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ACCOUNTABILITY FOR WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICTS: EMERGING CHALLENGES

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Abstract

Non-international armed conflicts (NIACs) have become the dominant form of contemporary warfare, yet accountability for war crimes committed in these contexts remains inconsistent and often ineffective. While international humanitarian law (IHL) criminalises serious violations arising in NIACs, enforcement is frequently undermined by legal, institutional, and practical barriers. This article critically examines the evolving framework for accountability and interrogates the challenges that impede its effective implementation. Its primary objective is to evaluate the adequacy of existing mechanisms and identify both normative and operational gaps that hinder the realisation of justice. The study adopts a doctrinal and qualitative methodology, drawing on treaty interpretation, customary IHL, and relevant international and domestic jurisprudence, including developments under the Rome Statute of the International Criminal Court. Selected contemporary NIACs are used illustratively to situate the analysis within real-world contexts. The article finds that despite the progressive expansion of war crimes applicable to NIACs, accountability is constrained by jurisdictional limitations, difficulties in attributing responsibility to non-state armed groups, evidentiary challenges, political interference, and tensions between peace processes and criminal prosecutions. These factors collectively perpetuate impunity, particularly at the domestic level. The article recommends strengthening domestic legal frameworks in line with international standards, enhancing cooperation between national and international mechanisms, clarifying modes of liability for non-state actors, and restricting the use of amnesties for international crimes. It concludes that a more integrated and context-sensitive approach is essential for ensuring meaningful accountability.

Keywords: Non-international armed conflict, War crimes, Accountability, International Humanitarian Law, Non-state armed groups; International Criminal Court

1.Introduction

Contemporary armed conflict is increasingly characterised by violence occurring within, rather than between, states. These situations, commonly described as non-international armed conflicts (NIACs), involve sustained hostilities between governmental forces and organised non-state armed groups, or among such groups themselves. They are frequently marked by serious violations of international humanitarian law (IHL), often with grave humanitarian consequences. Despite their prevalence, NIACs have traditionally occupied a sensitive position within international law, largely due to concerns relating to state sovereignty and the principle of non-intervention.

The legal regulation of NIACs has developed progressively. While early humanitarian law instruments focused primarily on inter-state conflicts, the four Geneva Conventions of 1949 introduced a significant innovation through Common Article 3, which sets out minimum

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standards applicable in internal conflicts.[3] This framework was later supplemented by Additional Protocol II of 1977[4] and further enriched by the development of customary international law.[5] Nevertheless, treaty-based regulation of NIACs remains less detailed than that governing international armed conflicts, leaving considerable reliance on judicial interpretation and state practice.

The question of accountability for war crimes committed in NIACs has similarly evolved. Historically, such violations were treated as matters of domestic jurisdiction, attracting limited international oversight. This position shifted significantly in the 1990s through the jurisprudence of international criminal tribunals, particularly the International Criminal Tribunal for the former Yugoslavia (ICTY). In *Prosecutor v Tadić*, the Appeals Chamber affirmed that serious violations committed in NIACs may give rise to individual criminal responsibility under customary international law.[6] The establishment of the International Criminal Court (ICC) reinforced this development by providing a permanent mechanism with jurisdiction over war crimes committed in both international and non-international armed conflicts.[7] Despite these advances, the enforcement of accountability in NIACs remains uneven. Structural and practical challenges persist, including fragmented command structures within armed groups, jurisdictional limitations, evidentiary constraints, and the often delicate balance between peace negotiations and criminal prosecutions. In addition, disparities between the legal frameworks governing international and non-international conflicts continue to affect the scope and enforcement of war crimes.

This study examines the legal foundations of NIACs, the evolution of applicable war crimes, and the mechanisms through which accountability is pursued. It argues that although international law now clearly recognises criminal responsibility in NIACs, significant gaps remain in both normative clarity and practical enforcement. Addressing these shortcomings requires strengthened domestic legal systems, improved international cooperation, and a more coordinated approach involving multiple accountability actors.

