4 The threshold of non-international armed conflict

This chapter examines the threshold distinguishing situations of non-international armed conflict from situations of internal disturbances in light of recent developments. An argument is advanced in support of a particular approach to the application of this threshold in the characterisation of non-international armed conflict. The definition of non-international armed conflict provided in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) forms a central tenet of this argument.

The chapter begins with an analysis of the concept of armed conflict developed in the case law of the ICTY. After unpacking the cardinal elements of this concept, and illustrating examples of how it has been applied, the geographical and temporal scope of non-international armed conflict is examined. The development of international humanitarian law to include conflict between non-state actors is also scrutinised as an integral feature of the concept. Another aspect that will be addressed is the question as to whether a state of armed conflict presupposes the existence of responsible command. In summing up the essential features of the non-international armed conflict threshold, the chapter will conclude with some remarks on its future development.

4.1 *Tadić*: a formula for the characterisation of armed conflict

On 2 October 1995 the Appeals Chamber in the *Tadić* case issued its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadić* Jurisdiction Decision).[1] The context of this decision was the trial of Duško Tadić, a Bosnian Serb charged with

[1] *Tadić* Jurisdiction Decision.

crimes against humanity, grave breaches of the Geneva Conventions and violations of the customs of war under Articles 2, 3 and 5 of the ICTY Statute.[2] The Decision addressed, *inter alia*, a challenge that the Tribunal lacked subject-matter jurisdiction to try Tadić for war crimes.[3] Before allegations relating to violations of the laws and customs of war under Article 3 of the ICTY Statute could be considered, the Tribunal first needed to determine the existence of armed conflict. This preliminary issue concerned the status of the situation in Bosnia and Herzegovina from around 24 May until 30 August 1992, the period of time during which it was alleged Tadić committed war crimes including murder, forcible sexual intercourse and abuse of prisoners.[4]

The defence for Tadić contended that 'there did not exist a legally cognizable armed conflict – either internal or international – at the time and place that the alleged offences were committed'.[5] This argument was based on the fact that 'the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (although movements of tanks are admitted)'.[6] The Appeals Chamber rejected the argument of the appellant on the grounds that 'the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities'.[7] The significance of this position will be returned to later in this chapter.[8] At this juncture, attention will be focused on the concept of armed conflict propounded in this decision: '[A]n 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'.[9]

This description of armed conflict represents a very significant development of international humanitarian law. As noted by Professor Christopher Greenwood,

[2] *Prosecutor* v. *Tadić* (Case No. IT-94–1-AR72), Second Amended Indictment, 14 December 1995.
[3] *Tadić* Jurisdiction Decision, para. 8.
[4] *Tadić* Second Amended Indictment.
[5] *Tadić* Jurisdiction Decision, para. 8. [6] *Ibid*.
[7] *Ibid*. para. 67. [8] See sections 4.2 and 4.3.
[9] *Tadić* Jurisdiction Decision, para. 70.

The definitions of international and internal armed conflict are of considerable importance. Neither term is defined in the Geneva Conventions or other applicable agreements. Whereas there is an extensive literature on the definition of 'war' in international law, armed conflict has always been considered a purely factual notion and there have been few attempts to define or even describe it.[10]

According to Sonja Boelaert-Suominen, a legal adviser at the Office of the Prosecutor:

> The seemingly innocuous description by the Appeals Chamber of what constitutes an armed conflict was innovative in various respects. First, it covers a variety of hypotheses and caters explicitly for conflicts between non-state entities. Second, whilst it sets a low threshold for the application of humanitarian law in general, it is particularly important for its consequences in relation to internal armed conflicts. The definition of armed conflict suggested by the Appeals Chamber covers not only the classic examples of (a) an armed conflict between two or more states and (b) a civil war between a state on the one hand, and a non-state entity on the other. It clearly encompasses a third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other.[11]

The latter part of the definition, referring to 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State', is particularly significant for its development of the threshold associated with 'armed conflict not of an international character'.[12] The wording has been credited to the Presiding Judge, Professor Antonio Cassese.[13]

The definition clarifies the threshold distinguishing situations of non-international armed conflict in international humanitarian law. It distinguishes broadly the conditions determining the existence of armed conflict, as distinct from situations of internal disturbance. The definition indicates a threshold that is clearly lower than that required by Article 1(1) of Additional Protocol II. As noted by Peter Rowe, '[t]his definition conflates the issue of the degree of intensity of armed action required for an armed conflict to exist and the nature of such a conflict. In the latter context it is wider than Additional Protocol II, which does not encompass an armed conflict between organized groups within a State'.[14]

[10] Greenwood, 'Development of International Law' at 114.
[11] Boelaert-Suominen, 'Yugoslav Tribunal', at 632–3.
[12] For an analysis of the original field of application associated with common Article 3, see Chapter 2, at section 2.2.4.
[13] Rowe, 'International Criminal Tribunal for Yugoslavia', at 697.
[14] *Ibid.*

The definition was applied for the first time in *obiter dicta* by the ICTY to the situation in the Prijedor region of Bosnia and Herzegovina.[15] In doing so, the *Tadić* Appeals Chamber considered grounds for asserting the existence of 'a legally cognizable armed conflict',[16] triggering the application of international humanitarian law:

> Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict … There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed – a factual issue on which the Appeals Chamber does not pronounce – international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[17]

The definition propounded in the *Tadić* Jurisdiction Decision on 2 October 1995 has since been widely utilised as a formula for the characterisation of non-international armed conflict. In addition to being applied consistently in the case law of the ICTY,[18] the definition has

[15] The definition of armed conflict was introduced by the Appeals Chamber as an *obiter dictum*. An *obiter dictum* is 'a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)', Bryan A. Garner, *Black's Law Dictionary* (8th edn; St. Paul: West Publishing, 2004), p. 1102.

[16] *Tadić* Jurisdiction Decision, para. 66. [17] *Ibid*., para. 70.

[18] See *Ibid*.; *Prosecutor* v. *Tadić* Trial Chamber Judgment, 7 May 1997, ICTY Case No. IT-94-1-AR72, para. 561; *Prosecutor* v. *Delalic*, *Mucic*, *Delic and Landzo*, Trial Chamber Judgment, 16 November 1998, ICTY Case No. IT-96-21-T, para. 183; *Prosecutor* v. *Furundzija*, Trial Chamber Judgment, 10 December 1998, ICTY Case No. IT-95-17/1, para. 59; *Prosecutor* v. *Kordic and Cerkez*, Trial Chamber Judgment, 26 February 2001, ICTY Case No. IT-95-14/2-T, para. 24; *Prosecutor* v. *Kordic and Cerkez*, Appeals Chamber Judgment, 17 December 2004, ICTY Case No. IT-95-14/2-T, para. 336; *Prosecutor* v. *Kunarac*, *Kovac and Vukovic*, Trial Chamber Judgment, 22 February 2001, ICTY Case No. IT-96-23, para. 402; *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Appeals Chamber Judgment, 12 June 2002, ICTY Case No. IT-96-23, para. 56; *Prosecutor* v. *Naletilic and Martinovic*, Trial Chamber Judgment, 31 March 2003, ICTY Case No. IT-98–34-T, para. 177; *Prosecutor* v. *Stakić*, Case No. IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para. 568; *Prosecutor* v. *Slobodan Milošević*, Third Chamber Decision on Motion for Judgment of Acquittal (*Milošević* Rule 98bis Decision), ICTY Case No. IT-02-54-T, 16 June 2004, para. 16; *Prosecutor* v. *Blagojevic and Jokic*, Case No. IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para. 536; *Prosecutor* v. *Strugar*, Case No. IT-01-42-T, Judgment, Trial Chamber II, 31 January 2005, para. 215; *Prosecutor* v. *Limaj*, *Bala*, *and Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, para. 84; *Prosecutor* v. *Orić*, Judgment, Case No. IT-03-68-T, Trial Chamber II, 30 June 2006, para. 254; *Prosecutor*

also been employed in the reports of independent experts,[19] international commissions of enquiry[20] and various manuals on the law of armed conflict.[21] It has furthermore been utilised in the case law of the ICTR,[22] the ICJ,[23] the International Criminal Court (ICC)[24] and the Special Court for Sierra Leone.[25] The incorporation of this threshold

v. *Haradinaj et al*., Judgment, Trial Chamber I, ICTY Case No. IT-04-84-T, 3 April 2008, paras. 37–49; *Prosecutor* v. *Boškoski and Tarćulovski*, Judgment, Trial Chamber II, Case No. IT-04-82-T, 10 July 2008, para. 175.

[19] For examples, see Report of the Special Rapporteur on the Human Rights Situation in the Sudan, Sima Samar, UN Doc. E/CN.4/2006/111, 11 January 2006, para. 8; Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, UN Doc. E/CN.4/2005/103, 7 February 2005, p. 30, fn. 14; Terrorism and Human Rights: Final Report of the Special Rapporteur, Kalliopi K. Koufa, E/CN.4/Sub.2/2004/40, 25 June 2004, p. 30, fn. 23; Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, E/CN.4/2002/32, 6 March 2002, para. 18; Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, A/56/440, 4 October 2001, para. 13; Report on the Situation of Human Rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Mona Rishmawi, pursuant to Commission Resolution 1996/57 of 19 April 1996, E/CN.4/1997/88, 3 March 1997, para 54.

[20] Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, para. 51; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 74. See also Report of the Sierra Leone Truth and Reconciliation Commission, vol. 1, 5 October 2004, para. 57 (available at www.trcsierraleone.org. Last visited: 3 April 2008); Report of the Commission for Reception, Truth and Reconciliation Timor-Leste, 31 October 2005, para. 141 (available at www.etan.org/news/2006/cavr.htm).

[21] See, e.g. UK Ministry of Defence, *Manual,* 2004, p. 29; Canadian Department of National Defence, *Prisoner of War Handling Detainees and Interrogation and Tactical Questioning in International Operations*, Joint Doctrine Manual; Ottawa: Department of Defence, 2004, section 1–7, fn. 21; International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary* (Sanremo: IIHL, 2006), p. 2.

