

REMOVING THE DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT IN THE *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

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[This article argues that the distinction between international and non-international armed conflict should be removed from the war crimes provisions of the 1998 Rome Statute of the International Criminal Court. This distinction arises from the history of the development of international humanitarian law culminating in the 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions. However, recent developments in treaty law, particularly weapons treaties, indicate a movement away from this distinction. Maintaining the distinction is also likely to cause procedural difficulties for the International Criminal Court when it is prosecuting war crimes in complex factual situations such as those which occurred in the former Yugoslavia. An examination of the differences between war crimes in international and non-international armed conflict demonstrates that, with the exception of those which by their nature are limited to international armed conflict, removal of the distinction can and should be a realistic objective of the 2009 Rome Statute Review Conference.]

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[I]nternal conflicts now [claim] many more casualties than wars between States.¹

What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.²

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¹ United Nations Secretary-General Kofi Annan, *Message to the Second Review Conference of States Parties to the Convention on Certain Conventional Weapons*, UN Doc SG/SM/8076 DC/2822 (11 December 2001).

I INTRODUCTION

'Dum-dum' or expanding bullets,³ poison and poisoned weapons,⁴ asphyxiating gas⁵ and weapons of a nature to cause 'unnecessary suffering'⁶ have long been banned in international armed conflict. However, with internal⁷ conflicts now claiming many more lives than international conflicts, it is disturbing that war crimes provisions outlined in the 1998 *Rome Statute of the International Criminal Court* do not apply to the use of these weapons in internal armed conflict.⁸ The *Rome Statute* established the International Criminal Court ('ICC') and gives it jurisdiction to prosecute war crimes in international and non-international armed conflict.⁹ Yet, the *Rome Statute* provisions enforcing regulation of the use of weapons in warfare apply only in the context of international armed conflict.¹⁰ These are not the only war crimes limited to international armed conflict. Others include launching indiscriminate attacks likely to cause incidental loss of life, injury to civilians or damage to civilian objects; widespread, long-term and severe damage to the environment; attacking undefended places which are not military objectives; improper use of flags and markings; use of human shields; and the use of starvation as a method of warfare.¹¹ These acts, committed in the course of non-international armed conflict, cannot be prosecuted by the ICC as war crimes.

In general, the *Rome Statute* made much needed progress in the area of war crimes by giving the ICC power to punish genocide and crimes against humanity even when not committed in the context of armed conflict,¹² and by including war crimes committed both in international and internal armed conflict.¹³ Given this progress, it was disappointing that the distinction between international and internal armed conflict was not removed completely.

There have been some examples that demonstrate how this distinction will operate in future. One example was the use of chemical weapons by Iraqi forces

² *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [119] ('*Tadic*').

³ *Hague Declaration (IV,3) concerning Expanding Bullets*, opened for signature 29 July 1899, (1907) UKTS 32 (entered into force 4 September 1900) ('*Hague Declaration (IV,3)*').

⁴ *Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9, art 23(a) (entered into force 26 January 1910) ('*Hague Regulations*').

⁵ *Hague Declaration (IV,2) concerning Asphyxiating Gases*, opened for signature 29 July 1899, (1907) UKTS 32 (entered into force 4 September 1900).

⁶ *Hague Regulations*, above n 4, art 23(e).

⁷ 'Internal' and 'non-international' are used interchangeably in this article and should be taken to have the same meaning.

⁸ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) ('*Rome Statute*').

⁹ The ICC is complementary to national criminal jurisdictions, and in some cases jurisdiction over war crimes will be exercised by national courts: *Rome Statute*, above n 8, para 10 of the preamble, arts 1, 17. In this article, reference to the ICC is intended to include reference to any court exercising jurisdiction over crimes established by the *Rome Statute*.

¹⁰ *Rome Statute*, above n 8, art 8(2)(b).

¹¹ *Ibid.*

¹² See, eg, Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of the *Rome Statute* for the new International Criminal Court' (1999) 23 *Melbourne University Law Review* 635, 652-3.

¹³ *Ibid.* 662-3.

against the northern Kurdish population of Iraq in 1987–88, resulting in the deaths of ‘at least 50,000 by the most conservative estimate, and possibly twice that number’.¹⁴ If such attacks took place now they would be likely to amount to crimes against humanity or genocide; however, whether or not they constitute war crimes would depend on whether they amounted to serious violations of common art 3(1)(a) of the 1949 *Geneva Conventions*, which proscribes ‘violence to life and person’.¹⁵ Use of such weapons would not of itself be a war crime in the context of non-international armed conflict, in contrast to if they were used in international armed conflict. Another example was indiscriminate bombing of Chechnya by Russia in the 1990s.¹⁶ According to the *Rome Statute*, indiscriminate attacks, as such, would not constitute a war crime, in non-international armed conflict.

The key provision of the *Rome Statute* in relation to war crimes is art 8. It consists of 50 provisions creating a total of 71 war crimes. As drafted, these crimes are divided into four categories according to their application in international or non-international armed conflict:

- (a) Article 8(2)(a): grave breaches of the 1949 *Geneva Conventions* against persons or property protected under the provisions of the relevant *Geneva Convention* (international armed conflict);¹⁷
- (b) Article 8(2)(b): other serious violations of laws and customs applicable in international armed conflict;
- (c) Article 8(2)(c): serious violations of art 3 common to the 1949 *Geneva Conventions* (non-international armed conflict);
- (d) Article 8(2)(e): other serious violations of the laws and customs applicable in armed conflicts not of an international character.

While there is considerable overlap between the provisions relating to international armed conflict and non-international armed conflict, provisions for the former are much more detailed. The *Elements of Crimes*, prepared pursuant to art 9 of the *Rome Statute*, shows a total of 46 separate war crimes relating to international armed conflict compared, with only 25 for internal armed conflict.¹⁸

This article argues that art 8 of the *Rome Statute* should be amended at the earliest opportunity to remove the distinction between international and

¹⁴ See Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (1993) <<http://hrw.org/reports/1993/iraqanfal/ANFALINT.htm>> at 1 May 2004.

¹⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31, art 3 (entered into force 21 October 1950) (*‘Geneva Convention I’*); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, art 3 (entered into force 21 October 1950) (*‘Geneva Convention II’*); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 3 (entered into force 21 October 1950) (*‘Geneva Convention III’*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, art 3 (entered into force 21 October 1950) (*‘Geneva Convention IV’*). The four conventions are collectively referred to as the ‘1949 *Geneva Conventions*’.

¹⁶ See Theodor Meron ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 239, 277.

¹⁷ *Geneva Convention I*, above n 15, art 50; *Geneva Convention II*, above n 15, art 51; *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, art 147.

¹⁸ *Report of the Preparatory Commission for the International Criminal Court: Addendum — Part II: Finalised Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) (*‘Elements of Crimes’*).

non-international armed conflict. This opportunity exists at the Review Conference required to be held in 2009.¹⁹ Further, it is argued that recent developments in international humanitarian law support the case for such an amendment and that practical reasons for addressing this issue also exist.

However, before turning to those arguments, it is helpful to look at the development of international law in this area in order to understand how this legal dichotomy found its way into the *Rome Statute*.

II BACKGROUND

Prior to 1949, formal treaties relating to international humanitarian law and the law of war applied only to armed conflict between states. The 1864, 1906 and 1929 *Geneva Conventions* focused on the protection of medical personnel and the wounded from attack, and care for the wounded from both sides in any international armed conflict.²⁰ The 1868 *St Petersburg Declaration* prohibited the use of weapons which caused unnecessary suffering in ‘times of war between civilised nations’.²¹ The *Hague Regulations* applied to wars between the high contracting states with detailed provisions regulating the treatment of prisoners of war, the conduct of war on land and the occupation of territory of hostile states.²² Internal armed conflicts were recognised in customary international law, but only where they reached the level of intensity of a civil war, or ‘belligerency’— as opposed to rebellions and insurgencies.²³ In all other instances, states retained the right to quash rebellions and insurgencies in accordance with municipal law.²⁴

¹⁹ *Rome Statute*, above n 8, arts 121–3. This will be the first opportunity to propose amendments to key provisions of the *Rome Statute*.

