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USE OF FORCE

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REPORT

**Initial Report on the Meaning of Armed Conflict
in International Law**

Prepared by the International Law Association
Committee on the Use of Force

Summary

In May 2005, the Executive Committee of the International Law Association 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". 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 war and peace. Given that important aspects of international law turn on whether a situation is properly defined as armed conflict, providing a clear understanding of what counts as armed conflict would support the proper functioning of the law in general. Most fundamentally, it would support the proper application of human rights law.

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 existence of armed conflict triggers international humanitarian law (IHL) obligations, affects treaty rights, asylum rights and other important rights and duties. The Committee found no widely accepted definition in any treaty, but did find evidence that certain characteristics do define armed conflict in international law. The existence of armed conflict is not something that can be declared or denied by governments as a matter of policy.

The Committee employed standard international legal methodology. Looking to relevant treaties--in particular IHL treaties--rules of customary international law, general principles of

international law, judicial decisions and the writing of scholars, as of the drafting of this Initial Report, the Committee has found evidence of at least two characteristics with respect to all armed conflict:

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

These characteristics were restated perhaps most authoritatively in a 1995 decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*. That decision has been widely cited for its description of the characteristics of armed conflict.

A number of questions respecting these characteristics remain for further research in preparation of the Final Report. In particular, further clarification will be sought as to the requirements of organization and intensity. More research is needed on when armed conflict begins, when it ends, and on territorial scope. In the course of this research, additional characteristics may be found.

It should also be emphasized that the Committee's mandate is to clarify the meaning of armed conflict in international law. It is not to determine when IHL applies or what principles of IHL apply in what circumstances.

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 or what is 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 scientific litmus test.¹ Correctly categorising situations as armed conflict 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 more rights and advocates of a narrow definition that better protects individuals. During armed conflict states have greater 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.

Before the adoption of the United Nations Charter in 1945, states officially declared war and thereby triggered wartime law. Even then, however, states did not always declare war when war existed or refrain from declaring war when it did not exist. With the adoption of the Charter, declarations of war have become mostly irrelevant in international law. International law continues to reflect a war-peace distinction, but the division is based on whether a particular situation of violence amounts, as a factual matter, to armed conflict.

Until the 11 September 2001 attacks on the United States, states generally resisted acknowledging that fighting on their territory was armed conflict. To do so was to admit

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

failure, a loss of control to opposition forces.² Some scholars even raised the possibility that the distinction between armed conflict and peace in international law was dissolving.³ 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 pressed governments to acknowledge fighting as armed conflict and to apply IHL,⁴ but the real pressure for clarification came with the US “declaration” of a “global war” in 2001 and its claim⁵ 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.⁶

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

(b) Methodology and Organisation

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: relevant treaties, evidence of customary international law, relevant general principles of international law, judicial decisions and the writing of scholars.⁷ 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 the practice of states under relevant treaties and in customary international law as evidenced by state practice and *opinio juris*.

The Report is organized around the time periods associated with major developments in IHL. IHL is the subfield of international law most concerned with the meaning of armed conflict and is, consequently, the field that provides the most evidence as to the meaning of armed conflict in general law. Since IHL is such an important part of this Report, it made sense to organize it around the timeframe of the major IHL developments that is, the 1949 Geneva Conventions, the 1977 Additional Protocols and the statutes of the international criminal tribunals of the 1990s. Reference is also made to the ICRC 2005 customary international law study. This examination of the evidence cannot begin to consider all relevant state practice but does refer to many of the most significant developments since the Second World War.

² See M E O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror* (2004) 43 Columbia Journal of Transnational Law 435.

³ See, for example, 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; T Meron & A Rosas, *A Declaration of Minimum Humanitarian Standards* (1995) 85 American Journal of International Law 375. These authors advocate a rule prohibiting the use of lethal force except in cases of necessity in any context.

⁴ See, for example, the cases of Sri Lanka (International Committee of the Red Cross, *Sri Lanka*, in ICRC Annual Report 1996 (1997) 140-42, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_annual_report_2006/\\$File/icrc_ar_06_Full.zip](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_annual_report_2006/$File/icrc_ar_06_Full.zip)), Colombia (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 El Salvador (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).

⁵ See *infra*.

⁶ See *infra*.

⁷ Statute of the International Court of Justice art. 38.

The materials reviewed indicate substantial support for the conclusion that certain specified criteria are characteristic of armed conflict.

(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.⁸ The *ius ad bellum* regulates the resort to force by states and to a certain extent its conduct, through the requirements of necessity and proportionality.⁹ Under this law, the terms “war” and “armed attack” are of particular significance.¹⁰ 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 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”.¹¹ 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.¹² After the adoption of the Charter, governments and jurists began to abandon the use of the term “war”.¹³

It is still possible for states to find themselves in a state of war¹⁴ or to make formal declarations of war.¹⁵ Many national constitutions still require formal declarations of war in some circumstances.¹⁶ Such a declaration is not contrary to international law unless

⁸ See generally C Greenwood, *The Relationship Between Ius Ad Bellum and Ius In Bello* (1983) 9 *Review of International Studies* 133-147, reprinted in C Greenwood, *Essays on War in International Law* 13 (London: Cameron May Ltd, 2006).

⁹ See generally J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004).

¹⁰ 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).

¹¹ L Oppenheim, II *International Law: A Treatise* 202 (H Lauterpacht ed, London: Longman, Greens and Co, 1952).

