Chapter 2
Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict

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Contents

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2.1 Introduction

International humanitarian law (IHL) is based on the premise that armed conflicts can be categorised as either international under Common Article 2 of the Geneva Conventions[1] or Article 1(4) of Additional Protocol I or non-international under Common Article 3 of the Geneva Conventions and/or Article 1 of Additional Protocol II. Depending on their qualifications, different rules apply.[2] What is more two different mechanisms of enforcement were applicable until the mid-1990s. While in international armed conflicts state responsibility and individual liability could be used to ensure the proper application of IHL, in times of non-international armed conflicts only state responsibility could be attached to violations of IHL, a system that failed inasmuch as there was no legal forum to address such issues and, thus, violations were left unpunished. Hence, the distinction was of utmost significance.

The statutes and jurisprudence of various international criminal tribunals altered this position inasmuch as they proclaimed that acts in contravention of IHL committed during non-international armed conflicts could also be viewed as criminal acts and prosecuted as such. Undoubtedly the criminalisation of IHL provisions emerged as the most suitable solution to deal with serious breaches of the laws of armed conflict. Further, 'the law of internal armed conflict has drawn on international criminal law to fill out its substance content.'[3]

However, although the use of international criminal law to ensure that individuals are protected in times of armed conflict is to be welcome some questions are left unanswered, notably relating to the qualification of a non-international armed conflict. As aforementioned, treaty law knows of two types of non-international armed conflicts. This could appear as a purely legalistic distinction if it did not entail a distinction in the content and scope of the protection offered to certain persons and in the prohibition of certain types of acts. The problem increased as those norms were criminalised[4] through jurisprudence[5] and Statutes of international

[1] Article 2 common to the Four Geneva Conventions; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in armed forces in the field, 12 August 1949, 75 UNTS 31; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, 12 August 1949, 75 UNTS 85; Geneva Convention relative to the treatment of prisoners of war, 12 August 1949, 75 UNTS 135; Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, 75 UNTS 287 (GCs).

[2] Akande 2012, p. 34.

[3] Sivakumaran 2011, p. 220.

[4] This chapter does not aim to discuss the criminalisation of violations of international humanitarian law occurring in non-international armed conflicts. It takes the stance that this criminalisation is now entrenched in international criminal law and that the current problem lies in the definition of an armed conflict.

[5] ICTY Tadic 1995, Prosecutor v. Tadic, Case No IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 127 and 130 [hereafter ICTY

criminal tribunals.[6] It became hence of utmost relevance to qualify properly the non-international armed conflict as one falling within the purview of Common Article 3 or Additional Protocol II. While it is widely accepted that violations of Common Article 3 entail criminal liability because of their customary nature, this seems to be less true for all violations contained in Additional Protocol II. To add to the already complicated array of types of armed conflicts, international tribunals have adopted definitions of armed conflicts that do not fall squarely in any of the above-mentioned provisions or their customary equivalent. In addition, the Statute of the International Criminal Court, that is deemed to represent the current status of the law, offers definitions of armed conflict that appear *prima facie* to be different from those expounded in treaty law and in the jurisprudence.

The chapter does not aim to focus on the applicability threshold of international humanitarian law, rather it examines whether international legal rules, including treaty, customary international law and jurisprudence, provide for one, two or potentially three types of non-international armed conflicts. In particular, it investigates whether the definitions used by the international criminal tribunals and courts to trigger the application of war crimes[7] provisions coincide with the definitions expounded in treaty and customary law.

2.2 Applicability Tests in Treaty Law: Additional Protocol II and Common Article 3

Treaty law recognises two types of non-international armed conflicts: a distinction deeply entrenched in the 1949 Conventions and the 1977 Additional Protocols. The Geneva Conventions offer a first definition while the Additional Protocol II to the same conventions imparts a second one.

(Footnote 5 continued)
Tadic 1995]. In the same decision the Court explained that for an offence to fall within the purview of criminal prosecution by the ICTY it must fulfil four requirements, namely 'the violation must constitute an infringement of a rule of international humanitarian law', 'the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met', 'the violation must be "serious"' and 'the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule'. Paragraph 94.

[6] Statute of the International Criminal Tribunal for Rwanda. '[T]he ICTR Statute can be regarded as an important document in introducing the concept of war crimes in an internal armed conflict, a development that has subsequently been consolidated in the ICC Statute.' Van den Herik 2005, p. 273.

[7] 'The term war crime alludes to the violation of a recognised obligation of the rules of armed conflict which must be respected by conflicting parties.' Bassiouni 1999, p. 101.

2.2.1 Common Article 3

Common Article 3 provides a set of international humanitarian rules applicable in 'case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Unfortunately for lawyers, it is remarkably silent on the circumstances when it is applicable since it does not impart a definition. The only pieces of information it contains relate to territorial issues, i.e. Common Article 3 only applies in the territory of a state party, and the contra-distinction made with conflicts covered by the rules enshrined in the Geneva Conventions, i.e. Common Article 3 conflicts covers conflict that are not of international nature. This vague formulation leaves room for interpretation since neither 'armed conflict' nor 'non-international character' are defined. Neither objective nor subjective criteria are included in the first sentence of Common Article 3 as the article was a political compromise.[8] This lack of definition is welcomed by Pictet in his Commentary on the Geneva Conventions,[9] and according to some authors was the aim of the drafters of the said treaties.[10]

Indeed, a proposal to clarify the material field of application of Common Article 3 put forward at the XXIst International Conference of the Red Cross and Red Crescent Society in Istanbul in September 1969 was rejected.[11] Meaning must be sought outside the treaty itself and notably by perusing the *travaux préparatoires* and the Commentary to the convention. The crucial question for states is to determine Common Article 3's threshold of applicability, as during the drafting of the provision, many delegations expressed their fear that any sort of internal trouble would trigger it. As Jinks explains, 'the coherence of the "armed conflict" concept turns on the viability of the distinction between internal disturbances or insurrections and internal armed conflicts.'[12]

Yet, the ICRC pushed for recognising situations with a low threshold of violence.[13] Different criteria were enumerated during the discussions and may be of some help in determining the threshold of applicability, although they should be regarded as neither an exhaustive, nor a legally binding list. In fact the actual boundary is determined on a case-by-case basis.

In this regard, Pictet imparts a number of possible criteria to gauge whether Common Article 3 is applicable. First, hostilities have to be conducted by

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[8] Tahzib-Lie and Swaak-Goldman 2004, p. 243. See also Pejic 2007, p. 85. For a detailed drafting history of Common Article 3 see Moir 1998, p. 337.

[9] Pictet 1960, p. 49. Abi-Saab also argues that '[t]his vague formulation, which was considered at the time as one of the major defects of Article 3, is now considered, however, as one of its main advantages, in the sense that it does not formally exclude a broad interpretation.' Abi-Saab 1991, p. 216.

[10] Jinks 2003, p. 2.

[11] See Verri 1972, p. 99.

[12] Jinks 2003, p. 2.

[13] Kretzmer 2009, p. 40.

organised armed groups and exhibit such intensity that the government cannot rely simply on ordinary policing methods. Second, the hostilities carried out by the insurgents must have a collective character. Third, the insurgents must show some degree of organisation (a responsible command and a capacity to meet the minimal humanitarian requirements).[14] These criteria are reminiscent, if only distantly, of those inscribed in Article 1 of Protocol II.[15]

Common Article 3 applies in the case of a classic civil war when the state's armed forces are confronted with armed opposition groups within the state's territory. Moreover, this provision is applicable when two dissident groups fight against each other within the territory of one state which may, or may not, be a party to the armed conflict.

