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The Rome Statute as Evidence of Customary International Law

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3 | War Crimes in Non-International Armed Conflict: Article 8 of the Rome Statute and Custom

3.1 INTRODUCTORY REMARKS

War crimes in the strict sense are violations of international humanitarian law that are criminalised under international law.¹ The main part of international humanitarian law is contained in 'Hague law' and 'Geneva law', named after the conventions that were adopted in those two cities. The primary rules applicable to non-international armed conflict are Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977. Apart from treaty law, customary law mostly codified in treaties is the other main source of international humanitarian law.

Although only a few conventions of international humanitarian law expressly incriminate violations of their rules as war crimes,² the definition of war crimes under international law was well developed after World War II. War crimes were explicitly provided in a series of treaty provisions, such as article 6 of the 1945 Nuremberg Charter, articles 2 and 3 of the 1993 Statute of the ICTY, and article 4 of the 1994 Statute of the ICTR, as well as article 8 of the Rome Statute. Article 8 of the Rome Statute includes war crimes committed in both international and non-international armed conflicts (also referred to as internal armed conflict).³ The definition of war crimes in article 8 is divided into four categories based on the nature of the armed conflict and the specific area of international humanitarian law. Articles 8(2)(c) and 8(2)(e) of the Rome Statute list serious violations of Common Article 3 of the 1949 Geneva Conventions and other serious violations of the laws and customs committed in the context of non-international armed conflict.⁴

1 The concept of war crimes is different from crimes occurred in or of war, see Georges Abi-Saab, 'The Concept of War Crimes' in S. Yee and T. Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (New York: Routledge 2001) 112-13; Michael Cottier, 'Article 8' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 304-05 and fn 1; Timothy McCormack, 'Crimes against Humanity' in D. McGoldrick *et al* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing 2004) 204-05.

2 Geneva Convention I, art 49; Geneva Convention II, art 51; Geneva Convention III, art 130; Geneva Convention IV, art 147; the 1977 Additional Protocol I, arts 11 and 85.

3 1998 Rome Statute, art 8.

4 *ibid.*, arts 8(2)(a) and (b).

This Chapter examines the relationship between articles 8(2)(c) and (e) of the Rome Statute and customary law with regard to the definition of war crimes committed in non-international armed conflict.⁵ Up to the early 1990s, the customary nature of war crimes in non-international armed conflict was controversial. In 1995, the Appeals Chamber of the ICTY in the *Tadić* decision on jurisdiction upheld, however, that war crimes can also be committed in non-international armed conflict, and that this reflects customary international law.⁶ At the present time, commentators agree that the rule of war crimes in non-international armed conflict is a part of customary law.⁷ For example, Rule 156 of the 2005 ICRC *Study* provides that ‘serious violations of international humanitarian law constitute war crimes, applicable in both international and non-international armed conflicts’.⁸

The central question here is whether articles 8(2)(c) and (e) were and are of a declaratory nature (reflection or crystallisation) of customary law in 1998 and at present with respect to war crimes in non-international armed conflict. For this purpose, section 3.2 interprets the texts of the Rome Statute to show whether articles 8(2)(c) and (e) are articulated as being declaratory of custom concerning war crimes in non-international armed conflict. Section 3.3 explores the development of war crimes trials and the concept of war crimes in armed conflict before and after World War II to show whether the definition of war crimes in non-international armed conflict under international law developed after World War II and before the 1998 Rome Conference. The 1949 Geneva Conventions, the 1977 Additional Protocol II, the two *Tadić* decisions on jurisdiction and the work of the International Law Commission on the Draft Code of Crimes are mainly discussed in section 3.3. Section 3.4 observes the drafting of the Rome Statute on the issue of war crimes in non-international armed conflict, in which positions of States and their statements at the Rome Conference are carefully explored. Further developments of war crimes in this context after the adoption of the Rome Statute are examined in section 3.5. Section 3.6 concludes with closing remarks based on this examination of the relationship between article 8 and custom on war crimes in non-international armed conflict.

5 *ibid*, art 8.

6 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 130-34.

7 JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II (New York: CUP 2005), Rule 156 and accompanying commentary; Robert Heinsch, ‘Commentary on Rule 84 “Individual Criminal Responsibility for War Crimes”’ in M.N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare* (2nd edn, Cambridge: CUP 2017) 392.

8 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I, Rule 156.

3.2 WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICT IN THE ROME STATUTE

The text of article 8 does not expressly address whether article 8 is declaratory of custom with respect to war crimes in non-international armed conflict. A further assessment of the Rome Statute helps to answer whether other provisions indicate a preliminary affirmation for article 8 as declaratory of custom. First, the Preamble of the Rome Statute provides that crimes in the jurisdiction of the ICC are 'grave crimes [that] threaten the peace, security and well-being of the world'.⁹ These crimes are 'the most serious crimes of concern to the international community as a whole' and 'must not go unpunished'.¹⁰ The notion of 'seriousness' is also reiterated in articles 8(2) (c) and (e) of the Rome Statute.¹¹ The wording of grave and serious crimes in the Preamble does not suggest that these crimes are in nature crimes under customary law rather than that these offences are widespread and heinous.¹²

In addition, the statement that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'¹³ suggests that normally States rather than international tribunals are obliged to prosecute international crimes, including war crimes. The ICJ once held that some international crimes give rise to the *erga omnes* nature of an obligation.¹⁴ However, the *erga omnes* obligation does not indicate the crime is of a customary status. The '*erga omnes*' status of an obligation may derive from crimes embedded in either treaty or custom.¹⁵ Thus, the duty to prosecute crimes in the Preamble of the Rome Statute does not indicate whether these crimes are exclusively crimes under customary law. Leena Grover also supports this view.¹⁶ The Preamble, therefore, does not assist in assessing whether articles 8(2)(c) and (e) were declaratory rules of custom concerning war crimes.

According to Grover, article 5 of the Statute (material jurisdiction) and the *jus cogens* nature of these crimes also suggest that article 8 may well be reflective of custom about war crimes.¹⁷ She concluded that crimes in the

9 1998 Rome Statute, Preamble, para 3.

10 *ibid*, para 4.

11 Elements of Crimes, in 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', ICC-ASP/1/3 and Corr.1, p 108, UN Doc PCNICC/2000/1/Add.2.

12 Margaret M. deGuzman, 'Gravity and Legitimacy of the International Criminal Court' (2008) 32 *Fordham Intl LJ* 1400.

13 1998 Rome Statute, Preamble, para 6.

14 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, [1970] ICJ Rep 3, 32, para 33.

15 Institut de Droit International, 'Obligations and rights *erga omnes* in international law', Resolution of the Fifth Commission (2005) (Rapporteur Giorgio Gaja), art 1; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 250.

16 *ibid*, 249-50.

17 *ibid*, 247-50.

Rome Statute might be reflective of customary law.¹⁸ Indeed, if the prohibition of war crimes is a rule of *jus cogens*, all individuals under customary law are prohibited from committing war crimes, and States cannot derogate from this rule by reserving the right to permit impugned conducts of war crimes. However, the *jus cogens* nature of war crimes does not inherently imply an obligation upon all States to prosecute war crimes.¹⁹ The gravity threshold, article 5 and the *jus cogens* nature of war crimes are evidence but not conclusive as to whether war crimes in non-international armed conflict and its underlying offences in the Statute were declaratory of custom. Other provisions of the Statute do not clarify whether these war crimes are declaratory of custom.²⁰ These findings also apply to crimes against humanity, discussed in the next chapter.

The text of article 8 and other rules of the Rome Statute only draw a frame for the picture of war crimes in non-international armed conflict as a mirror of custom in general. Detailed issues about the inclusion of war crimes in non-international armed conflict beg the question whether war crimes in non-international armed conflict were a restatement (codification) or crystallisation of custom at the Rome Conference. During the preparatory works for the 1998 Rome Statute of the International Criminal Court, representatives of States expressed their claims and acceptable options for the inclusion of war crimes in armed conflict in the Rome Statute.²¹ One issue fiercely debated was whether the concept of war crimes covers violations in non-international armed conflict. The majority of State representatives supported the inclusion of war crimes in non-international armed conflict;²² arguments to the contrary existed among a small group of States.²³

18 *ibid*, 220-344.

19 See a different view, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi', UN Doc A/CN.4/L.682 and Corr.1 (2006), paras 188-89; Leila N. Sadat and Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (1999) 88 *Geo LJ* 381, 409-10; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 250 arguing that these crimes in art 5 of the Rome Statute have 'the status of custom and even of *jus cogens* obligation'.

20 For a detailed analysis, see Grover, *ibid*, 246-70.

21 UN Doc A/CONF.183/2/Add.1 and Corr.1, UN Doc A/CONF.183/2/Add.1 and Corr.1, UN Doc A/CONF.183/C.1/L.1 and Corr.1, and UN Doc A/CONF.183/C.1/L.4; Mahnoosh Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22, 32.

22 UN Doc A/CONF.183/SR.7, 25 January 1997, pp 4-5 (Bangladesh); US, 'Statement by the US delegation to the Preparatory Committee on the Establishment of an International Criminal Court', 23 March 1998.

23 UN Doc A/CONF.183/C.1/SR.33, paras 33 (Syrian Arab Republic), 37 (India); UN Doc A/CONF.183/C.1/SR.34, para 48 (Turkey); UN Doc A/CONF.183/C.1/SR.35, paras 2, 4 (Egypt), 54 (Pakistan), 64 (Iraq); UN Doc A/CONF.183/C.1/SR.36, para 6 (Libya).

Some States continued to challenge the customary status of war crimes in non-international armed conflict.²⁴ These debates indicate that the answer is unclear. Issues of war crimes in non-international armed conflict under customary law before and during the adoption of the Rome Statute must be considered separately because this difference remains crucial for present and future national authorities in prosecuting war crimes committed in the past based on *ex post facto* laws.

3.3 WAR CRIMES IN ARMED CONFLICT

This section provides an historical overview of the concept of war crimes. For clarity of argument, this section covers three periods, first from 1919 to 1945, then from 1945 to 1949, and last from 1949 to the early 1990s. During the first two periods, war crimes in non-international armed conflict were not discussed. A short overview of war crimes trials in the first two periods intends to provide a background for understanding some arguments in the following sections of this Chapter and the following chapters.

3.3.1 Stocktaking of war crimes and war crimes trials: 1919-1945

The idea of prosecuting war crimes through international tribunals against large-scale atrocities has emerged mainly only after World War I,²⁵ although war crimes trials have been conducted by national authorities for a long time.²⁶ After World War I, the Preliminary Peace Conference of Paris established the Commission on Responsibilities of the Authors of the War and on Enforcement of Penalties (1919 Commission on Responsibilities) to inquire into 'the responsibilities relating to the war'.²⁷ The 1919 Commission on Responsibilities elaborated a list of 32 offences criminalising violations of

24 For example, China, see UN Doc A/CONF.183/C.1/SR.5, para 120; A/CONF.183/C.1/SR.25, para 36, UN Doc A/CONF.183/SR.9, para 38.

25 Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers 1996) 51; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge: CUP 2014) 266-68.

26 William A. Schabas, 'Atrocity Crimes (Genocide, Crimes against Humanity and War Crimes)' in W.A. Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge: CUP 2016) 208; M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Leiden: Brill 2013) 540-48; Anthony Cullen, 'War Crimes' in N. Bernaz and W.A. Schabas (eds), *Routledge Handbook of International Criminal Law* (London: Routledge 2011); Timothy McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in T. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Martinus Nijhoff Publishers 1997).

27 See Geo A. Finch, 'The Peace Conference of Paris, 1919' (1919) 13 *AJIL* 159, 168-71; United Nations War Crimes Commission (ed), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO 1948) [UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*] 34.

the laws and customs of law.²⁸ The list was not a text invention but reflected main facts at that time.²⁹ The idea of prosecuting individuals for war crimes was included under article 228 of the 1919 Treaty of Versailles.³⁰ In fact, there were trials of Germans accused of war crimes by the Allied national tribunals, but there was no extradition after the armistice. Meanwhile, few of the accused were tried for mistreating prisoners of war and murdering survivors of shipwrecks by the German Reichsgericht (Supreme Court) in Leipzig.³¹

The Report of the Commission on Responsibilities and article 228 evidenced that the Allies States attempted to prosecute individuals for war crimes at an international level. Nevertheless, it is uncertain whether they intended to pursue justice or only to achieve political ends by using justice. The US supported that persons should be punished for their violations of the laws and customs of war in national courts, instead of an international tribunal.³² From World War I to World War II, except for the ILA's effort to include war crimes as an international crime, not much constructive contribution to the definition of war crimes existed.³³ In 1926, the International Law Asso-

28 Commission on Responsibilities, 'Report on the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Presented to the Preliminary Peace Conference' reprinted in (1920) 14 *AJIL* 95 [Report of the Commission on Responsibilities], 114-15. The 32 offences are listed as follows: '(1) Murders and massacres; systematic terrorism; (2) Putting hostages to death; (3) Torture of civilians; (4) Deliberate starvation of civilians; (5) Rape; (6) Abduction of girls and women for the purpose of enforced prostitution; (7) Deportation of civilians; (8) Internment of civilians under inhuman conditions; (9) Forced labour of civilians in connection with the military operations of the enemy; (10) Usurpation of sovereignty during military occupation; (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory; (12) Attempts to denationalise the inhabitants of occupied territory; (13) Pillage; (14) Confiscation of property; (15) Exaction of illegitimate or of exorbitant contributions and requisitions; (16) Debasement of currency, and issue of spurious currency; (17) Imposition of collective penalty; (18) Wanton devastation and destruction of property; (19) Deliberate bombardment of undefended places; (20) Wanton destruction of religious, charitable, educational and historic buildings and monuments; (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew; (22) Destruction of fishing boats and of relief ships; (23) Deliberate bombardment of hospitals; (24) Attack on and destruction of hospital ships; (25) Breach of other rules relating to the Red Cross; (26) Use of deleterious and asphyxiating gases; (27) Use of explosive or expanding bullets, and other inhuman appliances; (28) Direction to give no quarter; (29) Ill-treatment of wounded and prisoners of war; (30) Employment of prisoners of war on unauthorised works; (31) Misuse of flags of truce; and (32) Poisoning of wells.'

29 Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 *JICJ* 657, 667-69.

30 Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, in 2 *Bevans* 43, p 137, art 228(1).

31 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 45-51; Bassiouni, *Introduction to International Criminal Law* 547-48.

32 Report of the Commission on Responsibilities, 127, 140-42.

33 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 45-51; William A. Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court' (2014) 25 *CLF* 171.

ciation (ILA) adopted a Draft Statute for a Permanent International Criminal Court, which suggested including 'violations of treaties, conventions or declarations regulating the methods of conduct of warfare and violations of the laws and customs of war' into the jurisdiction of that proposed court.³⁴ This definition of war crimes is quite open. During the period from 1919 to 1945, the notion of war crimes is mostly defined as 'violations of the laws and customs of law'. The wording 'crime' in the phrase 'war crimes' referred to the non-fulfilment of obligations under the law or 'violations' of law, instead of 'serious' violations of the laws at that time. The phrase 'war crimes' was not used in a technical legal sense but in a general sense.³⁵ This general definition constitutes the main substantive part of war crimes now. The notion of international prosecution of war crimes in non-international armed conflict was not considered in the period from 1919 to 1945.

3.3.2 War crimes trials after World War II: 1945-1949

The outcome of World War I practice was unsatisfactory, but it began a trend of trying individuals for violations of international law during a war. The first actual international prosecution of war crimes before international tribunals began after World War II.³⁶ The work of the United Nations War Crimes Commission (UN War Crimes Commission) paved the way for this.³⁷ In 1943, the Allied Powers established the UN War Crimes Commission to investigate and collect evidence of war crimes for further prosecutions at national courts.³⁸ The UN War Crimes Commission adopted a 'draft convention of a permanent United Nations War Crimes Court' (Draft Convention), relying on a draft statute prepared by Lawrence Preuss (Preuss Draft).³⁹ Article 1 of the Preuss Draft provided a list of offences constituting

34 Committee on Permanent International Criminal Court, 'Statute of the Court (as amended by the Conference)' in International Law Association Report of the 34th Conference (Vienna 1926) (ILA, London 1926) 118, art 21.

35 'Report of the International Law Commission', GAOR 51st Session Supp No 10, UN Doc A/51/10 (1996), para 50, p 54.

36 William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: CUP 2006) 226-27.

37 Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court'; Bassiouni, *Introduction to International Criminal Law* 549-51.

38 It was established by the meeting of the Allied and Dominions representatives held in London on 20 October 1943. The 'United Nations' in this Commission was unrelated to the present world body founded in 1945. The evidence collected by the United Nations War Crimes Commission was not relied upon by the later international tribunals, but by national prosecutions. See Bassiouni, *Introduction to International Criminal Law* 549-51.

39 'Draft Convention on the Trial and Punishment of War Criminals', II/11 (14 April 1944); Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court', 175-76; 'Minutes of Thirty-third Meeting' (26 September 1944), M. 33 (corrected text), 6; 'Draft Convention for the Establishment of a United Nations War Crimes Court' (30 September 1944), C. 50(1).

war crimes with 15 offences.⁴⁰ By contrast, the UN War Crimes Commission dropped the list so as to 'give the [UN War Crimes] Court the necessary latitude of action to carry out the intention of the Allied governments' to prosecute Germans.⁴¹ It seems that it did not aim to provide a detailed enumeration of war crimes.

The Preamble and article 1 of the Draft Convention restricted jurisdiction to war crimes committed by the enemies.⁴² Some States were worried about the risk of prosecuting offences committed by the Allied parties.⁴³ The London Conference involving the UK, the US, France and the Union of Soviet Socialist Republics (USSR) had been advocating the establishment of the international military tribunal since late June 1945.⁴⁴ Aiming to prosecute and punish German major war criminals of the European Axis in World War II,⁴⁵ governments of the four States adopted the London Agreement, to which they annexed the Nuremberg Charter, on 8 August 1945.⁴⁶ Other States as main contributors to the work of the UN War Crimes Commission were excluded from the negotiation of the London Agreement, but they finally acceded to this Agreement.⁴⁷ In accordance with the London Agreement, the International Military Tribunal (IMT) was established, and the Nuremberg Charter set out the IMT's constitution, jurisdiction, and function.⁴⁸

40 These offences were murder or massacre, rape, enforced prosecution, terrorisation, wanton devastation, other serious acts, which by reason of their atrocious character, their ruthless disregard of the sanctity of human life and personality or their wanton interference with rights of property, are unrelated to reasonably conceived requirements of military necessity.

41 'Explanatory Memorandum to Accompany the Draft Convention for the Establishment of a United Nations War Crimes Court' (6 October 1944), C. 58.

42 'Draft Convention for the Establishment of a United Nations War Crimes Court' (30 September 1944), C. 50(1).

43 William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: OUP 2012) 74-75.

44 *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: USGPO 1949).

45 The Moscow Declaration on General Security, Joint Four-Nation Declaration, 30 October 1943.

46 Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 UNTS 280 [London Agreement]; Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 UNTS 284 [Nuremberg Charter].

47 Greece, Denmark, Yugoslavia, Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay. See *France et al v Göring et al*, Judgement and Sentence of the Nuremberg International Military Tribunals, in *Trial of the Major War Criminals before the International Military Tribunals: Nuremberg, 14 November 1945-1 October 1946* (Blue Series) (Nuremberg: International Military Tribunal 1947), (1948) 1 TMWC 171, (1946) 41 AJIL 172 [*France et al v Göring et al*, (1948) 1 TMWC 171].

48 London Agreement, art 2; Nuremberg Charter; *France et al v Göring et al*, Preliminary Hearing (14-15, 17 November 1945, in Berlin), (1948) 2 TMWC 1, pp 1-27.

According to article 6(b) of the Nuremberg Charter the IMT had jurisdiction over:

War crimes: *namely*, violations of the laws or customs of war. Such violations shall include, *but not be limited to*, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁴⁹

Article 6(b) defined war crimes with a non-exhaustive catalogue and from a general aspect of actions that violate ‘the laws or customs of war’. The IMT held that ‘[t]his law [of war] is not static, but by continual adaptation follows the needs of a changing world.’⁵⁰ The UN Secretary-General commented that

Any enumeration or exemplification of particular war crimes [...] seems to be [...] of rather limited value for the future. Such a catalogue may be an adequate expression of the present situation [...].⁵¹

In this way, the Nuremberg Charter left the door open for further development. In the IMT, 18 of 24 individuals were indicted for war crimes, and 16 of the 18 indicted were convicted of war crimes.⁵²

Based on the Tokyo Charter, the Tokyo International Military Tribunal for the Far East (IMTFE) was established to try Japanese officials.⁵³ Article 5(b) of the Tokyo Charter stipulated that the IMTFE had jurisdiction over ‘conventional war crimes: namely, violations of the laws or customs of war’.⁵⁴ Article 5(b) did not specify what and the extent to which acts constituted violations of laws of war leading to criminalisation.⁵⁵ In addition, the IMTFE was required to establish a connection between war crimes and crimes against peace in exercising jurisdiction over war crimes. This jurisdictional requirement, instead of a legal element of war crimes, limited the suspects prosecuted in the Tribunal to major war criminals. The IMTFE

49 Italics by the author.

50 *France et al v Göring et al*, (1948) 1 TMWC 171, p 221.

51 ‘The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General’, UN Doc A/CN.4/5 (1949), pp 62-63.

52 *France et al v Göring et al*, (1948) 1 TMWC 171; Bassiouni, *Crimes against Humanity* 154.

53 Charter of the International Military Tribunal for the Far East, 19 January 1946, as amended on 26 April 1946, in 4 Bevens 21 [Tokyo Charter].

54 Tokyo Charter, art 5.

55 *France et al v Göring et al*, (1948) 1 TMWC 171, p 221; UN Doc A/CN.4/5 (1949), p 51.

found seven of 28 Japanese individuals guilty of conventional war crimes.⁵⁶ The Dutch Judge Röling argued that three defendants had been wrongfully acquitted of some charges of war crimes,⁵⁷ while another two should have been convicted of war crimes.⁵⁸

A number of national trials also took place.⁵⁹ From 1946 to 1949, the Nuremberg Military Tribunals (the NMTs) held 12 trials (Subsequent Proceedings)⁶⁰ in Germany in accordance with Control Council Law No. 10.⁶¹ The definition of war crimes in Control Council Law No. 10 is substantively consistent with that in the Nuremberg Charter.⁶² In addition, some other States also prosecuted suspects of war crimes committed during World War II.⁶³ Australia, China, the US, the USSR, the UK, the Philippines and the Netherlands (Indonesia) were all involved in war crimes trials.⁶⁴ There

56 *US et al v Araki et al*, Judgment, in United Nations War Crimes Commission (ed), *Transcripts of Proceedings and Documents of the International Military Tribunals for the Far East (Tokyo Trials): Judgment [US et al v Araki et al, Judgment]*, verdicts, pp 1145-211. Two individuals were dead during the proceeding for diseases. One charge was dropped because the accused was found mentally unfit for trial. The seven defendants were Kōki Hirota, Akira Mutō, Heitarō Kimura, Seishirō Itaganki, Iwane Matsui, Kenji Dohihara and Hideki Tōjō.

