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Protracted Armed Violence as a Criterion for the Existence of Non-international Armed Conflict: International Humanitarian Law, International Criminal Law and Beyond

Miloš Hrnjaz* and Janja Simentić Popović **

Abstract

The present article provides legal analysis of the concept of 'protracted armed violence' which is part of the commonly accepted definition of non-international armed conflict (NIAC). The International Criminal Tribunal for former Yugoslavia interpreted this notion as the intensity requirement. However, the practice of other international legal institutions that use this concept (such as International Criminal Court and some other judicial institutions) is not always coherent with this finding. This fact raised several theoretical and practical issues in the process of interpretation and implementation of international legal norms. Therefore, the aim of the article is to critically reassess the 'protracted armed violence' concept in various branches of international law and to contribute to the better understanding of the NIAC phenomenon.

1. Introduction

In International Humanitarian Law (IHL), the difference between international armed conflicts (IACs) and non-international armed conflicts (NIACs) is still of great importance. The difference in applicable legal norms in these two types of conflicts is a pervasive fact and therefore demands for the strict definition and distinction of these situations. Of special importance is to understand the definition of NIACs. First of all, NIACs pose serious difficulty for the distinction between the state of peace, where IHL is not at all applicable and the situation when an armed conflict takes place. This is so because sometimes it can be hard to distinguish between isolated and sporadic acts of violence that do not amount

* Assistant Professor of International Law at the University of Belgrade—Faculty of Political Science, Belgrade, Serbia. E-mail: milos.hrnjaz@fpn.bg.ac.rs. This article is the result of the work on the project 'Political Identity of Serbia in Global and Regional Context' (ref number 179076) funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia. The authors would like to thank Jelena Plamenac for her valuable comments on an earlier draft of the article.
** Teaching Assistant and a PhD Candidate at the University of Belgrade—Faculty of Political Science, Belgrade, Serbia. E-mail: janja.simentic@fpn.bg.ac.rs

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to armed conflict on one side and NIAC on the other.[1] Moreover, NIACs are the prevailing type of armed conflicts in the world today.[2] Finally, when it can be established that NIAC does take place this conflict invoke complexities about the application of relevant legal rules, both in theory and practice.

There are many authors, intrigued by NIAC, who have already provided solid insights into different aspects of this type of armed conflict.[3] In line with this trend, the authors of this article will use the existing knowledge on this subject as a starting point for the exploration of concept of NIAC. However, the aim of this piece is to shed light on one specific issue in the now commonly accepted definition of NIAC: the meaning of the notion 'protracted armed violence'.

The term 'protracted armed violence' hailed from the jurisprudence of the International Criminal Tribunal for former Yugoslavia (ICTY) and was first used in the *Tadić* case,[4] in which it was stated that: 'an armed conflict exists whenever there is (…) *protracted armed violence* between governmental authorities and organised armed groups or between such groups within a State.'[5] The ICTY shaped a solid and virtually uniform interpretation of the 'protracted armed violence' as 'intensity of the violence' with the duration of the violence as but one of the indicators for the intensity. However, the use of the concept of 'protracted armed violence' was not confined to the realm of the ICTY.

The notion 'protracted armed violence' acted as an inspiration for the introduction of 'protracted armed conflict' syntagma in the Article 8(2)(f) of the Statute of the International Criminal Court (ICC). Nevertheless, ICC did not establish a uniform practice in the interpretation of the notion 'protracted' in its jurisprudence. This is the consequence of the complexities in the use of the term 'protracted', as well as the intricate circumstances of the adoption of the Statute. The term protracted was also brought into play outside IHL and ICL ambit,

1 It is therefore interesting to note that the definition of NIAC provided by the International Criminal Tribunal for former Yugoslavia is followed by the comment that: 'In an armed conflict of an internal […] character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.' *The Prosecutor v Dusko Tadić*, Case No IT-94-1 (ICTY, May 1997) para 562.This excerpt illustrates that relevant criteria from the NIAC definition are central in the 'peace-war' distinction.

2 See: A Bellal (ed), *The War Report, Armed Conflicts in 2018* (The Geneva Academy of International Humanitarian Law and Human Rights 2019).

3 See eg: L Moir, *The Law of Internal Armed Conflict* (CUP 2004); A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010); J Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 (881) *International Review of the Red Cross* 1; S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012); M Milanović and V Hadži-Vidanović, 'A Taxonomy of Armed Conflict' in N White and C Henderson (eds), *Research Handbook on International Conflict and Security Law, Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar Publishing 2013); Y Dinstein, *Non-international Armed Conflicts in International Law* (CUP 2014).

4 *The Prosecutor v Duško Tadić* Case No ICTY-94-1-A (ICTY, 2 October 1995).

5 ibid para 70 (emphasis added).

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along with the inconsistencies regarding its interpretation.[6] Going on further, the use of the special meaning of the term 'protracted' provokes even more confusion when it is coupled with studies from branches of social sciences, where the term 'protracted conflict' has quite a different meaning than in IHL.[7] Therefore, in order to establish a multidisciplinary and comprehensive approach to the study of today's conflicts it is important to grasp this plurality of meanings.

The main arguments presented in the article are as follows: there are strong reasons, both from *de lege lata* and *de lege ferenda* standpoint that the term 'protracted armed violence' be understood as part of the criterion of *intensity* of violence in the definition of NIAC and not as the separate criterion of *duration* of violence. Second, even if Article 8(2)(f) of ICC Statute did introduce a new type of NIAC (with the scope of its application placed between the scope of application of common Article 3 of the Geneva Conventions and Additional Protocol II) this fact should be limited only to the application of ICC Statute and it should bear no validity from the perspective of IHL. Finally, notwithstanding the above-mentioned arguments, there is a real peril that various (judicial) bodies will interpret the term 'protracted armed violence' in a literal sense (duration of violence as a separate criterion for the existence of NIAC). This could cause the problem both for the proper interpretation of the existence of NIAC in the field of IHL and for the fragmentation of international law.

Having in mind these main arguments, this article is structured in the following manner. The first part of this article explains the inauguration of the term 'protracted armed violence' and the case law of ICTY. The second part of the article contains critical assessments of the application of the 'protracted armed conflict' notion by International Criminal Court. In the third part the authors move beyond ICTY and ICC and present how both 'protracted armed violence' and 'protracted armed conflict' are used in various ways and by various institutions and how this multiplication of usage contributes or could contribute to the uncertainty in meanings of the concepts. Concluding remarks are presented in the final part of the article.

2. The Emergence of 'Protracted Armed Violence' as a Concept

Even though the threshold of IHL application is tied to the term armed conflict, the notion of armed conflict was not defined in hard law instruments, either deliberately or because of the lack of consensus.[8] This applied also to the

[6] For examples of the use of 'protracted armed violence' concept by different institutions see: Sivakumaran (n 3) 166.

[7] See eg: EE Azar, *The Management of Protracted Social Conflicts* (Dartmouth Publishing Company 1990).

[8] See: ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the*

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definition of NIAC.[9] There were of course doctrinal contributions to the definition of this concept,[10] with the special emphasis on the work of ICRC on the Commentaries on each provision of the Geneva Conventions under the editorship of Jean Pictet.[11] Commentaries to common Article 3 provide a useful insight into the understanding of NIAC concept by presenting a list of 'convenient criteria' that should be taken into consideration when assessing whether NAIC takes place.[12] In commentaries to GC I, III and IV these criteria can be subsumed under two categories: the ones that seek to establish objective elements for proving the existence of NIAC (organisation and characteristics of the non-state actor, the need for the involvement of regular military forces, reaction of UN) and the ones that are in line with the doctrine of recognition of belligerency (formal criteria of recognition of insurgents as belligerents).[13] While these criteria were not, in the words of the authors of the commentaries, *condition sine qua non* for the existence of the NIAC, they did reflect the two necessary requirements for the establishment of the existence of NIAC: organisation of the parties to the conflict and intensity of the conflict.

