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## 'Protracted armed conflict': A conundrum. Does article 8(2)(f) of the Rome Statute require an organised armed group to meet the organisational criteria of Additional Protocol II?

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Martha M Bradley\*

Abstract

This contribution sets out to determine whether the degree of organisation that a non-state fighting unit has to meet to be classified as an organised armed group under art 8(2)(f) of the Rome Statute is similar to the requirements set out in art 1(1) of Additional Protocol II. The construct 'protracted armed conflict' was for the first time introduced in art 8(2)(f) of the Rome Statute. Article 8(2)(f) of the Rome Statute delineates the type of conflict in which the war crimes listed under art 8(2)(e) of the Rome Statute may be committed. The meaning attached to 'protracted armed conflict' as introduced by art 8(2)(f) of the Rome Statute is obscure in that its application differs from the traditional definition of non-international armed conflict. However, in defining the nature of the conflict under art 8(2)(f), the term 'organised armed group', first codified in art 1(1) of Additional Protocol II, is used. Furthermore, the war crimes listed in art 8(2)(e) are founded on the description of violations of the rules of international humanitarian law in Additional Protocol II. In these circumstances, it is possible under art 8(2)(f) that an organised armed group must meet the organisational criteria required by art 1(1) of Additional Protocol II. On the other hand, the construct 'protracted armed conflict' may create an entirely new category of organised armed groups unique to art 8(2)(f) of the Rome Statute. The most straightforward explanation is that the organisational criteria under art 8(2)(f) simply are similar to the requirements under art 8(2)(d) of the Rome Statute. As reflected in the *Ntaganda Decision of Trial Chamber VI of the International Criminal Court on 8 July 2019*, conflict classification is crucial

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to war crime adjudication as a nexus is required between war crimes and the arena in which they are committed. An initial step the International Criminal Court undertakes in prosecuting war crimes is to determine whether or not an armed conflict existed at the time the alleged crime was committed and to classify that conflict. As confirmed by the 2018 War Report, the majority of armed conflicts are non-international in nature, and violations of international humanitarian law constituting war crimes in all probability are most likely to occur in this context. As recorded, the majority of investigations into war crimes as well as current cases relating to the alleged commission of war crimes adjudicated by the ICC occurred in the context of non-international armed conflict. Many of the crimes being investigated or tried are included in the listing in art 8(2)(e) and, therefore, transpire in art 8(2)(f)-type armed conflicts. It is important to gain certainty as to the organisational threshold requirement to be satisfied in establishing whether there is a 'protracted armed conflict' under art 8(2)(f) of the Rome Statute. The author offers preliminary conclusions in relation to the conundrum by interrogating the traditional sources of international law.

### 1. Introduction

The types of war crimes listed in art 8(2)(e) of the Rome Statute describe acts committed during a non-international armed conflict.<sup>1</sup> In order for war crimes to be so categorised, they must meet the threshold requirements as determined by art 8(2)(f) of the Rome Statute to be inherent to this type of conflict.<sup>2</sup> However, the wording in art 8(2)(f) of the Rome Statute differs from that in art 8(2)(d) in that the term 'armed conflict not of an international character' is not simply repeated.<sup>3</sup> The central question this contribution raises is whether or

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not art 8(2)(f) of the Rome Statute<sup>4</sup> necessitates the same degree of organisation that is required from an organised armed group under art 1(1) of Additional Protocol II.<sup>5</sup>

This question arises for three reasons. First, art 8(2)(f) introduces the construct 'protracted armed conflict' in describing the non-international armed conflict in which the war crimes listed in art 8(2)(e) are committed (this differs from the description of non-international armed conflict in art 8(2)(d) of the Rome Statute).<sup>6</sup> Second, the nature of the crimes listed in art 8(2)(f) of the Rome Statute is founded on the prohibitive norms underlying the substantive provisions of Additional Protocol II.<sup>7</sup> Article 8(2)(e) essentially criminalises the prohibitions initially codified in Additional Protocol II. Finally, the phrase 'organised

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armed group' was included specifically in the scope of application of Additional Protocol II and indeed is repeated in art 8(2)(f).<sup>8</sup>

Clearly, arts 8(2)(e) and (f) of the Rome Statute display a synergy.<sup>9</sup> What is questioned is whether or not the relationship of Additional Protocol II to art 8(2)(e) and (f) of the Rome Statute, as well as the explicit inclusion of the term 'organised armed group' and the introduction of the construct 'protracted armed conflict' is so extensive as to elevate the threshold requirements above those associated with traditional (Common Article 3)<sup>10</sup> non-international armed conflict (as required under art 8(2)(d) of the Rome Statute). If the response is negative, then the nature of the content of 'organised armed group' under art 8(2)(f) needs to be determined.<sup>11</sup> In order to do so, a secondary question becomes salient: Are 'armed conflict not of an international character' (art 8(2)(d) of the Rome Statute) and 'protracted armed conflict' (art 8(2)(f) of the Rome Statute) one and the same in their meaning? To pose the question differently: Do the constitutive factors, including the notion 'organised armed group', have the same meaning in art 8(2)(d), which refers to traditional non-international armed conflict, as they do in art 8(2)(f)?

Neither the meaning of 'armed conflict' nor 'non-international armed conflict' is defined in treaty law under the *lex specialis* of international humanitarian law. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) responded to this *lacuna*

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in *Prosecutor v Dusko Tadic*: Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction (*Tadic*) by providing a description of what in its view are the characteristics of armed conflict: 'An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'<sup>12</sup> This 'test' often is referred to as the *Tadic* formula. Once it has been determined that a violent situation is an armed conflict, it needs to be established what the type of conflict it is. Trial Chamber I of the ICTY refined the *Tadic* formula so that the definitional criteria determine the existence of a non-international armed conflict, specifically in *Prosecutor v Dusko Tadic*: Opinion and Judgment:

'The test applied by the Appeals Chamber for the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict, namely, the intensity of the conflict and the organisation of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely-related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.'<sup>13</sup>

The threshold requirements in establishing a non-international armed conflict are, first, that the violence resulting from the fighting must reach a sufficient level of intensity and, second, that the fighting forces of the non-state actor must be sufficiently organised to be categorised as an

organised armed group.<sup>14</sup> Treaty law creates two distinct categories of non-international armed conflict: a Common Article 3-type non-international armed conflict<sup>15</sup> and an Additional Protocol II-type non-international armed conflict.<sup>16</sup> In respect of a traditional armed conflict under Common Article 3 (and art 8(2)(d) of the Rome Statute),<sup>17</sup> the

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level of violence equates to protracted armed violence and the degree of organisation is merely relative;<sup>18</sup> an armed group under traditional non-international armed conflict need not display a high level of sophistication.<sup>19</sup> The group must be sufficiently organised to be able to launch military attacks; must have a leader and function as a unit; must possess a (primitive) disciplinary structure; and must be capable of enforcing the rules of Common Article 3.<sup>20</sup> An Additional Protocol II-type non-international armed conflict demands a greater degree of organisation from the non-state actor fighting the government on its territory.<sup>21</sup> Article 1(1) of Additional Protocol II determines its scope of application as well as the organisational threshold in this type of conflict, namely, that organised armed groups in terms of this Protocol should be under responsible command and should exercise control over territory.<sup>22</sup> Furthermore, territorial control should be exercised to such an extent that these organised armed groups carry out concerted military operations and are able to implement the Protocol.<sup>23</sup>

The term 'organised armed group' is specifically included in art 8(2)(f) of the Rome Statute to describe a material requirement that the fighting forces of the non-state party to the conflict defined in this article need to meet in order to be considered an 'organised armed group' in terms of an art 8(2)(f)-type armed conflict. The wording 'protracted armed conflict' has generated extensive discussion and

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its exact content remains uncertain.<sup>24</sup> The debate surrounding the threshold of intensity under art 8(2)(f) of the Rome Statute falls outside the scope of this contribution as it has received sufficient attention in recent scholarship.<sup>25</sup>

The requirement for clarification of the ambiguity that is raised by the article's central question is not purely academic but has a practical effect. According to the 2018 War Report, a minimum of 51 non-international armed conflicts occurred in at least 23 states.<sup>26</sup> Seven of these states are party to the Rome Statute and are bound by its jurisdiction should war crimes allegedly be committed in the territory of member states.<sup>27</sup> Furthermore, situations occurring in the territory of non-signatory states to the Rome Statute may be referred for investigation by the Security Council to the Prosecutor of the International Criminal Court, as was the case with Sudan<sup>28</sup> and Libya.<sup>29</sup> Currently under investigation but not yet in the trial phase, referencing the possible commission of war crimes during non-international armed conflict, are the situations in Uganda<sup>30</sup> and

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Libya.<sup>31</sup> Conflict is an everyday reality, the commission of war crimes being the catastrophic consequence thereof. This contribution aims to assist in the continuing endeavour of establishing legal certainty with regard to the war crime provisions and the classification of conflict in international legal instruments.

