ARMED FORCES AND INTERNATIONAL JURISDICTIONS

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intersentia
Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

Distribution for the UK:
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Distribution for Austria:
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Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

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Cover photo: © Diego Vito Cervo – Dreamstime.com

ISBN 978-94-000-0183-1
D/2013/7849/110
NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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5. CONCLUSIONS

The International Court of Justice has dealt with regular armed forces in the contexts of passage through the territory of another State without its consent, UN peacekeeping operations and the use of force, either in the context of the right to resort to force *(jus ad bellum)* or of armed conflict *(jus in bello)*. It has been the *jus ad bellum* and, in particular the right of self-defence, that has taken a substantial part of the Court's judicial activity. The basic tenets of the approach of the Court have been, first, a restrictive view of the law on the use of force and, secondly, the application of this law exclusively to the specific facts that have been proven by irrefutable evidence and only by reference to the justifications offered by the litigant States. The rationale underlying the conservative view of the law by the Court, especially with regard to the right of self-defence, appears to be great risks inherent in a liberal or wide invocation of self-defence to the general international peace and security. Thus, the Court evaluated this invocation as a matter of the factual context of a particular dispute.

The Court has dealt in particular with the significance of irregular armed groups in the law on the use of force. It has treated this law as law applied between States and even though it has not made any express pronouncement on the matter its Judgments are implicit of this character of the law. The Court has so far sought to establish the precise connection of a State to the activities of armed groups and has laid emphasis on the degree of control a State exercises over such groups in a given factual context. This approach does not seem to be satisfactory to a number of States and jurists that view as the crucial factor for the lawful resort to force the security interests of a State seen in a general context and not by reference to specifically ascertainable facts. Be it as it may, it appears that the approach of the Court as an authoritative decision-maker as to the state of the law is accurate, even though admittedly not very explicit. It represents the views of the majority of States and upholds the general framework of public order in the international community that was introduced by the scheme of the UN Charter: That the unilateral use of force by States is prohibited, save for the exercise of the right of self-defence and that, even in this case, it must not be allowed to endanger international peace and security.

CHAPTER 5
THE PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS ON ARMED FORCES: ISSUES OF STATUS AND ATTRIBUTION

Andrea CARCANO

1. INTRODUCTION

Tasked with the repression of serious violations of international humanitarian law (IHL), international courts and tribunals (including hybrid tribunals) participate – to a greater or lesser extent – in a global process of enforcement, clarification, and development of norms and principles of IHL.[1] Benefiting from the freedom afforded by a system which lacks a supervisory mechanism such as a *Cour de cassation* or a Supreme Court, these judicial bodies are routinely engaged in filling the *lacunae* which, almost inexorably, emerge in the application of norms and principles of IHL to the factual circumstances of each case.[2] In doing so, international courts and tribunals push the boundaries of IHL forward and, arguably, advance it more rapidly than the natural inclination of states – or at least of some states – towards anything bridling their freedom, would permit.

Because IHL has traditionally developed – and continues to develop – through treaties and the domestic practice of states as exemplified, for instance, by military manuals and decisions of national courts, it would therefore be imprudent to herald the practice of international courts and tribunals as representing the main source and depository of IHL norms. Nevertheless, due to the depth of some of the decisions of international courts and tribunals; as well

1 Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order' (2011) New York University Public Law and Legal Theory Research Paper Series, Working Paper no. 11-05.

2 See generally Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010); Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals', (2008) 97 *Georgetown Law Journal* 119.

as their sheer number in the sense of there being an accumulation of cases consistently reiterating the same principle in relation to particular issues; and the possibility that – either because of their precedential effects[3] or persuasive value[4] – they may influence the development of IHL, neglecting such practice would be equally superficial. In light of such considerations pointing to the significance of judicial decisions from both an academic and a normative perspective, this chapter explores some key issues of status and attribution concerning armed forces[5] which have emerged in the practice of international courts and tribunals, and examines the contribution to the development and clarification of IHL made by those jurisdictions. This study will look at the practice in a holistic manner, seeking to join the dots from a plethora of cases, highlighting any emerging patterns as well instances in which the practice has yet to crystallize in a coherent framework.

2. ISSUES OF STATUS

In the course of an armed conflict, the status of an individual – whether a civilian, a combatant, or a person carrying out a combat function – is fundamental, as it defines his or her individuals rights under international law.[6] In this context, the practice of international courts and tribunals has discussed

3 Establishing the binding nature of ICTY and ICTR Appeals Chambers' decisions see *Prosecutor v Zlatko Aleksovski* (Appeal Judgement) IT-95-14/1-A (24 March 2000) paras 92–115. See also Article 20(3) of the Statute of the Special Court for Sierra Leone (SCSL) providing that 'The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'. On the operation of precedent in international criminal law see Fausto Pocar, Guido Acquaviva, 'Stare Decisis' in Max-Planck Encyclopedia of Public International Law (2008).

4 The possibility of a precedent being followed because of its persuasive value was underscored by the Trial Chamber in *Prosecutor v Zoran Kupreškić et al.* (Trial Judgement) IT-95-16-T (14 January 2000) para 540. See also Andrea Carcano, 'The ICTY Appeals Chamber's *Nikolić* Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?' (2003) 13 *Italian Yearbook of International Law* 88–93.

5 The term 'armed forces' covers those that in an international or non-international armed conflict carry out a 'continuous combat function'. It is preferred to the term 'combatants' because technically speaking, combatant status exists only in international armed conflicts. It reflects the notion of 'armed forces' adopted in Article 3 common to the four Geneva Conventions of 1949 (Common Article 3). This approach differs from that of Additional Protocol II, where the term 'armed forces' is restricted to state armed forces, whereas the armed forces of non-state parties are referred to as 'dissident armed forces' or other 'organized armed groups'. See International Committee of the Red Cross, *Customary International Humanitarian Rules*, vol 1 (CUP 2005) 11 (Customary Humanitarian Rules). See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004); Charles H B Garraway, '"Combatants" – Substance or Semantics?' in Michael N Schmitt and Jelena Pejic (eds), *Essays in Honor of Yoram Dinstein* (Martinus Nijhoff 2007) 320–9; Gary Solis, *The Law of Armed Conflict* (CUP 2010) 191.

6 Solis (n 5) 186–7.

certain aspects of the principle of distinction and the concept of direct participation in hostilities; held that the status of POW could result from an accord among the belligerents; and confirmed the criminalization of the use of children as soldiers in both international and internal armed conflicts. These developments are reviewed in turn.

2.1. CIVILIANS AND ARMED FORCES

The practice of international criminal jurisdictions has clarified the meaning of existing norms and principles of IHL and contributed to their consolidation as customary norms in several respects. With regard to the notion of civilian, an International Criminal Tribunal for Rwanda (ICTR) Trial Chamber in *Kayishema*, relying on Article 50 of Additional Protocol I, held that 'the civilian population comprises all persons who are civilians' and that 'all persons who are not combatants might be considered civilians'.[7] In *Blaškić*, the Trial Chamber stated that the category of civilians covers 'persons who are not, or no longer, members of the armed forces'.[8] The Appeals Chamber in *Blaškić* subsequently confirmed the need to look to Article 50(1) of Additional Protocol I for the notion of civilian and clarified that in a case of doubt, a person shall be considered to be a civilian,[9] and that the principle of distinction should be regarded as reflective of customary international law.[10] It also corrected the Trial Chamber's conclusion as to the criterion for identifying the status of a civilian. For the Appeals Chamber, it was misleading to assess the 'standing as a civilian' by virtue of the 'specific situation of the victim at the time the crimes were committed',[11] because, contrary to the view of the Trial Chamber, the specific situation of the victim at the time of the commission of the offence may not be 'determinative of his civilian or non-civilian status'.[12] The Appeals Chamber underlined that if a victim of crimes is a 'member of an armed organization', the fact that it he is 'not armed or in combat at the time of the commission of crimes does not accord him civilian status'.[13] In *Kordić* the Appeals Chamber not only reiterated the notion of civilian contained in Article 50(1) of Additional Protocol

7 *Prosecutor v Clément Kayishema & Obed Ruzindana* (Trial Judgement) ICTR-95-1-T (21 May 1999) para 179.