Field, 2nd edn, 2016, paras 384–86. <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> (all internet references were accessed in January 2020); ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd edn, 2017, paras 406–8. <https://ihl-databases.icrc.org/ihl/full/GCII-commentary>.

9 Common Art 3 to the Geneva Conventions applies 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' without further explaining the term NIAC. Therefore, it is useful to get acquainted with the history of drafting of this article in order to grasp the meaning of NIAC. In that regard see: Sivakumaran (n 3) 156–62; Cullen (n 3) 27–51, Moir (n 3) 23–29, DA Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 11 *Case Western Reserve Journal of International Law* 37, 41–54.

10 See eg: Elder (n 9) 53; ICRC, 'Humanitarian Aid to the Victims of Internal Conflicts', Meeting of a Commission of Experts in Geneva, 25–30 October 1962, Report' (1963) 3 *International Review of the Red Cross* 79, 82–83.

11 For contributors see: J-M Henckaerts, 'Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century' (2012) 94 *International Review of the Red Cross* 1551, 1552.

12 See: J Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, vol 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva (1952) 49–50; J Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, vol 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva (1960) 36; J Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, vol 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva (1958) 35–36.

13 Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, vol 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Geneva*, 1952, pp 49–50; Pictet (ed), *Commentary on the Third Geneva Convention*, above note 14, p 36; J Pictet (ed), *Commentary on the Fourth Geneva Convention*, above note 12, pp 35–36.

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This was the state of affairs in IHL when ICTY began its work. There was no one legally binding definition of NIAC in IHL treaties and there were several factors to look into in order to establish that NIAC takes place. However, in order to conduct its work and to establish whether war crimes took place in the territory of former Yugoslavia, ICTY needed to rely on a solid and precise definition. Therefore, in 1995 the Appeals Chamber of ICTY delivered a judgement in the *Tadić* case in which it paved the way for the first explicit general definition of armed conflict, by stating that: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[14] Hence, the definition of NIAC was also established: NIAC is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. As useful as this definition of NIAC may have been, it still needed to pass the test of practical convenience. This came with the further elaboration of the definition that was provided by the Trial Chamber in the 1997 judgement, in the same case:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.[15]

Hence, an interesting interpretation emerged: even though the Appeals Chamber had used the term *protracted armed violence* which, in its ordinary meaning, referred to the *duration* of the violence, the Trial Chamber interpreted this notion as the *intensity* of the violence.[16] In dictionaries and thesauruses of the English language the adjective 'protracted' is defined by referring to the time element: 'lasting for a long time or made to last longer than necessary';[17] 'drawing out in time, prolonging, delaying';[18] 'unduly or unusually extended or

[14] *The Prosecutor v Duško Tadić* (n 4) para 70. It is usually pointed out that this statement contains a general definition of the armed conflict from which a definition of NIAC could be derived; however, Kritsiotis interestingly indicates that the Appeals Chamber 'committ[ed] itself to the provision of not one but *two* definitions'. See: D Kritsiotis, 'The Tremors of Tadic' (2010) 43 *Israel Law Review* 262, 267. See also: J-F Quéguiner, 'Dix ans après la création du Tribunal penal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire' (2003) 85 *International Review of the Red Cross* 271, 273–75.

[15] *The Prosecutor v Duško Tadić*, Case No IT-94-1-T (ICTY, 7 May 1997) para 562.

[16] We do not claim that this interpretation was completely unexpected, having in mind that the criterion of intensity was recognised in the doctrine as a requirement for NIAC. What we point out to in fact is the odd wording that Appeal Chamber used ('protracted armed violence'instead of eg violence of certain intensity) and the fact that the Trial Chamber did not dwell on this issue in more detail.

[17] Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/protracted'

[18] *Webster's New Dictionary and Thesaurus* (Concise Edition, Russel, Geddes and Grosset 1990) 436.

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prolonged'.[19] However, as the authors of the 2016/2017 Commentaries to the Geneva Conventions rightly point out:

> From the perspective of the practical application of humanitarian law, an independent requirement of duration could, in contrast, lead to a situation of uncertainty regarding the applicability of humanitarian law during the initial phase of fighting among those expected to respect the law, or to a belated application in situations where its regulatory force was in fact already required at an earlier moment.[20]

Grignon also illustratively explains that the criterion of duration of the conflict can only be assessed *post factum*, as well as the complexity it provokes, both for the International Criminal Law and the protection of persons. She emphasizes that at the beginning of the conflict the parties do not know how long the conflict will last and therefore might not be aware of the qualification of the acts they commit as war crimes. This situation raises the question about the necessary intention of the perpetrators of the acts for their qualification as war crimes.[21] Another unwanted consequence of the interpretation of the term protracted as the duration is that the protection of the persons affected by the conflict would be at stake (e.g. in cases of the arrest of persons at the outset of hostilities they would not be considered as protected by the rules of IHL, contrasted to the arrest later in the conflict when they would gain protection).Therefore, authors of this piece believe there are strong arguments to advocate that the intensity of the violence rather than its duration is more convenient criterion for the establishment of NIAC.

In addition, there is no evidence whatsoever that Appeal Chamber in the Tadic case wanted to make any change in the already accepted criteria for the existence of NIAC—intensity of the violence and organisation of the parties. The decision to use the term 'protracted' as indication for intensity of the violence in this case could be seen as misfortunate, however the texts of the judgments should not be interpreted in a literal way, as sacred texts. Namely, it should be recalled that the text of a judgment is not a treaty text. Moreover, even the 'ordinary meaning' of the terms of the treaty could have a special technical legal meaning.[22] This special technical legal meaning sometimes does not correspond with the ordinary meaning of that term used in general dictionaries. Therefore, the term 'protracted' in the definition of NIAC in IHL

[19] *Webster Illustrated Contemporary Dictionary* (Encyclopaedic Edition, J.G. Ferguson Publishing Company1988) 585.

[20] ICRC, *Commentary on the First Geneva Convention* (n 8) para 439; ICRC, *Commentary on the Second Geneva Convention* (n 8) para 461.

[21] J Grignon, 'The Beginning of Application of International Humanitarian Law: A Discussion of a few Challenges' (2014) 96 *International Review of the Red Cross* 139, 158.

[22] See, eg: L Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 62.

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should be interpreted as part of the intensity criteria and not as a separate criterion of duration of the violence.

Before we indicate how interpretation of the term 'protracted' took root in the ICTY jurisprudence a short reminder of the role of judicial decisions in ICTY will be provided.[23] The leading case on the role of precedent in the jurisprudence of ICTY is the decision of Appeals Chamber in *Aleksovski Case*.[24] In this case Appeals Chamber concluded that 'decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive',[25] but also that *ratio decidendi* of Appeals' Chamber decisions is binding on Trial Chambers.[26] Even though the Appeals Chamber in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadić case* was the one that first used the term 'protracted armed violence' it did not offer its authoritative interpretation. It was rather the Trial Chamber in the same case that opted for the understanding of the term 'protracted' as part of intensity criteria of NIAC. However, other actors in the interpretation game could have decided to either follow or criticise this approach of the Trial Chamber.[27] Hence, the wide acceptance of the Trial Chamber interpretation was actually mostly dependent on its persuasiveness. As Jacob puts it:

> a precedent-based rule can usually be outweighed or defeated, and the degree or weight of its authority depends on a plethora of factors, such as the hierarchical rank of the court ... the reputation of that court ... the

[23] In general, International Law when one is dealing with the issue of precedent it is axiomatic to recall two provisions of the Statute of the International Court of Justice (ICJ). Article 38 stipulates that the Court shall apply international conventions, international customs and general principles of law. According to the same Article, judicial decisions and doctrine of international law are used only as subsidiary means for the determination of legal rules. Also, Art 59 of the Statute specifies that the decision of the Court has no binding force except between the parties and in respect of that particular case. There is, however, a continuing and fierce debate on the proper role of courts and its decisions in International Law. Three main positions on this issue can be summarised as follows: practically outmoded *la bouche de la loi*, widely recognised law development (where the phrase is probably deliberately used in a broad way) and law-making (recently widely accepted too).

