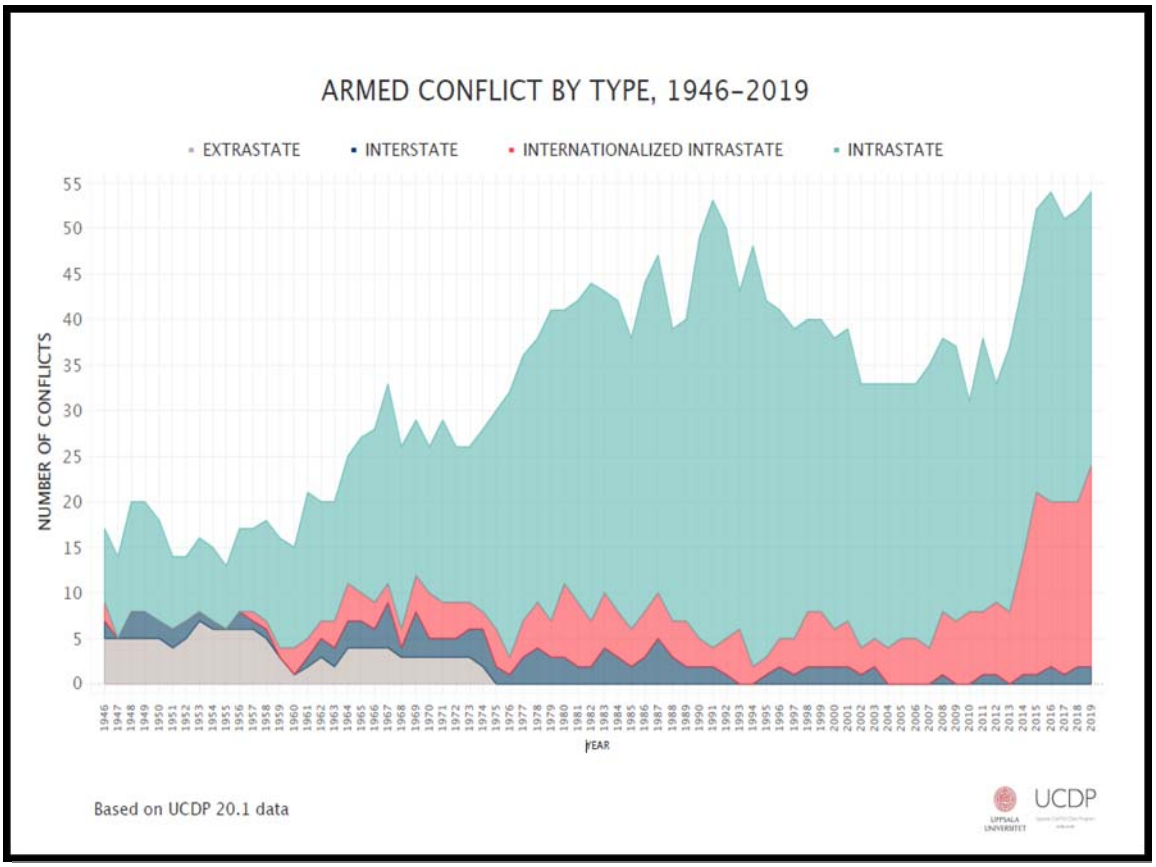
2. NON-INTERNATIONAL ARMED CONFLICTS: THEIR PLACE IN INTERNATIONAL HUMANITARIAN LAW

2.1 Introduction

If we turn the pages of history, we will find that the development of International Law happened to regulate the relationship between the States. These States are sovereign in their internal and external relations, can make alliances and wage war. Just as the domestic framework of any country, regulates the use of force and allows only the State and its machinery to use force for lawful purposes, International Law too regulated the conduct of use of force, which initially only allowed the States to use force against each other. The need to regulate the conduct of hostilities was recognized during the American Civil War which led to the adoption of Lieber Code. Although the Lieber Code was drafted to regulate the conduct of armies during a civil war, it was instrumental in the drafting in the later conventions on armed conflict. Immediately, in the following year in 1864 Geneva Convention for the Amelioration of the Wounded was adopted. Since then, the international community has taken a lot of interest and drafted several laws like The Hague Regulations in 1899 and 1907, The Geneva Conventions of 1929 and later the four Geneva Conventions of 1949 supplemented by three additional Protocols of 1977. The major purpose of these regulations was to balance the military interest and exercise of power by the State with the principles of humanity.

However, if one looks through these Conventions, a lot of emphasis has been placed on the conduct of States in cases of they are being engaged at war against each other and with no or negligible attention to the conduct of hostilities and use of force by armed groups or non-State actors. However, with the changing times, conflicts involving non-State actors have increased.

As per the World Conflict Report, there are around *seven* ongoing active conflicts between States, and around *fifty* conflicts that are not of international character but fought between States and non-State armed groups or amongst non-State groups.[21]



A sheer look at the above graph will give any reader the impression that since 1946 till today, there has been a decline in the State-based conflict, meaning thereby that of all the conflicts that occurred in the last century, post world wars, there is a drastic decline of use of force by one State against another. Since 1946, direct participation of States in an act of hostility against the other State has diminished to a far greater extent.

[21] Geneva Academy of International Humanitarian Law and Human Rights, *The War Report 2018* (April 2019).

However, an important inference that comes out of the same graphical representation is that, although the States are not engaging in war, the number of conflicts continue to rise.

This emergence of non-State actors, their pre-dominant use of force against the State and against other non-State actors has led the scholars of International Law to re-examine the law associated with force, armed conflicts and non-State actors, bracketed as Law relating to non-international armed conflicts.

The current chapter will investigate the nuances of laws and rules that apply to armed conflicts engaged into by non-State actors, with State or without State as one of the parties. Before delving deeper into the law relating to non-international armed conflicts, it becomes pertinent to understand the term and its constituents. 'Armed conflict' *per se* has come into the parlance of International Law, talking generally, and international humanitarian law, particularly, very recently.

2.2 War

The International law was divided into two diametrically opposite situations: war and peace by Hugo Grotius in his celebrated work, The Law of War and Peace (1625). The importance of 'war' in International Law can be gauged by this itself that Oppenheim devoted the second volume of his seminal treatise to, inter alia, war. "War" has several meanings, from a flexible expression used as a figure of speech ("war of nerves") or an allusion to a social campaign ("war on drugs") to a war as a legal term having special legal connotations. War although has been recognized as a core-concept of international law, it is also used loosely in various other senses and thus it is not open to scientific litmus test or a strict interpretation. With several connotations associated to the terminology of war, the scholars of international law have faced an everlasting problem in understanding what war is and when the rules pertaining to war apply.

One does not find a binding definition of war in the premises of public international law. However, one does find some scholarly definitions and others drafted by judges dealing in international law.

2.2.1 Legal Definitions

- ***K. von Clausewitz*** defined war in the 19th and 20th century as –

  "War is a struggle of an extensive scale designed by one party to compel it's opponent to fulfil its will."[22]

- During the same period, in the case of ***Driefontain Consolidated Gold Mines v Janson***[23] the House of Lords developed that,

  "When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look up as a breach of peace, the relationship of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant."[24]

- ***J. G. Starke*** gave a more detailed definition of war in the middle of the 20th century as

  "There must now be distinguished:

  1. A war proper between states.
  2. Armed Conflicts or breaches of the peace, which are not of the character of the war, and which are not necessarily confined to hostilities involving states only but may include a struggle in which non-state entities participate.

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[22] Carl von Clausewitz, *On War* 75 (Princeton University Press, 1989).

[23] *Janson v. Driefontein Consolidated Mines* [1902] AC 484.

[24] J.G. Starke, *Introduction to International Law* 510 (Butterworths, London, 7th Edition, 1972). Also see I.A. Shearer, *Starke's International Law* 478 (LexisNexis UK, 11th Edition, 1994).

It is significant that coincidently with the development of the second category (…) the nature of war itself has become more distinctly clarified as a formal status of armed hostility, in which the intention of the parties, the so-called animus belligerents, may be a decisive factor. This is consistent with Clausewitz's view that war is not merely of itself a political act but serves as a real political instrument for the achievement of certain ends. Thus, a state of war may be established between two or more states by a formal declaration of war, although active hostilities may never take place between them. (…) Moreover, the cessation of armed hostilities does not, according to modern practice, necessarily terminate a state of war."[25]

- ***L. Oppenheim*** has defined war as

  "A convention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[26]

Y. Dinstein has analysed this definition very accurately. He points out that "One element seems common to all definitions of war…. War is a contest between states. Some qualifying words should nevertheless be appended. International law recognizes two separate types of war: inter-State wars (waged between two or more States) and intra-State wars (civil wars conducted between two or more parties within a single State) …. Many of the rules applicable to and in an intra-State strife are fundamentally different from those relating to inter-State war.

