

Revisiting the scope of application of Additional Protocol II: Exploring the inherent minimum threshold requirements

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Abstract

Currently, the landscape of armed conflict reflects a complex reality: Multiple non-international, as well as international armed conflicts, often co-exist in the same territory during the same time frame. Consequently, not all these conflicts are regulated under the same rules of international humanitarian law. In the period leading up to mid-2019, multiple armed conflicts of a mixed nature prevailed. On the African continent the conflicts in the Central African Republic, Mali, South Sudan and the Democratic Republic of the Congo are examples of such complexity which presents a challenge in conflict classification. In each of these conflicts, some of the armed groups display a degree of territorial control, with the result that these conflicts may trigger the application of Additional Protocol II. Additional Protocol II is the only treaty dedicated to the regulation of non-international armed conflict. It supplements and elaborates on the basic guarantees of humane treatment codified in Common Article 3, thus offering better protection to those involved in an Additional Protocol II-type non-international armed conflict. Article 1(1) of Additional Protocol II necessitates a high degree of organisation to be in place for an armed group to qualify as an organised armed group within the scope of application of this treaty. Not every 'band' acting under a 'leader' qualifies as an organised armed group under Additional Protocol II as only those armed groups that satisfy certain criteria are considered to be an armed group for the purposes of Additional Protocol II. Even though this instrument has celebrated 40 years of survival since its activation in 1978, its scope of application has received scant attention in scholarly work. This contribution sets out to clarify the minimum threshold requirements

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inherent in the organisational criteria that non-state fighting units have to meet under Article 1(1) of Additional Protocol II. It will achieve its aim by employing the rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Keywords: Additional Protocol II, conflict classification, non-international armed conflict, organisational criteria, territorial control, sustained and concerted military operations, implementation of Additional Protocol II

1 INTRODUCTION

It is the purpose in this article to promote a better understanding of the minimum degree of organisation that an organised armed group must meet under Article 1(1) of Protocol II Additional to the Geneva Conventions (Additional Protocol II) in order to become a party to an Additional Protocol II-type non-international armed conflict.¹ Additional Protocol II serves to supplement and develop the regime codified in Common Article 3.^{2,3} It is the only treaty that exclusively

¹ Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

² Common Article 3 Common to the Geneva Conventions (Common Article 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).

³ Protocol II op cit note 1, art 1(1): 'This Protocol, *which develops and supplements* Article 3 common to the Geneva Conventions of 12 August 1949 ...' (emphasis added). For a discussion of the drafting history of Additional Protocol II as well as an analysis of its content, see L Moir *The Law of Internal Armed Conflict* (2003) 89–132; L Zegveld *Accountability of Armed Opposition Groups in International Law* (2002) 9–34; see A Cassese 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *ICLQ* 416. In essence, Additional Protocol II expands on the contents of Common Article 3 by including the detailed rules regulating fundamental guarantees of humane treatment (arts 4 and 5); judicial guarantees (art 6); the treatment of the wounded, sick and shipwrecked (arts 7 and 8); and the use of the Red Cross emblem (art 12). Additional Protocol II provides specific rules for the protection of children during non-international armed conflicts (art 4(3)) and offers rules

regulates non-international armed conflict.⁴ Although this treaty has been in force for more than 40 years, its application remains pivotal, especially in the African context, as multiple complex conflicts co-exist in single territories (such as the ongoing conflicts in the Central African Republic,⁵ Mali,⁶ the Democratic Republic of the Congo ('DRC')⁷ and South Sudan)⁸. The application of Additional Protocol II can offer better protection (than that under Common Article 3 alone) to civilians as well as those party to the conflict.⁹ The importance of conflict classification will be elaborated on in part 2 of this contribution, but it must be stated at the outset that different international humanitarian law rules apply to different categories of conflict.¹⁰

that provide for the protection of medical personnel and units as well as enabling medical personnel to perform their duties (arts 9–12). Additional Protocol II further provides rules for the conduct of hostilities, including the protection of the civilian population against attacks (art 13); for protecting objects indispensable to the survival of the civilian population (art 14); for offering protection to works and installations harbouring dangerous forces (art 15); and for protecting cultural objects (art 16). Additional Protocol II also prohibits the forced movement of civilians (art 17) and allows for and regulates relief operations (art 18).

⁴ Protocol II (see note 1). For an overview of the content and relevance of Additional Protocol II, see Fausto Pocar and Gian Luca Berute (eds) *International Institute of Humanitarian Law: 'The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives; 40th Round Table on Current Issues of International Humanitarian Law (San Remo, 7th–9th September 2017'*, available at <http://iihl.org/wp-content/uploads/2018/07/The-Additional-Protocols-40-Years-Later-New-Conflicts-New-Actors-New-Perspectives_2.pdf> (accessed on 6 April 2020).

⁵ For an overview of the nature of the conflict in the Central African Republic and the parties involved, see A Bellal 'The War Report: Armed Conflicts in 2018' 82–92, available at <<https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>> (accessed on 12 July 2019).

⁶ For an overview of the nature of the conflict in Mali and the parties involved, see Bellal (see note 5) 102–116.

⁷ For an overview of the nature of the conflict in the DRC and the parties involved, see Bellal (see note 5) 93–101.

⁸ For an overview of the nature of the conflict in South Sudan and the parties involved, see Bellal (see note 5) 116–123.

⁹ Such complex conflicts exist outside the African continent, for instance the situation in Syria. For a description of the situation in Syria as at the end of 2018, see Bellal (see note 5) 123–135.

¹⁰ For an overview of classification, see Marco Sassòli 'Scope of Application: When Does IHL Apply' in Marco Sassòli (ed) *International Humanitarian Law: Rules Controversies, and Solutions to Problems Arising in Warfare* (2019) 168–203. See also Marco Sassòli 'International and Non-International Armed Conflicts' in Sassòli op cit 204–230 for an overview of the rules of international humanitarian law applicable to the different categories of armed conflict. 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

Two overall categories of armed conflict exist namely, international armed conflict¹¹ and non-international armed conflict^{12,13}. In conflict classification, the key is to determine who is a party to a conflict.¹⁴ An international armed conflict occurs when there is fighting between the

in nature, see Dieter Fleck 'The Law of Non-International Armed Conflict' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* 3ed (2013) 603–605.

¹¹ Common Article 2 gives content to the notion 'international armed conflict' by determining that '[t]he 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 recognised by one of them'. Common Article 2 Common to the Geneva Conventions, Geneva Conventions (See note 2). In its *Ntaganda* decision on 8 July 2019 Trial Chamber VI of the International Criminal Court defined an international armed conflict to exist 'whenever there is a resort to armed force between states'. *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Bosco Ntaganda* Judgment, Trial Chamber VI, 8 July 2019 Case No ICC-01/04-02/06 (hereafter *Ntaganda* case). For a better understanding of the construct 'international armed conflicts', see note 10 at 169–180.

¹² The concept of non-international armed conflict is not defined in treaty law. The opposing sides in a non-international armed conflict must be either the armed forces of the territorial state opposing a non-state fighting unit or non-state fighting units opposing one another in the absence of state involvement. In *Prosecutor v Dusko Tadic a/k/a 'Dule': Opinion and Judgment* Trial Chamber I of the ICTY it was determined that a non-international armed conflict in the context of Common Article 3 exists when the fighting unit of the organised armed group involved in the conflict is sufficiently organised and the violence associated with the conflict is protracted in nature; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 *Prosecutor v Dusko Tadic a/k/a 'Dule'* IT-94-1-T 7 May 1997 (Opinion and Judgment) Trial Chamber I, para 561 (hereafter *Tadic* Appeal). 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, namely, 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. See *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.

¹³ The *Ntaganda* case (see note 11) para 702. For an overview of the distinction between international armed conflict and non-international armed conflict, see Kubo Mačák *Internationalized Armed Conflicts in International Law (Oxford Monographs in International Humanitarian and Criminal Law)* (2018) 9–23.

¹⁴ Fleck op cit note 10 at 50; Jann K Kleffner 'Scope and Application of International Humanitarian Law' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* 3ed (2013) 50. See also Tilman Rodenhäuser 'Parties to Non-International Armed Conflicts under International Treaty Law' in Tilman Rodenhäuser (ed) *Organizing Rebellion: Non-State Armed Groups under*

armed forces of two or more state parties,¹⁵ or in situations as described in Article 1(4) of Additional Protocol I to the Geneva Conventions.¹⁶ A non-international armed conflict exists where a state's armed forces oppose organised armed groups in its territory or where organised armed groups fight each other absent state involvement in a single territory and the fighting is sufficiently severe that the violence stemming from it is protracted in nature.¹⁷ Treaty law creates two distinct categories of non-international armed conflict.¹⁸ The first category is non-international armed conflicts that meet the minimum threshold requirements under Common Article 3.¹⁹ The second category of

International Humanitarian Law, Human Rights Law, and International Criminal Law (2018) 33–60.

¹⁵ Common Article 3 gives content to the difference between the actors involved in an armed conflict which is deemed to be either 'international' or 'not international in character' within the scope of application of the Geneva Conventions: '[T]he 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 recognised by one of them ...' (Geneva Conventions (see note 2)).

¹⁶ See Additional Protocol I which expands the notion of international armed conflict to include armed conflicts in which peoples oppose colonial governments, racist regimes, alien occupation or asserting a right to self-determination. Article 1(4) of Additional Protocol I determines:

'The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.'

International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3.

¹⁷ See *Tadic Appeal* (see note 12) para 70. In the absence of a treaty definition for the legal construct 'non international armed conflict', the Appeals Chamber of the ICTY explained what it considered to be the characteristics of armed conflict in *Prosecutor v Dusko Tadic a/k/a 'Dule': Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction*. It considered an armed conflict to exist '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'. This understanding of the term 'armed conflict' is referred to as the *Tadic* formulation.

¹⁸ The two categories are Common Article 3-type non-international armed conflict as well as Additional Protocol II-type non-international armed conflict.

¹⁹ Trial Chamber I of the ICTY refined the *Tadic* formula to serve as the definitive criterion for determining the existence of a non-international armed conflict under Common Article 3 specifically in *the Tadic Appeal*. It determined that '[t]he 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

non-international armed conflict refers to those armed conflicts that satisfy the scope of application under Additional Protocol II.²⁰

Article 1(1) of Additional Protocol II determines the material field of application of the treaty and refers specifically to the term ‘organised armed groups’.²¹ In accordance with this article, Additional Protocol II applies to warring parties within the territory of the contracting state.²² The warring parties are armed forces and dissident armed forces or other organised armed groups.²³ In the last sentence of this provision, Additional Protocol II inserts the criteria that such organised armed groups should meet in order for Additional Protocol II to be applicable.²⁴ It establishes that for this agreement to find application to organised armed groups, such organised armed groups should be under responsible command and exercise control over the territory.²⁵ Territorial control should be exercised to such an extent that these

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²⁰ See art 1(1) of Additional Protocol II which determines its scope of application. Protocol II (see note 1).