[24] *Prosecutor v Aleksovski*, Case No IT-95-14/1-A (ICTY, 24 March 2000). More on this issue see: V Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 305–25.

[25] ibid para 114.

[26] ibid para 113.

[27] A Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2011).

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soundness of the reasoning employed ... its reception by the larger epistemic community (...).[28]

The following passage will demonstrate how the subsequent jurisprudence of ICTY after *Tadić* case embraced the interpretation offered by Trial Chamber. For instance, the Trial Chamber in the *Haradinaj*[29] case emphasised that '[t]he criterion of protracted armed violence has therefore been interpreted in practice, including by the Tadić Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration'.[30] To support this view, the Trial Chamber offered a comprehensive analysis of various judgments in which ICTY embarked on a mission to assess the intensity of the conflict.[31] In the *Boškoski and Tarčulovski*[32] case, the Trial Chamber presented the practice of certain national courts and concluded 'that national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces in deciding whether an armed conflict exists'.[33] Therefore, it did conclude that 'protracted' denotes intensity, and that length of the conflict is only one part of the assessment of the intensity requirement.

This stance is confirmed by pointing to the list of indicative factors for the assessment of intensity of the conflict that is deduced from previous ICTY's case law.[34] It is frequently mentioned that the intensity criteria needs to be assessed on a case by case basis,[35] which suggests that the list of indicative factors compiled by the ICTY is never final. However, one can infer a set of indicative factors for the assessment of intensity of violence from the existing ICTY case law. These factors can be grouped in the following manner: (i) features of the armed violence (seriousness of the attacks; increase in armed clashes; the spread of clashes over a territory and *over a period of time*; number, *duration* and intensity of individual confrontations); (ii) personnel and types of forces used; (iii) weapons and other military equipment used; (iv) extent of damage and casualties; (v) consequences for civilian population (emergence of displaced persons and refugees); (vi) engagement of international community,

[28] M Jacob, 'Precedents: Lawmaking through International Adjudication' in A von Bogdandy and I Venzke (eds), *International Judicial Lawmaking* (Max Planck—Institut für ausländishes öffentliches Recht und Völkerrecht 2012) 49.

[29] *Prosecutor v RamushHaradinaj, IdrizBalaj, LahiBrahimaj*, Case No IT-04-84-T (ICTY, 3 April 2008).

[30] ibid para 49.

[31] ibid paras 39–48.

[32] *Prosecutor v LjubeBoškoski, Johan Tarčulovski*, Case No IT-04-82-T (ICTY, 10 July 2008).

[33] ibid paras 180–83.

[34] ibid paras 177–78.

[35] *Prosecutor v Boškoski* (n 32) para 175; *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No IT-03-66-T (ICTY, 30 November 2005) para 90; *Prosecutor v Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin*, Case No IT-95-13/1-T (ICTY, 27 September 2007) para 407.

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(vii) existence of arrangements to stop the conflict; (viii) dealing with the participants of the conflict and perpetrators of crimes.[36]

From this set of indicative factors it is evident that the duration of the violence is but one factor required for the establishment of the existence of NIAC; it is neither the sole factor nor an independent one. However, the fact that the term 'protracted' is used, rather than e.g. 'armed violence of certain intensity', introduces a dose of murkiness into the interpretation. In the ICTY case law one can also find remarks that especially highlight the duration of the conflict, side by side with intensity.[37] Kritsiotis also notices that:

> [t]his language injected a necessary temporal factor into the legal reckoning of the Appeals Chamber, and spoke to the actual *duration* of the armed violence in question—one that does not feature explicitly in Common Article 3of the Geneva Conventions to be sure, but which did make its mark felt during the deliberations that brought us that particular provision.[38]

The case in which ICTY was closest to proclaiming the duration of violence as an element of NIAC is the *Boškoski and Tarčulovski* case, in which it stated that '[t]he element of "protracted" armed violence in the definition of internal armed conflict has not received much explicit attention in the jurisprudence of the Tribunal. *It adds a temporal element to the definition of armed conflict*'.[39] However, later in the judgment, when the intensity criterion was analysed, the Trial Chamber did not insist on the duration of the conflict as the indicative factor, let alone the independent criterion.[40] In conclusion, with few exceptions the ICTY case law regarding the interpretation of the term 'protracted' as part of the intensity criterion is practically consistent and can be viewed as settled practice.

The confirmation of the value of *Tadić* reading of the term 'protracted' could be found in the jurisprudence of other courts: International Criminal Tribunal

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36 For the case law of ICTY in which these factors are enlisted see: *Prosecutor v Vlastimir Đorđević*, Case No IT-05-87/1-T (ICTY 23 February 2011) para 1523 and *Prosecutor v Boškoski* (n 32) para 243.

37 'At any rate, in the time following October 1992 there was **serious fighting for an extended period of time**.' *Prosecutor v Dario Kordić, Mario Čerkez*, Case No IT-95-14/2-A, (ICTY 17 December 2004) para 341; 'The Chamber is, therefore, in no doubt that the armed violence occurring from mid-1998 in Kosovo and continuing through to the commencement of the NATO air campaign on 24 March 1999, involving VJ and MUP forces fighting the KLA, was of **sufficient duration and intensity** to amount to the "protracted armed violence" envisaged by the first prong of the test for an internal armed conflict.' *Prosecutor v Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, Case No IT-05-87-T (ICTY, 26 February 2009) para 820.

38 Kritsiotis (n 14) 284–85.

39 *Prosecutor v Boškoski* (n 32) para 186 (emphasis added).

40 ibid paras 243–44.

for Rwanda (ICTR)[41] and Special Court for Sierra Leone (SCSL).[42] Given the historical and institutional connections[43] between the ICTY and ICTR, it comes as no surprise that ICTR was the first Court to use the definition of NIAC provided in the *Tadić* case. In cases in which the ICTR used this definition the interpretation of the 'protracted armed violence' as the intensity criterion is in line with the ICTY practice.[44] As for SCSL, in several cases it took over the definition of armed conflict from *Tadić* case, as well as the criterion of intensity.[45]

To conclude, it seems that Ingo Venzke rightly underlines that '[i]n order to succeed, an interpretation of a rule needs to connect to the past in a way that shapes future application'.[46] The wide acceptance of the ICTY's inclusion of 'protracted armed violence' in the definition of NIAC is a proof of its success.[47] The definition of NIAC stipulated in the *Tadić* case is connected to the past, in the sense that it had successfully used two previously widely accepted criteria for the establishment of the existence of NIAC: organisation of parties to the conflict and the intensity of the conflict itself (controversially recognised in the term 'protracted'). Ironically, as will be demonstrated, the definition provided in the *Tadić* case had to pay the price for its centrifugal normative force and persuasiveness.[48] Said definition unexpectedly found its way not only into the Statute of the International Criminal Court (ICC), but was also used outside the

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[41] International Criminal Tribunal for Rwanda was established in 1994 by the UN Security Council in order to trial persons responsible for crimes committed between 1 January–31 December 1994 in the territory of Rwanda and other neighbouring states. See more on: <http://unictr.irmct.org/>.

[42] Special Court for Sierra Leone was established in 2002 as the result of a request to the UN by the Government of Sierra Leone for 'a special court' to address serious crimes committed during the country's decade-long (1991–2002) civil war. See more about this interesting Court at: <http://www.rscsl.org/>.

[43] Those connections are *inter alia* the same Chief Prosecutor and the same Appeal Chamber.

