III. INTERNATIONAL CRIMINAL COURT

The International Criminal Court and Non-International Armed Conflicts

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Keywords: International Criminal Court; international humanitarian law; non-international armed conflict.

Abstract: Non-international armed conflicts are more numerous, more brutal and entail more blood-shed today than international ones. The Statute of the International Criminal Court explicitly upholds the traditional distinction between international and non-international conflicts, and armed conflicts will have to be characterized accordingly. But the tendency to adapt the international humanitarian law (IHL) regime for non-international conflicts to the rules for international ones emerges. Article 7 on Crimes Against Humanity and Article 8(2)(c) and (e) on War Crimes amount to real progress in this respect. Yet, the regulation on war crimes in particular does not provide for comprehensive criminal responsibility of individual perpetrators in non-international conflicts.

1. INTRODUCTION

The opening for signature of the Statute[1] of the International Criminal Court (ICC) on 17 July 1998 should be regarded as the climax of a development which started with the establishment of the International Criminal Tribunals in Nuremberg and Tokyo. The Statute gives voice to recent efforts to provide a treaty basis for international criminal law.[2] International criminal law now has the chance to develop into an effective mechanism to enforce humanitarian law.

The establishment of a permanent International Criminal Court is an institutional novelty enhancing the evolving system of criminal responsibility of individuals for violations of international law. The basis for the ICC is formed by the statutes of the International Criminal Tribunal for the Former Yugoslavia

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1. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.
2. On 4 April 2000 the ICC Statute was signed by 95 states. On 4 April 2000 the ICC Statute was ratified by Fiji, Ghana, Italy, Norway, San Marino, Senegal and Trinidad and Tobago. According to Art.126 the ICC will be instituted after the deposit of the 60th instrument of ratification, acceptance, approval or accession.

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(ICTY)[3] and the International Criminal Tribunal for Rwanda (ICTR).[4] It is now recognized that individuals can be held criminally responsible for violations of international humanitarian law directly under international law and complementary to domestic jurisdiction and jurisprudence of states parties to the Statute. States parties have identified certain crimes as the most serious and of concern to the international community as a whole and pursue the goal not to let such crimes go unpunished.[5]

In addition to this doctrinal aspect, the offences incorporated in the ICC Statute emanate from and are characterized by current practices in armed conflicts. The global changes which took place after the dissolution of states and the change in political structure in, *inter alia*, Europe triggered enormous national, religious, anthropological and ethnical rifts and gave rise to a great number of variously motivated clashes. Today, non-international armed conflicts are more numerous, more brutal and entail more blood-shed than international armed conflicts. The hostilities in Liberia, Southern Sudan, East Timor as well as former Yugoslavia and the Great Lakes Region are some recent examples. At the same time, the interest and concern of the international community focus considerably more on non-international armed conflicts since the adoption of two Additional Protocols to the Geneva Conventions in 1977[6] which form a comprehensive codification of international humanitarian law.

The increased awareness of non-international armed conflicts is also clear from the legal regulation of such conflicts. In particular the Ottawa Treaty on Antipersonnel Landmines[7] and the Second Protocol on the Protection of Cultural Property[8] as well as their negotiation history reveal a certain trend[9] to set up a body of humanitarian law in non-international armed conflicts which is similar to the system applicable in international armed conflicts. This trend or, rather, effort to apply similar legal rules to non-international conflicts also emerges in international criminal law. The ICTY and ICTR have been instituted in major

3. UN Security Council Resolution 827, UN Doc. S/RES/827 (1993).
4. UN Security Council Resolution 955, UN Doc. S/RES/955 (1994).
5. ICC Statute, *supra* note 1, preamble para. 4.
6. Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3 (1979), 16 ILM 1391 (1977) [hereinafter AP I]; Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609 (1979), 16 ILM 1442 (1977) [hereinafter AP II].
7. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 8 September 1997, 36 ILM 1507 (1997).
8. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999, 38 ILM 769 (1999).
9. *See for example* J.-M. Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 3 Humanitäres Völkerrecht – Informationsschriften 147-154, at 153 (1999).

armed hostilities between governmental armed forces and non-governmental armed groups and of such groups among themselves.

Any criminal law that establishes abstract offences instead of listing criminal acts and their circumstances enumeratively, has to be interpreted by jurisprudence in order to become applicable. Only the interpretation of abstract criminal provisions – within the framework of the rule of law – guarantees that the full range of offences which the legislator has envisaged to criminalize is covered by the actual application of the provisions. It is well understood that decisions and judgments of ICTY and ICTR do not have any binding force on the ICC. Decisions and judgments of ICTY and ICTR exclusively refer to their Statutes and are binding in their specific trials only. Yet, their jurisprudence[10] paved the way for applying international criminal law equally in international and in non-international armed conflicts. This will have an impact on the jurisdiction of the future ICC and the offences as incorporated in the Statute.

In sum, the development of an equal treatment of types of conflict in criminal jurisdiction and offences reveals that there is a tendency to disregard differences in the legal coverage of international and non-international armed conflicts. In 1977 the attempt to reach identical protection of the civilian population in international as well as in non-international armed conflicts failed. In 1998, however, the signatories of the ICC Statute took the first step to give precedence to the protection granted by international humanitarian law regardless of national sovereignty in non-international armed conflict.

The following article seeks to analyze how far the assimilation process of international criminal law – and thus of international humanitarian law in general – has progressed. It will examine the criterion of 'armed conflict' in international criminal law and especially deal with the question of which types of armed conflicts are covered by international criminal and humanitarian law on the one hand and national laws on the other hand. The analysis will not only focus on the question of which offences fall under the jurisdiction of the ICC and to what extent the ICC distinguishes between different types of conflict. It will also elaborate on the offences which, according to the ICC Statute, are covered in non-international armed conflicts. Furthermore it will examine the future regime of individual criminal responsibility in various types of conflict, compare it to the regime for international conflicts and identify potential lacunae in the coverage of non-international armed conflicts by international criminal law.

10. In particular the jurisprudence of the ICTY; *see* Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras. 71 *et seq.* and paras. 86-93; for an inclusion in Art. 2 of the ICTY Statute *cf.* the Trial Chamber of the ICTY in the Čelebići case, Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 317.

2. THE CRITERION OF 'ARMED CONFLICT' IN INTERNATIONAL CRIMINAL LAW

According to the traditional concept of international humanitarian law and despite various semantic differences,[11] a classical distinction exists with regard to its applicability, i.e. the distinction between international armed conflict, non-international armed conflict and merely internal or domestic conflict situations.[12] An international armed conflict is the traditional and 'normal' situation to which the provisions of international humanitarian law apply. Despite a tendency in current state practice[13] to consider humanitarian law rules for international conflicts applicable to non-international conflicts as well, it is still a fact that in non-international armed conflicts only a limited number of humanitarian law provisions apply.[14] Finally, the traditional concept of international humanitarian law is based on the fact that states do not apply humanitarian law rules at all and exclusively rely on instruments of domestic public and criminal law in situations qualifying as mere internal or domestic armed conflicts. Additional Protocol II[15] and the ICC Statute[16] refer to such internal conflicts as "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." The ICC Statute is explicitly based on this traditional concept, as can be seen in Article 8 in which the definition of war crimes distinguishes between international and non-international armed conflicts and omits 'internal conflicts' from this definition.

