

THE 'INTENSITY' THRESHOLD IN ARTICLE 8(2)(f) OF THE ROME STATUTE: THE CONUNDRUM CREATED BY THE TERM 'PROTRACTED ARMED CONFLICT' AND THE POSSIBILITY OF A NEW CATEGORY OF NON-INTERNATIONAL ARMED CONFLICT

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Abstract

Article 8(2)(d) of the Rome Statute lists the war crimes over which the International Criminal Court may exercise jurisdiction, while article 8(2)(f) of the Rome Statute subsequently determines the type of armed conflict that must exist for jurisdiction to be triggered. Accordingly, article 8(2)(f) reads: 'It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.' This second part of article 8(2)(f) determines that the nature of an armed conflict must be 'protracted'. The phrase 'protracted armed conflict' may or may not propose an additional (higher) threshold of violence requirement that must co-exist with the intensity of violence requirement inherent in the first part of the provision. This possibility fuels the debate that the notion of intensity inherent in article 8(2)(f) differs from that in article 8(2)(d) of the Rome Statute. If such an additional threshold of violence requirement under article 8(2)(f) of the Rome Statute exists, it may be argued that this provision creates a new category of non-international armed conflict unique to the Rome Statute. Available literature does not clarify this problem. Employing the rules of treaty interpretation, this article contemplates the meaning of the wording 'protracted armed conflict' in order to determine whether it is indeed possible that it introduces such a higher level of intensity.

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1 Introduction

The purpose of this article is to determine the intensity threshold expressed in article 8(2)(f) of the Rome Statute in the wording 'protracted armed conflict'.¹ In examining article 8(2)(f) of the Statute the ordinary meaning of the text, the context and the object and purpose of the provisions will be considered in accordance with the general principles of treaty interpretation.² The inclusion of the phrase 'protracted armed conflict' in the second sentence of article 8(2)(f) possibly creates a requirement for a higher threshold of violence than the minimum intensity of violence associated with protracted armed violence and, in fact, could institute a new category of non-international armed conflict. Alternatively, it may be that the inclusion of the phrase 'protracted armed conflict' is superfluous and is merely repetitive of the intensity of violence requirement already inherent in a Common Article 3-type armed conflict which provides that the intensity threshold is fulfilled if violence is protracted in nature.³ As only the requirement concerning the existence of a 'protracted' armed conflict not of an international character is contentious, and not the fact that the commission of a war crime presupposes the existence of a non-international armed conflict, the article serves to determine the content of the term 'protracted armed conflict' occurring in article 8(2)(f) of the Rome Statute. Furthermore, the article seeks to establish whether it

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

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), art 31(1); 31(2); 31(3); art 32. For an in-depth discussion of art 31(1), see JM Sorel & V Bore Eveno 'Article 31: Convention of 1969' in O Corten & P Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary: Volume I* (2011) 804–837; For an in-depth discussion of art 31, see Sorel & Bore Eveno and the *MOX Plant case (Ireland v The United Kingdom)* Provisional Measures, Case No 10 ITLOS, 3 December 2001, para 51; For an in-depth discussion of art 32, see Y le Bouthillier 'Article 32: Convention of 1969' in Corten & Klein 841–863.

³ Geneva Conventions of 12 August 1949; see also O Triffterer & K Ambos *Rome Statute of the International Criminal Court: A Commentary* 2 ed (2008) 441; K Dörmann, L Lijnzaad, M Sassòli & P Spoerri *International Committee of the Red Cross: Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016) 160–161; Y Dinstein *Non-International Armed Conflict in International Law* (2014) 190–191.

conceivably creates a new category of non-international armed conflict.⁴ Whether article 8(2)(f) demands an additional threshold of violence criterion and, consequently, establishes a new type of non-international armed conflict, however, is inconsequential in the context of international humanitarian law alone. It does not create a new category of non-international armed conflict to which only specific rules of international humanitarian law apply. Rather, the relevance of this distinction for the purposes of international criminal law is that individuals incur individual criminal responsibility for war crimes committed under article 8(2)(d) only if such crimes are committed during a conflict falling within the scope of article 8(2)(f) of the Rome Statute, the content of which is at present opaque.

Clarification in terms of the threshold of intensity and the meaning of an article 8(2)(f)-type armed conflict remains pressing from both an African (regional) and international perspective. It is reported that, at a minimum, a total of 36 non-international armed conflicts occurred in 2016.⁵ The need for clarification is prompted by situations currently being investigated by the Prosecutor of the International Criminal Court (ICC) as well as contemporary non-international armed conflicts occurring in the territory of signatories to the Rome Statute. Addressing future conflicts also requires a clear understanding of the construct 'protracted armed conflict'. Conflicts not of an international nature that are under investigation (up to the end of 2017) for the violation of war crimes have taken place in the following countries or territories: Afghanistan;⁶ Colombia;⁷ Nigeria;⁸ Central African Republic;⁹ Democratic Republic

⁴ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15–17 July 1998): Volume II Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, A/CONF.183/13 (Vol 11) paras 13, 40–41; 44, 67, 102, 146, 169; A Zimmerman and R Geiss 'War Crimes – Preliminary Remarks on Para 2(c)–(f) and Para 3' in O Triffterer & K Ambos *The Rome Statute of the International Criminal Court: A Commentary* 3 ed (2016) 544–546; M Cortier 'War Crimes' in R O'Keefe *International Criminal Law* (2015) 312–314; A Cullen 'The Concept of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: Interpreting the Threshold Contained in Article 8(2)(f): Rome Statute of the International Criminal Court' in A Cullen *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010) 180–185.

⁵ A Bellal *The War Report: Armed Conflict in 2016* 29–30 <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202016.pdf> (accessed 9 January 2018).

⁶ 'Afghanistan' <https://www.icc-cpi.int/afghanistan> (accessed 13 December 2017).

⁷ 'Colombia' <https://www.icc-cpi.int/colombia> (accessed 13 December 2017).

⁸ 'Nigeria' <https://www.icc-cpi.int/nigeria> (accessed 13 December 2017).

⁹ 'Central African Republic' <https://www.icc-cpi.int/car> (accessed 13 December 2017).

of the Congo;¹⁰ Mali;¹¹ Darfur;¹² and Georgia.¹³ Conflicts classified as non-international in nature in the 2016 War Report which occurred on the territory of state parties to the Rome Statute or were referred to the ICC by the United Nations (UN) Security Council took place in Colombia,¹⁴ Libya¹⁵ and Mali.¹⁶

Article 8(2)(f) of the Rome Statute determines the scope of application, that is, the arena (type of non-international armed conflict) in which the types of war crimes listed in article 8(2)(e) of the Rome Statute must be committed in order for the ICC to exercise jurisdiction over such violations. It is not disputed that the drafters of the Rome Statute drew on international humanitarian law to draft these provisions. At this juncture, the meaning of the term 'non-international armed conflict' is revisited briefly before considering the possibility of a new type of non-international armed conflict created by the wording 'protracted armed conflict' as included in article 8(2)(f) of the Rome Statute. Armed violence of clashes between a government and organised armed groups must meet certain criteria, including threshold of violence, to qualify as an international armed conflict.¹⁷ However, no definition for the term 'armed conflict' is contained in the relevant treaty. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), delineated what it considered to be the characteristics of armed conflict. In *Prosecutor v Duško Tadić* it phrased the formula as follows: 'An armed conflict exists whenever there is a resort to armed force between states or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a state' (own emphasis).¹⁸ Once a situation meets the requirements for the existence of an armed conflict, the second question, namely, what type of armed conflict it is, must be established. Subsequently, Trial Chamber I refined the *Tadić* formula with reference to the definitional criteria which serve to determine the existence of a non-international armed conflict. Specifically, in *Prosecutor v Duško Tadić aka 'Dule': Opinion and Judgment*, this was determined to be the intensity of the conflict (which must equate to protracted armed violence) and the level of organisation of the parties to

¹⁰ 'Democratic Republic of the Congo' <https://www.icc-cpi.int/drc> (accessed 13 December 2017).

¹¹ 'Mali' <https://www.icc-cpi.int/mali> (accessed 13 December 2017).

¹² 'Darfur' <https://www.icc-cpi.int/darfur> (accessed 13 December 2017).

¹³ 'Georgia' <https://www.icc-cpi.int/georgia> (accessed 13 December 2017).

¹⁴ Bellal (n 5 above) 63.

¹⁵ Id 79.

¹⁶ Id 87.

¹⁷ See *Prosecutor v Duško Tadić aka 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-A, A.Ch, 19 July 1998 para 70.

¹⁸ Ibid.

the conflict. Trial Chamber I stated that these two requirements served the sole purpose of differentiating a non-international armed conflict from 'banditry, unorganized and short-lived insurrections, or terrorist activities' which are not subject to international humanitarian law.¹⁹

The first part of article 8(2)(f) reproduces article 8(2)(d), which precisely dictates the scope of application of article 8(2)(c). Article 8(2)(d) of the Rome Statute mimics the wording 'armed conflict not of an international character' which also determines the scope of application of Common Article 3. The drafting history of the Rome Statute reflects that in drafting these war crime provisions, it was the intention of the drafters to codify custom.²⁰ The construct 'armed conflict not of an international character' is a manifestation of the customary understanding of this term as Common Article 3 has achieved customary international law status.²¹ Threshold requirements under article 8(2)(d) of the Rome Statute, Common Article 3 and customary international humanitarian law, therefore, are the same.²² The benchmark test for the notion of intensity under article 8(2)(d) of the Rome Statute, thus, is 'protracted armed violence'. Furthermore, the latter part of article 8(2)(c), as adopted in article 8(2)(f) of the Rome Statute, describes the same 'negative test' as is found in the text of article 1(2) of Additional Protocol II.²³ The purpose of this 'negative test' is to identify situations falling short of the level of intensity associated with 'armed conflict' and exclude them from the scope of application of article 8(2)(c) of the Rome Statute. The rationale is based on the fact that such situations are not an 'armed conflict'; they are 'internal disturbances and tensions, such as riots, isolated

¹⁹ *Prosecutor v Duško Tadić aka 'Dule'* IT-94-1-T 7 May 1997 (Opinion and (Judgment)) Trial Chamber I para 561.

²⁰ Summary Records (n 4 above) paras 41, 44, 67, 76, 102–112, 169, 277, 294. See also Cullen (n 4 above) 183–185; A Cullen 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)' (2008) 12 *Journal of Conflict and Security Law* 444. See *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo, Case No ICC-01/05-01/08, Pre-Trial Chamber III, 23 May 2008 paras 127–130; *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Case No ICC-01/04-02/06, Pre-Trial Chamber II, 9 June 2014 106.

²¹ See Dörmann *et al* (n 3 above) 443–444. These 2016 ICRC Commentaries explain: 'With respect to Article 8(2)(c), States restated the scope of application of common Article 3.'

²² *Ibid.*

²³ Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II).

and sporadic acts of violence or other acts of a similar nature'.²⁴ This formulation further echoes the conclusion that the threshold of violence associated with article 8(2)(c) of the Rome Statute is that of protracted armed violence.