The contribution is structured as follows: Part 2 explores the relationship between conflict classification and war crime adjudication. Its purpose is to demonstrate the importance of establishing not only the existence of an armed conflict, but also the type of conflict in the classification under art 8(b), 8(d) or 8(f) of the Rome Statute. Parts 3 to 6 of the contribution focus on answering the central question posed in the introduction. In part 3, art 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention)<sup>32</sup> is employed to establish the ordinary meaning of 'organised armed group' as included in art 8(2)(f) of the Rome Statute in order to compare the content of the notion in this example with understanding its meaning in art 1(1) of Additional Protocol II. Part 4 examines the drafting history of art 8(2)(f) of the Rome Statute to determine whether or not the drafters intended the definition of 'organised armed group' to meet the strict threshold requirements necessitated under art 1(1) of Additional Protocol II. Parts 5<sup>33</sup> and 6<sup>34</sup> employ the subsidiary sources of international law as codified in art 38(1)(d) of the Statute of the International Court of Justice to clarify the threshold of organisation demanded under art 8(2)(f) of the Rome Statute. Finally, in part 7 a conclusion is presented.

As a point of departure, the traditional sources of international law are used throughout the article. These are the sources of international law listed in art 38(1) of the International Court of Justice Statute.<sup>35</sup> As the article seeks to determine the content of the notion 'organised armed group' in the context of art 8(2)(f) of the Rome Statute, the law of treaty interpretation, as set out in arts 31 to 33 of the Vienna Convention, is frequently used to facilitate the interpretation of this instrument.<sup>36</sup>

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## 2. Conflict classification and war crime adjudication

It may be questioned why conflict classification matters in relation to the prosecution of alleged war criminals under the Rome Statute. In response, classification matters as the existence of an armed conflict informs the two contextual elements inherent in war crimes.<sup>37</sup> Furthermore, the type or category of armed conflict (international or non-international) determines the category of crimes under which the alleged war criminal is charged.<sup>38</sup> In *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda*, decided on 8 July 2019, Trial Chamber VI confirmed that the existence of an armed conflict was vital in the context of war crime prosecution as two requirements must be met in determining each war crime confirmed in a particular case:<sup>39</sup> first, that the conduct in question (the alleged commission of a war crime) took place 'in the context of and was associated with' the relevant category of armed conflict;<sup>40</sup> second, that the alleged perpetrator of a war crime indeed was aware of factual circumstances that established the existence of an armed conflict.<sup>41</sup> In the 2019 *Ntaganda* decision, Trial Chamber VI summarised the nexus existing between the armed conflict and the commission of a war crime as follows:

'For conduct to qualify as a war crime, a nexus must be established with the armed conflict in question. The nexus requirement serves to distinguish war crimes from crimes that ought to be treated as purely domestic, and prevents random or isolated criminal occurrences from being characterised as war crime[s]. The conduct must have taken place "in the context of" and have been "associated with an armed conflict".'<sup>42</sup>

The nexus is a manifestation that there is a relation between international criminal law and international humanitarian law.<sup>43</sup> One author explains that international criminal law and the international

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criminal justice system support the international human rights regime by the provision of enforcement mechanisms.<sup>44</sup> The war crime provisions in the Rome Statute create an enforcement platform in the form of the International Criminal Court to adjudicate the most serious violations of international humanitarian law (criminalised and codified in the Rome Statute as war crimes) that fall within the jurisdiction of this Court.<sup>45</sup> Conflict classification is a preliminary to the application of all international humanitarian law,<sup>46</sup> and it equally is a preliminary issue in war crime adjudication by international criminal courts and tribunals in the sense that war crimes are committed only during armed conflict.

In relation to the adjudication of a war crime by the International Criminal Court, not only the existence of an armed conflict must be established, but the type of conflict also has to be determined as the war crimes provision in the Rome Statute is structured according to three types of armed conflicts in the context of which war crimes are committed. Thus, conflict classification is a crucial step in determining the category of war crimes under which an alleged war criminal is charged. Article 8 of the Rome Statute establishes the substantive jurisdiction of the International Criminal Court over war crimes, as well as the scope of application to be satisfied in order for the Court to exercise jurisdiction over these crimes. Section 8 of the Rome Statute (the war crimes provision) classifies the types of conflict as 'international',<sup>47</sup> 'armed conflicts not of an international character'<sup>48</sup> and/or 'protracted armed conflicts'.<sup>49</sup> In particular, arts 8(2)(a) and 8(2)(b) of the Rome Statute list the types of war crimes over which the Court exercises jurisdiction if they are committed in the arena of an international armed conflict. Article 2, which is common to all four Geneva Conventions, defines an international armed conflict to include all forms of declared war as well as any other armed conflict that may arise between two or more states, even if a state of war is not recognised by any of the states involved.<sup>50</sup>

crimes representative of the most serious violations of Common Article 3 that are committed in the context of non-international armed conflict as detailed in art 8(2)(d) of the Rome Statute. The purpose of the *chapeau* of art 8(2)(c), read together with art 8(2)(d) of the Rome Statute, is to illustrate the type of situations in which an art 8(2)(c)-type crime can be committed. These provisions mimic the scope of application of Common Article 3 in describing 'an armed conflict not of an international character' or simply a Common Article 3- type armed conflict.<sup>51</sup>

Therefore, if art 8(2)(c) reproduces the phrase 'armed conflict not of an international character' as introduced in the *chapeau* of Common Article 3, then logically the scope of application included in art 8(2)(d) is a duplication of the minimum threshold of organisation required under Common Article 3.<sup>52</sup> The International Criminal Court recently reaffirmed the customary status of, and the synergy between, Common Article 3 and arts 8(2)(c) and (d) in its 2016 ruling (the decision of Trial Chamber II in the *Bemba* case).<sup>53</sup> The 2016 'International Committee of the Red Cross Commentaries' serve to confirm the customary status of Common Article 3 and reiterate the understanding of the International Committee of the Red Cross of the threshold requirements implied in the wording of this provision.<sup>54</sup> It is in terms of the understanding of the term 'organised armed group' as a party to the type of conflict referred to in arts 8(2)(c) and (d) of the Rome Statute that there is agreement with the content of the notion 'organised armed group' under Common Article 3 and, therefore, customary international law.

Finally, art 8(2)(e) lists what constitute 'other' types of war crimes non-international in nature, apart from those classified as Common Article 3-type war crimes. The types of war crimes listed in art 8(2)(e) must be committed during a non-international armed conflict that meets the threshold requirements inherent in the type of conflict determined by art 8(2)(f) of the Rome Statute. Article 8(2)(f) of the Rome Statute introduced the construct 'protracted armed conflict' which differs from the Common Article 3 formulation of 'armed conflict not of an international character' as included under art 8(2)(c) of the Rome Statute. The threshold requirements inherent to a 'protracted armed conflict' remain unclear.

### 3. Textual comparison

This part aims to determine the ordinary meanings of the term 'organised', which is included in the construct 'organised armed group', and the term 'protracted', which forms part of the phrase 'protracted armed conflict'. Both terms are included in the text of art 8(2)(f) of the Rome Statute. The purpose of this examination is to determine whether the ordinary meaning of the constructs 'organised armed group' and 'protracted armed conflict' suggests the inclusion of the organisational threshold requirements listed under art 1(1) of Additional Protocol II. Additional Protocol II specifically refers to the construct 'organised armed group' in its scope of application. This analysis is conducted by employing arts 31(1) and 33 of the Vienna Convention on the Law of Treaties.<sup>55</sup>

The adjective 'organised' is defined in the *Collins English Dictionary* as 'planned or controlled on a large scale and involving many people', or as 'orderly and efficient'.<sup>56</sup> Synonyms include the terms 'systematised', 'structured' and 'prepared'.<sup>57</sup> In the present context it means that an armed group (fighting forces of the non-state actor party to the conflict) has to be under control or that its actions are planned or controllable and executed in an orderly or somewhat efficient manner. These terms also indicate that a measure of leadership structure is present if the armed group (fighting forces) is under control.

Article 8(2)(f) of the Rome Statute departs from the text of art 1(1) of Additional Protocol II.<sup>58</sup> Although Additional Protocol II refers to the term 'organised armed group' and subsequently confers an organisational criterion upon the fighting forces of the non-state actor party to an Additional Protocol II-type armed conflict, it specifically dictates minimum organisational criteria which these fighting forces have to meet in order to be considered sufficiently organised.<sup>59</sup> These threshold requirements are considered to expand on the organisational criterion inherent in Common Article 3 in that art 1(1) of Additional Protocol II sets a much higher organisational threshold than that of

Common Article 3.<sup>60</sup> As none of the four criteria listed in art 1(1) of Additional Protocol II is explicitly repeated in the text of art 8(2)(f) of the Rome Statute, and no other specific organisational criteria are listed in this provision, one may interpret these requirements to be merely indicative and not constitutive factors of the organisational criteria in its present context. Therefore, the ordinary meaning of the term 'organised' fails to provide any insight into the degree of organisation that the fighting forces of the non-state party to an art 8(2)(f) of the Rome Statute-type of non-international armed conflict must satisfy in order to qualify as an organised armed group in accordance with this provision.