[25] Mary Ellen O'Connell (Ed.), *What is War? An Investigation in the Wake of 9/11* 480 (Martins Nijhoff Publishers, Boston, 2012).

[26] Oppenheim, *International Law and Treatise, Vol II War and Neutrality* 60 (Longman Greens, London 2nd Edition 1912), H. Lauterpacht(ed.), *International Law* 202 (Cambridge University Press 7th Edition 2017).

Hence, Oppenheim was entirely right in excluding civil wars from his definition."[27]

- ***Dinstein's*** definition reads as follows,

  "War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict."[28]

- ***Ch Greenwood*** defines war in the following words,

  "At one time… 'war' …was a formal legal concept which only came into being when there was a declaration of war or some other indication by one of the parties to a conflict that is regarded itself as being at war with its adversary; there could be war without actual fighting and fighting without war. Determining whether a conflict constituted a war, in this sense, was therefore never easy; contrary to popular belief, most conflicts do not start with a declaration of war even in the eighteenth and nineteenth centuries.[29]

2.2.2 Concept Diluted: However, gradually the concept of war got diluted and lost its essence due to the following reasons:

- **Non-Declaration:** These definitions of war were disregarded as they attach undue importance to declarations of war. As contended by Oppenheim and other legal scholars during the same classical period, the resort to legal force was unregulated. Meaning thereby no justiciability as to the causes or reasons for war

[27] Supra note 26 at 52.

[28] Ibid, 15.

[29] Ch Greenwood, *The Law of War (International Humanitarian Law)*791 (Oxford 1st Edition 2003).

was imperative. It was only the 'declaration of war' that had considerable legal significance. Further, considering the UN Charter and the *ius cogens* concept a declaration of war would be held to be invalid. The UN Charter prohibits all uses of force except in self-defence or with the authorization of the Security Council.[30] As correctly pointed out, the Hague Convention III of 1907, relating to the Opening of Hostilities, should be considered as void and terminated by virtue of Article 64 of the Vienna Convention on the Law of Treaties which prescribes precedence to the customary rule.[31]

- **Combatant Status:** Since 1945, declarations of war have been almost unknown with most States engaged in hostilities denying that they were at war. Since the duty to treat prisoners or civilians in a humane fashion should not depend upon such formalities, the scenario was changed in 1949 with the coming of the Geneva Conventions. Common Article 2 of the Geneva Conventions provided that even if the State parties that are at war do not recognize it, the Conventions should apply to any armed conflict between such State parties. Thus, "servicemen captured in a conflict in which both sides denied that they were at war… were nevertheless prisoners of war".[32]

- **Non-Acceptance by States:** It might be surprising, that before the beginning of this millennium there was neither a need to define the term war, nor there was any difficulty to identify a war. Since the end of Second World War, the world witnessed several wars like the Korean Wat, Vietnam War and the recent ones like the Gulf War and Iraq War- conflicts that strictly fit into the straight jacketed term 'war'. The conflicts were fought between armed forces of sovereign states or

[30] C Gray, *International Law and the Use of Force* 23 (Oxford University Press 3rd ed 2008).

[31] *KH (Article 15(c) Qualification Directive) Iraq v. Secretary of State for the Home Department* CG [2008] UKAIT 00023.

[32] Ch Greenwood, *The Law of War (International Humanitarian Law)*791-792 (Oxford 1st Edition 2003).

well-organized forces fighting within the States. The same generation also saw 'civil wars' such as Afghanistan, Congo, Lebanon, Sri Lanka, Sudan and many more.

However, during the same time, there were several conflicts, involving less degree of violence than that observed in the above-mentioned conflicts, in which the states have been reluctant to declare a situation of 'war' or 'civil war'. Intense fighting or hostilities accruing on a state's territory reflect the failure of that government and a recognition of the situation as a war would bring the world's attention to the scene of terrible suffering, displacement and economic crises rampant in the conflict zone. Resultant would be investors and trading partners start looking elsewhere, International Organizations like UN start scrutinizing the government action and the ICRC demands access to conflict zones and prisons.[33]

There have been several records presented by the ICRC where the governments have denied the organization access to its territory to monitor and provide humanitarian aid claiming that the violence is below and does not qualify the threshold of war, and hence is below the jurisdiction of ICRC.[34] In light of these, the ICRC has pressed the governments to recognize war, although given so many intrusive opportunities to international organizations and negative repercussions, and in fact no persuasive reason provided by the international law, it is understandable that the governments will tend to avoid the label 'war'.

2.3 Armed Conflict

As various scholars had discarded the use of war to describe the hostilities governed by International Law, a new concept came as a substitution. This new term was 'armed

[33] Supra note 25 at 13.

[34] International Committee of the Red Cross, "ICRC Annual Report", 140-42 (1997).

conflict'. Armed conflict became synonymous to war times and acted as a trigger concept thus initiating the application of international humanitarian law. The international humanitarian law was now also referred to as the law of armed conflicts whose operation in effect would override several peacetime rules of international law. [35]

2.3.1 Development of Armed Conflict in International Law: During the age of legal formalism, the challenge to regulate a situation of war might have been somewhat less as the government's formally declared war, and upon that declaration, the laws of war would be triggered. However, lately it was realized that the states and governments had started using the term armed conflicts instead of war as reflected in their international practice. One of the illustrations is provided by the comment by the British Lord Privy Seal of 1 November 1956 regarding the Suez Canal zone hostilities, "Her Majesty's Government do not regard their present action as constituting war…. There is no state of war, but there is a state of conflict."[36]

Nevertheless, the development "from war to armed conflict" was clearly visible in the international documents that came into being post Second World War and thus confirmed the change in the terminology.

- **The Charter of the United Nations 1945**: Article 16 of the Covenant of the League of Nations that referred to a "recourse to war" by a Covenant-breaking State was replaced by Article 39 of the UN Charter that now mentioned "threat to the peace, breach of the peace, or act of aggression".
- **Four Geneva Conventions of 1949** use both the terms "war" and "armed conflict" indicating that "armed conflict" comprises "war", but it is of a broader scope:

[35] See, International Covenant of Civil and Political Rights, 1966 Art 4. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226 ICJ discussed the relationship between the ICCPR and the law of armed conflict.

[36] *Supra* note 25 at 3.

Common Article 2 provides that "…the Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[37] Although the Fourth Geneva Convention relates to the 'Protection of Civilian Persons in Time of War', i.e. uses the term 'war' but the section of the status of aliens (Articles 35-46) relates to "Aliens in the Territory of the Party to the Conflict"… thereby accommodating the term 'armed conflict'.

- **The Hague Convention of 14th May 1954 for the Protection of Cultural Property in the Event of Armed Conflict**: First document that in a consistent way uses the phrase 'armed conflict' only and exclusively- from its title to preamble through its final provisions.
- **Two Additional Protocols of 1977** and other conventions thereafter have consolidated the use of the term 'armed conflict'.
- **The Rome Statute of the International Criminal Court 1998:** Article 8 particularly deals with war crimes conducted during an armed conflict.

2.3.2 War to Armed Conflict: The question that would come to the mind of any student of international law would be what the possible reason behind this shift could be. The answer was finally given by the ICRC in its Commentary to the First Geneva Convention of 1949 when it said,

> "The substitution of this much more general expression ("armed conflict") for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defense. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the

[37] Article 2 of Geneva Conventions 1949. https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf. (last visited on June 01, 2019)

intervention of armed forces is an armed conflict… even if one of the Party denies the existence of a state of war".[38]

The adoption of term 'armed conflict' was associated with the use of force in inter-state relations, but with this an attempt was also made to get rid of the term "civil war" which was used in common parlance by every scholar but had no legal definition. Regulation of civil war fell never within the purview of international law, the reason being amazingly simple that international law regulated the matters between the sovereign states. Thus, all matters not concerned between two states fell outside the jurisdiction of international law and were regulated as internal matter meaning thereby that all forms of violence, hostilities, riots and rebellions were a matter of domestic jurisdiction of the state, hence the laws of war would apply only to "war" -use of force between states- in the strict sense of term and not to "civil war" as it was the conflict or use of force between parties, especially non-state actors- within the boundaries of a state. Although, once the belligerency of the insurgent party is recognized by the state involved in the internal conflict or by any other state, the laws of war would be triggered.[39] Thus, the application of the laws of war was not automatic, but dependent on the fact that the belligerent party is recognized with state like qualities by other states. Thus, before the adoption of the four Geneva Conventions in 1949, there was just one body of law to govern the conduct of hostilities and as it did not distinguish between international and other wars, it either applied in toto to international conflict between States (or conflicts treated as such) or it did not apply at all. [40]

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[38] J.S. Pictet, *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (ICRC, Geneva, 1952). Available at https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf. (last visited on June 27, 2019)

[39] L Moir, *Law of Internal Armed Conflict* 42-43 (Cambridge University Press, Cambridge, 1st edn., 2002).