²⁰ *Convention for the Amelioration of the Condition of Wounded in Armies on the Field*, opened for signature 22 August 1864, 129 Consol TS (entered into force 22 June 1865) (‘1864 Geneva Convention’); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 6 July 1906, [1907] ATS 9, (entered into force 29 July 1907) (‘1906 Geneva Convention’); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 27 July 1929, [1931] ATS 6, (entered into force 19 June 1931) (‘1929 Geneva Convention’).

²¹ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight*, opened for signature 29 November 1868, [1901] ATS 125 (entered into force 11 December 1868) (‘*St Petersburg Declaration*’).

²² *Hague Regulations*, above n 4.

²³ Joseph Chitty (ed), *The Law of Nations or Principles of The Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns from the French of Monsieur de Vattel* (1833) book III, ch 18, § 295 <http://www.constitution.org/vattel/vattel_03.htm> at 1 May 2004. Chitty notes that in 1756, Emmerich de Vattel commented that a civil war (as opposed to a rebellion) produced two independent parties who were under an absolute obligation to observe the customary law of war in relation to each other. He wrote that

when a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect as a public war between two different nations.

²⁴ International Committee of the Red Cross, *Commentaries on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977 (1987) [4342] <<http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0f47ae2f6a509689c12563cd004399df?OpenDocument>> at 1 May 2004; Yair Lootsteen, ‘The Concept of Belligerency in International Law’ (2000) 166 *Military Law Review* 109, 113–14.

The last formal recognition of belligerency occurred in 1861 — just before the American Civil War — when Britain recognised the belligerency of the Confederate States.²⁵ In internal armed conflicts since then, any observance of the customary international law has been tacit and generally based on reciprocity. For example, rebels who treat wounded members of government forces humanely and accord captured members of government forces with prisoner of war status have been more likely to receive the same treatment in return.²⁶ Nevertheless, most internal armed conflicts have remained outside the purview of customary international law.²⁷

Recognition of belligerency provided no certainty as to if and when international humanitarian law might apply to a conflict. For this reason, the International Committee of the Red Cross ('ICRC') began early last century working to formalise its role in internal conflicts. During the Spanish Civil War in 1936–39, the ICRC obtained the agreement of both sides to the conflict to respect the 1864 and 1906 *Geneva Conventions*.²⁸ Following the Second World War, the ICRC argued that the new 1949 *Geneva Conventions* should apply to both non-international and international armed conflict.²⁹

The ICRC's proposal was opposed by states which feared intrusion on state sovereignty through a reduction in their capacity to quell riots and uprisings within their own borders.³⁰ As a compromise, common art 3 of the 1949 *Geneva Conventions* was adopted as a 'microcosm' or self-contained 'mini-convention' of minimum humanitarian principles to be observed 'in the case of non-international armed conflict occurring in the territory of one of the high contracting parties'.³¹ Common art 3 protects 'persons taking no active part in hostilities, including members of the armed forces who have laid down their arms or are placed hors de combat by sickness, wounds, detention, or any other cause'.³² In particular, it prohibits violence to life and person, the taking of hostages, outrages upon personal dignity, and the denial of judicial guarantees.³³

²⁵ Lootsteen, above n 24, 114.

²⁶ Gerald Draper, 'Humanitarian Law and Internal Armed Conflicts' (1983) 13 *Georgia Journal of International and Comparative Law* 253, 259–61. Examples of internal armed conflicts where the law of war was observed without recognition of belligerency include the Nigerian repression of the rebellion in Biafra in the 1960s and the 1988 El Salvador conflict where the Farabundo Marti National Liberation rebels undertook to observe common art 3 of the 1949 *Geneva Conventions* and *Additional Protocol II*: see *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [106]–[107].

²⁷ Draper, above n 26, 254.

²⁸ *Ibid* 261.

²⁹ ICRC, *Commentaries on the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949*, [42]–[48] <<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/1919123e0d121fefc12563cd0041fc08?OpenDocument>> at 1 May 2004; Draper, above n 26, 262–3.

³⁰ ICRC, above n 29, [43]–[44]; Draper, above n 26, 263–4.

³¹ 1949 *Geneva Conventions*, above n 15, common art 3. See also Draper, above n 26, 264–5 and Richard Schneider, 'ASIL Insight: *Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law*' *The American Society of International Law Newsletter* (US), November 1995.

³² 1949 *Geneva Conventions*, above n 15, common art 3(1).

³³ 1949 *Geneva Conventions*, common art 3(2); Draper, above n 26, 269; Laura Lopez, 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts' (1994) 69 *New York University Law Review* 916, 924.

The remaining provisions of the 1949 *Geneva Conventions*, which relate to international armed conflict and occupation of territory, are much more extensive. Further, the ‘grave breaches’ regime imposes on high contracting parties the mandatory prosecution or extradition of offenders who commit certain criminal acts.³⁴ These breaches include:

- wilful killing, torture or inhumane treatment;³⁵
- biological experiments;³⁶
- wilfully causing great suffering or serious injury to body or health;³⁷
- extensive destruction and appropriation of property, not justified by military necessity;³⁸
- unlawful deportation or transfer or unlawful confinement of persons who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals;³⁹
- wilfully depriving such persons of the rights of fair and regular trial;⁴⁰
- taking of hostages;⁴¹ and
- forcing a prisoner of war or protected civilian to serve in the forces of a hostile power.⁴²

The 1977 *Additional Protocols*⁴³ maintained the distinction between international and non-international conflicts with *Additional Protocol I* applying to international armed conflict⁴⁴ and *Additional Protocol II* applying to non-international armed conflict.⁴⁵ Whereas common art 3 of the 1949 *Geneva Conventions* had not defined ‘armed conflict’, *Additional Protocol II* adopted a higher threshold in stating that it would apply only to armed conflict between government and insurgent forces under responsible command and that insurgents must control territory and have the ability to implement the protocol.⁴⁶ These requirements operate to exclude the activities of organisations such as the Irish

³⁴ *Geneva Convention I*, above n 15, arts 49, 50; *Geneva Convention II*, above n 15, arts 50–1; *Geneva Convention III*, above n 15, arts 129–30; *Geneva Convention IV*, above n 15, arts 146–7.

³⁵ *Geneva Convention I*, above n 15, art 50; *Geneva Convention II*, above n 15, art 51; *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, art 147.

³⁶ *Geneva Convention I*, above n 15, art 50; *Geneva Convention II*, above n 15, art 51; *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, art 147.

³⁷ *Geneva Convention I*, above n 15, art 50; *Geneva Convention II*, above n 15, art 51; *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, art 147.

³⁸ *Geneva Convention I*, above n 15, art 50; *Geneva Convention II*, above n 15, art 51; *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, art 147.

³⁹ *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, arts 4, 147.

⁴⁰ *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, arts 4, 147.

⁴¹ *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, arts 4, 147.

⁴² *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, arts 4, 147.

⁴³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (*‘Additional Protocol I’*); and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (*‘Additional Protocol II’*).

⁴⁴ *Additional Protocol I*, above n 43, art 1(4).

⁴⁵ Draper, above n 26, 273–4. See also Lopez, above n 33, 930–1.

⁴⁶ *Additional Protocol I*, above n 43, art 1(1).