2.1. Existence of an armed conflict

Modern international humanitarian law[17] does not give a legal definition of 'armed conflict'. In general, the notion of armed conflict may be described as to

11. Concerning the different uses of the expression 'armed conflict' and of its qualifications *cf.* J. Partsch, *Armed Conflict*, *in* R. Bernhardt (Ed.), Encyclopedia of Public International Law, Instalment 3 (1981), at 28.
12. J. Pictet, Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 35 (1958).
13. *Cf.*, Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras. 96 *et seq.*, concluding 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".
14. The development of humanitarian rules for non-international armed conflicts in international treaties and custom is described for example by Th. Meron, *Is International law Moving towards Criminalization?*, 9 European Journal of International Law 18-31, at 25 (1998), and Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras. 100-127.
15. Art. 1(2).
16. Art. 8 (2)(d) and (f).
17. On the development of the concept of armed conflict and its relationship to the notion of 'war' *see* Partsch, *supra* note 11.

include the use of force in a warlike manner.[18] The Geneva Conventions[19] refer to such a definition in so far as they clarify that the Conventions shall apply "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."[20] This determination of the field of application is reiterated by Article 1(3) AP I and indirectly repeated in Article 1(1) AP II, while Additional Protocol II explicitly exempts internal disturbances and tensions from the notion of 'armed conflict'. The ICTY stated that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[21]

2.2. Temporal and geographical scope of the armed conflict

Yet, the question remains of the temporal and geographical link between the armed force or the protracted armed violence and the offence. It is clear that international criminal law may only be applied when the offence has been committed in case of an armed conflict. Therefore, the decisive factor is whether the offence is committed at a time and place when hostilities are actually taking place or, in other words, what the connection should be between the armed force or protracted violence and the offence in order to apply international criminal law. It derives from the nature of the occurrence of armed force or protracted violence that the whole situation forms the 'armed conflict', be it international or non-international. Thus, the very existence of an armed conflict in terms of its temporal and geographical scope extends beyond the exact time and place of hostilities.[22] The condition of 'armed conflict' is fulfilled until a peaceful settlement of hostilities is achieved and the whole territory is under the control of a

18. *Id.*, A. 2. (b).
19. 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1950); 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85 (1950); 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950); and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
20. Common Art. 2 (1) Geneva Convention.
21. Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 70; this definition is also used in Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-I-T, Trial Chamber, 7 May 1997, para. 561; Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, paras. 182 *et seq.*; and Prosecutor *v.* Anto Furundžija, Judgment, Case No. IT-95-17/1-T, Trial Chamber, 10 December 1998, para. 59. The ICTR Trial Chamber stated in the *Akayesu* case that "the term 'armed conflict' in itself suggests the existence of open hostilities between armed forces which are organized to a greater or lesser degree", Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "Common Article 3".
22. Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras. 67 and 70.

party to the conflict, whether or not actual combat takes place there.[23] In conclusion, hostilities do not have to occur at the exact time[24] and in the exact place[25] of the alleged commission of the crime in order to fulfil the condition of 'armed conflict'. Armed force or protracted violence in the general context of the offence in question is sufficient for the offence to fall under the regime of international criminal law.

2.3. Nexus between the acts of the accused and the armed conflict

It was just noted that a general link between the offence and the temporal as well as geographical framework of the (non-international) armed conflict is sufficient in order to apply international criminal law. The question remains if a substantive link between the offence and the armed conflict is required. Unfortunately the ICC Statute does not provide for any guidance on this matter.

The question is of crucial importance since at least a minimum connection should be required in order to justify the application of international criminal law instead of domestic criminal law. However, to link the alleged offence too closely to the armed conflict could have the effect that certain acts fall outside the application of international criminal law and would be governed exclusively by domestic criminal law. This would especially be unacceptable in case of non-international armed conflicts in which the functioning of the domestic legal system, including the criminal legal system, is even more dubious than in non-international armed conflicts.

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23. *Id.*, para. 70.
24. The ICTY Chamber in the *Čelebići* case based its findings on "continuing armed violence at least from [...] 6 March 1992 until [...] November 1995", Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 185; the Trial Chamber in the *Furundžija* case found an armed conflict during the general time frame of the act of the accused in Bosnia-Herzegovina, Prosecutor *v.* Anto Furundžija, Judgment, Case No. IT-95-17/1-T, Trial Chamber, 10 December 1998, para. 59; the ICTR Trial Chamber in the *Akayesu* case observed in a similar manner that generally "there existed at the time of the events alleged in the Indictment an armed conflict not of an international character", Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "Common Article 3" and under "Additional Protocol II".
25. In the *Čelebići* case the ICTY Trial Chamber referred to the applicability of rules of international humanitarian law. With regard to the geographical factor the Chamber stated that "for the norms of international humanitarian law to be applicable [...] there does not have to be actual combat activities in a particular location", Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 185. In this specific case, the Chamber stated that the requirement of an armed conflict did not apply "in the Konjić municipality itself". It held that "combat activities" in "the larger territory of which it [i.e. Konjić municipality] forms part" were sufficient for the determination of an armed conflict. The ICTR Trial Chamber stated that "the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the 'war front'", Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "Ratione loci".

The findings of the ICTY, although not wholly clear-cut on the issue, reveal a certain line of thinking.[26] While referring to a "sufficient connection" – "rapport suffisant"[27] and an "obvious link" between the criminal act and the armed conflict,[28] the Court explicitly emphasized that it did not require a "direct connection"[29] in order to establish a "clear nexus"[30] between the armed conflict and the acts in question. Such a clear nexus is based on the following criteria: the place of the offence, the location and status of the victims, and the *de facto* position and duties of the accused.[31] Although sufficient nexus between the alleged acts and the armed conflict is not defined, neither in the ICC Statute nor by the jurisprudence of the ICTY, it seems to be recognized that the required link does not have to be a direct one. In case such direct link may not be established, it is enough to have recourse to the position of the victim and the alleged perpetrator as well as their connection to any party to the armed conflict. When this global evaluation appears to provide for a 'sufficient' nexus between the offence and the armed conflict, the International Criminal Court can apply international criminal law.

3. THE JURISDICTION OF THE COURT

The International Criminal Court is established by Article 1 of the Statute as a permanent institution with power to exercise its jurisdiction "over persons for the most serious crimes of international concern". Article 5 of the Statute lists four crimes which can be qualified as such and, thus, establishes the jurisdiction of the Court: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. These four crimes constitute as such – *per definitionem* – the "most serious crimes [...] of concern to the international community as a

26. Compare for example Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-I-T, Trial Chamber, 7 May 1997, paras. 573 *et seq.*. It held sufficient that "the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." The Trial Chamber first maintained the 'negative test' in so far as "it is [not] necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict". In terms of a 'positive test' the Chamber then only repeated the requirement of a 'close relation' and ascertained a 'direct connection' between the acts of the accused and the armed conflict – although its previous statement indicates strongly that such a 'direct connection' is not necessarily required.
27. Procureur *c/* Zlatko Aleksovski, Judgment, Case No. IT-95-14/1, Trial Chamber, 25 June 1999, para. 45.
28. Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 193.
29. *Id.*
30. *Id.*, para. 197.
31. *Id.* para. 196. In the *Furundžija* case the Trial Chamber relied on the accused being an "active combatant" participating in a practice at least endorsed by a party to the conflict, Prosecutor *v.* Anto Furundžija, Judgment, Case No. IT-95-17/1-T, Trial Chamber, 10 December 1998, para. 65.

whole" (Article 5). In the following, these four crimes will be analysed with respect to the question whether, under which circumstances and to what extent they apply to non-international armed conflicts and, if so, which offences in non-international armed conflicts entail individual criminal responsibility under the ICC Statute.

3.1. The crime of aggression, Article 5 (1)(d)(2) ICC Statute

The question whether the crime of aggression can be committed in case of non-international armed conflicts – which would be equally difficult to establish whether the alleged aggression is committed by the government or by non-governmental groups – is presently not relevant because a definition of the crime has not yet been drafted on the basis of Articles 121 and 123 of the Statute. Therefore, according to Article 5 (2) of the Statute the ICC shall not exercise its jurisdiction over the crime of aggression yet.

3.2. The crime of genocide, Article 5 (1)(a) and Article 6 ICC Statute

The ICC has jurisdiction over the crime of genocide according to Article 5(1)(a) and Article 6 of its Statute. Article 6 defines the crime of genocide for the purpose of the ICC Statute by listing five different offences and providing that these are to be qualified as genocide when committed with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The enumerative list of offences contains killing of members of the group (Article 6(a)), causing serious bodily or mental harm to members of the group (Article 6(b)), deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Article 6(c)), imposing measures intended to prevent births within the group (Article 6(d)), and forcibly transferring children of the group to another group (Article 6 (e)).

The wording of Article 6 does not make any reference to armed conflict, neither in its general provision nor in its list of offences. Due to the lack of reference to an armed conflict, the nature of the conflict is irrelevant for the application of the genocide provision. In other words, offences may be qualified as genocide in case they meet the specific preconditions set out in Article 6, irrespective of the question of an armed conflict. It is not relevant if the offence is committed in a situation of international or non-international armed conflict or in case of internal disturbances and tensions. Legal findings by the ICC on the crime of genocide will be independent from any qualification of an underlying armed conflict.