57 The three defendants were Takasumi Oka, Kenryo Stato and Shigetaro Shimada.

58 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP 2005) 45. *US et al v Araki et al*, Dissenting Opinion of Judge Röling, pp 178-249. The two defendants were Mamoru Shigemitsu and Kōki Hirota.

59 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*, 522-24; United States et al, 'Report of the Deputy Judge Advocate for War Crimes, European Command June 1944 to July 1948' (War Crimes Division, Office of the Judge Advocate General, 1948) concerning German and other Axis individuals, there were practices of charging, prosecuting or trying at Separate locations, in and outside German.

60 *US v Brandt* [Medical case], *US v Milch* [Milch case], *US v Altstötter* [Justice case], *US v Pohl* [Pohl case], *US v Flick* [Flick case], *US v Krauch* [I.G. Farben case], *US v List* [Hostage case], *US v Greifelt* [RuSHA case], *US v Ohlendorf* [Einsatzgruppen case], *US v Krupp* [Krupp case], *US v von Weizaecker* [Ministries case], *US v von Leeb* [High Command case], in *Trials of the War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* [TWC] (Washington, DC: USGPO 1946-1949).

61 Control Council Law No. 10, 'Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity', enacted by the Allied Control Council of German, in Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10* (Washington, DC: USGPO 1949) 6. For detailed analysis of these trials, see Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: OUP 2011).

62 Control Council Law No. 10, art II.

63 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*; *R v Finta* (Judgment, Supreme Court), [1994] 1 SCR 701; *Advocate General v Klaus Barbie* (Judgment, Court of Cassation, France), (1985) 78 ILR 124; *Polyukhovich v The Commonwealth of Australia and Anor* (Order, High Court), (1991) 172 CLR 501; *Public Prosecutor v Menten* (Judgment, Supreme Court), (1981) 75 ILR 331; *R v Sawoniuk* (Judgment), [2000] EWCA Crim 9 (10 February 2000).

64 See S. Linton (ed), *Hong Kong's War Crimes Trials* (Oxford: OUP 2013); K. Sellars, *Trials for International Crimes in Asia* (Cambridge: CUP 2016); G. Fitzpatrick, T. McCormack and N. Morris (eds), *Australia's War Crimes Trials 1945-51* (Leiden: Brill 2016); Fred L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946-1949* (Oxford: OUP 2017).

were proceedings in the Asia Pacific region, including war crimes trials at Yokohama.⁶⁵ Many suspected war criminals were accused of or found guilty of ordering or perpetrating 'conventional war crimes' in these national tribunals.⁶⁶ These post-World War II trials leave much legacy for the latter UN *ad hoc* tribunals and the ICC,⁶⁷ despite criticism of their procedures.⁶⁸

One point deserves attention with respect to war crimes. Despite debates about retroactive prosecution over other crimes, war crimes as international crimes in the jurisdiction of the IMT was well supported.⁶⁹ It is accepted that the Nuremberg Charter contributed to the formation of customary international law and it forms part of contemporary customary law.⁷⁰ The following international instruments and subsequent case law also confirmed that the Nuremberg Charter was an established part of international law.⁷¹ A unanimously adopted General Assembly resolution, 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal'

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- 65 *Yamashita v United States of America*, [1946] USSC 27, (1948) 4 LRTWC 1; *Prosecutor v Eisentrager et al* (Judgment, Military Commission, the US), (1949) 14 LRTWC 8. For a table of war crimes trials in the Far East, see P. Post *et al* (eds), *The Encyclopedia of Indonesia in the Pacific War* (Leiden: Brill 2010) 409.
- 66 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*; Philip Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (Austin: University of Texas Press 2013).
- 67 David Luban, 'The Legacies of Nuremberg' (1987) 54 *Social Research* 779; George Ginsburgs and Vladimir N. Kudriavtsev, *The Nuremberg Trial and International Law* (The Hague: Martinus Nijhoff Publishers 1990); Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *JICJ* 830; Antonio Cassese, 'Introductory Note', UN Audiovisual Library of International Law, Historical Archives.
- 68 Bassiouni, *Introduction to International Criminal Law* 556; Ginsburgs and Kudriavtsev, *The Nuremberg Trial and International Law*; Telford Taylor, 'The Nuremberg Trials' (1955) 55 *Columbia L Rev* 488; Hans Ehard, 'The Nuremberg Trial against the Major War Criminals and International Law' (1949) 43 *AJIL* 223.
- 69 For debates, see *France et al v Göring et al*, (1948) 1 TMWC 171, pp 218-20; 'Summary record of the 44th meeting of the 2nd session', UN Doc A/CN.4/SR.44 (1950), paras 71, 72, 77, 79; Josef L. Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 662, 669; Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 123-24. For support, see Lord Wright, 'War Crimes under International Law' (1946) 62 *LQR* 40, 41; 'Minutes of Conference Session of July 19, 1945' and 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 296 (Professor André Gros), 331 (Justice Robert H. Jackson).
- 70 'Universal Declaration of Human Rights', GA Res 217 (III) A (1948), UN Doc A/RES/217 (III) A; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 5 November 1950, 3 September 1953, 213 UNTS 221, art 7(2); UN Doc S/25704 (1993), para 35; *Tadić* Appeals Chamber Decision on Jurisdiction, para 141.
- 71 *Justice case*, (1948) 3 TWC 3, p 966; *Attorney General v Eichmann* (Appeal Judgment, Supreme Court, Israel), 29 May 1962, (1968) 36 ILR 277, para 11; *Prosecutor v Erdemović* (Joint Separate Opinion of Judge McDonald and Judge Vohrah) ICTY-96-22-A (7 October 1997), para 51; *Tadić* Appeals Chamber Judgment, para 289; 'Summary record of the Fifty-Fourth Meeting', UN Doc E/CN.4/SR.54 (1948), 13; *Kononov v Latvia* (Judgment, Merits and Just Satisfaction, Third Section) ECtHR Application No. 36376/04 (24 July 2008), para 115(b); William A. Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 *JICJ* 609, 609-10; William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: OUP 2015).

(1946 GA Resolution) directly confirmed that a war crime is an international crime.⁷² William Schabas argued that by referring to ‘international law’ in article 11 of the 1948 Universal Declaration of Human Rights,⁷³ debates about the rule against non-retroactivity in article 11 indicate States’ recognition of the legitimacy of the IMT judgment and the Subsequent Proceedings.⁷⁴ War crimes embedded in the 1950 Nuremberg Principles, which was adopted by the ILC,⁷⁵ are part of the corpus of customary law now.⁷⁶

In a nutshell, the notion of war crimes has been well recognised in international law. Nevertheless, similar to the period after World War I, issues about war crimes in non-international armed conflict were not raised during the discussions in the IMT and IMTFE judgments as well as these subsequent international instruments, including the 1950 Nuremberg Principles.⁷⁷

3.3.3 Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977: 1949–early 1990s

During the timeframe from 1949 to the early 1990s, the four 1949 Geneva Conventions and their two 1977 Additional Protocols further developed the definition of war crimes.⁷⁸ The 1960 ICRC Commentary wrote that ‘[t]he Geneva Conventions form part of what are generally known as the laws and customs of war, violations of which are commonly called “war crimes”’.⁷⁹ This subsection first briefly examines Common Article 3 of the 1949 Geneva Conventions and then introduces article 6 of Additional Protocol II in non-international armed conflict.

72 ‘Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal’, GA Res 95 (I) (1946), UN Doc A/RES/95 (I).

73 UN Doc A/RES/217 (III) A.

74 ‘Summary record of the Hundred and Fifteenth Meeting [of the Third Committee]’ (28 October 1948), UN Doc A/C.3/SR.115; ‘Summary record of the Hundred and Sixteenth Meeting [of the Third Committee]’ (29 October 1948), UN Doc A/C.3/SR.116; ‘Summary record of the Fifty-Fourth Meeting’ (10 June 1948), UN Doc E/CN.4/SR.54, p 13. See W.A. Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge: CUP 2013) 2369-78, 2380-90.

75 The ILC was not established at that time, but the establishment of it had been recommended by a drafting-committee of its predecessor, Committee on the Progressive Development of International Law and its Codification to the General Assembly. See ‘Report of the Committee on the plans for the formulation of the principles of the Nuremberg Charter and judgment’ (17 June 1947), UN Doc A/AC.10/52 (1947), para 2; UN Doc A/RES/94 (I) (1946).

76 Cassese, ‘Introductory Note’, pp 6-7.

77 For discussions of war crimes, see ‘Summary record of the 49th meeting of the 2nd session’, UN Doc A/CN.4/SR.49 (1950), paras 2, 15.

78 Geneva Convention I, arts 49 and 50; Geneva Convention II, arts 51 and 52; Geneva Convention III, arts 130 and 131; and Geneva Convention IV, arts 147 and 148. See Cullen, ‘War Crimes’; Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*.

79 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol II (Geneva: ICRC 1960) 261.

3.3.3.1 Common Article 3 of the Geneva Conventions

Common Article 3 of the 1949 Geneva Conventions concerns the application of principles of the Geneva Conventions to non-international armed conflicts. Common Article 3 prohibits the following acts against protected persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.⁸⁰

This provision was the only provision in the Geneva Conventions that dealt with the protection of persons as human beings rather than as combatants in non-international armed conflict.⁸¹ Common Article 3 applies to both kinds of armed conflicts because this 'minimum requirement of humanitarian guarantees in the case of a non-international armed conflict is a *fortiori* applicable in international conflicts'.⁸²

However, Common Article 3 does not include an enforcement mechanism by prosecuting violations of it as war crimes in international law.⁸³ At the 1949 Geneva Conference, there was no discussion on violations of Common Article 3 as war crimes.⁸⁴ Common Article 3 was finally adopted with the compromise that:

It makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity [...]. Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; [...]; it does not in any way affect its [the Government's] right to prosecute, try and sentence its adversaries for their crimes, according to its own laws.⁸⁵

The parties to a non-international armed conflict are neither obliged nor entitled by Common Article 3 to punish violations of Common Article 3 as 'war crimes' at the international level at that time. Rather, Common Article 3

80 1949 Geneva Conventions, Common Article 3.

81 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol I (Geneva: ICRC 1952) 48.

82 *Military and Paramilitary Activities* Judgment 114, para 218; Jean de Preux, *Commentary on the Geneva Conventions of 12 August 1949*, Vol III (Geneva: ICRC 1960) 16.

83 Lindsey Cameron et al, 'Article 3-Conflicts not of an international character' in ICRC (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: CUP 2016), para 520.

84 Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-B.

85 Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol I, 60-61.

simply recognises the competency of a State Party to punish rebels and soldiers' violations as crimes at the national level 'according to its own laws'.⁸⁶

At that time, the grave breaches regime of the Geneva Conventions was the only category of war crimes recognised at the international level, which is one of four categories of war crimes now.⁸⁷ In addition, the idea of extending the grave breaches regime to non-international armed conflict was not envisaged by the 1949 Conference.⁸⁸ As Sandesh Sivakumaran observed, although the majority of States favoured the extension of regulation to non-international armed conflict, 'a number of States took the view that civil wars should not be regulated through international law'.⁸⁹ It is inconclusive to argue that those States supporting regulation of civil wars had considered the criminalisation of violations of Common Article 3 as war crimes.⁹⁰

To sum up, at the 1949 Geneva Conference, States Parties had not recognised such violations in non-international armed conflict as war crimes. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity simply referred to the definition of war crimes committed in international armed conflict in the Nuremberg Charter.⁹¹ There was no further development about war crimes in non-international armed conflict in international law in that period, despite many conflicts at that time.

3.3.3.2 *Additional Protocol II of 1977*

The 1977 Additional Protocol II, according to its article 1(1), covers the applicable humanitarian law in non-international armed conflict. The following paragraph discusses whether the notion of war crimes was recognised in Protocol II. Article 6 of Additional Protocol II deals with 'penal prosecution'. Article 6(1) provides the scope of the application of article 6 to the trial of 'criminal offences related to the armed conflict'. Article 6(5) of Protocol II

86 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, Rule 157; Cameron *et al*, 'Article 3', para 528.

87 Jean-Marie Henckaerts and Heike Niebergall-Lackner, 'Introduction' in ICRC (ed), *Commentary on the First Geneva Convention*, paras 1, 11.

88 'Fourth Report drawn up by the Special Committee of the Joint Committee' in *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B, pp 114-18; *Tadić Appeals Chamber Decision on Jurisdiction*, paras 79-81, 84. But see 'Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v Tadić*, 17 July 1995 (Case No. IT-94-1-T)', p 35; *Tadić Appeals Chamber Decision on Jurisdiction*, para 83.

89 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP: Oxford 2012) 40-41.

90 'Prosecutor's Response to the Defence's Motions filed on 23 June 1995' (7 July 1995), 44-47; The 2016 *Commentary on the First Geneva Convention* confirmed this interpretation.

91 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, 11 November 1970, 754 UNTS 73.

concerns amnesty. It reads that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' Meanwhile, according to Rule 159 of the 2005 ICRC *Study*,

At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.⁹²

By referring to article 6(5) to support Rule 159, the ICRC *Study* appears to interpret article 6(5) in such a way that amnesty does not apply to war crimes committed in non-international armed conflict.⁹³ This interpretation is contestable.⁹⁴ If States Parties had not recognised serious violations in non-international armed conflict as war crimes in the text of Additional Protocol II, how could they deem war crimes in this context as an exception to amnesty?

The text of article 6 does not stipulate war crimes. It seems that drafters of Additional Protocol II also did not aim to include war crimes in non-international armed conflict in international law.⁹⁵ Article 6(2)(c) of Additional Protocol II confirms the non-retroactivity principle under 'the law' that 'no one shall be held guilty of any criminal offence [...] which did not constitute a criminal offence, under the law, at the time when it was committed'. The French text of the phrase 'the law' in article 6(2)(c) refers to 'national or international law'.⁹⁶ What criminal offences in international law were in the mind of the drafters? The commentary to article 6(2)(c) explained that 'the reference to international law is mainly intended to cover crimes against humanity'.⁹⁷ There was no mention of war crimes. The drafters did not address whether the notion of war crimes in non-international armed conflict is recognised in international law. They did not recognise or deny the authorisation of amnesty to war crimes in non-international armed con-

92 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, Rule 159.

93 *ibid.*

94 Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel Ybk HR* 103, 133-34.

95 Schabas, *Unimaginable Atrocities* 180.

96 See also Amendment to art 10(1)(d), 'Belgium, Netherlands, New Zealand' (24 March 1975), CDDH/1/262, in 'Official Records of the Diplomatic Conference in Geneva (1974-1977), Vol IV', p 35; C. Pilloud *et al* (eds), *Commentary on the Additional Protocol: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (The Hague: Martinus Nijhoff Publishers 1987) § 4606.

97 Pilloud *et al* (eds), *ibid.*, § 4607; 'Summary Record of Committee I, Second Session, 33rd meeting' (20 March 1975), in 'Official Records of the Diplomatic Conference in Geneva (1974-1977), Vol VIII', CDDH/1/SR.33, para 26.

flict.⁹⁸ In fact, during the 1974-1977 negotiations, war crimes for violations of Protocol II were discussed but never recognised. States intended to avoid interference in their sovereign right to punish individuals' taking part in hostilities. ⁹⁹ Article 6(2), thus, was irrelevant to the issue of war crimes in non-international armed conflict at that time.¹⁰⁰

As cited above, article 6(5) of Additional Protocol II concerns the granting of amnesty. According to articles 6(1) and (5), State authorities should grant an amnesty to persons who have 'participated in the armed conflict', been 'deprived of liberty for reasons related to the armed conflict', or committed other offences related to non-international armed conflict. In fact, article 6(5) aimed to promote the peace and development of a State rather than justice through prosecution of national offences or war crimes.¹⁰¹ Some States considered the amnesty provision as interference and limitation of their sovereignty.¹⁰² They also gave further explanations and considered article 6(5) as a recommendation.¹⁰³ As Canada's military manual (2001) notes,

When AP II [the 1977 Additional Protocol II] was adopted, states refused to make violations of its provisions regarding criminal offences. Certain nations were reluctant to allow other states to interfere in their internal affairs by way of trials for war crimes alleged to have taken place in their national territory.¹⁰⁴

Given the reluctance of States Parties to recognise rebels as combatants, individuals participating in civil wars against the government, regardless of whether they comply with international humanitarian law, may be prosecuted for national offences in national law, for instance, crimes of rebellion,

98 'Amendment to Article 10, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Democratic Republic of Viet Nam, German Democratic Republic, Hungary, Mongolia, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics' (24 March 1975), CDDH/I/260, in 'Official Records of the Diplomatic Conference in Geneva (1974-1977), Vol IV', p 34.

99 'Summary Record of Committee I, Second Session, 34th meeting' (20 March 1975), in *ibid*, Vol VIII, CDDH/I/SR.34, paras 7 (ICRC), 13 (India), 15 (Sweden), 17 (Pakistan), 34 (Mongolia); 'Amendment to Article 10, Sweden' (24 March 1975), CDDH/I/261, in *ibid*, Vol IV, p 35. There was no discussion on this issue in the plenary meeting, see 'Summary record of the 50th plenary meeting', and 'Annex-Explanations of vote', CDDH/SR.50, in *ibid*, Vol VII, paras 56-102.

100 Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78, 80; 'The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)' (27 May 1994), UN Doc S/1994/674, annex, para 42.

101 Pilloud *et al* (eds), *Commentary on the Additional Protocols*, § 4618.

102 'Summary record of the 50th plenary meeting', and 'Annex-Explanations of vote', CDDH/SR.50, Nigeria, Spain. See also CDDH/I/SR.34, para 21 (Nigeria).

103 For instance, CDDH/SR.50, *ibid*, paras 70 (Nigeria), 73 (Syria), 78 (Saudi Arabia), 79 (Canada), Explanations of Saudi Arabia, Spain, Zaire.

104 Canada, Law of Armed Conflict at the Operational and Tactical Levels 2001, § 1725.1 'Breaches of Protocol II'. See also Rüdiger Wolfrum, 'Enforcement of International Humanitarian Law' in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: OUP 1995) 524.

rather than war crimes in international law. Thus, the idea of war crimes in non-international armed conflict was not covered under article 6(5) at that time.

In short, the notion of war crimes in non-international armed conflict was not envisaged in article 6 of Additional Protocol II. Article 6(5) does not reveal the idea that war crimes committed in this context was accepted in international law at that time.

3.3.3.3 Summary

The above observation reveals that States did not recognise war crimes in non-international armed conflict in Common Article 3 of 1949 Geneva Conventions or 1977 Additional Protocol II. Common Article 3 did not criminalise violations of the law of war in non-international armed conflict as war crimes. The concept of war crimes in non-international armed conflict was not well developed in 1977. During this period, States did not contemplate treating serious violations in non-international armed conflict as war crimes, and they seldom prosecuted serious violations of Common Article 3 at the national level.¹⁰⁵ Even in the early 1990s, a legal adviser to the ICRC pointed out that ‘international humanitarian law applicable to non-international armed conflict does not provide for international penal responsibility of persons guilty of violations’.¹⁰⁶ In international law, no sign indicated a shift to criminalise offences committed in non-international armed conflict as war crimes until the establishment of the two UN *ad hoc* tribunals.

3.3.4 Shifts since the establishment of the two UN *ad hoc* tribunals: 1993–1996

Concerning the two UN *ad hoc* tribunals, this subsection first examines the Statutes of the two tribunals and then considers the *Tadić* Appeals Chamber Decision on Jurisdiction as well as certain shifts subsequent to this decision.

3.3.4.1 Statutes of the two UN *ad hoc* tribunals

The ICTY Statute does not use the term ‘war crimes’. However, its article 2 refers to ‘grave breaches’ of the four Geneva Conventions, and its article 3 provides for ‘violations of the laws or customs of war’.¹⁰⁷ The preparatory process of the two UN *ad hoc* tribunals’ Statutes appears to show that no consensus existed among States concerning war crimes in non-international armed conflict.

105 Laura Perna, *The Formation of the Treaty Rules Applicable in Non-International Armed Conflicts* (The Hague: Brill | Nijhoff 2006) 139-43, on the absence of domestic prosecutions for serious violations of Common Article 3.

106 Denise Planner, ‘The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts’ (1990) 30 *IRRC* 409, 414.

107 1993 ICTY Statute, art 3.

First, drafters for the ICTY Statute in the UN Secretariat did not distinguish war crimes in international armed conflict from offences committed in non-international armed conflict.¹⁰⁸ The Secretary-General commented that 'the laws or customs of war' included the 1907 Hague Convention (IV) and its Annex as well as the Hague Regulations. He added that 'war crimes defined in the Nuremberg Charter were already recognised as war crimes under international law'.¹⁰⁹

However, some States expressed a different view about the term 'the laws or customs of war' in article 3 of the ICTY Statute at the UN Security Council debate. France, the US and the UK gave an interpretative clarification of this term to cover all applicable international conventions.¹¹⁰ Representatives of the US commented to the Security Council:

[...] it is understood that the 'laws or customs of war' referred to in Article 3 [of the ICTY Statute] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to those Conventions.¹¹¹

The US delegation noted that 'other members of the [Security] Council share our view regarding the [...] clarifications related to the Statute'.¹¹² This interpretative statement indicates that some member States of the Security Council intended to include all applicable 'humanitarian law agreements', including Common Article 3 and the Additional Protocols.

The absence of protest by other States also showed the implicit willingness of the Security Council to criminalise serious violations in non-international armed conflict. The Security Council continually asserted that individuals would be held responsible for serious violations of international humanitarian law in non-international armed conflict, such as on the occasions of armed conflicts in Afghanistan, Somalia and Rwanda.¹¹³ The call for the creation of the Commission of Inquiry further confirmed the Security Council's aim to criminalise serious violations in non-international armed conflict.¹¹⁴

108 UN Doc S/25704 (1993), para 62.

109 *ibid*, paras 41-43, 62.

110 Security Council, 'Provisional Verbatim Record of the 3217th meeting' (25 May 1993), UN Doc S/PV. 3217, pp 11 (France), 15 (US), 19 (UK).

111 *ibid*, p 15 (US).

112 *ibid*.

113 UN Doc S/PRST/1994/12; UN Doc S/RES/794 (1992), para 5; UN Doc S/RES/814 (1993), para 13; UN Doc S/RES/935 (1994). For other resolutions in the Security Council and the General Assembly, see Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, Rule 151, p 554 and fn 15.

114 For a detailed analysis, see *Tadić* Appeals Chamber Decision on Jurisdiction, paras 72-78; Djamchid Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *YIHL* 177.

