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Revisiting the notion of 'intensity' inherent in Common Article 3: An examination of the minimum threshold which satisfies the notion of 'intensity' and a discussion of the possibility of applying a method of cumulative assessment

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Summary: The 2016 ICRC Commentaries reveal an appreciation that the intensity of violence test which is included in the Common Article 3 understanding of the notion of 'intensity' has arrived at a point at which situations formerly regarded as instances of 'sporadic violence' have become so violent as to be reclassified as armed conflict not of an international character in that the situation resembles 'protracted armed violence'. The difficulty lies in determining whether a lower intensity situation is sufficiently violent to constitute a Common Article 3-type non-international armed conflict. The minimum threshold test in relation to the notion of 'intensity' in Common Article 3 pertinently is concerned with the relationship between the terms 'duration' and 'intensity'. At what point has a violent situation lasted long enough to exceed our understanding of the meaning of 'sporadic' and, thus, has become a non-international armed conflict? Is the method of assessing the level of violence in the context of Common Article 3 limited to a bilateral approach or is an aggregate assessment framework permissible as an application in border-line low-intensity non-international armed conflicts? These questions illustrate the importance of gaining a comprehensive understanding of the phrase 'protracted armed violence'.

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1 Introduction

The requirements which transform a situation into a non-international armed conflict are the existence both of a certain level of intensity of violence and a degree of organisation in the non-state party engaged in the armed conflict.[1] Of crucial importance is a clear understanding of the issue of when a situation demonstrates sufficient escalation to meet these requirements, as only then is the application of the law of non-international armed conflict triggered.[2] The purpose of this article is to explore the intensity threshold needed to trigger the application of Common Article 3.[3] Common Article 3 to the Geneva Conventions is the first treaty provision aimed at regulating non-international armed conflict.[4] The purpose of this provision is to outline basic humanitarian obligations that are binding on both state and non-state parties to a conflict.[5] The article promotes the humane treatment of civilians not party to the conflict, as well as those who become *hors de combat;* it offers these categories some judicial protection and obliges all parties to a Common Article 3-type armed conflict

1 *Prosecutor v Dusko Tadic aka 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-A, A.Ch, 19 July 1998, para 70; see also *Prosecutor v Mile Mrksic, Miroslav Radic, Veselin Sljivancanin* Case No IT-95-13/1-T Trial Chamber 27 September 2007, for a confirmation of this test; *Prosecutor v Dusko Tadic a/k/a 'Dule'* IT-94-1-T 7 May 1997 (Opinion and (Judgment)) Trial Chamber I, para 561 (emphasis added). The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on *two aspects* of a conflict, the *intensity of the conflict* and the *organisation of the parties to the conflict*. In an armed conflict of an internal or mixed character, these closely-related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.

2 International Law Association 'The Hague Conference (2010): Use of Force: Final Report on the Meaning of Armed Conflict in International Law'. In O'CONNELL, Mary Ellen (ed). *What is War: An Investigation in the Wake of 9/11* (Vol 37 International Humanitarian Law Series, Martinus Nijhoff Publishers 2012) (included at 319 of the book, 1, 4 fn 9 of the Report).

3 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

4 ibid.

5 Common Article 3 to Geneva Conventions (note 3).

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to collect and care for the wounded and sick.[6] In addition to these basic obligations, Common Article 3 further encourages parties to the conflict to agree to be bound more extensively by other, if not all, provisions of the four Geneva Conventions. In examining Common Article 3, the ordinary meaning of the text,[7] the context[8] and the object and purpose[9] of the provisions will be considered in accordance with the general principles of treaty interpretation.

The categorisation of an armed conflict has important legal consequences[10] and, from an operational perspective, unambiguous guidance which facilitates the categorisation of a situation is vital.[11] Military commanders and lawyers need to plan operations in accordance with the applicable legal framework.[12] They also need to instruct soldiers accordingly as to whether they are operating in the arena of an international or non-international armed conflict.[13] The reality of the existence of 'mixed' armed conflicts and the possibility of low-intensity armed conflicts are challenges faced by those responsible for categorising an armed con-

6 ibid.

7 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), art 31(1). For an in-depth discussion of art 31(1), see SOREL, JM, BORE EVENO, V. 'Article 31: Convention of 1969'. In CORTEN, O, KLEIN, P (eds). *The Vienna Conventions on the Law of Treaties: A Commentary: Volume I*. Oxford: Oxford University Press, 2011, pp 804–837.

8 Vienna Convention (note 7) arts 31(2) and 31(3). For an in-depth discussion of art 31, see SOREL and BORE EVENO (note 7). In *The MOX Plant case (Ireland v The United Kingdom)*, Provisional Measures, Case No 10 ITLOS, 3 December 2001, para 51.

9 Vienna Convention (note 7) art 32. For an in-depth discussion of art 32, see LE BOUTHILLIER, Y. 'Article 32: Convention of 1969' in CORTEN and KLEINP (note 7), pp 841–863.

10 See Final Report (note 2) 4 fn 9. GRAY, Christine. 'The Meaning of Armed Conflict: Non-International Armed Conflict'. In O'CONNELL (note 2) 77–71. For a discussion of some of the examples of legal consequences flowing from whether or not an armed conflict is categorised as international or non-international in nature, see FLECK, Dieter. 'The Law of Non-International Armed Conflict'. In FLECK, Dieter (ed). *The Handbook of International Humanitarian Law.* 3rd edn, Oxford University Press, 2013, pp. 603–605. For an example of how the applicable legal framework is determined by the classification of a situation as an international armed conflict, non-international armed conflict or law enforcement exercise, see CARSWELL, Andrew J. (ed). *Handbook on International Rules Governing Military Operations,* (2013) para 2.5 68–70 [online] Available at: <https://www.icrc.org/sites/default/files/topic/file_plus_list/043-handbook_on_international_rules_governing_military_operations.pdf> Accessed 14 October 2017.

11 Executive Power Military Decree No 15 of 22 April 2016, 4–5 [online] Available at: <https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir_15_2016.pdf> Accessed 2 August 2017.

12 CARSWELL (note 10) Foreword; GARRAWAY, C. 'Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces'. In HAYASHI, N (ed). *National Military Manuals on the Law of Armed Conflict* FICHL Publication Series No 2 (2nd edn 2010) p. 52. Military manuals serve to disseminate the law of armed conflict for this purpose.

13 ibid.

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flict.[14] A soldier on the ground may urgently need to assess the applicable legal framework.[15] In some instances, soldiers and their commanders do not enjoy the luxury of contacting a legal advisor or of contemplating the issue whether or not the various indicative factors of organisation have been met. Indeed, they may not have sufficient information to make a judgment.

International criminal courts and tribunals also face this dilemma of categorisation as they have to establish whether or not they have the necessary jurisdiction to enable them to adjudicate war crimes resulting from serious violations of the law of non-international armed conflict.[16] In order to exercise jurisdiction, a court or tribunal must show that a non-international armed conflict exists during the time an alleged crime was committed.[17] A more refined or more comprehensive understanding of the notions of 'intensity' and 'organised armed groups' would assist in making such an assessment, especially when confronted with low-intensity armed conflict or situations that are opaque. The vast majority of contemporary armed conflicts are non-international in nature, and this reality prompts the need for certainty with regard to the content of the terms associated with such conflicts.[18]

The notion of 'intensity' as expressed in the law of non-international armed conflict is what determines the level of fighting present in order to satisfy the second constitutive element – the threshold of violence – of a non-international

14 BELLAL, Annyssa. 'ICRC Commentary of Common Article 3: Some Questions Relating to Organized Armed Groups and the Applicability of IHL' [online] Available at: <http://www.ejiltalk.org/icrc-commentary-og-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl> Accessed 5 October 2017; HAQUE, AA. 'The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)' [online] Available at: <http://www.ejiltalk.org/the-united-states-is-at-war-with-syria-accoriding-to-the-icrc-new-geneva-convention-commentary/> Accessed 14 June 2016; VITE, S. 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations'. *International Review of the Red Cross*, 2000, vol. 91, p. 69 at p. 83. For a discussion of mixed armed conflicts, see AKANDE, D. 'Classification of Armed Conflicts: Relevant Legal Concepts'. In WILMSHURST, E (ed). *International Law and the Classification of Conflicts.* Oxford University Press, 2012, p. 63.

15 See GARRAWAY (note 12) p. 53 for the practical value of, for instance, LOAC cards as a simplified form of a military manual which may be useful in these types of situations.

16 GRAY (note 10) 77–78. Gray points out that '[t]he ICC will have to face the problem of classification because of the different provisions in Article 8 of its Statute. The prosecution will have to establish the nature of the armed conflict in every case of prosecution of war crimes. The ICTY experience shows that this will be demanding.'