3.3. The crimes against humanity, Article 5(1)(b) and Article 7 ICC Statute

Paragraph 1 of Article 7 contains a list of offences constituting a crime against humanity provided, first, that these acts are committed as part of a widespread or systematic attack directed against any civilian population and, second, that they are committed with knowledge of the attack. The acts listed are murder (Article 7(1)(a)), extermination (Article 7(1)(b)), enslavement (Article 7(1)(c)), deportation or forcible transfer of population (Article 7(1)(d)), imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (Article 7(1)(e)), torture (Article 7(1)(f)), rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (Article 7(1)(g)), persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [as defined in Article 7(3), i.e. male and female], or other grounds that are universally recognized as impermissible under international law, in connection with any act [referred to in Article 7(1)] or any crime within the jurisdiction of the Court (Article 7(1)(h)), enforced disappearance of persons (Article 7(1)(i)), the crime of apartheid (Article 7(1)(j)), and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Article 7(1)(k)). The question arises whether these offences have to be committed in an international or a non-international armed conflict.

3.3.1. Textual Approach

Similar to the provision on genocide, the wording of Article 7 does not explicitly refer to the situation of an armed conflict. Only in two instances is it alluded to. The formulation "attack directed against any civilian population" in the general introduction in paragraph 1 and the respective definition of this criterion in paragraph 2(a) as well as the definition of "deportation or forcible transfer of population" in paragraph 2(d) could indicate that such acts constitute crimes against humanity only when committed in case of an – international or non-international – armed conflict.

The term "civilian population" in paragraph 2(a) hints at the customary principle of distinction in international humanitarian law (*cf.* Article 48 AP I) and to the customary definition of the civilian person and the civilian population as embodied in Article 50 AP I. The latter definition seems to point out that Article 7 of the ICC Statute would presuppose an armed conflict, and would require it to be an international one in order to establish a crime against humanity. Additional Protocol II repeats the concept of protection of the civilian population in the context of non-international armed conflicts (Article 5(1)(b) and (e), Articles 13-18).

The wording in Article 7(2)(d) is even more ambiguous. In the context of non-international armed conflicts Additional Protocol II uses the term "displacement" of the civilian population and "forced movement" of civilians in Article 17. The wording "deportation or forcible transfer of population" repeats parts of the prohibition contained in Article 49(1) Geneva Convention IV[32] which protects civilian persons in international conflicts from "individual or mass forcible transfers, as well as deportations". Although Article 49(2) speaks of "evacuations" and "displacement of protected persons", the assumption that the provision of Article 7(1)(d) on deportation or forcible transfer of population constitutes a crime against humanity in international and non-international conflict remains questionable.

3.3.2. Contextual approach

A comparison to the ICTY Statute is striking as Article 5 of the ICTY Statute explicitly requires that crimes against humanity are "committed in armed conflict, whether international or internal in character". The ICTY Statute thus makes an armed conflict, either international or non-international, the precondition for applying individual criminal responsibility to crimes against humanity.

This wording gave rise to a considerable debate in recent international criminal jurisprudence. In its decision on the jurisdiction of the ICTY in the *Tadić case*,[33] the Appeals Chamber referred to a "settled rule of customary international law" – in contrast to the wording of Article 5 of the ICTY Statute – that crimes against humanity do not require a connection to international armed conflict. Moreover, it favoured the argument that customary international law does not require a connection to "any armed conflict at all".[34] It openly sympathised with the view that, in drafting the Statute, the UN Security Council may have defined the crime in Article 5 more narrowly than is necessary under customary international law.[35]

32. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
33. Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995.
34. *Id.*, para. 141.
35. *Id.* On the ground of this decision, the Trial Chamber in the same case strongly favoured the concept of customary international law no longer necessitating a connection between crimes against humanity and an armed conflict of any type, Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-1-T, Trial Chamber, 7 May 1997, para. 627. With regard to the ICTY Statute, however, the Trial Chamber applied its general statements on the link between offences of individual criminal responsibility and an armed conflict and identified the existence of an armed conflict as well as a nexus between the act and that conflict as the two conditions of applicability of the provision on crimes against humanity, Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-1-T, Trial Chamber, 7 May 1997, para. 626.

As it has been convincingly shown in legal writing that customary international law does not require such a connection,[36] crimes against humanity may be committed either in international or in non-international conflicts or even in internal disturbances and tensions. This is also reflected in Article 3 of the ICTR Statute which does not refer to the criterion of any armed conflict.[37] Moreover, crimes against humanity are considered the general offence of which the crime of genocide forms a specific sub-group. Neither the crime of genocide nor crimes against humanity depend on the criterion of any armed conflict.[38]

3.4. War crimes, Article 5(1)(c) and Article 8 ICC Statute

Article 8 provides for the jurisdiction of the ICC for war crimes. The very long and rather complex provision of Article 8 consists of three major parts, embodied in its three paragraphs. Paragraph 1 provides that any commission of war crimes entails the criminal responsibility of the individual: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The definition of "war crimes" for the purpose of criminal responsibility under the ICC Statute is contained in paragraph 2. Paragraph 3 clarifies that "nothing in paragraph 2 (c) and (e) [i.e. the definition of war crimes in the case of non-international conflicts and the fact that individual criminal responsibility is provided for in such situations] shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

Among the crimes entailing individual criminal responsibility under the ICC Statute, Article 8 is the only provision which explicitly refers to armed conflict and explicitly distinguishes between international, non-international armed conflicts and internal disturbances and tensions.

War crimes are listed in paragraph 2(a) and (b) in case of international armed conflict, and in paragraph 2(c) and (e) in non-international armed conflicts. This is done by exempting the applicability of the war crimes provision in certain situations according to paragraph 2(d) and (f). This definition supports the concept of national sovereignty of states and repeats and reinforces the classical distinction with regard to the applicability of international humanitarian law

36. In the same sense Th. Meron, *International Criminalization of Internal Atrocities*, 89 American Journal of International Law 554-577, at 557 (1995).
37. The fact has also been emphasized by the United Nations Security Council, UN Doc. S/1995/134, and the ICTR, Judgment, Prosecutor *v.* Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998, 6.4.
38. *See also* A. Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes*, 58/1 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 47-108, at 54 (1998); C. Stahn, *Zwischen Weltfrieden und materieller Gerechtigkeit: Die Gerichtsbarkeit des Ständigen Internationalen Strafgerichtshofs (IntStGH)*, 25 Europäische Grundrechtezeitschrift 577-591, at 582 (1998).

between international, non-international and mere internal or national armed conflicts.

With regard to the rules on "grave breaches of the Geneva Conventions" of 1949 (Article 8(2)(a)) and "other serious violations" of humanitarian law (Article 8(2)(b)), these war crimes explicitly apply to "international armed conflicts". They do so without defining this type of conflict. It is well established in modern humanitarian law[39] that an armed conflict should be qualified as an international one whenever at least two subjects of international law are involved. An international armed conflict may be described to include the use of force in a warlike manner between subjects of international law (whether they recognize themselves as being at war or not), all measures short of war (whether they are compatible with Article 2(4) of the Charter of the United Nations or not), and wars of national liberation under the conditions of Articles 1(4) and 96(3) AP I.[40]

Article 8(2)(c) and (e) of the ICC Statute lists war crimes in the form of "serious violations of Article 3 common to the Geneva Conventions" (Article 8(2)(c)) and "other serious violations of the laws and customs [of war]" (Article 8(2)(e)) in situations of "armed conflict not of an international character". This wording goes back to the formulation in Article 3 common to the Geneva Conventions providing for a minimum set of humanitarian law rules applicable "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".

Neither the ICC Statute nor common Article 3 GC provide a definition of 'armed conflict not of an international character'. It follows from the wording that it constitutes an armed conflict without the involvement of at least two subjects of international law, generally referred to as a 'non-international armed conflict'.[41] The difference with international armed conflicts is provided by Article 1(1) AP II which defines non-international armed conflicts as "all armed conflicts which are not covered by Article 1 [of AP I]", while Article 1(3) and (4) AP I determines the applicability of Additional Protocol I in situations of international armed conflict.

The question remains whether both common Article 3 GC and Article 1 AP II address principally the same situation of non-international armed conflict or whether both provisions cover substantially different conflict situations. Whereas common Article 3 GC addresses an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties", Article 1(1) AP II refers to non-international armed conflicts

39. *See, for example,* Y. Sandoz, Chr. Swinarski & B. Zimmermann (Eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 39 (1987).
40. *See* Partsch, *supra* note 11, A. 2. (b).
41. *See* Sandoz, Swinarski & Zimmerman, *supra* note 39, General introduction to Protocol II, No. 4458.

