

The 1949 Geneva Conventions therefore established a two-pronged approach to armed conflict and the application of LOAC to the parties and events so engaged. Under the Geneva Conventions framework, any armed conflict will be either an international armed conflict falling within Common Article 2 or a non-international armed conflict falling with Common Article 3. Internal disturbances and tensions — such as riots and looting — not rising to the level of armed conflict, in contrast, do not trigger the application of LOAC.

QUESTIONS FOR DISCUSSION

1. Was the switch from the term “war” to the term “armed conflict” a positive development? Do you see any downsides?
2. What would happen if both parties to a conflict denied that there was an armed conflict? What if they signed an agreement establishing the absence of an armed conflict and thus sought to prevent the application of LOAC?
3. How does the very existence of Common Article 3 fulfill the historic purposes of LOAC?
4. What is the importance of the last sentence of Common Article 3, both historically and for the application of the law?

As you consider these questions, think about the basic purposes and principles of LOAC discussed in Chapters 1 and 2.

B. DEFINING ARMED CONFLICT

When events in a particular locale suggest the existence of armed conflict, the first questions must be: Is there an armed conflict and if so, what kind of armed conflict? Although the parties to a conflict, as alluded to above, will often seek to characterize it in the way most advantageous to their political, strategic and legal position — usually by denying the existence of an armed conflict at all — the Geneva Conventions clearly choose not to leave these determinations to the parties. Rather, as the International Criminal Tribunal for Rwanda (ICTR) emphatically stated in *Prosecutor v. Jean-Paul Akayesu*, the first prosecution for genocide:

It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, [LOAC] will apply once it has been established there exists an . . . armed conflict which fulfills [the] pre-determined criteria.⁷

7. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 603 (Sept. 2, 1998).

In this section, we examine how states and courts—both domestic and international—have applied the definition of armed conflict to past and modern conflicts. Keep in mind that before the drafting of the 1949 Geneva Conventions, state determinations regarding the existence and nature of armed conflict carried significantly greater weight than they do now.

1. Abandoning Old Concepts of War

Historically, a declaration of war was often considered a necessary prerequisite to the existence of war. Grotius explained, “[b]ut to obtain the peculiar rights and consequences resulting from the law of nations, a declaration of war by one of the parties, at least, if not by both, is absolutely requisite in all cases.”⁸ However, long before the Geneva Conventions, the notion that war only existed in the legal sense after a formal declaration of war began to be discarded. The following two cases offer examples of a more functional approach to identifying armed conflict and the obligations and privileges that accompany it.

THE PRIZE CASES

67 U.S. 635 (1862)

[Note: At the start of the Civil War, President Abraham Lincoln did not ask for Congressional permission to declare war on the South, as doing so would have been a tacit recognition of the Confederacy. In April 1861, however, President Lincoln ordered a blockade of Southern ports, which suggested he was treating the Confederacy as a belligerent power instead of as a mere rebellion (because the blockade effectively cut off the entire South, punishing everyone within). Foreign and American ships were frequently captured trying to smuggle goods through the blockade. The Prize Cases involved the seizure of vessels bound for Confederate ports before Congress later authorized the President to declare a state of insurrection on July 13, 1861.]

Mr. Justice GRIER.

Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification has not been, and cannot be disputed.

8. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 318 (Oliver H.G. Leigh ed., A.C. Campbell trans., 1901) (1625). See also JENNIFER K. ELSEA & RICHARD F. GRIMMETT, *CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS* (2011).

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms." "This being the case, it is very evident that the common laws of war — those maxims of humanity, moderation, and honor — ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible and more destructive to the nation."

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war

according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. . . .

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to-wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense, of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to-wit, that insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities are not enemies because they are traitors, and a war levied on the Government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection." . . .

On this first question, therefore, we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion which neutrals are bound to regard.

U.S. v. PLENTY HORSES (1891)

Adapted from Robert Utley, *The Ordeal of Plenty Horses*

AMERICAN HERITAGE MAGAZINE (December 1974)

[*Note: A number of cases stemming from the battles between the United States and Native American tribes address questions of belligerency, status of combatants, applicability of the law of war and other related questions. The case of U.S. v. Plenty Horses grew out of a violent encounter in the last days of the conflict between the tribes and the United States, and addressed the question of whether the hostilities constituted war in the legal sense.*]

On January 8, 1891, newspapers throughout the United States headlined a tragic event in the Indian troubles rocking the Sioux reservations of South Dakota. A talented and popular army officer attempting to enter a hostile encampment to talk peace had been treacherously slain by a young Sioux warrior. The death of Lieutenant Edward W. Casey shocked and saddened his legions of friends and admirers. . . .

[After a tentative peace took hold between the US forces and the Sioux in late 1890], on December 29, the 7th Cavalry tried to disarm Big Foot's band of Miniconjou Sioux on Wounded Knee Creek, twenty miles east of Pine Ridge Agency. . . .