17 GRAY (note 10) pp. 77–78.

18 BELLAL, Annyssa (ed). *The War Report 2014.* Oxford University Press, 2015, pp. 23–25; KRESS, Claus, MÉGRET, Frédéric. 'The Regulation of Non-International Armed Conflict: Can a Privilege of Belligerency be Envisioned in the Law of Non-International Armed Conflict'. *International Review of the Red Cross*, 2014, vol. 96, pp. 30, 49; GRAY (note 10) p. 69; Geneva Academy, *The War Report: Armed Conflicts in 2016* [online] Available at: <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202016.pdf> Accessed 24 October 2017.

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armed conflict.[19] The purpose of the minimum threshold of violence test embodied by the notion of 'intensity' is to identify situations which resemble an armed conflict in character but in which the fighting is not sufficiently violent to isolate such situations from a law enforcement paradigm (regulated by domestic law and human rights law) and to elevate them to the sphere of non-international armed conflict (regulated by the law of non-international armed conflict).[20] The minimum threshold of violence in terms of non-international armed conflict treaty law is crossed when the violence escalates beyond the degree of violence associated with merely sporadic acts such as riots, rebellions and internal disturbances.[21] At this point, the minimum threshold of violence requirement is met in accordance with the international humanitarian treaty law applicable to non-international armed conflicts, that is, at this point Common Article 3 and Additional Protocol II are triggered.[22] The determination of this minimum threshold of violence or how to identify the minimum threshold of violence remains problematic.[23] This article explores the intensity threshold which necessarily triggers the application of Common Article 3 only.

In order to achieve its objective, the article explores three seminal questions: What is the minimum level of violence needed to fulfil the notion of 'intensity' in terms of Common Article 3? Are there any identifiable constitutive indicators which promote greater certainty when an assessment is made regarding whether or not the minimum level of violence resulting from fighting satisfies

19 *Tadic* (Appeals Chamber) (note 1) para. 70. For a general overview of the notion of intensity, see SIVAKUMARAN, S. *The Law of Non-International Armed Conflict.* Oxford University Press, 2014, pp. 167–170; Final Report (note 2) 15, 20; DÖRMANN, K, LIJNZAAD, L, SASSÒLI M, SPOERRI, P. (editorial committee) and International Committee of the Red Cross, 'Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field'. Cambridge University Press, International Committee of the Red Cross (ICRC), 2016, paras. 423–428.

20 Final Report (note 2) n 67 p. 15. For a discussion of the law enforcement paradigm as applicable to isolated and sporadic acts of violence, see DINSTEIN, Y. *Non-International Armed Conflicts in International Law.* Cambridge University Press, 2014, pp. 22–23; CARSWELL (note 10) p. 44 para 2.6; DÖRMANN and others (note 19), para. 431, n. 138.

21 DINSTEIN (note 20) pp. 21–22; DÖRMANN and others (note 19), pp. 423–425.

22 Final Report (note 2) n. 67 15; *Prosecutor v Kordic and Cerkez* Case No IT-95-14/2-A, Judgment Appeals Chamber, 17 December 2004, para. 341; DINSTEIN (note 20), pp. 38–48; CARSWELL (note 10), para. 2.3.1.1 at 55 and para 2.3.3.2 at 59.

23 *Juan Carlos Abella v Argentina*, Report No 55/97, Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, Doc 6 rev (1998) para 156 (*La Tablada* case). In this case, the Inter-American Commission of Human Rights appreciated that '[t]he most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. *The line separating an especially violent situation of internal disturbances from the 'lowest' level Article 3armed conflict may sometimes be blurred and, thus, not easily determined*. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case' (emphasis added).

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the minimum threshold requirements necessitated by the notion of 'intensity' under Common Article 3? Is the method of assessing the level of violence in the context of Common Article 3 limited to a bilateral approach, or could an aggregate assessment framework be allowed for under the law of non-international armed conflict as codified in Common Article 3?

The article is divided into four sections, including the introduction. Section two provides a better understanding of the minimum threshold of the notion of 'intensity' as required under Common Article 3. The text of Common Article 3 refers to its scope of application as being dependent on the existence of an 'armed conflict not of an international character'. This provision offers no definition of what it deems to be an armed conflict not of an international character or whether any minimum threshold requirements must be satisfied to trigger its application.[24] The purpose of section two of the article is to examine the term 'armed conflict not of an international character' in order to establish whether or not the notion of 'intensity' underpins this construct and, if it does, what the content is of the minimum threshold requirements inherent in this notion. Section two is divided into two subsections.

The first subsection examines the Final Record of the Diplomatic Conference of Geneva of 1949 in order to determine whether or not the drafters contemplated the level of violence which should result from a situation in order for it to fall within the scope of application of Common Article 3 and, if they did, what the content was of such a notion of 'intensity' at the time of drafting.[25] The second subsection reviews subsequent judicial practice in order to give substance to the notion of 'intensity'. The *Tadic* case constitutes the notion of 'intensity' which is inherent to Common Article 3 as being that of 'protracted armed violence'.[26] This section specifically peruses the case law of international courts and tribunals that explores the notion of 'protracted armed violence' in order to establish whether there are constitutive factors which provide greater clarity in an assessment of whether the minimum threshold of violence has been satisfied in order to trigger the application of Common Article 3.

Section three of the article explores the method of assessment employed to evaluate whether a violent situation of a non-international nature is sufficiently protracted. It considers whether in international law a bi-lateral approach restricts the assessment of violence generated from a situation where multiple violent situations between several organised armed groups exist on a single territory (assessing the degree of violence resulting from fighting between the state and the non-state armed group or between two non-state armed groups alone),

24 Geneva Conventions (note 3) Common Article 3.

25 Final Record of the Diplomatic Conference of Geneva of 1949, Vol II, Section B (Federal Political Department Berne) [online] Available at: <https://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html> Accessed 26 August 2017.

26 *Tadic* (Appeals Chamber) (note 1) 70.

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or if a cumulative method of assessment (where the intensity of violence is the product of 'adding up' the over-all fighting) is allowed under international law. Finally, the conclusion summarises the results of the examinations conducted in the article in order to promote a better understanding of the notion of 'intensity' in the context of Common Article 3.

2 Minimum threshold

2.1 Drafting history

The text of the Geneva Conventions fails to give insight into the meaning of the term 'armed conflict'. The drafting history of the Geneva Conventions reveals that at the time the legal meaning of the term 'armed conflict' was unclear.[27] Prior to the time of drafting the Geneva Conventions, the term 'war' was relied upon as depicting the scope of application of international humanitarian law instruments.[28] The legal construct 'armed conflict not of an international character' was for the first time introduced in the *chapeau* of Common Article 3.[29] Uncertainty concerning the full meaning of this term was evident at the time.[30] This 'formulation' of the scope of application of Common Article 3 seems to be the result of a compromise reached by its drafters.[31] The text of Common Article 3 fails to define this term, but the drafting history offers insight into the understanding of the term 'armed conflict not of an international character' at the time.[32]

At this stage of the analysis, it is important to recall that in 1949 the scope of application of contemporary international humanitarian law applicable in non-international armed conflicts for the most part was restricted to situations that closely resembled international armed conflicts or to situations that were recognised as belligerency alone.[33] The inclusion of a treaty provision particular to the protection of victims during a non-international armed conflict, therefore,

27 Final Record (note 25) 12, 42, 43 and 129; CULLEN, Anthony. 'Article 3 Common to the Four Geneva Conventions of 1949 and the Threshold of Non-International Armed Conflict in International Humanitarian Law'. In CULLEN, Anthony. *The Concept of Non-International Armed Conflict in International Humanitarian Law.* Cambridge University Press, 2010, pp. 27–29.

28 CULLEN (note 27), p. 27.

29 ibid, pp. 27–29.

30 For a discussion of the debate centring around the usage of the term 'armed conflict not of an international character' during the Conference in Geneva specifically, see GIAD, Draper. 'Humanitarian Law and Internal Conflicts'. *Ga J Intl & Comp L*, 1983, pp. 253, 278; FARER, Tom. 'Humanitarian Law and Armed Conflicts: Toward the Definition of International Armed Conflict'. *Colum L Rev,* 1971, vol. 71, pp. 37, 72; CULLEN (note 27), pp. 27–51.

31 ibid.

32 Final Record (note 25) 12, 42–3 and 129; CULLEN (note 27), pp. 27–51; DRAPER (note 30), pp. 263–268.

33 SCHINDLER, Dietrich. 'The Different Types of Armed Conflicts According to The Geneva Conventions and Protocols' (1979) 163 Collected Courses of the Hague Academy of International Law, pp. 145–148; DRAPER (note 30), p. 264; CULLEN (note 27), pp. 41–44.