[40] R Bartles, "Timelines, Borderlines and conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed conflicts" 91 *International Review of the Red Cross* 34 (2009).

It was in 1949, with the inclusion of Article 3 to the four Geneva Conventions that civil war became the subject of international law and was finally regulated. In order to regulate these conflicts which are not of international character, that Article 3 was included in the Geneva Conventions and so as to strengthen its application and avoid any confusion by using the term civil war, the term "armed conflict" was preferred.

Article 3 opens up in the following way, "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply….". [41]

Thus, with the adoption of the term "armed conflict", coupled with UN Charter and the Geneva Conventions, two issues were resolved. Firstly, the law of armed conflict would be triggered upon facts of fighting and not declarations and secondly the conflicts fought within the territories of a state will also come under the purview of international law.

However, this change shifted the problem from declarations to the problem of identifying what facts that amount to armed conflict.[42] Whether or not an armed conflict exists depends upon the satisfaction of objective criteria. It has been a perennial challenge for the scholars of international law to identify the criteria of an armed conflict. There have been several instances where governments have denied any kind of conflict taking place within their territory and termed it as a mere criminal activity. With the coming of the Article 3 of Geneva Conventions, if the states recognize the presence of armed conflict within their state, it will trigger the application of international humanitarian law. It is because of the reluctance of some States that the most significant distinction in

[41] Julia Grignon, "The beginning of application of international humanitarian law: A discussion of a few challenges" 96 *International Review of the Red Cross* 313 (2014).

[42] Supra note 25 at 14.

International Law is that war and peace seem to be blurring.[43] However, with the September 11 attacks on the United States, a reversal approach was seen. The response of the US government with the declaration of the "global war on terror" was an example of a government declaring war where it could be characterized only as a crime. The result was that the law applied during peace was no longer applicable. Moreover, the government got the authority to apply the international humanitarian law and utilizing the rights, such as right to detain without trial and kill combatants, search the vessels on high seas, seize the cargo that are available during an armed conflict.[44]

This situation aggravated the problem, which was pre-existing due to the under-inclusion of armed conflicts. When a government claims that it is not involved in an armed conflict, laws of peace apply, including the complete umbrella of the human rights protection. Although, some who should be declared as the Prisoners of Wars would be labelled as criminals, but that inequity is negligible to violation of rights that occur when a government claims the rights and privileges of wartime in non-war situation, as happened in the case of US in its "war against terror".[45] As Antonio Cassese has rightly pointed out the disruptions caused to the categories of international law in the name of fighting terrorism.[46]

These events and issues had necessitated the definition of armed conflict as a lack of a widely accepted definition was creating serious impediments in the proper functioning of the law of armed conflicts.

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[43] Supra note 29 at 96.

[44] Mary Ellen O'Connell, "The Legal Case Against Global War on Terror Cases and Materials", 36 Case *Western Reserve Journal of International Law* 3 (2004).

[45] Supra note 25 at 52.

[46] Antonio Cassesse, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", 12 *European Journal of International Law* 993 (2001).

2.3.3 Definition: By definition, all armed conflicts involve recourse to military means. However, a minimal cross-border transgression is not an armed conflict,[47] nor does even an armed attack necessarily give rise to an armed conflict.[48] No armed conflict will arise unless the victim of an armed attack opts for a military response. And, even if an attack by non-state actors, such as a terrorist group, were to constitute an armed attack for the purposes of the right to self-defence, response action against the terrorist would not normally give rise to an armed conflict. For some, then, armed conflict must have territorial dimension, so that non-state actors cannot engage in an armed conflict unless they control a territory.[49] **Greenwood** has defined armed conflict in the following words-

"many isolated incidents, such as border clashed and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashed will it be treated as armed conflict to which the rules of international humanitarian law apply."[50] Indeed, as Professor Vaughan Lowe says, "War- armed conflict -has a radical legal effect."[51]

Although no definition of "armed conflict" is provided in relevant international treaties, there are a few instances in which the application of international armed conflict rules is discussed. The ICRC[52] in its Commentary on the 1949 Geneva Conventions mentions the scope of application of these Conventions- an indication of what an armed conflict is:

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[47] Supra note 44 at 60.

[48] Ibid, 3.

[49] Christopher Greenwood, Supra note 17, page 283.

[50] Dieter Fleck (Ed). *The Handbook of Humanitarian Law in Armed Conflict 42 (Oxford University Press 1995).*

[51] Vaughan Lowe, *International Law* 282-83 (Oxford University Press 2007). He adds, "Combatants in State's armed forces may kill and destroy property within the laws of war without fear of facing trial for murder criminal damage."

[52] Alison Duxbury, "Drawing Lines in the Sand - Characterizing Conflicts for the Purposes of Teaching International Humanitarian Law" 8 *Melbourne Journal of International Law* (2007).

"The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation. It remains to ascertain what is meant by armed conflict …any difference arising between two States and leading to the intervention of armed force is an armed conflict within the meaning of Article 2, even if one the Parties denies the existence of the state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place …The respect due to human personality is not measured by the number of victims. …If there is only a single wounded person because of the conflict, the Convention will have been applied as soon as he has collected and tended" [53]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) investigated the definition of armed conflict more recently in *The Prosecutor v Tadic Cas*e (Jurisdiction, Appeals) in 1995. In that case, the issue in part was whether an armed conflict had existed as the appellant asserted that "there did not exist a legally cognizable armed conflict- either internal or international -at the time and place that the alleged offences were committed."[54] The case related, therefore, to international internal armed conflict. The Appeals Chamber reached the following determination:

"We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of

[53] J.S. Picket, *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (ICRC, Geneva, 1952). Available at https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf. (last visited on June 04, 2019)

Further in its Commentary on Prisoners of War Convention (The Third Convention), the ICRC states, "even if there has been no fighting, the fact gar persons covered by the Convention are detained is sufficient for its application." Available at https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf

[54] *Supra* note 18 at 19.

internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there." [55]

From these two often cited statements about when armed conflict rules are triggered, the definition of armed conflict and its types are highlighted that are discussed hereinafter in the chapter in detail.

2.3.4 Kinds of Armed Conflict: Thus, going through the definition of the term "armed conflict" there are there are three factual situations of violence enumerated under international law to which the following legal regimes apply:

- **International Armed Conflicts** -both national and international law applies, including the whole body of international humanitarian law and international human rights law ("hard core" provisions and other rules that have not been derogated from)[56]
- **Non-International Armed Conflicts** – basically same legal regimes apply, but international humanitarian law to a much more limited extent than in the case of international armed conflicts
- **Internal disturbances and tensions** – national (including criminal) laws and international human rights law regulations apply; international humanitarian law does not apply to such situations.

[55] Sandesh Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict", 22 *European Journal of International Law* 230 2011. Also see Tadić Jurisdiction, para 70.

[56] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136.

2.4 International Armed Conflict

2.4.1 Definition and Meaning: Article 2 common to the Geneva Conventions of 1949 states that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them'.[57] It follows from this that an international armed conflict is essentially an inter-state conflict.[58] However, the key question for the application of international humanitarian law is 'when does an armed conflict exist between two States such that this body of law applies?'

In both the *jus ad bellum* and the *jus in bello*, post-World War II international law has moved away from conditioning the applicability of the law on the formal or technical concept of war and towards much more factual criteria. Under the jus ad bellum, what is prohibited by the UN Charter is the 'use of force' and, under international humanitarian law, the application of the law depends on the existence of an 'armed conflict'. The Geneva Conventions do not define 'armed conflict'. However, it has been defined by the Appeals Chamber of the ICTY in *Tadić* (Appeal on Jurisdiction) case as follows:

"An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the

[57] Laurie R. Blank & Benjamin R. Farley, "Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World", 36 *Michigan Journal of International Law* 467 (2015).

[58] Except in situations covered by art. 1(4) of Additional Protocol I.

whole territory under the control of a party, whether or not actual combat takes place there."[59]

2.4.2 Threshold: By asserting that an international armed conflict exists whenever there is resort to armed force by States[60], this decision suggests that the threshold for an international armed conflict is very low.[61] As ***Vité*** notes, "it is... not necessary for the conflict to extend over time or for it to create a certain number of victims".[62] Thus, use of armed force by one State against another will make it an international armed conflict,[63] except perhaps in cases where the use of force is unintended (for example arising out of error).[64] The low threshold for international armed conflicts is reflected in the ICRC commentary to the Geneva Conventions which states that:

"Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons

[59] Tadić Jurisdiction, para 70.