Senika-Wakan-Ota, Plenty Horses, was a youth of twenty-two in 1891. . . . [He was raised with the Sioux but then sent to a boarding school for 5 years. He came back not white, but no longer fully Indian either.]

On January 6, [Casey's scouts] convinced him that he might further the cause of peace by personally talking with some of the Brulé and Oglala chiefs. With this in mind he set forth the next morning on the fatal ride up White Clay Creek.

Plenty Horses set forth that morning, too, his heart black with recent experiences. . . . On December 29 Plenty Horses had heard the distant rumble of guns and hastened to Wounded Knee. "It was an awful sight," he remembered. . . .

Plenty Horses was one of a party of about forty Sioux that chanced on Casey and two Cheyenne scouts, White Moon and Rock Road. . . . After a round of friendly handshaking and an exchange of pleasantries most of the Sioux drifted down the hillside to where other Indians were butchering cattle. About ten, including Plenty Horses, remained to talk with the white officer.

[Casey spoke with some of the Sioux leaders and then turned to leave].

During this conversation Plenty Horses had slowly backed his horse out of the circle and posted himself about three or four feet behind Casey. As Richard and the officer wheeled their horses to depart Plenty Horses took his Winchester from under his blanket, calmly raised it to his shoulder, and fired one shot. The bullet tore into the back of Casey's head and came out just under the right eye. The horse reared and pitched its rider from the saddle. Casey crashed to the ground on his face, dead. . . .

On January 15, 1891, the Sioux leaders surrendered and laid out their camp at Pine Ridge Agency. . . . The last Indian "war" had ended.

[Plenty Horses was arrested and brought to trial.] The defense strategy became apparent even in the selection of jurors and followed a consistent course in the cross-examination of prosecution witnesses and the questioning of defense witnesses. Nock and Powers sought to demonstrate that the Army and the Sioux, and specifically Casey and Plenty Horses, viewed themselves as belligerents engaged in warfare and that the killing of a belligerent during a state of war could not be regarded as a criminal offense within the competence of the civil courts. . . .

The next day, after eloquent and emotional summations by prosecution and defense, Judge Shiras charged the jury. Although the Sioux did not constitute an independent nation with legal authority to declare war, he said, they still had the power to go to war. If the jurors felt that a state of war existed in actual if not legal fact, they should acquit the defendant. If they judged a war not to be in progress and Plenty Horses to have shot Casey with malice and deliberation, they should find him guilty of murder. If in the second circumstance the killing had occurred without premeditation and in a condition of great mental excitement, the verdict should be manslaughter. The jury, composed largely of farmers of average intelligence, deliberated all night and finally, at noon on April 30, confessed to a hopeless deadlock. The vote stood, on the twenty-third as on the first ballot, at six for

murder and six for manslaughter — in effect a hung jury, though there was no question in its collective mind of Plenty Horses' guilt. . . .

The second trial, which opened in the same courtroom on May 23 and featured much the same cast of characters, followed a script similar to the first. . . .

Once more the prosecution and defense wrangled over the relevance of the war issue. In the previous trial Nock and Powers had demonstrated that the Indians regarded themselves as engaged in war with the white soldiers, but no evidence had been presented to show how the Army viewed the question. In fact, District Attorney Sterling had recently called on General Miles at his Chicago headquarters to see if he would come to Sioux Falls and testify that there had been no war. "My boy," the newspapers reported Miles as replying, "it was a war. You do not suppose that I am going to reduce my campaign to a dress-parade affair?" And with that the general sent a staff officer, Captain Frank D. Baldwin, to appear for the defense. Baldwin's testimony, together with military reports introduced in evidence, clearly established the Army's view that, as Miles had declared, it was a war. . . .

Baldwin's testimony coupled with the military documents proved decisive. "There is no need of going further with this case," Judge Shiras announced . . . to astonished participants and spectators [and] he explained that the guilt or innocence of Plenty Horses turned wholly on the war issue. The defense had shown beyond doubt that war existed. If Wounded Knee was not a battle in a war, the soldiers were guilty of murder. Had Casey shot and killed Plenty Horses while reconnoitering the No Water camp, he surely would not have been charged with murder in the civil courts. The slaying of Casey, therefore, could only be called an act of war, and Judge Shiras could not accept any verdict other than acquittal. . . .

QUESTIONS FOR DISCUSSION

1. If the Geneva Conventions existed at the time of the *Prize Cases*, would there have been an armed conflict as defined in common Article 2 or common Article 3 of the Geneva Conventions? What impact does the legitimacy of the insurgency have on the application of the laws of armed conflict? Should it have an impact?