²¹ *Ibid*; Protocol II (see note 1) art 1(1).

‘This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of this territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’ (emphasis added).

²² *Ibid*, art 1(1).

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

organised armed groups can carry out concerted military operations and implement the present Protocol.²⁶

A survey of the existing literature reveals that scholarly work regarding the scope of application of Additional Protocol II is limited.²⁷ Although a select few authors have clarified the meaning of the additional criteria that underpin the notions of ‘organised armed groups’ and ‘intensity’ for this instrument, unanswered questions concerning the exact scope of some of these obligations remain.²⁸ It may be that some consider the additional criteria for its scope of limitation to be clear or that this instrument is infrequently used in the areas of geographic interest to these scholars.²⁹

However, as this treaty is the most comprehensive instrument regulating the law of non-international armed conflict, it is crucial that there should be an objective assessment of whether or not an Additional Protocol II-type armed conflict exists.³⁰ To clarify the minimum threshold requirements that organised armed groups must satisfy under Additional Protocol II, the author has conducted desk-based research using the traditional sources of international law as a point of departure.³¹ As this contribution seeks to determine the content of the notion ‘organised armed groups’ under Article 1(1) of Additional Protocol II, the law of treaty interpretation as set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (‘VCLT’) is frequently employed to facilitate the interpretation of this provision.³²

The central research questions in this article are to determine the content of the notion ‘organised armed group’ as it is understood in the context of Additional Protocol II and whether or not there are any benchmark tests inherent in the additional organisational criteria

²⁶ Ibid.

²⁷ The available literature concerning Additional Protocol II compared to scholarly work concerning Common Article 3 is limited. A very insightful work concerning Additional Protocol II, however, is Sylvie Junod ‘Additional Protocol II: History and Scope’ (1983) 33 *American University Law Review* 37. In his monograph Tilman Rodenhäuser provides a brief overview of the organisational criteria of Additional Protocol II; see Rodenhäuser (See note 14) 49–54.

²⁸ Moir op cit note 3 at 99–108; Sandesh Sivakumaran *The Law of Non-International Armed Conflict* (2012) 182–189; Junod op cit note 27.

²⁹ For a discussion of the application of Additional Protocol II in practice, Moir op cit note 3 at 119–132.

³⁰ For an overview of the content of this treaty, Zegveld op cit note 3 at 9–34; Cassese op cit note 3 at 416; Moir op cit note 3 at 109–32.

³¹ Traditional sources are the sources of international law listed in art 38(1) of the International Court of Justice Statute. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute).

³² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

listed in Article 1(1) of Additional Protocol II. In order to address these research questions, the article is divided into four parts, including this introduction. Part 2 of the article highlights the importance of conflict classification. Part 3 of the contribution fleshes out the four requirements listed under Article 1(1) of Additional Protocol II to clarify the content of the organisational criteria established in this provision and to determine whether any of these organisational criteria imposes minimum threshold requirements. Finally, a conclusion is drawn in part 4.

2 THE IMPORTANCE OF CONFLICT CLASSIFICATION

During the 38th Round Table on Current Issues of International Humanitarian Law held in San Remo, Italy, the question of whether or not the categorisation of armed conflict matters was posed to Richard Gross, who at the time served as the Legal Counsel to the Chairman of the Joint Chiefs of Staff, United States Department of Defence, Washington DC.³³ In responding, he highlighted to whom classification indeed matters:

Yes, it matters, it absolutely matters, it matters to policy makers, it matters to strategists and strategic level leaders; it matters to operational planners; and it matters certainly to the legal advisors of armed forces. It is an important question. It is important to determine what sort of armed conflict we are in so that we may advise our clients and so that our clients may make decisions.³⁴

The category of armed conflict, as well as the category of non-international armed conflict, determine which applicable corpus of the law of armed conflict regulates a situation.³⁵ Therefore, it is possible that the armed forces belonging to the territorial state on whose territory a conflict is occurring may operate under the law of international armed conflict or the law of non-international armed

³³ Carl Marchand and Gian Luca Beruto (eds) *International Institute of Humanitarian Law: The Distinction Between International and Non-International Armed Conflicts: Challenges for IHL? 38th Round Table on Current Issues of International Humanitarian Law (San Remo, 3rd–5th September 2015)* (2016) 46–49.

³⁴ His answer is more nuanced as he highlighted in which respects classification does or does not matter. See his contribution in Marchand op cit note 33 at 46–49.

³⁵ For a general overview of the importance of conflict classification, see Bradley op cit note 19 at 55–58; Marchand and Beruto (See note 33); Sassòli op cit note 10 at 168–203. For an overview of the differentiation of international humanitarian law applicable to international and non-international armed conflicts as well as the areas of contention owing to this differentiation, see Sassòli op cit note 10 at 204–230.

conflict³⁶ where a distinction is made between the rules contained in Common Article 3 or Additional Protocol II, depending on the enemy they engage.³⁷ The armed forces may even operate in a law enforcement paradigm where internal disturbances or political protests co-exist with an armed conflict in its territory.³⁸

The reality of mixed armed conflicts,³⁹ hybrid warfare,⁴⁰ cross-border non-international armed conflict,⁴¹ spill-over non-international

³⁶ For a discussion of the meaning of the term ‘the law of non-international armed conflict’, see Yoram Dinstein *Non-International Armed Conflicts in International Law* (2014) 3. For a breakdown and comprehensive discussion of the sources of the law of non-international armed conflict, see Sivakumaran op cit note 28 at 101–152 and Moir op cit note 3 at 30–210.

³⁷ Bradley op cit note 19 at 57.

³⁸ Ibid. For a discussion of such below-the-threshold situations, Bradley op cit note 19 at 11; T Haecck *Armed Conflict, Internal Disturbances or Something Else? The Lower Threshold of Non-International Armed Conflict* (2012) 15–16.

³⁹ In the *Tadic* case Trial Chamber discussion I recognise the reality of there being mixed armed 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.’ *Tadic* Appeal (see note 12) para 561 (emphasis added). For a discussion of mixed armed conflicts, see D Akande ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in E Wilmschurst (ed) *International Law and the Classification of Conflicts* (2012) 63.

⁴⁰ No agreed-upon legal definitions of the construct ‘hybrid warfare’ exist; this term rather should be viewed as a term of art or descriptive in nature. Suckow-Ziemer describes this term as follows:

‘Hybrid warfare occupies the uncomfortable middle ground between conventional and unconventional warfare, mixing elements of both in the process. Hybrid wars are, broadly defined, conflicts involving one or more non-state actors that nevertheless possess the attributes of a state’s military. Frequently hybrid combatants have the backing of a foreign power which supplies them with money, equipment and in some cases training. This combination produces a fighting force that is capable of conducting combat operations on the modern battlefield while existing outside of the fetters of law and doctrine which constrain state militaries.’

H Suckow-Ziemer ‘Hybrid War: A Definition and Call for Action’ (March 2018), available at <<http://yris.yira.org/comments/2323>> (accessed on 12 July 2019).

⁴¹ Vite defines cross-border armed conflicts as follows:

‘Another possibility is that state forces enter into conflict with a non-governmental armed group located in the territory of a neighbouring state. In that case, there is thus no spillover or exportation of a pre-existing conflict. The hostilities take place on a cross-border basis. If the armed group acts under the control of its state of residence, the fighting falls within the definition of an international armed conflict between the two states concerned. If, however, this group acts on its own initiative, without being at the service of a government party, it becomes more difficult to categorise the situation.’

armed conflict⁴² and transnational armed conflict⁴³ demands a clear understanding of conflict classification in order to navigate and determine when the law of armed conflict becomes applicable and which rules regulate situations.⁴⁴ As the majority of conflicts are non-international in nature and international armed conflicts are easier to identify, therefore the need for clarification of the classification of the two types of non-international armed conflict remains important.⁴⁵

From an operational perspective, clarity indeed is needed as is highlighted in the aforementioned quote by Richard Gross.⁴⁶ At state level, military commanders and lawyers must plan military operations within the correct legal framework.⁴⁷ For instance, if they foresee that they might have to detain individuals, then the rules of detention differ between situations of international armed conflict, Common Article 3-type non-international armed conflict, and an Additional Protocol II-type non-international armed conflict.⁴⁸ This distinction is

S Vite 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 90.

⁴² Schorberl defines spill-over armed conflicts as conflicts that are fought between state armed forces and opposing non-state armed groups or among non-state armed groups fighting one another with such fighting spilling over into the territory of a neighbouring state. K Schorberl 'The Geographical Scope of Application of The Conventions' in A Clapham, P Gaeta and M Sassòli (eds) *The 1949 Geneva Conventions: A Commentary* (2015) 77. For a discussion of the geographic limitations of non-international armed conflicts, see M Bradley 'Expanding the Borders of Common Article 3 in Non-International Armed Conflicts: Amending its Geographical Application Through Subsequent Practice?' (2017) 64:3 *Netherlands International Law Review* 375–406.

⁴³ Kress agrees that this construct merely is a descriptive term and not a legal term. He describes this occurrence as a 'descriptive term for a phenomenon which may be defined as cross-border armed violence between a state and a (collective) non-state actor'. C Kress 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *JCSL* 245.

⁴⁴ Vite op cit note 41 at 69–94.

⁴⁵ Bellal op cit note 5 at 31–35.

⁴⁶ Marchand and Beruto op cit note 33 at 47.

⁴⁷ Andrew J Carswell (ed) 'Handbook on International Rules Governing Military Operations' (2013) para 2.5 pp 68–70, available at <https://www.icrc.org/sites/default/files/topic/file_plus_list/0431-handbook_on_international_rules_governing_military_operations.pdf> (accessed on 14 October 2017). See also C Garraway 'Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces' in N Hayashi (ed) *National Military Manuals on the Law of Armed Conflict* FICHL Publication Series No 2 2ed (2010) 52 available at <<https://www.toaep.org/ps-pdf/2-hayashi-second>> (accessed on 16 April 2020). Military manuals serve to disseminate the law of armed conflict for this purpose.

⁴⁸ For an overview of the relevance of classification pertaining to the law of detention in armed conflict, see Marco Sassòli 'Selected Cross-Cutting Issues' in Marco Sassòli *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019) 611–624. Sassòli op cit note 10

relevant not only to the territorial state but also to troop-contributing states operating in complex battle arenas.⁴⁹ Often soldiers and their commanders cannot contact their legal advisors when operating on the ground. Officers of different ranks will not have received the same level of legal training and do not have the luxury of considering the nuances of conflict classification in a real-time life and death situation.

Equally, some organised armed groups may wish to operate within the confines of the law of non-international armed conflict⁵⁰ and their fighters cannot be expected to entertain various theories on conflict classification, which necessitates simple and clear-cut triggers for the application of either Common Article 3 or Additional Protocol II. It is important to refine the threshold tests of conflict classification and the classification criteria can never be defined clearly enough. To sum up, if the law of conflict classification is accessible and clear to all involved, the chances are far greater that those affected will be assisted in arriving at correct decisions in urgent or borderline situations and will be less likely to breach the rules of international humanitarian law.