> 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 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.

Thus, Article 1 AP II adds several criteria which have to be fulfilled in order to apply Additional Protocol II.[42] While common Article 3 GC is applicable in any non-international armed conflict, Article 1 AP II is considerably more narrow. Yet, the type of conflict which both provisions address is the very same, only the quality of the conduct of hostilities and the threshold of applicability of these provisions differ considerably.

Although common Articles 2 and 3 GC are not totally clear on that point, Article 1(2) AP II unambiguously excludes internal disturbances and tensions from the applicability of Additional Protocol II and from the definition of armed conflict. The provisions thus reaffirm the traditional concept that internal disturbances and tensions form a third type of conflict situation which is not regulated by international humanitarian law.[43]

The ICC Statute sticks to this concept as Article 8(2)(d) and (f) clarify that the definition of war crimes under the Statute does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature". Contrary to Article 1(2) AP II, the provision of Article 8(2)(d) and (f), first sentence, does not exclude these internal disturbances and tensions from the notion of 'armed conflict', but puts it in contrast to non-international armed conflicts. Article 8(2)(f) introduces the additional condition that "other serious violations" of humanitarian law in non-international armed conflicts apply to "armed conflicts that take place in the territory of a State when there is protracted armed violence between governmental authorities and organized armed groups or between such groups", thus referring exactly to the definition of "armed conflict" of modern international criminal jurisprudence.[44] It therefore does not have a further limiting effect on the application of Article 8(2)(e) and (f) of the ICC Statute and on the definition of non-international armed conflicts contained therein. It simply restates that internal disturbances and tensions exclusively belong to the domestic affairs of a state

42. For example the ICTR qualified the conflict in Rwanda in 1994 as "an internal [i.e. is non-international] armed conflict within the meaning of Additional Protocol II" because the "material conditions" of Additional Protocol II had been fulfilled; *see* Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "Additional Protocol II".
43. J. Pictet, Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 35 (1958).
44. Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 70.

and do not – at least in principle[45] – entail the applicability of international humanitarian law.

4. THE DISTINCTIVE CRITERIA OF ARMED CONFLICTS

One might doubt whether the distinction between three different types of armed conflict in international humanitarian law is a helpful one and can still be regarded as a reflection of modern customary law. It is a fact, however, that the ICC Statute has incorporated this concept and establishes it as the basis of its jurisdiction for war crimes. The problem arising from this concept is not a problem of legal definition. To define non-international armed conflict as a conflict which neither constitutes an international one nor an internal disturbance and tension, is legally correct and not challengeable.

Rather, the problem lies in its application by the future ICC in nowadays highly complex conflict situations. As is clear from the various conflicts and sub-conflicts on the territory of former Yugoslavia, the qualification of a conflict as international, non-international or merely internal is not an issue of academic interest, but a matter of international concern and a necessity of jurisprudential practice. It is likely that the future ICC will have to deal on a regular basis with similarly complex conflict situations as those occurring in former Yugoslavia. It might therefore be useful to examine the criteria emanating from recent criminal jurisprudence on which the ICC will be able to rely when qualifying the type of conflicts in the context of individual responsibility for war crimes.

4.1. Distinction between non-international armed conflict and internal disturbances and tensions

In order to distinguish between non-international armed conflicts and internal disturbances and tensions it may be helpful to use the criteria of the intensity of the conflict and a sufficient organization of the parties to the conflict. Indeed, the ICTR Trial Chamber had recourse to these criteria in the *Akayesu case* when it had to qualify the armed conflict in Rwanda.[46] With regard to the criterion of organization of the parties to the conflict, the Chamber first distinguished "mere acts of banditry or unorganized and short-lived insurrections" from "genuine armed conflicts" and excluded them from the scope of common Article 3 GC. It then simply stated that the Rwandan governmental forces on the one hand and the RPF on the other hand were "well-organized and considered to be armies in

45. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, paras. 218-220.
46. Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "Common Article 3".

their own right."[47] The Tribunal thus considered such acts of banditry and unorganized and short-lived insurrections as types of internal disturbances and tensions not qualifying as non-international armed conflicts in terms of common Article 3 GC and in terms of Article 8(2) ICC Statute respectively. Concerning the criterion of organization of the parties to the conflict itself, the Court only formally referred to the criterion of sufficient organisation. It did not answer the question under which conditions an organization is 'well-organized', except that the self-esteem of the parties concerned was deemed sufficient. Sub-criteria as to when a non-governmental party meets the condition of 'sufficiently organized' are not provided, neither by recent jurisprudence nor by legal writing.

The Tribunal refers to the criterion of intensity of the conflict, but, again, does not provide substantial indications as to when an armed conflict is deemed to be sufficiently intense to be qualified as a non-international armed conflict in the sense of common Article 3 GC and Article 1(1) AP II. The Tribunal first clarified that the assessment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict.[48] It then referred to the qualification of the Rwandan conflict as "a war, an internal [i.e. non-international] armed conflict" by "all observers to the events, including UNAMIR and UN Special rapporteurs."

The criterion of 'aim and objective' pursued by the parties to the conflict might be another possibility of demonstrating the distinction between non-international armed conflicts and internal disturbances and tensions. Although the ICTY used this criterion,[49] it did not elaborate on its substance.[50] It did not examine the conditions under which the aim and objective of an armed conflict may identify the conflict as either international or non-international.

Concluding from these observations, the ICC will not be able to have recourse to more substantial criteria than 'intensity of the conflict', 'sufficient organisation of the parties to the conflict' and 'aim and objective' of these parties in order to distinguish between non-international armed conflicts and internal disturbances and tensions. With respect to these criteria it is not clear which sub-criteria constitute such intensity of the conflict and sufficient organisation of the parties to the conflict.

47. *Id.*
48. *Id.*, under "Applicability of Common Article 3 and Additional Protocol II".
49. Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 224.
50. The ICTY Trial Chamber introduced the criteria of the "aim and objective" which is pursued by the parties to the conflict. It did so with regard to the question if a former international armed conflict was continued after a certain date or "alter[ed] fundamentally in its nature." *Id.*, para. 234.

4.2. Distinction between international and non-international armed conflicts

In order to deliver a judgment on alleged war crimes in non-international armed conflicts the ICC will not only have to distinguish between non-international armed conflicts and internal disturbances and tensions, but also between non-international and international armed conflicts. Since an international conflict was not at stake in Rwanda, conclusions from recent jurisprudence may only be drawn from findings of the ICTY.[51]

According to legal writing in international humanitarian law, the distinction between international and non-international armed conflicts may in theory be drawn relatively clearly by applying the rule of the involvement of 'two or more subjects of international law'. In practice, only the quality of non-governmental parties to the conflict as subjects of international law would be arguable.

Yet, such an approach is rendered questionable on the basis of statements of the ICTY on that issue. The Appeals Chamber in its judgment in the *Tadić case* seemed to hint at the possibility that an armed conflict could "be international in character alongside an internal armed conflict."[52] The Chamber held that the conflicts in the former Yugoslavia had "both internal [i.e. non-international] and international aspects".[53] The Trial Chamber in its judgment in the *Tadić case* qualified the conflict between the Government of the Republic of Bosnia-Herzegovina and the Bosnian Serb forces in its entirety[54] as at least a non-international one[55] and during a certain period and in certain parts of the territory of Bosnia-Herzegovina even as an international armed conflict.[56] This wording means that the very same armed conflict in the same timeframe and at the same place could be qualified simultaneously as international and non-international.

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51. Although the Appeals Chamber used the expression "internal conflict" and not "non-international armed conflict", it is clear that it referred to the latter notion in contrast to internal disturbances and tensions where international humanitarian law is, in principle, not applicable; Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, , para. 70: "International humanitarian law applies [...] and extends [...] until [...], in the case of internal conflicts, a peaceful settlement is achieved".
52. Prosecutor *v.* Duško Tadić, Judgment on the Appeals, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 84. With regard to "the conflicts in the former Yugoslavia" the Appeals Chamber referred to the involvement of armed forces of Croatia in Bosnia- Herzegovina and of the Yugoslav National Army in Croatia as three distinct subjects of international law, thus considering the armed conflict an international one (para. 72). At the same time the Chamber identified the use of armed violence between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina (as well as Croatian Government and Croatian Serb rebel forces in Croatia). From this finding it drew the conclusion that these conflicts should be qualified as non-international ones (para. 72).
53. Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 77.
54. Trial Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-1-T, Trial Chamber, 7 May 1997, para. 566.
55. *Id.*, para. 568.
56. *Id.*, para. 569; whether the Trial Chamber at least implicitly considered the entire conflict to be a non-international one after 19 May 1992, is of no relevance in this respect.