2. How would a situation like that in *Plenty Horses* be viewed today?

3. The U.S. Supreme Court took a similarly practical approach to the determination of war against Indian tribes or unaffiliated bands of Indians, looking primarily to the facts of the engagement rather than the formalities. As the Court explained in *Montoya v. U.S.*, "We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war."⁹

9. *Montoya v. U.S.*, 180 U.S. 261, 267 (1901).

2. Modern Definition of Armed Conflict

As noted above, the Geneva Conventions establish two categories of armed conflict but do not codify explicit definitions of either international or non-international armed conflict. States, courts, and organizations such as the ICRC frequently characterized situations as armed conflict and specified whether they constituted international or non-international armed conflict in the years after 1949. However, it was not until the establishment of the *ad hoc* international criminal tribunals to try those accused of atrocities in the former Yugoslavia and Rwanda that a formal definition of armed conflict was set forth. The International Criminal Tribunal for the former Yugoslavia (ICTY) was an *ad hoc* international tribunal established by the U.N. Security Council under Chapter VII of the U.N. Charter in 1993 to try perpetrators of war crimes, crimes against humanity, and genocide during the conflict in the former Yugoslavia. The following case was the first case the ICTY heard and the defense immediately challenged the existence of an armed conflict — the result was what is now commonly understood as the definition of armed conflict.

PROSECUTOR v. TADIĆ

*Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction
Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995*

[Note: Duško Tadić (pronounced Tad-itch), a Bosnian Serb, was indicted on multiple counts of crimes against humanity, war crimes and other atrocities committed against Bosnian Muslims and Croats in the Prijedor region, including at the Omarska concentration camp. During the trial phase, the defense moved for an interlocutory appeal on jurisdiction, alleging that the ICTY lacked subject-matter jurisdiction over the alleged crimes.]

A. Preliminary Issue: The Existence of an Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict — either internal or international — at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains

language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. . . .

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

"[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." . . .

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. . . . In addition to these textual references, the very nature of the Conventions — particularly Conventions III and IV — dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." . . . Article 2, paragraph 1, provides:

"[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1." . . .

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty." . . .

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language

"for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies 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.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed — a factual issue on which the Appeals Chamber does not pronounce — international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opština of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs. . . . In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

Definition of Armed Conflict

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

a. International Armed Conflict

Common Article 2 applies to any conflict between two states involving their armed forces, no matter how minor or short-lived, even if one or both states deny the existence of the conflict. As the Commentary to the Geneva Conventions explains:

By its general character, [the first] paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.

It remains to ascertain what is meant by 'armed conflict'. The substitution of this much more general expression for the word 'war' was deliberate. It is possible to argue almost endlessly about the legal definition of 'war'. A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.¹⁰

Notwithstanding the Geneva Conventions' firm requirement that the existence of an armed conflict is based solely on objective determinations based on the facts on the ground, the application of the law of international armed conflict is not always straightforward. In some situations, a seemingly minor confrontation or situation will meet the threshold for international armed conflict, even though neither country will be beating the drums of war. Thus, for example, the Iranian detention of fifteen British sailors in the Persian Gulf in March 2007¹¹ triggered the law of international armed conflict and the Third Geneva Convention governed the treatment of the detained sailors. The fact that neither the United Kingdom nor Iran recognized a state of war or the existence of an armed conflict had no bearing on the application of LOAC. The Commentary clarifies that even if both states deny the existence of an armed conflict, the Geneva Conventions still apply based objectively on the *de facto* situation: "[e]ven in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not

10. INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 22-23 (Oscar M. Uhler & Henri Coursier eds., 1958).

11. Sarah Lyall, *Iran Detains British Sailors in Waters Off Iraq*, N.Y. TIMES (Mar. 23, 2007).

be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."¹²

In other situations, a state may simply deny the existence of an armed conflict for any number of reasons, such as domestic political consumption, efforts to seek legitimacy, or other goals.

U.S. v. NORIEGA

808 F. Supp 791 (S.D. Fla. 1992)

[Note: General Manuel Noriega was the military dictator of Panama when he was arrested during Operation Just Cause in Panama in 1989. He was tried and convicted of multiple counts of drug-trafficking and related offenses. At sentencing, he raised the question of his prisoner of war status and the impact it would have on sentencing and confinement. To address this question, the court had to ascertain whether he qualified as a prisoner of war; to determine that question, the court first had to assess whether the conflict between the U.S. and Panama was an international armed conflict as set forth in Common Article 2. If so, the Geneva Convention Relative to the Treatment of Prisoners of War would apply.]

Before the Court are several questions, but the ultimate one appears to be whether or not the Geneva Convention prohibits incarceration in a federal penitentiary for a prisoner of war convicted of common crimes against the United States. To resolve this issue the Court must consider three interrelated questions: 1) what authority, if any, does the Court have in this matter; 2) is Geneva III applicable to this case; 3) if so, which of its provisions apply to General Noriega's confinement and what do they require?