3 DETERMINING THE MINIMUM THRESHOLD OF ORGANISATION

The adjective ‘organised’ in the term ‘other organised armed groups’ suggests an official level of organisation in order for a group to qualify as an ‘organised armed group’ party to an Additional Protocol II-type conflict.⁵¹ The adjective ‘organised’ means that something must be ‘orderly and efficient’, indicating discipline and a goal-orientated functionality, and is also defined as ‘planned and controlled on a large scale and involving many people’.⁵² In the context of an armed group that is party to an Additional Protocol II-type conflict, this definition

(‘International and Non-International Armed Conflicts’) at 228 for a discussion as to why the differentiation of these rules remains controversial.

⁴⁹ See Andrew Clapham ‘Defining Armed Conflicts under the Additional Protocols: Is There a Need for Further Clarification’ in Pocar and Berute op cit note 4 at 38–39 when he discusses the application of Additional Protocol I and Additional Protocol II to conflicts outside the territory of the state party, for instance when multi-national forces are deployed to an outside state.

⁵⁰ Jann K Kleffner ‘The Applicability of International Humanitarian Law to Organized Armed Groups’ (2011) 93:882 *International Review of the Red Cross* 456–460. See also Hannah Read ‘Rebel Group Compliance with International Humanitarian Law and Foreign State Sponsorship’ (2019) Political Science Department – Theses, Dissertations, and Student Scholarship, available at <<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1050&context=poliscitheses>> (accessed on 12 July 2019).

⁵¹ Ibid.

⁵² M O’Neill and E Summers *Collins English Dictionary* (2015) 554.

entails that such a collective needs to be controlled, that disciplinary structures need to be available to ensure order, and that such an armed group must have the capability of planning its military actions.⁵³ Additional Protocol II goes further than merely implying that a degree of organisation needs to exist within this other party opposing the government.⁵⁴ The latter part of Additional Protocol II provides for specific organisational requirements that have to be met in order for an armed group to be sufficiently organised to permit the application of Additional Protocol II.⁵⁵ Only once all these organisational criteria are fulfilled will the armed group qualify as a party (other organised armed group) to an Additional Protocol II-type conflict.⁵⁶ In terms of Additional Protocol II an armed group is sufficiently organised if it is under responsible command; when the armed group exercises control over part of the territory of the state; if the armed group is capable of carrying out sustained and concerted military operations; and, finally, when such armed group is able to implement Additional Protocol II.⁵⁷

3.1 Responsible command

An armed group needs to possess a responsible command structure to give effect to the additional organisational criteria included in Additional Protocol II.⁵⁸ It would be impossible for an armed group to exercise control over territory, to engage in sustained and concerted military operations or to implement the provisions of Additional Protocol II if it were not under responsible command. It may also be argued that the fulfilment of the other criteria (territorial control, sustained and concerted military operations and the ability to apply Additional Protocol II) serves as evidence that an organised armed group does possess a responsible command structure. This part analyses

⁵³ ICTR (Trial Chamber) *Prosecutor v Ignace Bagilishema* (7 June 2001) Case No ICTR-95-1A-T para 171 (hereafter the *Bagilishema Judgement*).

⁵⁴ See Protocol II (note 1) art 1(1).

⁵⁵ See Protocol II (note 1) art 1(1).

⁵⁶ *Ibid.* 'This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which takes place in the territory of a High Contracting Party between its dissident armed forces or other organized armed groups which, *under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*' (emphasis added).

⁵⁷ See Protocol II (note 1) art 1(1); *Bagilishema Judgment* (see note 53) para 171.

⁵⁸ Protocol II (note 1) art 1(1).

Article 87 of Additional Protocol I⁵⁹ as well as customary international humanitarian law and its relationship to Article 1(1) of Additional Protocol II in order to determine the content of the term ‘responsible command’ as included in Article 1(1) of Additional Protocol II.⁶⁰

The adjective ‘responsible’ is defined as ‘having control over’ or ‘authority over’ or ‘to be able to decide and to be held responsible’.⁶¹ The noun ‘command’ is understood as the ability to ‘order or compel’ or ‘to have authority over’.⁶² The literal meaning of this phrase implies the existence of leadership with the authority to issue orders to its subordinates. Such leadership furthermore has the capacity to hold its subordinates accountable for their actions. This ability reflects its degree of organisation. Therefore, the ordinary meaning of the term ‘responsible command’, read in the context of Additional Protocol II, implies the ability of the leadership of an armed group to exercise control.⁶³ It points to the existence of a well-organised leadership structure within the armed group which enables such an armed group to exercise control over territory and to order and execute military operations on a continuous basis.⁶⁴

In addition, the term ‘responsible command’ implies that such an armed group has the ability to reprimand members of the armed group should they violate the rules of Additional Protocol II.⁶⁵ The drafting history of Article 1(1) of Additional Protocol II provides that the ability of an armed group to implement and observe the conditions of Additional Protocol II is one of the duties underlying the doctrine of responsible command.⁶⁶ The possession of a responsible command leadership structure, in turn, is one of the organisational criteria inherent in the scope of the material application of Additional Protocol II.⁶⁷ The International Committee of the Red Cross (‘ICRC’) Commentaries to Article 1 of Additional Protocol II in addressing the meaning and content of the term ‘responsible command’ echo this understanding:

⁵⁹ Additional Protocol I (note 16).

⁶⁰ This approach is allowed for by the general rules of treaty interpretation as codified in art 31 of the Vienna Convention on the Law of Treaties. VCLT op cit note 32 at art 31.

⁶¹ M O’Neill and E Summers op cit note 52 at 679.

⁶² Ibid at 150.

⁶³ The ordinary meaning of responsible command. See M O’Neill and E Summers (note 52) at 679 read together with art 1(1) of Additional Protocol II (see note 1).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Additional Protocol II (see note 1) art 1(1).

The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.⁶⁸

The jurisprudence of the International Criminal Tribunal for Rwanda ('ICTR') gives content to the term 'responsible command'.⁶⁹ In the *Akayesu* case, Trial Chamber I *inter alia* had to determine whether the Rwanda Patriotic Front ('RPF') satisfied the organisational criterion that needed to be met for an armed group to qualify as a party to the Rwandan conflict.⁷⁰ This Trial Chamber specifically considered whether General Kagame had exercised responsible command over his troops, and it answered this question in the affirmative.⁷¹ Trial Chamber I came to this conclusion after having considered whether the RPF possessed structured leadership.⁷² Structured leadership is indicative of the fact that the organisation of a group has reached a sophisticated level.⁷³ The Trial Chamber found that the fact that the leadership was answerable to authority showed that the leadership was sufficiently structured.⁷⁴ Owing to the presence of such structured leadership, Trial Chamber I further found that it indeed was this sufficiently organised 'responsible' command structure that enabled the RPF to not only exercise control over Rwandan territory, but also to increase the size of the territory over which it exercised control.⁷⁵ The leadership of the RPF, thus, was organised to such an extent that it was able to gain control over more and more territory during the duration of the conflict.⁷⁶ This organisational ability of the RPF serves as evidence of the existence of structured leadership. As structured leadership is

⁶⁸ Y Sandoz, C Swinarski C and B Zimmerman *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (1987) para 4463.

⁶⁹ ICTR (Judgement Chamber 1) *Prosecutor v Akayesu* No (2 September 1998) Case No ICTR-96-4-T para 623 (hereafter *Akayesu* case); ICTY (Trial Chamber) *Prosecutor v Zejnil Delalic and Zdravko Mucic, Hazam Delic and Esad Landzo* (16 November 1998) Case No IT-96-21-T; ICTY (hereafter *Delalic* case); (Appeals Chamber) *Prosecutor v Sefer Halilovic* (16 October 2007) Public Case No IT-01-48-A (hereafter *Halilovic* Appeal Case); ICTY (Trial Chamber) *Prosecutor v Halilovic* (16 November 2005) Case No IT-01-48-T (hereafter *Halilovic* case).
⁷⁰ *Akayesu* case (see note 69) para 623.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

an indicator of a high level of organisation, Trial Chamber I concluded that the Patriotic Resistance Force possessed responsible command.⁷⁷

The RPF was effective on the battlefield and was able to continuously engage in military operations owing to the existence of a responsible command structure.⁷⁸ Evidence of this is the fact that the RPF systematically deployed its troops during active military operations.⁷⁹ Finally, the RPF had applied the provisions set out in Additional Protocol II, and its leadership was expressly committed to be bound by this treaty and other applicable rules of the law of non-international armed conflict.⁸⁰ This judgment is seminal as it establishes that one of the primary duties implied in the doctrine of responsible command is that a commander has to enforce the law of armed conflict upon his subordinates.⁸¹ This fact enables one to conclude that responsible command requires an armed group to be sufficiently organised to give effect to the organisational criterion provided in Additional Protocol II. It is also the case that it is the fulfilment of its organisational criterion as set out in Additional Protocol II that serves as evidence that an armed group has acted under responsible command.⁸²

Although Additional Protocol II fails to give specific content to what is meant by 'responsible command', its sister treaty, Additional Protocol I, does articulate and explain the content of what is expected of a commander.⁸³ Article 31(b) of the VCLT allows for the consultation of an instrument for interpretative purposes if such a treaty is closely related to the treaty in need of clarification.⁸⁴ Additional Protocol I and Additional Protocol II are such treaties and fall within the scope of application of Article 31(b) of the VCLT. The article employs Article 87 of Additional Protocol I⁸⁵ to provide guidance in aiding in

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid at para 174.

⁸⁰ Ibid.

⁸¹ *Akayesu* case (see note 69).

⁸² Protocol II (see note 1) art 1(1).

⁸³ Protocol I (see note 16).

⁸⁴ VCLT (see note 32).

⁸⁵ Protocol I op cit note 16 at art 87:

'Article 87 – Duty of commanders (1) The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and this Protocol Srti X for an argument on the customary status of responsible command. obligatory to all parties to any tipe of conflict. in re (2) In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are

the interpretation of the term 'responsible command' as included in Article 1 of Additional Protocol II.⁸⁶

According to Article 87 of Additional Protocol I the duty of commanders essentially entails that a commander must inform and educate his armed forces or members of his group with regard to the laws of war applicable to the conflict in which they are engaged. Education alone is not sufficient;⁸⁷ it is the responsibility of such a commander to prevent and suppress breaches of the law.⁸⁸ A commander has to prevent, to the greatest extent, violations of the laws of war.⁸⁹ Finally, responsible command entails that the commander has to take disciplinary steps should a violation be reported.⁹⁰ If a member of his armed forces or armed group is found guilty of such violations, these should be reported and the appropriate punishment imposed.⁹¹

The ICRC Commentaries give insight into the purposive formulation of Article 87 of Additional Protocol I.⁹² The Commentaries clearly state that the primary role of a military commander (whether state or non-state) is to exercise command.⁹³ Command is exercised through a hierarchical and disciplinary system aimed at ensuring compliance with the laws of armed conflict.⁹⁴ The ICRC further

aware of their obligations under Conventions and this Protocol. (3) The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'

⁸⁶ The author admits that Additional Protocol I concerns armed liberation movements opposing states during liberation conflicts. However, it is argued that this doctrine has reached customary status and that this provision reflects custom and the general content of this obligation will be obligatory to all parties to any type of conflict (Protocol I) (see note 16).

