

## **NON-INTERNATIONAL ARMED CONFLICTS: CRITICAL REFLECTIONS ON THE ADOPTION OF LIMITED RULES AND MULTIPLE DESCRIPTIONS**

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### **ABSTRACT**

Armed conflicts not of an international character is a unique category, unlike international armed conflicts, in the sense that states consider it an internal matter and prefer to treat it as a law-enforcement situation. Under the laws of armed conflict, states are reluctant to confer the status of combatant and prisoner-of-war to non-state actors. This posture of states has gone to the extent of adopting different rules of conduct on international level in respect of international and non-international armed conflicts. On the other hand, states have recognized two categories of non-international armed conflicts in the Statute of International Criminal Court (Rome Statute) and two relevant lists of war crimes also. Taking into account the inferior legal treatment towards non-international armed conflicts, the author first seeks to investigate the drafting history of the Geneva Conventions of 1949 and critically explain how States agreed upon a smaller set of rules in the form of the Common Article 3 in respect of non-international armed conflicts, as compared to the detailed regulations with regard to international armed conflicts. Subsequently, the author intends to examine the scope and impact of multiple descriptions of non-international armed conflicts in the Common Article 3, the Additional Protocol II and the Rome Statute. The paper thus seeks to emphasize that the formulation of different clauses is not only absurd and illogical, but also creates gap in the protection of victims and prosecuting the war criminals of non-international armed conflicts. For this purpose, the author follows historical methodology and mainly relies on primary sources and, in some cases, secondary materials too.

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## 1. INTRODUCTION

Majority of the armed conflicts going on these days are non-international in character.<sup>1</sup> The international legal regulation of hostile conduct during armed conflicts not of an international character has been a subject of plenty of controversies and politics.<sup>2</sup> Before World War II, recognition of belligerency<sup>3</sup> by other states was indispensable to apply the relevant rules of international law.<sup>4</sup> However, international law did not apply in case of non-recognition of belligerency or in the event of civil wars, for instance Spanish Civil War, 1936-39.

Article 3 common to the Geneva Conventions of 1949, however, recognize the category of armed conflicts not of an international character and provide for certain restraints on the conduct of armed operations in such armed conflicts.<sup>5</sup> Article 3 has also attained the status of a miniature<sup>6</sup> Convention. Notably, the remaining provisions of the Geneva Conventions lay down detailed rules regulating conduct of military operations, but in international armed conflicts. This discriminatory legal position raises a

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<sup>1</sup> C Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 77.

<sup>2</sup> See, S Sivakumaran, *The Law of Non-International Armed Conflict* (1st edn, OUP 2012) 20; International Committee of the Red Cross, *Commentary on Article 3, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949* (2nd edn, ICRC 2016) para 361 <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016> accessed 15 March 2023; WE Hall, *A Treatise on International Law* (7th edn, OUP 1917) 29-39.

<sup>3</sup> The conditions necessary for the recognition of belligerency are: hostilities of general nature [JL Brierly, *The Law of Nations* (H Waldock ed, 6th edn, OUP 1963) 141]; possession over a part of territory, administration and observance of law of war [Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection, art 8, in *Resolutions of the Institute of International Law Dealing with the Law of Nations* (James Brown Scott ed, OUP 1916) 159]. Territorial states recognised belligerency in the American Civil War and the Boer War only: N Zamir, *Classification of Conflicts in International Humanitarian Law* (Edward Elgar 2017) 19-20.

<sup>4</sup> J G Starke, *International Law* (IA Shearer ed, 11<sup>th</sup> edn, OUP 2007) 140.

<sup>5</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I), Article 3.

<sup>6</sup> Final Records of the Diplomatic Conference of Geneva of 1949 (Federal Political Department, Berne) vol 2, s B, 326 (USSR delegate).

question as to how negotiating states could draft and adopt different provisions for regulating hostile conduct in two formally different situations but involving common issues of minimizing the suffering and protecting the victims of war. Therefore, Part II of the paper presents a critical scrutiny of the drafting and negotiating exercises which were undertaken for the adoption of the four Geneva Conventions.