Neither the geographical requirement nor the type of parties to the conflict delineated in article 8(2)(f) of the Rome Statute differs from the scope of application of article 8(2)(c) of the Rome Statute, which describes a Common Article 3-type armed conflict.²⁵ The inclusion of the phrase 'when there is protracted armed conflict', on the other hand, proves significant.²⁶ The term 'protracted armed conflict' is not included in the wording of article 8(2)(c) of the Rome Statute. An analysis of the intensity of violence threshold requirement of article 8(2)(c) of the Rome Statute reveals that the violence has to be protracted, but in this instance the noun 'violence' is modified by the adjective 'protracted', which is not used with reference to an 'armed conflict' as is the case in article 8(2)(f) of the Rome Statute. The meaning of the term 'protracted armed violence' must be examined before attempting a comparison.²⁷ The term 'protracted violence' necessitates that there has to be a certain level of intensity for an incident to be transformed into a non-international

²⁴ Dörmann *et al* (n 3 above) 443–444.

²⁵ Cullen (n 4 above) 180; WA Schabas *Oxford Commentaries on International Law: The International Criminal Court: A Commentary on the Rome Statute* (2010) 1999; Zimmerman and Geiss (n 4 above) 543–545.

²⁶ Rome Statute (n 1 above) art 8(2)(f).

²⁷ For a discussion of the 'threshold of violence' in the context of Common Article 3, see ICRC 'How is the Term "Armed Conflict" Defined in International Humanitarian Law' Opinion Paper, March 2008 5, as cited in Dörmann *et al* (n 3 above) paras 423 and 154. The ICRC expressed its understanding of non-international armed conflict thus: 'Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum* of organisation.' Dörmann *et al* (n 3 above) paras 427 and 155; Cullen (n 4 above) 117–123, 127. Cullen considers a clear understanding of the term 'protracted' important: 'It is useful to consider the terms of the *Tadić* definition as a means of clarifying this threshold of application of international humanitarian law. It is clear that intensity required for the existence of armed conflict is above that of internal disturbances and tensions. It is also clear that hostilities need not reach the magnitude of "sustained and concerted military operations". *The issue is one of clarifying the threshold of intensity that is required for the characterisation of a situation as one of armed conflict. This degree of intensity hinges on the interpretation of the word "protracted"*. The level of armed violence associated with this term determines the applicability of international humanitarian law when the organisational requirement of an armed group is also met' (own emphasis).

armed conflict.²⁸ Case law has identified specific indicators, which aid in an assessment of whether the violence resulting from a violent situation is sufficiently intense to constitute 'protracted armed violence'.²⁹ None of these indicators, in themselves, are determinative. Essentially, the interpretation of 'protracted violence' turns on the manner in which the violence is conducted rather than on its duration.³⁰

In order to clarify the meaning of the intensity test inherent in article 8(2)(f) of the Rome Statute and, thus, to determine the content and effect of the wording 'protracted armed conflict', two fundamental questions are required to be satisfactorily addressed. The initial question relates to the benchmark for measuring whether a situation is sufficiently intense to be considered an armed conflict both in the context of article 8(2)(d) of the Rome Statute and as expressed in the notion of 'protracted armed conflict' contained in article 8(2)(f) of the Rome Statute. Thus, the first question posed is: Do the minimum threshold requirements and constitutive indicators inherent in the notion of 'intensity' differ in the context of 'protracted armed violence'? The second question is: Does

²⁸ See *Tadić* (Appeals Chamber) (n 17 above); *Prosecutor v Boškoski and Tarčulovski*, Trial Judgment, Case No IT-04-82-T, T.Ch.II, 10 July 2008 para 175; *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Trial Judgment, Case No IT-04-84-T, T.Ch.I, April 2008 para 39; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Case No ICC-01/04-01/06, Pre-Trial Chamber I, 29 January 2007 para 538; *Prosecutor v Zejnil Delalić, Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga'*, Judgment, Case No IT-96-21-T, T.Ch., 16 November 1998; *Prosecutor v Enver Hadžihasanović, Amir Kubara*, Judgment, Case No IT-01-47-T, T.Ch., 15 March 2006; *Prosecutor v Georges Anderson Nderubumwe Rutanganda*, Judgment, Case No ICTR-96-3-T, T.Ch.I, 6 December 1999 para 93; *Prosecutor v Alfred Musema*, Judgment and Sentence, Case No ICTR-96-13-A, T.Ch.I, 27 January 2000 paras 248–251; *Prosecutor v Jean-Paul Akayesu*, Judgment, Case No ICTR 96-4-T, T.Ch.I, 2 September 1998 para 627.

²⁹ In the *Haradinaj* case (n 28 above) para 49, the Trial Chamber considered the way in which the criterion of 'protracted violence' had in practice been established by examining the cases of *Tadić*; *Čelebići*; *Slobodan Milošević*; *Kordić and Čerkez*; *Halilović*; *Limaj*; *Hadžihasanović and Kubura*; *Martić*; and *Mrkšić & Others*. The Trial Chamber determined that the following indicative factors existed in order to determine whether the nature of the violence indeed was protracted: [t]he number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.

³⁰ *Haradinaj* case (n 28 above) para 49; Dörmann *et al* (n 3 above) paras 88–94. Para 90 stipulates: 'The duration of hostilities is thus appropriately considered to be an element of the assessment of the intensity of the armed confrontations. Depending on the circumstances, hostilities of only a brief duration may still reach the intensity level of a non-international armed conflict if, in a particular case, there are other indicators of hostilities of a sufficient intensity to require and justify such an assessment.'

the wording 'armed conflict not of an international character' employed in article 8(2)(d) of the Rome Statute and 'protracted armed conflict' used in article 8(2)(f) of the Rome Statute refer to the same category of non-international armed conflict? If the answer to these questions is in the affirmative, then the notion of 'intensity' is the same for both situations. If the response is unclear or if the answer is in the negative, then it is possible that the notion of 'intensity' requires a differing level of violence under article 8(2)(f) of the Rome Statute and, consequently, will constitute a category of non-international armed conflict unique to this provision.³¹

The article is divided into five sections, including this introduction, and aims to clarify the intensity threshold introduced with the wording 'protracted armed conflict' as introduced by article 8(2)(f) of the Rome Statute. Section 2 of the article employs article 33 of the Vienna Convention on the Law of Treaties (Vienna Convention) to draw a textual comparison between the French and English versions of the Rome Statute. Section 3 surveys the drafting history of article 8(2)(f) of the Rome Statute as a subsidiary means of treaty interpretation. In section 4, the relevant case law of the ICC is fleshed out in order to answer the research questions posed in the article. Finally, a conclusion is drawn in section 5.

2 Textual Comparison

This section aims to determine the literal meaning of the term 'protracted armed conflict' as included in article 8(2)(f) of the Rome Statute. This analysis is undertaken by employing articles 31(1) and 33 of the Vienna Convention. This section also comments on the theories underpinning the scholarly debate central to the textual interpretation of the wording 'protracted armed conflict' as included in article 8(2)(f) of the Rome Statute. It will consider theories primarily concerned with a potentially faulty translation, as well as questions relating to poor drafting and redundant text.³²

An examination of the relevant French and English texts of the Rome Statute may shed light on whether there is merit to the argument that a linguistic error arose as a result of a mistranslation and, furthermore, that

³¹ cf Dörmann *et al* (n 3 above) para 444.

³² For a discussion of these theories, see Dörmann *et al* (n 3 above) 441; Dinstein (n 3 above) 190–191; S Sivakumaran *The Law of Non-International Armed Conflict* (2012) 192–194; S Sivakumaran 'Identifying an Armed Conflict Not of an International Character' in C Stahn and G Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 371–380; K Ambos *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (2014) 133; Cullen (n 20 above) 419.

such an error is the root cause of the misconception that article 8(2)(f) of the Rome Statute establishes a new category of armed conflict owing to the inclusion of the phrase 'protracted armed conflict'. Article 33 of the Vienna Convention covers the interpretation of treaties authenticated in multiple languages. This provision is employed in this part of the analysis as it has informative value central to the scholarly commentary suggesting that an erroneous translation contributed to the confusion that plagues the final sentence of article 8(2)(f) of the Rome Statute.³³

A comparison of the French and English texts of article 8(2)(f) of the Rome Statute enables us to make an assessment as to whether there is any discrepancy concerning the meaning of the term 'protracted armed conflict'. Both the English and French texts have been authenticated.³⁴ In the event of a treaty being authenticated in more than one language and the texts then diverging, one text has precedence over the other.³⁵ Article 33(4) of the Vienna Convention determines that if a comparison of two treaties reveals different meanings, the meaning which best encapsulates the object and purpose of the treaty and, consequently, best reconciles the text should prevail. The assumption, however, is that the meaning of the terms is identical in authentic drafts of the same treaty.³⁶ In this case, the presumption is that the term 'protracted armed conflict' means the same in both English and French. The existence of different meanings of a term in two or more languages will be accepted only if a comparison of authentic texts reveals this through the process of treaty interpretation as per articles 31 and 32 of the Vienna Convention on the Law of Treaties.

The official English version of the sentence in question reads: 'It applies to *armed conflicts* that take place in the territory of a state when there is *protracted armed conflict* between authorities and organised armed groups or between such groups' (own emphasis).³⁷ The equivalent sentence in French should read: '*Il s'applique aux conflits armés qui se déroulent sur le territoire d'un État lorsqu'il existe un conflit*

³³ Vienna Convention (n 2 above) art 33.

³⁴ Rome Statute (n 1 above) art 128.

³⁵ Vienna Convention (n 2 above) art 33(1). For a discussion of art 33, see the following sources: J Hardy 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals' (1961) 37 *British Yearbook of International Law* 72; P Germer 'Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties' (1970) 11 *Harvard International Law Journal* 400; D Shelton 'Reconcilable Differences? The Interpretation of Multilingual Treaties' (1996-1997) 20 *Hastings International and Comparative Law Review* 611; O Dörr 'Interpretation of Treaties Authenticated in Two or More Languages' in O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (2012) 587.

³⁶ Vienna Convention (n 2 above) art 33(3).

³⁷ Rome Statute (n 1 above) art 8(2)(f). If this sentence had read 'armed conflicts which are protracted', it would have eased the interpretative conundrum.

*armé prolongé entre les autorités gouvernementales et les groupes armés organisés ou entre ces groupes.*³⁸ However, the official French version of the text of article 8(2)(f) reads:

*L'alinéa 20 du paragraphe 2 s'applique aux conflits armés ne présentant pas caractère international et ne s'applique donc pas aux situations de troubles et tensions internes telle que les émeutes, les actes isolés et sporadiques de violence ou les actes de nature similaire. Il s'applique aux conflits armés qui opposent de manière prolongée sur le territoire d'un État les autorités du gouvernement de cet État et des groupes armés organisés ou des groupes armés organisés entre eux.*³⁹

The direct English translation of this provision reads: 'It applies to armed conflicts which are opposed, in a protracted manner, in the territory of a state, governmental authorities of this state and organised armed groups, or (occurs) between such organised armed groups.'⁴⁰ This translation highlights that the French term *opposent* refers to the fact that it is the fighting forces which are opposing each other in a protracted manner. At first glance, the translation of these texts reveals no fundamental difference between the wording of the official English and French texts.⁴¹ This observation is supported by a closer examination of pertinent terms in both languages, notably 'armed conflict' or *conflit armé* and 'protracted' or *prolongé*. The English terms will be defined first.