¹² For recent discussions of these rules, see 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; C Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2nd ed 2004).

¹³ 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; A D McNair and A D Watts, *The Legal Effects of War* (New York: Cambridge University Press, 4th ed 1966); C Greenwood, *War, Terrorism and International Law* (2004) 56 *Current Legal Problems* 505, 529; M E O’Connell, *The Legal Case Against the Global War on Terror* (2004) 36 *Case Western International Law Journal* 349, 353.

¹⁴ C Greenwood, *The Concept of War in Modern International Law* (1987) 36 *International and Comparative Law Quarterly* 283, 302-305.

¹⁵ *Jus Ad Bellum*, Partial Award, Ethiopia Claims 1-8, Eritrea Ethiopia Claims Commission, 2006 ILM 430.

¹⁶ For example, the United States Constitution mandates that ‘war’ be declared by the Congress. US Constitution art. I sec. 8. The Congress has not declared a war, however, since the Second World War, despite

(depending on the context) it constitutes a threat within the meaning of Article 2(4) of the United Nations Charter.¹⁷ 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.¹⁸ The terminology of war was also used by Israel in the 2006 conflict in Lebanon.¹⁹

To summarise, although the term “war” may still have some significance in a few areas such as for some national constitutions,²⁰ 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.²¹ The Committee plans further research on the term armed attack and its relationship to armed conflict.

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 today²² although the “law of armed conflict” or “IHL” are more generally accepted.

the many uses of force in that period 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).

¹⁷ As Brownlie writes, ‘acts which would otherwise have been equivocal may be treated as offensive if one of the parties to a conflict declares itself in a state of war.’ I Brownlie, *International Law and the Use of Force by States* 368 (Oxford: Clarendon Press, 1963).

¹⁸ *Jus Ad Bellum*, Partial Award, supra n 15.

¹⁹ See identical letters dated 12 July 2006 from Dan Gillerman, Permanent Representative of Israel to the United Nations, addressed to the UN 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, 109th Congress, 18 July 2006.

²⁰ See, for example, D L Westfield, *War Powers: the President, the Congress, and the Question of War*, supra n 16.

²¹ 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 12, at 108-20; B Simma (ed), *The Charter of the United Nations: A Commentary* 794-803 (Oxford: Oxford University Press, 2nd ed 2002); Y Dinstein, *War, Aggression and Self-defence* 182-208 (Cambridge, Cambridge University Press, 3rd ed 2005). See also *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v United States of America) (Merits) 1986 ICJ reports 14, 191; *Oil Platforms* (Islamic Republic of Iran v United States of America) (Merits) 2003 ICJ reports 803, 876; *Jus Ad Bellum*, Partial Award, supra n 15.

²² See, for example, Letter from J B Bellinger, III, Legal Advisor, 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 *Documents on the Laws of War*, (eds 3rd ed Oxford: Oxford University Press, 2000).

“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.²³

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.²⁴ There is nowadays thought to be growing convergence between the rules governing international and non-international armed conflicts and in the future it may be less important to classify the type of conflict.²⁵ The jurisprudence of the ICTY, state practice and treaties all demonstrate this convergence.²⁶ 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.²⁷ 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.²⁸

The term “hostilities” is another common term used frequently in IHL. It is closely related to the concept of “armed conflict” but is apparently a narrower term. Hostilities are at least the

²³ According to Greenwood: ‘A non-international armed conflict is a confrontation between the existing governmental authority and groups of persons subordinate to this authority, 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 (Ardley, NY: Transnational Publishers, 2004); J Peijic, *Terrorist Acts and Groups: A Role for International Law?* (2004) 75 *British Yearbook of International Law* 71, 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).

²⁴ See discussion *infra*.

²⁵ 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.

²⁶ 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 Conventional Weapons (and its protocols) was extended to non-international armed conflict through amendment in 2001; it came into force on 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, 15 July 1999.

²⁷ See however Art 1(4) of Protocol I that treats certain conflicts involving entities other than States as international in character.

²⁸ See discussion *infra*.

actual engagement in fighting but some take the term to mean the broader concept of “actual prosecution of the armed conflict on behalf of the parties to the conflict”.²⁹ It is the first understanding that comports with the international legal meaning of armed conflict.³⁰

II ARMED CONFLICT IN IHL AND BEYOND

With the adoption of the United Nations Charter, some thought major war would end and with it the need for IHL.³¹ In fact, major war did not end and the ICRC was prescient enough to understand that IHL would require further development.³² In 1949, most states in the world came together to agree to four new Conventions for the protection of victims of armed conflict.³³ For the purposes of this Report, the 1949 Conventions are particularly important because, unlike earlier IHL instruments, the 1949 Conventions deal with the issue of scope of application. In 1977 two Additional Protocols were added to the 1949 Conventions,³⁴ and in the 1990s, statutes for several international criminal tribunals were drafted that include provisions on war crimes committed during armed conflict. In addition to these major IHL developments, this section also surveys judicial decisions, commentary and the actual treatment of various conflicts during the time frame of each of these major developments in IHL.