Serious violations of the laws of armed conflict amount to war crimes and they are dealt with by international criminal law. Under the Rome Statute, there are two categories of non-international armed conflicts and two corresponding enumerations of war crimes also. This legal treatment is manifestly unequal. Therefore, Part III of the paper seeks to analyze the concerned legal provisions and the jurisprudence of international criminal tribunals. It also aims at underlining that the Rome Statute's drafting exhibits apparent deficiencies and that it does not extend to several war crimes committed during a non-international armed conflict.

## 2. NON-INTERNATIONAL ARMED CONFLICTS: FROM FULL CONVENTION TO MINIATURE

Before the adoption of the four Geneva Conventions of 1949,<sup>7</sup> there was no international instrument regulating belligerent conduct during non-international armed conflicts. It finally happened in the form of Article 3 common to the Conventions. In this regard, the proposals made during the initial exercises for the Geneva Conventions were crucial. The International Committee of the Red Cross (ICRC) organized the Preliminary Conference of National Red Cross Societies in 1946. In respect of non-international armed conflicts, it suggested an expression, 'armed conflict within the borders of a state', and sought to extend the applicability of the 1929 Geneva Convention on armed forces<sup>8</sup> to such

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<sup>7</sup> Geneva Convention I (n 5); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).

<sup>8</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 303.

armed conflicts also.<sup>9</sup> Similarly, it offered the term ‘civil wars’ to enlarge the scope of applicability of Geneva Convention on prisoners of war<sup>10</sup> (1929).<sup>11</sup> The unique feature of the two proposals was that they sought full application of both the Conventions to non-international armed conflicts.

In the next year, the ICRC convened the Conference of Government Experts which suggested a wider expression, ‘civil war in any part of the home or colonial territories’.<sup>12</sup> Furthermore, the Conference proposed to apply the principles of both the 1929 Conventions and the draft Convention on civilians to civil and colonial armed struggles.<sup>13</sup> Thus, both the above Conferences were in favor of full application of the Conventions or their principles to non-international armed conflicts. They did not discriminate as far as application of restraints in war is concerned.

Modifying the initial recommendations a little, the ICRC submitted four draft Conventions containing the following common paragraph before the Stockholm Conference in 1948<sup>14</sup> for deliberations:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the parties to the conflict and shall have no effect on that status.<sup>15</sup>

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<sup>9</sup> International Committee of the Red Cross, Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross (26 July-3 August 1946) 15, 70.

<sup>10</sup> Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 343.

<sup>11</sup> Report on the Work of the Preliminary Conference (n 9) 15, 70.

<sup>12</sup> International Committee of the Red Cross, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (14-26 April 1947) 8, 103, 272.

<sup>13</sup> *ibid.*

<sup>14</sup> XVII<sup>th</sup> International Red Cross Conference, Stockholm (1948).

<sup>15</sup> International Committee of the Red Cross, Draft Revised or New Conventions for the Protection of War Victims (1948) 5, 52, 153.

The draft did not provide any definition of non-international armed conflicts and it made obligatory the compliance of the principles of the Convention, instead of its provisions to non-international armed conflicts. Subsequently, the draft was subjected to two important modifications. The examples of wars were removed and the word ‘principles’ was replaced by the word ‘provisions’:

In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, subject to the adverse Party likewise acting in adherence thereto. The Convention shall be applicable in those circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.<sup>16</sup>

Accordingly, negotiations began at the Diplomatic Conference. During the initial rounds of discussions before the Joint Committee, there was no opposition to full application of the law to non-international armed conflict.<sup>17</sup> The delegates were more concerned about the intensity of war.<sup>18</sup> They wanted to deal with low-intensity feuds all by themselves. It is on this contentious issue that the matter was referred to the Special Committee for further deliberations.<sup>19</sup> Initially, the negotiating states before the Special Committee did not reconsider their choice to fully apply the provisions of the Conventions to non-international armed conflicts. Notably, by ten votes to one, they resolved in favor of full application of the Conventions as per the approved Stockholm draft.<sup>20</sup>

However, due to lack of consensus on the question of scale of hostilities during civil war, the task of drafting a new paragraph was assigned twice to two different Working Parties. While the draft of the First Working Party required compliance with the entire Convention,<sup>21</sup> the France-led

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<sup>16</sup> Final Record (n 6) vol 1, 47, 61, 73, 113.