⁸⁷ Protocol I op cit note 16 at art 87.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid. This summary of the ICRC on the content of responsible command, as articulated by art 87 of Additional Protocol I, was echoed by the ICTY Trial Chamber in the *Delalic* case. *Delalic* op cit note 69 at para 334. The Trial Chamber summarised this duty as follows: 'As is most clearly evident in the case of military commanders by Article 87 of Additional Protocol I, international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.'

⁹² See Sandoz, Swinarski and Zimmerman op cit note 68 at para 3549.

⁹³ Ibid.

⁹⁴ Ibid.

explains that for the commander to promote and enforce the law of armed conflict, certain specific duties have to be performed by such a commander.⁹⁵ The Commentaries highlight three of the duties that the ICRC deems most important, namely, that the commander has to prevent breaches of the law from being committed; that breaches have to be suppressed as soon as they are brought to the attention of the commander; and, finally, that such breaches or violations of the laws of war need to be reported to the relevant authorities.⁹⁶ These duties are not limited to the highest-ranking officials.⁹⁷ These duties are the duties of all commanders in control of men or women who are subordinate to them across the complete spectrum of the hierarchical command structure.⁹⁸

In the *Delalic* case, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') Trial Chamber surveyed the content of Article 87 of Additional Protocol I.⁹⁹ The Tribunal explored the failure of commanders to act, prevent and/or punish in the context of Article 87 of Additional Protocol I in the *Halilovic* case.¹⁰⁰ Sefer Halilovic (Halilovic), a Serb by birth, had been a high-ranking military commander in Bosnia and Herzegovina since 1993.¹⁰¹ In 1993, Halilovic served as commander of the main staff of the armed forces of the Republic of Bosnia and Herzegovina in the midst of the Bosnian genocide, in consequence of which he was tried by the ICTY Trial Chamber in 2005.¹⁰² The finding of the Trial Chamber was that Halilovic could not be held liable under the doctrine of responsible command for the violations by his subordinates and he was acquitted,

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid at 51 para 3553:

'According to the sponsors of the proposal which was behind the rule under consideration here: in its reference to "commanders", the amendment was intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command. This is quite clear. There is no member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the Protocol. As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the commander-in-chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task.'

⁹⁸ Ibid.

⁹⁹ *Delalic* case (see note 69).

¹⁰⁰ *Halilovic* case op cit note 69 at para 2.

¹⁰¹ Ibid.

¹⁰² Ibid; *Halilovic* case (see note 69).

but the case went on appeal.¹⁰³ The doctrine of command responsibility provided the foundation for the appeal.¹⁰⁴

This case is important as the Trial Chamber listed the duties inherent in the doctrine of command responsibility as including the obligation of the commander to take preventive measures in order to ensure that his or her subordinates complied with the law of armed conflict.¹⁰⁵ The Appeals Chamber confirmed that the duty to prevent violations of the law of armed conflict was a general obligation inherent in responsible command.¹⁰⁶ The Appeals Chamber further stated that a commander had to punish his subordinates following a violation of the laws of war.¹⁰⁷ However, neither the Trial Chamber nor the Appeals Chamber explained or gave examples as to what actions were considered preventive measures, nor did they describe which measures undertaken by a commander in an attempt to prevent breaches of the law of war would be considered sufficient.¹⁰⁸ Would such measures be considered on a case-by-case basis or are there core minimum duties or steps a commander could take? Are such duties equally applicable to situations of international and non-international armed conflict? None of these issues were addressed by either the Trial Chamber or the Appeals Chamber. As this interpretation of Article 87 in itself is insufficient to provide clarity about the exact extent of the meaning of the term 'responsible command' as included in Article 1(1) of Additional Protocol II, this examination of the term 'responsible command' continues by examining its meaning under customary international humanitarian law.

¹⁰³ *Halilovic* Appeal Case op cit note 69 at para 5.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* 'In discussing the "duty to prevent" in paragraphs 79 through 90 of the Trial Judgment, the Trial Chamber described what it termed a "general obligation" of each commander order and control of his own troops. The general duty of commanders to take the necessary and reasonable measures is well rooted in customary international law and stems from their position of authority. The Appeals Chamber stresses that "necessary" measures are the measures appropriate for the superior to discharge his obligation (showing that the genuinely tried to prevent or punish) and "reasonable" measures are those reasonably falling within the material powers of the superior. What constitutes "necessary and reasonable" measures to fulfil a commander's duty is not a matter of substantive law but of evidence.'

¹⁰⁷ *Ibid* at para 64. 'The Appeals Chamber holds that the Trial Chamber erred when giving the impression that there is an additional requirement to the third element of superior responsibility and agrees with the Prosecution that the correct legal standard is solely whether the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.'

¹⁰⁸ See discussion between notes 99 and 104.

Customary international humanitarian law gives content to the notion of responsible command in the context of both international armed conflict and non-international armed conflict.¹⁰⁹ It is an accepted rule of general treaty interpretation that relevant rules of international law, applicable to the relations between parties to the treaty, may be employed to provide clarity to a treaty provision.¹¹⁰ The content of the notion of responsible command, derived from customary international humanitarian law and applicable to non-international humanitarian law specifically, consequently will be used to interpret the term 'responsible command' as included in Article 1(1) of Additional Protocol II.¹¹¹

The duties with which a commander has to comply under customary international law applicable to international armed conflict to be considered 'responsible' include the implementation of international humanitarian law; the duty to instruct his or her subordinates concerning the meaning and content of international humanitarian law; and the commander's ability to enforce these rules upon his or her subordinates.¹¹² Arguably, the exact extent of responsible command is far less clear when one considers the concept of 'responsible command' in the context of organised armed groups as parties to a non-international armed conflict rather than in the context of the official armed forces of states.¹¹³ The reason for this argument is the paucity of authority in evaluating the content of the doctrine of responsible command specifically in relation to non-international armed conflict. The question arises as to whether the content of the customary principle is the same for commanders (of the regular armed forces and other organised armed groups) at war in both international and non-international armed conflicts.

The ICRC Study on Customary International Humanitarian Law provides for certain responsibilities concerning the commander's duty to implement international humanitarian law and his or her

¹⁰⁹ For a discussion of the customary international humanitarian law notion of 'responsible command', see *Delalic* case op cit note 69 at paras 333–343; A Cassese, G Acquiva, M Fan and A Whiting *International Criminal Law: Cases and Commentary* 1st (2011) 421-457; A Cassese, P Gaeta, L Baig, M Fan, C Gosnell and A Whiting *Cassese's International Criminal Law* (2013) 186; Fleck op cit note 10 at 40–41.

¹¹⁰ VCLT op cit note 32 at art 31(3)(c): 'There shall be taken into account, together with the context ... (b) any relevant rules of international law applicable in the relations between parties.'

¹¹¹ Protocol II (note 1).

¹¹² J Henckaerts 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *IRRC* 175 196.

¹¹³ *Ibid.*

duty to ensure that his or her subordinates comply with international humanitarian law.¹¹⁴ Some of these duties are considered by the ICRC to have reached customary status for situations of both international and non-international armed conflict, binding all commanders to act in accordance with international humanitarian law.¹¹⁵ These duties regarding the implementation of international humanitarian law specifically imposed on non-state actors are the following:

Rule 139: Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control [IAC/NIAC] (hereafter Rule 139).

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity [IAC/NIAC] (hereafter Rule 140).

Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces [IAC/NIAC] (hereafter Rule 142).¹¹⁶

Reading customary rules 139, 140 and 142 together, the customary principle of responsible command imposes minimum duties on commanders on both sides of the non-international conflict: Commanders have to inform their subordinates about the content of the law of armed conflict;¹¹⁷ they have to educate these subordinates so that they are able to instruct them to comply with such laws;¹¹⁸ and they are obliged to ensure respect for the law by imposing the necessary disciplinary structures on their subordinates.¹¹⁹ These obligations are absolute and are not dependent on compliance by the other party to the non-international armed conflict.¹²⁰

This author submits that the Study on Customary International Law has not been accepted without scrutiny by either states or scholars who question whether the claim made by the ICRC that the bulk of the rules apply to both international and non-international armed conflicts indeed is true.¹²¹ The scope of each rule has to be

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid, Rule 139.

¹¹⁸ Ibid, Rule 139 and 142.

¹¹⁹ Ibid, Rule 138.

¹²⁰ Ibid, Rule 140.

¹²¹ See M Sassòli 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 *Journal of International Humanitarian Legal Studies* 5 at 24; Sivakumaran op cit note 28 at 61; Michael Wood 'The Evolution and Identification of Customary International

analysed on a case-by-case basis. It is not clear whether the rules on implementation cited above irrefutably apply to both international and non-international armed conflict.¹²² In view of the fact that two types of non-international armed conflicts exist, it is also unclear as to whether these rules apply to all non-international armed conflict. The question arises as to whether these rules form part of customary international humanitarian law for both CA 3-type non-international armed conflicts (that is, all types) and Additional Protocol II-type non-international armed conflicts, but exclude those conflicts that do not comply with the higher threshold of application included in Article 1 of Additional Protocol II. Both practice and case law revealing the implementation and observation of the Rules of Additional Protocol II are scarce. The lack of authority that can be consulted as a subsidiary means that the interpretation of Additional Protocol II is problematic as it is difficult to show that any of the rules included in Additional Protocol II indeed meet the requirements of *usus* and *opinio iuris*. It could be argued that the principle of command responsibility is a general principle of international law binding all parties to international and non-international armed conflict. Again, it remains difficult to pinpoint how general principles are formulated and what the exact differences between custom and the general principle are.¹²³

In examining this criterion, scholars have not considered the requirement of a responsible command to equate to a 'rigid military hierarchy' similar to state armed forces.¹²⁴ Essentially, 'responsible command' is construed to entail de facto authority and at a minimum understands 'responsible command' in the context of Article 1(1) of Additional Protocol II to demand an organisational structure that allows or enables an organised armed group to control territory, to plan and be able to carry out sustained and concerted military operations and to impose a disciplinary structure on its members to give effect to Additional Protocol II.¹²⁵ It is fair to consider that 'responsible command' under Additional Protocol II implies a higher degree of organisation than that under Common Article 3 as the type of obligation a group incurs under Additional Protocol II necessitates a

Law of Armed Conflict' (2018) 51 *Vanderbilt Journal of Transnational Law* 727 731–733.