Republican Army ('IRA') in Northern Ireland, the Basque Separatist Movement ('ETA') in Spain and the 'Shining Path' in Peru.⁴⁷ In addition, *Additional Protocol II* does not apply to situations of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature'.⁴⁸

In other respects, *Additional Protocol II* is broader than common art 3 in that, like *Additional Protocol I*, it extends protection to wounded and sick civilians as well as medical and religious personnel.⁴⁹ It also includes five provisions dealing with the protection of civilians, civilian objects, cultural objects and relief actions, although these are not as detailed as those in *Additional Protocol I*.⁵⁰ In addition to the four categories already listed in common art 3, *Additional Protocol II* prohibits the following conduct:

- any form of corporal punishment;⁵¹
- collective punishments;⁵²
- acts of terrorism;⁵³
- rape and enforced prostitution;⁵⁴
- slavery;⁵⁵
- pillage;⁵⁶
- threats to commit any of the foregoing acts;⁵⁷
- recruiting children under the age of 15 into the armed forces or allowing them to take part in the hostilities;⁵⁸
- attacks on the civilian population;⁵⁹
- starvation of civilians;⁶⁰
- attacks against buildings containing dangerous forces, historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;⁶¹ and
- ordering the displacement of civilian population for reasons related to the conflict, unless the security of the civilians involved or military reasons so demand.⁶²

However, *Additional Protocol II* is not as extensive as *Additional Protocol I*.⁶³ Provisions of *Additional Protocol I* without any equivalent in *Additional Protocol II*, and which relate to the methods and means of warfare,

⁴⁷ Hilaire McCoubrey and Nigel White, *International Law and Armed Conflict* (1992) 318.

⁴⁸ *Additional Protocol II*, above n 43, art 1(2).

⁴⁹ *Additional Protocol II*, above n 43, arts 7–12.

⁵⁰ *Additional Protocol II*, above n 43, arts 13–17.

⁵¹ *Additional Protocol II*, above n 43, art 4(2)(a).

⁵² *Additional Protocol II*, above n 43, art 4(2)(b).

⁵³ *Additional Protocol II*, above n 43, art 4(2)(d).

⁵⁴ *Additional Protocol II*, above n 43, art 4(2)(e).

⁵⁵ *Additional Protocol II*, above n 43, art 4(2)(f).

⁵⁶ *Additional Protocol II*, above n 43, art 4(2)(g).

⁵⁷ *Additional Protocol II*, above n 43, art 4(2)(h).

⁵⁸ *Additional Protocol II*, above n 43, art 4(3)(c).

⁵⁹ *Additional Protocol II*, above n 43, art 13(2).

⁶⁰ *Additional Protocol II*, above n 43, art 14.

⁶¹ *Additional Protocol II*, above n 43, arts 15–16.

⁶² *Additional Protocol II*, above n 43, art 17.

⁶³ Draper, above n 26, 274; Lopez, above n 33, 926–7.

include the prohibition of the use of weapons, projectiles and material; methods of warfare likely to cause superfluous injury or unnecessary suffering; and the prohibition of methods of warfare which may be intended or expected to cause widespread, long-term and severe damage to the natural environment.⁶⁴ Other provisions of *Additional Protocol I* not included in *Additional Protocol II* are those for the protection of civilian populations and the prohibition of attacks on non-defended localities.⁶⁵

As *Additional Protocol II* does not address the punishment of war crimes committed in non-international armed conflict, events of the early 1990s were very important in signalling a change in approach to the enforcement of existing treaty and customary international law. The atrocities which occurred in the former Yugoslavia and Rwanda resulted in the UN Security Council voting to establish the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). The *Statute of the International Criminal Tribunal for the Former Yugoslavia* empowered the ICTY to prosecute grave breaches of the 1949 *Geneva Conventions* and 'violations of the laws or customs of war'.⁶⁶ While the Security Council did not classify conflicts in the former Yugoslavia as international or internal, the ICTY held in *Tadic* that art 3 of the *ICTY Statute* relating to violations of the laws or customs of war should apply to both international and non-international armed conflict.⁶⁷ The establishment of the ICTR by the Security Council in 1994 was even more significant in terms of the recognition of war crimes relating to non-international armed conflict, as the conflict there was classified as internal, and the *Statute of the International Criminal Tribunal for Rwanda*⁶⁸ refers only to violations of common art 3 and *Additional Protocol II*. This was the first time 'international criminality' was extended to purely internal armed conflict.⁶⁹ Thus the establishment of the ICTY and ICTR and the extension of criminality to non-international armed conflict were pivotal in the formation of the ICC and the inclusion of war crimes in non-international armed conflict in its jurisdiction.⁷⁰

III THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Despite the evolution in approach outlined above, the 1998 Rome Conference still saw some opposition to the inclusion of war crimes committed in non-international armed conflict in the jurisdiction of the ICC. The International Law Commission determined as early as 1992 that the ICC's jurisdiction should be 'limited to crimes of an international character defined by specified

⁶⁴ *Additional Protocol I*, above n 43, art 35.

⁶⁵ *Additional Protocol I*, above n 43, art 59.

⁶⁶ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, arts 2, 3, UN Doc S/RES/827 (25 May 1993) ('*ICTY Statute*').

⁶⁷ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [94].

⁶⁸ *Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, art 4, UN Doc S/RES/955 (8 November 1994) ('*ICTR Statute*').

⁶⁹ Adam Roberts and Richard Guelff, *Documents of the Laws of War* (3rd ed, 2000) 616.

⁷⁰ See McCormack and Robertson, above n 12, 638.

international treaties in force'.⁷¹ The Rome Conference worked from a draft article which listed war crimes under four categories that still exist⁷² — the lists reflected crimes taken directly from existing conventions and protocols. Nonetheless, some states disagreed with this approach and argued that only crimes established by the 1949 *Geneva Conventions*, the *Hague Regulations* and the 1929 *Geneva Convention* should be included. Others argued for the inclusion of crimes contained in *Additional Protocols I and II*, while others opposed the inclusion of any crimes committed in internal armed conflict.⁷³

The negotiated outcome was that crimes based on grave breaches of the 1949 *Geneva Conventions*, 'serious violations' of common art 3 of the 1949 *Geneva Conventions* and *Additional Protocols I and II*, and breaches of other customary international laws were included in the *Rome Statute*. This entrenched in international law the criminality of future war crimes in any armed conflict, regardless of character. However, the rigid distinction between international and internal conflict was retained in the *Rome Statute* with some major differences in the crimes in each category.

A *Article 8 of the Rome Statute*

The drafting of the war crimes provisions in art 8 are generally based on the provisions of the treaties in which the relevant law or custom is found. Differences in expression in the overall schemes of those treaty arrangements are reflected in the end product. The distinction between grave breaches of the 1949 *Geneva Conventions* and 'serious violations' of common art 3 have been retained. Grave breaches in relation to persons or property protected under any of the 1949 *Geneva Conventions* are listed as war crimes under art 8(2)(a) while the acts prohibited by common art 3 are war crimes for the purposes of arts 8(2)(c) and 8(2)(e) which relate to non-international armed conflict.

As a result, in prescribing war crimes in international armed conflict and non-international armed conflict, different terminology is used to describe the same conduct, which makes it difficult to align the provisions. The *Elements of Crimes* demonstrate the extent to which the various crimes have been drafted inconsistently.⁷⁴ For example, 'wilful killing' in international armed conflict in art 8(2)(a)(i) equates to 'murder' in internal armed conflict in art 8(2)(c)(i); 'biological experiments' in international armed conflicts in art 8(2)(a)(ii) are similar to 'medical or scientific experiments' in internal armed conflict in art 8(2)(e)(xi); and 'wilfully causing great suffering' in international armed conflict in art 8(2)(a)(iii) is the equivalent of 'cruel treatment' in internal armed conflict in art 8(2)(c)(i).

