

# INTERNATIONAL LAW ASSOCIATION

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### USE OF FORCE

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### Final Report on the Meaning of Armed Conflict in International Law

#### Summary

In May 2005, the Executive Committee of the International Law Association (ILA) approved a mandate for the Use of Force Committee to produce a report on the meaning of war or armed conflict in international law. The report was motivated by the United States' position following the attacks of 11 September 2001 that it was involved in a "global war on terror". In other words, the U.S. has claimed the right to exercise belligerent privileges applicable only during armed conflict anywhere in the world where members of terrorist groups are found. The U.S. position was contrary to a trend by states attempting to avoid acknowledging involvement in wars or armed conflicts. The Committee was asked to study the evidence in international law and report on how *international law* defines and distinguishes situations of armed conflict and those situations in which peacetime law prevails. Given that important aspects of international law turn on whether a situation is properly defined as armed conflict, providing a clear statement about the definition of armed conflict in international law would support the proper functioning of the law in general. Most fundamentally, it would support the proper application of human rights law (HRL).

At the outset of its work, the Committee found that the term "war", while still used, has, in general, been replaced in international law by the broader concept of "armed conflict". The Report focuses, therefore, on "armed conflict".

The Committee also found that the existence of armed conflict has many significant impacts on the operation of international law beyond the well-known fact that during armed conflict international humanitarian law (IHL) will apply and states party to an armed conflict (or other emergencies) may have the right to derogate from some human rights obligations. In addition, states that provide asylum to persons fleeing the violence of armed conflict will have the duty to do so; treaty obligations may be implicated; the law of neutrality may be triggered; arms control agreements are affected, and United Nations forces engaged in armed conflict will have rights and duties not applicable in operations outside of armed conflict. These are just some of the areas of international law that are affected by the outbreak of armed conflict. Plainly, the existence of armed conflict is a significant fact in the international legal system, and, yet, the Committee found no widely accepted definition of armed conflict in any treaty. It did, however, discover significant evidence in the sources of international law that the international community embraces a common understanding of armed conflict. All armed

conflict has certain minimal, defining characteristics that distinguish it from situations of non-armed conflict or peace. In the absence of these characteristics, states may not, consistently with international law, simply declare that a situation is or is not armed conflict based on policy preferences.

The Committee confirmed that at least two characteristics are found with respect to all armed conflict:

- 1.) The existence of organized armed groups
- 2.) Engaged in fighting of some intensity

In addition to these minimum criteria respecting all armed conflict, IHL includes additional criteria so as to classify conflicts as either international or non-international in nature.<sup>1</sup> These additional criteria will be discussed briefly below, but the main focus of the Report is on the basic characteristics of armed conflict rather than the classification of armed conflict under IHL.

The Committee followed standard international legal methodology in identifying these basic characteristics. It examined treaties; state practice and *opinio juris*; and, as subsidiary means, judicial decisions, and the writing of scholars. The Committee also considered the definitions of armed conflict used by other disciplines.<sup>2</sup> The Committee collected evidence from mid-1945 through mid-2010. The 1945 starting date was natural as the United Nations Charter was adopted in June of that year. The Charter all but eliminated the importance of declarations of war for international law purposes. After 1945, such declarations no longer were determinative of the *de jure* existence of war or armed conflict. Just four years later, the 1949 Geneva Conventions were adopted. In these treaties, too, the term “armed conflict” is significant. Article 2 common to all four Conventions states that the Conventions apply in all situations of “armed conflict”—not just in declared wars.<sup>3</sup>

The Committee’s research indicates that since the Second World War our world has been characterized by much violence. Nevertheless, a distinction is made between the violence that gives rise to the right of a state to claim the belligerent’s privileges to kill without warning, detain without trial, or seize cargo on the high seas. The violence must be organized and intense—even between sovereign states—before the otherwise prevailing peacetime rules are suspended. States, international organizations, courts, and other legitimate actors in the international legal system distinguish lower level or chaotic violence from armed conflict. The International Committee of the Red Cross (ICRC) Commentary to the Conventions refers to “any engagement of the armed forces of High Contracting Parties” as an armed conflict for purposes of applying the Conventions. The Committee, however, found little evidence to support the view that the Conventions apply in the absence of fighting of some intensity. For non-state actors to move from chaotic violence to being able to challenge the armed forces of a state requires organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity. Such organized forces are only recognized as engaged in armed conflict when fighting between them is more than a minimal engagement or incident. The Inter-American Commission on Human Rights characterized an engagement of Argentina’s armed forces with organized, armed militants that lasted thirty hours and resulted in casualties and property destruction as an armed conflict.<sup>4</sup> The Committee found no other examples more minimal than this as being described by a court, the Security Council, other organizations, states, or scholars as an armed conflict. Among

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<sup>1</sup> For example, it is often stated that for IHL to apply to a non-international armed conflict, the fighting must be “protracted”. See *infra* pp 19, 37.

<sup>2</sup> In September 2007, the Committee participated in an inter-disciplinary conference on the meaning of armed conflict at the University of Notre Dame. Members of the military, war correspondents, military historians, political scientists, just war ethicists, and peace studies scholars all made presentations on the definition of armed conflict from the perspective of their discipline. The presentation by Peter Wallenstein, a peace studies scholar, was particularly helpful as he drew on a major database on armed conflict developed at Uppsala University in Sweden. See *infra* n 44. See also the collected papers from the conference in *The Meaning of Armed Conflict in International Law* (M E O’Connell ed. forthcoming Martinus Nijhof.)

<sup>3</sup> *I Commentary on the Geneva Conventions of 12 August 1949* 32 (footnote omitted) (J S Pictet ed, Geneva: ICRC, 1952).

<sup>4</sup> *Juan Carlos Abella v Argentina*, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.98, Doc. 6 rev., 18 November 1997, paras. 149-51 (distinguishing ‘internal disturbances’ from armed conflict on the basis of the nature and level of violence). See also *infra* pp 19, 37.

the many other situations of violence widely acknowledged to be armed conflict, the Inter-American Commission's finding in the Argentine case appears to involve the least amount of fighting. It is well known that criminal gangs can perpetrate considerable levels of violence even against the armed forces of a state. Still, states have rejected recognizing such situations as "armed conflict". Criminals generally do not organize themselves to carry out armed conflict with government military forces. It is also common knowledge that the well-organized armed forces of states often clash, for example, at disputed land or maritime boundaries. States do not, however, classify such incidents as armed conflicts unless they reach a certain level of intensity.

Many will recognize the characteristics of intensity and organization from a 1995 decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*, a decision widely cited for its description of the characteristics of armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) found that both a certain amount of organization among all fighting groups and a certain level of intense fighting distinguished armed conflict from other violence, such as riots and border incidents. While the *Tadić* criteria are well known, the Committee found significant additional evidence supporting the decision.

The Committee submitted its findings to the ILA in June 2008 as an Initial Report. That Report was presented at the ILA Biennial in Rio de Janeiro. The Report was received favourably with suggestions for the final report. In particular, ILA members asked that care be taken to emphasize that even during armed conflict certain fundamental human rights continue to apply. IHL is not the only law relevant to armed conflict. That point is reflected throughout this Final Report. The Committee also undertook to add more details to the final report respecting the criteria of organization and intensity and at least some discussion as to the commencement, termination, and territorial scope of armed conflict. These complex topics require additional in-depth research. These topics could well be the focus of future Committee reports.

The Initial Report and a report of the Working Session at the Rio Biennial are included in the 2008 Proceedings of the ILA. The Initial Report has remained posted on the Website of the ILA since June 2008. Also, the Committee's Chair publicized the Initial Report in an article published in 2008 that is also available online.<sup>5</sup> Since the posting of the Report, the Rio Biennial, and the publication of the article, the Committee has received no evidence of state practice to support a different conclusion than that reached in its Initial Report. The U.S. appears to continue to recognize a "global war on terror," although in somewhat modified form. It is now characterized as an "armed conflict with al-Qaeda, the Taliban and associated forces".<sup>6</sup> Yet, many other examples came to the Committee's attention in the same time period supporting the Committee's initial conclusions. The new evidence is included in this Final Report. The Report continues to conclude that all armed conflict involves, at a minimum, intense fighting among organized armed groups.<sup>7</sup>

## I INTRODUCTION

### (a) Mandate and Purpose

Since at least the time of Hugo Grotius and his seminal work, *The Law of War and Peace* (1625), international law has been organised around two contrasting situations: the presence or absence of war, now more commonly referred to as armed conflict. Armed conflict is, therefore, a core concept in international law, but it is also a socially constructed concept and, as such, it is not amenable to any

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<sup>5</sup> M E O'Connell, *Defining Armed Conflict* (Winter 2008) 13 Journal of Conflict & Security Law 393.

<sup>6</sup> H H Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, [www.state.gov](http://www.state.gov). Available at: <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>7</sup> As stated above the Committee recognizes that international law distinguishes between different types of armed conflict relying on criteria additional to the common characteristics of organization and intensity. The Committee's mandate, however, was to report on the general definition of armed conflict. Consequently, the different categories of armed conflict, although identified throughout the Report are not its particular focus. They, too, might well be a topic for a future Committee.

scientific litmus test.<sup>8</sup> Nevertheless, whether or not armed conflict exists depends on the satisfaction of objective criteria. Identifying these criteria has been a long-standing challenge in international law. The challenge seems to have become greater in recent years with the clash today between advocates of a broad, flexible understanding of armed conflict that affords states belligerent rights and advocates of a narrow definition that better protects individuals. During armed conflict states have expanded rights to kill without warning, detain without trial, and suspend or derogate from treaties and other obligations. Individuals may have their right to life, their right to a trial, and other important rights circumscribed in armed conflict. Therefore, the existence of armed conflict not only triggers the application of IHL, but can also have a wide reaching impact on the international legal norms regulating relations between states including asylum obligations, HRL, neutrality law, UN operations, and treaty practice.<sup>9</sup> Until the 11 September 2001 attacks, states generally resisted acknowledging that even intense fighting on their territory was armed conflict. To do so was to admit failure, a loss of control to opposition forces, and could be seen as recognizing a status for insurgents.<sup>10</sup> Some scholars even raised the possibility that the distinction between armed conflict and peace in international law was dissolving.<sup>11</sup> There seems to have been little pressure to clarify the meaning of armed conflict when governments were willing to apply the higher level of rights and duties applicable in peacetime. True, the International Committee of the Red Cross (ICRC) has consistently pressed governments to acknowledge fighting as armed conflict and to apply IHL,<sup>12</sup> but the real pressure for clarification came with the U.S. declaration of a “global war” in 2001 and its claim to exercise certain rights applicable only in armed conflict, such as the right to kill combatants without warning, detain without trial, search vessels on the high seas, and seize cargo.<sup>13</sup> Subsequently, European Union member states have also

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<sup>8</sup> N Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War* (2004) 43 Columbia Journal of Transnational Law 1.

<sup>9</sup> See, e.g., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc A/HRC/14/24/Add.6 at 9, 28 May 2010 (‘Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside of armed conflict, or in relation to the interstate use of force.’ Citing UN Doc A/61/311, paras. 33-45 (detailed discussion of ‘arbitrary’ deprivation of life under human rights law)).

<sup>10</sup> See, e.g., the position of the Russian government with respect to the conflict in Chechnya in the 1990s. Arguments of Russia in *Isayeva, Yusopova and Bazayeva v Russia*, nos. 57947/00, 57948/00 and 57949/00, ECHR 24 February 2005 [hereinafter *Isayeva I*]. But see decision of the Russian Constitutional Court finding that a non-international armed conflict was occurring between Russian forces and Chechen rebel forces in the mid-1990s: *Presidential Decrees and the Resolutions of the Federal Government Concerning the Situation in Chechnya*, Judgment of July 31, 1995. Available at [http://www.venice.coe.int/docs/1996/CDL-INF\(1996\)001-e.pdf](http://www.venice.coe.int/docs/1996/CDL-INF(1996)001-e.pdf). See examples of states refusing to recognize armed conflict on their territory, in M E O’Connell, *Humanitarian Assistance in Non-International Armed Conflict: The Fourth Wave of Rights, Duties and Remedies* (2002) 31 Israel Yearbook on Human Rights 183, 196. See also *infra* n 12.

<sup>11</sup> See, for example, the arguments for the principle of necessity to govern all uses of lethal force in F F Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict* (2001) 64 Saskatchewan Law Review 347; and T Meron & A Rosas, *A Declaration of Minimum Humanitarian Standards* (1991) 85 American Journal of International Law 375. See also, International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) at 78-82 [hereinafter ICRC, *Interpretive Guidance on Direct Participation in Hostilities*] (indicating a common rule of necessity for all uses of lethal force). Available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC\\_002\\_0990.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf).

<sup>12</sup> See, for example, the cases of El Salvador, Sri Lanka, and Colombia. Re Sri Lanka, see International Committee of the Red Cross, *ICRC Annual Report 1996* 140-42 (1997); re Colombia see ICRC action to protect and assist the victims of armed conflict in Colombia, 2 April 2008, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/colombia-report-02042008>, and re El Salvador see R K Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts* (1993) 9 American University Journal of International Law and Policy 49, 89.