¹²² Henckaerts op cit note 112 at 196.

¹²³ For an overview of general principles, see Laura Pineschi (ed) *General Principles of Law: The Role of the Judiciary* (2015) as part of the series *Ius Gentium: Comparative Perspectives and Law and Justice* Vol 46.

¹²⁴ Junod op cit note 27 at 37; A Cullen *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010) 103.

¹²⁵ Ibid.

more sophisticated organisational structure than the basic guarantees of humane treatment included in Common Article 3.¹²⁶

From the analysis above, one may conclude that the term ‘responsible command’, as included in Article 1(1) of Additional Protocol II, not only is a reflection of the customary international humanitarian law duties that are the result of the commander’s relationship of superiority vis-à-vis his or her subordinates, but the text of Article 1(1) of Additional Protocol II itself also confers additional duties upon commanders of organised armed groups participating in Additional Protocol II-type conflicts.¹²⁷ In order for a commander of an organised armed group to fulfil the conditions of ‘responsible command’, therefore, such a commander has to inform his or her subordinates of the content of Additional Protocol II; to educate them on its contents; to suppress violations of its substance; and to punish his or her subordinates should they violate the provisions of this convention. Such a commander must also be sufficiently organised to launch sustained military attacks in accordance with the law of non-international armed conflict and Additional Protocol II. In essence, the requirement of command responsibility constitutes an integral part of the organisational criteria, it serves to give effect to the other organisational criteria and should not be interpreted in isolation.

3.2 Territorial control

An armed group has to be organised to such an extent that it is able to exercise control over part of the territory belonging to the High Contracting Party against which it is fighting in an Additional Protocol II-type armed conflict.¹²⁸ The term ‘control’ is defined as the ‘power to direct something’.¹²⁹ The example given in the *Collins English Dictionary* is that ‘the territory is mostly under guerrilla control’.¹³⁰ Interpreted in the context of Article 1(1) of Additional Protocol II, therefore, the armed group must be able to direct the activities occurring within the territory under its control. The text of Additional Protocol II itself specifically determines the two basic activities that the armed group has to direct (or control): Control has to be exercised in order to use part of the territory ‘so as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.¹³¹

¹²⁶ Sivakumaran (see note 28).

¹²⁷ See Protocol II (see note 1).

¹²⁸ Protocol II (see note 1) art 1(1).

¹²⁹ M O’Neill and E Summers op cit note 52 at 166.

¹³⁰ Ibid.

¹³¹ Protocol II (see note 1) art 1(1) read together with the literal meaning of control as derived from M O’Neill and E Summers (see note 52).

The question arises as to whether any size requirement is inherent in the wording ‘part of its territory’.¹³² Phrased differently: Is there a minimum size of territory that has to be controlled by an armed group in order for it to be considered sufficient so as to satisfy this organisational requirement included in Additional Protocol II? The text of Additional Protocol II does not dictate the size of the territory to be controlled.¹³³ However, the drafters made proposals concerning the size requirement of the territory under the control of the armed group.¹³⁴ They suggested that it should be a ‘substantial part’ of the territory which is controlled by the armed group, or that it has to be a ‘non-negligible part of the territory’.¹³⁵ The text pertaining to the criterion or proportion of controlled territory, however, was excluded by the Drafting Committee when it reviewed the final version of the text.¹³⁶ Arguably, it is not the size of the territory that is central to determining whether or not the organisational requirement of territorial control has been complied with,¹³⁷ but rather the quality of control exercised over the territory which is fundamental in making such a determination.¹³⁸ This argument is supported by case law.¹³⁹

The threshold of organisation concerning the exercise of control over territory was expounded upon by the ICTR Trial Chamber in the *Musema* case.¹⁴⁰ In the *Musema* case, the Trial Chamber found that the dissident armed forces or other organised armed groups must be capable of dominating a sufficient part of the territory belonging to the High Contracting Party against which it is fighting.¹⁴¹ The Trial Chamber considered sufficient territorial control to be exercised in a case where the dissident armed force or organised armed group is capable of

¹³² Protocol II (see note 1) art 1(1).

¹³³ Ibid.

¹³⁴ Sandoz, Swinarski and Zimmerman op cit note 68 at para 4465.

¹³⁵ Ibid.

¹³⁶ Junod op cit note 27 at 38.

¹³⁷ Ibid; Consideration of Draft Protocol II (CDDH/1), ‘Summary Record of the 33rd Meeting held on Thursday, 20 March 1975 at 10:20’ (Document No CDDH/I/SR.33) available at <https://www.loc.gov/rf/frd/Military_Law/pdf/RC-records_Vol-8.pdf> (accessed on 16 April 2020) 347 para 24:

‘Both articles should be considered in the light of article 1, already approved by the Committee, and more particularly of the last sentence of paragraph 1 thereof, which stated that dissident armed forces might “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol” (CDDH/I/274)’.

¹³⁸ Junod op cit note 27 at 38.

¹³⁹ ICTY (Trial Chamber 1) *Prosecutor v Alfred Musema* (27 January 2000) Case No ICTR-96-13-A paras 253 and 258 (hereafter *Musema* case).

¹⁴⁰ Ibid.

¹⁴¹ Ibid at para 258.

utilising the territory under its command to engage in sustained and concerted military operations.¹⁴² In addition, it deemed it necessary for control to be exercised in such a way that the provisions of Additional Protocol II could be implemented in the territory under the control of the dissident armed forces or another organised armed group.¹⁴³ This supports a functional approach to determining whether the threshold of organisation concerning territorial control is exercised. It is indeed the fact that territory (large or small) is controlled in such a manner as to enable the dissident armed forces or another organised armed group to give effect to the organisational requirements included in Article 1(1) of Additional Protocol II that is of importance. The ICRC's Commentaries to the Geneva Conventions echo this interpretation.¹⁴⁴ The ICRC is of the opinion that the word 'such' was placed strategically to stress that it indeed is the degree of control and the compliance with the two requirements included in Additional Protocol II that are key and not the size of the territory.¹⁴⁵

Finally, the Commentaries impose a further criterion – not included in the text of Article 1(1) – that has to be satisfied in order to meet the organisational threshold inherent in 'control over a part of the territory'.¹⁴⁶ According to the Commentaries, a degree of stability concerning control over territory is required.¹⁴⁷ The Commentaries argue that without stability armed groups would not be able to give effect to the rules of Additional Protocol II.¹⁴⁸

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Sandoz, Swinarski and Zimmerman op cit note 68 at para 4465:

'The word "such" provides the key to interpretation. The control must be sufficient to allow sustained and concerted military operations to be carried out and for the Protocol to be applied, ie, for example, caring for the wounded and the sick, or detaining prisoners and treating them decently, as provided in Articles 4 and 5.'

¹⁴⁶ Ibid at para 4467.

¹⁴⁷ Ibid. 'In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.'

¹⁴⁸ Ibid.

3.3 Sustained and concerted military operations

This part supplies content to the organisational criterion inherent in Additional Protocol II which requires that an organised armed group must be able to launch sustained and concerted military operations.¹⁴⁹ The ability of an organised armed group to control territory to the extent that it can launch sustained and concerted military operations forms one of the key organisational criteria specified by Article 1(1) of Additional Protocol II. The ability to control territory also serves as an indicator to determine whether the organisational criteria of responsible command and control over territory have been met.¹⁵⁰ This requirement also informs the notion of ‘intensity’ inherent in Additional Protocol II. However, this falls outside the scope of this contribution.¹⁵¹

Article 1(1) of Additional Protocol II reads ‘to enable them [armed groups] to carry out sustained and concerted military operations’.¹⁵² The adjectives ‘sustained’ and ‘concerted’ are now analysed in order to give content to the types of military operations that are considered necessary to fulfil the organisational criteria of Additional Protocol II. The *Collins English Dictionary* defines the term ‘sustained’ as the ability ‘to maintain or continue for a period of time’.¹⁵³ The term ‘sustained’ thus confers a time element upon an Additional Protocol II-type armed conflict. The *Collins English Thesaurus* provides the following synonyms that confirm this temporal meaning of the word ‘sustained’, namely, ‘continuous’, ‘constant’, ‘prolonged’ and ‘perpetual’.¹⁵⁴ The phrase could thus read ‘continuous ... military operations’, ‘constant ... military operations’, ‘prolonged ... military operations’, ‘perpetual ... military operations’. The adjective ‘concerted’ is defined as ‘decided or planned by mutual agreement’.¹⁵⁵ The *Collins English Thesaurus* regards the term as synonymous with ‘co-ordinated’, ‘collaborative’, ‘joint’, ‘unified’ and ‘combined’.¹⁵⁶ These terms highlight the collective nature of the armed group required to co-ordinate the military operation jointly. The phrase could read ‘co-ordinated’ military operation. Co-ordination is synonymous with the term ‘organisation’.¹⁵⁷ The literal

¹⁴⁹ See Protocol II (note 1) art 1(1).

¹⁵⁰ Protocol II (see note 1) art 1(1).

¹⁵¹ Martha M Bradley ‘An analysis of the notions of “organised armed groups” and “intensity” in the law of non-international armed conflict’ unpublished LLD thesis, University of Pretoria, February 2018.

¹⁵² The author inserted these terms.

¹⁵³ M O’Neill and E Summers op cit note 52 at 812.

¹⁵⁴ Ibid at 844.

¹⁵⁵ Ibid at 156.

¹⁵⁶ Ibid at 157.

¹⁵⁷ Ibid at 173.

interpretation of the ‘sustained and concerted military operations’, therefore, implies that an armed group under responsible command exercises such control over a part of its territory so as to enable such armed group to carry out continuous and organised or planned military operations.¹⁵⁸ It does not suffice for the armed group to be organised in order to use the territory under its control for launching the planned and prolonged Additional Protocol II-type military operation (which reflects organisation). In addition, the armed group needs to satisfy the threshold of violence or type of attack required in order to be classified as an Additional Protocol II-type armed conflict.¹⁵⁹ The terms ‘sustained’ and ‘concerted’ also imply a high threshold of violence.¹⁶⁰ Indeed, it is the ability of an organised armed group to launch attacks meeting such a high threshold which reflects that it satisfies this organisational criterion.¹⁶¹

The drafting history of Additional Protocol II does not expand on either of the terms ‘sustained’ or ‘concerted’.¹⁶² The ICRC Commentaries to Additional Protocol II confirm that the literal meaning of these terms has been construed correctly in the above analysis.¹⁶³ The ICRC gave content to its understanding of the term ‘sustained and concerted military operations’ by proposing the following definitions:

‘Sustained’ (in French the reference is to *opérations continuées*) means that the operations are kept going or kept up continuously. The emphasis is therefore on continuity an[d] persistence. ‘Concerted’ (in French: *concertées*) means agreed upon, planned and contrived, done in agreement according to a plan. Thus we are talking about military operations conceived and planned by organized armed groups.¹⁶⁴

In addition, the ICRC Commentaries conclude that the drafters chose the terms ‘sustained’ and ‘concerted’ instead of the terms ‘duration’ and ‘intensity’, as the latter would introduce a subjective element into the requirement.¹⁶⁵ The drafters deemed an organisational criterion requiring military operations to be ‘sustained’ and ‘concerted’ to be objective.¹⁶⁶

Case law provides further content for the criterion that requires that military operations be sustained and concerted. In the *Boskoski* case,

¹⁵⁸ Protocol II (see note 1) art 1(1).