The adjective 'protracted' is defined as being to 'lengthen' or 'extend'.⁴² To 'protract' is synonymous with the verbs 'prolong', 'lengthen'; 'extend'; 'continue'; 'draw out'.⁴³ Each of these terms indicates a relationship with time. The adjective 'protracted' may be interpreted as referring to a prolongation of the period of time of an activity revealed by the noun it qualifies. In the present construct, the relevant phrase is an 'armed conflict'. The term 'armed conflict' here refers to an armed conflict not of an international character.⁴⁴ A literal interpretation of the phrase 'protracted armed conflict' thus suggests that an armed conflict not of an international character should be lengthy or prolonged. Therefore,

³⁸ The author relied on B Eveno *Le Petit Larousse Compact*: 2001, le premier du siècle (2000) for the translation.

³⁹ *Le texte du Statut de Rome de la Cour pénale internationale est celui du document distribué sous la côte A/CONF.183/9, en date du 17 juillet 1998, et amendé par les procès-verbaux en date des 10 novembre 1998, 12 juillet 1999, 30 novembre 1999, 8 mai 2000, 17 janvier 2001 et 16 janvier 2002. Le Statut est entré en vigueur le 1er juillet 2002.*

⁴⁰ The author used the *Le Petit Larousse* (n 38 above) for the translation.

⁴¹ *Statut de Rome* (n 39 above) art 8(2)(f).

⁴² M O'Neill & E Summers (eds) *Collins English Dictionary* (2015) 636.

⁴³ *Id* 673.

⁴⁴ See Rome Statute (n 1 above) art 8(2)(f).

this interpretation arguably introduces a 'temporal requirement' to be included in the 'intensity of violence requirement'. This temporal requirement is therefore additional to the level of violence which meets the intensity threshold associated with Common Article 3 that is met when (mere) 'protracted armed violence' occurs, for the fact that in this case 'duration' as a compulsory element of the intensity threshold is not considered.

As far as the French term *conflit* is concerned, the *Petit Larousse* dictionary gives priority to the meaning of 'the opposition between forces' in its definition,⁴⁵ which can mean armed opposition, and essentially refers to 'violence' or 'violent behaviour which erupts between forces'.⁴⁶ A direct translation of the latter part of the French text of article 8(2) (f) of the Rome Statute would read: '...which places in opposition, in a protracted manner in the territory of a state, governmental authorities and organized armed groups or between such groups'.⁴⁷ The construction indicates that it is the placing in opposition of the various forces that is protracted and, thus, it is the violence or force between the parties that is to be protracted or prolonged in nature in order for an armed conflict to exist. These analogies support the notion that the French wording should have referred to 'armed violence' and not 'armed conflict'.

Stated differently, the word 'violence' should have been the translated term for *conflit*.⁴⁸ The English word 'violence' is defined in French as *qua fait prevue de brutalité, d'emportement; qui a une force brutale, une grande intensité*.⁴⁹ This definition focuses on the intensity of the violence, highlighting that the intensity has to be 'brutal' and 'great'.⁵⁰ If the wording 'protracted armed conflict' is replaced by 'protracted armed violence', then the *Tadić* requirement indeed is mimicked.⁵¹ The protracted nature of the conflict is how the intensity of violence should be measured in order to determine whether or not an armed conflict exists. Approaching the French translation with caution, understanding that it should have read 'violence' instead of 'conflict', resolves the linguistic issue and favours the argument that there should be no new threshold

⁴⁵ *Le Petit Larousse* (n 38 above) 310.

⁴⁶ *Ibid.*

⁴⁷ *Statut de Rome* (n 39 above). The *Le Petit Larousse* (n 38 above) translation was used.

⁴⁸ The French meaning of the term 'violence' is '*qua fait prevue de brutalité, d'émportement*'; '*qui a une force brutale, une grande intensité*'. See *Le Petit Larousse* (n 38 above) 1068. See Sivakumaran, who comes to a similar conclusion. He based his analysis on a translation of the original French text and the authenticated English text of the *Tadić* definition; Sivakumaran in Stahn (n 32 above) 374–375.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See *Tadić* (Appeals Chamber) (n 17 above) para 70.

requirement as the Rome Statute was intended to codify custom and not to create new law.⁵² The fact that the term 'violence' was deliberately replaced by the term 'armed conflict', as evidenced by the Official Records of the Rome Statute, cannot be ignored.⁵³

The French text uses the term *prolongé*, which is then translated as 'protracted' in the English text. The *Petit Larousse* dictionary prioritises 'changing the duration of' or 'perpetuating' something in defining *prolonger*.⁵⁴ *Prolongé* means prolonged in English. The use of the word 'prolong' is in line with the interpretation that the second sentence of article 8(2)(f) of the Rome Statute necessitates a duration requirement. It is argued that the terms 'protracted' and 'prolonged' can be used interchangeably and that 'protracted' thus is used correctly in the English version of the provision. This interpretation is fully in keeping with the purpose of the Rome Statute, which is to codify custom and not to create new law.⁵⁵

Apart from there being a linguistic error which is the result of a faulty translation, it is questioned whether article 8(2)(f) is the result of poor drafting.⁵⁶ One such theory reasons that, apart from the suggestion that the use of the term 'violence' would have prevented the debate as it would have merely emphasised the threshold requirement already included in the scope of article 8(2)(f), the final sentence included in article 8(2)(f) of the Rome Statute is redundant.⁵⁷ This theory holds that the final sentence merely reiterates the requirements already spelled out in the

⁵² For a summary of the customary law argument, see Cullen (n 4 above) 183–185; Cullen (n 20 above) 443–445.

⁵³ Summary Records (n 4 above) 247.

⁵⁴ *Le Petit Larousse* (n 38 above) 829.

⁵⁵ ICRC Commentary of 2016 Article 3: Conflicts Not of an International Character <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDA490736C1C1257F7D004BA0EC> (accessed 23 November 2016) para 444; Sivakumaran (n 35 above) 794. The most popular theory is simply that the creation of a new category of non-international armed conflict is contrary to the object and purpose of the Statute. Sivakumaran summarises this argument as follows: 'The interpretation of a shared threshold of application between 2(c) and 2(e) is supported by the customary status of the offences in these sections. It is arguable that their recognition as norms of customary international law (applicable in all situations of armed conflict) makes the interpretation of a new category of non-international armed conflict in 8(2)(f) superfluous. Given that the *chapeau* of 2(e) states that all offences in this section stand "within the established framework of international law", it would seem unusual to place the interpretation of 8(2)(f) outside this framework.' This reasoning reflects the assertion that general agreement existed at the time of the drafting of the Rome Statute, namely, that the definitions of international crimes were to reflect existing customary international humanitarian law and not to create new law. Sivakumaran (n 32 above) 192–195.

⁵⁶ Sivakumaran (n 32 above) 192 note 287; Cullen (n 20 above) 419.

⁵⁷ Sivakumaran (as above).

first sentence and could have been deleted.⁵⁸ Another line of reasoning is that the text should have been drafted to refer to armed violence which is protracted instead of protracted armed conflict.⁵⁹ It is contemplated that the repetition of the term 'armed conflict' causes this unnecessary confusion.⁶⁰ The term 'protracted' arguably does not alter the existing intensity threshold but refers merely to the duration requirement.⁶¹ The argument that the duration requirement is employed to distinguish actual non-international armed conflicts from sporadic incidents of violence supports this theory.⁶² This way of thinking supports the notion that there is no distinction between the threshold of violence requirement (the existence of protracted armed violence) as included in article 8(2)(d) of the Rome Statute and in article 8(2)(f), as the term 'protracted' included in its second sentence relates merely to the qualifier that sporadic incidents are excluded from its scope of application.⁶³ The 2016 International Committee of the Red Cross (ICRC) Commentaries come to a similar conclusion.⁶⁴ These Commentaries to the First Geneva Convention have been consulted in validation of this interpretation as the Commentaries have value as analytical tools, constituting '[a] teaching that explores the meaning of the provision – looking at its object and purpose, situating it in context, considering its drafting history, analysing subsequent practice, and canvassing relevant literature – can prove influential'.⁶⁵ The ICRC Commentaries, in particular, are an invaluable subsidiary source and fill the role of publicist within the ambit of article 38(1)(d).⁶⁶

The 2016 ICRC Commentaries to Common Article 3 comment on the notions of 'protracted' and 'duration' and how the confusion relates to

⁵⁸ Ibid.

⁵⁹ Sivakumaran (n 32 above) 192–194, 373–379.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² D Fleck *The Handbook of International Humanitarian Law* 3 ed (2013) 588; Dörmann *et al* (n 3 above) 160–161. See also Cullen (n 20 above) 440, notes 89–90, where Cullen summarises Bothe's opinion (M Bothe 'War Crimes' in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 418) as follows: 'The systematic order of article 8 (crimes in connection with an international armed conflict/crimes in connection with non-international armed conflict) involves the need to determine two different thresholds: that between an armed conflict and a situation which does not at all constitute an armed conflict within the meaning of subparagraphs (c) or (e). The latter threshold is regulated by subparagraphs (e) and (f) for subparagraphs (c) and (e) respectively.' cf Fleck (n 62 above) 588.

⁶³ cf Fleck (n 62 above) 588.

⁶⁴ 2016 Commentaries (n 55 above) paras 443–444.

⁶⁵ S Sivakumaran 'The Influence of Teachings of Publicists on the Development of International Law' (2017) 66(1) *International and Comparative Law Quarterly* 15.

⁶⁶ See Sivakumaran (n 65 above) 3–5; 15–16 for an insightful review of the value of the ICRC's scholarly work, in general, and its commentaries, in particular.

the debate around article 8(2)(f) of the Rome Statute.⁶⁷ The ICRC is of the opinion that the interpretation that article 8(2)(f) intended to create a distinct type of armed conflict is not correct.⁶⁸ It interprets article 8(2)(f) of the Rome Statute to specify that violence must not be sporadic or isolated but instead, the violence should be sufficiently intense (thus protracted).⁶⁹ The 2016 ICRC Commentaries to Common Article 3 hold the opinion that the test to demonstrate 'intensity' used by the ICC involves those indicative factors previously identified by the ICTY Trial Chambers.⁷⁰ No new intensity threshold is created by article 8(2)(f). Moreover, paragraphs (d) and (f) of article 8(2) of the Rome Statute share exactly the same threshold requirements as Common Article 3.⁷¹

A contrary scholarly theory, related to the textual construction of article 8(2)(f) of the Rome Statute, rationalises that the inclusion of the term 'protracted armed conflict' in the latter part of article 8(2)(f) of the Rome Statute is simply redundant.⁷² Sivakumaran reasons that this term merely iterates that violence need not be 'sustained military operations' and that the essence of the 'protracted armed violence' requirement is intensity rather than duration.⁷³ This provision, therefore, is substantially the same as article 8(2)(d) of the Rome Statute and does not create a new category of non-international armed conflict.⁷⁴

Vité has summarised the opposing view held by others writing on the topic.⁷⁵ Cumulatively, these scholars interpret the text of article 8(2)(f) of the Rome Statute as definitely creating a new intensity criterion. They base this interpretation on the view that article 8(2)(f) is deemed to add a time criterion which is not necessitated under the intensity threshold associated with regular non-international armed conflict.⁷⁶ Scholars who share this opinion compare the intensity requirements by interpreting and comparing article 8(2)(d) and (f) of the Rome Statute.⁷⁷ As article 8(2)(d) directly refers to Common Article 3, the intensity threshold for this provision (as discussed earlier) is that of 'protracted armed

⁶⁷ 2016 Commentaries (n 55 above) paras 443–444.