2. Conceptual and Legal Framework of Non-International Armed Conflicts

2.1 Defining Non-International Armed Conflict under International Humanitarian Law

International humanitarian law does not provide a single, comprehensive definition of non-international armed conflict. Instead, the concept has emerged through a combination of treaty provisions, judicial decisions, and customary law. The foundational provision is Common Article 3 of the 1949 Geneva Conventions, which applies to "armed conflict not of an international character" occurring within the territory of a state.[8] While it establishes core humanitarian

[3] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, Common article 3

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

[5] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP 2005)

[6] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (ICTY Appeals Chamber, 2 October 1995) para 134

[7] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(c)-(e)

[8] Geneva Conventions (n 3) Common art 3

protections, it does not specify the threshold at which internal violence becomes an armed conflict.

Additional Protocol II of 1977 offers a more detailed, though narrower, formulation. Under Article 1(1), the Protocol applies to conflicts between state armed forces and organised armed groups that operate under responsible command and exercise sufficient territorial control to conduct sustained military operations.[9] This definition excludes conflicts occurring solely between non-state armed groups and reflects a deliberate limitation designed to safeguard state sovereignty.

In practice, the most widely accepted definition of NIAC derives from international criminal jurisprudence. In *Prosecutor v Tadić*, the ICTY Appeals Chamber defined a NIAC as existing wherever there is "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[10] This formulation has been consistently adopted in subsequent case law and is generally regarded as reflecting customary international law.

2.2 Thresholds for the Classification of NIACs

For a situation to qualify as a NIAC, two cumulative criteria must be satisfied: the intensity of the violence and the organisation of the parties involved.[11] These requirements serve to distinguish armed conflicts from situations of internal disturbances, such as riots or sporadic acts of violence.

The intensity requirement demands that the level of violence exceed isolated or short-lived disturbances. Relevant indicators include the frequency and severity of clashes, the duration of hostilities, the types of weapons employed, the scale of casualties, and the degree of involvement of state armed forces.[12] As emphasised in Tadić, no single factor is determinative; the assessment must be based on the overall factual context.

The organisation requirement focuses on the structure and capacity of the non-state armed group. Factors typically considered include the existence of a command hierarchy, internal disciplinary mechanisms, the ability to recruit and train members, and the capacity to plan and execute coordinated operations.[13]Unlike the requirement under Additional Protocol II, customary international law does not require proof of territorial control.

These criteria have been reaffirmed in the jurisprudence of the International Criminal Court, including in *Prosecutor v Lubanga*[14]and *Prosecutor v Ntaganda*.[15]Their application promotes legal certainty while ensuring that IHL is not extended to situations more appropriately governed by international human rights law.

2.3 Distinguishing NIACs from Internal Disturbances and Tensions

A central function of the legal framework governing non-international armed conflicts (NIACs) is to differentiate such conflicts from situations of internal disturbances and tensions, including

[9] Additional Protocol II (n 4) art 1(1)
[10] Tadić (n 6) para 70
[11] Tadić (n 6) paras 70, 562
[12] Ibid para 70
[13] *Prosecutor v Haradinaj* (Judgment) IT-04-84-T (ICTY Trial Chamber, 3 April 2008) paras 49–60
[14] *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (Pre-Trial Chamber I, 29 January 2007) paras 233-234
[15] *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06 (Trial Chamber VI, 8 July 2019) paras 704-706

riots, sporadic violence, and large-scale protests. Article 1(2) of Additional Protocol II expressly excludes these situations from its scope, thereby affirming that not all forms of internal violence trigger the application of international humanitarian law (IHL).[16]

International jurisprudence has reinforced this distinction. The International Criminal Tribunal for the former Yugoslavia (ICTY) clarified in Prosecutor v Tadić that internal disturbances do not meet the requisite thresholds of intensity and organisation necessary to qualify as armed conflict.[17]Similarly, the International Committee of the Red Cross (ICRC) Commentary underscores that the application of IHL is exceptional and must not be conflated with law-enforcement frameworks governed primarily by international human rights law.[18]

This distinction carries significant legal consequences. Where violence does not reach the NIAC threshold, the conduct of state agents and private individuals is regulated principally by domestic law and international human rights obligations rather than the war crimes regime under IHL.[19]Maintaining this boundary is essential to preserving both the coherence of IHL and the legitimacy of international criminal accountability.

