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The Applicability of International Humanitarian Law to Organised Criminal Organisations:
an Analysis of Mexico and the Zetas Cartel

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<p>Abstract:</p> <p>The definition of 'organised crime' has evolved during the last decades to adapt to this ever-changing phenomenon. As a consequence of globalisation, criminal organisations expanded their reach by transporting illicit goods from one border to another. With the ratification of the Convention Against Transnational Organised Crime, states established a suitable definition of organised crime to eradicate this phenomenon. However, there are situations in which the level of violence exerted by criminal organisations is not suitable for what is described in the Palermo Convention.</p> <p>The aim of this thesis is to analyse if international humanitarian law can be applicable in situations involving organised criminal groups. Since the determination of existence of a non international armed conflict has to be done on a case-by-case basis, the violence in Mexico is used as a case study, specifically the 'Zetas' criminal organisation. After the declaration of the 'war on drugs' by former President Felipe Calderón, state armed forces were deployed to dismantle criminal organisations. The so called 'war' was not regulated by the rules and customs of war and armed conflict, causing systematic human rights violations by army officials and the sophistication of criminal organisations to perpetrate counter-attacks of higher intensity.</p> <p>This research reviews the definition of non-international armed conflicts and the elements that need to be fulfilled to determine the existence of this type of conflict. According to common article 3, Additional Protocol II to the Geneva Conventions, and international case law, two specific must be considered: the organisation of the group and the intensity of the attacks. The findings show that the 'Zetas' organisation has a strong horizontal structure that provides special training for new recruits, and has exerted protracted armed violence with techniques similar to the ones used by state armed forces. It is concluded that this criminal organisation fulfils the requirements to be considered party to a non-international armed conflict. The declaration of existence of a conflict of this nature make possible the regulation of the conflict based on the rules of war and armed conflicts. The last chapter reviews the regulation made through international humanitarian law and international human rights law in the protection of civilians, so as the accountability for violations committed by members of armed forces through international criminal law.</p>	

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1. Introduction

1.1 Background.

Organised crime is not a new phenomenon. Policy makers and government officials in every state of the world have developed techniques to combat organised criminal groups. However, globalisation changed the way these groups operate, allowing easy transit of illicit goods from one border to another. The use of violence is a relatively common feature of organised criminal organisations, posing no real danger to the rule of law in the states in which they operate.¹

In their beginnings, Mexican criminal organisations limited their activities to transport illicit goods from their country of origin into the United States through the nearly 2,000 miles of shared border between these two countries.² Juan Nepomuceno Guerra, the founder of one of the first transnational criminal organisations in Mexico, started his illegal business smuggling whiskey into the United States during the years of the Prohibition. It became one of the strongest and most profitable criminal organisations in Mexico.³ The increase in marijuana and cocaine consumption during the 1960s and the 1970s in the United States caused the creation and expansion of the Felix Gallardo Organisation. This organisation came to an end after the arrest of its founder, Felix Gallardo, due to the murder of the Drug Enforcement Administration (DEA) agent, Enrique Camarena.⁴

Without a leader, the organisation divided into small groups that soon recruited more members and grew in size and power. After an arrangement made between Mexican and Colombian criminal organisations, the southern border of the country became the entrance door for the transport of cocaine on its way to the United States. Taking control over these routes became the central goal of criminal organisations. What started as clashes between members of these groups,

¹ Congressional Research Service (CRS), 'Mexico: Organised Crime and Drug Trafficking Organisations' (R41576 July 18 2020) Introduction.

² Anoop Ballal and others, 'The Drug Cartel Cluster in Mexico' Ecole de Management & Lab Centre for Competitiveness ecch 211-0481 <https://www.researchgate.net/publication/237009773_The_Drug_Cartel_Cluster_in_Mexico/link/0046351ae1b692e5a0000000/download> accessed 15 November 2020.

³ Guadalupe Correa-Cabrera, *Los Zetas Inc.* (Temas de hoy, 2018) 36-7.

⁴ Christopher Woody, 'The "godfather" of Mexico's cartels has been sentenced for killing of a DEA Agent' *Business Insider* (30 Aug 2017) <<https://www.businessinsider.com/miguel-angel-felix-gallardo-godfather-of-mexicos-cartel-sentenced-2017-8?r=MX&IR=T>> accessed 21 Nov 2020.

rapidly evolved to what has been considered ‘brutal drug-trafficking-related violence’.⁵ This takes place in a context where government officials are offered bribes in exchange for impunity.⁶ The widespread corruption has allowed organised criminal organisations to perpetrate attacks against civilian population without being held accountable. Therefore, the rule of law in Mexico has been undermined to such an extent that it is nearly impossible to enforce domestic law.⁷ The level of violence related to criminal organisations is now considered different from the one commonly used by traditional criminal organisations: targeting civilians, journalists, political candidates, activists, and any person that criminal groups consider a threat to their organisation.⁸

Due to the seriousness of the situation, in 2006, former President Felipe Calderón decided to launch the so-called ‘war on drugs’. This ‘war’ was by no means regulated by international humanitarian law, and only represented ‘the use of armed forces in law enforcement duties, which include a policy of confronting organised crime and the deployment of joint operations between the armed forces and state and municipal security agencies’.⁹ This action only increased the level of violence caused by organised criminal groups and the number of human rights violations perpetrated by state armed forces. It is estimated that 102,696 homicides were committed in the country between December 2006 and November 2012.¹⁰ The government’s inability to control the extreme violence provoked by organised criminal groups also resulted in the displacement of more than 1.6 million people from their homes.¹¹ Despite the failed strategy on the ‘war on drugs’, state armed forces have not returned to their quarter. Organised criminal organisations implemented sophisticated techniques to defend themselves from the attacks of state armed forces and to expand their businesses over other criminal organisations.

⁵ CRS (n 1) Introduction.

⁶ Ibid 9,10.

⁷ In 2016, it was estimated that only 9 out of every 100 crimes resulted in convictions. Jose Luengo-Cabrera and Tessa Butler, ‘Impunity in Mexico: A Rising Concern’ (*Justice in Mexico*, 22 Nov 2017) <<https://justiceinmexico.org/category/collaborations/>> accessed 21 Nov 2020.

⁸ CRS (n 1) Introduction.

⁹ Inter-American Commission on Human Rights, ‘The Human Rights Situation in Mexico’ (44/15, 31 December 2015) 8.

¹⁰ Ibid 8, 9. That period corresponds to the time former President Calderón held the presidency.

¹¹ José Reveles, ‘Mexico’, in Heinrich-Böll-Stiftung and Regine Schönenberg (eds) *Transnational Organised Crime* (Bielefeld, 2013) 150.

Numerous efforts have been made to combat extremely violent criminal organisations besides the use of state armed forces: extraditions, eradication of marijuana crops, the merging of federal security forces, and profound public security and judicial reforms.¹² The US government and Mexican officials have collaborated to extradite members of criminal organisations to be tried in the United States since corruption and impunity have hampered the efforts to bring them to justice in Mexico. Despite the damage that criminal organisations have caused to people not belonging to these organisations, most of their members are tried for crimes related to money laundering, affording total impunity for crimes they committed, such as murder, kidnapping, rape, and extortion.¹³

1.2 Aim and Research Question.

This thesis aims to analyse the context of violence caused by organised criminal organisations through the lenses of international humanitarian law. The main question to be answered is: can international humanitarian law be applicable in the case of organised criminal groups? The determination of existence of an armed conflict cannot be made under fix parameters and can only be made on a case by case basis. Therefore, to answer this question, the situation of violence in Mexico involving organised criminal groups and state armed forces is taken as a case study.

If the situation were to meet the requirements to be considered a non-international armed conflict, then the following questions would be: how are the hostilities regulated by international law? This would bring two important benefits to the situation used as case study. The first one is the protection of civilians afforded by international humanitarian law through the regulation of hostilities. Civilians need to be protected from the acts of extreme violence perpetrated by members of criminal organisations, and from the human rights violations committed by state armed forces. The second one is the possibility to held members of organised criminal groups accountable of their actions in international instances, such as the International Criminal Court.

¹² Ballal (n 2) 7, 8.

¹³ Ibid 8, 9.

1.3 Methodology and Limitations.

The first part of this research comprehends a brief study on the definition of transnational organised crime under the Palermo Convention and a study on the development of transnational organised crime in Mexico. It cannot be argued that the situation in Mexico fulfil the requirements to be considered a non-international armed conflict if it is not understood why it should not be considered an organised criminal phenomenon in the first place.

The second substantive chapter corresponds to chapter three. There is explained the definition of non-international armed conflicts. In order to do so, common article 3 (CA3) and Additional Protocol II (APII) to the Geneva Conventions will be at the core of the research. The fourth chapter complements chapter three by analysing case law regarding the elements that should be considered for the declaration of existence of a non-international armed conflicts, specifically the judgments and decisions of the ICTY. The elements are two: the organisation or the armed groups and the intensity of attacks.

Chapter five focuses on the Mexican criminal organisation ‘Zetas’. This criminal group was chosen to exemplify the current status of organised criminal organisations in Mexico. According to the elements established in international humanitarian law, the organisation of the group and the intensity of the attacks are studied in order to determine if this group fulfil them.

The last chapter before concluding this research aims to explain the consequences of the declaration of existence of a non-international armed conflict. It is divided into three sub-sections: international humanitarian law, international human rights law and international criminal law. While it is evident that the existence of an armed conflict will be regulated by international humanitarian law, it is less evident the reason to address international human rights law and international criminal law. The first one provides protection to individuals at all times, in peace and war alike. In times of conflict, international humanitarian law rules coexist with those codified in international human rights law instruments. It will be studied how these two branches of law complement each other in times of conflict. Lastly, international criminal law provides the

necessary tools enforce the rules of war and to hold accountable those who do not comply with them.

What is out of the scope of this study is to assess the effectiveness of the applicability of the rules of war in states with an uprising of violence due to organised crime, so the analysis will be strictly limited to the legal aspect of the application of such branch of law in that particular context.

2. Transnational Organised Crime

2.1 Defining Organised Crime.

In recent years, the study of organised crime has obtained more relevance due to the social, political, and economic impact that this phenomenon has on every state of the world.¹⁴ Since it became a recurring component of the political discourse in the past decades, the definition has remained vague and unclear. This has posed a challenge for lawmakers to develop suitable ways of enforcement.¹⁵ The approach taken to address organised crime will influence the measures taken intending to eradicate illegal practices related to the existence of organised criminal organisations.

In order to understand the current conceptualisation of organised crime, in this chapter is reviewed the development of the concept, starting in the 1960s in the United States with the ideas of the criminologist Donald Cressey.¹⁶ In 1967, the US President's Commission on Law Enforcement and the Administration of Justice attempted to find a suitable definition of organised crime. Donald Cressey, who served as an advisor for the Commission proposed that 'the organised criminal, by definition, occupies a position in a social system, an "organisation" which has been rationally designed to maximise profits by performing illegal services and providing legally forbidden products demanded by the broader society'.¹⁷ The structure of the criminal organisations was central to his argument, in which he stressed the importance to distinguish between formal and informal organisations¹⁸. When explaining this distinction he suggested that 'the structures of formal organisations are rational. They allocate certain tasks to certain members, limit entrance, and influence the rules established for their own maintenance and survival'.¹⁹ Despite the influence of Cressey's work in the United States' government

¹⁴ Alan Wright, *Organised Crime* (1st edn, William Pub 2006) 1.

¹⁵ Pierre Hauck and Sven Peterke, 'Organised crime and gang violence in national and international law' (2010) 92 IRRC 407, 408.

¹⁶ Wright (n 14) 3.

¹⁷ Donald R. Cressey, *Theft of the Nation: the Structure and Operations of Organized Crime in America* (1st edn, Harper & Row, 1969) 72 as cited in Wright, (n14) 4.

¹⁸ Wright (n 14) 5.

¹⁹ Donald R. Cressey, *Criminal Organizations: Its Elementary Forms* (Heinemann Educational, 1972) 11 in Wright, (n14) 5.

policies, numerous scholars contested the definition he provided. After a study conducted in Detroit, the criminologist Joseph Albin suggested that 'a criminal syndicate consists of a system of loosely structured relationships functioning primarily because each participant is interested in furthering his own welfare'.²⁰ Opposing to Cressey's idea, who viewed criminal organisations as rational hierarchies, Albin proposed the existence of simpler, dynamic networks of patrons and clients.²¹ Within this system, 'patrons' are defined as 'criminal entrepreneurs' whose function is to provide of information to their 'clients' in exchange for support. In this context, 'clients' are people occupying strategic positions that serve to the interests of the criminal group.²²

Francis Ianni and Elizabeth Reuss-Ianni, also opposed to Cressey's argument of rational hierarchies. After carrying out extensive fieldwork, these researchers concluded that 'traditional kinship groups are the basis of organised crime'.²³ In this sense, 'kinship' is a broader concept that comprehends not only blood relations but also fictive god-parental and affinitive ties. They argued that criminal organisations in the United States, such as the Italian *Mafia*:

are not really formal organisations... They are not rationally designed and consciously constructed; they are responsive to culture and are patterned by tradition. They are not hierarchies of organisational positions which can be diagrammed and then changed by recasting the organisational chart; they are patterns of relationship among individuals which have the force of kinship and so they can only be changed by drastic, often fatal action. ²⁴

Organised crime was not a problem within the United States solely. Acknowledging the proliferation of organised crime as a side-effect of globalisation in the form of transnational crime,²⁵ the international community and international bodies recognised the need to provide for a comprehensive definition of this phenomenon. In 1975, during a Conference in Toronto, the United Nations (UN) established that organised crime:

[I]s understood to be the large scale and complex criminal activity carried on by groups of persons, however loosely or tightly organised, for the enrichment of those participating and at the expense of the community and its members. It is frequently accomplished through

²⁰ Joseph L. Albin, *The Americas Mafia: Genesis of a Legend* (Appleton Century Crofts, 1971) 288 in Wright, (n14) 5.

²¹ Wright (n 14) 6.

²² Ibid.

²³ Ianni, Francis A.J. and Elizabeth Reuss-Ianni, *Family Business: Kinship and Social Control in Organized Crime* (Russell Sage Foundation, 1972) 153 in Wright (n 14) 6,7.

²⁴ Ibid.

²⁵ Hauck and Peterke (n 15) 416-7.

ruthless disregard of any law, including offences against the person, and frequently in connexion with political corruption.²⁶

As a consequence of the impact of organised crime in state members of the European Union (EU), in 1998 the Justice and Home Affairs (JHA) Council set out a definition in order to achieve 'a more efficient and faster judicial cooperation in criminal matters'²⁷ based on mutual legal assistance between state members. According to Article 1 of a Joint Action of the JHA Council of the EU:

A criminal organisation shall mean a lasting, structured association of two or more persons, acting in concert with a view to committing crimes or other offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such crimes or offences are an end in themselves or a means of obtaining material benefits and, if necessary, of improperly influencing the operation of public authorities.²⁸

There are two main characteristics that can be identified when analysing transnational organised crime. The first one is the cross-border nature of this type of crime. This comprehends both, a cross-border criminal and the cross-border transfer of illegal commodities. There are two reasons to cross borders for the commitment of a crime. The first one is because it allows for exploitation of the structures that differ from one country to another. The second one is closely related to a market economy principle: supply and demand are usually located in different regions.²⁹ The second characteristic of transnational organised crime is that it is referred to networks of criminals or organised crime groups. However, the organisational factor of organised crime is a topic of difficult access through conventional instruments or criminological research. This phenomenon is so complex that comprehends the convergence of social, cultural and economic systems.³⁰

The attempt to define organised crime during the 1960s, exposed the difficulty this represented. Finally, the efforts to lay the normative groundwork for control of transnational organised crime

²⁶ ECOSOC 'Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders: Report' (1976) A/CONF.169/15/Add.1

²⁷ Joint Action of the Justice and Home Affairs Council to Create a Criminal Offence to Participate in a Criminal Organisation [1998] 2075th Council Meeting Press/98/73.

²⁸ Ibid art 1.

²⁹ Vincenzo Militello, 'Participation as an International Offence' in Hans-Jörg Albrecht and Cyrill Fijnaut (eds) *The Containment of Transnational Organised Crime* (Freiburg im Breisgau: Ed. iuscrim Max-Planck-Inst, 2002) 5.

³⁰ Ibid 6

were materialised in the UN Convention Against Transnational Organised Crime on the 12th of December of 2000.³¹ The international community acknowledged the necessity of agreements that would allow for effective cooperation among state members. Therefore, it was established that the purpose of the Convention was 'to promote cooperation to prevent and combat transnational organised crime more effectively'.³² To achieve this aim, the international community agreed on common definitions for organised criminal groups and the activities that would constitute a crime.

Article 2 of the Convention establishes the following:

For the purposes of the Convention:

- a) 'Organised criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
- b) 'Serious Crime' shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.
- c) 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.³³

While the international community agreed on the necessity to reach a consensus regarding transnational organised crime, the definitions offered in article 2 of the Palermo Convention have been subject of criticism for being 'over-inclusive and vague'.³⁴ Opposed to Cressey's ideas of criminal organisations as well-defined structures, the definition provided in the Convention establishes that a criminal group 'does not need to have formally defined roles for its members, continuity of its membership or a developed structured'. On the other hand, the Convention establishes that a structured group is not 'randomly formed for the immediate commission of an offence'. In this sense, the threshold needed for a group to be considered an organised criminal group is lower than the one proposed by Cressey, but high enough to exclude gang criminality from the reach of the Convention. Nevertheless, gangs are not the only group that can be excluded from the definition. Terrorist and insurgent groups are also ruled out from the definition

³¹ Wright (n 14) 10.

³² UNGA United Nations Convention against Transnational Organized Crime (adopted 15 Nov 2000) 2225 UNTS 209 (UNTOC) art 1.

³³ UNTOC art 2.