A Commission of Experts made a distinction between international and non-international armed conflict. The Commission of Experts, chaired by Frits Kalshoven and later by Cherif Bassiouni,¹¹⁵ was set up in 1992 by the Security Council to investigate violations of international humanitarian law in the former Yugoslavia.¹¹⁶ In its 1994 Report, the Commission of Experts stated that:

[...] unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification. [...] It is probable that common article 3 would be viewed as a statement of customary international law, but unlikely that the other instruments would be so viewed. In particular, there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes.¹¹⁷

In addition, '[i]t must be observed that the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal [the ICTY] are offences when committed in international, but not in internal [,] armed conflicts.'¹¹⁸ The statements show that according to the Commission of Experts, war crimes in non-international armed conflict may be a treaty-based crime, while article 3 of the ICTY Statute is confined to violations committed in international armed conflict. This Report shared the view of Theodor Meron, who wrote in 1993 that:

Were any part of the former Yugoslav conflict deemed internal rather than international, the perpetrators of even the worst atrocities could not be prosecuted for grave breaches or war crimes but only for the crime of genocide, which is much more difficult to establish, and for crimes against humanity.¹¹⁹

Article 4 of the ICTR Statute is the first provision that expressly criminalised violations of Additional Protocol II of 1977 and Common Article 3 in non-international armed conflict.¹²⁰ The UN Secretary-General commented that the Security Council incorporated article 4 into the Statute because the

115 'Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council' (27 May 1994), UN Doc S/1994/674, para 2.

116 UN SC Res 780 (1992), UN Doc S/RES/780 (1992), para 2; 'Secretary-General Report on the establishment of the Commission of Experts submitted to the Security Council' (14 October 1992), UN Doc S/24657 (1992).

117 'The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)' (27 May 1994), UN Doc S/1994/674, annex, paras 42, 52.

118 *ibid*, para 54.

119 Theodor Meron, 'The Case for War Crimes Trials in Yugoslavia' (1993) 72 *Foreign Affairs* 122, 128; repeated in Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78, 80.

120 'Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994)' (13 February 1995), UN Doc S/1995/134, para 12; Larissa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (The Hague: Martinus Nijhoff 2005) 205.

Rwanda conflict in nature was a non-international armed conflict.¹²¹ The Secretary-General also admitted the progressive innovation of article 4 criminalising serious violations in non-international armed conflict as war crimes. He noted that as opposed to the ICTY Statute, 'the Security Council took a more expansive approach to include the applicable law and international instruments [namely, Additional Protocol II and Common Article 3 to the Geneva Conventions] [...] regardless of whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime'.¹²² The explanatory statement of this paragraph cited added that:

Although the question of whether common article 3 entails the individual responsibility of the perpetrator of the crime [war crimes] is still debatable, some of the crimes included therein, when committed against the civilian population, also constitute crimes against humanity and as such are customarily recognised as entailing the criminal responsibility of the individual.¹²³

The Secretary-General, thus, acknowledged that the Security Council adopted an 'expansive approach' by including violations of Additional Protocol II and Common Article 3.

The observation indicated that the Security Council as well as States at the Council supported prosecuting individuals for violations in non-international armed conflict. The US in its interpretative statement, however, did not clarify whether serious violations in non-international armed conflict constitute war crimes or crimes against humanity. It is also unclear whether other States considered 'war crimes in non-international armed conflict' when they in Security Council meetings or other fora addressed individual responsibility for violations of international humanitarian law in non-international armed conflict.¹²⁴ These practices, therefore, do not demonstrate the strong acceptance of a customary rule criminalising these violations as war crimes at that time. Also, the establishment of the two UN *ad hoc* tribunals by the Security Council is not an explicit articulation of concession of the sovereignty of the community of nations about war crimes.¹²⁵ The Secretary-General was doubtful whether violations of Common Article 3 in non-international armed conflict entail individual criminal responsibility for 'war crimes'.

121 UN Doc S/1995/134, para 11.

122 *ibid*, para 12.

123 *ibid*, para 12 and fn 8.

124 France, 'Minister of State and Minister of Foreign Affairs, Letter dated 16 January 1993 to the Procurator-General of the Court of Cassation and Chairman of the Committee of French Jurists, annexed to Letter dated 10 February 1993 to the UN Secretary-General', UN Doc S/25266 (10 February 1993) p 52; Statement before the UN Security Council, UN Doc S/PV.3217 (Provisional) (1993), pp 20 (Hungary), 25(France); UN Doc S/PV.3400 (1994), p 8 (UK); UN Doc S/PV.3692 (1996), pp 12 (South Africa), 21(Indonesia); Ethiopia, 'Transitional Government, Statement by the Chief Special Prosecutor before the UN Commission on Human Rights' (17 February 1994), UN Doc E/CN.4/1994/SR.28, para 2.

125 Bassiouni, *Introduction to International Criminal Law* 535-36.

In light of these divergent positions, it is less convincing to conclude that the UN Security Council and the Secretary-General intended to confirm a pre-existing customary rule of war crimes in non-international armed conflict.

3.3.4.2 *Tadić Appeals Chamber decision on jurisdiction*

Article 4 of the ICTR Statute first criminalised violations in non-international armed conflict,¹²⁶ whereas it is generally argued that the ICTY in the 1995 *Tadić* jurisdiction decision for the first time addressed war crimes in non-international armed conflict. Similar to the idea of expanding article 3 of the ICTY Statute advanced by the US, the ICTY progressively departed from the restrictive idea of the Commission of Experts by applying article 3 to offences committed in non-international armed conflict. The ICTY appears to follow the Security Council's approach concerning article 4 of the ICTR Statute. The court of Bosnia and Herzegovina held that 'the customary status of criminal liability for [...] war crimes against civilians and individual responsibility for war crimes committed in 1992 was confirmed by UN Secretary-General, International Law Commission and jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).'¹²⁷ In light of the above observation and as will be seen below, this statement is not persuasive.

The ICTY indeed extended article 3 to cover violations in international and non-international armed conflicts. The most frequently referred case is the 1995 *Tadić* Interlocutory Appeal Decision on jurisdiction, the reasoning of which was subscribed to in subsequent cases.¹²⁸ In this case, the prosecution charged Dusko Tadić with a list of crimes allegedly committed in a region of Bosnia-Herzegovina in 1992. Some of the charges were cruel treatment and murder under article 3 of the ICTY Statute. Tadić challenged the jurisdiction of the tribunal. One reason was that article 3 of the ICTY Statute only conferred jurisdiction over violations of the laws or customs of war in international armed conflict because war crimes were confined to conflicts of that character. In fact, the acts charged happened in a non-international armed conflict.¹²⁹

The prosecution replied that these crimes were committed in the context of international armed conflict.¹³⁰ Alternatively, even if the conflict was non-international, the ICTY also had jurisdiction, because 'violations of law or customs of war' in article 3 were not confined to violations committed

126 UN Doc S/1995/134, para 12.

127 *Prosecutor's Office v Anić* (Preliminary Hearing Decision, Court of Bosnia and Herzegovina) S11 K 005596 11 Kro (31 May 2011), para 35.

128 *Tadić Appeals Chamber Decision on Jurisdiction*, para 94.

129 Brief to Support the Motion on the Jurisdiction of the Tribunal (23 June 1995), Section 3; *ibid*, para 65.

130 'Prosecutor's Response to the Defence's Motions filed on 23 June 1995' (7 July 1995), paras 36-45.

in international armed conflict.¹³¹ The US also submitted its *amicus curiae* addressing the same view. In its view, article 3 of the ICTY Statute 'is only an exemplary and not an exhaustive list, and the language of Article 3 is otherwise broad enough to cover all relevant violations of the laws or customs of war, whether applicable in international or non-international armed conflict'.¹³² The Trial Chamber dismissed Tadić's challenge to the ICTY's subject-matter jurisdiction. Also, the Chamber supported the prosecutor's alternative argument about the interpretation of 'violations of law or customs of war' without further explanation.¹³³

The defendant appealed on this issue. The Appeals Chamber rejected the challenge to its jurisdiction.¹³⁴ After examining the 'intent of the Security Council and the logical and systematic interpretation of article 3 as well as customary international law', the Appeals Chamber upheld the view that 'violations of the laws and customs of war' under article 3 of the ICTY Statute included violations of international humanitarian law applicable in non-international armed conflict.¹³⁵ Firstly, it explained that article 3 aimed to prosecute all serious violations of international humanitarian law,¹³⁶ including Common Article 3 applicable to non-international armed conflict.¹³⁷ Violations of laws and customs of war as war crimes go beyond grave breaches regime in the Geneva Conventions to include 'serious' violations in non-international armed conflict.¹³⁸

Secondly, the Appeals Chamber provided four cumulative requirements for violations to be subject to being charged under article 3. These four requirements are:

- (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹³⁹

131 *ibid.*

132 US, 'Amicus Curiae brief presented to the ICTY, *Tadić* case, Motion Hearing' (25 July 1995), pp 35-37.

133 *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1-T (10 August 1995), para 53.

134 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 71-137.

135 *ibid.*, para 86.

136 *ibid.*, paras 87-93.

137 *ibid.*, paras 94-127; *Mucić et al* Appeals Chamber Judgment, para 136.

138 The ICTY Statute does not mention whether 'serious' is necessary for the assessment of a war crime of 'violations of laws or customs of war'.

139 *Tadić* Appeals Chamber Decision on Jurisdiction, para 94; Jennifer Trahan, *Genocide, War Crimes, and Crimes against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch 2006) 55-76.

The Appeals Chamber concluded that only if the four requirements are satisfied, 'the tribunal has jurisdiction over **any** serious violations of laws or customs of war, regardless of whether they occurred within an internal or international armed conflict'.¹⁴⁰

The Appeals Chamber carefully analysed the last requirement.¹⁴¹ The Chamber held that an express treaty rule criminalising violation in non-international armed conflict and entailing individual criminal responsibility is not necessary for the prosecution of war crimes.¹⁴² The absence of penalising provisions in a treaty does not mean that serious violations of them cannot be prosecuted as international crimes.

The Appeals Chamber then resorted to customary international law. The Chamber stressed that, if the two criteria of 'the clear and unequivocal recognition of the rules of warfare in international law' and 'States practice indicating an intention to criminalise the norm' were satisfied, prohibitions in international humanitarian law entails individual criminal responsibility under customary law.¹⁴³ According to the Appeals Chamber, '[n]o one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition' and 'many elements of international practice show that States intend to criminalise serious breaches' in non-international armed conflict.¹⁴⁴ Thus, the two requirements were fulfilled, and an individual who seriously violated law applicable in non-international armed conflict could incur individual responsibility under customary law.¹⁴⁵ In addition, after analysing the prosecution in Nigeria, military manuals of four States, national legislation of two States (Belgium and the former Yugoslavia) as well as a Security Council resolution on Somalia, the Appeals Chamber concluded that 'customary international law imposes criminal liability for serious violations of Common Article 3' in non-international armed conflict.¹⁴⁶

In discussing the individual responsibility, the Appeals Chamber might have considered the idea proposed by Meron. In his paper published in 1995, months before the delivery of the *Tadić* Appeals Chamber Decision, Meron argued that 'the concept of international criminality' should be extended 'to violations of Common Article 3 and Protocol II' because serious violations of them are of universal concern and subject to universal condemnation.¹⁴⁷ He wrote that 'whether the prohibition is unequivocal in character, the gravity of the act and the interests of the international commu-

140 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 91, 94, 137 (emphasis in original).

141 *ibid*, paras 128-36.

142 *ibid*, para 128.

143 *ibid*.

144 *ibid*.

145 *ibid*, paras 128-37.

146 *ibid*, paras 130-34, Germany, Military Manual 1992; New Zealand, Interim Law of Armed Conflict Manual 1992; US, Manual of the United States 1956; UK, LOAC Manual 1958.

147 Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 554, 576.

nity are all relevant factors in determining the criminality of various acts.¹⁴⁸ This statement is very similar to the sentences in the *Tadić* Appeals Chamber Decision cited above.¹⁴⁹ Nevertheless, Meron did not claim that violations of Common Article 3 and Additional Protocol II incur individual criminal responsibility for 'war crimes', because at that time he did not classify these violations as 'war crimes'.¹⁵⁰ In fact, Meron referred to the US Joint Chiefs of Staff's proposal defining 'other inhumane acts' in article 5 (crimes against humanity) of the ICTY Statute to cover violations of Common Article 3.¹⁵¹ He considered that Article 4 of the ICTR Statute 'enhances the prospects for treating egregious violations of human rights law – not only of international humanitarian law – as offences under international law'.¹⁵² As cited above in his journal article in 1993, Meron might have preferred to criminalise some violations in non-international armed conflict as crimes against humanity or genocide, rather than war crimes.¹⁵³ Even the *Tadić* Appeals Chamber did not expressly declare that those guilty under article 3 of the ICTY Statute were responsible for 'war crimes'. Instead, the Appeals Chamber interpreted article 3 as a 'residual clause' that covers violations of international humanitarian law not falling under the definitions of other crimes (crimes against humanity, genocide and grave breaches of Geneva Conventions).¹⁵⁴

Judge Li in his separate opinion took a different position on the issue of war crimes in non-international armed conflict. Judge Li agreed with the US's interpretative interpretations of article 3 of the ICTY Statute proposed covering violations of Additional Protocol II and Common Article 3.¹⁵⁵ He also referred to the reports of the Commission of Experts and Meron's work published in 1995 as noted above. He considered that 'the notion of war crimes is limited to situations in international armed conflicts'.¹⁵⁶ In light of these observations, Judge Li might also share Meron's view that violations of Common Article 3 and Additional Protocol II in non-international armed conflict incur individual criminal responsibility for crimes against humanity or genocide.

148 *ibid*, 562.

149 *ibid*, paras 128-29.

150 Theodor Meron, 'The Case for War Crimes Trials in Yugoslavia' (1993) 72 *Foreign Affairs* 122, 128; Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78, 80.

151 Meron, 'International Criminalization of Internal Atrocities', 560-61.

152 *ibid*, 568.

153 Meron, 'The Case for War Crimes Trials in Yugoslavia', 128; repeated in Meron, 'War Crimes in Yugoslavia and the Development of International Law', 80.

154 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 87, 89, and 91.

155 *Tadić* Appeals Chamber Decision on Jurisdiction (Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction), para 12.

156 *ibid*, paras 8-10.

In fact, the *Tadić* Appeals Chamber's analysis of individual liability for violations in non-international armed conflict is rather brief as compared to its discussion on customary rules of international humanitarian law.¹⁵⁷ The Appeals Chamber concluded that a customary rule existed at that time based on only scarce authorities. The Chamber heavily relied on *opinio juris* in the identification of a customary rule, leaving State practice as an indication of 'intention'.¹⁵⁸ Apart from some military manuals, there is limited evidence providing that serious violations of rules applicable in non-international armed conflict are punishable as 'war crimes' in international law at that time.¹⁵⁹ The Chamber also referred to 'substantive justice and equity' and national legislation of the former Yugoslavia to justify its finding.¹⁶⁰

To sum up, individuals are criminally responsible for violations of Common Article 3 in non-international armed conflict before the ICTY and the ICTR. These violations may constitute crimes against humanity or genocide. This idea of individual criminal responsibility in non-international armed conflict does not show that a general agreement has been reached on criminalising violations in this context as 'war crimes' in international law. However, as Larissa van den Herik noted, the *Tadić* Appeals Chamber Decision indeed 'paved the way for future prosecution' of 'war crimes'.¹⁶¹ The ICTY's subsequent decisions endorsed this interpretation of article 3.¹⁶² Its four requirements for the application of article 3 of the ICTY Statute were

157 Analysing customary rules of international humanitarian law governing non-international armed conflict, see *Tadić* Appeals Chamber Decision on Jurisdiction, paras 96-127.

158 Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 *AJIL* 238, 242.

159 Manuals of the UK, Swiss, Norwegian, Federal Republic of Yugoslavia and Canadian. See Michael Bothe, 'War Crimes in Non-International Armed Conflicts' in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers 1996) 297.

160 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 135-36.

161 For an analysis of the development of jurisprudence in the ICTY and the ICTR after this decision, see Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* 208-14.

162 *Prosecutor v Martić* (Decision on the Issuance of an International Arrest Warrant) Transcript of Oral Proceedings (8 March 1996), paras 135-36; *Prosecutor v Tadić* (Sentencing Judgment) ICTY-94-1-T (14 July 1997) [*Tadić* Sentencing Judgment], paras 609, 613, 639; *Mucić et al* Trial Judgment, para 306; *Mucić et al* Appeals Chamber Judgment, paras 143, 147, 154.

also subscribed to in many subsequent ICTY cases.¹⁶³ After the delivery of the *Tadić* Appeals Chamber Decision on Jurisdiction, the early 1990s saw a shift towards including the notion of war crimes in non-international armed conflict.

3.3.4.3 *Shifts subsequent to the Tadić Appeals Chamber Decision on Jurisdiction*

Before the delivery of the *Tadić* Appeals Chamber Decision, commentators differed on whether a rule of violations in non-international armed conflict entailing individual criminal responsibility had been established in international law. Michael Bothe argued that there was ample basis for the punishment of individuals for their violations in non-international armed conflict as war crimes.¹⁶⁴ The majority of commentators, however, answered negatively.¹⁶⁵ James O'Brien was uncertain whether violations of Common Article 3 in non-international armed conflict gave rise to individual criminal responsibility.¹⁶⁶ Meron noted that even in 1995 the accepted wisdom was that Common Article 3 and Protocol II constituted an uncertain basis for individual criminal responsibility on the international plane.¹⁶⁷ As observed above, some commentators contended that violations of these provisions involved individual liability, but it is unclear whether the perpetrators were liable for crimes against humanity or war crimes.¹⁶⁸

After the delivery of the *Tadić* Appeals Chamber Decision, commentators responded differently. Rowe disagreed with the idea of considering violations of Common Article 3 in non-international armed conflict as war

163 *Prosecutor v Prlić et al* (Judgement) ICTY-04-74-T (29 May 2013) [*Prlić et al* Trial Judgment], para 142; *Prosecutor v Perišić* (Judgement) ICTY-04-81-T (6 September 2011) [*Perišić* Trial Judgment], para 75; *Prosecutor v Delić* (Judgement) ICTY-04-83-T (15 September 2008), para 42; *Prosecutor v Boškoski & Tarčulovski* (Judgement) ICTY-04-82-T (10 July 2008), para 296; *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-T (27 September 2006) [*Krajišnik* Trial Judgment], para 842; *Prosecutor v Orić* (Judgement) ICTY-03-68-T (30 June 2006), para 257; *Prosecutor v Halilović* (Judgement) ICTY-01-48-T (16 November 2005), para 30 (*Halilović* Trial Judgment); *Prosecutor v Hadžihasanović & Kubura* (Judgement) ICTY-01-47-T (15 March 2006), para 17 (*Hadžihasanović & Kubura* Trial Judgment); *Prosecutor v Limaj et al* (Judgement) ICTY-03-66-T (30 November 2005) [*Limaj et al* Trial Judgment], para 175; *Prosecutor v Strugar et al* (Judgement) ICTY-01-42-T (31 January 2005), para 218; *Prosecutor v Blagojević et al* (Judgement) ICTY-02-53-T (17 January 2005), para 37.

164 Bothe, 'War Crimes', 251.

165 Meron, 'War Crimes in Yugoslavia and the Development of International Law', 82-83.

166 James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *AJIL* 639, 647.

167 Meron, 'International Criminalisation of Internal Atrocities', 559.

168 For other debates, see Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law'; George Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 *AJIL* 64.

crimes.¹⁶⁹ He maintained that the *Tadić* Appeals Chamber Decision was not entirely consistent with treaty provisions and would create legal difficulties concerning the status of rebels. Even if the Decision was reached because of the development of customary law, disagreements also existed about the state of customary law.¹⁷⁰ By contrast, some commentators supported the decision on the war crimes issue. In 1996, Meron wrote that 'I entirely agree with the Tribunal's views that violations of Article 3 common to the Geneva Conventions entail individual criminal responsibility under customary law'.¹⁷¹ Again, he did not refer to war crimes or crimes against humanity. But in 1998, he developed three strategies for the criminalisation of war crimes in non-international armed conflict.¹⁷² An increasing number of scholars recognised then that criminal responsibility can be attached to individuals for war crimes committed in non-international armed conflict.¹⁷³ Judge Cassese, the presiding judge of the Appeals Chamber in the *Tadić* Appeals Chamber Decision, opined that 'particularly after *Tadić*', 'it is now widely accepted that serious infringements of customary or applicable treaty law on internal armed conflicts must also be regarded as amounting to war crimes'.¹⁷⁴

The International Committee of the Red Cross (ICRC) also shifted its position that war crimes were limited to international armed conflict.¹⁷⁵ In its 1993 comments on the proposal to establish the ICTY, the ICRC contended that 'according to international humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed

169 Peter Rowe, 'Liability for War Crimes during a Non-International Armed Conflict' (1995) 34 *Military L & L War Rev* 149, 155-56.

170 Peter Rowe, 'Duress as a Defence to War Crimes after *Erdemović*: A Laboratory for a Permanent Court?' (1998) 1 *YIHL* 210, 222-25.

171 Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 243.

172 Theodor Meron, 'Is International Law Moving towards Criminalisation?' (1998) 9 *EJIL* 18, 25-30.

173 Christopher Greenwood, 'International Humanitarian Law and the *Tadić* Case' (1996) 7 *EJIL* 265, 277-78; Rein Mullerson, 'International Humanitarian Law in Internal Conflicts' (1997) 2 *J Armed Conflict L* 109, 122; Avril McDonald, 'The Year in Review' (1998) 1 *YIHL* 113, 121-22; Catherine Cissé, 'The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda' (1998) 1 *YIHL* 161, 167; Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *AJIL* 302, 313; Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving towards a Uniform Enforcement Mechanism for All Armed Conflicts?' (2000) 5 *J Conflict & Security L* 63; Jan E. Aldykiewicz and Geoffrey S. Corn, 'Authority to Court-Martial Non-US Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts' (2001) 167 *Military L Rev* 74, 101-43.

174 Antonio Cassese, *International Law* (2nd edn, Oxford: OUP 2005) 437.

175 ICRC, DDM/JUR/442 b, para 4; ICRC, 'Statement in the 9th UN Congress on the Prevention of Crimes and Treatment of Offenders' (Cairo, 30 April 1995), UN Doc A/CONF.169/NGO/ICRC/1, p 4, reprinted in JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II: Practices (New York: CUP 2005) 3703, § 405.

conflict'.¹⁷⁶ It then gradually abandoned this position. In February 1997, the ICRC prepared a working paper regarding war crimes,¹⁷⁷ in which it classified war crimes into three categories, including other serious violations committed in international armed conflict and war crimes in non-international armed conflict.¹⁷⁸ In its 2005 ICRC *Study*, Rule 156 concludes that trials for war crimes before national and international tribunals support a customary rule of war crimes in non-international armed conflict.¹⁷⁹ Although the method employed in the 2005 ICRC *Study* has been criticised for its flexibility,¹⁸⁰ this critique of Rule 156 with respect to war crimes is now insignificant.

In sum, after the delivery of the *Tadić* Appeals Chamber Decision, the positions of commentators and the ICRC changed quickly. Commentators and the ICRC tend to support the view that individual responsibility for war crimes is limited to international armed conflict is outdated.¹⁸¹ These academic and institutional demands for such a norm indirectly imply that a positive customary rule, providing individual responsibility for war crimes in non-international armed conflict, had not yet fully emerged in 1995.¹⁸² After the *Tadić* Appeals Chamber Decision on Jurisdiction, a rule was emerging concerning war crimes in non-international armed conflict.