(a) *The 1949 Geneva Conventions*

From 1949-77

The 1949 Geneva Conventions each include a scope provision in common Article 2. It reads:

²⁹ See Third Expert Meeting on the Notion of Direct Participation in Hostilities, ICRC, 18-19 (1995), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) (Report on Direct Participation in Hostilities). The term hostilities is also of particular significance in the context of the concept of ‘direct participation in hostilities’. Under Article 51(3) of Additional Protocol I and Article 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’. For a discussion of the meaning of the term ‘direct participation in hostilities’, see *Customary International Humanitarian Law Volume I: Rules 22-23* (J-M Henckaerts and L Doswald-Beck eds, Cambridge: Cambridge University Press, 2005). The Study regards this rule as customary. For an effort to further clarify the meaning of ‘direct participation in hostilities’, see Report on Direct Participation in Hostilities 17-24. This Report indicates that the greater point of disagreement among the experts is not over the meaning of ‘hostilities’ but of ‘direct participation’.

³⁰ See discussion *infra* and see Separate Opinion of Judge Simma, in *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) 2005 ICJ reports, paras 6-23.

³¹ For example, the International Law Commission. See, however, 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.

³² *Id.* at 58-59.

³³ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 31 (each entered into force 21 October 1950) (hereafter 1949 Geneva Conventions).

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted in 1977 (Protocol I), 12 December 1977, 1125 UNTS 3 (hereafter Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, adopted in 1977, 12 December 1977, 1125 UNTS 609, (hereafter Protocol II). See also *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y Sandoz et al eds, Geneva: Martinus Nijhoff Publishers, 1987).

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 explains that

[t]his 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 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.³⁵

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. 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, suggests criteria for determining the existence of an Article 3 armed conflict as follows:

- (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

³⁵ I *Commentary on the Geneva Conventions of 12 August 1949* 32 (footnote omitted) (J S Pictet ed, Geneva: ICRC, 1960).

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.³⁶

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganised and short-lived insurrection.

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 to which IHL applied. Two examples amongst many 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 in neither case was the incident treated as an armed conflict. The 1961 *Red Crusader* incident involved a Danish fishing enforcement vessel and a British Navy vessel in an attempt by the Danes to arrest a British fishing trawler.³⁷ A commission of inquiry found the Danes had used excessive force in arresting the trawler, but neither that fact nor the involvement of forces of two parties to the 1949 Conventions led to treatment of the incident as an armed conflict. Similarly in the 1970s in the “Cod Wars” between Iceland, the UK and Germany, naval vessels of the UK and Germany escorted fishing vessels to prevent interdiction by Icelandic fishery enforcement vessels.³⁸ 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.

Weisburd describes the following incidents as including the engagement of troops but on too limited a basis to have been treated as armed conflicts. He calls them “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).³⁹

These examples are to be contrasted with the acknowledged armed conflicts of the period: 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-

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

³⁷ Report of the Commission of Inquiry Into the Red Crusader Incident, 35 ILR 485 (1962).

³⁸ For the facts of the incident, see *Fisheries Jurisdiction* (Federal Republic of Germany v Iceland), 1974 ICJ reports 175.

³⁹ A M Weisburd, *Use of Force: The Practice of States Since World War II* 255-56, 257-59, 260, 276-77. (University Park, PA: Pennsylvania State University Press, 1997).

Honduras (“the Soccer War” 1969), the 1973 Arab-Israeli Conflict, and the Turkish Invasion of Cyprus (1974).⁴⁰

Both types of examples indicate that following the adoption of the 1949 Conventions conflicts were commonly classified on the basis of intensity of fighting and not simply as to whether the armed forces of the parties to the Conventions were engaged.

(b) The 1977 Protocols

From 1977-93

The Biafran War in Nigeria and the Vietnam War convinced the ICRC of the need to update the 1949 Conventions in light of the growing problem of civil war and unconventional warfare. In 1977, two Protocols were adopted 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.

Additional Protocol I added nothing to the meaning of armed conflict in the 1949 Geneva Conventions. The major development in Additional Protocol I is not in relation to the meaning of armed conflict but rather what entities can be engaged in an armed conflict to which the international rules of IHL apply. So-called “wars of national liberation” are deemed to be international in nature by Article 1(4) of the Protocol.

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 UK 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.”⁴¹ France made a similar statement on becoming a party to the Protocol.⁴²

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 its scope of application in Article 1:

Material field of application

⁴⁰ For accounts of most of these armed conflicts and lesser incidents, see generally A M Weisburd, *Use of Force*, supra n 39. Weisburd also includes incidents in which there was no fighting and no engagement of armed forces, as well as conflicts that have been treated as armed conflicts.

⁴¹ See Reservations/Declaration 2 July 2002.

⁴² See Reservations/Declaration 11 April 2001.

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 armed conflict than Common Article 3. This was done in order to make its more detailed and demanding rules acceptable to states.⁴³ 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 cover a situation where there is no government.⁴⁴ It requires sustained and concerted operations and that the rebels be able to implement the Protocol.

Consequently there are currently 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 define the lower threshold of the concept of armed conflict.⁴⁵ Examples of the situations covered by Article 1(2) are: “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

⁴³ See G I A D Draper, *Humanitarian Law and Internal Armed Conflicts* (1983) 13 Georgia Journal of International and Comparative Law 253, 275.

⁴⁴ 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.’ *Commentary on the Additional Protocols*, supra n 34, at 1351.

⁴⁵ *Id.* at 1351-52.

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.⁴⁶

A number of conflicts following the adoption of the Protocols were generally acknowledged to be armed conflicts to which IHL applied: the 1980-88 Iran-Iraq War; the Falklands Conflict (1982), the Persian Gulf War (1990-1991); and the internal conflicts in El Salvador (1980-1993), the Philippines (1991) and Bosnia-Herzegovina (1992-1994).