II. Applicability of Geneva III

[The United States argued that there was no international armed conflict in Panama.]

The government has thus far obviated the need for a formal determination of General Noriega's status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time was it agreed that he was, in fact, a prisoner of war.

The government's position provides no assurances that the government will not at some point in the future decide that Noriega is *not* a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. . . .

12. INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean de Preux ed., 1960).

Article 2

The present Convention shall apply to all cases of declared war or of *any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party. . . . (Emphasis added.)

The Convention applies to an incredibly broad spectrum of events. The government has characterized the deployment of U.S. Armed Forces to Panama on December 20, 1989 as the "hostilities" in Panama. Letter from the State Dept't to the Attorney General of the United States, Jan. 31, 1990 at 1. However the government wishes to label it, what occurred in late 1989-early 1990 was clearly an "armed conflict" within the meaning of Article 2. Armed troops intervened in a conflict between two parties to the treaty. While the text of Article 2 itself does not define "armed conflict," the Red Cross Commentary to the Geneva Conventions of 1949 states that:

Any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2. . . . It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4.

Commentary at 23 (footnote omitted).

In addition, the government has professed a policy of liberally interpreting Article 2:

The United States is a firm supporter of the four Geneva Conventions of 1949. . . . As a nation, we have a strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. Armed Forces. Consequently, the United States has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions contained in common Article 2 are not met. In this respect, we share the views of the International Committee of the Red Cross that Article 2 of the Conventions should be construed liberally.

Letter from the State Dept. to the Attorney General of the United States, Jan. 31, 1990 at 1-2.

U.S. v. PROSPERI

573 F. Supp. 2d 436 (D. Mass. 2008)

[Note: Defendants, suppliers of concrete to the "big dig" construction project in Boston, were accused of multiple counts of fraud. They contended that the fraud counts were barred by the statute of limitations; the government in turn argued that the statute of limitations was tolled by the Wartime Suspension of Limitations Act, which tolls statutes of limitations in fraud actions during wartime and for three years after the cessation of hostilities, because the United States was involved in wars in Afghanistan and Iraq.]

... The government argues that the Suspension Act tolled the running of the statute of limitations as of September 18, 2001, the date on which Congress authorized the use of military force against the Taliban government of Afghanistan; or alternatively, as of October 10, 2002, the date of the authorization of the use of military force in Iraq. ...

At War

Defendants next argue that the United States is not "at war" within the meaning of the Suspension Act. As the parties recognize, Congress has not exercised its power under Article I, Section 8, clause 11 of the United States Constitution to "declare war." Aside from a formal declaration of war, the Suspension Act gives no explicit indication of the type of military action that Congress intended to trigger a tolling of a limitations period under the Act. As a result, this case requires the court to make the determination of what it means for the United States to be "at war" within the meaning of the Act. ...

Moreover, there is no compelling logic connecting a formal declaration of war with the state of *being at war*. Even taking an originalist view of the Constitution, the logic cannot be defended. The idea that our nation could be at war, even without a formal declaration by Congress, was recognized by the Supreme Court at the nascency of the Republic. In *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 1 L. Ed. 731, 4 Dall. 37 (1800), the Supreme Court was called upon to decide whether the Quasi-War with France (1798-1800) was in fact a war, despite the absence of a formal declaration of war by Congress. The decision was necessary to resolve ownership rights to ships and cargo recaptured by U.S.-commissioned vessels from French privateers. The unanimous Supreme Court, writing seriatim, found it irrelevant whether the conflict was a "perfect" (i.e., a declared) war, or an "imperfect" one.

If [war] be declared in form, it is called solemn, and is of the perfect kind. ... But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn [that is, not declared], and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. ... [I]t is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprisal, and that congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war. ... [However,] the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.

... Instead, the Court focused on the presence of the indicia of war.

In March 1799, congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an American and

French armed vessel, combating on the high seas, with a view the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

Id. at 41. See also *The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 668, 17 L. Ed. 459 (1862) (“[W]ar may exist without a declaration on either side.”).

The United States has not declared war in any conflict since World War II, despite prolonged engagements in Korea, Vietnam, Kosovo, Afghanistan, and Iraq (twice) and shorter deployments in Panama, Grenada, Haiti, and Somalia, among others. Vietnam, the second invasion of Iraq, and the invasion of Afghanistan were undertaken instead by legislative authorization—the Gulf of Tonkin Resolution and the Authorization for Use of Military Force (AUMF) that stopped short of formal declarations of war. . . . The use of force in the first Iraq war was also authorized by the United Nations (and later by Congress). . . .