3.3.5 The work of the International Law Commission

An overview of the ILC's work on the Draft Code of Crimes and the drafts of the International Criminal Court Statute helps in understanding comments of State delegations at the Sixth Committee on these drafts related to the issue of war crimes in non-international armed conflict. This subsection also examines the viewpoint concerning the extension of war crimes occurring in non-international armed conflict among members of the ILC.

176 ICRC, 'Preliminary Remarks' (25 March 1993), DDM/JUR/442 b, reprinted in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol 2 (New York: Transnational Publishers 1995) 391-92.

177 ICRC, 'War Crimes, Working Paper Prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court' (13 February 1997).

178 Convention on the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 7 August 1956, 249 UNTS 215.

179 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II.

180 Scobbie, 'The Approach to Customary International Law in the Study'; Bethlehem, 'The Methodological Framework of the Study' and Charles Garraway, 'War Crimes' in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: CUP 2011); Claude Emanuelli, 'Comments on the ICRC Study on Customary International Humanitarian Law' (2006) 44 *Canadian Ybk Intl L* 437, 440.

181 Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2, 2-17.

182 New Zealand, Military Manual 1992; Argentina, Law of War Manual 1989.

3.3.5.1 Draft Code of Offences (Crimes)

The ILC was re-entrusted by the General Assembly to prepare a draft code of offences and security of mankind (Draft Code of Offences (Crimes)) in 1981.¹⁸³ Doudou Thiam was appointed as the Special Rapporteur for this task.¹⁸⁴ In the 1980s and the early 1990s, the issue of war crimes was debated at many meetings of the ILC.¹⁸⁵ In the 1980s, governments did not discuss war crimes in non-international armed conflict.¹⁸⁶ In his fourth and seventh reports, Thiam did not include serious violations of Common Article 3 and other serious violations of Additional Protocol II in the scope of war crimes.¹⁸⁷ In the fourth report, he used the phrase ‘non-international armed conflicts’ in two alternatives to define war crimes in draft article 13.¹⁸⁸ Thiam, however, did not use the phrase in a technical way as we consider it at the present time. He might have intended to use the phrase to cover conflicts between States and non-State entities, including fighting against colonial domination, alien occupation or racist regimes in the exercise of self-determination, without noticing that article 1(4) of Additional Protocol I characterises these conflicts as international armed conflict instead of non-inter-

183 ‘Draft Code of Offences against the Peace and Security of Mankind’, GA Res 897 (IX) (1954), UN Doc A/RES/897 (IX); ‘Draft Code of Offences against the Peace and Security of Mankind’, GA Res 36/106 (1981), UN Doc A/RES/36/106, paras 1-2.

184 ‘Report of the International Law Commission’, GAOR 37th Session Supp No 10, UN Doc A/37/10 (1982), para 252, p 121; ‘Draft Code of Offences against the Peace and Security of Mankind’, GA Res 37/102 (1982), UN Doc A/RES/37/102.

185 ‘Report of the International Law Commission’, GAOR 38th Session Supp No 10, UN Doc A/38/10 (1983); ‘Fourth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur’, UN Doc A/CN.4/398 and Corr.1-3 (1986); ‘Report of the International Law Commission’, GAOR 41st Session Supp No 10, UN Doc A/41/10 (1986); ‘Fifth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur’, UN Doc A/CN.4/404 (1987); ‘Report of the International Law Commission’, GAOR 43rd Session Supp No 10, UN Doc A/43/10 (1988); ‘Draft Code of Crimes against the Peace and Security of Mankind’ (1986-1989), UN Doc A/RES/41/75, UN Doc A/RES/42/151, UN Doc A/RES/43/164, UN Doc A/RES/44/32; ‘Seventh report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur’, UN Doc A/CN.4/419 and Add.1 (1989); UN Doc A/51/10 (1996). For draft texts, see the Analytical Guide to the Work of the International Law Commission regarding Draft Code of Crimes against the Peace and Security of Mankind.

186 ‘Comments and observations received pursuant to General Assembly resolution 37/102’ (8 March 1983), Suriname.

187 UN Doc A/CN.4/398 and Corr.1-3 (1986); UN Doc A/CN.4/419 and Add.1 (1989).

188 For discussions of nuclear weapons in 1986 and 1989, see ‘Summary record of the 1958th meeting of the 38th session’, UN Doc A/CN.4/SR.1958 (1986), para 23; ‘Summary record of the 1960th meeting of the 38th session’, UN Doc A/CN.4/SR.1960 (1986), para 20, ‘Summary record of the 1961st meeting of the 38th session’, UN Doc A/CN.4/SR.1961 (1986), para 28; ‘Summary record of the 1962nd meeting of the 38th session’, UN Doc A/CN.4/SR.1962 (1986), paras 13, 35; ‘Summary record of the 1965th meeting of the 38th session’, UN Doc A/CN.4/SR.1965 (1986), para 12; UN Doc A/41/10 (1986), paras 103-14; UN Doc A/CN.4/419 and Add.1 (1989), paras 19, 25.

national armed conflict.¹⁸⁹ Later he replaced the phrase 'non-international armed conflicts' with 'rules of international law applicable in armed conflict' in his seventh report.¹⁹⁰

The issue of war crimes in non-international armed conflict emerged in discussing the seventh report in 1989, but the majority of Commission members did not contemplate the extension of war crimes to non-international armed conflict.¹⁹¹ One member stated that the new phrase 'rules of international law applicable in armed conflict' was controversial and would raise a question whether offences committed in non-international armed conflict could be regarded as war crimes.¹⁹² Some members argued that this new phrase indeed covered non-international armed conflict¹⁹³ and that serious violations of Common Article 3 and Additional Protocol II were included as war crimes.¹⁹⁴ However, Thiam suggested that the scope of 'rules of international law applicable in armed conflict' was limited to the 1907 Hague Convention, grave breaches of the 1949 Geneva Conventions, as well as articles 11 and 85 of Additional Protocol I.¹⁹⁵

In the 1991 text of the Draft Code of Crimes, the definition of war crimes also referred to violations of international law applicable in 'armed conflict'.¹⁹⁶ The phrase 'armed conflict' did not limit itself to international armed conflict. One member insisted that war crimes were limited to serious violations in international armed conflict,¹⁹⁷ while three members upheld different views.¹⁹⁸ The Netherlands expressed its positive attitude towards the inclusion of war crimes in non-international armed conflict.¹⁹⁹ It 'agreed with the ILC that [war crimes] should also be applicable to national armed conflicts, given that serious war crimes can likewise be committed in these

189 The 1977 Additional Protocol I, art 1(4).

190 UN Doc A/CN.4/419 and Add.1 (1989), pp 82-83, para 8.

191 UN Doc A/CN.4/SR.1962 (1986), para 34; 'Summary record of the 1963rd meeting of the 38th session', UN Doc A/CN.4/SR.1963 (1986), para 30.

192 'Summary record of the 2101st meeting of the 41st session', UN Doc A/CN.4/SR.2101 (1989), para 24 (Mr Jacovides).

193 'Summary record of the 2096th meeting of the 41st session', UN Doc A/CN.4/SR.2096 (1989), para 34 (Mr Roucouas); 'Summary record of the 2097th meeting of the 41st session', UN Doc A/CN.4/SR.2097 (1989), paras 22-23 (Mr Barsegov).

194 'Report of the International Law Commission', GAOR 44th Session Supp No 10, UN Doc A/44/10 (1989), paras 107-08.

195 UN Doc A/CN.4/419 and Add.1 (1989), pp 82-83, para 8.

196 'Draft Code of Crimes against the Peace and Security of Mankind, Titles and texts of articles adopted by the Drafting Committee', UN Doc A/CN.4/L.459 and Corr.1 and Add.1 (1994), para 22. 'Thirteenth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/466 (1995), paras 95-110.

197 'Summary record of the 2240th meeting of the 43rd session', UN Doc A/CN.4/SR.2240 (1991), paras 48-49, 73 (Mr Pellet).

198 UN Doc A/CN.4/SR.2240 (1991), paras 64 (Mr Graefrath), 66 (Mr Calero Rodrigues), 71 (Mr Eriksson).

199 'Comments and observations received from Governments', UN Doc A/CN.4/448 and Add.1(1993), Netherlands, para 70, pp 87-88.

circumstances'.²⁰⁰ The chairperson of the Drafting Committee, established by the ILC to prepare the text of the Draft Code of Crimes, stated that 'this ambiguity is constructive, in light of the fact that Common Article 3 applied in non-international armed conflicts'.²⁰¹ Hence, the ambiguous text in the 1991 draft kept the door open for the inclusion of war crimes in non-international armed conflict, at the very least, including serious violations of Common Article 3.

In discussing war crimes in the 1995 ILC draft text, different views were expressed whether to expand the law of war crimes to non-international armed conflict. By citing the ICTR Statute, some Commission members argued that the notion of war crimes should be extended to non-international armed conflict.²⁰² Other members disagreed with such a construction.²⁰³ At the Sixth Committee in February 1996, State delegations also expressed divergent views.²⁰⁴ In June 1996, draft article 18 included serious violations in non-international armed conflict as war crimes.²⁰⁵ Draft article 18 stated that:

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: (a) Any of the following acts committed in violation of international humanitarian law: [...] (b) Any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health: [...] (c) Any of the following acts committed wilfully in violation of international humanitarian law: [...] (d) Outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (e) Any of the following acts committed in violation of the laws or customs of war: [...] (f) Any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character: [...] (g) In the case of armed conflict, [...].²⁰⁶

200 *ibid.*

201 UN Doc A/CN.4/SR.2240 (1991), para 29 (Mr Pawlak).

202 'Summary record of the 2384th meeting of the 47th session', UN Doc A/CN.4/SR.2384 (1995), paras 26 (Mr Fomba), 71 (Mr Rosenstock); 'Thirteenth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/466 (1995), p 46, para 107. New proposed draft article 22 'war crimes' read that: '[a]n individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to...]. For the purposes of this Code, a war crime means: 1. Grave breaches of the Geneva Conventions of 1949, namely: [...] 2. Violations of the laws or customs of war, which include, but are not limited to [...]'.²⁰⁶

203 UN Doc A/50/10 (1995), para 101.

204 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 50th session', UN Doc A/CN.4/472 (1996), paras 139-40, 145.

205 'Draft Code of Crimes against the Peace and Security of Mankind-Titles and texts of articles adopted by the Drafting Committee on second reading at the 47th and 48th sessions', reproduced in 'Summary record of the 2437th meeting of the 48th session', UN Doc A/CN.4/SR.2437 (1996), para 7, p 32.

206 *ibid.*, para 7, pp 33-34.

Draft articles 18(d) and (g) covered violations in both kinds of armed conflict. Draft article 18(d) criminalised violations of fundamental guarantees embodied in Common Article 3 and article 4(2) of Additional Protocol II. Draft article 18(g) criminalised the method of warfare causing widespread, long-term and severe damage to the natural environment if these violations cause serious consequences to the population in armed conflict, whether of international or internal character.²⁰⁷ In addition, draft article 18(f) listed seven acts committed in violation of international humanitarian law applicable in non-international armed conflict as war crimes.²⁰⁸ The list is identical to the definition of war crimes in article 4 of the ICTR Statute. The ILC almost adopted draft article 18 in its entirety under draft article 20 of the final 1996 Draft Code of Crimes.²⁰⁹ Based on the text of the 1996 Draft Code of Crimes, a new regime of war crimes in non-international armed conflict was emerging.

3.3.5.2 1993 and 1994 drafts of the International Law Commission for an International Criminal Court

The General Assembly had also entrusted the ILC to consider the issue of an international judicial organ.²¹⁰ The ILC earnestly worked on this mandate, but the General Assembly later deferred this because the definitions of crimes were not completed.²¹¹ In 1989, based on a proposal of Trinidad and Tobago and a request of the General Assembly, the ILC resumed its work on the issue of an international criminal court.²¹² From 1989 to 1991, the ILC's work on an international criminal court was included as part of its work for the Draft Code of Crimes. The initial draft texts of the judicial organ focused on procedural matters instead of substantive definitions of crimes, which were covered by the Draft Code of Crimes.²¹³

In 1992, a working group, established by the ILC to work on the issue of international criminal jurisdiction, submitted its proposals.²¹⁴ In discussing these proposals in the Sixth Committee, only the Italian delegate implicitly

207 *ibid.*, p 34.

208 *ibid.*

209 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries', in UN Doc A/51/10 (1996), para 50, p 56 [1996 Draft Code of Crimes], art 20.

210 'Prevention and Punishment of the Crime of Genocide, Study by the International Law Commission of the question of an International Criminal Jurisdiction', GA Res 260 B (III) (1948), UN Doc A/Res/260 B (III).

211 'Question of Defining Aggression', GA Res 688 (VII) (1952), UN Doc A/RES/688 (VII); 'International Criminal Jurisdiction', GA Res 687 (VII) (1952), UN Doc A/RES/687 (VII); 'International Criminal Jurisdiction', GA Res 898 (IX) (1954), UN Doc A/RES/898 (IX); 'International Criminal Jurisdiction', GA Res 1187 (XII) (1957), UN Doc A/RES/1187 (XII).

212 UN Doc A/RES/44/39.

213 'Eleventh report on the Draft Code of Offences against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/449 and Corr.1 (1993), pp 113-24.

214 'Working Group established pursuant to the request contained in General Assembly resolution 44/39 of 4 December 1989' (16 May 1990).

mentioned the issue of war crimes in non-international armed conflict.²¹⁵ In its written comments, the Italian government recommended that war crimes considered by the Geneva Conventions and its protocols be listed in the jurisdiction of the proposed court.²¹⁶

In 1993, the working group submitted its preliminary but comprehensive text of a draft statute of an international criminal tribunal with commentary to the ILC.²¹⁷ The ILC then attached this Draft text to its report to the General Assembly for discussion.²¹⁸ Article 22 of the 1993 Draft text provided a list of crimes defined by treaties as international crimes. The working group's commentary on article 22 stated that 1977 Additional Protocol II was not included in the list, as Protocol II contains no provision about grave breaches.²¹⁹ The Slovenian delegation, however, did not share the working group's view. Its delegate argued that the reason for excluding Additional Protocol II from the list of article 22 was not convincing, as the Protocol also prohibited acts characterised as serious violations of humanitarian law.²²⁰ In the Sixth Committee, one delegate supported incorporating Additional Protocol II in the treaty list of article 22.²²¹ That delegate probably was also Slovenian. In his view, the 'notion of war crimes should be extended to crimes committed in internal armed conflicts'.²²² Slovenia recommended that the ILC should follow the approach of the ICTY Statute to cover war crimes for violations of international humanitarian law applicable in non-international armed conflict under article 22. Other delegates or governments, however, did not share the Slovenia's position.²²³ In brief, it is inconclusive to argue that article 22 of the 1993 Draft text covered 'war crimes' in non-international armed conflict.

215 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 47th session' [French], UN Doc A/CN.4/446 (1992), prepared by Secretariat.

216 'Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction', UN Doc A/CN.4/452 and Add.1-3 (1993), Italy, para 6.

217 'Revised report of the Working Group on a draft statute for an international criminal court', UN Doc A/CN.4/L.490 and Add.1, as reproduced in UN Doc A/48/10 (1993), annex.

218 UN Doc A/48/10 (1993), pp 100-31.

219 *ibid*, annex, art 22, p 107, para (3).

220 'Observations of Governments on the report of the Working Group on a draft statute for an international criminal court', UN Doc A/CN.4/458 and Add.1-8 (1994), in UN Doc A/CN.4/SER.A/1994/Add.I, para 4 (Slovenia).

221 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 48th session', UN Doc A/CN.4/457 (1994), para 84; 'Summary record of the 2330th meeting of the 46th session', UN Doc A/CN.4/SR.2330 (1994), para 23.

222 UN Doc A/CN.4/457 (1994), para 84.

223 UN Doc A/CN.4/458 and Add.1-8 (1994), pp 22-96 (Algeria, Australia, Austria, Belarus, Chile, Cuba, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Japan, Kuwait, Malta, Mexico, New Zealand, Nordic countries, Norway, Panama, Romania, Spain, Sri Lanka, Sweden, Tunisia, UK, US, Yugoslavia); UN Doc A/CN.4/457 (1994), paras 84-88.

In addition, article 26(2)(a) of the 1993 Draft text required special acceptance of a jurisdictional clause for crimes ‘under general international law’ but not covered by article 22.²²⁴ Some members of the ILC argued that article 26(2)(a) covered offences in non-international armed conflict, but the offences were only aggression and crimes against humanity that were not defined by treaties.²²⁵ War crimes in non-international armed conflict, therefore, in their view, were not covered under this article. However, Slovenia claimed that in drafting article 26(2)(a), the working group considered crimes for violations of customary international law applying to non-international armed conflict, for example, Common Article 3 of the four Geneva Conventions.²²⁶ Therefore, article 26(2)(a), at the very most, covered serious violations of Common Article 3 in non-international armed conflict, although the label of the offences is uncertain.

In 1994, the working group, re-established by the ILC and chaired by James Crawford,²²⁷ submitted a report with draft commentaries to the ILC.²²⁸ The ILC adopted the 1994 Draft Statute accompanied by commentaries and then submitted it to the General Assembly.²²⁹ Article 20(c) of the 1994 Draft Statute proposed ‘serious violations of the laws and customs applicable in armed conflict’.²³⁰ According to its commentary, the ILC shared the idea that a category of war crimes exists under customary international law, which is distinct from the grave breaches regime.²³¹ The ILC was very cautious and did not directly address whether the term ‘armed conflict’ covered non-international armed conflict. State delegations in the Sixth Committee said that ‘crimes associated with domestic armed conflicts [...] should not have been explicitly mentioned as falling within the jurisdiction of the Court’.²³²

224 1993 Draft Statute, art 26(2)(a) reads: ‘[i]t was accepted and recognised by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals’.

225 ‘Report of the International Law Commission’, UN Doc A/49/10 (1994), para 48 (Mr Crawford); UN Doc A/CN.4/SR.2330 (1994), paras 5 (Mr Crawford), 23 (Mr Villagran Kramer), 31-32 (Mr Kabatsi).

226 UN Doc A/CN.4/458 and Add.1-8 (1994), para 10 (Slovenia).

227 ‘Summary record of the 2331st meeting of the 46th session’, UN Doc A/CN.4/SR.2331 (1994). The Working Group on a draft statute for an international criminal court held 27 meetings. The 1993 text was considered from the 2329th to 2334th meetings, held between 3 and 9 May 1994, UN Doc A/CN.4/SR.2329-2334 (1994).

228 ‘Report of the Working Group on the question of a Draft Statute for an International Criminal Court-Revision’, UN Doc A/CN.4/L.491/Rev.2, UN Doc A/CN.4/L.491/Rev.2/Corr.1, and UN Doc A/CN.4/L.491/Rev.2/Add.1-3 (1994).

229 UN Doc A/49/10 (1994), pp 20-73.

230 *ibid.*, p 39.

231 *ibid.*

232 ‘Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 49th session’, UN Doc A/CN.4/464/Add.1 (1995), para 89.

In addition, article 20(e) of the 1994 Draft Statute also proposed 'exceptionally serious crimes of international concern' for violations of treaties in an Annex. The Annex provided an exhaustive list of treaty crimes, including 'grave breaches' of the 1949 Geneva Conventions and Additional Protocol I.²³³ Similar to the 1993 Draft text and the 1993 Working Group, the ILC expressly excluded Additional Protocol II from the Annex²³⁴ because that Protocol does not specifically contain a provision about grave breaches or criminalising serious violations as war crimes. Since Common Article 3 was not excluded from the Annex, one may argue that grave breaches of Common Article 3 in non-international armed conflict were implicitly included. Its drafters, however, did not contemplate criminalising 'grave breaches' of Common Article 3 in non-international armed conflict as war crimes. Except for some support by a few judges, the jurisprudence of the ICTY also did not support the idea of 'grave breaches' of Common Article 3 in non-international armed conflict.²³⁵ In contrast to its 1993 Draft text, the ILC's 1994 Draft Statute was more modest because it contemplated no offences committed in non-international armed conflict.

States and international organisations submitted their comments on the 1994 Draft Statute to the UN Secretary-General.²³⁶ Belarus argued that Additional Protocol II should be included in the list of Annex in article 20(e),²³⁷ while Switzerland cast doubt on this view by stating that:

A fifth category of crimes is constituted by 'crimes established under or pursuant to the treaty provisions listed in the annex' (article 20, paragraph (e)), including, in particular, the Geneva Conventions of 12 August 1949 and Protocol I additional thereto of 8 June 1977 (perhaps also Protocol II?).²³⁸

233 UN Doc A/49/10 (1994), pp 67-69.

234 *ibid.*, Commentary on art 20(e), p 69 (j).

235 *Tadić* Trial Chamber Decision on Jurisdiction, paras 46-52; *Tadić* Appeals Chamber Decision on Jurisdiction (Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction), part IV, para 7; *Mucić et al* Trial Judgment, para 203; *Prosecutor v Aleksovski* (Judgement, Dissenting Opinion of Judge Rodrigues) ICTY-95-14/1-T (25 June 1999), paras 27-49.

236 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Court, Report of the Secretary-General' (20 March 1995), UN Doc A/AC.244/1, Belarus, China, Singapore, Sweden, Switzerland, Venezuela, and the ICTY. See also 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Court, Report of the Secretary-General, Addendum' (30 March 1995), UN Doc A/AC.244/1/Add.1, Azerbaijan, Czech Republic, Sudan, and the Crime Prevention and Criminal Justice Branch and the United Nations International Drug Control Program; UN Doc A/AC.244/1/Add.2 (1995), Cyprus, France, and US; UN Doc A/AC.244/1/Add.3 (1995), Libya; UN Doc A/AC.244/1/Add.4 (1995), Barbados and Trinidad and Tobago.

237 UN Doc A/AC.244/1(1995), Belarus, para 14.

238 *ibid.*, Switzerland, para 6.

The US opposed the inclusion of violations of Additional Protocol II in the jurisdiction of the proposed Court.²³⁹ In connection with its position, as observed above, the US only opposed the jurisdiction of the Court instead of the criminalisation of violations in non-international armed conflict. In addition, it was unknown what the positions of other States were from their comments on the issue of war crimes in non-international armed conflict. They seemingly did not intend to include serious violations in non-international armed conflict as war crimes at that time.

3.3.5.3 Summary

The examination of the ILC's work on the Draft Code of Crimes shows that the view on war crimes in non-international armed conflict dramatically changed in the final 1996 Draft Code of Crimes. The observation of the ILC's work on the International Criminal Court demonstrates that in 1995 the majority of UN member delegations were reluctant to consider war crimes committed in non-international armed conflict. The ILC did not specify to what extent it codified or progressively developed the notion of war crimes. Some observers of the ILC were ambitious about including violations in non-international armed conflict, but they were more prudent about labelling these offences as war crimes.