[60] Julia Grignon, "The beginning of application of international humanitarian law: A discussion of a few challenges" 96 *International Review of the Red Cross* 312 (2014).

[61] Supra note 78 at 69.

[62] Ibid.

[63] Dieter Fleck (Ed). The Handbook of Humanitarian Law in Armed Conflict 42 (Oxford University Press 1995).

[64] UK Ministry of Defence, The Manual of the Law of Armed Conflict (2004) 29: 'an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country.'

covered by the Conventions are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial."[65]

The alternative view, which tried to be consistent with definition of non-international armed conflicts asserts that a certain intensity is required to be reached during the use of force between States in order to classify it as an international armed conflict. However, this analogy is mistaken. If one needs to apply the requirement of intensity to classify any hostility as an international armed conflict would lead to severe repercussion. The effect would be that if any prescribed intensity requirement is not met, then in such a scenario no law would govern the conduct of military operations. Thus, even at the opening of the hostilities, the classification will not be possible if below that level of intensity.[66] However, in case of an internal conflict, if the tensions do not reach the intensity of non-international armed conflict, then the hostilities would be governed by domestic laws and international human rights law framework. It is a question of fact whether an armed conflict exists between two States. Where it does, military operations may only be carried out by the parties in the territories of the parties, as well as on the high seas (including the airspace above and the sea floor below) and including the exclusive economic zones of neutral States.[67] In international armed conflicts, international humanitarian law will

[65] J.S. Picket, *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (ICRC, Geneva, 1952). Available at https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf. (last visited on June 01, 2019)

[66] International Law Association, 'Final Report of the Meaning of Armed Conflict in International Law' (2010). https://pilac.law.harvard.edu/mcac-report//2-key-concepts-in-the-laws-of-armed-conflict-and-counterterrorism-frameworks (last visited on July 11, 2019)

[67] Dieter Fleck (Ed). *The Handbook of Humanitarian Law in Armed Conflict* 59 *(Oxford University Press 1995).*

[67] Vaughan Lowe, *International Law* 282-83 (Oxford University Press 2007). Note that military operations will be prohibited in certain areas, such as hospital and safety zones, demilitarized zones, and neutralized zones, all of which are established by agreement of the parties. Ibid, paras 219–20.

apply to the activities of the parties across this broad geographical area, and in any other area where military operations are actually carried out.

2.4.3 Other Thresholds of International Armed Conflict

2.4.3.1 Occupation: Common Article 2 to the 1949 Geneva Conventions states that the Conventions shall also apply to all cases of partial or total occupation of the territory of a Party, even if the occupation meets with no armed resistance. [68] The last part of that provision (dealing with occupation without armed resistance) is intended to cater for situations like the German annexation of Czechoslovakia prior to World War II. Although occupation has not been defined in the Geneva Conventions, customary international law under article 42 of the 1907 Hague Regulations provides that "territory is considered occupied when it is actually placed under the authority of the hostile army".[69] This means that the occupier must exercise effective territorial control, substituting its own authority for the authority of the territorial State, and do so without the consent of the government.[70] Usually this will require the occupying power to deploy troops on the ground to impose a degree of stability and to carry out the obligations imposed by international humanitarian law. A brief incursion will probably not amount to occupation under the Hague Regulations.

Alternatively, it may be possible for a State to be in occupation of the territory of another State, or parts of it, not directly but rather through a subordinate (or puppet) administration that it controls. Where the former State exercises such control over the

[68] James G Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict" 850 *International Review of the Red Cross* 313 (2003)

[69] See Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) ICJ Rep 2005, 168, paras 172ff (Armed Activities case), International Committee of The Red Cross.

[70] See generally, A. Roberts, 'What is Military Occupation?' 249 *British Yearbook of International Law* 55 (1984).

administration, or over a group exercising control over the territory of a State such that the acts of the administration or group are attributable to the State, the State may constitute an occupying power. In the Armed Activities case, the International Court of Justice considered the possibility that parts of the Democratic Republic of the Congo that were controlled by rebel groups outside the Ituri region (where it found a belligerent occupation) were under the occupation of Uganda but dismissed the possibility on the facts because those groups were not 'under the control of Uganda'.[71] However it has been asserted that the situation in Nagorno-Karabakh constitutes an example of indirect occupation on the basis that Armenia is in control of the administration that exercises control of the so-called 'Nagorno-Karabakh Republic', which is recognized as a part of Azerbaijan. [72]

The Fourth Geneva Convention imposes obligations regarding occupation and occupied territory. Article 6 of the Fourth Convention states that '[t]he present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2'. The important point here is that the Convention applies from the beginning of the conflict as well as from the beginning of occupation. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above.

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[71] Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, para 177. The possibility of indirect occupation has also been accepted by the ICTY. See Prosecutor v Tadić, IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para 584 (Tadić Trial Judgment). The level of control that will be required for such indirect occupation is the level provided for by the law of State responsibility. However, contrary to the ICTY decisions, the correct test of control under the law of State responsibility will be complete control and dependence under art. 4 of the International Law Commission's Articles on State Responsibility or failing that 'effective control' under art. 8 of those Articles

[72] *Supra* note 78 at 74-75.

In a situation of occupation, the occupying power may be engaged in hostilities with, or otherwise take military action against, a local non-state group, as happened in Iraq after the 2003 invasion by the US and UK and the fall of the regime of Saddam Hussein. In order to determine the law applicable to such action, it must first of all be determined that the situation is not merely an internal disturbance or riot (in which case domestic law will apply) but rather hostilities or combat governed by the law of armed conflict. Questions will arise in such a scenario as to whether or not those actions are governed by the law applicable to international armed conflicts (since the context is one of occupation) or rather by the law applicable to non-international armed conflicts (since the particular contention is between a State and a non-state group).[73]

There are two possibilities in this sort of situation. First of all, the non-state group may be fighting on behalf of the occupied State or may be under a command responsible to the occupied State within the meaning of articles 4(A)2 of the Third Geneva Convention or article 43 of Additional Protocol I. Secondly, the non-state group may be independent of the occupied State. In the first case, it is clear that the conflict will be governed by the law applicable to international armed conflicts since the group, though an irregular force, would form part of the armed forces of the State under the provisions mentioned above. The case of other non-state groups is more difficult. The Israeli Supreme Court has taken the view that confrontations between the occupying party and non-state groups in occupied territory are governed by the law applicable to international armed conflicts, even in cases where the non-state group is not fighting on behalf of a State.[74] The conclusion follows from the fact that the Geneva Conventions, and other rules concerning international armed conflicts (including Additional Protocol I, where applicable), apply to

[73] See A. Paulus and M. Vashakmadze, "Assymetrical War and the Notion of Armed Conflict—A Tentative Conceptualization" 95 *International Review of the Red Cross* 91 (2009)

[74] The Public Committee against Torture in Israel. The Government of Israel, High Court of Justice, HCJ 769/02 (13 December 2006) paras 16–23 (Targeted Killings case).

the acts of the occupying power and regulate the relationship between the occupying power and the people in the occupied territory.

It is important to note that the law of occupation is not just about the relationship between two contending States and not just a means of indicating the temporary nature of the authority of the occupier vis-à-vis that of the territorial State. The law of occupation is also a means of regulating what may well be the tense relationship between the occupying power and persons within the occupied territory and a means of providing restraint about how the occupier treats the local population.

Thus, in cases of an uprising or a rebellion in a foreign territory that is under a temporary occupation by the occupier, the response of the occupier has to be in accordance with the law of occupation forming part of the rules of international armed conflict.[75] This conclusion is also supported by the International Court of Justice's decision in the Armed Activities case where the Court applied the law of occupation (derived from the Geneva Conventions and from customary law emerging from the Hague Regulations) and the law of international armed conflicts (as derived from the Geneva Conventions and Additional Protocol I) to Uganda's acts in the Ituri region. This was even though Uganda was acting primarily against non-state groups in that region.[76]

[75] https://pilac.law.harvard.edu/mcac-report//2-key-concepts-in-the-laws-of-armed-conflict-and-count (last visited on August 12, 2019).

[76] Armed Activities case. For a similar view, see the decision of the ICC Pre- Trial Chamber in Prosecutor v Lubanga, ICC-01/04-01/06, Decision on Confirmation of Charges (Pre-Trial Chamber) 29 January 2007, para 220 (Prosecutor v Lubanga Pre-Trial Chamber, Confirmation of Charges Decision); also Prosecutor v Katanga and Chui, ICC-01/04-02/07, Decision on Confirmation of Charges (Pre-Trial Chamber) 26 September 2008, para 240 (Prosecutor v Katanga and Chui).