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was subject to much debate.[34] In fact, the wording of Common Article 3 was the most contentious of all the provisions negotiated during the 1949 conference in Geneva.[35] The majority of states were concerned that if 'an armed conflict not of an international character' was broadly interpreted, their sovereignty could be compromised.[36] In contradiction, the International Committee of the Red Cross (ICRC) argued for the broadest possible application of Common Article 3 and even for it to be applied to situations in which lower levels of violence were present.[37]

It appears that the drafters deemed the term 'armed conflict not of an international character' to be synonymous in its meaning with the contemporary understanding of the term 'civil war'.[38] The concept of a 'civil war' was understood to be a conflict which in many instances was similar to an international armed conflict contemporary to the time of drafting, but which took place within the borders of one country and where only one of the armed forces confronting each other was the armed force of a state.[39]

The drafting history further indicates that both a certain threshold of violence and a degree of organisation of the parties involved are required for a situation to be considered an 'armed conflict not of an international character'.[40]

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34 DRAPER (note 30), p. 263 recalls that '[t]his article provoked the longest single debate of any provision at the Diplomatic Conference of 1949'; CULLEN (note 27), p. 29; PICTET, Jean S. *The Geneva Conventions of 12 August 1949: Commentary Published Under the General Editorship of Jean S Pictet, Director for General Affairs of the International Committee of the Red Cross* (translated from the original French)*: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross 1952) 49.

35 DRAPER (note 30), p. 1949.

36 DRAPER (note 30), p. 265; CULLEN (note 27), pp. 27–51; DÖRMANN and others (note 19), pp. 151–152.

37 PICTET (note 34), p. 50.

38 Final Record (note 25), pp. 42–43: 'The Report drawn up by the Joint Committee and presented to the Plenary Assembly interprets the term "armed conflict not of an international character" as having the same meaning as civil war ... Although some delegations favoured a more flexible and expansive approach to the application of international humanitarian norms, it appears that *none contested or objected to the use of the term "civil war" as synonymous with "armed conflict not of an international character"*' (emphasis added); Final Record (note 25) p. 129: 'At the present Conference, the *question immediately arose of deciding what was to be understood by "armed conflict not of an international character which may occur in the territory of one of the High Contracting Parties". It was clear that this referred to civil war*, and not to a mere riot or disturbances caused by bandits. States could not be obliged, as soon as a rebellion arose within their frontiers, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied' (emphasis added).

39 Final Record (note 25) p. 12: 'As to *civil war, the term "armed conflict" should not be interpreted as meaning "individual conflict", or "uprising". Civil war was a form of conflict resembling international war, but taking place inside the territory of a state. It was not a conflict between a number of individuals*' (emphasis added).

40 Final Record (note 25), p.42: 'International law and Conventions should apply *when civil*

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The drafting history does not deliver much content to provide us with a better understanding of the threshold of violence, but it does indicate that the threshold of violence should be of a similar level to that expected during an international armed conflict at that time.[41] The drafters thus intended the notion of intensity under Common Article 3 to require a very severe degree of violence. This is evident as this instrument was drafted shortly after the conclusion of World War II, and that is the type of situation upon which the drafters drew when referring to an international armed conflict. In this context, such threshold requirements are aimed at distinguishing armed conflicts from mere acts of banditry and minor uprisings which are yet to take on the proportions of a full-scale civil war.[42] The Official Records reveal an indicator which is evidence that a situation is sufficiently violent to trigger the application of Common Article 3.[43] This indicator is evident when a state party to the Geneva Conventions is forced to have recourse to regular military forces in order to combat 'insurgent' parties on its sovereign territory.[44]

The 1952 ICRC Commentaries to the First Geneva Convention have been consulted in validation of this interpretation of the drafting history.[45] The Commentaries provide substance to the notion of 'intensity' as they follow shortly after the Conventions were adopted and, thus, are a resource for the comprehension of the meaning of the notion of 'intensity' at the time of drafting.[46] Commentaries have value as analytical tools, constituting '[a] teaching that explores the meaning of the provision – looking at its object and purpose, situating it in context, considering its drafting history, analysing subsequent practice, and can-

war was of such magnitude as to be full scale war' (emphasis added). PICTET (note 34), p. 36.

41 Final Record (note 25), p. 129 and CULLEN (note 27), p. 42: 'The Report drawn up by the Joint Committee and presented to the Plenary Assembly interprets the term "armed conflict not of an international character" as having the same meaning as "civil war". In explaining what was understood by "armed conflict not of an international character", the Report states that "it was clear this refers to civil war" … The Report of the Joint Committee … is referred to here only to highlight that *the terms "civil war" and "armed conflict not of an international character" were understood as possessing equivalent thresholds. This is significant, as the concept of civil war presupposes the existence of hostilities of a scale and duration similar to that of an international conflict*. Situations falling short of this level of intensity would not merit the recognition of belligerency and hence would not qualify for application of international humanitarian law' (emphasis added).

42 Final Record (note 25), p. 46: '… it was indispensable to distinguish between rebellion, which was more than an uprising but had not yet taken the proportion of a civil war, as was defined in international law.' Cf *Prosecutor v Boskoski and Tarculovski* Case No IT-04-82-T Trial Chamber 10 July 2008, para 175; *Prosecutor v Ramush Haradinaj Idriz Balaj Lahi Brahimaj* Case No IT-04-84-T Trial Chamber 3 April 2008, para. 39.

43 See CULLEN (note 27) p. 30; Final Record (note 25) p. 11.

44 CULLEN (note 27), p. 30; Final Record (note 25), p. 11; PICTET (note 34), p. 49.

45 PICTET (note 34).

46 ibid.

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vassing relevant literature – can prove influential'.[47] The ICRC Commentaries, in particular, are an invaluable subsidiary source and fill the role of publicist within the ambit of article 38(1)(d).[48]

Unfortunately, the 1952 ICRC Commentaries to the First Geneva Convention did nothing to dispel the uncertainty surrounding the meaning of an 'armed conflict not of an international character'.[49] In order to provide some guidance so as to enable state parties to assess whether a situation constitutes an 'armed conflict not of an international character', thus triggering the application of Common Article 3, it furnished a list of 'convenient criteria' to be used during such an assessment.[50] These criteria were determined from the various amended drafts tabled during the 1949 conference in Geneva.[51] The Commentaries asserted that none of these criteria was constitutive but merely indicative.[52] Their purpose was to help state parties distinguish between a situation constituting a 'genuine armed conflict' and one which was a 'mere act of banditry or an unorganised and short-lived insurrection'.[53]

These indicators seem closely to resemble the high level of violence commonly associated with international armed conflict.[54] The 1952 Commentaries nonetheless recommended that Common Article 3 should be applied as widely as possible and supported a broader interpretation of the notion of 'intensity'

47 SIVAKUMARAN, Sandesh. 'The Influence of Teachings of Publicists on the Development of International Law'. *International and Comparative Law Quarterly*, 2017, vol. 66, no. 1, pp. 1–32, 15.

48 See SIVAKUMARAN for an insightful review of the value of the ICRC's scholarly work in general and its commentaries in particular. SIVAKUMARAN (note 47), pp. 3–5, 15–16.

49 PICTET (note 34).

50 PICTET (note 34) pp. 49–50: '(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 of the Convention. (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. (3)(a) That the *de jure* Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression. (4)(a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory. (c) That the armed forces act under the direction of the organized civil 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.'

51 PICTET (note 34), pp. 49–50.

52 ibid.

53 ibid; DÖRMANN and others (note 19), pp. 152–153, paras. 417–21 for a review of the 1952 Commentaries.

54 PICTET (note 34), pp. 49–50.

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associated with the term 'armed conflict not of an international character'.[55] This broad interpretation, however, is not in keeping with the meaning the drafters intended the notion of 'intensity' to have as necessitated by this term.[56] It is clear from the Official Records that the intention of the drafters was that the notion of an 'armed conflict not of an international character' requires a very high level of violence equal to full-scale civil war or to violence so intense that it reaches the same level of violence that was commonly associated with an international armed conflict at the time of drafting of Common Article 3.[57]

2.2 Case law

In the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber formulated the threshold test required to fulfil the notion of intensity in the context of Common Article 3.[58] In this landmark decision, Appeals Chamber I determined that this test required the existence of 'protracted armed violence' to show that a situation was intense enough to constitute an armed conflict not of an international character.[59] In the *Tadic* case, Trial Chamber I provided the rationalisation for this test:

The test as applied by the Appeals Chamber to the existence of an armed conflict *for the purposes of the rules contained in Common Article 3* focuses on two aspects of a conflict: *the intensity of the conflict* and the organization of the conflict. In an armed conflict of an internal or mixed character, these closely related *criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities* which are not subject to international humanitarian law …[60]

The *Tadic* formulation sets a lower threshold requirement for the application of Common Article 3 than the test initially intended by the drafters of the Geneva Conventions did.[61] Jurisprudence in international tribunals and courts followed this formulation of the notion of intensity in the *Tadic* case and confirmed that violence had to be of a protracted nature.[62] International tribunals and courts follow the *Tadic* decision and generally accept that the term 'protracted violence'

55 PICTET (note 34), p. 50.

56 cf discussion between nn 38 and 57 of this article.