3.3.6 Assessment and conclusions

The exploration of the notion of war crimes and its evolution in the context of non-international armed conflict indicates that there is a remarkable trend of criminalising serious violations in non-international armed conflict in the UN Security Council and among scholars.²⁴⁰ As shown above, after the First and Second World Wars, the practice of prosecution of war crimes emerged in international law. The establishment of international investigation commissions in 1919 and 1943, the criminalisation of violations of international humanitarian law by treaties, and war crimes trials at Nuremberg and Tokyo evidenced the attempts of the international community to prosecute war crimes under international law. The issue of war crimes in non-international armed conflict, however, was not considered from 1919 to 1945. When Common Article 3 and Additional Protocol II were adopted, they did not evidence States' recognition of war crimes in non-international armed conflict. Despite some instances of national legislation, there was no criminalisation of violations in non-international armed conflict as war crimes at the inter-

239 UN Doc A/AC.244/1/Add.2 (1995), US, para 105.

240 Cameron *et al*, 'Article 3', para 522.

national level until the early 1990s.²⁴¹ After the *Tadić* Appeals Chamber Decision on jurisdiction, the view emerged among scholars that serious violations of Common Article 3 and of Additional Protocol II in non-international armed conflict were war crimes. The *Tadić* Appeals Chamber Decision and the ICTR Statute also shed light on the drafting of war crimes in the 1996 Draft Code of Crimes. The ICRC and the ILC remarkably accepted the idea of war crimes in non-international armed conflict in 1996. Yet, a rule of war crimes in non-international armed conflict was not widely accepted under customary law at that time.²⁴²

Indeed, there have been some prosecutions carried out against individuals with respect to acts perpetrated before 1995 in non-international armed conflict. For example, the Hague District Court convicted a former Afghan soldier for committing war crimes in the 1980s civil war for torture of civilians.²⁴³ The Netherlands either prosecuted suspects for war crimes committed in the Rwanda non-international armed conflict in 1994 or granted a request for the surrender for an individual who was charged with war crimes committed in 1994.²⁴⁴ In recent years, Dutch courts convicted individuals for war crimes committed in the civil war of Ethiopia (the late 1970s).²⁴⁵ The Netherlands is active in prosecuting war crimes committed in non-international armed conflict. Belgium and Switzerland are also pros-

241 Australia, War Crimes Act 1945, amended 1988, § 5(c); Netherlands, Criminal Law in Wartime Act 1952, amended 1990, Preamble and art 1(3); Nicaragua, Military Penal Code 1996, art 47; Norway, Military Penal Code 1902, arts 107-108; Spain, Penal Code 1995, arts 607-614; Thailand, Prisoners of War Act 1955, §§ 12-19. UN Doc S/1994/674, para 52.

242 Robert Cryer, Håken Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: CUP 2014) 27; Sivakumaran, *The Law of Non-International Armed Conflict* 475-76; Meron, 'War Crimes in Yugoslavia and the Development of International Law', 82; Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 *EJIL* 360, 366 and fn 20; ICRC, Preliminary Remarks, 25 March 1993, para 4; William J. Fenrick, 'The Prosecution of War Criminals in Canada' (1989) 12 *Dalhousie LJ* 256, 259 and fn 9.

243 *Public Prosecutor v Heshamuddin Hesam* (Judgment, District Court of The Hague, the Netherlands) LJN: AV1163 (14 October 2005); *Public Prosecutor v Heshamuddin Hesam* (Judgment, Supreme Court, the Netherlands) LJN: BG1476 (8 July 2008), paras 5.1, 5.3, 6.6. See also *Public Prosecutor v Habibullah Jalalzoy* (Judgment, Supreme Court, the Netherlands) LJN: BC7418 (8 July 2008); *Public Prosecutor v Abdullah Faqirzada* (Judgment, Supreme Court, the Netherlands) LJN: BR6598 (8 November 2011), para 40, Faqirzada was acquitted for lacking evidence to establish his command responsibility.

244 *Public Prosecutor v Joseph Mpambara* (Judgment, Court of Appeal of The Hague, the Netherlands) LJN: BR0686 (7 July 2011); *Public Prosecutor v Joseph Mpambara* (Judgment, Supreme Court, the Netherlands) ECLI: NL:HR:2013:1420 (26 November 2013); *Public Prosecutor v Yvonne Basebya* (Judgment, District Court of The Hague, the Netherlands) LJN: BZ4292 (1 March 2013), paras 1.2, 19, 37, her individual responsibility was not supported for lack of a nexus with an armed conflict, but she was convicted for incitement to genocide; *Public Prosecutor v Michel Bagaragaza* (Request for surrender, District Court of The Hague, the Netherlands) LJN: BC8211 (21 March 2008).

245 Reuters, 'Dutchman put on trial for Ethiopian war crimes in 1970s', available at: <https://www.reuters.com/article/us-netherlands-ethiopia-war-crimes/dutchman-put-on-trial-for-ethiopian-war-crimes-in-1970s-idUSKBN1CT27U?il=0> [accessed 5 March 2018].

ecuting suspects of war crimes in the First Liberian Civil War (1989-1996). A Canadian court found Munyaneza responsible for war crimes committed in Rwanda in 1994 because in its view article 4 of the ICTR Statute reflects customary international law.²⁴⁶ The Extraordinary African Chambers in Senegal in 2016 decided that Hissène Habré, the former President of Chad, committed war crimes in the 1982-1990 civil wars. Spanish courts are considering prosecuting war crimes committed in Morocco in 1976.²⁴⁷

It should be stressed that most of these prosecutions are based on national legislation rather than customary international law. For instance, the 1977 *Criminal Code* of the former Yugoslavia²⁴⁸ and section 8 of the 1952 Dutch *Wartime Offences Act*²⁴⁹ clearly provide for violations of 'laws and customs of war'. Dutch courts charged Van Anraat, a Dutch businessperson, for war crimes during the Iran-Iraq war in 1988.²⁵⁰ In this case, a Dutch Court of Appeal held that 'laws and customs of war' in 1988 included Common Article 3 of the four 1949 Geneva Conventions in 'conflict not of an international nature'. Van Anraat complained to the European Court of Human Rights (ECtHR) about the imprecision of the term 'laws and customs of war'. The ECtHR firstly concluded that 'it is the role of the domestic courts to interpret and apply relevant rules of domestic procedural or substantive law'. The interpretation of the Dutch Court of Appeal was not a violation of article 7 of the European Convention on Human Rights concerning legal certainty.²⁵¹ Therefore, it is acceptable for these isolated prosecution of war crimes in civil wars by reference to national laws stipulated before offences occurred. Alternatively, the ECtHR relied on the *Tadić* Appeals Chamber Decision on Jurisdiction in stating that in customary law, a serious violation of Common

246 *R v Munyaneza* (Judgment, Supreme Court of Quebec, Canada) 2009 ACCS 2201 (22 May 2009), paras 131-35, 147.

247 Spain, the *Sahara* case, see International Federation for Human Rights, 'Universal Jurisdiction Developments: January 2006–May 2009', 2 June 2009.

248 Socialist Federal Republic of Yugoslavia, *Criminal Code* 1977, repealed by the *Criminal Code of the Republic of Serbia* as of 1 January 2006, arts 142-156.

249 *Wartime Offences Act (Wet Oorlogsstrafrecht/WOS)*, 10 July 1952, amendments to the law dated 27 March 1986 (Bulletin of Acts and Decrees, 1986, 139) and amendment by Act of Parliament of 14 June 1990 (Bulletin of Acts and Decrees, 1990, 369), replaced by the *International Crimes Act (Wet internationale misdrijven)* of 19 June 2003. Dutch *Genocide Convention (Implementation) Act (Uitvoeringswet genocideverdrag)* of 1964 and *Torture Convention (Implementation) Act (Uitvoeringswet folteringverdrag)* of 1988 have been repealed by articles 19 and 20 of the *International Crimes Act*.

250 *Public Prosecutor v Frans Cornelis Adrianus van Anraat* (Judgment, District Court of The Hague, the Netherlands) LJN: AX6406 (23 December 2005), para 14; *Public Prosecutor v Van Anraat* (Judgment, Court of Appeal of The Hague, the Netherlands) LJN: BA6734 (9 May 2007), para 13; *Public Prosecutor v Van Anraat* (Judgment, Supreme Court, the Netherlands) LJN: BG4822 (30 June 2009).

251 *Van Anraat v the Netherlands* (Decision on admissibility, Third Section) ECtHR Application No. 65389/09 (6 July 2010), paras 93-96.

Article 3 in non-international armed conflict was an international crime in the 1980s.²⁵² This authority is also an isolated decision. The isolated practice does not contradict the previous point that in 1995, the view that there was international criminal liability for war crimes in non-international armed conflict was not well accepted but isolated.

Some practice exists supporting the view that offences committed in a civil war before the 1990s can be prosecuted as war crimes in 'international law' as we understand it at the present time. This assumption is contestable because a rule of war crimes in non-international armed conflict was less accepted in custom before the early 1990s. Whether this flaw is an obstacle for victims to claim compensation in civil litigation is a separate issue which goes beyond the focus of this topic. Isolated examples of national prosecutions and legislation do not significantly weaken the general observation. States did not reach an agreement on criminalising serious violations in non-international armed conflict as war crimes in international law in late 1995. The next section analyses debates about war crimes in non-international armed conflict to show whether such an agreement was reached in the drafting, or at the adoption, of the Rome Statute.

3.4 WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICT: WERE ARTICLES 8(2)(C) AND (E) DECLARATORY OF CUSTOM?

The work of the ICRC and the ILC's 1996 Draft Code of Crimes inspired the drafting of article 8 of the Rome Statute.²⁵³ A Trial Chamber of the ICTY held that article 8 of the Rome Statute incorporates part of the *Tadić* Appeals Chamber Decision into its definition of war crimes.²⁵⁴ This section illustrates the process of codification and crystallisation of customary law by depicting the evolution of the notion of war crimes in non-international armed conflict under articles 8(2)(c) and (e) of the Rome Statute. When the International Criminal Court was being established, States and international organs vigorously debated the scope of war crimes, including whether the law of war crimes applies to non-international armed conflict.²⁵⁵ The drafting history of war crimes is examined following three phases, at the *Ad Hoc* committee, the Preparatory Committee and the Rome Conference.

252 *ibid*, para 94.

253 Cryer *et al*, *An Introduction to International Criminal Law and Procedure*.

254 *Prosecutor v Milošević* (Decision on Motion for Judgement of Acquittal) ICTY-02-54-T (16 June 2004) [*Milošević* Decision on Acquittal Judgment], para 20.

255 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP 2005) 45; Mahnouch Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22, 32.

3.4.1 *Ad Hoc* Committee 1995 sessions

Two related issues were discussed at the *Ad Hoc* Committee. The first one was whether breaching international humanitarian treaty rules formed part of customary law. The second issue was whether violations of these rules could give rise to individual criminal responsibility. After two meetings, the *Ad Hoc* Committee submitted a Report to the General Assembly in September 1995.²⁵⁶ The Report mentioned that:

There were different views as to whether the laws and customs applicable in armed conflict [...] should include those governing non-international armed conflicts, notably common article 3 of the 1949 Geneva Conventions and Additional Protocol II thereto. Those who favoured the inclusion of such provisions drew attention to the current reality of armed conflicts, the statute of the *ad hoc* Tribunal for Rwanda and the recent decision of the *ad hoc* Tribunal for the former Yugoslavia recognising the customary-law status of common article 3.²⁵⁷

The 'recent decision' mentioned here is the *Tadić* Trial Chamber decision on jurisdiction delivered in August 1995. In that decision, Common Article 3 was considered as a customary rule, and serious violations of it were criminalised as war crimes.²⁵⁸

The *Ad Hoc* Committee's Report went on to state that:

However, other delegations expressed serious reservations concerning the possibility of covering non-international armed conflicts and questioned the consistency of such an approach with the principle of complementarity. As regards Additional Protocol II, the view was expressed that that instrument as a whole had not achieved the status of customary law and therefore was binding only on States parties thereto.²⁵⁹

Some delegations feared that an 'inherent competence' of the proposed court over war crimes in non-international armed conflict would violate the principle of complementarity.²⁶⁰ The view was also expressed that violations of Common Article 3 or Additional Protocol II in non-international armed conflict should not fall within the jurisdiction of the Court.²⁶¹ The Committee commented that 'the conduct would universally be acknowledge[d] as wrongful [...] [, but] there was doubt [...] in respect of whether it constituted a crime'.²⁶² The Report concluded that most delegations supported the idea

256 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), para 74.

257 *ibid* (italics added).

258 *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1-T (10 August 1995) [*Tadić* Trial Chamber Decision on Jurisdiction], paras 57-74.

259 UN Doc A/50/22 (1995), para 74.

260 *ibid*, para 74.

261 *ibid*.

262 *ibid*, para 72.

of including a rule about war crimes committed in non-international armed conflict in the Statute.²⁶³

These debates deserve comment. In August 1995, 184 of the 185 UN member States ratified the 1949 Geneva Conventions, whereas only 128 of the 185 States ratified Additional Protocol II. This Report indicates that some delegations had doubts about the customary status of Additional Protocol II as a whole, but not about Common Article 3. Delegations were focused on the customary status of Common Article 3 and Additional Protocol II rather than the customary status of war crimes for violations. Divergent views existed concerning the customary status of treaty rules applicable in non-international armed conflict. In some delegations' logic, individuals are only responsible for acts that violate an international humanitarian rule with customary status.²⁶⁴ Some States supported the inclusion of violations of a rule of Additional Protocol II in non-international armed conflict, but only if it was recognised as custom. If States had agreed on 'war crimes committed in non-international armed conflict' under customary law, some of them would not argue that only States Parties to Additional Protocol II are subjected to treaty-based crimes. Russia, Turkey, China, India and several other Asian States as well as several Arab States also opposed the inclusion of war crimes in non-international armed conflict at that time. Doubts about the customary status of war crimes in non-international armed conflict did not suddenly evaporate one month later in October 1995, when the *Tadić* Appeals Chamber Decision on Jurisdiction was rendered. The specific *Tadić* Appeals Chamber Decision has to be seen as a starting point for the formation of a new customary rule.

3.4.2 Preparatory Committee sessions and intersessional meetings: 1996–1998

From 1996 to 1998, the Preparatory Committee held six sessions and established different working groups.²⁶⁵ The working group on the definition of crimes and the working group on definitions and elements of crimes dealt with the war crimes issue. Three intersessional meetings were also held during this period.

263 *ibid.*

264 This is not the place here to discuss the customary status of international humanitarian law in non-international armed conflict and its relevance with individual criminal responsibility, see Henckaerts and Doswald-beck, *Customary International Humanitarian Law*, Vol 1.

265 UN Doc A/AC.244/L.5; 'Preparatory Committee on Establishment of International Criminal Court, Provision Agenda', UN Doc A/AC.249/L.1; 'Establishment of an international Criminal Court', GA Res 51/207 (1997), UN Doc A/RES/51/207, para 4. The other working groups: working group on general principle of criminal and penalties; working group on complementarity and trigger mechanism; working group on procedural matters; working group on individual cooperation and judicial assistance.

3.4.2.1 1996 sessions

Before the first session, Judge Cassese, then President of the ICTY, and the US delegation each submitted a document about the definition of war crimes to the Preparatory Committee.²⁶⁶ These two documents constituted the basis for the discussion of war crimes. Judge Cassese held that article 3 of the ICTY Statute contained 'violations of customary law on internal conflicts, including article 3 Common to the four Geneva Conventions'.²⁶⁷ The US draft on the other hand distinguished grave breaches of the 1949 Geneva Conventions from other serious violations of the laws and customs.²⁶⁸ During the first session, several speakers called for the definition of war crimes to include 'grave breaches of the 1949 Geneva Conventions' and 'other serious violations of the laws and customs of war'.²⁶⁹

Views were divided on whether to include war crimes in non-international armed conflict and on the scope of the applicable international humanitarian law in this context. Some States upheld the opinion that war crimes in non-international armed conflict should be included as the 1996 Draft Code of Crimes provided. An Austria's draft text with a non-exhaustive list included violations of law applicable to non-international armed conflict in the definition of war crimes.²⁷⁰ In light of the expansive interpretation of article 3 of the ICTY Statute, France also proposed including 'serious violations' of the laws and customs of war as war crimes in both international and non-international armed conflicts.²⁷¹ Italy proposed punishing infringements of the Geneva Conventions in both kinds of armed conflicts.²⁷² The Italian delegate added that the list of crimes enumerated in article 3 of the ICTY Statute was a useful guide.²⁷³ Egypt's draft included violations of Common Article 3 and articles 4 and 18 of Additional Protocol II as war crimes.²⁷⁴

266 US, 'Redraft of ILC Article 20 on ICC Jurisdiction with Proposed Elements' (23 March 1996); 'Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence, submitted by Antonio Cassese' (22 March 1996).

267 'Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence', submitted by Antonio Cassese, para 6.

268 'Redraft of ILC Article 20 on ICC Jurisdiction with Proposed Elements', arts 20, 20bis, 20ter draft.

269 'Preparatory Committee on Establishment of International Criminal Court discusses inclusion of war crimes in list of "core crimes" 4th Meeting' (26 March 1996), UN Doc L/2764.

270 Austria, 'Serious violations of the laws and customs applicable in armed conflicts' (2 April 1996).

271 France, 'Draft Statute of the International Criminal Court: Working Paper' (6 August 1996), UN Doc A/AC.249/L.3, arts 27 and 31, pp 30-34.

272 UN Doc L/2764, 27 March 1996; Italy, 'Proposal on war crimes' (30 March 1996).

273 Italy, 'Proposal on war crimes' (30 March 1996).

274 Egypt, 'Draft: Optional Approaches to the Definition of War Crimes' (29 March 1996).

Other States neither expressed views nor intended to include crimes in non-international armed conflict within the jurisdiction of the Court. Singapore did not express a view about the inclusion of violations of Common Article 3 and Additional Protocol II because it was considering the Annex list of article 20(e) of the 1994 ILC Draft Statute.²⁷⁵ A Japanese proposal limited the context of war crimes to international armed conflict. Japanese representatives said it was a State's responsibility to ensure their militaries conformed to international law and to prosecute individuals under the national law.²⁷⁶ India and Russia also raised doubts about whether the Court should address non-international armed conflict.²⁷⁷ The UK representative argued for clearly enumerated criminal acts that violated customary international law. However, the Annex submitted by the UK about applicable customary international law excluded Common Article 3.²⁷⁸ It appears that at the time the UK doubted whether violations of Common Article 3 and Additional Protocol II in non-international armed conflict constituted war crimes under international law.

Considering different State proposals, the Chairman of the Preparatory Committee proposed a text that included the violations of Common Article 3 and Additional Protocol II within square brackets.²⁷⁹ Square brackets indicate that a consensus has not yet been reached on a proposal. The Chairman's revised text also put the phrases 'whether of an international or of a non-international character' and 'of Additional Protocol II' within square brackets.²⁸⁰ The Preparatory Committee summarised:

Some delegations expressed the view that it was important to include violations committed in internal armed conflicts given their increasing frequency in recent years, that national criminal justice systems were less likely to be able to adequately address such violations and that individuals could be held criminally responsible for such violations as a matter of international law, [...]. Other delegations expressed the view that violations committed in internal armed conflicts should not be included, that the inclusion of such violations was unrealistic [...], that individual criminal responsibility for such violations was not clearly established as a matter of existing law [...], and that customary law had not changed in this respect since the Rwanda Tribunal Statute.²⁸¹

275 Singapore, 'Amendments to Article 20 footnote 3' (4 April 1996).

276 Japan, 'Proposal on the Definition of War Crimes' (27 August 1996), UN Doc A/AC.249/WP.48.

277 UN Doc L/2764, 27 March 1996.

278 UK, 'Graves Breaches, Customary international law – annex' (1 April 1996).

279 'Chairman's Informal Text No 4, Article 20ter, War Crimes' (4 April 1996), UN Doc A/AC.249/1996/WG.1/IP.4; 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996', UN Doc A/AC.249/1 (1996), Annex I, pp 65-67.

280 'Chairman's Revised Informal Text No 4' (5 April 1996), UN Doc A/AC.249/CRP.9/Add.4; 'Draft Summary of Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996' (9 April 1996), UN Doc A/AC.249/CRP.2/Add.2/Rev 1, p 62.

281 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', GAOR 51st Session Supp No 22, UN Doc A/51/22 (1996), Vol I, para 78; UN Doc A/AC.249/1 (1996), para 38.

Similar proposals and arguments for the notion of war crimes were also reflected when the report of the *Ad Hoc* Committee was discussed in the Sixth Committee of the General Assembly. Delegations claimed that a customary rule existed regarding war crimes in international armed conflict, whereas divergent opinions existed concerning war crimes in non-international armed conflict.²⁸²

3.4.2.2 1997-February-session

In February 1997, three States and the ICRC submitted proposals to the Preparatory Committee on the issue. New Zealand and Switzerland's joint working paper proposed serious violations of international humanitarian law applicable in non-international armed conflict as war crimes.²⁸³ The US supported a restricted idea of war crimes in non-international armed conflict, extending this to violations of Common Article 3 but not of Additional Protocol II.²⁸⁴ The ICRC included violations in non-international armed conflict as war crimes. The ICRC proposal based on the joint working paper was much broader. Relying on the three State proposals, Working Group I on the definition of crimes worked out text on war crimes and recommended it to the third session of the Preparatory Committee.²⁸⁵ The text also included many square brackets in Section C of war crimes, which provided that certain serious violations of Common Article 3 in non-international armed conflict could constitute war crimes.²⁸⁶

282 'Summary record of the 26th-30th meetings [of the Sixth Committee]', UN Doc A/C.6/50/R.26-30 and 48-50 (1995); UN Doc A/C.6/50/R.30 (1995), paras 30 (Hungary), 50 (India), 80 (Argentina), 81 (Georgia).

283 'Working Paper submitted by the delegations of New Zealand and Switzerland' (14 February 1997), UN Doc A/AC.249/1997/WG.1/DP.2.

284 US, 'War Crimes: Proposal' (15 February 1997), UN Doc A/AC.249/1997/WG.1/DP.1; Christopher Keith Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124, 28.

285 'Preparatory Committee of an International Criminal Court approved work program for two-week session' (21 February 1997), UN Doc A/AC.249/1997/L.2; Working Group I, 'War crimes, Draft Consolidated Text' (20 February 1997), UN Doc A/AC.249/1997/WG.1/CRP.2; Working Group I, 'War crimes Preliminary Text' (20 February 1997), UN Doc A/AC.249/1997/WG.1/IP/REV.1; Working Group I, 'War crimes, Draft Consolidated Text' (21 February 1997), UN Doc A/AC.249/1997/WG.1/CRP.2/Corr.1; 'Decision taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' (12 March 1997), UN Doc A/AC.249/1997/L.5.

286 UN Doc A/AC.249/1997/WG.1/CRP.2 and Corr.1, 20 February 1997; 'Preparatory Committee on International Criminal Court Concluded Third Session' (21 February 1997), UN Doc L/2824,.