[44] *The Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T (ICTR, 2 September 1998) para 619; *The Prosecutor v Georges Anderson Nderubumwe Rutaganda*, Case No ICTR-96-3-T (ICTR, 6 December 1999) para 93. It should, however, be stressed that there were some ICTR Judgments that did not expressly mention the term protracted armed violence and intensity of the conflict in the analysis of the concept of NIAC (*The Prosecutor v Semanza*, Case No ICTR-97-20-T (ICTR, 15 May 2003) para 355; *The Prosecutor v Kamuhanda*, ICTR-95-54-T (ICTR, 22 January 2004) para 722).

[45] *The Prosecutor v Moinina Fofana and Allieu Kondewa*, Case No SCSL-04-14-T (SCSL, 2 August 2007) para 124; *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No SCSL-04-15-T (SCSL, 2 March 2009) para 95.

[46] I Venzke, 'The Role of International Courts as Interpreters and Developers of Law: Working Out the Jurisgenerative Practice of Interpretation' (2011) 34 *Loyola Los Angeles International and Comparative Law Review* 99, 121.

[47] See the following sections of the article for details.

[48] It is going to be demonstrated that the price is lack of the coherence of the meaning of the term.

context of international criminal law system, causing additional ambiguities. These issues will be addressed in the following parts of the article.

3. The International Criminal Court and 'Protracted Armed Conflict'

There is no doubt that both the accomplishments and failures of ICTY and ICTR significantly contributed to the establishment and institutional structure of the International Criminal Court (ICC).[49] Various scholars, judges and practitioners already commented on this relation, as well as on similarities and differences between *ad hoc* tribunals and ICC.[50] For the purpose of this article it is especially important to note that the NIAC definition from the *Tadić* case found its way into the wording of the ICC Statute. During the Rome Conference 'the inclusion of war crimes committed in armed conflicts not of an international character was rather difficult to achieve'.[51] A number of states which were in the minority (such as Algeria, Bahrain, China, India, Indonesia, Libyan Arab Jamahiriya, Nepal, Saudi Arabia, Sudan, Syrian Arab Republic, Turkey, Oman, Viet Nam) explicitly wanted to completely exclude provisions relating to NIAC the Statute.[52] Some states were only willing to accept the jurisdiction of the Court for war crimes committed in NIAC in cases of total collapse of a State's judicial system (Qatar, Pakistan).[53] This seemed like a drawback from widely accepted practice of the ICTY which *inter alia* concluded that there is no valid reason to protect:

49 MC Bassiouni, 'International Criminal Justice in Historical Perspective: the Tension Between States' Interests and the Pursuit of International Justice' in A Cassese (ed), *The Oxford Companion of International Criminal Justice* (OUP 2009).

50 See, eg M Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 *Journal of International Criminal Justice* 427; C Jorda, 'The Major Hurdles and Accomplishments of ICTY: What the ICC can Learn from Them' (2004) 2 *Journal of International Criminal Justice* 572; G Boas, 'Comparing the ICTY and the ICC: Some Procedural and Substantive Issues' (2000) XLVII *Netherlands International Law Review* 267.

51 A Zimmermann and R Geiß, 'Article 8 para. 2 (c)–(f) and para. 3: War Crimes Committed in an Armed Conflict Not of an International Character' in O Triffterer and K Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart Publishing 2016) 529.

52 For the detailed analysis of *travaux préparatoires* on this issue see: A Cullen, 'The Definition of Non-international Armed Conflict in the Rome Statute of International Criminal Court: An Analysis of Threshold of Application Contained in Article 8(2)(f)' (2007) 12 *Journal of Conflict and Security Law* 419.

53 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (Official Records 1998) 340. It is interesting to note that representative of Turkey stated that 'it was not clear how the Court would decide whether there was an internal conflict or not'. The representative of India further stated 'that there could not be a homogeneous structure of treatment of international and non-international armed conflicts so long as sovereign states existed'.

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> civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State.[54]

That is one of the reasons why representatives of many states insisted that ICC needed to have jurisdiction for all war crimes committed in NIAC (such as Germany, Denmark, Sweden, Italy, Canada, Brazil, United Kingdom, Sierra Leone, Ireland).[55]

As a result of these complex negotiations between states, a proposal was made to include a higher threshold of application along the line of Additional Protocol II (AP II). Most of the states, however, refused to accept the proposed amendment to the application threshold made by Bureau (among the states that advocated this position were Spain, South Africa, Australia, Uganda, Tanzania, Denmark, Canada, Norway, Slovenia, Zimbabwe, Costa Rica). The representatives of those states argued that the reference to control over a part of a state territory would restrict the scope of the Courts' action excessively and/or that it is necessary for the Court to have jurisdiction over war crimes committed in the NIAC between organised groups.[56] Sierra Leone's delegate made an important comment that higher threshold would mean that NIAC such as the one in his country would not be covered by the jurisdiction of the Court. Therefore, he proposed new text which actually echoed the *Tadić* judgment and eventually became paragraph 2 (f) of Article 8:

> paragraph 2 (e) applies to armed conflicts not of international character and thus not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups.[57]

[54] *The Prosecutor v DuškoTadić* (n 4) para 97.

[55] The representative of Denmark remarked that '[f]or the Court to be relevant, it must have jurisdiction over crimes committed not only in international armed conflicts but also in internal armed conflicts, which were the theatre of most war crimes committed today'*United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (Official Records 1998) 339. The representative of Austria confirmed that this was position of all European Union Member States.

[56] See, eg the statement of the representative of Spain in this regard. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (Official Records 1998) 329.

[57] Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (emphasis added).

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The difference between the wording of this provision and its inspiration (paragraph 70 of *Tadić* Interlocutory Appeal Judgement) is that the notion 'protracted armed violence' is replaced by the term 'protracted armed conflict'. It is hard to definitely conclude why delegate of Sierra Leone used the formulation 'protracted armed conflict' instead of 'protracted armed violence' and, even more importantly, why other states accepted this formulation.[58] There are at least two concurring explanations. The first one is in fact based on the premise that the change was a result of poor drafting and that the intention of the drafters was not to elevate the threshold of application of the Article 8(2)(e) in comparison to Article 8(2)(c).[59] Dörmann argues that the term 'protracted' is redundant, since protracted violence is already a constituent element of NIAC.[60] Sivakumaran adds that 'if an armed conflict is defined, in part, as protracted armed violence, then a protracted armed conflict is simply protracted protracted armed violence'.[61] Moreover, the same author explains that the French version of Sierra Leone delegate speech is identical to the corresponding portion of the Tadić definition: 'Elle s'applique aux conflitsarmes qui ont lieu sur le territoire d'un Etat des lorsqu'ilexiste *un conflit arme prolonge entre les autorites gouvernementales et des groupes armes organises ou entre de tels groups.*' Thus, Sivakumaran concludes, 'if the French text were followed, the intention would quite clearly seem to have been to adopt the *Tadić* definition. It may come down to a simple issue of translation: "conflit" was translated as "conflict" rather than "violence"'.[62]

Alternative explanation for the change rests on the premise that the final wording of Article 8(2)(f) represents a compromise between the States that argued for the same threshold of application of paragraphs 2(c) and 2(e) and those that argued for the threshold of Article 2(e) in accordance AP II.[63]

The position that one takes about the reasons for change in the wording is important because it has further implications. Namely, the question that is left unanswered is how the Article 8(2)(f) is to be interpreted in relation to Article

[58] The problem regarding the position of states on the proposal of the representative of Sierra Leone is timing: the proposal was actually made on the very end of the Conference, so we do not have reactions of other states, only the fact that proposal was accepted.

[59] This Article enlists 'other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law' without mentioning the wording of protracted armed conflict.

[60] K Dörmann, *Elements of War Crimes under the Rome Statute of International Criminal Court* (CUP 2003) 441.

[61] Sivakumaran (n 3) 193.

[62] S Sivakumaran, 'Identifying an Armed Conflict not of an International Character' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2007) 374.

