Non-international armed conflict and guerrilla warfare

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I. Introduction

The international legal regulation of armed conflict has traditionally concentrated on conflicts taking place between states. A cursory examination of the relevant treaty provisions serves to underline this priority.[1] With a few high-profile exceptions, however, the pattern of armed conflict since 1945 has been dominated by conflicts taking place within states — i.e. non-international or internal armed conflicts, often involving guerrilla warfare. It was accordingly essential that international law (particularly international humanitarian law and international criminal law) develop to more accurately reflect this reality,[2] and states now accept that a significant body of international law exists to regulate non-international armed conflict. Although conventional international law is still largely limited to common Article 3 of the 1949 Geneva Conventions and Protocol II Additional thereto, adopted in 1977,[3] significant expansion has taken place in the relevant customary international law. Developments with regard to criminal responsibility also now render it beyond dispute that violations of the laws and customs regulating non-international armed conflict can represent war crimes.

II. The conventional regulation of non-international armed conflict

A. Common Article 3

In the absence of more detailed regulation, Article 3 common to the Geneva Conventions of 1949 imposes an obligation to respect at least the most fundamental humanitarian principles of the Conventions on the parties to non-international armed conflict.[4] It

[1] The four Geneva Conventions of 1949, for example, comprise a total of 429 articles. Only one, common Article 3, is not specifically concerned with international armed conflict.

[2] For an examination of this development, see L. Moir, *The Law of Internal Armed Conflict* (Cambridge, 2002), Chapters 1-4. In the context of international armed conflict, guerrilla warfare is probably of particular importance in the determination of combatant status. See, for example, Article 1 of the 1907 Hague Regulations, Article 4 of Geneva Convention III and Article 44 of Additional Protocol I. During non-international armed conflict, where combatant status does not exist as a legal concept, guerrilla warfare is more relevant to the issue of when and whether an individual is taking an active part in hostilities. See discussion below. It is important to note that non-international armed conflicts fought for the purpose of liberation from colonial or oppressive regimes are now deemed to be international in character and regulated by that body of humanitarian law. See Article 1(4) of Additional Protocol I.

[3] A (growing) number of other treaties are, however, equally applicable to both international and non-international armed conflicts. See discussion below.

[4] Indeed, it has been referred to as a 'Convention in miniature'. See, for example, J.S. Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volume I* (Geneva, 1952), 48. The International Court of Justice has also stated that, although common Article 3 contains 'certain rules to be applied in the armed conflicts of a non-international character … in the event

begins by asserting in general terms that all those persons 'taking no active part in 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, shall in all circumstances be treated humanely'. The precise nature of 'humane treatment' may not, of course, always be entirely clear, and little guidance is offered by either the *travaux préparatoires* or the ICRC Commentaries.[5] Common Article 3 therefore takes the slightly easier approach of listing in paragraph (1)(a)-(d) four particular activities which would necessarily fall short of humane treatment, all of which 'are and shall remain prohibited at any time and in any place whatsoever'. Prohibited behaviour comprises violence to life and person, the taking of hostages, outrages upon personal dignity and the passing of sentences and carrying out of executions without the provision of accepted judicial guarantees.

Further provisions of common Article 3 require that the wounded and sick shall be collected and cared for, permit the International Committee of the Red Cross (or, indeed, any other impartial humanitarian body) to offer its services to the parties to the conflict, urge the parties to render the Geneva Conventions applicable in their entirety through the conclusion of special agreements, and reassure states parties that the application of common Article 3 does not constitute any form of recognition of the insurgents, having no affect on the legal status of the parties to the conflict.[6]

B. Additional Protocol II

Additional Protocol II was adopted in 1977 to combat the perceived failure of common Article 3 in terms of ameliorating the effects of non-international armed conflict.[7] With the stated aim of developing and supplementing common Article 3 — although without actually modifying the application of common Article 3 itself, Additional Protocol II is a much more expansive and detailed instrument. Indeed, many of its provisions are similar to (and clearly based on) the rules regulating international armed conflicts.[8] There is, however, a significant caveat to this increased regulation, in that the scope of application set out in Article 1 of Additional Protocol II is clearly narrower than that of common Article 3. Its provisions are therefore applicable only to a relatively small number of non-international armed conflicts.[9]

In contrast to the fairly general provisions of common Article 3, the issue of humane treatment is dealt with extensively in Articles 4, 5 and 6 of Additional Protocol

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of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"'. See *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*), *Merits*, ICJ Rep. 1986, 14, paragraph 218. An outline of the drafting history of common Article 3 can be found in Moir, *Internal Armed Conflict*, 23-29.

[5] Pictet, *Commentary I*, 53, suggested that a specific definition of humane treatment was not required, the term having 'entered sufficiently into current parlance to be understood'.

[6] For further discussion of the content of common Article 3 see Pictet, *ibid*., 52-61; and Moir, *Internal Armed Conflict*, 58-67.

[7] For background to the adoption of Additional Protocol II, see Moir, *ibid*., 89-96.

[8] And, indeed, international human rights law.

[9] See Moir, *Internal Armed Conflict*, 100-109. Further discussion of the content of Additional Protocol II can be found in Moir, *Internal Armed Conflict*, 109-119; and Y. Sandoz, C. Swinarski & B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), 1365-1481. See also discussion below relating to the existence of non-international armed conflict.

II. Article 4 deals with fundamental guarantees and, as does common Article 3, proceeds from the initial requirement that all those not taking a direct part in hostilities are be treated humanely at all times to provide a number of specific prohibitions. Article 4, however, succeeds in extending the level of protection offered through the additional, or at least explicit, prohibition in paragraph (2) of collective punishments, terrorism, slavery, pillage, rape and other sexual offences — as well as threats to commit any of the acts listed, whilst Article 4(3) introduces a number of new provisions relating to the protection and treatment of children. It should also be noted that Article 4(1) prohibits an order that there shall be no survivors. In contrast to the rest of Additional Protocol II — and indeed, to the provisions of common Article 3 — this obviously does not relate to those taking no direct part in hostilities. Article 5 introduces specific measures of protection for those persons 'deprived of their liberty for reasons related to the armed conflict', whilst Article 6 expands significantly on paragraph (1)(d) of common Article 3 by outlining in some detail those judicial guarantees considered essential for the prosecution and punishment of offences related to the conflict.

Part III of Additional Protocol II (i.e. Articles 7-12) deals with the wounded, sick and shipwrecked, and Part IV (i.e. Articles 13-18) with the civilian population. Whilst common Article 3 contains only the general requirement that the wounded and sick be collected and cared for, Articles 7 and 8 of Additional Protocol II offer further guidance on this point. Articles 9-12, however, are clearly derived from the law of international armed conflict rather than common Article 3, and provide protection for religious personnel and medical personnel, units and transports. In terms of the civilian population, common Article 3 offered no explicit protection against attack and, although earlier drafts of Additional Protocol II contained yet greater protection, what remains certainly represents an improvement. Article 13 states that individual civilians and the civilian population (i.e. those not taking a direct part in hostilities) are to enjoy protection against 'the dangers arising from military operations'. In particular, they must not be made the object of attack, nor must objects indispensable to their survival,[10] works and installations containing dangerous forces,[11] cultural objects and places of worship.[12] Article 17 prohibits the forced displacement of the civilian population, and Article 18 permits relief societies to offer their services in relation to victims of the conflict.[13]

C. Other conventional international law

The body of treaty law aimed specifically at regulating non-international armed conflict is contained solely within common Article 3 and Additional Protocol II. There has, however, been a growing tendency for the international community to encompass both international and non-international armed conflicts in relation to the regulation of certain types of weapon. Thus, in 1993 the Chemical Weapons Convention was

[10] Thus preventing starvation of the civilian population as a method of combat. See Article 14.

[11] Where such an attack would result in the release of dangerous forces, causing severe civilian losses. This prohibition applies even where the installation is a military objective. See Article 15.

[12] Article 16.

[13] More controversially, Article 18(2) provides that where the civilian population is suffering undue hardship, 'relief operations … *shall* be undertaken' (emphasis added). Such operations are, however, 'subject to the consent of the High Contracting Party concerned'. See Moir, *Internal Armed Conflict*, 118-119; and Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols*, 1478-1481.

adopted,[14] Article I of which prohibits their use 'under any circumstances'. Granted, there is no explicit mention of non-international armed conflict, but the language used is absolute and makes it clear that chemical weapons are not to be used in any armed conflict, irrespective of its international or non-international character. The use of anti-personnel mines in both types of conflict is similarly prohibited by Article 1 of the 1997 Ottawa Convention,[15] itself a major expansion of the rules adopted in 1996 by means of Amended Protocol II to the 1980 Conventional Weapons Convention.[16] A measure of explicit protection for cultural property during non-international armed conflict also exists within international treaty law, where the 1954 Hague Convention states in Article 19 that the parties to such a conflict must apply at least those provisions relating to respect for cultural property.[17] The Second Protocol to the Convention, adopted in 1999, also applies explicitly to both international and non-international armed conflict.[18]

III. The customary regulation of non-international armed conflict

The tendency to include both international and non-international armed conflicts in recent instruments relating to methods and means of warfare is, perhaps, reflective of developments in customary international law. As Meron explains, 'Calamitous events and atrocities have repeatedly driven the development of international humanitarian law',[19] and such calamitous events in recent times have tended to be non-international in character. It is, then, not entirely surprising that humanitarian law has moved away from a state-centred approach towards greater concern for the individual. This shift in emphasis has been reflected in customary international law, which has seen considerable expansion in the area of non-international armed conflict and where there is now significant convergence between those rules of custom regulating international and non-international armed conflict.[20]

This applies both to those rules regarding the conduct of hostilities and the protection of victims. As far as the conduct of hostilities is concerned, the decision to regulate both types of armed conflict in conventions such as those dealing with anti-

[14] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 32 ILM (1993) 800.

[15] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 36 ILM (1997) 1507.

[16] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended 3 May 1996) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 35 ILM (1996) 1206. Although not containing an absolute prohibition on their use, Protocol II had been amended to apply equally to non-international armed conflict. See Article 1(2).

[17] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240. The Convention contains further measures of protection for cultural property in the context of international armed conflict, which parties to non-international armed conflict are encouraged to render applicable by means of special agreement.