[22] *Akayesu*, Judgment, para. 619; *Prosecutor* v. *Rutaganda*, Trial Chamber Judgment, 6 December 1999, ICTR Case No. ICTR-96-3, para. 92.

[23] *Democratic Republic of the Congo* v. *Uganda*, ICJ, Case Concerning Armed Activities on the Territory of the Congo, Separate Opinion of Judge Simma, 19 December 2005, para. 23. Available at www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_opinions_simma_20051219.pdf, last visited: 3 April 2008.

[24] *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06), Decision on the confirmation of charges, 29 January 2007, para. 233.

[25] *Prosecutor* v. *Fofana et al*., Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 16 May 2005, Appeals Chamber Decision of the Special Court for Sierra Leone. Separate Opinion of Justice Robertson, para. 32.

into the Rome Statute of the International Criminal Court has been cited as indicative of its customary status.[26]

While the concept of non-international armed conflict created by the definition is distinctly broader in scope than that considered by the drafters of the Geneva Conventions, it is arguably now the most authoritative formulation of the threshold associated with common Article 3. The section that follows examines how the definition has been interpreted in the case law of the ICTY. In doing so, it explores conditions associated with the existence of armed conflict in international humanitarian law.

4.1.1 Two aspects of non-international armed conflict determining the applicability of international humanitarian Law: the organisation of parties and the intensity of hostilities

In its judgment on the merits, the *Tadić* Trial Chamber interpreted the definition expounded in the Jurisdiction Decision as a 'test' for the existence of armed conflict and hence also for applicability of common Article 3.[27] The definition 'focuses on two aspects of a conflict; the intensity of the conflict and the organisation of the parties to the conflict'.[28] The Trial Chamber went on to say that in 'an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.[29]

The two aspects of non-international armed conflict stated by the *Tadić* Trial Chamber – the *intensity* of the conflict and the *organisation* of parties to the conflict – provide grounds for the characterisation of a state of armed conflict (and thus also for the application of common Article 3). The Trial Chamber in the *Delalic* case highlighted this interpretation of non-international armed conflict, stating that 'in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved'.[30] This approach was echoed by the *Kordic and Cerkez* Appeals Chamber which stated that 'the requirement of *protracted* fighting is significant in excluding mere cases of civil unrest or single acts of terrorism'.[31]

[26] Bothe, 'War Crimes' in Cassese *et al. Rome Statute,* p. 423. The incorporation of the *Tadić* definition into the Rome Statute of the International Criminal Court will be examined in detail in Chapter 6.

[27] *Tadić*, Trial Chamber Judgment, para. 562. [28] *Ibid.*

[29] *Ibid.* [30] *Delalic et al.*, Trial Chamber Judgment, para. 184.

[31] *Kordic and Cerkez*, Appeals Chamber Judgment, para. 341 (emphasis in original).

In interpreting the definition of non-international armed conflict provided by the *Tadić* Jurisdiction Decision, the International Criminal Tribunal for Rwanda (ICTR) employed an approach in line with that of the ICTY. Applying it to the situation in Rwanda, the tribunal held that it was 'necessary to evaluate both the intensity and organisation of the parties to the conflict'.[32]

These two aspects of non-international armed conflict provide a basis for determining the existence of armed conflict and thus also the applicability of international humanitarian law. However, as noted by Idi Gaparayi, an Associate Legal Officer at the ICTY, '[d]etermining what counts as "protracted" armed violence and as a "well-organized" armed group requires a case-specific analysis of the facts'.[33] The sections that follow will examine the terms contained in the *Tadić* definition, focusing in particular on the meaning of 'organized armed group' and 'protracted armed violence'. In doing so, a framework for the analysis of facts on a case-by-case basis will be developed.

4.1.1.1 The organisation of parties

The organisational requirement for the characterisation of armed conflict has been highlighted on a number of occasions by the International Committee of the Red Cross (ICRC). The Seville Agreement on the Organisation of the International Activities of the Components of the International Red Cross and Red Crescent Movement states that 'an armed conflict exists when the armed action is taking place between two or more parties and reflects a minimum of organization'.[34] The importance of organisation was also emphasised by the ICRC in the analysis of situations that are unclear in status.

Common Article 3 does not define the term 'party to the conflict'. In the case of an international armed conflict, the parties thereto in principle can only be States, but the situation in non-international armed conflicts is less clear, as in

[32] *Akayesu*, Judgment, para. 620.

[33] Gaparayi, 'Milošević Trial', at 753. A similar point was made by the ICTR Trial Chamber in which it stated that 'whether a conflict meets the criteria of Common Article 3 is to be decided on a case by case basis'. *Prosecutor* v. *Musema*, Judgment and Sentence, Trial Chamber I, Case No. ICTR-96-13-A, 27 January 2000, para. 251.

[34] The Seville Agreement, formally known as 'The Agreement on the Organisation of the International Activities on the Components of the International Red Cross and Red Crescent Movement', was an internal agreement within the Red Cross Movement concerning the division of operations between the ICRC and the International Federation of Red Cross and Red Cresent Societies. See 'Agreement on the Organisation of the International Activities of the Components of the International Red Cross and Red Crescent Movement' (1998) 322 *International Review*

such cases at least one party to the conflict is not a State. The general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organization and discipline – enough to enable them to respect international humanitarian law – in order to be recognized as a party to the conflict.[35]

Similarly, the commentary, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, indicates the parties should be 'organized to a greater or lesser extent' in order for a situation to qualify as one of armed conflict.[36] While the *Tadić* Jurisdiction Decision did not define what constitutes an 'organized armed group',[37] indicators to this effect have been provided by subsequent case law. The Decision on Motion for Judgment of Acquittal (*Milošević* Rule 98bis Decision) rendered in the case of *Prosecutor* v. *Milošević* highlights conditions indicative of the level of organisation required for an armed group to qualify as 'organized' under the *Tadić* definition.[38]

The context of the Rule 98bis Decision concerned the trial of Slobodan Milošević for crimes including violations of the laws or customs of war allegedly committed in Kosovo.[39] As violations of the laws or customs of war cannot occur in the absence of armed conflict, the Trial Chamber examined the situation in Kosovo at the time the alleged violations took place to see if the requirements of the *Tadić* test were fulfilled. In order for the situation to qualify as a legally cognisable armed conflict, hostilities are required to be of sufficient intensity and the parties to the conflict must be organised to a greater or lesser extent. For the *Milošević* Trial Chamber, the latter required an evaluation of the Kosovo Liberation Army (KLA) as an organised armed group. In assessing the level of organisation in the KLA, the Trial Chamber found 'a sufficient body of evidence pointing to the KLA being an organized military force, with an official joint command structure, headquarters,

of the Red Cross 159. Available online at www.icrc.org/web/eng/siteeng0.nsf/iwpList74/02CED570ABFDD384C12/56B66005C9C6. Last visited: 3 April 2008.

[35] ICRC, 'Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998'; 23 January 1998. Available at www.icrc.org/web/eng/siteeng0.nsf/html/57JPLQ.

[36] Dörmann *et al.*, *Elements of War Crimes,* p. 442.

[37] This point is also made by Sonja Boelaert-Suominen. See 'Yugoslav Tribunal' at 635.

[38] See generally Idi Gaparayi, 'Milošević Trial', at 752.

[39] *Prosecutor* v. *Milošević, et al.*, Second Amended Indictment, Case No. IT-99–37-PT, 16 October 2001. Available at www.un.org/icty/indictment/english/mil-2ai011029e.htm. Last visited: 3 April 2008.

designated zones of operation, and the ability to procure, transport, and distribute arms'.[40]

The reasoning used in the *Milošević* Rule 98bis Decision was cited in the Judgment of Trial Chamber II in the case of *Prosecutor* v. *Limaj*.[41] In determining the existence of armed conflict during an earlier period in Kosovo, the *Limaj* Trial Chamber applied the *Tadić* test using an approach similar to that of the *Milošević* Trial Chamber.[42] The degree of organisation in the KLA was assessed along with the intensity of hostilities prior to May 1998.[43]

The Judgment of the *Limaj* Trial Chamber detailed how the KLA qualifies as 'an organised armed group' within the meaning of the *Tadić* formula.[44] In assessing the level of organisation in this armed group, considerable emphasis was placed on the role of the General Staff as the main governing body of the KLA.[45] The functions of this body included the appointment of zone commanders,[46] the supply of weapons,[47] the issuance of political statements and communiqués,[48] the distribution of KLA Regulations to units,[49] the authorisation of military action[50] and the assignment of tasks to individuals within the organisation.[51] According to the Trial Chamber, the organised nature of the KLA was also shown in how members of the General Staff were involved in the negotiations with representatives of the European Community and foreign missions based in Belgrade.[52] Diplomatic relations with the KLA developed to the extent that:

> [B]y July 1998 the KLA had become accepted by international representatives, and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis. This discloses and confirms that by that time the KLA had achieved a level of *organizational stability and effectiveness*. In particular this gave it the recognized ability to speak with one voice and with a level of persuasive authority on behalf of its members. Both the KLA's need for secrecy and the existence of an established hierarchy in its ranks is apparent from the

[40] *Prosecutor* v. *Slobodan Milošević*, Trial Chamber Decision, para. 23.
[41] *Limaj et al.*, Judgment, para. 90. [42] *Ibid.*
[43] The time frame was earlier than that of *Milošević*. The charges brought against Milošević concerned the commission of crimes 'beginning on or about 1 January 1999 and continuing until 20 June 1999'. *Prosecutor* v. *Milošević et al.*, Second Amended Indictment, para. 17.
[44] *Limaj et al.*, Judgment, paras. 94–134. [45] *Ibid.*, para. 94.
[46] *Ibid.*, para. 96. [47] *Ibid.*, para. 100.
[48] *Ibid.*, para. 101. [49] *Ibid.*, para. 98.
[50] *Ibid.*, para. 46. [51] *Ibid.*, para. 46.
[52] *Ibid.*, para. 125.