8 *Prosecutor v Tihomir Blaškić* (Trial Judgement) IT-95-14 (3 March 2000) para 180 (*Blaškić* Trial Judgement).

9 *Prosecutor v Tihomir Blaškić* (Appeal Judgement) IT-95-14-A (31 July 2004) para 111 (*Blaškić* Appeal Judgement).

10 *Blaškić* Trial Judgement (n 8) para 110.

11 Ibid para 114.

12 *Blaškić* Appeal Judgement (n 9) para 114.

13 Ibid.

I,[14] but also stressed that 'according to Article 51(3) of Additional Protocol I, civilians are protected against attacks, unless and for the time they take part directly in hostilities'.[15] It went on to hold that 'the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'.[16] As concerns the concept of armed forces, in *Akayesu*, the Trial Chamber held that this notion should be defined broadly as to 'cover all armed forces as described within national legislations'.[17] In particular, it stressed that

> Due to the overall protective and humanitarian purpose of these international legal instruments, ... The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.[18]

Along the same lines, in *Rutaganda*, the Trial Chamber, having noted that there has been much discussion of 'armed forces' and 'Party to a conflict',[19] also cautioned that 'a too restrictive definition of these terms would dilute the protection afforded to victims and potential victims of armed conflicts'.[20] As a result, the definition of persons covered by those terms 'should not be limited to commanders and combatants but should be interpreted in their broadest sense'.[21]

The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) has further considered the notion of armed forces. Based on Article 50 of Additional Protocol I and Article 4A of the Geneva Convention III, the Appeals Chamber in *Blaškić* held that the individuals who cannot claim civilian status are the 'Members of the armed forces, and members of militias or volunteer corps forming part of such armed forces'[22] and the 'members of organized resistance groups', provided that they fulfil the requirements laid out

14 *Prosecutor v Dario Kordić & Mario Čerkez* (Appeal Judgement) IT-95-14/2-A (17 December 2004) para 50 (*Kordić & Čerkez* Appeal Judgment), para 48.
15 Ibid, para 50.
16 Ibid. See also *Kayishema & Ruzindana* (n 7) para 180.
17 *Prosecutor v Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) para 625 (Akayesu Trial Judgement).
18 Ibid, para 631.
19 *Prosecutor v Georges Anderson Nderubumwe Rutaganda* (Judgement and Sentence) ICTR-96-3-A (6 December 1999) para 96.
20 *Prosecutor v Alfred Musema* (Judgement and Sentence) ICTR-96-13-T (27 January 2000) para 266 (*Musema* Trial Judgement); *Akayesu* Trial Judgement (n 17) paras 630–634.
21 Ibid.
22 *Blaškić* Appeal Judgment (n 12) para 113.

in Article 4A of the Geneva Convention III.[23] Similarly, in *Kordić*, the Appeals Chamber indicated that Article 43 of Additional Protocol I covers the different categories of forces listed in Article 4A of Geneva Convention III, which include (i) 'members of armed forces (other than medical personnel and chaplains)'; (ii) the 'militias or volunteer corps' that form 'part of such armed forces'; and (iii) 'members of organized resistance groups'.[24] It added that members of a Territorial Defence – an organized resistance group – are combatants at all times during the conflict.[25] Likewise, 'members of the armed forces resting in their homes in the area of the conflict' and 'members of the TO [Territorial Defence] residing in their homes' remain 'combatants whether or not they are in combat, or for the time being armed'.[26]

2.2. THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES

As concerns the notion of direct participation in hostilities,[27] international criminal jurisdictions have not only applied existing norms, but have qualified the purview of this notion by providing specific examples. Such an approach was neither deliberate nor settled, rather it emerged gradually over the years, one case after another.

Adopting a rather simplistic approach – particularly from the perspective of criminal law which requires the law to be as clear as possible so as to enable an accused to prepare an adequate defence to the charges laid against him or her – the Trial Chamber in *Tadić* found it unnecessary to single out the criteria distinguishing those taking an active part in hostilities and those who are not. According to the Chamber, it was sufficient to engage in an examination of the relevant facts of each victim, and 'to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time'.[28] The problem with this approach is that it leaves the analysis of the facts without legal guidance, effectively placing such analysis entirely within a judge's evaluation, which may of course change from one judge to another. However, subsequent case-law has been, or at least tried, to be more precise.[29]

23 Ibid.
24 *Kordić & Čerkez* Appeal Judgment (n 14) para 50.
25 Ibid, para 51.
26 Ibid.
27 On the concept of direct participation in hostilities see Solis (n 5) 202–5.
28 *Prosecutor v Duško Tadić* (Trial Judgement) IT-94-1-T (7 May 1997) para 616 (*Tadić* Trial Judgment).
29 The approach criticised in the text was, however, followed by the SCSL Trial Chamber in *Prosecutor v Fofana & Kondewa* (Trial Judgement) SCSL-04-14-T (2 August 2007) para 133 (*CDF* Trial Judgement), where the Chamber held that 'Adopting the position taken by the Trial Chamber in the *Tadić* Trial Judgement, this Chamber holds that it does not serve any

Relying on Article 51(3) of Additional Protocol I, the Appeals Chamber in *Kordić* opined that civilians can be said to be directly participating in hostilities when engaged in 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy's armed forces'.[30] In *Strugar*, stressing that the 'notion of participation in hostilities is of fundamental importance to international humanitarian law';[31] the Appeals Chamber restated the general principle that 'civilians enjoy general protection against dangers arising from military operations unless and for such time as they take a direct part in hostilities'.[32] Prompted by the facts before it, the Appeals Chamber in *Strugar* also embarked on a detailed analysis of the notion of 'direct participation in hostilities'. At issue in the case was whether the accused, a retired Croatian soldier could be deemed to have directly participated in hostilities – thus losing his status as civilian – on account of having been the driver to several civilian and military Croatian authorities during the hostilities occurring in Vukovar in December 1991.[33]

The Appeals Chamber noted that Common Article 3 provides examples of persons other than civilians, who are still entitled to protection by virtue of not taking active part in combat activities. The Chamber considered these to be 'members of armed forces who laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause'.[34] Reasoning *a contrario*, the Appeals Chamber argued that 'active participation in hostilities encompasses armed participation in combat activities'.[35] It specified, however, that the conduct amounting to 'direct or active participation in hostilities' is not 'limited to combat activities as such'.[36] In setting out to clarify the notion of 'combat activities', the Chamber elaborated on the distinction between combat activities and acts of violence. First, it considered that Article 67(1)(e) of Additional Protocol I distinguishes between 'direct participation in hostilities and the commission of "acts harmful to the adverse party"'. Second, it noted that Article 3(1) of the 1989 UN Mercenaries Convention[37] also draws a distinction between direct participation in hostilities and participation 'in a concerted act of

useful purpose to embark upon an exhaustive definition of the categories of persons who may be said not to be taking a direct part in hostilities'.

30 *Kordić & Čerkez* Appeal Judgment (n 14) para 51.

31 *Prosecutor v Strugar* (Appeal Judgement) IT-01-42-A (17 July 2008) para 174 (Strugar Appeal Judgment). See also *Prosecutor v Momčilo Perišić* (Trial Judgement) IT-04-91-T (6 September 2011) para 78.

32 *Strugar* Appeal Judgment (n 31) para 174.