[18] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 38 ILM (1999) 769, Article 22.

[19] T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 243.

[20] For discussion of this phenomenon, see Moir, *Internal Armed Conflict*, 133-192; and L. Moir, 'Towards the Unification of International Humanitarian Law?' in R. Burchill, N.D. White & J. Morris (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge, 2005), 113-125.

personnel mines or chemical weapons provides valuable evidence of the international community's attitude. Customary rules regulating non-international armed conflict go beyond the prohibition of particular weapons, however, and pivotal in this regard was the 1995 decision of the Appeals Chamber of the ICTY in *Prosecutor* v. *Tadić*.[21] This was the first authoritative statement not only that customary international rules exist to regulate non-international armed conflict, but that these are largely derived from the rules applicable to international armed conflict.[22] The Appeals Chamber accordingly asserted that those rules protecting civilians were equally applicable to non-international armed conflict, as were many of the rules regarding methods and means of warfare. After all:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[23]

Nonetheless, the Chamber denied that non-international armed conflicts were regulated by the customary rules of humanitarian law in their entirety. In particular it was held that:

> (i) only a number of rules and principles governing international armed conflict have gradually been extended to apply to internal conflicts; and
> (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal armed conflicts, rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[24]

Several commentators found this difficult to accept,[25] and subsequent developments have perhaps demonstrated that they had good reason to doubt the

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[21] *Prosecutor* v. *Tadić*, Case IT-94-1, Appeal on Jurisdiction, 2 October 1995.

[22] The Diplomatic Conference of 1974-1977 did not accept that any customary rules existed in the context of non-international armed conflict, since 'the attempt to establish rules for a non-international armed conflict only goes back to 1949 and … the application of common Art. 3 in the practice of States has not developed in such a way that one could speak of "established custom"'. See M. Bothe, K.J. Partsch & W.A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague, 1982), 620. Additional Protocol II accordingly has a slightly different Martens Clause to that contained in Article 1(2) of Additional Protocol I, making no reference to 'principles of international law derived from established custom'.

[23] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 97.

[24] *Ibid*., paragraph 126.

[25] C. Greenwood, 'International Humanitarian Law and the *Tadić* Case' (1996) 7 EJIL 265, for example, argued, at 278, that the customary norms set out by the Appeals Chamber significantly exceeded the traditional regulation of non-international armed conflict. Similarly, Rowe suggested that the decision had essentially destroyed the traditional distinction between international and non-international armed conflict. See C. Warbrick & P. Rowe, 'The International

Chamber's ability to limit the law's development in this way. Thus, in the context of non-international armed conflict, the Statute of the International Criminal Court — adopted in 1998 and purporting to reflect custom by restricting its jurisdiction in Article 5 to 'the most serious crimes of concern to the international community as a whole' — not only includes violations of common Article 3 and several violations of Additional Protocol II, but also a significant number of provisions drawn from the rules of international armed conflict.[26] The approach of the ICC is, then, apparently consistent with 'the gradual blurring of the fundamental differences between international and internal armed conflicts'.[27] That is not to say that the Appeals Chamber was completely misguided, however, and the Rome Statute still reflects some important differences in terms of the customary rules applicable to international and non-international armed conflict. Indeed, the two types of conflict are treated quite separately by the Statute. Nonetheless, it is interesting to note that of the 161 rules of customary international humanitarian law recently identified by the ICRC, 147 are said to apply to both international and non-international armed conflict.[28]

IV. War crimes in non-international armed conflict

A. The existence of non-international armed conflict

If the laws of non-international armed conflict are to be enforced against individuals, then it is imperative to determine when a non-international armed conflict is actually taking place. This is not as easy as might initially be thought, and is certainly more difficult than determining whether an international armed conflict is in progress. The use of force by one state against another is, after all, relatively uncommon and tends to be more obvious.[29] In contrast, forcible measures taken by states internally, against their own populations, are more numerous. In addition, states are more likely to accept the relevance of humanitarian law in the international context in order to maximise the protection due to their troops. In terms of non-international armed conflict, where the survival of the government may be at stake, the first line of defence for states is likely to be a denial that armed conflict exists at all, thus seeking to render humanitarian law inapplicable and reduce their legal obligations to armed opponents.

Common Article 3 provides only that it is applicable 'in the case of armed conflict not of an international character'. No further assistance in the identification of

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Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case' (1996) 45 ICLQ 691, 701.

[26] Rome Statute of the International Criminal Court, 37 ILM (1998) 999. Article 8(2)(c) deals with violations of common Article 3, and Article 8(2)(e) with other violations of the laws and customs of non-international armed conflict. See discussion of their provisions below.

[27] H. von Hebel & D. Robinson, 'Crimes Within the Jurisdiction of the Court' in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague, 1999), 79, 125.

[28] J.M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, 2005). Twelve rules are stated to apply only to international armed conflict, and two to non-international armed conflict. The ICRC Study has not, however, escaped criticism.

[29] This is not always the case, of course, and there may well be situations — small scale border incidents, for example — where the existence or otherwise of international armed conflict is difficult to determine.

such conflicts is offered.[30] Additional Protocol II, on the other hand, does list a number of conditions in Article 1(1), where it is required that the armed conflict take place between the 'armed forces [of a High Contracting Party] and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol'. Article 1(2) further provides that the Protocol does not apply in the case of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' — these are not armed conflicts. Although its provisions were intended to develop and supplement common Article 3, Additional Protocol II makes it clear in Article 1(1) that this was to be achieved 'without modifying its [i.e. common Article 3's] existing conditions of application'. The result is that Additional Protocol II is narrower in scope than common Article 3.[31] Some conflicts will accordingly be regulated by common Article 3 but not Protocol II, whereas others will successfully meet the higher threshold of Additional Protocol II. Of course, common Article 3, its broader applicability left unaltered by the Protocol, would still necessarily apply to those conflicts too.

The ICTY Appeals Chamber asserted in *Tadić* that a non-international armed conflict exists wherever there is 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.[32] This is a comparatively wide definition, requiring neither territorial control nor compliance with humanitarian law on the part of the non-state party. In line with common Article 3, nor is there any requirement that government troops actually participate in hostilities. The ICTY threshold is therefore set considerably lower than that of Additional Protocol II. In fact, the single (and fairly general) requirement of protracted armed violence involving organised armed groups means that common Article 3 will apply to a broad range of situations. This definition has met with subsequent approval from both the ICTY and ICTR, although the latter has, perhaps wisely, cautioned that the Appeals Chamber's statement is still 'termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of common Article 3, is to be decided on a case-by-case basis'.[33]

The Rome Statute of the ICC demonstrates a similar approach to that of the Appeals Chamber, and sets out the scope of application for Article 8(2)(c) and (e) in Article 8(2)(d) and (f). Article 8(2)(d) indicates the material scope for violations of common Article 3, providing that they can be committed during 'armed conflicts not of an international character', which does not include 'internal disturbances and tensions, such as riots, isolated or sporadic acts of violence or other acts of a similar nature'. The reliance on Article 1(2) of Additional Protocol II is obvious, and it had been intended that a similar threshold be applied to Article 8(2)(e).[34] Article 8(2)(f) states additionally, however, that subparagraph (e) applies to 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups'. This is a lower

[30] The inclusion of objective criteria was ultimately rejected. See Pictet, *Commentary I*, 49-50.

[31] Non-international armed conflicts fought exclusively between non-state actors with no governmental involvement, for example, do not meet the criteria set out in Additional Protocol II.

[32] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 70.

[33] *Prosecutor* v. *Rutaganda*, Case ICTR-96-3, Judgment of 6 December 1999, paragraph 91.

[34] von Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', 120.

threshold than that in Additional Protocol II, and serves to enhance the jurisdiction of the ICC.

The existence or otherwise of a non-international armed conflict is not, however, only relevant to the applicability of common Article 3, Additional Protocol II or customary law. It is also a vital question for the purposes of international criminal law, in that war crimes can only be committed in the context of, and associated with, armed conflict. Thus, for example, although the ICC Elements of Crimes do not require an alleged perpetrator to make any legal evaluation of the existence or otherwise of a non-international armed conflict, they do require him to have an 'awareness of the factual circumstances that established the existence of an armed conflict'.[35] This does not mean that war crimes can only be committed during, or at the scene of hostilities. During non-international armed conflict, humanitarian law applies to the whole territory of the state concerned rather than the specific region(s) of combat alone.[36] The ICTY has accordingly indicated that:

> It is … sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if … the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.[37]

B. The question of individual criminal responsibility

The issue of individual criminal responsibility for violations of the laws of non-international armed conflict has not always been free from difficulty. There is nothing in common Article 3 to suggest that any criminal responsibility flows from a breach of its provisions. Nor are violations of common Article 3 considered grave breaches of the Geneva Conventions in that they are generally committed against nationals of the same state, rather than those of another state.[38] Nor does Additional Protocol II make any reference to criminal responsibility for the violation of its provisions.[39] Thus, it was

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[35] Elements of Crimes, Report of the First Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3-10 September 2002, ICC-ASP/1/3, 108, Article 8, Introduction. It was generally believed, however, that, 'in most situations, it would be so obvious that there was an armed conflict, that no additional proof as to awareness would be required'. See K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge, 2002), 18-22.

[36] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 70.

[37] *Prosecutor* v. *Kunarać*, Case IT-96-23&23/1, Judgment of 22 February 2001, paragraph 568.

[38] Victims are not, then, 'protected persons' in the context of the Geneva Conventions. There is, however, a measure of ongoing debate on this area and the Appeals Chamber in *Prosecutor* v. *Tadić*, Judgment of 15 July 1999, paragraph 166, argued that, in the context of modern armed conflicts, 'the requirement of nationality is [not] adequate to define protected persons. … [Instead] allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test'. This is not entirely the approach of the ICC Statute on the issue, although the Elements of Crimes require perpetrators to know only that the victim belonged to an 'adverse party to the conflict'. See Dörmann, *Elements of War Crimes*, 28-32; and P. Rowe, 'War Crimes' in D. McGoldrick, P. Rowe & E. Donnelly (eds.), *The Permanent International Criminal Court* (Oxford, 2004), 203, 221-222.