³⁴ Alexandra Orlova and James Moore, "Umbrellas" or "building blocks": defining international terrorism and transnational organised crime in international law' (2005) 27 Houston International Law in Hauck and Peterke (n 15) 421.

provided by the Convention, since the aim of criminal groups should be ‘to obtain, directly or indirectly, a financial or other material benefit’.³⁵ Therefore, groups with political motives are not considered to be covered by the Convention.³⁶

Another important aspect to take into account is the commitment of what is considered a ‘serious crime’. The Palermo Convention adopted a fixed parameter that includes all offences ‘punishable by a maximum deprivation of liberty of at least four years’.³⁷ The broad interpretation that can be given to the four years’ parameter provided by the Convention allowed states to determine the activities that are considered to be serious crimes within their territory. Nevertheless, this fixed parameter of four years overlooked the differences amongst the criminal systems and sanctions of the more than 190 UN Member states.³⁸ While these differences are indeed problematic, another solution would not have met with the approval of states³⁹ and the success of the Convention relies on the international capacity to work towards greater effectiveness in the fight against organised crime.⁴⁰ In fact, most of the articles in the Convention addressed the ways of co-operation among states. This co-operation is reflected in the ‘confiscation of proceeds of crime, extradition and transfer of criminals, mutual legal assistance, and joint investigations’.⁴¹

The international efforts to combat organised crime can only be successful through the applicability of common legal standards.⁴² Despite the widespread application of the Convention by state parties and the existence of the Conference of the Parties to UNCTOC,⁴³ there is no mechanism promoting and reviewing the effective implementation of the Convention. As long as this mechanism is not created, the Convention will not be fully applied and the co-operation among states will be insufficient.

³⁵ UNCTOC art 2.

³⁶ Hauck and Peterke (n 15) 422.

³⁷ Militello (n 29) 102.

³⁸ Ibid 106.

³⁹ Hauck and Peterke (n 15) 422.

⁴⁰ Hans-Jörg, (n 29) 106.

⁴¹ UNCTOC arts 11-21 in Hauck and Peterke (n 15) 423.

⁴² Hauck and Peterke (n 15) 420.

⁴³ UNCTOC, Art. 32(1).

2.2 Transnational Organised Crime in Mexico.

Transnational organised crime is regulated by demand and supply of illegal commodities, illegal risks, various types of investment, fraud and illicit services.⁴⁴ Scholars and legislators have solely addressed this phenomenon through the lens of market economy, limiting their understanding of TOC as an exchange of goods that are transported and trade illegally. While this has proven to be useful for the understanding of transnational organised crime and the strengthening of co-operation among states, it is inadequate when assessing the situation in Mexico.

In order to understand the evolution of transnational organised crime in Mexico, it is necessary to understand the geographic location of the country and the impact this have had in the trade of illicit goods. Sharing almost 2,000 miles of border with the United States, this region counts with two rivers, the Colorado and the Rio Grande, so as deserts and mountains. This have facilitated the smuggling of drugs and migrants into the United States.⁴⁵ The drugs manufactured outside Mexican territory are obtained from Central and South American countries. An important amount of drugs enter the country from the southern border on its way to the northern border with the United States. Once the illicit goods are there, various techniques are employed in order to smuggle the product that will be later sold within the US territory. These techniques include ‘floating narcotics across isolated stretches of the river, flying small aircrafts near the ground to avoid radar, bribing order officials in order to pass through checkpoints and utilising human “mules” to smuggle narcotics aboard commercial aircraft in their luggage or bodies’.⁴⁶

Mexican criminal organisations have evolved rapidly, going from traditional criminal structures to hierarchical organisations with highly sophisticated machinery. In the early 20th century, the trafficking business was limited to marijuana and heroin. It was not until the end of the 1980s and the beginning of 1990s that traffickers gained notoriety, after Mexican traffickers filled up the void left by Colombian criminal organisations. During the early years, Mexican criminal

⁴⁴ Hans-Jörg (n 29) 5.

⁴⁵ Ballal (n 1).

⁴⁶ F Burton, ‘Mexico: The Price of Peace in the Cartel Wars’ (Stratfor, 2 May 2007) <https://www.stratfor.com/mexico_price_peace_cartel_wars> accessed 15 November 2020.

organisations tended to be 'hierarchical, mostly bound by familial ties and led by local kingpins'.⁴⁷

After gaining notoriety in the 1980s, the businesses of criminal organisations diversified to include activities such as 'money laundering, bribery, gun trafficking, and corruption'.⁴⁸ With the inclusion of these activities, the levels of violence related to organised criminal groups resulted in an increment, changing the pattern of violence these groups followed during the first years of the business. In the beginning, acts of violence only took place in the border between Mexico and the United States, but in recent decades spread to Mexico's interior, specifically to the states in the Pacific and those right at the border. The diversification of the business, combined with the presence of violence in more states, has shown to have a direct increment in crimes such as kidnapping, extortion, oil theft, and human smuggling.⁴⁹ In general terms, violence is a common feature in the trade of illicit goods. It is exercised by traffickers to settle disputes and to maintain discipline among their employees in an attempt to appear organised to creditors, buyers, and suppliers. At the same time, it is used to intimidate competitors.⁵⁰

While high rates of homicides associated to organised crime are not only present in Mexico, the violence associated with Mexican crime organisations has proven to be of a different scale.⁵¹ Organised crime organisations' acts of violence are not only associated with intimidation, discipline and resolution of conflicts, they have also targeted journalists, government officials and political candidates.⁵² Some observers have pointed out Mexico's excess of violence as an

⁴⁷ Patrick Corcoran, 'Mexico Government Report Points to Ongoing Criminal Fragmentation' *InSight Crime* (14 April 2015) <<https://www.insightcrime.org/news/analysis/mexico-government-report-points-to-ongoing-criminal-fragmentation/>> accessed 22 Nov 2020.

⁴⁸ CRS (n 1) Summary.

⁴⁹ Ibid 1.

⁵⁰ Robert MacCoun and Peter Reuter *Drug War Heresies: Learning from Other Times, Vices and Places* (Cambridge University Press, 2001); Kevin Riley, *Snow Job? The War Against International Cocaine Trafficking* (Transactional Publishers, 1996) in CRS (n 1) 3.

⁵¹ Homicide levels in Latin America are one of the highest in the world. According to the UN Global Study on Homicide, Latin America concentrates 37% of the world's intentional homicides. United Nations Office on Drugs and Crime (UNODC), 'Global Study on Homicide' (2019).

⁵² CRS (n 1) 2.

exception to the 'typical standards of organised crime'.⁵³ This claim seems to be founded on the violence perpetrated by criminal groups with car bombs, rocket-propelled grenade launchers, and grenades.⁵⁴

Another form of violence derived from the illicit businesses of organised criminal organisations is the forced disappearance in Mexico. The Mexican government does not have update data of the missing or forcibly disappeared people. This can be explained by the underreporting caused by fear of reprisal and the lack of trust in the authorities. Also, biological databases are not available in the country, when these are needed to identify the unclaimed bodies found in mass graves. Even though every mass grave is different, each one can have over 250 skulls and remains, some of which are several years old, making the identification process nearly impossible.⁵⁵

The displacement of people is another consequence of the widespread violence caused by organised crime. According to the Swiss-based Internal Displacement Monitoring Centre, between 2009 and 2018, approximately 380,000 people were displaced in Mexico as a result of the violence exerted by organised criminal organisations. Some authorities claim that the number of displaced people can exceed 1 million, depending on the definition given to 'displacement'. The reasons people cite as to why they moved from one place to another are 'violence among members of organised crime, clashes between armed groups with Mexican security forces, and fear of future violence.'⁵⁶

⁵³ Vanda Felbab-Brown, *Peña Nieto's Piñata: The Promise and Pitfalls of Mexico's New Security Policy Against Organized Crime* (Brookings Institution, 2013) in CRS (n 1) 2.

⁵⁴ CRS (n 1) 7.

⁵⁵ Patrick J. McDonnell and Cecilia Sanchez, 'A Mother Who Dug in a Mexican Mass Grave to Find the 'Disappeared' Finally Learns Her Son's Fate,' *Los Angeles Times* (20 March 2017) <<https://www.latimes.com/world/mexico-americas/la-fg-mexico-disappeared-20170320-story.html>> accessed 22 Nov 2020; BBC 'Mexico Violence: Skulls Found in a New Veracruz Mass Grave,' *BBC News* (20 March 2017) <<https://www.bbc.com/news/world-latin-america-39326415>> accessed 22 Nov 2020.

⁵⁶ Juan Arvizu, 'Crimen Desplazó en México a 380 Mil Personas' *El Universal* (24 July 2019) <<https://www.eluniversal.com.mx/nacion/seguridad/crimen-desplazo-en-mexico-380-mil-personas>> accessed 22 Nov 2020.

Traffickers also have a vast territorial influence in parts of the country that are key points for production or for trafficking routes. This is a consequence not only of the violence they exert, but of the involvement of government officials with such groups. Corruption is present in every level of the government. Only in 2018, twenty former state governors were under investigation or in jail, including the former Secretary of Public Security, Genaro Garcia Luna. He was arrested in Texas at the end of 2019, facing charges of having taken multimillion-dollar bribes from the Sinaloa Cartel.⁵⁷

When organised criminal organisations that carry out demonstrations of extreme violence are assessed under the lens of international humanitarian law, two main arguments question the desirability of characterising a given situation as a non-international armed conflict. The first argument is that criminal groups lack political goals or ideology, therefore, these groups do not have an interest in ‘confronting the government and assuming its powers and responsibility’.⁵⁸ The second argument relates to the application of international humanitarian law above the ‘constitutional state’s “law enforcement model”’.⁵⁹ This way, criminals can be targeted as combatants, with no presumption of innocence, while impunity in state’s armed forces might encourage the use of more violence.⁶⁰ While the law of war and armed conflict does not contemplate ideology as an element to determine the existence of an armed group in a non-international armed conflict, it is worth analyse the applicability of these arguments to the situation in Mexico.

Despite the transnational character of the Mexican trafficking organisations, the acts of extreme violence take place only in Mexican territory. The corruption present in all levels of the government has impeded the application of a successful strategy to eradicate organised crime. Bribes and corruption have guaranteed impunity and protection for members of organised criminal groups. This has been essential for their growth and expansion.⁶¹ In an attempt to

⁵⁷ CRS (n 1) 9.

⁵⁸ Hauck and Peterke (n 15) 433.

⁵⁹ Ibid 431.

⁶⁰ Ibid.

⁶¹ CRS (n 1) 9, 10.

weaken organised criminal organisations, former President Felipe Calderón launched a 'war' against them in 2006. Nevertheless, this so-called 'war' did not follow the rules and principles of international humanitarian law, resembling more to a militarisation of the state than to an actual war. As mentioned in the above paragraph, criminal organisations lack ideology and have no interest in assuming state's powers. Even though the case of Mexican criminal organisations is very similar, there is an important distinction: in their search for expansion, these organisations have assumed certain functions of the state.⁶² In the words of former President Calderón:

In traditional theories of state and law, the state is defined by its monopolistic characteristics: it has the monopoly of law, the monopoly of levying taxes and the monopoly of power [...] Nowadays, the misters (drug barons) have come to a position where they contest the monopoly of state power, establish their own power, come to a place and impose their own law there, and finally, levy their duties which are like taxes the state does not levy: we are talking about a parallel state.

We must ask ourselves: Who rules, the mayor of a place or the drug baron? Who rules, the governor of this state, or the boss of the group, or the boss of the Mafia established in that state? Who rules in a country, the President and Congress or the laws of the drug barons?⁶³

Criminal organisations not only assumed the state's powers, as mentioned by former President Calderón. They have also taken responsibilities in the communities they exercise some form of control. These communities have benefited from the creation of jobs, the social services provided in communities where the government has failed to do so, and the money given to local churches.⁶⁴ Within this context, despite a lack of ideology, Mexican criminal organisations have successfully performed activities that should only be performed by the state.

The second argument questioning the desirability to determine the existence of a non-international armed conflict emphasises human rights' violations by the state armed forces while increasing the levels of violence and impunity. After former President Calderón launched the so-called 'war' against organised criminal organisations, were deployed 70,000 soldiers and marines to collaborate with 30,000 federal police officers trained to combat organised criminal organisations.⁶⁵ The deployment of soldiers and marines was not the only measure taken by

⁶² The former National Secretary of Defence, General Guillermo Galván Galván, has confirmed that 'criminal organisations have taken over state institutions in some regions where "public security has been completely overrun"' in Reveles (n 11) 158.

⁶³ Ibid 158-9.

⁶⁴ Ballal (n 1) 24.

⁶⁵ Reveles (n 11) 159.

former President Calderón. After an agreement made between Mexico and the United States, there was a significant increment in the number of extraditions between these two countries.⁶⁶ At the same time, the number of raids to methamphetamine labs and the destruction of marijuana crops increased. These measures alone proved ineffective, and in 2008 judicial reforms were implemented.⁶⁷

Without the declaration of a state of emergency derived from a non-international armed conflict, army officials have not complied with the rules of war and armed conflicts allowing for impunity of army officials in human right's violations. Citizens of the country find themselves as collateral damage in a conflict that it is not properly regulated.

⁶⁶ The extradition of criminals to the United States would guarantee a fair trial. Members of criminal organisations continued to operate from detention centres. After being extradited to the US, members of these groups lose the power and impunity they have obtained through bribes and extortion.

⁶⁷ The measures included the broaden understanding of the term 'organised crime'; the inadmissibility of confessions obtained under torture; the inclusion of alternatives to jail for minor offences; the participation of judges in every step of the trials; a new, oral system for trials, among other measures. In Ballal (n 1) 7-8.

3. International Humanitarian Law: Non-international Armed Conflicts

3.1 Defining Non-International Armed Conflicts.

Identifying an armed conflict not of an international character is crucial for the application of the law of non-international armed conflict. International Humanitarian Law (IHL) is the branch of law that regulates the conduct of participants in an armed conflict. According to the situation, it is necessary to assess if the level of violence amounts to what can be considered an ‘armed conflict’.⁶⁸ Nonetheless, the literature on the law of armed conflict has focused disproportionately on international armed conflicts⁶⁹. It was not until recent times that more authors focus on particular aspects of the law applicable to non-international armed conflicts.⁷⁰

The differences in treaty law between these types of conflicts are vast. Starting with the Geneva Conventions of 1949, the Hague Conventions that preceded them, and Additional Protocol I of 1977, these focus solely on armed conflicts of international character. These treaties contained a detailed body of rules relating to the conduct of hostilities and the protection of those who do not take part, or no longer take part in hostilities.⁷¹ In comparison, the rules regulating non-international armed conflicts are restricted to common Article 3 of the Geneva Conventions and Additional Protocol II of 1977. At the same time, it was stated by the Appeals Chamber of the ICTY in the *Tadic (Appeal on Jurisdiction)*⁷² that customary international law fills the gaps left by treaty law regarding non-international armed conflicts.

While the extensive law regulating international armed conflicts makes possible to easily identify hostilities of this nature, it can not be said the same about NIAC. Article 2 common to the Geneva Conventions states that such Convention ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if

⁶⁸ Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmshurst (ed) *International Law and the Classification of Conflicts* (Oxford University Press 2012) 32.

⁶⁹ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (1st ed, Oxford University Press, 2002) 1

⁷⁰ For instance, Anthony Cullen *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (Cambridge University Press, 2010); Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002); Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002).

⁷¹ Akande (n 68) 34, 35.

⁷² *Prosecutor v. Tadić*, (Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [127].

the state of war is not recognised by one of them'. It can be said then that an international armed conflict is an inter-state conflict, with the exception of self-determination conflicts of national liberation. Despite being an internal armed conflict, wars of national liberation are contemplated in article 1(4) of the Additional Protocol I of 1977, stating that also applies to armed conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.⁷³

Determining whether or not a situation of violence within a State could be classified as a non-international armed conflict is not as simple as determining the existence of an international armed conflict.⁷⁴ A situation of violence within a state could be labelled as a riot, internal tensions or disturbances, disregarding the application of the law of non-international armed conflict. The difficulty to identify an armed conflict of this nature arises from the lack of an authoritative definition. This has caused a shift in the debate, centring the efforts in finding facts that will aid to the identification of an armed conflict, rather than trying to find a definition for this kind of conflict itself.⁷⁵

The absence of definition is by no means an accident, and the reason to it can be found in the differences of opinion between delegates, in the Diplomatic Conference that took place in 1949. During the Conference, numerous attempts were made to define a non-international conflict, and the original text that would become common Article 3 of the Geneva Conventions was developed. It provided that:

[i]n all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.⁷⁶

The opinion among delegates was divided in two. One group was conformed by those who believed the Conventions should apply to all cases of armed conflict not of an international

⁷³ Akande, (n 68) 49.

⁷⁴ Ibid 50.

⁷⁵ Sivakumaran, (n 69) 156.

⁷⁶ *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department, Berne), Vol I, 47.

character. The other group of delegates opposed to the idea, arguing that the Conventions should 'not apply to conflicts of this nature'.⁷⁷ After numerous modifications, what is now common Article 3 was adopted by 34 votes to 12, with one abstention.⁷⁸ Nevertheless, the disagreement throughout the drafting process is reflected in the ambiguity of definition of non-international armed conflicts and the uncertain scope of application of such article.

The lack of a clear definition of this type of conflicts and the uncertain applicability of common Article 3 has been subject of study. The 'no-definition' school of thought believes that no definition can be 'precise enough to cover all possible manifestations of a particular concept'.⁷⁹ In this sense, an overly strict definition would restrict the application of common Article 3 to very specific situations, while a broad interpretation of common Article 3 would grant humanitarian protection in as many situations as possible. The International Committee of the Red Cross has used this ambiguity to 'push the threshold of application as low as possible',⁸⁰ to provide aid in all situations of civil unrest.⁸¹

The absence of an accepted definition of 'armed conflict' has not posed a challenge in the sphere of international armed conflicts. It is relatively easy to determine the existence of an international armed conflict due to the involvement of troops of different states engaged in combat.⁸² This is not the case of internal armed conflicts, mostly due to the common use of force of states within their territories. While it is rare for states to employ force in its relations with other states, this practice is frequently used within the state's territory, ranging from everyday enforcement actions, to large-scale operations aiming to suppress civil disturbances. As a result, it poses a big challenge to determine when a situation of law enforcement or civil unrest has reached the threshold to be considered an armed conflict.⁸³

⁷⁷ Sivakumaran (n 69) 157.

⁷⁸ *Final Record* (n85) 339.