As the ordinary meaning of 'organisation' does not give any insight into the threshold requirements, and such threshold requirements are inherent in a protracted armed conflict, the meaning of the term 'protracted' may offer insight into the organisational criteria. The adjective 'protracted' is defined as being to 'lengthen' or 'extend'.<sup>61</sup> To 'protract' is synonymous with the verbs 'prolong', 'lengthen', 'extend', 'continue' and 'draw out'.<sup>62</sup> Each of these terms indicates a relation to the passage of time. The adjective 'protracted' may be interpreted as referring to a prolongation of the period of time of the activity revealed by the noun it qualifies. In the present construct, the relevant phrase is an 'armed conflict'. The term 'armed conflict' here refers to an armed conflict not of an international character.<sup>63</sup> A literal interpretation of the term 'protracted armed conflict' thus suggests that an armed conflict not of an international character should be lengthy or prolonged in continuation. Therefore, this interpretation arguably introduces a 'temporal requirement' to be included in the threshold requirements inherent in art 8(2)(f) of the Rome Statute.<sup>64</sup> Thus, an organised armed group is possibly considered sufficiently organised to engage in prolonged fighting. Prolonged fighting necessitates the organised armed group to sustain its military operations over a period of time and, in order to do so, the group is sufficiently organised to replenish the supply of ammunition and weaponry, call upon reserves and/or continuously train fighters. The term 'prolonged' may create an expectation of a more sophisticated degree of organisation by an

organised armed group than the degree of organisation demanded in the identification of a traditional non-international armed conflict. The textual interpretation does not provide sufficient certainty as to the content of the construct 'organised armed group' under art 8(2)(f) of the Rome Statute, and for that reason the drafting history of the Rome Statute is consulted.

### 4. Drafting history

This part turns to the drafting history of art 8(2)(f) as a supplementary means of treaty interpretation in order to determine whether the drafters intended to include the threshold requirements inherent in art 1(1) of Additional Protocol II in the term 'organised armed group' as it is used in art 8(2)(f) of the Rome Statute.<sup>65</sup> The drafting history of art 8(2)(f) of the Rome Statute reveals that very few states wished art 8(2)(f) to duplicate the high organisational and intensity of violence threshold requirements inherent in art 1(1) of Additional Protocol II.<sup>66</sup>

The Bureau Proposal (which served as the starting point of the discussion) derives from the text of art 1(1) of Additional Protocol II:

'Section D of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organised 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.'<sup>67</sup>

This draft offered by the Bureau mimicked the very high threshold requirements included in art 1(1) of Additional Protocol II.<sup>68</sup> The majority of

states held the view that the inclusion of the Additional Protocol II requirements should be avoided, and the Bureau Proposal consequently was rejected.<sup>69</sup> The first reason for not including the threshold requirements set out in Additional Protocol II and the definition of an Additional Protocol II-type non-international armed conflict in art 8(2)(f) of the Rome Statute is that art 1(1) of Additional Protocol II exclusively regulates conflicts between the armed forces of states and the fighting forces (organised armed groups) of non-state actors and not those between two or more non-state actors (two or more organised armed groups) in the absence of a state party to such a conflict.<sup>70</sup>

The inclusion of Additional Protocol II definitions and thresholds, thus, would exclude the jurisdiction of the Court over war crimes committed in a significant number of armed conflicts.<sup>71</sup> Many of the provisions of Additional Protocol II failed to reach customary status at the time of drafting, and this remains the case.<sup>72</sup> The Drafting Committee tasked with the drafting of the Rome Statute aimed to codify custom and not to create new crimes or new requirements. The inclusion of Additional Protocol II and its stringent organisational criteria, as well as an intensity requirement, is contrary to this intention.<sup>73</sup> Another basis on which it was decided not to introduce the text and requirements under art 1(1) of Additional Protocol II into the text of art 8(2)(f) of the Rome Statute was that at the time of drafting, Additional Protocol II had not been widely ratified.<sup>74</sup> This situation led to various states appealing against the inclusion of such content as expressed in Additional Protocol II in the text of the Rome Statute.<sup>75</sup> The states not party to Additional Protocol II did not wish to be indirectly bound to it through art 8(2)(e) and (f) of the Rome Statute by incurring criminal responsibility for the violation of essentially similar provisions.<sup>76</sup> As one scholar correctly points out, it should be noted that some states

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indeed welcomed a stricter threshold, but this proposal eventually was rejected.<sup>77</sup>

Mr Dabor from Sierra Leone suggested an amendment to the Bureau Proposal in order to consolidate the text with the Committee's decision to reject the inclusion of the four threshold requirements adopted from Additional Protocol II.<sup>78</sup> He suggested that the second sentence of the introductory part to Section D had to be deleted and replaced by the following: 'It applies to armed conflicts that take place in a territory of a state when there is *protracted armed conflict* between governmental authorities and organised armed groups or between such groups.'<sup>79</sup> Interestingly, the minutes of this meeting reveal that the term 'violence' was replaced by the term 'conflict'.<sup>80</sup> This formulation was well received by the majority of states and was consequently adopted.<sup>81</sup> The drafting history, however, does not reveal what the members of the drafting committee understood in terms of whether or not the Sierra Leone proposal included a new threshold requirement.<sup>82</sup> The records of the Sierra Leone proposal explicitly indicate that the word 'violence' was replaced by the word 'conflict',<sup>83</sup> but they fail to mention the reasoning behind this substitution.<sup>84</sup> In addition, the drafting history is silent as to why the word 'violence' (which mirrors the *Tadic* formulation) was replaced by the term 'conflict'.<sup>85</sup> It is unclear whether the alteration was intentional or an error in transcription. Unfortunately, any interpretation of this drafting history is flawed by the probability of an intrusion of an element of subjectivity, with the consequence that only limited information can be derived from it.

The drafting history fails to clarify the threshold tests inherent in the construct 'organised armed group' under art 8(2)(f) of the Rome Statute.<sup>86</sup> However, it suggests that the Additional Protocol II

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requirements were not meant to be included.<sup>87</sup> In addition, it does not implicitly answer the question whether the term 'organised' presupposes the inclusion of the same minimum organisational criteria required from the armed forces of the non-state party to a Common Article 3-type armed conflict.<sup>88</sup> As the drafting history does not sufficiently answer all the questions posed, the relevant subsidiary sources of international law are analysed to determine if they offer greater clarity.

## 5. Case law

The case law of the International Criminal Court, however, offers helpful guidance regarding the interpretation of the organisational threshold required of an 'organised armed group' partaking in a 'protracted armed conflict'. The case law specifically addresses the primary question posed in this article regarding whether or not the construct 'organised armed group' requires the strict threshold requirements included in art 1(1) of Additional Protocol II.<sup>89</sup> Of special relevance to the examination of this issue are the following cases: *Prosecutor v Thomas Lubanga Dyilo*;<sup>90</sup> *Prosecutor v Germain Katanga*;<sup>91</sup> *Prosecutor v Jean-Pierre Bemba Gombo*;<sup>92</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* and *Prosecutor v Bosco Ntaganda*.

In the *Lubanga* case, Thomas Lubanga Dyilo was charged *inter alia* as a co-perpetrator in the charges of enlisting and conscripting children under the age of 15 years into the *Force Patriotique pour la Liberation du Congo* (FPLC) and using these children to actively participate in the hostilities allegedly taking place in the Republic of Congo from 2 June to 13 August within the meaning of art 8(2)(e)(vii) of the Rome Statute.<sup>93</sup> As art 8(2)(e)(vii) is specific with regard to crimes committed during a non-international armed conflict as

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characterised in art 8(2)(f) of the Rome Statute, the Trial Chamber first had to establish whether an armed conflict existed during the period in question and, second, whether such a conflict was international or non-international in nature.<sup>96</sup> One of the factors considered by the Trial Chamber in order to conduct this assessment was whether the FPLC had met the sufficient degree of organisational criteria to qualify as an organised armed group in the context of art 8(2)(f) of the Rome Statute.<sup>97</sup>

The Court specifically divorced the possible organisational threshold requirement of art 8(2)(f) of the Rome Statute from the organisational criteria included in art 1(1) of Additional Protocol II by clarifying that art 8(2)(f) of the Rome Statute does not require groups to exercise control over a territory in order to carry out sustained and concerted military operations.<sup>98</sup> After the Court had established that art 8(2)(f) of the Rome Statute does not demand the organisational threshold akin to art 1(1) of Additional Protocol II from the non-state party to the 'protracted armed conflict', the Trial Chamber gave content to the minimum degree of organisation indeed demanded by an art 8(2)(f)-type conflict. The Trial Chamber determined that an organised armed group merely must be sufficiently organised in order to carry out protracted armed violence.<sup>99</sup> The Trial Chamber also provided a non-exhaustive list of factors that would serve as guidance when it had to determine whether an armed group was sufficiently organised.<sup>100</sup> It listed the following factors as potentially relevant: the force or group's ability to plan military operations and put them into effect; the force or group's internal hierarchy; the command structure and rules; the degree to which military equipment (including firearms) is available; and the extent, seriousness and intensity of any military involvement.<sup>101</sup> The Trial Chamber emphasised the fact that none of these factors individually was determinative.<sup>102</sup> It ruled that the criteria should be applied with flexibility when the organisational requirement of an organised armed group is tested as art 8(2)(f) of the Rome Statute provides for only a 'limited' requirement of organisation.<sup>103</sup> It may be anticipated that the Trial Chamber used the term 'limited' to highlight the contrasting degree of organisation expressly required by art 1(1) of Additional Protocol II versus the flexible indicators interpreted to

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be entrenched in the term 'organised armed group' as per art 8(2)(f) of the Rome Statute.<sup>104</sup> This clear differentiation by the Trial Chamber between the organisational criteria required by art 8(2)(f) of the Rome Statute and those by art 1(1) of Additional Protocol II is in line with the drafting history of the Rome Statute, which reveals that art 8(2)(f) was not to duplicate the high threshold requirements included in art 1(1) of Additional Protocol II.<sup>105</sup>

The Trial Chamber determined that, as from March 2003 at the latest, the FRPI was an organised armed group as it possessed sufficient leadership and command structure to permit it to carry out the basic training of its fighters and to engage in prolonged hostilities between March and May 2003.<sup>106</sup> In this case, the flexibility of the organisational threshold indicates a rather lower or minimal threshold.<sup>107</sup> These criteria mimic the initial organisational test executed by the Pre-Trial Chamber which required merely 'some degree of organisation'.<sup>108</sup>