3. War Crimes in Non-International Armed Conflicts

3.1 Evolution of War Crimes Applicable to NIACs

The concept of war crimes was historically confined to international armed conflicts, reflecting the inter-state orientation of classical international law. Early codifications, including the Hague Regulations of 1899 and 1907, did not address internal conflicts, thereby leaving atrocities committed during civil wars largely within domestic jurisdiction.[20]

This position began to shift after the Second World War, particularly with the adoption of the Geneva Conventions of 1949. Common Article 3 introduced minimum humanitarian standards applicable to NIACs, marking a significant normative development.[21]However, the recognition of individual criminal responsibility for violations committed in NIACs emerged more clearly through judicial practice rather than treaty law.

A decisive turning point occurred in *Prosecutor v Tadić*, where the ICTY Appeals Chamber held that serious violations of Common Article 3 entail individual criminal responsibility under customary international law.[22]This finding rejected the earlier assumption that war crimes were limited to international armed conflicts. Subsequent jurisprudence of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) confirmed that acts such as murder, torture, cruel treatment, and attacks against civilians constitute war crimes in NIACs.[23]

By the end of the twentieth century, a core body of war crimes applicable to NIACs had crystallised as customary international law.[24]Nonetheless, this body of law remains less

[16] Additional Protocol II (n 4) art 1(2)
[17] Tadić (n 5) para 70
[18] Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907).
[19] Geneva Conventions (n 3) Common art 3.
[20] Tadić (n 5) para 134.
[21] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) paras 608-609
[22] Henckaerts and Doswald-Beck (n 5)
[23] ICRC, Commentary on the First Geneva Convention (2nd edn, CUP 2016) para 423
[24] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 para 25

comprehensive than that applicable in international armed conflicts, a disparity that continues to affect accountability efforts.

3.2 Common Article 3 and Customary International Humanitarian Law

Common Article 3 occupies a foundational position in the regulation of NIACs and is often described as a "mini-convention" within the Geneva framework.[25]It prohibits, among other acts, violence to life and person, murder, mutilation, cruel treatment, torture, the taking of hostages, outrages upon personal dignity, and the passing of sentences without due judicial guarantees.[26] These obligations bind all parties to a NIAC, including non-state armed groups.

Although Common Article 3 does not explicitly refer to war crimes or individual criminal responsibility, international jurisprudence has firmly established its criminal dimension. The ICTR in *Prosecutor v Akayesu* affirmed that serious violations of Common Article 3 and Additional Protocol II give rise to war crimes liability under international law.[27]

The development of customary international humanitarian law has further expanded the scope of obligations applicable in NIACs. The ICRC's 2005 Study identifies a wide range of customary rules, including the principles of distinction, proportionality, and precautions in attack, as well as protections for civilian objects.[28]While aspects of the Study have been debated in academic literature, it has been widely relied upon by international and domestic courts as evidence of customary norms.

3.3 War Crimes under the Rome Statute: Scope and Limitations

The Rome Statute of the International Criminal Court represents the most comprehensive treaty codification of war crimes applicable to NIACs. Article 8(2)(c) criminalises serious violations of Common Article 3, while Article 8(2)(e) enumerates additional offences, including intentionally directing attacks against civilians, humanitarian personnel, and protected objects.[29]
Despite this progress, important limitations remain. The catalogue of war crimes applicable to NIACs is narrower than that applicable to international armed conflicts, particularly with respect to means and methods of warfare and environmental protection.[30]Furthermore, Article 8(2)(f) introduces a threshold requirement excluding situations of internal disturbances and tensions, thereby restricting the Court's jurisdiction.[31]

Nevertheless, the jurisprudence of the ICC confirms that these provisions must be interpreted in light of customary international law. In Prosecutor v Lubanga and Prosecutor v Ntaganda, the Court reaffirmed the criteria of organisation and intensity and clarified that territorial control is not a general requirement unless expressly provided.[32]However, the absence of certain categories of crimes, particularly environmental war crimes in NIACs, continues to create normative and practical gaps in accountability.