<sup>17</sup> Final Record (n 6) vol 2, s B, 10-15, see also, K Jeenger, *A Humanitarian Critique of International Humanitarian Law* (Springer 2024) Chapter 8 (forthcoming).

<sup>18</sup> E.g., France and China. See, *ibid* 9-14.

<sup>19</sup> *ibid* 26.

<sup>20</sup> *ibid* 45.

<sup>21</sup> *ibid* 47.

Second Working Party offered minimum restraints.<sup>22</sup> Meanwhile, Russia also submitted its draft aiming at maximum application of the Conventions during non-international armed conflicts.<sup>23</sup> The draft produced by the France-led Party secured maximum number of votes before the Joint Committee.<sup>24</sup> Thus, it was presented before the Plenary Assembly for final voting. The Russian delegate once again stressed upon the full application of the Conventions in the following words:

I should be very glad if the supporters of Article 2 would explain why, in the case of conflicts of a non-international character, it would be impossible to apply the provisions of the Wounded and Sick Convention or those of the Civilians Convention, which stipulate, for instance, that civilian hospitals may in no circumstances be attacked, and that women and children shall at all times enjoy particular respect and protection, that, in order to bring relief to the civilian population, the unrestricted transport and distribution of various shipments, such as medicines and medical equipment, shall be guaranteed.<sup>25</sup>

The humanitarian concerns raised by the Russian and Mexican delegates did not find much favor in the Plenary Assembly. On the other hand, a newly-independent State, Burma, representing the Asian block, was completely against the idea of imposing restraints on belligerent conduct in a civil war.<sup>26</sup> This position adopted by a post-colonial state testifies the approach that independence merely changed the individuals in power, but not the colonial attitude to control and suppress any form of resistance or social movement.

The French draft containing handful of rules was finally passed by way of a compromise.<sup>27</sup> The colonizing countries never wanted to adhere to detailed rules of conduct in violent encounters with colonies during armed resistance or hostile freedom struggles. Finally, the French-draft took the shape of the existing Article 3 common to the four Geneva Conventions.

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<sup>22</sup> *ibid* 83.

<sup>23</sup> *ibid* 97-98.

<sup>24</sup> *ibid* 37.

<sup>25</sup> *ibid* 326.

<sup>26</sup> *ibid* 102, 328.

<sup>27</sup> *ibid* 339.

The compromise is discriminatory because in the event of international armed conflicts, detailed provisions of the Conventions apply, whereas, in case of an armed conflict not of an international character, only ‘most basic protection’<sup>28</sup> in the form of ‘elementary ethical’<sup>29</sup> rules is available. The Common Article 3 has been observed to be unspecific, generic and lacking wider obligations on the parties.<sup>30</sup> Although, the Additional Protocol II provide for more rules of regulating the conduct, however, its application is rare due to high threshold of applicability.<sup>31</sup>

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has eloquently highlighted the discriminatory legal treatment in *Tadić* as follows:

It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign state? If international law, while of course duly safeguarding the legitimate interests of states, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>32</sup>

Thus, the Tribunal found the difference in rules in both the types of armed conflicts completely irrational and emphasized the need to have uniform rules irrespective of the type of armed conflict.

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<sup>28</sup> C Byron, ‘Armed Conflicts: International or Non-International?’ (2001) 6 JC&SL 63, 64.

<sup>29</sup> T Meron, in Rein Müllerson, ‘International Humanitarian Law in Internal Conflicts’ (1997) 2 JACL 109, 113.

<sup>30</sup> Mullerson, in Byron (n 28) 64.

<sup>31</sup> *Prosecutor v Boškoski and Tarčulovski* (Judgment) IT-04-82, T Ch (10 July 2008) para197; A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 109-112.

<sup>32</sup> *Prosecutor v Dusko Tadić* (Judgment on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72, A Ch (2 October 1995) para 70.

### 3. NON-INTERNATIONAL ARMED CONFLICTS: SINGLE TERM, MULTIPLE ATTRIBUTES

The laws of armed conflict and international criminal law both deal with 'non-international armed conflicts. However, both of them use this expression twice: in one place without any description, while at the other with some details. In this way both the bodies of law draw boundaries between the same expressions so that each expression can have its application in a different context. This curious legal position is elaborated below along with some critical reflections.