By way of contrast, other forceful events have not generally been characterized as armed conflict.⁴⁷ For example, in 1981 and 1982 incidents involving Soviet submarines in Swedish waters, including the use of depth charges by the Swedish Navy, were not treated as an armed conflict.⁴⁸ Also in 1981, US fighter jets engaged in a firefight with Libyan aircraft above the Gulf of Sidra, shooting them down.⁴⁹ This incident was not treated as an armed conflict. In 1985, the US intercepted an Egyptian passenger plane carrying the hijackers of the *Achille Lauro*. The Egyptian plane was forced down in Sicily.⁵⁰ No one, apparently, considered the US and Egypt to have been engaged in an armed conflict. Along similar lines in 1985, French secret agents attached bombs to the hull of the Greenpeace ship, *the Rainbow*

⁴⁶ *Commentary on the Additional Protocols*, supra n 34, at 1355.

⁴⁷ O’Connell, *Enhancing the Status of Non-State Actors*, supra n 2, at 445-46.

⁴⁸ 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 Schemann, *Soviet Accuses Swedes on Listening Post*, New York Times, 11 November 1981, A3.

⁴⁹ S R Ratner, *The Gulf of Sidra Incident of 1981: The Lawfulness of Peacetime Aerial Engagements*, in *International Incidents*, supra n 48, at 181; A M Weisburd, *Use of Force*, supra n 39, at 289-90.

⁵⁰ See C P Wallace, *Action by US ‘Surprises and Saddens’ Egypt*, Los Angeles Times, 12 October 1985, 1.

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 as an armed conflict or that the agents were subject to IHL rather than New Zealand's criminal law.⁵¹

(c) *Statutes of International Criminal Tribunals*

From 1993-2008

The meaning of armed conflict has undergone considerable development in the Statutes and jurisprudence of the two ad hoc tribunals established by the Security Council during the 1990s, the ICTY and the ICTR, and in the Statute of the ICC adopted by States in 1998. In 2007 the ICC delivered its first judgement considering the meaning of armed conflict.

The ICTY *Tadić* decision is nowadays widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts.⁵² 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".⁵³ 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.⁵⁴

In applying the *Tadić* Appeal 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, in an armed conflict of an internal or mixed character these closely related criteria are used solely for the purpose of distinguishing an armed conflict from banditry, unorganized or short-lived insurrections or terrorist activities which are not subject to IHL.⁵⁵ Many other ICTY cases follow this approach.⁵⁶ In *Kordić and Čerkez*, the Appeals Chamber said that the term "protracted" is significant in excluding mere cases of civil unrest or single acts of terrorism in cases of non-international conflicts.⁵⁷

The *Mucić* case elaborated on the *Tadić* test in relation to international conflicts stating that,

⁵¹ *Rainbow Warrior* (New Zealand v France) 20 RIAA 217 (1990).

⁵² 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 Persons, 17 March 2006, Op. no. 363/2005, CDL-AD (2006)009 (Venice Commission Opinion).

⁵³ *Prosecutor v Tadić*, Case No. IT-94-1-T, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

⁵⁴ L Moir, *The Law of Internal Armed Conflict*, supra n 23, at 42, quoting *Prosecutor v Tadić*, Case No. IT-94-1-A, Jurisdiction, 2 October 1995, para. 70.

⁵⁵ *Prosecutor v Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 562.

⁵⁶ *Prosecutor v Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 536; *Prosecutor v Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005, para. 24; *Prosecutor v Limaj et al*, Case No IT-03-65-T, Judgement, 30 November 2005, para. 84; *Prosecutor v Galić*, Case No. IT-98-29-T, Opinion and Judgement, 5 December 2003, para. 9; *Prosecutor v Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, paras. 566-68. See also Venice Commission Opinion, supra n 52: '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.'

⁵⁷ *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 341.

“the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law” and furthermore that it was “guided by the Commentary to the Fourth Geneva Convention, which considers that ‘any difference arising between two States and leading to the intervention of members of the armed forces’ is an international armed conflict and ‘it makes no difference how long conflict lasts, or how much slaughter takes place’”.⁵⁸

The question as to whether there was a non-international armed conflict came before the ICTY again 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.⁵⁹ 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 Commentary, however, was of persuasive value only; although it does offer 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 Court in *Tadić*.⁶⁰

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) was treated as evidence of the nature of the conflict; account was taken of the spread of the conflict over territory, the increase in number of government forces and 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 has attracted the attention of the Security Council and whether any resolutions have been passed.

The Trial Chamber also held that fighters must exhibit organisation, but only “some degree of organisation will suffice”.⁶¹ It rejected the argument that in order to be bound by IHL a party must be able to implement IHL.⁶² The Chamber referred to the fact that other Chambers had

⁵⁸ *Prosecutor v Mucic et al*, Case No. IT-96-21-T, Judgement, 16 November 1998, paras. 184, 208.

⁵⁹ See *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal *Under Rule 98 bis*, 16 June 2004.

⁶⁰ The same approach to the ICRC criteria was adopted in the *Limaj* case (*Prosecutor v Limaj et al*, supra n 56, 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 Article 8 of the Rome Statute of the International Criminal Court adopted the *Tadić* approach (para. 87).

⁶¹ *Id.* at para. 89.