[39] This stands in direct contrast to Additional Protocol I, which outlines a number of grave breaches in Articles 11 and 85.

being argued as recently as 1990 that, 'international humanitarian law applicable to non-international armed conflict does not provide for individual penal responsibility'.[40] Likewise, in the context of the establishment of the ICTY, both the ICRC and the UN Secretary-General's Commission of Experts took the position that the commission of war crimes was limited to international armed conflicts.[41] When the ICTR Statute asserted jurisdiction over violations of common Article 3 and Additional Protocol II in 1995, the UN Secretary-General described the relevant provision as one which 'for the first time criminalises common Article 3'.[42]

It was, then, no surprise when the defence team argued in *Tadić* that, even if a body of law did exist to regulate both international and non-international armed conflict, its violation did not entail individual criminal responsibility where the conflict was non-international in character.[43] The argument failed. Relying on national military manuals, national legislation implementing the Geneva Conventions and unanimously adopted resolutions of the Security Council as clear evidence of *opinio juris*, the Appeals Chamber held that states did intend for serious breaches of the laws and customs of non-international armed conflict to be treated as war crimes. The fact that such offences were not grave breaches did not impact upon the question of criminal responsibility,[44] and it was therefore asserted that:

> … customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.[45]

As a policy position, this must be right. After all, violations of the laws of war have always been regarded as criminal and there is no reason why, 'once those laws [were] extended to … internal armed conflicts, their violation in that context should not have been [equally] criminal, at least in the absence of a clear indication to the contrary'.[46] The Lawyers Committee for Human Rights also argued in 1998 that it was 'untenable to argue that the perpetrators of atrocities committed in non-international armed conflict should be shielded from international justice just because their victims

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[40] D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts' 278 IRRC (1990) 409, 414.

[41] Preliminary Remarks of the International Committee of the Red Cross, 25 March 1993, unpublished — see Greenwood, 'Humanitarian Law and the *Tadić* Case', 280, n.2; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, paragraph 52.

[42] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134 (13 February 1995), paragraph 12. Nonetheless, the Security Council clearly felt that the ICTR Statute was adopted in compliance with the principle of *nullum crimen sine lege*, and that violations of common Article 3 were already crimes in international law.

[43] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 128. See, however, Dissenting Opinion of Judge Li, paragraph 13.

[44] *Ibid*., paragraphs 130-133.

[45] *Ibid*., paragraph 134. In other words, as outlined in *Prosecutor* v. *Delalić*, Case IT-96-21, Judgment of 16 November 1998, paragraph 308, 'The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common article 3 clearly does not in itself, preclude such liability'. Criminal responsibility is, instead, to be found in customary law.

[46] Greenwood, 'Humanitarian Law and the *Tadić* Case', 280-281.

were of the same nationality',[47] and the position has been reaffirmed in subsequent case law of both the ICTY and ICTR.[48] Indeed, the UK Military Manual, having been relied upon in its 1958 form by the ICTY in *Tadić* as evidence of the customary status of war crimes and criminal responsibility during non-international armed conflict, now — in its 2004 incarnation — actually cites the *Tadić* decision as authority for the same point.[49]

Nonetheless, during negotiations leading to the adoption of the Rome Statute several delegations still apparently believed that individual criminal responsibility for war crimes committed during non-international armed conflicts had yet to be demonstrated conclusively, and were therefore opposed to their inclusion.[50] Most states disagreed, and were rather more determined that such war crimes be included in the Statute, first, because 'it was precisely in internal armed conflicts that national criminal justice systems were in all likelihood unable to adequately respond to violations of such norms', and second, because a failure to provide for jurisdiction over non-international armed conflicts would have rendered the ICC unable to prosecute what are now the most common violations of humanitarian law.[51] Despite this, the final draft of the Statute placed before the Diplomatic Conference in April 1998 still retained the option of removing any reference to such jurisdiction entirely.[52] It was no great surprise when this option was rejected, and jurisdiction over violations of the laws and customs of non-international armed conflict was granted to the Court in Article 8 of its Statute. The Statute accordingly serves to affirm the customary status not only of many rules regulating non-international armed conflict, but also of the attendant criminal responsibility for their violation. Indeed, even more recently the ICRC Study on Customary Humanitarian Law has again stated that serious violations of international humanitarian law constitute war crimes whether committed during international or non-international armed conflict, and that both categories of war crimes result in individual criminal responsibility.[53] This particular issue, then, seems beyond doubt.

C. Violations of common Article 3

Reflecting widespread international consensus regarding the customary status of war crimes committed during non-international armed conflict, the Rome Statute of the ICC serves as an appropriate basis for the examination of those criminal offences. Article 8(2)(c) of the Statute grants the Court jurisdiction over serious violations of common Article 3, whilst Article 8(2)(e) provides for jurisdiction over other serious violations of

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[47] Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statut*e (New York, 1998), Section IV.

[48] See, for example, *Prosecutor* v. *Delalić*, paragraph 316, asserting that 'the substantive prohibitions in common Article 3 … constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility'. It was similarly held in *Prosecutor* v. *Akayesu*, Case ICTR-96-4, Judgment of 2 September 1998, paragraph 617, that the violation of common Article 3 and Additional Protocol II 'entails, as a matter of customary international law, individual responsibility for the perpetrator'.

[49] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, 2004), 397-398.

[50] von Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', 105. This minority (including China, India, the Russian Federation, Turkey and a number of other Asian and Arab states) accordingly believed that the inclusion of such jurisdiction within the Statute would prove dangerous for the prospects of its universal acceptance.

[51] *Ibid*.

[52] Option V ('Delete sections C and D'), UN Doc. A/CONF.183/2 (April 1998).

[53] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 551-555 and 568-603.

the laws and customs applicable to non-international armed conflicts — including those provisions of Additional Protocol II deemed to represent customary international law. Their provisions will be examined in turn.

Turning initially to Article 8(2)(c), the first point of note is that the Rome Statute asserts jurisdiction only over 'serious violations' of common Article 3. In one respect this seems consistent with the terms of Article 5 of the Statute, limiting the activities of the ICC to the 'most serious crimes of concern to the international community as a whole'.[54] And yet, it could quite conceivably be argued that, in fact, *any* violation of common Article should be considered serious. In *Tadić*, after all, the ICTY Appeals Chamber suggested that a violation is serious where it constitutes 'a breach of a rule protecting important values, and [involves] grave consequences for the victim'.[55] Given that common Article 3 represents the 'elementary considerations of humanity' applicable to any armed conflict,[56] it is difficult to conceive of a violation of its terms that would not be serious — or at least a violation of the specific prohibitions set out in paragraph 1(a)-(d). Thus, Trial Chamber II of the ICTY held that:

> … each of the prohibitions in Common Article 3: against murder; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples, constitute, as the [International Court of Justice] put it, 'elementary considerations of humanity', the breach of which may be considered to be a 'breach of a rule protecting important values' and which 'must involve grave consequences for the victim'.[57]

The Chamber did, however, suggest that 'it may be possible that a violation of some of the prohibitions of Common Article 3 may be so minor as to not involve "grave consequences for the victim"'.[58] To the extent that this is true, the approach of the Rome Statute would indeed seem to be consistent with existing law, and the affirmation that serious violations of common Article 3 are 'namely' those that follow (i.e. the four specific prohibitions in common Article 3(1)(a)-(d) as reproduced in Article 8(2)(c)(i)-(iv)) accordingly renders the list exhaustive. Any other violations of common Article 3 — such as failing to collect and care for the sick and wounded — are not, then, 'serious' and do not result in individual criminal responsibility.[59]

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[54] It has been suggested that this limitation is also consistent with the ICTR Statute and relevant ICTY jurisprudence. See M. Cottier, W.J. Fenrick, P.V. Sellers & A. Zimmerman, 'Article 8: War Crimes' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, 1999), 173, 270.

[55] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 94.

[56] *Nicaragua* Case, Merits, paragraph 218.

[57] *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 612. A similar approach has been taken by the ICTR. See, for example, *Prosecutor* v. *Akayesu*, paragraph 616; *Prosecutor* v. *Rutaganda*, paragraph 106.

[58] *Ibid*. No example of such a violation was given, although Zimmerman suggests that the only such example 'might be the singular passing of a short term (!) imprisonment without adequate judicial guarantees'. See Cottier *et al*, 'War Crimes', 271.

[59] See also Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 590-591.

(i) Violence to life and person

Common Article 3(1)(a) prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'. Additional Protocol II takes a similar, if not identical, approach in Article 4(2)(a) by prohibiting 'violence to the life, health and physical or mental wellbeing of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment'. Of course, in one respect, violence to life and person is an integral feature of any armed conflict and many such acts would not, therefore, involve criminal responsibility. The distinguishing feature of this offence and its criminality is the victim of the violence. In terms of common Article 3, violence to life and person is prohibited and criminal where it is aimed at those persons 'taking no active part in hostilities'. To this end, the ICTY has used the test of 'whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities'.[60] What matters, therefore, is that the victims were not actively involved in hostilities at the exact time of the offence. Provided this is the case, they are entitled to the protection of common Article 3 — irrespective of the nature and level of any prior involvement in hostilities.[61]

In terms of the substance of the prohibition, the ICTY asserted in 2000 that violence to life and person in common Article 3 is 'a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences'.[62] Prosecution for the general offence of violence to life and person, rather than one of its constituent elements, would therefore be difficult, if not impossible. Indeed, Trial Chamber II of the ICTY has argued that there is no clear indication in state practice as to what the content of a general offence of 'violence to life and person' may be in customary international law. It was not, then, 'satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law'.[63]

Whilst bearing in mind that the phrase 'in particular' renders neither the list of acts prohibited by common Article 3(1)(a) — nor indeed by Article 8(2)(c)(i) of the ICC Statute — exhaustive, it is, then, essential to understand the meaning of the constituent elements of the offence. The first of these, i.e. murder, is comparatively simple and represents the killing of a victim 'resulting from an act or omission of the accused committed with the intention to kill or cause serious bodily harm which [the perpetrator] should reasonably have known might lead to death'.[64] In fact, it has been

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[60] *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 615.

