau* to section D, which referred to organized armed groups that exercised 'control over a part of [a State party's] territory'. That wording was very restrictive: in his own country, for example, the rebel forces did not occupy a territory. Thus, as presently drafted, section D would exclude the type of internal conflict presently taking place in Sierra Leone. His delegation therefore proposed that the second sentence of the *chapeau* be replaced by the text: 'It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.³⁰¹

The French text of the speech more clearly points to this conclusion, for it is *identical* to the corresponding portion of the *Tadić* definition. The speech reads in relevant part:

Elle s'applique aux conflits armés qui ont lieu sur le territoire d'un État dès lors qu'il existe un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes.³⁰²

The relevant part of the *Tadić* Decision on Interlocutory Appeal reads:

... nous estimons qu'un conflit armé existe chaque fois qu'il y a recours à la force armée entre États ou un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes au sein d'un État.³⁰³

Thus, if the French text of the speech were followed, the intention would quite clearly seem to have been to have the *Tadić* definition adopted.³⁰⁴ It may come down to a simple issue of translation: 'conflit armé' was translated as 'armed conflict' rather than 'armed violence'.

The intention of other states present at the Diplomatic Conference should also be borne in mind. In light of the number of non-international armed conflicts that take place, a large number of states considered it essential to include in the Statute provisions on war crimes in non-international armed conflicts.³⁰⁵ To impose a threshold, such as that contained in the Bureau proposal, that would have the effect of preventing a good number of these conflicts from falling within Article 8(2)(e) of the Statute would have been contrary to the intention of these states. Thus, several states welcomed the proposal of Sierra Leone for this very reason. Uganda, for example, supported the proposal, noting that '[w]hether or not the perpetrators controlled territory was

²⁹⁹ Kress, War Crimes, above note 238, 117–18.

³⁰⁰ Article 5 *quater*, Section C would become Article 8(2)(c) of the Statute while Article 5 *quater*, Section D is equivalent to Article 8(2)(e) of the Statute.

³⁰¹ A/CONF.183/C.1/SR.35, para 8.

³⁰² *Ibid* (emphasis added). The written proposal was worded differently but to similar effect: 'Elle s'applique aux conflits armés qui opposent de manière prolongée sur le territoire d'un État les autorités gouvernementales à des groupes armés organisés ou ces groupes entre eux' (A/CONF.183/C.1/L.62).

³⁰³ *Tadić* Decision on Interlocutory Appeal on Judgment, above note 2, para 70 (emphasis added).

³⁰⁴ See Kress, East Timor, above note 110, 419; Kress, War Crimes, above note 238, 118. However, it should be noted that it was the English version of the *Tadić* Decision that was authoritative. See the Separate Declaration of Judge Deschênes on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 2.

³⁰⁵ See e.g. A/CONF.183/C.1/SR.25, para 10 (South Africa on behalf of Member States of the Southern African Development Community). See further below, 481–2.

immaterial'.³⁰⁶ The Sole account of the sort of conflict the *chapeau* was retained, groups, as suggested by the

Despite these various different view. In the view reference to 'protracted armed conflict' the need for the armed & military operations for a & mirrors the Pre-Trial Chamber the words 'for a prolonged conflict' that a new threshold has with duration playing a suggest that there is no ground on Interlocutory Appeal. The same word used in the 1 'protracted'. So 'protracted' 'prolonged'. Thus, for the considered interchangeable an element of protraction, said, the notion of prolonged trial chamber considers it a pre-trial chamber that it could be used to interpret extent that this would raise Article 8(2)(d) refers simply term interpreted in the *Tadić*. That Article does not constitute violence, be protracted.

4.3 Recognition of b

Although recognition of b to be canvassed on occasion was explicitly kept open by group may appeal for recognition Provisional Government or recognize its status as a b General Franco appealed

³⁰⁶ A/CONF.183/C.1/SR.3

³⁰⁷ A/CONF.183/C.1/SR.3

³⁰⁸ *Lubanga* Decision on Co Warrant, para 60; *Bemba Gombi*

³⁰⁹ *Tadić* Decision on Interlocutory Appeal

³¹⁰ See *Al-Bashir* Decision on

³¹¹ *Bemba Gombo* Decision

³¹² *Ibid*, para 235.