<sup>13</sup> G W Bush, President’s Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (11 September 2001); G W Bush, President’s Address to Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347 at 1348 (20 September 2001) (Bush said the US was in a ‘war on terror’ that would last ‘until every terrorist group of global reach has been found, stopped and defeated’). For references to particular U.S. claims of belligerent rights to target, detain, and search, see, M E O’Connell, *Ad Hoc War*, in *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection* 405 (Horst Fischer et al, eds., 2004). See also *infra* pp 30-31.

been grappling with the definition of armed conflict after the adoption of an EU Directive affording asylum rights to persons fleeing armed conflict.<sup>14</sup>

The need now clearly exists for a clarification of the distinction between armed conflict and peace. The proper application of IHL, HRL, asylum rights, and other international legal principles depends on an accurate understanding of the legal meaning of armed conflict. It is the mandate of the Committee to provide this clarification.

(b) Methodology

The Committee took up the mandate to report on the meaning of armed conflict in international law by employing standard international legal analysis. The members looked to the primary and secondary sources of international law.<sup>15</sup> The Committee found no multilateral treaty that provides a generally applicable definition of armed conflict. Therefore the meaning of armed conflict is to be found in customary international law as evidenced by state practice and *opinio juris*, as well as subsidiary sources, judicial decisions and scholarly commentary.

IHL, judicial decisions applying IHL, and the writing of scholars on IHL were particularly helpful to the Committee, given, as stated above, that the 1949 Geneva Conventions apply, according to Common Article 2, during “armed conflict”. HRL, judicial decisions applying HRL and scholarly writing on HRL also proved helpful, although in this area, scholars and courts are noting the increasing convergence of fundamental protection rules that apply in both situations of armed conflict and peace.<sup>16</sup> In the *Nuclear Weapons* Advisory Opinion the International Court of Justice (ICJ) dealt with the argument that the use of nuclear weapons constituted a violation of the right to life contrary to Article 6 of the International Covenant on Civil and Political Rights (ICCPR) in these terms:

The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can

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<sup>14</sup> See Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless person as refugees or as person who otherwise need international protection and the content of the protection granted, (30 September 2004) Official Journal of the European Union L 304, [hereinafter EU Qualification Directive].

<sup>15</sup> Statute of the International Court of Justice, art 38.

<sup>16</sup> Indeed, the treaty provisions of IHL already incorporate some aspects of human rights norms that are applicable in times of armed conflict. Art 72 of Additional Protocol I specifically requires that the fundamental guarantees in art 75 are to be applied in addition to ‘other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 (1979). Art 75 of Additional Protocol I defines fundamental guarantees as prohibition of murder, torture, inhuman and degrading treatment, taking of hostages, corporal punishment and collective punishment. Additional Protocol II makes express reference to human rights (‘Recalling ... that international instruments relating to human rights offer a basic protection to the human person’) while Arts 4-6 of Protocol II elaborate on the protection of the basic human rights already the object of Common Article 3. See generally, F Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 No 871 IRRC 549 (2008). See also C Antonopoulos, *The Relationship Between International Humanitarian Law and Human Rights*, 63 Revue Hellenique de Droit International (2010), issue 2 [forthcoming]; W Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, (2007) 40 Israel Law Review 592 (no. 2).

only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. ...<sup>17</sup>

However, in applying the right to life provision of the European Convention of Human Rights in more recent cases, the European Court of Human Rights (ECHR) has not felt the need to categorize situations as armed conflict or peace in order to assess the legality of the use of force by authorities.<sup>18</sup> Indeed, commentators are finding that as HRL develops it is of increasing importance in the context of armed conflict, and, as a consequence, the need to define armed conflict carefully so as to exclude the application of human rights is declining. Nevertheless, some older decisions concerned with HRL, such as the *Nuclear Weapons* case and the Inter-American Commission on Human Rights decision *Abella v. Argentina* have been helpful.<sup>19</sup>

In addition to IHL and HRL, other relevant subfields of international law are examined in the Report as well as many examples of conflict. Often a court, commission or other authoritative decision-maker will state whether or not a particular situation is an armed conflict. In the absence such evidence, the Committee examined other indications such as application of IHL by the parties, involvement of the ICRC, reference to the Security Council, official statements of the parties involved, scholarly commentary, and references in the media to determine the status of a conflict. It is an impossible task to examine all relevant legal developments or to comprehensively assess all relevant jurisprudence. Nor was it practical to review all conflicts since the adoption of the U.N. Charter. Nevertheless, the Report considers a significant amount of material and, as mentioned above, no omissions have been brought to the Committee's attention after two years.

### (c) Terminology

Clarifying the meaning of armed conflict is facilitated by an appreciation of several other terms frequently used in discussions of armed conflict. In the context of the use of force, international law distinguishes between *ius ad bellum* and IHL.<sup>20</sup> *Ius ad bellum* regulates the situations in which states

<sup>17</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, para. 25. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 196, para. 106 and *Armed Activities on the Territory of the Congo* (Congo v Uganda), 19 December 2005, ICJ Rep. 2005, 168, para. 216 (to the effect that the protections offered by human rights conventions continue to apply in cases of armed conflict).

<sup>18</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art 2, opened for signature 4 November 1950, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>. It provides:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In several cases arising out of the Chechen conflict in Russia, the European Court of Human Rights found violations of art 2 but did not specify that these were violations of IHL and so not excused even in the case of armed conflict. See, *Isayeva I*, supra n 10; *Isayeva v Russia*, no. 57950/00, ECHR 24 February 2005 [hereinafter *Isayeva II*]; and *Khashiyev & Akayeva v Russia*, nos. 57942/00 and 57945/00, ECHR 24 February 2005.

Similarly, in *Ergi v Turkey*, no. 66/1997/850/1057, ECHR 28 July 1998, the ECHR considered Turkey's use of force to repress the Kurdish Worker's Party. The ECHR cited only art 2 of the Convention when determining that there was insufficient evidence to prove a Turkish violation of art 2.

<sup>19</sup> *Abella v Argentina*, supra n 4.

<sup>20</sup> See generally C Greenwood, *The Relationship Between Ius Ad Bellum and Ius In Bello* (1983) 9 *Review of International Studies* 133-47, in C Greenwood, *Essays on War in International Law* 13 (London: Cameron May

can lawfully resort to force. Under this law, the terms “war” and “armed attack” are of particular significance. First with respect to “war”, in classic pre-Charter *ius ad bellum*, this was the international law term used to describe the situation of armed conflict between states, and it is still in use today. It has undergone a particular resurgence in public discourse in the context of the so-called “war on terror”.

In Oppenheim’s classic definition, war was “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases”.<sup>21</sup> During the period when many legal scholars and states contended that the resort to force was unregulated, a declaration of war had considerable legal significance, such as bringing into operation not only the laws of war, as IHL was then known, but also the institution of neutrality and validating the exercise of belligerent rights. The United Nations Charter, however, prohibits all use of force except in self-defence or with Security Council authorisation.<sup>22</sup> After the adoption of the Charter, governments and jurists began to abandon the use of the term “war”.<sup>23</sup>

It is still possible for states to find themselves in a state of war<sup>24</sup> or to make formal declarations of war.<sup>25</sup> Many national constitutions still require formal declarations of war in some circumstances.<sup>26</sup> Such a declaration is not contrary to international law unless (depending on the context) it constitutes a threat within the meaning of Article 2(4) of the United Nations Charter.<sup>27</sup> Political factors are obviously of considerable significance in this context and frequently will dictate whether states use the terminology of war or choose to use other more pacific terminology and strategies to deal with the problem. For example, in 2005 Eritrea used the terminology of war in its argument before the Eritrea/Ethiopia Claims Commission but failed to report its actions to the Security Council as required under Article 51 of the Charter that governs the legal right to self-defence.<sup>28</sup> The terminology of war was also used by Israel in the 2006 conflict in Lebanon.<sup>29</sup>

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Ltd, 2006) and for an explanation of the various terms used to describe this area of the law, see J Gardam, *Introduction*, in *Humanitarian Law* xi (J Gardam ed, Aldershot: Ashgate, 1999).

<sup>21</sup> L Oppenheim, II *International Law: A Treatise* 202 (H Lauterpacht ed, London: Longman, Greens and Co, 1952).

<sup>22</sup> For recent discussions of these rules, see C Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 3<sup>rd</sup> ed 2008); M E O’Connell, *Preserving the Peace: The Continuing Ban on War Between States* (2007) 38 *California Western International Law Journal* 41; M Wood, *The Law on the Use of Force: Current Challenges* (2007) 11 *Singapore Yearbook of International Law* 1.

<sup>23</sup> As to the relevance of ‘war’ in post-Charter times, see E Lauterpacht, *The Legal Irrelevance of the ‘State of War’* (1968) 62 *Proceedings of the American Society of International Law* 58; R R Baxter, *The Legal Consequences of the Unlawful Use of Force under the Charter* (1968) 62 *Proceedings of the American Society of International Law* 68; Lord McNair and A D Watts, *The Legal Effects of War* (New York: Cambridge University Press, 4<sup>th</sup> ed 1966); C Greenwood, *War, Terrorism and International Law* (2004) 56 *Current Legal Problems* 505, 529, in Greenwood, *Essays on War in International Law*, supra n 20 at 431-32.

<sup>24</sup> C Greenwood, *The Concept of War in Modern International Law* (1987) 36 *International and Comparative Law Quarterly* 283, 302-5 in Greenwood, *Essays on War in International Law*, supra n 20 at 54-59.

<sup>25</sup> *Jus Ad Bellum*, Partial Award, Ethiopia Claims 1-8, Eritrea Ethiopia Claims Commission, 2006 ILM 430.

<sup>26</sup> For example, the United States Constitution mandates that ‘war’ be declared by the Congress. U.S. Constitution art I sec. 8. The Congress has not declared a war, however, since the Second World War, despite the many subsequent uses of force including cases commonly characterized as war: the Korean War, the Vietnam War, the Gulf War, and the Iraq War. See D L Westerfield, *War Powers: the President, the Congress, and the Question of War* (Westport, CT: Praeger Publishers, 1996).

<sup>27</sup> As Brownlie writes, ‘acts which would otherwise have been equivocal may be treated as offensive’. I Brownlie, *International Law and the Use of Force by States* 368 (Oxford: Clarendon Press, 1963).

<sup>28</sup> *Jus Ad Bellum*, Partial Award, supra n 25.

<sup>29</sup> See Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937-S/2006/515, 12 July 2006. However, the resolution of the US Congress House of Representatives on the conflict used the traditional terminology of armed attack and self-defence. House Resolution 921, 109<sup>th</sup> Congress, 18 July 2006.

To summarise, although the term “war” may still have some significance in a few areas such as for some national constitutions,<sup>30</sup> or some domestic contracts, in international law the term “war” no longer has the importance that it had in the pre-Charter period.

Another term important to distinguish from armed conflict is the phrase “armed attack”. Armed attack is a term of art under Article 51 of the United Nations Charter. The occurrence of an armed attack triggers a state’s right to resort to measures in self-defence. The phrase lacks an agreed definition.<sup>31</sup> Irrespective, however, of what constitutes such an event under *ius ad bellum*, an armed attack that is not part of intense armed fighting is not part of an armed conflict.<sup>32</sup>

Turning to terminology in IHL, the traditional description of the customary practices that developed into both treaty and customary IHL was “the laws and customs of war” or more generally “the law(s) of war”. These terms are still in use today<sup>33</sup> although the “law of armed conflict” or “IHL” are more generally accepted.

“International” and “non-international” are also significant terms in the context of applying IHL. Traditionally, “international armed conflicts” are conflicts between states and “non-international armed conflicts” are those between states and armed groups within the territory of a state or states.<sup>34</sup> In more recent times conflicts not involving a government, for example on the territory of a “failed state”, can qualify as armed conflicts to which IHL applies.<sup>35</sup> There is thought to be growing convergence between the rules governing international and non-international armed conflicts and in the future it may

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<sup>30</sup> See, for example, D L Westerfield, *War Powers: the President, the Congress, and the Question of War*, supra n 26.

<sup>31</sup> What constitutes an armed attack has been comprehensively examined by a number of commentators, in particular, C Gray, *International Law and the Use of Force*, supra n 22 at 128-48; B Simma (ed), *The Charter of the United Nations: A Commentary* 794-803 (Oxford: Oxford University Press, 2<sup>nd</sup> ed 2002); Y Dinstein, *War, Aggression and Self-Defence* 182-208 (Cambridge, Cambridge University Press, 4<sup>th</sup> ed 2005). See also *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v United States of America), Merits, 27 June 1986, ICJ Rep. 1986, 14, para. 191; *Case Concerning Oil Platforms* (Islamic Republic of Iran v United States of America), Merits, 6 November 2003, ICJ Rep. 2003, 161, para. 51; *Jus Ad Bellum*, Partial Award, supra n 25.

<sup>32</sup> The distinction between armed attack and armed conflict is also relevant to the question of when an armed conflict begins. See *infra* pp 37-38.

<sup>33</sup> See, for example, Letter from J B Bellinger, III, Legal Adviser, US Department of State, and W J Haynes, General Counsel, US Department of Defence, to Dr J Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study, 3 November, 2006, 46 ILM 514 (2007), at fn 1 (‘[t]he field has traditionally been called the ‘laws and customs of war’. Accordingly, we will use this term, or the term ‘law of war’, throughout’). For a comprehensive collection of relevant documents and their use of terminology see generally A Roberts and R Guelff (eds.) *Documents on the Laws of War*, (3<sup>rd</sup> ed Oxford: Oxford University Press, 2000).