57 ibid.

58 *Tadic* (Appeals Chamber) (note 1), para 70. For a discussion of the *Tadic* definition, see GRAY (note 10), pp. 73–77; CULLEN, Anthony. 'The Threshold of Non-International Armed Conflict'. In CULLEN (note 27), pp. 117–123; KÜFFNER DOOR, Stefanie. 'The Threshold of Non-International Armed Conflict – The *Tadic* Formula and its First Criterion Intensity'. *Militair Rechtelijk Tijdschrift*, 2009, vol. 102, pp. 301–311.

59 *Tadic* (Appeals Chamber) (note 1), para. 70; see also *Tadic* (Opinion and Judgment) (note 1), para. 561.

60 *Tadic* (Opinion and Judgment) (note 1), para. 562 (emphasis added).

61 cf discussion between notes 38 and 57 of this article.

62 See *Tadic* (Appeals Chamber) (note 1), para. 70.

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necessitates a certain degree of intensity to transform an incident into an armed conflict.[63] Case law also determines that, in order to satisfy the intensity of violence requirement, the violence has to be sufficiently protracted.[64] At first glance, it seems that these two terms are used in a circular manner, but closer scrutiny reveals that they are used synonymously. In the interests of consistency, this author refers to the term 'protracted nature of violence' or 'protracted violence'.

In 2008 the ICRC, following wide acceptance of the 'protracted armed violence' test, particularly in light of subsequent judicial practice, endorsed this *Tadic* formulation as the correct test for the notion of intensity and the existence of non-international armed conflict.[65] The 2016 ICRC Commentaries reiterated the seminal importance of the *Tadic* case and confirmed that the *Tadic* formulation was the correct test to be used in determining whether a situation constitutes a non-international armed conflict in the context of Common Article 3.[66] Therefore, it is clear that the contemporary legal understanding of the notion of intensity inherent in an armed conflict not of an international character is that of 'protracted armed violence'.[67] An understanding of this notion of intensity depends on the meaning of the term 'protracted'.[68] Case law of international

63 See DÖRMANN and others (note 19), paras 424 and fn 126.

64 *Prosecutor v Matric* Case No IT-95-1+R61 Trial Chamber, Judgment 8 March 1996, 41; *Prosecutor v Zejnil Delalic Zdravko Mucic, also known as 'Pavo', Hazim Delic Esad Landzo also known as 'Zenga'* Case No IT-96-21-T, Judgment Trial Chamber 16 November 1998, 183–92; *Prosecutor v Jean-Paul Akayesu* Case No ICTR 96-4-T Judgment Chamber I 2 September 1998, 627; *Prosecutor v Alfred Musema* Case No ICTR-96-13-A Judgment and Sentence Trial Chamber I 27 January 2000, paras 248–51; *Prosecutor v Kordic and Cerkez* Case No IT-95-14/2-A Judgment, Appeals Chamber 17 December 2004*; Prosecutor v Milosevic* Case No IT-02-54-T Trial Chamber decision on motion for judgment of acquittal 16 June 2004, paras 26–40; *Prosecutor v Sefer Halilovic* Case No IT 01-48-T Trial Chamber Judgment 16 November 2005, 24; *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu* (Judgment) Case No IT-03-66-T, 30 November 2005, Trial Chamber II, 171–3; *The Prosecutor v Enver Hadzihasanovic Amir Kubara* Case No IT-01-47-T Trial Chamber 15 March 2006; *Prosecutor v Georges Anderson Nderubumwe Rutanganda* Case No ICTR-96-3-T, 26, Trial Chamber I, judgment and sentence May 2006, Judgment, para 93; *Haradinaj (*Trial Judgment) n 42, 49; *Boskoski* (Trial Judgment) (note 42), paras. 199–203; *The Prosecutor v Thomas Lubanga Dyilo* Judgment pursuant to art 74 of the judgment Case No ICC-01/04-01/00 Trial Chamber 14 March 2012, para. 538.

65 ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law' Opinion Paper, March 2008, 5, as cited in DÖRMANN and others (note 19), paras. 423 154. The ICRC expressed its understanding of non-international armed conflict as follows: 'Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum* of organisation.'

66 DÖRMANN and others (note 19), paras. 427, 155.

67 cf Tadic (note 1), para. 70 and DÖRMANN and others (note 19), paras. 427, 155.

68 CULLEN (note 27), p. 127. Cullen considers a clear understanding of the term protracted important: 'It is useful to consider the terms of the *Tadic* definition as a means of clarify-

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courts and tribunals promotes a better understanding of what is meant by the term 'protracted' as it suggests several indicative factors that may be employed to determine whether violence is protracted or not.[69] These indicative factors are not conditions that need to exist concurrently.[70] Instead, they are used as indicative factors in assessing whether a specific armed clash is sufficiently intense to meet the minimum threshold of protracted violence and, thus, transform the incident into an armed conflict not of an international character.[71]

In *Kordic and Cerkez*, the Court stated that the significance of the term 'protracted' in its relation to the term 'violence' stems from the aim to exclude cases of mere civil unrest or single acts of terrorism from cases of armed conflict not of an international character.[72] In the *Haradinaj* case,[73] the Trial Chamber considered how the criterion of 'protracted violence' had in practice been established by examining the cases of *Tadic*;[74] *Celebici*;[75] *Slobodan Milosevic*;[76] *Kordic and Cerkez*;[77] *Halilovic*;[78] *Limaj*;[79] *Hadzihasonovic and Kubura*;[80] *Matric*;[81] and *Mrksic & Others*.[82] The Trial Chamber determined that the following indicative factors existed in order to determine whether the nature of the violence indeed was protracted:

[T]he number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of

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ing this threshold of application of international humanitarian law. It is clear that intensity required for the existence of armed conflict is above that of internal disturbances and tensions. It is also clear that hostilities need not reach the magnitude of "sustained and concerted military operations". *The issue is one of clarifying the threshold of intensity that is required for the characterisation of a situation as one of armed conflict. This degree of intensity hinges on the interpretation of the word 'protracted'*. The level of armed violence associated with this term determines the applicability of international humanitarian law when the organisational requirement of an armed group is also met' (emphasis added).

69 *Boskoski* (note 42); *Lubanga* (note 64), para. 538; *Haradinaj* (note 42), para. 49; DÖRMANN and others (note 19), para. 432.

70 ibid.

71 ibid.

72 *Kordic* (note 64), para. 341.

73 *Haradinaj* (note 42), para. 49.

74 *Tadic* (Appeals Chamber) (note 1).

75 *Mucic* (note 64).

76 *Milosevic* (note 64).

77 *Kordic* (note 64).

78 *Halilovic* (note 64).

79 *Limaj* (note 64).

80 *Hadzihasanovic* (note 64).

81 *Matric* (note 64).

82 *Mrksic* (note 64).

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civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.[83]

The *Boskoski* Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia reviewed previous cases before the Tribunal in order to list the indicative factors the Tribunal had relied on in order to assess the protracted nature of violence in the situations before it.[84] It distinguished between 'primary' factors and 'other' indicative factors.[85] The primary indicative factors considered by the Trial Chamber were similar to those highlighted in the *Haradinaj* case.[86] The value of the *Boskoski* judgment does not lie exclusively in its confirmation of the primary indicative factors, but also lies in its discussion of 'other' or alternative indicative factors used less frequently by the Tribunal, but which are of equal value for their ability to assess whether a situation meets the necessary degree of protracted violence.[87] These 'other' indicative factors, which were also taken into account by the Trial Chamber, include:

[t]he number of civilians forced to flee form the combat zones; the types of weapons used, in particular the use of heavy weapons, and other military equipment such as tanks and other heavy vehicles; the blocking or besieging of and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory; and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements; and the attempt of representatives from international organisations to broker and enforce cease fire agreements.[88]

The *Boskoski* Trial Chamber further examined how the involvement of state organs could be indicative of the fact that the violence had become protracted.[89] Specifically, it mentions the military use of armed force against armed groups.[90] The Tribunal deemed it instructive to consider the government's own interpretation of the situation, for instance, whether in the circumstances a government is applying human rights law or has suspended its application.[91] This information

83 *Haradinaj* (note 42), para. 49.
84 *Boskoski* (note 42), para 177.
85 ibid.
86 ibid. '[T]he seriousness of attacks and whether there has 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 and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.'
87 *Boskoski* (note 42), para. 177.
88 ibid.
89 ibid, para. 178.
90 ibid.
91 ibid.