circumstance that individuals involved in negotiations with foreign missions were referred to by a number, apparently corresponding to their level in the KLA hierarchy. Further, from the course of these discussions it appears that the KLA was able to formulate and declare a change of military tactics and also conditions for refraining from further military action. This is indicative that at the time the KLA had the ability to coordinate military planning and activities and to determine a unified military strategy, as well as the ability to conduct military operations of a larger scale.[53]

The level of organisation within the KLA was thus also evidenced by its operational effectiveness. The ability to coordinate a unified military strategy through a chain of command was clearly important in this regard. The Trial Chamber highlighted the role of the command structure utilised by the KLA in overall functioning of the organisation:

> [T]he KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organization. Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police.[54]

The ability to recruit, train and equip new members was also cited as evidence of the level of organisation within the KLA.[55] The possession of weapons, including artillery mortars and rocket launchers, was further evidence relevant to this requirement.[56] In the utilisation of these weapons, the intensity of hostilities was emphasised by the Trial Chamber as an additional indicator of the KLA's level of organisation:

> By the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo–Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo–Macedonian border in the south and the municipality of Mitrovice/Kosovka Mitrovica in the north. The ability of the KLA to engage in such varied operations is a further indicator of its level of organization.[57]

Evaluating the evidence, the *Limaj* Trial Chamber concluded that 'before the end of May 1998 the KLA sufficiently possessed the characteristics of an organized armed group, able to engage in an internal armed conflict'.[58] Accordingly, the first requirement of the *Tadić* test was fulfilled. The Trial Chamber's analysis of the KLA as an 'organised armed group' reveals a

[53] *Ibid*., para. 129. Emphasis added.
[54] *Ibid*., para. 171. [55] *Ibid.* [56] *Ibid.* [57] *Ibid*., para. 172. [58] *Ibid*., para. 134.

number of indicators relevant to the application of the *Tadić* definition. It is important however to appreciate, in view of the complex nature of non-international armed conflict, that each situation has to be considered on a case-specific analysis of facts.[59] The requirement of sufficient intensity is closely related to that of organisation and will now be examined in the interpretation of the term 'protracted armed violence'.

4.1.1.2 The intensity of hostilities

Similar to the organisational requirement, the threshold of 'protracted armed violence' requires the interpretation of facts on a case-specific basis. As noted in *Rutaganda*, 'the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis'.[60] The need to proceed to consider each situation on its merits is also highlighted by the Inter-American Commission on Human Rights in the *Tablada* case:

> The most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the 'lowest' level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.[61]

It is useful to consider the terms of the *Tadić* definition as a means of clarifying this threshold for the application of international humanitarian law. It is clear that the 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 concerned 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

[59] *Rutaganda*, Judgment, para. 93. [60] *Ibid.*

[61] Report No. 55/97 Case 11.137, Juan Carlos Abella Argentina [1]/November 18, 1997, para. 153. Available at www.cidh.oas.org/annualrep/97eng/Argentina11137.htm. See also *Akayesu*, Judgment, para. 603.

group is also met. On the use of the term 'protracted', Sonja Boelaert-Suominen comments that

> the decision of the Appeals Chamber seems to indicate that this implies a time element. The case-law of the Tribunal indicates that the terms 'protracted armed violence' should be interpreted in a flexible manner and that 'protracted' does not carry the same meaning as 'sustained'. Accordingly, there is no requirement that military operations be carried out in a sustained or continuous manner.[62]

Similarly, Bahia Thahzib-lie and Olivia Swaak-Goldman state that:

> [T]he protracted requirement is met when the hostilities are extended over time and include events attributable to the conflict. Whether or not hostilities are 'protracted' is assessed by reference to the entire period from the initiation of hostilities to the cessation of hostilities. While an examination of the 'protracted' nature of hostilities might be fairly straightforward in a more classic non-international armed conflict, it is more problematic if several non-State parties are involved. The extent to which hostilities originating from several different non-State parties can be aggregated in considering whether hostilities are protracted will depend on the relationship between the non-State parties.[63]

Thus to the extent that the protracted element is considered, it must be loosely interpreted. It should not be read to require that hostilities be carried out in a sustained or continuous manner. Rather, it should be judged by reference to the entire period of hostilities.

The level of armed violence required for the application of common Article 3 must be high enough to exclude isolated or sporadic acts of violence, but low enough to include situations of internal conflict where hostilities are not necessarily carried out on a continuous basis. The degree of intensity required for the existence of armed conflict was examined in the *Milošević* Rule 98bis Decision. The intensity requirement was assessed focusing on the length or protracted nature of the conflict and the seriousness of armed clashes,[64] the spread of clashes over the territory,[65] the increase in number of governmental

[62] 'Yugoslav Tribunal', at 634.

[63] Thahzib-lie and Swaak-Goldman, 'Determining the Threshold', in Lijnzaad *et al.*, *Making the Voice of Humanity Heard*; Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 248.

[64] *Milošević*, Trial Chamber Decision on Motion for Judgment of Acquittal (*Milošević* Rule 98bis Decision) Case No. IT-02-54-T, 16 June 2004, para. 28.

[65] *Ibid*., para.29.

forces sent to Kosovo[66] and the type of weaponry used.[67] In clarifying the threshold for the application of international humanitarian law to the situation, the Trial Chamber made two significant points in response to submissions by *amici curiae*. The *amici curiae*, Steven Kay and Timothy McCormack, submitted that the KLA did not act under an organised civil authority and that, as a consequence, the situation fell short of the threshold of armed conflict.[68] In responding to this claim, the Trial Chamber asserted it did not 'accept existence of a civilian authority as a requirement for the existence of an armed conflict'.[69] In another submission, the *amici curiae* contended that the KLA did not exercise sufficient control over territory.[70] In response, the Trial Chamber stated that it did not 'accept that such control of territory is a requirement for the existence of an armed conflict'.[71] While holding that control over territory and the existence of organised civil authority were not necessary for the characterisation of a situation as one of armed conflict, the Chamber nevertheless noted these conditions did in fact exist in Kosovo during the period relevant to the indictment.[72]

In assessing the intensity of armed violence during a different period of the conflict in Kosovo, the *Limaj* Trial Chamber used a similar approach to that employed by the *Milošević* Trial Chamber.[73] The seriousness of armed clashes,[74] the mobilisation of troops by the government,[75] the kind of weaponry utilised,[76] the destruction of property,[77] the displacement of local population[78] and the existence of casualties[79] were highlighted as conditions indicative of the intensity of hostilities.

In assessing the intensity of hostilities, the Trial Chamber emphasised the level of armed violence between the parties to the conflict and the irrelevance of the purpose for which the parties were fighting:

> The two forces were substantially engaged in their mutual military struggle. While the Serbian forces were far more numerous and better trained and equipped, it appears they were ill-prepared to deal effectively with small guerrilla type forces that would not engage them in prolonged fixed

[66] *Ibid*., para. 30. [67] *Ibid*., para. 31.
[68] *Milošević*, Trial Chamber Decision, para. 34. [69] *Ibid.*
[70] *Ibid*., para. 36. Mr. Steven Kay, QC, and Professor Timothy L.H. McCormack acted as *amici curiae*.
[71] *Ibid*., para. 36. [72] *Ibid*., paras. 34, 36.
[73] 'First Trial', at *Prosecutor* v. *Milošević*, Trial Chamber Decision, paras. 26–32.
[74] *Limaj et al.,* Judgment, paras. 135–43 . [75] *Ibid*., para. 150.
[76] *Ibid*., para. 166. [77] *Ibid*., para. 142.
[78] *Ibid*., paras. 142, 167. [79] *Ibid*., para. 134.

engagements. Serbian military intelligence may also have overestimated the strength and capability of the KLA at the time so that the Serbian forces were arraigned in greater number and with greater military resources than was warranted by the actual KLA forces. In this respect, as revealed by the evidence, many combat operations were carried out in the area of Drenica where the KLA developed earlier and was probably best organised. But, most importantly in the Chamber's view, the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.[80]

This statement by the Trial Chamber indicates the irrelevance of *jus ad bellum* in determining the existence of armed conflict. This is an important point to note. Governments have been known to deny the applicability of international humanitarian law on the grounds of not recognising the cause of an organised armed group.[81] It should be emphasised in relation to such cases that the existence of armed conflict is determined on the basis of objective criteria and not the subjective judgement of either party to the conflict. As noted by the ICTR Trial Chamber in *Akayesu*:

> It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfils their respective pre-determined criteria.[82]

The predetermined criteria relating to common Article 3 are the level of organisation possessed by parties to the conflict and the intensity of hostilities. In relation to the requirement of intensity, it is important to consider the evolution that has taken place in international humanitarian law since the drafting of the Geneva Conventions, in particular since the establishment of the international criminal tribunals for Rwanda and the former Yugoslavia, and to bear in mind that the

[80] *Ibid*., para. 170. [81] See Chapter 2, at section 2.4.
[82] *Akayesu*, Judgment, para. 603.

characterisation of situations should be approached on a case-by-case basis.

Some studies stipulate a *numerical* threshold of deaths for the recognition of a situation as one of armed conflict. The *Yearbook* of the Stockholm International Peace Research Institute sets a numerical threshold of 1,000 battle-related deaths,[83] while the Uppsala Department of Peace and Conflict Research sets a threshold of twenty-five battle-related deaths.[84] Such numerically defined thresholds would arguably be inappropriate in a legal context for a number of reasons. First, the focus of these thresholds is solely on the number of deaths and the criterion of organisation on the part of non-state actors is overlooked. Second, the number of deaths that occur in the vast majority of armed conflicts represent only a subset of the total number of victims. Third, the stipulation of a numerical threshold would set an unwarranted restriction on the application of common Article 3 and other rules of customary international humanitarian law. The protection that might otherwise be provided by international humanitarian law would no longer apply to many situations, in particular in the early stages of hostilities or in cases of low-intensity armed conflict. As noted by Jean Pictet, '[t]he respect due to the human personality as such is not measured by the number of victims'.[85]

As a condition for determining the existence of armed conflict, the intensity of hostilities is an important consideration for the application of international humanitarian law. While conditions evidencing the intensity of non-international armed conflict are often similar to those of international armed conflict, it is worth noting that the threshold for the application of international humanitarian law to the former is distinctly different from that of the latter. A state of international armed conflict can be said to exist in the absence of hostilities in cases of military occupation. A situation where two or more states are considered 'at war' also qualifies as international armed conflict in the absence of hostilities. Article 2 common to the four Geneva Conventions of 1949 defines the terms of their applicability to such situations. It states that each Convention shall apply to

> all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

[83] SIPRI *Yearbook 2006*.