[61] *Ibid*., paragraph 616, where the Trial Chamber held it 'sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities *at the relevant time*' (emphasis added). *Abella* v. *Argentina*, Report No. 55/97, *Annual Report of the Inter-American Commission on Human Rights 1997*, paragraphs 176 and 189, held that, 'Individual civilians are … covered by Common Article 3's safeguards when they are captured or otherwise subjected to the power of an adverse party, even if they had fought for the opposing party. … the persons who participated in the attack on the military base were legitimate targets only *for such time as they actively participated in the fighting*'. See also Moir, *Internal Armed Conflict*, 58-61. The ICC Elements of Crimes for Article 8(2)(c) accordingly require that victims 'were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in hostilities', and that the perpetrator 'was aware of the factual circumstances that established this status'.

[62] *Prosecutor* v. *Blaskić*, Case IT-95-14, Judgment of 3 March 2000, paragraph 182.

[63] *Prosecutor* v. *Vasiljević*, Case IT-98-32, Judgment of 29 November 2002, paragraph 203.

[64] *Prosecutor* v. *Krstić*, Case IT-98-33, Judgment of 2 August 2001, paragraph 485, reflecting the consistent definition of the ICTY and ICTR.

stated by the ICTY that murder in the context of common Article 3 is no different from 'wilful killing' as a grave breach of the Geneva Conventions. Given that the aim of common Article 3 is to render elementary considerations of humanity applicable to non-international armed conflict and, since the killing of protected persons in an international armed conflict is prohibited, it must also be prohibited during non-international armed conflict — with the caveat that, in terms of non-international armed conflict, the victim must be taking no active part in hostilities rather than a 'protected person', strictly speaking.[65] The ICC Statute takes the same approach.

Mutilation is explicitly prohibited by common Article 3 and by Additional Protocol II,[66] although neither instrument offers any definition of the offence. Indeed, in the context of international armed conflict, the Commentaries on the Geneva Conventions consider the term 'sufficiently clear not to need lengthy comment … [it is] covered by the general idea of "physical suffering" [and is] a particularly reprehensible and heinous form of attack on the human person'.[67] The Commentary on Article 11 of Additional Protocol I does, however, state that mutilation refers 'particularly' to amputation and injury to limbs,[68] whilst the ICTY has stated that sexual mutilation is also included.[69] Following this illustrative approach, the elements of the crime for ICC purposes require that:

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.

…

Reference to disfigurement and disabling or removing organs or appendages 'in particular' makes it clear that these examples are not exhaustive, and that other acts of mutilation are both possible and criminal. In contrast to the agreed elements of the crime in the context of international armed conflict, however, there is no result requirement in non-international armed conflict. The crime of mutilation committed during non-international armed conflict may, then, be broader in scope than that committed during international armed conflict.[70]

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[65] *Prosecutor* v. *Delalić*, paragraphs 422-423; *Prosecutor* v. *Kordić & Čerkez*, Case IT-95-14/2, Judgment of 26 February 2001, paragraph 233.

[66] Article 4(2)(a) of Additional Protocol II prohibits mutilation as a category of cruel treatment. It is also prohibited by the laws of international armed conflict. See Article 13 of Geneva Convention III, Article 32 of Geneva Convention IV and Article 11 of Additional Protocol I. Jurisdiction is granted to the ICC both as a violation of common Article 3 (Article 8(2)(c)(i)) and in the context of other serious violations of the laws and customs of non-international armed conflict (Article 8(2)(e)(xi)).

[67] J.S. Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volume IV* (Geneva, 1958), 223-224.

[68] Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols*, 156.

[69] *Prosecutor* v. *Tadić*, Judgment of 7 December 1997, paragraph 45.

[70] Element 2 for Article 8(2)(b)(x) of the Statute requires that the mutilation 'caused death or seriously endangered the physical or mental health of such person or persons'. The reasons for this divergence are unclear. In contrast to Article 13 of Geneva Convention III and Article 32 of Geneva Convention IV, common Article 3 and Additional Protocol II certainly do not

Cruel treatment is prohibited by common Article 3, and is also proscribed by Article 4(2)(a) of Additional Protocol II, where it represents a fairly broad crime including at least 'torture, mutilation or any form of corporal punishment'. In the context of common Article 3, the ICTY has held that cruel treatment has the same meaning as 'inhuman treatment' as a grave breach of humanitarian law.[71] Neither humanitarian law nor human rights law offered any guidance as to the substance of the crime,[72] however, leaving the ICTY to arrive at its own definition. This it did in the following terms:

> … cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common Article 3 … as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common Article 3 … is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common Article 3, constitutes cruel treatment.[73]

The ICC takes a similar approach, and the elements of the crime for both inhuman treatment as a grave breach and cruel treatment as a violation of common Article 3 both require simply that the perpetrator 'inflicted severe physical or mental pain or suffering upon one or more persons'.

The final constituent offence in terms of violence to life and person is that of torture. Humanitarian law provides no definition of the offence, and so the ICTY asserted that the definition set out in Article 1 of the 1984 Convention Against Torture represents customary international law.[74] Subsequent jurisprudence has largely followed this position, although a number of slight modifications have been suggested. Less than a month after the *Delalić* judgment, for example, it was asserted that torture in the context of an armed conflict:

> (i) consists of the infliction, by act or omission, of severe pain and suffering, whether physical or mental; in addition
> (ii) this act or omission must be intentional;

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impose such a condition. Nor, however, does Article 11 of Additional Protocol I. It has been suggested that this may be a simple drafting error. See Dörmann, *Elements of War Crimes*, 396.

[71] See, for example, *Prosecutor* v. *Delalić*, paragraph 443; *Prosecutor* v. *Blaskić*, paragraph 186; *Prosecutor* v. *Kordić & Čerkez*, paragraph 265.

[72] Although there is a considerable body of European jurisprudence on inhuman treatment and how it is distinct from torture. See, for example, *Ireland* v. *United Kingdom*, 2 EHRR 25. For critical analysis of this jurisprudence, see M.D. Evans, 'Getting to Grips with Torture' (2002) 51 ICLQ 365. International human rights law can play a vital role in interpreting certain provisions of humanitarian law — and vice versa. On the nature of this relationship, see L. Moir, 'Decommissioned? International Humanitarian Law and the Inter-American Human Rights System' (2003) 25 HRQ 182, 182-185.

[73] *Prosecutor* v. *Delalić*, paragraph 552. The ICTY also went on to hold in *Prosecutor* v. *Kvocka*, Case IT-98-30/1, Judgment of 2 November 2001, paragraph 161, that the level of suffering required to constitute cruel treatment is lower than that required for torture.

[74] *Prosecutor* v. *Delalić*, paragraph 459. The definition is therefore applicable to both international and non-international armed conflicts.

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
(iv) it must be linked to an armed conflict;
(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.[75]

Although very closely tied to the 1984 definition, this includes additional reference in (iii) to humiliation, apparently justified by the 'general spirit of international humanitarian law'.[76] It should be noted, however, that no such reference exists in the elements of the crime for the purposes of ICC jurisdiction.

Likewise, more recent jurisprudence questions the necessity of official involvement. The ICTY had initially stated in *Delalić* that a requirement of official involvement must extend to officials of non-state parties,[77] which is of course vital for the offence to remain important in the course of non-international armed conflict. It has since been argued, however, that the elements of torture in the context of humanitarian law are not necessarily the same as those in human rights law and, in particular, that the presence of an official — either state or non-state — is not required for the offence in humanitarian law.[78] Private acts can accordingly constitute torture in the context of non-international armed conflict. Indeed, the ICC elements of the crime of torture as a violation of common Article 3 require only that the perpetrator inflicted 'severe physical or mental pain or suffering … for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind'.

Torture as a crime against humanity requires neither official involvement nor that the suffering be inflicted for a specific purpose.[79] Nonetheless, it is clear that the purposive element still applies to torture as a war crime. As the ICTY has explained, it is the:

> … purpose and the seriousness of the attack on the victim that sets torture apart from other forms of mistreatment. Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture …[80]

It would not seem to be the case, however, that a prohibited purpose need be the sole (or indeed the main) goal behind the suffering imposed and, even where a prohibited purpose is entirely absent, such activities would still represent criminal violations of common Article 3 in the broader context of cruel treatment.

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[75] *Prosecutor* v. *Furundžija*, Case IT-95-17/1, Judgment of 10 December 1998, paragraph 162.

[76] *Ibid*. See also J.R.W.D. Jones & S. Powles, *International Criminal Practice* (Ardsley, 2003), 280-281.

[77] Paragraph 473.

[78] On the basis that international criminal law engages the responsibility of individuals, whilst human rights law instead engages state responsibility. See *Prosecutor* v. *Kunarać*, paragraphs 465-497; upheld in the Appeals Chamber Judgment of 12 June 2002, paragraph 148.

[79] ICC Elements of Crimes, Article 7(1)(f).

[80] *Prosecutor* v. *Krnojelać*, Case IT-97-25, Judgment of 15 March 2002, paragraph 180.

(ii) Taking of hostages

The taking of hostages is prohibited by common Article 3 and by Article 4(2)(c) of Additional Protocol II,[81] and clearly involves the seizing of persons taking no active part in hostilities and depriving them of their liberty. Of course, it must be remembered that detaining civilians is not always unlawful — it may, for example, be intended as a measure of protection — and the distinguishing feature of hostage-taking is accordingly the purpose of the crime. As the ICTY has explained:

> … the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement …
> The additional element that must be proved … is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a 'threat either to prolong the hostage's detention or to put him to death'. In the Chamber's view, such a coercive threat must be intended as a coercive measure to achieve the fulfilment of a condition. The Trial Chamber in the Blaskić case phrased it in these terms: 'The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage'.[82]

The elements of the crime for ICC jurisdiction are consistent with this approach.

Finally, it should be noted that, although a specific instrument exists in this area (i.e. the International Convention Against the Taking of Hostages),[83] Article 12 provides explicitly that, 'the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto'. Article 13 further states that it shall not apply 'where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State'. This would be the normal situation during non-international armed conflict in any case.