³¹³ See above, 17–20.

³¹⁴ Resolution 10, in *Final*

³¹⁵ See Bedjaoui, *Algerian R*

immaterial'.³⁰⁶ The Solomon Islands stated that the Bureau proposal 'did not take account of the sort of contemporary conflict that the Court was designed to address. If the *chapeau* was retained, it should be amended to cover armed conflict between armed groups, as suggested by the representative of Sierra Leone'.³⁰⁷

Despite these various indications, pre-trial chambers of the ICC have taken a different view. In the view of the *Lubanga* Pre-Trial Chamber, Article 8(2)(f) with its reference to 'protracted armed conflict between . . . organized armed groups' 'focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time'.³⁰⁸ This sentence is important for it mirrors the Pre-Trial Chamber's understanding of the *Tadić* definition but goes on to add the words 'for a prolonged period of time'. At first sight, the additional language suggests that a new threshold has indeed been created for the application of Article 8(2)(f), with duration playing a greater role than before. Closer inspection, however, may suggest that there is no greater focus on duration than there was in the *Tadić* Decision on Interlocutory Appeal. The original, French, text of *Lubanga* refers to 'prolongée', the same word used in the French text of *Tadić*,³⁰⁹ the English original of which was 'protracted'. So 'protracted' was translated as 'prolongée', which was translated back as 'prolonged'. Thus, for these purposes, the words 'protracted' and 'prolonged' were considered interchangeable and as has already been seen, the *Tadić* definition contains an element of protraction, albeit as part of the broader notion of intensity. That being said, the notion of prolongation is starting to take on a life of its own,³¹⁰ and one pre-trial chamber considers it to be an additional element.³¹¹ It has even been suggested by a pre-trial chamber that the (potentially) more restrictive standard of Article 8(2)(f) could be used to interpret the threshold of application of Article 8(2)(d).³¹² To the extent that this would raise the threshold of Article 8(2)(d), it would be incorrect. Article 8(2)(d) refers simply to 'armed conflicts not of an international character', a term interpreted in the *Tadić* Decision on Interlocutory Appeal and discussed above. That Article does not contain a requirement that the conflict, as opposed to the violence, be protracted.

4.3 Recognition of belligerency

Although recognition of belligerency has fallen into disuse,³¹³ the possibility continues to be canvassed on occasion. The possibility of recognizing a situation as belligerency was explicitly kept open by the 1949 Diplomatic Conference.³¹⁴ The non-state armed group may appeal for recognition as a belligerent. For example, in December 1960, the Provisional Government of the Algerian Republic appealed to 'the Atlantic powers' to recognize its status as a belligerent.³¹⁵ Likewise, during the Spanish civil war (1936–9), General Franco appealed to states not involved in the violence for recognition as a

³⁰⁶ A/CONF.183/C.1/SR.35, para 23.

³⁰⁷ A/CONF.183/C.1/SR.35, para 80.

³⁰⁸ *Lubanga* Decision on Confirmation of Charges, para 234. See also *Al-Bashir* Decision on Arrest Warrant, para 60; *Bemba Gombo* Decision on Confirmation of Charges, para 233.

³⁰⁹ *Tadić* Decision on Interlocutory Appeal, para 70.

³¹⁰ See *Al-Bashir* Decision on Arrest Warrant, paras 60–70.

³¹¹ *Bemba Gombo* Decision on Confirmation of Charges, para 235.

³¹² *Ibid*, para 235.

³¹³ See above, 17–20.

³¹⁴ Resolution 10, in *Final Record*, above note 6, Vol I, 362.

³¹⁵ See Bedjaoui, *Algerian Revolution*, above note 138, 179.