Occupation will cease 'with the end of actual control of the territory by the occupying power'.[77] Usually the end of actual control will coincide with the removal of the occupying power's troops from the occupied territory. However, control may extend beyond this removal, for example, in cases where the direct control of the occupier is simply replaced by indirect occupation carried out through a group or administration that is established by the occupier and is under its complete control. More difficult is the situation, such as that in Gaza, where the armed forces of the occupier leave the territory and no longer exercise control over the governance of the territory but continue to exercise control over other aspects of the territory (in the case of Gaza, control over the airspace, over certain borders and over adjacent sea areas). Opinion is divided over whether such a situation constitutes a continuation of occupation.[78] However, it may be argued that, like the criteria for statehood (where the criteria for the creation of statehood are not the same as the criteria for the maintenance or continuation of statehood) [79], the criteria for the establishment of occupation may not be the same as the criteria for the maintenance of occupation. This argument would suggest that even in cases where a former occupying power no longer exercises the level of control that would justify the establishment of occupation, if it exercises such control as to prevent another power from exercising full control, the occupying power remains in occupation.

2.4.3.2 Self-Determination: It is quite clear that armed hostilities between two States qualifies as an international armed conflict. Additional Protocol I of 1977 that was enacted to protect the victims of international armed conflict also provides for the application of the laws of international armed conflict to an armed conflict that is being

[77] D. Fleck (ed.), *Protection of the Civilian Population* 282 (The Handbook of International Humanitarian Law, 2007)

[78] S. Vite, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" 91 *International Review of the Red Cross* (2009). Available at https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite.pdf (last visited on June 01, 2019)

[79] James Crawford, *The Creation of States in International Law*, 667 (Oxford University Press, 2 edn, 2014)

waged by people against its own State in order to secure freedom which actually is a category of internal armed conflict. The said provision has been made available under article 1(4) of Additional Protocol I as per which people fighting against colonial domination, alien occupation and against racist regimes will be protected.[80] An internal issue has been a subject of international humanitarian law because any hostility of such a natures forms part of the right to self-determination. The reason for this extended application is since such a hostility is recognized as the exercise of their right of self-determination which is guarded by the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[81]

The provision is reflection of popular concerns of the era in which Additional Protocol I was negotiated as well as a response to the desire, mainly of developing countries, for legitimation of those engaged in liberation struggles. The provision was primarily aimed at the situation regarding Israel's occupation of Palestine, the struggle in South Africa and Rhodesia (as it was then called) and the colonial struggles of the time.[82] However, Additional Protocol I has never been applied in any of those situations. One of the reasons why the provision has not been applied is that the three situations are difficult to define. However, it must be remembered that the key question identified by the provision is whether a movement is fighting in the exercise of the right of self-determination. That is a matter to be determined by reference to general international law. Most authors consider that article 1(4) has not been accepted as a norm of customary international law.[83]

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[80] Fundamentals of IHL by ICRC available at https://casebook.icrc.org/law/fundamentals-ihl. (last visited on July 29, 2019)

[81] Supra note 78 at 71.

[82] See G. Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions" (1991) 85 *American Journal of International Law* 1, 6.

[83] A. Cassese, 'Wars of National Liberation and Humanitarian Law' reprinted in A. Cassese (ed.), The Human Dimension of International Law: Selected Papers (2008) 99, 106.

2.4.3.3 Recognition of Belligerency: As discussed already, even prior to the Second World War, international law provided for one circumstance in which the laws of war would apply to a civil war waged between a rebel group and the State. This was where an insurgent group was recognized as a belligerent for the purpose of and with the consequence of bringing the laws of war into operation in relation to the conflict. The recognition of belligerency could be granted either by the government against whom the insurgent group was fighting or alternatively by third States, usually through a declaration of neutrality by that foreign State. According to ***Oppenheim***, "any State may recognize insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war".[84]

The effect of a recognition of belligerency by the belligerent government was that the entire laws of war were brought into effect between the contending parties. The effects of recognition of belligerency are primarily relative, i.e. they operate between the recognizing State and the belligerent group and do not, in principle, change the relations between other States and the belligerent group[85].

The practice of recognizing belligerencies appears to have declined since the creation of the concept of non-international armed conflicts and it has been claimed that the doctrine is now either obsolete or has fallen into disuse. Although, except Boer War (1899–1902) there have been no instance where the belligerency of an insurgent group was recognized expressly by the belligerent. Nonetheless, there are several scenarios where other States who are third part to the belligerency have recognized belligerency of insurgents operating in other countries. More so, in recent times, although direct recognition of belligerency is not in practice, there have been several instances where indirect

[84] Oppenheim, *International Law*, Vol. II: Disputes, War and Neutrality (2nd edn, 1912) 92.

[85] L. Oppenheim, *International Law*, Vol. II: Disputes, War and Neutrality (7th edn, 1952) 251.

recognition has been done by virtue of declarations of neutrality, confiscation or accepting the existence of blockade maintained by one of the belligerents. [86]

2.4.4 Termination of Armed Conflict: As the *Tadić* decision indicates,[87] in international armed conflicts international humanitarian law applies until a general conclusion of peace is reached. The clearest example of a general conclusion of peace is the conclusion of a peace treaty between the belligerent parties. However, since the Second World War, such peace treaties have not been common, except the 1979 peace treaty between Israel and Egypt being a notable exception[88]. This is probably due, in part, to the fact that peace treaties have in the past been used for the termination of 'wars' and there has been a noticeable decline in declared wars.

Therefore, questions have arisen as to whether other events might constitute a conclusion of peace and are therefore to be regarded as ending of an armed conflict between two or more States. In particular, the issue has arisen as to whether a ceasefire or an armistice agreement is to be regarded as bringing an armed conflict to an end or whether, alternatively, the parties are to be regarded as in a state of war and therefore subject to international humanitarian law until a peace treaty is signed. This latter view would mean, for example, that the belligerents remain entitled to continue to use force against one another or that they may continue to exercise belligerent rights at sea, where there is a breach of the armistice or ceasefire agreement.[89] Under the Hague Regulations of 1907, an armistice only suspended military operations and the belligerent parties could resume

[86]https://pilac.law.harvard.edu/indefinite-war-legal-briefing//section-5-overview-international-hum (last visited on July 29, 2019)

[87] Tadić Jurisdiction, para 70.

[88] Peace Treaty between Egypt and Israel of 1979 (1979) 18 International Law Materials 362.

[89] G. Chang, '*How to Stop North Korea's Weapons Proliferation*' Wall Street Journal (1 July 2009).

operations at any time. [90] This was because an armistice was not regarded as bringing the war to an end.

The issue of what is required to bring an armed conflict to an end is of great significance in contemporary international affairs given that there has, as yet been no peace treaty terminating the Korean conflict of the early 1950s, nor a peace treaty between Israel and some of her Arab neighbours since the 1949 conflict. The better view seems to be that taken by ***Greenwood*** that

"since armed conflict is not a technical, legal concept but a recognition of the fact of hostilities, the cessation of active hostilities should be enough to terminate the armed conflict".[91]

A fortiori, a ceasefire or armistice agreement will bring an armed conflict to an end where it is intended to bring the hostilities to an end.[92] In any event, the cessation of hostilities will trigger the application of certain duties, such as the duty to release prisoners of war[93] and of persons interned in occupied territory or in the territory of the parties to the conflict.[94] However, certain parts of international humanitarian law will apply beyond the cessation of hostilities, for example the law of occupation,[95] as well as the law applicable to those protected persons who are not released and repatriated. [96] When the

[90] Article 36: Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (1907).

[91] Dieter Fleck (Ed). *The Handbook of Humanitarian Law in Armed Conflict 42* (Oxford University Press 1995).

[92] Y. Dinstein, *War, Aggression and Self-Defense* 44 (Cambridge University Press, Cambridge, 3rd Edition, 2002).

[93] Geneva Convention III, Art. 118.

[94] Geneva Convention IV, Art. 133 and 134.

[95] Geneva Convention IV, Art. 6.