(iii) Outrages upon personal dignity

Outrages against personal dignity are prohibited by common Article 3(1)(c) and Additional Protocol II, coming within the jurisdiction of the ICC through Article 8(2)(c)(ii) of the Statute. Clearly influenced by the developing body of international human rights law,[84] common Article 3 contained the first specific prohibition of such conduct. Consistent with the whole of common Article 3, this provision is aimed at ensuring humane treatment for those taking no active part in hostilities. Of course, as explained above, the precise substance of 'humane treatment' may not always be clear and international humanitarian law has tended to take an illustrative approach, providing examples of behaviour that would fall short of the required standard. Common Article 3 thus prohibits 'outrages upon personal dignity, in particular, humiliating and degrading treatment', while Article 4(2)(e) of Additional Protocol II

[81] It also represents a grave breach in the context of international armed conflict. See Geneva Convention IV, Article 147.

[82] *Prosecutor* v. *Kordić & Čerkez*, paragraphs 312-313.

[83] 18 ILM (1979) 1456.

[84] See, for example, Preamble to the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948.

prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. The criminal offence is, then, broad and residual in character, including at least humiliating and degrading treatment, and with the other examples given in Additional Protocol II being non-exhaustive.

There is a body of jurisprudence from the ICTY regarding the offence, considered in the context of Article 3 of its Statute. Thus, in *Furundžija*, where the accused was convicted of 'outrages upon personal dignity including rape', it was held that:

> The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law … intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.[85]

Further clarification identified outrages upon personal dignity as being 'a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*',[86] and in particular:

> … an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious harm or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament. … Consequently, an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.[87]

This has since been refined slightly, with the removal of any requirement that the humiliation or degradation suffered be 'lasting' — provided the harm suffered was 'real and serious' — so that any act of sufficient intensity to satisfy objective tests will be criminal as long as the offender was aware that his 'act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity'.[88] The elements of the crime for ICC jurisdiction are broadly consistent with this approach, although no illustrative acts are offered. Instead, they require only that the perpetrator 'humiliated, degraded or otherwise violated the dignity' of the victim, and that the severity of the offence 'was of such degree as to be generally recognized as an outrage upon personal dignity'. It seems clear, then, that the offence as set out in Article 8(2)(c)(ii) of the Rome Statute 'deliberately envelops a wide range of inhumane acts'.[89]

Finally, the footnote appended to the elements of the crime provides yet more detail in three respects: first, the offence can equally be committed against dead

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[85] *Prosecutor* v. *Furundžija*, paragraph 183.

[86] *Prosecutor* v. *Aleksovski*, Case IT-95-14/1, Judgment of 25 June 1999, paragraph 54.

[87] *Ibid*., paragraph 56.

[88] See *Prosecutor* v. *Kunarać*, paragraph 501; Appeals Chamber Judgment of 12 June 2002, paragraph 164.

[89] Cottier *et al*, 'War Crimes', 247.

persons;[90] second, the victim need not be aware of the humiliation or degradation — it is enough that the victim be sufficiently humiliated either in his own eyes, or in the eyes of others;[91] and third, given the important role that cultural and religious values play in determining whether particular victims would find particular treatment humiliating and degrading, the victim's cultural background must be taken into consideration.[92]

(iv) Sentencing or execution absent indispensable judicial guarantees

Common Article 3(1)(d) prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. The Statute of the ICC makes virtually identical provision in Article 8(2)(c)(iv).[93] What common Article 3 fails to do, however, is specify any such judicial guarantees. Nor have the ad hoc criminal tribunals made any pronouncement on this issue. In order to asses the substantive content of the offence it is necessary, then, to have recourse to Additional Protocol II (as being reflective of human rights requirements) and indeed to international human rights law itself. It is, after all, more helpful to examine what states have broadly agreed to be necessary than to consider individual legal systems. An immediate problem arises, however, in seeking to draw upon international human rights law to interpret common Article 3 — which protects only those judicial guarantees that are considered 'indispensable'. In fact, international human rights instruments tend to treat most judicial guarantees as derogable, and so not indispensable at all.[94] The provisions of Additional Protocol II, then, as a means of explaining and interpreting common Article 3, are vitally important.[95] Article 6(2) of Additional Protocol II provides that:

> No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

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[90] Reflecting situations such as that in the *Max Schmid* Trial, where the body of a dead prisoner of war was mutilated and denied an honourable burial. *Law Reports of Trials of War Criminals*, Volume XIII, 151-152. See also Dörmann, *Elements of War Crimes*, 314 and 323.

[91] This reflects human rights jurisprudence, such as *Campbell & Cosans* v. *United Kingdom*, ECHR Series A, Volume 48, Judgment of 25 February 1982, paragraph 28.

[92] A number of examples were provided during drafting negotiations, such as being forced to eat certain foodstuffs (e.g. pork), to perform certain acts (e.g. drink alcohol or smoke tobacco), or to alter the appearance in a manner prohibited by religious beliefs (e.g. cut the hair or shave off a beard). See Dörmann, *Elements of War Crimes*, 315.

[93] The only slight variation is that the judicial guarantees required by the Statute are those 'generally recognized as indispensable', rather than those considered indispensable by 'civilized peoples'.

[94] Although states are free to derogate only to the extent required by the exigencies of the situation, and 'provided that such measures are not inconsistent with their other obligations under international law'. See the International Covenant on Civil and Political Rights, Article 4; European Convention on Human Rights, Article 15; and American Convention on Human Rights, Article 27.

[95] Remembering that Additional Protocol II develops and supplements common Article 3, Article 6(2) clearly serves to explain and clarify the judicial guarantees contained therein. As the ICRC Commentary explains, 'Article 6 of Additional Protocol II … gives valuable indications to help explain the terms of [common] Article 3'. See Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols*, 878. See also 1396-1397

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by the law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt.

At least those guarantees must apply in the context of non-international armed conflict, and even this list is not exhaustive.[96] Additional guarantees may be imported from human rights law, and it has indeed been suggested that several indispensable guarantees do exist beyond the provisions of Additional Protocol II.[97] In drafting the elements of the crime for the ICC it was decided not to draw up a list of specific judicial guarantees, and this flexibility will allow the Court to utilise continuing developments in human rights law in assessing whether the crime has been committed.

D. Violations of other laws and customs regulating non-international armed conflict

(i) Attacks against the civilian population

Despite its status as one of the most fundamental principles of humanitarian law, common Article 3 does not explicitly prohibit attacks on the civilian population. It does, however, provide that all persons taking no active part in hostilities are to be treated humanely at all times, specifically prohibiting violence to their life and persons. Additional Protocol II, on the other hand, makes explicit provision in Article 13(2) that the 'civilian population as such, as well as individual civilians, shall not be the object of attack', and it is beyond doubt that this prohibition is an established rule of customary international humanitarian law.[98] Indeed, the ICC is granted jurisdiction over the offence by virtue of Article 8(2)(e)(i) of its Statute.

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[96] Evident from the fact that the provisions of Article 6(2) are only listed 'in particular'.

[97] Article 6 is, after all, based heavily on the relevant provisions of the ICCPR. The body of human rights case law on the right to a fair trial is also extensive. Dörmann has accordingly argued that additional guarantees include, but are not necessarily limited to, the right to be advised of judicial and other remedies available and time limits in which they may be exercised (provided for in Article 6(3) of Additional Protocol II); the right to have judgment pronounced publicly; and the principle of *ne bis in idem*. See *Elements of War Crimes*, 409-411. He also outlines, at 410, assistance to be gained from human rights law in terms of clarifying the necessary rights and means to defence.

[98] See, for example, Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 3-8; *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 127, where it was stated that 'customary rules have developed to govern internal strife. These … cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks'; and *Prosecutor* v. *Martić*, Case IT-95-

Unlike Additional Protocol I, which provides a definition of 'civilian' in the context of international armed conflict,[99] Additional Protocol II offers no such guidance. This is most unfortunate as the determination of civilian status can be especially difficult during non-international armed conflict. Indeed, the natural assumption that 'civilians' take no active part in hostilities can be rather dangerous. Many non-international conflicts are uneven in terms of the competing parties, with state forces having access to significant military power whereas insurgents tend to have more meagre resources. Faced with such an imbalance, non-state actors are routinely forced to resort to guerrilla warfare, relying upon the civilian population for shelter and concealment. Making a genuine distinction between civilians and combatants in these situations can be impossible. Although unlikely to be popular with states, the best approach in light of the underlying principles of humanitarian law must be to define civilian status as broadly as possible.[100] Thus, the ICTR has accepted that a wide definition of 'civilian' is warranted in non-international armed conflict, whereby a 'targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population'.[101] The general rule, then, is that where there are no clearly identifiable insurgent forces, immunity from attack must be afforded to the entire civilian population. As outlined above in relation to violence to life and person as a violation of common Article 3, protection from attack as a civilian must therefore attach to all individuals unless they were taking an active part in hostilities at the *precise time* of the alleged offence.[102]

The offence also includes indiscriminate attacks, i.e. attacks which either are not, or cannot be directed against specific military objectives, and area bombardment, i.e. attacks which treat several distinct military objectives located in a civilian area as a single military objective.[103] Civilian casualties are not, however, unlawful per se, and customary international law prohibits incidental harm to civilians only where this is considered 'excessive in relation to the concrete and direct military advantage anticipated'.[104] This balancing act may be particularly difficult in the context of non-international armed conflict, where Additional Protocol II is silent regarding a proportionality test for incidental civilian casualties. Bothe has, however, argued that this was simply due to the 'dramatic simplification' of the text of Additional Protocol II during drafting, and that it was assumed throughout that the general protection afforded to civilians in Article 13 would include this requirement implicitly.[105]

11, Review under Rule 61, 8 March 1996, paragraph 11, where it was held that, 'There exists … a corpus of customary international law applicable to all armed conflicts … the prohibition on attacking the civilian population as such, or individual civilians [is] undoubtedly part of this corpus of customary law'.

[99] See Additional Protocol I, Article 50.

[100] This is consistent with the approach taken for international armed conflict.

[101] *Prosecutor* v. *Kayishema & Ruzindana*, Case ICTR-95-1/ICTR-96-10, Judgment of 21 May 1999, paragraphs 127-128.

[102] See notes 60 and 61 above, and accompanying text.

[103] See Article 51 of Additional Protocol I; Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 37-45; and the ICJ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 ILM (1996) 809, paragraph 78.