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will aid in establishing whether a government is involved in a law enforcement operation which tries to contain internal disturbances or whether it is engaged in an actual armed conflict with an organised armed group. In the *Musema* judgment, the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber confirmed that the deployment of police forces or even armed units by a government for the purpose of restoring law and order within the confines of a law enforcement operation would not turn a situation into an armed conflict.[92] The resort of the state to 'extraordinary means', such as the deployment of its military force for purposes which clearly are not in line with what is reasonably expected as being law enforcement, however, will serve as an indicator that an armed conflict is occurring.[93]

Scholars generally consider that forced recourse to military action is a strong indicator that internal hostilities had reached the threshold of 'protracted armed violence'.[94] However, they caution that a rushed assessment should not be made if there is evidence of state military response.[95] Rather, it must be shown that the military armed forces were not reacting in support of the national police in the context of a law enforcement exercise.[96] The deployment of national military armed forces, therefore, is not enough to indicate a situation of 'protracted armed violence'. The purpose of its deployment must be of a military nature. For this to be the case, they must be deployed by the state in order to launch military operations, as a result of fighting of a non-international nature taking place on its sovereign territory. If the need to combat hostilities on national territory necessitates the deployment of the national armed forces to launch military operations, this could be considered a constitutive factor of a situation satisfying the notion of 'protracted armed violence'. However, this is only one of the indicative factors, and it is not a compulsory indicator but may be a constitutive indicator if it fulfils the aforementioned criteria.[97]

Other international tribunals and courts, such as the International Criminal Court (ICC), have confirmed the indicative factors developed by the International Criminal Tribunal for the Former Yugoslavia in relation to 'protracted violence'.[98] For instance, in the *Lubanga* case, the ICC contributed to the jurisprudence by explaining its understanding of 'protracted violence' in relation to Common Article 3.[99] The ICC utilised the indicative factors used by Trial

92 *Musema* (note 64), paras. 248–251.

93 AMBOS, K. 'Chapter III: War Crimes'. In AMBOS, K. *Treatise on International Criminal Law; Volume II; The Crimes and Sentencing.* Oxford University Press, 2014, p. 128.

94 DINSTEIN (note 20) p. 36, para. 109; MOIR, Lindsay. *The Law of Internal Armed Conflict.* Cambridge University Press, 2002, p. 35.

95 DINSTEIN (note 20), p. 36.

96 ibid.

97 cf *Haradinaj* (note 42), 49.

98 *Lubanga* (note 64), para. 538; *Akayesu* (note 64), para. 627.

99 *Lubanga* (note 64), para. 538.

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Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the *Mrksic* case to determine whether the violence was sufficiently protracted.[100] The International Criminal Tribunal for Rwanda referred to these indicative factors as forming part of an 'evaluation test' which it employed to determine whether situations were mere internal disturbances and tensions or whether they constituted armed conflicts in the legal sense.[101] In the *Akayesu* case, Chamber I of the International Criminal Tribunal for Rwanda concluded in its assessment of the intensity requirement that the evaluation of this threshold requirement was not dependent on a subjective judgment by the parties to the conflict but that it was an objective test.[102]

In the *Haradinaj* case, Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia concluded that from its survey it had established that, to a greater extent, the term 'protracted' referred to how the conflict is conducted rather than to its duration.[103] It has also been argued that the term 'protracted' was not synonymous with the term 'sustained', with the meaning that violence should be uninterrupted over a period of time, and that the term 'protracted' should be interpreted in a flexible manner.[104] This determination was echoed by the application of the intensity requirement in the *La Tablada* case.[105] As discussed earlier, the Inter-American Commission of Human Rights (Inter-American Commission) had to determine whether an armed confrontation lasting a mere 30 hours was an example of an internal disturbance 'or whether this confrontation constituted an armed conflict not of an international character'.[106]

The Inter-American Commission assessed the threshold requirements concerning the degree of organisation of the parties to the conflict and the protracted nature of violence of the confrontation in order to determine whether this confrontation was an armed conflict not of an international character.[107] The Commission's assessment of the protracted nature of the confrontation at the La Tablada military base is a prime example which indicates the least amount of fighting needed in order to meet the threshold of violence.[108] According to the Commission, the term 'an armed conflict not of an international character' in Common Article 3 refers to situations of 'low intensity and open confrontations

100 ibid.
101 See *Rutanganda* (note 64), para. 93; *Musema* (note 64), paras. 248–251; *Akayesu* (note 64), para. 627. See CULLEN, A. 'Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law'. *Mil L R*, 2005, vol. 183, pp. 66, 134.
102 *Akayesu* (note 64), para. 603.
103 *Haradinaj* (note 42), para. 49.
104 ibid.
105 *La Tablada* (note 23), para. 155.
106 ibid.
107 ibid.
108 ibid.

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between relatively organised armed forces' which take place within the borders of a single state.[109] The Commission appreciated that:

[t]he most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. *The line separating an especially violent situation of internal disturbances from the 'lowest' level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined.* When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.[110]

In its analysis of the nature of the incident at the La Tablada military base and its evaluation of whether this incident satisfied the intensity requirement, the Inter-American Commission considered factors including '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'.[111] The Commission concluded that despite its brief duration, the clash between the Argentinian armed forces and the militants had triggered the application of Common Article 3 and satisfied the intensity requirement by meeting the threshold of protracted violence.[112] The incident at the La Tablada military base is an example of a single incident which was not sustained and which did not take place over a long period of time.[113] This example supports the submission that in relation to the term 'protracted violence', it is the manner in which the conflict is conducted that carries the most weight.[114]

Other judicial bodies have not been convinced that attacks displaying similar levels of violence as the lower degree of violence displayed at the La Tablada base were sufficiently protracted so as to transform a violent incident into an armed conflict.[115] An example of such a case is the *Limaj* case.[116] Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia was reluctant in the *Limaj* case to acknowledge low-scale violence as an armed conflict not of an international character.[117] In the *Limaj* case, the ICTY Trial Chamber

109 ibid, para. 152.
110 ibid, para. 156 (emphasis added).
111 ibid.
112 ibid, para. 155.
113 ibid.
114 DÖRMANN and others (note 19), para. 92. The ICRC agrees with this sentiment, but cautions as follows: '[T]he ICTY also noted that the duration of armed confrontations should not be overlooked when assessing whether hostilities have reached the level of intensity of a non-international armed conflict: [C]are is needed not to lose sight of the requirement for protracted armed violence in the case of [a]n armed conflict, when assessing the intensity of the conflict. The criteria are closely related. They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.'
115 *Limaj* (note 64).
116 ibid.
117 ibid, paras. 135–173.

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had to ascertain whether an armed conflict existed in the period from 1997 and 1998 between the KLA and the government armed forces in Kosovo in order to apply Common Article 3.[118] This case illustrates the indicative factors employed by the ICTY to determine the moment when the minimum intensity threshold has been met.[119] The *Limaj* case is highlighted as it refers to more than one incident which was assessed by the courts in contrast to the single incident in the *La Tablada* case, which the Commission deemed to be sufficiently protracted to be classed as an armed conflict.[120]

In the *Limaj* case, the defence alleged that a 'series of regionally disparate and temporally sporadic attacks carried out over a broad and contested geographic area should not be held to amount to an armed conflict'.[121] Trial Chamber II of the ICTY rejected this view and found that, at a minimum, the attacks occurring towards the end of May 1998 until at least 26 July 1998 could not accurately be classed as 'temporally sporadic or geographically dispersed'.[122] The ICTY Trial Chamber surveyed the violent incidents that occurred between 1997 and 1998 in Kosovo in order to establish whether and at what moment the sporadic acts of violence became protracted and an armed conflict not of an international character came into existence.[123] It is clear from the survey conducted by Trial Chamber II that indicative factors, such as the number, duration and intensity of individual confrontations when placed on a time line, clearly reveal when violence escalates to the extent that it becomes protracted.[124] Among the other indicative factors considered in this case was the type of weaponry used by the parties to the conflict.[125] In order to consider the nature of the violence, Trial Chamber II placed the incidents of violence on a time line, assessing four distinct periods which revealed how violence became increasingly severe and finally protracted.[126] These periods were 1 March to 1 April 1998; 1 April to 15 May 1998; 15 May to 31 May 1998; and 1 June to 26 July 1998.[127] The attacks that occurred between 1 June and 26 July 1998 alone were considered by the courts as sufficiently protracted in nature to move these attacks into the realm of an armed conflict not of an international character.[128]

The decisive question that needs to be answered is how the nature of the violence of the attacks prior to 31 May 1998 differs from the nature of the violence displayed by attacks that occurred between 1 June and 26 July 1998. The

118 ibid.
119 ibid.
120 *Limaj* (note 64); *La Tablada* (note 23).
121 *Limaj* (note 64), para. 168.
122 ibid.
123 ibid.
124 ibid.
125 ibid.
126 ibid.
127 ibid.
128 ibid.