¹⁵⁹ See discussion in Bradley (note 151) ch 6, sec 3.2.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Consideration of Draft Protocol II (see note 137).

¹⁶³ Sandoz, Swinarski and Zimmerman op cit note 68 at para 4469.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

Trial Chamber II of the ICTY differentiated between the thresholds of violence and organisation required to satisfy the criteria of protracted armed violence as required by Common Article 3 and ‘sustained and concerted military operations’ as required by Additional Protocol II.¹⁶⁷ Trial Chamber II stated that a higher level of organisation of an armed group was required to meet the threshold of ‘sustained and concerted’ armed violence rather than that required for ‘protracted’ violence.¹⁶⁸ Arguably, it is the term ‘sustained’ that indicates such a difference, as the armed group has to engage in more than one military operation (compare with *La Tablada*)¹⁶⁹ and that there is a temporal element to it. This temporal element attaches an element of sustainability to the duration of the existence of the armed group itself, requiring it to have been in existence for a period of time. Trial Chamber II of the International Criminal Court considered the term ‘sustained and concerted military operations’ in the *Katanga* case.¹⁷⁰ The Court emphasised the fact that territorial control and a certain degree of organisation enabled the armed groups to plan and carry out sustained and concerted military attacks.¹⁷¹

To date, the ICTR¹⁷² and the Special Court for Sierra Leone¹⁷³ are the only international criminal tribunals to have exercised jurisdiction over

¹⁶⁷ ICTY (Trial Chamber II) *Prosecutor v Boskoski and Tarculovski* (10 July 2008) Case No IT-04-82-T para 197.

¹⁶⁸ *Ibid.*

¹⁶⁹ See Inter-American Commission on Human Rights *Juan Carlos Abella v Argentina* Report No 55/97 Case 11.137 Inter-Am C.H.R. 271, OEA ser.L/V/11.98.doc. 6 rev (1998).

¹⁷⁰ ICC (Trial Chamber) *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga* (7 March 2014) Case No ICC-01/04-01/07 p 8.

¹⁷¹ *Ibid* at para 239.

¹⁷² See UN Security Council ‘Statute of the International Criminal Tribunal for Rwanda’ (as last amended on 13 October 2006) 8 November 1994 available at <<http://www.refworld.org/docid/3ae6b3952c.html>> (accessed on 23 August 2017). Security Council Resolution 955 (1994) of 8 November 1994 and last amended by Security Council Resolution 1717 (2006) of 13 October 2006, art 4. The United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) by adopting Security Council Resolution 955 on 8 November 1994 under the auspices of its Chapter VII powers. This Tribunal was intentionally established to prosecute persons responsible for serious violations of international humanitarian law and also those responsible for the commission of genocide between 1 January 1994 and 31 December 1994. Art 4 of the Statute of the ICTR, which was annexed to this Resolution, criminalises violations of both Common Article 3 and Additional Protocol II committed on Rwandan territory between 1 January 1994 and 31 December 1994.

¹⁷³ UN Security Council, Statute of the Special Court for Sierra Leone of 16 January 2002, Security Council Resolution 1315 (2000) available at <<https://www.refworld.org/docid/3dda29f94.html>> (accessed on 26 April 2020). The Special Court for Sierra Leone (Special Court) was established by an agreement between

violations of Additional Protocol II. The Special Court for Sierra Leone tested the material requirements necessary to trigger its application.¹⁷⁴ It was not necessary for the ICTR to test the applicability of Additional Protocol II as its application was predetermined and included in the Statute of the ICTR.¹⁷⁵ This part employs the civil war in Sierra Leone to illustrate a situation of non-international armed conflict and an armed group which the Special Court for Sierra Leone regarded as satisfying the requirement of 'sustained and concerted military operations'.¹⁷⁶ An example of such an armed group is the Revolutionary Armed Front ('RUF').¹⁷⁷

the United Nations and the government of Sierra Leone pursuant to Security Council Resolution 1315 of August 2001. The purpose of the Special Court was to prosecute those individuals bearing the greatest responsibility for the serious violations of humanitarian law and Sierra Leonean law on the territory of Sierra Leone as from November 1996. Articles 3 and 4 of the Statute of the Special Court criminalised certain violations of international humanitarian law and, as such, conferred substantive jurisdiction upon the Special Court over those bearing the greatest responsibility for the commission of such war crimes in the context of art 3 of its Statute, which specifically criminalises violations of Common Article 3 and Additional Protocol II. As established, these offences occur only within the context of a non-international armed conflict that meets the threshold requirements of Common Article 3 and/or Additional Protocol II, depending on the violation. In the event of an Additional Protocol II-type war crime having been committed, the Prosecutor consequently would have to prove that an Additional Protocol II-type armed conflict (a situation meeting the material scope of application as set out in art 1(1) of Additional Protocol II) existed at the time of the alleged violation in the territory of Sierra Leone.

¹⁷⁴ Special Court for Sierra Leone (Trial Chamber) *Prosecutor v Charles Ghankay Taylor* (18 May 2012) Case No SCSL-03-01-T 571-4, 2049 (hereafter the *Taylor* case). See also Special Court for Sierra Leone *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (RUF accused) (Trial judgment)(1–2 March 2009) Case No SCSL-04-15-T available at <<http://www.refworld.org/cases,SCSL,49b102762.html>> (accessed on 23 August 2017) paras 978-981 (hereafter *Sesay* case). In the *Sesay* case, Trial Chamber I pointed out that where certain offences (war crimes) with which the accused had been charged, existed exclusively under Additional Protocol II (not Common Article 3), additional conditions had to be met.

¹⁷⁵ See Statute of the International Criminal Tribunal for Rwanda (see note 173) art 4. See also *Akayesu* Case (see note 69) para 606:

'When the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council.'

¹⁷⁶ *Taylor* Judgment (see note 174) para 18.

¹⁷⁷ *Ibid* at paras 18–19.

An eleven year-long non-international armed conflict plagued Sierra Leone from 23 March 1991 until 18 January 2002.¹⁷⁸ This armed conflict has been termed ‘complex’ due to the fact that several of the armed groups party to it changed alliances and leadership and became fractured owing to internal divisions.¹⁷⁹ However, the RUF was party to the conflict for the entire duration of the civil war and during this time remained sufficiently stable.¹⁸⁰ This armed group had been formed in the late 1980s.¹⁸¹ The RUF’s initial aim, and the purpose of its establishment, were to forcibly overthrow the All People’s Congress (‘APC’) government in order to restore democracy and good governance in Sierra Leone.¹⁸²

Some judicial decisions of the Special Court for Sierra Leone viewed the RUF as a guerrilla army and an irregular force.¹⁸³ This armed group relied on portable weapons and a high degree of mobility as the cornerstones of its military tactics.¹⁸⁴ The organisational structure of the RUF was very sophisticated and comparable to that of a state’s regular armed forces.¹⁸⁵ The RUF used a military system of ranking and possessed a clear hierarchy of command.¹⁸⁶ It was in possession of a responsible command structure in combination with territorial control over parts of Sierra Leone that enabled the RUF to launch military operations that were classified as both sustained and concerted.¹⁸⁷

At the beginning of the conflict, the RUF launched attacks from forests, but it soon and increasingly managed to exercise control over various areas on the sovereign territory of Sierra Leone, which served as military bases from which armed attacks were planned and launched.¹⁸⁸ In the initial stages, many non-international armed conflicts may be classified as Common Article 3-type armed conflicts. However, over time the armed group can meet the higher organisational threshold requirements such as control over territory, as a result of which the Common Article 3-type non-international armed conflict is transformed into an Additional Protocol II-type armed conflict. Common Article 3, therefore, may apply at the beginning of an armed conflict, and the application of Additional Protocol II could be triggered at a later stage during the conflict. It is at the stage

¹⁷⁸ Ibid at para 18.

¹⁷⁹ Ibid at para 19.

¹⁸⁰ Ibid at paras 18–19.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ *Sesay Case* (see note 174) paras 1513, 1721.

¹⁸⁴ Ibid at paras 648–700.

¹⁸⁵ Ibid at para 649.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid at para 650.

¹⁸⁸ Ibid at para 1479.

that the RUF exercised territorial control that Additional Protocol II became applicable. During different stages of the armed conflict, the RUF controlled several areas in Sierra Leone.¹⁸⁹ Each area under its geographical control possessed an operational command unit that was sufficiently organised to plan and execute military operations from the territory under its command.¹⁹⁰

The operational command unit was made up of various key leadership positions (ranks).¹⁹¹ Some of the most significant ranks that were established essentially to be responsible for planning and executing military operations included the 'leader', the 'battlefield commander', the 'battalion group commander', the 'battle front inspector' and 'area commanders'.¹⁹² The battlefield commander was specifically tasked with the planning and execution of military operations.¹⁹³ The battle front inspector was responsible for the fighters at the front;¹⁹⁴ he would arrange for reinforcements to be deployed to the battle fronts where and when they were needed.¹⁹⁵ The battle front inspector also reported on the situation at the front lines of conflict in his area to the battlefield commander who, in turn, would inform the leader and, if necessary, adapt the battle plan based on the information received.¹⁹⁶ Area commanders were in charge of specific geographical areas during military operations.¹⁹⁷ They were responsible for updating the battle front inspector on the battlefield situation in their designated areas.¹⁹⁸ This organisational structure enabled the RUF to share information on all fronts of the battle and adapt its planning to sustain its military operations.¹⁹⁹ The success of this organisational structure, and the RUF's ability to control the territory through responsible command in order to plan and execute military operations on a continuous basis, is evident not only from the eleven years' duration of the civil war but also from an analysis of various of the attacks specifically studied by the Special Court in the cases before it.²⁰⁰

¹⁸⁹ Ibid.