33 Ibid, paras 181–2.

34 Ibid, para 175.

35 Ibid.

36 Ibid, para 176.

37 See International Convention against the Recruitment, Use, Financing and Training of Mercenaries (adopted 4 December 1989) available at <www.icrc.org/eng/war-and-law/index.jsp> accessed 1 December 2012.

violence'.[38] In light of these references, it concluded that the notion of direct participation in hostilities is not limited to 'involvement in violent or harmful acts against the adverse party'.[39] Further, referring to Article 15 of Geneva Convention IV, which distinguishes between 'taking part in hostilities' and performing 'work of a military character', the Appeals Chamber opined that the concept of direct participation in hostilities does not embrace all activities in support of one party's military operations or war effort.[40] Otherwise, said the Appeals Chamber, if 'all activities in support of military operations' could be equated to 'direct participation in hostilities', the principle of distinction would be rendered 'meaningless'.[41] It then provided a list of conducts which would fall within the concept of 'direct participation in hostilities' and that which lies outside the concept, even if nonetheless contributing to the war effort.

As examples of direct participation in hostilities, the Appeals Chamber listed the following activities: (i) 'bearing, using or taking up arms'; (ii) taking part in 'military or hostile acts…armed fighting or combat'; (iii) 'participating in attacks against enemy personnel, property or equipment'; (iv) 'transmitting military information for the immediate use of a belligerent'; (v) 'transporting weapons in proximity to combat operations'; and (vi) serving as 'guards, intelligence agents, lookouts, or observers on behalf of military forces'.[42]

As regards conduct not constituting 'direct participation in the hostilities', albeit supportive of the war effort, the Appeals Chamber included: (i) 'participating in activities in support of the war or military effort of one of the parties to the conflict'; (ii) 'selling goods to one of the parties to the conflict'; (iii) 'expressing sympathy for the cause of one of the parties to the conflict'; (iv) 'failing to act to prevent an incursion by one of the parties to the conflict'; (v) 'accompanying and supplying food to one of the parties to the conflict'; (vi) 'gathering and transmitting military information, transporting arms and munitions, and providing supplies'; and (vii) 'providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons'.[43]

Upon an analysis of the relevant facts, the Appeals Chamber found that the conduct of the accused fell within the latter of these two categories and concluded that as the driver of civilian and military authorities, the accused was a civilian because he was not involved in 'acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party'.[44]

38 *Strugar* Appeal Judgment (n 31) para 176.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid, para 177.

43 Ibid.

44 Ibid, para 178.

The jurisprudence of the Special Court for Sierra Leone (SCSL) also extensively addressed the issue of conduct to be considered as direct participation in hostilities. In *Fofana & Kondewa*, the Trial Chamber held that persons:

> accused of collaborating with the government or armed forces would only become legitimate military targets if they were taking direct part in the hostilities. Indirectly supporting or failing to resist an attacking force is insufficient to constitute such participation. In addition, even if such civilians could be considered to have taken a direct part in hostilities, they would only have qualified as legitimate military targets during the period of their direct participation.[45] (emphasis added)

The Trial Chamber went on to state that if 'there is any doubt as to whether an individual is a civilian he should be presumed to be a civilian and cannot be attacked merely because he appears dubious.' It further opined that since 'The armed law enforcement agencies of a State are generally mandated only to protect and maintain the internal order of the State', there is a general presumption that 'such forces are considered to be civilians for the purposes of international humanitarian law'. However, it clarified that 'the same presumption will not exist for military police or gendarmerie who operate under the control of the military', as such incorporation, which may occur 'de lege, by way of a formal Act, or de facto' 'will cause the police to be classified as combatants instead of civilians'.[46]

2.3. THE *MRŠKIĆ* CASE: STATUS OF POW BY AGREEMENT?

There is no dispute that recognition of the status as a prisoner of war is a right of all combatants that belong to the armed forces of a party to an international armed conflict, in accordance with the criteria laid out in Article 4(A) of the Geneva Convention III.[47] Traditionally, all combatants are entitled to this status, but, as there is no category of combatants in non-international armed conflicts, there are, by corollary, no prisoners of war in the context of non-international armed conflicts.[48] Yet, interestingly, however, the Appeals Chamber in *Mrkšić & Šlijivančanin* held that a detainee may be recognised as a POW in the context of an internal armed conflict whenever the parties to a conflict (international or not) have agreed to apply the Geneva Convention III to their struggle. Thus, even when a conflict is not international in character, a detainee may be recognised as having the status of POW. In view of its

45 *CDF* Trial Judgment (n 29) para 135.
46 Ibid, para 137.
47 Dinstein (n 5) 34–5.
48 Solis (n 5) 191.

innovative character, the reasoning of the Appeals Chamber requires careful scrutiny.

Following Croatia's steps towards gaining independence in 1991 from the then Socialist Federal Republic of Yugoslavia (SFRY), the JNA intervened within the territory of what is today Croatia to halt the path towards independence.[49] By the end of August 1991, it laid siege to Vukovar, a city in Eastern Slavonia.[50] Heavy fighting occurred in the city, which fell on 20 November 1991.[51] The Trial Chamber found that on the very same day, 194 Croatian men had been taken by the JNA from the Vukovar hospital to a hangar in Ovčara where they were mistreated and later executed by Serb forces, including paramilitaries and Serbian Territorial Defence.[52] The Trial Chamber found that the JNA had picked these individuals among the people present in the hospital on the basis of their perceived involvement in Croatian military formations participating in the Vukovar battle and had considered them POWs.[53] There is no discussion in the judgement, however, as to how these individuals could be considered POWs according to the Geneva Convention III.[54]

On appeal, the Appeals Chamber held that one of the accused (Šlijivančanin) – an officer in the JNA – had a continuous duty towards the POWs to ensure their protection, which required him 'not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed',[55] and therefore, indirectly, upheld the Trial Chamber's finding that those individuals were indeed POWs.[56] Unlike the Trial Chamber, the Appeals Chamber provided (as discussed below) a rationale for this finding, though arguably only a partial one. The Appeals Chamber did not specify the nature of the armed conflict before it; it pointedly noted that the Trial Chamber had not made a finding as to whether the armed conflict in the municipality of Vukovar at the material time was of an international or non international nature, but it did not itself enter such a finding either as if, contrary to what her remark implied, such a designation was irrelevant.[57]

Relying on Article 2(3) and Article 3(3) common to the Geneva Conventions, the Appeals Chamber held that 'even in the context of an internal armed conflict, the Geneva Convention III applies where the parties to the conflict have agreed

49 *Prosecutor v. Mrkšić & Šlijivančanin* (Trial Judgement) IT-95–13/1-T (27 September 2007) paras 20–37 (*Mrkšić & Šlijivančanin* Trial Judgement).
50 Ibid, paras 234–9.
51 Ibid, para 293–4.
52 Ibid, paras 479–81.
53 Ibid, para 207, 480.
54 Ibid, para 207.
55 *Prosecutor v Mrkšić & Šlijivančanin* (Appeal Judgement) IT-95–13/1-A (5 May 2009) para 74 (*Mrkšić & Šlijivančanin* Appeal Judgment).
56 Ibid, paras 71–5.
57 Ibid, para 69.

that the Convention shall apply.'[58] Even in a situation involving a non-state entity, it stands to reason that the validity of a specific agreement accepting to implement a humanitarian convention should be recognised. Paragraph 3 of Common Article 3 supports this view.[59] However, while the general conclusion reached by the Appeals Chamber appears to be beyond reproach, the reasoning adopted in support of its application to the facts in the case is rather scant. One aspect of this reasoning which I find puzzling is the lack of elaboration as to why it was necessary to adopt it in the present case. The Appeals Chamber focused on proving the existence of an *ad hoc* agreement without mentioning whether the parties were otherwise bound by the Geneva Convention III, namely under either conventional or customary law. From the perspective of the sources of international law, the inquiry made by the Appeals Chamber as to whether the parties to the conflict were bound to respect the Geneva Convention III because they had so agreed should have been raised only after a finding that they were not otherwise bound under treaty or customary law. That they were not otherwise bound by the Geneva Convention III may be regarded as implicit if one takes the view that the conflict at hand was internal in character, but the Appeals Chamber should have made this clear. Instead, a doubt emerges that in order to verify the existence of an international obligation it is not necessary to first assess whether a given international norm is binding *qua* treaty or customary international law. It could also be argued that the Appeals Chamber's reference to the possibility of the application of the Geneva Convention III by agreement in the context of a non international armed conflict implied that the conflict in Vukovar was internal in character and that, therefore, the Appeals Chamber should have said as much. This may be further confirmed given that the Trial Chamber's finding that the Croatian forces were an organized armed group (See Section III(ii) below), rather than the forces of a state, was not overturned by the Appeals Chamber. Moreover, if the SFRY and Croatia were both states, the Appeals Chamber may have reasoned differently as regards the applicability of the Geneva Convention III, beginning with considering the status of Croatia in respect of the SFRY and the accompanying question of the transfer of the obligations of the latter to the former. Because of the limited reasoning offered by the Appeals Chamber, however, all of these questions remain hanging in the ether.