⁶⁸ Ibid.

⁶⁹ 2016 Commentaries (n 55 above) para 443.

⁷⁰ Ibid.

⁷¹ Id paras 443–444.

⁷² Sivakumaran (n 32 above) 193.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ S Vité 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *Review of the Red Cross* 82. The works of R Provost *International Human Rights and Humanitarian Law* (2002) 268 ff and A Bouvier & M Sassòli (eds) *How Does Law Protect in War?* Vol 1, Geneva, ICRC (2006) 110 are cited.

⁷⁶ Ibid.

⁷⁷ Vité (n 75 above) 82, note 50.

violence'.⁷⁸ They share the point of view that, for an 'armed conflict not of an international character' to exist in the context of article 8(2)(d), duration is an 'optional' indicator which may be considered when evaluating whether or not a situation is sufficiently violent to constitute a Common Article 3 or article 8(2)(d)-type armed conflict.⁷⁹ These scholars express the opinion that duration is not an obligatory element in the phrase 'protracted armed violence'. In their view, the inclusion of the term 'protracted' in the final sentence of article 8(2)(f) introduces an additional minimum temporal requirement on top of the minimum intensity test already included in the existing notion of 'protracted armed violence'.⁸⁰ These scholars rationalise the inclusion and positioning of the term 'protracted' to make 'duration' a constitutive element which must be fulfilled for a situation to satisfy the intensity threshold required by article 8(2)(f) of the Rome Statute.⁸¹ Therefore, these scholars make a persuasive argument that article 8(2)(f) does create a new category of non-international armed conflict in the context of which war crimes listed in article 8(2)(d) should have been committed in order for the ICC to be able to exercise jurisdiction over such alleged war crimes.⁸²

Cullen emphasises the significance of the common usage of the construct 'armed conflict not of an international character' as the basis of his textual interpretation of the provisions concerned with war crimes committed in the context of non-international armed conflict.⁸³ The essence of his argument (as explained hereafter) is that, owing to the unique meaning which this phrase (armed conflict not of an international character) has acquired in international humanitarian law, and its inclusion in article 8(2)(f), this refutes arguments suggesting that the term 'protracted armed conflict' introduces a unique notion of intensity threshold under this provision. It is generally accepted that the notion of intensity needed to establish an 'armed conflict not of an international character' is the same notion of intensity as that which triggers the application of Common Article 3.⁸⁴ This degree of violence is also termed the 'lower threshold of application' and the minimum threshold requirement test determined by this notion of intensity is formulated as 'protracted armed violence'.⁸⁵ The construct 'armed conflict not of an international character' is included in several international humanitarian

⁷⁸ Vité (n 75 above) 82.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Cullen (n 20 above) 442; Cullen (n 4 above) 182–183.

⁸⁴ Ibid.

⁸⁵ Ibid.

law treaties states Cullen. Consequently, he argues that it has acquired a special meaning in international humanitarian law.⁸⁶ Historically, the same minimum threshold of violence envisaged in the notion 'protracted armed violence' applies to all international humanitarian law treaties which refer to 'armed conflict not of an international character' within its scope of application (except, perhaps, article 8(2)(f)-type conflicts).⁸⁷ None of the treaties (arguably except for article 8(2)(f) of the Rome Statute) which refer to 'armed conflicts not of an international character' deviate from the accepted lower threshold criteria, also known as the *Tadić* criteria.⁸⁸ The material scope of application included in article 1(1) of Additional Protocol II substantiates this argument. The material scope of application of article 1(1) and the notion of intensity associated with the minimum threshold of violence which has to be present in a situation to transform a situation into an Additional Protocol II-type armed conflict is higher than the threshold requirements included in Common Article 3.⁸⁹ The wording 'armed conflict not of an international character', therefore, does not appear in article 1(1) of Additional Protocol II.⁹⁰

Cullen considers this example to clearly signal that the meaning of this term is settled in law as it is consistently relied on, and its constitutive elements are referred to in a uniform manner (the existence of a certain degree of organisation of the organised armed group party to the conflict and the presence of protracted armed violence).⁹¹ Therefore, he argues that article 8(2)(f) of the Rome Statute introduces no new intensity standard. This argument is persuasive to an extent, but does not explain why the second sentence of article 8(2)(f) of the Rome Statute was indeed adopted. This sentence clearly incorporates the term 'protracted armed conflict' in the scope of application of this provision and cannot be ignored. Perhaps this is why Cullen offers an additional interpretation

⁸⁶ The treaties specifically cited by Cullen are the First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358-64 art 19(1); Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) (adopted 3 May 1996, entered into force 3 December 1998); United Nations CCW/CONF.I/ 16 art 1(3); 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 2001 (adopted 21 December 2001, entered into force 18 May 2004) CCW/CONF.II/2 (CCW) art 1(3); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999 (adopted 26 March 1999, entered into force 9 March 2004) 38 ILM (1999) 769-782 (Eng) art 22. See Cullen (n 20 above) 442 and Cullen (n 4 above) 182-183.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

of the scope of application of these war crime provisions which places an emphasis on the placement and usage of the term 'other' as included in article 8(2)(e) of the Rome Statute: '*Other* serious violations of the laws and customs applicable in *armed conflicts not of an international character* within the established framework of international law, namely, any of the following acts ...'⁹²

Cullen therefore deems the positioning and use of the term 'other', and its proximity to the term 'armed conflicts not of an international character', to categorise offences listed in article 8(2)(e) of the Rome Statute in such a way that its scope of application is that required by Common Article 3-type armed conflicts.⁹³ The result of relying on the use of the term 'other' has the same result as his previous interpretation, which focuses on the understanding of the term 'armed conflict not of an international character'. Accordingly, it supports a singular scope of application and a singular notion of intensity which is that of 'protracted armed violence' to be applicable to article 8(2)(c), (d), (e) and (f) of the Rome Statute.⁹⁴

This line of reasoning, which is the result of 'selective' textual interpretation, may be subject to scrutiny. For instance, while such an interpretation of article 8(2)(e) of the Rome Statute may at first glance seem logical, the interpreter has to be mindful that it is not the purpose of article 8(2)(e) of this treaty to determine the scope of application in which the war crimes listed in it should take place in order for the ICC to exercise jurisdiction. Rather, the purpose of article 8(2)(e) is to criminalise what it considers to be the most serious violations of the laws and customs of non-international armed conflicts and to bring them within the jurisdiction of the ICC. It is article 8(2)(f) of the Rome Statute alone which was purposefully included in order to determine the type of conflict which must be present and during which such war crimes as those listed under article 8(2)(e) of this treaty are committed in order for the ICC to have substantive jurisdiction over those who allegedly committed such atrocities.

In essence, therefore, this section reveals that a comparison of the English and French texts of article 8(2)(f) of the Rome Statute suggests that the term 'prolonged' indeed requires a longer or prolonged armed conflict. This interpretation supports the creation of a new category of non-international armed conflicts. On the other hand, an examination of the theories underpinning the scholarly debate central to this textual inconsistency revealed that some theories oppose this outcome of the

⁹² Cullen (n 4 above) 182–183.

⁹³ Ibid.

⁹⁴ Ibid.

textual comparison and are against the introduction of a new category of armed conflict as a result of the inclusion of the term 'protracted armed conflict'. At this stage of the analysis, it is inconclusive as to whether article 8(2)(f) of the Rome Statute indeed provides for a new category of armed conflict. The drafting history, as a subsidiary means of interpretation, is consulted in order to give clarity with reference to this term as the literal interpretation fails to offer the necessary clarity.⁹⁵

3 Drafting History

This section serves to examine key contributions made during the negotiation of the Rome Statute as a supplementary means of interpretation in order to promote a better understanding of why the term 'protracted armed conflict' was included in article 8(2)(f) of the Rome Statute.⁹⁶ Not only does it chronologically summarise these contributions, but it also aims to provide a background concerning the motivation behind each of these contributions as this is essential in order to understand the logic behind the final outcome of the debate around this somewhat unsatisfactory provision. Scholarly theories which consider that the intent of the drafters will offer insight as to whether article 8(2)(f) of the Rome Statute was intended to create a new type of armed conflict will also be examined.⁹⁷

The term 'protracted' is used without substantial content in the Summary Records of the Rome Statute.⁹⁸ However, the work clarifies when and why the term 'protracted armed conflict' was included in the relevant war crime provision and without explanation it reveals that the term 'violence' was replaced by the term 'armed conflict'.⁹⁹ A deconstruction of key developments and proposals made in the drafting process of the provision, which later became article 8(2)(f) of the Rome

⁹⁵ Summary Records (n 4 above) 247.

⁹⁶ See Vienna Convention (n 2 above) art 32, which recognises the drafting history of a treaty as a supplementary source of treaty interpretation. 'Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 either: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' For an in-depth discussion of art 32 itself, see Corten & Klein (n 2 above) 841–863; Dörr & Schmalenbach (n 35 above) 571–586.

⁹⁷ Sivakumaran (n 32 above) 192–195, 371–380; Cullen (n 4 above) 175–177; Cullen (n 20 above) 428–438.

⁹⁸ Summary Records (n 4 above) 247.

⁹⁹ Ibid.

Statute, to some extent promotes an understanding of why the provision was formulated in the way it was.¹⁰⁰

Initially, the committee whose task it was to draft Part 2 of the Rome Statute divided the definition of war crimes into four sections.¹⁰¹ Sections A and B focused on norms regulating international armed conflict; sections C and D regulated norms central to war crimes committed in the context of non-international armed conflict.¹⁰² The inclusion of section C was uncontentious and provoked little discussion as it criminalised offences contrary to the norms included in Common Article 3, and its scope of application was identical to that of Common Article 3-type armed conflicts.¹⁰³ Conversely, the types of norms and the arena (type of non-international armed conflict) in which such war crimes could be committed under section D (which later become article 8(2)(e) and (f) of the Rome Statute) triggered divisive debate.¹⁰⁴

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

Section D of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.¹⁰⁵

This draft offered by the Bureau mimicked the very high threshold requirements included in article 1(1) of Additional Protocol II.¹⁰⁶ The draft proved problematic for several reasons.¹⁰⁷ First, a duplication of the scope of application of Additional Protocol II would exclude non-international armed conflicts in which the territorial state does not participate.¹⁰⁸ Second, Additional Protocol II and the Bureau draft apply exclusively to conflicts in which a state party opposes a non-state party.¹⁰⁹ These provisions do not apply to armed conflicts in which one or more

¹⁰⁰ Ibid.

¹⁰¹ Id paras 33, 157.

¹⁰² Ibid.

¹⁰³ Id paras 40, 158.

¹⁰⁴ Id paras 10, 14, 34, 36, 50, 52, 54, 55, 62, 74, 76, 104, 107, 108, 110, 114–120, 161, 169, 268–271, 273.