<sup>34</sup> See, M E O’Connell, *Saving Lives through a Definition of International Armed Conflict*, Proceedings of the 10th Bruges Colloquium, 22-23 October 2009: ‘[A]n international armed conflict involves a confrontation of two or more states. ... An armed conflict may be an international armed conflict, involving two or more states even if the organized armed groups are not the regular armed forces of the states involved’ (paragraph break omitted). According to Greenwood: ‘A non-international armed conflict is a confrontation between the existing governmental authority and groups of persons subordinate to this authority or between different groups none of which acts on behalf of the government, which is carried out by force of arms within national territory and reaches the magnitude of an armed confrontation or a civil war’. C Greenwood, *Scope of Application of Humanitarian Law*, in *The Handbook of Humanitarian Law in Armed Conflicts* 54 (D Fleck ed, Oxford: Oxford University Press, 2d ed. 2008). See also R Arnold, *Terrorism and IHL: A Common Denomination*, in *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* 3, 11-12 (R Arnold ed, Lausanne: Editions Interuniversitaires Suisses – Edis, 2005); R Arnold, *The ICC as a New Instrument for Repressing Terrorism* 116 (Ardsley, NY: Transnational Publishers, 2004); J Pejic, *Terrorist Acts and Groups: A Role for International Law?* (2004) 75 *British Yearbook of International Law* 71, 86, citing M Sassòli, *The Status of Persons Held in Guantanamo under International Humanitarian Law* (2004) 2 *Journal of International Criminal Justice* 96, 100; L Moir, *The Law of Internal Armed Conflict* 30-52 (Cambridge: Cambridge University Press, 2002).

<sup>35</sup> See *infra* pp 13, 19, 23, 28.

be less important to classify the type of conflict.<sup>36</sup> The jurisprudence of the ICTY, state practice and treaties all demonstrate this convergence.<sup>37</sup> Nevertheless, there remain important distinctions in the rules. Which set of rules applies continues to depend, as it has traditionally, first and foremost on who the parties to the conflict are—whether the organized armed groups are predominantly sovereign states or not.<sup>38</sup> Some rules applicable in non-international armed conflict may also depend on the fighting reaching a higher level of intensity than is required in the general understanding of armed conflict.<sup>39</sup>

The term “hostilities” is another term closely related to the concept of “armed conflict”. The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law defines the term as “the (collective) resort by the parties to the conflict to means and methods of injuring the enemy...”.<sup>40</sup> The term refers to the actual fighting of an armed conflict and is relevant to at least two important principles of IHL: civilians who take direct part in hostilities are no longer immune from attack by lawful combatants<sup>41</sup> and at the end of active hostilities prisoners of war should be released.<sup>42</sup>

## II EVIDENCE OF ARMED CONFLICT

As explained above, a new era with respect to armed conflict began in 1945 with the adoption of the United Nations Charter and the prohibition on the use of force in Article 2(4). This Article does more than prohibit war; it generally prohibits the use of force in international relations. Under the Charter states are permitted to use force only in self-defence against an armed attack (Article 51) or if the Security Council authorizes a use of force as a necessary measure to restore international peace and security. International law does not, however, expressly restrict the resort to force within states—though rebellion and the like are usually prohibited under national law.

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<sup>36</sup> See generally J G Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict* (2003) 85 No 850 International Review Red Cross 313; E Crawford, *Unequal Before the Law: the Case for the Elimination of the Distinction between International and Non-international Armed Conflicts* (2007) 20(2) Leiden Journal of International Law 441.

<sup>37</sup> For example, some weapons conventions do not distinguish between international and non-international armed conflict. See the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention), 1015 UNTS 163 (entered into force 26 March 1975); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), 1974 UNTS 45 (entered into force 29 April 1997); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (Ottawa Convention), 2056 UNTS 211 (entered into force 1 March 1999); the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), 1342 UNTS 137 (entered into force 2 December 1983) was extended to non-international armed conflict through amendment in 2001 (entered into force 18 May 2004). See also the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 823 UNTS 231 (entered into force 9 March 2004), which applies to all armed conflicts. There has also been convergence in the enforcement regimes and in particular in the establishment of individual criminal responsibility in internal armed conflicts. See generally Statute of the International Criminal Tribunal for Rwanda, available at <http://www.un.org/ictt/statute.html>, and *Prosecutor v Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999.

<sup>38</sup> See however art 1(4) of Additional Protocol I to the 1949 Geneva Conventions that treats certain conflicts involving entities other than States as international in character.

<sup>39</sup> See discussion *infra* pp 19, 37.

<sup>40</sup> See ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, *supra* n 11 at 43.

<sup>41</sup> According to art 51(3) of Additional Protocol I and art 13(3) of Additional Protocol II to the 1949 Geneva Conventions, civilians are immune from direct attack ‘unless and for such time as they take a direct part in hostilities’.

<sup>42</sup> 1949 Geneva Convention III, art 118.

With the adoption of the Charter, some thought major war would end.<sup>43</sup> In fact, large scale conflicts continued and so did lesser uses of force. The majority of armed conflicts since 1945 have in fact been internal armed conflicts, often with the intervention of outside powers. Numerous inter-state conflicts have occurred as well. Using a definition of armed conflict compatible with that of this Report, Cherif Bassiouni identifies 313 such conflicts during the period 1945 to 2008.<sup>44</sup>

In this section, we review violent conflicts through three periods: 1945-1980, 1980-2000, and 2000-2010. We consider major legal developments of each period relevant to the definition of armed conflict as well as evidence relevant to how particular conflicts were classified.<sup>45</sup> While no single indicator is usually determinative in classifying a situation, a number of indicators taken together do provide an understanding of how the international community regarded a situation.<sup>46</sup>

### **1945-1980**

In this first period for review, in addition to the U.N. Charter, the major contemporary IHL agreements were concluded, namely the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Common Article 2 of the four 1949 Conventions sets out their scope:

In addition to the provisions which shall be implemented in peacetime, the present 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.

The ICRC Commentary to common Article 2 indicates the view of the ICRC respecting the scope of the Conventions:<sup>47</sup>

This paragraph is entirely new. It fills the gap left in the earlier Conventions, and deprives the belligerents of the pretexts they might in theory invoke for evasion of their obligations. There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the Convention. The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation.

It remains to ascertain what is meant by “armed conflict”. The substitution of this much more general expression for the word “war” was deliberate. One may argue

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<sup>43</sup> See discussion in J.L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision* (1951) 45 *American Journal of International Law* 37, 43.

<sup>44</sup> The 313 are categorized as ‘international war’: 96, ‘non-international war’: 152, and ‘purely internal conflict’: 65. M. Cherif Bassiouni (ed.) *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* 79 (vol. 1, 2010): for the purposes of the study he defines an armed conflict as the

clashing of interests (positional differences) over national values of some duration and magnitude between at least two parties (organized groups, states, groups of states, organizations) that are determined to pursue their interests and achieve their goals and/or a ‘contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is a state, results in 25 battle-related deaths’ and/or ‘protracted armed conflict between such groups.’

<sup>45</sup> Ibid. at 75 (footnotes omitted.) See also Uppsala Conflict Data Program, [www.ucdp.uu.se](http://www.ucdp.uu.se) and Peter Wallensteen, *What’s in a War? Insights from a Conflict Data Program*, in *The Definition of Armed Conflict in International Law* supra n 2.

<sup>46</sup> See discussion supra pp 6-7 respecting the Report’s methodology and sources of evidence.

<sup>47</sup> It is also important to note that violent situations may wax and wane, beginning, for example, as civil unrest or a border incident, then developing into an armed conflict or receding to non-violence.

<sup>47</sup> The Trial Chamber in *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal *Under Rule 98 bis*, 16 June 2004, para. 19 stated ‘the ICRC Commentary is nothing more than what it purports to be, i.e., a commentary, and only has persuasive value’.

almost endlessly about the legal definition of “war”. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.<sup>48</sup>

As the Commentary emphasizes, the Geneva Conventions were intended to apply in all situations of armed conflict not just declared wars. By de-emphasizing any formal definition of armed conflict, the Commentary to Article 2 aimed at encouraging wider application of IHL than was the case before 1949.

Article 3 common to the four 1949 Geneva Conventions, the so-called “mini convention” dealing with non-international armed conflict, has a significantly different scope provision to Article 2. It applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”.

Common Article 3 is a revolutionary provision in that it was the first international treaty provision to attempt to regulate non-international armed conflict. The ICRC Commentary, in the words of the ICTY, provides criteria that are “useful” indicators of the sort of factors to take into account in determining the existence of an Article 3 armed conflict and distinguishing it from lesser forms of violence such as “banditry, unorganised and short-lived insurrections, or terrorist activities”,<sup>49</sup> viz:

- (1) That 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.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
  - (b) that it has claimed for itself the rights of a belligerent; or
  - (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
  - (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
  - (b) That the insurgent civil authority exercises *de facto* authority over the population within a determinate portion of the national territory.
  - (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
  - (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.<sup>50</sup>

In 1977, two Protocols were added to the 1949 Conventions. Each has a scope provision. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, provides in Article 1(3):

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

<sup>48</sup> I *Commentary on the Geneva Conventions of 12 August 1949*, supra n 3 at 32 (footnote omitted).

<sup>49</sup> *Prosecutor v Boskoski & Tarculovski*, Case No. IT-04-82-T, Judgement (Trial Chamber) 10 July 2008 at paras. 175,176.

<sup>50</sup> III *Commentary on the Geneva Conventions of 12 August 1949* 36 (J S Pictet ed, Geneva: ICRC, 1960).

Additional Protocol I includes so-called “wars of national liberation”, deeming them to be international in nature.<sup>51</sup>

In response to this expansion of the parties that could be engaged in an armed conflict to which the rules of Additional Protocol I apply, the U.K. made the following statement upon becoming a party to the Protocol: “It is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes, including acts of terrorism, whether concerted or in isolation”.<sup>52</sup> France made a similar statement on becoming a party to the Protocol.<sup>53</sup>

In addition, in a commentary on Additional Protocol I, Karl Josef Partsch explains that low level uses of force between states comparable to internal disturbances and tensions within states “should also be excluded from the concept of armed conflict as this term is used in Art. 1 of the first Protocol”.<sup>54</sup>

Additional Protocol II is also intended to apply only to intense armed fighting and not mere incidents. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, provides for its scope of application in Article 1:

#### Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and 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.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Additional Protocol II sets a higher threshold for application than Common Article 3. This was done in order to make its more detailed and demanding rules acceptable to states.<sup>55</sup> Consequently Additional Protocol II applies only to conflicts that more resemble traditional interstate conflict—it requires control over territory by organised armed groups. The Protocol does not apply to a situation where there is no government.<sup>56</sup> Non-state actor armed groups must engage in sustained and concerted operations and be able to implement the Protocol.

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<sup>51</sup> Art 1(4) of the Protocol.

<sup>52</sup> See Reservations/Declaration, 2 July 2002. Available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

<sup>53</sup> See Reservations/Declaration, 11 April 2001. Available at (in French) <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>.

<sup>54</sup> M Bothe, K J Partsch, & W A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 46 (Nijhoff, 1982).

<sup>55</sup> See G I A D Draper, *Humanitarian Law and Internal Armed Conflicts* (1983) 13 Georgia Journal of International and Comparative Law 253, 275.

<sup>56</sup> As the ICRC Commentary observes, ‘the Protocol applies on the one hand in a situation where the armed forces of the government confront dissident armed forces, i.e., where there is a rebellion by part of the government army or where the government’s armed forces fight against insurgents who are organized in armed groups, which is more often the case. This criterion illustrates the collective character of the confrontation; it can hardly consist of isolated individuals without co-ordination’. J Pictet, C Pilloud et al., *International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 1351 (Y Sandoz et al. eds., Nijhoff 1987).

Consequently, after 1977 there were two separate regimes for non-international armed conflict: those covered by Common Article 3 with its relatively low threshold of application but limited protections and conflicts falling within the scope of Additional Protocol II whose threshold of application is high but offers more protections.

According to the ICRC Commentary, Article 1(2) of Additional Protocol II is intended to indicate the lower threshold of armed conflict.<sup>57</sup> Article 1(2) excludes from the coverage of Protocol II “riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions”.

The ICRC gave the following description of internal disturbances during the first session of the Conference of Government Experts in 1971 that preceded the adoption of the Additional Protocols:

This involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.

As regards “internal tensions,” these could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time:

- large scale arrests;
- a large number of “political” prisoners;
- the probable existence of ill-treatment or inhumane conditions of detention;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact;
- allegations of disappearances.

In short, as stated above, there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are *internal tensions*, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.

These definitions are not contained in a convention but form part of ICRC doctrine.... While designed for practical use, they may serve to shed some light on these terms, which appear in an international law instrument for the first time.<sup>58</sup>

State practice during this period indicates that states generally drew a distinction between on the one hand, hostile actions involving the use of force that they treated as “incidents”, “border clashes” or “skirmishes” and, on the other hand, situations that they treated as armed conflicts. The following armed conflicts of the period have been classified as “wars” or invasions: India-Pakistan (1947-48), the Korean War (1950-53), the 1956 Suez Invasion, many wars of national liberation (e.g., Algeria, Indonesia, Tunisia, Morocco, Angola), the Vietnam War (1961-1975), the 1967 Arab-Israeli Conflict, the Biafran War (1967-70), El Salvador-Honduras (the “*Soccer War*” 1969), the 1973 Arab-Israeli Conflict (the “*Yom Kippur War*”), and the Turkish Invasion of Cyprus (1974).<sup>59</sup> The ICRC was active

<sup>57</sup> Ibid. at 1351-52.

<sup>58</sup> *Commentary on the Additional Protocols*, supra n 56 at 1355 (footnotes omitted).

<sup>59</sup> For accounts of most of these armed conflicts and lesser incidents, see generally A M Weisburd, *Use of Force: The Practice of States Since World War II*, 98, 103, 29, 74-75, 68, 70-71, 71-73, 77-79, 255, 257-58, 258-59, 260, 276 (University Park, PA: Pennsylvania State University Press, 1997).

with respect to these conflicts. They involved high casualty rates, and appeals were made to the Security Council for help in ending the fighting.