⁷⁹ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 32.

⁸⁰ Georges Abi-Saab, 'Non-International Armed Conflicts' in UNESCO, *International Dimensions of Humanitarian Law* (Dordrecht, 1988) 224-225.

⁸¹ *Ibid* 225.

⁸² Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *Int Rev Red Cross*, 69, 71.

⁸³ Moir (n 79) 34.

There are also political factors that can influence the determination of existence of an armed conflict not of an international character. The State in which the conflict is taking place should be the that will determine the kind of conflict in its own territory. If another State were to determine it, this action could be perceived as an intervention of the State's internal affairs.⁸⁴ This allow the labelling of situations in accordance with political interests of the actors concerned, even if the facts on the ground say otherwise, preventing the application of humanitarian law.

The formula proposed by common Article 3 'armed conflict not of an international character' was the closest to a definition for internal armed conflicts during 1949 to 1995. Additional Protocol II concluded in 1977 also played an important role in the attempt to define this type of conflicts, proposing additional criteria to the concept in order for the Protocol to apply.⁸⁵ It wasn't until 1995 that the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) provided a more precise definition in the *Tadić* Decision on Interlocutory Appeal on Jurisdiction. The Appeals Chamber concluded that 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.⁸⁶ This definition has been adopted by a variety of actors,⁸⁷ since it combines the elements proposed by common Article 3 and Additional Protocol II. It can be said then, that an armed conflict not of an international character is 'protracted armed violence between governmental authorities and organised armed groups or between such groups'.⁸⁸

Uncertainty continues surrounding the identification of a non-international armed conflict despite the definition provided by the Appeals Chamber of the ICTY. Debate continues to exist as to whether or not a given a situation reached the threshold to be considered a non-international armed conflict. Nevertheless, the debate moved on from seeking a precise definition of 'non-

⁸⁴ Ibid.

⁸⁵ Sivakumaran, (n 69) 164.

⁸⁶ *Prosecutor v. Tadić* (n 72) [70].

⁸⁷ Sivakumaran (n 69) 155.

⁸⁸ Ibid.

international armed conflict', to the facts that aided in the identification of this type of conflicts. Also, to the actual application of the law of war in non-international armed conflicts. The next section of this chapter will describe the facts enshrined in common Article 3, Additional Protocol II and the *Tadic* Jurisprudence that aided on the identification of this internal conflicts.

3.2 Common Article 3.

Frequently referred to as a 'Convention in miniature' or as a 'microcosm' of the Geneva Conventions as a whole,⁸⁹ common Article 3 is an attempt to 'impose the underlying humanitarian principles of all four Conventions upon the parties to internal armed conflicts'.⁹⁰ After numerous debates between the delegates, participants of the Diplomatic Conference held in 1949, the outcome was the adoption of the proposal that would become common Article 3, reading as follows:

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall apply as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned 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 judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for.⁹¹

The International Court of Justice states that 'the rules in such article reflect elementary considerations of humanity applicable under customary international law to any armed conflict',⁹² but it does not define exactly what is meant by a non-international armed conflict. Instead, the text of the article provides that it is applicable: 'in case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. There are two separate criteria in this provision. First, the requirement regarding the geographical

⁸⁹ Abi-Saab (n 80) 31.

⁹⁰ Moir (n 79) 31.

⁹¹ Article 3 common to the four Geneva Conventions.

⁹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgement, Merits) [1986] ICJ Rep 14 [218].

location of the conflict taking place ‘in the territory of one of the High Contracting Parties’.⁹³ This requirement has lost importance in practice since the four Geneva Conventions have universally been ratified now meaning that any armed conflict between governmental armed forces and armed groups, or between these groups, can only take place on the territory of one of the parties to the Convention.⁹⁴ However, this has not always been the case. An example of this is the armed conflict taking place in Yemen in the 1960s. This State was not part of the Convention at that time, therefore, common Article 3 was inapplicable and the conduct of hostilities must have been regulated by customary law. With the wide acceptance of common Article 3 this could be considered as customary international law.⁹⁵

The second criteria provided by CA3 is the existence of an ‘armed conflict’. The absence of a universally accepted definition of the term was discussed in the first part of this chapter, but it could be said that common Article 3 only defines those conflicts to which applies in a negative way ‘not of an international character’ without offering further guidance as to their exact identification.⁹⁶ In order to determine the existence of a non-international armed conflict, it is necessary to identify the parties to the conflict. In the case of a conflict governed by common Article 3, at least one of the parties must be a non-state group. This could be between a State and non-state armed group or between non-state groups. International humanitarian law provides the elements to take into account when determining that a group can be regarded as a party to an armed conflict. In order to do so, a group must have certain level of organisation with a command structure⁹⁷ and the level of violence must reach certain level of intensity.⁹⁸ These elements will be further discussed in the next chapter.

⁹³ Moir (n 79) 31.

⁹⁴ ICRC ‘How is the Term “Armed Conflict” defined in International Humanitarian Law?’ (2008) Opinion Paper, 3.

⁹⁵ *Nicaragua v. United States of America* (n 92), reaffirmed by the the Yugoslav Tribunal Appeals Chamber in *Prosecutor v Tadić* (n 72) [98].

⁹⁶ Moir (n 79) 31.

⁹⁷ Jelena Pejic, ‘Status in Armed Conflicts’, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 85, 86.

⁹⁸ *Prosecutor v Tadić* (n 72) [70].

Besides the level of organisation and structure of the non-state armed group, some scholars add a further condition, affirming that the motives of the group must be taken into account. This suggests that purely criminal groups acting for private, instead of non-political motives, such as ‘*mafia*’ groups and territorial gangs, would not have the possibility to be part of a non-international armed conflict.⁹⁹ Nevertheless, this additional condition does not have legal basis under international humanitarian law. International criminal tribunals have not made reference to the purposes or motivation of the groups in question to determine whether these can be party to a conflict, with the exception of the ICTY. In the *Limaj* case, the defence contested the argument that the fighting in 1988 between Serbian forces and the Kosovo Liberation Army could constitute an armed conflict. Their argument was based on the notion that Serbian forces were not intended to defeat the enemy army, but to carry out "ethnic cleansing" in Kosovo'.¹⁰⁰ The Tribunal argued that ‘the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant’.¹⁰¹

In a general aspect, the motives behind criminal groups’ actions are difficult to identify. Some of these groups 'carry out criminal activities such as extortion or drug-trafficking',¹⁰² while pursuing political objectives. Some others do not have political objectives, but exercise a power pertaining to the political sphere.¹⁰³

3.3 Additional Protocol II.

On the years after the adoption of common Article 3 in 1949, there was a clear need to further develop the law regulating non-international armed conflicts. During the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in 1974, members of

⁹⁹ Vité (n 82) 78.

¹⁰⁰ Ibid.

¹⁰¹ *Prosecutor v. Limaj*, (Judgement) IT-03-66-T (30 November 2005) [84].

¹⁰² Vité (n 82) 78.

¹⁰³ Ibid.

the government and Red Cross experts expressed an urgent need to amend or clarify the rules governing internal armed conflicts:

When put to the test... The rules of protection in [common] Article 3 had been shown to require elaboration and completion. Government and Red Cross experts consulted by the ICRC since 1971 had confirmed the urgent need to strengthen the protection of victims of non-international armed conflicts by developing international humanitarian law applicable in such situations.¹⁰⁴

A draft of the Protocol was made by the ICRC and it was put before the Diplomatic Conference,¹⁰⁵ providing that it would apply ‘to all armed conflicts not Covered by Article 2 to the Geneva Conventions of 12 August 1949, taking place between armed forces or other organised armed groups under responsible command’.¹⁰⁶ The scope of application was intended to be the same as CA3, however, this draft did not obtain a widespread acceptance among states. Some argued that the scope of application needed further elaboration, pushing for the addition of elements that would aid with the identification of existence of a non-international armed conflict.¹⁰⁷ Other states appealed for more clarity on the terms used by the ICRC, ‘responsible command’ and ‘armed forces or other organised armed groups under responsible command’.¹⁰⁸ At the end of numerous debates of this nature, two protocols were adopted: one dealing with international armed conflicts, Additional Protocol I,¹⁰⁹ and the other one dealing with non-international armed conflicts, Additional Protocol II.¹¹⁰

While Additional Protocol II addresses non-international armed conflicts, it is important to discuss the exclusion of wars of national liberation to Additional Protocol II. Before the Diplomatic Conference in 1974, there was no consensus on the status of wars of national

¹⁰⁴ Bujard (ICRC) ‘Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts’ Geneva (1974-1977), (1978) CDDH/I/SR/22 VIII, 201

¹⁰⁵ Sivakumaran (n 69) 182.

¹⁰⁶ Draft Protocol Additional to Geneva Conventions of August 12 1949, Article 1(1), in *Official Records* (n 104) Vol I, Part Three, 33.

¹⁰⁷ *Official Records* (n 104) Vol VIII, 209 [40] and 212 [57]. France and Vietnam respectively.

¹⁰⁸ Ibid 209 [37] and 231 [11]. Spain and Argentina respectively.

¹⁰⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 1977) 1125 UNTS 3.

¹¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Geneva, 1977) 1125 UNTS 609.

liberation under international humanitarian law. The international character of these conflicts was recognised in resolutions adopted by the UN General Assembly.¹¹¹

The scope of application of international armed conflicts was defined in common Article 2 of the Geneva Conventions and only after the Diplomatic Conference of 1974, the scope of application was broadened in article 1, providing the following:

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protections and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the Protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations.¹¹²

This way, the concept of armed conflicts of international character provided by common Article 2, is expanded in the last paragraph of the first article of the Additional Protocol I. The debate to the characterisation of wars of national liberation was lead by members of Third World Countries, despite the widespread belief among delegates that this kind of conflicts should be considered of non-international character. The argument behind the attempt to internationalised this type of conflicts was briefly explained by the President of the Islamic Republic of Mauritania, Ould Dada, stating that 'the countries of the Third World were asking very little: only that the Conference should not exclude freedom fighters from protection. Such fighters would never renounce their rights.'¹¹³

The most detailed explanation for the internationalisation of wars of national liberation was provided by the Professor Georges Abi-Saab of the Egyptian Delegation. He argued that

¹¹¹ Anthony Cullen *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (Cambridge University Press, 2010) 64.

¹¹² Additional Protocol I, Article 1(4).

¹¹³ *Official Records* (n 104) vol V, CDDH/SR.1, 13-14.

Wars of national liberation had formed a very important category of armed struggle in the post-1945 period and a number of them were still continuing.\. Contemporary international law recognised such wars as international armed conflicts. United Nations General Assembly Resolution 3103 (XXVIII) was the latest in a stream of resolutions of important international bodies proclaiming that principle. The General Assembly had, indeed, gone further by recommending sanctions against colonial, alien and racist régimes and the provision of assistance to specific liberation movements, and the Security Council in one case had ordered mandatory sanctions. It would be difficult to explain all such international action if wars of national liberation were to be considered merely as armed conflicts of a non-international character. Existing practice provided abundant proof of the international nature of such conflicts.¹¹⁴

While most of the delegations belonging to Third World states and socialist states supported the internationalisation of wars of national liberation, the majority of Western states representatives opposed to the idea.¹¹⁵ The representatives of the governments of Canada, United Kingdom, the Netherlands and the United States, among others, protested against what they saw as a 'politicisation' of international humanitarian law.¹¹⁶ They argued that 'the introduction of a distinction into international humanitarian law based on the cause for which a particular group was fighting, would not improve the implementation of this body of law'.¹¹⁷ Despite the arguments presented by the delegates of Western states, the final version of Article 1 of Additional Protocol I was approved with 70 votes in favour,¹¹⁸ 21 against¹¹⁹ and 13 abstentions.¹²⁰ This represented a victory to the 'Third World' countries, even though none of the conflicts taking place after the adoption of such Protocol have fallen under the scope of Article 1(4).¹²¹

After the adoption of wars of national liberation as international armed conflicts, there was less interest in the formulation of a Protocol relating to non-international armed conflicts. M. Abdul-Malik expressed the view of the delegates by stating that 'his delegation... wondered whether draft Protocol II was necessary, since draft Protocol I, article 1 covered the three possible

¹¹⁴ Ibid vol VIII, CDDH/SR.2, 8.

¹¹⁵ Lysaght, 'The Attitude of Western Countries', in Cassese (ed), *New Humanitarian Law*, (Naples: Editoriale Scientifica s.r.l., 1979), 349-356.

¹¹⁶ Cullen (n 111) 73-77.

¹¹⁷ Ibid 78.

¹¹⁸ *Official Records*, (n 104), vol V, CDDH/SR.11, 102, in Cullen (n 111) 79.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Cullen (n 111) 85.

situations, namely those in which peoples were fighting against colonial domination, alien domination or racist regimes'.¹²² In fact, developing countries were in favour of restricting as much as possible the scope of application of APII, so that their situation would be covered by API.¹²³

During the Diplomatic Conference some delegates favoured the idea of adopting only one protocol that would be applicable to all situations of armed conflict. This suggestion was made in an attempt to avoid the problems of classification of conflicts depending on their international and non-international nature. During his participation, the representative of the Swedish delegation explained the reasons behind this position:

All armed conflicts, whatever their magnitude, should be subject to the same humanitarian rules. Since the existing conventions were limited to international armed conflicts, non-international conflicts were sometimes claimed to be international so that the humanitarian law in force might apply. One set of legal rules for all conflicts would obviate allegations of foreign countries. The most appropriate solution would be to define rules relating to non-international armed conflicts which would closely resemble the rules applicable in international conflicts. It was absolutely vital for combatants in the field to be protected by clear and uncomplicated rules.¹²⁴

This was not the first attempt of this nature to modify the law regulating armed conflicts. During the Diplomatic Conference in which the Conventions of 1949 were drafted, this idea was also discussed, however, it did not get enough support, raising concerns regarding its impact on state sovereignty. Although the main concern was not about sovereignty when this proposition was put forward during the Diplomatic Conference of 1974, the majority of delegates did not support the idea of 'international humanitarian law relating to situations of non-international armed conflict being equivalent to that of international armed conflict'.¹²⁵

On the other hand, the idea of formulating two protocols instead of only one instrument regulating all kinds of armed conflicts, was strongly supported by the ICRC representatives at the Diplomatic Conference. This approach was intended to achieve 'a delicate balance between the needs of humanity and the security requirements of the State intending to take the requisite

¹²² *Official Records* (n 104) vol VIII, CDDH/I/SR.24, 232.

¹²³ Cullen (n 111) 86.

¹²⁴ *Official Records* (n 104) vol V, CDDH/SR.14, 142.

¹²⁵ Cullen (n 111) 89, 90.

steps to maintain and re-establish order on its territory'.¹²⁶ After deliberation and despite the view of some delegates of ADII as 'unnecessary', a consensus was finally achieved. In an effort to obtain the support needed for the adoption of Additional Protocol II, the original draft conformed by four preambular paragraphs and forty-seven articles, was reduced considerably, while the threshold of application was raised above the originally proposed by the ICRC.

During the Diplomatic Conference was decided that Additional Protocol II would apply to armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.¹²⁷ This way, the threshold of application of APII to non-international armed conflicts is higher than the one in CA3 in numerous ways. First, unlike common Article 3, applicable to all non-international armed conflicts, the Protocol is not applicable to conflicts arising between two or more organised armed groups. This means that the Protocol applies only if governmental forces are part to the armed conflict.¹²⁸ This way in which the threshold of application is higher than the one in common Article 3, proves to be inconvenient, since there could be situations in which the government has collapsed or it is too weak to intervene, leaving the development of the conflict in the hands of only armed groups.¹²⁹ Moreover, some of the conflicts taking place in the last few decades 'have occurred between factions none of which could plausibly be regarded as the government of a State'.¹³⁰ Another issue arising from Article 1(1) is the lack of determination of what exactly can be considered an 'organised armed group'. While some delegates implied the need of an organisation similar to the one in state armed forces, an explanatory note inserted into the Report of Committee I intended to explain this concept as follows: 'all the armed forces -including those which under some national systems might not be called regular forces- constituted in accordance

¹²⁶ *Official Records* (n 104) vol VIII, CDDH/I/SR.22, 202 in Cullen (n 111) 91.

¹²⁷ Additional Protocol II, Article 1(1)

¹²⁸ Akande (n 68) 54.

¹²⁹ Abi-Saab (n 80) 228-229 in Moir (n 79) 104.

¹³⁰ Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 Yearbook of IHL 3 [138] in Moir (n 79) 104.

with national legislation under some national systems'.¹³¹ However, some scholars have labelled this explanation as 'inadequate' for the correct application of the Protocol.¹³²

Second, it is required that the armed group exerts control over territory. This requirement is linked to two different elements: the ability to carry out sustained and concerted military operations and the ability to implement the Protocol. The first element is explained in the Commentary on the Additional Protocols by the ICRC.¹³³ 'Sustained' makes reference to the operations that keep going or are made continuously, making emphasis on the continuity and persistence. On the other hand, 'concerted' means 'agreed upon, planned and contrived, done in agreement according to a plan'.¹³⁴ This means that the military operations must be conceived and planned by the organised armed groups, ruling out the criteria of duration and intensity of the attacks. If these criteria were to be considered, then there would be a subjective element when the applicability of the Protocol should not depend on the subjective judgement of the parties, whereas continuity and intensity represent an objective assessment of the situation. To fulfil the control over territory requirement, it is also necessary that the armed group has the ability to implement the Protocol. The ICRC manifested that:

In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organised in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, here must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.¹³⁵

The third difference between the application of APII and common Article 3 is that the Protocol applies to 'non-international armed conflicts taking place in the territory of a party between its armed forces and and organised armed groups'. This statement combines two different requirements: the first one is that the conflict must take place in the territory of a party and the

¹³¹ Y Sandoz, C Swinarski and B Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987) 626 in Moir (n 79) 105.

¹³² Moir (n 79) 105.

¹³³ Commentary on the Additional Protocols (n 131) 1352 [4463] in Moir (n 79) 104.

¹³⁴ Moir (n 79) 104.