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frequency of attacks (these attacks were referred to as mere sporadic incidents of violence) increased significantly between the period of March and April 1998 and the end of May 1998.[129] By the end of May 1998, attacks occurred on a daily basis.[130] Adversaries to the conflict drastically changed the methods they used in carrying out attacks over these time periods.[131] Each period displays how the methods employed by the adversaries resulted in the significant escalation of armed violence.[132] The fighting itself grew more violent, and the Serbian forces relied on what is termed 'heavy' weaponry (grenades, mortars, rockets and landmines) as opposed to 'light' weaponry (rifles, etc) as had been used during previous clashes.[133] The facts reveal that heavier weapons were used toward the end of May 1998[134] and that the number of casualties was much higher.[135] The number of soldiers deployed by the Serbian forces was much higher than the number of government soldiers engaging in earlier clashes.[136] Only in the final period and not before did Trial Chamber II of the ICTY consider that the violence had become sufficiently protracted and Common Article 3 had become applicable.[137]

In the *La Tablada* case, a single clash qualified as being sufficiently protracted even though the death toll was low, the clash lasted not more than 30 hours, and light arms were employed.[138] This incident resembles clashes that occurred during the first period of the *Limaj* case which were deemed by Trial Chamber II of the ICTY to be mere sporadic incidents.[139]

The approach of the Inter-American Commission in the *La Tablada* case, therefore, differed from the approach of the ICTY in *Limaj*. This causes one to question what type of relationship exists between 'duration' and intensity' within the notion of 'protracted armed violence'.[140] In the *Haradinaj* case, Trial Chamber I of the ICTY addressed the question of the relationship between 'duration' and 'intensity' as they relate to the term 'protracted armed conflict'.[141] Here Trial Chamber I considered that the factors that indicated how a conflict is conducted should carry more weight than 'duration' alone when an assessment is made about whether the violence is sufficiently protracted to constitute a Common Article 3-type conflict.[142] In the *Limaj* case, Trial Chamber II argued that dura-

129 ibid.
130 ibid.
131 ibid.
132 ibid, paras. 146–153.
133 ibid.
134 ibid, paras. 153 and 156.
135 ibid, para. 164.
136 ibid, para. 171.
137 ibid, paras. 171–173.
138 *La Tablada* (note 23).
139 cf *La Tablada* (note 23) and *Limaj* (note 64).
140 ibid.
141 cf discussion at nn 72–139.
142 ibid.

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tion was only one factor that ought to be considered when such an assessment is made.[143] The *Limaj dictum* indicates that the approach of the Inter-American Commission towards the notion of 'protracted armed violence' in the *La Tablada* case may not be as controversial as it seemed.[144] It may be that the Inter-American Commission placed more emphasis on the fact that military armed force was used against a military objective rather than the brief period of time that the fighting lasted.[145]

The 2016 ICRC Commentaries aim to promote a better understanding of the interplay between 'duration' and 'intensity' in the context of the phrase 'protracted armed violence'.[146] These Commentaries expressly ask whether or not duration is an independent criterion of 'protracted armed violence'.[147] The answer that the ICRC gives is that duration is only one of the elements to be considered in the assessment of the intensity of armed confrontations.[148] It specifically cites the *La Tablada* case as an example of a situation where an international commission considered a brief armed confrontation to constitute an armed conflict not of an international character as other indicative factors for such intensity were present to justify this.[149] One scholar addresses the matter of intensity as it is evaluated in the *La Tablada* case.[150] This scholar is of the opinion that, if duration alone was to serve as an intensity threshold test, then situations such as the incident at the La Tablada military base would not be deemed to be meeting the requirement of 'protracted armed violence'.[151] He stresses that duration alone cannot be determinative, and raises the practical consideration that, if this had indeed been the case, then any assessment of the nature of a situation could be made only after a certain period of time had elapsed.[152] This scholar suggests that the term 'protraction' itself was used in *Tadic* as it couples protraction with a scale precisely in order to require violence of a certain magnitude.[153] He reasons that intensity is a much wider construct and that duration is only one element of it.[154]

As this scholar revisits the *La Tablada* judgment, therefore, he considers that the use of the indicative factors of 'protracted armed violence' by the Inter-American Commission is acceptable as this Commission correctly treated duration as only one element of this notion.[155] He agrees with the *indicia* the Commission

143 ibid.
144 cf *La Tablada* (note 23) and *Limaj* (note 64).
145 cf discussion at nn 106–139.
146 DÖRMANN and others (note 19), p. 159.
147 ibid.
148 ibid.
149 ibid.
150 SIVAKUMARAN, (note 47), 167–169.
151 ibid.
152 ibid.
153 ibid.
154 ibid.
155 ibid.

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used in its assessment of intensity, but also considers that its final conclusion may be erroneous.[156] Another scholar highlights the fact that the notion of intensity needed to constitute an armed conflict and the duration of hostilities required to trigger the application of Common Article 3 are closely intertwined.[157] He interprets the case law of the ICTY to suggest that, in an assessment of protracted armed violence, indicative factors concerned with the method of fighting should bear more weight than duration, and confirms that he also considers duration to be only one factor.[158] A further scholarly opinion cautions that the intensity of violence is not an alternative to protracted hostilities, and emphasises that the approach followed in the *Haradinaj* case is correct.[159] He argues that, if duration was meant to be a compulsory indicator of 'protracted armed violence', then the *Tadic* formulation would have expressly included it as a third criterion.[160] This scholar is of the view that, according to *Tadic*, there are only two threshold tests, and this suggests that duration is only one indicator of the existence of protracted armed violence.[161]

In conclusion, the notion of 'protracted armed violence' has been firmly established and accepted as the intensity test applicable to Common Article 3. Post-*Tadic* judicial practice, as well as scholarly opinion, agrees that indicative factors are valuable in making an assessment of whether or not a situation is sufficiently protracted to constitute an armed conflict not of an international character. These indicative factors should be applied on a case-by-case basis, and the method of fighting rather than the duration of hostilities should be deemed determinative when such an assessment is made.

3 The cumulative violence approach and the notion of 'intensity'

This section addresses the question of whether international law indicates that the required intensity thresholds can be attained cumulatively by more than two independent parties to an armed conflict, even though they have not been arrived at in the mutual relations between any two of the parties. In other words, must an intensity analysis take place in the context of the bilateral relations between two opposing parties to a potential non-international armed conflict, or can there be an accumulation of intensity occurring in the multilateral relations between several such 'independent' parties? For ease of reference, this concept (or rather assessment approach) is called 'cumulative violence'.

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156 ibid.

157 MOIR, Lindsey. 'The Concept of Non-International Armed Conflict'. In CLAPHAM, Andrew, GAETA, Paola, SASSOLI, Marco (eds). *The 1949 Geneva Conventions: A Commentary.* Oxford University Press, 2015, p. 410, para. 53.

158 ibid.

159 DINSTEIN (note 20), pp. 34–35.

160 ibid.

161 ibid.

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The relevance of this question lies in the fact that in territories plagued with lasting low-intensity conflict (especially those where a plethora of competing non-state armed groups are fighting one another in a single territory), the law enforcement services of the territorial state may be too weak to address these situations through the application of domestic law or international human rights law.[162] Iraq and Syria are examples in point.[163] Such situations can create a legal vacuum. According to one line of reasoning, the cumulative approach might assist in filling this gap as it will serve the purpose of triggering Common Article 3, which at least offers protection for victims of such low-intensity situations.[164]

This reasoning, however, does carry the risk that such a 'cumulative assessment approach' could do away with those threshold restrictions which serve the purpose of differentiating between incidents of sporadic spurts of violence, riots and low-intensity violence, on the one hand, and actual non-international armed conflict, on the other.[165] As explained in section 2.2 of the article, the intensity benchmark of 'protracted armed violence' serves the crucial purpose of distinguishing these low-intensity situations form situations that are subject to international humanitarian law.