#### *3.1. Non-International Armed Conflicts under the Laws of Armed Conflict*

As regards the definition of non-international armed conflicts, Article 3 common to the four Geneva Conventions of 1949 adopts a 'non-definition approach'.<sup>33</sup> The only guidance that the Article provides is that a non-international armed conflict is a conflict not of an international character. It, thus, follows that in a non-international armed conflict at least one party is not a state. Therefore, a non-international armed conflict occurs between a state and an organized armed group or dissident armed forces, or between organized armed groups. However, the Article leaves it open to question whether internal strife and tensions, such as riots, isolated and sporadic acts of violence fall within the definition of non-international armed conflicts. In the beginning, the 1952 ICRC Commentary to the first Geneva Convention suggested the application of Common Article 3 to banditry, riots, internal strife or disorder because in such situations also a state cannot be permitted to abandon the wounded without care, or to torture and to take hostages.<sup>34</sup> However, the second edition of the Commentary published in 2016 precludes such internal disturbances from the purview of non-international armed conflicts and confirms two essentials which have been recognized by the ICTY in the *Tadić*<sup>35</sup> case, that is, intensity of

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<sup>33</sup> Sivakumaran (n 2) 156.

<sup>34</sup> International Committee of the Red Cross, Commentary on Article 3, Geneva Convention I (1st edn, ICRC 1952) <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/1952> accessed 12 February 2023.

<sup>35</sup> *Tadić* (n 32) para 70.

violence and organized armed groups.<sup>36</sup>

As regards the intensity of violence, the element originally put forth by an Appeals Chamber of the ICTY in the *Tadić* case was protracted violence which means the conflict should continue for a considerable period of time. The Chamber expressed itself in the following words: ‘Protracted armed violence between governmental authorities and organized armed groups or between such groups within a state, amounts to armed conflict not of an international character’.<sup>37</sup> However, continuance of small fights for many weeks without intense hostilities is not sufficient; therefore, the Appeals Chamber further added that protracted violence must go beyond the intensity requirements.<sup>38</sup> Later on, intensity was considered as main criterion and protraction ancillary to it.<sup>39</sup>

The other essential condition of organization of armed group distinguishes mob violence from a non-international armed conflict. Common indicators of organization of an armed group are discipline, command structure, headquarter, military training, access to weapons, planned operations, etc.<sup>40</sup> However, when dissident forces fight against the incumbent government, it is not necessary to check the organization criterion because such forces already possess the characteristics of organization. The contribution of the above *Tadić* test is that to try a person accused of having committed war crimes, the ICTY refers to the above criteria in respect of Common Article 3 in every case.<sup>41</sup>

However, these tests were prescribed after more than four decades of adopting the text. Meanwhile, frequent civil wars took place.<sup>42</sup> In majority

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<sup>36</sup> ICRC, Commentary on Article 3 (n 2).

<sup>37</sup> *Tadić* (n 32) para 70.

<sup>38</sup> *ibid.*

<sup>39</sup> S Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (CUP 2014) 105; *Tadić* (n 32) para 562; *Prosecutor v Limaj, Bala and Musliu* (Judgment) IT-03-66-T, T Ch (30 November 2005) para 90.

<sup>40</sup> *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T, T Ch (3 April 2008) para 60.

<sup>41</sup> Y Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court* (Routledge 2004) 121, 123.

<sup>42</sup> D Fleck, ‘The Law of Non-International Armed Conflicts’ in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 581; D P

of them, colonies fought against colonial domination seeking to overthrow the white masters.<sup>43</sup> In these armed conflicts, the applicability of Common Article 3 remained by and large in question in the absence of any parameter.<sup>44</sup> Moreover, the Article provided only for a minimum rules in respect of belligerent conduct in non-international armed conflicts. Therefore, during the preparatory exercises of revising the Geneva Conventions in 1970's, the ICRC submitted a draft containing detailed restraints on the conduct in non-international armed conflicts. The draft, though, did not lay down any constituting elements for non-international armed conflicts. The draft read as below:

Article 1. – Material field of application:

1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organized armed groups under responsible command.
2. The present Protocol shall not apply to situations of internal disturbances and tensions, inter alia riots, isolated and sporadic acts of violence and other acts of a similar nature ...<sup>45</sup>

Conversely, during the negotiation process, the delegates agreed upon a definition providing for a higher threshold in respect of non-international armed conflicts as mentioned below:

... [T]hose armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under

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Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 AJIL 272, 272-77; UNDP, Human Development Report (2005) 153 <https://hdr.undp.org/system/files/documents/human-development-report-2005-english.human-development-report-2005-english> accessed 3 May 2023.