⁶² *Id.* at paras. 88-89.

taken into account factors “including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms”.⁶³ 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.⁶⁴

The criteria of intensity and organisation in a non-international armed conflict were considered in detail again in 2008 in the case of *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.⁶⁵

The ICTR⁶⁶ has followed the approach of the ICTY on Common Article 3. In *Akayesu*,⁶⁷ the Tribunal considered the nature of the conflict in Rwanda at some length.⁶⁸ 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.⁶⁹ 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”, evaluating the intensity of the conflict and the organisation of the parties.⁷⁰ Intensity did not depend on the subjective judgment of the parties; it was objective.⁷¹

The Inter-American Commission on Human Rights had to determine whether IHL applied in *Abella v Argentina*.⁷² The Commission’s determination depended, in turn, 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.”⁷³

⁶³ Id. at para. 90, citing *Milošević* Rule 98 *bis* Decision, *supra* n 59, at paras. 23-24.

⁶⁴ Id. at paras. 94-134.

⁶⁵ *Prosecutor v Ramush Haradinaj*, Case No. IT-04-84-T, 3 April 2008, at para. 49 (for the factors relevant to assessing intensity see para. 49 and for organisation see paras 64-89).

⁶⁶ See Human Rights Watch, *Case Law of the International Criminal Tribunal for Rwanda*, February 2004, available at <http://www.hrw.org/reports/2004/ij/ictf/index.htm>.

⁶⁷ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, paras. 619-27.

⁶⁸ See also *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 170-72.

⁶⁹ See also *Prosecutor v Akayesu*, *supra* n 67, at paras. 619-21; *Prosecutor v Kayishema and Ruzindana*, *supra* n 74, at para. 155-90.

⁷⁰ Id. at para. 620.

⁷¹ *Prosecutor v Akayesu*, *supra* n 67, at para. 603.

⁷² *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).

⁷³ Id. at para. 155.

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”.⁷⁴ 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”. The Rome Statute is not limited to conflicts between governments and armed groups; it omits the condition 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”.⁷⁵

The extent to which the *Tadić* test is consistent with the ICC Rome Statute was considered by the Trial Chamber of the ICTY in the judgment on the *Milošević amici curiae* motion. The Chamber was of the view that the *Tadić* case definition of internal armed conflict was consistent with Article 8 of the ICC Statute.⁷⁶

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 Lubanga Dyilo*.⁷⁷ 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”.⁷⁸

Other developments during this period include the Secretary-General’s adoption in 1999 of the *Bulletin on Observance by United Nations Forces of International Humanitarian Law*.⁷⁹ IHL applies when United Nations forces are in situations of armed conflict, actively engaged as combatants, to the extent and for the duration of their engagement.⁸⁰ National courts in the United Kingdom,⁸¹ Canada, Italy and Belgium have struggled with cases turning on the legal status of peacekeeping operations and the applicability of IHL to their conduct.

⁷⁴ This language is the same as Art 1(3) of Protocol I and Art 1(2) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (entered into force 1 March 1999) (Mine Ban Treaty), 36 ILM 1507 (1997).

⁷⁵ 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.

⁷⁶ *Milošević* Rule 98 bis Decision, supra n 59, at para. 20.

⁷⁷ Case no ICC-01/04-01/06, 29 Jan 2007.

⁷⁸ *Id.* at para 234.

⁷⁹ *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.

⁸⁰ C Greenwood, *International Humanitarian Law and UN Military Operations* (1998) 1 Yearbook of International Humanitarian Law 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).

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

In a case particularly on point, *Brocklebank*,⁸² 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. The Court did not find 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, which does not apply to peace operations. However, other authorities, such as the Commission of Inquiry of 1995⁸³ and the Simpson Study of the law applicable to Canadian forces in Somalia in 1992-1993,⁸⁴ arrived at the opposite conclusion.

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 humanitarian law."⁸⁵ Similarly a Belgian Military Court denied the applicability of IHL in Somalia and Rwanda. It found that IHL did not apply to operations with humanitarian aims in situations of internal conflicts instituted under Chapter VII of the UN Charter. Consequently it rejected the argument that Belgian troops were either "combatants" or "occupying forces" in either crisis.⁸⁶

The 2004 United Kingdom Manual of the Law of Armed Conflict 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."⁸⁷ The Manual observes that the expression "armed conflict" remains undefined and cites the ICRC Commentary⁸⁸ and the *Tadić* case as guidance. In relation to the question of the threshold of armed conflict the Manual says that:

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

⁸² *The Queen v Brocklebank*, Court Martial Appeal Court of Canada, 2 April 1996, 106 Canadian Criminal Cases (3d); see also K Boustany, *Brocklebank: A Questionable Decision of the Court Martial Appeal Court of Canada* (1998) 1 Yearbook of International Humanitarian Law 371.

⁸³ Although the Commission of Inquiry did not reach any definitive conclusions on the issue of applicability, 87% of its general recommendations were supported and implemented by the Department of National Defence.

⁸⁴ J M Simpson, "Law Applicable to Canadian Forces in Somalia" 1992/93: A study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997).

⁸⁵ 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.

⁸⁶ Belgium, Military Court, *Violations of IHL in Somalia and Rwanda*, Case Nr. 54 A. R., 20 November and 17 December 1997. The French report on military engagement in Rwanda also does not offer any practical solutions. Rapport d'information No. 1271, available at <http://www.assemblee-nationale.fr/11/dossiers/Rwanda/r1271.asp>. However, the Indonesian report on investigations and prosecution of atrocities in East Timor seems to be different. 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>.