2.2.2 Additional Protocol II

Owing due to the aforementioned deficiencies in the international legal machinery states agreed to enhance the regime of Common Article 3. Additional Protocol II is 'the first and only international agreement exclusively regulating the conduct of the parties in a non-international conflict.'[16] Sadly, in comparison to Common Article 3 Additional Protocol II adopts a more restrictive approach to internal conflicts and 'even formally excludes some situations, that, with a broad interpretation, could be included in the scope of application of Article 3'.[17] According to Article 1, Additional Protocol II is only applicable when a conflict between an incumbent government and internal belligerent forces arises, not when the state is shaken by conflicts among different dissident groups, in which case only Common Article 3 is pertinent.[18] The conservative shift to more demanding criteria was a compromise to allow some states to obtain a treaty that contains more specific rules pertaining to non-international armed conflicts and other states to deny its applicability due to the high threshold.

Additional Protocol II is to be applied automatically when the stringent requirements of Article 1 are met. This provision stipulates that dissident forces must be 'under responsible command' and '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.' This happened despite the fact that 'the ICRC

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[14] These were in fact some of the criteria proposed during the drafting negotiations to the 1949 Geneva Conventions. See Elder 1979, pp. 52–53.

[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 8 June 1977, UN Doc A/32/144, Appendix II (1977) 16 International Legal Materials 1442. See also International Institute of Humanitarian Law and International Committee of the Red Cross 2003, pp. 5–7.

[16] Green 2002, p. 61.

[17] Abi-Saab 1991, p. 216. See also Vité 2009, p. 79.

[18] Sandoz et al. 1987, para 4461.

persistently tried to avoid writing into Article 1 phraseology relating to the degree of organization necessary for armed forces or other armed groups; the duration of the conflict; the amount of territory to be controlled by a nongovernmental party; and other factors that would reduce the scope of the Protocol by establishing conditions that had to be fulfilled before the instrument came into force.'[19] '[T]he three criteria that were finally adopted on the side of the insurgents … restrict the applicability of the Protocol to conflicts of a certain degree of intensity'.[20]

The very high threshold set by Additional Protocol II[21] means that in reality the protocol applies 'to situations at or near the level of a full-scale civil war'[22] or belligerency, a highly improbable case when one examines contemporary armed conflicts where territorial control is not anymore one of the priorities of armed opposition groups. In addition, the problem remains as to the exact time when a situation develops into an armed conflict within the terms of Additional Protocol II.

Further at first sight Article 1 Additional Protocol II lowers the bar of the applicability of the treaty since it excludes 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. However, practice shows that Common Article 3 is not applied either under these circumstances.[23]

2.2.3 Relationship Between These Two Instruments

As illustrated above, Common Article 3 and Additional Protocol II apply a different applicability standard. The relationship between the two conventional instruments is, thus, of great importance when considering which one prevails. Pursuant to the general rules of international law and notably the *lex posterior*[24] and *lex specialis*,[25] Additional Protocol II should contain the universal rules applicable to conflicts of non-international nature.

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[19] Forsythe 1978, p. 284.

[20] Sandoz et al. 1987, para 4453.

[21] See discussion in Spieker 2001, pp. 142–143.

[22] See United Nations Secretary-General 1998, Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted pursuant to Commission on Human Rights Resolution 1997/21, UN Doc E/CN.4/1998/87, 12 January 1998, para 74 and Ambos 2001, p. 338.

[23] See below the case-law of ICTY and ICTR. See also Vité 2009, p. 76 and Tahzib-Lie and Swaak-Goldman 2004, p. 249.

[24] The full sentence is 'lex posterior derogat legi priori' and means that the newer norm is preferred over the elder one.

[25] The full sentence is 'lex specialis derogat legi generali' and means that 'whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.' United Nations General Assembly (International Law Commission) 2006, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.702, 18 July 2006, para. 14.2(5) [hereafter UNGA (ILC) 2006].

2.2.3.1 Lex Posterior

According to Article 30(2) of the 1969 Vienna Convention on the Law of Treaties (VCLT) '[w]hen a treaty specifies that it is subject to or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'[26] In the case at hand the Additional Protocol II is not considered as incompatible with the Geneva Conventions. First, as its name says, the aim of an Additional Protocol is to develop the law in an area which the drafters of the initial conventions think to be underdeveloped.[27] Second, Additional Protocol II clearly indicates that it *develops* and *supplements* common Article 3. That Additional Protocol II and Common Article 3 should have the same scope of application was the original intention of the ICRC.[28] Hence, at first sight Additional Protocol II should 'override' the provisions contained in the Geneva Conventions.

To some degree, this simultaneous validity has been conserved, for if Additional Protocol II is applicable then Common Article 3 is also since the latter's threshold is lower than the one expounded in Article 1 AP II. Without a doubt Additional Protocol II has a much narrower field of application. Yet, in the same sentence, Article 1(1) AP II also underlines the autonomy of Common Article 3 in relation to Additional Protocol II as it expounds that its intention is not to modify the existing conditions or application of common Article 3. The first words of Article 1(1) AP II are welcome since sponsors to Article 1(2) AP II intended to impose thereby a restrictive interpretation of the scope of application of Common Article 3.[29] As a result of this autonomy, treaty law identifies two distinctive kinds of conflicts.[30]

Additionally, one must bear in mind that in pursuance of Article 30(4) VCLT '[w]hen the parties to the later treaty do not include all the parties to the earlier one:

> (a) as between states Parties to both treaties the same rule applies as in paragraph 3;
> (b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.'[31]

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[26] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, 23 May 1969.

[27] Turns argues that 'Protocol II can be regarded as "new" law in the sense that it represents the first—and, to date, the only—major attempt to apply the laws of war in a comprehensive manner to non-international armed conflicts.' Turns 1995, p. 817.

[28] UNGA (ILC) 2006, para 14.2(5). Abi-Saab 1991, p. 215.

[29] Abi-Saab 1986, pp. 145–148.

[30] 'It should be noted that this fairly restrictive definition applies only to Protocol II. The definition does not apply to Article 3 common to the four Geneva Conventions.' Sassoli and Bouvier 1999, p. 90.

[31] The application of this rule may appear awkward when referring to conflicts that do not cross the borders of a state and, hence, only involve a party to the Convention. However, the Geneva Conventions and Additional Protocol II are international treaties regulated by the 1969 Vienna Convention on the Law of Treaty as far as it provisions reflect the state of customary international law.

In the case where states are parties to both treaties and unless otherwise provided for in a treaty, the earlier instrument applies only to the extent its provisions are compatible with the later treaty (in conformity with the latin maxim *lex posterior derogat legi priori*).[32] Since Additional Protocol II, as explained earlier, regulates the scope of application of both instruments, both treaties are simultaneously applicable and, therefore, two thresholds of applicability of norms relating to non-international armed conflict exist. In the instance where a state has only ratified the Geneva Conventions, Additional Protocol II is not applicable and only one type of non-international armed conflict is possible.

2.2.3.2 Lex Specialis

In the case where two treaties cover the same subject, the rule of the *lex specialis* may be used for interpretation purposes, the rationale being that the 'special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law'.[33] Undoubtedly the rules spelled out in Common Article 3 are universally applicable and are of general nature. First, as per the *travaux préparatoires* Common Article 3 reiterates basic norms that were entrenched in domestic legislation relating basically to the protection of the human rights and physical integrity of persons not taking part in the hostilities, or who have laid down their arms, or who are *hors de combat*. The Commentary asserts that Common Article 3 include 'rules which were already recognised as essential in all civilized countries and embodied in the national legislation of the states in question, long before the convention was signed'.[34]

Second, 'the entire philosophy of the provisions of common Article 3, whether explicitly reaffirmed or not, is included in [AP II]',[35] thereby giving the impression that Additional Protocol II is the *lex specialis* of Common Article 3. Indeed, the International Court of Justice plainly explained in the *Nicaragua* case that the norms encapsulated in Common Article 3 represent universal values, a 'minimum yardstick',[36] more, they reflect 'elementary considerations of humanity'.[37] This cannot be said of Additional Protocol II which goes beyond these fundamental

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[32] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, 23 May 1969, Article 30(3).

[33] UNGA (ILC) 2006, para 14.2(7). For a discussion on the concept of lex specialis, see McCarthy 2008, p. 101.

[34] Pictet 1960, p. 36.

[35] Explanations of Vote on Protocol II 1978, Belgium, VII 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, Bern, 1978, Annex, p. 76.