[The recognition that the laws of war apply to non-declared wars], of course, still leaves open the question of when a military engagement becomes a “war” for purposes of the Act. Certainly not every shot fired or every armed skirmish is of sufficient magnitude to stop the running of the statute of limitations. In distilling the legislative history, the (albeit sparse) case law, custom and historical practice, as well as the teachings of common sense, the factors that a court should consider in deciding whether the United States is “at war” for purposes of the Act should include: (1) the extent of the authorization given by Congress to the President to act; (2) whether the conflict is deemed a “war” under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict (including the cost of the related procurement effort); and (4) the diversion of resources that might have been expended on investigating frauds against the government. These are the criteria that the court will apply in answering the two questions posed by this case.

While not formal declarations of war, the AUMFs signified the commitment of Congress “to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President.” . . . Each authorization specifically states that it is “intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” . . . The authorizations recognized the “constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities.” The President in turn has submitted to Congress the reports the [War Powers Resolution] requires. Thus, in practice, both political branches have treated the Iraq and Afghanistan conflicts as “wars” in any conventional sense of the term.

The judicial branch has done no differently. The Supreme Court, in addressing the issues raised by the detention of persons seized in Afghanistan and elsewhere as alleged “enemy combatants,” has consistently invoked the legal presumption that the United States is at war. See, e.g., *Hamdi*, 542 U.S. at 519 (“[D]etention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”). Cf. *id.* at 536 (“[A] state of war is not a blank check.”). See also *Boumediene v. Bush*, 128 S. Ct. 2229, 2262, 171 L. Ed. 2d 41 (2008) (the conflict with al Qaeda

and other terrorist groups, "if measured from September 11, 2001, to the present, is already among the longest wars in American history."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-632, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006) (Common Article 3 of the Geneva Conventions is incorporated into the Uniform Code of Military Justice by its reference to the "laws of war").²⁶

(2) Definitions of War and International Law. . . .

Without belaboring the point, it is almost impossible to find a . . . contemporary definition of "lawful" war that depends on a formal declaration for its existence. Definitions rather emphasize the element of armed conflict, whether among States or between States and insurrectionary forces. War: "[A] contention between two or more States, through their armed forces, for the purposes of overpowering each other and imposing such conditions of peace as the victor pleases." L.F.L. Oppenheim, Vol II, quoted in British Manual of Military Law, Part III at 5, n.2. "[A state of war] 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." *Prosecutor v. Tadic* Judgment, Case No. IT-94-1-A, P 70. (International Criminal Tribunal for Former Yugoslavia (ICTY) App. Chamber, July 15, 1999).

Dictionary definitions of "war" are in accord. WEBSTER NEW INT'L DICTIONARY 2871 (2d ed. 1934) (War: "[A] contest between nations or states, carried on by force, whether for defence, for revenging insults and redressing wrongs, for the extension of commerce, for the acquisition of territory, for obtaining and establishing the superiority and dominion of one over the other, or for any other purpose; armed conflict of sovereign powers; declared and open hostilities."). THE OXFORD ENGLISH DICTIONARY 887 (2d ed. 1989) (War: "Hostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state."). See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2d ed. 1987) (War: "[A] conflict carried on by force of arms, as between nations or between parties within a nation; warfare, as by land, sea, or air."). Nowhere in these definitions is to be found the need for a formal declaration to establish the existence of a state of war (*ultima ratio regum*). . . .

Termination of Hostilities

The tolling provisions of the Suspension Act apply "until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." As the government posits, a strong case can be made, given the continuing expenditures and loss of life in Iraq and Afghanistan, that the United States remains at war. It is nonetheless incumbent on the court, under the test it

26. By acknowledging the binding force of the Geneva Convention on U.S. courts, the Supreme Court domesticated the international law principle that rules of war come into play not only in "cases of declared war," but also during any "armed conflict" involving a state actor. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Part 1, Art. 2.

proposes, to identify a clear demarcation point at which the tolling provisions of the Suspension Act cease to run. . . .

On December 22, 2001, the United States formally recognized and extended full diplomatic relations to the new government of Hamid Karzai. That recognition signaled the cessation of a state of war with Afghanistan. Accordingly, the statute of limitations with respect to the Afghan conflict, expired on December 22, 2004. Similarly, on May 1, 2003, President Bush, while aboard the USS *Abraham Lincoln*, proclaimed that “[m]ajor combat operations in Iraq have ended. . . .” Consequently, with regards to the Iraq conflict, the statute of limitations expired on May 1, 2006.