[84] See Wallensteen and Sollenberg, 'Armed Conflict'. See also www.pcr.uu.se/research/UCDP/definition_of_armed_conflict.htm.

[85] Pictet, *Commentary II*, p. 27.

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

As a declaration of war in itself is sufficient to bring into force the Geneva Conventions, it is clear that the requirement of intensity need not be relevant to determining the status of an armed conflict initiated in this way. It is noteworthy also that the second paragraph of Article 2 stresses that the Conventions apply to all cases of occupation 'even if the said occupation meets with no armed resistance'.[86]

Considering that the existence of hostilities is not a prerequisite for international armed conflict, it is clear that the threshold of applicability associated with such situations is distinctly different to that of non-international armed conflict. Any analogy between the two thresholds therefore needs to be carefully qualified. While there is considerable overlap in the customary international law standards applicable to international and non-international armed conflicts, it is important to recognise how such situations are characterised. The former generally manifests itself as 'a resort to armed force between States' while the latter may be characterised according to the level of organisation of armed groups and the intensity of hostilities. As noted in Chapter 2, common Article 3 provides no indication of the degree of intensity required for a situation to qualify as 'armed conflict not of an international character'. At the time of drafting, the material field of application associated with this provision was that of civil war, i.e. an armed conflict of dimensions similar to that of a conventional international war but taking place within the borders of a sovereign state. This concept of non-international armed conflict is now of less contemporary relevance. It bears little resemblance to the current threshold of application of common Article 3. The category of situations that qualify as 'armed conflict not of an international character' has broadened considerably since 1949. The lowering of the threshold of intensity required for the existence of armed conflict has resulted in the extension of the protection provided by international humanitarian law. The definition of non-international armed conflict as 'protracted armed violence between governmental authorities and organized armed groups'

[86] The Elements of Crimes states that 'the term "international armed conflict" includes military occupation.' ICC, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), fn. 34.

has broadened the scope of 'armed conflict not of an international character'. It also implicitly reaffirmed the exclusion of situations of internal disturbance and tensions from the remit of common Article 3. The section that follows will examine applications of the *Tadić* definition in order to illustrate further how the test may be interpreted and to show also its currency as a formula for the characterisation of non-international armed conflict.

4.1.2 Application of the Tadić *formula for the characterisation of armed conflict*

The *Tadić* formula has been applied to various situations to confirm the existence of armed conflict for the application of international humanitarian law. As this standard for the characterisation of armed conflict was first developed in the jurisprudence of the ICTR and the ICTY, it is useful to probe further the case law of these institutions before observing its application in other contexts.

The *Tadić* definition of non-international armed conflict was first applied in the case law of the ICTR when dealing with allegations of violations of international humanitarian law committed by Jean Paul Akayesu.[87] While the UN Security Council had already characterised the situation in Rwanda as one of non-international armed conflict,[88] the ICTR Trial Chamber found it necessary to establish the applicability of common Article 3 and Additional Protocol II individually.[89] The Tribunal determined the applicability of war crimes provisions in the ICTR Statute through the utilisation of the ICRC Commentary on Common Article 3, the ICRC Commentary on Additional Protocol II and the *Tadić* definition of non-international armed conflict. In order to distinguish the situation from ones constituting internal disturbance and tensions, the Chamber stated that it would be 'necessary to evaluate both the intensity and organisation of the parties to the conflict'.[90] Applying this approach to the situation in Rwanda, the Trial Chamber found that there had been:

> A civil war between two groups … Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special

[87] *Akayesu*, Judgment, para. 619. [88] *Ibid.*, para. 605.
[89] *Ibid.*, para. 607.
[90] *Ibid.*, 620. The Trial Chamber described de facto armed conflict as 'the existence of hostilities between armed forces organised to a greater or lesser extent', *ibid.*

rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions.[91]

After confirming the application of common Article 3, the Trial Chamber went on to state that the situation also met the requirements of Article 1(1) of Additional Protocol II:

In addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF [Rwandan Patriotic Front], under the command of General Kagame, and, on the other, the governmental forces, the FAR [Rwandan Armed Forces]. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.[92]

The *Tadić* definition of non-international armed conflict was utilised again before the ICTR in the *Rutaganda* case.[93] Here the approach employed in *Akayesu* was referred to: '[I]n dealing with this issue, the *Akayesu Judgment* suggested an "evaluation test", whereby it is necessary to evaluate the intensity and the organisation of the parties to the conflict to make a finding on the existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.'[94] A similar line of reasoning was followed by the ICTR Trial Chamber in *Musema*:

The expression 'armed conflicts' introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or

[91] *Ibid*., para. 621. [92] *Ibid*., para. 627.
[93] *Rutaganda*, Judgment, 6 December 1999, para. 93. [94] *Ibid.*

lesser degree. Internal disturbance and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in the legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.

Having defined the term in an abstract manner, to the Chamber it is apparent that whether a conflict meets the criteria of Common Article 3 is to be decided on a case by case basis.

In dealing with this issue, the Akayesu Judgment suggested an 'evaluation test' whereby the Trial Chamber evaluated the intensity and organization of the parties to the conflict to make a finding on the existence of an armed conflict not of an international character.

This approach, followed as well in the Rutaganda Judgment, finds favour with the Trial Chamber of this instance.[95]

The approach employed by the ICTR is naturally in line with that of its sister institution the ICTY.[96] The *Tadić* definition has been employed consistently in the case law of the ICTY[97] and has been described in a recent judgment as 'well-settled in the jurisprudence of the Tribunal'.[98] The first context of its application, discussed earlier in the chapter, was to a situation in Bosnia and Herzegovina.[99] The status

[95] *Musema*, Judgment and Sentence, paras. 248–51.

[96] The principle of *stare decisis* applies to decisions of both tribunals. *Stare decisis* is 'the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation'. Bryan A. Garner, *Black's Law Dictionary* (8th edn; St. Paul: West Publishing, 2004), p. 1443.

[97] This was noted in *Limaj et al.*, Judgment, para. 84.

[98] *Orić*, Judgment, para. 254.

[99] The *Tadić* Trial Chamber confirmed the existence of armed conflict in the region but did not rule on its classification as either internal or international:

> Having regard then to the nature and scope of the conflict in the Republic of Bosnia and Herzegovina and the parties involved in that conflict, and irrespective of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces, the Trial Chamber finds that, at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war embodied in Article 3 common to the four Geneva Conventions of 12 August 1949, applicable as it is to armed conflicts in general, including armed conflicts not of an international character.
> *Tadić*, Trial Chamber Judgment, para. 568.

of situations in this state was also examined in *Celebici*,[100] *Orić*[101] and *Hadžihasanović*.[102]

In addition to Bosnia and Herzegovina, the *Tadić* definition of non-international armed conflict was furthermore applied to determine the status of situations in Croatia.[103] Decisions from the *Milošević* and *Limaj* cases relating to situations in Kosovo have thus far however

[100] The object of *Celebici* Trial Chamber's deliberations concerned allegations of war crimes committed in the municipality of Konjic. The existence of armed conflict in this region was confirmed mainly by reference to the intensity of hostilities:

> The level of the fighting in Bosnia and Herzegovina as a whole, as in Konjic itself, was clearly intense and consequently attracted the concern of the United Nations Security Council and General Assembly, along with other international organizations. Acting under Chapter VII of the United Nations Charter, the Security Council passed numerous resolutions in relation to the conflict and consistently called upon all of the parties involved to put an end to their military operations.
>
> In Konjic, the TO and MUP were joined for a short period by the HVO as part of a Joint Command established and organized to fight the Serb forces. At the very least, these forces representing the 'governmental authorities' were engaged against the forces of the Bosnian Serbs – the JNA and VRS joined by local volunteers and militias – who themselves constituted 'governmental authorities' or 'organized armed groups'. This finding is without prejudice to the possibility that the conflict may in fact have been international and the parties involved States and their representatives.
>
> The Trial Chamber must therefore conclude that there was an 'armed conflict' in Bosnia and Herzegovina in the period relevant to the Indictment and notes that, regardless of whether or not this conflict is considered internal or international, it incorporated the municipality of Konjic. Thus, the first fundamental precondition is met for the application of international humanitarian law, including those norms of the law incorporated in Articles 2 and 3 of the Statute, to the present case, providing there is shown to be a sufficient nexus between the alleged acts of the accused and this armed conflict.

Delalic et al., paras. 190–2.

[101] *Prosecutor* v. *Orić*, Judgment, Trial Chamber II, Case No. IT-03-68-T, 30 June 2006, para. 259.

[102] See section 4.2.1.

[103] The characterisation of the situation in Croatia was dealt with in the judgments of both Trial Chamber and the Appeal Chamber in the *Kunarac* case. The ruling of the Trial Chamber on the status of the situation as one of armed conflict was upheld by the Appeal Chamber. Both chambers refer to the *Tadić* definition of non-international armed conflict in discussions relating to the applicability of Article 3 of the ICTY Statute. *Kunarac et al.*, Trial Chamber Judgment, para 402; *Kunarac et al.*, Appeals Chamber Judgment, 1 para. 56. These rulings will be discussed further at section 4.2, relating to the geographical scope of internal armed conflict.

The status of the situation in Croatia was also dealt with in the *Furundzija* case.