<sup>43</sup> L C Green, 'War Crimes, Crimes against Humanity, and Command Responsibility' (1997) 50 Naval War College Review 26, 55.

<sup>44</sup> See, Forsythe (n 42) 272-77.

<sup>45</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977) vol I, pt 3, 33.

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.<sup>46</sup>

The definition seeks to develop and supplement Common Article 3 without modifying its conditions of applicability.<sup>47</sup> The conditions of applicability of Additional Protocol II are more intense as compared to Common Article 3 criteria of intensity of violence and organization of armed groups. The phrase ‘responsible command’ in Protocol II indicates leadership, control, discipline and hierarchical structure. Commanders for this purpose are those who not only maintain control and discipline over their forces but also ensure obedience to their orders. Therefore, responsible command naturally desires organization to some extent.<sup>48</sup> The definition further requires armed groups or dissident armed forces to exercise dominance and occupation over certain part of the territory of the state which is ‘not under the control of the government’.<sup>49</sup> The requirement, thus, excludes those armed groups which operate from foreign territories only.<sup>50</sup>

The final condition under Protocol II is ‘ability to conduct sustained and concerted military operations. It must be noted that as per the language of the Article, this condition is attached to the control requirement, and it is a characteristic of desired gravity of control. The term ‘sustained’ signifies ‘continuous’,<sup>51</sup> while the expression ‘concerted’ means ‘planned’.<sup>52</sup> Ability to comply with the Protocol is yet another feature of the kind of control required to be exercised. Implementation of the Protocol, thus,

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<sup>46</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) Article 1 para 1: for more on the history of adoption of Protocol II, see Forsythe (n 42) 277-86; for India’s role in the same, see S Burra, ‘India and the Additional Protocols of 1977 (2013) 53 IJIL 422, 439-42.

<sup>47</sup> Protocol II (n 46) Article 1 para 1.

<sup>48</sup> International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC/Martinus Nijhoff 1987) para 4463 (Commentary on the Additional Protocols).

<sup>49</sup> *ibid* para 4467.

<sup>50</sup> Y Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 45.

<sup>51</sup> *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch (2 September 1998) para 626.

<sup>52</sup> *ibid*.

requires, for example, infrastructure necessary to conduct ‘free and fair trials’<sup>53</sup> and to ‘cure the wounded’.<sup>54</sup> Thus, the degree of control is measured by the fulfillment of the above two requirements, that is, sustained operations and compliance.

However, Protocol II is narrower<sup>55</sup> than Common Article 3 in many respects, such as subjective assessment of applicability, higher threshold in the criterion,<sup>56</sup> problematic ability requirement,<sup>57</sup> and no applicability in case of civil war between two or more organized armed groups. It is surprising that a drafting exercise which was undertaken to expand the law on non-international armed conflicts, actually adopted a text that resulted in narrowing it down.

### 3.2. Non-International Armed Conflicts under International Criminal Law

Under international criminal law, a mention of a type of armed conflicts is related to the enumerated war crimes with respect to which an international criminal tribunal may exercise jurisdiction, if committed. Article 8 of the Rome Statute contains multiple enumerations of war crimes.<sup>58</sup> The term ‘war crimes’ was earlier taken to mean acts in violation of laws or customs of war.<sup>59</sup> However, international instruments (like Additional Protocol I of 1977,<sup>60</sup> the Statutes of ICTY 1993<sup>61</sup> and of International Criminal Court

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<sup>53</sup> Protocol II (n 46) Article 6.

<sup>54</sup> *ibid* Article 7.

<sup>55</sup> C Chinkin and M Kaldor, *International Law and New Wars* (CUP 2017) 236; Dinstein (n 50) 7.

<sup>56</sup> Boškoski (n 31) para197; Cullen (n 31) 109-112.

<sup>57</sup> K Jeenger, ‘How “Ability” Requirement in Additional Protocol II may Disable its Applicability to NIACs’ (2017) XVI ISIL YB of Int’l Humanitarian & Refugee Law 43, 46-48.