[63] Sivakumaran accepts that it is possible to make an argument for such a interpretation of Art 8(2)(f) but still argues that threshold of application for both paras 2(c) and 2(e) is the same. See Sivakumaran (n 62) 376.

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8(2)(d) and whether Article 8(2)(f) introduced a new type of NIAC. This uncertainty provoked a discord in the doctrine of International Law.[64]

Cullen and Sivakumaran, among others, presented detailed arguments as to why the threshold provided in Article 8(2)(f) should be interpreted as equivalent to that contained in paragraph 2(d).[65] In short, Cullen advanced following arguments based on the rules of interpretation stipulated in the customary rules on the interpretation of international treaties codified in Vienna Convention on the Laws of Treaties:

1. *the intention of the Statute's drafters* (Cullen argued that 'the drafting history of the Statute shows consistency in positing one threshold for all provisions relating to armed conflict notof an international character'[66]);
2. *the textual interpretation of Articles 8(2)(f) and 8(2)(e)* (the use of the term 'armed conflict not of an international character' in the Article which is directly taken from the common Article 3 of GCs and the use of the term 'other' in Article 8(2)(e) because 'it situates the offences listed in the same category of armed conflict as that of common Article 3'[67]);
3. *customary status of the offences in the sections 2(c) and 2(e)* ('it is arguable that their recognition as norms of customary international law (applicable in all situations of armed conflict) makes the interpretation of a new category of non-international armed conflict in 8(2)(f) superfluous').[68]

Sivakumaran invoked similar arguments.[69] It should be stressed, however, that he also pointed out that the same threshold of application for sections 2(c) and 2(e) is advisable from *lex ferenda* perspective since making the differentiation between acts stipulated in those two sections would actually mean 'to discriminate within armed conflicts not of an international character in addition to the more traditional discrimination that exists between non-international armed conflicts and their international counterparts'.[70]

[64] Jelena Pejic mentions two main groups of authors in this regard. The first group of authors who believe that there is no change in this sense are represented by: T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 260; M Bothe, 'War Crimes' in A Cassese, P Gaeta, and JWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 423; Cullen (n 3). For the opposing view, see A Bouvier and M Sassoli (eds), *How Does Law Protect in War?*, ICRC, Geneva, vol 1, 2006 110; Rene Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 268; W Schabas, *An Introduction to the International Criminal Court* (3rd edn, CUP 2007) 116. See: Pejic (n 3) 193.

[65] Sivakumaran (n 62); Cullen (n 3).

[66] Cullen (n 3) 176.

[67] ibid 183.

[68] ibid 183–84.

[69] Sivakumaran (n 62) 371–77.

[70] ibid 375.

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Despite these very thorough arguments of Cullen and Sivakumaran it is still possible to argue that Article 8(2)(d) and 8(2)(f) do not have the same meaning. Namely, both of these authors base their claims on the interpretation rules stipulated in the 1969 Vienna Convention on the Law of the Treaties. Even though the application of interpretation rules stipulated in Articles 31–33 of this Convention is confirmed in the practice of ICTY, ICTR and ICC as reflecting customary international law, there are some special features of applicability of these rules in the Rome regime.[71] For example, both Cullen and Sivakumaran rely heavily on preparatory work as an aid for the interpretation of the Article 8(2)(f) even though various scholars warn that this method has limited value in the context of interpretation of Rome Statute.[72]

In addition, if one takes a closer look at the general rule of interpretation contained in the Article 31(1) of the Vienna Convention it will see that it stipulates that 'treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Therefore, it is clear that according to this general rule the interpretation of the term could not be reduced only to its literal meaning. The context that needs to be taken into consideration is the Rome Statute as a whole, with the special emphasis on neighbouring provisions of Article 8(2)(f), such as 8(2)(d). In comparing these two provisions it would be strange to conclude that they have the same meaning even though their texts differ. Moreover, such conclusion could be contrary to the principle of effectiveness in the interpretation of treaties. This principle is a part of the principle of interpretation in good faith which, *inter alia*, demands that 'all provisions of the treaty or other instrument must be supposed to have been intended to have significance and to be necessary to convey the intended meaning; that an interpretation which reduces some part of the text to the status of a pleonasm, or mere surplusage, is prima facie suspect'.[73] Marco Sassòli also recalls the principle of effectiveness in this context by underlining that 'under the normal rule of treaty interpretation according to which a provision (or difference between provisions) is to be presumed to have an *effet utile*, one would conclude that there are two different scopes of application for the rules in each list of the ICC Statute (and therefore possibly equally for the underlying rules of IHL).'[74] Having all the said in mind, it is possible to conclude that the 'proper' interpretation of the use of the term 'protracted armed conflict' in Article 8(2)(f) remains controversial.

At any rate, answer to the dilemma of the proper interpretation of Article 8(2)(f) and the term 'protracted armed conflict' should be looked for in the practice of ICC. In the *Lubanga* case[75] the Pre-Trial Chamber remarked that

[71] Grover (n 22).
[72] ibid.
[73] Thirlway, cited by Grover (n 22) 17.
[74] M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 184.
[75] *The Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06 (ICC, 29 January 2007) para 230.

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Article 1 (1) of AP II 'sets out criteria for distinguishing between NIACs and situations of internal disturbances and tensions'.[76] The same Chamber then compared the criteria for the application of AP II and the definition of NIAC from the *Tadić* case, concluding that the definition from the *Tadić* case:

> echoes the two criteria of Protocol Additional II (some degree of organisation of the group and ability to plan and carry out sustained and concerted military operations), except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control.[77]

The Pre-Trial Chamber also noted that the term *protracted armed violence* 'focuses on the need for the armed groups in question to have the ability to plan and carry out military operations *for a prolonged period of time*'.[78] Sivakumaran notes that although it seems that the addition of words 'for a prolonged period of time' in the *Lubanga* case suggests 'that a new threshold has indeed been created for the application of Article 8(2)(f), with duration playing a greater role',[79] a closer inspection 'may suggest that there is no greater focus on duration than there was in *Tadić* interlocutory appeal'.[80]

Sivakumaran argues that the duration of the conflict in the *Lubanga* case should be viewed as part of the intensity criteria for the establishment of the existence of a NIAC.[81] While it is possible to read the Pre-Trial Chamber's conclusions in this light it is important to stress out that during the analysis of the term 'protracted armed conflict' the Pre-Trial Chamber found that an armed conflict of 'certain degree of intensity *and* extending from at least June 2003 to December 2003 existed on the territory of Ituri'.[82] Additionally, the Pre-Trial Chamber investigated the facts of the concrete case and concluded that 'it seems clear that the FNI (Front National Intégrationniste) was capable of carrying out large-scale military operations *for a prolonged period of time*'.[83]

From these passages, one can conclude, as a minimum, that it is not possible to argue with absolute certainty whether the Pre-Trial Chamber in the *Lubanga* case followed the ICTY's practice that the term 'protracted' should be viewed

[76] ibid para 231. It seems, however, that this is not completely true. Article 1 (1) of AP II indeed differentiates between its scope of application and situations of internal disturbances and tensions as not being armed conflicts. However, it is not possible to argue that the material scope of application of the AP II is equal to the concept of non-international armed conflicts, since the criteria for application of common Art 3 are not as strict as the criteria for application of AP II.

[77] *The Prosecutor v Thomas Lubanga Dyilo* (n 75) para 233.

[78] ibid para 234 (emphasis added).

[79] Sivakumaran (n 62) 378–79.

[80] ibid. This argument is coherent with Sivamakuran's argument that Art 8(2)(f) does not change the threshold for the existence of NIAC.

[81] ibid

[82] *The Prosecutor v Thomas Lubanga Dyilo* (n 75) para 235 (emphasis added).

[83] ibid para 237 (emphasis added, footnote omitted).