On a separate note, the reasoning of the Appeals Chamber is perplexing in that, contrary to what was claimed in the appeal judgement, there does not appear to be a basis for the existence of an agreement among the parties to the conflict in the present case. In seeking to demonstrate why it was possible to

58 Ibid.

59 Paragraph 3 of Common Article 3 to the Geneva Conventions reads: 'The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. See text in Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3rd edn, OUP 2000) 302.

speak of an 'agreement' between the belligerents, the Appeals Chamber relied on the following three elements. First, it mentioned that the European Communities Monitoring Mission (ECMM), had 'given instructions to its monitors on the implementation of the Zagreb Agreement which indicated that the Geneva Conventions were to be applied to the prisoners of war'.[60] Second, it pointed to the existence of an order issued on 18 November 1991 by General Života Panić, directing the JNA units in the Vukovar area to observe all aspects of Geneva Convention III.[61] Third, it recalled that Colonel Nebojša Pavković advised the ECMM monitors of instructions from General Rašeta that 'Croat forces would not be evacuated with the rest of the humanitarian convoy' but remain as 'prisoners of war and the Geneva Conventions would apply'.[62] Thereafter, the Appeals Chamber added that 'while the Zagreb Agreement makes no mention of the application of Geneva Convention III to the Croat forces at the Vukovar hospital', the mentioned documents allows for the conclusion that the 'JNA had agreed that the Croat forces were to be considered prisoners of war and that the Geneva Convention III was to apply'.[63]

The evidence adduced by the Trial Chamber in support of the thesis that an agreement as to the applicability of the Geneva Convention III existed between the belligerents is unconvincing. It unquestionably appears from the quoted evidence that there existed a commitment by the JNA to implement the Geneva Convention III. By contrast, the Appeals Chamber found it difficult to conclude that the Croatian forces had made a distinct commitment that they intended to apply the Geneva Convention III. It did not indicate who had made such a commitment and what had been specifically agreed to. Instead of the presence of a mutual agreement, the evidence relied on by the Appeals Chamber suggests the existence of a unilateral promise on the part of the JNA made to the ECMM, in particular, expressing the intention of the JNA to adhere to the Geneva Convention III. On closer inspection, what the Appeals Chamber treated as an 'agreement among the parties' was in essence a unilateral declaration of intent by one of the two parties to the armed conflict in Vukovar.[64] In itself, this could be regarded as a promise by a state, and therefore be regarded as binding the JNA forces to respect the Geneva Convention III in their treatment of the Croatian prisoners.[65] That being so, it could be argued that the Appeals Chamber's finding as to the applicability of the Geneva Convention III in an internal armed conflict

60 *Mrkšić & Šljivančanin* Appeal Judgment (n 56) para 69.

61 Ibid.

62 Ibid.

63 Ibid.

64 As perceptively noted in Giulia Pinzauti, 'Protecting Prisoners of War: The Mrskic et al. Appeal Judgment' (2010) 8(1) *Journal of International Criminal Justice* 199–219.

65 For a detailed analysis on the possibility and conditions for a unilateral act to be a source of obligation on the State making it and containing the relevant references to the practice of the International Court of Justice see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 35–36.

is certainly innovative. It remains to be seen, however, whether it will join the league of those Appeals Chamber's pronouncements that, due to their persuasive rationale have come to shape the development of IHL or whether, because of the rather scant reasoning, it will remain an isolated dictum.

2.4. CHILD SOLDIERS – BETWEEN CIVILIAN AND COMBATANT STATUS

A key achievement in the practice of international courts and tribunals – in particular that of the SCSL and later the International Criminal Court (ICC) – is the unequivocal affirmation of the prohibition of the use of children as part of the armed forces. The recruitment, whether by conscription or enlistment, of children below fifteen years of age into the armed forces of a party to a conflict or, as the case may be, into an armed group, is a war crime under customary international law in both international and non-international armed conflicts.[66] In the *Norman* case, the SCSL Appeals Chamber had to determine whether the prohibition against 'child recruitment' contained in Article 4(c) of its Statute was already a crime, and thus entailed individual criminal responsibility under customary international law at the time of occurrence of the acts alleged in the indictment in 1996.[67] After a detailed review of different sources, the Appeals Chamber came to the conclusion that – even before having been crystallized in the ICC Statute – the prohibition against 'child recruitment' had already become an international crime 'certainly by November 1996'.[68] The subsequent case-law of the SCSL had adhered to this jurisprudence.[69]

In the *Fofana & Kodewa* case (CDF case), the Trial Chamber clarified that not only the recruitment or (conscription) of children, but also their use to participate actively in hostilities is 'proscribed under customary international humanitarian law'.[70] In the *Taylor* case, the Trial Chamber reiterated that 'conscripting or enlisting children under the age of 15, or 'using them to participate actively in hostilities' is a war crime'.[71] It specified that the crime of conscripting or enlisting children is an offence of a continuous character, which is committed throughout the period of a child's participation into the armed

66 *Customary Humanitarian Rules* (n 5) 482–5.
67 *Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2004-14-AR72 (31 May 2004) para 8 (*Norman* Interlocutory Appeal Decision).
68 Ibid para 53.
69 *CDF* Trial Judgment (n 29) para 187; *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Trial Judgement) SCSL-04-15-T (2 March 2009) para 184 (*RUF* Trial Judgment).
70 *CDF* Trial Judgment (n 29) para 197.
71 *Prosecutor v Charles Ghankay Taylor* (Trial Judgement) SCSL-03-01-T (18 May 2012) para 440 (*Taylor* Trial Judgment).

forces or group, which ends only when the child leaves the armed group or reaches the age of fifteen.[72]

In both the *CDF* and the *Sesay et al.* (RUF) cases, the Trial Chambers interpreted the phrase 'using children to participate actively in hostilities' by reference to a report prepared by the ICC Preparatory Commission[73] in the process of drafting the ICC Statute.[74] On this basis, both Chambers agreed that the term 'using' children and the expression 'participate actively in hostilities' contained in Article 4 of the SCSL Statute should be interpreted as covering 'both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints'.[75] They also agreed that those terms do not cover 'activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's accommodation', with the exception of activities in which children exercise a 'direct support function' such as 'acting as bearers to take supplies to the front line, or activities at the front line itself'.[76] In the *Taylor* case, the Trial Chamber added that the prohibition against using children in hostilities covers exposing them to direct risk in combat operations as well as forcing them into (i) 'carrying loads for the fighting faction'; and also entails (ii) 'finding and/or acquiring food, ammunition or equipment'; (iii) 'acting as decoys, carrying messages, making trails or finding routes'; and (iv) 'manning checkpoints or acting as human shields'.[77]