<sup>58</sup> See Article 8(2).

<sup>59</sup> R Baxter, ‘The Municipal and International Law Basis of Jurisdiction Over War Crimes’ in DF Vagts et al (eds), *Humanising the Laws of War: Selected Writings of Richard Baxter* (OUP 2013) 67.

<sup>60</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) Article 85 para 5.

<sup>61</sup> Statute of International Tribunal for the Prosecution of Persons Responsible for

(ICC)<sup>62</sup>) and an Appeals Chamber of the ICTY<sup>63</sup> consider only *serious* violations of the laws or customs of war in the ambit of war crimes. The prosecution for the commission of war crimes extends to both international as well as non-international armed conflicts. Although, it must be mentioned that the original draft of the Statute of ICC did not extend its jurisdiction to war crimes committed in non-international armed conflicts and even during negotiations, delegates were divided on this subject.<sup>64</sup>

As regards war crimes committed in non-international armed conflicts, the Statute includes two enumerations: a narrower and a wider one. Each enumeration has a corresponding provision which also informs the features of non-international armed conflict to which the enumeration is related. The first enumeration contained in Article 8(2)(c) adopts a non-definition approach, exactly same as in Common Article 3. It uses the expression ‘an armed conflict not of an international character’. The list of war crimes attached to it has been connected to serious violations of prohibitions mentioned in Common Article 3.<sup>65</sup> Notably, the war crimes mentioned therein are limited, numbering four only. The corresponding provision does not contain any guidance as to what constitutes a non-international armed conflict, except that ‘Article 8(2)(c) 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’.<sup>66</sup> Therefore, the requirements as to organization of armed groups and intensity of violence as prescribed in the *Tadić*<sup>67</sup> case are applicable here also for the alleged commission of a war crime in non-international armed conflict.<sup>68</sup>

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Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted on 25 May 1993) Article 2, 3.

<sup>62</sup> Statute of International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) Article 8(2)(c), (e).

<sup>63</sup> *Tadić* (n 32) para 94.

<sup>64</sup> Cullen (n 31) 420-21.

<sup>65</sup> Rome Statute (n 62) Article 8(2)(c).

<sup>66</sup> *ibid* Article 8(2)(d).

<sup>67</sup> *Tadić* (n 32) para 70.

<sup>68</sup> See, *Prosecutor v Al Bashir* (Decision on the Prosecutor’s Application for a Warrant of Arrest against Al Bashir) ICC-02/05-01/09, P T Ch I (4 March 2009) para 59; *Prosecutor v Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-

The second enumeration of war crimes contained in Article 8(2)(e) under the heading ‘Other serious violations of the laws and customs applicable in armed conflicts not of an international character’ is more detailed (numbering twelve). It is applicable to a category of non-international armed conflicts separately described under Article 8(2)(f) as follows:

Paragraph 2(e) 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. It 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.

This approach renders protracted armed conflict and organization of armed group essential to constitute a non-international armed conflict. According to Theodor Meron, it reflects recent developments in the law.<sup>69</sup> The drafting history of the Statute reveals that Article 8(2)(f) was incorporated as suggested by the delegation from Sierra Leone.<sup>70</sup> However, the proposal made by Sierra Leone (protracted armed conflict and organized armed groups) resembles the test of non-international armed conflicts laid down in the *Tadić* case by an Appeals Chamber of the ICTY.<sup>71</sup> The only difference between the two is that the *Tadić* test uses the word ‘violence’ in the expression ‘protracted armed violence’, whereas the proposal of Sierra Leone replaces it by the word ‘conflict’. This substitution in Sierra Leone’s proposal has been found to be ‘a straight-forward drafting error’.<sup>72</sup>

Coming back to the essential requirements under Article 8(2)(f), a Pre-Trial Chamber of the ICC in *Lubanga* case has confirmed that an organized armed group should be able to plan and execute military operations for a prolonged period of time.<sup>73</sup> The other condition of organization of armed group has been found to be implicit in the jurisprudence of the ICC and the

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01/06, PT Ch I (29 January 2007) paras 208, 210.

<sup>69</sup> Aksar (n 41) 123.

<sup>70</sup> Darcy (n 39) 107.