In the *Al-Mahdi* case the Office of the Prosecutor charged Mr Ahmad Al Faqi Al-Mahdi with a single charge under art 8(2)(e)(iv) of the Rome

Statute. The charge sheet alleged that Mr Al-Mahdi had attacked protected objects during the Mali conflict during the relevant period, and this was considered a war crime under the said provision. <sup>109</sup> An element innate to this war crime under art 8(2)(e)(iv) of the Rome Statute is that it had to be committed during and in the context of an armed conflict not of an international character as described in art 8(2)(f) of this treaty. <sup>110</sup> The Trial Chamber articulated that art 8(2)(e) of the Rome Statute indeed imposed the contextual component and defined this provision as being applicable to 'armed conflicts not of an international character that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organised armed groups'. <sup>111</sup>

The Trial Chamber identified the parties to the armed conflict as the government of Mali (government forces fighting on its behalf) and the non-state actor parties, Amar Dine and AQIM. <sup>112</sup> The Trial Chamber was satisfied that the armed forces of both non-state actor parties were sufficiently organised to qualify as organised armed groups in

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accordance with art 8(2)(f) of the Rome Statute. <sup>113</sup> It highlighted the following indicators of organisation which it took into consideration: the armed group displaced the Malian army and exercised effective control over territory for nine months and it exercised control during a protracted period which allowed these groups to carry out several key attacks and enabled them to take over even more territory. <sup>114</sup> These organised armed groups belonging to Amar Dine and the AQIM met a very high organisational threshold which was similar to that included in art 1(1) of Additional Protocol II. They thus serve as examples of highly-organised armed groups. A comparison between the organisational indicators met by the organised armed groups belonging to Amar Dine and AQIM (which were very sophisticated) and the FRPI in the *Lubanga* case (which showed some signs of organisation) clearly illustrates the true flexibility of the organisational threshold test.

In the *Bemba* case the accused, Mr Bemba, was charged by the Prosecutor of the International Criminal Court with effectively acting as a military commander within the meaning of art 28(a) for the crimes against humanity of murder (art 7(1)(a)) and rape (art 7(1)(g)), and the war crimes of murder (art 8(2)(c)(i)), rape (art 8(2)(e)(vi)) and pillaging (art 8(2)(e)(v)). <sup>115</sup> Mr Bemba, a national of the Democratic Republic of the Congo, allegedly committed the crimes with which he was charged on the territory of the Central African Republic during the period 26 October 2002 to 15 March 2003. <sup>116</sup> The Trial Chamber needed to establish whether an 'armed conflict not of an international character' existed at the relevant time in pursuit of the charges made under art 8(2)(c)(i) (murder), art 8(2)(e)(vi) (rape) and art 8(2)(e)(v) (pillaging) of the Rome Statute. <sup>117</sup>

This case is of great significance as the Trial Chamber conducted a detailed analysis clearly explaining how it determined the status of the conflict. <sup>118</sup> It is also a very recent case, having been decided in 2016, and it follows several years after the *Lubanga* case. <sup>119</sup> It is useful to determine whether the analysis by the Trial Chamber is concordant with the previous decisions or whether a different approach was followed. <sup>120</sup> The Trial Chamber acknowledged that the legal construct

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'armed conflict' was not defined in the text of the Rome Statute. <sup>121</sup> This Chamber, akin to the approach of the Pre-Trial Chamber and Trial Chambers I and II, adopted the *Tadic* definition of armed conflict:

[A]n armed conflict exists whenever there is a resort to armed force between states or *protracted violence between governmental authorities and organised 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 peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in 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.' <sup>122</sup>

The Trial Chamber first paid attention to the relevant parties to the conflict in order to determine whether the fighting forces of the non-state actor party to the conflict met the organisational criteria. <sup>123</sup> It stated that Mr Bemba had been charged with bearing criminal responsibility owing to the alleged commission of war crimes in the context of an armed conflict not of an international character between governmental authorities of the Central African Republic supported by the *Mouvement de Libération du Congo* (MLC), on the one hand, and the organised armed group led by General Bozize, on the other. <sup>124</sup> It carefully considered whether the organisational criteria applicable to the Rome Statute provisions, art 8(2)(c) and art 8(2)(f)-type war crimes differed. <sup>125</sup> Essentially, such a differentiation would be indicative of the possibility that two different types of armed conflict not of an international character could exist under art 8(2)(d) and (f) of the Rome Statute. <sup>126</sup> It relied on the finding of the Pre-Trial Chamber in order to answer this question:

'Even though mention of opposing parties to the conflict is made *expressis verbis* in art 8(2)(f) of the Statute but not in art 8(2)(d) of the Statute ... this characteristic element in the context of a [non international armed conflict] is a well-established principle in the law of armed conflict underlying the 1949 Conventions [and] also applies to art 8(2)(c).' <sup>127</sup>

The Trial Chamber is of the view that the organisational criteria relevant to the war crimes listed in art 8(2)(c) and art 8(2)(e) of the Rome Statute and the situations of armed conflict not of an international character

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included in art 8(2)(d) and art 8(2)(f) of the Rome Statute are the same. <sup>128</sup> Straightforwardly, the Trial Chamber agreed with the Pre-Trial Chamber in the *Bemba* case, given the lack of a definition in the Rome Statute, that the organisational criterion requires merely such armed groups to possess a degree of organisation that enables them to carry out protracted armed violence. <sup>129</sup> The Trial Chamber went a step further than the Pre-Trial Chamber in that it specifically voiced the view that the steep organisational criteria, as previously included in art 1(1) of Additional Protocol II, are not required by the Rome Statute. <sup>130</sup> Those criteria may logically serve as flexible indicators to aid in determining whether or not the organisational criterion has been met, but they are not required. <sup>131</sup>

This 2016 ruling by the Trial Chamber conforms to the International Criminal Court's decisions in the *Katanga* and *Lubanga* cases, <sup>133</sup> and the Trial Chamber reiterated the organisational test formulated in both these cases. <sup>134</sup> The Trial Chamber in the *Lubanga* case determined that a non-exhaustive list of indicators existed and that none of these indicators individually determined whether or not the organisational criterion had been met. <sup>135</sup> These Trial Chamber decisions shared the view that the indicators should be approached with some flexibility. <sup>136</sup>

The *Bemba* case cleared up some confusion over the use of the term 'responsible command' as an indicator of organisation as used by the Pre-Trial Chamber. <sup>137</sup> Clarification was needed as this term could be understood as necessitating the existence of the same 'responsible command' criterion included explicitly in art 1(1) of Additional Protocol II. <sup>138</sup> The Trial Chamber emphasised that the meaning of the term 'responsible command' in the current context differed from the explicit organisational criterion of responsible command as included in art 1(1) of Additional Protocol II. <sup>139</sup> The Trial Chamber highlighted that the Pre-Trial Chamber had defined the indicator 'responsible command' as merely entailing 'some degree of organisation of those

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armed groups, including the possibility of imposing discipline as well as the ability to plan and carry out military operations'. <sup>140</sup> The Trial Chamber considered this definition provided by the Pre-Trial Chamber to overlap with the list of organisational indicators set forth by the Trial Chamber and stated that 'responsible command' in this context simply included an additional indicator of the possibility of imposing discipline. <sup>141</sup> Therefore, it is not considered to be an optional indicator requiring a high threshold of organisation, but merely the possibility that imposing some discipline is sufficient and that this requirement should be applied flexibly. <sup>142</sup>

The Trial Chamber concluded its remarks concerning 'responsible command' by specifically stating that it did not deem it necessary to see any contradiction in the approaches followed by either the Pre-Trial Chamber or the Trial Chamber with regard to the term 'responsible command'. <sup>143</sup> It clearly stated that art 8(2)(f) of the Rome Statute did not reflect the strict organisational criteria required under art 1(1) of Additional Protocol II. <sup>144</sup> Consequently, the Trial Chamber arrived at the position that the organisational criterion for the fighting forces (organised armed groups) of the non-state parties to the conflict in relation to art 8(2)(c)-type war crimes under the Rome Statute and art 8(2)(d) situations as delineated in the Rome Statute was the same organisational criterion applicable to art 8(2)(e)-type war crimes listed in this provision of the

Rome Statute and the situations alluded to in art 8(2)(f) of the Rome Statute. <sup>145</sup> Simply put, there is one organisational threshold applicable to the fighting forces (organised armed groups) of the non-state armed forces under art 8 of the Rome Statute. <sup>146</sup>

The 2019 *Ntaganda* case, which was decided on 8 July 2019, is (at the time of publication) the most recent decision presented by the International Criminal Court where Trial Chamber VI was tasked with conflict classification. <sup>147</sup> Trial Chamber VI, furthermore, was specifically charged with determining whether the situation that transpired in the Ituri region of the Democratic Republic of the Congo between 6 August 2002 and 31 December 2003 constituted a non-international

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armed conflict under art 8(2)(d) and 8(2)(f) of the Rome Statute, as Mr Ntaganda had been accused of committing alleged war crimes pursuant to art 8(2)(c) and 8(2)(e) of the Rome Statute. <sup>148</sup> In its interpretation of the nature of the non-international armed conflicts under the Rome Statute, Trial Chamber VI seems to consider 'armed conflict not of an international character' and 'protracted armed conflict' under art 8(2)(d) and 8(2)(f) of the Rome Statute to be a single category of non-international armed conflict, namely, a traditional or Common Article 3-type non-international armed conflict. Trial Chamber VI reasoned as follows:

'Although paras 2(d) and (f) of Article 8 provide some guidance, the Court's legal framework does not define the term 'armed conflict not of an international character' as referred to in para 2(c) and (e). However, noting that paragraph 2(e) and the Elements of Crimes explicitly refers to 'the established framework of the international law of armed conflict', the Chamber adopts the definition of 'armed conflict not of an international character' introduced by the ICTY Appeals Chamber in 1995, which has since been accepted by States as authoritative and has become part of State practice. It will therefore consider that such a conflict exists in case of 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'<sup>149</sup>

Trial Chamber VI explicitly states that an art 8(2)(f) armed conflict exists when there is 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'. <sup>150</sup> This statement is an exact repetition of the *Tadic* criterion which determines the threshold requirements inherent under a Common Article 3 type-conflict or, in the case of the Rome Statute, the threshold requirements associated with a non-international armed conflict under art 8(2)(d). <sup>151</sup> Indeed, Trial Chamber VI examines the existence of an armed conflict not of an international character under art 2(d) and 2(e) simultaneously; <sup>152</sup> no differentiation of interpretation is made. Trial Chamber VI specifically states that the requirements for non-international armed conflict are that at least two sufficiently-organised armed groups are involved and that the violence resulting from the fighting must meet a certain level of intensity. <sup>153</sup> No mention of the construct 'protracted armed conflict' is made in the

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Trial Chamber's analysis. <sup>154</sup> In assessing whether the organisational requirement necessary for the existence of a non-international armed conflict was present, Trial Chamber VI cited the indicators identified in the *Boskoski* Appeals Decision before the ICTY <sup>155</sup> and specifically referred to previous decisions in which they had been applied, citing the relevant parts of the *Bemba*, <sup>156</sup> *Katanga* and *Lubanga* decisions. <sup>159</sup> Furthermore, the analysis by Trial Chamber VI does not reference the stricter criteria established in Additional Protocol II. <sup>160</sup> Clearly, Trial Chamber VI considers the threshold criteria establishing non-international armed conflict in terms of paras 8(2)(d) and 8(2)(f) to be the same: No greater degree of organisation is expected of an organised armed group engaging in a 'protracted armed conflict'.

The fact that Trial Chamber VI did not comment on the construct 'protracted armed conflict' may be regarded as an indication that the Court considered the issue to have been settled by previous decisions, or that it did not consider that there was a discrepancy in meaning to begin with, or that it overlooked the second part of art 8(2)(f), which includes the term 'protracted armed conflict'. The first possibility, that it viewed the previous decisions as conclusive in deciding the question, is the most likely.

The analysis of relevant case law has revealed that the term 'organised armed group' as included in art 8(2)(f) of the Rome Statute does not require the application of organisational criteria established in Additional Protocol II. The term 'organised armed group' has the same meaning under art 8(2)(d) as under art 8(2)(f), and mimics the Common Article 3 organisational criterion.

## 6. Scholarly debate

For the most part, commentators are of the view that arts 8(2)(c) and (d) of the Rome Statute reflect the organisational criteria of Common Article 3 and art 8(2)(f) of the Rome Statute. <sup>161</sup> Consequently, these scholars agree that art 8(2)(f) of the Rome Statute does not require the higher organisational criteria of art 1(1) of Additional Protocol II. These scholars reason that the organisational criteria of Common Article 3

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have acquired customary law status under international humanitarian law and, consequently, that the organisational criterion inherent in the Rome Statute reflects the organisational criteria that the armed forces of a non-state party to an armed conflict not of an international character have to satisfy. <sup>162</sup> Furthermore, this correlation is supported by the spirit displayed in the drafting of the Rome Statute. <sup>163</sup> The drafters aimed to codify general principles of international law as well as customary international law rather than to create new international humanitarian law rules or unique war crimes. <sup>164</sup> Three noteworthy alternative arguments are offered that support the conclusion that no differentiation is to be made between the scope of application of arts 8(2)(d) and 8(2)(f) of the Rome Statute and the type of armed conflict not of an international character as included in Common Article 3 and, consequently, customary international humanitarian law. <sup>165</sup>

The first argument holds that it is significant that the phrase 'armed conflict not of an international character' as originally included in Common Article 3 is repeated in the Rome Statute. <sup>166</sup> The term 'armed conflict not of an international character' was for the first time used in Common Article 3, and its purpose was to determine the scope of application of the article. <sup>167</sup> This phrase is repeated in all four sub-sections included in art 8 of the Rome Statute, which determines the types and categories of war crimes committed in the context of non-international armed conflict over which the International Criminal Court exercises substantive jurisdiction. <sup>168</sup> It is argued that the usage of this phrase indicates that there is a single threshold criterion, and that it is identical to the criteria and scope of application applicable in Common Article 3. <sup>169</sup>

Scholarly argument in support of this theory highlights the fact that the same construct 'armed conflict not of an international character' is reproduced in all existing international humanitarian law treaties that regulate situations that fall within the scope of application which

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is similar to that of Common Article 3. <sup>170</sup> The argument is made that this phrase is significant in international humanitarian law as it is associated with a Common Article 3-type non-international armed conflict. <sup>171</sup> An additional reason offered in support of this theory is that the scope of application of Additional Protocol II, which determines much steeper threshold requirements, refrains from repeating this term. <sup>172</sup> The logical assertion is that this has been done as it applies to conflicts that differ from those meeting the lower thresholds inherent in the scope of application of Common Article 3. <sup>173</sup>

The second argument concerns the inclusion of the term 'other' as a 'determiner' of the scope of application of art 8(2)(e) of the Rome Statute. <sup>174</sup> It is argued that a plain reading, which considers both the use and positioning of this term, supports the notion that an identical scope of application applies to crimes listed under art 8(2)(c) and (d) of the Rome Statute. <sup>175</sup> This assertion essentially means that the scope of application described in art 8(2)(d) and (f) is identical. <sup>176</sup> The relevant part of art 8(2)(e) reads: 'other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law' and continues by listing these crimes. <sup>177</sup> It is argued that the term 'other' serves as a bridge between the most serious violations in the context of Common Article 3-type non-international armed conflicts and 'other' war crimes also committed in the context of Common Article 3. <sup>178</sup> The argument holds that, if another scope of application exists that is applicable to art 8(2)(c) of the Rome Statute, then the word 'other' should have been omitted from the text of art 8(2)(e) of the Rome

Statute. <sup>179</sup> Although this author agrees with the overall conclusion of this argument, namely, that art 8(2)(f) does not create a new type of armed conflict, she cannot ignore the fact that art 8(2)(f) explicitly determines the scope of art 8(2)(e) of the Rome Statute as its opening phrase is '[p]aragraph 2(e) applies to' and continues by introducing the term 'protracted', the meaning of which is ignored in this argument.

Commentators who claim that art 8(2)(f) of the Rome Statute creates a new category of what constitutes armed conflict base their argument on the intensity of violence requirement and not on the organisational criterion. <sup>180</sup> These commentators are of the opinion that the inclusion of the term 'protracted armed conflict' rather than 'protracted armed violence' necessitates a different intensity threshold unique to art 8(2)(f)-type non-international armed conflicts, thus creating a new type of non-international armed conflict under this provision of the Rome Statute. <sup>181</sup> This debate has been addressed in other scholarly works and will not be expanded on here. <sup>182</sup> The point that is relevant to the present discussion is that commentators do not challenge the organisational criterion as a factor that is indicative of a new type of armed conflict; it is the intensity requirement that is challenged. <sup>183</sup>

Rodenhäuser offers a third approach in relation to the interpretative conundrum that the phrase 'protracted armed conflict' poses in his monograph *Organising Rebellion* in which he specifically considers the nature of the non-state actors party to armed conflicts not of an international character as included in the Rome Statute. <sup>184</sup> His initial understanding of the wording in art 8(2)(d) and 8(2)(f) of the Rome Statute is that it offers two definitions of non-international armed conflict. <sup>185</sup> He considers that the definitions of armed conflict not of an international character and the parties to these conflicts under international criminal law are fundamentally related to the meaning of such conflicts under international humanitarian law. <sup>186</sup>

As an example of his reasoning, he offers the source of the war crimes listed under art 8(2)(c) of the Rome Statute and the arena in which they are committed under art 8(2)(d) and its intrinsic relationship to international humanitarian law. <sup>187</sup> He argues that art 8(2)(c) of the Rome Statute (which criminalises serious violations of Common

Article 3) and art 8(2)(d) (which defines the type of conflict in which these crimes are to be classified as war crimes) echo the threshold test inherent in a Common Article 3-type non-international armed conflict. <sup>188</sup> He concludes that, as a result of an intrinsic relationship between these war crime provisions and international humanitarian law, parties to an art 8(2)(c)-type conflict must meet a criterion for the same degree of organisation as parties fighting in a Common Article 3-type non-international armed conflict. <sup>189</sup>