⁸⁷ The Manual of the Law of Armed Conflict 27 (UK Ministry of Defence, 2004).

⁸⁸ III *Commentary on the Geneva Conventions of August 12 1949*, supra n 34.

bombing of another country. At the other extreme, a full-scale invasion would amount to an armed conflict.⁸⁹

The International Law Commission is considering a proposed definition of armed conflict for the purposes of its work on “Effects of Armed Conflicts on Treaties” The draft definition (on which opinions continue to be divided as to the inclusion of non-international armed conflicts) is based on the formulation adopted by the Institute of International Law in its resolution of the 28th of 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 States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.⁹⁰

The 2005 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General accepted the *Tadić* definition of armed conflict.⁹¹

Also in 2005 the ICRC published a major study on the customary status of IHL.⁹² The aim of the study was first to assess what elements of IHL are now reflected in customary law, in particular the more recent humanitarian treaties that do not have the same level of acceptance as the 1949 Geneva Conventions. Secondly, given the limited nature of the treaty rules applicable to non-international armed conflict, it was desirable to determine if in fact customary international law regulates non-international conflict in more detail than treaty law.⁹³ The study does not contain a definition of armed conflict, however, despite the evident usefulness of including one.

Relevant state practice on the definition question of armed conflict following the adoption of the international criminal court statutes and the ICRC study included the following: In February 1995, a Canadian naval vessel fired across the bow of a privately owned Spanish fishing vessel on the high seas to prevent over-fishing of Greenland Halibut. Spain brought a case against Canada before the ICJ, complaining against Canada’s “measures of coercion and the exercise of jurisdiction over [the *Estai*] and its captain”; Spain claimed that Canada’s actions violated Article 2(4) of the UN Charter among other treaties as well as customary law obligations.⁹⁴ The ICJ found it had no jurisdiction in the case, so no ruling on the question was ever made. The “Herring War” in 1994, between Iceland and Norway, also involved the

⁸⁹ The Manual of the Law of Armed Conflict, supra n 87, at 29 (footnote omitted).

⁹⁰ ILC Report on the work of its fifty-ninth session (7 May to 5 June and 9 July to 10 August 2007) GAOR Sixty-second Sess Supp No 10 (A/62/10), para 284-288.

⁹¹ 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.

⁹² *Customary International Humanitarian Law*, supra n 31. Consider in connection with this part *Perspectives on the ICRC Study on Customary International Humanitarian Law* (E Wilmshurst and S Breau eds, Cambridge: Cambridge University Press, 2007) and see ICRC Opinion Paper, March 2008, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”.

⁹³ See J-M Henckaerts, *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law* (2006) 13 Human Rights Brief 8.

⁹⁴ *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)*, 1998 ICJ reports 432, 437.

engagement of official vessels of states, as well as limited use of armed force.⁹⁵ These incidents were not treated as armed conflicts.

Rioting, even when it is widespread, resulting in deaths or serious destruction is not considered armed conflict because of the lack of organisation. Such rioting occurred in the United Kingdom (esp. 1985, 2001, 2005), Los Angeles (1992), Albania (1997), France (2005) and Kenya (2007-8). These have not been classified as armed conflicts. In the case of Los Angeles, United States Marines were deployed to help quell the violence. They operated under police rules.⁹⁶

States have on occasion fired on civil aircraft.⁹⁷ While many of these cases involved mistaking passenger planes for enemy attack aircraft, in 1996 Cuba intentionally shot down two civil aircraft flown by persons opposed to the Castro regime after the aircraft made illegal incursions into Cuban airspace. The debate around this incident was over whether the aircraft were over international waters or not.⁹⁸ The case was described as an “incident,” not an armed conflict.

The US has argued that it entered into a worldwide war on terrorism as of the attacks of 11 September 2001.⁹⁹ Terrorist attacks since 11 September, however, including the attacks in London, Madrid and Bali, have been characterized as crimes, not armed conflict.¹⁰⁰

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

⁹⁵ 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; *Saint Vincent and the Grenadines v Guinea* (the *M/V Saiga* case), International Tribunal for the Law of the Sea, 37 ILM 360 (1998). See also J P E Hijos, *SA 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).

⁹⁶ 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 Reydams, *Niyonteze v Public Prosecutor*, Tribunal militaire de cassation (Switzerland), 27 April 2001 96 AJIL 231 (2002).

⁹⁷ See A F Lowenfeld, *AGORA: The Downing of Iran Air Flight 655: Looking Back and Looking Ahead* (1989) 83 American Journal of International Law 336; C. Morgan, *The Shooting of Korean Air Lines Flight 007: Responses to Unauthorized Aerial Incursions*, in *International Incidents*, supra n 48, at 202.

⁹⁸ M Clary, *Cuban Fighters Down 2 Planes Owned by Exiles*, Los Angeles Times, 25 February 1996, A1.

⁹⁹ G W Bush, President’s Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (11 September 2001); 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. 1432 (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’.) 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). See also A Dworkin, *Official Examines Legal Aspects of Terror War: Interview with Charles Allen*, US Department of Defense Deputy General Counsel for International Affairs (on file with author); 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> at 6; 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.

¹⁰⁰ O’Connell, *Enhancing the Status of Non-State Actors*, supra n 2.

“incident”, “armed provocation”, “border incursion”, “clash” and the like, but not an armed conflict.¹⁰¹ North Korean naval submarines have also been detected in Japanese territorial waters, neither in transit nor on the surface – two violations of the right of innocent passage.¹⁰² These incursions have not been treated as armed conflict.