Last but not least, the position of the *Lubanga* Trial Chamber requires noting. In line with Article 8(2)(e)(vii) of the ICC Statute, the ICC Trial Chamber in its judgement of 14 March 2012 made clear that the crime of conscripting or enlisting child soldiers amounts to the 'incorporation of a boy or a girl under the age of fifteen into an armed group, whether coercively (conscription) or voluntarily (enlistment)',[78] or to the use of the children 'to participate actively in hostilities'.[79] It stressed that the ICC Statute aims to protect vulnerable children, including when they lack information or alternatives,[80] and that at the age of fifteen a child will be 'unable to give genuine and informed consent when enlisting in an armed group or force', with the consequence that 'the consent of a child to his or her recruitment does not provide an accused with a valid defence'.[81]

72 Ibid, para 443.
73 Report of the Preparatory Committee on the Establishment of an International Criminal Court (1998) UN Doc A/CONF.183/2/Add.1, 21 (fn 12).
74 *CDF* Trial Judgment (n 29) para 193; *RUF* Trial Judgment (n 69) para 188.
75 Ibid.
76 Ibid.
77 *Taylor* Trial Judgment (n 69) para 444.
78 *Prosecutor v Dylo Lubanga* (Trial Judgement) ICC-01/04-01/06 (14 March 2012) para 607 (*Lubanga* Trial Judgement).
79 Ibid, para 609.
80 Ibid, para 617.
81 Ibid, para 617.

One aspect of the practice of international criminal jurisdictions in matters of child soldiers that leaves one puzzled is the corollary which flows from it: namely, the confirmation of the legality of recruiting into the armed forces of a state or of an organized armed group boys or girls between fifteen and seventeen years of age. It is discomforting to consider children of that age adult enough to be recruited, asides the fact that in several national legislations they would still be considered 'minors', but also because such practice contradicts recent developments in human rights law. Article 1 of the 1989 Convention on the Rights of the Child provides that 'a child means every human being below the age of eighteen years'.[82] Yet, similar to the field of IHL, the Convention prohibits only the recruitment of children below the age of fifteen years.[83] Subsequent developments in the field of human rights, however, has seen the prohibition against the use of children in armed conflicts extending to what in most countries is considered the age of adulthood, that is eighteen years.

In the above-discussed *Norman* case, the SCSL Appeals Chamber perceptively displayed full awareness of these developments. In an amply reasoned decision, the Appeals Chamber underscored that Article 2 of the 1999 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor provides that 'the term "child" shall apply to all persons under the age of 18'.[84] It observed that, since the adoption of that instrument, the international 'debate' had 'shifted to the next step in the development of international law, namely the raising of the standard to include all children under the age of 18'.[85] In this regard, the SCSL Appeals Chamber underscored that Article 4(1) of the 25 May 2000 Optional Protocol II to the *Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, had in fact increased the age limit against child recruitment to eighteen years.[86]

Regrettably, there is no trace of this debate in the *Lubanga* judgement. So it is unclear whether the ICC adhered to the norms of the ICC Statue because of its obligation to do so, or because it deemed that boy or girls of fifteen years old could be considered mature enough to be legally recruited. Answering this

82 Article 1 reads 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' See Convention on the Rights of the Child (adopted 20 November 1989) available at <www2.ohchr.org/english/law/crc.htm> last accessed 20 October 2012.

83 Paragraphs 2 and 3 of Article 38 read:
States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

84 *Norman* Interlocutory Appeal Decision (n 67) para 34.

85 Ibid.

86 Ibid, 35.

question could have proved useful for future case law of the ICC and for all other courts, including municipal courts, facing similar situations. While true that it was not 'strictly necessary' for the Chamber to embark on such a discussion considering that its task is to apply the Statute of the ICC, the exercise of the judicial function by a court of law, particularly when it seeks recognition from the international community, cannot be a mechanical enterprise. On a topic of such importance and in order not to give the impression that human rights law was beyond its concern, it is submitted that the ICC should be expected in future cases to give reasons as to its failure to address the apparent contradiction between its case-law and the recent developments in human rights law.

3. STATUS OF ARMED GROUPS

Most conflicts that international criminal jurisdictions have been concerned with have not been of an international character but rather of an internal character. They have concerned fighting between a state and armed groups rebelling against it, or among groups of fighters within the same territory. In the *Tadić* Jurisdiction Decision of 2 October 1995, the Appeals Chamber stated that:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[87]

And it clarified that:

> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general 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.[88]

In view of these passages, in order to find that a conflict is internal in character it is necessary to demonstrate that the non-governmental fighters involved are 'organized armed groups and that there 'is protracted armed violence'. The wording and criteria used in *Tadić* Jurisdiction Decision, which accords with the Geneva Conventions, has displayed much influence on the jurisprudence of international courts and tribunals. The next section examines the criteria developed in such jurisprudence for qualifying a group of fighters as an

87 Prosecutor *v Duško Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70 (emphasis added).

88 Ibid.

organised armed group within the meaning of Common Article III and/or as 'dissident armed forces or other organized armed groups' within the meaning of Additional Protocol II for the purposes of application of IHL.

3.1. THE BOSNIAN-SERBS FORCES OPERATING IN BOSNIA AND HERZEGOVINA (1992–1995)

In *Tadić*, the Trial Chamber was to rule on the conflict between the Republic of Bosnia-Herzegovina, which became a state on 22 May 1992 and Bosnian-Serb forces.[89] It found that the Bosnian-Serb forces amounted to an "organized military force", comprising forces formerly part of the JNA, which operated under the command of the Bosnian-Serb administration in Pale (Bosnia and Herzegovina) and occupied a significant part of Bosnia-Herzegovina.[90] According to the Trial Chamber, the Bosnian-Serb forces fighting against the *de jure* Government of the Republic of Bosnia-Herzegovina in Sarajevo, possessed, at least from 19 May 1992, an organized military force, namely the VRS, which comprised forces formerly part of the JNA transferred to the *Republika Srpska* by the Federal Republic of Yugoslavia (then Serbia and Montenegro).[91] In explaining why it was possible to speak of the existence of an armed group, the Trial Chamber relied implicitly on the criterion of operating under a unified command when noting that 'these forces were originally under the command of the Bosnian Serb administration...headed by the Bosnian Serb President, Radovan Karadzic'.[92] Applying also a territorial criterion, it stressed that the Bosnian-Serb Forces 'occupied and operated from a determinate, if not definite, territory'.[93]

3.2. CROATIAN FORCES FIGHTING IN VUKOVAR IN 1991 AGAINST THE JNA

Although not ruling on the nature of such conflict, in the *Mrkšić & Šlijivančanin* Trial Judgement, the Trial Chamber found that the hostilities that had erupted in the second part of 1991 in what is present-day Croatia and led to the prolonged siege of Vukovar (until 20 November 1991) constituted an armed conflict.[94] On one side, there were the SFRY's governmental forces numbering between 4,000 and 6,000. On the other side, Croatian forces; although it spoke of the Republic

89 *Tadić* Trial Judgment (n 28) paras 563–4.
90 Ibid, para 566.
91 Ibid, para 565.
92 Ibid, para 564.
93 Ibid.
94 *Mrkšić & Šlijivančanin* Trial Judgement (n 49) para 422.

of Croatia, the Trial Chamber did not consider those forces as governmental forces, instead qualifying them as an 'organised armed group'.[95] The Croatian forces included (i) the 'permanent and reserve members of the police from the Ministry of Internal Affairs of the Republic of Croatia'; (ii) 'members of the National Guard Corps...and in the closing stages members of the newly created Croatian Army'; and (iii) 'members of other local volunteer defence groups'.[96] The Trial Chamber noted that these forces acted under a unified command, which had a designated headquarters in Vukovar.[97] It recalled that, in the autumn of 1991, opposing the Serb forces in Vukovar were up to 1,500–1,700 Croatian Forces.[98] After noting that these forces included both professional and volunteer armed fighters, and that they were involved in fighting against Serb forces 'in the municipality and in the city of Vukovar', the Chamber concluded that the Croatian forces possessed the 'characteristics of an organised armed group within the meaning of the jurisprudence of the Tribunal'.[99]