Rodenhäuser then deals with art 8(2)(f) of the Rome Statute, arguing that the types of crimes listed under art 8(2)(e) of the Rome Statute can be committed in an armed conflict as described in art 8(2)(f). <sup>190</sup> He is uncomfortable with the construct 'protracted armed conflict' and acknowledges that it is unclear whether the definition included in art 8(2)(f) refers to armed conflicts similar to the Common Article 3-type non-international armed conflicts as included in art 8(2)(d) of the Rome Statute or whether it lays out new threshold tests. <sup>191</sup> He acknowledges that the introduction of the construct 'protracted armed conflict' probes the question of whether the capacity of armed groups (referring to the organisational threshold) under art 8(2)(f) of the Rome Statute is identical to the requirements in art 8(2)(d), which are the Common Article 3 threshold. <sup>192</sup>

Rodenhäuser then raises two questions. First, he asks whether or not the non-state parties under art 8(2)(f) of the Rome Statute represent a specific type of non-state actor. <sup>193</sup> For example, should such an entity mirror the type of entity which satisfies the criteria of art 1(1) of Additional Protocol II? <sup>194</sup> Second, he explores the possibility of whether the organisational threshold tests for non-state parties to the conflicts defined in art 8(2)(d) and 8(2)(f) differ substantially. <sup>195</sup> Rodenhäuser's enquiry echoes the questions central to the concerns in this article, and an evaluation of his treatment of the problems in interpretation in determining the meaning of 'organised armed group' offers a useful comparison with the argument in the article. <sup>196</sup>

Rodenhäuser starts his discussion by reflecting on Bothe's treatment of the legal conundrum that arises as a result of the inclusion of

the term 'protracted armed conflict'. <sup>197</sup> He agrees with Bothe that as 'organised armed group' originates in the text of Additional Protocol II, the term has a specific meaning in the context that a non-state fighting unit becomes an 'organised armed group' only in the event that it meets all four the requirements listed in art 1(1) of Additional Protocol II. <sup>198</sup> However, Rodenhäuser underlines that this interpretation coexists with an alternative meaning. <sup>199</sup> He argues that the ordinary meaning of the term simply entails that a non-state entity is sufficiently organised to engage in military-type fighting and is capable of implementing the rules applicable to the conflict in which it is engaged. <sup>200</sup> He thus maintains that the meaning of this term is not 'necessarily tied' to the threshold requirements necessitated by art 1(1) of Additional Protocol II. <sup>201</sup> He supports his line of reasoning with reference to the rejection by the drafting committee of proposals aimed at introducing the Additional Protocol II criterion to art 8(2)(f) of the Rome Statute, as well as to the *dictum* of Trial Chamber I in the *Lubanga* judgment. <sup>202</sup> As noted earlier, in *Lubanga* Trial Chamber I rejected the notion that organised armed groups under art 8(2)(f) must meet the high organisational threshold inherent in art 1(1) of Additional Protocol II. <sup>203</sup>

Therefore, on the first point of inquiry, Rodenhäuser concludes that the non-state entity party to an art 8(2)(f)-type armed conflict does not need to be as sophisticated as an organised armed group opposing government armed forces in an Additional Protocol II-type conflict. <sup>204</sup> This author reaches the same conclusion. Rodenhäuser suspends his interrogation without arriving at a conclusion to his second point of inquiry. <sup>205</sup> He questions whether or not the organised armed group has to meet similar criteria under art 8(2)(d) and art 8(2)(f). <sup>206</sup> His non-treatment of this question may be interpreted as a deduction that if the organisational requirements inherent in the scope of application of Additional Protocol II need not be met under art 8(2)(f), and this defines the only other type of non-state actor

in international humanitarian law that lies behind these provisions, then logically organised armed groups under both articles must meet the only other criterion, which is that of Common Article 3. <sup>207</sup> It is submitted that according to Rodenhäuser, the criteria for art 8(2)(d) and 8(2)(f)-type armed groups are the same. In the available scholarly literature there is no argument to support the view that the Additional Protocol II organisational criteria are applicable under art 8(2)(f) of the Rome Statute to organised armed groups engaged in a 'protracted armed conflict'.

## 7. Conclusion

This contribution considers whether the term 'organised armed group' in relation to art 8(2)(f) of the Rome Statute demonstrates inherent threshold requirements that differ from those in Additional Protocol II. This possibility arises because the wording that determines the type of situation in which the alleged war crimes are committed in order for jurisdiction to be vested in the International Criminal Court is different. Article 8(2)(c) refers to 'an armed conflict not of an international character', as does Common Article 3, whereas art 8(2)(f) of the Rome Statute introduces the term 'protracted armed conflict' and incorporates the notion of 'an organised armed group'. This notion specifically promotes a unique relation to Additional Protocol II as it first was codified in art 1(1) of this treaty which determines the scope of application. Its inclusion in art 8(2)(f) of the Rome Statute could be an indication of the identification of a synergy between the organisational criteria expected from an organised armed group under this provision and those in art 1(1) of Additional Protocol II. Furthermore, the war crimes listed in art 8(2)(e) committed in the context of a 'protracted armed conflict' are founded on norms expressed in the prohibitive rules contained in Additional Protocol II.

Part 2 of this contribution serves a dual purpose. First, it lays the foundation by explaining the inter-relationship between conflict classification and war crime adjudication. Second, it underlines the need for clarity concerning the threshold requirements and a definition of the different types of conflict. In parts 3 to 6 the traditional sources of international law were employed in seeking clarification of the central research question.

orderliness or a capacity for administration. What the meaning of the term entails in respect of art 8(2)(f), however, is less clear, although a literal interpretation automatically proposes the four criteria included in art 1(1) of Additional Protocol II.

The drafting history of art 8(2)(f) of the Rome Statute, which is examined in part 4 of this contribution, provided a degree of insight as it reveals that few states supported duplicating the high organisational criteria included in art 1(1) of Additional Protocol II. A survey of the Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole reveal that, for various reasons, the majority of states wished to avoid incorporating such a demanding organisational criterion and, instead, held fast to the agreed objective of the Drafting Committee to only codify custom and not to create new obligations. The customary status of some provisions of Additional Protocol II is disputed, and inserting a higher level of organisational criteria is also rejected. This rejection of the organisational criteria associated with Additional Protocol II revealed by the examination of the drafting history is of singular importance to the discussion. The fact that at this stage the drafters held to the intent to codify custom suggests that the organisational criterion associated with Common Article 3 (as is the case with art 8(2)(c) and (d) of the Rome Statute) is applicable to art 8(2)(f) of the Rome Statute even if there is no implicit reference.

The case law of the International Criminal Court is analysed in part 5 of the contribution and provides some certainty in respect of the manner in which the notion 'organised armed group' relates to the term 'protracted armed conflict' in art 8(2)(f) of the Rome Statute. A survey of case law offers clarification that general legal opinion views the strict organisational criteria listed in art 1(1) of Additional Protocol as optional in terms of art 8(2)(f) of the Rome Statute and that a minimum degree of organisation is sufficient. A review of the case law confirms that the criteria required under art 8(2)(f) of the Rome Statute are identical to those demanded of organised armed groups in accordance with the war crimes provision applicable in non-international armed conflicts.

With regard to the issue that art 8(2)(f) of the Rome Statute introduces a different threshold of violence from that understood in the *Tadic* formula in that this article uses the term 'protracted armed conflict' and not 'protracted armed violence', part 6 of the contribution establishes that scholarly opinion coalesces around the view that the organisational criteria under art 8(2)(f) match the understanding of the criteria under Common Article 3 as included in arts 8(2)(c) and (d) of the Rome Statute. These criteria correspond to those under Common Article 3, and the same benchmarks determine whether an armed group is sufficiently organised as those applicable under

art 8(2)(c) to (f) of the Rome Statute. Therefore, the conclusion is drawn that the organisational threshold criteria demanded under art 1(1) of Additional Protocol II are not insisted on for a non-state fighting unit to qualify as an organised armed group under art 8(2)(f) of the Rome Statute. It is sufficient that the same criteria as under art 8(2)(d) of the Rome Statute and Common Article 3 are met.

\* LLB LLM LLD (Pretoria) LLM (Cape Town), Lecturer, Department of Public Law, University of Pretoria. Parts of this article are taken from the author's unpublished doctoral thesis titled 'An analysis of the notions of "organised armed groups" and "intensity" in the law of non-international armed conflict', supervised by Professors Erika de Wet and Jann Kleffner and completed at the University of Pretoria in February 2018. The author would like to thank Professors Christo Botha and Annelize Nienaber for their comments on earlier drafts of the article.

1 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 (ICC Statute).

2 Article 8(2)(f) of the Rome Statute determines the scope of application in which the war crimes listed under art 8(2)(e) of the Rome Statute are committed.

3 Compare Rome Statute supra (n1) art 8(2)(d) which reads: 'Paragraph 2(c) applies to *armed conflicts not of an international character* and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'; Rome Statute art 8(2)(f) provides as follows: 'Paragraph 2(e) applies to *armed conflicts not of an international character* and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is *protracted armed conflict* between governmental authorities and organised armed groups or between such groups' (emphasis added). See also C Gray 'The meaning of armed conflict: Non-international armed conflict' in ME O'Connell (ed) *What is War: An Investigation in the Wake of 9/11* (2012) 69 at 72.

4 The Rome Statute of the International Criminal Court is the treaty that establishes the International Criminal Court, the purpose of which is to exercise jurisdiction over the most serious international crimes as listed in art 5 of its Statute. The crimes within the jurisdiction of the Court are genocide (art 6); crimes against humanity (art 7); war crimes (art 8); and the crime of aggression (art 8bis). Section 8 of the Rome Statute determines the types and categories of war crimes over which the International Criminal Court has substantive jurisdiction as well as their scope of application. Rome Statute supra (n1).

5 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict' (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II).