¹⁹⁰ Ibid at para 661.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid at para 663.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid at para 664.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ *Taylor* case (see note 174); *Sesay* Judgment (see note 174); Special Court for Sierra Leone (Trial Chamber) *Prosecutor v Moimina Fofana, Allieu Kandewa* (2 August 2007) Case No SCSL-04-14-T (hereafter *Fofana* case); Special Court for Sierra

In several cases the Special Court for Sierra Leone evaluated whether the conflict in Sierra Leone had met the stricter threshold of Additional Protocol II and could be classified as an Additional Protocol II-type armed conflict in order to prosecute members of the RUF, the Civil Defence Forces ('CDF') and the Armed Forces Revolutionary Council for violations of Additional Protocol II.²⁰¹ These included the *Fofana* case,²⁰² the *Brima* case,²⁰³ the *Sesay* case²⁰⁴ and the *Taylor* case.²⁰⁵ The Special Court for Sierra Leone considered that the conflict under its jurisdiction indeed satisfied the requirements of an Additional Protocol II-type armed conflict.²⁰⁶ In its analysis of the applicability of Additional Protocol II the Court echoed the requirement that dissident armed forces or organised armed groups should be able to exercise such control over a part of their forces' territory so as to enable them to carry out sustained and concerted military operations.²⁰⁷

The above analysis reveals that the terms 'sustained' and 'concerted' entail that military operations have to have an element of duration to them, and must be planned. These terms distinguish attacks within the context of Additional Protocol II from attacks that are spontaneous and have an element of brevity to them. A high level of organisation and control over territory is needed in order for an organised armed group to launch such attacks. This element of duration implies that an Additional Protocol II-type organised group should exist for an extended period of time. The organised armed group, thus, will have to have an element of durability concerning its life span.

3.4 Implementation of Additional Protocol II

This part deals with the ability of an organised armed group to implement the provisions of Additional Protocol II.²⁰⁸ Such ability implies the organisational criterion to be met in order for Additional Protocol II to find application in non-international armed conflict, as well as the manifestation that an armed group fulfils the other organisational criteria of 'responsible command' and 'territorial control'.²⁰⁹ It is clear from the text of Article 1(1) of Additional Protocol

Leone (Trial Chamber) *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Barbor Kanu* (20 June 2007) Case No SCSL-04-16-T (hereafter *Brima* case).

²⁰¹ Ibid.

²⁰² *Fofana* case (see note 200).

²⁰³ *Brima* case (see note 200).

²⁰⁴ *Sesay* case (see note 174).

²⁰⁵ *Taylor* case (see note 174).

²⁰⁶ Statute of the Special Court for Sierra Leone (see note 173) art 1(1).

²⁰⁷ *Fofana* case (see note 200) para 126.

²⁰⁸ As required under art 1(1) of Additional Protocol II (note 1).

²⁰⁹ Ibid.

II that the term ‘this Protocol’ refers to Additional Protocol II. The noun ‘implementation’ is defined as the ability, for instance, to ‘carry out’ instructions.²¹⁰ The noun ‘implementation’ can also be replaced by the terms ‘carrying out’, ‘effecting’, ‘enforcement’, ‘realisation’ or ‘fulfilment’.²¹¹ Therefore, the provision may be understood as implying ‘to enable the organised armed group to enforce Additional Protocol II’ or ‘to enable the organised armed group to give effect to Additional Protocol II’. The only term in this textual construction the meaning of which can be contested, and which holds the key as to what is expected from the armed group to be compliant with this requirement, is the term ‘enable’.²¹² The question is whether the mere ability of an armed group to implement the provisions of Additional Protocol II is sufficient to fulfil this requirement as set out in Article 1(1) of Additional Protocol II or whether more is required from such an armed group. Is the actual implementation of Additional Protocol II required to satisfy this final organisational requirement?²¹³

The verb ‘enable’ means ‘to provide (someone) with the means or opportunity to do something’ or ‘to make possible’.²¹⁴ The terms ‘allow’, ‘permit’, ‘facilitate’ or ‘empower’ are synonymous with the term ‘enable’.²¹⁵ Such an ability to implement Additional Protocol II results from the armed group’s sufficient degree of organisation (possessing responsible command) and control over territory so as to engage in sustained and concerted military operations. Case law has supported this interpretation.²¹⁶

In the *Akayesu* case, the ICTR considered the ability of an organised armed group or dissident armed force and not the actual implementation as the correct requirement under Article 1(1).²¹⁷ The ICTR stated that an armed group must be able to apply Additional Protocol II.²¹⁸ This view was reiterated by this Tribunal in the *Musema* case where the ICTR stated that ‘the insurgents must be in a position to implement this Protocol’.²¹⁹ It in fact is the other three requirements (the existence of a responsible command structure, control over territory and the ability to conduct sustained military operations) that enable an armed

²¹⁰ O’Neill and Summers op cit note 52 at 437.

²¹¹ Ibid.

²¹² See Additional Protocol II (see note 1), art 1(1).

²¹³ Sivakumaran op cit note 28 at 188–189 para 4.1.5, where the author contemplates whether actual implementation indeed is necessary.

²¹⁴ O’Neill and Summers op cit note 52 at para 250.

²¹⁵ Ibid 277.

²¹⁶ *Akayesu* case (see note 69) para 623; *Musema* case (see note 139) para 258; *Fofana* case (see note 200).

²¹⁷ *Akayesu* case (see note 69) para 623.

²¹⁸ Ibid at paras 623, 626.

²¹⁹ *Musema* case (see note 139) para 258.

group to be able to implement the provisions of Additional Protocol II. It is this high criterion of organisation which is necessary for an armed group to be able to implement the Protocol, as is evinced by the rules as codified in Additional Protocol II. For instance, Article 5 of Additional Protocol I concerns persons whose liberty is restricted. This provision requires that such persons may send and receive letters²²⁰ and receive medical examinations.²²¹ Article 4 provides that children have certain fundamental rights, including education,²²² and Article 6 provides for a basic provision ensuring the right of a fair trial and the abolition of the death penalty for certain categories of people. These specific requirements cannot easily be met without a sufficient degree of organisation, and they are comparable with those responsibilities expected of sovereign states. For an armed group to be able to comply with these provisions, it will have to possess a command structure meeting a very high level of organisation and also be in possession of and have control over the territory.²²³

In the *Fofana* case, the Special Court for Sierra Leone drew the same conclusion as the ICTR had done in the *Musema* case.²²⁴ The Special Court for Sierra Leone confirmed that in order for Additional Protocol II to find application to the conflict in Sierra Leone, the 'dissident armed forces or organised armed group were *able* to implement Additional Protocol II'.²²⁵ The use of the term 'able' by the Special Court for Sierra Leone supports the interpretation that the ability of the group was

²²⁰ Protocol II (see note 1) art 5(c).

²²¹ *Ibid* at art 5(d).

²²² *Ibid* at art 4(3)(A).

²²³ CDDH/SR.49, Annex to the Summary Record of the 49th Plenary Meeting: Explanation of the vote, 75 at 77:

'Like any compromise, the text is subject to certain interpretations not always of the same nature. Some delegations argue that because of the number of qualifications contained in it, only conflicts of a very high threshold such as civil wars are covered. Others like my delegations underline that these qualifications are a reflection of the factual and practical circumstances that would in fact have to exist if a party to the conflict could be expected to implement the provisions of this protocol. Furthermore, we do not agree necessarily that these conditions could exist only in civil war situations. In our view dissident armed forces or other organised armed groups would need to have a responsible command, to exercise control over some territory, and to have sustained military operations in order to practically speaking, to implement the protocol. The key to the height of threshold we suggest lies in the expression "to implement this Protocol": for the threshold of the Protocol will now clearly depend on the contents of the Protocol.'

²²⁴ See *Musema* case (see note 139) para 258 and *Fofana* case (see note 200) paras 126, 127.

²²⁵ *Fofana* case (see note 200) paras 126, 127.

sufficient to satisfy this criterion.²²⁶ The Special Court for Sierra Leone, therefore, employed 'able' as a threshold requirement when it assessed whether the facts relating to the armed conflict were indicative of the fact that the RUF indeed was able to implement Additional Protocol II.²²⁷

The literal interpretation of the term 'enable', however, does not answer the key question of whether Additional Protocol II requires the mere ability to implement Additional Protocol II or its actual implementation. The Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in Geneva between 1974 and 1977 also did not shed much light on this issue. Pakistan²²⁸ and Spain²²⁹ suggested to the Drafting Committee that the actual implementation of the Protocol should be required of all parties to the conflict and that the text should be amended accordingly. It is unclear whether these representatives made this suggestion merely to make explicit what they understood as already being implied by the text.²³⁰ Spain actually suggested that its understanding was that, for an armed group to comply with this requirement, such an armed group had to have the ability and the readiness to implement Additional Protocol II.²³¹ Another possibility is that the representatives of Pakistan and Spain suggested because they regarded the text as not requiring the actual implementation of Additional Protocol II, but merely the ability to do so. These inconclusive views of only two countries are insufficient to determine the intention of the drafters at the time.

The ICRC captures the essence of this criterion in its Commentary:

This is the fundamental criterion which justifies the other elements of the definition: being under responsible command and in control of a part of the territory concerned, the insurgents must be in a position to implement the Protocol. The threshold for application therefore seems fairly high. Yet, apart from the fact that it reflects the desire of the Diplomatic Conference, it must be admitted that this threshold

²²⁶ See *Fofana* case (see note 200) paras 126, 127 and Protocol II (see note 1) art 1(1).

²²⁷ *Ibid.*

²²⁸ Art 1 – Material Field of Application (adopted by Committee I at the 2nd session and by the Conference at the 49th plenary meeting on 2 June 1997) CDDH/1/26, 11 March 1974, 6. Pakistan: 'Redraft to read: "The armed forces opposing the authorities in power are represented by a responsible authority and declare their intention of observing the humanitarian rules laid down in Article 3, Common to the Geneva Conventions and in the present Protocol."'

²²⁹ *Ibid.* Spain 'effectively exercised in such a way as to guarantee its readiness and ability to observe and enforce observance of the rules of humanitarian law in force'.

²³⁰ See notes 228 and 232.

²³¹ *Ibid.*

has a degree of realism. The conditions laid down in this paragraph ... correspond with actual circumstances in which the parties may reasonably be expected to apply the rules developed in the Protocol, since they have the minimum infrastructure required therefor.²³²

The ICRC is of the opinion that an armed group must be in a position to implement Additional Protocol II.²³³ It does not mention the actual implementation of this Protocol but rather only the ability to implement it.²³⁴ This analysis by the ICRC is in line with the reasoning of the Special Court for Sierra Leone and the ICTR, and may be interpreted as supporting the position that the term 'enable' refers to the ability of the group.²³⁵ This explanation of the position of the ICRC is the consequence of the provision not reading 'the insurgents must implement the Protocol'. Scholars tend to agree with this conclusion reached by the ICRC.²³⁶ One scholar summarises his understanding of the 'ability' of an organised armed group to implement Additional Protocol II as follows:

The insurgents' ability to comply with AP/II is a matter of potentiality, which need not coincide with the overall record of their performance. To the extent that reciprocity between the parties to the conflict is an issue, it is reciprocity in capabilities and not in actual conduct. As long as an organized armed group possesses the means to implement AP/II, the crossing of the second threshold is not linked to the insurgents making overt use of their latent powers.²³⁷

Other scholars maintain that the possibility that actual implementation is required is not necessarily ruled out.²³⁸ They argue that if an organised armed group complies with the material requirements listed in Article 1(1) of Additional Protocol II, it indeed is expected of such a group to give effect to Additional Protocol II as they have the adequate infrastructure to do so.²³⁹

At this point this analysis turns to case law in order to clarify whether the mere ability to enforce Additional Protocol II or the actual implementation of this instrument is required by Article 1(1) of Additional Protocol II. Part 3.1 and 3.2 above illuminate that the RUF possessed a very high threshold of organisation, including

²³² Sandoz, Swinarski and Zimmerman op cit note 68 at para 4470.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ See *Musema* case (see note 139) para 258 and *Fofana* case (see note 200) paras 126, 127.