3.4.2.3 *Subsequent sessions and intersessional meetings*

In June 1997, Germany convened the first intersessional workshop about the issue of war crimes for NATO experts in Bonn and provided an informal working paper (Bonn Text). The Bonn Text included serious violations of Common Article 3 in non-international armed conflict under Section C and other violations of the laws and customs applicable in non-international armed conflict under Section D.²⁸⁷ Both sections remained in square brackets. States made remarks about the Bonn Text. Turkey said the two sections should remain in square brackets.²⁸⁸ The UK held that

At present, this [Section C] must remain in square brackets as our review [of the UK's position in relation to internal armed conflict] has not yet been completed. However, [...] there may be a change to their position.²⁸⁹

As to Section D, the UK was 'not yet convinced that this section in principle is reflective of customary international law. This section, therefore, should also remain in square brackets in its entirety'.²⁹⁰ The ICRC, however, commented that the text missed war crimes committed in non-international armed conflict.²⁹¹

The fourth session of the Preparatory Committee and the second intersessional meeting did not develop the issue of war crimes in non-international armed conflict. In this period, some States and the ICRC in the Sixth Committee and the General Assembly also expressed their demands for the inclusion of war crimes in non-international armed conflict in the Statute.²⁹²

287 'Informal working paper on war crimes and preliminary comments on Bonn's text' (15 July 1997), UN Doc A/AC.249/1997/WG.1/IP/REV.1.

288 'United Nations negotiations on the establishment of an International Criminal Court (ICC): Second Informal Inter-Sessional Workshop for experts from Member States of the Atlantic Alliance with regard to the issue of War Crimes' (21 October 1997), UN Doc A/AC.249/1997/WG.1/IP.

289 'Comments submitted by Partners', Annex to the 'Informal working paper on war crimes' (14 July 1997), UN Doc A/AC.249/1997/WG.1/IP/REV.1.

290 *ibid.*

291 Preparatory Committee, 'Preliminary comments on BONN's Text' (15 July 1997), UN Doc A/AC.249/1997/WG.1/IP/Rev1.

292 UN Doc A/C.6/52/SR.11 (1997), para 46 (Trinidad and Tobago, speaking on behalf of the 14 State members of the Caribbean community); 'Summary record of the 13th meeting [of the Sixth Committee]', UN Doc A/C.6/52/SR.13 (1997), para 16 (Costa Rica); 'Summary record of the 14th meeting [of the Sixth Committee]', UN Doc A/C.6/52/SR.14 (1997), paras 49 (Germany), 55 (Belarus); UN Doc A/C.6/52/SR.15 (1997), para 15 (ICRC); GAOR 52nd session, 23rd plenary meeting, UN Doc A/52/PV.23 (3 October 1997), Ethiopia.

The fifth session in December 1997 was fruitful with respect to war crimes.²⁹³ Working Group I submitted its definition of war crimes.²⁹⁴ Draft article 20C provided five options on war crimes in non-international armed conflict. Option I contained two sections, Sections C and D (predecessors of articles 8(2)(c) and (e) of the Rome Statute). Option I proposed removing the square brackets in Sections C and D and added a new restrictive clause before Sections C and D. The text of Section C was not substantially distinct from article 8(2)(c) of the Rome Statute, while the text of Section D listed 12 acts of serious violations.²⁹⁵ Option I provided the original framework for the final version of articles 8(2)(c) and (e) of the Rome Statute. Germany and the UK both submitted a war crimes text that was similar to Option I.²⁹⁶ Like the proposal in Option I, Option II further suggested inserting another four violations in Section D. Option III advised deleting the restrictive clause of Sections C and D. By contrast, Option IV proposed deleting Section D, and Option V proposed deleting both Sections C and D.²⁹⁷ Draft article 20C with five options on war crimes in non-international armed conflict was well supported. Both the Report of the Zutphen Intersessional meeting and the Preparatory Committee's 1998 Draft Statute defined war crimes in non-international armed conflict with similar text and structure to Draft article 20C.²⁹⁸ All these documents with the Report of the Preparatory Committee were transmitted to the 1998 Rome Conference for discussion.²⁹⁹

The recapitulation of the drafting works shows that States' attitudes were changing with respect to criminalising serious violations in non-international armed conflict as war crimes. States switched their positions within months of the delivery of *Tadić* Appeals Chamber Decision in October 1995, despite the scarcity of prosecution practice. The US stated that it 'strongly

293 Report of the Working Group on the Definition of the Crime, 'Informal Working paper on war crimes', in 'Decision taken by the Preparatory Committee at its session held from 1 to 12 December 1997', UN Doc A/AC.249/1997/L.9/Rev.1, Annexe I; UN Doc A/AC.249/1997/WG.1/CRP.9. Other versions see UN Doc A/AC.249/1997/WG.1/CRP.7; UN Doc A/AC.249/1997/WG.1/CRP.7 Add.1; UN Doc A/AC.249/1997/WG.1/CRP.8; 'War Crimes, Article 20C', UN Doc A/AC.249/1997/WG.1/CRP.9.

294 UN Doc A/AC.249/1997/WG.1/CRP.9, 12 December 1997.

295 *ibid.* Section D in Option I listed 12 serious violations, 4 of which contained several sub-options relating to intentionally directly attacking against civilian population, intentionally directing attacks against buildings, monuments, places not for military purpose, forcing or recruiting children under the age of fifteen years into armed forces, and prohibited weapons.

296 'Reference Paper on War Crimes submitted by Germany' (12 December 1997), UN Doc A/AC.249/1997/WG.1/DP.23/Rev1; UK and Germany, 'Informal Working Paper on War Crimes Option B' (12 December 1997).

297 UN Doc A/AC.249/1997/WG.1/CRP.9.

298 'Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands' (4 February 1998), UN Doc A/AC.249/1998/L.13; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 19-20.

299 UN Doc A/CONF.183/2.

believe[d] that serious violations of the elementary customary norms reflected in Common Article 3 should be the centrepiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts'.³⁰⁰ The US also 'urged' that 'there should be a section, in addition to Section C, covering other rules regarding the conduct of hostilities in non-international armed conflicts'. The US said it was 'eager to work with other delegations to build strong consensus on these matters'.³⁰¹ These concluding remarks indicate that in the US's view, no consensus had been reached on the 'subject matter jurisdiction' in early 1998.³⁰² The US in fact in 1996 had just passed an Act to cover war crimes in civil wars for 'grave breaches' of humanitarian rules.³⁰³ In addition, according to the German 'Working Paper on War Crimes', a consensus was reached on serious violations of Common Article 3 in non-international armed conflict during the third session of the Preparatory Committee in February 1997.³⁰⁴ The ICRC in December 1997 observed that 'the emergence of *opinio juris* on a customary rule on criminal liability for violations of international humanitarian law committed in non-international armed conflict has recently been recognised'.³⁰⁵

In fact, States either supported or opposed the inclusion of war crimes in non-international armed conflict for several reasons. Only some of them argued that war crimes in non-international armed conflict was or was not part of international law. States' expressions for inclusion of war crimes in non-international armed conflict indicates the practice of these States, but it is less convincing to argue that their support also evidences *opinio juris* for a customary rule of war crimes in non-international armed conflict at that time. In conclusion, a customary rule of war crimes in non-international armed conflict was crystallised before 1998 concerning serious violations of Common Article 3. However, no consensus existed on criminalising serious violations of Additional Protocol II and other rules applicable in non-international armed conflict as war crimes at that time. Discussions on war crimes in non-international armed conflict at the 1998 Rome Conference seem to enhance this conclusion and to demonstrate the crystallisation of customary rule.

300 'Statement, United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court' (23 March 1998).

301 *ibid.*

302 US, War Crimes Act of 1996, 18 USC 2441(c)(3), as amended by Military Commissions Act of 2006, 10 USC 948a note.

303 *ibid.*, 18 USC 2401(c).

304 'German Synoptical Working Paper on War Crimes: Intersessional Workshop for experts from NATO countries with regard to the issue of war crimes' (Bonn, 24 and 25 June 1997).

305 ICRC, 'Commentary on the Definition of War Crimes Submitted to the Preparatory Committee for the Establishment of an International Criminal Court' (1-12 December 1997), p 24.

3.4.3 Crystallisation of war crimes committed in non-international armed conflict in Rome: 1998

During the 1998 Rome Conference, three main issues were discussed with regard to war crimes in non-international armed conflict.³⁰⁶ The first issue was whether to include provisions on war crimes in non-international armed conflict. The second issue was what acts should be added in addition to violations of Common Article 3 of the Geneva Conventions. The third issue was what the threshold is for war crimes in non-international armed conflict.³⁰⁷ This section focuses on the inclusion issue in general and the threshold issue. In doing this, this section will analyse the debates of States at the Rome Conference to show whether a customary rule was crystallised that serious violations of Common Article 3 and other serious violations in non-international armed conflict constitute war crimes in international law.

3.4.3.1 *The inclusion of war crimes in non-international armed conflict*

Delegations debated war crimes in detail at the Rome Conference.³⁰⁸ This subsection looks into the attitude and explanations of States and organisations towards the inclusion of war crimes in non-international armed conflict.

Many delegations addressed their positions on the inclusion of Sections C and D of war crimes in the meetings.³⁰⁹ The majority of European States, Arab and South African States, Australia, Canada, Russia, the US, many Latin American States and some Asian States all expressed their support of the

306 UN Doc A/CONF.183/C.1/SR.3, UN Doc A/CONF.183/C.1/SR.4, UN Doc A/CONF.183/C.1/SR.5.

307 Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *AJIL* 2, 7.

308 'Summary Records of meetings of the Committee of the Whole', UN Doc A/CONF.183/C.1/SR.3, UN Doc A/CONF.183/C.1/SR.4, UN Doc A/CONF.183/C.1/SR.5, UN Doc A/CONF.183/C.1/SR.25, UN Doc A/CONF.183/C.1/SR.26, UN Doc A/CONF.183/C.1/SR.27, UN Doc A/CONF.183/C.1/SR.33, UN Doc A/CONF.183/C.1/SR.34, UN Doc A/CONF.183/C.1/SR.35, UN Doc A/CONF.183/C.1/SR.36.

309 From the 1st to 23rd meetings, the 1998 Draft Statute (UN Doc A/CONF.183/2, 14 April 1998) prepared by the Preparatory Committee was discussed in the Committee of the Whole. From the 24th to 32nd meetings, the Discussion Paper (UN Doc A/CONF.183/C.1/L.53, 6 July 1998) prepared by the Bureau of the Committee of the Whole was discussed. From the 33rd to 36th meetings, the Bureau Proposal (UN Doc A/CONF.183/C.1/L.59 and Corr.1, 13 July 1998) was discussed.

inclusion of Section C or both sections.³¹⁰ France noted that the ‘war crimes’ sections covered provisions in 1949 Geneva Conventions and their Additional Protocols and that in practice the 1998 Statute would reflect existing law.³¹¹ The French delegation said that accepting a restriction of war crimes to international armed conflict would be a retrograde step.³¹² However, Germany stated that ‘war crimes committed in non-international armed conflicts must be included in view of their increasing frequency and the inadequacy of national criminal justice systems in addressing such violations’.³¹³

310 ‘Summary Records of Plenary meetings of the Conference’, UN Doc A/CONF.183/SR.2, paras 13 (South Africa), 34 (UK), 54 (Sweden), 66 (Canada), 81 (Republic of Korea), 91 (Slovenia); UN Doc A/CONF.183/SR.3, paras 21 (Czech Republic), 48 (Lithuania), 74 (Costa Rica), 83 (Armenia); 114 (Observer for the European Community); UN Doc A/CONF.183/SR.4, paras 12 (Albania), 57 (Namibia), 66 (Chile); UN Doc A/CONF.183/SR.5, paras 5 (Slovakia), 13 (Brunei Darussalam), 21 (Hungary), 28 (Zambia), 47 (Estonia), 54 (Bulgaria), 61 (US); UN Doc A/CONF.183/SR.6, paras 2 (Belgium), 12 (Ireland), 77 (France); UN Doc A/CONF.183/SR.7, paras 26 (Bangladesh), 74 (Cape Verde); UN Doc A/CONF.183/SR.8, paras 3 (Denmark), 10-11 (Georgia), 20 (Russian Federation), 38 (Belarus), 45 (Bahrain), 62 (Ecuador), 68 (Uganda); UN Doc A/CONF.183/SR.9, para 21 (Philippines).

‘Summary Records of meetings of the Committee of the Whole’, UN Doc A/CONF.183/C.1/SR.3, paras 13-14 (Netherlands); UN Doc A/CONF.183/C.1/SR.4, paras 40-41 (Netherlands), 54 (US), 57 (Germany); UN Doc A/CONF.183/C.1/SR.5, paras 64 (Italy), 104 (Australia), 106 (Costa Rica), 108 (Canada), 109 (Belgium), 110 (New Zealand), 111 (Czech Republic), 112 (Ireland), 113 (Republic of Korea), 114 (Brazil), 117 (UK), 119 (Norway); UN Doc A/CONF.183/C.1/SR.6, paras 77 (France), 100 (US); UN Doc A/CONF.183/C.1/SR.25, paras 24 (New Zealand), 14 (Austria on behalf of the EU), 31 (Japan), 38 (Mozambique), 52 (Norway), 55 (Sierra Leone), 59 (Azerbaijan), 62 (Trinidad and Tobago), 65 (Mexico), 68 (UK), 71 (Germany), 73 (Botswana), 76 (Croatia), 78 (Australia), 80 (Senegal); UN Doc A/CONF.183/C.1/SR.26, paras 38 (Liechtenstein), 41 (Switzerland), 44 (Lithuania), 51 (Brazil), 54 (Republic of Korea), 58 (Chile), 66 (Mali), 69 (Italy), 72 (Togo), 78 (Cuba), 81 (Portugal), 107 (Ireland), 116 (Georgia), 118 (Lesotho), 123 (Greece), 126 (Cameroon), 131 (Slovakia); UN Doc A/CONF.183/C.1/SR.27, paras 9 (Uruguay), 13 (Colombia), 17 (Finland), 18 (Nicaragua), 21 (Bahrain), 23 (Slovenia), 27 (Hungary), 34 (Israel), 41 (Angola), 44 (Bosnia and Herzegovina), 49 (Denmark), 51 (Czech Republic), 54 (Poland), 55 (Congo), 58 (Benin), 69 (Cyprus), 81 (Gabon); UN Doc A/CONF.183/C.1/SR.28, paras 4 (Ethiopia), 7 (Burkina Faso), 22 (Brunei Darussalam), 26 (Namibia), 30 (Malta), 33 (Romania), 44 (France), 55 (Spain), 58 (Guatemala), 68 (Philippines), 71 (Ecuador), 73 (Andorra), 77 (Guinea-Bissau), 90 (Venezuela), 83 (Qatar); UN Doc A/CONF.183/C.1/SR.33, paras 18-19 (Switzerland), 24 (US), 68 (Germany), 80 (UK); UN Doc A/CONF.183/C.1/SR.34, paras 4 (Sweden), 22 (Trinidad and Tobago), 34 (Spain), 60 (South Africa), 75 (Jordan), 107-08 (Australia), 112 (Mexico); UN Doc A/CONF.183/C.1/SR.35, paras 8 (Sierra Leone); 15 (Italy), 23 (Uganda), 37 (Finland), 41 (Venezuela), 49 (Tanzania), 62 (Ethiopia), 67 (Canada), 68 (Denmark); 73 (Portugal); 76 (Estonia), 80 (Solomon Island), 84 (Botswana); UN Doc A/CONF.183/C.1/SR.36, paras 2 (Norway), 12 (Congo), 30 (Slovenia), 33 (Zimbabwe), 37 (Costa Rica), 39 (Andorra), 42 (Bosnia and Herzegovina).

311 France, National Consultative Commission on Human Rights, ‘Statement by Director of the Legal Department of the French Ministry of Foreign Affairs’ (22 April 1998).

312 UN Doc A/CONF.183/C.1/SR.6, para 77 (France).

313 UN Doc A/CONF.183/C.1/SR.4, paras 57, 60 (Germany).

Spain also supported the inclusion of the two sections because offences committed in non-international armed conflict should be dealt with and a consensus seemed to be emerging in that regard.³¹⁴ Venezuela said: 'what [sic] important was the nature and seriousness of the crimes, rather than the context in which it was [sic] committed'.³¹⁵ Bangladesh upheld the insertion of both sections to achieve 'high standards of justice', and urged that the list of violations in Section D be extended.³¹⁶

Despite voting against the Rome Statute and subsequently declaring that they would not ratify the Statute,³¹⁷ the US and Israel showed a positive attitude towards the inclusion of war crimes in non-international armed conflict.³¹⁸ The US strongly believed that:

serious violations of the elementary customary norms reflected in common Article 3 should be the centrepiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section, in addition to Section C, covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC's jurisdiction.³¹⁹

The US also stressed that:

[...] concerning war crimes, [...] it was essential to cover internal armed conflicts, which were the most frequent and the most cruel. That area of law had been developed and clearly established and must be included in the Statute.³²⁰

In its view, the law of war crime in non-international armed conflict was well established under customary law.³²¹ The US supported the inclusion of war crimes in non-international armed conflict and assisted in ensuring they would be covered by the Rome Statute.³²²

In addition, some States swiftly changed their positions on war crimes in non-international armed conflict. Japan once claimed that the context of war crimes was limited to international armed conflict. In the second plenary

314 UN Doc A/CONF.183/C.1/SR.28, para 55 (Spain).

315 UN Doc A/CONF.183/C.1/SR.35, para 41 (Venezuela).

316 UN Doc A/CONF.183/C.1/SR.7, paras 26-7 (Bangladesh); UN Doc A/CONF.183/C.1/SR.28, para 40 (Bangladesh).

317 'Statement by Judge Eli Nathan, Head of the Delegation of Israel' (17 July 1998).

318 UN Doc A/CONF.183/SR.9, paras 28 (US), 33 (Israel); UN Doc A/CONF.183/C.1/SR.27, para 34 (Israel).

319 'Statement, United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court' (23 March 1998).

320 UN Doc A/CONF.183/C.1/SR.9, para 100 (US).

321 UN Doc A/CONF.183/SR.5, para 61 (US); UN Doc A/CONF.183/C.1/SR.4, para 49 (US); UN Doc A/CONF.183/C.1/SR.6, para 100 (US).

322 US, 'Intervention on the Bureau's Discussion Paper (A/CONF.183/C.1/L.53)' (8 July 1998); David J. Scheffer, 'The United States and the International Criminal Court' (1999) 93 *AJIL* 12, 14, 16.

meeting at the Conference, Japan simply stated that ‘war crimes that have not become part of customary international law should be excluded from the treaty’.³²³ Yet, Japan kept silent on the inclusion of Sections C and D. In connection with the statement cited, its acquiescence might be interpreted as indicating that Japan doubted the customary status of some provisions in Section D at that time or Japan was willing to accept Section D but did not want to do so explicitly. Japan, thus, implicitly accepted that war crimes in non-international armed conflict, in general, had become part of customary law. Likewise, the UK changed its attitude towards violations of Additional Protocol II and ‘strongly favoured the inclusion of Sections C and D’ as war crimes.³²⁴ When a new threshold was introduced to limit the scope of non-international armed conflict, the UK even criticised this threshold for its potential effect to narrow the ICC’s competence.³²⁵ Russia also appreciated the inclusion of Section C, but it doubted the justification for including Section D.³²⁶ Its suspicion of war crimes in non-international armed conflict was erased partly. This observation has shown that these States did not object to war crimes in non-international armed conflict in general but were concerned about violations of Additional Protocol II.

Many intergovernmental and non-governmental organisations at the Conference also addressed the inclusion of war crimes committed in non-international armed conflict.³²⁷ The ICRC noted that crimes committed in non-international armed conflict were crimes under customary international law.³²⁸ It submitted that ‘the Court must have jurisdiction over war crimes committed in all types of armed conflict, international or otherwise’.³²⁹ The ICRC further said that ‘many of the acts listed in Section D were recognised as crimes by customary law’.³³⁰

It should also be noted that more than 20 States objected to the inclusion of Section C or Section D or both, as Philippe Kirsch noted.³³¹ Firstly, some States were concerned that the jurisdiction of the Court would prejudice

323 UN Doc A/CONF.183/SR.2/Add.1 and Corr.1, para 44 (Japan).

324 UN Doc A/CONF.183/C.1/SR.5, para 117 (UK).

325 UN Doc A/CONF.183/C.1/SR.33, para 80 (UK).

326 UN Doc A/CONF.183/SR.7, para 20 (Russian Federation); UN Doc A/CONF.183/C.1/SR.28, para 20 (Russian Federation).

327 UN Doc A/CONF.183/SR.2, the Agence de cooperation culturelle et technique; UN Doc A/CONF.183/SR.3, para 115 (the European Community); UN Doc A/CONF.183/SR.4, paras 67 (League of Arab States), 72 (the Office of the United Nations High Commissioner for Refugees); UN Doc A/CONF.183/SR.5, para 72 (Women’s Caucus); UN Doc A/CONF.183/SR.7, para 108 (Human Rights Watch); UN Doc A/CONF.183/SR.8, para 75 (the Latin American Institute of Alternative Legal Services).

328 UN Doc A/CONF.183/C.1/SR.28, para 108 (ICRC).

329 UN Doc A/CONF.183/SR.4, para 68 (ICRC).

330 UN Doc A/CONF.183/C.1/SR.36, para 52 (ICRC).

331 ‘Summary record of the 3rd plenary meeting of the Conference’, UN Doc A/CONF.183/SR.3, paras 13-14, Thailand, Vietnam, Syria, Iraq, India, Libya, Saudi-Arabia, Pakistan, Qatar, Sudan, Algeria, Turkey, China, Egypt, Iran, Sri Lanka, Yemen, Comoros, Indonesia, Nepal, Oman, Burundi and Russian Federation.

their State sovereignty.³³² One State said that it would accept the inclusion of Section C if the Court would not prejudice State sovereignty. Another two States said that they would accept the inclusion of the two sections as long as the Court's jurisdiction was complementary.³³³ Secondly, in the first round of discussions, some States worried about the threshold of non-international armed conflict because how the Court would decide the existence of internal conflicts or internal disturbances was unclear.³³⁴ Sudan was in favour of the inclusion of Section C; however, it argued that Section D implied a double standard that would hamper efforts at amnesty and domestic reconciliation.³³⁵ Turkey called for a threshold of war crimes in both armed conflicts in the context of policies or as part of large-scale crimes.³³⁶ Sudan and Turkey did not object to war crimes in non-international armed conflict, but they either stressed the practical difficulties in identifying a threshold or claimed a higher threshold to restrain the ICC's competence.

Thirdly, some States addressed a variety of other considerations. Indonesia held that acts set out in both sections could be prosecuted as crimes against humanity.³³⁷ India noted that '[t]here is also no agreement about whether or not conflicts not of an international nature could be covered under the definition of such crimes under customary international law'.³³⁸ Comoros mentioned that the content of both sections should be discussed.³³⁹ Some other States expressed their concerns about the conflicts between international law and domestic law or policy, for example, the reference to 'enforced pregnancy'.³⁴⁰ Iran, Saudi Arabia and some other Arab States argued that express recognition of a crime in non-international armed conflict would tend to legitimise abortion, which would be in conflict with the religious policy of prohibiting abortion in some Arabic States.³⁴¹

332 UN Doc A/CONF.183/C.1/SR.5, para 115 (India); UN Doc A/CONF.183/C.1/SR.28, paras 88 (Saudi Arabia), 104 (Libya); UN Doc A/CONF.183/C.1/SR.28, para 9 (Pakistan); UN Doc A/CONF.183/C.1/SR.35, paras 54 (Pakistan), 57 (Qatar); UN Doc A/CONF.183/C.1/SR.36, para 6 (Libya).