[25] ibid
[26] Geneva Conventions (n 3) Common art 3
[27] Akayesu (n 20) paras 608-609
[28] Henckaerts and Doswald-Beck (n 5)
[29] Rome Statute (n 7) art 8(2)(c)-(e)
[30] ibid.
[31] Rome Statute (n 7) art 8(2)(f).
[32] Lubanga (n 14) paras 233-234; Ntaganda (n 14) paras 704-706

4. Attribution of Responsibility in Non-International Armed Conflicts

4.1 Individual Criminal Responsibility

Individual criminal responsibility forms the cornerstone of accountability for war crimes in NIACs. International criminal law rejects collective guilt and instead attributes liability to natural persons responsible for the commission of international crimes. This principle is codified in Article 25 of the Rome Statute, which recognises various modes of liability, including direct perpetration, co-perpetration, ordering, aiding and abetting, and contributing to group crimes.[33]

International jurisprudence confirms that this principle applies equally in NIACs. In Tadić, the ICTY made it clear that the internal nature of a conflict does not preclude individual criminal responsibility.[34] Similarly, the ICTR consistently affirmed that individuals may be held liable for war crimes committed during internal conflicts, irrespective of official capacity.[35]

The ICC has further refined these principles. In Lubanga, the Court developed a control-based theory of co-perpetration, emphasising the accused's essential contribution to the crime.[36] This approach applies to members of both state and non-state armed groups. The irrelevance of official capacity, as provided in Article 27 of the Rome Statute, reinforces the individualised nature of criminal responsibility.[37]

4.2 Command and Superior Responsibility

International criminal law also recognises liability for superiors who fail to prevent or punish crimes committed by subordinates. This doctrine, known as command or superior responsibility, is codified in Article 28 of the Rome Statute and reflects customary international law.[38]

Liability arises where a superior exercises effective control over subordinates, knew or had reason to know that crimes were being committed or about to be committed, and failed to take necessary and reasonable measures to prevent or repress such acts.[39]The ICTY elaborated these elements in Prosecutor v Delalić (Čelebići), emphasising that actual authority and control, rather than formal rank, are determinative.[40]

In the context of NIACs, this doctrine has been extended to leaders of non-state armed groups. The ICTR in Kayishema and Ruzindana confirmed that civilian superiors may incur responsibility where they exercise effective authority.[41]The ICC adopted a similar approach in *Prosecutor v Bemba,* affirming that effective control is the decisive criterion, even outside formal military structures.[42]Although the Appeals Chamber later overturned the conviction on evidentiary grounds, the doctrinal framework remains intact.

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[33] Rome Statute (n 7) art 25
[34] Tadić (n 6)
[35] Akayesu (n 21)
[36] Lubanga (n 14) paras 322-346
[37] Rome Statute (n 7) art 27
[38] ibid art 2
[39] ibid art 28
[40] *Prosecutor v Delalić (Čelebići)* (Judgment) IT-96-21-T (ICTY, 16 November 1998) paras 346–377
[41] *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) paras 223–226.
[42] *Prosecutor v Bemba* (Judgment) ICC-01/05-01/08 (Trial Chamber III, 21 March 2016); (Appeal Judgment, 8 June 2018)

4.3 Responsibility of Non-State Armed Groups

Non-international armed conflicts are typically characterised by the involvement of non-state armed groups, raising complex issues of attribution. While international criminal law focuses on individual responsibility, members and leaders of such groups may incur liability for war crimes committed in NIACs. Common Article 3 and customary IHL apply equally to all parties to the conflict, regardless of their status under domestic law.[43]

International jurisprudence has consistently rejected the argument that non-state actors are exempt from liability. The ICTY in Kordić and Čerkez affirmed that members of irregular forces and militias may be held responsible for war crimes.[44]The ICC has likewise prosecuted leaders of non-state armed groups, including in Lubanga and Ntaganda, confirming that participation in an organised armed group suffices to trigger IHL obligations once the NIAC threshold is met.[45]

Beyond individual liability, debates continue regarding the collective responsibility of armed groups as entities. While international criminal law does not recognise organisational criminal liability, other mechanisms, including United Nations reporting frameworks and sanctions regimes, increasingly attribute violations to such groups.[46]This fragmented practice highlights an ongoing gap between individual criminal responsibility and broader accountability mechanisms in NIACs.