> Here the *Tadić* definition of non-international armed conflict was applied in determining the existence of armed conflict between the Croatian Defence Council (HVO) and the Army of Bosnia and Herzegovina (ABiH) during May

carried more important elucidations of the threshold for non-international armed conflict. As illustrated above at section 4.1.1, the content of these decisions is of particular significance to the interpretation of the twin criteria associated with the *Tadić* definition.

In addition to its use by the ICTR and the ICTY, the *Tadić* definition of non-international armed conflict has also been applied to determine the status of situations in a number of other contexts. These situations include Palestine,[104] the Sudan,[105] Somalia,[106] Sierra Leone,[107] Lebanon[108] and East Timor.[109]

The Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories, John Dugard, used the definition on a number of occasions in evaluating the status of the situation in the Occupied Palestinian Territories of the Middle East.[110] In a report issued on the 4 October 2001 he stated that the situation could be characterised, 'on an irregular and sporadic basis', as an armed conflict due to the 'frequent exchanges of gunfire between the Israel Defence Forces and Palestinian gunmen'.[111]

Mona Rishmawi, an Independent Expert of the Commission on Human Rights, applied the *Tadić* definition to the situation in Somalia in order to determine the existence of armed conflict and thus the applicability of international humanitarian law. Accordingly, she held

1993. The Trial Chamber's findings, however, dealt briefly with the matter. It did not elaborate on how the formula was applied or why evidence presented by the prosecutor met the requirements for the existence of armed conflict. *Prosecutor* v. *Furundzija*, Trial Chamber Judgment, 10 December 1998, Case No. IT-95-17/1, para. 59.

[104] Report of the Special Rapporteur, para. 13; Report of the Special Rapporteur, E/CN.4/2002/32, para. 18.

[105] For examples, see Report of the Special Rapporteur, UN Doc. E/CN.4/2006/111, para. 8; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 74.

[106] Report on the Situation of Human Rights in Somalia, E/CN.4/1997/88, para 54.

[107] See also Report of the Sierra Leone Truth and Reconciliation Commission, vol. 1, 5 October 2004, para. 57 (available at www.trcsierraleone.org. Last visited: 3 April 2008).

[108] Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, para. 51.

[109] Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste, 31 October 2005, para. 141 (available at www.etan.org/news/2006/cavr.htm.

[110] Report of the Special Rapporteur, E/CN.4/2002/32, 6 para. 18; Report of the Special Rapporteur, A/56/440, para. 13.

[111] Report of the Special Rapporteur, E/CN.4/2002/32, para. 18; Report of the Special Rapporteur, A/56/440, para. 13.

that 'as long as the faction leaders, the militias and other irregular armed forces continue their conflict in Somalia and until a peaceful settlement is reached, international humanitarian law related to internal armed conflict applies in the whole territory of Somalia irrespective of whether the specific area is engulfed in active fighting'.[112]

In explaining the work of the Sierra Leone Truth and Reconciliation Commission in relation to violations of international humanitarian law, the report of the Commission cites the definition of armed conflict provided by and states:

> With regard to its work the Commission has assumed the existence of armed conflict throughout the timeframe defined in section 6(1) of the Act. It seems appropriate to consider that international humanitarian law continued to apply within Sierra Leone subsequent to the Lomé Peace Agreement and probably until 18 January 2002, when the conflict was officially declared to have come to an end.[113]

The Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General referred to the formula provided by the *Tadić* Jurisdiction Decision in its evaluation of the situation's status. In matching the facts of the situation to this formula,[114] the Commission recognised the situation as one of non-international armed conflict rendering common Article 3 applicable:

> The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). As noted above, the first two groups of insurgents took up arms against the central authorities

[112] Report on the Situation of Human Rights in Somalia, E/CN.4/1997/88, para. 55.

[113] Report of the Sierra Leone Truth and Reconciliation Commission, vol. 1, para. 57.

[114] It should be noted however that the approach adopted by the Commission on Inquiry is not entirely consistent with the jurisprudence of the ICTY. The Report of the Commission on Inquiry refers to the 'existence of organised armed groups fighting against the central authorities' as a requirement of 'internal armed conflict under common Article 3 of the Geneva Conventions'. In doing so, it overlooks the possibility of a state of armed conflict occurring between organised armed groups without the involvement of state authorities. The Report also refers to 'control by rebels over part of the territory' as a requirement for the chararterisation of a situation as one of non-international armed conflict. This appears to set a much higher threshold for the application of international humanitarian law than that which would normally be required for the application of common Article 3. See Report of the International Commission of Inquiry on Darfur, 25 January 2005, para. 75.

in or around 2002. However, the scale of rebel attacks increased noticeably in February 2003. The rebels exercise *de facto* control over some areas of Darfur. The conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.[115]

A further example of the application of the *Tadić* definition by a fact-finding body is provided in the Report of the Commission of Inquiry on Lebanon relating to the 'grave situation of human rights in Lebanon caused by Israeli military operations'.[116] The Report of the Commission states that:

> It is well established in international humanitarian law that for the existence of an armed conflict the decisive element is the factual existence of the use of armed force. That aside, there is authority for the proposition that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies as soon as an armed conflict arises and it binds all the parties thereto to fully comply with it. On the basis of the factual circumstances of the conduct of the hostilities that took place, including the intensity of the violence and the use of armed force, the Commission is of the view that the existence of an armed conflict during the relevant period has been sufficiently established.[117]

The different contexts to which the *Tadić* definition has been applied indicate the authoritative standing it has acquired as a formula for the characterisation of non-international armed conflict in international humanitarian law. It is worth noting, in addition to the sources referred to in this section, that the definition has also been incorporated into the Rome Statute of the International Criminal Court. This will be returned to later in Chapter 5. The section that follows will examine the geographical scope of the *Tadić* definition of non-international armed conflict.

[115] *Ibid*.

[116] Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, para. 51.

[117] *Ibid*.

4.2 The geographical scope of non-international armed conflict

In considering grounds for recognising the existence of armed conflict in Prijedor the *Tadić* Appeals Chamber held, in accordance with the definition of non-international armed conflict referred to above, that 'the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities'.[118] International humanitarian law thus pertains not only to those areas where actual fighting is taking place: it applies to the entire territory of the state involved in armed conflict. This position clearly strengthens the reach of international humanitarian law. It is expressed consistently in the jurisprudence of the Tribunal.[119] The Trial Chamber in the *Blaskic* case referred to the definition of armed conflict provided by the *Tadić* Jurisdiction Decision as a 'criterion' applicable

> to all conflicts whether international or internal. It is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part.[120]

Similarly, in *Kordic and Cerkez* the Trial Chamber stated that

> in order for norms of international humanitarian law to apply in relation to a particular location, there need not be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms a part.[121]

In the *Kunarac* case, the Trial Chamber applied the *Tadić* definition of non-international armed conflict to determine the existence of armed conflict between Bosnian Serbs and Bosnian Muslims in the municipalities of Foca, Gacko and Kalinovik.[122] In doing so it held that a state

[118] *Tadić* Jurisdiction Decision, para. 67.

[119] See *Delalic et al.*, Trial Chamber Judgment, para. 185; *Prosecutor* v. *Blaskic*, Trial Chamber Judgment, 3 March 2000, ICTY Case No. IT-95-14, para. 64; *Kunarac et al.*, Trial Chamber Judgment, paras. 402 and 567; *Naletilic and Martinovic*, Trial Chamber Judgment, para. 177; *Kordic and Cerkez*, Appeals Chamber Judgment, para. 319.

[120] *Blaskic*, Trial Chamber Judgment, para. 64.

[121] *Kordic and Cerkez*, Trial Chamber Judgment, para. 27. The findings of the Trial Chamber on this point were supported in the Judgment of the Appeals Chamber. *Kordic and Cerkez*, Appeals Chamber Judgment, para. 319.

[122] *Kunarac et al.*, Trial Chamber Judgment, paras. 402 and 567. Similar to the *Furundzija* Trial Chamber's finding, the finding of the *Kunarac* Trial Chamber does not elaborate on its application of the *Tadić* formula.

of armed conflict existed in the region relevant to the indictment and emphasised that international humanitarian law applies continuously to the whole of the territory under the control of one of the parties, whether or not actual combat takes place there.[123] While the defence conceded the existence of an armed conflict in Foca, this finding was appealed on the grounds that the Trial Chamber had erred, *inter alia*, in establishing the existence of armed conflict in Gacko and Kalinovik.[124] In responding to this challenge, the Appeals Chamber stated pointedly that:

> [T]he Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties. The Appeals Chamber finds that ample evidence was adduced before the Trial Chamber to demonstrate that an armed conflict was taking place in the municipalities of Gacko and Kalinovik at the relevant time.[125]

The language used by the Appeals Chamber in this case places emphasis on the broad geographical scope of international humanitarian law. The position originally expressed in the *Tadić* Jurisdiction Decision is reproduced in the *Kunarac* Appeal Chamber's Judgment:

> There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.[126]

[123] *Kunarac et al.*, Trial Chamber Judgment, para. 568.
[124] *Kunarac et al.*, Appeals Chamber Judgment, para. 49.
[125] *Ibid.*, para. 56. [126] *Ibid.*, para. 57.

The prosecution of war crimes is thus dependent upon: (a) the existence of armed conflict; and (b) a nexus to armed conflict.[127] The broad interpretation given to the geographical scope of armed conflict is not without significance. In so far as it avoids fragmentation of status, it facilitates a greater degree of clarity and cohesiveness in the application of international humanitarian law to situations of non-international armed conflict. The Trial Chamber in the *Delalic* case states that 'whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable'.[128] The continuity of applicability is preserved by this position preventing interpretations of the law that would arbitrarily deprive victims of the protection it provides.