There is some risk that the 'cumulative assessment approach' could indeed envelop situations that were never intended to be regulated by the law of non-international armed conflict. This, in turn, is contrary to the very purpose of the distinction between the law enforcement paradigm and the humanitarian law paradigm. That being said, it is possible to re-interpret the terms 'sporadic' and 'isolated'.[166] For example, if several independent fighting units (or sufficiently organised armed groups) simultaneously, or in close temporal proximity, confront one another in one territory, are such incidents truly 'sporadic' in nature? If multiple armed groups (for instance, in Iraq there were more than 70, and some claim that in Syria there are thousands of such fighting units) confront one another from time to time in a single territory, are such events truly isolated? It is possible to argue that this 'below-the-threshold' test does not disqualify the usage of the cumulative approach under certain conditions.

Keeping these concerns and possibilities in mind, this section assesses the implications of the cumulative assessment method. First, it explains the traditional assessment method and compares it to the author's functional understanding of cumulative violence. Thereafter it examines whether an alternative interpretation of protracted violence 'between' governmental authorities and/or

162 See GEISS, Robin. 'Armed Violence in Fragile States: Low-Intensity Conflicts, Spill-Over Conflicts, and Sporadic Law Enforcement Operations by Third Parties'. *International Review of the Red Cross*, 2009, vol. 91, no. 873, p. 133.

163 RADIN, S. 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts'. *International Law Studies*, 2013, vol. 89, p. 724.

164 GEISS (note 162), p. 133.

165 *Tadic* (Opinion and Judgment) (note 1), para. 561.

166 ibid.

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'between' organised armed groups can accommodate the cumulative assessment approach.

3.1 The cumulative versus bi-lateral assessment of violence

The concept of 'cumulative violence' accepts that protracted armed violence is the appropriate benchmark of intensity which establishes the existence of a Common Article 3-type conflict. It questions, however, whether the nature of the assessment should be restricted to the traditional approach articulated in the *Tadic* decision.[167] In line with this traditional reasoning, protracted armed violence serves as the intensity threshold which distinguishes armed incidents of low intensity violence from actual non-international armed conflict.[168] This intensity threshold is assessed in terms of the level of violence between each party to the conflict. If one or more forces are engaged, multiple non-international armed conflicts can co-exist.[169]

Traditionally, therefore, the intensity assessment is conducted in terms of the bilateral fighting relationship between each party to the conflict, for instance, where more than one organised armed group is present within a single territory, as was the case in Libya between 2014 and the end of 2016.[170] In this situation there were multiple non-state armed groups fighting one another: Libya Dawn; Libya Shield; the Islamic State; and Ansar al-Sharia.[171] For the purposes of this example, these groups are deemed to be completely independent of one another and in conflict in the absence of any state involvement.[172] As stated previously, multiple non-international armed conflicts can be ongoing at the same time in a single territory.[173]

In accordance with the traditional assessment method, one has to establish the degree of violence evinced in the fighting between Libya Dawn versus Libya Shield; Libya Dawn versus the Islamic State; Libya Dawn versus Ansar al-Sharia; Libya Shield versus the Islamic State; Libya Shield versus Ansar al-Sharia; and the Islamic State versus Ansar al-Sharia. There are thus six bilateral fighting relationships. If all of these confrontations reach the threshold of 'protracted armed violence' (and these groups certainly are sufficiently organised in terms of Common Article 3), then six separate non-international armed conflicts exist. All of

167 *Tadic* (Appeals Chamber) (note 1), para. 70.

168 ibid; *Tadic* (Opinion and Judgment) (note 1), para. 561.

169 It is possible that several conflicts or even mixed conflicts can co-exist within the territory of a single state, even multiple non-international armed conflicts. See *Tadic* (Opinion and Judgment) (note 6), para. 562; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States),* Merits (Judgment), 27 June 1986 [1986] ICJ Rep 14, 103, para. 219.

170 ibid, 17 to 18.

171 ibid.

172 ibid.

173 See *Tadic* (Opinion and Judgment) (note 1), para. 562; *Nicaragua* (note 169), para. 219.

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these situations are thus regulated by Common Article 3 (at a minimum). If the threshold of violence is protracted in nature, then the law of non-international armed conflict is triggered between those parties.

If two fighting forces or even sufficiently-organised armed groups, however, have a violent encounter which falls short of 'protracted armed violence' and is merely a short-lived insurrection, then that situation is not regulated by Common Article 3 as it does not constitute an armed conflict. For example, if the fighting between Libya Shield and Ansar al-Shari does not satisfy the notion of 'intensity' under Common Article 3, then this situation would be regulated by domestic Libyan law and the international human rights regime as applicable in the state of Libya. The other five situations (the conflicts between Libya Dawn versus Libya Shield; Libya Dawn versus the Islamic State; Libya Dawn versus Ansar al-Sharia; Libya Shield versus the Islamic State; and the Islamic State versus Ansar al-Sharia) would be regulated by Common Article 3 as they meet the intensity threshold and, therefore, are considered to constitute non-international armed conflicts.

As indicated above, the traditional understanding of the notion of 'intensity' essentially entails that the level of violence needs to be measured on a bilateral level between independent parties to the conflict. This necessity is the same in a mixed armed conflict.[174] In contrast, the cumulative approach adds up or combines the violence from each separate conflict between the state and non-state actors, as well as the indicative factors present, to facilitate this assessment simultaneously across the territory of a single state, and it then determines whether the minimum threshold of violence has been satisfied. For instance, again employing the Libyan example, the degree of violence resulting from the fighting between the different forces, Libya Dawn versus Libya Shield; Libya Dawn versus the Islamic State; Libya Dawn versus Ansar al-Sharia; Libya Shield versus the Islamic State; and the Islamic State versus Ansar al-Sharia, are added together and assessed holistically. All the indicative factors of violence as explored in section 2.2 of the article are applied to the violence resulting cumulatively from the fighting between all the pairs of these different forces.

3.2 An alternative interpretation of protracted armed violence 'between' governmental authorities and/or 'between' organised armed groups

The concept of 'cumulative violence' was not conspicuous in the general research into the notion of 'intensity'. The *chapeau* of Common Article 3 does

174 See also note 169. *Tadic* (Opinion and Judgment) (note 1), para. 583 acknowledges that mixed armed conflicts can exist: *Nicaragua* (note 169), para. 219 also acknowledges the possibility of mixed conflicts. A mixed armed conflict refers to a combination of non-international armed conflicts and international armed conflicts concurrently occurring in the same territory. At this juncture, this author considers that the term 'mixed armed conflict' can refer to a single territory in which different non-international armed conflicts co-exist.

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not reveal whether this provision indeed does allow for a 'cumulative approach' to assess the intensity of violence unique to an 'armed conflict not of an international character'. As pointed out, the term 'non-international armed conflict' is not defined in any of the Geneva Conventions and fails to offer any insight into the notion of 'intensity' in general.[175] The drafting history of the Geneva Conventions, Additional Protocol II and the Rome Statute offer no comment on the concept of 'cumulative violence'.[176]

It is possible that it was not envisioned that mixed armed conflicts and situations of low intensity violence may require regulation at the time of the drafting of the Geneva Conventions and Additional Protocol II. The drafters of these instruments specifically envisioned a higher level of intensity than subsequent practice reflects as being sufficient.[177] Neither the 1952 nor the 2016 Commentaries to Additional Protocol II contemplate such an extensive assessment model of the notion of 'intensity'.[178] Even though the 1952 Commentaries encouraged a broad interpretation of Common Article 3, this author considers it to be too far-fetched to conclude that such a broad interpretation was ever intended to facilitate the 'cumulative approach'.[179] States were very intent at time of the drafting not to compromise any of their sovereign rights, and they understood the intensity threshold to be equal to that of a civil war.[180] This 'broader' call for an interpretive approach perhaps could relate to borderline situations of conflict classification. One also has to keep in mind that the Commentaries are not a binding instrument, but a persuasive source only.[181]

It may be helpful at this juncture to revisit the *Tadic* formulation of the intensity test in order to establish whether it prohibits a cumulative approach in the assessment of the intensity of violence. The *Tadic* formula states that an armed conflict exists 'whenever there is a resort to armed force between states or *protracted armed violence* between governmental authorities and *organised armed groups* or between such groups within a state'.[182] At first glance (and in line with

175 See sec 2.1 of this article.

176 cf Final Record (note 25); Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Vol VII, Federal Political Department, Bern, 1978; Final Record of the Diplomatic Conference of Geneva of 1949, Vol II, Section B (Federal Political Department Berne) 42–3 [online] Available at: <https://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html> Accessed 26 August 2017.

177 See sec 2.1 of this article. See also sec 2 of Chapter 6 of unpublished thesis by this author, BRADLEY, Martha M. 'An Analysis of the Notion "Organised Armed Group" and the Notion of "Intensity" in the Law of Non-International Armed Conflict', 20 November 2017 (on file with the author).