⁷¹ James Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *The American Journal of International Law* 404, 408. At that time the ILC was also working on a Draft Code of Crimes Against the Peace which it claimed would form the basis of the ICC's jurisdiction but that proposal was discarded in 1992 so that states could become parties to a statute for an international criminal court before the code came into force: Crawford, above this note, 407.

⁷² Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22, 32. Arsanjani comments that the structure which 'had been created to facilitate negotiation, survived as the final structure'.

⁷³ *Ibid.*

⁷⁴ *Elements of Crimes*, above n 18, 18–20, 37–8, 47.

In addition, crimes drawn from the provisions of *Additional Protocols I* and *II* reflect the differences between the two protocols, with violations of the laws and customs applicable in international armed conflict being listed in art 8(2)(b), and violations of laws and customs applicable in non-international armed conflict being listed in arts 8(2)(c) and 8(2)(e). The leader of the US delegation to the Rome Conference claimed that differences between arts 8(2)(b) and 8(2)(e) reflect agreement among most delegates that ‘customary international law has developed to a more limited extent with respect to internal armed conflicts’.⁷⁵ The provisions in art 8(2)(b) to which the US delegation leader was apparently referring, will now be examined.

1 *Weapons Likely to Cause Superfluous Injury or Unnecessary Suffering*

Four provisions relating to the use of weapons in international armed conflict are absent from the provisions relating to non-international armed conflict. These provisions are:

- (a) Article 8(2)(b)(xvii): employing poison and poisoned weapons;
- (b) Article 8(2)(b)(xviii): employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices;
- (c) Article 8(2)(b)(xix): employing expanding bullets; and
- (d) Article 8(2)(b)(xx): employing weapons likely to cause superfluous injury or unnecessary suffering.

The provisions in arts 8(2)(b)(xvii), 8(2)(b)(xviii) and 8(2)(b)(xix) are drawn from the *Hague Regulations* in the case of poison or poisoned weapons;⁷⁶ the 1925 *Geneva Protocol* in the case of asphyxiating, poisonous or other gases;⁷⁷ and the *Hague Declaration (IV,3)* in the case of expanding bullets.⁷⁸

The omission from the *Rome Statute* of the weapons prohibitions in *Additional Protocol II* has led to an argument that these prohibitions have never been accepted as customary international law with regard to internal armed conflict.⁷⁹ However, the ICRC indicated in 1997 that it considered the employment of ‘weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering’ to be a serious violation of international humanitarian law applicable in non-international armed conflict.⁸⁰ When, in *Tadic*, the ICTY considered whether its power under art 3 of the *ICTY Statute* included the power to prosecute violations committed in

⁷⁵ David Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 *The American Journal of International Law* 12, 16. Mr Scheffer is US Ambassador-at-Large for War Crimes Issues.

⁷⁶ *Hague Regulations*, above n 4, art 23(a).

⁷⁷ *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, opened for signature 17 June 1925, (1929) XCIV LNTS 65–74, (entered into force 8 February 1928) (‘1925 Geneva Protocol’).

⁷⁸ *Hague Declaration (IV,3)*, above n 3.

⁷⁹ See, eg, Theodor Meron et al, ‘Application of Humanitarian Law in Noninternational Armed Conflicts’ (1991) *American Society of International Law: Proceedings of the 85th Annual Meeting* 83, 98.

⁸⁰ ICRC, *War Crimes: Working Paper Prepared by the ICRC for the United Nations Preparatory Committee for the Establishment of an International Criminal Court* (1997) <<http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/860343B2E63B2522C1256B66005A6C68>> at 1 May 2004.

internal armed conflict,⁸¹ it found that, in relation to the means and methods of warfare, there were a number of instruments showing ‘the gradual extension to internal armed conflict of rules and principles concerning international wars’.⁸² The Appeals Chamber commented:

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane; and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.⁸³

Although the Rome Conference was aware of the *Tadic* decision, it did not choose to follow the ICTY’s interpretation in relation to these war crimes.⁸⁴ However, there are still other developments to which the Appeals Chamber did not refer to, or which have occurred since the Rome Conference in 1998. In particular, a number of modern weapons conventions do not distinguish between international and non-international armed conflict. They include the *Biological Weapons Convention*,⁸⁵ the *Chemical Weapons Convention*,⁸⁶ and the *Ottawa Convention*, which prohibits anti-personnel landmines.⁸⁷ States that are party to these conventions agree not to use, develop, produce or stockpile weapons covered by the relevant convention.⁸⁸ In the case of chemical weapons, states agree not to use riot control agents as a method of warfare although this does not include ‘law enforcement including domestic riot control purposes’.⁸⁹ These conventions do not distinguish between international and non-international conflicts since their mandate extends beyond warfare. The conventions have all received wide support: the *Biological Weapons Convention* now has 150 States

⁸¹ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [71]–[89].

⁸² *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [119]. The instruments include the *Turku Declaration of Minimum Humanitarian Standards* of 1990 and revised in 1994 (reprinted in Commission on Human Rights, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UN Doc E/CN.4/1995/116 (31 January 1995)). According to the Appeals Chamber, this declaration was indirectly endorsed by the 1994 Conference on Security and Cooperation in Europe in its *Budapest Document 1994: Towards Genuine Partnership in a New Era* (1994), [34] and in the Commission on Human Rights’ *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Forty-Sixth Session*, UN Doc E/CN.4/Sub.2/1994/56 (28 October 1994).

⁸³ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [119].

⁸⁴ See generally, McCormack and Robertson, above n 12, 663.

⁸⁵ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975) (‘*Biological Weapons Convention*’).

⁸⁶ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993, [1997] ATS 3 (entered into force 29 April 1997) (‘*Chemical Weapons Convention*’).

⁸⁷ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, opened for signature 18 September 1997, [1999] ATS 3 (entered into force 1 March 1999) (‘*Ottawa Convention*’).

⁸⁸ *Biological Weapons Convention*, above n 85, art 1; *Chemical Weapons Convention*, above n 86, art 1; *Ottawa Convention*, above n 87, art 1.

⁸⁹ *Chemical Weapons Convention*, above n 86, art 2(9)(d).

Parties,⁹⁰ the *Chemical Weapons Convention* has 161,⁹¹ while 141 states have signed the *Ottawa Convention* since it was opened for signature in December 1997.⁹²

The broad acceptance of the *Chemical Weapons Convention* — which covers toxic chemicals and munitions and devices designed to cause death or harm through the toxic properties of the chemicals⁹³ — and the *Biological Weapons Convention* — which covers all toxins as well as biological agents and weapons designed to use such toxins or agents for hostile purposes⁹⁴ — indicates that at the very least, the use of poison, poisoned weapons or asphyxiating gases should be criminalised in all armed conflicts.

There have also been important developments in relation to the *Certain Conventional Weapons Convention*⁹⁵ since July 1998, when the *Rome Statute* was concluded. *Amended Protocol II* to the *Certain Conventional Weapons Convention*, which was entered into force on 3 December 1998 and now has 75 states party to it,⁹⁶ contains prohibitions and restrictions on the use of mines, booby traps and other devices, and applies to internal armed conflict as well as international armed conflict.⁹⁷ The *Certain Conventional Weapons Convention* itself now has 94 States Parties.⁹⁸ At the Second Review Conference of the *Certain Conventional Weapons Convention* in December 2001, States Parties agreed to extend the scope of application of the *Certain Conventional Weapons Convention* and its existing protocols to non-international armed conflict.⁹⁹ This means that *Protocol I* (concerning weapons causing injury by means of fragments not detectable by x-ray), *Protocol III* (concerning incendiary weapons) and *Protocol IV* (concerning blinding laser weapons)¹⁰⁰ will in future be applied by States Parties in all armed conflict. This amendment, proposed by the US, will enter into force on 18 May 2004.¹⁰¹ While the amendment leaves open the possibility that future protocols may exclude or modify the revised scope

⁹⁰ UN Department for Disarmament Affairs, *Status of Multilateral Arms Regulation and Disarmament Agreements* (2004) <<http://disarmament.un.org:8080/TreatyStatus.nsf>> at 1 May 2004.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Chemical Weapons Convention*, above n 86, art 2.