5. Accountability Mechanisms for War Crimes in Non-International Armed Conflicts

5.1 Domestic Prosecutions and the Principle of Complementarity

Domestic prosecution remains the primary avenue for ensuring accountability for war crimes committed in non-international armed conflicts (NIACs). This reflects the traditional allocation of criminal jurisdiction to states as well as the subsidiarity principle underpinning international criminal law. States are generally obliged under both customary international law and treaty frameworks to investigate and prosecute serious violations of international humanitarian law (IHL) occurring within their jurisdiction.[47]

The Rome Statute reinforces this approach through the principle of complementarity, under which the International Criminal Court (ICC) may exercise jurisdiction only where national authorities are unwilling or genuinely unable to act.[48]Article 17 establishes admissibility criteria that prioritise domestic proceedings, provided they are conducted independently, impartially, and in good faith.[49]

In practice, however, domestic accountability in NIACs is frequently undermined by institutional weakness, lack of political will, the existence of amnesty laws, and ongoing insecurity.[50] Even where states have incorporated international crimes into domestic legislation, enforcement is often inconsistent, particularly when alleged perpetrators include state officials or influential

[43] Geneva Conventions (n 3) Common art 3
[44] *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T (ICTY, 26 February 2001) para 341
[45] Lubanga (n 12); Ntaganda (n 14)
[46] UN Security Council, 'Report of the Secretary-General on Children and Armed Conflict' UN Doc S/2020/525.
[47] Geneva Conventions (n 3); Henckaerts and Doswald-Beck (n 5)
[48] Rome Statute (n 7) Preamble, para 10
[49] ibid art 17
[50] William Schabas, An Introduction to the International Criminal Court (6th edn, CUP 2020)

armed actors. These limitations frequently necessitate recourse to international or hybrid accountability mechanisms.

5.2 International Criminal Court Jurisdiction and Practice

The ICC represents the most significant permanent international mechanism for prosecuting war crimes in NIACs. Under Articles 5 and 8 of the Rome Statute, the Court has jurisdiction over war crimes committed in both international and non-international armed conflicts, subject to territorial, temporal, and personal jurisdictional requirements.[51]

Most situations investigated by the ICC including those concerning Uganda, the Democratic Republic of the Congo, Mali, and the Central African Republic have arisen from NIAC contexts.[52] However, the Court's jurisdiction is inherently limited. It may act only where the relevant state is a party to the Rome Statute or where jurisdiction is triggered through a United Nations Security Council referral.[53]

In addition, prosecutorial discretion, resource constraints, and evidentiary challenges have contributed to a relatively limited number of completed cases.[54] Despite these constraints, ICC jurisprudence has significantly clarified aspects of war crimes law in NIACs, particularly in relation to modes of liability, conflict classification, and the role of customary international law.[55] The Court's practice thus reflects both the promise and the structural limitations of international criminal justice.

5.3 Hybrid and Internationalised Criminal Tribunals

Hybrid or internationalised tribunals have emerged as an intermediate model of accountability, combining elements of domestic and international law, personnel, and procedure.[56]These mechanisms are often established where domestic systems lack the capacity to prosecute international crimes effectively, yet full international intervention is either impractical or politically unfeasible. Prominent examples include the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Kosovo Specialist Chambers.[57] The SCSL was particularly significant in affirming individual criminal responsibility for war crimes committed in a NIAC and in rejecting the applicability of amnesties for international crimes.[58]

Hybrid tribunals offer important advantages, including local participation, proximity to affected communities, and enhanced legitimacy. However, they also face persistent challenges, such as political interference, restricted jurisdiction, and high operational costs.[59] Their mixed record

[51] Rome Statute (n 7) arts 5, 8.
[52] ICC, 'Situations and Cases' https://www.icc-cpi.int/ accessed 10 March 2026.
[53] Rome Statute (n 7) arts 12-13.
[54] Schabas (n 50) 112-118
[55] Lubanga (n 14); Ntaganda (n 14).
[56] Sarah Nouwen, *Complementarity in the Line of Fire* (CUP 2013)56-60
[57] Special Court for Sierra Leone (SCSL); Extraordinary Chambers in the Courts of Cambodia (ECCC); Kosovo Specialist Chambers (KSC)
[58] *Prosecutor v Kallon and Kamara* (Decision on Challenge to Jurisdiction: Olme Accord Amnesty)) SCSL-2004-15-AR72 (E)
[59] Nouwen (56) 112-120

illustrates both the potential and the fragility of such mechanisms in addressing accountability gaps in NIACs.