By contrast, the following armed clashes during the period involved the engagement of armed forces of two or more sovereign states but on too limited a basis to have been treated as armed conflicts. They are described rather as “limited uses of force”: Saudi-Arabia-Muscat and Oman (1952, 1955), United Kingdom-Yemen (1957), Egypt-Sudan (1958), Afghanistan-Pakistan (1961), and Israel-Uganda (1976).<sup>60</sup> These situations had few or no casualties and requests to the Security Council did not concern on-going fighting.

Other examples of armed incidents between states that were not treated as armed conflicts are the *Red Crusader* incident and the “Cod Wars”. In both instances neutral decision-makers provided opinions on international legal aspects of the cases, but the cases were treated as incidents, not armed conflict, despite the fact they involved “engagement” of state armed vessels. The 1961 *Red Crusader* incident involved a Danish fishing enforcement vessel, the *Niels Ebbesen*, and a British fishing trawler.<sup>61</sup> After the Danish vessel fired upon the trawler, a British Naval vessel, HMS *Trowbridge*, escorted both the *Niels Ebbesen* and the *Red Crusader* to port in Aberdeen. A naval vessel escorting a fishing enforcement vessel would seem to fit the phrase “any engagement” used in the ICRC Commentary to define international armed conflict.<sup>62</sup> An official inquiry into the incident, however, gave no indication that either of the parties or the professors of international law on the commission considered it an armed conflict. The Commission found the Danes had used excessive force in arresting the trawler, but neither that fact nor the involvement of two parties to the 1949 Geneva Conventions led to treatment of the incident as an armed conflict.

Similarly in the 1970s in the “Cod Wars” between Iceland, the U.K. and Germany, naval vessels of the U.K. and Germany escorted fishing vessels to prevent interdiction by Icelandic fishery enforcement vessels.<sup>63</sup> Despite applying the label “war” and the use of armed force, these were not treated as a legal matter as armed conflict. There is certainly no hint of this categorisation in the International Court of Justice decision in the cases.

### **1980-2000**

The most important legal development in this period relevant to the definition of armed conflict was the creation of the two *ad hoc* international criminal tribunals by the Security Council during the 1990s, the ICTY and the ICTR, and the establishment of the International Criminal Court by the Rome Statute of the ICC adopted by States in 1998.

The ICTY *Tadić* decision is widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts.<sup>64</sup> According to the Appeals Chamber of the ICTY in the *Tadić* case 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... These hostilities [fighting among groups within the former Yugoslavia] exceed the *intensity requirements* applicable to *both international and internal* armed conflicts. There has been protracted, large-scale

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<sup>60</sup> A M Weisburd, *Use of Force*, supra n 59 at 255, 257-58, 258-59, 260, 276.

<sup>61</sup> *Report of the Commission of Inquiry Into the Red Crusader Incident*, (1962) 35 ILR 485.

<sup>62</sup> See *Ibid.*

<sup>63</sup> For the facts of the incident, see *Fisheries Jurisdiction* (Federal Republic of Germany v Iceland), 25 July 1974 ICJ Rep. 1974, para. 175.

<sup>64</sup> See, for example, the Rome Statute of the International Criminal Court, art 8, 17 July 1998, 37 ILM 999; European Commission for Democracy Through Law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, 17 March 2006, Op. no. 363/2005, CDL-AD (2006)009 [hereinafter Venice Commission Opinion].

violence between the armed forces of different States and between governmental forces and organized insurgent groups.<sup>65</sup>

The *Tadić* formulation has no requirement that armed groups exercise territorial control, be capable of meeting IHL obligations, or that a government be involved in the fighting.<sup>66</sup>

In applying the *Tadić* Appeals Chamber formulation the *Tadić* Trial Chamber focused on two aspects of a conflict: the intensity of the conflict and the organisation of the parties to the conflict. In the opinion of the Chamber, “[i]n 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”.<sup>67</sup> Many other ICTY cases follow this approach.<sup>68</sup>

The *Mucić* case, however, did not emphasize the need for intense hostilities in international conflicts stating that, “the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law”.<sup>69</sup>

The ICTR<sup>70</sup> has followed the approach of the ICTY respecting Common Article 3. In *Akayesu*,<sup>71</sup> the Tribunal considered the nature of the conflict in Rwanda at some length.<sup>72</sup> The Chamber quoted the *Tadić* case on the definition of armed conflict; it also noted the ICRC commentary on Common Article 3, which ruled out mere acts of banditry, internal disturbances and tensions and unorganized and short-lived insurrections.<sup>73</sup> Because the definition of an armed conflict is abstract, the question whether or not a situation can be described as an armed conflict, meeting the criteria of Common Article 3, was to be decided on a case-by-case approach. The ICTR suggested an evaluation test, assessing both the intensity of the conflict and the organisation of the parties.<sup>74</sup> Intensity did not depend on the subjective judgment of the parties; it was objective.<sup>75</sup>

<sup>65</sup> *Prosecutor v Tadić*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70 (emphasis added) [hereinafter *Tadić Jurisdiction Decision*].

<sup>66</sup> L Moir, *The Law of Internal Armed Conflict*, supra n 34 at 42, quoting *Tadić Jurisdiction Decision*, supra n 65 at para. 70.

<sup>67</sup> *Prosecutor v Tadić*, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, para. 562 [hereinafter *Tadić Trial Judgement*].

<sup>68</sup> *Prosecutor v Blagojević and Jokić*, Case No. IT-02-60-T, Judgement (Trial Chamber), 17 January 2005, para. 536; *Prosecutor v Halilović*, Case No. IT-01-48-T, Judgement (Trial Chamber), 16 November 2005, para. 24; *Prosecutor v Limaj et al*, Case No IT-03-66-T, Judgement (Trial Chamber), 30 November 2005, para. 84; *Prosecutor v Galić*, Case No. IT-98-29-T, Judgment and Opinion (Trial Chamber), 5 December 2003, para. 9; *Prosecutor v Stakić*, Case No. IT-97-24-T, Judgement (Trial Chamber), 31 July 2003, paras. 566-68. See also Venice Commission Opinion, supra n 64: ‘sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an ‘armed conflict’ in the sense that they trigger the applicability of International Humanitarian Law’.

<sup>69</sup> *Prosecutor v Mucić et al*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16 November 1998, para. 184.

<sup>70</sup> See Human Rights Watch, *Case Law of the International Criminal Tribunal for Rwanda*, February 2004. Available at <http://www.hrw.org/reports/2004/ij/ictt/index.htm>.

<sup>71</sup> *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, paras. 619-27.

<sup>72</sup> See also *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 170-72.

<sup>73</sup> See also *Prosecutor v Akayesu*, supra n 71 at paras. 619-21; *Prosecutor v Kayishema and Ruzindana*, supra n 72 at para. 155-90.

<sup>74</sup> *Prosecutor v Akayesu*, supra n 71 at para. 620. The court also said, as a general matter: “The term ‘armed conflict’ in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent”. Ibid.

<sup>75</sup> *Prosecutor v Akayesu*, supra n 71 at para. 603.

The Rome Statute of the International Criminal Court, 17 July 1998, provides in Article 8 for war crimes. War crimes include serious violations of Common Article 3, which “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>76</sup> Article 8(2)(e) applies to other serious violations of the laws and customs applicable in armed conflict not of an international character. It “applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups”.<sup>77</sup> The Rome Statute is not limited to conflicts between governments and armed groups; it omits the condition of Additional Protocol II that dissident armed forces or other organised groups should be “under responsible command or exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”.<sup>78</sup>

The Inter-American Commission on Human Rights considered the meaning of armed conflict in *Abella v Argentina*.<sup>79</sup> The Commission had to determine whether IHL applied, which in turn depended on whether the petitioners had been involved in an armed conflict with Argentine authorities. The Commission found that an armed conflict had indeed occurred despite the fact that fighting lasted only thirty hours. The Commission considered the following factors: “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”.<sup>80</sup>

A number of other judicial decisions (national and international) contributed to defining armed conflict. Courts in the United Kingdom,<sup>81</sup> Canada, Italy and Belgium have struggled with cases turning on the legal status of peacekeeping operations and the applicability of IHL to their conduct. In the *Brocklebank* case the Canadian Court Martial Appeal Court considered the torture and beating to death of a Somali teenager during Canada’s participation in the UN peacekeeping mission in Somalia.<sup>82</sup> The Court found no evidence of an armed conflict in Somalia at the material time and, on that basis, found the criminal counts inapplicable because they were based on the Fourth Geneva Convention.<sup>83</sup>

An Italian Commission of Inquiry looking into the conduct of Italian peacekeeping troops in Somalia apparently also found it difficult to define the nature of the conflict. “It appears evident from the Report that it is truly difficult to ascertain whether the events reported can be set within a legal context of war or within that of a police operation aiming at restoring public order. Therefore, the Commission failed to express any legal evaluation of the facts, particularly from the perspective of international

<sup>76</sup> See art 8(2)(d). This language is the same as art 1(2) of Additional Protocol II.

<sup>77</sup> See art 8(2)(f).

<sup>78</sup> D Willmott, *Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court* (2004) 5 Melbourne Journal of International Law 196, 218. See also H Spieker, *The International Criminal Court and Non-International Armed Conflicts* (2000) 13(2) Leiden Journal of International Law 395, 409.

<sup>79</sup> *Abella v Argentina*, supra n 4 at paras. 149-51.

<sup>80</sup> *Ibid.* at para. 155.

<sup>81</sup> See *R v Ministry of Defence; ex parte Walker*, UKHL 22 [2000] 2 All ER 917 (House of Lords) (6 April 2000).

<sup>82</sup> *The Queen v Brocklebank*, 106 Canadian Criminal Cases (3d); 134 D.L.R. (4<sup>th</sup>) 377 (Court Martial Appeal Court of Canada) (2 April 1996); see also K Boustany, *Brocklebank: A Questionable Decision of the Court Martial Appeal Court of Canada* (1998) 1 Yearbook of International Humanitarian Law 371.

<sup>83</sup> However, other authorities arrived at the opposite conclusion. See, e.g., the Report of the Somalia Commission of Inquiry, by The Department of National Defence and the Canadian Forces (1997), available at <http://www.forces.gc.ca/somalia/somaliae.htm>; and J M Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93*, study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Public Works and Government Services, 1997). See also *Ministre public and Centre pour l'égalité des chances et la lutte contre le racisme v C... et B...*, Belgium, Military Court, Judgment of 17 December 1997, *Journal des Tribunaux*, 4 April 1998, p. 286-89 [hereinafter Decision of Belgian Military Court].

humanitarian law”.<sup>84</sup> Similarly a Belgian Military Court denied the applicability of IHL in UN peacekeeping operations in Somalia and Rwanda during the same period. It found that IHL did not apply to operations with humanitarian aims in situations of internal conflicts instituted under Chapter VII of the United Nations Charter. Consequently it rejected the argument that Belgian troops were either “combatants” or “occupying forces” in either crisis.<sup>85</sup>

During this period the European Court of Human Rights heard a number of claims for violation of both human rights and IHL in situations involving armed clashes. The Court did not, however, analyze the definition of armed conflict or clearly classify situations as armed conflicts or not. Rather, it tended to focus on whether or not violations had occurred of Article 2 of the European Convention on Human Rights that protects the right to life in war and peace.<sup>86</sup>

Other developments during this period include the 1994 United Nations Convention on Safety of United Nations and Associated Personnel. The Convention makes it a crime to attack UN personnel and others covered by the Convention and Article 2(2) provides “This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of its personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies”.<sup>87</sup> As Greenwood observes the effect of this provision “is that the threshold for the application of international humanitarian law is also the ceiling for the application of the Convention”.<sup>88</sup> If a low threshold of hostilities is adopted for the application of the Convention this will have the effect of rendering virtually non-existent the protections offered by the Convention. An associated development is the Secretary-General’s 1999 *Bulletin on Observance by United Nations Forces of International Humanitarian Law*.<sup>89</sup> IHL applies when UN forces are in situations of armed conflict, actively engaged as combatants and to the extent and for the duration of their engagement.<sup>90</sup>

A number of conflicts during this period were generally acknowledged to be armed conflicts: the Iran-Iraq War (1980-88); El Salvador (1980-1993); the Falklands Conflict (1982); Turkey-Kurdistan (1984-1992); the Persian Gulf War (1990-1991); the Philippines insurgency (1991); Bosnia-Herzegovina (1992-1994); Russia-Chechnya (1994-1996); Ecuador-Peru (1995). In the case of the Chechnya conflict the Constitutional Court of the Russian Federation emphasised the fact that the disarmament of the irregular armed units could not be achieved without the use of army forces.<sup>91</sup>

In one minor incident, namely the 1988 shooting down and capture of a U.S. pilot by Syrian forces over Lebanon, U.S. officials at first said the pilot was entitled to be treated as a prisoner of war under

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<sup>84</sup> N Lupi, *Report by the Enquiry Commission on the Behaviour of Italian Peace-Keeping Troops in Somalia* (1998) 1 Yearbook of International Humanitarian Law 375, 379.

<sup>85</sup> Decision of Belgian Military Court, *supra* n 83 at 286-89. See also, the French report on military engagement in Rwanda: Rapport d’information No. 1271, available at <http://www.assemblee-nationale.fr/11/dossiers/Rwanda/r1271.asp>; and the Indonesian report on investigations and prosecution of atrocities in East Timor: Executive Summary Report on the investigation of human rights violations in East Timor, Jakarta, 31 January, 2000. Available at <http://www.etan.org/news/2000a/3exec.htm>.