On February 27-28, 2014, armed men in unmarked uniforms (understood to be and later identified as Russian troops) seized Crimea’s parliament building and two airports, and subsequently spread out to secure control over Crimea, a province of Ukraine. Ukraine’s government described the Russian intrusion as an invasion, put troops on high alert and appealed to NATO for assistance. Within a few weeks, Russia annexed Crimea after a referendum widely viewed as rigged by pro-Russian forces. As of this writing, Russia continues to assert control over Crimea and has incorporated it into Russia. Unlike the situation that developed a few months later in eastern Ukraine, the situation in Crimea involved very little, if any, kinetic violence. Beyond reports of one or two shots being fired, Russian and Ukrainian military forces did not engage directly in hostilities. Nonetheless, LOAC applied to the situation in Crimea from the moment Russian forces entered Ukrainian territory without Ukraine’s consent. Consider why — indeed, it may seem counterintuitive in the absence of fighting and in light of reports that Ukrainian soldiers were unarmed in most confrontations.

The immediate application of LOAC upon any dispute between states leading to the engagement of their armed forces is fundamental to LOAC’s core purposes and effectiveness. Think back to the arguments by German and Japanese authorities regarding the application of LOAC during WWII, described earlier in this chapter. The threshold for international armed conflict is designed to maximize LOAC’s protective purposes. Once Russian forces entered Ukrainian territory, the need for LOAC’s protective framework became evident. From what body of law could soldiers detained — by either side — seek protection for treatment, repatriation or other rights? This low threshold helps to ensure that there are no gaps in legal protection, guarding against situations in which “no law governs the conduct of military operations below that level of intensity, including the opening phase of hostilities.”¹³

13. Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 41 (Elizabeth Wilmshurst, ed. 2012).

present — reluctant to countenance international intrusions into what they view as domestic matters and often deny the application of Common Article 3 altogether. Consider what might explain this continued resistance.

When the ICTY began to hear cases stemming from the violence in Kosovo, it had to address conflict characterization anew. Unlike the fighting in Croatia and Bosnia, the nature of the violence in Kosovo raised questions as to whether the situation met the threshold for an armed conflict.

PROSECUTOR v. FATMIR LIMAJ

Case No. IT-03-66-T, Judgement

Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005

[Note: Fatmir Limaj was a commander in the Kosovo Liberation Army in 1998 and was in charge of one of the prison camps in Kosovo when the alleged crimes were committed, including inhumane treatment and torture of Serb prisoners and murder of Serb civilians.]

1. The existence of an armed conflict and nexus

(a) Law

83. In order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute, two preliminary requirements must be satisfied. There must be an armed conflict, whether international or internal, at the time material to the Indictment, and, the acts of the accused must be closely related to this armed conflict.

84. The test for determining the existence of an armed conflict was set out in the *Tadić* Jurisdiction Decision and has been applied consistently by the Tribunal since:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

Under this test, in establishing the existence of an armed conflict of an internal character the Chamber must assess two criteria: (i) the intensity of the conflict and (ii) the organisation of the parties. These 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." The geographic and temporal framework of this test is also settled jurisprudence: crimes committed anywhere in the territory under the control of a party to a conflict, until a peaceful settlement of the conflict is achieved, fall within the jurisdiction of the Tribunal.

85. The Defence submit that in determining the existence of an armed conflict for the purposes of the Tribunal's jurisdiction the Chamber may consider the insurgents' control over a determinate territory, the government's use of army against the insurgents, the insurgents' status as belligerents, and whether the insurgents have a State-like organisation and authority to observe the rules of war. This submission draws on the International Committee of the Red Cross ("ICRC") Commentary to

Common Article 3 of the Geneva Conventions, which is the basis for the charges brought under Article 3 of the Statute. In the relevant part, the Commentary lists different conditions for the application of Common Article 3 which were discussed at the Diplomatic Conference for the Geneva Conventions. The Commentary explicitly clarifies, however, that this list is "in no way obligatory" and is suggested merely as "convenient criteria" to distinguish a genuine armed conflict from an act of banditry or an unauthorised or short-lived insurrection. It further states:

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.

86. The drafting history of Common Article 3 provides further guidance. Several proposed drafts of what later became known as Common Article 3 sought to make its application dependant, *inter alia*, on conditions such as an explicit recognition of the insurgents by the *de jure* government, the admission of the dispute to the agenda of the Security Council or the General Assembly of the United Nations, the existence of the insurgents' State-like organisation, and civil authority exercising *de facto* authority over persons in determinate territory. However, none of these conditions was included in the final version of Common Article 3, which was actually agreed by the States Parties at the Diplomatic Conference. This provides a clear indication that no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions. . . .

88. The Defence submit even further that the extent of organisation of the parties required for establishing an armed conflict, as well as, generally, the level of its intensity, have not yet been defined by the jurisprudence of the Tribunal. They submit that the law does not require the impossible and that, in order to be bound by international humanitarian law, a party to a conflict must be able to implement international humanitarian law and, at the bare minimum, must possess: a basic understanding of the principles laid down in Common Article 3, a capacity to disseminate rules, and a method of sanctioning breaches. They also refer to Additional Protocol II to the Geneva Conventions, which requires a higher standard for establishment of an armed conflict, and submit that in order for Additional Protocol II to apply it must be established that the insurgent party (in the present case, the KLA) was sufficiently organised to carry out continuous and persistent military operations and to impose discipline on its troops, that it exercised some degree of stability in the territories it was able to control and had the minimum infrastructure to implement the provisions of Additional Protocol II.