¹³⁵ Commentary on the Additional Protocols (n 131) 1352-3 [4463].

second one is that it must be solely between the forces of that party and armed groups.¹³⁶ In a situation in which a foreign State intervenes in an internal armed conflict with prior consent of the State where the armed conflict is taking place, the conflict will remain non-international. In this case, even when both states are parties to the Protocol, this will not apply to the acts of the intervening State because 'the conflict is not between the armed forces of that party and armed groups'.¹³⁷

In some cases, internal armed conflicts 'meet the standards for the application of common Article 3, but fall below the threshold of Protocol II'.¹³⁸ This is a direct consequence of the higher threshold for the application of the Protocol. In these situations, conflicts are governed by common Article 3. This is possible due to the stipulation that common Article 3 was developed and supplemented by the Additional Protocol II 'without modifying its existing conditions of application',¹³⁹ ensuring the protection afforded by Article 3 regardless of the type of internal conflict.

¹³⁶ Akande (n 68) 55.

¹³⁷ Ibid.

¹³⁸ Moir (n 79) 101.

¹³⁹ Ibid.

4. Elements of Non-International Armed Conflicts

4.1 The *Tadić* Jurisprudence.

The ICTY Appeals Chamber in the *Tadić* Decision on Interlocutory Appeal on Jurisdiction, provided the most innovative development of a precise definition of non-international armed conflicts.¹⁴⁰ The chamber stated that ‘an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’.¹⁴¹ This definition synthesised the core elements in the definition set out in common Article 3 and Additional Protocol II, providing a ‘neat’ and ‘concise’ definition.¹⁴² The legal adviser at the Office of the Prosecutor in this case, Sonja Boelaert-Suominen, stated the following:

The seemingly innocuous description by the Appeals Chamber of what constitutes an armed conflict was innovative in various respects. First, it covers a variety of hypotheses and caters explicitly for conflicts between non-state entities. Second, whilst it sets a low threshold for the application of humanitarian law in general, it is particularly important for its consequences in relation to internal armed conflicts. The definition of armed conflict suggested by the Appeals Chamber covers not only the classic examples of (a) an armed conflict between two or more states and (b) a civil war between a state on the one hand, and a non-state entity on the other. It clearly encompasses third situation, (c) an armed conflict in which no government party is involved because two or more non-state entities are fighting each other.¹⁴³

In this definition, a clear distinction is made between armed conflicts not of an international character and internal disturbances, setting out a lower threshold than the one required in article 1(1) of Additional Protocol II. It also contemplates the conflicts between organised groups within the state, situation that is not contemplated in APII.¹⁴⁴

The *Tadić* Appeals Chamber applied this definition when considered the grounds to determine the existence of a ‘legally cognizable armed conflict’¹⁴⁵ for the application of international humanitarian law:

¹⁴⁰ Sivakumaran (n 69) 164.

¹⁴¹ *Prosecutor v Tadić* (n 72) [70].

¹⁴² Sivakumaran (n 69) 164.

¹⁴³ Sonja Boelaert-Suominen, ‘Commentary: The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts’ (2000) 13 *Cambridge University Press* 632-3 in Cullen (n 111) 119.

¹⁴⁴ Cullen (n 111) 119.

¹⁴⁵ *Prosecutor v Tadić* (n 72), para 66.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict... There has been protracted, large-scale violence between the armed forces of different states and between governmental forces and organised insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.¹⁴⁶

The *Tadić* Trial Chamber interpreted this definition as a 'test' to determine the existence of a non-international armed conflict. In the facts of the case, the Trial Chamber noted that 'the test applied by the Appeals Chamber... focuses on two aspects of a conflict: the intensity of the conflict and the organisation of the parties'.¹⁴⁷ These two characteristics have since then been a constant refrain in the ad hoc international criminal tribunals' jurisprudence.¹⁴⁸

4.2. Intensity of the Conflict.

The two components of the concept of non-international armed conflicts mentioned in the section above cannot be described in abstract terms and must be evaluated on a case-by-case basis.¹⁴⁹ In the *Rutaganda* case, the International Criminal Tribunal for Rwanda stated that: 'the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of common Article 3, is to be decided upon a case-by-case basis'.¹⁵⁰ In the *Tablada* case, the Inter-American Commission on Human Rights also highlighted the need to consider each situation on its merits:

The most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the 'lowest' level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.¹⁵¹

The requirement of intensity of the conflict can be interpreted in multiple ways through different data. This data could include 'the collective nature of the fighting or the fact that the State is obliged to resort to its army as its police forces are not able to deal with the situation on its

¹⁴⁶ Ibid [70].

¹⁴⁷ *Prosecutor v Tadić* (Opinion and Judgement) IT-94-1-T (7 May 1997) [562].

¹⁴⁸ Sivakumaran, (n 69) 165.

¹⁴⁹ Cullen (n 111) 123.

¹⁵⁰ *Prosecutor v Rutaganda* (Judgement) ICTR-96-3-A (26 May 2003).

¹⁵¹ *Abella v Argentina* Inter-American Commission on Human Rights, report No.55/97, case 11.137.

own'.¹⁵² Also, 'the duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces and the number of victims'.¹⁵³ The determination of existence of a non-international armed conflict must be made based on objective criteria, avoiding subjective judgements of either party of the conflict. As noted by the ICTR Trial Chamber in *Akayesu*:

It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgement of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgement of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimised by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfils their respective pre-determined criteria.¹⁵⁴

The *Tadić* definition is useful when determining the threshold for the application of international humanitarian law, making clear that the intensity required should be higher than the one in internal disturbances and tensions.¹⁵⁵ Nevertheless, this does not mean that the hostilities should be 'sustained and concerted military operations' as required in Additional Protocol II. This way, the degree of intensity can be determined by the interpretation of the word 'protracted'.¹⁵⁶ Sonja Boelaert-Suominen attempted to explain the meaning of the term 'protracted' in the following statement:

the decision of the Appeals Chamber seems to indicate that this implies a time element. The Case-Law of the Tribunal indicates that the terms 'protracted armed violence' should be interpreted in a flexible manner and that 'protracted' does not carry the same meaning as 'sustained'. Accordingly, there is no requirement that military operations be carried out in a sustained or continuous manner.¹⁵⁷

On the same note, Bahia Thahzib-lie and Olivia Swaak-Goldman mentioned:

[T]he protracted requirement is met when the hostilities are extended over time and include events attributable to the conflict. Whether or not hostilities are 'protracted' is assessed by reference to the entire period from the initiation of hostilities to the cessation of hostilities. While an examination of the 'protracted' nature of hostilities might be fairly straightforward in a more classic non-international armed conflict, it is more problematic if several non-State parties are involved. The extent to which hostilities originating from several different non-State parties can

¹⁵² Vité (n 82) 76.

¹⁵³ Roger Pinto 'Report of the Commission of experts for the study of the question of aid to the victims of internal conflicts' (1963) 23 International Review of the Red Cross 59, 82-83.

¹⁵⁴ *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-A 23 (November 2001) [603].

¹⁵⁵ Cullen (n 111) 127.

¹⁵⁶ *Ibid.*

¹⁵⁷ Boelaert-Suominen (n 143) 634, in Cullen (n 111) 128.

be aggregated in considering whether hostilities are protracted will depend on the relationship between the non-State parties.¹⁵⁸

The protracted element should not be measured based on hostilities carried out in a sustained or continuous manner; instead, it should be judged the entire period of hostilities as reference. The *Milošević* Rule 98bis Decision assessed the level of intensity required to determine the existence of a non-international armed conflict. This was based on the following criteria: 'length or protracted nature of the conflict and the seriousness of armed clashes,¹⁵⁹ spread of clashes over the territory,¹⁶⁰ the increase in number of governmental forces sent to Kosovo¹⁶¹ and the type of weaponry used'.¹⁶² The Trial Chamber made other two significant points when clarifying the threshold for the application of international humanitarian law. It determined that neither the existence of a civilian authority¹⁶³ nor control over territory are requirements for determining the existence of a non-international armed conflict.¹⁶⁴

In another assessment of the intensity of the conflict in Kosovo but in a different period of time, the *Limaj* Trial Chamber employed a similar approach to the one used by the *Milošević* Trial Chamber.¹⁶⁵ The conditions that the *Limaj* Trial Chamber took into consideration as indicative of the intensity of hostilities were the following: 'the seriousness of armed clashes,¹⁶⁶ mobilisation of troops by the government,¹⁶⁷ the kind of weaponry utilised,¹⁶⁸ the destruction of property,¹⁶⁹ the displacement of local population¹⁷⁰ and the existence of casualties'.¹⁷¹ The Trial Chamber also emphasised that the purpose of the fighting is 'irrelevant' since the determination of existence of an armed conflict must be based solely on two criteria: 'the intensity of the conflict

¹⁵⁸ Thahzib-lie and Swaak-Goldman 'Determining the Threshold' in Lijnzaad *et al. Making the Voice of Humanity Heard* (Martinus Nijhoff Publishers, 2004) 248, in Cullen (n 111) 128.

¹⁵⁹ *Prosecutor v. Milošević* (Decision on Motion for Judgement of Acquittal) ICTY IT-02-54-T (16 June 2004) [28] in Cullen (n79) 128.

¹⁶⁰ *Ibid* [29].

¹⁶¹ *Ibid* [30].

¹⁶² *Ibid* [31] in Cullen (n 111) 128-129.

¹⁶³ *Ibid* [34].

¹⁶⁴ *Ibid* [36].

¹⁶⁵ Cullen (n 111) 129

¹⁶⁶ *Prosecutor v Limaj et al.* (n 101) [135]-[43].

¹⁶⁷ *Ibid* [150].

¹⁶⁸ *Ibid* [166].

¹⁶⁹ *Ibid* [142].

¹⁷⁰ *Ibid* [142], [167].

¹⁷¹ *Ibid* [134].

and the organisation of the parties'.¹⁷² Some studies have suggested determining the existence of an armed conflict based on a numerical threshold of deaths. For example, the Uppsala Department of Peace and Conflict Research suggests a threshold of twenty five battle-related deaths,¹⁷³ while the Yearbook of the Stockholm International Peace Research Institute sets a threshold of 1,000.¹⁷⁴ The setting up of numerical thresholds is inappropriate for different reasons. The first reason is that the criterion of organisation of non-state actors is ignored, focusing only on the intensity of the conflict based on the number of deaths. The second reason is that the number of deaths occurring in a conflict is only a subset of the total number of victims. Lastly, it would establish a higher threshold than the one established in common Article 3, limiting the application of international humanitarian law.¹⁷⁵

A different approach to determining the intensity of the violence is the factor of the duration of hostilities. Since the Appeals Chamber utilised the term 'protracted' instead of referring to a certain level of violence, it can be understood that the period of time is the most critical factor to assess the intensity of hostilities. Nevertheless, if duration were the only element to consider when assessing the intensity of the conflict, a short period of fighting, such as the one in *La Tablada* case, would not be considered a non-international armed conflict.¹⁷⁶ The Appeals Chamber 'added the words large-scale to the requirement of protraction to convey a sense of magnitude'.¹⁷⁷ Also, the *Boškoski* Trial Chamber mentioned that 'care is needed not to lose sight of the requirement for protracted armed violence in the case of an internal armed conflict, when assessing the intensity of the conflict'.¹⁷⁸ This way, if there were acts of violence of relatively brief duration, the situation can still be considered an armed conflict. Likewise, acts of violence of moderate intensity over a an extended period of time may amount to the determination of an internal armed conflict.¹⁷⁹

¹⁷² Cullen (n 111) 130.

¹⁷³ Peter Wallensteen, Margareta Sollenberg 'Armed Conflict, 1989-2000' (2001) 38 Journal of Peace Research 629

¹⁷⁴ The Stockholm International Peace Research Institute (SIPRI), 'SIPRI Yearbook 2006: Armaments, Disarmament and International Security 27

¹⁷⁵ Cullen (n 111) 131.

¹⁷⁶ *Juan Carlos Abella v Argentina* OEA/Ser.L/V/II.98 Doc. 6 rev. (13 April 1998) Case 11.137 [152].

¹⁷⁷ Sivakumaran (n 69) 167.

¹⁷⁸ *Prosecutor v Boškoski and Tarčulovski* (Judgement) IT-04-82-T (10 July 2008) [175].

¹⁷⁹ Sivakumaran (n 69) 168.

Some other factors can be used to assess the existence of a non-international armed conflict. These can include the geographical spread of the violence,¹⁸⁰ the number of deaths, injuries, and damage caused by the violence;¹⁸¹ the level, length, and duration of violence,¹⁸² weapons used by the parties,¹⁸³ mobilisation of individuals and distribution of weapons to them,¹⁸⁴ the involvement of third parties,¹⁸⁵ the conclusion of ceasefire and peace agreements,¹⁸⁶ prosecution of offences applicable only in armed conflicts¹⁸⁷, amnesties¹⁸⁸ and the use of armed forces on the part of the state, instead of the use of police forces.¹⁸⁹

Several indicia need to be considered to determine if the intensity of the violence meets or surpasses the threshold for an internal armed conflict. This should be decided on a case-by-case basis, since the lack of one or two of them would not mean that the threshold has not been met. These factors need to be weighed against one other in a particular situation.¹⁹⁰

4.3. Organisation of the Armed Group.

In an attempt to aid in the analysis of situations with an unclear status, the International Committee of the Red Cross has mentioned, in reference to the parties to a non-international armed conflict:

¹⁸⁰ *Prosecutor v. Milošević* (159) [29]; *Prosecutor v Boškoski* (n 179) [216]-[234], [243].

¹⁸¹ *Prosecutor v Tadić* (Opinion and Judgement) (n 147) [565]-[566]; *Prosecutor v Limaj* (n 101) [135]-[167]; *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) [235].

¹⁸² *Prosecutor v Tadić* (Opinion and Judgement) (n 147) [565]-[566]; *Prosecutor v Delalić, Mucić, Delić and Landzo*, (Judgement) IT-96-21-T (16 November 1998) [189]; *Prosecutor v Milošević* (n 159) [28]; *Prosecutor v Limaj* (n 101) [135]-[167].

¹⁸³ *Prosecutor v Milošević* (n 159) [31]; *Prosecutor v Limaj* (n 101) [135]-[167]; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgement) IT-04-84-T (3 April 2008) [49]; *Prosecutor v Boškoski* (n 178) [213]-[222].

¹⁸⁴ *Prosecutor v Delalić et al.*, (n 182) [188]; *Prosecutor v Milošević* (n 159) [30]; *Prosecutor v Limaj* (n 101) [135]-[167].

¹⁸⁵ *Prosecutor v Tadić* (Opinion and Judgement) (n151) [567]; *Prosecutor v Delalić* (n 182) [190]; *Prosecutor v Haradinaj* (n 183) [49]; *Prosecutor v Boškoski* (n 178) [220]-[224], [232]-[234], [243]; *Prosecutor v Lubanga* (n 181) [235].

¹⁸⁶ *Prosecutor v Boškoski* (n 178) [232]-[234], [243].

¹⁸⁷ *Ibid* [243], [247].

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid* [243], [245]-[246]; ICRC ‘Armed Conflicts Linked to the Disintegration of State Structures, Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law’ [1998] 19-23.

¹⁹⁰ Sivakumaran (n 69) 168-9.

Common Article 3 does not define the term ‘party to the conflict’. In the case of an international armed conflict, the parties thereto in principle can only be states, but the situation in non-international armed conflicts is less clear, as in such cases at least one party to the conflict is not a State. The general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organisation and discipline - enough to enable them to respect international humanitarian law - in order to be recognised as a party to the conflict.¹⁹¹

In the commentary *Elements of War Crimes under the Rome Statute of the International Criminal Court*, it is mentioned that the parties ‘should be organised to a greater or lesser extent.’¹⁹² This shows that the existence of the organisational requirement is not controversial itself. The difficulty arises in determining the necessary level.¹⁹³ For instance, the *Limaj* Trial Chamber noted that ‘some degree of organisation by the parties will suffice’,¹⁹⁴ while the *Akayesu* Trial Chamber referred to armed forces ‘organised to a greater or lesser extent’.¹⁹⁵ Commentators also refer to a ‘minimum’ level of organisation,¹⁹⁶ a ‘modicum of organisation’¹⁹⁷ and a level of organisation that ‘must not be exaggerated’.¹⁹⁸

While the *Tadić* decision fails to provide a definition or explanation of what constitutes and ‘organised armed group’,¹⁹⁹ international Jurisprudence has developed a series of indicative factors to assess the organisation of armed groups. Since these indicia are taken from instances of high-intensity non-international armed conflicts, ‘the lack of existence of one or many of them, does not mean that a low-level non-international armed conflict is not taking place’.²⁰⁰

The Decision on Motion for Judgement of Acquittal in the case of *Prosecutor v. Milošević* (*Milošević* Rule 98bis Decision) provided clear conditions for the level of organisation required

¹⁹¹ Ibid 442.

¹⁹² Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary* Cambridge University Press (2003) 442.

¹⁹³ Moir (n 79) 36.

¹⁹⁴ *Prosecutor v Limaj* (n 101) [89].

¹⁹⁵ *Prosecutor v Jean-Paul Akayesu*, (n 154) [620].

¹⁹⁶ Dietrich Schindler *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* [1979] Hague Academy of International Law 119, 163.

¹⁹⁷ G.I.a.D Draper, *The Geneva Conventions of 1949* (1965) 90.

¹⁹⁸ Claus Kress, ‘The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes’ (2002) 416.

¹⁹⁹ Boelaert-Suominen (n 143) 635 in Cullen (n 111) 124.