3.3. THE KOSOVO LIBERATION ARMY (KLA)

According to the settled practice of the ICTY, the KLA was an organized armed group that since 1999 was engaged in a non-international armed conflict with the Federal Republic of Yugoslavia (now Serbia). The criteria for identifying the KLA as an organized armed group have been the object of detailed analysis in a number of judgments. The key aspects of this practice can be highlighted here. In the *Milošević* case, the Trial Chamber found that the KLA qualified as an "organized armed group"[100] because it operated under a recognised 'joint command structure', had 'its own headquarters and designated zones of operation', and the 'ability to procure, transport and distribute arms.[101] Along these lines, in *Limaj*, the Trial Chamber stressed that the KLA had a 'meticulous an organised command structure';[102] the capacity 'to coordinate their actions';[103] 'regulations setting out structure and duties of the components of the KLA and coordinating their respective roles';[104] 'a military police responsible for the 'discipline of the soldiers' and for 'controlling the movements

95 Ibid, para 418.
96 Ibid, para 410.
97 Ibid.
98 Ibid.
99 Ibid.
100 *Prosecutor v Slobodan Milošević* (Decision on Motion for Judgement of Acquittal) IT-02-54-T (16 July 2004) para 23.
101 Ibid, paras 23–25.
102 *Prosecutor v Fatmir Limaj et al.* (Trial Judgement) IT-03-66-T (30 November 2005) paras 97–107.
103 Ibid, para 108.
104 Ibid, paras 110–1.

of KLA servicemen';[105] the 'ability to recruit new members';[106] the ability to provide KLA soldiers 'with military training';[107] and, was involved in negotiations with the 'representatives of the European Community and foreign missions based in Belgrade'[108] to solve the Kosovo crisis.[109]

In *Haradinaj et al*, the Trial Chamber recalled that the practice of the ICTY had identified several indicative factors, none of which are, in themselves, essential to establish whether the "organization" criterion is fulfilled.[110] It considered, however, the following criteria to be relevant: (i) the existence of 'KLA headquarters' and 'command structure'; (ii) the application of 'disciplinary rules and mechanisms'; (iii) the exercise of 'territorial control…by the KLA'; (iv) the ability of the KLA 'to gain access to weapons and other military equipment', 'to recruit members' and 'provide them with military training', 'to carry out military operations and use tactics and strategy', and 'to speak with one voice'.[111] It concluded that, having fulfilled these criteria, the KLA qualified as an "organized armed group" by 22 April 1998 under the *Tadić* test.[112]

In *Milutinović*, the Trial Chamber remarked that what matters for the existence of 'an internal conflict' and thus for the application of IHL, is the 'nature of the violence between state forces and a non-state armed group, or between such groups, and the level of organisation of that group'.[113] The Trial Chamber considered that the relevant "governmental authorities" were those of the FRY and Serbia, and the forces under their control, and that they were engaged in Kosovo primarily against the group known as the KLA.[114] It found that the KLA's organisation and activities revealed a 'gradual progression towards centralization of authority and co-ordination of efforts against the FRY/Serbian forces'.[115] It observed that already in 1998 the KLA had: (i) established 'a General Staff and subordinated seven zone headquarters under it'; (ii) adopted 'regulations governing troop structure and military discipline'; (iii) 'carried out coordinated attacks on FRY/Serbian forces'; (iv) established 'a financial operation, smuggled and/or purchased significant weapons stocks'; (v) 'instituted the use of a distinctive KLA emblem'; and (vi) 'implemented strategic policies to further their aims'.[116]

105 Ibid, para 113.
106 Ibid, para 118.
107 Ibid, para 119.
108 Ibid, para 125.
109 Ibid, para 129.
110 Ibid, para 60.
111 Ibid, para 64.
112 Ibid, para 89.
113 *Prosecutor v Milutinović et al* (Trial Judgement) IT-05-87-T (26 February 2009) para 791.
114 Ibid, para 792.
115 Ibid, para 840.
116 Ibid.

3.4. THE ALBANIAN NATIONAL LIBERATION ARMY (NLA)

In *Boškoski & Tarčulovski*, the Trial Chamber found that the NLA was an organized armed group for the purpose of applying Common Article 3 of the Geneva Conventions.[117] It opined that 'the leadership of the [armed] group must, as a minimum, have the ability to exercise some control over its members' so that the obligations under Common Article 3 'may be implemented'.[118] This served to distinguish organized armed groups from 'irregular, anarchic armed groups with no responsible command'.[119] In fact, the Chamber held that an 'organized armed group' must have 'some hierarchical structure' and its leadership must be in position 'to exert authority over its members.'[120] The Trial Chamber discarded the 'convenient criteria' contained in the International Committee of the Red Cross (ICRC) Commentary[121] for ascertaining the level of organisation of a given group, and the submissions that an organized armed group must possess a method of sanctioning breaches of Common Article 3.[122] In line with earlier jurisprudence, it adhered to the finding that 'some degree of organisation by the parties will suffice to establish the existence of an armed conflict', as an armed group 'does not need to be as organized as the armed forces of a State'.[123]

The Trial Chamber underscored that under Common Article 3 and Additional Protocol II, there is a significant difference in the required degree of organisation of an armed group. Under Common Article 3, only a minimal degree of organisation is required because the scope of this norm is only to provide and ensure some 'basic humanitarian protections'.[124] On the other hand, the level of organization required under Additional Protocol II is higher: an armed group must have the capacity to effectively implement Protocol II and thus 'control of even a modest area of land' is needed.[125]

Undertaking a purposeful survey of the previous case-law, the Trial Chamber aptly divided the criteria for the identification of an organized armed group into five broad categories of relevant 'factors'. These include: (i) 'factors signaling the presence of a command structure';[126] (ii) 'factors indicating that the group could carry out operations in an organized manner';[127] (iii) 'factors indicating a level of logistics';[128] (iv) 'whether an armed group possessed a level of discipline and the

117 *Prosecutor v Boškoski & Tarčulovski* (Trial Judgement) IT-04-82-T (10 July 2008) para 194.
118 Ibid, para 195.
119 Ibid, para 196.
120 Ibid, para 195.
121 Ibid, para 196.
122 Ibid.
123 Ibid, para 196, referring to *Limaj* Trial Judgment (n 102) para 89.
124 Ibid, para 197.
125 Ibid, para 197.
126 Ibid, para 199.
127 Ibid, para 200.
128 Ibid, para 201.

ability to implement basic obligations of Common Article 3';[129] and (v) 'factors indicating the ability of an armed group to speak with one voice'.[130] Last but not least, the Trial Chamber stressed that lack of organisation cannot merely be inferred by the frequent violation of IHL by members of an armed group, but that it was necessary to 'examine how the attacks were planned and carried out' and whether such attacks were 'the result of a military strategy' or 'were perpetrated by members deciding to commit attacks of their own accord.'[131] Applying these criteria to the facts before it, the Trial Chamber noted that in June 2001 the NLA had approximately 2,000 to 2,500 members that operated under a unified and structured leadership; that expressed goals through communiqués; and had a 'basic system of discipline...that allowed it to function with some effectiveness.[132] It further remarked that over time the nature of the activities of the NLA revealed a more planned and coordinated pattern of operations,[133] and the group was present in 'more obviously defined geographic areas, mainly in the north-west of the country'.[134] The Trial Chamber found that, although it was not a 'modern, well-organised and supplied, trained and disciplined, efficient fighting force',[135] the NLA was able 'to compel the government to commit the full weight of its substantial army including reserves' to the fight against it.[136] And most importantly, the Trial Chamber recorded that by August 2001, the NLA had 'developed a level of organisation and coordination quite markedly different and more purposed from that which existed in the early months of 2001.'[137] This had enabled it to conduct military activities and to achieve a measure of military success over more than three months at a level which could not have been expected at the beginning of 2001.[138] The Chamber thus found the NLA to be 'an organised armed group'[139] and held that 'in August 2001, at the times material to the Indictment', there was a 'state of internal armed conflict in FYROM involving FYROM security forces, both army and police, and the NLA.[140] This conclusion remained undisturbed on appeal.[141]

129 Ibid, para 202.
130 Ibid, para 203.
131 Ibid, para 205.
132 Ibid, para 277.
133 Ibid, para 288.
134 Ibid.
135 Ibid, para 289.
136 Ibid.
137 Ibid.
138 Ibid, para 290.
139 Ibid, para 291.
140 Ibid, para 292.
141 *Prosecutor v Boškoski & Tarčulovski* (Appeal Judgement) IT-04-82-A (19 May 2010).