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as a part of the intensity criterion, or that it considered that the duration of the conflict should be considered as an independent criterion for the application of Article 8(2)(f) of the ICC Statute. Sylvain Vité argues that the judgment of Pre-Trial Chamber in this case seems to define a field of application of Article 8(2)(f):

> that is stricter than that of common Article 3, as it requires the fighting to take place over *a certain period of time*. It is, however, broader than that of Additional Protocol II as it does not require the armed group(s) concerned to exercise territorial control (nor to have the non-international armed conflict between the state and non-state actor, AN.). The category of conflict targeted here is therefore half way between the categories referred to in common Article 3 and in Additional Protocol II.[84]

The Trial Chamber in *Lubanga* case[85] firstly agreed with the part of the Pre-Trial Decision in which it had concluded that the involvement of an organised armed group able to plan and carry out sustained military operations would allow the conflict to be characterised as an armed conflict that is not of international character.[86] The Trial Chamber continued, however, with the analysis of the organisation of the non-state armed group and the *intensity of violence* as criteria for the establishment of existence of NIAC. By quoting from the ICTY's *Mrškić* case, the *Lubanga* case Trial Chamber included armed attacks carried out over a period of time as part of the intensity criteria.[87] In this case Vité accepted that Trial Chamber was more in line with the ICTY approach: 'The Trial Chamber's reasoning would therefore seem to support the views of those who consider that there is no difference between the thresholds of application of the two sub-paragraphs (paragraphs 2(c) and 2(e), AN) of the Rome Statute . . ..'[88]

The Trial Chamber in the *Katanga* case followed the approach of *Lubanga* Trail Chamber.[89] It quoted Article 8(2)(f) and paragraph 70 of the *Tadić* judgment, and then the *Mrškić* and *Lubanga* cases, making the duration of the conflict part of the intensity criterion.[90] It is interesting to note, however, that in the part of the Decision that dealt with the intensity of the conflict the Trial Chamber stated:

[84] S Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 69, 82.

[85] *The Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06 (ICC, 14 March 2012).

[86] ibid para 535.

[87] ibid para 538.

[88] S Vité, 'Chapter 4: Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgement in the *Lubanga* Case' (2012) 15 *Yearbook of International Humanitarian Law* 67.

[89] *The Prosecutor v Germain Katanga*, Case No ICC-01/04-01/07 (ICC, 7 March 2014).

[90] ibid para 1187.

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> [w]ith specific reference to its foregoing review of the attacks that followed assault on Bogoro, the Chamber finds that the armed conflict was *both* protracted and intense owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003.[91]

The statement that the conflict was both protracted and intense could *prima facie* suggest that the Trial Chamber considered the term 'protracted' not as the part of the intensity criterion, but as an independent criterion for the existence of NIAC. Yet, the very next sentence of the Decision declares that 'in the Chamber's view, the evidence before it suffices to fulfil the intensity of the conflict requirement', which clearly puts the 'protracted' requirement in the scope of intensity criterion.[92]

The Pre-Trail Chamber in the *Bemba* case was actually the first one to directly note that Article 8(2)(f), unlike Article 8(2)(d), contains a second sentence, additionally requiring the existence of a protracted armed conflict.[93] However this Chamber did not wish to address the question whether this meant that the requirement of a protracted armed conflict sets a higher or additional threshold of intensity since 'the period in question covers approximately five months and is therefore to be regarded as 'protracted' in any event'.[94] This being so, it should come as no surprise that some authors like Yoram Dinstein used this decision to conclude that the requirements of the intensity of the violence and protracted nature in the NIAC should be separated: '(v)iolence that is protracted but not intense, or intense but not protracted, does not amount to NIAC.'[95] Dinstein further advocated that the term *protracted* should be understood as an antonym of sporadic and isolated violence as characteristics of internal tensions and disturbances. The same author admitted that it is hard to give the precise meaning of the term 'protracted', but he has offered following explanation: '[w]hatever the shortest admissible space of time may be, it can not plummet down to just a few hours or even a few days.'[96]

The Trial Chamber in the *Bemba* case, on the other hand, noted:

> the concept of protracted conflict has not been explicitly defined in the jurisprudence of this Court, but has generally been addressed within the framework of assessing the intensity of the conflict. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court emphasized the

[91] ibid para 1217 (emphasis added).
[92] ibid.
[93] *The Prosecutor v Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08 (ICC, 15 June 2009) para 235.
[94] ibid (emphasis added).
[95] Dinstein (n 3) 35.
[96] ibid 33.

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> duration of the violence as a relevant factor. This corresponds to the approach taken by chambers of the ICTY.[97]

In this case, the Trial Chamber referred to several ICTY judgments in this regard—*Kordić and Čerkez*[98], *Limaj*[99], *Delalić*,[100] and at the end *Haradinaj*.[101] Nevertheless, at the end the same Chamber reached a somewhat contradictory conclusion concerning the relationship between the intensity of the armed conflict and the term 'protracted armed conflict':

> the Chamber finds beyond reasonable doubt that the armed conflict reached a sufficient level of intensity for purposes of Articles 8(2)(d) and 8(2)(f), namely, one exceeding 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. On the basis of the *length of the armed conflict*, namely more than four and a half months, and the regular hostilities, the Chamber *also* finds beyond reasonable doubt that the armed conflict was 'protracted' within the meaning of Article 8(2)(f).[102]

Even though it is possible to read this paragraph as a proof that the Trial Chamber understood the term 'protracted' as being connected with the duration of the conflict and more as an independent criterion for the application of Article 8(2)(e) than as part of the intensity criterion, it seems more plausible that the Trail Chamber wanted to make sure that Article 8(2)(f) is applicable *even if* the term 'protracted' is understood as prolonged armed conflict.

Finally, it is reasonable to conclude that ICC practice is not perfectly consistent in the interpretation of Article 8(2)(f) and the term 'protracted armed conflict' used in this provision. It could be just that Court had pains with poorly drafted treaty. In most of the analysed cases the Court inclined to the interpretation along the lines of ICTY practice (in which the duration of the conflict was just part of the intensity criterion and not the independent one), but it is obvious that different Chambers had difficulties deconstructing the proper meaning of 'protracted armed conflict' and the role of duration in it. Described position will probably result in situation in which Chambers will try to escape to deal with the dilemma of the right interpretation of the term 'protracted armed conflict' (like a Pre-Trial Chamber in *Bemba* case). This could be a reasonable strategy for the Court when it deals with violence which is *both* relatively intense *and* relatively prolonged, which will probably be the case, more often than not.

[97] *The Prosecutor v Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08 (ICC, 21 March 2016) para 139.
[98] ibid para 341.
[99] ibid paras 171–73.
[100] ibid para 186.
[101] ibid para 49.
[102] ibid para 663. (emphasis added).

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Be that as it may, one should recall that there is a difference between IHL and International Criminal Law (ICL) as two closely connected but separate branches of International Law.[103] Namely, despite the important contribution in the Post-Cold War period of ICL to the development of IHL its differences should not be overlooked. One should keep a clear the difference between the texts of statutes of ICL institutions on the one side and general rules of IHL and ICL on the other: 'when international criminal courts were set up ... they did indeed lay down in their Statutes the various classes of crimes to be punished; however, these classes were conceived of and couched merely as offences over which each court had jurisdiction. In other words, the crimes were not enumerated as in a criminal code, but simply as a specification of the jurisdictional authority of the relevant court. The value and scope of those enumerations was therefore only germane to the court's jurisdiction and did not purport to have a general reach.'[104]

More concretely and in the line with the main argument of this piece, one should not look at the text of the Rome Statute as completely representing customary rules of ICL or IHL. Several authors already commented that treaties such as the Rome Statute 'are the fruit of diplomatic compromise, and may sometimes exceed and often fall short of customary law. For example, the Rome Statute of the International Criminal Court appears to deviate from custom in a number of areas ...'.[105]

Therefore, as Sassòli rightly warns that even if Rome Statute or ICL recognise duration of violence as a separate criterion for the existence of NIAC in some situations 'such a standard is not useful for parties, fighters, victims and humanitarian organizations at the outbreak of a conflict. It is not imaginable that they must wait and see how it develops before they know whether they must comply with IHL, are protected by it, should have been complying with it from the beginning, or may invoke it'.[106]

To conclude this part, even if one interprets the term 'protracted' as the independent criterion for the establishment of NAIC in the ICC ambit, this does not necessarily mean that this establishes a new type of conflict or a new criterion for the existence of NIAC in IHL.