<sup>86</sup> See, e.g., *Ergi v Turkey*, *supra* n 18 and *Khashiyev & Akayeva v Russia*, *supra* n 18.

<sup>87</sup> Convention on the Safety of United Nations and Associated Personnel, art 2(2), 2051 UNTS 363 (opened for signature 9 December 1994).

<sup>88</sup> Greenwood, Handbook, *supra* n 34 at 53.

<sup>89</sup> *UN Secretary General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13, 6 August 1999. Available at [http://www.un.org/peace/st\\_sgb\\_1999\\_13.pdf](http://www.un.org/peace/st_sgb_1999_13.pdf).

<sup>90</sup> C Greenwood, *International Humanitarian Law and United Nations Military Operations* (1998) 1 Yearbook of International Humanitarian Law 3, 24. See also M Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* ch. 3 (Leiden: Martinus Nijhoff Publishers, 2004).

<sup>91</sup> *Presidential Decrees and the Resolutions of the Federal Government Concerning the Situation in Chechnya*, *supra* n 10 at para. 6.

the Third Geneva Convention.<sup>92</sup> President Reagan called that into question when he said, “I don’t know how you have a prisoner of war when there is no declared war between nations. I don’t think that makes you eligible for the Geneva Accords”.<sup>93</sup>

Other minor incidents, in terms of duration and casualties, were not classified as armed conflicts even though they involved a clash between forces of two states.<sup>94</sup> For example, in 1981 and 1982 incidents involving Soviet submarines in Swedish waters, including the use of depth charges by the Swedish Navy, were classified by scholars as incidents not armed conflict.<sup>95</sup> Also in 1981, U.S. fighter jets engaged in a fire fight with Libyan aircraft above the Gulf of Sidra, shooting them down.<sup>96</sup> Scholars have classified this case as an incident, not an armed conflict.<sup>97</sup> In 1985, French secret agents attached bombs to the hull of the Greenpeace ship, *the Rainbow Warrior*, while docked in Auckland, New Zealand. The ship was sunk with the loss of one life. New Zealand police quickly arrested the two agents. In the subsequent arbitration to enforce a decision in the case by the Secretary-General of the United Nations, the arbitrators do not refer to the bombing or the arrest of the agents as an armed conflict or indicate that the agents were subject to IHL rather than New Zealand’s criminal law despite the fact that armed forces and law enforcement officers of two sovereign states were involved.<sup>98</sup> The “Herring War” in 1994, between Iceland and Norway, also involved the engagement of official vessels of states, as well as limited use of armed force.<sup>99</sup> These incidents were not treated as armed conflicts. Based on the reaction of states to several serious cases of rioting, it is apparent that states do not treat such events as armed conflict. This is the case even when the rioting is widespread resulting in deaths or serious destruction, and the armed forces are involved. The primary factor distinguishing riots from armed conflict is that rioters lack organisation. Such rioting occurred in the United Kingdom (1985), United States (1992), and Albania (1997). In the case of the United States, Marines were deployed to help quell violence in Los Angeles. They operated under police rules.<sup>100</sup>

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<sup>92</sup> See Proceedings of the American Society of International Law 82 (1988), 602-3, 609-11. See also, M Asada, *International Armed Conflict and International Humanitarian Law*, in *The Meaning of Armed Conflict in International Law*, supra n 2.

<sup>93</sup> Proceedings of the American Society of International Law, supra n 92 at 610.

<sup>94</sup> M E O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, (2004) 3 Columbia Journal of Transnational Law 435, 445-46.

<sup>95</sup> R Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm*, in *International Incidents: The Law that Counts in World Politics* 40, 41-44 (W M Reisman and A R Willard eds, Princeton: Princeton University Press, 1988); S Schmemmann, *Soviet Accuses Swedes on Listening Post*, New York Times, 11 November 1981, A3.

<sup>96</sup> S R Ratner, *The Gulf of Sidra Incident of 1981: The Lawfulness of Peacetime Aerial Engagements*, in *International Incidents*, supra n 95 at 181; A M Weisburd, *Use of Force*, supra n 59 at 289-90.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Rainbow Warrior* (New Zealand v France), 20 RIAA 217, 1990.

<sup>99</sup> B Maddox, *Fleets fight in over-fished waters: Fishing disputes have risen up the diplomatic agenda*, Financial Times (London), 30 August 1994, at 4. The first two cases before the International Tribunal for the Law of the Sea concerned arrest of fishing vessels. See *Panama v France* (the *Camouco* case), International Tribunal for the Law of the Sea, 7 February 2000, available at [http://www.itlos.org/cgi-bin/cases/case\\_detail.pl?id=4&lang=en](http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=4&lang=en); *Saint Vincent and the Grenadines v Guinea* (the *M/V Saiga* case), International Tribunal for the Law of the Sea, 37 ILM 360 (1998). Available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html). See also J P E Hijos, *S A v Canada* (Attorney General) (the *Estai* case), FC 1011 (Federal Court of Canada) (2005). See also E Cowan, *Oil and Water: the Torrey Canyon Disaster* (Philadelphia: Lippincott, 1968).

<sup>100</sup> Rwanda in 1994 may be another example. The Tutsis inside Rwanda were not an organized armed group at the time Hutu leaders ordered their deaths. Most charges against Hutu leaders later were for genocide and crimes against humanity, not war crimes. The Swiss Military Court of Cassation, however, found Niyonteze, the mayor of a Rwandan town, guilty of war crimes. See B H Oxman and L Reydam, *Niyonteze v Public Prosecutor, Tribunal Militaire de Cassation (Switzerland)*, 27 April 2001 (2002) 96 American Journal of International Law 231.

### 2000-2010

One of the most prominent relevant developments in international law in this period was the publication by the ICRC in 2005 of a comprehensive study of customary international humanitarian law.<sup>101</sup> The Study identifies a large body of customary law rules that apply in both international and non-international armed conflicts. The Study also identifies a set of rules that apply only in international armed conflict. The Study does not provide a definition of either category of armed conflict, however, nor does it define armed conflict.

In 2008 the ICRC posted a paper on its Website, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* The paper defines the categories of international and non-international armed conflict and indicates the current understanding of the ICRC regarding armed conflict in general:

International armed conflicts exist whenever there is *resort to armed force between two or more States*. ... Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organization*.<sup>102</sup>

The phrase defining international armed conflict has certain differences from the Commentary to the 1949 Conventions. To describe international armed conflict, the ICRC now uses the phrase “resort to armed force” in place of “any engagement” of the armed forces of two or more High Contracting Parties. It also omits the Commentary phrase “regardless of duration or intensity”.<sup>103</sup>

In 2009 the ICRC published the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* and utilized the concept of organised armed groups to identify the armed forces of a non-state party to a non-international armed conflict.<sup>104</sup> The report refers to organised armed groups as those that “develop a sufficient degree of military organisation to conduct hostilities on behalf of a party to the conflict, albeit not always the same means, intensity and level of sophistication as State armed forces”.<sup>105</sup>

The meaning of armed conflict continued to be developed in the jurisprudence of the ICTY during this period. A number of cases followed the approach of *Tadić* as to the meaning of armed conflict.<sup>106</sup> In *Kordić and Čerkez*, the Appeals Chamber said that the term “protracted” in the *Tadić* case is significant in excluding mere cases of civil unrest or single acts of terrorism in cases of non-international conflicts.<sup>107</sup>

The question as to whether there was a non-international armed conflict came before the ICTY again

<sup>101</sup> J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005). Available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/pcustom>.

<sup>102</sup> ICRC, *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?* 5 (2008). Available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (emphasis in the original).

<sup>103</sup> See also, J Pejic, *Terrorist Acts and Groups: A Role for International Law?*, supra n 34 at 73 (‘International humanitarian law is the body of rules applicable when armed violence reaches the level of armed conflict, whether international or non-international’).

<sup>104</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, supra n 11 at 27.

<sup>105</sup> *Ibid.* at 32.

<sup>106</sup> *Prosecutor v Blagojević and Jokić*, supra n 68 at para. 536; *Prosecutor v Halilović*, supra n 68 at para. 24; *Prosecutor v Limaj et al*, supra n 68 at para. 84; *Prosecutor v Galić*, supra n 68 at para. 9; *Prosecutor v Stakić*, supra n 68 at paras. 566-68. See also Venice Commission Opinion, supra n 64.

<sup>107</sup> *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement (Appeals Chamber), 17 December 2004, para. 341.

with regard to the conflict in Kosovo; the Tribunal had to decide whether there was a non-international armed conflict or mere internal unrest. In *Milošević*, an *amici curiae* motion was brought that there was no armed conflict in Kosovo at the relevant times and so no case to answer for war crimes under Article 3 of the ICTY Statute.<sup>108</sup> It was argued that the armed conflict began on 24 March 1999 when the NATO bombing campaign began. Before then, the conflict did not involve protracted armed violence; it was only “acts of banditry, unorganized and short-lived insurrections or terrorist activities”. The Trial Chamber held that *Tadić* had set out the test for the existence of an internal armed conflict. The Chamber was of the view that the *Tadić* test was “not inconsistent” with the ICRC’s Official Commentary to Common Article 3 of the Geneva Conventions set out above. The Chamber pointed out that the Commentary was of persuasive value only, so that while the Commentary offered a more extensive list of criteria, these are not definitive or exhaustive. Thus the Chamber dismissed the more restrictive criteria of the ICRC in relation to Common Article 3 in favour of the broader approach of the Tribunal in *Tadić*.<sup>109</sup>

As for the factors that should be taken into account in assessing intensity, the Trial Chamber in the *Milošević* case considered a large body of evidence: the size of the Serbian response to the actions of the Kosovo Liberation Army (KLA); the spread of the conflict over territory; the increase in number of government forces and the type of the weapons used. The Chamber said that control over territory by insurgents was not a requirement for the existence of a non-international armed conflict. Reference was also made to the decisions of other Chambers that had considered such factors as the seriousness of attacks and whether there had been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces, mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict had attracted the attention of the Security Council and whether any resolutions had been passed. The Trial Chamber in *Limaj* also held that fighters must exhibit organisation, but only “some degree of organisation will suffice”.<sup>110</sup> It rejected the argument that in order to be bound by IHL a party must be able to implement IHL.<sup>111</sup> The Chamber referred to the fact that other Chambers had taken into account factors “including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms”.<sup>112</sup> The Chamber pointed to the fact that the KLA had a general staff that appointed zone commanders, gave directions to units and issued public statements. Unit commanders gave orders and subordinate units generally acted in accordance with those orders. Steps had been taken to introduce disciplinary rules and military police and to recruit, train and equip new members.<sup>113</sup>

The criteria of intensity and organisation in a non-international armed conflict were considered in detail

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<sup>108</sup> See *Prosecutor v Milošević*, supra n 47.

<sup>109</sup> The same approach to the ICRC criteria was adopted in the *Limaj* case (*Prosecutor v Limaj et al*, supra n 68 at para. 85). The Trial Chamber in that case also observed that the drafting history of Common Article 3 shows a clear rejection of more detailed criteria (para. 86) and moreover that art 8 of the Rome Statute of the International Criminal Court adopted the *Tadić* approach (para. 87).

<sup>110</sup> *Prosecutor v Limaj et al*, supra n 68 at para. 89. The Court cited a study by the ICRC in support of its position:

The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria; the term ‘armed conflict’ presupposes the existence of hostilities between armed forces *organised to a greater or lesser extent*; there must be the opposition of armed force and a certain intensity of the fighting.

Ibid. citing ICRC, Working Paper, 29 June 1999 (submitted by the ICRC as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the ICC) (emphasis in the original).

<sup>111</sup> Ibid. at paras. 88-89. However later cases have established that ‘the leadership group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations and Common Article 3 of the Geneva Conventions may be implemented’. *Prosecutor v Boskoski & Tarculovski*, supra n 49 at para. 196.

<sup>112</sup> *Prosecutor v Limaj et al*, supra n 68 at para. 90, citing *Prosecutor v Milošević*, supra n 47 at paras. 23-24.

<sup>113</sup> Ibid. at paras. 94-134.

again in 2008 in the cases of *Haradinaj*<sup>114</sup> and *Boskoski & Tarculovski*.<sup>115</sup> In *Haradinaj* the Trial Chamber, after a survey of the practice reviewed in previous ICTY decisions, observed that the criterion of protracted armed violence in practice had been interpreted as referring more to the intensity of the armed violence than to its duration.<sup>116</sup>

In *Boskoski & Tarculovski* the Trial Chamber identified the following factors that previous decisions had regarded as relevant to the determination of the intensity of the conflict:

the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by the shelling or fighting; the quantity of troops and units deployed; existence and change of frontlines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease-fire agreements.<sup>117</sup>

As for the factor of organisation the Trial Chamber in *Haradinaj* concluded that: “an armed conflict can exist only between the parties that are sufficiently organised to confront each other with military means”<sup>118</sup> and suggested a number of indicative factors that should be taken into account “none of which are, in themselves, essential to establish whether the ‘organisation’ criterion is fulfilled”.<sup>119</sup> In *Boskoski & Tarculovski* the Trial Chamber identified, from previous decisions of the Chamber, the following five broad groups of factors as relevant to the requirement of organisation: first, those factors that indicate the presence of a command structure;<sup>120</sup> secondly, factors that indicate whether the group can carry out operations in an organised manner;<sup>121</sup> thirdly, factors indicating the level of logistics;<sup>122</sup> fourthly, factors that determine whether an armed group possesses the level of discipline and the ability to implement the basic obligations of Common Article 3;<sup>123</sup> and finally, those factors that indicate whether the armed group was able to speak with one voice.<sup>124</sup>

The Trial Chamber also considered a number of national decisions on the meaning of armed conflict and remarked that “national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces in deciding whether an armed conflict exists. The high number of casualties and extent of material destruction have also been important elements in their deciding whether an armed conflict existed”.<sup>125</sup> Other factors that the Trial Chamber found provided “useful practical guidance to an evaluation of the intensity criterion in the particular factual circumstances of the case” were the way that “organs of the State such as the police

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<sup>114</sup> *Prosecutor v Ramush Haradinaj*, Judgement (Trial Chamber) Case No. IT-04-84-T, 3 April 2008.