4.3 The temporal scope of non-international armed conflict

The Tribunal's position concerning the temporal scope of armed conflict confirms the constant applicability of international humanitarian law to situations of protracted armed violence where hostilities are not necessarily to be characterised as continuous.[129] Indeed, the use of the term 'protracted' in the Tribunal's definition of non-international armed conflict implies that hostilities need not require, unlike Additional Protocol II, the use of 'sustained and concerted' military operations.[130] As interruptions in fighting do not suspend the obligations of the parties under international humanitarian law, the

[127] The existence of a nexus to the armed conflict is an important requirement for the prosecution of war crimes. In order to hold a person responsible for such offences, the acts of the accused must be closely related to the hostilities. *Delalic et al.*, Trial Chamber Judgment, para. 185; *Naletilic and Martinovic*, Trial Chamber Judgment, para. 177. While the geographical scope of the armed conflict concept is to be broadly interpreted, the nexus requirement ensures a degree of balance in the applicability of international humanitarian law. As noted by the *Naletilic* Trial Chamber:

> Once it is established that an armed conflict occurred in a territory, the norms of international humanitarian law apply. It is not necessary to further establish that actual combat activities occurred in a particular part of the territory. The existence of an armed conflict nexus is established if the alleged crimes 'were closely related to the hostilities'.

Naletilic and Martinovic, Trial Chamber Judgment, para. 177.

[128] *Delalic et al.*, Trial Chamber Judgment, para. 185.

[129] See Zimmermann, 'War Crimes', in O. Triffterer (ed.), *Commentary on Statute of the International Criminal Court* (Verlagsgesellschaft: Baden-Baden, 1999), p. 285.

[130] See Zimmermann, 'War crimes'.

use of 'protracted' in the Tribunal's definition allows for a broad interpretation of the non-international armed conflict threshold. Given its breadth, a question may be raised concerning the parameters of reasonable interpretation. As discussed earlier, implicit in the term 'protracted armed violence' is that the hostilities in question must possess a certain degree of intensity. It also implies the conflict must be of a certain duration. The duration required, like the aspect of intensity, is subject to interpretation and should be assessed on the basis of a case-specific analysis of facts. According to the jurisprudence of the Inter-American Commission on Human Rights however it would appear that if the other characteristics of armed conflict are fulfilled the temporal aspect need not exceed a couple of days. As the findings of the Commission are relevant to subsequent discussion, it is useful here to look at the *La Tablada* case in order to explore its interpretation of the temporal aspect of non-international armed conflict.

According to the decision of the Inter-American Commission on Human Rights in the *La Tablada* case, 'Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State.'[131] On the threshold determining the existence of armed conflict, the Commission held that:

> In contrast to these situations of domestic violence, the concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other. In this regard, Common Article 3 simply refers to, but does not actually define 'an armed conflict of a non-international character'. However, Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. Thus, Common Article 3 does not apply to riots, mere acts of banditry or an *unorganised* and short-lived rebellion. Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It is important to understand that application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable

[131] Case 11.137 (*La Tablada*), Juan Carlos Abella Argentina, Report N° 55/97 of the Inter-American Commission on Human Rights, 18 November 1997, para. 152. Available at www.cidh.oas.org/annualrep/97eng/Argentina11137.htm.

to a civil war in which dissident armed groups exercise control over parts of national territory.[132]

The issue before the Commission concerned an attack on a military base in Argentina. In order to determine the applicability of international humanitarian law, the Commission had to evaluate the status of the situation and decide on its characterisation as one of either armed conflict or internal disturbance.

The Commission believes that before it can properly evaluate the merits of the petitioner's claims concerning the recapture of the La Tablada base by the Argentine military, it must first determine whether the armed confrontation at the base was merely an example of an 'internal disturbance or tensions' or whether it constituted a non-international or internal armed conflict within the meaning of Article 3 common to the four 1949 Geneva conventions ('Common Article 3'). Because the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions, a proper characterization of the events at the La Tablada military base on January 23 and 24, 1989 is necessary to determine the sources of applicable law. This, in turn, requires the Commission to examine the characteristics that differentiate such situations from Common Article 3 armed conflicts in light of the particular circumstances surrounding the incident at the La Tablada base.[133]

The Commission drew on the concept of internal disturbances and tensions outlined by the ICRC Commentary on Additional Protocol II to elucidate the distinction demarcating the applicability of international humanitarian law in situations of non-international armed conflict:

- riots, that is to say, all disturbances *which from the start are not directed by a leader and have no concerted intent*;
- isolated and sporadic acts of violence, *as distinct from military operations carried out by armed forces or organized armed groups*;
- other acts of a similar nature which incur, in particular, mass arrests of persons because of their behaviour or political opinion.[134]

Despite its brevity, spanning only two days, the Commission considered the event to rise above the threshold of internal disturbances to merit the application of international humanitarian law:

Based on a careful appreciation of the facts, the Commission does not believe that the violent acts at the La Tablada military base on January 23 and 24, 1989

[132] *La Tablada*, para. 152. [133] *Ibid*., para. 148.
[134] *Ibid*., para. 149. Emphasis added by Commission.

can be properly characterized as a situation of internal disturbances. What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons – all forms of domestic violence not qualifying as armed conflicts.

What differentiates the events at the La Tablada base from these situations are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective – a military base. The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.

The Commission concludes therefore that, despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.[135]

This decision of the Inter-American Commission of Human Rights sets a low temporal requirement for the application of international humanitarian law in situations of non-international armed conflict. While the definition of armed conflict requires the existence of 'protracted' hostilities, it appears from the *La Tablada* case that this temporal element need not exceed a couple of days. This is a significant clarification of the law of armed conflict for the reason that it precludes expansive interpretations of the time required for a situation to merit the application of international humanitarian law. According to the reasoning of the Commission, the application of international humanitarian law to situations of non-international armed conflict may be asserted where the material conditions manifesting a state of armed conflict are met despite being brief in duration.

If applied to the definition of non-international armed conflict propounded by the ICTY, the position of the Inter-American Commission on Human Rights would appear to infer that a situation of 'protracted armed violence' need not be measured in terms of weeks or months in order for it to be characterised as an armed conflict. The fact that the La Tablada incident lasted only thirty hours is indicative of the broad temporal scope that is sometimes assumed for application of international humanitarian norms in situations of non-international

[135] *Ibid.*, paras. 154–6.

armed conflict.[136] The temporal element should not however be considered independently of other conditions governing the applicability of international humanitarian law. As noted earlier, all aspects are interrelated and must be considered on a case-by-case basis.

4.4 The existence of armed conflict between non-state actors

The application of international humanitarian law to hostilities between non-state armed groups was not an issue considered by the drafters of the Geneva Conventions of 1949. As illustrated in Chapter 2, the term indicating common Article 3's field of application, 'armed conflict not of an international character',[137] was understood by delegates at the Diplomatic Conference as referring to situations akin to civil war.[138] Civil wars, by definition, required the participation of an armed force representing a *de jure* government.[139] As the prevailing standard was that of belligerency,[140] the idea that common Article 3 would also cover conflicts between non-state actors without the involvement of a *de jure* government would have appeared somewhat incongruous to the drafters of the Geneva Conventions. International humanitarian law has however developed to cover such situations. As noted by A.P.V. Rogers:

> The existence of an armed conflict does not necessarily mean that there is an armed contention between the state and an insurgent faction. There can be an armed conflict between factions within a state. Some light has been thrown on these issues by the important ruling on jurisdiction of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.[141]

The definition of non-international armed conflict as 'protracted armed violence between governmental authorities and armed groups *or between such groups*' by the *Tadić* Appeals Chamber confirms the applicability of international humanitarian law to conflicts lacking any involvement of governmental authorities. The approach taken by the Appeals Chamber

[136] This is viewed by some authors as a positive development of the law. For Bahia Thahzib-lie and Olivia Swaak-Goldman, the protracted requirement does not 'immunise acts committed in the early stages of a conflict'. 'Determining the Threshold', p. 248.

[137] As noted by Sonja Boelaert-Suominen, 'the ICRC commentary to Common Article 3, and especially the criteria suggested by the ICRC for its application, do not cater for the hypothesis of conflicts between non-State entities'. 'Yugoslav Tribunal' at 633.

[138] See Chapter 2, at section 2.1.2. [139] See Chapter 2, at section 2.1.1

[140] On the doctrine of belligerency, see Chapter 1, at section 1.4.

[141] Rogers, *Law on the Battlefield*, p. 218.

on this issue indicates an important development of international humanitarian law. Support for this development is evidenced not only by the extensive utilisation of the *Tadić* definition of non-international armed conflict, but also by the incorporation of the definition's terms into the Rome Statute of the International Criminal Court.

It is noteworthy that the position taken by the ICRC prior to *Tadić* was to encourage the application of international humanitarian law in such situations. In its Commentary on Additional Protocol II, the ICRC notes the rejection of its proposal for the Protocol to apply to armed conflict between non-state armed groups:

> In its draft the ICRC had provided that the Protocol would be applicable in the case of several factions confronting each other without involvement of the government's armed forces, for example, if the established government had disappeared or was too weak to intervene. Such a situation, it appeared to the Conference, was merely a theoretical textbook example and the provision was dropped, even though the ICRC had already been confronted with this type of situation.[142]

The ICRC Commentary goes on to say that as a consequence of this, the definition of non-international armed conflict contained in Additional Protocol II 'does not cover such cases and only common Article 3 will apply to them'.[143] The Commentary was published in 1987, eight years before the *Tadić* Jurisdiction Decision. The position expressed in the Commentary on the applicability of common Article 3 to conflicts between non-state actors indicates the ICRC's interest in the formal extension of international humanitarian law to cover such situations. A position paper issued by the ICRC in January of 1998 argued for a similar approach to the issue of common Article 3's applicability:

> Given the humanitarian purpose of common Article 3, its scope of application must be as wide as possible and should not be limited by unduly formal requirements. It is revealing in this respect that various recent UN Security Council resolutions have called upon 'all parties to the conflict' to respect international humanitarian law, and this also in the context of such 'anarchic conflicts' as those in Somalia and Liberia … In [these] cases the Security Council implicitly stated that hostilities linked to the disintegration of the State constituted an armed conflict.[144]

While noting positions adopted by the UN Security Council on 'anarchic conflicts', the ICRC also conceded that the majority of expert opinion did

[142] ICRC, *Commentary on the Additional Protocols,* para. 4461. [143] *Ibid.*
[144] ICRC, 'Armed conflicts linked to the disintegration of State structures'.

not support this approach to the application of international humanitarian law: 'With regard to the term "armed conflict", expert opinion has also and almost exclusively taken into account conflicts between a government and a rebel party, but not conflicts between different factions in a country.'[145]

The subsequent incorporation of the *Tadić* definition into Article 8(2)(f) of the Rome Statute of the International Criminal Court suggests a general acceptance of the fact that a state of armed conflict can now exist between organised armed groups without any involvement of state authorities.[146] This development of international humanitarian law ensures that the victims of conflicts between non-state armed groups need not be excluded from the protection it provides on account of the non-involvement of state authorities.