333 UN Doc A/CONF.183/C.1/SR.27, paras 60 (Indonesia), 61 (Comoros), 73 (Nepal); UN Doc A/CONF.183/C.1/SR.36, para 20 (Oman).

334 UN Doc A/CONF.183/C.1/SR.4, para 76 (Sudan); UN Doc A/CONF.183/C.1/SR.5, para 107 (Turkey); UN Doc A/CONF.183/C.1/SR.27, para 5 (Algeria).

335 UN Doc A/CONF.183/C.1/SR.5, paras 101-03 (Sudan).

336 *ibid*, para 107 (Turkey).

337 UN Doc A/CONF.183/C.1/SR.27, para 60 (Indonesia).

338 'Statement, by Mr Dilip Lahiri, Additional Secretary (UN) Ministry of External Affairs Head of the Indian Delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 16 June 1998, para 11.

339 UN Doc A/CONF.183/C.1/SR.27, para 61 (Comoros).

340 UN Doc A/CONF.183/C.1/SR.3, para 32 (Saudi-Arabia); UN Doc A/CONF.183/C.1/SR.4, paras 63 (Libya), 66 (United Arab Emirates); UN Doc A/CONF.183/C.1/SR.5, paras 21 (Saudi-Arabia), 71 (Iran). However, abortion was not an issue in Jordan, see UN Doc A/CONF.183/C.1/SR.34, para 73 (Jordan).

341 UN Doc A/CONF.183/C.1/SR.3, para 32 (Saudi-Arabia).

Lastly, Iraq and Syria voiced their objections without giving reasons.³⁴² Thailand was not satisfied with the two sections, while Vietnam strongly advocated excluding them.³⁴³ Some other States objected to the inclusion, while upholding a flexible view for further discussion. Iran and Sri Lanka firmly opposed the inclusion of Section D because it was not an expression of well-established customary law, whereas they were flexible concerning Section C.³⁴⁴ China initially favoured the deletion of both sections, but it said it was open to any other suggestions.³⁴⁵

Overall, summary records of meetings show that the majority of delegations supported the inclusion of war crimes in non-international armed conflict, in particular, Section C, albeit with different views. Section D is more controversial for its underlying acts and the threshold of non-international armed conflict as opposed to its inclusion in the Rome Statute. States addressed their objections to the inclusion of war crimes in non-international armed conflict on different grounds. The observation demonstrates that these States were worried about specific crimes, the threshold of non-international armed conflict, as well as the relationship between the ICC's and their national tribunals' jurisdiction, instead of objecting to war crimes in non-international armed conflict in general. Some States were uneasy about war crimes in this context being tried by the ICC. In their view, the complementarity mechanism reserved assessment of the unable and unwilling exclusively to the Court, which looked like a form of interference with their internal affairs.³⁴⁶ Their concerns implicitly confirmed their positive attitude towards the prosecution of war crimes in non-international armed conflict in national courts, although they objected to the inherent jurisdiction of the Court over such crimes.

Many of these opposing States did not insist on their objections. A final compromise formula was agreed that 'enforced pregnancy' was changed to 'forced pregnancy', with the clarification that 'this definition shall not in any

342 UN Doc A/CONF.183/SR.4, para 18 (Syrian Arab Republic); UN Doc A/CONF.183/C.1/SR.27, para 2 (Iraq); 'Indonesia, Philippines, Thailand and Vietnam: Proposal regarding the Bureau Proposal' in UN Doc A/CONF.183/C.1/L.59 and Corr.1, UN Doc A/CONF.183/C.1/L.74, 14 July 1998: 'The provisions of the Sections C and D shall not apply if there is any foreign interference in the situation of armed conflict not of an international character.'

343 UN Doc A/CONF.183/C.1/SR.28, para 51 (Thailand); A/CONF.183/C.1/SR.27, para 64 (Vietnam).

344 UN Doc A/CONF.183/SR.5, para 102 (Iran); UN Doc A/CONF.183/C.1/SR.27, para 80 (Sri Lanka); UN Doc A/CONF.183/C.1/SR.34, paras 62-3 (Iran).

345 UN Doc A/CONF.183/C.1/SR.5, para 120 (China); A/CONF.183/C.1/SR.25, para 36 (China).

346 ICRC (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: CUP 2016). For discussions on the principle of complementarity, see C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: CUP 2011).

way be interpreted as affecting national laws relating to pregnancy'.³⁴⁷ As will be seen below, the thresholds of non-international armed conflict also made the two sections less difficult to be accepted. Indonesia, Thailand and Vietnam finally all agreed to prosecute these violations in non-international armed conflict as war crimes.³⁴⁸ Philippe Kirsch, the Chair of the Committee of the Whole, concluded:

[...] the first section [Section C] [...] was supported by almost all delegations. Even some of those delegations that publicly stated that they did not think the statute should apply to internal armed conflicts indicated privately that if it did, they could accept a provision based on Common Article 3. The second section [Section D], which defined the other serious violations of the laws and customs of armed conflict to be governed by the statute, was more controversial.³⁴⁹

3.4.3.2 *Thresholds of non-international armed conflict*

As mentioned above, Working Group I drafted five options for war crimes in non-international armed conflict. Its definition of war crimes was submitted to the Preparatory Committee and later included in the Committee's Draft Statute.³⁵⁰ In the Draft Statute, Option I set out the content of Sections C and D. Option I also contained a newly added restrictive clause for war crimes.³⁵¹ The new provision stated: 'Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tension, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.'³⁵²

This threshold was not adequately discussed in the first round of discussions. In the second round of discussions, the Discussion Paper, prepared by the Bureau of the Committee of the Whole, re-organised the five options for Sections C and D to satisfy different concerns about war crimes.³⁵³ The Discussion Paper proposed two options for Section C and two options for Section D. Option I of Section C proposed a list of violations of Common Article 3 in non-international armed conflict, whereas Option II of Section C recommended the deletion of the whole section. The two options of Section D

347 1998 Rome Statute, art 7(2)(f).

348 'Proposal Submitted by Indonesia, Philippines, Thailand and Viet Nam', UN Doc A/CONF.183/C.1/L.74, 14 July 1998.

349 Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 7 and fn 17.

350 UN Doc A/CONF.183/2, pp 19-20.

351 'Report of the Working Group on the Definition of the Crime, Informal Working paper on war crimes, 18 December, 1997', in 'Decision taken by the Preparatory Committee at its session held from 1 to 12 December 1997', UN Doc A/AC.249/1997/L.9/Rev1, annex I; UN Doc A/AC.249/1997/WG.1/CRP.9, 12 December 1997. See also UN Doc A/AC.249/1997/WG.1/CRP.7, 3 December 1997; UN Doc A/AC.249/1997/WG.1/CRP.7 Add.1, 4 December 1997; UN Doc A/AC.249/1997/WG.1/CRP.8, 5 December 1997.

352 UN Doc A/AC.249/1997/WG.1/CRP.9, 12 December 1997, p 7.

353 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53, pp 205-07.

were formulated similar to Section C. The Discussion Paper duplicated the restrictive clause cited above as an opening clause, which was applicable to both Sections C and D. After the second round of discussions, the restrictive opening clause was generally accepted for Section C. It was later wholly integrated into article 8(2)(d) to limit violations of Common Article 3 in article 8(2)(c).

In the Bureau Proposal, also prepared by the Bureau of the Committee of the Whole, the square brackets in Sections C and D were deleted, and there was no option of removing either section. It appears that Sections C and D were no longer options but were assumed as belonging clearly under the jurisdiction of the Court. In the Bureau Proposal, the restrictive clause cited above was relocated to the opening clause of Section D (the first safeguard for Section D).³⁵⁴ In order to receive delegations' broader support for Section D, the second restriction of Section D was added to its opening clause. The Bureau Proposal added language drawn from article 1(1) of Additional Protocol II:

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.³⁵⁵

In addition, the Bureau Proposal added a negative threshold of armed conflict, which states: 'Nothing in sections C and D shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all means consistent with international law.'³⁵⁶

Delegations discussed the Bureau Proposal for a whole day on 13 July 1998. A few delegations, such as India, continued to insist that the Statute should not apply to war crimes in non-international armed conflict.³⁵⁷ Turkey was not satisfied when limitations were inserted, and emphasised the exclusion of war crimes in non-international armed conflict.³⁵⁸ Its concern was more focused on a high threshold for the exercise of the jurisdiction by the Court and the method for maintenance of national security, rather than whether serious violations in non-international armed conflict were punishable as war crimes.

354 'Proposal prepared by the Bureau' (11 July 1998) [Bureau Proposal], UN Doc A/CONF.183/C.1/L.59 and Corr.1, art 5 quarter War Crimes, p 215.

355 *ibid*, p 213.

356 UN Doc A/CONF.183/C.1/SR.33, para 7 (Netherlands).

357 *ibid*, paras 33 (Syrian Arab Republic), 37 (India); UN Doc A/CONF.183/C.1/SR.34, para 48 (Turkey); UN Doc A/CONF.183/C.1/SR.35, paras 2, 4 (Egypt), 54 (Pakistan), 64 (Iraq); UN Doc A/CONF.183/C.1/SR.36, para 6 (Libya).

358 UN Doc A/CONF.183/C.1/SR.34, para 48 (Turkey); UN Doc A/CONF.183/SR.9, para 43 (Turkey).

After inserting the second safeguard for Section D and the negative threshold of non-international armed conflict, China did not resist the inclusion of Section D but still had doubts about some subparagraphs listed in this section.³⁵⁹ Nevertheless, China in the end voted against the Rome Statute.³⁶⁰ At the Rome Conference and after, China repeatedly explained that '[t]he definition of war crimes committed during domestic armed conflicts in the Statute had far exceeded commonly understood and accepted customary international law' and said that it 'opposed the inclusion of non-international armed conflicts in the jurisdiction of the Court'.³⁶¹ Egypt shared a similar view with China and said that the Statute should only deal with war crimes recognised under customary international law. Section D was rejected because its content had not been recognised as customary international law except for the paragraph relating to children.³⁶² However, unlike China, Egypt did not show any resistance to the inclusion of Section D and even made a declaration to accept the jurisdiction of the ICC.³⁶³ Russia was also not satisfied with the negative threshold of armed conflict, and suggested a reference to 'State sovereignty' after the wording 'affect'.³⁶⁴ However, Russia did not vote against the Rome Statute and signed it.

On the other hand, some others criticised the second safeguard for Section D and the negative threshold of armed conflict.³⁶⁵ Some States argued that by introducing the second safeguard, the Bureau Proposal set up a high threshold for other serious violations of war crimes in non-international armed conflict.³⁶⁶ Others claimed that the very high threshold would inhibit the capacity of the Court to prosecute war crimes committed in non-interna-

359 UN Doc A/CONF.183/C.1/SR.33, para 40 (China), which had difficulty in accepting, paragraphs regarding 'pillaging; conscripting or enlisting children under the age of fifteen; killing treacherously a combatant adversary; subjecting persons to physical mutilation; destroying or seizing the property of an adversary'.

360 'Summary record of the 9th plenary meeting of the Conference', UN Doc A/CONF.183/SR.9, para 38 (China).

361 *ibid* ; UN Doc A/CONF.183/SR.9, para 38 (China).

362 UN Doc A/CONF.183/C.1/SR.35, paras 2, 4 (Egypt).

363 *Situation in the Arab Republic of Egypt* (Decision on the 'Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt', OTP) OTP-CR-460/13 (23 April 2014).

364 UN Doc A/CONF.183/C.1/SR.34, para 82 (Russian Federation).

365 States did not support the requirements, see UN Doc A/CONF.183/C.1/SR.33, para 14 (Austria (on behalf of European Union)); UN Doc A/CONF.183/C.1/SR.34, para 34 (Spain); UN Doc A/CONF.183/C.1/SR.35, paras 8 (Sierra Leone), 114-15 (Croatia, Czech Republic, Estonia, Hungary, Iceland, Norway, Poland, Slovenia and Austria).

366 UN Doc A/CONF.183/C.1/SR.33, para 7 (the Netherlands, Coordinator).

tional armed conflict between armed groups.³⁶⁷ The Italian delegation stated that 'the acceptability of the two substantial restrictions was contingent on the acceptance of the entire package of provisions contained in section C and D'.³⁶⁸ In the spirit of compromise, many States opposing the inclusion of Sections C and D finally gave up their objections.³⁶⁹ Burundi, which was initially opposed to including war crimes in non-international armed conflict,³⁷⁰ finally accepted its inclusion.³⁷¹ Sudan even recommended adding a reference to conflicts among armed groups to cover a broad scope of war crimes in non-international armed conflict.³⁷² The final package deleted the requirement of 'responsible command and control over territory' and included conflicts among armed groups for Section D.³⁷³ The two safeguards for Section D with these slight changes were later incorporated into article 8(2)(f) of the Statute.³⁷⁴ The negative threshold of non-international armed conflict finally applied to the entire article 8 and was integrated into article 8(3) of the Statute.³⁷⁵

Discussions on the thresholds reveal that war crimes in non-international armed conflict were widely accepted in international law. As Kirsch pointed out: 'those reactions [towards the two added restrictions in articles 8(2)(e) and (f)] ultimately proved useful, reflecting as they did widespread support

367 *ibid*, paras 14 (Austria, on behalf of European Union); 18 (Switzerland), 24 (US), 68 (Germany), 80 (UK); UN Doc A/CONF.183/C.1/SR.34, paras 9 (Trinidad and Tobago), 22 (New Zealand), 34 (Spain), 60 (South Africa), 94 (Sudan), 107 (Australia), 112 (Mexico), 114 (Croatia, Czech Republic, Estonia, Hungary, Iceland, Norway, Poland, Slovenia); UN Doc A/CONF.183/C.1/SR.35, paras 8 (Sierra Leone), 23 (Uganda), 37 (Finland), 49 (Tanzania), 60 (Lithuania), 67 (Canada), 68 (Denmark), 76 (Estonia), 77 (Romania), 79 (Solomon Islands); UN Doc A/CONF.183/C.1/SR.36, paras 2 (Norway), 30 (Slovenia), 33 (Zimbabwe), 37 (Costa Rica), 42 (Bosnia and Herzegovina), 52 (ICRC). 'Information conveyed by New Zealand on Behalf of the International Committee of the Red Cross' (13 July 1998), UN Doc A/CONF.183/INF/11; 'Sierra Leone: Proposal regarding the Bureau proposal in UN Doc A/CONF.183/C.1/L.59 and Corr.1' (13 July 1998), UN Doc A/CONF.183/C.1/L.62.

368 UN Doc A/CONF.183/C.1/SR.35, para 15 (Italy).

369 *ibid*, para 31 (Algeria); UN Doc A/CONF.183/C.1/SR.34, para 85 (Thailand). '§§ C and D would not apply if there was any foreign interference in the non-international armed conflict'; UN Doc A/CONF.183/C.1/SR.35, para 35 (Indonesia); UN Doc A/CONF.183/C.1/SR.27, para 80 (Sri Lanka); UN Doc A/CONF.183/C.1/SR.35, para 44 (Sri Lanka).

370 UN Doc A/CONF.183/C.1/SR.27, para 46 (Burundi).

371 UN Doc A/CONF.183/C.1/SR.35, para 20 (Burundi).

372 UN Doc A/CONF.183/C.1/SR.34, para 96 (Sudan).

373 Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 10; 'Draft Statute for the International Criminal Court' (16 July 1998), UN Doc A/CONF.183/C.1/L.76 and Add.1.

374 1998 Rome Statute, the second sentence of art 8(2)(f).

375 *ibid*, art 8(3).

for covering internal armed conflicts'.³⁷⁶ Considering States' support for the inclusion and their shifts, there is sufficient evidence of State practice showing widespread acceptance that in international law war crimes cover serious violations of Common Article 3 and other rules of international humanitarian law applicable in non-international armed conflict.

3.4.4 Conclusions

This review of the preparatory works demonstrate that the majority of States at the Rome Conference generally accepted a rule of war crimes in non-international armed conflict. War crimes for violations of Common Article 3 in non-international armed conflict were generally accepted before the 1998 Rome Conference, while war crimes for other serious violations in non-international armed conflict were crystallised at the 1998 Rome Conference. As shown above, an overwhelming number of States generally recognised serious violations of war crimes in non-international armed conflict, despite some States' reluctance to expand its scope. After the adoption of the Rome Statute in 1998, satisfaction was also expressed in the General Assembly and the Sixth Committee about the inclusion of war crimes in non-international armed conflict in the Rome Statute.³⁷⁷ Notwithstanding a few States' concerns, it cannot be denied that based on sufficient practice and *opinio juris*, a customary rule was crystallised to criminalise serious violations of international humanitarian law in non-international armed conflict as war crimes in 1998.³⁷⁸

Nepal expressed its concern that the inclusion of serious violations of Additional Protocol II would cause difficulties for a State that is not a party to the Protocol.³⁷⁹ This concern, in fact, cannot be upheld now. 112 of the 123 States Parties to the Rome Statute were also States Parties to Additional Protocol II when they ratified the Statute.³⁸⁰ In addition, Colombia declared that:

376 Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 7.

377 GAOR 53rd session, 10th plenary meeting, UN Doc A/53/PV.10 (22 September 1998), Finland; GAOR 53rd session, 22nd plenary meeting, UN Doc A/53/PV.22 (30 September 1998), Zambia; 'Summary record of the 10th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.10 (1998), para 14 (Greece); 'Summary record of the 11th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.11(1998), paras 87 (Liechtenstein), 95-6 (ICRC); 'Summary record of the 12th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.12 (1998), paras 42 (UK), 57 (Georgia); 'Summary record of the 12th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.12 (2000), para 34 (Libyan Arab Jamahiriya).

378 Krefß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 104-09, 175.

379 UN Doc A/CONF.183/C.1/SR.27, para 73 (Nepal).

380 8 of the 123 States Parties first ratified the Statute and then ratified Additional Protocol II. These 8 States are Afghanistan, DRC, Fiji, Nauru, Palestine, Serbia and Timor-Leste, as well as Trinidad and Tobago.

the provisions of the Statute must be applied and interpreted in a manner consistent with the provisions of international humanitarian law and, consequently, that nothing in the Statute affects the rights and obligations embodied in the norms of international humanitarian law, especially those set forth in article 3 common to the four Geneva Conventions and in Protocols I and II Additional thereto.³⁸¹

States accepted that when becoming a party to the Rome Statute, the situation would not be dependent upon the acceptance of legal instruments defining the substance of such crimes. For instance, Mexico, the Marshall Islands and Andorra are States Parties to the Rome Statute but are not States Parties to Additional Protocol II.³⁸² The three States are not bound by Additional Protocol II, but their citizens are obliged indirectly not to exercise conducts that are considered as violations. In short, with regard to war crimes in non-international armed conflict, article 8(2)(c) was a reflection of pre-existing customary law, and article 8(2)(e) was a crystallisation of customary law. The two provisions of the Rome Statute were declaratory of customary law concerning war crimes in non-international armed conflict at the adoption of the Statute in 1998.

3.5 FURTHER RECOGNITION OF WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICT: ARE ARTICLES 8(2)(C) AND (E) DECLARATORY OF CUSTOM?

By 31 December 2000, 139 States signed the Rome Statute. As of June 2018, the Statute has been ratified by 123 States and signed by another 30 States.³⁸³ Further practice and statements confirm the establishment of a customary rule of war crimes in non-international armed conflict.

3.5.1 Preparatory Commission: Elements of Crimes

States at the Rome Conference decided to establish a Preparatory Commission for the International Criminal Court to further the operation and arrangements of the Court.³⁸⁴ There were five sessions of the Preparatory Commission over the course of 1999 and 2000 during which some States submitted proposals and commented on the elements of war crimes in articles

381 'Declarations, Colombia', Rome Statute of the International Criminal Court, 5 August 2002, para 1.

382 'States Parties to the Following International Humanitarian Law and Other Related Treaties as of 14-Dec-2017', available at: <https://ihl-databases.icrc.org/ihl> [accessed 12 December 2017].

383 In 2018, there exist 195 States, comprising 193 UN member States and two non-member observer States (Holy See and the State of Palestine). Cook Islands and Niue are not included in the list of these States, but they are States with full treaty-making capacity.

384 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc A/CON.183/10, Annex, Resolution F.

8(2)(c) and (e).³⁸⁵ By consensus, the Preparatory Commission in 2000 adopted the Elements of Crimes.³⁸⁶ According to the summaries of the Sixth Committee proceedings: 'all the speakers expressed satisfaction with the conclusion of the finalised draft texts for the Elements of Crimes'.³⁸⁷ The materials on the drafting of the Elements of Crimes, however, do not contribute anything significant to the debate.³⁸⁸ The adoption of the Elements of Crimes by consensus as well as the fact that more than 110 States signed the Statute in 2000 further 'provided clear proof of the international community's commitment' to the establishment of the ICC as well as its recognition of war crimes in non-international armed conflict 'within the shortest possible time'.³⁸⁹

3.5.2 Practice of States

Before ratifying the Statute, several States passed national law to bring their legislations into line with the provisions of the Statute. Except for a few States that have not enacted or drafted implementing legislation in their national laws,³⁹⁰ many States Parties have implemented the Rome Statute and the 1949 Geneva Conventions by providing provisions of war crimes in non-inter-

385 Christopher K. Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (2000) 94 *AJIL* 773, 776-79; 'List of documents issued at the first, second and third sessions of the Preparatory Commission, held in 1999, Working Group on Elements of Crimes', in 'Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999)', PCNICC/1999/L.5/Rev1, 22 December 1999, Annexe I, US, Costa Rica, Hungary and Switzerland, Republic of Korea, Colombia, China and the Russian Federation; 'Proposal submitted by China and the Russian Federation on the elements of article 8, paragraph 2(c)(i)', in the discussion paper proposed by the Coordinator (PCNICC/1999/WGEC/RT.5/Rev1), PCNICC/1999/WGEC/DP.27, 12 August 1999.

386 Elements of Crimes, in 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', ICC-ASP/1/3 and Corr.1, UN Doc PCNICC/2000/1/Add.2. See 'Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000) (summary)', PCNICC/2000/L.3/Rev1, 6 July 2000, para 11; 'Summary record of the 9th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.9 (2000), para 9 (France, on behalf of the European Union, Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Malta, Romania, Slovakia and Slovenia).

387 'Summary record of the 9th-13th meetings [of the Sixth Committee]', UN Doc A/C.6/55/SR.9-13 (2000).

388 Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes' (2003) 7 *MPUNYB* 341, 396-402.

389 'Summary record of the 11th meeting [of the Sixth Committee]', UN Doc A/C.6/54/SR.11 (1999), para 31 (Australia); UN Doc A/C.6/55/SR.9 (2000), para 14 (Columbia); UN Doc A/C.6/55/SR.11 (2000), para 19 (Trinidad and Tobago); 'Summary record of the 13th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.13 (2000), paras 1 (Croatia), 34 (Slovakia).