[36] ICJ Nicaragua 1986, para 218.

[37] It is remarkable that the Italian proposal concerning Common Article 3 during the 1949 negotiations stipulated that the rules contained therein 'constitute the basis of universal humanitarian law'. See Final Record of the Diplomatic Conference of Geneva of 1949, 1951, p. 113.

principles since it clarifies certain rules. For example Article 4 AP II which contains the fundamental guarantees draws heavily upon the prohibition expounded in Common Article 3,[38] a position also supported by Van den Herik who explains that 'Article 4 may only come into play to the extent that it directly supplements common Article 3'.[39] Abi–Saab goes as far as to declare that 'these additions are not new in themselves, but appear more as a detailed interpretation of existing rules, particularly as concerns fundamental guarantees, and they do not go much beyond what had been provided in very general terms by common Article 3'.[40] Additional Protocol II offers greater protection to civilians and civilian objects[41] as well as detained persons.[42]

At first glance Additional Protocol II is the *lex specialis* of Common Article 3. Yet, it must be underlined that the *lex specialis* presumption does not apply when 'the application of the special law might frustrate the purpose of the law'[43] or 'where the parties have intended otherwise'.[44] As aforementioned the drafters of Additional Protocol II clearly endowed the general norm, i.e. Common Article 3, with autonomous application and, hence, the *lex specialis* cannot be applied in this context.

As a conclusion, treaty law as envisaged in the Geneva Conventions and the Additional Protocol II knows of two types of non-international armed conflicts, granting individuals different kinds of protection from the ghastly effects of armed conflicts.

2.3 Applicability Tests in Customary Law

In keeping with the *Nicaragua* jurisprudence, international customary law continues to exist besides norms regulated in treaty law.[45] This means that along the treaty provisions on the qualification of an armed conflict, customary law provisions must be pinpointed all the more as authors contend that '[c]ustomary law has accelerated the development of the law of armed conflict, particularly in relation to

[38] The United Nations Secretary-General explained that Common Article 3 is more 'fully elaborated in Article 4 of the 1977 Additional Protocol II'. United Nations Secretary General 1995, Report Pursuant to Para 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134, 13 February 1995, para 11.

[39] Van den Herik 2005, p. 205.

[40] Abi-Saab 1991, p. 219.

[41] See generally Part IV of AP II.

[42] Articles 5 and 6 AP II.

[43] UNGA (ILC) 2006, para 14.2(10).

[44] UNGA (ILC) 2006, para 14.5(27).

[45] International Court of Justice 1986, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Judgment, [1986] ICJ Rep 14, 27 June 1986, para 179 [hereafter ICJ Nicaragua 1986].

crimes committed in internal conflicts'.[46] Nevertheless, one must bear in mind that '[i]t is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in … treaty provisions'[47] to the extent that any discussion on customary law must be based on the aforementioned treaties.

2.3.1 Study on Customary International Humanitarian Law

Unfortunately the Study on Customary International Humanitarian Law does not offer a readily available answer to the types of armed conflicts that are known to customary law. Indeed the Study, despite its breadth and detailed approach to its aim, namely that of clarifying customary norms of international humanitarian law, does not discuss the issue of the characterisation of the conflict. The Study simply refers to international and non-international armed conflicts and all norms are accordingly described. As Meron states '[i]t does not adopt the three-tiered approach of the Geneva Conventions and Additional Protocols'.[48]

Remarkably, on the face of it, the International Committee of the Red Cross did not consider it worth a discussion. However, as intrigued as the author of this chapter, McLauren and Schwendimann speculate about the reason for this lack that shakes the edifice of the Study inasmuch as its bases appear to be rather weak. Since no definition of a non-international armed conflict is provided, it is easy to argue that a particular event or series of events are not to be considered as a non-international armed conflict and, thus, the rules pertaining to such conflicts as ascertained in the Study are not binding upon states via their customary nature.[49]

Obviously tortured by the issue, McLauren and Schwendimann asked Henckaerts, legal advisor of the International Committee of the Red Cross and one of the masterminds of the Study, to clarify the reasons that led to this major legal flaw. He replied that no customary definition was included because doing so 'would require a study in and of itself. [Short of that] all we could have done was to repeat the various provisions in treaty law (Geneva Conventions, Articles 2 and 3; Additional Protocol II, Article 1(1); Statute of the International Criminal Court (ICC)) and possibly some dicta from case-law of the ICTY'.[50]

In brief, the issue of the customary nature of the definition of armed conflict is very complicated and hence would have merited an investigation of its own. In an

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[46] Greppi 1999, pp. 531–553. See also Schindler 2003, p. 178.

[47] United Nations Commission of Experts Appointed to Investigate Violation of International Humanitarian Law in the Former Yugoslavia, Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council, UN Doc S/1994/674, 27 May 1994, para 52.

[48] Meron 2000, p. 261.

[49] McLauren and Schwendimann 2005, p. 1227.

[50] Cited in McLauren and Schwendimann 2005, p. 1227.

article published in 2011, Pejic however states that the Study did not distinguish between the two categories because 'it was found that states did not make such a distinction in practice'.[51] No references support her statement. Regrettably for us there is no readily available answer to the question of whether international customary law provides for a single definition of non-international armed conflict.

2.3.2 *Establishing Customary International Humanitarian Law*

Consequently, one needs to resort to the traditional method of establishing customary law. In pursuance of Article 38 of the Statute of the International Court of Justice, a customary norm is formed of two elements, state practice[52] and *opinio juris sive necessitates*,[53] 'the latter of which is dominant in the formation of humanitarian and human rights law'.[54]

State practice must be constant and uniform[55] as well as of some duration.[56] To establish actual practice one should hold to acts but also to *inter alia* treaties, diplomatic correspondence, and unilateral declarations.[57] Practice, although scarce, reveals that states, having ratified Additional Protocol II, indeed consider that two sets of norms are applicable in times of non-international armed conflicts, depending on whether the threshold of Additional Protocol II is reached.

States have on several occasions distinguished between Additional Protocol II and Common Article 3 conflicts. For example, during the conflict in Chechnya the Constitutional Court of Russia clearly asserted that the rules pertaining to Additional Protocol II were applicable. It could have left it to acknowledging the applicability of Common Article 3 inasmuch as its provisions reflect basic principles applicable in all types of armed conflicts and, moreover the Russian Federation had not incorporated the Additional Protocol II rules into the domestic

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[51] Pejic 2011, p. 191.

[52] As Henckaerts notes '[a]lthough decisions of international courts are subsidiary sources of international law, they do not constitute state practice'. Henckaerts 2005, p. 5.

[53] International Court of Justice Statute 1945, 26 June 1945, Article 38.

[54] Meron 1998, p. 9.

[55] International Court of Justice 1950, Asylum Case (Columbia v. Peru), [1950] ICJ Rep 266, 27 November 1950, p. 277. However, in the Nicaragua case, the International Court of Justice explained that the practice does not need to be absolutely rigorous with regard to the conformity principle. ICJ Nicaragua 1986, para 186.

[56] International Court of Justice 1969, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands), [1969] ICJ Rep 3, 20 February 1969, paras 73–74. However, since this decision, the International Court of Justice has not emphasised the time element anymore.

[57] International Court of Justice 1970, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, [1970] ICJ Rep 3, 5 February 1970.

legal system. Yet, it preferred to state that Additional Protocol II (though it regrettably did not prop up its standpoint by any legal reasoning) was applicable.[58] Likewise the Federal Government of Germany informed the Russian Federation that it classified the conflict as one covered by Additional Protocol II.[59] Other examples of states examining whether Additional Protocol II is applicable include Switzerland. The Directorate for Public International Law of Switzerland qualified the conflict in El Salvador in 1986 as one falling within the purview of Additional Protocol II after careful examination of the factual situation and legal implications.[60]

Furthermore, United Nations bodies refer to both sets of norms. For example, when creating the International Criminal Tribunal for Rwanda the Security Council mentioned Additional Protocol II.[61] Yet, recently, a growing number of resolutions do not distinguish between these two times of conflicts, let alone between international and non-international armed conflicts.[62]

As for the laws expounded in military manuals, some military manuals like the one for the Canadian forces[63] or the British Forces[64] distinguish between Common Article 3 and Additional Protocol II non-international armed conflicts.