Common Article 3 is now a recognised applicable standard in situations of guerrilla warfare where hostilities take place between organised armed groups without the involvement of governmental authorities. To characterise such situations as manifestations of armed conflict would have appeared controversial in the past because of non-involvement of *de jure* state authorities. The definition of non-international armed conflict provided by the *Tadić* Jurisdiction Decision has been a catalyst in remedying this. It is important to recognise the influence of this decision on the development and interpretation of the law.[147] The formula it provides for the characterisation of non-international armed conflict addresses what was one of the most significant lacunae of international humanitarian law, the material conditions governing its applicability. The section that follows investigates the existence of 'responsible command' as an additional condition of the characterisation of armed conflict. In doing so, attention is focused on its effect on the threshold of non-international armed conflict in international humanitarian law.

4.5 The question of responsible command

4.5.1 Does the concept of non-international armed conflict presuppose the existence of responsible command?

In the case of *Prosecutor* v. *Hadžihasanović* the ICTY affirmed for the first time the applicability of the doctrine of command responsibility to

[145] *Ibid*. [146] See Zimmermann, 'War Crimes', p. 286.

[147] See Greenwood, 'Development of International Law'. See also Boelaert-Suominen, 'Yugoslav Tribunal', 619.

situations of non-international armed conflict.[148] In doing so, however, the Tribunal asserted the existence of 'responsible command' to be an integral part of the concept of non-international armed conflict. The notion of responsible command employed in this context is taken from Article 1(1) of Additional Protocol II. As illustrated in Chapter 3, this provision sets a high threshold for the application of international humanitarian law.[149] Decisions issued in the *Hadžihasanović* case relating to the doctrine of command responsibility are explored in this section as a means of examining how such an interpretation of responsible command affects the threshold for the characterisation of non-international armed conflict.

The doctrine of command responsibility, expressed in Article 7(3) of the Statute of the ICTY,[150] allows a commander to be held criminally responsible for the illegal acts of a subordinate 'if he knew or had reason to know that the subordinate was about to commit such acts or had done so and [...] failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'.[151] On 16 July 2003 the ICTY Appeals Chamber in the *Hadžihasanović* case issued a decision affirming the applicability of this doctrine to crimes committed in situations of non-international armed conflict.[152] The decision

[148] See *Prosecutor* v. *Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002; *Prosecutor* v. *Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003. Available at www.un.org/icty.

[149] See Chapter 3, at section 3.2.2.

[150] Statute of the ICTY, updated November 2003. Available at www.un.org/icty/basic/statut/stat11-2003.htm (last visited: 3 April 2008).

[151] The doctrine of command responsibility is also expressed in Article 38 of the Rome Statute of the International Criminal Court (37 ILM 999, 1998):

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[152] *Hadžihasanović et al.*

of the Appeals Chamber upheld a previous ruling on the matter by the *Hadžihasanović* Trial Chamber.[153] The decisions of both Chambers in this case are, for a number of reasons, of particular significance to the development of international humanitarian law. First, prior to the *Hadžihasanović* case, the ICTY had never explicitly ruled on the question of whether, under customary international law, a commander could be held criminally responsible for the illegal acts of his or her subordinates in a situation of non-international armed conflict. Second, in linking the doctrine of command responsibility to the existence of 'responsible command', the tribunal has equated the latter concept to the 'organised' nature of armed groups. The implication of doing so is that the term 'organised armed group' may now not be applied without assuming also the existence of responsible command. Third, the *Hadžihasanović* case contributes further to the existing overlap in the norms applicable in internal and international armed conflict in international humanitarian law.

In so far as this development of the law ensures a greater degree of accountability for violations of humanitarian norms, the Tribunal's affirmation of the doctrine's applicability in non-international armed conflict is to be welcomed. It is unfortunate, however, that the approach adopted in doing so confuses the threshold for the application of international humanitarian law in such situations.

4.5.2 The existence of responsible command as a condition for the characterisation of armed conflict: Prosecutor *v.* Hadžihasanović

As highlighted previously, the threshold for the application of international humanitarian law in the *Tadić* definition of non-international armed conflict is significantly lower than that stipulated in Additional Protocol II.[154] Article 1(1) of the Protocol states that it applies to armed conflicts

> which take place in the territory of a High Contracting 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 and to implement this Protocol.[155]

[153] *Hadžihasanović, et al.* Trial Chamber,

[154] See Zimmermann, 'War Crimes' p. 285.

[155] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 1, 1125 UNTS 609. Emphasis added.

In the *Hadžihasanović* case, the Tribunal uses the concept of responsible command contained in Article 1(1) of Additional Protocol II to illustrate the applicability of the command responsibility doctrine in situations of non-international armed conflict. In doing so, however, the Tribunal confuses the matter by referring to the standard of responsible command contained in the Additional Protocol as being applicable in *all* situations of non-international armed conflict.

4.5.2.1 The meaning of responsible command

The *Hadžihasanović* Trial Chamber cites the ICRC Commentary on Protocol II to clarify how it understands the meaning of responsible command:

> The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. *It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.*[156]

Utilising this interpretation of the term, the Trial Chamber states that 'responsible command means an organisation that is both capable of planning and carrying out sustained and concerted military operations, *and* imposing discipline in the name of the *de facto* force or government'.[157] The Chamber also refers to the ICRC Commentary on common Article 3 to support the principle of responsible command as a standard applicable in all situations of armed conflict:

> As the ICRC Commentary on Common Article 3 states, when discussing the criteria for an 'armed conflict' (to distinguish an armed conflict from acts of banditry or an 'unorganized and short-lived insurrection'), the Party in revolt against the *de jure* government 'possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.'[158]

4.5.2.2 Questions concerning the use of criteria indicating the existence of armed conflict from the ICRC Commentary on common Article 3

The fact that the ICRC included the above criterion among others referred to as being 'in no way obligatory' for the application of

[156] As cited in *Hadžihasanović et al.*, Trial Chamber, Pilloud *et al.*, *Commentary,* p. 1352. Emphasis added by Trial Chamber.
[157] *Hadžihasanović et al.*, Trial Chamber, para. 161. [158] *Ibid.*

common Article 3 is not mentioned by the Trial Chamber.[159] Regardless of this omission, the appropriateness of referring to the criteria listed in the ICRC Commentary must be questioned as the contemporary concept of non-international armed conflict differs considerably from that employed at the time of the drafting of the Geneva Conventions.

Some scholars of international law see the list of conditions posited in the ICRC Commentary as a useful tool for determining the existence of armed conflict. For example, Derek Jinks states that 'the criteria are best understood as independently sufficient grounds to establish the existence of an "armed conflict"'.[160] The weight generally given to the ICRC criteria in interpreting grounds for recognising the existence of armed conflict is further evidenced by their use in decisions of the ICTR and the ICTY.[161]

As illustrated in Chapter 2,[162] the term 'armed conflict not of an international character' was understood by delegates at the Diplomatic Conference to have a meaning synonymous with that of 'civil war'. As common Article 3 is now applicable in situations that fall short of civil war, a lower threshold for the application of international humanitarian law clearly needs to be recognised. The approach employed by the Trial Chamber in referring to the ICRC Commentary is thus not helpful. As noted by René Provost:

> The criteria put forward by the ICRC in its commentary, however convenient, can be seriously misleading. The criteria were elaborated in the context of an attempt to define armed conflict not of an international character to which the Conventions as a whole would be applicable. A decision was made at the Conference not to make the Conventions applicable to a narrow type of internal conflict, but rather to adopt a widely applicable but substantively limited regime. There is therefore no justification for the adoption of the elements of a restrictive definition of internal armed conflict in the context of Article 3.[163]

The Appeals Chamber, taking a similar approach to that of the Trial Chamber in citing ICRC Commentary,[164] also neglects to mention the

[159] Pictet, *Commentary I*, p. 49.

[160] Jinks, 'September 11', at 31. See also Lt. Colonel H. Wayne Elliott on use of the criteria as a basis for determining the existence of armed conflict in Chechnya, 'Chechnya and the Laws of War', available at www.crimesofwar.org/expert/chech-eliot.html.

[161] E.g. *Akayesu*, Judgment, paras. 619 and 562.

[162] See Chapter 2, at section 2.1.2.

[163] Provost, *International Human Rights,* p. 266.

[164] See *Hadžihasanović et al.,* Appeals Chamber, para. 15:

> Responsible command was an integral notion of the prohibition imposed by Article 3 common to the 1949 Geneva Conventions against the doing of certain

criteria as being 'in no way obligatory' for the application of common Article 3. Affirming the command responsibility doctrine to be a corollary of responsible command in non-international armed conflict,[165] the Appeals Chamber furthermore utilises Article 1(1) of Additional Protocol II in the same way as the Trial Chamber.[166] The approach adopted by both Chambers in their interpretation of command responsibility implies a threshold of application higher than that associated with common Article 3.