⁹⁴ *Biological Weapons Convention*, above n 85, art 1.

⁹⁵ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, opened for signature 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983)

⁹⁶ UN Department for Disarmament Affairs, *Status of Multilateral Arms Regulation and Disarmament Agreements*, above n 90.

⁹⁷ *Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, opened for signature 31 May 1995, 35 ILM 1206 (entered into force 3 December 1998) (*Amended Protocol II*).

⁹⁸ UN Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVI/treaty2.asp>> at 1 May 2004.

⁹⁹ *Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, opened for signature 21 December 2001 (not yet in force).

¹⁰⁰ *Ibid.*

¹⁰¹ UN Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, above n 98.

provision, it is significant that there was no opposition on this occasion. As Maresca comments, '[o]n the contrary, it was recognised by all States Parties as an important and necessary development of international humanitarian law'.¹⁰²

In 1998, the Rome Conference was unable to agree on what weapons should be included in the *Rome Statute* as being 'of a nature to cause superfluous injury or unnecessary suffering'.¹⁰³ The result was that art 8(2)(b)(xx) as currently drafted does not criminalise the use of any weapons; but rather suggests that in future the *Rome Statute* be amended to include an annex listing weapons that are the subject of a comprehensive prohibition. The major area of disagreement at the Rome Conference surrounded the use of nuclear weapons, which the five permanent members of the Security Council wanted excluded from the operation of the *Rome Statute*.¹⁰⁴ This disagreement ensured that nuclear weapons, along with biological and chemical weapons, were excluded from its operation.¹⁰⁵

It is hoped that the issue of what weapons should be included in the *Rome Statute* will be more successfully addressed at the 2009 Review Conference, and that the developments in relation to the weapons conventions referred to above will leave no question that the use of prohibited weapons should be criminalised in all armed conflicts. The practice of taking new developments in international law into account is supported by the manner in which art 8 is reflective of modern treaties other than the *Geneva Conventions* and the *Hague Conventions* in relation to both international and non-international armed conflict.¹⁰⁶ For example, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*¹⁰⁷ is reflected in arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute*, and the *Convention of the Rights of the Child*¹⁰⁸ is reflected in arts 8(2)(b)(xxvi) and 8(2)(e)(vii).

With regard to dum-dum bullets, art 8(b)(xix) makes it a war crime in international armed conflict to employ 'bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions'. This wording is taken directly from the *Hague Declaration (IV,3)*¹⁰⁹ which was appropriate at the time in addressing the potential use of such bullets in international armed conflict, following their development by the British for use in India.¹¹⁰ Although there have been alleged breaches of the *Hague Declaration (IV,3)*,¹¹¹ it is said that it has generally been

¹⁰² Louis Maresca, 'Second Review Conference of the *Convention on Certain Conventional Weapons*' (2002) 845 *International Review of the Red Cross* 255, 255–6.

¹⁰³ Arsanjani, above n 72, 34; McCormack and Robertson, above n 12, 664–6.

¹⁰⁴ Arsanjani, above n 72, 34; McCormack and Robertson, above n 12, 664–6.

¹⁰⁵ Arsanjani, above n 72, 34–5; McCormack and Robertson, above n 12, 665.

¹⁰⁶ See McCormack and Robertson, above n 12, 663–4.

¹⁰⁷ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956).

¹⁰⁸ *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁰⁹ *Hague Declaration (IV,3)*, above n 3.

¹¹⁰ Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 105, 122.

¹¹¹ Roberts and Guelff, above n 69, 63; Robin Coupland and Dominique Loye, 'The 1899 *Hague Declaration* concerning Expanding Bullets: A Treaty Effective for More Than 100 Years Faces Complex Contemporary Issues' (2003) 849 *International Review of the Red Cross* 135, 135.

observed in international armed conflict with 'full metal jacket' bullets being standard army issue.¹¹²

Making use of dum-dum bullets a war crime in all armed conflict is potentially complicated for at least two reasons. First, the outdated prohibition can be easily avoided with the advent of modern small calibre high velocity bullets that cause similar superfluous injuries in victims.¹¹³ While Switzerland has been working for some time to update the *Hague Declaration (IV,3)* to prohibit all 'projectiles with dum-dum effects',¹¹⁴ this proposal was not successful at the 2001 Second Conference on the *Certain Conventional Weapons Convention*.¹¹⁵ Switzerland has, however, said it will continue to argue for the modernisation of the dum-dum prohibition.¹¹⁶

Second, handguns used by many police forces throughout the world use bullets with exposed tips that flatten and expand on impact.¹¹⁷ The justification for their use is based on the need for police to act in self-defence to incapacitate attackers quickly, and the need to minimise the risk of bullets passing through such attackers and harming bystanders.¹¹⁸ Research into wound ballistics has shown that ammunition fired from police handguns carries far less energy than a dum-dum rifle bullet with the result that, in surgical terms, the injury is not as serious in medical terms.¹¹⁹ Accordingly, surgeon and former coordinator of ICRC surgical activities, Robin Coupland, has suggested that 'the employment of handguns that use bullets with lead exposed at the tip for domestic law enforcement should not preoccupy experts in international humanitarian law'.¹²⁰

For the purposes of the *Rome Statute*, it is submitted that the complications associated with the prohibition of dum-dum bullets should not stand in the way of eliminating the distinction between international and non-international armed conflict. The preferable solution would be for there to be agreement on a prohibition of all ammunition with dum-dum effects by 2009. However, if that does not occur, the wording of art 8(2)(b)(xix) could be refined so that the use of expanding bullets that carry more than a prescribed level of energy would be a war crime. Police and counter-terrorist squads would be protected from this provision since no war crime is committed unless such weapons are used in 'armed conflict'.¹²¹

¹¹² Coupland and Loye, above n 111, 138. See also Ernst Jan Hogendoorn, 'The Human Rights Agenda: The Further Development of Arms Control Regimes' (1999) 34 *Disarmament Diplomacy* <<http://www.acronym.org.uk/dd/dd34/34hrw.htm>> at 1 May 2004.

¹¹³ Coupland and Loye, above n 111, 138.

¹¹⁴ Federal Department of Defence, Civil Protection and Sports, Switzerland, *Protocol on Wound Ballistics Regulations for Small Calibre Weapons and Ammunition* (2000) <<http://www.vbs.admin.ch/internet/GST/KVR/f/actu-WB-doc1.htm>> at 1 May 2004; Maresca, above, n 102, 25.

¹¹⁵ *Final Document of the Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 72–81, UN DOC CCW/CONF.II/2 (21 December 2001).

¹¹⁶ *Ibid* 79.

¹¹⁷ Coupland and Loye, above n 111, 140–1.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* 141.

¹²⁰ *Ibid*.

¹²¹ See Part V of this article for a definition of armed conflict.