²³⁶ Dinstejn op cit note 36 at 47; Junod op cit note 27 at 38.

²³⁷ Dinstejn op cit note 36 at para 151.

²³⁸ Sivakumaran op cit note 28 at 188–189; Junod op cit note 27 at 38.

²³⁹ Junod op cit note 27 at 38.

control over territory and responsible command. As a result, it was able to implement Additional Protocol II. Case law gives an indication of some of these features that serve as an illustration of this ability to implement Additional Protocol II. In the *Sesay* case, the Special Court for Sierra Leone determined that the RUF had been structured in such a way as to have under its control units that could enable it to implement Additional Protocol II, Common Article 3 and other internal codes of conduct.²⁴⁰ These units were known as the RUF Special Units.²⁴¹ These special units did not form part of the operational chain of command.²⁴² In addition, they did not directly participate in any military operations.²⁴³ However, they were essential to the pursuance of the military objectives of the RUF.²⁴⁴ They ensured the ability of the RUF to implement Additional Protocol II, and they included the Internal Defence Unit,²⁴⁵ the Intelligence Office,²⁴⁶ the Military Police Unit²⁴⁷ and the G5 Unit.²⁴⁸ The Internal Defence Unit investigated, prosecuted and punished minor offences committed by RUF fighters.²⁴⁹ More serious offences were channelled to the Overall IDU Commander.²⁵⁰ Intelligence officers were embedded among fighters engaging in military operations on the front lines.²⁵¹ These intelligence officers were tasked with reporting breaches of the fighters' code of conduct to the overall Intelligence Office Commander.²⁵² The Military Police Unit received investigative reports and punished misconduct allegedly committed by both fighters and civilians present in RUF-controlled territory.²⁵³ The G5 was tasked with settling cases of misconduct between civilians.²⁵⁴ From this it is evident that a highly-organised structure existed, capable of implementing Additional Protocol II.

The facts of the case reveal that some of these special units were specifically tasked with duties that are provided for in Additional Protocol II.²⁵⁵ For instance, the Internal Defence Unit removed civilians

²⁴⁰ *Sesay* case (see note 174) 674.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid* at paras 682–687.

²⁴⁶ *Ibid* at paras 688–689.

²⁴⁷ *Ibid* at paras 690–691.

²⁴⁸ *Ibid* at paras 692–696.

²⁴⁹ *Ibid* at paras 682–687.

²⁵⁰ *Ibid* at para 689.

²⁵¹ *Ibid* at paras 688–689.

²⁵² *Ibid.*

²⁵³ *Ibid* at paras 690–691.

²⁵⁴ *Ibid* at paras 692–696.

²⁵⁵ *Ibid* at paras 683, 692–693.

from the front lines of military operations to safety zones, which were designated areas located away from hostilities.²⁵⁶ This action complies with the requirements set out in Article 13 of Additional Protocol II.²⁵⁷ Additional Protocol II demands the protection of the civilian population.²⁵⁸ The G5 Unit was tasked with the provision of medicine and food to civilians and their scanning and processing in order to provide them with travel passes.²⁵⁹ This task is reflective of Article 17 of Additional Protocol II which prohibits the forced movement of civilians, as well as Article 14 of Additional Protocol II which requires that civilians need access to food stocks and basic services necessary for survival.

The facts of the cases before the Special Court for Sierra Leone further revealed that even though the RUF was sufficiently structured and thus able to implement Additional Protocol II, this armed group did not always comply with the provisions of Additional Protocol II.²⁶⁰ In fact, there is some evidence indicating that the RUF applied the provisions of Additional Protocol II selectively.²⁶¹ Trial Chamber I of The Special Court for Sierra Leone, for instance, determined that the RUF only selectively punished fighters for violations of the law of armed conflict.²⁶² In fact, Trial Chamber I came to the conclusion that discipline was exercised by the RUF only when the RUF found it beneficial to its own war plan.²⁶³ The RUF would enforce discipline or comply with the laws of armed conflict only in order either to win

²⁵⁶ Ibid at para 683.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid at paras 692–693.

²⁶⁰ Ibid at para 712.

²⁶¹ Ibid at para 717.

²⁶² Ibid at paras 706, 707, 712. See specifically Sesay (see note 174) paras 706, 707:

‘We consider that the RUF’s disciplinary system was critical to maintaining its operation as a cohesive military organisation, particularly as the force grew with the addition of captured civilians trained as fighters. There is evidence of radio messages sent from Sankoh periodically to reiterate the importance of discipline, respect of the chain of command and of obeying RUF rules. Fighters who failed to obey orders were liable to be executed. The Chamber therefore finds that Commanders utilised the disciplinary mechanisms available to them primary as a means to intimidate and control their subordinates and compel obedience to superior orders. The Chamber is cognisant of the fact that throughout the indictment period fighters were indeed punished for transgressions such as rape, looting and burning. However, it is noteworthy that these instances of systematic discipline of fighters for crimes committed against civilians occurred in locations where the RUF had a relatively stable control over that territory and we find that the objective of such actions was to secure the loyalty of civilians for the success of their operations.’

²⁶³ Ibid.

the support of the civilian population or to maintain control over territory.²⁶⁴ The Special Court summarised the situation as follows:

The disciplinary process was fundamentally a means of keeping control over their own fighters and was not a system to punish for the commission of crimes. However, some crimes were punished in areas under RUF control and where no hostilities were then taking place in order to appease the population who reacted to a particular situation.²⁶⁵

This analysis by the Special Court for Sierra Leone supports the view that the ability to implement Additional Protocol II is sufficient to satisfy the final organisational criterion. This is evident from the fact that the Special Court for Sierra Leone considered the RUF to be an organised armed group in terms of Article 1(1), even though it was able to comply with the provisions of Additional Protocol II but did not completely adhere to these. Its rulings supported the interpretation that the ability to implement Additional Protocol II is a sufficiently viable criterion and that actual compliance is too high a threshold.²⁶⁶ However, it is possible that this position may be altered in future jurisprudence as Additional Protocol II has neither been tested frequently by courts nor applied frequently in practice.

4 CONCLUSION

The purpose of this article is to give content to the meaning of the notion 'organised armed group' as included in the text of Additional Protocol II. The importance of conflict classification was stressed in part 2 of this contribution. Conflict classification is of the utmost importance as it determines the applicable legal framework regulating the armed conflict and the determination should be conducted on a case-by-case basis. As part 2 illustrated, conflict classification is not limited to determining whether the law of international armed conflict or the law of non-international armed conflict applies. As two categories of non-international armed conflict exist, the rules of

²⁶⁴ Ibid.

²⁶⁵ Ibid at para 712:

'We therefore find that the RUF disciplinary system functioned essentially to allow the leadership to maintain control over all the RUF fighters and impose and maintain order in RUF-held territory. It failed to systematically deter or regularly and effectively punish crimes against civilians or persons *hors de combat*. The disciplinary process was fundamentally a means of keeping control over their own fighters and was not a system to punish for the commission of crimes. However, some crimes were punished in areas under RUF control and where no hostilities were then taking place in order to appease the population who reacted to a particular situation.'

²⁶⁶ Ibid.

the law of non-international armed conflict applicable to an armed conflict that is non-international in nature will depend on whether or not such a situation is classified as a Common Article 3-type non-international armed conflict or an Additional Protocol II-type non-international armed conflict.

In terms of the content of the organisational criteria that the notions 'dissident armed groups' and 'other organised armed groups' have to satisfy under Article 1(1) of Additional Protocol II, Article 1(1) introduces four compulsory criteria with which a non-state fighting unit must comply in order to satisfy the notion 'organised armed group' in the context of Additional Protocol II. These four conditions, which an armed group must fulfil under Article 1(1) of Additional Protocol II, are the presence of a responsible command structure; control over a portion of the opposing state's territory; the ability to launch sustained and concerted military operations from such territory; and, finally, the ability to implement the provisions of Additional Protocol II over such a territory. Part 3 of this contribution examined the content and threshold tests inherent in these criteria with which an armed group must comply to trigger the application of Additional Protocol II if the necessary degree of violence is also satisfied.

As is concluded in part 3.1 of this article, 'responsible command' essentially calls for the non-state armed group to possess a leadership structure sufficient to allow it to give effect to the other three requirements listed in Article 1(1) of Additional Protocol II. Only where there is responsible command will an organised armed group have the ability to exercise such control over its fighters as to enable it to control territory, to launch sustained and concerted military operations and to have the ability to enforce discipline to the extent that it can give effect to the obligations it incurs under Additional Protocol II.

The 'territorial control' requirement, which is examined in part 3.2 of the article, stipulates no minimum size. The yardstick that measures whether this requirement has been satisfied is the quality of control with which the armed group governs such a territory. The necessary degree of control is satisfied (however large or small the territory) if the armed group can use it to launch sustained and concerted military operations and to administer it in such a way that it can give effect to Additional Protocol II. Part 3.3 studied the requirement regarding 'sustained and concerted military operations'. Essentially, this requirement entails that an armed group must be sufficiently organised to plan lasting military operations. Therefore, if a non-state fighting force is able to fight only short-lived, spontaneous or incidental battles, then it would fall short of this organisational standard.

The final requirement concerns the ability of an armed group to implement Additional Protocol II and this requirement is scrutinised in part 3.4 of this article. This part determines whether this criterion

requires the actual implementation of Additional Protocol II or whether it is sufficient if the armed group has the ability to do so. The Special Court for Sierra Leone supports the view that the ability to implement Additional Protocol II is sufficient to satisfy the final organisational criterion, but this position may possibly be altered by future jurisprudence. Indeed, case law indicates that the ability of an armed group to have only the simple organisational capacity to use the territory under its command to be able to give effect to the provisions of Additional Protocol II is sufficient to satisfy the organisational criterion of Article 1(1) of Additional Protocol II.

This article aspires to contribute to a better understanding of the conditions that an organised armed group must satisfy to become a party to an Additional Protocol II type-armed conflict. The importance of the fact that at an operational level there should be clear and brief guidelines for conflict classification, in general, cannot be overemphasised. The need for such clear guidelines highlights the need for a continuing re-examination of the criteria inherent in Article 1(1) of Additional Protocol II and their thresholds.