178 PICTET (note 34); DÖRMANN and others (note 19).

179 PICTET (note 34), para. 50.

180 See sec 2.1 of this article.

181 SIVAKUMARAN (note 47), pp. 3–5; 15–16.

182 *Tadic* (note 1), para. 70 (emphasis added).

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the way in which courts have applied it), this reasoning suggests that an assessment should be made of whether violence is protracted in nature 'between' the different parties separately. Perhaps this interpretation may be challenged. An understanding of the usage of the word 'between' may prove helpful in establishing whether it serves exclusively to juxtapose the violence resulting from the fighting between the two parties to the conflict, or whether this term has a broader meaning which possibly allows for the application of the cumulative assessment approach by not excluding it at the outset.[183]

There are differing definitions of the term 'between'.[184] Apparently, there is a departure from the interpretation that the term 'between' is restricted to a comparison or relationship between two things alone (thus restricting its usage to a bilateral relationship).[185] Fowler's *A Dictionary of Modern English Usage* specifically comments on the misnomer that 'between' is restricted to the relationship between two things alone.[186] It clarifies that the term 'between' can refer to the relationship 'between' multiple things.[187] A reading of the ordinary language meaning of the *Tadic* formula, therefore, suggests that an assessment approach which is cumulative in nature is not prohibited.[188]

The Syrian conflict can serve as a hypothetical example illustrating the importance of a clear understanding of the term 'between'.[189] Hypothetically, it

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183 ibid.

184 *Collins English Dictionary* (2015) 65. The *Collins English Dictionary* defines 'between' as 'a point intermediate to two points' or indicating a linkage relation or comparison'. This dictionary seems to state that 'between' is restricted to a bilateral relationship. Following this definition of the term means that the *Tadic* formula restricts the assessment method which determines whether the notion of 'intensity' is satisfied to the traditional bilateral approach, which means that 'cumulative' violence is not an assessment option at all. THOMPSON, Della (ed). *The Concise Oxford Dictionary*, 9th edn, Clarendon Press, 1995 p. 123 considers that 'between' can mean 'shared by' but does not expressly restrict its usage to only two things. BRANFORD, William (ed). *The South African Pocket Oxford Dictionary*, 7th edn, Cape Town University Press, 1987, p. 67 defines 'between' as 'the space or interval bounded by *two or more* points etc' (emphasis added) or 'shared by or confined to'. This dictionary specifically states that the word 'between' is not restricted to the relationship between two things alone.

185 cf *Collins English Dictionary* (note 184), p. 65; *South African Pocket Oxford Dictionary* (note 184), p. 67; and *Concise Oxford Dictionary* (note 184), p. 123.

186 FOWLER, HW. *A Dictionary of Modern English Usage*. Oxford University Press, 1983, p. 57 explores the term 'between'.

187 FOWLER (note 186), p. 57 explains that 'between is a sadly ill-treated word … The *OED* gives a warning against the superstition that "between" can be used only of the relationship between two things, and that if there are more "among" is the right preposition. In all senses *between* has been, from its earliest appearance, extended to more than two … It is still the only word available to express the relation of a thing to many surrounding things severally and individually …'

188 cf *Tadic* (note 1), para. 70.

189 For a discussion on the classification of the situation in Syria, see *The War Report: Armed Conflicts in 2016* (n 18)-40; GILL, Terry D. 'Classifying Conflict in Syria'. *Int'l L Stud,* 2016,

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is possible that the violence between the Free Syrian Army (FSA), other militias and the Islamic State, separately in their bilateral relationship with the Syrian armed forces, does not meet the intensity threshold, but the aggregated violence (that is, the violence occurring between FSA-Syrian Armed Forces; militias versus Syrian Armed Forces; Islamic State versus Syrian Armed Forces; FSA versus Islamic State; FSA versus other militias, and so forth) meets that threshold. For the purposes of this example, it should be assumed that these groups are completely independent of one another. In line with the traditional application of the *Tadic* formula, the word 'between' means that the violence between the FSA and the Syrian Armed Forces should be protracted in nature to constitute a separate non-international armed conflict. Similarly, the violence resulting from the fighting between Islamic State and FSA needs to be protracted to constitute another (co-existing) non-international armed conflict. If the violence between the Syrian Armed Forces and the militia is judged to be insufficiently intense, then there is no armed conflict between them and the fighting will be regulated by domestic law and by international human rights law.

However, a re-interpretation of the term 'between' moves our understanding away from the bi-lateral approach followed in these examples.[190] As indicated, 'between' in reality concerns relations between more than two objects alone and, therefore, the *Tadic* formulation could allow for a cumulative assessment of the violence resulting from the fighting between all the various units of these parties.[191] If the violence resulting from the fighting between the FSA, Islamic State, the Syrian Armed Forces and the militias is totaled up and equates to protracted armed violence, then Common Article 3 will become applicable and bind all these groups. This approach will bring the violent situation that exists between the militia and the Syrian Armed Forces (in the example above), which is excluded by the narrow reading of the term 'between', into the realm of the law of non-international armed conflict. In summary, therefore, the cumulative violence method is speculative at this stage. It will require a new reading of terms such as 'between', 'sporadic' and 'isolated'. One will also have to carefully consider the consequences of potentially integrating situations of sporadic violence into the law of armed conflict.

4 Conclusion

The purpose of this article has been to determine the content of the notion of 'intensity' as it relates to Common Article 3. An understanding of the notion of 'intensity' is seminal to determining what types of situations constitute 'armed conflict[s] not of an international character'. Section two (the first substantive part of the article) gave content to the notion of 'intensity' under Common Arti-

vol. 92, pp. 353–380.

190 See *Tadic* (note 1), para. 70.

191 ibid.

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cle 3 by determining the minimum threshold of violence that needs to exist in order to constitute a Common Article 3-type armed conflict. Furthermore, it investigated the possibility of there being factors which can assist in such a determination. A first subsection surveyed the drafting history of Common Article 3 to establish whether it offers a deeper insight into the notion of 'intensity' in the context of this treaty. The drafting history of Common Article 3 reflects the view that the level of violence needed to constitute an armed conflict not of an international character under Common Article 3 equates to a level similar to full-scale civil war or international armed conflict.[192] The drafters, therefore, considered that a very high degree of violence was needed to constitute an armed conflict not of an international character.

The case law analysis conducted in the second subsection centres on adding substance to the meaning of the benchmark test for the notion of 'intensity' under Common Article 3 as a result of the deliberations of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the landmark *Tadic* case. The *Tadic* case articulated the benchmark test needed to satisfy the notion of 'intensity' in relation to Common Article 3 as 'protracted armed violence'.[193] This benchmark has been followed widely by international tribunals and international criminal courts.[194] An analysis of case law highlights, on a case-by-case basis, that there are certain factors that may be employed to assess whether the notion of 'intensity' has been met under Common Article 3.

These factors are considered to be indicative in nature. It would be more helpful if some of these factors were to be classed as constitutive in nature in order to assist in the achievement of a more certain assessment of the nature of situations reflecting low-intensity violence. One factor in particular might be constitutive in nature, and that is whether the response to a violent outbreak demands the deployment of a state's armed forces for a military purpose where their mandate clearly is not that of law enforcement. However, this is a factor which is not helpful in situations where a conflict arises in a failed state or where the state does not respond to or intervene in a conflict among several armed groups in the absence of state involvement.

Section three (the second and final substantive part of the article) explores the possibility of utilising an aggregate approach in assessing the intensity of violence in relation to low-intensity situations that have arisen among multiple armed groups on a single territory.[195] A brief assessment of the available literature indicates, although opinion suggests it is not necessarily prohibited, that it is unlikely that the law permits this approach if perhaps in unique cases it may be determined to apply as a consequence of a policy consideration.

192 See sec 2.1 of this article.
193 *Tadic* (Appeals Chamber) (note 1), para 70.
194 See sec 2.2 of this article.
195 See sec 3 of this article.

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Regrettably, not all questions have been addressed in a manner which affords a neat definition in relation to the notion of 'intensity' under Common Article 3. Some questions remain unanswered or merely have been partially answered. Among such questions is a determination of the exact minimum degree of violence necessary to fulfil the threshold of 'protracted armed violence', as well as a determination of constitutive assessment guidelines. In addition, it is still legally uncertain whether or not an accumulative assessment method is allowed.

In summary, the sole firm conclusion that can be supported is that in the context of Common Article 3 the notion of 'intensity' necessitated by Common Article 3 is satisfied if the violence is of a protracted nature. Whether or not the violence which results from a conflict situation is sufficient to equate to protracted armed violence should be assessed on a case-by-case basis and on a bilateral level.

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