6 Compare art 8(2)(d) of the Rome Statute which reads: 'Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature' with the text of art 8(2)(f): 'Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. *It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups*' (emphasis added). The second sentence is unique to art 8(2)(f).

7 Compare the war crimes listed under art 8(2)(e) of the Rome Statute with Additional Protocol II supra (n5) Parts II, III and IV. See Y Dinstein *Non-International Armed Conflicts in International Law* (2014) 188. Dinstein remarks: 'When the twelve sub-paragraphs of art 8(2)(e) are evaluated, various features of interaction with AP/II become prominent. The first is that a number of paragraphs are closely knit with the corresponding AP/II norms.' See also A Cullen 'The concept of non-international armed conflict in the Rome Statute of the International Criminal Court' in A Cullen *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010) 159 at 180.

8 Compare the second part of art 8(2)(f) of the Rome Statute ('It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and *organised armed groups* or between such groups') and the scope of application codified in art 1(1) of Additional Protocol II ('and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or *other organised 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'). See also Dinstein op cit (n7) 190-192.

9 Dinstein op cit (n7) 188-192; T Rodenhäuser *Organising Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (2018) 55-57.

10 Common Article 3 Common to the Geneva Conventions: Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

11 Rome Statute supra (n1).

12 See *Prosecutor v Dusko Tadic aka 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-A, A.Ch, 19 July 1998, para 70.

13 *Prosecutor v Dusko Tadic a/k/a 'Dule'* IT-94-1-T 7 May 1997 (Opinion and Judgment) Trial Chamber I, para 562.

14 Ibid.

15 See the *chapeau* of Common Article 3 to the Geneva Conventions supra (n10).

16 See art 1(1) of Additional Protocol II supra (n5) for its material scope of application.

17 The type of conflict portrayed in arts 8(2)(c) and (d) of the Rome Statute is identical to a Common Article 3-type armed conflict. See *Situation in the Democratic Republic of the Congo: In the Case of the Prosecutor v Germain Katanga, Judgment Pursuant to Article 74 of the Statute* Case No ICC-01/04-01/07-3436, Trial Chamber 7 March 2014, para 789: 'The Chamber will give precedence to the "chapeau" of this article, which is consistent with Article 3 common, which constitutes the basis of art 8(2)(c).' Cullen op cit (n7) 180; R Geiss and A Zimmerman 'Article 8: War crimes: Preliminary remarks on para 2(c)-(f) and para 3' in O Triffterer and K Ambos *The Rome Statute of the International Criminal Court: A Commentary* 3ed (2016) 543-545; WA Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 199, 204; K Dörmann, L Lijnzaad, M Sassöli and P Spoerri (eds) *International Committee of the Red Cross: Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field* (2016) paras 424-437 of the Commentaries on Common Article 3.

18 For a discussion of the organisational criteria, see MM Bradley 'Revisiting the notion of "organised armed group" in accordance with Common Article 3: Exploring the inherent minimum threshold requirements' (2018) 1 *Afr Yrbk Internat'l Humanit'n L* 50 at 55-58. For an overview of the intensity requirement under



Common Article 3, see MM Bradley 'Revisiting the notion of "intensity" inherent in Common Article 3: An examination of the minimum threshold which satisfies the notion of "intensity" and a discussion of the possibility of applying a method of cumulative assessment' (2017) 17 *International Comparative Law Review* 7–38.

19 Bradley (2018) op cit (n18) 69 for a discussion of the *La Tablada* case. In *La Tablada*, the Inter-American Court of Human Rights stated that the necessitated degree of organisation expected from a fighting unit under Common Article 3 need merely be relative. *Juan Carlos Abella v Argentina*, Report No 55/97, Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, doc 6 rev 1998 (*La Tablada* case) para 152.

20 See Bradley (2018) op cit (n18) 67–77 for an analysis of these indicative factors.

21 Additional Protocol II supra (n5) art 1(1).

22 Ibid. A very insightful work concerning Additional Protocol II is S Junod 'Additional Protocol II: History and scope' (1983) 33 *Am Univ L Rev* 37. In his monograph Rodenhäuser provides a brief overview of the organisational criteria of Additional Protocol II; see Rodenhäuser op cit (n9) 49–54.

23 Additional Protocol II supra (n5) art 1(1).

24 For a discussion of the debate concerning art 8(2)(f), see C Kress 'War crimes committed in non-international armed conflicts' (2001) 30 *Israel Yrbk Hum Rights* 104, 118; N Quenivet 'Applicability test of Additional Protocol II and Common Article 3 for crimes in internal armed conflict' in D Jinks, J Maogoto and S Solomon (eds) *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (2014); Cullen op cit (n7) 69, 82, 174–85, 206; see J Pejic 'The protective scope of Common Article 3: More than meets the eye' (2011) 93 *IRRC* 202; S Sivakumaran *The Law of Non-International Armed Conflict* (2014) 192–194; Dinstein op cit (n3) 190; K Ambos *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (2014) 543; M Cortier 'War crimes' in R O'Keefe *International Criminal Law* (2015) 312–314; O Triffterer and K Ambos *Rome Statute of the International Criminal Court: A Commentary* 3ed (2016) 441; Dörmann op cit (n17) 160–161 paras 443–444.

25 In this regard, see MM Bradley 'The "intensity" threshold in art 8(2)(f) of the Rome Statute: The conundrum created by the term "protracted armed conflict" and the possibility of a new category of non-international armed conflict' 2017 *S Afr Yrbk Internat'l L* 42 at 79; Sivakumaran op cit (n24) 190–191; S Sivakumaran 'Identifying an armed conflict not of an international character' in C Stahn and G Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2008) 361 at 371–380; Ambos op cit (n24) 133.

26 A Bellal (ed) *The War Report: Armed Conflict in 2018* (2019) 31–32, available at [https:// geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf](https://geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf), accessed on 23 September 2019.

27 Compare Bellal op cit (n26) 32–33 with parties to the Rome Statute, available at [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx), accessed on 23 September 2019.

28 United Nations Security Council Resolution 1593 (2005) (31 March 2005) (S/RES/1593 (2005)).

29 United Nations Security Council Resolution 1970 (2011) (26 February 2011) (S/RES/1970 (2011)).

30 See 'Situation referred to the ICC by the Government of Uganda' (ICC-02/04), available at <https://www.icc-cpi.int/uganda>, accessed on 23 September 2019.

31 See 'Situation referred to the ICC by the United Nations Security Council' (ICC-01/11), available at <https://www.icc-cpi.int/libya>, accessed on 23 September 2019.

32 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

33 Part 4 considers relevant case law of the ICC.

34 Part 6 considers the scholarly debate.

35 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS No 993 (ICJ Statute).

36 Vienna Convention supra (n32).

37 'Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Bosco Ntaganda' (8 July 2019) Trial Chamber VI Judgment No ICC-01/04-02/06) para 698. 'The Pre-Trial Chamber confirmed several war crimes allegedly committed in the context of an armed conflict not of an international character, pursuant to arts 8(2)(c) and 8(2)(e) of the Statute. For each of the war crimes confirmed, the following two requirements must be established: (i) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (ii) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.'

38 Ibid.

39 Ibid.

40 Ibid. Note that the Court referred to armed conflict not of an international character as the crimes were listed under arts 8(2)(c) and 8(2)(e) of the Rome Statute.

41 Ibid.

42 *Ntaganda* supra (n37) para 731.

43 Ibid.

44 M Sassoli *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019) at para 9.5.4.

45 Rome Statute op cit (n1) arts 5, 11, 12, 13, 14, 15.

46 Sassoli op cit (n 44) para 9.5.5.

47 Rome Statute art 8(2)(b).

48 Rome Statute art 8(2)(d).

49 Rome Statute art 8(2)(f).

50 Common Article 2, Geneva Conventions op cit (n10).

51 Rome Statute arts 8(2)(c) and (f).

52 Geneva Conventions op cit (n10). See *Katanga* supra (n17) para 789: 'The Chamber will give precedence to the "chapeau" of this article, which is consistent with Article 3 common, which constitutes the basis of art 8(2)(c).' Cullen op cit (n7) 180; Zimmerman and Geiss op cit (n17) 543–545; Schabas op cit (n17) 199, 204.

53 *Situation in The Central African Republic: In the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), 21 March 2016, paras 127–130.

54 Dörmann op cit (n17) paras 424–437 of the Commentaries on Common Article 3.

55 Vienna Convention op cit (n32) arts 31–32.

56 M O'Neill and E Summers *Collins English Dictionary* 7ed (2015) 554.

57 M Webster *Thesaurus Online*, available at <https://www.merriam-webster.com/>, accessed on 17 January 2017.

58 Additional Protocol II op cit (n5).

59 Additional Protocol II art 1(1). The four minimum requirements set out in Additional Protocol II are that the fighting forces of such a non-state actor party to an Additional Protocol II-type non-international armed conflict have to be under responsible command; exercise control over territory which assists them to execute sustained and concerted military operations; have the ability to conduct sustained and concerted military operations; and have the ability to implement Additional Protocol II.

60 Article 1(1) of Additional Protocol II. The opening lines of this provision reads: '1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application' (emphasis added).

61 O'Neill and Summers op cit (n56) 636. See also Bradley op cit (n25) 49–59 where the author examines in detail the ordinary meaning of 'protracted armed conflict' in the context of the intensity requirement under art 8(2)(f).