On the factual side, states have also distinguished between two sets of non-international armed conflicts. For example, the applicability of Common Article 3 hinges on facts and not on the willingness of the state to admit the facts.[65] Yet, in practice, many states are unwilling to acknowledge the applicability of Common Article 3, owing to a concern that they would thereby be admitting their reduced

[58] See Gaeta 1996, pp. 563–570.

[59] German Bundestag, Document 13/718, 13th legislative period, 9 March 1995, reproduced in parts in Sassoli and Bouvier 1999, p. 1404.

[60] Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs, 20 January 1986, cited in Annuaire Suisse de Droit International 1987, pp. 185–187.

[61] United Nations Security Council 1994, Resolution 955 (1994), UN Doc S/RES/955 (1994), 8 November 1994.

[62] United Nations Security Council 2013, Resolution 2106 (2013), UN Doc S/RES/2106 (2013), 24 June 2013, pream para 13; United Nations Security Council 2012, Resolution 2068 (2012), UN Doc S/RES/2068 (2012), 19 September 2012, pream para 3.

[63] Canada National Defence 2001, Joint doctrine manual: law of armed conflict at the operational and tactical levels, Office of the Judge Advocate General, B-GJ-005-104/FP-021, 13 August 2001, Chap. 17.

[64] United Kingdom Ministry of Defence 2005, para 3.5 explains that if 'the dissident or anti-government armed forces exercise sufficient territorial control as to enable them to carry out sustained and concerted military operations and implement Additional protocol II, that Protocol applies in addition to Common Article 3.' See also para 3.9.

[65] ICTR Akayesu 1998, Prosecutor v. Akayesu, Case No ICTR-96-4-T, 2 September 1998, para 603 [hereafter ICTR Akayesu 1998]. See also the Explanations of Vote on Protocol II 1978, Brazil, VII VII 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, Bern, 1978, Annex, p. 76.

control of their territory[66] and particularly to a fear that they would thereby be according some status to the non-state fighters. Nevertheless 'whilst states may not be willing to admit to the application of Common Article 3 as a matter of law, its provisions are frequently applied in fact.'[67] They do not, on the other hand, apply *de facto* Additional Protocol II rules. Practice hence shows that states distinguish between Additional Protocol II and Common Article 3 conflicts.

To pinpoint *opinio juris* it must be demonstrated that states generally recognise that a legal and not only a moral, political obligation is involved in their attitude. They must also believe that this practice is obligatory and settled.[68] The aforementioned example of the Constitutional Court of Russia[69] also demonstrates that certain states believe they must decide upon the applicability of Common Article 3 or Additional Protocol II and cannot simply brand the conflict 'non-international'; they must determine the exact characterisation of the armed conflict. The stance of the Colombian government to apply Additional Protocol II in its conflict with FARC also illustrates the point.[70] In other words, in conflicts where Additional Protocol II was obviously applicable, states did recognise its application and did not shun away from characterising the conflict as such and apply the higher standards enshrined in Additional Protocol II.

One must nonetheless consider that according to the authors of the Study of Customary International Humanitarian Law that a customary rule exists 'when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio juris*'.[71] Although this interpretation of customary international law may be interesting for lawyers who think in terms of how the law ought to be and those who trust that 'contemporary exigencies of humankind require[] the conscious, deliberate use of law as an instrument of policy',[72] it does not satisfy the criteria of classical international law, even those relating human rights and humanitarian norms. On the other hand, it is clear that '[i]n situations where practice is ambiguous … *opinio juris* plays an important role in determining whether or not that practice counts towards the formation of custom'.[73] As a result, there are two sets of rules regulating non-international armed conflicts, both based or linked to treaty rules.

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[66] When American President Clinton visited Russia in May 1995, he was informed that the Russian army was only conducting a 'police action against terrorists'. Tskhovrebov 1995, footnote 55.

[67] United Kingdom Ministry of Defence 2005, para 3.6.1.

[68] International Court of Justice 1969, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands), [1969] ICJ Rep 3, 20 February 1969.

[69] Acts may both constitute the objective element and be evidence of subjective element in the same time. Henckaerts also recognises that 'it prove[s] very difficult and largely theoretical to strictly separate elements of practice and legal conviction.' Henckaerts 2005, p. 8.

[70] Szesnat and Bird 2012, p. 240.

[71] Henckaerts and Doswald-Beck 2005, p. xlii.

[72] Lasswell and McDougal 1992, p. xxii.

[73] Henckaerts 2005, p. 8.

Further, as far as the minimum threshold of applicability of international humanitarian law in times of non-international armed conflicts is concerned, 'state practice since 1949 indicates that banditry, criminal activity, riots, or sporadic outbreaks of violence and acts of terrorism do not amount to an armed conflict'.[74] Although Common Article 3 does not specifically refer to a minimum threshold of applicability and although Common Article 3 is autonomous in relation to Additional Protocol II the minimum threshold expounded in Additional Protocol II is also applicable to Common Article 3. In some instances, states have admitted *expressis verbis* the applicability of Common Article 3 but that seems to be only the case when the conflict drags on beyond several weeks and months.[75]

2.4 Jurisprudence of International Criminal Tribunals

Although the jurisprudence of international criminal courts only count as subsidiary source of international law, it is nevertheless important because it might point at existing persuasive evidence of customary law.[76] Further, 'because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international lay by influencing the subsequent practice of states and international organizations'.[77] Hence, examining the jurisprudence of the *ad hoc* but also permanent international criminal tribunals, one must investigate whether they simply restate the law, adduce customary evidence of a certain rule or go beyond that rule thus pushing towards the creation of new norms.

As Abi–Saab explains

> '[f]rom the time when common Article 3 was first discussed in the 1949 Diplomatic Conference, until today, we see the shift of the pendulum between those who wanted to extend the definition contained in this Article as widely as possible to cover all situations, and those who wanted to confine it within very restrictive limits'.[78]

The main question in this regard is whether the jurisprudence of international criminal tribunals has not set the pendulum on the side of those who wished for a broad application of Common Article 3.

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[74] United Kingdom Ministry of Defence 2005, para 3.5.1.

[75] Bond 1974, p. 60. For example, the French government in 1956, after several years of asserting that the conflict in Algeria was a suppression of an uprising, admitted the applicability of Common Article 3 and 'recognise[d] a separate legal status for Algerian detainees in order to mitigate the impact of French law.' Forsythe 1978, p. 277.

[76] Henckaerts 2005, p. 5.

[77] Henckaerts 2005, p. 5.

[78] R. Abi-Saab 1991, p. 213.

2.4.1 The International Criminal Tribunal for the Former Yugoslavia

Despite the fact that the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not expressly refer to non-international armed conflicts, the ICTY has on the basis of Article 3 of its Statute[79] established jurisdiction over crimes committed in such conflicts.[80] In this regard, it appears that the ICTY knows of only one threshold of non-international armed conflict. Indeed, whilst the well-known *Tadic Jurisdiction* decision refers to Common Article 3 crimes the ICTY has on numerous occasions applied crimes deriving from Additional Protocol II[81] and yet failed to discuss the threshold of applicability of Additional Protocol II. Technically, in pursuance of treaty law, the ICTY should have verified that the conflict fell within the remit of Additional Protocol II.

Relying on the ICRC Commentary to the Geneva Conventions[82] the *Tadic Jurisdiction* decision created the following test for the existence of an armed conflict, irrespective of its international or non-international characterisation: '[A]n 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'.[83] Under this test 'well settled in the jurisprudence of the Tribunal',[84] the twin requirements are the intensity of the conflict and the organisation of the parties.[85] The ICTY however, noted in *Boskoski* that the temporal element of the adjective 'protracted' had 'not received much explicit attention in the jurisprudence of the Tribunal'.[86]

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[79] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia.