[96] Geneva Convention III, art. 5; Geneva Convention IV, art. 6; Additional Protocol I, art. 3.

proposition that an armistice or ceasefire which brings hostilities to a close should now be regarded as terminating an armed conflict is combined with the prohibition of the use of force contained in the UN Charter, the effect is that the parties to an armed conflict may no longer exercise belligerent rights at sea and may no longer resort to force after the conflict is terminated, even if there are breaches of the agreement. Resort to force would only be permissible where it constitutes a lawful use of force in self-defense.[97] This was confirmed by the Security Council in resolution 95 (1951) where it rejected Egypt's continued exercise of belligerent rights against shipping, after the armistice which ended hostilities in the 1949 conflict with Israel. [98]

2.4.5 New State as a consequence: The question whether or not a conflict is an inter-state one may be difficult to answer where one of the parties claims to be a State and the other party rejects that claim—as occurred, for example, during the dissolution of the former Socialist Federal Republic of Yugoslavia. Thus, when an internal rebel movement is successful in creating a new State, a non-international armed conflict originally would become international.[99] However, as ***Crawford*** has pointed out, except in the case of entities possessing the right of external self-determination (i.e. colonial or other non-self-governing peoples with a right to determine their political status including a right to independence),[100] secession without the consent of the parent State is rarely recognized as successful as a matter of international law. Therefore, where an armed conflict involves an attempt at secession it would be difficult to argue that a rebel group had gained statehood such that the conflict had now become international. Nonetheless, this may be possible in cases of dissolution of the parent State or where the parent State consents to secession but continues to fight (perhaps indirectly by providing support for groups

[97] Dieter Fleck (Ed). *The Handbook of Humanitarian Law in Armed Conflict* 42 (Oxford University Press 1995).

[98] D. Akande, '*The Korean War Has Resumed!! (Or so we are told*)' EJIL: Talk! (22 July 2009).

[99] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1A35 (Last visited on July 18, 2019)

[100] See UNGA res. 1514 (1960); UNGA res. 2625 (1970).

within the new State). However, the fact that the armed conflict is ongoing may itself make it more difficult to argue that the criteria for statehood had been met. In ***Prosecutor v Milošević***,[101] the ICTY's Trial Chamber had to determine the question of when Croatia became a State (at the time of the dissolution of the former Socialist Federal Republic of Yugoslavia) such that the conflict became an international armed conflict. Applying the criteria for statehood contained in the Montevideo Convention, it determined that Croatia was a State by October 1991; this was before Croatia was recognized by the European Community in January 1992 and admitted to the UN in May 1992.[102]

2.5 Non-International Armed Conflicts

2.5.1 Definition and Meaning: It is not always easy to determine when a situation of violence within a State is to be classified as a non-international armed conflict. Where a situation of violence is regarded merely as one of internal strife or civil disturbance, international law considers that it does not reach the threshold of 'armed conflict' and international humanitarian law does not apply. However, where the internal violence does reach this threshold, international humanitarian law will apply to that internal, or more accurately, non-international armed conflict. The relevant question, therefore, is what is the threshold above which a non-international armed conflict may be said to be taking place.

2.5.2 Threshold of Non-International Armed Conflicts under various provisions

2.5.2.1 Common Article 3: Unfortunately, Article 3 Common to all four 1949 Geneva Conventions does not specify precisely when it will apply, referring only to an 'armed conflict not of an international character occurring in the territory of one of the High

[101] Prosecutor v Milošević, IT-02-54-T, Decision on Motion for Judgment of Acquittal Under Rule 98 bis (Trial Chamber), 16 June 2004 (Prosecutor v Milošević).

[102] Ibid.

Contracting Parties'.[103] Whether or not such a conflict is taking place is determined by criteria which have been fleshed out by customary international law. In the *Tadić* case, the Appeals Chamber of the ICTY referred to a non-international armed conflict as a situation of "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[104] This test is also adopted in article 8(2)(f) of the Statute of the ICC. As the ICC Statute indicates, a non-international armed conflict excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'.[105]

- The requisites for a non-international armed conflict are firstly, parties to that conflict. What is evident from customary international law is that a non-international armed conflict governed by Common Article 3 may be a conflict between a State and a non-state armed group or it may also be a conflict arising between non-state groups. In all non-international armed conflicts, at least one side must be considered a non-state group and international humanitarian law provides the rules for determining when such a group may be regarded as party to an armed conflict. In order to be a party to an armed conflict a non-state group must have a certain level of organization with a command structure.[106] In short, in the words of the Appeals Chamber in *Tadić*, it must be an 'organized armed group'.[107] The factors relevant to determining whether an armed group is sufficiently organized are as follows: "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a

[103] Common Article 3 of Geneva Conventions 1949. https://pilac.law.harvard.edu/indefinite-war-legal-briefing//section-5-overview-international-humanitarian-law-provisions-concerning-the-end-of-non-international-armed-conflict (last visited on January 15, 2019)

[104] Tadić Jurisdiction, para 70.

[105] ICC Statute, art. 8(2)(d) and 8(2)(f), following art. 1 of Additional Protocol II.

[106] J. Pejic, *'Status of Armed Conflicts'* in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 85–6 (Pejic, Status of Armed Conflicts).

[107] Tadić Jurisdiction, para 70.

headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords."[108] It is worth noting that these are not minimum factors that must be present but rather indicators of organization.

The question may arise whether violence involving criminal groups which act for private non-political motives may be classified as a non-international armed conflict. Although it is usually the case that groups involved in non-international armed conflicts have a political purpose or aim, this is not a requirement under international humanitarian law. The cases in the international criminal tribunals, which set out the criteria for classifying conflicts, do not include reference to the motivation or purpose of the groups in questions. What is important is that the group has a sufficient degree of organization, taking into account the factors indicated above, and that the group is able to and does conduct, or is otherwise involved, in an armed campaign which reaches the required degree of intensity. Factually, it is unlikely that these conditions will be met with criminal gangs, but the possibility cannot be ruled out. Indeed, the possibility of the application of international humanitarian law to the fight against piracy has been acknowledged by the United Nations Security Council. In resolution 1851 (2008), the Security Council authorized States and regional organization 'to undertake all necessary

[108] United Nations Human Rights Office of the High Commissioner, "International Legal Protection of Human Rights in Armed Conflict", 37 (2011). Available at https://www.ohchr.org/documents/publications/hr_in_armed_conflict.pdf (last visited on February 16, 2019) Prosecutor v Ramush Haradinaj, IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para 60 (Prosecutor v Haradinaj).

measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea,... provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law'.[109] The reference to international humanitarian law appears to be an indication that the use of force against the pirates may rise to a level where it amounts to or is in any event a part of an armed conflict.[110]

- The second criterion required for a non-international armed conflict is that the level of violence or fighting must reach a certain degree of intensity.[111] In *Tadić* the ICTY spoke of 'protracted armed violence'.[112] While the word 'protracted' suggests that the criterion relates exclusively to the time over which armed conflict takes place, it has come to be accepted that the key requirement here is the intensity of the force. There are factors, beyond timing, that go to determining whether the violence reaches the 'intensity' that would cause it to be classified as an armed conflict. The requirement for a degree of intensity indicates that the threshold of violence that is required for the application of law of armed conflicts in non-international armed conflicts is higher than the case of international armed conflicts. Unlike the law regulating international armed conflicts, which applies from the initiation of inter-state violence (and perhaps even before), the situation with respect to non-international armed conflicts is more fluid as often the violence pre-dates the establishment of a non-international armed conflict. Thus,

[109] UNSC Res. 1851 (2008).

[110] See R. Geiss, "Armed Violence in Fragile States: Low Intensity Conflicts, Spill Over Conflicts, and Sporadic Law Enforcement Operations by External Actors" 91 *International Review of the Red Cross* 127 (2009).

[111] D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols" 163 *Recueil des cours* 147 (1979).

[112] *Prosecutor v Dusko Tadić* (1995) IT-94-1-AR72, § 70 (Tadíc Jurisdiction).

the question when the violence crosses the threshold of applicability of international humanitarian law will often need to be answered.

In ***Prosecutor v Ramush Haradinaj et al***, which arose out of the conflict in Kosovo between the authorities of the Federal Republic of Yugoslavia and the Kosovo Liberation Army, the ICTY relied on a number of indicative factors for assessing the two criteria of 'intensity' and 'the organization of armed groups'.[113] The factors relevant to intensity include: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.[114] Clearly, these criteria may point in different directions and a complete assessment has to be made of the overall situation without there being any particular formula that can be applied to determining what weight should be given to the different factors. It may well be that violence of relatively short duration amounts to a non-international conflict where the scale of violence and destruction is particularly high.

In the ***Abella*** case the Inter-American Commission of Human Rights held that a confrontation lasting thirty hours between the Argentinian military and a dissident group of soldiers was covered by Common Article 3.[115] Alternatively prolonged violence may suffice even though the individual confrontations do not result in

[113] *Prosecutor v Ramush Haradinaj* (2008) IT-04-84-T, § 60 (Prosecutor v Haradinaj); United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict,* HR/PUB/11/01 (November 2011).

[114] Ibid.