89. The Chamber does not share this view. The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, 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." Therefore, some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no

determination of individual criminal responsibility is intended under this provision of the Statute. This position is consistent with other persuasive commentaries on the matter. A study by the ICRC submitted as a reference document to the Preparatory Commission for the establishment of the elements of crimes for the ICC noted that:

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

90. For these reasons the Chamber will apply the test enumerated in the *Tadić* Jurisdiction Decision to determine whether the existence of an armed conflict has been established. Consistently with decisions of other Chambers of this Tribunal and of the ICTR, the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis. By way of example, in assessing the intensity of a conflict, other Chambers have considered factors such as the 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. With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms. . . .

(b) Findings

93. The Indictment alleges that an armed conflict between Serbian forces and the KLA existed in Kosovo not later than early 1998. The Chamber heard evidence and is satisfied that the Serbian forces involved in Kosovo in 1998 included substantial forces of the Army of Yugoslavia ("VJ") and the Serbian Ministry of Internal Affairs ("MUP"), i.e., the police, and, therefore, constitute "governmental authorities" within the meaning of the *Tadić* test. The Chamber will discuss below whether the Prosecution has established that the KLA possessed the characteristics of an organised armed group, within the meaning of the *Tadić* test, and whether the acts of violence that occurred in Kosovo in the material time reached the level of intensity required by the jurisprudence of the Tribunal to establish the existence of an armed conflict.

(i) Organisation of the KLA . . .

95. Further, as the Chamber has found earlier in this decision, progressively from late May to late August 1998 the territory of Kosovo was divided by the KLA into seven zones: Drenica, Dukagjin, Pastrok, Shala, Llap, Nerodime, and Karadak. Each zone had a commander and covered the territory of several municipalities. The level of organisation and development in each zone was fluid and developing

and not all zones had the same level of organisation and development; this was significantly influenced by the existence and extent of the KLA's presence in each zone before April 1998. . . .

98. While, not necessarily without fail, the Chamber accepts that, generally, zone commanders acted in accordance with directions from the General Staff. The "Provisional Regulations for the Organisation of the Army's Internal Life" of the KLA ("Regulations") were distributed to the various units by the General Staff. . . .

100. . . . The General Staff was also active in organising issues of overall importance for the functioning of the KLA, such as the supply of weapons. . . .

101. Further, it was the General Staff that issued political statements and communiqués which informed the general public in Kosovo and the international community of its objectives and its activities. Political Statement No. 2 of the KLA, issued by the General Staff on 27 April 1998 and published in the Kosovo newspaper "Bujku" two days later, described the KLA and its political goals as follows:

The KLA constitutes the integrity of the armed forces of Kosovo and its occupied territories, and its aim is the liberation and unification of the occupied territories of Albania. . . .

110. The KLA Regulations further support the existence of such an organisational structure and hierarchy. Although the Regulations are dated "1998" and the precise date of their promulgation is not identified, the Chamber accepts from the evidence, and finds, that at least by the end of June 1998 these Regulations were available and were being distributed among KLA soldiers at various positions. . . .

111. The Regulations, *inter alia*, established several ranks of KLA servicemen, defined the duties of the unit commanders and deputy unit commanders, as well as the duties of the company, platoon, and squad commanders, and created a chain of military hierarchy between the various levels of commanders. It was declared in the Regulations that "obedience, respect and orders strictly follow the chain of military hierarchy." The Regulations authorised an officer at a higher level "to demand from an officer beneath him the enforcement of the law, of regulations, of orders, instructions, etc." and provide that "a junior officer is obliged to carry out orders, decisions, instructions, etc." Further, the Regulations contained explicit provisions directed to guaranteeing that orders would be executed down the hierarchy. . . .

123. The evidence varies considerably as to the supply and use of uniforms in the KLA in the period before August 1998. Some evidence indicates that by February 1998 most of the KLA soldiers had uniforms with badges identifying their allegiance, although the evidence indicates that the military uniforms were of varying nature. Some KLA soldiers wore some self-made uniforms. Others had no uniforms at all. As with most things the position regarding uniforms improved as the end of 1998 neared. While the existence of a uniform may be indicative of the existence of a well-organised entity, in the view of the Chamber, this factor alone is not determinative in this case of the existence of an organised military structure, as it has little bearing on the functioning of the KLA, especially having regard to its rapid expansion after March 1998 which undoubtedly placed unanticipated strain on the provision of commodities such as uniforms, at a time when other needs were clearly more relevant to the military functioning of the KLA. . . .