¹⁰⁵ Id para 215; Geneva Protocol II (n 23 above).

¹⁰⁶ Summary Records (n 4 above) para 215.

¹⁰⁷ Ibid.

¹⁰⁸ Id paras 2, 60, 331, 344.

¹⁰⁹ Id paras 8, 60, 331, 335.

non-state parties fight each other.¹¹⁰ Third, another restriction inherent in the Bureau draft lies in the fact that the four threshold requirements that must be satisfied in order for a situation to be characterised as an Additional Protocol II-type armed conflict are difficult to satisfy.¹¹¹ By reproducing article 1(1) of the Additional Protocol, this Bureau draft effectively excluded the majority of armed conflicts not of an international character.¹¹² Consequently, had this draft been accepted, many war crimes would go unpunished as they would fall outside the scope of jurisdiction of the ICC.¹¹³

Fourth, the task of the drafting committee was to codify 'custom'; the creation of new law fell outside the scope of its mandate.¹¹⁴ In reality, the inclusion of Additional Protocol II threshold requirements in section D exceeded the mandate of the drafting committee.¹¹⁵ At the time of drafting (and this is still the case), Additional Protocol II had not been ratified by many, let alone all, states.¹¹⁶ The poor ratification rate also suggests that it is unlikely that many of the articles acquired customary status.¹¹⁷ The Bureau's draft proposal of section D of the Rome Statute was rejected based on the reasons listed above.¹¹⁸

After reviewing the Bureau draft, Mr Haffner, the Austrian representative on the drafting committee, suggested that the *chapeau* of section D included armed conflicts not of an international character in which only organised armed groups were engaged in fighting, regardless of whether such groups exercised control over the territory.¹¹⁹ Mr Dabor of Sierra Leone made a seminal contribution to the final formulation of the *chapeau* of section D, which ultimately became the second, albeit contentious, part of article 8(2)(f) of the Rome Statute.¹²⁰ Mr Dabor voiced his reservations about the *chapeau* of section D as it appeared

¹¹⁰ Id paras 8, 24, 34, 52, 60, 103, 169, 321, 331, 335.

¹¹¹ Summary Records (n 4 above) paras 52, 348.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Summary Records (n 4 above) paras 41, 44, 67, 102–112, 161, 169, 277, 294; See also Cullen (n 4 above) 183–185; Cullen (n 20 above) 444.

¹¹⁵ Ibid.

¹¹⁶ See <http://ihl-databases.icrc.org/applic/ihl/ihl> (accessed 9 November 2013) for a list of state parties to Additional Protocol II.

¹¹⁷ Sivakumaran is of the opinion that the likelihood of the provisions of Additional Protocol II acquiring customary status are 'few and far between'; S Sivakumaran 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 *European Journal of International Law* 224.

¹¹⁸ Summary Records (n 4 above) paras 41, 44, 67, 102–112, 161, 169, 277, 294.

¹¹⁹ Id paras 14, 320. See also the proposal by Bosnia and Herzegovina as summarised in the Summary Records (n 4 above) paras 42, 347. Mr Haffner's comment is included as evidence that the high threshold of violence associated with Additional Protocol II was discarded by the drafters.

¹²⁰ Summary Records (n 4 above) paras 8, 335.

in the Bureau proposal.¹²¹ His delegation found that the text, which confined the scope of application of Section D to those organised armed groups exercising control over territory, was too restrictive.¹²² He offered the example of his country, Sierra Leone, where rebel forces engaged in armed conflict not of an international character did not occupy territory and, consequently, the present formulation of the text (Bureau proposal) would exclude similar types of internal armed conflict.¹²³ Mr Dabor suggested that the second sentence of the introductory part to Section D had to be deleted and replaced with the following: 'It applies to armed conflicts that take place in a territory of a state when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups.'¹²⁴ Interestingly, the minutes of this meeting reveal that the term 'conflict' was replaced by the term 'violence'.¹²⁵

This formulation was well received by the majority of states.¹²⁶ The drafting history, however, does not provide what the members of the drafting committee understood the implications of the terms of the new threshold requirement included in the Sierra Leone proposal to be.¹²⁷ The summary records indicate that the Sierra Leone proposal explicitly sought to replace the word 'violence' with 'conflict',¹²⁸ but they fail to mention the reasoning behind this substitution.¹²⁹ In addition, the drafting history is silent as to why the word 'violence' (which mirrors the Tadić formulation) was replaced by the term 'conflict'.¹³⁰ Clearly, the change was intentional; otherwise the minutes would not reflect it.¹³¹ The inclusion of the term 'conflict' deviates from the *Tadić* formulation. Arguably, then, here is a hint that a new category of armed conflict

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Document A/CONF.183/C.1/L.62; Summary Records (n 4 above) 247.

¹²⁵ Document A/CONF.183/C.1/L.62. 'Introductory paragraph to Section D, second sentence: Replace the sentence with the following: "It applies to armed conflicts that take place in a territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups." The word "Party" has been deleted, and the word "violence" has been changed to "conflict" (own emphasis).

¹²⁶ States expressly showing support and preference for this draft included Uganda, Portugal, the Solomon Islands and Slovenia. See Summary Records (n 4 above) paras 23, 37, 73, 80, 337–338, 342, 346. For a further discussion in respect of the formulation of section D, see specifically A/Conf.183/C.1/Sr.35, 334–343.

¹²⁷ See discussion in Cullen (n 4 above) 175; Sivakumaran (n 32 above) 194–195.

¹²⁸ Document A/CONF.183/C.1/L.62; Summary Records (n 4 above) 247.

¹²⁹ Ibid.

¹³⁰ See specifically A/Conf.183/C.1/Sr.35, 334–343.

¹³¹ Ibid.

has been created.¹³² The question, though, is whether or not the inclusion of the term 'conflict', or rather the formulation of the phrase 'protracted armed conflict', establishes a new additional threshold requirement, distinct from article 8(2)(d) of the Rome Statute and, as a result, from Common Article 3. A comment made by Mr Zappalà, the representative from Bosnia and Herzegovina, at the 36th meeting of the final conference, indicates that at least one state representative regarded this formulation as creating a new threshold requirement.¹³³ His delegation was concerned about raising the threshold for war crimes under section D and, therefore, thought that *if a different threshold had to be established*, the wording proposed by the delegation of Sierra Leone would be acceptable.¹³⁴ The other states represented on the drafting committee failed to respond to this comment.¹³⁵ It is possible that their silence signalled acquiescence. However, there is nothing in the drafting history to support this interpretation.¹³⁶

However, there is also scholarly support for a different interpretation of the drafting history.¹³⁷ Cullen starts his analysis of the drafting history by acknowledging that the discussion surrounding the final version of article 8(2)(f) in the Summary Records is limited. Most importantly, he emphasises that no reference whatsoever is made to how the states serving on the drafting committee understood the proposal by Sierra Leone in relation to the existing scope of application of Common Article 3.¹³⁸ He does, however, find it important to revisit the timeline and the comments made during the final conference in Rome before this drafting committee met.¹³⁹ This interpretation by Cullen arguably rests on a timeline of contributions signalling four significant stages of the negotiations during the Rome Conference concerning the provisions dealing with war crimes committed in non-international armed conflict.¹⁴⁰ These negotiations took place over a five-week period.¹⁴¹ The first significant period refers to the first four weeks of the negotiations as well as to the work conducted by the preparatory committee prior to the Rome Conference.¹⁴² At this stage, the draft provision featured only one *chapeau* that introduced a unified scope of application for violations of

¹³² *Tadić* (Appeals Chamber) (n 17) para 70.

¹³³ Summary Records (n 4 above) paras 42, 347.

¹³⁴ *Ibid.*

¹³⁵ A/Conf.183./C.1.SR.36; Summary Records (n 4 above) 343–348.

¹³⁶ Summary Records (n 4 above).

¹³⁷ Cullen (n 20 above) 419–445; Cullen (n 4 above) 175.

¹³⁸ Cullen (n 20 above) 436; Cullen (n 4 above) 175.

¹³⁹ *Ibid.*

¹⁴⁰ Cullen (n 20 above) 436–438; Cullen (n 4 above) 175–177.

¹⁴¹ Cullen (n 20 above) 437; Cullen (n 4 above) 176.

¹⁴² Cullen (n 20 above) 437; Cullen (n 4 above) 175–176.

Common Article 3 and other violations of the law of non-international armed conflict.¹⁴³ The initial draft, thus, featured only a single scope of application for all war crimes committed during non-international armed conflict. This single scope of application was one that was a duplication of the minimum threshold requirements which is unique to Common Article 3.¹⁴⁴

The second significant moment was when the Bureau's draft introduced separate thresholds of application for war crimes specifically criminalised under Common Article 3 and then the category of 'other serious violations' of the law of non-international armed conflict.¹⁴⁵ This draft was introduced a mere four days before the end of the negotiating conference.¹⁴⁶ As has been explained earlier in this article, the Bureau draft echoed the strict scope of application of Additional Protocol II for crimes that fell within the category 'other serious violations' of the law of non-international armed conflict.¹⁴⁷ The Bureau draft was not well received. It faced heavy criticism.¹⁴⁸ The fact that the Bureau draft was criticised, interprets Cullen, is an overall criticism of the introduction of more than one threshold of application in the context of the war crime provisions criminalising violations of the law of non-international armed conflicts.¹⁴⁹ He does not consider the criticism to necessarily be an outcry against the inclusion of the very high threshold tests adopted from Additional Protocol II into the Bureau draft.¹⁵⁰ Notwithstanding this, Cullen refers to this second significant period as a 'hasty' introduction of a reformulated draft.¹⁵¹

The third significant moment was the introduction of the Sierra Leone proposal.¹⁵² Sierra Leone redrafted the war crime provisions applicable to non-international armed conflict in order to remedy the situation that had been created by the introduction of the Bureau draft.¹⁵³ Sierra Leone removed references to territorial control and Additional Protocol II-type language from its formulation of the provision as it agreed that the Bureau draft had been too restrictive.¹⁵⁴

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Cullen (n 20 above) 437; Cullen (n 4 above) 176.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Cullen (n 20 above) 437; Cullen (n 4 above) 176–177.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Cullen (n 20 above) 437; Cullen (n 4 above) 177.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

The fourth and final significant moment refers to the fact that the proposal made by Sierra Leone was almost instantaneously accepted and adopted into the final text.¹⁵⁵ Hardly any recorded discussion relative to the adoption of this text exists and, according to him, there is no record of the views of the parties.¹⁵⁶ In fact, Cullen suggests that the acceptance of the Sierra Leone draft and the almost instantaneous rejection of the Bureau draft confirm the uniformity and consistency of the intent of the drafters throughout the drafting process, which is that a single scope of application should apply for all war crimes committed during non-international armed conflict.¹⁵⁷ He argues that the two separate *chapeaux* that were adopted in the final draft, therefore, do not introduce two different thresholds of application for the crimes listed in article 8(2)(c) and (d) of the Rome Statute and that, consequently, article 8(2)(f) is a mere development of the threshold contained in article 8(2)(d) of the Rome Statute.¹⁵⁸

Unfortunately, any interpretation of this drafting history might be flawed by elements of subjectivity as only limited information can be derived from it. Sivakumaran's criticism of Cullen's deconstruction of the time line and key events of the drafting process of the Rome Statute is, first, that some comments made during the negotiations may have been disregarded as being unhelpful and that some of the inferences made could have been subjective. For instance, even though the first draft of the provision used during the first stage had a single *chapeau*, there is some evidence from the drafting history that not all state parties were satisfied with this, and that they encouraged a stricter formulation of the scope of application for 'other serious crimes'.¹⁵⁹ This possibly motivated the Bureau to introduce its reformulation of the provision.¹⁶⁰ Although there admittedly is almost no reflection of the way in which state parties interpreted the Sierra Leone draft, at least one state voiced the opinion that it considered that Sierra Leone had set a higher threshold

¹⁵⁵ Cullen (n 20 above) 437–438; Cullen (n 4 above) 177.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* 'The fact that each section is now covered by a different *chapeau* should not necessarily be taken to imply different fields of application. Indeed, it will be argued in the section that follows that Article 8(2)(f) must be read as a development of the threshold contained in Article 8(2)(d), implying uniformity of applicability for both sections.'