3.5. THE RWANDA PATRIOTIC FRONT

Following *Tadić*, the ICTR Trial Chamber in *Akayesu* made clear that for a finding to be made on the existence of an internal armed conflict in the territory of Rwanda, it was 'necessary to evaluate both the intensity and organization of the parties to the conflict'.[142] In line with Article 4 of the ICTR Statute – which vests the Chambers with jurisdiction to try IHL violations of both Common Article 3 and Additional Protocol II – the Trial Chamber noted that in order for Additional Protocol II to apply, additional requirements must be satisfied.[143] To clarify these additional requirements, the Trial Chamber recalled that under Additional Protocol II 'The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces'[144] and that the degree of organization 'should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations' and to impose discipline in the name of a *de facto* authority'.[145] Last but not least, the Trial Chamber added that these armed forces 'must be able to dominate a sufficient part of the territory so as to maintain 'sustained and concerted military operations and to apply Additional Protocol II'.[146]

The Chamber found that there was a conflict of a non-international character in Rwanda between the RPF, under the command of General Kagame, and the governmental forces.[147]It determined that the RPF fell within the categories of armed groups bound by Additional Protocol II. In particular, it pointed out that the RPF had increased its control over Rwandan territory to over half of the country by mid-May 1994, and carried out 'continuous and sustained military operations' until the end of the war.[148] The Chamber also remarked that the RPF troops were disciplined and possessed a structured leadership which was answerable to authority[149]and that the RPF had declared to the ICRC that it was bound by the rules of IHL.[150] The validity of the Chamber's analysis and the criteria it outlined for the application of Additional Protocol II were confirmed in subsequent ICTR cases and have become settled jurisprudence.[151]

142 *The Prosecutor v. Akayesu* (Trial Judgement) ICTR-96-4-T (2 October 1998) para 620.
143 Ibid, paras 618, 623.
144 Ibid, para 626.
145 Ibid, para 626.
146 Ibid.
147 Ibid, para 627.
148 Ibid, para 627.
149 Ibid.
150 Ibid.
151 *Musema* Trial Judgment (n 20) paras 256–258; *Prosecutor v Kayshema & Ruzindana* (Trial Judgment) ICTR-95-1-T (21 May 1999) paras 171–172; *Prosecutor v Rutaganda* (Trial Judgment) ICTR-96-3-T (6 December 1999) paras 94–5; *Ignace Bagilishema v Prosecutor* (Trial Judgment) ICTR-95-1A-T (7 June 2001) para 100.

3.6. THE REVOLUTIONARY UNITED FRONT (RUF)

In the *RUF* case, the accused members of the RUF were charged with collective punishment, acts of terrorism, and pillage under Additional Protocol II.[152] To this end – noting that 'Additional Protocol II applies only in situations of non-international armed conflict'[153] – the Trial Chamber took judicial notice of the fact that the 'conflict in Sierra Leone occurred from March 1991 until January 2002'[154] and determined that the 'conflict in Sierra Leone was of a non-international character'.[155] The Chamber then moved on to prove that the RUF fell under the category of 'dissident armed forces or other organised group' as required for the application of Additional Protocol II. This required proving that the RUF forces were: (i) 'under responsible command'; (ii) 'able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations'; and (iii) 'able to implement Additional Protocol II'.[156]

Assessing the evidence before it, the Trial Chamber concluded that the members of the RUF were indeed under responsible command and that the RUF had the capacity to implement the provisions of Additional Protocol II on the territory that it seized and controlled.[157] The Trial Chamber remarked that the control exercised by the RUF over the Kailahun District for the duration of the armed conflict was critical to its capacity to wage war and enabled it carry out sustained and concerted military operations.[158] From the Kailahun district the RUF High Command communicated with troops situated in other areas of Sierra Leone and 'an armory and airfield were established' in the area, which were used 'for the production and distribution of materials including arms and ammunitions'.[159]

3.7. THE UNION DES PATRIOTES CONGOLAIS (UPC); AND THE FORCE PATRIOTIQUE POUR LA LIBÉRATION DU CONGO (FRPI)

In *Lubanga*, the Trial Chamber recalled that under Article 8(2)(f) of the ICC Statute, which, in essence, mirrors the approach adopted in the *Tadić* Jurisdiction Decision, it is possible to speak of the existence of a non-international armed

152 *RUF* Trial Judgment (n 69) para 966.
153 Ibid, para 966.
154 Ibid, para 969.
155 Ibid, para 977.
156 Ibid, para 966.
157 Ibid, para 978.
158 Ibid, paras 979–980.
159 Ibid, para 979.

conflict when there is 'protracted armed conflict' between 'governmental authorities and organized armed groups' or 'between such groups'.[160] The Trial Chamber noted that Article 8(2)(f) does not incorporate the requirement that to be qualified as such, an organised armed group needs to exercise control over a portion of territory and be "under responsible command", as set out in Article 1(1) of Additional Protocol II.[161] Instead, the Trial Chamber considered it sufficient under the ICC Statute – as required under Common Article 3 – for organized armed groups to have a 'sufficient degree of organisation, in order to enable them to carry out protracted armed violence'.[162] The Chamber went on to enumerate a 'non-exhaustive list of factors that are 'potentially relevant' for an organized armed group to be regarded as such. These are (i) 'the force or group's internal hierarchy'; (ii) 'the command structure and rules': (iii) 'the extent to which military equipment, including firearms, are available'; (iv) 'the force or group's ability to plan military operations and put them into effect'; and (v) 'the extent, seriousness, and intensity of any military involvement'.[163] It remarked, however, that 'none of these factors are individually determinative'.[164]

Assessing the facts at hand on the basis of these criteria, the Chamber found that there were a 'number of simultaneous armed conflicts in Ituri and in the surrounding areas within the DRC [Democratic Republic of Congo], involving various different groups'.[165] It is worth recalling here the Trial Chamber's findings in respect of two of these groups. First, it found that the UPC (*Union des patriotes congolais*) was an organized armed group because it had 'a leadership structure', it 'was capable of training troops as well as imposing discipline', and it carried out 'sustained military operations in Ituri during the relevant timeframe'.[166] With regard to the FRPI, the Trial Chamber deemed it an organised armed group because it 'had a sufficient leadership and command structure, participated in the Ituri Pacification Commission, carried out basic training of soldiers and engaged in prolonged hostilities'.[167] The ICC concluded that the armed conflict involving the UPC/FPLC and other armed groups between September 2002 and 13 August 2003 was 'non-international in nature'.[168]

160 Ibid, para 534.
161 Ibid, para 536.
162 Ibid.
163 Ibid, para 537.
164 Ibid, para 537.
165 Ibid, para 543.
166 Ibid, paras 543, 550.
167 Ibid, para 546.
168 Ibid, para 567.