Unfortunately, the Appeals Chamber does not further elaborate on this question. It only deals with the situation that a non-international armed conflict turns into an international one.[57]

The question if the same armed conflict may be international and non-international in character at the very same time thus remains unanswered. From a logical point of view such an idea is hardly conceivable. It appears much more adequate and therefore preferable to determine the temporal as well as the geographical scope of the armed conflict so that a convincing categorisation is possible. A complex armed conflict should be split up into sub-timeframes and / or sub-places. The sub-conflicts should then be qualified separately. The test therefore should be that the ICC qualifies an armed conflict as either international or non-international. Once qualified, the respective rules of international humanitarian and international criminal law apply throughout the entire territory, unless singular conflicts in specific areas have to be separated from the general conflict and the type of conflict will then be qualified separately.

The problem therefore remains of differentiating between international and non-international armed conflict in complex situations. The qualification of non-state actors in international humanitarian law as subjects of international law or, more precisely, the qualification of the relationship between such non-state actors to states 'behind' such actors has been developed by recent jurisprudence in the context of the armed conflicts in former Yugoslavia. The Appeals Chamber in the *Tadić* case clarified that, despite the formal involvement of a non-governmental party any conflict is to be qualified as an international one if that non-governmental party acts "on behalf of"[58] another state. If, on the other hand, participants in a – non-international – armed conflict do not act on behalf of another state, the armed conflict is hence to be qualified as a non-international one.

On the basis of this clarification it will be up to the future ICC to establish the criteria to attribute the non-governmental participants' acts to a subject of international law.[59] The question whether criteria of imputability in the context of state responsibility are to be applied directly or indirectly[60] with reference to the definition of the combatant status under Article 4(A)(1) of Geneva Convention III,[61] or whether some kind of material 'equation' is at stake, is of only academic importance.

57. Prosecutor *v.* Duško Tadić, Judgment on the Appeals, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 84.
58. *Id.*
59. Decisive are therefore the conditions under which forces fighting against the central authorities of the same state may be attributed to organs of a state other than that on whose territory they live and operate; *Id.*, para. 91.
60. On the basis of a doubtful interpretation of the wording of Art. 4(A)(1) GC III, Prosecutor *v.* Duško Tadić, Judgment on the Appeals, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, paras. 90-94.
61. Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

Any theory results in a test of control[62] of that other state over the persons fighting against the authorities of their home state. The ICTY Trial Chamber in the *Tadić case*[63] elaborated on the test of 'effective control'[64] which has been developed by the International Court of Justice in the *Nicaragua case* with respect to the concept of state responsibility.[65] This test of effective control stipulates that specific instructions concerning various activities of the individuals in question must have been issued by the state.[66] The Appeals Chamber elaborated in more detail on this concept and distinguished between single private individuals acting as a *de facto* state organ on the one hand and armed forces on the other hand.[67] For a single private individual – or a group that is not militarily organized – to be qualified as acting as a *de facto* state organ when performing a specific act of armed violence, it is necessary to ascertain that specific instructions concerning the commission of that particular act of armed violence have been issued. For subordinate armed forces – or militias or paramilitary units – to be qualified as *de facto* state organs, it is necessary to determine control by that state as being of a general nature: co-ordination or help in the general planning of the military activity,[68] which goes beyond the mere provision of financial assistance or military equipment or training.

Regardless of whether the future ICC will adopt the same reasoning, it will in any case have to identify and apply preconditions which have to be fulfilled in order to attribute acts or omissions of non-state actors in non-international armed conflicts to subjects of international law which control these non-state actors. In identifying such preconditions, the ICC will necessarily have to discuss the detailed system which has been developed by the ICTY. It remains to be seen whether the ICC will follow the distinction between militarily organized groups and non military organized groups.

Legal research should be employed in order to define criteria and sub-criteria for the establishment of what constitutes a 'military organization'. Factual evidence will be an issue when deciding how to establish sufficient evidence for grade, stability and efficiency of the organization of a non-state actor in a non-international armed conflict as well as for the military character of such an organisation. Another matter of evidence will be the establishment of sufficient

62. Prosecutor *v.* Duško Tadić, Judgment on the Appeals, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 95.
63. Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-1-T, Trial Chamber, 7 May 1997, paras. 582 and 595.
64. Prosecutor *v.* Duško Tadić, Judgment on the Appeals, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, paras. 97 and 104.
65. Military and Paramilitary Activities In and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, paras. 109 and 116.
66. Prosecutor *v.* Duško Tadić, Judgment on the Appeals, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 125.
67. *Id.*, para. 137.
68. *Id.*, para. 131.

control to be exercized by a state 'behind' the non-state actor, according to the different types of these non-state actors. These practical differences may give rise to doubts about whether the criteria as developed by the ICTY might be too complicated and too subtle to be practically applicable in the complexity of non-international armed conflicts. Yet, alternative criteria for the participation of non-state actors in armed conflicts which may turn an otherwise non-international armed conflict into an international one are even less obvious.

5. WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICTS

Articles 8(2)(c) and 8(2)(e) correspond with the idea that the grave breaches regime of the Geneva Conventions of 1949 are not restricted to international armed conflicts, but also applicable in non-international armed conflicts, through state practice and corresponding *opinio iuris*.[69] The question whether the system of grave breaches is restricted to international conflicts for the sake of national sovereignty,[70] has become obsolete in the context of the treaty based Statute of the ICC.

Articles 8(2)(c) and 8(2)(e) mirror the system of war crimes in international armed conflicts as contained in Articles 8(2)(a) and 8(2)(b). This system is based on the findings of the ICTY with respect to Articles 2 and 3 of the ICTY Statute. Article 2 of the ICTY Statute refers to the self-contained regime of grave breaches of the Geneva Conventions of 1949 only. This means that any other – serious – violation of international humanitarian law, if not addressed by Articles 4 and 5 of the ICTY Statute, had to be covered by the general clause of Article 3, thus comprising "all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5."[71] Articles 8(2)(a) and 8(2)(b) of the ICC Statute make the same distinction between grave breaches as set out in the 1949 Geneva Conventions and other serious violations of international humanitarian law. With respect to war crimes in non-international armed conflicts Article 8(2)(c) provides for individual criminal responsibility for serious violations –

69. *See* Separate Opinion of Judge Abi-Saab *in* Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 (RP D6397-D6403), D6398; and Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 202; the possibility of such development in customary humanitarian law was already indicated by the Appeals Chamber in the Tadić Case on the jurisdiction of the ICTY, Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 83.
70. *Id.*, para. 80.
71. *Id.*, para. 89.

https://doi.org/10.1017/S0922156500000297 Published online by Cambridge University Press

'grave breaches' – of common Article 3 GC and Article 8(2)(e) covers other serious violations.[72]

5.1. Serious violations of common Article 3(c) GC

Article 8(2)(c) of the ICC Statute provides for individual criminal responsibility in case of serious violations of Article 3 common to the four Geneva Conventions of 1949. The "minimum yardstick"[73] of international humanitarian law as contained in common Article 3 GC enumerates in paragraph 1 four groups of acts which are prohibited. This list is exhaustive and constitutes the four groups of acts which "are and shall remain prohibited." It is non-exhaustive in so far as the basic rule contained in common Article 3(1) is the precept of humane treatment in all circumstances and without any adverse distinction. The list of the four groups of prohibited acts in common Article 3 explicitly pursues the goal of humane treatment. This means that any act not falling under the list is prohibited on the sole condition that it constitutes an infringement of the minimum humane treatment in all circumstances and with any adverse distinction. Each act according to Article 3(1) (i) and (iv) constitutes a serious violation *per se* and needs no further testing.

The ICC Statute repeats the list of prohibited acts under common Article 3(1) GC in Article 8 (2)(c). Contrary to the system as set out in the Geneva Conventions, Article 8(2)(c) of the ICC Statute does not contain a general clause providing for criminal responsibility for serious violations of common Article 3 GC. The expression "namely" in the introductory sentence of Article 8(2)(c) clarifies that only those serious violations as spelled out in sub-paragraphs (i) to (iv) are matters of criminal responsibility. This results from the aspiration of the Statute to define situations of and offences in non-international armed conflicts as precisely as possible, thereby taking account of state sovereignty. General clauses which open the door for interpretation have been avoided.