¹⁵⁹ See Sivakumaran (n 32 above) 192 footnote 289, where he refers to the commentary of the delegates of Egypt, Sudan and Bahrain. A/CONF.183/C.1/SR.26 para 115 (Egypt); A/CONF.183/C.1/SR.28 para 64 (Sudan); A/CONF.183/C.1/SR.27 para 21 (Bahrain).

¹⁶⁰ See the Bureau Draft at Summary Records (n 4 above) 215.

of application in article 8(2)(f) than the one included in article 8(2)(d) of the Rome Statute.¹⁶¹

What is helpful from this summary of key developments is that it is evident that the scope of application included in the Bureau's draft of this provision, which was strongly reminiscent of the scope of application included in article 1(1) of Additional Protocol II, was overly strict and unacceptable to most, if not all, states.¹⁶² It is also clear that not only was the territorial requirement removed from the draft, but the material scope of application that was consistent with the unique language formulation of Additional Protocol II, was removed through the Sierra Leone proposal.¹⁶³ A lower level of intensity clearly is required by the Sierra Leone draft, which later became the adopted provision.¹⁶⁴ What is unclear and cannot be established from either the text or the drafting history alone is whether this formulation is stricter than the scope of application included in article 8(2)(c) of the Rome Statute and, if it is not narrower, why a second *chapeau* is included.¹⁶⁵

It is argued that the drafters of the Rome Statute did not intentionally wish to differentiate between the threshold of violence requirements included in article 8(2)(d) and (f) of the Rome Statute and, furthermore, that this outcome is due to a linguistic error.¹⁶⁶ The argument that linguistic issues led to the inclusion of the term 'protracted armed conflict' instead of 'protracted armed violence' plausibly relies on the drafting history.¹⁶⁷ It is arguable that the delegate of Sierra Leone wanted to reduce the threshold requirement proposed by the Bureau¹⁶⁸ rather than introduce a new threshold that differed from article 8(2)(c) of the Rome Statute.¹⁶⁹ This line of reasoning is supported by a comparison between the transcript of the speech given by the delegate from Sierra Leone (in French) when he introduced the text (in English).¹⁷⁰ The terminology he

¹⁶¹ See the comment made by Mr Zappalà of Bosnia as recorded in the Summary Records (n 4 above) 347 para 42; cf A/Conf.183/C.1/SR. 36, Summary Records (n 4 above) 343–348.

¹⁶² Summary Records (n 4 above) 320 paras 8, 14, 24, 34, 52, 60, 169, 321, 331, 355.

¹⁶³ cf Text of Bureau Draft available at Summary Records (n 4 above) 215 and the Sierra Leone draft in Summary Records (n 4 above) 247 and A/CONF.183/C.1/L.62.

¹⁶⁴ Ibid.

¹⁶⁵ cf Rome Statute (n 1 above) art 8(2)(f) with Sierra Leone Draft at Summary Records (n 4 above) 247 and A/CONF.183/C.1/L.62.

¹⁶⁶ Sivakumaran (n 32) 373.

¹⁶⁷ Sivakumaran (n 32 above) 192. For an in-depth discussion of Sivakumaran's theory, see Sivakumaran (n 32 above) 373–380. This section between footnotes 170–180 serves as a summary of his argument.

¹⁶⁸ Ibid 174.

¹⁶⁹ Sivakumaran (n 32 above) 374.

¹⁷⁰ Ibid.

used in the speech is identical to the wording in the French version of the *Tadić* case.¹⁷¹ The applicable section in the *Tadić* case reads:

*Nous estimons qu'on armé ont lieu sur le territoire d'un Etat dès lors qu'il existe un conflit armé prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes au sein d'un Etat.*¹⁷²

The comparable section in the speech of the delegate of Sierra Leone is as follows:

Elle s'applique aux conflits armés existe chaque fois qu'il y a recours à la force armée entre Etats ou un conflit armé prolongé entre les autorités gouvernementales et des groupes armés ou entre de tels groupes.¹⁷³

A direct translation of the relevant section of the speech reads: '[W]e believe that an armed force (or armed conflict) takes place on the territory of a state when there is prolonged armed conflict between the governmental authorities and organised armed groups or between such groups within a state.'¹⁷⁴ The repetition of the term 'armed conflict' creates a redundancy, that is, that the war crimes listed in article 8(2)(e) apply to armed conflict taking place in a state where there is an armed conflict.

It is possible that the word *conflit* has been correctly translated but that it had been inappropriately used in the French text.¹⁷⁵ The original French text of the *Tadić* case may be translated as follows: 'It applies to armed conflicts whenever there is recourse to armed force between states or protracted armed conflict between governmental authorities and armed groups or between such groups.'¹⁷⁶ In the alternative exposition, the wording 'armed force' could also be translated as 'armed violence'.¹⁷⁷ If, indeed, the speech was intended to mimic the *Tadić* criteria, it makes sense that the wrong term was used in the speech. Sivakumaran notes that this comparison supports the notion that it was the intention of the delegation from Sierra Leone simply to adopt the

¹⁷¹ Ibid. These provisions are cited as they appear in Sivakumaran in Stahn (n 32 above) 374, footnotes 83–84.

¹⁷² As cited in Sivakumaran in Stahn (n 32 above) 374, footnote 84.

¹⁷³ Id footnote 83.

¹⁷⁴ The author used the *Le Petit Larousse* (n 38 above) for the translation.

¹⁷⁵ *Le Petit Larousse* (n 38 above) 310.

¹⁷⁶ *Tadić* (Appeals Chamber) (n 17 above) para 70.

¹⁷⁷ *Le Petit Larousse* (n 38 above) 310.

Tadić criterion and that the word *conflit*¹⁷⁸ was mistranslated as ‘conflict’ rather than as ‘violence’.¹⁷⁹

Flaws are conceivably inherent in this line of argument: it may be that the Summary Records of the Rome Conference do not reveal the intention of the delegate of Sierra Leone. Moreover, no record from the Rome Conference reflects the fact that the delegate from Sierra Leone intended to mimic the *Tadić* criterion or that his delegation wanted the proposed provision to have precisely the identical threshold of violence requirement as had been included in draft article 8(2)(d) of the Rome Statute.¹⁸⁰ The delegate from Sierra Leone clearly wanted to oppose the inclusion of the higher Additional Protocol II threshold, but no further information is available, and there is no record of the intention of this delegation.¹⁸¹

In summary, a survey of the drafting history reveals that the threshold requirements inherent in Additional Protocol II were too restrictive and, consequently, the Bureau proposal was rejected and the Sierra Leone proposal was adopted in its place. Interestingly, this proposal replaced the term ‘violence’ with ‘conflict’ but failed to give content to the construct ‘protracted armed conflict’ or to motivate the change from ‘violence’ to the term ‘conflict’.¹⁸² The inclusion of ‘protracted armed conflict’ is what causes confusion as it remains uncertain as to whether the drafters intended to include a threshold requirement distinct from Common Article 3-type armed conflicts as they are included in article 8(2)(d) of the Rome Statute.¹⁸³ In order to determine the meaning of the construct ‘protracted armed conflict’, the subsequent section examines the relevant case law of the ICC with the goal of promoting a better understanding of whether a new threshold requirement was indeed included in article 8(2)(f) of the Rome Statute.

4 Case Law

The ICC on various occasions considered the classification of a situation falling within the parameters of article 8(2)(f)-type non-international armed conflicts when accused persons faced charges based on

¹⁷⁸ *Le Petit Larousse* (n 38 above) 247: ‘*Opposition pouvant aller jusqu’à la lute armée entre deux ou plusieurs Etats. Un conflit mondial.*’ The word ‘conflict’, thus, can be translated to mean opposition which is sufficient to become an armed struggle between two or more states: a global conflict. The word *conflit* is also a synonym for *belligérance*, which is closely related to a state of civil war.

¹⁷⁹ Sivakumaran (n 32 above) 194.

¹⁸⁰ cf Summary Records (n 4 above).

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

the war crimes listed in article 8(2)(e) of the Rome Statute.¹⁸⁴ These cases include the *Lubanga*,¹⁸⁵ *Katanga*,¹⁸⁶ *Ntaganda*,¹⁸⁷ *Bemba*¹⁸⁸ and *Al Mahdi*¹⁸⁹ cases. It is necessary to carefully consider the facts peculiar to each of these decisions, as the relevant Trial and Pre-Trial Chambers consider the classification of a situation as satisfying the scope of application of article 8(2)(f) of the Rome Statute in the context of the facts of each case before it. These Chambers also pay attention to the existence of certain indicators they consider to carry greater weight than others on a case-by-case basis. It is only through an analysis of the facts of the situation in question and how they relate to the term 'protracted armed conflict' that the approach of the courts and their understanding of the term 'protracted armed conflict' are clarified.

4.1 Lubanga Case (March 2012)

The types of war crimes of which Thomas Lubanga Dyilo was accused fall under the category of article 8(2)(e) war crimes as included in the Rome Statute.¹⁹⁰ Therefore, it was necessary for Pre-Trial Chamber I to review the events that had occurred between 2 June 2003 and late December 2003 in order for the ICC to be able to exercise jurisdiction over these types of war crimes. Such crimes must be committed within the type of conflict described in article 8(2)(f) of its Statute.¹⁹¹

¹⁸⁴ *Lubanga* (Pre-Trial Chamber) (n 28 above) 506; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga*, Trial Judgment, Case No ICC-01/04-01/07, Trial Chamber 7 March 2014; *Ntaganda*, *Warrant of Arrest*, Case No ICC-01/04-02/06, Pre-Trial Chamber I, 22 August 2006; *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Bosco Ntaganda*, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda*, Pre-Trial Chamber II, 9 June 2014; *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, *Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo*; Pre-Trial Chamber III, 23 May 2008; *Situation in the Republic of Mali in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, Case No ICC-01/12-01/15, Trial Chamber VIII, 27 September 2016.

¹⁸⁵ *Lubanga* (Pre-Trial Chamber) (n 28 above); *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber I, ICC-01/04-01/06, 14 March 2012.

¹⁸⁶ *Katanga* (Trial Chamber) (n 184 above).