By contrast, there were many conflicts not already mentioned above during this period that were widely recognized as armed conflicts, including in Angola, Bougainville, Congo, Liberia, Sierra Leone, Colombia, the Philippines, Indonesia, and Sri Lanka.¹⁰³

In December 2006, Israel’s Supreme Court considered the meaning of armed conflict and found that Israel is engaged in an armed conflict in the Palestinian Territories. The most important factor for the Court in reaching this determination was the number of persons who have died on both sides. It did not take into account the sporadic nature of the violence against Israel.¹⁰⁴

The requirement that armed conflict must meet some sort of threshold of intensity is supported by the 2007 consultation paper issued by the UK 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”.¹⁰⁵

Also in 2007, Iran detained the crew of a small British naval vessel claiming that the vessel was in Iranian territorial waters.¹⁰⁶ 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.¹⁰⁷ The UK did not take an official position, however, as to whether the Convention applied. It was certainly consistent with the spokesperson’s statement that the UK 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 human rights law.¹⁰⁸ Iran, however, treated the matter as one of illegal entry and indicated it might put the crew on

¹⁰¹ D Kirk, *North and South Korea Trade Charges Over Naval Clash*, New York Times, 30 June 2002, 12.

¹⁰² See *The Call to Arms*, Economist (London), 27 February 1999, 23; *The Koreas: the Money Factor*, Economist (London), 31 October 1998, 45.

¹⁰³ For a discussion of several of these conflicts see M E O’Connell, *Humanitarian Assistance in Non-International Armed Conflict: The Fourth Wave of Rights, Duties and Remedies* (2000) 31 Israel Yearbook on Human Rights 183.

¹⁰⁴ Public Committee Against Torture in Israel v Israel, HCJ 769/02 (Dec. 14, 2006). But see the ICJ Advisory Opinion on the Wall, finding Israel to be in occupation in the Occupied Palestinian Territory, and not in an armed conflict. The Court found Israel must confine itself to security measures consistent with the law of occupation. *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ reports 196.

¹⁰⁵ 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).

¹⁰⁶ 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.

¹⁰⁷ Id.

¹⁰⁸ 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).

trial. Iran made no reference to the Geneva Conventions that was reported in the English-language press.

Election-related violence in Kenya in late 2007 and early 2008 has consistently been described as rioting, civil unrest, and criminality, not armed conflict.¹⁰⁹ Colombia's 2008 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 reaching the level of actual armed conflict.¹¹⁰

Finally in early 2008, Swedish and British immigration tribunals assessed the conflicts in Iraq and Somalia for purposes of determining whether asylum seekers from those states could continue to receive asylum from armed conflicts.¹¹¹ In other words, the tribunals had to determine whether there were armed conflicts occurring in Somalia and Iraq. In *HH & Others*, an appeal of three asylum cases, decided 22 January 2008, a UK immigration tribunal found that the conflict in Somalia was a non-international armed conflict that was occurring in Mogadishu.¹¹² 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.¹¹³ The tribunal found the parties to the conflict sufficiently organized, and the intensity of fighting sufficient in the Mogadishu area.¹¹⁴ 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".¹¹⁵

The tribunal noted the differences in 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 Ethiopia and the United States were involved in intense fighting beginning in early 2007. By October, 6000 people were dead. The US position respecting its role in Somalia is that it was aiding Ethiopia in collective self-defence as well as using force in respect of its own "global war on terror".¹¹⁶

III CRITERIA AND CHARACTERISTICS OF ARMED CONFLICT

The above discussion supports the position that armed conflict is to be distinguished from "incidents"; "border clashes"; "internal disturbances and tensions such as riots, isolated and

¹⁰⁹ 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 2008, available at <http://www.gppac.net/page.php?id=1837>.

¹¹⁰ 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.")

¹¹¹ See also Swedish cases.

¹¹² *HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v Secretary of State for the Home Department*. CG [2008] UKAIT 00022. United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority. 28 January 2008. Online. UNHCR Refworld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47dfd9172>.

¹¹³ *Id.* at para. 318.

¹¹⁴ *Id.* at para. 337.

¹¹⁵ *Id.* at para. 330.

¹¹⁶ See J E Frazer, Assistant Secretary, Department of State, Policy Options in the Horn of Africa, Congressional Testimony, 11 March 2008.

sporadic acts of violence”;¹¹⁷ “banditry, unorganised and short lived insurrections or terrorist activities”¹¹⁸ and “civil unrest, [and] single acts of terrorism”.¹¹⁹ The distinction between these situations and armed conflict is achieved by reliance on the criteria of organisation and intensity. IHL also uses these criteria in distinguishing between different types of armed conflicts to which different categories of IHL apply.¹²⁰

The criteria of organisation and intensity are clearly related and should be considered together when assessing whether a particular situation amounts to an armed conflict. It seems that the higher the level of organisation the less degree of intensity may be required and vice versa.

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. However, it appears that none of these are reflected in the treaty or customary law meaning of armed conflict although they 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 reflected in treaty instruments,¹²¹ mentioned explicitly or implicitly in decisions of several courts and tribunals,¹²² 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, but is a more complex issue in the context of non-international armed conflict. Reaching the requisite level of organisation indicates, as a practical matter, that armed conflicts will commonly feature opposing groups controlling enough territory to organise. Trial Chambers of the ICTY have relied on several indicative factors to determine whether the organisation criterion is fulfilled. None of them, however, is central in themselves.¹²³ As mentioned in the *Milošević* case, organisation is dependent on a command structure, space to train, storage of weapons and supplies, or space to rest—all aspects of armed conflict not seen in less-organized violence. While more recent decisions of the ICTY and the Rome Statute do not emphasize control of

¹¹⁷ Additional Protocol II art 1(2).