<sup>115</sup> *Prosecutor v Boskoski & Tarculovski*, supra n 49.

<sup>116</sup> *Prosecutor v Ramush Haradinaj*, supra n 114 at para. 49.

<sup>117</sup> *Prosecutor v Boskoski & Tarculovski*, supra n 49 at para. 177 (footnotes omitted).

<sup>118</sup> *Prosecutor v Ramush Haradinaj*, supra n 114 at para. 60.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Prosecutor v Boskoski & Tarculovski* supra n 49 at para. 199.

<sup>121</sup> *Ibid.* at para. 200.

<sup>122</sup> *Ibid.* at para. 201.

<sup>123</sup> *Ibid.* at para. 202.

<sup>124</sup> *Ibid.* at para. 203.

<sup>125</sup> *Ibid.* at para. 183.

and the military use force against armed groups” and how certain human rights are interpreted such as the right to life and the right to be free from arbitrary detention.<sup>126</sup>

The Pre-Trial Chamber of the ICC for the first time considered the meaning of armed conflict in the ICC Rome Statute in the 2007 case of *Prosecutor v Thomas Luangwa Diylo*.<sup>127</sup> The Chamber focused on the criteria of intensity, organisation and protraction. The criteria of organisation and protraction are linked by the Chamber: “protracted armed conflict...focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time”.<sup>128</sup> In early 2007 and 2008, Swedish and British immigration tribunals assessed the conflicts in Somalia and Iraq for purposes of determining whether asylum seekers from those states could continue to receive asylum from armed conflicts.<sup>129</sup> The European Union had adopted a directive that required the grant of asylum in cases of “a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.<sup>130</sup>

The tribunals, therefore, had to determine whether there were armed conflicts occurring in Somalia and Iraq. In *HH & Others*, an appeal of three asylum cases, decided 28 January 2008, a U.K. immigration tribunal found that the conflict in Somalia was a non-international armed conflict that was occurring in Mogadishu.<sup>131</sup> Individuals from areas beyond Mogadishu did not have a right to seek asylum from armed conflict. The decision is highly detailed respecting the situation in Somalia. It uses the *Tadić* criteria to determine the meaning of armed conflict in international law.<sup>132</sup> The Tribunal found the parties to the conflict sufficiently organized, and the intensity of fighting sufficient in the Mogadishu area.<sup>133</sup> It also stated that “the Tribunal should endeavour to identify both the territorial area in respect of which international humanitarian law applies (following the identification of an internal armed conflict) and, where feasible, the parameters of the actual zone of conflict”.<sup>134</sup>

The Tribunal noted the differences in the applicable provisions of IHL that depend on whether a conflict is international or non-international, but provided virtually no analysis of why it considered Somalia a non-international armed conflict, despite the fact that from early 2007 Ethiopia and Somalia were involved in intense fighting. By October 2007, there were 6000 casualties from the conflict.

Other European Union member states also have had to decide what constitutes an armed conflict for purposes of granting asylum. On 17 February 2009, the Court of Justice of the European Union handed down a significant decision clarifying when states should grant asylum in the case of armed conflict. In *Elgafaji v. Staatssecretaris van Justitie*, the ECJ rejected reliance on IHL for this determination. The ECJ made two determinations relating to Article 15(c) of the EU Qualification Directive:

--the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

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<sup>126</sup> Ibid. at paras. 178, 193.

<sup>127</sup> *Prosecutor v Thomas Luangwa Diylo*, Case no ICC-01/04-01/06, Decision, 29 January 2007.

<sup>128</sup> Ibid. at para. 234.

<sup>129</sup> Mål nr UM 23-06, Kammarrätten I Stockholm, Migrationsöverdomstolen, Avd.5; and *HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v Secretary of State for the Home Department*. CG [2008] UKAIT 00022 (Asylum and Immigration Tribunal) (28 January 2008). Available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47dfd9172>.

<sup>130</sup> Art 15(c) of the EU Qualification Directive, supra n 14.

<sup>131</sup> *HH & Others*, supra n 129.

<sup>132</sup> Ibid. at para. 318.

<sup>133</sup> Ibid. at para. 337.

<sup>134</sup> Ibid. at para. 330.

--the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterizing the armed conflict taking place—assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.<sup>135</sup>

In *QD and AH v. Secretary of State for the Home Department*,<sup>136</sup> the United Kingdom Court of Appeal considered the impact of *Elgafaji* on prior U.K. decisions respecting Article 15(c). It confirmed that reliance on IHL is misplaced. The purposes of asylum must be considered. Asylum should be granted where a high level of violence is present. “[T]he phrase ‘situations of international or internal armed conflict’ in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*”.<sup>137</sup>

The Swedish appeal court for migration has also reconsidered earlier Swedish decisions under Article 15(c) of the EU Qualification Directive. In October 2009, the Court looked to a variety of IHL sources and literature for the meaning of armed conflict in asylum cases. The Court decided that in cases of internal armed conflict:

[T]he severe antagonism between different sections of the population includes protracted and still continuing fighting between the armed forces of the government and one or more other organized armed groups or between two or more such groups ... the violence the conflict entails is indiscriminate and so serious that there is well-founded reason to believe that a civilian person by his or her mere presence would run the veritable risk of being exposed to a serious and personal threat against life and limb.<sup>138</sup>

The new emphasis in European asylum law is to examine the actual violence being carried out by organized armed groups. It is from that violence that asylum seekers need protection. Given this purpose, despite the fact that the courts to date have only considered non-international armed conflicts, international armed conflict would equally need to be characterized by serious violence for there to be a reason for European states to provide protection.

Late in the period under review, the International Law Commission debated a definition of armed conflict for its Draft Articles Relating to the Effects of Armed Conflicts on Treaties. Draft Article 2(b), defining armed conflict involving states, provides: “‘Armed conflict’ means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups”.<sup>139</sup>

<sup>135</sup> *Elgafaji v Staatssecretaris van Justitie*, C-465/07, Eur. Ct. Justice, 17 February 2009.

<sup>136</sup> [2009] EWCA Civ 620.

<sup>137</sup> *Ibid.* at para. 35.

<sup>138</sup> Mål nr UM 133-09, Kammarrätten i Stockholm, Migrationsöverdomstolen, Avd.1 (Translation by Committee member Inger Österdahl).

<sup>139</sup> UN Doc/ A/CN.4/627 (22 March 2010). The article was referred to the Drafting Committee in June 2010. This definition replaces one proposed in 2008 and based on the formulation adopted by the Institute of International Law in its resolution of the 28 August 1985:

‘Armed conflict’ means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict Report of the International Law Commission to the General Assembly, 60 UNGAOR Supp (No 10) at 83, UN Doc A/63/10 (2008).

Other state practice includes the 2004 United Kingdom Manual of the Law of Armed Conflict that provides as follows in relation to international armed conflict: “The law of armed conflict applies in all situations when the armed forces of a state are in conflict with those of another state or are in occupation of territory. The law also applies to hostilities in which some of those involved are acting under the authority of the United Nations and in internal armed conflicts. Different rules apply to these different situations”.<sup>140</sup> The Manual observes that the expression “armed conflict” remains undefined and cites the ICRC Commentary<sup>141</sup> and the *Tadić* case as guidance. In relation to the question of the threshold of armed conflict the Manual says,

whether any particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances. For example, the replacing of border police with soldiers or accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country. At the other extreme, a full-scale invasion would amount to an armed conflict.<sup>142</sup>

The requirement that armed conflict must meet some sort of threshold of intensity is also supported by the 2007 consultation paper issued by the U.K. Ministry of Justice on *War Powers and Treaties: Limiting Executive Powers*. The Paper observes “there may be difficult questions about when violence has reached the threshold where there can be said to be a state of ‘armed conflict’ between the participants”.<sup>143</sup>

The Supreme Court of Israel found in 2006 that Israel was engaged in a “continuous state of armed conflict” with various “terrorist organizations” due to the “unceasing, continuous and murderous barrage of attacks” and the armed response to these. The most important factor for the Court in reaching this determination was the number of persons who have died on both sides.<sup>144</sup>

Some mistakenly believe that the 2006 U.S. decision *Hamdan v. Rumsfeld* supports the possibility of an armed conflict in the absence of fighting.<sup>145</sup> The Court did not in fact make such a finding. In *Hamdan*, the Supreme Court found the Bush administration’s special military commissions for trials at Guantánamo Bay unconstitutional because they did not comply with the Uniform Code of Military Justice (UCMJ). The Court ruled that while the president had the right to create military commissions, they had to comply with the UCMJ. The UCMJ permitted the creation of military commissions that complied with the laws of war. For purposes of testing the compliance of the Guantánamo commissions with the laws of war, the Court accepted the Bush administration’s argument that the U.S. was in a “non-international armed conflict with al-Qaeda”. The Court found that Common Article 3 of

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<sup>140</sup> *The Manual of the Law of Armed Conflict* 27 (UK Ministry of Defence, 2004). In addition to the U.K., the Committee found that some states have no publicly available manual (Greece, Japan, Kenya) or the manual has no definition of armed conflict (USA). The 2001 Canadian Forces' Law of Armed Conflict Manual: At the Operational and Tactical Levels, B-GJ-005-104/FP-021 (2001-08-13), available at [http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA\\_2004-eng.pdf](http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf), includes the following in the “glossary” at the end of the document: ‘An armed conflict is a conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized resistance movements’.

<sup>141</sup> III *Commentary on the Geneva Conventions of August 12 1949*, supra n 50.

<sup>142</sup> *The Manual of the Law of Armed Conflict*, supra n 140 at 29 (footnote omitted).

<sup>143</sup> United Kingdom Ministry of Justice, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers*, Consultation Paper CP26/07, 25 October 2007, 25. Available at <http://www.official-documents.gov.uk/document/cm72/7239/7239.pdf>. See also the White Paper, *The Governance of Britain: Constitutional Renewal* (Cm 7342, March 2008).

<sup>144</sup> *Public Committee Against Torture in Israel v Israel*, HCJ 769/02, para. 16 (14 December 2006). See also the *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory*, supra n 17.

<sup>145</sup> 548 U.S. 557, 628-29 (2006); accord D Amann, Remarks, Panel: Same or Different? Bush and Obama Administration Approaches to Fighting Terrorists, Annual Meeting of the American Society of International Law, 26 March 2010.

the 1949 Geneva Conventions covers even that purported conflict. The Court did not find, however, that the U.S. *was* in a worldwide-armed conflict with al-Qaeda.<sup>146</sup>

The U.S. Executive Branch, in contrast to U.S. courts, has spoken unequivocally about being in a “global war on terror” or an “armed conflict” against certain terrorists groups wherever found. The US has argued that it entered into a worldwide war on terrorism as of the attacks of 11 September 2001.<sup>147</sup> State Department Legal Adviser, Harold Koh, however, spoke to the American Society of International Law in March 2010. Koh made clear that the Obama Administration was not using the term “global war on terror”. Rather, it would base its actions on the view that the U.S. is in an “armed conflict with al-Qaeda, the Taliban, and associated forces”.<sup>148</sup> Under the new term, however, the U.S. is carrying out many actions that would only be lawful during the hostilities of actual armed conflict, including killing without warning and detention without trial.<sup>149</sup>

Other terrorist attacks since 11 September 2001 have not been treated as armed conflict, but rather have been characterized as crimes.<sup>150</sup> Police methods, not military force, have been used in response. For example, in 2008, terrorists based in Pakistan carried out coordinated attacks at a number of sites in Mumbai, India, that left 174 persons dead.<sup>151</sup> Within a year of the attacks, civil trials were underway in India and Pakistan of persons suspected of involvement.<sup>152</sup> The indications are that most states recognized that these attacks belonged in the same category as those that have occurred subsequent to 11 September in London, Madrid, and Bali, all of which have been characterized as crimes, not armed conflict. Police methods, not military force, have been used in response.

According to the Venice Commission:

78. ... [T]he organised hostilities in Afghanistan before and after 2001 have been an “armed conflict” which was at first a non-international armed conflict, and later became an international armed conflict after the involvement of US troops. On the other hand, sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an “armed conflict” in the sense that they trigger the applicability of International Humanitarian Law.

79. The Venice Commission considers that counter-terrorist measures which are part of what has sometimes been called “war on terror” are not part of an “armed conflict” in the sense of making the regime of International Humanitarian Law applicable to them. It considers that further reflection is necessary to consider whether any

<sup>146</sup> In an earlier decision, Justice O’Connor looked to such factors as the number of troops and the fact of active combat to find an armed conflict in Afghanistan. See *Hamdi v Rumseld*, 542 U.S. 507, 521 (2004).