6. Conclusion

For many years, a concise and authoritative definition of a non-international armed conflict did not exist. Attempts were made to define the term at diplomatic conferences but consensus could not be reached. Definitions were posited at meetings of experts and by commentators; however, they failed to gain sufficient traction to make any one of them authoritative. Nonetheless, a range of situations that fell within the term could be identified and the core elements of a definition of non-international armed conflict had been identified and accepted. It was only in 1995 with the *Tadić* Decision on Interlocutory Appeal on Jurisdiction that the term was defined in an authoritative manner and widely followed. The *Tadić* Decision defines a non-international armed conflict by reference to two elements: intensity of violence and organization of the armed group. Subsequent ICTY jurisprudence has elucidated these two elements and provided indicia against which the elements can be assessed. An international criminal tribunal thus proved critical in the elucidation of the notion of a non-international armed conflict, basing itself on elements that were generally accepted as constituting key features of the violence.

Despite organization of the armed group comprising one of the two elements of a non-international armed conflict, insufficient attention has been paid to armed groups, their structure, and workings. Little attention has been paid to why it is that organization of the armed group is an element of the definition of a non-international armed conflict. Even less has been paid to the relationship between organization and enforcement of the law. Furthermore, the notion of responsible command is traditionally interpreted by reference to a hierarchical pyramidal structure which does not always map onto the structure of armed groups. The structure of armed groups is also often compared with that of the armed forces of the state, skewing the notion of organization. The important nexus between the scope of application of the law and its substantive content also remains under-explored. In sum, the element of organization and the workings of armed groups are only just starting to be understood.

A further complexity arises in ascertaining whether or not particular conventional rules are applicable to the non-international armed conflict in question. Additional Protocol II requires that the non-international armed conflict be of a particular sort before it applies. The principal addition is that the armed group exercises 'such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations and to implement the present Protocol'. This phrase has been interpreted in a very particular manner, one which goes against the text of the instrument itself. The scope of application of the Rome Statute has also given rise to debate. The Rome Statute provides that certain rules will apply in 'protracted armed conflicts' but the meaning of the phrase has proven open to debate.

Accordingly, while significant advancements have been made on the notion of a non-international armed conflict, for such a foundational issue, considerable uncertainties remain.

Ascertaining whether or not a non-international armed conflict exists continues to be the subject of dispute, primarily due to the lack of a neutral party both able and willing to take on the role of characterizing the violence. This has led to a number of states denying the existence of a non-international armed conflict. However, examples of denial need to be compared against examples of acceptance of involvement in an armed conflict. Only in this way will a more complete picture of the situation become apparent.

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The identification of a non-international armed conflict operates at another level, namely the distinction between a non-international armed conflict and an international armed conflict. The issue arises because what may seem to be a non-international armed conflict may turn out to be an international armed conflict. This is the subject of the next chapter.

Points of the RUF were vitiated entirely by initiatives such as 'Operation Pay Yourself' by which salaries of fighters would be paid through their looting.⁸⁰⁹ For his part, Che Guevara indicated that '[m]erchandise that cannot be paid for in cash will be paid for with bonds; and these should be redeemed at the first opportunity'.⁸¹⁰ For its part, the 1982 Code of Conduct for members of the Sendero Luminoso of Peru included the injunctions '[d]o not steal', '[r]eturn what you borrow', and '[r]espect the property of farmers'.⁸¹¹ The CNF of Burma also has provisions in its internal Code on the prohibition of 'taking the properties or possessions of civilians'.⁸¹² Along similar lines, the 2006 Taliban Code of Conduct provided that 'Mujahideen have no right to confiscate money or personal possessions of civilians'.

4.8 Wanton destruction

The prohibition on the destruction or seizure of property of the adversary, subject to imperative military necessity, is a rule of customary international law.⁸¹³ The Customary International Humanitarian Law study suggests that this prohibition is 'essentially the same as' the prohibition on attacking civilian objects.⁸¹⁴ However, it is submitted that the two are distinct from one another, albeit related. While the present prohibition is limited to the property of the adversary, the prohibition on attacking civilian objects is of more general application. Similarly, this prohibition is subject to notions of military necessity, while the prohibition on attacking civilian objects is subject to such notions only to the extent that it becomes a military objective.