4. ISSUES OF ATTRIBUTION OF THE CONDUCT OF ARMED FORCES TO A STATE

The question of the attribution of the conduct of a given organized armed group to a state is a matter of particular relevance because the attribution of such conduct gives rise to consequences under two different legal regimes triggering different fields of responsibility. From the perspective of IHL, it transforms the nature of the conflict at hand into an international armed conflict with the consequent application of the related normative framework and the possibility of finding an individual responsible for wider categories of breaches of IHL than it would be in the course of a non-international armed conflict. From the perspective of public international law it makes a state responsible for the conduct carried out by that group. As a result of the divergence in the scope of responsibility pursued between these distinct legal regimes, the practice of international courts and tribunals on the question of attribution deviates and appears to pull in different directions.

As is well known, the Appeals Chamber in *Tadić* devised a test of 'overall control', which it preferred to the 'effective control' test defined earlier by the International Court of Justice (ICJ) in the *Nicaragua* case.[169] In 2007, in the *Genocide* case,[170] the ICJ confirmed the validity of the "effective control" test and distanced itself from the "overall control" test devised by the ICTY in *Tadić*.[171] Interestingly, despite the efforts of the ICJ to ensure the prevalence of the test it considered to be reflective of customary international law, the *Tadić* test has been adopted by both the SCSL and the ICC. The former applied it out of obligation because of it being bound to follow precedents of the ICTY and the ICTR Appeals Chamber,[172] the latter out of choice, being persuaded of its validity. In none of these cases, however, was the linkage between the non-organized armed group and the state in question established, which suggests that the overall control test is itself not an easy threshold to meet.

In the *AFRC* case, the Trial Chamber found that 'the armed conflict in Sierra Leone was non-international' because, contrary to what submitted by the Prosecution, there was no evidence to prove beyond reasonable doubt that a third state had intervened in the 'conflict, either through its own troops or alternatively by exercising the requisite degree of overall control over some of the

169 *Prosecutor v. Duško Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999); *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] *ICJ Rep* 14. See also *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (Judgment) [1980] *ICJ Rep* 3.

170 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] *ICJ Rep* 43.

171 Ibid, paras 402–3.

172 See above (n 3).

conflict's participants to find that they acted on its behalf'.[173] Likewise, in the *RUF* case, the Trial Chamber stated that because of the involvement of internal insurgent groups, such as the AFRC and the RUF, the conflict in Sierra Leone did not *prima facie* satisfy the test in Common Article 2, and was not international in character.[174] The Chamber applied the *Tadić* test to see whether the conduct of either of these groups could be considered 'consistent with the jurisprudence of our sister tribunal the ICTY'.[175] Adhering to such case-law, it held that a non-international conflict may become international if "some of the participants in the internal armed conflict act on behalf of that other State."[176] The Trial Chamber endorsed the principle 'that an organized armed group may be said to be acting on behalf of another State when that State exercises overall control over the group'.[177] It then stated that in order to satisfy this test, it had to be shown that the Republic of Liberia: '(i) Provided financial and training assistance, military equipment and operational support, and (ii) Participated in the organisation, co-ordination or planning of military operations'.[178] Upon an examination of the evidence, the Trial Chamber found that there were 'long-standing links between Liberians including Charles Taylor and the RUF', but that this evidence was insufficient to establish beyond reasonable doubt that Taylor 'was in a position to exercise overall control over the RUF as an organisation'.[179]

In the *Lubanga* Trial Judgment, the Trial Chamber stated that it intended to apply the *Tadić* test of 'overall control', which the Pre-Trial Chamber in its Decision on the Confirmation of Charges had embraced.[180] Applying this test, the Trial Chamber inquired whether the armed groups operating in Ituri could be said to have been acting under the overall control of, and be used as agents for fighting between two or more states, namely, Uganda, Rwanda, or the Democratic Republic of Congo.[181] Upon a detailed analysis, the Trial Chamber concluded in the negative.[182] It held that the conflict in Ituri between the UPC/FPLC and other armed groups between September 2002 and 13 August 2003 was non-international in nature.[183] Although not finding that the facts of the case met the test, the approach of the Trial Chamber is significant, albeit somewhat weakened by its neglect of the recent ICJ case in the *Genocide* case, because of

173 *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* (Trial Judgement) SCSL-04-16-T (20 June 2007) paras 250–1 (AFRC Trial Judgment).

174 *RUF* Trial Judgment (n 71) para 972.

175 Ibid, para 985.

176 Ibid, para 974.

177 Ibid, para 975.

178 Ibid.

179 Ibid, para 976.

180 *Lubanga* Trial Judgment (n 78), para 541.

181 Ibid, para 552.

182 Ibid, paras 553–566.

183 Ibid, para 567.

embracing the 'overall control' test and could influence the development of the ICC jurisprudence further.

5. CONCLUSION

The practice of international courts and tribunals concerning armed forces has been conservative on certain issues and progressive on others and rightly so. A conservative practice, which results not from strict or rigid interpretations, but from punctual application and clarification of existing norms and principles by those in a position of authority to do so within a legal system, enables a legal system to gain authority and pulls towards compliance. It is necessary because it contributes to the achievement of clarity, stability, and predictability as to the content of applicable norms and principles. Concomitantly, a progressive practice is important as well as it prevents a system from becoming static. Without a healthy degree of innovative practice, there would not be the kind of adaptation to circumstances which serves to expand the mantle of the law to areas where protection is most needed such as in the context of non-international armed conflicts. Finding the right balance between the quest for stability and the need for progress ensures that armed forces in both international and non international armed conflicts are subject to a legal system that is both exacting in its quest for protection and fair in its allocation of burdens and responsibilities.

International courts and tribunals have consistently (though not without some bumps along the way) recalled and applied principles and norms of IHL, contributing to their consolidation and clarification through the discussion of their meaning in a variety of specific contexts. Taking a progressive, if not bold, stand, international courts and tribunals have expanded norms of IHL towards the field of non international armed conflicts so as to bring all belligerents under the purview of the law. In so doing, courts have implicitly backed the idea of the drafters of the Geneva Conventions and the Additional Protocol II – fully justified by elementary considerations of humanity – that non-state actors participating in an armed conflict should also be bound by fundamental norms of IHL in the appropriate circumstances, regardless of whether they participated to the formation of such norms, or have so agreed.[184] Despite these positive steps, some areas of concerns remain and should be flagged here for further reflection.

First, the implicit recognition of the legality of recruiting into the armed forces boys or girls between fifteen and seventeen years of age is troubling because it criminalizes only the recruitment of children below fifteen years of

[184] Providing a thorough reflection on the possible reasons why non-state actors may be bound by IHL see Jann Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 *International Review of the Red Cross* 443–461.

age. Not only does this run contrary to some recent developments within the field of human rights, but it is also perplexing from the perspective of contemporary IHL. Professional soldiers have the right to expect that all combatants in the battlefield understand and apply contemporary IHL. Such a legitimate expectation may not be fulfilled by individuals, who in most legal systems are not believed to be mature enough to drive or to vote, and who may not take IHL seriously. The concern is that when confronting boys or girls of less than eighteen years of age, the risk that members of the armed forces may be exposed to, and be victims of, indiscriminate and disproportionate attacks may be at its zenith. While courts are not legislators, neither are they indifferent bystanders: concerns about a given norm may be raised in its application by a Chamber, if only by way of *obiter dicta*.

Second, the increasing application of the 'overall control' test in international criminal jurisdictions as opposed to the 'effective control' test followed *qua* customary law by the ICJ may cause uncertainty in the sphere of duties of organized armed groups. On one hand, there is the emergence of a practice in the field of IHL and international criminal law followed by the ICTY, the SCSL and the ICC, which uses the overall control devised in *Tadić*. On the other hand, there is the reiteration by the ICJ in the recent *Genocide* case that the 'effective control' test is that which reflects customary international law. It is believed that it falls on the ICC, which unlike the SCSL is not bound by the practice of the ICTY, to explain why reliance on the 'overall control' test, may not be an impermissible departure from customary international law.