[115] Abella v Argentina, Inter-American Commission on Human Rights, Case No. 11.137, Report No. 55/97 (18 November 1997).

extensive casualties or destruction and are mere 'pin-pricks'. However, in the case of violence implicating State authorities it is to be expected that the violence is of the kind that would be used by the armed forces of a State though what is decisive is the activity rather than the arm of the State that is carrying it out.[116] Thus even operations conducted by law-enforcement agents are not excluded from classification as non-international armed conflicts.

A question that is sometimes posed is whether the threshold of derogation from human rights treaties in case of a 'public emergency threatening the life of the nation'[117] may serve as an indication that the threshold of a Common Article 3 conflict under international humanitarian law has been reached. There is nothing in the treaty texts to suggest such an interpretation and such a linkage cannot always be established in practice. Because the existence of a non-international armed conflict is a question of fact it does not (and should not) require a State declaration,[118] including one derogating from a human rights treaty. Moreover, there are cases in which States declared public emergencies and presumably fulfilled the derogation criteria even though no non-international armed conflict was threatened or ongoing. There are also cases in which non-international armed conflicts have occurred without the State declaring a public emergency and derogating from its human rights obligations, mainly for political reasons. It could also be asked how any linkage between the derogation threshold could trigger the application of international humanitarian law if a State is not a party to the relevant treaty, for instance the ICCPR. Similarly, it is not clear how a derogation threshold could be relied on with respect to treaties that make no provision for derogation, such as the African Charter on Human and Peoples' Rights. What is the utility of this proposal for

[116] See Human Rights Committee, 'General Comment 29: States of Emergency (article 4)' CCPR/C/21/Rev.1/Add.11 (2001).

[117] Andrew Clapham and Paola Gaeta (eds.), T*he Oxford Handbook of International Law in Armed Conflict,* (Oxford Handbook Online, 1sr Edn/2014)

[118] International Committee of the Red Cross, "International Humanitarian Law: A Comprehensive Introduction", (2016).

non-international armed conflicts waged only between non-state armed groups? These and other queries suggest that the existing international humanitarian law triggers remain sufficient to enable a determination of when a situation may be classified as a non-international armed conflict, without the need to resort to additional criteria.

2.5.2.2 Additional Protocol II: The threshold for the application of Additional Protocol II to non-international armed conflicts is higher than that for Common Article 3. As is the case with the Common Article 3, Additional Protocol II do not apply to instances of internal disturbance and tensions such as riots, isolated and sporadic acts of violence (the threshold for 'armed conflict').[119] However, Article 1(1) of Additional Protocol II, states that the Protocol shall apply to 'all armed conflicts which take place on the territory of a Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.[120] This test is similar to that which was historically applied by States in recognizing belligerency in civil wars for the purpose of bringing into effect the law of armed conflict.[121] However, the application of this provision is restricted only to Additional Protocol II and is a more stringent test of non-international armed conflicts than that which exists in customary international law. However, there seems to be truly little, if any evidence that the test contained in Additional Protocol II is regarded as anything other than the test for the application of the rules in that treaty. The test is more severe and demanding than the threshold required for the application of Common Article 3 in several ways. *First*, it excludes conflicts which arise solely between organized armed groups and applies only if government forces are involved in the armed conflict. *Secondly*, there is the requirement that the organized armed group exercises control over

[119] *Supra* note 78 at 71.

[120] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1).

[121] L. Oppenheim, *International Law, Vol. II: Disputes, War and Neutrality* (2nd edn, 1912) 92.

territory. The test seems designed for a situation in which a rebel group is a contending power, with the government, for authority over the State or a part of it. The requirement of control over territory is linked to an ability to carry out sustained and concerted military operations as well as an ability to implement the protocol. Textually, the words do not seem to require the actual carrying out of such operations but merely the ability to do so. However, in practice it is difficult to conceive of control of territory being achieved and maintained without sustained and concerted military operations being carried out at some stage. A *third* differentiation between the application of Additional Protocol II and Common Article 3 is that Additional Protocol II applies to non-international armed conflicts between its armed forces and organized armed groups in the territory of the Contracting Party.[122]

The combination of the requirements that the conflict be (i) in the territory of a party and (ii) between the forces of that party and armed groups is to limit the application of the Protocol in internationalized non-international armed conflicts. As will be discussed below, in situations when a foreign State intervenes in an internal armed conflict with the consent of the State where the conflict is taking place, the armed conflict remains non-international. However, even where both the intervening State and the territorial State are parties to Additional Protocol II, that treaty will not apply to the acts of the intervening State in the conflict. This is because the conflict does not take place in its territory and though it takes place in the territory of another party to the Protocol, the conflict is not between the armed forces of that party and armed groups. Applying this interpretation to the armed conflict in Afghanistan, (since it became a non-international conflict in 2002) would mean that though Afghanistan became party to Additional Protocol II in 2009 and though some of the countries fighting in Afghanistan with its consent are also parties to Additional Protocol II, the Protocol does not apply to the conflict between those

[122] *Supra* note 78 at 91.

intervening countries and armed groups they fight.[123] It is not clear whether this was intended in the drafting of article 1(1) of the Protocol. An alternative interpretation would be to consider the forces of the intervening State to be part of the armed forces of the territorial State.[124]

Although this would be desirable to extend the humanitarian protections of Additional Protocol II, this test for armed forces does not find support in the rest of international humanitarian law. The forces of a co-belligerent are not usually regarded as part of the armed forces of a party. A State is responsible for all the acts of its own armed forces[125] and it would be a stretch to say that a State is responsible for all acts of the co-belligerent's forces.

A different way of reaching a similar result (i.e., making Additional Protocol II apply to acts of invited foreign forces) is to consider whether the territorial State is legally responsible under the law of State responsibility for violations of Additional Protocol II committed by foreign forces invited by the territorial State. However, for that to occur, the foreign forces would need to be 'placed at the disposal of' the territorial State.[126] This means that those forces must act under the exclusive direction and control of the territorial State and not under the authority of the sending State.[127] This test would rarely be satisfied and, therefore, the acts of foreign forces will rarely be attributable to the territorial State.

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[123] D. Akande, *'Afghanistan accedes to Additional Protocols to Geneva Conventions: Will AP II govern the conflict in Afghanistan?'* EJIL Talk (30 June 2009) (Akande, AP II and the Afghan conflict).

[124] *Supra* note 78 at 91.

[125] Ibid.

[126] D. Akande, *'Afghanistan accedes to Additional Protocols to Geneva Conventions: Will AP II govern the conflict in Afghanistan?'* EJIL Talk (30 June 2009).

[127] https://www.icrc.org/en/doc/assets/files/other/law10_final.pdf (last visited on July 29, 2019)

Thus, Additional Protocol II established a different threshold which even bifurcates between two types of armed conflicts, one that are covered by Common Article 3 and the other which is covered by both Common Article 3 Additional Protocol II [128]

2.5.2.3 A Third Threshold: It has been suggested that the provisions of the ICC Statute dealing with war crimes in non-international armed conflicts introduce a third type of non-international armed conflict, or rather, introduce a third threshold at which a different regime of law will apply to certain non-international armed conflicts. This suggestion is based on the fact that article 8(2)(f) of the Statute states that article 8(2)(e), which deals with war crimes in a non-international armed conflict (other than violations of Common Article 3, which are dealt with in article 8(2) (c)), applies where there is 'protracted armed conflict between governmental authorities and organized armed groups or between such groups'.[129] It is said that this threshold falls between those identified by Common Article 3 and Additional Protocol II because it requires a protracted conflict. It is noteworthy that article 8(2)(d), which deals with the applicability of Common Article 3, does not contain wording regarding protracted armed conflict.

Despite the different wording of paragraphs (2)(d) and (2)(f) of article 8, it is not at all clear that it was intended to create different thresholds of application. Nor does the wording do so. As is obvious, the wording in article 8(2)(f) is taken from the *Tadić* case in which the ICTY was trying to define the sorts of conflicts that would fall within Common Article 3. While it is true that some emphasis is placed on the duration of the conflict and the fact that it must be protracted, ICTY jurisprudence has already indicated that this is one of the factors to be taken into account in applying Common Article 3 and in judging intensity. Article 8(2)(f) is better interpreted as simply stating the intensity test

[128] Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts 54 (Oxford University Press, 1stedn,2012).