<sup>147</sup> See supra n 13; US Deputy National Security Adviser S. Hadley, in remarks at The Ohio State University, explained that the US was in a war as of 12 September, because the 11 September attacks were ‘an act of war’. S Hadley, Remarks at the Moritz College of Law of the Ohio State University (24 September 2004) (on file with Committee). See also A Dworkin, *Law and the Campaign against Terrorism: the View from the Pentagon*, Crimes of War Project (16 December 2002), available at <http://www.crimesofwar.org/print/onnews/pentagon-print.html>; J B Bellinger, *Legal Issues in the War on Terrorism*, London School of Economics (31 October 2006). Available at [http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061031\\_JohnBellinger.pdf](http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061031_JohnBellinger.pdf).

<sup>148</sup> H H Koh, *The Obama Administration and International Law*, supra n 6.

<sup>149</sup> It is unclear at present whether the armed conflict against al Qaeda et al extends to the United States and other Western countries. During the Bush administration, officials did claim that the “global war on terror” extended to the U.S., Germany and other countries not experiencing armed conflict.

<sup>150</sup> O’Connell, *Enhancing the Status of Non-State Actors*, supra n 94. Terrorist attacks are not automatically excluded, however, when considering the evidence as to the existence of armed conflict, see *Prosecutor v Boskoski & Tarculovski*, supra n 49 at paras. 184-91.

<sup>151</sup> *Mumbai attacks: One year on*, 26 November 2009. Available at <http://news.bbc.co.uk/2/hi/8379828.stm>.

<sup>152</sup> *Ibid.*

additional instrument may be needed in the future to meet or anticipate the novel threats to international peace and security.<sup>153</sup>

Similarly, Greenwood observes:

In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.<sup>154</sup>

The first decade of the 21<sup>st</sup> century has also seen a number of conflicts that were, generally, acknowledged to be armed conflicts, including the Afghanistan War (2001-), the Iraq War (2003-), the Israel-Lebanon War (2006), and the South Ossetia War between Russia and Georgia (2008). These conflicts were brought to the Security Council, involved claims and counter-claims regarding IHL, and, in all cases, involved organized, intense armed fighting that resulted in many casualties. The conflict of shortest duration was the Russia-Georgia War that lasted about one week. The 2006 UN Commission of Inquiry on Lebanon concluded “the hostilities that took place from the 12 July to the 14 August constitute an international armed conflict” but noted that the actual hostilities only took place between Israel and Hezbollah fighters.<sup>155</sup>

There were also non-international armed conflicts in the period that were widely recognized as armed conflicts. The Security Council has been involved in the armed conflict in Congo for many years. In its Resolution of 28 May 2010, it urged the restoration of peace and security, the protection of civilians, accountability for war crimes, and for peacekeepers to have appropriate rules of engagement for the “conflict”.<sup>156</sup> Similar references are found in Security Council resolutions on the armed conflict in Sri Lanka. The 2005 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General accepted the *Tadić* definition of armed conflict for determining that the fighting in that region was indeed armed conflict.<sup>157</sup>

By contrast, the Committee found evidence indicating that a number of exchanges between armed forces of states were not recognized as armed conflict. North Korea has been involved with Japan and South Korea in numerous incidents during this period. In 2001, Japanese Coast Guard vessels exchanged fire with a North Korean vessel in Japan’s exclusive economic zone. The North Korean vessel exploded and sank. Japan did not consider the incident an armed conflict because it involved coast guard vessels that carry out only law enforcement duties.<sup>158</sup> In 2002, a 21-minute exchange of fire between North and South Korea resulted in a patrol boat being sunk and four South Korean sailors being killed. It was referred to as an “incident”, “armed provocation”, “border incursion”, “clash” and the like, but not an armed conflict. It was not reported to the Security Council.<sup>159</sup> On 26 March 2010, a South Korean warship sank in waters disputed between North and South Korea. Forty-six South Korean sailors perished in the incident. North Korea denied responsibility. If it is established that North

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<sup>153</sup> Venice Commission Opinion, supra n 64.

<sup>154</sup> C Greenwood, *War, Terrorism and International Law*, supra n 23 at 529.

<sup>155</sup> Report of the Commission of Enquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc A/HRC/3/2, 23 November 2006, paras. 8-9 and 57.

<sup>156</sup> See the Website of the Security Council and the many resolutions adopted in the cases of both countries. E.g., S.C. Res. 1925 (2010) (Congo). Available at <http://www.un.org/Docs/sc/>.

<sup>157</sup> See *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*, Geneva, 25 January 2005, para. 74., Available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf).

<sup>158</sup> K Morikawa, Comments on the Draft Initial Report on the Meaning of Armed Conflict in International Law, 20 August 2008 (on file with the committee.)

<sup>159</sup> D Kirk, *North and South Korea Trade Charges Over Naval Clash*, New York Times, 30 June 2002, 12.

Korea is responsible for this attack, South Korea has indicated no plans to counter-attack with armed force, but will consider other non-forceful measures.<sup>160</sup>

In 2004, the Japanese Coast Guard discovered a Chinese submarine in its territorial waters. Japanese Coast Guard vessels and helicopters took part in a “maritime security operation”—presumably observing the submarine. No shots were fired. The sub left Japanese waters. Again, as the incident involved the Coast Guard, Japan’s official position was that it engaged its vessels and helicopters in a law enforcement effort.<sup>161</sup>

In 2007, Iran detained the crew of a small British naval vessel claiming that the vessel was in Iranian waters.<sup>162</sup> The British claimed they were in Iraqi waters. This case, again, involved the intervention of the armed forces of two states. It was not apparently considered an armed conflict. Britain complained when its troops were shown on television, and a spokesperson for the Prime Minister said doing so was a violation of the Third Geneva Convention.<sup>163</sup> The U.K. did not take an official position, however, as to whether the Convention applied. It was certainly consistent with the spokesperson’s statement that the U.K. hoped the higher standard regarding protection from public displays found in the Geneva Convention would be honoured (Third Geneva Convention, Article 13) even if Iran were not obligated to apply it. No similar protection appears to exist in peacetime HRL.<sup>164</sup> Iran, however, treated the matter as one of illegal entry and indicated it might put the crew on trial. Iran made no reference to the Geneva Conventions that was reported in the English-language press.

Colombia’s 2008 armed incursion into Ecuador was determined by the Organization of American States to have violated the principle of non-intervention and to have posed a threat of armed conflict, without having reached the level of actual armed conflict.<sup>165</sup> Also in 2008, Thailand and Cambodia clashed over a boundary dispute in the vicinity of the Temple of Preah Vihear. Soldiers from the two states exchanged rifle and rocket fire for about an hour leaving two Cambodian soldiers dead and seven Thai soldiers and two Cambodian soldiers wounded.<sup>166</sup> There was a further five minute clash in April 2009, leaving two Thai soldiers dead and ten injured. Two Cambodian soldiers were also injured as well as nine “others”.<sup>167</sup> Neither state has referred to the clashes as an armed conflict. The Security Council has not acted in the case.

During this period high intensity rioting by unorganised groups continued to be distinguished from armed conflict as in the case of the U.K. and France in 2005. Similarly election-related violence in Kenya in late 2007 and early 2008 has consistently been described as rioting, civil unrest, and criminality, not armed conflict.<sup>168</sup> Violence in Thailand in 2010 was also generally regarded as civil

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<sup>160</sup> C Sang-Hun, *North Korea Denies Role in Sinking of Warship*, N.Y. Times, 18 April 2010. See also, Letter dated 6 April 2009 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council, UN Doc S/2009/186, 7 April 2009 (referring to UN SC Res. 1718).

<sup>161</sup> Morikawa, *supra* n 158.

<sup>162</sup> See, for example, M Stannard, *What Law Did Tehran Break? Capture of British Sailors a Gray Area in Application of Geneva Conventions*, San Francisco Chronicle, 1 April 2007, A1.

<sup>163</sup> *Ibid.*

<sup>164</sup> The Foreign Office reports the United Kingdom did not take an official position on the Geneva Conventions. E-mail message of 17 May 2007 (on file with the Committee).

<sup>165</sup> See, for example, S Romero, *Files Released by Colombia Point To Venezuelan Bid to Arm Rebels*, New York Times, 30 March 2008, A1 (‘Colombia’s relations with its two Andean neighbours veered suddenly toward armed conflict after Colombian forces raided a FARC camp inside Ecuador on March 1, killing 26 people, including a top FARC commander, and capturing the computers, according to the Colombians’.)

<sup>166</sup> *2 Killed on Thai-Cambodia Border*, New York Times, 15 October 2008. Available at <http://www.nytimes.com/2008/10/16/world/asia/16cambo.html>.

<sup>167</sup> *Soldiers Die as Thai, Cambodian Troops Trade Fire*, 3 April 2009, CNN.com. Available at <http://edition.cnn.com/2009/WORLD/asiapcf/04/03/cambodia.thai.tensions/index.html>.

<sup>168</sup> For example, the Global Partnership for the Prevention of Armed Conflict refers to the situation in Kenya in late 2007 and early 2008 as ‘violence’ and ‘escalating violence’, not armed conflict. See Kenya Update 22 January

unrest but appeared to be moving toward armed conflict until 20 May 2010, when the military effectively re-gained control and dispersed the opposition.<sup>169</sup>

Mexico has experienced high levels of violence perpetrated by organized crime groups since 2006. Mexico military forces have been involved in the attempt to control well-financed and well-armed criminal groups involved in drug trafficking. Mexico's military forces follow law enforcement rules of engagement. There is no indication that persons are being held without trial until the end of hostilities. If the criminal gangs decided to challenge civil authorities for the right to govern, as opposed to fighting to prevent the break-up of their criminal activities, Mexico could become the scene of a non-international armed conflict.<sup>170</sup> This was not the case as of early 2010.

In sum, the evidence overwhelmingly supports the observation of Greenwood that “many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply”.<sup>171</sup>

### III CHARACTERISTICS OF ARMED CONFLICT

The discussion above supports the position that armed conflict is to be distinguished from “incidents”;<sup>172</sup> “border clashes”;<sup>173</sup> “internal disturbances and tensions such as riots, isolated and sporadic acts of violence”;<sup>174</sup> “banditry, unorganised and short lived insurrections or terrorist activities”<sup>175</sup> and “civil unrest, [and] single acts of terrorism”.<sup>176</sup> The distinction between these situations and armed conflict is achieved by reliance on the criteria of organisation and intensity. Over the years there have been various other characteristics that have been put forward as integral to armed conflict. The majority of these have related to the level of organisation of dissident groups. For example the requirement that the conflict take place between governmental forces and rebel forces and for the latter to control part of the territory, to have a responsible command and to be capable of implementing the requirements of IHL. Some definitions specify that the parties must be pursuing particular political goals; other definitions require that a specific number of persons must have died in the fighting.<sup>177</sup> However, it appears that none of these are essential characteristics of either the treaty or customary law meaning of armed conflict although several are integral to the application of Additional Protocol II.

*The criterion of organisation:* the evidence discussed above indicates clearly that armed conflicts involve two or more organized armed groups. Violence perpetrated by the assassin or terrorist acting essentially alone or the disorganized mob violence of a riot is not armed conflict. This criterion is

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2008. Available at <http://www.gppac.net/page.php?id=1837>. But see the ICC Pre-Trial decision discussed *infra* n 184-86 and accompanying text.

<sup>169</sup> *Bangkok Counts its Losses After Downtown Rioting*, 20 May 2010, npr.org.

<sup>170</sup> See *Mexican President: We're Not Losing the Drug War*, 26 February 2009, msnbc.com. Available at <http://www.msnbc.msn.com/id/29413556/print/1/displaymode/1098/>.

<sup>171</sup> Greenwood, Handbook, *supra* n 34 at 48.

<sup>172</sup> See state practice *supra* at pp 16-17.

<sup>173</sup> *Ibid.*

<sup>174</sup> Additional Protocol II art 1(2).

<sup>175</sup> *Tadić Trial Judgement*, *supra* n 67 at para. 562.

<sup>176</sup> See, e.g., *Kordić and Čerkez*, *supra* n 107 at para. 341.

<sup>177</sup> See *supra* n 44.

reflected in treaties;<sup>178</sup> other State practice; mentioned explicitly or implicitly in decisions of several courts and tribunals;<sup>179</sup> as well as in the commentary of international law scholars. The significance of organisation for the existence of an armed conflict is also reflected in United Nations peacekeeping practice. As outlined above, peacekeeping forces respect peacetime human rights protections unless a force opposing them is, *inter alia*, an organized armed group.

The organisation factor is readily met in conflicts involving states, as the majority of armed conflicts between states involve their regular armed forces. The issue may however, be relevant along with the rules on attribution in the case of paramilitary and irregular forces. The satisfaction of the criterion of organisation is more complex in the context of non-international armed conflict. The Trial Chambers of the ICTY have relied on several indicative factors outlined in detail above to determine whether the organisation criterion is fulfilled. The underlying theme is that there must be a sufficient level of organisation through a command structure in order for the basic requirements of Common Article 3 to the 1949 Geneva Conventions to be implemented.<sup>180</sup> None of the factors in itself is central.<sup>181</sup> Factors relevant to assessing organisation include command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; existence of communications infrastructure; and space to rest.<sup>182</sup> As a practical matter opposing groups will in most cases control enough territory to organize. Control of territory is an affirmative requirement for the application of Additional Protocol II.<sup>183</sup>

The criterion of organisation was considered in a pre-trial decision of the International Criminal Court in the ICC's Investigation into the Situation in the Republic of Kenya.<sup>184</sup> A majority of the Pre-Trial Chamber applied a flexible test to the requirement that a non-state actor group be organized as a condition of a finding of an armed conflict. In a dissent, Judge Hans-Peter Kaul suggested specific factors to consider in investigating organization. He wrote that "groups of organized crime...a mob, groups of (armed) civilians or criminal gangs,"<sup>185</sup> generally fail to meet the criterion of organization. He further pointed out that "the acts of the members of the 'organisation' must be linked to the 'organisation'. Several factors may be indicative. A specific collectivity of persons with some kind of policy level and hierarchical structure, the capacity to impose the policy on its members and to sanction them, induces a particular relationship between the policy level of that 'organization' and its members....".<sup>186</sup>

*The criterion of intensity:* The assessment here of state practice and *opinio juris*, judicial opinion, and the majority of commentators support the position that hostilities must reach a certain level of intensity to qualify as an armed conflict.