²⁰⁰ Sivakumaran, (n 69) 170.

for an armed group to be considered as ‘organised’ under the *Tadić* definition.²⁰¹ The *Milošević* Trial Chamber determined that the Kosovo Liberation Army (KLA) was an organised armed group based on the following criteria: the existence of ‘an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms’.²⁰²

In the *Prosecutor v. Limaj* was used the same reasoning behind by the *Milošević* Rule 98bis Decision to assess the level of organisation of the KLA in an earlier stage of hostilities than the one assessed by the *Milošević* Trial Chamber.²⁰³ There was a special focus on the role of the General Staff acting as the main governing body of the KLA.²⁰⁴ The characteristics of this group included the ‘appointment of zone commanders,²⁰⁵ the supply of weapons,²⁰⁶ the issuance of political statements and communiqués,²⁰⁷ the distribution of KLA regulations to units,²⁰⁸ the authorisation of military action²⁰⁹ and the assignment of tasks to individuals within the organisation.’²¹⁰ Another indicia of organisation shown by the KLA was the engagement of the General Staff members in negotiations with representatives of missions based in Belgrade and representatives of the European Community.²¹¹ This diplomatic exchange developed in the following way:

[B]y July 1998 the KLA had become accepted by international representatives, and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis. This discloses and confirms that by that time the KLA had achieved a level of organisational stability and effectiveness. In particular this gave it the recognised ability to speak with one voice and with a level of persuasive authority on behalf of its members. Both the KLA’s need for secrecy and the existence of an established hierarchy in its ranks is apparent from the circumstance that individuals involved in negotiations with foreign missions were referred to by a number, apparently corresponding to their level in the KLA hierarchy. Further, from the course of these discussions it appears that the KLA was able to formulate and declare a change of military tactics and also conditions for refraining from further military action. This is indicative that at the

²⁰¹ Cullen (n111) 124.

²⁰² *Prosecutor v. Milošević* (n 159) para 23 in Cullen (n 111) 125.

²⁰³ Cullen (n 111) 125

²⁰⁴ *Prosecutor v Limaj* (n 101) para 94.

²⁰⁵ Ibid [96].

²⁰⁶ Ibid [100].

²⁰⁷ Ibid [101].

²⁰⁸ Ibid [98].

²⁰⁹ Ibid [46].

²¹⁰ Ibid. These characteristics were summarised by Cullen (n 111) 125.

²¹¹ Ibid [125].

time the KLA had the ability to coordinate military planning and activities and to determine a unified military strategy, as well as the ability to conduct military operations of a larger scale.²¹²

The chain command proved to be another important criteria to take into account when trying to establish the existence of a non-international armed conflict.

[T]he KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organisation. Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police.²¹³

The command structure is what allows to have a coordinate and unified military strategy, which is a very useful indicia in order to determine the level of organisation of an armed group. Another criteria cited as evidence of the latter by the Trial Chamber, is the ability to recruit, train and equip new members. This goes hand in hand with the possession of weapons by the group members and the intensity of hostilities utilising these weapons.

By the end of May 1998 KLA units were constantly in armed clashes with substantial Serbian forces in areas from the Kosovo-Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo-Macedonian border in the south and the municipality of Mitrovice/Kosovka Mitrovica in the north. The ability of the KLA to engage in such varied operations is a further indicator of its level of organisation.²¹⁴

The Boškoski Trial Chamber also proposed useful indicia regarding the level of organisation. They focused on the command structure, the capacity to carry out military operations, logistical ability, the capacity to comply with international humanitarian law obligations, and the ability to reach agreements within the same group and establish diplomatic dialogues.²¹⁵

In an early stage of violence, armed groups frequently fail to meet the requisite degree of organisation, and it is only with time that there is a development on coordination, cohesion, and structure of the group. Armed groups tend to be organised in one of the following structures: pyramidal or horizontal.²¹⁶ The pyramidal structure counts with clearly defined chains of

²¹² Ibid [129].

²¹³ Ibid [171].

²¹⁴ Ibid [172].

²¹⁵ *Prosecutor v Boškoski* (n 178) [199]-[203] in Sivakumaran (n 69) 170.

²¹⁶ Sivakumaran (n 69) 172.

command. For example, the Armée de Libération National (ALN) of Algeria was 'highly structured with a strict chain of command, designated zones of operation, uniforms and insignia, and military regulations'.²¹⁷ The horizontally structured groups are decentralised, with less clarity in the different roles and responsibilities, and the power is distributed among various units. For example, the forces of the Taliban of Afghanistan, are considered to have 'no organised, uniformed military, no strategic military plans, and no formal command and control structure characteristic of a regular military'.²¹⁸

The decentralisation of a group does not automatically mean that it is not meeting the requirement of organisation under the scope of international humanitarian law. Even decentralised structures may be organised in a way they can carry out military operations. This misunderstanding results from comparing the organisation of armed groups to states' armed forces with highly structured lines of command as the only form of organisation. Regarding 'some degree of organisation' on Additional Protocol II, the ICRC has expressed that 'this not necessarily mean that there is a hierarchical system of military organisation similar to that of regular armed forces'.²¹⁹ This must be borne in mind at all times, when assessing the requirement of organisation of non-state armed groups.

²¹⁷ Bedjaoui M, *Law and the Algerian Revolution* (International Association of Democratic Lawyers, 1961) 46-55 in Sivakumaran (n 69) 173.

²¹⁸ Parks W, 'Combatants', in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (Volume 85, International Law Studies, Naval War College, 2009) 247, 258 in Sivakumaran (n 69) 170.

²¹⁹ Commentary on the Additional Protocols (n 131) 1352.

5. Organised Crime in Mexico: Los Zetas

5.1. Origin.

To understand the current context in which organised criminal organisations carry out their operations in Mexico, is to understand the origin itself of the criminal groups and the importance of their geographical location within the border with the United States. The present chapter will explain the origin of the Zetas criminal organisation, starting with their origins as the armed wing of the Gulf Cartel (CDG), following by the formation of ‘the Company’, only to finish with the creation of one of the most powerful criminal organisations in the country. It will be reviewed then, the organisation of the group and the intensity of the attacks they have perpetrated since their consolidation as an organised criminal organisation.

Before addressing the origin of the Zetas as a criminal organisation, the importance of the state of Tamaulipas as a strategic point for transnational criminal organisations needs to be explained. This Mexican state shares a long boundary with Texas and the coastline. Its customs receive approximately 40 percent of the trade between Mexico and the United States. It also accommodates ‘more than half of the ships destined for the European market’.²²⁰ Given this location, it has played a pivotal role in the drug trafficking business, but the shared border with the United States is not the only reason why Tamaulipas is a strategic point. The border cities surrounding the state of Tamaulipas are the main points of entry for traffickers importing illicit cargo from the south of the country. Therefore, Tamaulipas ‘has more border crossing into the United States than any other Mexican state’.²²¹ Eduardo Guerrero, a security consultant, and former intelligence official stated that ‘the shape and size of [the Tamaulipas] border encouraged smuggling activities, and thus there initially appeared a strong and cohesive organisation with a strong leadership, the genesis of the Gulf Cartel’.²²²

²²⁰ Ignacio Alvarado, ‘Una historia de narco política’ *El Universal* (Mexico, 17 June 2012) <<https://archivo.eluniversal.com.mx/notas/853903.html>> accessed 31 Oct 2020.

²²¹ Guadalupe Correa-Cabrera, *Los Zetas Inc.* (Temas de hoy, 2018) 33-4.

²²² Eduardo Guerrero, ‘Epidemias de violencia’ *Nexos* (Mexico, 1 July 2012) <<https://archivo.eluniversal.com.mx/notas/853903.html>> accessed 31 Oct 2020.

The origins of the Gulf Cartel can be traced back to 1930, when Juan Nepomuceno Guerra, a Mexican citizen, smuggled whiskey into the United States during the years of the 'prohibition'. He extended his operations in the following decades, adding gambling, prostitution, and car thefts.²²³ Despite this diversification of businesses, he was still considered a smuggler instead of a drug lord. His organisation resembled more to the definition of organised crime provided by criminologists in the United States in the 1960s than to the current Mexican criminal organisations. It was only after Juan Nepomuceno Guerra built relationships with officials and politicians²²⁴ that he was seen as the leader of a 'profitable, criminal enterprise'.²²⁵ During the 1980s and because of the influence exerted by the United States, the Gulf Cartel organisation grew exponentially. 'Due to US interdiction successes in the Caribbean during the [late 1980s] and 1990s, Mexico [became] the single most important way-station for cocaine and heroin produced in the Andes, and [remained] a major producer of marijuana and methamphetamines'.²²⁶ The easy transit into the United States made possible the exponential growth of the drug trade. After Juan García Ábrego, Juan Nepomuceno Guerra's nephew took the leadership of the organisation he allied with the Cali Cartel to transport the product of the Colombian organisation in exchange for half of each load.²²⁷ To fulfil the agreement, García Ábrego acquired airplanes and warehouses; built airstrips, and made arrangements with law enforcement authorities that included bribes in exchange for protection and impunity.²²⁸ During the late 1980s and 1990s, the Gulf Cartel introduced cocaine, marijuana, heroin, and methamphetamines into the United States.²²⁹ Even after the arrangements made between the Cali Cartel and the Gulf Cartel, the activities and organisation of the latter would still fit into the description of 'organised criminal organisation' in Article 2 of the Palermo Convention reviewed

²²³ Correa-Cabrea (n 210) 36-7.

²²⁴ Carlos Flores, 'Political Protection and the Origins of the Gulf Cartel' (2014) 61 *Crime, Law and Social Science* 517 in Correa-Cabrera (n223) 37.

²²⁵ Damon Tabor, 'Radio Tecnico: How The Zetas Cartel Took Over Mexico With Walkie-Talkies' *Popular Science* (25 March 2014) <<https://www.popsoci.com/article/technology/radio-tecnico-how-zetas-cartel-took-over-mexico-walkie-talkies/?src=SOC&dom=tw>> accessed 31 Oct 2020.

²²⁶ Hal Brands, 'Los Zetas: Inside Mexico's Most Dangerous Gang' *Air and Space Power Journal* (2009) <<http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2009/3tri09/brandseng.htm>> accessed 23 Nov 2020 in Correa-Cabrera (n 210) 37.

²²⁷ Tabor (n 214).

²²⁸ Eduardo Guerrero, 'El Dominio del Miedo' *Nexos* (1 July 2014) <<https://www.nexos.com.mx/?p=21671>> Accessed 31 Oct 2020.

²²⁹ Correa-Cabrera (n 210) 38.

in Chapter 2. The aim of the organisation was still to obtain a financial benefit from drug trafficking. It is estimated that between 1985 and 1995, the CDG obtained \$20 billion from this activity.²³⁰ The criminal organisation grew and strengthen its ties with government officials, journalists, migrants, business owners, and gangs.²³¹

After the extradition of García Ábrego to the United States, Osiel Cárdenas became the successor of the leadership of the criminal organisation.²³² It was the first time in the history of the organisation that a person not belonging to the family of the founder Juan Nepomuseno, became the leader. While Juan Ábrego relied on the extensive network he built to ensure the permanence of the organisation,²³³ Cárdenas resorted to violence as means to consolidate his position as leader of the Gulf Cartel.²³⁴ He formed a group of 'enforcers' to seize territory and to be protected from his enemies. The group's name was 'Zetas' and its members were 'highly trained and brutally efficient'.²³⁵ In its beginnings, the group was formed by the leader, Arturo Guzmán Decena, and thirty deserters of the Mexican army who belonged to elite forces.²³⁶ They received special training from the United States and Israel.²³⁷ However, because of the precarious working conditions and low salaries they received in the military, they decided to make a change, going from combating criminals to working for them.²³⁸ Robert Bunker, a visiting professor at the U.S. Army War College's Strategic Studies Institute, stated the following: 'before the Zetas, it was basically low-quality foot soldiers and enforcer types... What the Zetas brought to the table was that [military] operational capability. The other cartels did not know anything about this. It revolutionised the whole landscape'.²³⁹ It has been observed that 'the appearance of the Zetas represented a paradigmatic change in the operation of drug-trafficking groups, since it

²³⁰ Juan Munoz, 'México detiene y entrega a Estados Unidos a su principal narcotraficante' *El Pais* (Mexico, 16 January 1996) <https://elpais.com/diario/1996/01/16/internacional/821746813_850215.html> accessed 31 Oct 2020.

²³¹ Guerrero (n230).

²³² Correa-Cabrera (n223) 39.

²³³ Carlos Flores, 'Political Protection and the Origins of the Gulf Cartel' in Tony Payán, Kathleen Staudt, and Anthony Kruszewski (eds), *A War That Can't Be Won: Binational Perspectives on the War on Drugs* (Arizona University Press, 2013) in Correa-Cabrera (n223) 39.

²³⁴ Correa-Cabrera (n223) 39.

²³⁵ Tabor (n203).

²³⁶ Correa-Cabrera (n 223) 39.

²³⁷ *Ibid.*

²³⁸ Marco Rodríguez, 'El poder de los Zetas' (2006) <<https://www.monografias.com/trabajos28/poder-zetas/poder-zetas.shtml>> accessed 23 Nov 2020 in Correa-Cabrera (n223) 39.

²³⁹ Tabor (n203) in Correa-Cabrera (n223) 40.

inaugurated a social phase in the construction of professional criminal armies'.²⁴⁰ The other criminal groups in Mexico in those years observed how the Zetas helped Osiel Cárdenas to consolidate his power not only in Tamaulipas but also in other parts of the Gulf of Mexico.²⁴¹ The role and the importance of the Zetas in the Gulf Cartel are better explained by professor Hal Brands:

Cárdenas initially employed the Zetas as hired guns and maintained a firm hold on the group and its activities. He charged the Zetas with protecting his territory in Nuevo Laredo, murdering or intimidating competitors, and accompanying drug shipments to the U.S. border. He also apparently relied on the Zetas as his personal protection detail, making the group an immensely valuable commodity at a time when drug lords such as Cárdenas were increasingly falling victim to the violence they themselves had spawned.²⁴²

As the Zetas obtained more power and recruited more members, they decided to act as an independent group with an alliance with the Gulf Cartel. They expanded their business to include not only drug trafficking but also smuggling of migrants, extortion and kidnapping, selling black-market oil, among other activities. The close relationship the founders of the Gulf Cartel made with the community disappeared with the increasing display of violence and the corruption of law enforcement agencies.²⁴³

5.2. The Zeta's Structure.

An element to consider when assessing a situation to determine the existence of a non-international armed conflict is the level of organisation of the armed group. Due to the ever-changing nature of criminal organisations, it is very difficult to determine if these can be considered party to a non-international armed conflict in a given situation. The case of the Zetas is not very different. Despite all the information currently available, the exact organisation of this criminal group remains uncertain. There are two main theories regarding their organisation. The first one is the so-called 'official structure'.²⁴⁴ According to this theory, there is a hierarchy based

²⁴⁰ Guerrero (n230).

²⁴¹ The criminal organisations trying to obtain control over the state of Tamaulipas were the Juárez Cartel and the Sinaloa Cartel.

²⁴² Brands (n205) in Correa-Cabrera (n 223) 42.

²⁴³ Guerrero (n230)

²⁴⁴ Protected witnesses collaborating with law enforcement agencies provided the necessary information to develop a theory regarding the Zetas' training and operating methods.

on military discipline.²⁴⁵ The highest-ranking of the hierarchy is for the so-called ‘old Zetas’. These were once members of the Mexican army’s special forces. After they made the transition from members of the army to members of the Zetas, they were in control of the principal routes of drug-trafficking. The next people in the hierarchy are supposed to control the points of distribution of illegal products. Known as the ‘new Zetas’, they received special training and were also allowed to use high-caliber weapons since one of their main tasks included to protect the ‘old Zetas’.²⁴⁶ Some of them received previous training when they were members of the Guatemalan army or members of the elite corps of the Secretariat of National Defence (SEDENA).²⁴⁷ Lastly, the new Zetas were the ones in charge of executing the people designated by the old Zetas and carrying out essential operations.

The next level is the one formed by a group known as *Los Cobras*. These members have no special training, but they can perform essential tasks due to their loyalty towards the organisation.²⁴⁸ The next level is formed by the *halcones* or watchers. They were in charge of collecting information about enemies or police forces, with the aim to protect the organisation.²⁴⁹ This hierarchy is used to form cells that operate like military squadrons to ‘perpetrate kidnappings and executions of enemies to assure the control of the different trafficking plazas’.²⁵⁰

Scholars and journalists²⁵¹ have contested this theory despite it is provided by official sources. Because of the complex structure of the Zetas organisation, researchers have found that ‘even though Mexico’s security forces arrest hundreds of suspects every year, these arrests do not produce much useful intelligence on the organisation of these criminal groups.’²⁵²

²⁴⁵ Correa-Cabrera (n 223) 74.

²⁴⁶ Ibid 76.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Silvia Otero, “‘Las Estacas’, escoltas de los “Capos” del Golfo’ *El Universal* (17 December 2007) <<https://archivo.eluniversal.com.mx/nacion/156552.html>> accessed 19 Nov 2020.

²⁵¹ Journalists are the ones providing accurate information regarding organised criminal organisations in Mexico. Government officials are often bribed by members of these groups and provide misleading information to the public.

²⁵² John Bailey, ‘Los Zetas y McDonald’s’ *El Universal* (5 Nov 2011) <<http://www.eluniversalmas.com.mx/editoriales/2011/11/55520.php>> accessed 19 Nov 2020.

The second theory compares the structure of the Zetas with a business structure. This theory proposes a horizontal structure operating through transnational networks with a military strategy.²⁵³ In this theory, the group should be divided into various cells, which take direction from the central command but have little knowledge of the activities of other cells'.²⁵⁴ This would explain why even after the detention of several members, the structure of the group remains unknown. According to this theory, at the top of the structure would be those known for academics as 'regional managers' in charge of trafficking illegal goods. As it was mentioned at the beginning of this chapter, the Zetas did not limit their activities to drug trade only, so the higher ranking in the hierarchy would be conformed by a board of directors in charge of illegal businesses in a particular region.²⁵⁵ According to this theory, the next level should be conformed by members in charge of different activities divided into 'departments': 'marketing; research, development, and technology; human resources; and finance'.²⁵⁶ This theory emphasises the Zetas' 'marketing and branding', meaning that this criminal organisation would resort to the media to exhibit extreme violence²⁵⁷ to create a sensation of insecurity among the population and promote their reputation as a violent organisation. After they built the image of their organisation as extremely violent, they expanded their businesses to include kidnappings and extortions. They also expanded their control over territory by recruiting new members who would join their organisation to earn prestige or because the fear of reprisals.²⁵⁸ At the same time, the Zetas would offer 'protection' in exchange of money. They would act as both, perpetrators of violence and peacekeepers.

As for 'research, development, and technology', scholars have used this term to emphasise the development of new technologies and tactics, including complex communications technologies

²⁵³ Correa-Cabrera (n 223) 84.