2 Other Crimes Limited to International Armed Conflict

There are other crimes listed in art 8(2)(b) of the *Rome Statute* that are not replicated in arts 8(2)(c) or 8(2)(e). If the distinction between international and non-international conflict is to be removed from the *Rome Statute*, it will be necessary to consider each of these provisions. The following comments are not intended to be exhaustive; rather, they demonstrate that the differences between the provisions applying to international armed conflict and non-international armed conflict are not as great as the structure of art 8 suggests. The ICRC's current study on the customary rules of international humanitarian law due for publication later this year is likely to shed more light on state practice and *opinio juris* in many of these areas, thus making it possible to recommend appropriate amendments to art 8.¹²²

(a) Indiscriminate Attacks and Damage to the Environment

The war crime of excessive incidental death, injury or damage to the environment in art 8(2)(b)(iv) of the *Rome Statute* is based on a combination of provisions from arts 51 and 55 of *Additional Protocol I*, which prohibit indiscriminate attacks and the use of means or methods of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment.

There is no equivalent war crime of indiscriminate attacks in internal armed conflict, but rather there exists a general prohibition against attacking civilians contained in art 8(2)(e)(i) of the *Rome Statute*. The *Elements of Crimes* requires that the perpetrator intended the civilian population or civilians to be the object of the attack.¹²³ This requirement fails to address the issue of proportionality, which prohibits attacks that may be expected to cause injury or damage 'excessive in relation to the concrete and direct overall military advantage anticipated'.¹²⁴ The ICRC has recently reported that the prohibition of indiscriminate attacks and the principle of proportionality are now customary in non-international armed conflict.¹²⁵ If this is correct, there is no reason why the distinction between international and non-international armed conflict should be maintained with regard to indiscriminate attacks.

In the case of widespread, long-term and severe damage to the environment, the ICRC's 1994 *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* proposed that parties to non-international armed conflict should apply the rules for protecting the environment in international armed conflict, and urged states to incorporate these rules into their military manuals in a way that did not discriminate on the basis of

¹²² ICRC, *ICRC Study on Customary Rules of International Humanitarian Law* (2003) <<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList133/CE72DB35175CA0FEC1256D330053FA7B>> at 1 May 2004, which provides a summary and table of contents of *Customary International Humanitarian Law* to be published by Cambridge University Press in 2004.

¹²³ *Elements of Crimes*, above n 18, 41.

¹²⁴ *Rome Statute*, above n 8, art 8(2)(b)(iv).

¹²⁵ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 16 <<http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDC>> at 1 May 2004.

how the conflict is characterised.¹²⁶ The ICRC also included widespread, long-term and severe damage to the environment in the 1997 list of serious violations applicable in non-international armed conflict and indicated that, in its view, prohibition of such damage reflected customary international law.¹²⁷ Each of these documents appears to support an argument that this war crime ought to apply in non-international as much as international armed conflict. The ICRC's study can be expected to show how many states have followed the *Guidelines* and whether this argument is sustained.

(b) *Attacking Undefended Places Which are Not Military Objectives*

The wording of art 8(2)(b)(v) of the *Rome Statute* is taken from art 25 of the *Hague Regulations* which prohibits the 'attack or bombardment ... of towns, villages, dwellings, or buildings which are undefended'. This provision has no direct equivalent for non-international armed conflict. However, in relation to non-international armed conflict, art 8(2)(e)(i) makes it a war crime to intentionally direct attacks against the civilian population; art 8(2)(e)(iv) makes it a war crime to direct attacks intentionally at significant buildings; and art 8(2)(e)(xii) makes it a war crime to destroy or seize the property of an adversary unless imperatively demanded by the necessities of the conflict.

Support for the view that the distinction between international and non-international armed conflict should not be maintained with respect to this war crime is found in the ICTY's decision in *Tadic*, with regard to the scope of art 3 of the *ICTY Statute*. Article 3 of the *ICTY Statute* was also based on the *Hague Regulations* and gave the ICTY power to prosecute violations of the laws or customs of war including 'attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings'.¹²⁸ While the defence sought to argue that art 3 applied only to war crimes committed in international armed conflict, the Appeals Chamber held that art 3 gave the ICTY power to prosecute all 'serious' violations of international humanitarian law occurring in the context of international or internal armed conflict, including violations of general principles designed to protect civilians or civilian objects from hostilities.¹²⁹

¹²⁶ ICRC, 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict' (1996) 311 *International Review of the Red Cross* 230. See also *United Nations Decade of International Law*, GA Res 49/50, UN GAOR, 49th sess, 84th plen mtg, [11], UN Doc A/RES/49/50 (17 February 1995), where the General Assembly invited all States to 'disseminate widely the ... guidelines ... and to give due consideration to incorporating them into their military manuals'.

¹²⁷ ICRC, *War Crimes: Working Paper Prepared by the ICRC for the United Nations Preparatory Committee for the Establishment of an International Criminal Court*, above n 80. Sovereign States are often concerned about external interference in their environmental management. It should, be noted, however, that to constitute a war crime, damage to the environment would need to be serious enough to meet all three criteria, that is, 'widespread, long-term and severe' (emphasis added). Previous examples that have caused international shock include the use of agent orange in Vietnam and the Iraqi destruction and burning of Kuwaiti oil installations in 1991: see Hans Blix, 'Means and Methods of Combat' in United Nations Economic, Social and Cultural Organisation, *International Dimensions of Humanitarian Law* (1988) 135, 149–50; Roberts and Guelff, above n 69, 607.

¹²⁸ *ICTY Statute*, above n 66, art 3(c).

¹²⁹ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [94]; see also [126]–[127] with respect to customary rules.

(c) Improper Use of Flags and Markings

The improper use of a flag of truce, the markings of the UN, or the Red Cross emblem which results in death or serious injury is criminalised by art 8(2)(b)(vii) of the *Rome Statute* in relation to international armed conflict but is not proscribed in non-international armed conflict. This omission overlooks the fact that improper use of the Red Cross emblem in internal conflict is prohibited under art 12 of *Additional Protocol II*. While *Additional Protocol II* did not outlaw improper use of flags of truce or the UN emblem, users of these items in the context of internal conflict would seem just as culpable if their misuse resulted in death or serious injury.

(d) Transfers by Occupying Powers

In the context of international armed conflict, art 8(2)(b)(viii) of the *Rome Statute* prohibits an occupying power from transferring its own civilian population into an occupied territory, or deporting or transferring all or part of the population of an occupied territory within or outside the territory. With regard to internal armed conflict, art 8(2)(e)(viii) makes it a war crime to order the 'displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or military reasons so demand'.¹³⁰ Transferring parts of the civilian population of an occupying power into an occupied territory was included in *Additional Protocol I*.¹³¹ It was also one reason Israel refused to ratify the *Rome Statute*.¹³² Clearly, this aspect of art 8(2)(b)(viii) would not apply in non-international armed conflict. In this case, it is suggested that this could be addressed in the drafting of the particular crime which would make it clear that the elements of the crime would only be applicable in international armed conflict.

(e) Human Shields

By art 8(2)(b)(xxiii) of the *Rome Statute*, the use of the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations is a war crime in international armed conflict.¹³³ This war crime is taken from art 51(7) of *Additional Protocol I*; it is one of the provisions which was not replicated in *Additional Protocol II*, which offered limited protections for civilians in internal armed conflict. However, *Additional Protocol II* provided for the 'general protection' of the civilian population and individual civilians and the fundamental obligation that they not be the object of attack;¹³⁴ and common art 3 of the 1949 *Geneva Conventions* requires persons taking no active part in hostilities in all circumstances to be treated humanely. In light of these provisions, it would appear to be appropriate

¹³⁰ ICRC, *War Crimes: Working Paper Prepared by the ICRC for the United Nations Preparatory Committee for the Establishment of an International Criminal Court*, above n 80.

¹³¹ *Additional Protocol I*, above n 43, art 85(4)(a).

¹³² Office of the Legal Adviser to the Ministry of Foreign Affairs, Ministry of Foreign Affairs, Israel (2002) *Israel and the International Criminal Court* <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel+and+the+International+Criminal+Court.htm> at 1 May 2004.

¹³³ *Rome Statute*, above n 8, art 8(2)(b)(xxiii).