[80] ICTY Tadic 1995, para 93.

[81] See e.g. ICTY Nikolic 1995, Prosecutor v. Nikolic, Case No IT-95-2-R61, Review of Indictment Pursuant to Rule 61, Trial Chamber, 20 October 1995 [hereafter ICTY Nikolic 1995]. See discussion in Sivakumaran 2011, pp. 230–231.

[82] See especially discussion in ICTY Milosevic 2004, Prosecutor v. Milosevic, Case No IT-02-54-T, Decision on Motion for Judgement of Acquittal, Trial Chamber, 16 June 2004, para 19 [hereafter ICTY Milosevic 2004].

[83] ICTY Tadic 1995, para. 70.

[84] ICTY Oric 2006, Prosecutor v. Oric, Case No IT-03-68-T, Judgment, Trial Chamber, 30 June 2006, para 254.

[85] ICTY Limaj 2005, Prosecutor v. Limaj et al. Case No IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, para 84 [hereafter ICTY Limaj 2005]. See also the review of the case-law in ICTY Haradinaj 2008, Prosecutor v. Haradinaj et al., Case No IT-04-84-T, Judgment, Trial Chamber, 3 April 2008, paras 39–60 [hereafter ICTY Haradinaj 2008].

[86] ICTY Boskoski and Tarculovski 2008, Prosecutor v. Boskoski and Tarculovski, Case No IT-04-82-T, Judgment, Trial Chamber, 10 July 2008, para 186 [hereafter]. As Akande explains, '[w]hile the word "protracted" suggests that the criterion relates exclusively to the time over which armed conflict takes place, it has come to be accepted that the key requirement here is the intensity of the force.' Akande 2012, p. 52. For an earlier discussion on the adjective 'protracted' and its use by the ICTY, see Tahzib-Lie and Swaak-Goldman 2004, p. 248.

As the ICTY Trial Chamber in *Limaj* noted,[87] this position is consistent with other persuasive commentaries on the matter, as for example a comment of the International Committee of the Red Cross on the ICC Elements of Crimes which noted:

> 'The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria; the term 'armed conflict' presupposes the existence of hostilities between armed forces *organised to a greater or lesser extent*; there must be the opposition of armed forces and *a certain intensity* of the fighting'.[88]

A range of indicative factors has been used to ascertain the intensity of the conflict and the organisation of the parties.[89] Nonetheless, the ICTY has always stressed that none of these factors is preponderant in deciding upon the existence of an armed conflict;[90] 'These are not minimum factors that must be present but rather indicators of organization'.[91]

Interestingly, the ICTY highlights that under the *Tadic* test which governs the applicability of Article 3 of its Statute[92] it only needs to prove that there was an armed conflict in contradistinction to acts that do not fall within the purview of international humanitarian law.[93] The Trial Chamber held in *Limaj*:

> 'The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used "*solely for the purpose*, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law".'[94]

In *Haradinaj* the Court restated that the 'test serves to distinguish non-international armed conflict from banditry, riots, isolated acts of terrorism, or similar situations'.[95]

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[87] ICTY Limaj 2005, para 89.

[88] International Committee of the Red Cross, Working Paper, 29 June 1999 (submitted by the ICRC as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the ICC) (italics in original).

[89] With regard to intensity of the conflict, see ICTY Haradinaj 2008, para 49 and ICTY Boskoski and Tarculovski 2008, para 177; and organisation of the parties see ICTY Haradinaj 2008, para 60 and ICTY Boskoski and Tarculovski 2008, paras 199–203.

[90] With regard to intensity of the conflict, see ICTY Haradinaj 2008, para 49 and organisation of the parties at para 60.

[91] Akande 2012, p. 52.

[92] Article 3 ICTY is viewed as 'a general, residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 and 5 of the Statute, as well as violations of Common Article 3 of the Geneva Conventions, which specifically applies to cases of armed conflict not of an international character.' ICTY Milosevic 2004, para 15. See also Boelaert-Suominen 2000a, p. 75.

[93] See discussion in Bartels 2009, p. 38.

[94] ICTY Limaj 2005, para 89. Similar statements were made in ICTY Delalic et al. 1998, Prosecutor v. Delalic et al., Case No IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para 184; ICTY Kordic and Cerkez 2004, Prosecutor v. Kordic and Cerkez, Case No IT-95-14/2-A, Appeals Chamber, 17 December 2004, para 341; ICTY Milosevic 2004, para 26.

[95] ICTY Haradinaj 2008, para 38.

In *Prosecutor v. Limaj* et al. the defence challenged the Court's approach, arguing that the Trial Chamber should apply the stricter test of Article 1 of Additional Protocol II.[96] Sadly, the Trial Chamber's arguments are not convincing as it simply reiterates the position that it needs to prove that a minimum threshold has been attained and that 'the nature of the armed conflict is irrelevant to the application of Article 3 of the Statute'[97] and later confirms on the basis of previous case-law[98] that 'violations of Common Article 3 fall within the scope of Article 3 of the Statute'.[99] Nevertheless, it should be noted that the ICTY in *Limaj* only dealt with Common Article 3 and not Additional Protocol II crimes and thus there was no compelling reasons to warrant an examination of the threshold of applicability of Additional Protocol II. In fact in most cases in which the ICTY discussed the applicability test it was confronted with charges deriving directly from Common Article 3 and not from Additional Protocol II (i.e. collective punishment, acts of terrorism, pillage or threat to commit the forgoing act).

Unfortunately and surprisingly, the ICTY did not discuss this matter in cases where it directly applied Additional Protocol II crimes. For example, in cases where the Court had to deal with charges stemming from Article 4 AP II it found a legal trick to sidestep a discussion on the applicability of Additional Protocol II and declared that 'the only charge not coming under common Article 3 of the Geneva Conventions concerns the prohibition on plunder of private property but that is specifically mentioned in Article 3(e) of the Statute'.[100] In *Hadzihasanovic* the Court took the view that Article 3 of the ICTY Statute was broad enough to confer jurisdiction over other crimes.[101] As a result, it pointed out that wanton destruction as well as pillage could be prosecuted pursuant to Article 3(b) and 3(e), respectively, of the ICTY Statute even though they were not mentioned in Common Article 3 though prohibited under Additional Protocol II and, most significantly, under customary international law.[102]

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[96] ICTY Limaj 2005, para 88.

[97] ICTY Limaj 2005, para 92.

[98] See ICTY Delalic et al. 2001, Prosecutor v. Delalic et al., Case IT-96-21-A, Appeals Judgment, Appeals Chember, 20 February 2001, para 136 and ICTY Kunarac et al. 2002, Prosecutor v. Kunarac, Kovac and Vukovic, Case IT-96-23 & IT-96-23/1-A, Appeals Judgment, Appeals Chamber, 12 June 2002, para 68 [hereafter ICTY Kunarac et al. 2002].

[99] ICTY Limaj 2005, para 176. As the ICTY noted 'Article 3 of the Statute is a general and residual clause covering serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute'. ICTY Kunarac et al. 2002, para 68.

[100] ICTY Nikolic 1995, para 31.

[101] ICTY Hahdzihasanovic and Kubura 2005, Prosecutor v. Hadzihasanovic and Kubura, Case No IT-01-47-AR3.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, Appeals Chamber, 11 March 2005, para 14 [hereafter ICTY Hahdzihasanovic and Kubura 2005].

[102] ICTY Hahdzihasanovic and Kubura 2005, paras 29 and 37.

In *Milosevic* the Trial Chamber boldly stated that 'the Tadic test is consistent with Additional Protocol II to the Four Geneva Conventions';[103] nonetheless it hinted that the threshold of applicability of Additional Protocol II was higher inasmuch as it denied 'such control of territory [as] a requirement for the existence of an armed conflict'.[104] Later, in *Boskoski*, the ICTY distinguished between the threshold of applicability of Additional Protocol II and Common Article 3, stressing that it is mainly one relating to the degree of organisation of the armed groups and explained that

> 'Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in "protracted violence" is lower than the degree of organisation required to carry out "sustained and concerted military operations"'.[105]

The ICTY is no doubt aware that the threshold of applicability of Additional Protocol II is higher.