²⁵⁴ Brands (n 221) in Correa-Cabrera (n 223) 84.

²⁵⁵ Correa-Cabrera (n 223) 84.

²⁵⁶ Ibid.

²⁵⁷ Mass assassinations, decapitations, narco-blockades, and narco-messages.

²⁵⁸ Correa-Cabrera (n 223) 86.

and a broad transportation network. According to Damon Tabor, the Zetas operated in the following way:

At the height of its power, the group developed a Stasi-like army of spies and integrated technology and social media into their operations. They reportedly employed a team of computer hackers to track authorities with mapping software, and, according to one paper, 20 communication specialists to intercept phone calls.²⁵⁹

The use of advanced technologies and communications, allowed them to consolidate their power in the territories they controlled, and to expand their businesses through the interconnectedness of their members in a command-and-control capacity. This large number of members belonging to the organisation was controlled through what scholars have called the ‘human resources’ department. This is very similar to the structure explained in the first theory: the recruitment of former military personnel, police, gang members, street vendors, taxi drivers, among others, performing different activities related to the organisation.²⁶⁰ Rodrigo Canales attempted to attempt the recruitment process to become member of the Zetas:

[The Zetas] focus most of their recruitment on the army, and they very openly advertise for better salaries, better benefits, better promotion paths, not to mention much better food, than what the army can deliver. The way they operate is that when they arrive in a locality, they let people know that they are there, and they go to the most powerful local gang and they say "I offer you to be the local representative of the Zeta brand". If they agree, they train them and they supervise them on how to run the most efficient criminal operation for that town, in exchange for royalties.²⁶¹

With this strategy, the Zetas avoided unnecessary clashes between them and smaller organisations, expanding their territory of operations. A paramount difference between the Zetas and some other traditional criminal organisations is the military training they give to their new recruits. These ‘paramilitary training camps’ were located in remote areas in the states of Tamaulipas, Nuevo León, and Coahuila. The training is similar to the one given to the special forces of the Mexican army.²⁶² After this training, members of the Zetas are able to carry out operations as armed forces instead of traditional criminal organisations. Lastly, scholars have used the term ‘finance department’ to explain the relevance of the role played by the people

²⁵⁹ Tabor (n 220) in Correa-Cabrera (n 223) 88.

²⁶⁰ Correa-Cabrera (n 223) 88.

²⁶¹ Rodrigo Canales, ‘The deadly genius of drug cartels’ TedSalon (2013) video (17:56) in Correa-Cabrera (n 223) 89.

²⁶² Humberto Padgett, ‘Yo maté con el Z-40: La historia de Karen’ (17 July 2013) <<https://play.google.com/books/reader?id=3HEpDwAAQBAJ&hl=es&pg=GBS.PA332>> accessed 20 Nov 2020.

responsible for making payments to the active members of the organisation, including bribe payments and the expenses the organisation may have.

While these theories are useful when trying to understand this criminal group's structure, it does not offer any guidance as to how this group could be controlled or defeated, meaning that these theories are still linked to transnational organised crime. Clashes between the Zetas and state armed-forces occurred daily. These clashes resulted in civilian casualties and the displacement of people due to the inability of government officials to control the situation. According to the indicative factors developed by international jurisprudence, the level of organisation of armed groups under the *Tadić* definition must count with the existence of 'an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms'.²⁶³ A similar reasoning was reached in the *Prosecutor v. Limaj* when the Chamber determined that the characteristics of an armed group include the 'appointment of zone commanders',²⁶⁴ the supply of weapons,²⁶⁵ the issuance of political statements and communiqués,²⁶⁶ the distribution of KLA regulations to units,²⁶⁷ the authorisation of military action.²⁶⁸ Independently of the theory chosen to analyse the Zeta's structure, the level of organisation suffice the level determined by international jurisprudence to be considered non-state armed forces.

5.3 Intensity of the attacks.

The second element to determine the existence of a non-international armed conflict is the intensity of the attacks. The Zetas were the first group to adopt military techniques to perpetrate attacks and to defend their territories. As reviewed in chapter 4, the intensity of the attacks must be determined on a 'case-by-case basis'.²⁶⁹ The *Tadić* definition made clear that the intensity in a given situation must be higher than the one in internal disturbances and tensions. As it was

²⁶³ *Prosecutor v. Milošević* (n 159) [23] in Cullen (n 111) 125.

²⁶⁴ *Ibid* [96].

²⁶⁵ *Ibid* [100].

²⁶⁶ *Ibid* [101].

²⁶⁷ *Ibid* [98].

²⁶⁸ *Ibid* [46].

²⁶⁹ *Prosecutor v. Rutaganda* (n 150).

reviewed in the 'organisation of the group' section, the Zetas adopted tactics and techniques inspired in the elite forces of the Mexican army. The advanced training and skills of this organised group is better explained by Brands:

The initial group of the Zetas came from an elite army unit created specifically for counter-narcotics and counter-insurgency purposes. This group received training from French and Israeli instructors, and possessed a wealth of specialised knowledge regarding advanced military tactics. When they defected, the original Zetas thus brought with them considerable expertise in 'rapid deployment, aerial assaults, marksmanship, ambushes, intelligence collection, counter-surveillance techniques, prisoner rescues, sophisticated communications, and the art of intimidation,' skills they subsequently put to good use in their new profession.²⁷⁰

The level of organisation of the Zeta's group, the training of its members, and the weaponry they had access to, made it possible for them to perpetrate attacks of a higher level than the ones established in the *Tadić* definition. After their first appearances in the media, the group was described as follows:

The Zetas are capable of organising deployments by earth, sea, and air and of making ambush operations and incursions, and of organising patrols. They are specialised snipers. They can assault buildings, perform airborne and hostage search and release operations, they possess arms reserved for the exclusive use of the armed special forces. The Zetas are dressed in black, drive armoured cars, and shoot using German submachine guns that are more difficult to find in the black market than AK-47s. The Zetas have rocket-propelled grenade launchers, 12.7 mm/50 caliber machine guns, land-air missiles, and have even utilised helicopters in some of their most successful operations.

There are two examples of the Zetas' ability to perpetrate attacks. The first one is known as the 'San Fernando Massacre'. San Fernando is a small town located near to the border with the United States. This has been a strategic point to the trafficking of illicit goods into the United States. In an attempt to control the small town of San Fernando, members of the Zetas perpetrated an attack that lasted for several days and took many lives. Approximately 70 vehicles transporting men and weapons arrived to the town of San Fernando, provoking clashes between them and the group that controlled that town by that time. The Zetas obtained control over that territory, imposing an organisation formed by deserters of the armed forces at the head of the structure, followed by enforcers and *halcones*. Part of their activities consisted of wearing military-style uniforms to form raids at the town's entrance and search for members of other criminal organisations. They soon regained full control over that territory but the acts of violence

²⁷⁰ Brands (n 221) in Correa-Cabrera (n 223) 108.

were not limited to members of other organisations. Intimidation, murders, kidnappings and extortion occurred on a daily basis against inhabitants to that region. It is estimated that 10 per cent of the total population fled San Fernando in an attempt to escape the violence of this group. After the *halcones* mistook a vehicle transporting migrants on their way to the United States for members of another criminal organisation, the Zetas kidnapped the entire group of people and took them to a deserted area. When they realised their mistake, they proposed that they work for them, murdering those who denied the request. In sum, they murdered 72 people. This action attracted the international community's attention, and only then, the Mexican government deployed state army forces to regain control over that territory.²⁷¹

Another example of this group's capability to perpetrate attacks is the 'Allende's Massacre'. Due to betrayals among members of the organisation, the 'Zetas' decided to attack some people within their own organisation and their families. The attacks were perpetrated by members of the criminal group aided by local police officers. The officers who decided not to collaborate in the attack were forbidden to respond to emergency calls, and during three days, approximately 50 houses were under attack. In these attacks, children, women, and innocent people were tortured and murdered.²⁷² Due to the brutality of these attacks, neither the federal police nor the army provided help to those in danger.

²⁷¹ Juan Alberto Cedillo, *Las Guerras Ocultas del Narco* (1st edn, Mexico city, 2018) 77-99.

²⁷² Ibid 143-163.

6. Principles of International Law

6.1 Obligations of Armed Groups

The majority of armed conflicts that have occurred in the last few years have been of internal character. The Stockholm International Peace Research Institute reported in its 1998 Yearbook that twenty four out of twenty five major armed conflicts in 1997 were internal.²⁷³ Only during mid-1997 to mid-1998 there were approximately 5 million deaths related to internal conflicts, in which most of the casualties were civilians.²⁷⁴ In the present chapter is examined the international accountability for acts committed by armed groups and their members during internal armed conflicts.

When talking about accountability of armed groups, the first question to be answered is if and how these groups can be held accountable of their actions. There is no explicit prohibition on the use of force by armed opposition groups within a State, neither in the Charter of the United Nations nor in any other rule of international law.²⁷⁵ The way in which these groups can be held accountable for their actions is through specific rules and mechanisms focused on the prevention, regulation and punishment of the violence committed against civilians. The applicable law can be found in three different branches of international law: international humanitarian law, international human rights law and international criminal law.²⁷⁶ In the present chapter is briefly described how non-state armed groups are bound by international humanitarian law. The substantive rules applicable in non-international armed conflicts are reviewed in a more detailed way, focusing on the ones related to the protection of civilians.

²⁷³ The Stockholm International Peace Research Institute (SIPRI), 'SIPRI Yearbook 1998: Armaments, Disarmament and International Security' (Oxford University Press, 1998) in Avril McDonald, 'The Year in Review' (1998) 1 Yearbook of International Humanitarian Law 113, 121.

²⁷⁴ Interdisciplinary Research Program on Causes of Human Rights Violations 'World Conflict and Human Rights Map' (The Netherlands, 1998) in Zegveld (n 70) 2.

²⁷⁵ Ibid

²⁷⁶ Ibid.

It is generally accepted by states and scholars, that non-state armed groups are bound by the rules of international humanitarian law.²⁷⁷ However, the question of how these groups are bound, has divided academics' opinion since the drafting of common Article 3. Since the drafting of the Geneva Conventions, numerous theories have attempted to explain how non-state armed groups are bound by the laws of war. It is possible to identify five main theories: 'i) by being third parties to the Geneva Conventions and APII; ii) by domestic legislation; iii) through their members being bound directly by international law; iv) by having effective control over part of the territory; and v) through customary international law'.²⁷⁸ The first theory will be further explained in the next part of the present chapter.

6.1.1 Armed Groups Bound as Third parties to the Geneva Convention.

One of the first explanations on how non-state armed groups are bound by international humanitarian law was offered by the jurist Antonio Cassese. He suggested in an article published in 1981 that armed groups are bound to CA3 and APII as 'third parties'.²⁷⁹ He recognised that the rules in the Vienna Convention on the Law of Treaties would not apply *strictu sensu* since armed groups are non-state actors. Therefore, customary international law on third parties should apply based on articles 35 to 38 to the Vienna Convention.²⁸⁰ Article 35 establishes that 'third states can be bound by obligations contained in a treaty in instances where it is clear that: i) the contracting parties intended the treaty to confer such duties on those third parties; and ii) the third party has accepted that obligation in writing'.²⁸¹ If this article is applied to non-state armed groups, then these groups are bound by treaties in which the contracting parties intended to create obligations for such groups. In the case of common Article 3 and Additional Protocol II, Cassese observed that the *travaux préparatoires* and the texts of the treaties provides enough evidence that the intention of the contracting parties was to bind armed groups. Common Article 3 clearly imposes obligation 'on each Party to the [armed] conflict [not of an international

²⁷⁷ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (1st edn Oxford University Press 2017) 177; Moir (n 79) 52.

²⁷⁸ Fortin (n 277) 178.

²⁷⁹ Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *The International and Comparative Law Quarterly* 416.

²⁸⁰ Christine Chinkin, *Third Parties in International Law* (Clarendon Press, Oxford 1993) 39.

²⁸¹ Fortin (n228) 180.

character]’. This means that not only the state, but also armed groups must comply with what it is established there. It was not until the 1970s that this question got more attention, during the drafting of Additional Protocol II.²⁸² In the *travaux préparatoires* the different views among delegations are clearly shown. Some delegations, including the Italian, Colombian and Nigerian, completely opposed to the idea that armed groups should be bound by the Protocol’s provisions.²⁸³ Nevertheless, most of the delegations agreed upon the fact that armed groups should indeed be bound by Additional Protocol II.²⁸⁴ Since the beginning of the Protocol’s drafting process, the ICRC expressed that it should be binding for both parties in a non-international armed conflict. During the 1971 Conference of Government Experts, the ICRC stated:

In order to dispel any doubts or misgivings on the part of experts about the obligations which rebels should assume and the means of compelling them to do so, the ICRC representative wished to state that the ICRC had always held the view that Article 3 was binding not only on the governments of Contracting states but also on the population as a whole and, hence, on rebel forces. The obligation dated from 1949. This would not be changed if Article 3 were expanded by means of an additional protocol.²⁸⁵

Based on article 1 of APII in which is stated that the Protocol ‘develops and supplements’ common Article 3, it can be concluded that Additional Protocol II also binds both parties of a conflict, states and armed groups.²⁸⁶

²⁸² *Ibid* 181.

²⁸³ The Italian delegation stated ‘In ratifying this instrument, the High Contracting Parties will assume obligations, not towards rebel forces (which are neither subjects of international law nor Parties to Protocol II) but towards the other Contracting Parties, the international community and world opinion’. Geneva Conference, ‘Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts’ (1974-1977) VII CDDH/SR.5.1/Annex 122. Also, the Colombian delegation expressed that ‘the Protocol would bind only the signatory states since there is no practical way of imposing obligations on dissident armed forces or organised armed groups’. Geneva Conference 1974-1977 VII CDDH/SR.49, 79 [2].

²⁸⁴ An example of this is the United Kingdom delegation, ‘The obligations imposed on states and dissidents should not be so vague as to be nugatory or so high as to set an impossible standard’ Geneva Conference, 1974-1977 VIII CDDH/I/SR.24 236 [37]. On a similar note, the Soviet delegate stated that in case of accepting the article, ‘it would impose an obligation not only on Governments but on those who, for various reasons, were engaged in movements against governments’. Geneva Conference 1974-1977 XIV CDDH/III/SR.32 314 [22].

²⁸⁵ Conference on Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, ‘Report on the Work of the Conference’ (24 May-12 June 1971) 22 [223] in Fortin (n 277) 183.

²⁸⁶ Fortin (n 277) 183.

Not only in the *travaux préparatoires* and the text in common Article 3 and Additional Protocol II is evident that it was intended to bind non-state armed groups, international practice has also widely confirmed it.²⁸⁷ In the *Tablada* case, the Inter-American Commission stated:

Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces. Moreover, the obligation to apply Common Article 3 is absolute for both parties and independent of the obligation of the other. Therefore, both the MTP attackers [the armed opposition group fighting in the conflict under consideration] and the Argentine armed forces had the same duties under humanitarian law.²⁸⁸

It can also be observed in 'Military and Paramilitary Activities In and Against Nicaragua' that the International Court of Justice determined the applicability of common Article 3 to both parties of the conflict, the *Contras* and the Nicaraguan government. Also, in the context of internal armed conflicts, the UN Security Council and the UN Commission on Human Rights have called upon both parties to the conflict to respect the provisions of international humanitarian law and common Article 3.²⁸⁹

Regarding Additional Protocol II, and in accordance to the acts occurred in El Salvador, the UN Commission on Human Rights observed:

The Republic of El Salvador is a party to the Four Geneva Conventions of 1949 and the Additional Protocols of 1977 on the protection of victims of war. Since the current conflict in El Salvador is and 'armed conflict not of an international character' within the meaning of the Conventions and Protocols, the relevant rules apply, particularly those contained in Article 3 of each of the Conventions and in Protocol II, and must be observed by each of the parties to the conflict - in other words, by the Salvadorian regular armed forces and the opposition guerrilla forces.²⁹⁰

This demonstrates that international bodies have assumed competence to determine the applicability of common Article 3 and Additional Protocol II in cases where it is required.²⁹¹

6.1.2 Substantive Rules Applicable in non-international Armed Conflicts.

After the legal status of armed opposition groups was examined in the previous section, the substantive rules in internal armed conflicts are to be explored. The applicable law in non-

²⁸⁷ Zegveld (n 70) 10.

²⁸⁸ *Juan Carlos Abella v Argentina* (n 151).

²⁸⁹ UN Security Council (UNSC), Res. 1193 12 August 1998 on Afghanistan 12; UNSC, Res. 812 12 March 1993 on Rwanda 8; UNSC, Res 794 3 December 1992 on Somalia 4; UN Commission on Human Rights (UNCHR), Res 1999/18 23 April 1999 17; UNCHR, Res 1997/59 15 April 1997 on Sudan 6.

²⁹⁰ UNCHR, E/CN.4/1985/18 Report of the Special Representative, 1 February 1985.

²⁹¹ Zegveld (n 70) 12.

international armed conflicts focuses on the protection of civilians and persons *hors de combat*. This rules can be divided into three different categories: the principle of humane treatment, the protection of particular categories of persons, and the rules on humanitarian assistance.²⁹²

The present chapter focus on the first of these three categories: the principle of humane treatment. This is because of the applicability of such principle to the context of violent acts carried out by criminal groups in Mexico. Common Article 3 provides that persons not taking active part in hostilities ‘shall in all circumstances be treated humanely’.²⁹³ At the same time, Additional Protocol II sets out fundamental guarantees, dedicating an entire part to the principle of ‘humane treatment’.²⁹⁴ Derived from this principle are concrete obligations that have been included in the text of the instruments. These obligations are: ‘prohibition on violence to life and person, the taking of hostages, outrages upon personal dignity, sentence or execution without fair trial, collective punishments, acts of terrorism, slavery and pillage’.²⁹⁵ Since these obligations are enshrined in CA3 and APII, they have all reached the customary international law status.²⁹⁶

The persons entitled to humane treatment are, according to common Article 3 ‘persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause’. Article 2 of Additional Protocol II also stipulates that it applies ‘to all persons affected by an armed conflict as defined in Article 1’.²⁹⁷ The Yugoslavia Tribunal confirmed that armed opposition groups must comply with the humane treatment principle:

to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.²⁹⁸

²⁹² Sivakumaran (n 69) 255.