4.5.2.3 The requirement of 'sustained and concerted' military operations

By stating that the existence of armed conflict presupposes the existence of responsible command and that responsible command in turn presupposes 'sustained and concerted' military operations, the minimum threshold for the application of international humanitarian law is raised, requiring a higher intensity of hostilities. The ICRC Commentary on Additional Protocol II interprets the requirement of 'sustained and concerted military operations' as follows:

> 'Sustained' (in French the reference is to 'opérations continues') means that the operations are kept going or kept up continuously. The emphasis is therefore on continuity and persistence. 'Concerted' (in French: 'concertées') means agreed upon, planned and contrived, done in agreement according to a plan. Thus we are talking about military operations conceived and planned by organized armed groups.[167]

By inserting the Additional Protocol II notion of responsible command into the non-international armed conflict concept the Tribunal effectively narrows the latter to exclude situations where hostilities are of a lower level of intensity. It is important to emphasise that not all situations of armed conflict involve 'sustained and concerted' military operations.[168] The condition of 'sustained and concerted' military

> things in the course of an internal armed conflict. Referring to the criteria for determining whether there was an 'armed conflict not of an international character' within the meaning of that provision, the *ICRC Commentary* spoke, authoritatively, of a revolting party possessing 'an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the' convention.

[165] *Ibid.*, para. 14. [166] *Ibid.*, para. 15.

[167] Pilloud *et al.*, *Commentary,* p. 1353.

[168] Commenting on the definition of armed conflict provided by the *Tadić* Jurisdiction Decision, Zimmermann states 'it has to be noted, that unlike in the case of sustained armed violence, the operations need not be kept going continuously by the

operations, according to its use in the *Hadžihasanović* case,[169] is only applicable to hostilities reaching a high level of intensity. Hostilities that lack 'sustained and concerted' military operations may also be said to lack responsible command. In the absence of responsible command, according to the standard employed by the Tribunal, it is not possible to characterise a situation as one of armed conflict. The implication of not recognising an armed conflict on such grounds is that the application of international humanitarian law becomes restricted to situations where hostilities have already reached a high threshold of intensity.

4.5.2.4 Responsible command, command responsibility and the organisational requirement for armed groups engaged in non-international armed conflict

In supporting the Trial Chamber's affirmation of the applicability of the command responsibility doctrine in non-international armed conflict, the Appeals Chamber states that '[r]esponsible command was an integral notion of the prohibition imposed by Article 3 common to the 1949 Geneva Conventions against the doing of certain things in the course of an internal armed conflict'.[170] Referring to the existence of an organised military force as a prerequisite for the existence of armed conflict, the Chamber states that this in turn presupposes the existence of responsible command: 'It is evident that there cannot be an organised military force save on the basis of responsible command.'[171] Interpreting the organised nature of an armed group as evidence of responsible command, the Appeals Chamber states that

> [t]he relevant aspects of international law unquestionably regard a military force engaged in an internal armed conflict as organized and therefore as being under responsible command. In the absence of anything to the contrary, it is the task of a court to interpret the underlying State practice and *opinio juris* (relating to the requirement that such a military force be organized) as bearing its normal meaning that military organization implies responsible command and that responsible command in turn implies command responsibility.[172]

conflicting parties'. He also affirms that 'there is no need that the relevant military actions must be concerted and thus be planned and contrived.' 'War crimes' p. 285.

[169] See *Hadžihasanović et al.,* para. 161; and *Hadžihasanović et al.,* Appeals Chamber, para. 15.

[170] *Hadžihasanović et al.,* Appeals Chamber, para. 15.

[171] *Ibid.,* para. 16.

[172] *Ibid.*, para. 17.

4.5.3 Responsible command as a condition for the characterisation of non-international armed conflict in international humanitarian law

The position expressed by the *Hadžihasanović* Appeals Chamber clearly implies a higher threshold for the application of international humanitarian law than that of the *Tadić* definition of non-international armed conflict. As the concept of responsible command in *Hadžihasanović* is taken from Additional Protocol II, and as the interpretation of this concept is tied to Article 1(1) of the instrument, it follows as a logical consequence that the material field of application for non-international armed conflict is higher than that ordinarily assumed for the application of common Article 3. This threshold necessarily excludes all situations of non-international armed conflict where an organised armed group is not capable 'on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority'.[173] Considering how these terms narrow the scope of applicability, it would arguably be of benefit to distinguish between situations of internal armed conflict where the Additional Protocol II concept of responsible command applies and all other situations of non-international armed conflict.

Situations of non-international armed conflict without responsible command include cases where hostilities are protracted but of low intensity, lacking sustained and concerted military operation. Armed conflicts taking place between organised armed groups without the involvement of governmental authorities, referred to above at section 4.4, would also lack responsible command. In cases of armed conflict between governmental authorities and organised armed groups, the latter party would furthermore be required to represent a de facto authority for the concept of responsible command to apply.

Given the high threshold of application associated with Additional Protocol II, and the much lower threshold associated with common Article 3, it is important for responsible command not to be viewed as a condition determining the existence of armed conflict. Without making explicit this distinction, the concept of responsible command may serve to restrict unduly the application of international humanitarian law to situations not reaching the threshold of Additional Protocol II.

The approach taken by the *Hadžihasanović* Appeals Chamber in its interpretation of responsible command places considerable weight on

[173] As cited in *Hadžihasanović et al.,* Trial Chamber, para. 87. Pilloud *et al.*, *Commentary,* p. 1352.

the ICRC Commentary on common Article 3.[174] As emphasised above, the concept of non-international armed conflict has developed significantly since the drafting of the Geneva Conventions. The threshold of application currently associated with common Article 3 is considerably different to that indicated in the ICRC Commentary. The definition of non-international armed conflict provided by *Tadić* is a clear illustration of this. Drawing on the terms of this definition, Sonja Boelaert-Suominen comments that 'it can be safely concluded that the threshold suggested by the ICRC Commentary has failed to crystallise into customary international law. In particular, there is no requirement in the ICTY judgments that the non-State entities should somehow exert control over part of a territory, or that such armed forces have a responsible command.'[175]

Expressing a similar position to Boelaert-Suominen, Bahia Thahzib-lie and Olivia Swaak-Goldman also hold that the existence of responsible command should not be considered a requirement for the characterisation of non-international armed conflict:

> [F]or common Article 3 to apply, the hostilities must meet a minimum level of intensity and must arguably be sufficiently protracted. The hostilities must be conducted between parties that are sufficiently organised … although not necessarily under responsible command and willing to respect the laws of war.[176]

The reasoning of the *Hadžihasanović* Appeal Chamber has been criticised for its approach to the interpretation of responsible command in non-international armed conflict. Professor Christopher Greenwood comments that

> [T]he reasoning leaves open some large questions. Despite what it said about the need to be satisfied that state practice recognized the principle, the decision cites almost no state practice and concedes that 'domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict.' It does not explain why the concept of responsible command, which imposes duties on belligerents, automatically entails criminal responsibility for individuals. Nor does it explain why it is illogical for one concept of customary international humanitarian law to be applicable in international but not internal conflicts, while, nevertheless, conceding that not all of the principles of that law extend to both types of conflict.

[174] *Hadžihasanović,* Appeals Chamber, para. 15.
[175] See Boelaert-Suominen, 'Yugoslav Tribunal', at 633–4.
[176] Thahzib-lie and Swaak-Goldman, 'Determining the Threshold', p. 253.

Indeed, one might argue that a different approach to command responsibility might be appropriate in a non-international armed conflict, because the armed forces involved in such conflicts are often less structured and well organized (particularly on the non-governmental side) than in international hostilities.[177]

In so far as the responsible command concept presupposes the threshold of application associated with Additional Protocol II, the question as to whether it may be considered a prerequisite for the characterisation of non-international armed conflict must be answered in the negative. As the application of common Article 3 is not dependent on the existence of a de facto authority, sustained and concerted military operations or the involvement of governmental authorities, it would arguably be inappropriate to limit the reach of this provision by adding such conditions to its threshold of application. If responsible command is to be proposed as a condition for the characterisation of non-international armed conflict, it would first need to be redefined in terms that are consistent with the existing threshold of common Article 3. In the absence of such a development there are no grounds to depart from the prevailing standard.

4.6 Concluding observations

The approach first adopted in *Tadić* has developed into the prevailing standard for distinguishing the status of situations for the application of international humanitarian law. As such it has arguably impacted positively in the elucidation of the conditions signifying the existence of armed conflict. According to the jurisprudence of the ICTY and ICTR, the two factors distinguishing a state of armed conflict from internal disturbance are the level of organisation within armed groups and the intensity of hostilities. This approach provides a broad interpretation of non-international armed conflict, allowing reasonable breadth for the application of international humanitarian law to such situations.

The adaptation of the definition in the Rome Statute, and its application by various international bodies, illustrate the authority of the standard for the characterisation of armed conflict. It is important to recognise however that the utility of the formula is premised on the coherence of its interpretation. If it continues to be interpreted in the broad terms used in the earlier jurisprudence of the ICTY and ICTR,

[177] Greenwood, 'Command Responsibility', at 601.

the formula's future application will cover situations of low intensity armed conflict and will be capable of adapting to new forms of non-international warfare. However, if interpreted as requiring the existence of responsible command, as implied in the *Hadžihasanović* case, then it is foreseeable that its future application will be limited to situations of high-intensity armed conflict. The notion of 'responsible command' employed in this case is essentially an Additional Protocol II concept, requiring a higher threshold of application than common Article 3. It presupposes the existence of 'sustained and concerted' military operations and does not allow for the existence of armed conflict if the hostilities are of consistent low intensity.

It is important furthermore to recognise that the definition of non-international armed conflict is not to be interpreted on the basis of the criteria put forward by the ICRC in its Commentary on common Article 3. These criteria imply a threshold for the application of international humanitarian law higher than that required by the contemporary concept of non-international armed conflict. Derived from proposals discussed at the Diplomatic Conference of 1949, the criteria refer to situations displaying the characteristics of civil war. As the notion of non-international armed conflict has evolved considerably since the drafting of the ICRC Commentary, it needs to be recognised that the contemporary threshold for the application of international humanitarian law is lower than that which was assumed during the drafting of common Article 3. The *travaux préparatoires* of the Rome Statute provides further evidence of this and will be discussed in the chapter that follows.