[104] As expressed in Article 51(5)(b) of Additional Protocol I, reflecting post-World War II case law such as *US* v. *Ohlendorf, et al* (the *Einsatzgruppen* Trial), *Law Reports of Trials of War Criminals*, Volume XV, 111. For discussion of the customary status of this rule, see Henckaerts & Doswald-Beck, *ibid*., 46-50.

[105] M. Bothe, 'War Crimes' in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford, 2002), 421. On the drafting of Additional Protocol II, see Moir, *Internal Armed Conflict*, 91-96.

Finally, although explicitly prohibited neither by common Article 3 nor by Additional Protocol II, it would seem to be generally accepted that the prohibition on attacking civilians includes such attacks by way of belligerent reprisal. Indeed, the over-arching requirement of humane treatment and protection from violence at all times cannot leave the possibility of lawful reprisals against the civilian population open. The ICTY has therefore stated that the prohibition of reprisals against civilians is 'an integral part of customary international law',[106] and they must duly result in criminal responsibility.

(ii) Attacks on the distinctive emblem

Attacking objects or persons using the distinctive emblems of the Geneva Conventions comes under the jurisdiction of the ICC as a violation of customary law through Article 8(2)(e)(ii) of the Statute. It is interesting to note, however, that — as a specific criminal offence — this is a new development in international law.[107] The Geneva Conventions and Additional Protocol I provide detailed rules for the protection of medical personnel and objects in the context of international armed conflict.[108] In contrast, any protection by common Article 3 must be inferred from its requirement that the wounded and sick be collected and cared for. Such activities are, after all, only possible if the personnel, medical units and transports, etc., involved are protected from attack. Likewise, collecting and caring for the sick and wounded cannot be seen as participation in hostilities, so that the guarantee of humane treatment remains applicable.[109]

Additional Protocol II provides more specific protection in Articles 9-12. In particular, Article 9(1), provides that 'Medical and religious personnel shall be respected and protected', Article 11(1) that 'Medical units and transports shall be respected and protected at all times and shall not be the object of attack', and Article 12 that 'the distinctive emblem of the red cross, red crescent or red lion and sun on a white background … shall be respected in all circumstances'.[110] Unlike Additional Protocol I, Additional Protocol II provides no guidance on the terminology used. The ICRC Commentary to the Protocols, however, explains that the relevant definitions were simply omitted as part of the text's simplification, and that the same definitions apply to both international and non-international armed conflict.[111]

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[106] *Prosecutor* v. *Martić*, paragraph 17. See also *Prosecutor* v. *Kupreskić*, Case IT-95-16, Judgment of 14 January 2000, paragraphs 527-534; Dörmann, *Elements of War Crimes*, 446; Moir, *Internal Armed Conflict*, 237-243; and Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 526-529. The unlawfulness of reprisals against the civilian population in the context of international armed conflict is the subject of rather more debate. See, for example, Henckaerts & Doswald-Beck, *ibid*., 523; and UK Ministry of Defence, *Manual of the Law of Armed Conflict*, 420-421.

[107] The offence was not included in the ILC Draft Statute for an International Criminal Court, nor in the Statutes of the ICTY or ICTR. In fact, no mention was made of the offence in the drafting process of the ICC Statute until February 1997. See Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5 (1997), 11, paragraph (q).

[108] See numerous provisions of Geneva Conventions I and II, and Articles 8-31 of Additional Protocol I.

[109] Dörmann, *Elements of War Crimes*, 448. Of course, protection from attack is lost should the emblem be misused.

[110] Attacks against protected objects using the distinctive signals listed in Annex I to Additional Protocol I are also criminal in non-international armed conflict (provided the attacker has the capacity to receive and identify such signals).

[111] Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols*, 1405.

(iii) Attacks on humanitarian assistance and UN peacekeeping missions

These acts represent an entirely new criminal offence in international law, and are prohibited in the context of non-international armed conflict by customary law — as reflected in Article 8(2)(e)(iii) of the ICC Statute.[112] The precise basis for the crime is, however, rather vague. It has, for example, been suggested that both aspects are based on the 1994 Convention on the Safety of United Nations and Associated Personnel, Article 7(1) of which provides that 'United Nations and associated personnel, their equipment and premises shall not be made the object of attack'.[113] The definitions of UN and associated personnel offered in Article 1 of the Convention are certainly broad enough to (at least potentially) include either UN or NGO personnel providing humanitarian assistance. Such individuals receive no explicit protection, however, in either common Article 3 or Additional Protocol II. Of course, any attacks on those carrying out humanitarian missions must represent an attack on those taking no active part in hostilities, and hence a prohibited act in terms of the general protection afforded by common Article 3.[114] Only medical and religious personnel are specifically protected by Additional Protocol II, with relief operations regulated by Article 18. In light of its provisions, it seems possible that those engaged in humanitarian relief may be protected only where they are providing assistance in compliance with Article 18(2), i.e. with the consent of the relevant High Contracting Party.[115]

In contrast, treaty law regulating international and non-international armed conflict makes no reference to peacekeeping forces, and it seems clear that the 1994 Convention is the legal basis for the latter aspect of the offence. Certainly nothing in its provisions suggests that it does not apply equally to non-international armed conflict, and the deployment of UN missions is extremely common is such situations. The ICTR Prosecutor, for example, indicted Bernard Ntuyahaga for, inter alia, the murder of ten Belgian peacekeeping troops in 1994.[116] Consistent with general protection for civilians, for as long as peacekeeping missions take no active part in hostilities they must also be protected from attack in any case.[117]

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[112] See Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 105-114. It was originally considered a 'treaty crime', and only classed as a war crime relatively late in the ICC drafting process, once it became clear that treaty crimes would not be included in the Statute. See Cottier *et al*, 'War Crimes', 187-188.

[113] UN Doc. A/49/49 (1994). The Convention is not yet in force. Article 19 of the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind also suggested that attacks on UN and associated personnel were criminal. See UN Doc. A/51/332, 30 July 1996.

[114] Obviously, should such individuals cease to take no active part in hostilities, their protection from attack also ceases.

[115] Dörmann, *Elements of War Crimes*, 456.

[116] Although the alleged offence was considered as a crime against humanity (part of an attack on the civilian population) rather than as a war crime. See *Prosecutor* v. *Ntuyahaga*, Case ICTR-98-40, Indictment of 26 September 1998, paragraphs 6.18 and 6.19. The Indictment was later withdrawn, see *Prosecutor* v. *Ntuyahaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999.

[117] International law would seem, however, to have accepted a measure of special protection for such forces in any case. See, for example, Article 37(1)(d) of Additional Protocol I, where perfidy is said to include 'the feigning of protected status by the use of signs, emblems or uniforms of the United Nations'.

(iv) Attacks on cultural objects, places of worship, etc.

Protection for certain buildings during armed conflict was initially set out in Article 27 of the 1907 Hague Regulations. Although not applicable to non-international armed conflict per se, Article 27 certainly represents applicable customary international law,[118] and is essentially repeated in Article 8(2)(e)(iv) of the ICC Statute which prohibits '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'. The rule was largely incorporated into the 1954 Hague Convention for the Protection of Cultural Property in any case and, as outlined above, this provides explicitly in Article 19 for its application during non-international conflict — at least as regards those provisions on cultural property, defined by Article 1 as being property 'of great importance to the cultural heritage of every people', and including:

> … monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

Also protected are buildings for the preservation and exhibition of such property, and places designed to protect and shelter such property in the event of armed conflict. Article 16 of Additional Protocol II provides explicit protection for cultural objects whilst prohibiting their military use, and Article 15(1) of the 1999 Protocol to the 1954 Hague Convention — again, applicable during non-international conflict — provides explicitly for the criminality of certain acts in relation to such property.

Cultural property is, however, only one category of objects protected by the ICC Statute. Hospitals, medical units, etc., are also protected, despite the fact that this represents a duplication of the protection afforded by common Article 3, Additional Protocol II and specific rules of customary law to the emblems of the Geneva Conventions. This has been accepted by the ICTY, with the explanation that, whilst there is clear overlap with the offence of attacking civilian objects, this particular offence is more specific. Indeed, it can be seen as 'the *lex specialis* as far as acts against cultural heritage are concerned'.[119] At the time of the Statute's drafting, however, it was not certain that any general protection for civilian objects was accepted as being customary law in the context of non-international conflict. None was granted,[120] with the result that cultural objects may not receive protection under the Rome Statute where they do not meet the criteria set out in Article 1 of the 1954 Convention or Article 16 of Additional Protocol II — even if they are not being used for military purposes. It seems likely, however, that a broader protection of civilian objects does indeed represent customary law for the purposes of non-international armed conflict.[121]

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[118] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 127-135.

[119] *Prosecutor* v. *Kordić & Čerkez*, paragraph 361.

[120] Article 8(2)(e) of the Statute contains no provision corresponding to Article 8(2)(b)(ii).

[121] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 25-29.

(v) Pillaging

As early as 1863, and in the context of a non-international armed conflict, the Lieber Code had prohibited, 'all pillage or sacking, even after taking a place by main force'.[122] The basis of this offence would, however, seem to be Article 28 of the 1907 Hague Regulations, prohibiting the 'pillage of a town or place, even when taken by assault', and applicable to non-international armed conflict as customary law.[123] In addition, the pillage or misappropriation of cultural property is prohibited by Article 4(3) of the 1954 Hague Convention, and Additional Protocol II prohibits pillage explicitly in Article 4(2)(g).

The main difficulty in this area centres on the terminology used, previous practice having variously used the terms 'pillage', 'plunder', 'looting', 'sacking' and 'spoliation', and treating them as being synonymous and interchangeable. Article 3(e) of the ICTY Statute, for example, granted jurisdiction over 'plunder of public or private property', whereas Article 4(f) of the ICTR Statute granted jurisdiction over the crime of 'pillage'. No definition of the offence had, however, been universally agreed,[124] and the ICTY accordingly felt compelled to provide a definition (of 'plunder', rather than 'pillage') in *Delalić*, where it stated that:

> … the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'. … While it may be noted that the concept of pillage in the traditional sense implied an element of violence not necessarily present in the offence of plunder, it is for the present purposes not necessary to determine whether, under current international law, these terms are entirely synonymous. … the latter term … should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.[125]

In fact, the elements of the crime as adopted for the purposes of ICC jurisdiction do not require violence to accompany the offence. Instead, all that is necessary is that property was appropriated for private or personal use, with the intention of so depriving the owner of the property and without the owner's consent.[126] Whether this will be particular to the ICC, rather than more generally accepted as customary international law — indeed, whether even the ICC will still require an element of violence in practice — remains to be seen.