¹⁸⁷ *Ntaganda* (Warrant of Arrest) (n 184 above); *Ntaganda* (Pre-Trial Chamber) (n 184 above).

¹⁸⁸ *Bemba Gombo* (Pre-Trial Chamber) (n 184 above).

¹⁸⁹ *Al Mahdi* (Trial Chamber) (n 184 above).

¹⁹⁰ Amongst other charges, the Prosecutor of the International Criminal Court under articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute charged Thomas Lubanga Dyilo with the war crime of conscripting and enlisting children under the age of 15 years into an organised armed group.

¹⁹¹ *Ibid.*

In its analysis of whether the situation before it satisfied the threshold requirements inherent in article 8(2)(f) of the Rome Statute, Pre-Trial Chamber I formulated the test for assessing whether an article 8(2)(f)-type conflict existed in the case before it straightforwardly as ‘protracted armed conflict between ... organised armed groups’.¹⁹² The Pre-Trial Chamber then argued that these two elements required, first, the existence of a protracted armed conflict and, second, that the armed groups had to be organised. The Pre-Trial Chamber equated the need for these two threshold requirements with ‘the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time’.¹⁹³ Again, the duration of the period during which the attacks or violence took place could be interpreted to be synonymous with the intensity of violence threshold requirement inherent in article 8(2)(f) of the Rome Statute.¹⁹⁴ Pre-Trial Chamber I determined that the armed attacks that occurred on Congolese territory between June 2003, at least, and December 2003 met the necessary degree of intensity.¹⁹⁵ It made this assessment based on the frequency of attacks, the number of violations and the duration of the period of these attacks.¹⁹⁶

Trial Chamber I similarly found the existence of an armed conflict to be a fundamental requirement of charges under both article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.¹⁹⁷ It defined non-international armed conflict as follows:

It is argued a non-international armed conflict is established when states have not resorted to armed force and (i) violence is sustained and has reached a certain degree of intensity, and (ii) armed groups with some degree of organisation, including the capability of imposing discipline and the ability to plan and carry out sustained operations, are involved. *Additionally*, Article 8(2)(f) of the Statute stipulates that *the conflict must be ‘protracted’ for these purposes* (own emphasis).¹⁹⁸

The inclusion and the placing of the term ‘*additionally*’ is significant.¹⁹⁹ The synonyms ‘*furthermore*’, ‘*moreover*’ and ‘*also*’ could replace this term.²⁰⁰ The placing of the term ‘*additionally*’ suggests that an armed

¹⁹² *Lubanga* (Pre-Trial Chamber) (n 28 above) para 234.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid* para 235.

¹⁹⁶ *Ibid* paras 235 and 236.

¹⁹⁷ *Lubanga* (Trial Chamber) (n 185 above) paras 504 and 506.

¹⁹⁸ *Ibid.*

¹⁹⁹ *cf* *Lubanga* (Trial Chamber) (n 185 above) para 506.

²⁰⁰ *Collins English Thesaurus* (2015).

conflict was 'protracted' because, for it to fall within the scope of article 8(2)(f) of the Rome Statute, it must be 'protracted'.²⁰¹ Consequently, Trial Chamber I was of the opinion that an article 8(2)(f)-type armed conflict requires an extra threshold requirement distinguishing it from other armed conflicts not of an international character, for example, the type of conflict envisioned by article 8(2)(d) of the Rome Statute.²⁰² Clearly, this demands the inclusion of something else. Additionally, the conflict must be 'protracted'.²⁰³

The Trial Chamber neglected to deliberate on the content of this 'additional' requirement.²⁰⁴ However, it classified the 'protracted violence' carried out by multiple non-state armed groups between September 2002 and 13 August 2003 as being non-international in nature as intended by article 8(2)(f) of the Rome Statute.²⁰⁵ Again, this assessment of whether an armed conflict was considered to be protracted in nature was based on the duration of such a conflict.²⁰⁶ In this case sustained hostilities had occurred for almost 13 months.²⁰⁷

It would appear that scholarly opinion offers three different interpretations of the formulation of this intensity test by Trial Chamber I.²⁰⁸ Vité's point of view confirms the interpretation of this author, as explained above.²⁰⁹ Here, the two-pronged *Lubanga* formulation of the material scope of application of article 8(2)(f), is analysed. The *Lubanga* formulation is phrased as 'an armed group with a degree of organization, particularly the ability to plan and carry out military operations for a prolonged period of time must be involved'. Vité determines that the intensity test necessitated by article 8(2)(f) requires the existence of a certain level of intensity (equivalent to protracted armed violence) and that such violence must also be protracted.²¹⁰ This line of thinking has two consequences. On the one hand, it considers the *Lubanga* test to refer to a level of intensity that is higher than the minimum threshold of violence, which must exist in order to trigger the application of Common Article 3. On the other hand, it considers the test to reduce and broaden

²⁰¹ cf *Lubanga* (Trial Chamber) (n 185 above) para 506.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid para 563.

²⁰⁶ Ibid.

²⁰⁷ Ibid paras 563, 567.

²⁰⁸ *Lubanga* (Trial Chamber) (n 185 above) para 506. For a discussion of the interpretation of article 8(2)(f) of the Rome Statute in the *Lubanga* case, see Sivakumaran (n 32 above) 195; Vité (n 75 above) 82; Dinstein (n 3 above) 191; Sivakumaran (n 32 above) 378.

²⁰⁹ Vité (n 75 above) 82.

²¹⁰ Ibid.

the minimum thresholds inherent in the notion of intensity as this relates to Additional Protocol II-type armed conflicts.²¹¹ If measured on a scale of intensity, this would mean that the violent nature of an article 8(2)(f)-type conflict would be shown about halfway between the notions of intensity in the context of Common Article 3, reflecting the lowest level of violence on this scale and the notion of intensity of Additional Protocol II at its highest point.²¹²

Dinstein's viewpoint concerning the *Lubanga* formulation considers that to construe that article 8(2)(f) creates a higher intensity threshold than article 8(2)(d) is to create a 'false impression'.²¹³ Dinstein explains this line of thinking by highlighting the fact that the distinction made in *Lubanga* between article 8(2)(d) and (f) of the Rome Statute relates to the degree of organisation which the armed group must have in order to fulfil the notion 'organised armed group' and not the notion of intensity.²¹⁴ Interpreting paragraph 506 of the *Lubanga* case, Dinstein introduces an indicator which requires that an armed group should be organised to the extent that it could facilitate attacks which meet the threshold of 'protracted armed violence' in order to fulfil the scope of application of article 8(2)(f) of the Rome Statute.²¹⁵ According to this view, the *Lubanga* formulation considers that the organisational threshold is higher under article 8(2)(f) of the Rome Statute than it is under Common Article 3 (and consequently article 8(2)(d) of the Rome Statute), but that the notion of intensity remains identical.²¹⁶

Finally, the third interpretation – that of Sivakumaran – suggests that the formulation of paragraph 506 in the *Lubanga* case does not raise the threshold of intensity that requires violence to be protracted by the inclusion of an additional demand that the armed conflict itself is protracted in nature and, consequently, includes an element of duration.²¹⁷ He agrees that, at a first reading, it may appear that duration plays a more significant role in the context of article 8(2)(f) of the Rome Statute than it should.²¹⁸ This misconception then could lead to the conclusion that a new category of armed conflict is created. To draw such an artificial conclusion, however, is not correct.²¹⁹ A more thorough

²¹¹ Ibid.

²¹² Ibid.

²¹³ Dinstein (n 3 above) 191.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Sivakumaran (n 32 above) 195; Sivakumaran in Stahn (n 32 above) 378–379.

²¹⁸ Ibid.

²¹⁹ Ibid.

examination of paragraph 506 of the *Lubanga* case, together with article 8(2)(f) of the Rome Statute, argues Sivakumaran, contradicts the finding that a new category of armed conflict is created.²²⁰ Such closer reading reveals that a single scope of application similar to article 8(2)(d) of the Rome Statute exists.²²¹ In Sivakumaran's view, the original French version of the *Lubanga* case highlights that Trial Chamber I places no greater emphasis on duration as an indicator of protracted armed violence than the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia did in the *Tadić* Decision on Interlocutory Appeal.²²² He advances his argument by discussing how the French term *prolongée* was translated and recorded in the authenticated English transcript as 'prolonged' instead of 'protracted'.²²³ An examination of the scholarly interpretation of the *Lubanga* formulation has led to divergent results.²²⁴ This is because some scholars support the view that a single threshold of application applies to article 8(2)(d) to 8(2)(f), while others consider article 8(2)(f) to constitute a new, higher threshold of intensity which has to be satisfied in order for the court to exercise jurisdiction over a situation where the crimes listed in article 8(2)(e) of the Rome Statute allegedly took place. If its subsequent rulings are considered, it seems that the ICC itself has interpreted the *Lubanga* formulation to create a new category of armed conflict.²²⁵

4.2 Bemba Case (21 March 2016)

The *Bemba* case is important in the current context as not only is it one of the most recent cases before the ICC, but it also specifically highlights the 'additional' intensity requirement (protracted armed conflict) as included in the final sentence of article 8(2)(f) of its Statute.²²⁶ In the *Bemba* case, the Prosecutor of the ICC charged Mr Bemba with the war crime of effectively acting as a military commander within the meaning of article 28(a) of its Statute.²²⁷

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid. Here Sivakumaran refers to *Lubanga* (Decision on Confirmation of Charges) (n 28 above) para 234 and *Tadić* (Appeals Chamber) (n 17 above) para 70.

²²³ Sivakumaran (n 32 above) 195; Sivakumaran in Stahn (n 32 above) 378–379.

²²⁴ Ibid; Vité (n 75 above) 82; Dinstein (n 3 above) 191.

²²⁵ See Sivakumaran citing *Gombo* (Decision and Confirmation of Charges) (n 184 above) para 235 in Sivakumaran (n 32 above) 195 footnote 311.

²²⁶ Ibid para 138.

²²⁷ Ibid para 2. These charges were brought for the facilitation of the crimes against humanity of murder (art 7(1)(a)) and rape (art 7(1)(g)); and the war crimes of murder (art 8(2)(c)(i)); rape (art 8(2)(e)(vi)) and pillaging (art (8)(2)(e)(v)) under the Rome Statute.