390 Serbia, Criminal Code 2005, art 376; Peru, Presidential Decree on the National Human Rights Plan 2005, para 3.1.3 A1. 20 States have ratified the Rome Statute as of 1 January 2007. Mexico, Penal Code 1931, amended 2000, art 149 (ratified in 2005); Estonia, Penal Code 2001, para 94 (ratified in 2002).

national armed conflict.³⁹¹ For instance, in December 1999, Canada passed the *Crimes against Humanity and War Crimes Act*, which stipulates: 'crimes described in [...] paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date'.³⁹² The German *Code of Crimes against International Law* is going even beyond the inclusion of war crimes for non-international armed conflict by almost completely abandoning the distinction between international and non-international armed conflict.³⁹³ The 2004 UK *Manual of the Law of Armed Conflict* even clearly states:

Although the treaties governing internal armed conflicts contain no grave breach provisions, customary law recognises that serious violations of those treaties can amount to punishable war crimes. It is now recognised that there is a growing area of conduct that is criminal in both international and internal armed conflict. This is reflected in Article 8 of the Rome Statute.³⁹⁴

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- 391 Australia, ICC (Consequential Amendments) Act 2002, §§ 268.69-268.94; Belgium, Law relating to the Repression of Grave Breaches of International Humanitarian Law 1993, amended 2003, art 1*ter*; Burundi, Law on Genocide, Crimes against Humanity and War Crimes 2003, art 4; Bangladesh, The International Crimes (Tribunals) Act 1973, amended 2009, art 3(2)(d); Bosnia and Herzegovina, Criminal Code 2003, arts 173-175, 177-179; Cambodia, Law on the Establishment of the ECCC, art 1; Canada, Crimes against Humanity and War Crimes Act 2000, §§ 4 and 6; Central African Republic, Penal Code 2010, arts 156-157; Congo, Genocide, War Crimes and Crimes against Humanity Act (1998), art 4(c) and (d); Finland, Criminal Code 1889, amended 2008, § 5(1); France, Penal Code 1994, amended 2010, art 461-1; Germany, Law Introducing the International Crimes Code 2002, §§ 8(1)-(2), 9(1), 10(1)-(2), 11(1)-(2), 12; Georgia, Criminal Code 1999, arts 411-412; Ireland, International Criminal Court Act 2006, para 6(1); Ireland, Geneva Conventions Act 1962, amended 1998, § 4; Jordan, Military Penal Code 2000, art 41; Kenya, International Crimes Act 2008, para 6(4); Latvia, Criminal Code 1998, § 78; Lithuania, Criminal Code 1961, amended 1998, arts 333-344; The Republic of Moldova, Penal Code 2002, art 391; New Zealand, International Crimes and ICC Act 2000, § 11; Netherlands, The International Crimes Act 2003, art 6; Nicaragua, Revised Penal Code 1998, art 551; Niger, Penal Code 1961, amended 2003, art 208.8; Norway, Penal Code 1902, amended 2008, § 107; Rwanda, Law Setting up Gacaca Jurisdictions 2001, art 1; Senegal, Penal Code 1965, amended 2007, art 431-3(d); South Africa, ICC Act 2002, § 4(1); Spain, Penal Code 1995, amended 2010, art 614; Sweden, Penal Code 1962, amended 1998, para 6; Switzerland, Military Criminal Code 1927, amended 2011, arts 111-112d; Switzerland, Penal Code 1937, amended 2017, art 264b; Tajikistan, Criminal Code 1998, art 404; UK, International Criminal Court Act 2001, part 5, § 50; US, Military Commissions Act of 2006, 10 USC§ 948a 6(b)(1)(A); Venezuela, Code of Military Justice 1998, art 474; Vietnam, Penal Code 1999, §§ 313-314, 336-340, 343; The Socialist Federal Republic of Yugoslavia, Penal Code 1976, amended 2001, art 142.
- 392 Canada, Crimes against Humanity and War Crimes Act 2000, art 6(4); Canada, Law of Armed Conflict at the Operational and Tactical Levels 2001, § 1725.2: 'Today, however, many provisions of AP II are nevertheless recognised under customary International Law as prohibitions that entail individual criminal responsibility when breaches are committed during internal armed conflicts.'
- 393 International Criminal Code (VStGB) of 26 June 2002, entered into force on 30 June 2002, amended by art 1 of the Law of 22 December 2016, paras 8-12; Australia, ICC (Consequential Amendments) Act 2002, §§ 268.69-268.94.
- 394 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP 2004) 397, §§ 15.32, 15.32.1.

Enactment of these national laws confirmed the customary status of war crimes in non-international armed conflict.

Other jurisprudence further enhances the customary status of war crimes in non-international armed conflict. For instance, German courts have examined whether war crimes were committed in recent civil wars in Afghanistan, Chechnya, the Democratic Republic of Congo (DRC) and Syria.³⁹⁵ The German Federal Administrative Court in the *Chechnya* case had to determine whether a person is excluded from refugee protection for committing war crimes in a civil war. The court considered whether war crimes in civil war existed in 2002 by referring to article 8 of the Rome Statute.³⁹⁶ The Dutch Public Prosecutor charged a Dutch national for war crimes committed during the Second Liberian War (1999-2003), although the charge was dismissed for lack of evidence.³⁹⁷ In the *Liberation Tigers of Tamil Elam* (LTTE) case, one charge was war crimes in civil wars in Sri Lanka from 2003 to 2010. Referring to article 6(2)(f) of the *International Crimes Act*, The Hague District Court affirmed that it had jurisdiction over war crimes relating to non-international armed conflict.³⁹⁸

In addition, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice held that ‘according to the Rome Statute, [...] [war crimes] refer to various acts against persons and objects that include: [...] or serious violations of article 3 common [...] in the case of an armed conflict not of an international character’.³⁹⁹ A military court of the DRC relied on the Rome Statute indirectly to decide charges of war crimes committed in its non-international armed conflict from 2003 to 2006.⁴⁰⁰ Belgium, Finland and Sweden, as well as other States have been engaged in prosecuting war crimes com-

395 *Prosecutor v Ignace Murwanashyaka and Straton Musoni* [DRC case] (Judgment, Higher Regional Court, 5th Criminal Senate, Stuttgart, Germany) 3 StE 6/10 (28 September 2015); DRC case (Decision, Federal Supreme Court (Bundesgerichtshof/BGH), Germany) AK/13 (17 June 2010), paras 3(bb)(1)-(3); *Prosecutor v Klein and Wilhem* [Fuel Tankers case] (Termination of proceedings pursuant to Penal Procedure Code, Federal Public Prosecutor General, Germany) 3 BJs 6/10-4 (16 April 2010), paras D.II.4.a); *Prosecutor v Aria Ladjedoardi* (Decision, Federal Supreme Court, Germany) 3 StR 57/17 (27 July 2017), paras II (3)-(4); *Prosecutor v Abdelkarim El. B.* (Judgment, Higher Regional Court, 5th Criminal Senate, Frankfurt am Main, Germany) 3 StE 4/16 (8 November 2016).

396 *Chechen Refugee* case (Judgment, Federal Supreme Administrative Court (BVerwG), Germany) 10.C.7.09 (16 February 2010), paras 26-27.

397 *Public Prosecutor v Guus Kouwenhoven* (Judgment, District Court of The Hague, the Netherlands) LJN: AX7098 (7 June 2006).

398 *Public Prosecutor v Ramalingam/Liberation Tigers of Tamil Eelam* (LTTE) (Judgment, District Court of The Hague, the Netherlands) LJN: BU9716, 09/748802-09 (21 October 2011) pp 12-14.

399 *Recao* case (Judgment, Supreme Tribunal of Justice, Venezuela) 27 July 2004, pp 10-11.

400 *Garrison Military Auditor, Public Prosecutor's Office and civil parties v Kyungu Mutanga* (Judgment, Military Garrison Court of Haut-Katanga, DRC) 5 March 2009, pp 69-70.

mitted in recent civil wars by exercising personal or universal jurisdiction.⁴⁰¹ The absence of objection to the exercise of universal jurisdiction and the support of other States through extradition of suspects, for instance, Chad, Ethiopia, Spain and Turkey, at the very least, indicate their practice of supporting a rule of war crimes in non-international armed conflict in international law.⁴⁰²

Practice of other non-party States also indicates support for war crimes in non-international armed conflict.⁴⁰³ National laws of some non-party States have confirmed war crimes in civil wars.⁴⁰⁴ Some non-party States are preparing to accede to the Rome Statute.⁴⁰⁵ The amendment of its Constitution for ratification of the Rome Statute and the two *ad hoc* declarations according to article 12(3) of the Rome Statute manifest Ukraine's positive attitude towards war crimes in civil war.⁴⁰⁶ Despite its vote against the Statute, Israel did not object to war crimes in non-international armed conflict

401 *Public Prosecutor v Mouhammad Droubi* (Judgment, Svea Court of Appeal, Sweden) B 4770-16 (5 August 2016); *Public Prosecutor v Haisam Omar Sakhanh* (Judgment, District Court of Stockholm, Sweden) B 378716 (16 February 2017) for war crimes committed in Syria. For more details about complaints, investigations, arrests and prosecutions of war crimes committed in non-international armed conflict, see Human Rights Watch, 'These are the Crimes we are Fleeing' Justice for Syria in Swedish and German Courts and Annex, 3 October 2017; FIDH, ECCHR, REDRESS, FIBGAR, 'Make Way for Justice #3: Universal Jurisdiction Annual Review 2017', March 2017; TRIAL, ECCHR, FIDH, FIBGAR, 'Make Way for Justice #2: Universal Jurisdiction Annual Review 2016', February 2016; TRIAL, ECCHR, FIDH, 'Make Way for Justice: Universal Jurisdiction Annual Review 2015', April 2015; International Federation for Human Rights, Universal Jurisdiction Developments: January 2006-May 2009, 2 June 2009; ICRC, Customary IHL Database; *Repak* case (Judgment, Court of Appeal, Norway) 12 April 2010, p 15; *Public Prosecutor v Momcillo Trajković* (Opinions on Appeals of Conviction of Momcillo Trajković, Office of the Public Prosecutor of Kosovo) 68/2000 (30 November 2001), Section II (D).

402 For instance, Michel Desaedeleer, a Belgian citizen involved in the civil war in Sierra Leone, was arrested by Spain.

403 30 of these non-party States have signed the 1998 Rome Statute.

404 Signature States, see Angola, Constitution of the Republic of Angola 2010, art 61; Armenia, Criminal Code 2003, art 390; Belarus, Criminal Code 1999, arts 134-36, 138; Uzbekistan, Criminal Code 1994, amended 2001, art 152; Thailand, Prisoners of War Act 1955, §§ 12-19; US, War Crimes Act of 1996, 18 USC 2441 (c)(3). Further information is not available due to the language of legislation text in Russia, Spanish and Indonesia. States have not signed or acceded, see Lebanon, Lebanese Criminal Code 1943, art 197; Vietnam, Penal Code 1999, art 343; Report on the Practice of Ethiopia (1998), Chapter 6.4, Ethiopia's Penal Code; Nicaragua, Revised Penal Code 1998, art 551.

405 Indonesia is considering joining the Statute; Nepal, Asian Parliamentarians' Consultation on the Universality of the International Criminal Court, 'An action plan for the Working Group of the Consultative Assembly of Parliamentarians for the ICC and the rule of law on the universality of the Rome Statute in Asia', 16 August 2006, 5. e; Ukraine, Council of Ministers' decision No (82) of 2003 on Approval of Accession to the Statute of the International Criminal Court, 1 April 2003; Yemen's decision to accede to the Rome Statute was reversed due to national decision in 2007.

406 'Declaration by Ukraine lodged under Article 12 (3) of the Rome Statute' (9 April 2014); 'Declaration by Ukraine lodged under Article 12 (3) of the Rome Statute' (8 September 2015). The Ukraine's Criminal Code simply refers to war crimes in war. See Ukraine, Criminal Code of Ukraine 2001, arts 438, 441, 444.

but expressed concerns about the inclusion of forced transfer.⁴⁰⁷ The US declared that it would not ratify the Statute, and Russia withdrew its signature. However, they both have recognised war crimes in non-international armed conflict.⁴⁰⁸ Pakistan voted for the Statute, and it did not consider war crimes in non-international armed conflict as an issue.

Rules 102, 151 and 156 of the 2005 ICRC *Study* concerning individual criminal responsibility and war crimes further confirmed that serious violations of international humanitarian law in non-international armed conflict constitute war crimes.⁴⁰⁹ The 2005 ICRC *Study* demonstrates that some national military manuals address the issue of war crimes in non-international armed conflict,⁴¹⁰ although some of them limit war crimes to grave breaches in this context.⁴¹¹ Trials for war crimes in international law before international and national tribunals support the conclusion as provided under Rule 156.⁴¹² National laws, case law and many official statements from the early 1990s also endorse the view of criminal responsibility for war crimes in non-international armed conflict.⁴¹³

3.5.3 Post-Rome instruments and cases at the ICC and other tribunals

Post-Rome instruments for international and national tribunals demonstrate the importance of such a customary rule and further confirm the customary status of war crimes in non-international armed conflict. Definitions of war crimes in non-international armed conflict have been adopted to prosecute war crimes in civil war in the following legal documents: Statute of

407 'Statement by Judge Eli Nathan, Head of the Delegation of Israel' (17 July 1998); 'Summary record of the 14th meeting [of the Sixth Committee]', UN Doc A/C.6/54/SR.14 (1999), para 49 (Israel).

408 GAOR 58th session, 95th plenary meeting, UN Doc A/58/PV.95 (13 September 2004), US; US, War Crimes Act of 1996, 18 USC 2441 (c)(3), as amended by Military Commissions Act of 2006, 10 USC 948a note; Russian Federation, Criminal Code 1996, art 356.

409 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II, Rule 156 and its practice.

410 Australia, LOAC Manual 2006, 13. 39; Canada, LOAC Manual 1999, para 2; Canada, Law of Armed Conflicts Manual 2001, paras 1602-03, 1610; UK, LOAC Manual 2004, para 16.26; US, Military Commissions Act of 2006, 10 USC 948a note, § 6(b)(1)(A); Ukraine, IHL Manual 2004, para 1.8.4; Switzerland, Regulation on Legal Bases for Conduct during an Engagement 2005, para 152; Netherlands, Military Manual 2005, paras 1131-32, 1134; Cameroon, Instructor's Manual 2006, para 551; Sierra Leone, Instructor Manual 2007, 65, cited in ICRC, Customary IHL Database.

411 France, Law of Armed Conflicts Manual 2001, pp 44-46; Germany, Soldiers' Manual 2006, RII3; Burundi, Regulations on International Humanitarian Law 2007, Part *Ibis*; Mexico, IHL Guidelines 2009, para 5; Nigeria, Manual on the Laws of War States, para 6; Peru, IHL Manual 2004, para 31 a; Peru, IHL and Human Rights Manual 2010, para 32(a), cited in ICRC, Customary IHL Database.

412 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II.

413 *ibid*, Vol I, Rules 102, 151, pp 372-74, 553-54 and fns 12-14. Some practice does not clarify whether violations in non-international armed conflict constitute war crimes or crimes against humanity.

the Special Court for Sierra Leone (SCSL),⁴¹⁴ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC),⁴¹⁵ Statute of the Iraqi High Tribunal,⁴¹⁶ Regulation for East Timor's Serious Crimes Panel,⁴¹⁷ and Statute of the Extraordinary African Chambers within the Senegalese Judicial System.⁴¹⁸ Articles 3 and 4 of the 2002 Statute of the SCSL⁴¹⁹ copy article 4 of the ICTR Statute. The Statute of the African Court of Justice and Human and Peoples' Rights includes war crimes in non-international armed conflict.⁴²⁰

The jurisprudence of the two *ad hoc* tribunals after the adoption of the Rome Statute endorses war crimes in non-international armed conflict under customary international law.⁴²¹ An ICTY Trial Chamber even referred to article 8 of the Rome Statute to justify the consistency between the ICC Statute and the *Tadić* test about war crimes in non-international armed conflict.⁴²² Most Situations present before the ICC for consideration today, for instance, CAR, Darfur, DRC, Mali and Uganda, all occurred in non-international armed conflict. The OTP of the ICC also actively prosecuted serious violations in non-international armed conflict as war crimes, and these

414 Statute of the SCSL, arts 3-4.

415 Law on the Establishment of the ECCC, arts 6-7.

416 Statute of the Iraqi Special Tribunal, 43 ILM 231 (2004), art 13(a).

417 United Nations Transitional Administration in East Timor, Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc UNTAET/REG/2000/15, Dili, 6 June 2000 [East Timor, Regulation for Special Panels for Serious Crimes 2000], § 6.

418 Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 (unofficial translation by Human Rights Watch, an agreement between the African Union and Senegal) [Statute of the Extraordinary African Chambers within the Senegalese Judicial System], 52 ILM 1028 (2013), art 7(2).

419 Statute of the SCSL.

420 The African Court Statute of the African Court of Justice and Human and People's Rights, annexed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7 (I) Rev 1, 27 June 2014, not entered into force, arts 28 D (c) and (e). It has been signed by 9 States: Benin, Chad, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, São Tomé and Príncipe, and Sierra Leone.

421 *Mucić et al* Trial Judgment, paras 131-33; *Furundžija* Trial Judgment, para 132; *Prosecutor v Blaškić* (Judgment) ICTY-95-14-T (3 March 2000) [*Blaškić* Trial Judgment], para 176; *Prosecutor v Naletilić & Martinović* (Judgment) ICTY-98-34-T (31 March 2003), para 228; *The Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [*Akayesu* Trial Judgment], para 611; *The Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13-T (27 January 2000) [*Musema* Trial Judgment and Sentence], para 242; *The Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-T (7 June 2001) [*Bagilishema* Trial Judgment], paras 98-105; *The Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T (15 May 2003) [*Semanza* Trial Judgment and Sentence], paras 354-71; *The Prosecutor v Kamuhanda* (Judgment) ICTR-99-54A-T (22 January 2004) [*Kamuhanda* Trial Judgment], paras 721-24; *The Prosecutor v Ntagerura et al* (Judgment and Sentence) ICTR-99-46-T (25 February 2004) [*Ntagerura et al* Judgment and Sentence], para 766. For further references, see Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II, Rule 156.

422 *Milošević* Decision on Acquittal Judgment, para 20.

indicted include Lubanga,⁴²³ Katanga and Ngudjolo,⁴²⁴ Mbarushimana,⁴²⁵ and Al Mahdi.⁴²⁶ The Darfur Situation referred to the ICC by the Security Council further implied the Security Council's willingness to hold individuals responsible for war crimes in non-international armed conflict, despite its mandate to guarantee international peace and security.

The list of war crimes in non-international armed conflict is substantially shorter than that in international armed conflict. In order to overcome the gap between war crimes in international armed conflict and in non-international armed conflict, Belgium proposed harmonising them at the Review Conference.⁴²⁷ At the 2010 Kampala Review Conference, another three serious violations were added to the list in article 8(2)(e).⁴²⁸ By consensus, the Assembly of States Parties in 2017 decided to insert another three amendments into the list of war crimes in international and non-international armed conflicts.⁴²⁹

In October-November 2016, three African States notified the UN Secretary-General of their intention to withdraw from the Rome Statute. Philippines also did so in March 2018. Two of them, however, rescinded their withdrawal notifications.⁴³⁰ The impact of their withdrawals or attempts should not be overstated with respect to the generally recognised rule of war crimes in non-international armed conflict.

3.5.4 Assessment and conclusions

All the research about signing, ratification, amendments, national implementation legislation, international and national prosecutions as well as other specified tribunal instruments either echoes the view that article 8 is declara-

423 *The Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute, TC I) ICC-01/04-01/06-2842 (14 March 2012), paras 531, 571.

424 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 21, 23-24, 26, 28-32.

425 *Mbarushimana* Decision on Confirmation of Charges, paras 93, 103-07; *The Prosecutor v Mbarushimana* (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled Decision on the confirmation of charges, A Ch) ICC-01/04-01/10-514 (30 May 2012).

426 *The Prosecutor v Al Mahdi* (Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, PTC I) ICC-01/12-01/15 (24 March 2016); *The Prosecutor v Al Mahdi* (Judgment and Sentence, TC I) ICC-01/12-01/15 (27 September 2016).

427 'Harmonization of the Competences of the ICC Relating to War Crimes in Case of International Armed Conflict and Armed Conflict not of an International Character', Non-paper of Belgium, in Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010, Official Document-RC/11, Annexe VI, p 124.

428 Amendment to Article 8 of the Rome Statute of the International Criminal Court, 10 June 2010, 26 September 2012, 2868 UNTS 195, 36 States Parties.

429 'Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court', Resolution ICC-ASP/16/Res 4, 14 December 2017, para 2 and Annexes. Arts 8(2)(b)(xxvii)-(xxix) and arts 8(2)(e)(xvi)-(xviii) were inserted.

430 See C.N.805.2016.TREATIES-XVIII.10, C.N.786.2016.TREATIES-XVIII.10, C.N.62.2017.TREATIES-XVIII.10, C.N.862.2016.TREATIES-XVIII.10, C.N.121.2017.TREATIES-XVIII.10 and C.N.138.2018.TREATIES-XVIII.10.

tory of custom about war crimes in non-international armed conflict, or provides evidence that article 8 is generally recognised as a part of the corpus of customary law now. It is true that some non-party States continue to qualify war crimes as grave breaches of the Geneva Conventions,⁴³¹ and some States do not provide for war crimes in national law, not to mention war crimes in non-international armed conflict.⁴³² These facts are not sufficient to prevent or alter the status of current custom. In general, a customary rule criminalising violations in non-international armed conflict as war crimes is recognised. The two provisions of the Rome Statute continue to be declaratory of customary law concerning war crimes in non-international armed conflict.

3.6 CONCLUDING REMARKS

Before the 1990s, the international community did not consider war crimes in non-international armed conflict as international crimes under customary law. In 1993, the UN Security Council adopted the ICTY Statute, which set up the first step for legal development. The Security Council expressly recognised serious violations in non-international armed conflict as a category of war crimes when it adopted the 1994 ICTR Statute. In October 1995, the ICTY in the *Tadić* Appeals Chamber Decision on Jurisdiction further contributed to the formation of a customary rule, declaring that the law applied is pre-existing customary law. States generally accepted the rule of war crimes in non-international armed conflict during the preparation and negotiation process of the 1998 Rome Statute. The examination in this Chapter shows that war crimes in non-international armed conflict in general were and are part of the corpus of customary law. This Chapter concludes that article 8(2)(c) of the Rome Statute was a codification of pre-existing customary law, while article 8(2)(e) was a crystallisation of an emerging customary rule concerning war crimes in non-international armed conflict. The two provisions, in general, were declaratory of customary law in 1998 with respect to war crimes in non-international armed conflict. They continue to be declaratory of custom to the present day.

431 Somalia, Constitution of Somalia 1960, para 3.5.4.1; Ethiopia, Criminal Code 2005, arts 269-280; Azerbaijan, Criminal Code 1999, 116.0; Kiribati, Geneva Conventions (Amendment) Act 2010, § 5; Kazakhstan, Criminal Code 1997, § II; Sri Lanka's Geneva Conventions Act (2006); Zimbabwe, Geneva Conventions Act 1981, amended 1996.

432 China, Law Governing the Trial of War Criminals 1946, art 3.