5.4 Universal Jurisdiction and Transnational Prosecutions

Universal jurisdiction provides an additional pathway for accountability where territorial or international mechanisms are unavailable or ineffective. Under this principle, national courts may prosecute certain international crimes, including war crimes, irrespective of where they were committed or the nationality of those involved.[60]

In recent years, several states particularly in Europe have exercised universal jurisdiction over crimes committed in NIACs, notably in relation to the Syrian conflict.[61] These prosecutions demonstrate the capacity of transnational justice to address accountability deficits where other mechanisms are constrained.

Nevertheless, universal jurisdiction remains contested. Concerns regarding selective application, diplomatic tensions, evidentiary access, and the politicisation of prosecutions continue to limit its broader acceptance.[62] Despite these challenges, it remains an important complementary tool within the broader accountability framework.

6. Emerging Challenges in Enforcing Accountability

6.1 Fragmentation and Multiplicity of Armed Actors

A defining feature of contemporary NIACs is the proliferation and fragmentation of armed actors. Many conflicts involve fluid alliances, splinter groups, foreign fighters, and transnational networks, complicating the identification of responsible parties.[63]

Although international jurisprudence recognises that the existence of multiple actors does not preclude the classification of a NIAC, provided the thresholds of intensity and organisation are met, fragmentation complicates the attribution of responsibility.[64]In particular, doctrines such as command responsibility depend on establishing effective control, which may be difficult where command structures are diffuse or unstable.[65]

6.2 Jurisdictional Constraints and State Sovereignty

Jurisdictional limitations remain a significant barrier to accountability in NIACs. International criminal mechanisms rely heavily on state cooperation, consent, and political will.[66]The ICC's jurisdiction is constrained by territorial and nationality requirements, as well as by the role of the United Nations Security Council in referral situations.[67]

State sovereignty is frequently invoked to resist external intervention, particularly in conflicts framed as internal security matters. While sovereignty does not preclude international criminal

[60] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 140-150
[61] *Federal Prosecutor v Anwar Raslan* (Koblenz Higher Regional Court, 2022)
[62] Ryngaert (n 60) 155-160
[63] ICRC, *International Humanitarian Law and the Challenges of of Contemporary Armed Conflicts* (ICRC, 2019)
[64] *Prosecutor v Tadić* (Jurisdiction Decision) IT-94-1-AR72
[65] *Prosecutor v Delalić et al* (Čelebići Judgment) IT-96-21-T
[66] Nouwen (n 56) 73-80
[67] Rome Statute (n 6) arts 12-13

responsibility, its persistent invocation contributes to selective enforcement and accountability gaps.[68]These tensions are especially pronounced where alleged perpetrators remain in positions of power.

6.3 Evidentiary and Investigative Challenges in NIAC Contexts

The prosecution of war crimes in NIACs is often hindered by significant evidentiary challenges. Ongoing hostilities, limited access to conflict zones, destruction of evidence, and witness intimidation all impede effective investigations.[69]International courts have acknowledged these difficulties but insist that evidentiary standards must remain consistent with fair trial guarantees.[70]The ICC, in particular, has faced criticism for investigative shortcomings and reliance on intermediaries, which has contributed to case collapses and acquittals.[71]The tension between evidentiary rigor and operational realities remains a persistent challenge.

6.4 Immunities, Amnesties, and Peace Negotiations

The relationship between accountability and peace processes presents a recurring dilemma in NIACs. Amnesty provisions and negotiated settlements are often used to facilitate conflict resolution but may undermine efforts to prosecute serious international crimes.[72]

International law increasingly rejects the permissibility of amnesties for war crimes. The Special Court for Sierra Leone held that domestic amnesties cannot bar prosecution for international crimes under international law.[73]Nevertheless, amnesties continue to operate at the domestic level, particularly where international jurisdiction is absent or unenforced.
This tension highlights the complex interaction between legal and political considerations in NIAC contexts.

6.5 Selectivity, Political Influence, and Enforcement Gaps

Selectivity remains a persistent criticism of international criminal justice. Accountability mechanisms are often perceived as disproportionately targeting weaker states or non-state actors while powerful actors evade scrutiny.[74]

Political considerations influence not only the initiation of proceedings but also their enforcement, particularly where arrests depend on state cooperation.[75]The result is a significant enforcement gap, where legal norms exist but are unevenly applied. This disparity is especially evident in NIACs, where perpetrators frequently operate beyond effective judicial reach.