Article 8(2)(c) enumerates violations entailing the criminal responsibility of the perpetrator as "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (subparagraph (i) and common Article 3 (a)), "committing outrages upon personal dignity, in particular humiliating and degrading treatment" (subparagraph (ii) and common Article 3(c)), "taking of hostages" (subparagraph (iii) and common Article 3(b)), and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which

72. Such a provision was highly debated in the discussions on the draft Statute *see* A. Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes*, 58/1 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 47-108, at 72 (1998).

73. Military and Paramilitary Activities In and Against Nicaragua, *supra* note 65, para. 218; *cf.* already J. Pictet, Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 37 (1958).

are generally recognized as indispensable" (subparagraph (iv) and common Article 3(d)(iv). Only the order of subparagraphs (ii) and (iii) has been changed compared to common Article 3 and the wording of subparagraph (iv) is slightly adjusted to a more modern wording in humanitarian law. The highly debated question if common Article 3 of the Geneva Conventions already provides for individual criminal responsibility for a commission of prohibited acts under customary law,[74] is of no importance in the context of Article 8 because the ICC Statute as an international treaty will only be binding on the parties to that treaty.

Article 8(2)(c) repeats not only the list of prohibited and explicitly criminalized acts, but also the definition of possible victims of such acts. In both provisions the acts are covered when committed against "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause". The wording makes clear that the prohibited and criminalized acts could be committed against any person taking no active part in the hostilities, for whatever reason, whether or not belonging to the armed forces.[75] The wording provides for a broad application of serious violations of common Article 3 GC, thus contributing to its effectiveness. Especially if the acts are committed against civilian persons and the civilian population[76] who are protected under Geneva Convention IV, such acts incur the criminal responsibility of the perpetrator.

In addition to the question of potential victims, the problem of potential perpetrators merits some examination. The question is whether only members of the – governmental – armed forces may be criminally responsible for serious violations of common Article 3 GC, whether such responsibility is extended to any person taking part in the hostilities or supporting the war effort, or whether such responsibility can be applied to any serious violation. The wording of Article 8(2)(c) of the ICC Statute does not define the potential perpetrator of the criminalized acts. It follows from the fact that the provision identifies as possible victims any person – "including" members of the armed forces – who is placed

74. *Cf.* Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras. 128- 134; Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "Applicability of Common Article 3 and Additional Protocol II"; Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Opinion and Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, paras. 295 – 310. *See also,* for example, Th. Meron, *International Criminalization of Internal Atrocities*, 89 American Journal of International Law 554-577, at 559 (1995); Th. Meron, *Is International law Moving towards Criminalization?*, 9 European Journal of International Law 18-31, at 28 (1998).

75. Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "The class of victims".

76. J. Pictet, Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 38 (1958).

hors de combat, that there is no reason why the group of potential perpetrators of common Article 3 GC and Article 8(2)(c) of the ICC Statute should be limited in any respect.

Such a conclusion is supported by object and purpose of common Article 3 GC. In the *Akayesu case* the ICTR Trial Chamber stated that common Article 3 GC would

> normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.[77]

The Trial Chamber thus did not limit the group of potential perpetrators to members of the armed forces, but restricted it to persons who are at least supporting the war effort in a *de facto* position. Although it concluded that "the laws of war must apply equally to civilians as to combatants in the conventional sense",[78] it emphasized that potential perpetrators at least *de facto* have to support or fulfil the war efforts.[79]

Yet, this interpretation as provided by the Trial Chamber in the *Akayesu* case does not fully take into account the object and purpose of common Article 3 GC and of Article 8(2)(c) of the ICC Statute. The Trial Chamber was indeed referring to the temporal and the geographical connection between the offence and the non-international armed conflict and, secondly, the – sufficient – nexus between the actions and the non-international armed conflict. When the Trial Chamber examined if Akayesu was supporting the war effort taking into account his "communal authority", his "executive civilian position" and the fact that he wore a military jacket and carried a rifle,[80] the Chamber indeed analysed if these facts provided for a sufficient nexus between the actions of the accused and the non-international armed conflict. However, the nexus criterion should be distinguished from the problem of the potential perpetrator.

The object and purpose of the articles is to protect victims and potential victims in armed conflicts from the atrocities of war[81] in particular and to preserve and protect human dignity in general.[82] If, in a factual situation, a potential victim is endangered by a civilian, there is no reason why this civilian should not be

77. Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-T, Trial Chamber, 2 September 1998, 6.5 under "The class of perpetrators".
78. *Id.*
79. *Id.*, 7.1. Since such *de facto* support could not be proven according to the Chamber, Akayesu was not found guilty for violations of common Article 3 GC and AP II.
80. *Id.*
81. J. Pictet, *supra* note 76.
82. *See also* Le Procureur *c/* Zlatko Aleksovski, Judgment, Case No. IT-95-14/1, Trial Chamber, 25 June 1999, para. 49.

potentially accountable for violations of common Article 3 GC and criminally responsible for serious violations of the provision under Article 8(2)(c) ICC Statute. Any person who is in a factual position and function to commit (serious) violations of common Article 3 GC is potentially criminally responsible for such (serious) violations.

Compared to the corresponding list of grave breaches in international armed conflicts in Article 8(2)(a) ICC Statute, the enumeration of serious violations of common Article 3 GC is less comprehensive. The qualification of the taking of hostages as a war crime is identical. The provisions on wilful killing,[83] torture or inhuman treatment including biological experiments,[84] and wilfully causing great suffering, or serious injury to body or health,[85] when committed in a non-international armed conflict, are covered by the provisions on violence to life and person,[86] and outrages upon personal dignity.[87] Yet, the provision is still less explicit. Moreover, the rules on basic judicial guarantees[88] are not identical in scope. It might, however, give the ICC enough room to give adequate interpretations on the basis of the customary interpretation rules as embodied in Article 31(f) of the Vienna Convention on the Law of Treaties.[89] The gap between grave breaches and serious violations of common Article 3 GC is the lack of any provision on the extensive destruction and appropriation of property,[90] the unlawful deportation or transfer or unlawful confinement,[91] and on compelling a protected person to serve in the forces of the opponent[92] for non-international armed conflicts. If such acts are indeed less serious as violation of common Article 3 GC then the list contained in Article 8(2)(c) remains questionable.

The lack of a general clause in Article 8(2)(c) leads to the conclusion that the said lacunae may only – if at all – be filled by applying customary methods of legal interpretation – including the method of dynamic interpretation – to the list contained in Article 8(2)(c) in concrete cases. Whether this will lead to adequate solutions remains to be seen.

5.2. Other serious violations in Article 8(2)(e) ICC Statute

Article 8(2)(e) adds "other serious violations of the laws and customs applicable in armed conflicts not of an international character" to the list of serious violations of common Article 3 GC. As for the question of potential perpetrator and

83. Art. 8(2)(a)(i) ICC Statute.
84. Art. 8(2)(a)(ii) ICC Statute.
85. Art. 8(2)(a)(iii) ICC Statute.
86. Art. 8(2)(c)(i) ICC Statute.
87. Art. 8(2)(c)(ii) ICC Statute.
88. Art. 8(2)(a)(vi) and Art. 8(2)(a)(iv) ICC Statute.
89. Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).
90. *Cf.* Art. 8(2)(a)(iv) ICC Statute.
91. *Cf.* Article 8(2)(a)(vii) ICC Statute.
92. *Cf.* Article 8(2)(a)(v) ICC Statute.

the seriousness of the violation, the same criteria as described in paragraph 5.1. above apply.

With respect to potential victims of serious violations, Article 8(2)(e) does not explicitly specify, unlike Article 8(2)(c), against whom actions or omissions have to be committed in order to be covered by the provision. The reference to "the established framework of international law" provides the link to Additional Protocol II. Article 2(1) renders the Protocol applicable to "all persons affected by [a non-international armed conflict]" within the scope of Additional Protocol II. Article 4(1) specifies the potential victims entitled to a humane treatment as "all persons who do not take a direct part or who have ceased to take part in hostilities" and Article 13(3) grants the protection of the Protocol to civilians "unless and for such time as they take a direct part in hostilities." These provisions do not only apply as treaty law, but also customary law.[93]

As already indicated by its wording, the provision does not have recourse to the Geneva Conventions of 1949. Referring to "violations of the laws and customs of war [...] within the established framework of international law", Article 8(2)(e) deals with criminal responsibility for serious violations of international humanitarian law[94] applicable in non-international armed conflicts other than common Article 3 GC. Article 8(2)(e) contains an exhaustive ("namely") list of serious violations of humanitarian law in non-international armed conflicts, similar to Article 8(2)(c). Most of the offences listed in Article 8(2)(e) have their origins in Additional Protocol II, while others have been inserted in order to further develop the law.