[103] On the general relationship between these two branches see: M Sassòli, 'Humanitarian Law and International Criminal Law' in A Cassese (ed), *Oxford Companion to International Criminal Justice* (OUP 2009) 111–20.

[104] A Cassese, *International Criminal Law* (OUP 2003) 17. Vité made similar argument: 'it should nonetheless be recalled that this innovation in the Statute does not create a new concept of non-international armed conflict in international humanitarian law, but simply aims at determining the ICC's jurisdiction. It therefore applies only to the exercise of that jurisdiction and does not establish a category that is more generally applicable.' Vité (n 88) 83.

[105] W Shabas, 'Customary Law or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals' in J Doria, H-P Gasser and MC Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 81–82.

[106] ibid 119.

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4. 'Protracted Armed Violence' and 'Protracted Armed Conflict' beyond the ICTY and the ICC

In the previous part of the article we have shown how the term 'protracted' entered IHL and how it gained life of its own in the ICC context. We have traced consistencies in the interpretation of this notion in the jurisprudence of ICTY and pointed out to some of the difficulties of its understanding in the practice of ICC. In the following part of the article, we will present how the term NIAC and the criteria for its existence were used and interpreted by other international bodies. While the connections of IHL and ICL institutions are rather expected and even inevitable when it comes to crimes perpetrated in armed conflicts, embeddedness of IHL concepts in other branches of International Law is sometimes less evident and less expected.[107] We will present the relevance and application of IHL in different legal settings and what are the consequences for the interpretation of its terms.

La Tablada is one of the famous cases of the Inter-American Commission on Human Rights (IACHR) in which the Commission analysed the criteria for the existence of armed conflict.[108] Namely, the Commission analysed the 1989 attack on several Argentinean military barracks by more than 40 individuals belonging to the group *Todospor la Patria.* The attack lasted almost 30 hours, resulting in the death of 29 people, including members of the armed forces.

In their complaint petitioners claimed that state agents violated the rules of IHL in this occasion. Since Argentina denied the existence of armed conflict, and therefore the applicability of IHL rules, the Commission needed to clarify the difference between armed conflicts and internal tensions and disturbances. In the analysis of the scope of application of common Article 3 IACHR did indirectly conclude that its application presupposed organisation of the parties to the conflict[109] and intensity of the conflict.[110] The Commission argued in favour of applicability of common Article 3 as widely as possible, in line with the Commentaries to the GC I. Therefore, it could be argued that even though the Commission did not rely on ICTY practice, this finding is consistent with it.

What is more important to note in the ambit of this research is whether the Commission included the duration criteria in its assessment of the existence of NIAC. The Commission stressed that '*despite its brief duration* the violent clash

[107] The existence of war crimes depends on the existence of non-international or international armed conflict: without armed conflict there is no war crime.

[108] Inter-American Commission on Human Rights, Report No 55/97, Case No 11.137: Argentina, OEA/Ser/L/V/II.98, doc38, 6 December 1997.

[109] '[T]he concept of armed conflict, in principle, requires the **existence of organized armed groups**'; 'Common Article 3 is generally understood to apply to low intensity and open armed confrontations between **relatively organized armed forces or groups**', para 152.

[110] 'Common Article 3 is generally understood to apply **to low intensity and open armed confrontations**', para 152; 'What differentiates the events at the La Tablada base from [internal tensions and disturbances] are ... the nature and **level of the violence** attending the events in question.', para 155.

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between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities'.[111] It is evident that the criterion of duration was not decisive in the assessment of the nature the situation—if it was, this attack could not be considered as NIAC since it was ephemeral. However, it should not be overlooked that IACHR did decide to mention the short duration of the clash and to explain that it will not affect the qualification of the situation. If the duration of the conflict is not at all relevant, the Commission would not feel the need to mention it. However, this is far from claiming that the Commission considered duration as one of the criteria for NIAC. This is confirmed by the fact that conclusions made by Commission regarding the duration of the violence as part of criteria for the existence of NIAC were criticised by authors who treat duration of the violence as independent criteria of NIAC.[112]

Although it could be expected that human rights bodies, such as IACHC use concepts of IHL,[113] this is not that common for the courts such as the Court of Justice of European Union (CJEU).[114] Namely, this Court had an opportunity to clarify the concept of 'internal armed conflict' from the perspective of European Union law.[115] The Court issued a judgment in the *Diakité* case[116] concerning the interpretation of Article 15(c) of the Council Directive 2004/83/EC of April 2004 on the minimum standards for the qualification and status of third country nationals as refugees or persons otherwise in need of protection (Qualification Directive, QD).[117]

Qualification Directive stipulates subsidiary protection for persons who do not fulfil requirements for the refugee status but are in need of international protection because they face some sort of serious harm. The grounds for subsidiary protection are enlisted in Article 15 QD in which serious harm is defined as *inter alia* 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. The Belgian Court refused to recognise Mr. Diakité, a Guinean national, as a person eligible for subsidiary protection by arguing that the situation in

[111] ibid para 156. (emphasis added).
[112] See, eg Dinstein (n 3) 33–34.
[113] On the relation between IHL and Human Rights see: Provost (n 64).
[114] This is not the proper place to discuss rather complex relationship between EU law and International Law. For more on this issue, see eg: E Canizzaro, P Palchetti and RA Wessel (eds), *International Law as the Law of the European Union* (Martinus Nijhoff Publishers 2012).
[115] On critical appraisal of the relationship between EU Law and IHL from the perspective of *Diakité* case see: Claudio Matera, 'Another Parochial Decision? The Common European Asylum System at the Crossroad between IHL and Refugee Law in *Diakité*' (2012) *Questions of International Law* 3.
[116] Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] ECLI:EU:C:2014:39.
[117] Council Directive 2004/83/EC of April 2004 on the minimum standards for the qualification and status of third country nationals as refugees or persons otherwise in need of protection [2004] OJ L304/12.

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Guinea could not be classified as an internal armed conflict according to the rules of IHL. Mr. Diakité, on the other hand, claimed that the term 'internal armed conflict' from Article 15 QD does not have the same meaning as in IHL.

In its Judgement CJEU first noted the terminological difference between the phrase 'internal armed conflict' used in Article 15 QD and the phrase 'armed conflict not of an international character' used in IHL treaties. This difference lead the Court to conclude that EU legislature wished to grant subsidiary protection not only to the victims of 'armed conflict not of an international character' but also to persons affected by 'internal armed conflict', provided that such conflict involves indiscriminate violence.[118] As noted by Claudio Matera, this argumentation is far from convincing since many scholars and even the Chamber in the *Tadić*caseused terms 'internal armed conflict' and 'armed conflict of non-international character' as synonyms.[119] Advocate General in the case also noted that:

> the concepts of 'internal armed conflict', 'armed conflict not of an international character' and 'non-international armed conflict' which appear, respectively, in Article 15(c) of the Qualifications Directive, Common Article 3 of the Geneva Conventions and Protocol II are semantically almost identical.[120]

Moreover, the Directive uses the phrase 'in situations of international or internal armed conflict' which clearly resembles key notions of IHL.[121] Bauloz also notices that 'provision's terminology maybe thus used in two opposite ways, both for justifying its similarity to or dissemblance from IHL'.[122] She also speculates that the CJEU reliance on the difference in terminology stems from the fact that *travaux prépratoires* of the QD indicate that the explicit mention of GC IV in the first draft of the Directive was abandoned, thereby indicating the detachment from the NIAC definition in IHL.[123]

Therefore, more convincing is the CJEU's argument that IHL and subsidiary protection system pursue different aims and establish quite distinct protection

[118] *Aboubacar Diakité* (n 116) para 21. The Court defined the concept of 'internal armed conflict' for the purpose of Article 15 as 'a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other' (para 28).