The prohibition is an important one. As Francis Lieber remarked to General Halleck in 1863, during the US civil war, wanton destruction 'does incalculable injury. It demoralizes our troops; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult'.⁸¹⁵ Lieber was commenting on wanton destruction more generally rather than the wanton destruction of the property of the adversary, but the point is much the same. A prohibition on the 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity' is also to be found in the Statute of the ICTY.⁸¹⁶

5. Conclusion

A substantial body of law exists relating to the conduct of hostilities. Although common Article 3 is silent on point and Additional Protocol II contains only a minimum of relevant norms, a whole host of other rules are applicable to non-international armed conflicts. Numerous weapons treaties apply to international and non-international armed conflicts alike. The Rome Statute contains rules on targeting, the prohibition

⁸⁰⁹ On 'Operation Pay Yourself', see *RUF Trial Judgment*, above note 197, paras 782–4.

⁸¹⁰ Guevara, above note 191, 46.

⁸¹¹ Code of 1982, reproduced in J Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press, 2007) 152.

⁸¹² Chin National Front, Code, above note 26, Article 19 (unofficial translation).

⁸¹³ Rome Statute, Article 8(2)(e)(xii); Customary International Humanitarian Law, Rule 50; Darfur Commission Report, above note 25, para 166.

⁸¹⁴ *Customary International Humanitarian Law, Volume I: Rules*, above note 84, 597.

⁸¹⁵ Letter from Francis Lieber to General Halleck, 20 May 1863, reproduced in GB Davis, 'Doctor Francis Lieber's Instructions for the Government of Armies in the Field' (1907) 1 *AJIL* 13, 21.

⁸¹⁶ Article 3(b). See *Strugar Trial Judgment*, above note 50, para 228; *Hadžihasanović Decision on Appeal of Rule 98bis Decision*, above note 51, paras 29–30.

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on the use of certain weapons, and the prohibition on certain methods of combat. Other rules apply at the level of customary international humanitarian law. The rules have been identified and developed by the international criminal tribunals and accepted by states. The law on point has changed rather dramatically as compared with the views expressed at the 1974–7 Diplomatic Conference.

The methodological approach set out in Part I is demonstrated in the law relating to the conduct of hostilities, as it was in the context of the law on humane treatment. Treaties created in the period since the mid-1990s apply to non-international armed conflicts as a matter of course. The Convention on Certain Conventional Weapons, its Protocol II, and the Rome Statute have all been amended so as to apply to, or develop, the law of non-international armed conflict. It was through the jurisprudence of the international criminal tribunals that the customary law on point was identified and the relevant rules fleshed out. This customary international humanitarian law developed, in turn, through analogy to the law of international armed conflict.

The concerns identified in Chapter 3 also play out in the law in this area. The standard of international criminal law is narrower than that of international humanitarian law, certainly in the notion of the disproportionate attack, and possibly also in the prohibition on certain perfidious conduct. Analogy to the law of international armed conflict has taken insufficient account of the involvement of armed groups as is evident from the failure to reference parties to the conflict in the Ottawa Convention. It has also weakened certain protections, such as that afforded to works and installations containing dangerous forces. Tagging on non-international armed conflicts at the end of conventional instruments has led to their scope not always being the model of clarity, as is the case with the Hague Convention on Cultural Property.

The particularities of the law of non-international armed conflict are also important. For example, 'scorched earth' tactics are prohibited in non-international armed conflicts, but are not prohibited in certain limited circumstances in international armed conflicts. Uncertainties surrounding the scope of application of the prohibition on riot control agents and expanding bullets also relate to the specificities of non-international armed conflict and the desire to treat them as analogous to situations of internal tensions and disturbances rather than armed conflicts. That insufficient attention has been paid to the involvement of armed groups is evident also from the notion of direct participation in hostilities. Historically, the notion of an armed group was essentially contested for fear of affording that group a certain status. This meant that members of the armed group were considered civilians taking a direct part in hostilities. This has changed in recent years, primarily with the 2009 Interpretive Guidance of the ICRC. However, that guidance defines membership based on a continuous combat function in an armed group, with *de jure* membership not being considered. The capacities of the parties to the conflict are also brought to bear in such areas as the requirement to investigate certain losses of life.

These various issues also play out, albeit in very different ways, in the implementation and enforcement of the law of non-international armed conflict.

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