Offences based on Additional Protocol II, but not necessarily repeated in the exact wording, are "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities",[95] "pillaging a town or place, even when taken by assault",[96] "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities",[97] "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of

93. For example the ICTR treated this definition of potential victims as synonymous with the one on victims of serious violations of common Article 3 GC; Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, 6.5 under "The class of victims".
94. On the interpretation of the wording "violations of the laws and customs of war" *cf.* Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras. 87-91.
95. Art. 8(2)(e)(i) ICC Statute and Art. 13(2) 2 AP II. The supplement "not taking direct part in hostilities" clarifies the status of the victims as civilians because Additional Protocol II does not explicitly distinguish between civilians on the one hand and combatants on the other hand.
96. Art. 8(2)(e)(v) ICC Statute and Art. 4(2)(g) AP II.
97. Art. 8(2)(e)(vii) ICC Statute and Art. 4(3)(c) AP II.

the civilians involved or imperative military reasons so demand",[98] and "declaring that no quarter will be given."[99]

Article 8(2)(e)(vi) is interesting as it adds "committing rape, sexual slavery, enforced prostitution, forced pregnancy [...], enforced sterilization, and any other form of sexual violence" to the list of serious violations of humanitarian law for non-international armed conflicts. It explicitly states that any other form of sexual violence is "also constituting a serious violation of Article 3 common to the four Geneva Conventions". Thus both provisions of Article 8(2)(c) and (e) of the ICC Statute coincide. Whereas Article 4(2)(e) AP II and Article 8(2)(c) ICC Statute cover forms of sexual violence which can be qualified as "outrages upon personal dignity", the specific forms referring to the gender aspect entail criminal responsibility as an "other serious violation" of humanitarian law.[100] It will be most interesting to see how the ICC will apply these overlapping offences and which consequences it will attribute to this overlap.

The provision on "intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law"[101] partly refers to Articles 11 and 12 AP II (protection of medical units and transports) and partly addresses a gap emanating from Additional Protocol II. Protocol II neither provides for a general prohibition on attacks against civilian objects nor provides for respect and protection of relief actions and personnel. If relief workers are using the Red Cross / Red Crescent not only as distinctive, but also as a protective emblem and are involved in a humanitarian assistance operation, Article 8(2)(e)(ii) and (iii) coincide.

Article 8(2)(e)(iv) contains elements of several different existing provisions. It qualifies as a war crime "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." Article 8(2)(e)(iv) further elaborates Articles 8 and 11 AP II concerning hospitals and places where the sick and wounded are collected. Article 8 AP II only very vaguely prescribes to take "all possible measure" to search for and collect the wounded, sick and shipwrecked "whenever circumstances permit." Article 11 AP II only stipulates respect for and protection of medical units and transports in a general manner. The criminalization of attacks against hospitals and places where the sick and wounded are collected takes into account the regulation of protected civilian hospitals according to Article 18(f) GC IV.

98. Art. 8(2)(e)(viii) ICC Statute and Art. 17 AP II.
99. Art. 8(2)(e)(x) ICC Statute and Art. 4(1) 3rd sentence AP II.
100. *See, for example,* R. Wedgwood, *The International Criminal Court: An American View* 10 European Journal of International Law 93-107, at 94 (1999).
101. Art. 8(2)(e)(ii) ICC Statute.

As for attacks against buildings dedicated to religion, education, art, science or charitable purposes and historic monuments, Article 8(2)(e)(iv) is partly narrower and partly broader in scope than the prohibition of acts of hostility in Article 16 AP II. Article 16 is limited to "historic monuments, works of art or places of worship" and protects these objects against acts of hostility only when they "constitute the cultural or spiritual heritage of peoples". Article 8(2)(e)(iv) extends its application to buildings dedicated to education, science or charitable purposes, and does not repeat the additional condition that the building needs to be of specific importance for the cultural or spiritual heritage of peoples. Yet, it is less far reaching than the approach of the Second Protocol on the Protection of Cultural Property.[102] Article 8(2)(e)(iv) only protects cultural property with respect to violations which are part of a plan or policy or part of a large-scale commission (Article 8(1)). Article 15 of the Second Protocol does not contain a comparable restriction. Provided that the offence is committed intentionally, it covers both extensive destruction or appropriation of cultural property. Cultural property is defined as property which is protected under the 1954 Hague Convention[103] or the Second Protocol.

Article 8(2)(e)(xi) is partly based on Articles 4(2)(a) and 5(2)(e) AP II. It defines as a war crime

> subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.

Article 5(2)(e) AP II on medical procedures which are not indicated is considerably weaker than the provision on violence to the well-being of persons. Whereas Article 4(2)(a) APII prohibits violence to physical or mental well-being, including torture and mutilation "at any time and in any place whatsoever", Article 5(2)(e) 'hides' the prohibition on medical procedures not being indicated and inconsistent with the generally accepted medical standards as a binding, but less strict provision for people being responsible for the internment or detention of persons whose liberty has been restricted. Therefore the enforcement of that prohibition by criminal sanction in the ICC Statute constitutes considerable progress in humanitarian law.

The definition as a war crime of "destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict"[104] is based on Additional Protocol II, but extends its

102. 38 ILM 769 (1999), *supra* note 8.
103. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, 249 UNTS 240-288.
104. Art. 8(2)(e)(xii) ICC Statute.

scope. Article 14 AP II only prohibits "to attack, destroy, remove or render useless [...] objects indispensable to the survival of the civilian population" and does not cover private property in general. Here again, the ICC Statute contains a development of humanitarian law in non-international armed conflicts.

The ICC Statute further develops humanitarian law by adding new offences to the list of war crimes. A new offence is laid down in Article 8(2)(e)(iii), which says

> intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

This provision sanctions attacks against humanitarian assistance operations and reinforces the rather weak provision on relief actions as laid down in Article 18 AP II which does not explicitly prohibit such attacks. It thus contributes to the safety and security of humanitarian operations and of humanitarian space in general. This is regarded as one of the recent problems of humanitarian assistance and is discussed in state practice and international and non-international relief organisations.[105] Recent experiences in former Yugoslavia or, for example, in Liberia and Southern Sudan have revealed both the importance and urgency of substantive protection of personnel involved in humanitarian assistance operations.

The reference to United Nations peacekeeping operations[106] is motivated by recent experience in that field, especially in the conflicts in former Yugoslavia where soldiers involved in a UN mission have been used as human shields in order to prevent attacks on military objectives. The exclusion of peacekeeping operations based on a mandate under chapter VII of the UN Charter is consequent and adequate, since the provision is applicable in non-international armed conflicts. This qualification is no longer possible when armed forces in the framework of a peacekeeping mission act on the basis of chapter VII and thereby become themselves parties to the conflict. It gives a new dimension to the provision contained in Article 9 of the UN Safety Convention.[107] Article 9(1) lists crimes against United Nations and associated personnel, covering in particular murder, kidnapping or other attacks upon the person or liberty (Article 9(1)(a)), violent attack upon the official premises, the private accommodation or the

105. Cf. U. v. Pilar, *Humanitarian Space Under Siege – Some Remarks on Aid Agency's Perspective*, Background paper prepared for the Symposium Europe and Humanitarian Aid – What Future? Learning from Crisis, Bad Neuenahr/Germany, 22-23 April 1999 (forthcoming).

106. On this problem *see* M. Zwanenburg, *The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?*, 10 European Journal of International Law 124-143 (1999).

107. Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, UN Doc. A/RES/49/59 (1994); entry into force on 15 January 1999.

means of transportation likely to endanger person or liberty (Article 9(1)(b)) and threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act (Article 9(1)(c)).