²⁹³ Common Article 3 (1).

²⁹⁴ Additional Protocol II, part II.

²⁹⁵ Common Article 3 and Additional Protocol II article 4(1) in Sivakumaran (n 69) 257.

²⁹⁶ *Military and Paramilitary Activities in and against Nicaragua* (n 92) [218-20]; *Prosecutor v Tadic* (appeal on jurisdiction) (n 72) [98]; Customary International Humanitarian Law, rule 87.

²⁹⁷ Zegveld (n 70) 60.

²⁹⁸ *Prosecutor v Tadic* (Merits) IT-94-1-T (7 May 1997) (615).

Even though the term ‘civilians’ is not employed neither in CA3 nor in APII, international bodies have used it due to its applicability in the context of hostilities, when referring to people that are ‘not in power of armed opposition groups.’²⁹⁹ One important aspect of the principle of humane treatment is that it is applicable ‘without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’.³⁰⁰ Additional Protocol II also contains provisions to the non-discrimination applicability of the humane treatment principle on the grounds of language, national or social origin and political opinion.³⁰¹

There are specific prohibitions derived from the principle of humane treatment. The first one to be addressed is the one relating to violence to life and person against persons in the power of the adversary. This prohibition is contained in conventional³⁰² and customary international humanitarian law.³⁰³ According to this prohibition, the acts of murder, mutilation, cruel treatment, torture and corporal punishment are prohibited.³⁰⁴ Some of these acts have deserved special mention in international humanitarian law instruments, for example, the crime of murder. This crime is defined as ‘the death of the victim resulting from an act or mission of the accused committed with the intention to kill or cause serious bodily harm which he/she should reasonably have known might lead to death’.³⁰⁵ The prohibition on murder can be found in numerous codes of conduct, instructions and bilateral agreements.³⁰⁶

The next prohibition to be addressed is the one relating to torture. According to international humanitarian law and international criminal law, based on the Convention against Torture, this can be defined as ‘the intentional infliction of severe pain or suffering for a particular listed

²⁹⁹ Zegveld (n 70) 61.

³⁰⁰ Common Article 3.

³⁰¹ Additional Protocol II, Articles 2(1) and 4(1).

³⁰² Common Article 3; Additional Protocol II (4); Rome Statute, Article 8(2)(c)(i).

³⁰³ *Military and Paramilitary Activities in and against Nicaragua*, (n 92) 114 [2189-29]; Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915 (4 October 2000) [14].

³⁰⁴ Common Article 3; Rome Statute Article 8; Additional Protocol II Article 4(2).

³⁰⁵ *Prosecutor v Krstic*, (Judgement) IT-98-33-T (2 August 2001) [485] in Sivakumaran (n 69) 260.

³⁰⁶ The CPLA’s manifesto stating that members of the army were not to ‘kill or humiliate any of Chiang Kaishek’s army officers and men who lay down their arms’. Manifesto of the Chinese People’s Liberation Army; the Code of Conduct of the NRA ‘never kill any member of the public or captured prisoners, as the guns should only be reserved for armed enemies or opponents’, the National Resistance Army Code of Conduct, both in Sivakumaran (n 69) 260.

purpose'.³⁰⁷ Specifically, the individual committing the act must not be a 'public official or other person acting in an official capacity'.³⁰⁸ Torture can be differentiated from other forms of mistreatment, based on the purpose in which it is carried out. The prohibited purposes include obtaining a confession or information, coercion of the victim or of a third person, intimidating and punishing.³⁰⁹ Torture is also a common practice among criminal organisations in Mexico. Torturing people and the disposal of bodies are regular activities intended to optimise time and resources. This means, instead of paying somebody to torture a person for an extended period of time, members or criminal groups torture individuals 'to a point at which they remain alive but are unable to move'.³¹⁰

Cruel and inhuman treatment is the last act to be described, derived from the prohibition of violence to life and person. The ICTY defined cruel treatment as 'an intentional act or omission... which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity'.³¹¹ The Elements of Crimes of the International Criminal Court (ICC) defines cruel or inhumane treatment as 'the infliction of severe physical or mental pain or suffering upon one or more persons'.³¹² The assessment of seriousness must take into account the factual circumstances in which the act is taking place, 'including the nature of the act or omission, the context in which occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health'.³¹³ One important aspect to be noted is its temporal element, since there is no specification as to whether it has to last as long as it is 'real and serious'. In the context of Mexico, cruel and inhumane treatment is a common feature of the violence perpetrated by

³⁰⁷ *Prosecutor v Kunarac et al*, (Appeal Judgement) IT-96-23-A and IT-96-23/1A (12 June 2001) [142].

³⁰⁸ *Ibid* (148); Convention against torture UNTS 1465, Article 1.

³⁰⁹ *Prosecutor v Kunarac et al*, (Trial Judgement) IT-96-23-T and IT-96-23/1-T (23 February 2001) [485]; *Prosecutor v Limaj* (n 101) [239].

³¹⁰ Karina García, 'Violence within: Understanding the Use of Violent Practices Among Mexican Drug Traffickers' (2019) Justice in Mexico Working Paper Series 16 2 <https://justiceinmexico.org/wp-content/uploads/2019/11/GARCIA_Violence-Within.pdf> accessed 14 October 2020.

³¹¹ *Prosecutor v Delalić et al*, (n 182) [422]; *Prosecutor v Kordić and Čerkez* (Judgement) IT-95-14/2-T (26 February 2001) [265]; *Prosecutor v Naletilić and Martinović* (Judgement) IT-98-34-T (31 March 2003) [246].

³¹² ICC Elements of Crimes, Article 8(2)(c)(i) [3].

³¹³ *Prosecutor v Krnojelac* (Judgement) IT-97-25-T (15 March 2002) [131].

criminal groups. The use of violence is considered as something addictive by some members of these groups.³¹⁴

Sexual violence is the next prohibition derived from the principle of human treatment. Rape, enforced prostitution, indecent assault and threats are all prohibited in Additional Protocol II.³¹⁵ According to the Rome Statute, the acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence are considered war crimes on their own.³¹⁶ International jurisprudence have attempted to define rape and consent in numerous occasions,³¹⁷ derived from this, the ICC have established some requirements:

1. The perpetrator invades the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such a that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.³¹⁸

Sexual violence is not an uncommon practice among criminal groups and state armed forces in Mexico. According to an Amnesty International investigation of 100 women arrested in Mexico, it was found that these women are ‘routinely sexually abused by the security forces who want to secure confession and boost figures in an attempt to show that they are tackling rampant organised crime’.³¹⁹ The findings reveal that ‘women from marginalised backgrounds are the most vulnerable in Mexico’s so called “war on drugs”’.³²⁰ This is a consequence of the deployment of armed forces to public security tasks, using the so-called “war on drugs” as the reason behind it, even though state forces receive no training on these tasks and there is no legal mechanism to hold them accountable for their actions.

³¹⁴ García (n 310) 17.

³¹⁵ Additional Protocol II, Article 4(2)(e) and (h) in Sivakumaran (n 69) 264.

³¹⁶ Rome Statute, Article 8(2)(e)(vi), in Sivakumaran (n 69) 265.

³¹⁷ The *Akayesu* Trial Chamber defined rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’, *Prosecutor v Akayesu*, (Judgement) ICTR-96-4-T (2 September 1998) [598] [688] in Sivakumaran (n 69) 265; ‘sexual penetration, however slight (s) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth o the victim by the penis of the perpetrator’ *Prosecutor v Furundžija* (n273) [185].

³¹⁸ ICC Elements of Crimes, Article 8(2)(e)(vi)-1 in Sivakumaran (n 69) 265-6.

³¹⁹ Amnesty International, ‘Mexico: Sexual violence routinely used as torture to secure “confessions” from women’ (28 June 2016).

³²⁰ *Ibid*.

The prohibition on taking of hostages is the next one to be reviewed. This prohibition was an innovative inclusion in common Article 3 as it prohibited a practice that was common in 1949.³²¹

The definition of this act can be found on the 1979 Convention against the Taking of Hostages:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the ‘hostage’) in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (‘hostage-taking’) within the meaning of this Convention.³²²

The Convention was not drafted intending to be applicable to armed conflicts. Nevertheless, this definition has proven to be appropriate in times of war.³²³ Slavery and slave trade is also a prohibition derived from the principle of human treatment. These actions, so as the threats to enslave,³²⁴ are prohibited in conventional and customary law.³²⁵ International jurisprudence has defined slavery as ‘the exercise of any or all of the powers attaching to the right of ownership over a person’.³²⁶ The last prohibition to be revised is the one relating to collective punishments. This used to be a common practice among parties to non-international armed conflicts, an example of this is the Algerian war of independence, in which ‘if an attack took place, the nearest village was considered collectively responsible’.³²⁷ The rule of collective punishments cannot be found neither in common Article 3 nor in the Rome Statute, nevertheless, it is considered a rule of customary international law.³²⁸

³²¹ The Trial Judgement in *Wilhelm List and Others* observed that hostages could be taken and executed as a ‘last resort’. *The Hostages Trial, Trial of Wilhelm List and Others*, VIII Law Reports of Trials of War Criminals 34, 61.

³²² International Convention Against the Taking of Hostages, Article 1(1).

³²³ *Prosecutor v Sesay, Kallon and Gbao*, (Judgement) SCSL-04-15-A (26 October 2009) [579].

³²⁴ Additional Protocol II, Article 4(2)(h).

³²⁵ Additional Protocol II, Article 4(2)(f); Customary International Humanitarian Law, Rule 94. *Prosecutor v Krnojelac* (n 313) [353].

³²⁶ *Prosecutor v Kunarac* Trial Judgement (n 309) [539]; *Prosecutor v Kunarac* Appeal Judgement (n 307) [117] in Sivakumaran (n 69) 268.

³²⁷ R Branche, ‘The French in Algeria: Can There be Prisoners of War in a “Domestic” Operation?’ in Sivakumaran (n78) 271.

³²⁸ Customary International Humanitarian Law, Rule 103; Hague Regulations Article 50; ICTR Statute, Article 4(b).

6.2 International Human Rights Law.

6.2.1 Applicability of human rights law

It is widely accepted in present times that international human rights law is also applicable in situations of armed conflict.³²⁹ This can be found in the principal instruments of international humanitarian law, for example, in Additional Protocol II. In the Preamble is mentioned that ‘international instruments relating to human rights offer a basic protection to the human person’.³³⁰ At the same time, human rights law treaties also make reference to international humanitarian law. The main example is in the International Covenant for Civil and Political Rights, in which it is stated that ‘a state party to the Covenant may derogate from certain of its obligations (...) in time of public emergency which threatens the life of the nation’. Implicitly, this phrase makes reference to armed conflicts.³³¹ The ICJ has pronounced in this respect: ‘the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights’.³³² The majority of states, so as international courts and tribunals have also accepted that international human rights law continues to apply in times of armed conflicts.³³³ Nevertheless, this was not always accepted due to the differences in these branches of law.³³⁴

The first difference between international human rights law and international humanitarian law is the circumstances in which each one was created. The adoption of the Universal Declaration of Human Rights took place after Second World War, while international humanitarian law dates back to 'the 1860s with the inclusion of the Lieber Code (1863), the 1864 Geneva Convention, and the St Petersburg Declaration on Explosive Projectiles (1868).³³⁵ The second difference

³²⁹ Sivakumaran (n 69) 83.

³³⁰ Additional Protocol II, Preamble.

³³¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 Article 4.

³³² ICJ Rep 168 ‘Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)’ (2005) [216]; ICJ Rep 136 (Advisory Opinion) ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (2004) [106].

³³³ Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ A/CN.4/L.682 (13 April 2006) [4]; ICJ Rep 226 (Advisory Opinion) ‘Legality of the Threat or Use of Nuclear Weapons’ (1996) [25]; Human Rights Committee, General Comment 31 ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/21/Rev.1/Add.13 (2004) [11].

³³⁴ Sivakumaran (n 69) 84.

³³⁵ Ibid 85.

relies on the fact that human rights law has been developed within the UN system, contrary to international humanitarian law, that was developed mainly through the ICRC.³³⁶ The third difference and perhaps the most relevant is that international humanitarian law applies in hostilities between states and armed groups or between armed groups, while international human rights law regulates the relationship between the state and individuals. This means that international humanitarian law is based on the equality of obligation among the parties to the conflict, contrary to international human rights law, that is based on the unequal relationship between the governor and the governed.³³⁷ The last difference is the approach of the two bodies of law. The differences in certain norms exist because of the realities for which the norms were supposed to regulate. A clear example of this can be found on the right to life. International humanitarian law not only accepts the killing of combatants, it also accepts the killing of civilians in certain circumstances, opposing to the premise of international human rights law, that views the right to life as the supreme right on which all the other ones are built.³³⁸ As a consequence of these differences, there was no close relationship between the two bodies of law. It was not until 1968, at the International Conference on Human Rights in Tehran, that these two bodies of law came into close contact.³³⁹ The resolutions derived from the conference ‘underscored the close relations between human rights law and international humanitarian law; and they gave formal expression to the concern of the United Nations (UN) for international humanitarian law and its obligation to work for respect for international humanitarian law by parties to an armed conflict’.³⁴⁰

Once established the applicability of international human rights law in situations of internal conflict, it is necessary to explain the actual application. Nevertheless, the exact way in which international human rights law and international humanitarian law must be applied, is still

³³⁶ T Meron, ‘Convergence of International Humanitarian Law and Human Rights Law’ in D Warner (ed), *Human Rights and Humanitarian Law* (Martinus Nijhoff, 1997) 97, 98.

³³⁷ Sivakumaran (n 69) 85.

³³⁸ *McCann and Others v UK* App no 18984/91 (ECtHR, 27 September 1995) [147]; Human Rights Committee, Communication No R.11/45 (27 September 1995) UN Doc A/37/40 137 [13.1].

³³⁹ H-P Gasser, *International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Join Venture or Mutual Exclusion?* (2002) 152-3.

³⁴⁰ *Ibid* 154.

undefined. Below will be explained the three main ways in which the two bodies of law have been applied.

6.2.2 Normative content.

International human rights law has aided on the development of the normative content of international humanitarian law.³⁴¹ This is evident on the drafting process of Additional Protocol II, where the Federal Republic of Germany stated that ‘draft Protocol II was designed to establish, in all cases, a minimum standard of humanitarian protection in order to safeguard, in time of armed conflict, fundamental human rights on a level in accordance with the international covenants on human rights’.³⁴² On the same note, the delegation of Italy mentioned that ‘draft Protocol II was closely linked to all the international rules relating to human rights and could contribute to the application of certain ideas which had received increasing support since the adoption of the Universal Declaration’.³⁴³ It can be said then, that the clause on fundamental guarantees found on APII, is based on international human rights law.

International humanitarian law has also influenced international human rights law. The non derogable provisions of the International Covenant on Civil and Political Rights resemble the fundamental guarantees in humanitarian law treaties.³⁴⁴ The Convention for the Protection of All Persons from Enforced Disappearance makes reference to international humanitarian law,³⁴⁵ while the Convention on the Rights of Persons with Disabilities, expressively mentions that international humanitarian law must be respected.³⁴⁶ Perhaps the most concrete example is the provision to ‘respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child’, contained in the Convention on the Rights of the Child.³⁴⁷ On the other hand, the Optional Protocol on the Involvement of Children

³⁴¹ Sivakumaran (n 69) 87.

³⁴² *Official Records* (n104) Vol V 132 [26].

³⁴³ *Ibid* Vol 8 223 [46].

³⁴⁴ Gasser (n299) 157.

³⁴⁵ Convention for the Protection of All Persons from Enforced Disappearance, Articles 18, 24(2) in Sivakumaran (n 69) 87.

³⁴⁶ Convention on the Rights of Persons with Disabilities, Article 11, in Sivakumaran (n 69) 87.

³⁴⁷ Convention on the rights of the Child, Article 38(1) in Sivakumaran (n 69) 87.

in Armed Conflict states that non-state armed groups ‘should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years’.³⁴⁸

Perhaps the strongest argument against referring to humanitarian law ideas in human rights instruments is the difference of the context in which each instrument is applicable, impeding the utility of the norm.³⁴⁹ Taking again the example of the aforementioned Optional Protocol to the Convention on the Rights of the Child, this contains a prohibition on ‘using children under the age of 18 years to take a direct part in hostilities and compulsorily recruiting them into their armed forces’.³⁵⁰ This means that children ‘under the age of 18 years can attend schools operated by or under the control of armed forces’.³⁵¹ On the other hand, there is a strongest prohibition regarding non-state armed groups and the recruiting of children. As mentioned in the paragraph above, there is a prohibition for non-state armed groups on any form of recruitment for children under the age of 18 years.³⁵² This is contrary to the principle of equality of obligation of the parties to the conflict contained in international humanitarian law, in which all parties to the armed conflict must be treated alike regarding their substantive obligations.³⁵³ This creates inequality on the standards imposed on non-state armed groups compared to those imposed to the state. This has been questioned by armed groups in various occasions, the most notorious being in 2008, with a letter sent to the UN Secretary-General Ban Ki-Moon by the National Democratic Front of the Philippines (NDFP). In this letter, the NDFP expressed concern regarding the higher standards imposed on non-state armed forces, standards ‘that are not even made absolutely applicable to States’.³⁵⁴

6.2.3 Interpretation

International human rights law has been used as an interpretational tool to interpret provisions of international humanitarian law. Similar concepts in both bodies of law have been defined by

³⁴⁸ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Article 4(1).

³⁴⁹ Sivakumaran (n 69), 88.

³⁵⁰ *Ibid.*

³⁵¹ Optional Protocol to the Convention on the Rights of the Child, Article 3.

³⁵² *Ibid.*, Article 4.

³⁵³ Sivakumaran (n 69) 88.