In conclusion, the ICTY appears to favour a single definition in regard to the applicability test of a non-international armed conflict, this being dictated by its Statute. That being said, the test set out in *Tadic* appears to be lower than the one expounded in the ICRC Commentary.

As a result, Boelaert-Suominen explains that 'the threshold suggested by the ICRC Commentary has failed to crystallise into customary international law'. In particular, there is no requirement in the ICTY judgments that the non-state entities should somehow exert control over part of a territory, or that such armed forces have a responsible command[106] or be willing to respect the laws and customs of warfare.[107] Undoubtedly the ICTY jurisprudence has lowered the threshold of applicability of Common Article 3.

2.4.2 The International Criminal Tribunal for Rwanda

The greatest innovation in terms of international criminal law relating to non-international armed conflicts was the inclusion in Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) of crimes derived from Common Article 3 GCs and Article 4 of Additional Protocol II. Therefore the Statute of the ICTR 'fully deserves the epithet "historic"'.[108] In particular three sets of crimes derive from Additional Protocol II only and are not found in

[103] ICTY Milosevic 2004, para 21.
[104] ICTY Milosevic 2004, para 36.
[105] ICTY Boskoski and Tarculovski 2008, para 197.
[106] Boelaert-Suominen 2000b, pp. 633–634.
[107] Tahzib-Lie and Swaak-Goldman 2004, pp. 250–251.
[108] Turns 1995, p. 822.

Common Article 3.[109] As the specified crimes are not all crimes deriving from Common Article 3 the applicability and threshold of the two distinctive treaties would, so it seems, be of utmost importance.

As far as the threshold issue is concerned, the ICTR has applied an 'evaluation test' to determine whether a non-international, in contradistinction to an international, armed conflict exists[110] and whether an armed conflict, in contradistinction to internal disturbances, exists.[111] Under this test the Court must, similar to the *Tadic* case, appraise the 'intensity and organisation of the parties to the conflict'.[112] Alike the ICTY the ICTR uses this test to rule out 'mere acts of banditry, internal disturbances and tensions, and unorganized and short-lived insurrections'[113] from the application of the Statute.[114]

With regard to the relation between the Additional Protocol II and the Common Article 3 GCs thresholds the Court adopts the view that Additional Protocol II develops and supplements the rules under Common Article 3 GCs.[115] The Trial Chamber in *Akayesu* noted the different thresholds between Additional Protocol II and Common Article 3 and considered separately which convention applied.[116] The Court clearly specified that 'if an offence […] is charged under both Common Article 3 and Additional Protocol II, it will not suffice to apply Common Article 3 and take for granted that Article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable'.[117] It held that both standards applied to the conflict in question.

A different approach to the *Akayesu* 'bifurcation thesis' was adopted by the Trial Chamber in *Kayishema and Ruzindana*, for by declaring that '[a]n armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, in accordance with Protocol II, should be considered as a non-international armed conflict'[118]

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[109] This is the case for collective punishment, acts of terrorism, pillage and threats to commit any of the forgoing acts. Article 4(b)(d)(h) and (g) AP II respectively.

[110] ICTR Musema 2000, Prosecutor v. Musema, Case No ICTR-96-13-T, Judgment, Trial Chamber, 27 January 2000, para 247 [hereafter ICTR Musema 2000].

[111] ICTR Akayesu 1998, para 601; ICTR Musema 2000, para 248.

[112] ICTR Akayesu 1998, para 620; ICTR Musema 2000, para 250; ICTR Rutaganda 1999, Prosecutor v. Rutaganda, Case No ICTR-96-3-T, Judgment, Trial Chamber, 6 December 1999, para 93 [hereafter ICTR Rutaganda 1999]; ICTR Baglishema 2001, Prosecutor v. Baglishema, Case No ICTR-95-1A-T, Judgment, Trial Chamber, 7 June 2001, para 101 [hereafter ICTR Baglishema 2001].

[113] ICTR Rutaganda 1999, para 92.

[114] ICTR Akayesu 1998, para 620.

[115] ICTR Kayishema and Ruzindana 1999, Prosecutor v. Kayishema and Ruzindana, Case No ICTR-95-1-T, Judgment, Trial Chamber, 21 May 1999, para 170 [herafter ICTR Kayishema and Ruzindana 1999]; ICTR Musema 2000, para 252.

[116] ICTR Akayesu 1998, para 607. As Cullen notes, 'the ICTR Trial Chamber found it necessary to establish the applicability of common Article 3 and Additional Protocol II individually'. Cullen 2010, p. 133.

[117] ICTR Akayesu 1998, paras 607 and 618. See also ICTR Musema 2000, para 252.

[118] ICTR Kayishema and Ruzindana 1999, para 170.

the ICTR seems to list most of, albeit not all, the elements of the *Tadic* definition of an armed conflict whilst referring to Additional Protocol II in the same breath. This odd phrasing in fact means that the Court deems Common Article 3 and Additional Protocol II to have to be satisfied 'conjunctively'. Indeed, in *Rutaganda* the Trial Chamber stated that '[c]onsequently, the Prosecutor must prove that at the time of the events alleged in the Indictment there existed an internal armed conflict in the territory of Rwanda, which, at the very least, satisfied the material requirements of Additional Protocol II, as these requirements subsume those of Common Article 3.'[119] This finding was confirmed in *Baglishema* stating that if the higher threshold of applicability of Additional Protocol II was met, the material requirements of applicability *ipso facto* meet those of Common Article 3.[120] This undoubtedly supports the aforementioned simultaneous application of both standards when the more restrictive requirements set out in Additional Protocol II are fulfilled. Yet, this does not seem to cover situations that fall short of the threshold of Additional Protocol II but might be covered by Common Article 3 GCs.

It appears on the face of it that the ICTR is applying only one applicability standard, that is the Additional Protocol II standard, but this is due to the fact that the conflict in Rwanda was an Additional Protocol II conflict and there was thus no need to assess situations that fall solely within the remit of applicability of Common Article 3. Further, Article 4 of the ICTR specifically refers to 'Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II' which led the Court to believe correctly that both thresholds had to be met.[121] In this regard, the ICTR has identified four requirements that must be satisfied: (i) an armed conflict between the armed forces of a High Contracting Party and dissident armed forces or other organised armed groups; (ii) dissident forces were under responsible command; (iii) dissident forces were able to exercise control over a part of territory to carry out sustained and concerted military operations and (iv) dissident forces were able to implement Additional Protocol II.[122]

The first requirement is fulfilled by the presence of state armed forces 'understood in the broadest sense, so as to cover all armed forces as described within national legislation'[123] and armed opposition groups. As for the second requirement, i.e. that of responsible command, it is closely knitted with (i) how 'organised' the armed group is, (ii) the ability to carry out sustained and concerted military operations and (iii) the ability to ensure the implementation of international humanitarian law.

Indeed, the ICTR explained in *Musema* that dissident armed forces or other armed groups need not be hierarchically organized as a formal military

[119] ICTR Rutaganda 1999, para 435.

[120] ICTR Baglishema 2001, para 100. See also ICTR Rutaganda 1999, para 94.

[121] ICTR Musema 2000, para 245.

[122] ICTR Akayesu 1998, paras 619, 623; ICTR Rutaganda 1999, para 95; ICTR Baglishema 2001, para 100; ICTR Kayishema and Ruzindana 1999, para 171.

[123] ICTR Akayesu 1998, para 625; ICTR Musema 2000, para 256.

structure,[124] but that there must be a level of organisation that is capable of 'on the one hand, planning and carrying out sustained and concerted military operations—operations that are kept up continuously and that are done in agreement according to a plan, and on the other, of imposing discipline in the name of the de facto authorities'.[125]

Yet, the Court does not leave it at that as it also stresses that

> '[t]he armed forces 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. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces'.[126]

As mentioned by Vité, the distinctive criterion between an Additional Protocol II and a Common Article 3 armed conflict is that of the armed opposition group's control of territory.[127] This criterion (which assists in ascertaining the armed group's ability to carry out sustained and concerted military operations) for the applicability of Additional Protocol II, in contrast to Common Article 3, is strongly reaffirmed in the jurisprudence of the ICTR.