¹¹⁸ *Tadić*, supra n 55, at para. 562. Other cases have adopted this terminology: see, for example, *Blagojević and Jokić*, supra n 56, at para. 536; *Halilović*, supra n 56, at para. 24; *Galić*, supra n 56, at para. 9; *Stakić*, supra n 56, at para. 560.

¹¹⁹ See *Kordić and Čerkez*, supra n 57, at para. 341.

¹²⁰ For example, a higher degree of organisation is required for the application of Additional Protocol II; see discussion supra.

¹²¹ See Common Article 2 of the 1949 Geneva Conventions (referring to High Contracting Parties); Common Article 3 of the Geneva Conventions (“organised military forces”); Article 1 of Additional Protocol II (“or other organised armed groups”) and Rome Statute 8(2) (e).

¹²² In particular the *Tadić* case.

¹²³ See Case no IT-04-84-T, 3 April 2008 at para. 60 (for an analysis of the factors taken into account by the Tribunal in applying the organisation criterion).

territory, the actual cases indicate that this criterion may well be an aspect of organisation. The Committee will undertake additional research on the organization question, including the issue of control of territory and the related question of the geographic extent of armed conflict.

The criterion of intensity: State practice, judicial opinion and the majority of commentators support the position that a certain level of hostilities is characteristic of all armed conflict. This is the case with respect to both international and non-international armed conflict, although some commentators support the view that there is no intensity requirement for the former.

In the context of international armed conflict the intensity requirement takes the form of requiring more than a minor exchange of fire or an isolated or insignificant border clash. The duration of the particular event is apparently not a determinate factor. Yet, this distinction is difficult to establish in state practice. Fighting that does not last for some period of time is less likely to be “intense” enough to meet the intensity criterion of international armed conflict.

The decision in the *Tadić* case also indicates that the level of intensity of non-international armed conflicts must be protracted. 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 additional requirement helps to distinguish armed conflict from “banditry, riots, isolated acts of terrorism, or similar situations”.¹²⁴ The two concepts, intensity and protraction, are clearly linked and a lesser level of duration may satisfy the criterion if the intensity level is high.¹²⁵ The reverse is also the case.¹²⁶ The idea of “protraction” is also linked with the “organisation” criterion as it requires a certain level of organisation to undertake protracted hostilities.¹²⁷

Additionally, the intensity criterion raises the issue of location of an armed conflict. In *HH & Others*, the tribunal found an armed conflict in the capital, Mogadishu, but not the rest of Somalia. The IHL rules for non-international armed conflict applied only there. If the conflict had been characterized as an international armed conflict, some might argue that IHL rules presumably would have applied throughout Somalia, Ethiopia and the US. The intense fighting would still have only taken place in Mogadishu, however. It seems that few States apply IHL beyond the zone of intense fighting, whether the fighting is an international or non-international armed conflict.¹²⁸ The US has certainly not recognized IHL as applicable in the US, despite applying it in Iraq and Afghanistan since 2003 and 2001 respectively and presumably in Somalia since early 2007.

¹²⁴ *Tadić* Jurisdiction Decision, para. 70.

¹²⁵ This may be the explanation for the finding by the Inter-American Commission in *Abella*, discussed above, that fighting lasting only 30 hours was protracted enough for IHL to apply in a non-International armed conflict.

¹²⁶ See Case no IT-04-84-T, 3 April 2008 at para. 49.

¹²⁷ See Case no ICC-01/04-01/06, 29 Jan 2007.

¹²⁸ Under the rules on the use of force there are geographical limits on States hostile activities ‘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-defense....’ C Greenwood, *Scope of Application of Humanitarian Law*, supra n 23, at 53. See also Gardam, *Necessity, Proportionality and the Use of Force* 162-63 supra n 9 and C Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 273, 276-78 (Y Dinstein and M Tabory eds, Dordrecht: Martinus Nijhoff Publishers, 1989). But see Y Dinstein, *War, Aggression and Self-Defence* 19-20 supra n 21.

As the IHL rules on international and non-international armed conflict converge, the argument for a distinction between the intensity level required for international versus non-international armed conflict will presumably lose its purpose. Indeed, as the cases show, making a meaningful distinction between the two types of conflicts is increasingly difficult. The distinction that appears to remain important is between armed conflict—of whatever type—and peace.

CONCLUSION

The 2001 US “declaration” of a “war on terror” has highlighted the lack of clarity as to the meaning of armed conflict in international law. Are states at liberty to declare “war” and does this change the pre-existing legal regime governing armed conflict? It is the view of the Committee that a “declaration” of war is meaningless from the international law perspective. It is the factual existence of a state of armed conflict that marks the transition from the law of peace to the law of armed conflict. A state of armed conflict exists if the criteria of organised armed groups and intensity of the hostilities are satisfied. This is the case in relation to both international and non-international armed conflicts. Once armed conflict exists IHL is triggered. Relevant principles of human rights law and other rules of international law, however, continue to apply to the situation. Forceful actions that do not satisfy these criteria remain governed by domestic criminal law, human rights law, refugee law and other general rules of international law.