[129] A. Paulus and M. Vashakmadze, "Asymmetrical war and the notion of armed conflict – conceptualization" 91 *International Review of the Red Cross* (2009).

with the protracted nature of the conflict being a factor to be assessed in determining intensity.[130]

2.6 Difference between the two legal regimes

2.6.1 Causes of Distinction: This distinction between international and non-international armed conflicts arises out of the history of the regulation of wars and armed conflicts by international law. In the period following the peace of Westphalia and until the end of the Second World War, the international laws of war applied only to wars between States.[131] This was a consequence of the fact that international law as a whole was concerned only with relations between States[132] and eschewed regulation of matters considered to be within the domestic jurisdiction of States. Internal armed conflicts, or civil wars, were not considered to be 'real war[s] in the strict sense of the term in International Law, since that term was reserved for conflicts between States'.[133] It was possible for the laws of war to apply to civil wars but only in cases where there was recognition, either by the State involved in the civil war or by a third State, of the belligerency of the insurgent party.[134] Even in such a case, the application of the rules of international law to what was prima facie an internal situation did not occur automatically but rather because the insurgent party was recognized by the State concerned as having acquired State like qualities. During the period under consideration, the international laws of war did not distinguish between international and other wars. There was only one body

[130] *Supra* note 78 at 91.

[131] R Bartles, "Timelines, Borderlines and conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed conflicts" 91 *International Review of The Red Cross* 35 (2009).

[132] L. Oppenheim, *International Law, Vol. I: The Law of Peace* (2nd edn, 1912) 12, para 13: 'States solely and exclusively are the subjects of International Law.'

[133] L. Oppenheim, *International Law, Vol. II: War and Neutrality* (1st edn, 1906) 67.

[134] L Moir, *Law of Internal Armed Conflict* 42-43 (Cambridge University Press, Cambridge, 1st edn., 2002).

of law which either applied *in toto* to international conflicts between States (or conflicts treated as such) or it did not apply at all.[135]

The extension of international regulation to internal armed conflicts changed decisively after the Second World War. This was, of course, a period in which international law as a discipline began to recognize the possibility of extending rights and, indeed, obligations to individuals and other non-state actors. This recognition was exemplified in the period immediate to post World War II prosecutions for international crimes and the development of international human rights law, which had caused the need for Universal Declaration of Human Rights 1948. It is therefore not surprising that around the same time consideration was given to the extension of the laws of war to the regulation of internal armed conflicts. Indeed, the developments in international humanitarian law after World War II were foreshadowed by the practice of some States and of the League of Nations during the Spanish Civil War (1936–1939). Although there was no recognition of belligerency during that conflict, there was an emerging view that international law applied to the conduct of hostilities during a civil war and ***Antonio Cassese*** has argued that there was a development, during that conflict, of customary rules applicable to certain internal armed conflicts.[136] In any event, the bifurcation of international humanitarian law into the law of international armed conflicts and that of non-international armed conflicts was established by the Geneva Conventions of 1949. As those Conventions apply 'to all cases of declared war or of any other armed conflict

[135] R Bartles, "Timelines, Borderlines and conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed conflicts" 91 *International Review of The Red* Cross 51 (2009).

[136] A. Bellal, "The War Report Armed Conflicts in 2018" (2019) Available at https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf

Also see, *Prosecutor v Tadić*, IT-94- 1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 63 *(Tadić Jurisdiction).*

which may arise between two or more High Contracting Parties'[137], they apply to international or inter-state armed conflicts. It was proposed by the ICRC to extend the Conventions in their entirety to internal conflicts.[138] However, this proposal was rejected by most States and it was agreed instead to have a single provision— Article 3 common to the four Geneva Conventions ('Common Article 3')— which would be applicable 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Through Common Article 3 international treaty law, for the first time, sought to regulate certain aspects of internal conflicts, even in the absence of a recognition of belligerency. However, it also established a differentiation between the law applicable to inter-state conflicts and those applicable to internal or, more accurately, non-international armed conflicts.

The adoption of the Additional Protocols in 1977, further strengthened the division of international humanitarian law into two sets of rules applicable in international and non-international armed conflicts.[139] This division was also recognized in the Statute of the International Criminal Court of 1998, which makes a distinction between war crimes committed in an international armed conflict[140] and war crimes committed in a non-international armed conflict.[141]

2.6.2 Consequences of Distinction: The distinction between the International armed conflict and non-international armed conflict is necessary to apply the international humanitarian law as the law applicable is different. The major effect of this has been seen

[137] J. Grignon, "The beginning of application of international humanitarian law: A discussion of a few challenges" 96 *International Review of The Red Cross* 139-162 (2015).

[138] R Bartles, "Timelines, Borderlines and conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed conflicts" 91 *International Review of The Red Cross* 57 (2009).

[139] R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006) 96–8.

[140] Rome Statute of the International Criminal Court, art. 8(2)(a), 8(2)(b).

[141] Ibid.

in the limited laws available to be applied during a non-international armed conflict. With limited treaty provisions, non-international armed conflict is scantly regulated. The entire Geneva Conventions and the Additional Protocol I apply to international armed conflicts, whereas only Common Article 3 which is so basic that it relates to the protection of those who do not take part or those who no longer are taking part in hostilities applies to the non-international armed conflict. It is supported by the Additional Protocol II which again has just not more than twenty provisions. Moreover, even the ICC Statute dealing with non-international armed conflicts has limited rules for protection of victims and modest rules for the conduct of hostilities. Thus, one can find that limited provisions are present to deal with a conflict which is all present around the world.

2.6.3 Blurring of Distinction: However, with the latest developments, it has been seen that the distinction between legal regime governing international armed conflicts and non-international armed conflicts is been eroded. There are two major causes identified for the dissolution of this distinction.

Firstly, the recent specialized treaties dealing with armed conflicts and conduct of hostilities have provisions common for both the kinds of armed conflict. Therefore, their provisions apply irrespective of the kind of conflict. Such treaties are Biological Weapons Convention 1972, the Chemical Weapons Convention 1993, the Convention Prohibiting Anti-Personnel Land Mines 1997, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999 and the 2001 amendment which extends the Convention on Conventional Weapons and its protocols to non-international armed conflicts.

Secondly, with the unitary application of customary international law to armed conflicts, the distinction between the two has diminished. The customary rules of international law did not just fill the gaps left by the treaty law but also diminished the distinction between

the two kind of conflicts. This approach was taken by the Appeals Chamber of the ICTY in the *Tadić* (Appeal on Jurisdiction) case when it stated that:

"Notwithstanding... limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities."[142]

2.7 Conclusion

It is essential to distinguish between international and non-international armed conflicts for the purposes of the application of international humanitarian law because differences exist between the content of the law applicable to the different types of armed conflicts. The suggestion that there are rules of customary international law applicable to non-international armed conflicts which go beyond the rules in Common Article 3 and Additional Protocol II appears to be contrary to the earlier report of the Commission of Experts appointed by the Security Council to investigate violations of humanitarian law in the former Yugoslavia.[143] However, though questions have been raised as to the methodology used by the ICRC study for determining rules of customary international law,[144] there also seems to be acknowledgement, even by States, that customary international law now provides more elaborate rules for non-international armed conflicts than the rules to be found in Common Article 3 and Additional Protocol II. Thus, the provisions of the ICC Statute, which was adopted in 1998, relating to war crimes in non-

[142] *Tadic* jurisdiction, para 127.

[143] United Nations Security Council, "See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution" 13 (1992) para 42.

[144] D. Bethlehem, 'The Methodological Framework of the Study' and I. Scobbie, 'The Approach to Customary International Law in the Study' in E. Wilmshurst and S. Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 3, 15.

international armed conflicts, contain rules which go beyond the text of those treaties. However, it also ought to be noted that the provisions of the ICC Statute reflect a reluctance on the part of States to go as far as the ICTY and the ICRC. The Statute was adopted after the *Tadić* decision and incorporated some elements of that decision (e.g. the definition of non-international armed conflicts). However, some of the rules identified by the ICTY and ICRC as customary rules applicable in non-international armed conflicts (e.g. the prohibition of attacks on civilian objects) are not included in the war crimes provisions of the ICC Statute.

Although it is possible that the drafters of the Statute were simply more reluctant to criminalize violations of international humanitarian law in non-international armed conflicts than in international armed conflicts, it is nonetheless noteworthy that the Statute includes a significantly longer list of war crimes in international than in non-international armed conflicts.[145] In conclusion, the distinction between the law applicable in international and non-international armed conflicts is blurring; however, whenever States have been presented with opportunities to abolish the distinction they seem reluctant to do so. Also, it is undeniable that two key parts of international humanitarian law—the law relating to the status of fighters and the rules relating to detention of combatants and civilians—differ depending on the status of the armed conflict. For these reasons, classification of armed conflicts for the purpose of applying international humanitarian law remains important.

[145] Non-international armed conflict, *available at:* https://casebook.icrc.org/law/non-international-armed-conflict (last visited on August 4, 2020).