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<sup>178</sup> See Common Article 2 of the 1949 Geneva Conventions (referring to High Contracting Parties); Common Article 3 of the Geneva Conventions ('organised military forces'); art 1 of Additional Protocol II ('or other organised armed groups') and Rome Statute art 8(2)(e).

<sup>179</sup> In particular the *Tadić* case.

<sup>180</sup> See *Prosecutor v Boskoski & Tarculovski*, supra n 49 at para. 196.

<sup>181</sup> See *Prosecutor v Ramush Haradinaj*, supra n 114 at para. 60.

<sup>182</sup> See *Prosecutor v Milošević*, supra n 47; see also M Bothe, Direct Participation in Hostilities in Non-International Armed Conflict, Expert Paper, Second Expert Meeting on the Notion of Direct Participation in Hostilities, The Hague, 25-26 October 2004. Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2004-05-expert-paper-dph-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2004-05-expert-paper-dph-icrc.pdf).

<sup>183</sup> Art 1(1).

<sup>184</sup> *Situation in the Republic of Kenya*, no. ICC-01/09, (Pre-Trial Chamber) Decision Pursuant to art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

<sup>185</sup> *Ibid.* at para. 52 (Dissent of Judge Hans-Peter Kaul).

<sup>186</sup> *Ibid.* at para. 69.

Factors relevant to assessing intensity include for example the number of fighters involved;<sup>187</sup> the type and quantity of weapons used;<sup>188</sup> the duration and territorial extent of fighting;<sup>189</sup> the number of casualties;<sup>190</sup> the extent of destruction of property;<sup>191</sup> the displacement of the population; and the involvement of the Security Council or other actors to broker cease-fire efforts. Isolated acts of violence do not constitute armed conflict. The intensity criterion requires more than, for example, a minor exchange of fire or an insignificant border clash. None of the factors identified above is necessarily determinate in itself. A lower level with respect to any one may satisfy the criterion of intensity if the level of another factor is high.<sup>192</sup>

The jurisprudence of the ICTY indicates that the requirement of intensity will normally have a temporal aspect in the case of non-international armed conflicts for the purposes of the application of Common Article 3 to the Geneva Conventions.<sup>193</sup> In other words, in order to constitute a non-international armed conflict there must be a certain level of armed violence over a protracted period. The two concepts, intensity and protraction, are linked and a lesser level of duration may satisfy the criterion if the intensity level is high.<sup>194</sup> The reverse is also the case. The idea of “protraction” is also relevant to the “organisation” criterion, as it requires a certain level of organisation to undertake protracted hostilities.<sup>195</sup>

Nevertheless, according to the ICTY in *Haradinaj*, intensity is the more important criterion: “The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration”.<sup>196</sup> *Commencement, Termination, and Territorial Scope of Armed Conflict*: If armed conflict exists when organized armed groups are engaged in intense fighting, then, logically, armed conflict does not begin until these criteria are present; armed conflict ends when the criteria are no longer present, and armed conflict extends to territory where organized armed fighting is occurring. The Committee undertook only preliminary research into whether international law confirms these observations. We found these are complicated issues in need of thorough research.

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<sup>187</sup> See, e.g., *Prosecutor v Boskoski & Tarculovski*, supra n 49 at para. 177.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> See, e.g., *Abella v Argentina*, supra n 4 and *Prosecutor v Ramush Haradinaj*, supra n 114 at para. 49.

Respecting international armed conflicts, among the conflicts lasting for the shortest periods was the 1969 Soccer War between El Salvador and Honduras. It lasted four days. It involved the military forces of both sides using tanks, aircraft, and heavy artillery. 1000 soldiers and 2000 civilians were killed and 300,000 civilians were displaced. The OAS intervened to help bring about an end to the fighting. See T P Anderson, *The Hundred Hours War*, 107-28 (1981).

The 2008 South Ossetia War between Georgia and Russia lasted one week. It involved the military forces of both states using aircraft and heavy artillery. Estimates are that between 600 and 800 persons died, about half of whom were civilians, and 158,000 persons were displaced. France mediated a ceasefire. See T Bahrapour, *An Uncertain Death Toll in Georgia-Russia War*, Washington Post, 25 August 2008. Available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/24/AR2008082402150.html>.

<sup>193</sup> *Tadić Jurisdiction Decision*, supra n 65 at para. 70 and see *Prosecutor v Ramush Haradinaj*, supra n 114 at paras. 40-49 (for a consideration of how the term ‘protracted armed violence’ has been interpreted by the ICTY).

<sup>194</sup> See, e.g., *Abella v Argentina*, supra n 4.

<sup>195</sup> *Prosecutor v Thomas Luangwa Diylo*, supra n 127.

<sup>196</sup> *Ibid.* at para. 49.

For example if armed conflict commences when both the criteria of intensity and organisation are met, this raises the question of whether a single, significant armed attack constitutes an armed conflict irrespective of any response. Some who argue that armed conflict begins with a significant armed attack do so in the belief that otherwise IHL would not apply to such attacks because IHL is only triggered by armed conflict. The issue is not so simply resolved, however. Even in the absence of armed conflict, a member of the armed forces may invoke IHL to justify the use of lethal force. The case of the South Korean warship *Cheonan* provides an example. The *Cheonan* sank on 26 March 2010 in the vicinity of the disputed maritime boundary between North and South Korea. Forty-six sailors perished.<sup>197</sup> After a six-week investigation, South Korea concluded that a North Korean torpedo had sunk the ship.<sup>198</sup> This type of attack could give rise to a right to respond in self-defence under Article 51 of the United Nations Charter, given either additional information about likely future attacks or Security Council authorization. Nevertheless, South Korea has not responded with military force. To date there has been no exchange of fighting and so no armed conflict. If South Korea's facts are correct, the North Korean leaders who ordered the attack have committed a serious violation of international law and may someday be held accountable. North Korea had no right to attack the South Korean ship, and it is no justification that its leaders believed that the ship was a military target. The sailors on the North Korean submarine who implemented the order, however, may have a defence if they believed in good faith that they were following a lawful order to attack a military objective as permitted under IHL. In such a case, IHL may be invoked regardless of the existence of an armed conflict.

IHL may also be applied outside a situation of an armed conflict by analogy with the military law that normally governs members of a state's armed forces. There are a number of examples of members of the armed forces who while carrying out duties in peacetime trespass into another state's territory or territorial waters. These are not considered cases of armed conflict, but as the usual law applicable to members of the armed forces is their national state's military law, by analogy, it is possible and probably preferable to apply IHL. The case of the American pilot shot down by Syria in 1988 and the British sailors detained by Iran in 2007 are examples of states requesting application of IHL even where they did not recognize the existence of an armed conflict.

Thus, it appears possible to allay the concern about the application of IHL. It could be applicable to military operations even in the absence of armed conflict without redefining "intense fighting" to include significant one-sided first strikes. IHL could be applicable to soldiers who follow lawful orders or who are carrying out official duties. IHL would not apply to the leadership, however, who order first strikes without Security Council authorization. Such strikes are unlawful under the *jus ad bellum* and do not become lawful by following IHL and proclaiming that the action is within an "armed conflict".

With respect to cessation of armed conflict our preliminary observations are that it is rare for parties to end armed conflicts today with formal agreements.<sup>199</sup> More usual is the cessation of hostilities for a long enough period of time so that the parties and the international community recognize that the conflict is at an end. If a sufficient period elapses before the hostilities resume a new conflict would be presumed. International law contains no rule, however, as to how long the cessation needs to last for an armed conflict to be considered legally at an end. A number of factors would appear to be relevant. For example, even if hostilities cease, are the parties maintaining battle positions? Is it plain that fighting could recommence at any time or are forces being pulled back or even sent home? Are peacetime activities resuming such as trade, commerce, agriculture, and manufacturing? Are refugees who fled the fighting returning home? Some provisions of IHL may continue to apply after the cessation of hostilities, so IHL may not be a helpful indicator in identifying the end of armed conflict.<sup>200</sup>

<sup>197</sup> Security Council to Receive Briefing on South Korea Ship Probe, 10 June 2010, [http://www.globalsecuritynewswire.org/gsn/nw\\_20100610\\_6582.php](http://www.globalsecuritynewswire.org/gsn/nw_20100610_6582.php).

<sup>198</sup> J Sudworth, *How South Korean Ship Was Sunk*, 20 May 2010, BBC News. Available at [http://news.bbc.co.uk/2/hi/world/asia\\_pacific/10130909.stm](http://news.bbc.co.uk/2/hi/world/asia_pacific/10130909.stm).

<sup>199</sup> On peace agreements generally, see Christine Bell, *Peace Agreements and Human Rights* (2000).

<sup>200</sup> E.g., according to Common Article 2 the 1949 Geneva Conventions apply '...to all cases of partial or total occupation of the territory of the High Contracting Parties, even if said occupation meets with no armed resistance'. See also *Tadić Jurisdiction Decision*, supra n 65 at para. 70 ('[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general

The territorial scope of armed conflict is also a complex issue. As a general rule, armed conflict occurs where organized armed groups are engaged in intense armed fighting. Again, the actual territorial scope may or may not be co-extensive with the reach of IHL. IHL may well extend beyond the area of actual fighting for certain purposes. For example war crimes may occur at some distance from the actual fighting.<sup>201</sup> On the other hand, the territorial extent of armed conflict is critical to know for the correct application of *ius ad bellum* requirement of proportionality.<sup>202</sup> The United Nations Charter limits the right to use force to self-defence or with Security Council authorization. According to Greenwood:

Military operations will not normally be conducted throughout the area of war. The area in which operations are actually taking place at any given time is known as the ‘area of operations’ or ‘theatre of war’. The extent to which a belligerent today is justified in expanding the area of operations will depend upon whether it is necessary for him to do so in order to exercise his right of self-defence. While a state cannot be expected always to defend itself solely on ground of the aggressor’s choosing, any expansion of the area of operations may not go beyond what constitutes a necessary and proportionate measure of self-defence. In particular, it cannot be assumed—as in the past—that a state engaged in armed conflict is free to attack its adversary anywhere in the area of war.<sup>203</sup>

State practice is consistent with this position. States rarely recognize armed conflict beyond the zone of intense fighting, whether the fighting is in an international or non-international armed conflict.<sup>204</sup>

## CONCLUSIONS

In 2005, the International Law Association decided that a study of the concept of armed conflict should be undertaken to determine the meaning of this term in international law. Despite the importance of the issue over the years, as highlighted by the U.S. “declaration” of a “war on terror” in 2001, the meaning of armed conflict in international law has not been the subject of comprehensive analysis. This was the task of the Committee.

1. The Committee found that the term “armed conflict” had become especially significant with the adoption of the U.N. Charter in 1945 when the term “war” declined in importance. Nevertheless, neither the Charter nor any other important treaty currently defines armed conflict despite the fact that in many subfields of international law it is critical to determine whether or not a situation is one of armed conflict. The Committee, therefore, undertook extensive research into hundreds of violent situations since 1945 and identified significant state practice and *opinio juris* establishing that as a matter of customary international law a situation of armed conflict depends on the satisfaction of two essential minimum criteria, namely:
  - a. the existence of organized armed groups
  - b. engaged in fighting of some intensity.<sup>205</sup>

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conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there’).

<sup>201</sup> See *Tadić Jurisdiction Decision* *ibid.* and Separate Opinion of Judge Simma in *Armed Activities on the Territory of the Congo (Congo v Uganda)* *supra* n 17 334 at para. 20-21.

<sup>202</sup> See J Gardam, *Necessity and Proportionality and the Use of Force by States* 162-67 (Cambridge: Cambridge University Press 2004).

<sup>203</sup> Greenwood, *Handbook*, *supra* n 34 at 61-62.

<sup>204</sup> *Ibid.*

<sup>205</sup> As to different categories of armed conflict, see n 7 *supra*.

The Committee's assessment of this evidence is confirmed directly or indirectly in many judicial decisions and in scholarly commentary. These sources also indicate that the following conclusions respecting the concept of armed conflict are confirmed in customary international law:

2. In international law the concept of armed conflict has largely replaced the concept of war.
3. The earlier practice of states creating a *de jure* state of war by a declaration is no longer recognized in international law. Declarations of war or armed conflict, national legislation, expressions of subjective intent by parties to a conflict, and the like, may have evidentiary value but such expressions do not alone create a *de jure* state of war or armed conflict.
4. The *de jure* state or situation of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.
5. The accurate identification of a situation of armed conflict has significant and wide-ranging implications for the discipline of international law. Armed conflict may have an impact on treaty obligations; on U.N. operations; on asylum rights and duties, on arms control obligations, and on the law of neutrality, amongst others. Perhaps most importantly states may only claim belligerent rights during an armed conflict. To claim such rights outside situations of armed conflict risks violating fundamental human rights that prevail in non-armed conflict situations, i.e., in situations of peace.