¹³⁴ *Additional Protocol II*, above n 43, arts 13(1), 13(2).

that the parties who intentionally use civilians to shield military objectives from attack in non-international armed conflict should be as culpable as parties in international armed conflict.

(f) *Starvation*

Article 8(2)(b)(xxv) of the *Rome Statute* makes the intentional use of starvation of civilians as a method of warfare a war crime in international armed conflict. This includes depriving civilians of objects indispensable to their survival and wilfully impeding relief supplies as provided for in the 1949 *Geneva Conventions*. Although the provisions of *Additional Protocol II* are not as detailed as those in *Additional Protocol I*,¹³⁵ *Additional Protocol II*, which addresses non-international armed conflict, does prohibit starvation as a method of combat.¹³⁶ It also allows for relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and undertaken subject to the consent of the high contracting party concerned.¹³⁷ In addition, the ICRC has included 'starvation of civilians' in its list of serious violations of international humanitarian law applicable in non-international armed conflict.¹³⁸ In this context, it appears appropriate that starvation of civilians should be a war crime in non-international armed conflict.

(g) *Compelling a Protected Person to Serve in Armed Forces*

Compelling a prisoner of war or other protected person to serve in the armed forces of a hostile power is a war crime in international armed conflict under art 8(2)(a)(v) of the *Rome Statute*, but is not prohibited in internal armed conflict. Even though this crime constitutes a grave breach of the 1949 *Geneva Conventions*,¹³⁹ it has no equivalent in non-international armed conflict. There is no such thing as combatant status in non-international armed conflict with the result that captives are not entitled to prisoner of war status. In the case of civilians, 'protected persons' are those who 'find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or an Occupying Power of which they are not nationals'.¹⁴⁰ It is easy to foresee that states will not want to see this prohibition apply in non-international armed conflict where all persons are likely to be nationals of the same state, even though racial or religious differences may exist. In addition, the legitimate government may operate a system of military conscription. Again, this particular crime may have no application other than in international armed conflict and could be drafted accordingly.

¹³⁵ *Additional Protocol I*, above n 43, arts 54, 68–71.

¹³⁶ *Additional Protocol II*, above n 43, art 14.

¹³⁷ *Additional Protocol II*, above n 43, art 18(2).

¹³⁸ ICRC, *War Crimes: Working Paper Prepared by the ICRC for the United Nations Preparatory Committee for the Establishment of an International Criminal Court*, above n 80.

¹³⁹ *Geneva Convention III*, above n 15, art 130; *Geneva Convention IV*, above n 15, art 147.

¹⁴⁰ *Geneva Convention IV*, above n 15, art 4.

(h) Concluding Comments

The above comments on each of the differences demonstrate how similar the war crimes in international and non-international armed conflict already are, and if the weapons prohibitions are dealt with as recommended above, how little otherwise remains to be resolved in order to bring the two categories together. Any differences such as those relating to prisoners of war or occupying powers could be dealt with as they arise without the need to continue as separate categories.

IV PROCEDURAL ASPECTS OF THE DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

The structure of art 8 of the *Rome Statute*, which lists war crimes for international and internal armed conflict in separate parts, will require the prosecution to establish the nature of the relevant armed conflict in every case of alleged war crimes. The experience of the ICTY has shown that this is likely to be a very time-consuming task for the ICC,¹⁴¹ since the prosecutor will be obliged to ‘provide evidence and arguments for characterising the armed conflict where the crimes alleged were said to have been perpetrated in each case’.¹⁴²

The conflict in the former Yugoslavia shows how difficult it can be to determine the character of conflicts where rapid changes are occurring in the make up of opposing parties. According to the ICTY Appeals Chamber in *Tadic*, the conflicts in the former Yugoslavia

could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.¹⁴³

Although the conflict in the former Yugoslavia resulted in a complicated factual situation, this complexity is by no means unique. Other conflicts involving complexities of international and non-international aspects include the conflicts in Eritrea and Tigray under the former Mengistu regime of Ethiopia¹⁴⁴ and in Nicaragua where a non-international conflict between the government and the Contras became international with the involvement of the US.

While previous decisions of the ICTY Appeals Chamber and other tribunals including the ICTR may provide useful legal precedents for determining the criteria for assessing the character of a conflict, prior decisions as to fact will only be applicable for offences committed at the same time and in the same place.¹⁴⁵

While the procedural hurdle of having to establish the nature of the relevant conflict in each case may not, by itself, justify an amendment — especially in the

¹⁴¹ Mohamed Bennouna, ‘The Characterisation of the Armed Conflict in the Practice of the ICTY’ in Richard May et al (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 55, 55.

¹⁴² *Ibid* 57.

¹⁴³ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [72].

¹⁴⁴ McCoubrey and White, above n 47, 318.

¹⁴⁵ Bennouna, above n 141, 57–8; *Prosecutor v Mucic (Trial Chamber Judgment)*, Case No IT-96-21-T (16 November 1998) [228] (‘*Mucic*’).

case of a statute as important as the *Rome Statute* — it does demonstrate that there are practical as well as policy reasons for addressing the distinction between international and non-international armed conflicts in the *Rome Statute*.

The procedural hurdle created by the structure of art 8 of the *Rome Statute* has two aspects. First, there is the distinction between grave breaches of the 1949 *Geneva Conventions*, now contained in art 8(2)(a) of the *Rome Statute* and serious violations of common art 3, contained in art 8(2)(c) of the *Rome Statute*. These are war crimes committed against defined classes of victims, namely ‘persons or property protected under the provisions of the relevant *Geneva Convention*’ in art 8(2)(a) in the case of international armed conflict or ‘persons taking no active part in the hostilities’ in art 8(2)(c) in the case of non-international armed conflict. Second, there is the distinction between ‘other serious violations’ applicable in international armed conflicts set out in art 8(2)(b) and ‘other serious violations’ applicable in non-international armed conflicts set out in art 8(2)(e). These distinctions will be explored in turn.

A Distinction between ‘Grave Breaches’ and ‘Serious Violations of Common Article 3’

Direct incorporation of the current ‘grave breaches’ regime into the *Rome Statute* is likely to perpetuate the distinction between international and internal armed conflict. Under the 1949 *Geneva Conventions*, grave breaches are prohibited acts committed ‘against persons or property protected’ by the conventions. Such protection only arises in the context of a war between states. Accordingly, use of the term ‘grave breaches’ is likely to be interpreted as maintaining the distinction between international and non-international armed conflict with the result that the ICC will still be required to determine the character of relevant armed conflict. This has been the case under the *ICTY Statute* where art 2 refers to ‘grave breaches ... against persons or property protected under ... the Geneva Convention[s]’. Although there have been suggestions in the ICTY that customary law ‘has developed the provisions of the *Geneva Conventions* since 1949 to constitute an extension of the system of grave breaches to internal armed conflicts’,¹⁴⁶ the ICTY Appeals Chamber has held that grave breaches are only committed in international armed conflict and that persons or property will only be ‘protected’ in international armed conflict.¹⁴⁷

The alternatives appear to be either to agree that grave breaches can occur in non-international as much as international armed conflict, or to combine arts 8(2)(a) and 8(2)(c) of the *Rome Statute* to develop a single list of war crimes to apply to all armed conflicts. The ICTY Appeals Chamber in *Tadic* found that there were examples of state conduct supporting a view that the grave breaches regime operates regardless of whether the conduct concerned occurs in international or non-international armed conflict, including a statement to that effect by the US Government in an amicus curiae brief submitted to the Appeals Chamber.¹⁴⁸ The Appeals Chamber found it was unable to agree with the US but noted the significance of such a statement from one of the permanent members

¹⁴⁶ *Mucic*, Case No IT-96-21-T (16 November 1998) [202]. See also *Tadic*, Case No IT-94-1-AR72 (2 October 1995) (Separate Opinion of Judge Abi-Saab).