³⁵⁴ NDFP, Letter to UN Secretary-General Ban Ki-Moon (24 November 2008).

international human rights law, as it is with the case of torture. Under international humanitarian law, the use of torture is prohibited, however, there is no definition provided. Instead, torture is defined in international human rights law in the Convention against Torture.³⁵⁵ The ICTY Trial Chambers have stated that this definition can be used in a context where international humanitarian law is applicable.³⁵⁶ Although this has proven helpful, it has also raised questions about the suitability of this practice. While the use of international human rights law may complement the norms contained in international humanitarian law, some modification of the norm may be needed to make it appropriate depending on the context.³⁵⁷ The ICTY has shared its views in this respect, stating that ‘notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law’.³⁵⁸ In the specific case of torture, the ICTY Trial Chambers manifested that ‘the definition of an offence is largely a function of the environment in which it develops’, therefore, the Convention against Torture can only be used as an ‘interpretational aid’.³⁵⁹ There are some cases in which a specific norm will exist in both bodies of law. Under those circumstances, the precise relationship between the two norms will have to be ascertained on the basis of the *lex specialis* rule.³⁶⁰ For the applicability of the rule, two principles must be observed.³⁶¹ The first one is applied when there is a conflict of norms. In this situation, ‘the specific rule modifies the general rule to the extent of the inconsistency between them’.³⁶² The general rule remains in the background and it is only applicable to the extent that it does not conflict with the specific rule.³⁶³ The second principle is applied when both norms are ‘consistent with one another but one norm is of greater specificity than the other or is more tailored to the particular circumstances at hand.’³⁶⁴ In this case, the more specific rule is seen as an application of the general rule, meaning that there is no conflict between the two rules.

³⁵⁵ Sivakumaran (n 69) 88.

³⁵⁶ *Prosecutor v Tadić* (n 72) [459].

³⁵⁷ N Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 745-6 in Sivakumaran (n 69) 89.

³⁵⁸ *Prosecutor v Kunarac* (n 307) [471].

³⁵⁹ *Ibid* [469-70], [482].

³⁶⁰ Sivakumaran (n 69), 89.

³⁶¹ Report of the Study Group of the International Law Commission (n 333) [56-8].

³⁶² Sivakumaran (n 69), 89.

³⁶³ *Ibid*.

³⁶⁴ *Ibid*.

Although these two principles have proven helpful in the past, it is important to mention that the absence of a norm in international humanitarian law should not always be filled by a norm in another body of law. This is because ‘silence cannot always be equated with a gap in protection’.³⁶⁵

6.2.4 Direct Regulation

The last way in which international human rights law and international humanitarian law have been applied is through the direct regulation. In this case, international human rights law is used to regulate directly non-international armed conflicts, instead of relying on international humanitarian law.³⁶⁶

The ‘human rights law of non-international armed conflict’ approach can be divided into two schools of thought. The first one is the ‘unification’ school. The proponents of this school of thought argue that there should be a ‘unified body of law applicable in situations of peace and non-international armed conflict, regardless of the intensity of the conflict’.³⁶⁷ The second one is the ‘threshold’ school, in which it is argued that the law of non-international armed conflict should be applied according to the intensity of the violence. Under this premise, non-international armed conflicts would be regulated by international human rights law, while high intensity armed conflicts would be regulated by international humanitarian law.³⁶⁸ Under the direct regulation approach, human rights law is ‘being posited as a means of directly regulating non-international armed conflict’.³⁶⁹ Nonetheless, there is one important difference between international humanitarian law and international human rights law that makes nearly impossible

³⁶⁵ Ibid.

³⁶⁶ *Isayeva, Yusupova and Bazayeva v Russia*, App nos 57947/00 57948/00 and 57949/00 (ECtHR 24 February 2005). Although it is unclear if the European Court considered the situation to be a non-international armed conflict or internal tensions and disturbances, the predominant view is that the European Court was directly applying human rights law in a case that should have been regulated by international humanitarian law, in Sivakumaran (n 69) 93-4.

³⁶⁷ FF Martin, ‘Using International Human Rights Law for establishing a Unified Use of Force Rule in the Law of Armed Conflict’ *Saskatchewan Law Review*, (2001) 347 in Sivakumaran (n 69) 94.

³⁶⁸ Sivakumaran (n 69) 94.

³⁶⁹ Ibid.

the fully adoption of this approach. That difference is the principle of equality of obligation of belligerents.³⁷⁰

In international humanitarian law, the principle of equality holds that all the parties to the conflict 'must have the same rights and obligations'. Under international human rights law, there is not such norm. Since the basis of international human rights law is to regulate the relationship between the state and the individual, so the idea of equality of belligerents contravenes the ideas on which human rights law is founded. The *Kunarac* Trial Chamber expressed in this regard 'international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents'.³⁷¹ Under this premise, international human rights law results inappropriate, since it would not bind one or both parties to the conflict during a non-international armed conflict.

In recent years, the traditional view of human rights law binding state forces alone has been challenged by the argument that non-state armed groups may have certain human rights obligations.³⁷² Beyond the scope of this chapter is to analyse and discuss the theories surrounding this statement, however, the predominant theories will be mentioned. The first one is the equality of obligation in which if one of the parties is bound by an obligation, so is the other party.³⁷³ The second one is the idea of intrinsic principles, viewed as a 'demand on the international community'.³⁷⁴ The next one is to understand obligations as the correlative of rights, meaning that if a non-state armed group benefit from human rights, they should also have obligation.³⁷⁵ The last one is the one with broadest acceptance regarding the effective control over territory.³⁷⁶

³⁷⁰ H Lauterpacht, 'The limits of the Operation of the Law of War' (1953) 30 BYIL 206 in Sivakumaran (n 69) 95.

³⁷¹ *Prosecutor v Kunarac* (n 307), [470].

³⁷² A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) Chapter 7.

³⁷³ C Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements', in Sivakumaran (n 69) 95.

³⁷⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, E/CN.4/2006/53/Add.5 (27 March 2006) [25].

³⁷⁵ D Fleck, 'Humanitarian Protection Against Non-State Actors' in Sivakumaran (n 69) 96.

³⁷⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2005/7 22 December 2004 [76].

Not only scholars have developed the idea of non-state armed groups having human rights obligations, also UN bodies and truth commissions have taken this approach. One example is the argument formulated by Guatemala before the Guatemalan Commission for Historical Clarification, in which it was mentioned that ‘it was unacceptable to appraise the conduct of their security forces by stricter standards than the conduct of the guerrilla forces’.³⁷⁷ It cannot be said then, that the lack of equality of obligation is completely inappropriate in the regulation of non-international armed conflicts through international human rights law. In accordance with the last theory regarding the exercise of effective control over a territory, non-state armed groups would have to comply with human rights law. Below that threshold, armed groups may not be obliged to comply with human rights obligations.³⁷⁸

6.3 International Criminal Law

6.3.1. International Criminal Court

Most of the norms of international humanitarian law were created for the protection of civilians, however, the enforcement of these rules has proven to be problematic. The body of law governing non-international armed conflicts, common Article 3 and Additional Protocol II, do not contain provisions regarding their enforcement. As Yves Sandoz expressed: ‘the system as a whole has been devised for international conflicts; it cannot simply be switched over to non-international conflicts, whose basic data are completely different’.³⁷⁹ International criminal law is one mechanism of enforcement of international humanitarian law, sanctioning the ones committing serious violations of it.³⁸⁰ The most important development in this regard in recent years, has been the establishment of the International Criminal Court (ICC). The Rome Statute, which is the treaty establishing the Court and its operation, was adopted in 1998, entering into force in 2002 after meeting the threshold of ratifications required in Article 120. The ICC has a jurisdiction applicable only to offences committed after it entered into force, limiting the number of cases that can be tried.³⁸¹ At the same time, it can only hear cases where the accused is a

³⁷⁷ Tomuschat (n 373), 576.

³⁷⁸ Sivakumaran (n 69) 97.

³⁷⁹ Yves Sandoz, ‘Implementing Humanitarian Law’ (1988) *International Dimensions of Humanitarian Law*, 259.

³⁸⁰ Sivakumaran (n 69) 77.

³⁸¹ Rome Statute, Article 11.

national of a state that has ratified the Rome Statute. Nationals of a state that is not party to the Statute, may be prosecuted only if the crime is committed in the territory of a state party.³⁸²

The crimes over the ICC has jurisdiction are enshrined in Article 5 of the Rome Statute. In the case of non-international armed conflicts, these crimes can be divided into three areas: war crimes, crimes against humanity, and genocide. The last part of the present chapter examines the role international criminal law has played in the enforcement of international humanitarian law. It also explains crimes against humanity and war crimes under the context of non-international armed conflicts.

6.3.2 War crimes in internal armed conflicts

The establishment of individual criminal responsibility is clearly established for serious violations to the rules of war in international armed conflicts. Until recently, there was a common belief that war crimes could not be committed by non-state armed groups.³⁸³ War crimes are defined as a 'serious violation of international humanitarian law, which entails the individual criminal responsibility of the violator'.³⁸⁴ While common Article 3 and Additional Protocol II address non-international armed conflicts, they do not specifically refer to the role of the individuals members of a non-state armed group, referring only to the parties to the conflict.³⁸⁵ According to international practice, it can be said that serious violations to CA3 and APII can lead to the individual criminal responsibility of leaders of armed opposition groups. In this regard, the Yugoslavia Tribunal expressed:

The treaty and customary rules referred to above [*inter alia* Common Article 3 and Protocol II] impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in time of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts.³⁸⁶

³⁸² Rome Statute, Article 12.

³⁸³ Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008) 107-110.

³⁸⁴ Rome Statute, Article 12.

³⁸⁵ Zegveld (n 70) 99-100.

³⁸⁶ *Prosecutor v Furundžija*, (n273) [134].

Article 22 of the Rome Statute establishes that ‘persons can only be held criminally responsible when the conduct concerned at the time it took place constituted a crime within the jurisdiction of the Court’.³⁸⁷ The *null crimen sine lege* indicates that the norms contained in the Rome Statute are a source of substantive criminal law.³⁸⁸ The Yugoslavia Tribunal supported this argument when referred to the penal law content of the Statute, as opposed to the idea of it only having jurisdictional character.³⁸⁹ This Tribunal also set the grounds for the prosecution of leaders of non-state armed groups for violations of humanitarian norms other than those contained in common Article 3 and Additional Protocol II.³⁹⁰ The Appeals Chamber in the *Tadić* appeal case stated that ‘customary international law imposes criminal responsibility for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife’.³⁹¹ While the Tribunal did not elaborate any further, the Rome Statute gave clarity regarding the laws and customs of war that can impose obligations on individuals. Article 8(2)(e) of the Statute lists the crimes falling in the category of war crimes. These include directing attacks against civilian population;³⁹² buildings, material, medical units and transport;³⁹³ personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;³⁹⁴ committing rape, sexual slavery, and enforced prostitution,³⁹⁵ among others.

One important point to mention is that the Rwanda Tribunal determined that a person needs to have a ‘demonstrable link with a party to the conflict namely state armed forces or an armed opposition group’ in order to be convicted of war crimes.³⁹⁶ Accordingly, only members of state and non-state armed forces can be held individually responsible for war crimes. In the

³⁸⁷ Zegveld (n 70) 101.

³⁸⁸ H Fischer, ‘The International Criminal Court: a Critical Review of the Results of the Rome Conference’ (1998) 3-5 in Zegveld (n 70) 101.

³⁸⁹ *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo* (Judgement) IT-96-21-T (16 November 1998), [309].

³⁹⁰ Zegveld, (n 70) 102.

³⁹¹ *Prosecutor v Tadić* (n 72).

³⁹² Rome Statute, Article 8(2)(e)(i).

³⁹³ Ibid Article 8(2)(e)(ii).

³⁹⁴ Ibid Article 8(2)(e)(iii).

³⁹⁵ Ibid Article 8(2)(e)(vi).

³⁹⁶ Zegveld (n 70), 105.

Kayishema case, the Tribunal stated: ‘individuals of all ranks belonging to the armed forces under the military command of either of the belligerent Parties fall within the class of perpetrators. If individuals do not belong to the armed forces, they could only bear the criminal responsibility only when there is a link between them and the armed forces’.³⁹⁷ In this particular case, since there was no apparent link between *Kayishema* and the armed forces, he could not be held accountable for war crimes. Opposite to this decision, the Yugoslavia Tribunal expressed that war crimes should be committed during an armed conflict, while the concept of party to a conflict is not relevant when assessing individual criminal responsibility. Judge Rodrigues stated that ‘international humanitarian law has, to a large extent, grown beyond its state-centred beginnings... The principle is to prosecute natural persons individually responsible for serious violations of international humanitarian law irrespective of their membership in groups’.³⁹⁸

6.3.3 Crimes against humanity

Until recently, the predominant view was that only states could be held responsible of committing crimes against humanity. This belief came after the prosecutions that followed the Second World War.³⁹⁹ The understanding of these type of crimes was that only states or individuals supported by the state could commit them because of the necessity to have access to state institutions, personnel and resources.⁴⁰⁰ The main difference between war crimes and crimes against humanity is that war crimes are isolated acts, while crimes against humanity are ‘attacks committed against any civilian population pursuant to or in furtherance of a state or organisational policy to commit such attack’.⁴⁰¹ Non-state actors have proved to be able to perpetrate widespread and systematic acts. In 1991, the International Law Commission in the Draft Code of Crimes acknowledged this situation when stated:

It is important to point out that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone... the article does not rule out the possibility that private individuals with the facto power or organised in criminal gangs or

³⁹⁷ *Prosecutor v Clément Kayishema and Obed Ruzindana* (Judgement) ICTR-95-I-T (21 May 1999), [175].

³⁹⁸ *Prosecutor v Alekovski* (Judgement) IT-95-14/1-T (25 June 1999), Dissenting opinion of Judge Rodrigues [31] in Zegveld, (n 70), 106.

³⁹⁹ Fortin (n 277), 296.

⁴⁰⁰ Cherif Bassiouni, *International Criminal Law Vol I Sources, Subjects and Contents* (3rd edn, Martinus Nijhoff, 2008), 248-9 in Fortin (n 277), 296.

⁴⁰¹ Zegveld (n 70) 105.

groups might also commit the kind of systematic or mass violations of human rights covered by the article.⁴⁰²

Later in 1997, the *Tadić* Trial Chamber ruled that the ‘policy behind crimes against humanity, need not be the policy of a State’.⁴⁰³ Today, there is no doubt that members of a non-state armed group can commit crimes against humanity. Ten members of armed groups out of the thirty-four individuals against the ICC has issued arrest warrants, are facing charges of crimes against humanity.⁴⁰⁴ At the same time, the Special Court for Sierra Leone convicted three leaders of the Revolutionary United Front for crimes against humanity.⁴⁰⁵

While individuals can commit crimes against humanity, it is difficult to argue the same about armed groups. The main reason is that the international legal personality of a state is better understood than the legal personality of an armed group.⁴⁰⁶ Despite this difficulty, the Rome Statute implicitly recognises the possibility that a non-state armed group can commit crimes under international law:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contributions shall be intentional and shall either:-

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.⁴⁰⁷

To this day, there have not been any instances in which armed groups have been found responsible of committing crimes against humanity, but the responsibility of non-state armed groups in the commission of these crimes has implicitly been recognised. One example of this is a statement of the Darfur Commission of Inquiry, referring to the criminal responsibility of serious violations of human rights law and international humanitarian law:

⁴⁰² ILC, ‘Draft Code of Crimes against the Peace and Security of Mankind with commentaries’ (A/CN.4/SER.A/1996/Add.1, 1996), 103.

⁴⁰³ *Prosecutor v Tadić* (n 72)), [655].

⁴⁰⁴ Fortin (n 277), 297.

⁴⁰⁵ *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Trial Judgement) SCSL-04-15-T (2 March 2009).

⁴⁰⁶ Fortin (n 277), 298.

⁴⁰⁷ Rome Statute, Article 25(3)(d)(i).

may also involve the international responsibility of the State or of the international non-state entity to which those authors belong as officials (or for which they acted as *de facto* organs), with the consequence that the State or the non-state-entity may have to pay compensation to the victims of those violations.⁴⁰⁸

Despite the difficulties of holding an entire armed group responsible of committing crimes against humanity it is possible for an individual to commit crimes of this type and to be tried for it in international Tribunals.

⁴⁰⁸ UN, Report of the Independent International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004.

7. Conclusion

Proposing a war declaration might not seem the right path to a peace process. Proposing the applicability of international humanitarian law in cases involving criminal organisations might seem counterproductive for the improvement of a situation that could be controlled in ways that would not challenge the rule of law in a state. However, some situations of extreme violence exerted by criminal organisations cannot be understood through the lenses of organised transnational crime solely.

The first part of this thesis analysed the conceptualisation of organised crime at an international level. For years, government officials have pushed for policies oriented to ‘follow the money’ to hamper the growth of criminal organisations. While this is a good start, it has proven to be highly ineffective when implemented alone. Mexico was used as a case study to prove this point. With some of the largest criminal organisations in the world, the power these organisations have is often overlooked and compared with smaller organisations and even gangs, but can these be considered party to an armed conflict? According to common article 3, the threshold for the determination of existence of a non-international armed conflict is relatively low, and is made based on the parties to the conflict. As it was reviewed in chapter 3 and 4, the elements to consider to determine if a group can be regarded as an armed group are the level of organisation and the intensity of the attacks. In chapter 5 was analysed if the criminal group the ‘Zetas’ could fulfil the requirements to be considered party to an armed conflict. The background of the original members of this group as deserters of elite forces of the Mexican army, allowed them to build a strong organisation, providing specialised training for the new members. The sophisticated gun machinery they had access to played an important role in the capacity of the group to perpetrate high scale attacks. Therefore, it is concluded in this thesis that the ‘Zetas’ organisation fulfils the requirements to be considered party to a non-international armed conflict.

One of the main concerns of declaring the existence of a non-international armed conflict is the consequences the deployment of army officials would bring. As mentioned in the introduction

and chapter 2 of this research, in the case of Mexico, state armed forces are acting as law enforcers without regulation, allowing for the commitment of human rights violations. With the current state of things, the declaration of existence of a non-international armed conflict would bring certainty to the conduct of hostilities, the protection of civilians would be at the centre of discussions, and perpetrators of violations to the law of war and armed conflict would be held accountable of their actions. If criminal groups of this nature were to continue to be analysed through the lenses of transnational organised crime, the cycle of violence will never be broken.

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