(vi) Sexual offences

Common Article 3 makes no specific reference to sexual offences. Instead such offences are subsumed within some of the more general prohibitions contained therein. Article

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[122] Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100, 24 April 1863, Article 44.

[123] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 182-185.

[124] Attempts have been made. See, for example, A. Steinkam, 'Pillage' in R. Bernhardt (ed.), *Encyclopedia of Public International Law, Volume III* (Oxford, 1997), 1029.

[125] *Prosecutor* v. *Delalić*, paragraph 591. See also subsequent cases such as *Prosecutor* v. *Jelisić*, Case IT-95-10, Judgment of 14 December 1999; *Prosecutor* v. *Blaskić*; *Prosecutor* v. *Kordić & Čerkez*; and *Prosecutor* v. *Naletilić & Martinović*, Case IT-98-34, Judgment of 31 March 2003.

[126] ICC Elements of Crimes, Article 8(2)(e)(v).

4(2) of Additional Protocol II, however, is more explicit, prohibiting 'rape, enforced prostitution and any form of indecent assault' as outrages upon personal dignity in paragraph (2)(e) and 'slavery and the slave trade in all their forms' in paragraph (2)(f). Article 8(2)(e)(vi) of the ICC Statute prohibits 'rape, sexual slavery, enforced prostitution, forced pregnancy, … enforced sterilization, and any other form of sexual violence also constituting a serious violation of [common] Article 3'.

None of the relevant provisions of conventional humanitarian law actually define the various sexual offences. The ICTR first offered a definition in *Akayesu*, holding that rape is 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[127] The ICTY, on the other hand, eventually settled on the following:

> … the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.[128]

The elements of the crime for the ICC incorporate features of both ICTR and ICTY judgments, requiring that:

> 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
>
> …

Sexual slavery is based on the concept of slavery as set out in the 1926 Slavery Convention,[129] and enslavement as a crime against humanity.[130] Thus, sexual slavery has been defined by the UN Special Rapporteur on Contemporary Forms of Slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence'.[131] Enforced prostitution has a close relationship with sexual slavery, the UN Special Rapporteur suggesting that, in the context of armed conflict, 'most factual

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[127] *Prosecutor* v. *Akayesu*, paragraph 688.

[128] *Prosecutor* v. *Kunarać*, paragraph 460. See previous discussions in *Prosecutor* v. *Delalić*, paragraphs 478-497; and *Prosecutor* v. *Furundžija*, paragraphs 174-186. The greatest evolution took place regarding the element of coercion, and how coercive circumstances were to be demonstrated. See also Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, paragraph 24; and Dörmann, *Elements of War Crimes*, 332-337 and 469.

[129] 60 LNTS 253.

[130] See, for example, *Prosecutor* v. *Kunarać*, paragraphs 515-543.

[131] Final Report, paragraph 27.

scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery'.[132] Forced pregnancy is actually defined by the ICC Statute in the context of crimes against humanity rather than war crimes per se. Thus, Article 7(2)(f) provides that the term means 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'. Enforced sterilisation is included as a war crime in response to medical and scientific experiments carried out in this respect during World War II.[133]

Finally, the ICC Statute also prohibits any other form of sexual violence that would represent a serious violation of common Article 3. Sexual violence has been defined by the ICTR as 'any act of a sexual nature which is committed on a person under circumstances which are coercive',[134] although this is 'not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact'.[135] It would, then, cover activities such as forced nudity in public, etc. It will be clear from the above that many sexual offences are therefore additionally covered by other provisions of common Article 3. Thus, rape and other forms of sexual violence, whilst they may represent criminal offences in their own right, can also constitute torture, cruel treatment and outrages upon personal dignity in the form of humiliating and degrading treatment — a position confirmed by jurisprudence from both the ICTY and ICTR.[136] Any differentiation between the various offences will primarily be relevant to the issue of sentencing following a criminal conviction.

(vii) Recruitment of child soldiers

Article 4(3)(c) of Additional Protocol II provides that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.[137] The ICC Statute confirmed this to be a customary offence during non-international armed conflict in Article 8(2)(e)(vii), which asserts the Court's jurisdiction over the act of 'Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities', and — also in the context of non-international armed conflict — this provision has since been reproduced verbatim in the Statute of the Special Court for Sierra Leone.[138]

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[132] *Ibid*., paragraph 33.

[133] See discussion of medical experimentation below.

[134] *Prosecutor* v. *Akayesu*, paragraph 598.

[135] *Ibid*., paragraph 688.

[136] *Ibid*., paragraphs 597 and 687-688; *Prosecutor* v. *Delalić*, paragraph 496; and *Prosecutor* v. *Furundžija*, paragraph 186.

[137] In the context of international armed conflict, Article 77(2) of Additional Protocol I is similar, although requiring states parties only to take 'all feasible measures' to ensure that children younger than fifteen 'do not take a direct part in hostilities and, in particular, … refrain from recruiting them into their armed forces'. A similar provision is also to be found in Article 38(3) of the UN Convention on the Rights of the Child, UN Doc. A/44/25, 20 November 1989.

[138] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002, Annex: Statute of the Special Court, Article 4(c). See M. Happold, *Child Soldiers in International Law* (Manchester, 2005), 93-95 and 98. For further discussion of the Special Court's judgment on this point, see M. Happold, 'International Humanitarian Law, War Criminality and Child Recruitment: The Special

Three points remain to be made. First, and causing no real controversy, is the fact that the offence in non-international armed conflict involves the recruitment of child soldiers into either armed forces or groups. This contrasts with those provisions relevant to international armed conflict, prohibiting recruitment only into the armed forces, and is necessary in order to criminalise such activities by non-state actors. Second, is the difference between the ICC Statute, which prohibits 'conscripting or enlisting' child soldiers, and Additional Protocol II, which provides that they shall not be 'recruited'. This is also uncontroversial, as conscription and enlistment would both appear to be covered by the term 'recruitment' on any ordinary understanding of the words.[139] Finally, and perhaps more problematic, is the difference whereby Additional Protocol II provides that child soldiers may not 'take part in hostilities', but the ICC Statute provides instead that they may not 'participate actively in hostilities'. Might there be a difference between participation in hostilities on the one hand, and *active* participation on the other? Happold suggests that there is not, although he does also accept that there may well be some degree of confusion regarding precisely what is prohibited by customary law.[140]

(viii) Displacement of the civilian population

The forced displacement of civilians has become a relatively common feature of modern non-international armed conflict, particularly in an attempt to deprive guerrilla fighters of shelter and support from the local civilian population.[141] Its status as a criminal offence in customary international law is based directly on Article 17(1) of Additional Protocol II, which provides that, 'The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand', the requirements of which are simply reiterated by the ICC elements of the crime.

The requirements of the offence are relatively straightforward, although it is worth noting, first, that the crime is committed by the individual actually *ordering* the displacement rather than those who carry out the order.[142] Second, only those orders aimed specifically at the removal of civilians are criminal. Orders resulting in displacement only indirectly are not.[143] And finally, it would appear that — at least for the purposes of ICC jurisdiction — the forcible displacement of the entire civilian population is not required. Thus, whilst Article 8(2)(e)(viii) of the Rome Statute refers to '*the* civilian population', the elements of the crime refer to '*a* civilian population'. Article 17(1) of Additional Protocol II refers to 'the civilian population', whereas Article 17(2) refers simply to 'civilians'. It is clear, then, that irrespective of whether the whole population needs to be displaced, there is a minimum threshold to be reached before

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Court for Sierra Leone's Decision in *Prosecutor v. Samuel Hinga Norman*' (2005) 18 Leiden JIL 283.

[139] Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols*, 1380, where it is stated that 'non-recruitment also prohibits accepting voluntary enlistment'. See also the discussion in Dörmann, *Elements of War Crimes*, 377.

[140] Happold, *Child Soldiers*, 97-99.

[141] Cottier *et al*, 'War Crimes', 281.

[142] Those carrying out the order may, of course, incur criminal responsibility on other grounds.

[143] Although, again, these may result in criminal responsibility on some other grounds.

the offence is carried out, and displacement of a single civilian will certainly not suffice.[144]

(ix) Treacherous killing or wounding

The idea that combatants must not abuse the good faith of the enemy by practicing certain forms of deception is one of the oldest principles of humanitarian law.[145] In particular, it is not permitted to deceive the enemy regarding the protected status of individuals and objects in order to attack them. Such behaviour runs the risk of undermining respect for the rules of armed conflict and consequently endangering those who are most in need of (and, indeed, legally entitled to) specific protection.[146] In terms of international armed conflict, treacherous conduct, although prohibited by Article 23(b) of the 1907 Hague Regulations, was clarified only in 1977 by Article 37(1) of Additional Protocol I. It provides that:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.[147]

No similar provision exists in either common Article 3 or Additional Protocol II. The ICTY, however, has stated that perfidy is also prohibited during non-international armed conflict by customary international law — a position which must be entirely correct and which has subsequently been confirmed.[148] The ICC Statute provides for jurisdiction over the offence in Article 8(2)(e)(ix), although the language employed therein (and in the relevant elements of the crime) is slightly different from that employed in the context of international armed conflict. The offence during non-international armed conflict centres on the killing or wounding of a 'combatant adversary', whereas the offence in an international conflict relates to the killing or wounding of 'individuals belonging to the hostile nation or army'. In one respect this is entirely understandable, and designed purely to avoid the suggestion that a legal category of 'enemy combatants' exists for non-international armed conflict.[149] On the other hand, by limiting the victims of the offence to 'combatant' adversaries, the ICC

[144] See discussion in Dörmann, *Elements of War Crimes*, 472-473; and Cottier *et al*, 'War Crimes', 281.

[145] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 221-226.

[146] See Cottier *et al*, 'War Crimes', 218.