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[68] Schabas (n 50) 75-80

[69] ICC Office of the Prosecutor, Strategic Plan 2019-2021

[70] *Prosecutor v Jean-Pierre Bemba Gombo* (Appeal Judgment) ICC-01/05-01/08

[71] Schabas (n 50) 210-215

[72] UN, Report of the Secretary-General on the Rule of Law and Transitional Justice (2004) UN Doc S/2004/616

[73] *Prosecutor v Kallon and Kamara* (n 58)

[74] Makau Mutua, 'Never Again' (1997) 11 *Temple Int'l & Comp L J* 167

[75] Schabas (n 49) 220-225

7. Conclusion

This research has shown that the legal regime addressing accountability for war crimes in non-international armed conflicts (NIACs) has undergone notable development over time. The emergence of individual criminal responsibility for violations committed in internal conflicts driven largely by customary international law and the decisions of international criminal tribunals marks a significant milestone in the evolution of international humanitarian law. Foundational instruments, including Common Article 3 of the Geneva Conventions and the Rome Statute of the International Criminal Court, have reinforced the principle that grave breaches committed in NIACs are subject to international scrutiny and prosecution.

Notwithstanding these legal advancements, the actual enforcement of accountability remains inconsistent and often ineffective. A range of factors continue to hinder progress, including limited jurisdictional reach, fragile or underdeveloped domestic justice systems, political pressures, challenges in gathering and preserving evidence, and the often decentralized nature of non-state armed groups. In addition, the proliferation of armed actors and the delicate balance between peace negotiations and criminal justice objectives further complicate the pursuit of accountability.

In essence, the ongoing prevalence of impunity in many NIAC situations highlights a disconnect between established legal standards and their practical implementation. Addressing this disparity requires a more integrated and context-responsive strategy that combines domestic efforts with international and hybrid accountability mechanisms. In the absence of such coordinated action, the aspiration of meaningful accountability in NIACs is likely to remain unfulfilled.

8. Recommendations

To close the gap between legal norms and effective enforcement, the following measures are proposed:

8.1 Reform of Domestic Legal Systems-States should align their national legislation with international standards by explicitly criminalising war crimes applicable to NIACs. This includes incorporating clear definitions of offences, forms of liability, and doctrines such as command responsibility, while ensuring that domestic courts are empowered to prosecute such violations.

8.2 Capacity Building and Judicial Independence-There is a need for sustained investment in the capacity of courts, prosecutors, and investigative bodies to manage complex international crimes. Safeguarding these institutions from political influence is critical to maintaining credibility and impartiality.

8.3 Strengthening International Collaboration-Enhanced cooperation among states, international tribunals, and accountability bodies is essential. Mechanisms for evidence-sharing, extradition, mutual legal assistance, and enforcement of arrest warrants should be improved, particularly in cases involving cross-border armed groups.

8.4 Doctrinal Clarification for Non-State Actors-Further legal development is required to clarify how responsibility especially command responsibility applies within non-state armed groups. This will improve consistency and accuracy in attributing liability in fragmented conflict environments.

8.5 Restricting Amnesties for Serious Crimes-Amnesties should not extend to serious violations such as war crimes. In peace processes, accountability measures must be incorporated to ensure that justice is not subordinated to political compromise.

8.6 Utilisation of Hybrid and Internationalised Courts-In contexts where domestic systems lack capacity or willingness, hybrid tribunals offer a practical alternative. These mechanisms can integrate international standards with local participation, thereby enhancing both effectiveness and legitimacy.

8.7 Development of International Legal Frameworks-The international community should consider expanding the scope of existing legal instruments governing NIACs. Particular attention should be given to emerging areas such as environmental harm in armed conflict and evolving methods of warfare.

8.8 Protection and Support for Victims and Witnesses-Effective accountability depends on the participation of victims and witnesses. Comprehensive protection programmes including security measures, psychosocial support, and access to reparations should be prioritised.

8.9 Application of Universal Jurisdiction-States should make greater use of universal jurisdiction to prosecute individuals responsible for war crimes in NIACs, especially where the territorial state is unwilling or unable to take action.

8.10 Fostering Political Commitment to Accountability-Legal and institutional reforms must be supported by genuine political will. Both states and the broader international community should actively promote a culture that prioritises accountability and rejects impunity, thereby strengthening compliance with international humanitarian law.