2.4.3 The Special Court for Sierra Leone

In a similar manner to the ICTR, the war crimes provision in the Statute of the Special Court for Sierra Leone (SCSL),[128] derive from Common Article 3 GCs and Article 4 of Additional Protocol II. As mentioned above collective punishment, acts of terrorism, pillage and threats to commit the foregoing acts derive specifically from Article 4 of Additional Protocol II. The first three offences have been charged in all cases before the SCSL. In contrast, the ICTR and ICTY have been more reluctant to charge crimes deriving directly and solely from Additional Protocol II. Therefore, the cases before the SCSL could potentially add clarifications to the questionable applicability standard.

Regrettably, the SCSL adds more doubtful jurisprudence. The SCSL Appeals Chamber in *Fofana* has followed the broader test stating in regard to Article 3 of the SCSL Statute: 'In respect of Article 3, therefore, the court need only be satisfied that an armed conflict existed and that the alleged violations were related to the armed conflict'.[129]

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[124] ICTR Musema 2000, para 257.

[125] ICTR Musema 2000, para 257. See also ICTR Akayesu 1998, para 626.

[126] ICTR Akayesu 1998, para 626; ICTR Musema 2000, para 258.

[127] Vité 2009, p. 79.

[128] Statute of the Special Court for Sierra Leone.

[129] SCSL Fofana 2004, Prosecutor v. Fofana, Case No SCSL-04-14-PT-101, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict, Appeals Chamber, 25 May 2004, para 25 [hereafter SCSL Fofana 2004].

The SCSL does not fall short to give an explanation for such an interpretation stating

> '[i]t has been observed that "even though the rules applicable in internal armed conflict still lag behind the law that applies in international conflict, the establishment and work of the ad hoc Tribunals has significantly contributed to diminishing the relevance of the distinction between the two types of conflict". The distinction is no longer of great relevance in relation to the crimes articulated in Article 3 of the Statute as these crimes are prohibited in all conflicts.'[130]

The ICTY principle that there are minimum standards once a situation can be described as an armed conflict has without a doubt been readily adopted by the SCSL.[131] In this regard, the SCSL reiterates the *Tadic* definition of an armed conflict and uses the same criteria, that of the intensity of the conflict and the organisation of the parties.[132] Such criteria are essential to distinguish an armed conflict from other acts that do not fall within the purview of international humanitarian law.[133]

Yet, such a statement appears to be ground-breaking. Indeed the conflict in Sierra Leone took place only two years after the conflict in Rwanda and yet whilst the ICTR assesses the applicability of Additional Protocol II the SCSL does not appear to feel obliged to do so. It is all the more surprising as both Article 3 of the ICTR Statute and Article 3 of the SCSL Statute refer to violations of Common Article 3 *and* Additional Protocol II. The SCSL also analyses the ICTR position, acknowledging that the ICTR understands its jurisdiction in relation to non-international armed conflict to be ascertained when the requirements set out in Additional Protocol II are satisfied.[134] Yet, after reviewing the ICTY and ICTR jurisprudence, the SCSL Appeals Chamber explains that the crimes spelled out in Article 3 of its Statute are of customary nature and as the distinction between international and non-international armed conflict 'is no longer of great relevance in relation to the crimes articulated in Article 3 of the Statute'[135] the Court only needs to be satisfied that an armed conflict existed.[136] As a result, the SCSL considers that as the distinction between international and non-international armed conflicts is irrelevant with regard to the crimes listed in Article 3 of the Statute, the

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[130] SCSL Fofana 2004, para 25; See also SCSL Brima et al. 2007, Prosecutor v. Brima et al. Case No SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para 243 [hereafter SCSL Brima et al. 2007]; SCSL Taylor 2012, Prosecutor v. Taylor, Case No SCSL-03-01-T, Judgment, Trial Chamber, 18 May 2012, para 563 [hereafter SCSL Taylor 2012].

[131] SCSL Fofana 2004, para 23; SCSL Fofana and Kondewa 2007, Prosecutor v. Fofana and Kondewa, Case No SCSL-04-14-T, Trial Chamber, 2 August 2007, para 123 [hereafter SCSL Fofana and Kondewa 2007]; SCSL Brima et al. 2007, paras 243–244.

[132] SCSL Fofana and Kondewa 2007, para 124; SCSL Brima et al. 2007, paras 243–244; SCSL Taylor 2012, paras 563–564.

[133] SCSL Fofana and Kondewa 2007, para 124; SCSL Taylor 2012, para 564.

[134] SCSL Fofana 2004, para 20.

[135] SCSL Fofana 2004, para 25.

[136] See also SCSL Brima et al. 2007, paras 251.

distinction between the two types of non-international armed conflict is also irrelevant.

Nonetheless, the SCSL has at times examined whether the conflict fell within the purview of Additional Protocol II. In the *Fofana* case, the Court spelled out the classical criteria for the application of Additional Protocol II, stressing that an Additional Protocol II conflict automatically satisfies the criteria for the applicability of Common Article 3.[137] Yet, in the Court's application of the law there are no references to Additional Protocol II.[138] In the *Sesay* et al. Case, the Trial Chamber felt the need to investigate the applicability of Additional Protocol II as three counts charged by the Prosecution—collective punishment, acts of terrorism and pillage—were solely found in Additional Protocol II.[139] Although it spelled out the three criteria of responsible command, control over territory (combined with the ability to carry out sustained and concerted military operations) and implementation of Additional Protocol II[140] it only focused on the first two criteria and ignored the last one.[141] Moreover, the succinctness of the application of the criteria and the conclusion that anyway 'an armed conflict satisfying this higher threshold would necessarily constitute an armed conflict under Common Article 3'[142] conveys the impression that the Trial Chamber applied the Additional Protocol II test with extreme reluctance.

In conclusion, although the provision of the SCSL Statute in relation to crimes perpetrated in non-international armed conflict is similar to that of the ICTR, the SCSL has adopted the ICTY approach, namely that it only needs to be satisfied that there is an armed conflict.

2.4.4 The International Criminal Court

Last but not least, the Rome Statute of the International Criminal Court and the jurisprudence of its Chambers need to be scrutinised in order to resolve the question of whether there are two or only one type of non-international armed conflict. Two articles of the Statute relate to such conflicts. Article 8(2)(c) enumerates war crimes for serious violations of Common Article 3 that are committed against 'persons taking no active part in hostilities…'. It 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

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[137] SCSL Fofana and Kondewa 2007, paras 126–127.

[138] SCSL Fofana and Kondewa 2007, paras 695–700.

[139] SCSL Sesay et al. 2009, Prosecutor v. Sesay et al., Case No SCSL-04-15-T, Judgment, Trial Chamber, 2 March 2009, para 966 [hereafter SCSL Sesay et al. 2009].

[140] SCSL Sesay et al. 2009, para 966.

[141] SCSL Sesay et al. 2009, paras 978–981.

[142] SCSL Sesay et al. 2009, para 981.

other acts of a similar nature.[143] Article 8(2)(e) of the Rome Statute, which enumerates war crimes for other serious violations of the laws and customs applicable in non-international armed conflicts (similar to Article 4 of the SCSL Statute) adduces an additional requirement (stipulated in Article 8(2)(f) such that it only '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'.[144]

Inevitably the question is whether these two provisions reflect Common Article 3 and Additional Protocol II, respectively, or any other standard adopted by the previous international criminal tribunals. Certainly both Articles 8(2)(c) and 8(2)(e) could cover situations falling within the purview of Common Article 3, for the ICTY has consistently stressed the distinction between an armed conflict and other situations such as internal disturbances and tensions. Common Article 3 is now viewed as encapsulating the lowest threshold of a non-international armed conflict.