<sup>71</sup> Cullen (n 31) 432.

<sup>72</sup> R Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2011) 284.

<sup>73</sup> *Lubanga* (n 68) para 234.

wordings of various Articles of the Rome Statute,<sup>74</sup> for example, ‘such groups acted under a responsible command and had an operative internal disciplinary system’,<sup>75</sup> ‘the ability to plan and carry out military operations for a prolonged period of time’,<sup>76</sup> ‘widespread or systematic attack’<sup>77</sup> and ‘as part of a plan or policy or as part of a large-scale commission’.<sup>78</sup> The description under the sub-clause (f) does not intend to create a threshold different from that of the Common Article 3.<sup>79</sup>

Thus, the *Rome Statute* adopts two approaches to lay down different war crimes committed in non-international armed conflicts.<sup>80</sup> The similarities between the two postures followed under the sub-clauses (d) and (f) are that both exclude internal disturbances and tensions from their scope and the threshold in both the categories has been admitted to be the same (intensity and organization).<sup>81</sup> Despite this, a defect which narrows down the scope of Article 8(2)(f) is that it does not extend to those conflicts in which dissident armed forces of a state fight against the incumbent government. It thus creates a bizarre legal position. While Article 8(2)(d) is wider in scope, its corresponding list of war crimes under the sub-clause (c) is smaller. On the other hand, Article 8(2)(e) contains a longer list of war crimes, its scope under the sub-clause (f) is narrower. Consequently, in case of an armed conflict between a state and its rebellious armed forces, the International Criminal Court may exercise its jurisdiction in respect of limited types of war crimes enumerated under Article 8(2)(c). Thus, for instance, plunder of religious or educational property<sup>82</sup> may not amount to

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<sup>74</sup> Konstantinos Mastorodimos, *Armed non-state Actors in International Humanitarian Law and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate 2016) 25.

<sup>75</sup> *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07, P T Ch I (30 September 2008) para 239.

<sup>76</sup> *Lubanga* (n 69) para 234.

<sup>77</sup> Rome Statute (n 62) Article 7(1).

<sup>78</sup> *ibid* Article 8(1).

<sup>79</sup> Cryer (n 72) 284-85.

<sup>80</sup> Here it must be noted that Grave Breaches of the Geneva Conventions of 1949 as referred to as war crimes by Article 8(2)(a) are specific to international armed conflicts only: *Tadić* (n 32) para 80. See also, Green (n 43) 54.

<sup>81</sup> Cryer (n 72) 284-85.

<sup>82</sup> Rome Statute (n 62) Article 8(1)(e)(iv).

a war crime in such a case, although it is a war crime in other types of armed conflicts covered under Article 8(2)(f). Due to these discrepancies, the provision has been viewed as an example of ‘careless drafting’.<sup>83</sup> The dual criteria for war crimes in non-international armed conflicts ‘cannot be explained and accepted’.<sup>84</sup>

Notably, the laws of armed conflicts, on the other hand, apply to armed conflicts between a state and its dissident army by virtue of Common Article 3 and the Protocol II.<sup>85</sup> In such a situation, the strange legal position in the Rome Statute is indeed a dichotomy which is opposed to the basic purpose of the law of armed conflict.<sup>86</sup> To elaborate, while on one hand, the laws of armed conflict make it obligatory to respect the rules during an armed conflict between a state and its rebellious military, the serious violations of these on the other hand may invite no penalty because it may not amount to a war crime.

#### 4. CONCLUSION

This paper critically examined two key issues related to non-international armed conflicts: the differing rules and war crimes applied to such conflicts. It highlighted how some states restricted the international regulation of hostile conduct in these conflicts to a single article, despite the initial intention to create common principles for both international and non-international conflicts. The discussion underscored how colonial and post-colonial attitudes have shaped this approach, with political considerations often overshadowing humanitarian concerns. The paper also pointed out the absence of non-state actors in relevant negotiations. Furthermore, it examined how the Rome Statute treats war crimes differently in various non-international armed conflicts, a disparity that undermines respect for the rules of war and the jurisdiction of the criminal court.

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<sup>83</sup> Fleck (n 42) 588.

<sup>84</sup> Aksar (n 41) 123.

<sup>85</sup> Article 1(1).

<sup>86</sup> Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 82.