62 O'Neill and Summers op cit (n56) 673.

63 See Rome Statute art 8(2)(f).

64 Compare Bradley op cit (n25) 51.

65 See Vienna Convention op cit (n32) 32 which recognises the drafting history of a treaty as a supplementary source of treaty interpretation. 'Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of art 31, or to determine the meaning when the interpretation according to art 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' For an in-depth discussion of art 32 itself, see O Corten and P Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary: Volume I* (2011) 841–863; O Dörr and K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (2012) 571–586.

66 'United Nations Diplomatic Conference of Plenipotentiaries on the Rome on the Establishment of an International Criminal Court', Volume II 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (15 June–17 July 1998) p 335, para 8, p 348, para 52. (hereafter Summary Records).

67 United Nations Conference op cit (n66) 215. For an in-depth discussion of the drafting history with reference to the intensity requirement necessitated by the construct 'protracted armed conflict' specifically, see Bradley op cit (n25) 59–68.

68 Summary Records op cit (n66) 215.

69 Summary Records op cit (n66) 330 para 48, 341 para 68, 342 para 80.

70 cf Additional Protocol II supra (n5) art 1(1). See Summary Records op cit (n66) 321 para 24, 348 para 52, 342 para 80, 335 para 8, 169 para 103.

71 Ibid.

72 Summary Records op cit (n66) 277 para 41, 67 para 44, 161 para 76, 169 para 102.

73 Ibid.

74 Summary Records op cit (n66) 272 paras 59, 65; 286 para 51, 287 para 73, 331 para 63.

75 Ibid.

76 Ibid.

77 Sivakumaran op cit (n25) 192–194.

78 Document A/CONF.183/C.1/L.62; Summary Records op cit (n66) 335 para 8.

79 Ibid.

80 Ibid; Document A/CONF.183/C.1/L.62; Summary Records op cit (n66) 'Introductory paragraph to Section D, second sentence: Replace the sentence with the following: "It applies to armed conflicts that take place in a territory of a state when there is *protracted armed conflict* between governmental authorities and organised armed groups or between such groups. The word "party" has been deleted, and *the word "violence" has been changed to "conflict"* ' (emphasis added).

81 States expressly showing support and preference for this draft included Uganda, Portugal, Solomon Islands and Slovenia. See Summary Records supra (n66) paras 23, 337; paras 37, 338; paras 73 and 80, 342; paras 20, 346. For a further discussion in respect of the formulation of s D, see specifically A/Conf.183/C.1/Sr.35, 334–343.

82 See discussion in Cullen op cit (n7) 175; Sivakumaran op cit (n25) 194–195.

83 Document A/CONF.183/C.1/L.62; Summary Records op cit (n66) 247.

84 Ibid.

85 See specifically Doc A/Conf.183/C.1/Sr.35, Summary Records op cit (n66) 334–343.

86 Summary Records op cit (n66).

87 Summary Records op cit (n66) 331.

88 Summary Records op cit (n66).

89 As per art 38(1)(d) of the Statute of the International Court of Justice supra (n35), case law of international courts and tribunals is a secondary source of international law and aids the interpretation and clarification of primary sources.

90 *The Prosecutor v Thomas Lubanga Dyilo* Judgment Pursuant to Art 74 of the Judgment Case No ICC-01/04-01/00 Trial Chamber, 14 March 2012.

91 *Katanga* supra (n17). The facts of the *Katanga* case are not fleshed out as the principles set out in this case are sufficiently clear and underscore the reasoning in the *Lubanga* case supra (n90).

92 *Bemba* supra (n53).

93 Pre-Trial Chamber III, 23 May 2008; *Situation in the Republic of Mali in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi, Judgment and Sentence*, Case No ICC-01/12-01/15, Trial Chamber VIII, 27 September 2016.

94 *Ntaganda* supra (n37).

95 *Lubanga* supra (n90) para 1.

96 *Lubanga* supra (n90) para 504.

97 *Lubanga* supra (n90) para 506.

98 *Lubanga* supra (n90) para 536.

99 *Lubanga* supra (n90) para 537.

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid.

104 See *Lubanga* supra (n90) para 536 in light of art 8(2)(f) as compared to art 1(1) of Additional Protocol II.

105 Ibid.

106 *Lubanga* supra (n90) para 546.

107 Ibid.

108 cf *Lubanga* supra (n90) paras 546 and 506.

109 *Al Mahdi* supra (n93) para 2.

110 *Al Mahdi* supra (n93) para 13(4).

111 *Al Mahdi* supra (n93) para 17.

112 *Al Mahdi* supra (n93) para 49.

113 Ibid.

114 Ibid.

115 *Bemba* supra (n53) paras 1–2.

116 *Bemba* supra (n53) para 2.

117 *Bemba* supra (n53) paras 127–130.

118 *Bemba* supra (n53) paras 128, 131–132.

119 *Lubanga* supra (n90).

120 *Bemba* supra (n53); *Lubanga* supra (n90).

121 *Bemba* supra (n53) para 128.

122 *Bemba* supra (n53) para 128, citing *Tadic* supra (n12) para 70 (emphasis added).

123 *Bemba* supra (n53) paras 131–136.

124 Ibid.

125 *Bemba* supra (n53) para 132.

126 Ibid.

127 Ibid.

128 cf *Bemba* supra (n 53) para 132.

129 Ibid.

130 Ibid.

131 Ibid.

132 *Katanga* supra (n17) paras 671–684.

133 *Lubanga* supra (n90) paras 535–537.

134 cf *Bemba* supra (n53) 13; *Lubanga* supra (n90) 537; *Katanga* supra (n17) para 681; *Prosecutor v Milosevic* CaseNo IT-02-54-T, Trial Chamber decision on motion for judgment of acquittal, 16 June 2004, paras 23–24.

135 *Lubanga* supra (n90) 537.

136 Ibid.

137 *Bemba* supra (n53) 134.

138 Ibid.

139 *Bemba* supra (n53) paras 134–135.

140 *Bemba* supra (n53) para 135.

141 *Bemba* supra (n53) para 136.

142 Ibid.

143 Ibid.

144 Ibid.

145 Ibid.

146 Ibid. For the value of scholarly texts as a tool of interpretation, see S Sivakumaran 'The influence of teachings of publicists on the development of international law' (2017) 66 *Internat'l Comp L Q* 1–32.

147 *Ntaganda* supra (n37) paras 701–730.

148 *Ntaganda* supra (n37) paras 33 and 535.

149 *Ntaganda* supra (n37) para 701 (emphasis added).

150 Ibid.

151 Cf *Tadic* supra (n12) para 70.

152 *Ntaganda* supra (n37). See the Court's analysis in paras 701–715. No distinction is made between an art 8(2)(d) and (f)-type non-international armed conflict.

153 *Ntaganda* supra (n37) para 703.

154 *Ntaganda* supra (n37) See the Court's analysis in paras 701–715.

155 *Prosecutor v Boskoski and Tarculovski* Case No IT-04-82-A, Appeals Chamber, 19 May 2010 paras 19–24.  
156 *Bemba* Trial Judgment supra (n53) para 137.  
157 *Katanga* Judgment supra (n17) para 1187.  
158 *Lubanga* Trial Judgment supra (n90) para 538.  
159 *Ntaganda* supra (n37) para 716.  
160 *Ntaganda* supra (n37) paras 704–715.  
161 Geiss and Zimmerman (n17) 544–546; Cortier op cit (n24) 312–314.  
162 Ibid.  
163 Summary Records op cit (n66) 146 para 13, 169 para 102.  
164 Summary Records op cit (n66) 67 para 44.  
165 Cullen op cit (n7) 180–185; Rodenhäuser op cit (n9) 57–60.  
166 Cullen op cit (n7) 180–182.  
167 Ibid.  
168 Ibid. The phrase 'armed conflict not of an international character' is included in art 8(2)(c), (d), (e) and (f) of the Rome Statute supra (n1).  
169 Cullen op cit (n7) 180–185.  
170 See Cullen op cit (n7) 180–185, citing the following treaties: 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240–88 para 19(1); 1996 Protocol on Prohibition or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), art 1(3); 2001 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, art 1(3); 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 38 ILM (1999) 769–82 (Eng) art 22; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 NTS 609, art 1.  
171 See Cullen op cit (n7) 180–185.  
172 Ibid.  
173 Ibid.  
174 Ibid.  
175 Ibid.  
176 Ibid.  
177 Ibid.  
178 Ibid.  
179 Ibid.  
180 Op cit (n24)  
181 Ibid.  
182 Op cit n24)  
183 Schabas op cit (n17) 206.  
184 Rodenhäuser op cit (n9) 55.  
185 Rodenhäuser op cit (n9) 55.  
186 Ibid.  
187 Rodenhäuser op cit (n9) 55 and 56.  
188 Rodenhäuser op cit (n9) 56.  
189 Ibid.  
190 Ibid.  
191 Ibid.  
192 Ibid.  
193 Ibid.  
194 Ibid.  
195 Ibid.  
196 Ibid.  
197 Rodenhäuser op cit (n9) 56, citing M Bothe 'War crimes' in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 423.  
198 Rodenhäuser op cit (n9) 56.  
199 Rodenhäuser op cit (n9) 56–57.  
200 Ibid.  
201 Ibid.  
202 Rodenhäuser op cit (n9), citing *Lubanga* supra (n90) paras 543–546.  
203 The Court required only two of the four requirements listed under art 1(1) of Additional Protocol II.  
204 Rodenhäuser op cit (n9) 56–57.  
205 Ibid.  
206 Ibid.  
207 Ibid.

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