¹⁴⁷ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [81].

¹⁴⁸ *Ibid* [83].

of the Security Council. The Appeals Chamber also commented that '[w]ere other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize'.¹⁴⁹ The *Rome Statute* could provide an avenue through which states could express such a view. If the grave breaches regime were to apply to non-international armed conflict under customary international law, there would no longer be a need for a separate category of war crimes based on the general principles of common art 3 and the distinction between international and non-international armed conflict would fall away.

If there is insufficient support for such an extension of the grave breaches regime, an alternative solution would be to prepare a list of acts based on the 1949 *Geneva Conventions*, which are war crimes when committed in the context of any armed conflict. This list would not refer to the grave breaches regime or to persons protected by the 1949 *Geneva Conventions*, although it would still be necessary to define the classes of person against whom such conduct would be a war crime. One possible approach would be to use the more general terminology of common art 3 of the 1949 *Geneva Conventions* and *Additional Protocol II*. Thus art 8 of the *Rome Statute* could specify that defined acts are war crimes where they are committed against civilians and 'persons taking no active part in hostilities, including members of armed forces who have laid down their arms, those placed hors de combat by sickness, wounds, detention, or any other cause'.¹⁵⁰ These war crimes would apply in all situations of armed conflict, whether international, non-international or mixed.

B *Distinction between 'Other Serious Violations' in International Armed Conflict and Non-International Armed Conflict*

In the case of the distinction between 'other serious violations' in arts 8(2)(b) and 8(2)(e) of the *Rome Statute*, many crimes appear in both articles in exactly the same terms. However, the fact that they are contained in separate articles makes it necessary for the prosecution to establish the character of the armed conflict in order to secure a conviction on any charges for a specific war crime. The *Elements of Crimes* includes as an element of each crime listed in art 8(2)(b) that 'the conduct took place in the context of and was associated with an international armed conflict'.¹⁵¹ A corresponding element applies in the case of war crimes committed in non-international armed conflict under art 8(2)(e).¹⁵² The effect of this is that the ICC will be required to hear considerable evidence as to facts establishing the character of the armed conflict as international or non-international. According to the *Elements of Crimes*, perpetrators are required to be aware only of the factual circumstances that establish the existence of an armed conflict.¹⁵³ It is therefore suggested that, as a minimum, art 8 should be amended to combine arts 8(2)(b) and 8(2)(e) into one provision, applying in the case of an 'armed conflict'. This would limit the facts to be proved by the

¹⁴⁹ *Ibid.*

¹⁵⁰ 1949 *Geneva Conventions*, above n 15, common art 3.

¹⁵¹ *Elements of Crimes*, above n 18, 23–37.

¹⁵² *Ibid.* 41–8.

¹⁵³ *Ibid.* 18.

prosecution to those which the perpetrator was required to be aware, thus minimising the procedural hurdles associated with the current structure of art 8.

V THRESHOLDS

There are a number of threshold provisions included in art 8 of the *Rome Statute*. Redrafting art 8 would require consideration of these provisions. The first is a threshold level of gravity contained in art 8(1). This provision, promoted by the US,¹⁵⁴ applies to all armed conflicts providing that the ICC is to 'have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.¹⁵⁵ It has been pointed out that the words 'in particular' were intended to indicate the type of war crime over which the ICC has jurisdiction, but that it does not actually exclude jurisdiction over a single war crime.¹⁵⁶ For present purposes it can be noted that its continued presence would not impede the removal of the distinction between international and internal armed conflict.

Two other threshold provisions apply only to internal conflicts and are variations of the threshold provisions included in *Additional Protocol II* in 1977. Articles 8(2)(d) and 8(2)(f) read respectively:

- (d) Paragraph (2)(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (f) Paragraph (2)(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.

The wording of art 8(2)(d) and the first sentence of art 8(2)(f) is adapted from provisions included in art 1 of *Additional Protocol II*. However, it should be noted that the wording does not completely reproduce the limitations contained in art 1 of *Additional Protocol II*. Importantly, they do not include the requirement that 'dissident armed forces or other organised groups' be 'under responsible command or exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations'.¹⁵⁷ These words had been included in an earlier draft of art 8 but were deleted from the final draft 'owing to lack of support'.¹⁵⁸ Accordingly, the threshold was reduced from that of *Additional Protocol II*, with the effect that dissident forces will not be required to be so organised as to have responsible command and control over territory in order for war crimes committed in the conflict to fall within the jurisdiction of the ICC.

¹⁵⁴ Scheffer, above n 75, 16.

¹⁵⁵ *Rome Statute*, above n 8, art 8(1).

¹⁵⁶ McCormack and Robertson, above n 12, 662; Arsanjani, above n 72, 33.

¹⁵⁷ *Additional Protocol II*, above n 43, art 1(1).

¹⁵⁸ Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 2, fn 31.

There are at least three options in relation to arts 8(2)(d) and 8(2)(f):

- (a) Delete both provisions entirely, thereby returning to the position under common art 3. This would leave it to the ICC to define the term ‘armed conflict’ in the course of determining its jurisdiction.
- (b) Delete both provisions but include a definition of ‘armed conflict’. The definition provided by the ICTY Appeals Chamber in *Tadic* was that

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹⁵⁹

This definition was followed by the ICTY Trial Chamber in subsequent decisions¹⁶⁰ and has been referred to with approval by Theodor Meron.¹⁶¹ It can also be seen in an amended form limited to non-international armed conflict in the second sentence of art 8(2)(f) as it now stands.

- (c) Redraft the provisions as a general exclusion. This could be done by adapting the current provisions of art 8(2)(f) to provide that art 8 applies to ‘armed conflicts’ and thus does not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’. ‘Armed conflict’ could be defined or left undefined.

At present, it is suggested that the preferred option is option (2), which entails deleting arts 8(2)(d) and 8(2)(f) and including a definition of ‘armed conflict’ using the definition provided by the ICTY Appeals Chamber. This definition, in its original terms, applies to both international and non-international armed conflict and could accordingly be used as a general definition at the beginning or end of the article. However, both options (1) and (3) would also allow the removal of the distinction between international and non-international armed conflict.

VI CONCLUSION

There are policy as well as practical reasons for amending art 8 of the *Rome Statute* to remove the remaining differences between war crimes in international and non-international armed conflict. The most important reasons are those based on policy, which were perhaps best described by the ICTY Appeals Chamber in *Tadic*:

in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons

¹⁵⁹ *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [70].

¹⁶⁰ See, eg, *Prosecutor v Galic (Trial Chamber Judgment)*, Case No IT-98-29-T (5 December 2003) [9].

¹⁶¹ Theodor Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua’s* Fallout’ (1998) 92 *American Journal of International Law* 236, 237.

causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign state?¹⁶²

The first opportunity for amending art 8 of the *Rome Statute* will be at the 2009 Review Conference. If the above issues are not already being addressed, it is hoped that the Australian government will commence doing so in conjunction with other like-minded nations so that they can be properly resolved at that Conference. In this regard, State practice generally is very important and Australia should continue encouraging other states, particularly neighbours in the Pacific region, to ratify and accede not only to the *Rome Statute*, but also to other relevant treaties.¹⁶³

¹⁶² *Tadic*, Case No IT-94-1-AR72 (2 October 1995) [97].

¹⁶³ See Joint Standing Committee on Treaties, Parliament of Australia, *Report 45: The Statute of the International Criminal Court (2002)*, [1.53]–[1.54], appendix C for a description of Australia's role in developing the *Rome Statute* and chairing the 'Like-Minded Group' of over 60 nations.