The provision on war crimes with respect to persons involved in humanitarian assistance and peacekeeping missions seems to be less far-reaching than the regulation of the Safety Convention. In addition, crimes according to the Safety Convention are not restricted by the requirement that such personnel, installations and material are protected as civilians or civilian objects under humanitarian law (Article 8(2)(e)(iii)). Still, the ICC Statute constitutes a further development of existing humanitarian law by providing for a system of international jurisdiction for war crimes against such personnel, installations and material. While the ICC Statute codifies such international jurisdiction, Article 9 obliges states parties to the Safety Convention to make the offences listed crimes "under [their] national law" (Article 9(1)) and to make them "punishable by appropriate penalties" (Article 9(2)). Moreover, the Safety Convention does not provide for international jurisdiction to prosecute crimes according to Article 9. Article 10 spells out the duty of states parties to "take such measures as may be necessary to establish [...] jurisdiction" over such crimes. Thus, the ICC Statute constitutes a substantial further development of humanitarian law in this respect which is implicitly acknowledged by the saving clause in Article 20(a) of the Safety Convention.[108]

Another new provision is contained in Article 8(2)(e)(ix) on "killing or wounding treacherously a combatant adversary". In Additional Protocol II the only reference to the notion of combatant, without using the explicit expression, is Article 4(1) prohibiting to order that there shall be no survivors. Further provisions on the treatment of "combatant adversaries" – wounded, sick and shipwrecked are not to be qualified as combatant adversaries – are not contained in Additional Protocol II and therefore are an example of a substantial further development of international humanitarian law.

The exhaustive list of serious violations of humanitarian law in non-international armed conflict does not cover all provisions of Additional Protocol II ensuring a humane treatment in general. Similar to the list of serious violations of common Article 3 GC, a general clause entailing individual criminal responsibility for inhuman treatment of persons not taking part in hostilities (Article 4(1) AP II) is not implied. Moreover, specific acts as collective punishments (Article 4(2)(b)) and slavery and the slave trade in all their forms (Article 4(2)(f)) have been omitted in the list of serious violations. This is even more surprising as the fundamental guarantee of the prohibition of acts of terrorism

108. "Nothing in this [i.e. Safety Convention] shall affect [...] the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards; [...]."

and spreading of terror according to Articles 4(2)(d) and 13(2) AP II is not qualified as sufficiently serious as to be sanctioned by a provision on the criminal responsibility for (serious) violations.

A provision on medical treatment for wounded and sick persons whose liberty has been restricted according to Article 5(1)(a) AP II is not included either, nor does the list contain a transformation of the prohibitions of penal prosecutions according to Article 6 AP II. This leads to the conclusion that although the definition of other serious violations of humanitarian law in non-international armed conflicts constitutes major progress in international humanitarian law, important provisions – especially with respect to Article 4 AP II – are missing in the list of acts entailing individual criminal responsibility.[109] The intentional commission of theft, pillage or misappropriation of, or acts of vandalism against cultural property protected under the 1954 Hague Convention on Cultural Property is not covered either.[110] What is striking is the complete lack of any incorporation of Hague law, i.e. provisions on the proportionality of means and methods of warfare in the list of war crimes in non-international armed conflicts.[111]

Compared to the list of war crimes in international armed conflicts contained in Article 8(2)(b) of the ICC Statute, some offences are not reflected in Article 8(2)(e). It is particularly noteworthy that the general provision of criminalizing the intentional direction of attacks against civilian objects (Article 8(2)(b) (ii)) is missing in the context of non-international conflicts. Nor are the general offences of attacking undefended civilian towns, villages, dwellings or buildings (Article 8(2)(b)(v)) and killing or wounding a combatant *hors de combat* (Article 8(2)(b)(vi)) mentioned in Article 8(2)(e). The general sanction of perfidious acts (Article 8(2)(b)(vii)) does not have a corresponding provision for non-international conflicts. Intentionally launching an attack and thereby causing incidental loss to civilian persons or damage to civilian objects or a qualified damage to the natural environment (Article 8(2)(b)(iv))[112] is not criminalized in non-international conflicts.

6. CONCLUDING REMARKS

The Statute of the International Criminal Court is characterized by the traditional distinction between international and non-international armed conflicts in which provisions of humanitarian law apply on the one hand and internal disturbances and tensions which are traditionally regulated by national provisions of

109. *See also* Stahn, *supra* note 38, at 585.
110. Art. 15(1)(e) Second Protocol on Cultural Property.
111. *See* A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 European Journal of International Law 144-171, at 152 (1999); Meron, *supra* note 36, at 574.
112. *See* Chr. Tomuschat, *Das Statut von Rom für den Internationalen Strafgerichtshof*, 73 Die Friedens-Warte 335-347, at 340 (1998).

law and order on the other hand. Taking into account the complexity of recent and future armed conflicts, the specification of the temporal and geographical scope of armed conflicts and the identification of the respective types of distinct sub-conflicts within the framework of a more complex armed conflict have become essential.

Yet, borderlines between these types of armed conflict as well as disturbances and tensions appear to be clear in legal definition, but obscure and fluid in practice. The distinctive criteria of non-international armed conflicts as opposed to internal disturbances and tensions on the one hand and international armed conflicts on the other hand have been formally developed by international criminal jurisprudence. Criteria which will lead to adequate results in the practice of the future ICC have not been developed by the ICTY and ICTR so far. Neither with respect to internal disturbances and tensions nor regarding international conflicts will the ICC be able to have recourse to settled distinctive criteria and sub-criteria. The criteria of intensity of the conflict, organization of the parties to the conflict and aims and objectives of the parties have not been substantially developed. Sufficient evidence has not been developed either to show that the criteria of effective control of states over militarily organized and unorganized non-state actors can be applied by an international judicial organ in the complexity of current non-international armed conflicts. Hence the theoretically clear system of types of armed conflict and respectively applicable international criminal law will be considerably less clear in the application by the International Criminal Court.

The ICC's jurisdiction with respect to genocide in Article 6 and crimes against humanity in Article 7 is comprehensive under its Statute in its application to international and non-international armed conflicts. However, the jurisdiction for war crimes as set out in Article 8 not only differentiates formally, but also differs substantively regarding these types of conflict. Serious violations of common Article 3 to the Geneva Conventions (Article 8(2)(c)) as well as other serious violations of the laws and customs applicable in non-international armed conflicts (Article 8(2)(e)) do not provide for a comprehensive criminal responsibility of individual perpetrators in non-international conflicts.

First, acts which violate the human dignity and which are covered by common Article 3 GC, but not defined in Article 8(2)(c) ICC Statute are not endorsed with the sanction of such individual responsibility. Second, the list of other serious violations neither comprises a general clause entailing individual criminal responsibility for inhuman treatment of persons not taking part in hostilities nor provides for criminal sanction on specific acts as collective punishments, slavery and slave trade, acts of terrorism and spreading of terror. Third, intentional direction of attacks against civilian objects, attacking undefended civilian towns, villages, dwellings or buildings, killing or wounding a combatant *hors de combat* and perfidious acts are not sanctioned by the criminal responsibility of the perpetrator.

The fact that these offences are missing in the enumerative list of other serious violations in non-international armed conflicts is not due to a lesser seriousness compared to the acts the commitment of which does entail the criminal responsibility of the perpetrator. These gaps in the list of offences for non-international conflicts are therefore unsystematic and somewhat arbitrary. But what is even more important is that they weaken the system of individual criminal responsibility in non-international armed conflicts considerably. Both inhuman treatment of persons not taking part in hostilities other than those enumerated in Article 8(2)(e) and in particular acts of terrorism and spreading of terror have already occurred in today's conflicts in the Great Lakes Region. The fact that the perpetrators of such acts may very well go unpunished under international law gives rise to serious doubts about the effectiveness of the intention of the ICC Statute's member states to put an end to the impunity of perpetrators and in particular to contribute to the prevention of such crimes.[113]

The tendency to apply the regime of international humanitarian law in non-international armed conflicts has not only emerged from modern international treaties on the prohibition of antipersonnel landmines and the protection of cultural property. It has been reinforced and further developed with regard to the criminal responsibility of individuals for violations of humanitarian law. The regulation in Article 7 on crimes against humanity and in particular in Article 8(2)(c) and (e) on war crimes amounts to real progress in the applicability of international humanitarian law in non-international armed conflict. Yet, one has to state that such a process has only just started and is far from being completed. Not only is the formal distinction between both types of armed conflict explicitly incorporated and embodied in the Statute of the International Criminal Court, but also the discrepancy between both regimes for international and non-international armed conflicts is substantial – in theory as well as in practice.

113. ICC Statute preamble, para. 5.