The war crimes of rape and pillage, with which the accused was charged, require the existence of an armed conflict which meets the threshold requirements included in article 8(2)(f) of the Rome Statute.²²⁸ In the evaluation by Pre-Trial Chamber III of whether the facts of this case satisfied these threshold requirements, the Chamber paid specific attention to the intensity of violence threshold and the protracted character of the conflict.²²⁹ The method employed by the Pre-Trial Chamber in order to give content to the intensity of violence threshold requirement was divided into two.²³⁰ It separated the first and second sentence of the provision and dealt with each on its own.²³¹

The Trial Chamber analysed the latter part of article 8(2)(f) of the Rome Statute in order to ascertain whether it necessitated an additional threshold requirement.²³² Pre-Trial Chamber III further wished to give content to the term 'protracted armed conflict'.²³³ The manner in which the Pre-Trial Chamber articulated its understanding of the second sentence of article 8(2)(f) is worth noting:

Article 8(2)(f), which is stated to apply to article 8(2)(e), contains a second sentence additionally requiring that there be a 'protracted armed conflict'. This is in contrast to article 8(2)(d), stated to apply to article 8(2)(c), which does not include such a requirement ... this difference may be seen to require a higher or additional threshold of intensity to be met (own emphasis).²³⁴

The use of the wording 'additionally requiring' and 'in contrast to' hints at the possibility of a two-tier threshold of violence applied uniquely to article 8(2)(f).²³⁵ At first sight, the structure of this paragraph seems to differentiate conclusively between the threshold of violence criteria inherent in article 8(2)(d) and those in article 8(2)(f) of the Rome Statute, by pointing out that article 8(2)(f) of the Rome Statute further requires an armed conflict within its scope of application to be a 'protracted armed conflict'.²³⁶ Put simply, Pre-Trial Chamber III was of the opinion that an armed conflict not of an international character (in the context of both article 8(2)(d) and article 8(2)(f) of the Rome Statute) must exceed 'situations of internal disturbances and tensions, such as riots, isolated

²²⁸ Ibid para 127.

²²⁹ Ibid paras 137–140.

²³⁰ Ibid para 137.

²³¹ Ibid.

²³² *Bemba Gombo* (Pre-Trial Chamber) (n 184 above) para 138.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

and sporadic acts of violence or other acts of a similar nature'.²³⁷ In addition to this requirement, an article 8(2)(f)-type armed conflict must be characterised as being a 'protracted armed conflict'. The second requirement is not demanded of article 8(2)(d)-type armed conflicts.²³⁸ Nevertheless, the concluding remark of the Pre-Trial Chamber, which states 'this difference may be seen to require a higher or additional threshold of intensity to be met', is inconclusive and causes confusion about the preceding assessment (own emphasis).²³⁹ The inclusion of the term 'may' leaves the question begging as to whether a distinction exists between the intensity of violence threshold requirement inherent in article 8(2)(d) and (f) of the Rome Statute.²⁴⁰ Pre-Trial Chamber III failed to answer this question or to clarify its position in this matter, proffering the excuse in justification that the present case did not require an answer regarding the matter.²⁴¹

The Pre-Trial Chamber, however, tried to provide content to the phrase 'protracted armed conflict'.²⁴² It acknowledged that the ICC had not yet defined this term.²⁴³ Pre-Trial Chamber III revealed that a survey of case law highlighted a nexus between the duration of the fighting (violence), which is essentially a time requirement, and the fulfilment of the threshold of violence requirement necessitating that an article 8(2)(f)-type armed conflict must be 'protracted' in nature.²⁴⁴ It also determined that, for a 'protracted armed conflict' to exist, the requirement of an appropriate level of intensity of violence did not need to be 'continuous' or 'uninterrupted'; that it simply should 'go beyond' isolated or sporadic acts of violence.²⁴⁵ The Pre-Trial Chamber asserted that the armed conflict in the case before it had been a 'protracted armed conflict'²⁴⁶ and based its assessment on the duration of the conflict alone.²⁴⁷ The armed conflict in question had lasted for four and a half months.²⁴⁸ Pre-Trial Chamber III, thus, found 'beyond reasonable doubt that the armed conflict was "protracted" within the meaning of Article 8(2)(f)'.²⁴⁹

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Id para 139.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Id para 140.

²⁴⁶ Id para 663.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

4.3 Al Mahdi Case (September 2016)

The accused, Mr Ahmad Al Faqi Al Mahdi, was charged with intentionally directing attacks against ten buildings of religious and historical significance in Timbuktu, Mali.²⁵⁰ These attacks took place on 30 June 2012 and 11 July 2012.²⁵¹ Article 8(2)(e)(iv) of the Rome Statute criminalises attacks directed against special examples of civilian objects which particularly reflect the importance of the international cultural heritage.²⁵² Trial Chamber VIII pointed out that article 8(2)(e) sets out a contextual component.²⁵³ The war crimes listed under it can be committed in the context only of an 'armed conflict not of an international character that takes place in the territory of a state where there is protracted armed conflict between governmental authorities and organised armed groups'.²⁵⁴ The Trial Chamber was satisfied that the acts committed by the accused had taken place in the context of such an armed conflict to which the Malian government and organised armed groups, including Ansar Dine and Al Qaeda in the Islamic Maghreb, were parties.²⁵⁵ It assessed both the organisational and intensity requirements inherent in article 8(2)(f) of the Rome Statute in order to reach this conclusion.²⁵⁶

In its assessment of the intensity requirement, in relation to the hostilities that had occurred in Timbuktu, Trial Chamber VIII specifically considered the factor that the hostilities had taken place in territory under the control of the relevant organised armed groups and that these hostilities had occurred over a protracted (lengthy) period of time.²⁵⁷ The Trial Chamber emphasised the weight it placed on the duration indicator in the context of article 8(2)(f) of the Rome Statute, summarising that this indicator 'clearly demonstrates a sufficient degree of intensity of the conflict'.²⁵⁸ Essentially, the assessment of the intensity requirement was based solely on the duration of this conflict, and this was considered together with the existence of territorial control as an indicator of the existence of the organisational criteria.²⁵⁹ Mr Al Mahdi was convicted of the war crime of attacking protected objects as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute.²⁶⁰ The Trial Chamber

²⁵⁰ Id para 10.

²⁵¹ Ibid.

²⁵² Id para 44.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Id para 45.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Id at conviction and sentence.

ruled that all essential facts relating to the elements of the crime of which he had been charged had been proved beyond a reasonable doubt.²⁶¹

In summary, the analysis of the ICC rulings relevant for defining the meaning of the term 'non-international armed conflict' as it relates to article 8(2)(f) of the Rome Statute revealed that the 'duration of time criterion', which is inherent in the term 'protracted armed conflict', is the common indicator.²⁶² The respective Trial Chambers predominantly arrived at a decisive conclusion regarding the nature of an armed conflict as fitting the mould of an article 8(2)(f)-type armed conflict in two respects. First, the non-state fighters had to be sufficiently organised in order to be classed as an 'organised armed group'. Second, if the duration of the armed conflict (violence) was lengthy (prolonged), then it was considered to fulfil the requirement of a 'protracted armed conflict'. For the most part, case law does not pertinently mention or distinguish between the threshold of violence requirements inherent in article 8(2)(d) and article 8(2)(f) of the Rome Statute.

The *Lubanga* case, however, allowed for a suggestion that the construct 'protracted armed conflict' served as an additional criterion unique to article 8(2)(f) of the Rome Statute.²⁶³ It suggested that the phrase 'protracted armed conflict' created a situation in which the nature of armed conflict was additional to the threshold of violence and organisation criteria inherent in article 8(2)(d) of the Rome Statute, and that this requirement might well elevate an article 8(2)(d)-type armed conflict to an article 8(2)(f)-type armed conflict.²⁶⁴ The recent *Bemba* decision may be interpreted as lending support to this interpretation.²⁶⁵ Overall, 'protracted armed conflict' was interpreted to indicate that an armed conflict is lengthy in nature.

5 Conclusion

This article examines the threshold of intensity inherent in the construct 'protracted armed conflict' as introduced in article 8(2)(f) of the Rome Statute. The wording 'protracted armed conflict' has been proposed in this article to amount to an interpretative conundrum as it differs from the Common Article 3 formulation of an 'armed conflict not of an international character' as included under article 8(2)(c) of the Rome Statute. Previously, the wording 'protracted armed conflict' had not been used in treaty law. Given that the intensity threshold inherent in the

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ See *Lubanga* (Trial Chamber) (n 185 above) para 504.

²⁶⁴ Ibid.

²⁶⁵ See *Bemba* (n 184 above) para 138.

term 'protracted armed violence', is the benchmark required under the condition 'armed conflict not of an international character', its meaning must be established so as to determine whether there is any difference in meaning. In order to do so it is necessary to determine the minimum threshold of violence that is required to fulfil the notion of 'intensity' in relation to a 'protracted armed conflict'. The consequence of the notion of 'intensity' under article 8(2)(f) requiring a higher degree of intensity (or a different degree) in comparison with protracted armed violence means that a new type of non-international armed conflict has been created which is unique to article 8(2)(f)-type conflicts (which determines the scope of application of article 8(2)(e) war crimes). This distinction is of singular significance in international criminal law as individuals incur individual criminal responsibility for war crimes committed under article 8(2)(d) only if such crimes were committed during a conflict that falls within the scope of article 8(2)(f) of the Rome Statute.

In order to promote a better understanding of the construct 'protracted armed conflict', the three substantive parts of this article were dedicated to this end. First, it drew a textual comparison between the French and English versions of article 8(2)(f) of the Rome Statute, and employed articles 31 and 33 of the Vienna Convention in order to establish whether a linguistic error as a result of a faulty translation arose between these texts. The result of this inquiry revealed that no fundamental difference exists between the French and English authenticated texts. In fact, in both languages the terms 'protracted' and *prolongé* indicate a relationship with time. This section further considered scholarly theories concerning linguistic errors arising from a textual interpretation of article 8(2)(f) of the Rome Statute, including that of erroneous translation and poor drafting. These theories, however insightful, proved to be inconclusive.

Second, the article explored the drafting history of article 8(2)(f). The analysis conducted in section 3 of the article illustrated that the Official Records of the Rome Conference do not reveal the reason the delegate from Sierra Leone worded an article 8(2)(f)-type armed conflict as being a 'protracted armed conflict'.²⁶⁶ In addition, the drafting history does not offer an insight into the understanding of the Sierra Leonean contingent when they introduced this construct in the Drafting Committee, which accepted it without any deliberation of its exact meaning. Scholarly interpretation of the drafting history of article 8(2)(f) reflects diverse opinions. Some scholars, in their consideration of the Official Records, favour the viewpoint that this is a different notion of 'intensity' (and, therefore, that it describes a new type of armed conflict in terms of this provision), while others oppose this viewpoint.

²⁶⁶ Summary Records (n 4 above) 247.

Finally, the relevant case law of the ICC was considered in section four of the article. The ICC has the task of testing whether the scope of application under article 8(2)(f) has been fulfilled in its consideration of the cases where article 8(2)(e)-type war crimes are allegedly committed. This court viewed the construct 'protracted armed conflict' to require a conflict to exist over a period of time. The ICC, however, has not specifically commented on whether it regards 'duration' to be a constitutive factor of the intensity threshold demanded by article 8(2)(f) of its Statute. If this provision does demand duration to be a constitutive factor inherent in the notion of intensity under article 8(2)(f), then it differs from the notion of intensity under Common Article 3 and article 8(2)(c) and (d). Common Article 3 and article 8(2)(c) and (d) consider its minimum threshold of intensity to equate to 'protracted armed violence'. Under this threshold, duration is but one of many indicative factors that may be used to assess the intensity threshold of a situation.

In conclusion, scholarly opinion offers strong arguments both for and against the creation of a diverse notion of 'intensity' and, consequently, of a new category of non-international armed conflict as a result of the inclusion of the wording 'protracted armed conflict' in article 8(2)(f) of the Rome Statute. This interpretive conundrum requires clarification either by the ICC or by subsequent state practice. The content of the notion of 'intensity' in respect of article 8(2)(f) of the Rome Statute, therefore, is a matter of dispute.