125. Indicative of the extent of the KLA's organisation is its role in the negotiations with representatives of the European Community and foreign missions based in Belgrade. Jan Kickert, a diplomat with the Austrian Embassy in Belgrade, indicated that by the middle of 1998 it had become evident that a solution of the Kosovo crisis would not be achieved without the involvement of the KLA...

[Three meetings took place in July 1998 with representatives of the European Union, the international community and the KLA.]

129. As this evidence confirms, by July 1998 the KLA had become accepted by international representatives, and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis. This discloses and confirms that by that time the KLA had achieved a level of organisational stability and effectiveness. In particular this gave it the recognised ability to speak with one voice and with a level of persuasive authority on behalf of its members. . . .

134. In the Chamber's finding, before the end of May 1998 the KLA sufficiently possessed the characteristics of an organised armed group, able to engage in an internal armed conflict.

(ii) Intensity of the conflict

135. Sporadic acts of violence between Serbian forces and the KLA occurred in Kosovo in 1997 and early 1998. Some of these acts of violence were discussed by the Chamber earlier in this decision. The most significant of them was the attack at the end of February 1998 and in early March 1998 on the villages Qirez/Cirez, Likoshan/Likosane, and Prekazi-i-Poshtem/Donje Prekaze located in the Drenica area, in the course of which 83 Kosovo Albanians were killed. International observers present in Kosovo at the time testified that these events marked a turning point in the development of the conflict in Kosovo.

136. Around 5 March 1998 a police action was carried out in the area of Kline/Klina-Laushe/Lausa, located southwest of Prekazi/Prekaze. Reports indicated that buildings were attacked with heavy weapons and mortars. A group of diplomats who visited Prekazi/Prekaze on 8 March 1998 reported great devastation to a limited number of buildings, continuing heavy police presence and a complete absence of civilian activities. Houses were torched, burned, or fired at. Serbian forces from the Ministry of the Interior ("MUP") and forces associated with Serbian special units equipped with armoured personnel carriers and other heavy vehicles were involved in the operation. . . .

159. On or about 23 June 1998 the KLA took control of a coal mine and the village of Bardhi-i-Madh/Veliki Belacevac, 10 km west of Prishtina/Pristina. Shooting could be heard in the area for the entire day and Kosovo Albanian residents were reported to have fled to Prishtina/Pristina. . . . About a week later the Serbian forces attempted to retake the mine. Reports indicate that the Serbian forces used tear gas, that automatic gunfire and explosions were heard in the area, and that security forces, the VJ, and armed Serbian civilians were involved in this operation. This was the first action in which the participation of the VJ was officially confirmed by the Serbian side. . . .

166. As discussed earlier, tanks and armoured vehicles, heavy artillery weapons, air defence systems, APCs, machine guns, and explosives, among other weapons; were used in the conflict. . . .

168. The Defence submit 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. In the Chamber's view, the acts of violence that took place in Kosovo from the end of May 1998 at least until 26 July 1998 are not accurately described as temporally sporadic or geographically disperse. As discussed in the preceding paragraphs, periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area.

169. The Defence further submit that a purely one-sided use of force cannot constitute protracted armed violence which will found the beginning of an armed conflict. In the Chamber's view, this proposition is not supported by the facts established in this case. While the evidence indicates that the KLA forces were less numerous than the Serbian forces, less organised and less prepared, and were not as well trained or armed, the evidence does not suggest that the conflict was purely one-sided. KLA attacks were carried out against a variety of Serbian military, community and commercial targets over a widespread and expanding area of Kosovo. Further, KLA forces were able to offer strong and often effective resistance to Serbian forces undertaking military and police operations. While very large numbers of Serbian forces, well equipped, were deployed in the relevant areas of Kosovo during the period relevant to the Indictment, the KLA enjoyed a significant level of overall military success, tying up the Serbian forces by what were usually very effective guerrilla-type tactics. . . .

(iii) Conclusion

171. The Chamber is satisfied that before the end of May 1998 an armed conflict existed in Kosovo between the Serbian forces and the KLA. By that time the KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organisation. Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police, as well as to recruit, train and equip new members. Although generally inferior to the VJ and MUP's equipment, the KLA soldiers had weapons, which included artillery mortars and rocket launchers. By July 1998 the KLA had gained acceptance as a necessary and valid participant in negotiations with international governments and bodies to determine a solution for . . . Kosovo's crisis, and to lay down conditions in these negotiations for refraining from military action.

172. Further, by the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo-Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo-Macedonian border in the south and the municipality of Mitrovica/Kosovka Mitrovica in the north. The ability of the KLA to engage in such varied operations is a further indicator of its level of organisation. Heavily armed special forces of the Serbian MUP and VJ forces were committed to the conflict on the Serbian side and their efforts were directed to the control and quelling of the KLA forces. Civilians, both Serbian and Kosovo Albanian, had been forced by the