[147] Article 37 goes further than the Hague Regulations by prohibiting the capture of an adversary by perfidious means. This extension is not reflected in the ICC Statute.

[148] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 125; Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 221-226. For discussion of the relevance of the particular authority used by the ICTY, however, see Moir, *Internal Armed Conflict*, 146.

[149] See Cottier *et al*, 'War Crimes', 282.

Statute removes civilian casualties from the ambit of the crime for non-international conflict. Instead, only the treacherous killing or wounding of individuals taking part in hostilities is prohibited by Article 8(2)(e)(ix), with the treacherous killing of civilians covered by Article 8(2)(c)(i).[150]

(x) Denial of quarter

The status of denying quarter as a war crime in customary international law follows logically from the principle of proportionality, and from the rule that the lawful use of force is strictly controlled by military necessity. Enemy troops who have been placed *hors de combat* clearly no longer take an active part in hostilities, and so their death cannot be either necessary or proportionate, offering no direct military advantage. Such conduct was therefore prohibited by the Lieber Code,[151] and subsequently by Article 23(d) of the 1907 Hague Regulations. The offence was later expanded to include orders to give no quarter, and even to threaten that hostilities would be conducted on that basis.[152]

The offence can clearly be inferred from the provisions of common Article 3, which prohibits violence against those placed *hors de combat* and which further requires that the wounded be collected and cared for. Additional Protocol II further provides in Article 4(1) the specific rule that, 'It is prohibited to order that there shall be no survivors'. This is the last remaining element of the otherwise deleted draft section on methods and means of warfare,[153] and the ICRC Commentary explains that it is:

> … one of the fundamental rules on the conduct of combatants inspired by Hague Law. It is aimed at protecting combatants when they fall into the hands of the adversary by prohibiting a refusal to save their lives if they surrender or are captured, or a decision to exterminate them. The text of the draft was more explicit and read as follows: 'It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis'. The present wording is briefer, but does not alter the essential content of the rule.[154]

Nonetheless, in terms of ICC jurisdiction, this offence is limited to the issuing of an order. The actual conduct of hostilities in such a manner would, instead, be criminal as a violation of common Article 3 in terms of Article 8(2)(c)(i) of the Statute.

(xi) Mutilation and medical experimentation

Mutilation is explicitly prohibited by common Article 3, and so is criminalised on that basis by Article 8(2)(c)(i) of the ICC Statute.[155] Quite why there was also a need for it to be included in Article 8(2)(e)(xi) is unclear. Often accompanying the prohibition on

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[150] See Dörmann, *Elements of War Crimes*, 478; and Cottier *et al*, *ibid*.

[151] Articles 60-71, in particular Articles 60 and 61.

[152] See, for example, Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919 (1920) 14 AJIL 95, 115, where the list of charges following World War I included directions to give no quarter; and Article 40 of Additional Protocol I.

[153] See Moir, *Internal Armed Conflict*, 94.

[154] Sandoz, Swinarski & Zimmerman, *Commentary on the Additional Protocols*, 1371.

[155] It is also explicitly prohibited by Article 4(2)(a) of Additional Protocol II. See discussion above.

mutilation, however, and not specifically included as a violation of common Article 3, is the prohibition on medical and scientific experimentation. This is, instead, prohibited by Article 5(2)(e) of Additional Protocol II, the violation of which is criminal by means of customary international law, and which provides that, with respect to those persons deprived of their liberty due to the armed conflict, 'it is prohibited to subject [those persons] to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances'.

In terms of the ICC elements of the crime, there is very little difference between this offence and the offence of mutilation committed during non-international armed conflict. More difficult, however, is the determination of just what type of behaviour would constitute 'medical or scientific experimentation' although, in this respect, guidance can be drawn from a number of post-World War II cases.[156] The ICC Statute further requires that the medical or scientific experimentation either caused the death of the victim, or else seriously endangered their health. This sets a higher threshold than that contained in Additional Protocol II,[157] and it may be that customary law (other than in the context of the ICC) would prohibit a broader range of activities.

(xii) Destruction of property

The destruction or seizure of enemy property is not prohibited by common Article 3. Nor is such behaviour prohibited by Additional Protocol II, although Article 14 does prohibit the destruction or removal of 'objects indispensable to the survival of the civilian population'. Despite this, Article 8(2)(e)(xii) of the ICC Statute renders it a criminal offence in the context of non-international armed conflict. Rather than common Article 3 or Additional Protocol II, the offence is clearly imported from the laws of international armed conflict and based on the provisions of Article 23(g) of the 1907 Hague Regulations as reflecting custom.

E. Other war crimes during non-international armed conflict

It is clear, then, that those violations of humanitarian law considered criminal in the context of non-international armed conflict by the international community and elucidated in the ICC Statute go significantly beyond the terms of common Article 3 and, in some respects, beyond even Additional Protocol II. It has, however, been suggested that a number of other violations of customary humanitarian law not contained in the ICC Statute are also war crimes when committed in the context of internal conflict.[158] This is almost certainly true. It is necessary to point out, however, that these violations are likely to be covered by existing criminal offences in any case, and that whilst listing them as particular war crimes may serve to underline their importance or to assist in

[156] See, for example, *US* v. *Hoess*, *Law Reports of Trials of War Criminals*, Volume VII, 14-16; *US* v. *Milch*, *Law Reports of Trials of War Criminals*, Volume VII; *US* v. *Brandt et al*, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume I; and *US* v. *Pohl et al*, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume V. See also World Medical Association Regulations in Time of Armed Conflict, October 1956 (as amended); World Medical Association Recommendations Guiding Physicians in Biomedical Research Involving Human Subjects, June 1964 (as amended); and discussions in Dörmann, *Elements of War Crimes*, 233-239.

[157] And higher even than that contained in the relevant rules for international armed conflict. See Article 13 of Geneva Convention III and Article 11 of Additional Protocol I.

[158] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 599-603.

their prosecution before the ICC, it would add little in terms of substantive protection for the victims of, and participants in, non-international armed conflict. Nonetheless, at least some of the offences suggested are listed separately by the ICC Statute in the context of international armed conflict.

This is the case for the use of prohibited weapons, attacks causing disproportionate incidental civilian casualties, attacks on non-defended localities, the use of human shields and starvation of the civilian population as a method of warfare. Addressing these in turn, the use of poisonous weapons and gases, expanding bullets and other weapons causing unnecessary suffering or which are inherently indiscriminate is confirmed as being a criminal offence during international armed conflict by Article 8(2)(b)(xvii)-(xx) of the ICC Statute. No such explicit provisions appear regarding the use of such weapons during non-international armed conflict. This is certainly surprising given that these represent such 'well established forms of prohibited methods and means of combat'.[159] Indeed, it will be recalled that the ICTY Appeals Chamber had relied heavily on the illegality of such weapons in seeking to illustrate the scope of customary rules regulating conflicts not of an international character.[160] It seems unlikely that states would refute the criminality of such weapons in the course of non-international armed conflict and their use would indeed constitute a war crime — albeit one currently beyond the jurisdiction of the ICC.

Henckaerts and Doswald-Beck further suggest that indiscriminate attacks causing injury or death to civilians and attacks causing disproportionate civilian casualties are also specific war crimes in the context of non-international armed conflict.[161] The criminality of both such activities is surely beyond doubt. Indeed, both would surely represent violations of common Article 3 and the war crime of attacking the civilian population in any case.[162] The same is almost certainly true of attacks launched against non-defended localities and demilitarised zones.[163] Likewise, the use of civilians to render certain legitimate military targets immune from attack, explicitly criminalised in international armed conflict by Article 8(2)(b)(xxiii) of the Rome Statute, would represent a serious violation of common Article 3 and thereby become criminal in the context of non-international armed conflict by virtue of Article 8(2)(c)(i) and/or (ii), as well as by virtue of Article 8(2)(e)(i).[164] Starvation of the civilian population as a method of warfare is explicitly prohibited by Additional Protocol II in Article 14 (and implicitly in Article 18), and must also be criminal as a serious violation of common Article 3, covered by Article 8(2)(c) of the ICC Statute.

Two final violations of humanitarian law are said by Henckaerts & Doswald-Beck to be war crimes in the context of non-international armed conflict without appearing as war crimes anywhere in the ICC Statute — i.e. slavery and collective punishments.[165] Slavery and the slave trade are explicitly prohibited during non-

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[159] Rowe, 'War Crimes', 228.

[160] *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraphs 119-127.

[161] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 600-601. Incidental civilian casualties disproportionate to the direct military advantage gained are specifically criminalised in the course of international armed conflict by Article 8(2)(b)(iv) of the Statute.

[162] See relevant discussions above.

[163] See Article 8(2)(b)(v) of the ICC Statute, and discussions above regarding attacks upon the civilian population, protected objects, cultural property and the destruction of enemy property.

[164] The ICTY has held the use of human shields to constitute cruel treatment and an outrage upon personal dignity. See *Prosecutor* v. *Aleksovski*, paragraph 229; *Prosecutor* v. *Blaskić*, paragraph 716; and *Prosecutor* v. *Kordić & Čerkez*, paragraph 256.

[165] Henckaerts & Doswald-Beck, *Customary Humanitarian Law*, 602-603.

international armed conflict by Article 4(2)(f) of Additional Protocol II. Although not specifically mentioned in common Article 3, it seems impossible to argue that slavery would not also violate its general requirement of humane treatment, at least as an outrage upon personal dignity.[166] Collective punishments, also explicitly prohibited by Additional Protocol II,[167] are listed as war crimes by the Statutes of both the ICTR and the Special Court for Sierra Leone.[168] To the extent that such activities might involve the denial of judicial guarantees and due process, cruel treatment or even, in extremis, attacks upon the civilian population, these must also represent war crimes as serious violations of common Article 3.

[166] Even beyond the context of armed conflict, slavery is generally prohibited by international law and this prohibition is well established as a rule of customary law — probably even of *jus cogens*. See, for example, I. Brownlie, *Principles of Public International Law*, 6th edition (Oxford, 2003), 488-489. It is listed explicitly in Article 7(c) of the ICC Statute as a crime against humanity.

[167] Article 4(2)(b).

[168] Article 4(b) of the ICTR Statute, and Article 3(b) of the Special Court Statute.