Still, there are doubts as to whether Article 8(2)(f)—which clarifies the condition of applicability for Article 8(2)(e)—reflects the standards of Additional Protocol II. The language used is reminiscent of, albeit not identical to, the *Tadic* threshold as it defines a non-international armed conflict by reference to 'protracted armed conflict' and 'organised armed groups'.[145] The reference to a 'protracted' armed conflict is certainly a lower standard than the expression 'sustained and concerted military operations' enshrined in Article 1(1) of Additional Protocol II.[146] Moreover, unlike Additional Protocol II, the Rome Statute also formally captures situations where governmental authorities are not directly involved in the armed conflict, but where the conflict is merely between organized armed groups and which, in the past, were only covered by Common Article 3. As a matter of fact, during the drafting of the article delegates rejected a proposal to introduce the Additional Protocol II threshold and agreed on the one propounded in the *Tadic* case, thereby indicating 'that the latter test was considered to be distinct from, and a lower threshold than, the test under Additional Protocol II'.[147] The drafters of the Rome Statute considered that this broader definition of the scope of application of the law relating to non-international armed conflicts now constitutes customary law.[148]

The question is whether this creates another threshold. In other words, can Article 8(2)(e) be considered as a hybrid threshold between Additional Protocol II and Common Article 3? This is particularly significant as the drafters only stipulated conditions for the applicability of Article 8(2)(e) by referring in Article 8(2)(f)

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[143] Article 8(2)(d) Rome Statute.

[144] Article 8(2)(f) Rome Statute; emphasis added.

[145] ICTY Limaj 2005, para 87.

[146] Zimmermann 1999, p. 285.

[147] ICTY Boskoski and Tarculovski 2008, para 197.

[148] 'The incorporation of [the Tadic threshold] into the Rome Statute of the International Criminal Court has been cited as indicative of its customary status.' Cullen 2010, pp. 121–122.

to an amended version of the *Tadic* test.[149] Furthermore, Article 8(2)(c) expressly refers to Common Article 3[150] whilst Article 8(2)(c) relates to the *Tadic* test mentioned in Article 8(2)(f), thereby conveying the impression that the *Tadic* test is different from the one encapsulated in Common Article 3.

Many jurists argue that Article 8(2)(f) has the same threshold as Common Article 3.[151] Likewise, Akande does not think that the intention was to create different thresholds of application, noting that 'Article 8(2)(f) is better interpreted as simply stating the intensity test with the protracted nature of the conflict being a factor to be assessed determining intensity'.[152]

In *Bemba* the Pre-Trial Chamber noted that a non-international armed conflict occurs when it reaches a 'level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a state territory. The hostilities may break out (i) between government authorities and organized dissident armed groups or (ii) between such groups'.[153] This formulation tends to reflect the *Tadic* test, i.e. that of a minimum threshold to distinguish an armed conflict from other situations and the idea of two *organised* groups whose clashes reach a certain level of *intensity*. However, the Pre-Trial Chamber goes further, affirming that the group must be under responsible command so as to be able to impose discipline and carry out military operations,[154] criteria that are reminiscent of those stipulated in Additional Protocol II.

Some legal experts also contend that a temporal element is introduced by way of the word 'protracted', thereby creating a separate category of non-international armed conflict.[155] The ICC jurisprudence seems to confirm this viewpoint, for, when dealing with Article 8(2)(f) the ICC links the concept of 'protracted' to the ability of the armed groups to plan and carry out military operations rather than solely the intensity and the organisation of the armed groups as in the *Tadic* test.[156] In *Bemba* although the Pre-Trial Chamber specifically raises the issue of the temporal element it deems it unnecessary to address the argument in detail (i.e. spell out relevant factors), for the period during which the alleged crimes were committed was regarded as 'protracted'.[157] The position of the ICC is best summarised in the *Lubanga* judgment in which the Trial Chamber stated:

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[149] See discussion in Vité 2009, p. 81.

[150] See discussion in Boelaert-Suominen 2000a, p. 87.

[151] Pejic 2011, pp. 192–193; Meron 2000, p. 260; Cullen 2007, p. 445.

[152] Akande 2012, p. 56.

[153] ICC Bemba 2009, Prosecutor v. Bemba, Case No ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber, 15 June 2009, para 231 [hereafter ICC Bemba 2009].

[154] ICC Bemba 2009, para 234. See also ICC Lubanga 2007, Prosecutor v. Lubanga, Case No ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para 23 [hereafter ICC Lubanga 2007].

[155] Provost 2002, pp. 268 f.

[156] ICC Lubanga 2007, para 234.

[157] ICC Bemba 2009, para 235.

> '[i]t is argued a non-international armed conflict is established when states have not resorted to armed force and i) the violence is sustained and has reached a certain degree of intensity, and ii) armed groups with some degree of organisation, including the capability of imposing discipline and the ability to plan and carry out sustained military operations, are involved. Additionally, Article 8(2)(f) of the Statute stipulates that the conflict must be "protracted" for these purposes'.[158]

This *Lubanga* test is narrower than the one applied under the customary interpretation of Common Article 3 as it requires the fighting to take place over a certain period of time and yet, to a certain extent, broader than the one expounded in Additional Protocol II as it does not require the armed group to be in control of a section of the territory.[159] Whilst Vité concludes, this is a new test 'half way between the categories referred to in common Article 3 and in Additional Protocol II' it is argued that the interpretation imparted by the ICC is in fact closer to the original intention of the drafters of Common Article 3 than the interpretation by the ICTY. After all, the Commentary to Common Article 3 explains that '[s] peaking 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'.[160] Common Article 3 was not meant to cover situations in which organised groups were engaged in acts that just reached a minimum level of intensity.

2.5 Conclusion

International humanitarian law identifies two types of non-international armed conflict: first those covered by Common Article 3 and, second those falling within the purview of Article 1 AP II. There can be no doubt that the jurisprudence of the international criminal tribunals—the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court—has led to changes in relation to the distinction between the different types of non-international armed conflicts. The inconsistencies in the case law, however, mean that the tribunals have not had the significant impact on treaty law that might have been expected.

For example, the ICTR appears to be the only tribunal that closely follows this distinction and makes a conscious effort to verify that a situation falls within one and/or the other type of non-international armed conflict.

In contrast the ICTY has chosen to apply only one threshold of applicability. In *Tadic* it focused its attention on the distinction between armed conflicts and other

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[158] ICC Lubanga 2012, Prosecutor v. Lubanga, Case No ICC-01/04-01/06, Judgment, Trial Chamber I, 14 March 2012, para 506.

[159] See discussion in Vité 2009, p. 82.

[160] Pictet 1960, p. 37.

situations. This minimum threshold that allows a distinction between armed conflicts and other situations as well as the factors adopted by the ICTY to ascertain whether a conflict is taking place—intensity of conflict and organisation of the armed groups—are now widely accepted by the ICTR, the SCSL and the ICC. As Bartels explains '[d]espite the lack of a formal treaty-given definition, it seems reasonably clear nowadays what is to be considered an IAC or an NIAC, and thus what constitutes the distinction between the two types'.[161] Although the ICTY argues that it has based its case-law on the commentary there are however doubts that this threshold is similar to the one originally intended by the drafters of Common Article 3.[162] Common Article 3 has been extended[163] and distorted, inasmuch as it now applies as a minimum threshold (see jurisprudence of the ICTY, ICTR and SCSL) rather than to internal situations that are similar to international armed conflicts, yet occurring on the territory of a single state.

To further complicate matters, it appears that the drafters of the ICC Statute have in Article 8(2)(f) introduced a third type of armed conflict, a hybrid version of Common Article 3 and Additional Protocol II.[164] A closer and thorough examination nevertheless reveals that the threshold set in Article 8(2)(f) and the interpretation thereof are likely to be similar to the original intention of the drafters of Common Article 3. The question is whether the interpretation of the ICC will override the one by the ICTY in the *Tadic* case now so ingrained in customary international law. Will the ICC test slowly, but assuredly, find its way in customary international law? Time will tell.

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