[119] Matera (n 115) 13.

[120] Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2013] ECLI:EU:C:2013:500, Opinion of AG Mengozzi, para 19.

[121] For the analysis of the use of IHL concepts in QD see: C Bauloz, 'The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive' in DJ Cantor and J-F Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 248–69.

[122] C Bauloz, 'The Definition of Internal Armed Conflict in Asylum Law, The 2014 Diakité Judgment of the EU Court of Justice' (2014) 12 *Journal of International Criminal Justice* 835, 841.

[123] ibid.

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mechanisms, and that this is the reason why the phrase 'internal armed conflict' used in the Directive does not have the same meaning as in the system of IHL.[124]

It is important to observe, however, how the CJEU interpreted the meaning of NIAC in IHL from which it wishes to deviate. At the end of the *Diakité*judgment CJEU provided the following comment: 'The finding that there is an armed conflict must not be made conditional upon the armed forces involved having a certain level of organisation or upon the conflict *lasting for a specific length of time . . ..*'[125]

The Court also argued that application of the Directive should not depend on the classification of a conflict

> as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the *duration of the conflict*.[126]

These two statements clearly indicate that CJEU considered duration of the conflict as an independent criterion for the establishment of the existence of NIAC, and not a part of the intensity criterion. This was even more obvious in the Opinion of Advocate General, which was cited on several occasions in the *Diakité* case.[127] Even though Advocate General rightly stated in his Opinion that 'non-international armed conflict may exist only if two conditions are met, namely a certain degree of intensity of the conflict and a certain degree of organization of those taking part in the hostilities',[128] he also added:

> [i]n addition to the conditions mentioned above, *a third, temporal*, condition appears in the definition of 'non-international armed conflict' given by the ICTY (. . .)The same condition appears in Article 8(2)(f) of the Statute of the International Criminal Court (ICC). It should be pointed out that provision has been made for using such a criterion of duration in a fairly precise context, namely in order to define the violations of IHL that fall within the jurisdiction of the ICC and the other international criminal courts and that, even in that context, that criterion appears relevant, at least within the framework of the ICC Statute, only

[124] *Aboubacar Diakité* (n 120) para 24. Of course, the better solution would then be not to use the term 'armed conflict' in the Directive at all, but to use a description of a specific situation.
[125] ibid para 34.
[126] ibid para 35. (emphasis added).
[127] The role of Advocate General before CJEU is to present a reasoned submission (Opinion) which is not binding on the Court in which it will present the current state of affair in EU Law as well as the contours of its future development.
[128] *Aboubacar Diakité* (n 120) para 42.

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with a view to criminalising violations other than those of Common Article 3 of the Geneva Conventions.[129]

The Advocate General also emphasised that the ICRC expressed reference to the duration of the conflict in its 2008 opinion paper by defining NIAC as '*protracted armed confrontation* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State'.[130]

Even though CJEU at the end disregarded the IHL criteria for the establishment of NIAC, in its analysis it did consider that concept of NIAC in IHL comprises criterion of duration as the third independent criterion. Advocate General did the same and on top of that he equated the concept of 'protracted armed violence' from ICTY jurisprudence and 'protracted armed conflict' from ICC Statute without mentioning all the unsettled ambiguities. However, Advocate General made an insightful remark that context of the application of norms might affect the way of its interpretation.

Diakité case illustratively shows all the complexities of the definition of NIAC and how it is important to approach it with caution. It demonstrates certain perils of the fragmentation of International Law and of different interpretations of key legal concepts by different judicial institutions.[131] It also reveals that it is hard to expect that all judicial institutions will have the capacity of nuanced reading of the term 'protracted armed violence'. One could reasonably expect that the judicial institutions which do not primarily deal with IHL issues will interpret the term 'protracted' as 'prolonged period of time' since this is the ordinary meaning of the term. This conclusion is even more accentuated when one bears in mind that an institution like ICC (that indirectly deals with IHL issues) also has difficulties in establishing a clear and consistent meaning of the term 'protracted'. Having that in mind, it is interesting to point out to current developments that might contribute to the ambiguities in the interpretation of the same notions in different legal environments in the future.

In that regard it is instructive to pay close attention to complex relations between African Union (AU) and several African States and International Criminal Court and consequences thereof. First thing that needs to be taken into consideration is the actual and potential tendency for withdrawal of African States from ICC. In 2016, three African states—South Africa, Gambia and Burundi—announced their withdrawal from the ICC. This was a culmination of the long line of criticism towards the work of the ICC as being engaged only with situations in African countries. At the beginning of 2017 African Union Assembly adopted a Decision on the International Criminal

[129] ibid para 45.

[130] International Committee of the Red Cross, 'How is the Term 'Armed Conflict' Defined in International Humanitarian Law?' (2008) Opinion Paper 5 (emphasis added).

[131] For the stance that concerns of fragmentation of international legal order are unfounded see: Bauloz (n 122) 844–46.

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Court.[132] The Decision, *inter alia*, welcomes and fully supports the decisions taken by Burundi, South Africa and Gambia to announce their withdrawal from the ICC. The AU also adopted ICC Withdrawal Strategy,[133] however it is far from certain what its legal scope is.[134]

These steps illustratively show the trend of distrust of African States towards ICC.[135] The other side of that coin is the ongoing endeavour to establish a regional criminal court in Africa. In 2004 an idea transpired: to merge the two yet non-existing courts into one—African Court on Human and Peoples' Rights[136] and Court of Justice of the African Union[137] should become African Court of Justice and Human Rights (ACJHR).[138] However, having in mind that the 2008 Protocol on the Statute of the African Court of Justice and Human Rights is still not ratified by 15 States as provided in Article 9, the only operating court in present is African Court on Human and Peoples' Rights.[139] The idea to create one court is still on the table and another Protocol on its functioning was adopted in 2014—Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol).[140] This protocol expanded the jurisdiction of the ACJHR to encompass not only general legal matters and human right matters[141] but also international criminal law issues.[142] One of the leading commentaries on the text of the Protocol argues that 'even though the ratification of the Malabo Protocol and its Annex may be a protracted process with some important questions still to be resolved, the establishment of, simply speaking, an 'African Criminal Court' is becoming an increasingly concrete possibility'.[143]

132 Text of the Decision is available at <https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf‘.

133 Text of the Withdrawal Strategy is available at <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf‘

134 For an early comment on the Withdrawal strategy see <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/‘.

135 On 27 October 2017 Burundi became the first state to withdraw from ICC, while Gambia and South Africa decided to revoke the withdrawal in February and March 2017, respectively.

136 Established by Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

137 Established by Protocol of the Court of Justice of the African Union.

138 For the evolution of the idea see: Amnesty International, *Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court* (2016) 7–12.

139 See: <http://en.african-court.org/>

140 Text of the Protocol is available at: <https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf>

141 For that matter it was provided that it had two Sections: General Affairs Section and Human Rights Section. Article 16 of the Statute of the African Court of Justice and Human Rights.

142 See Arts 6,7 and 14 of the Malabo Protocol.

143 G Werle and M Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press 2017) 3.

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Of special importance for the topic of this piece is the Article 14 of Malabo Protocol which introduces the list of crimes for which the ACJHR will have jurisdiction. Among them is the new Article 28(D)(f) which is virtually the same as the Article 8(2)(f) of the ICC Statute (including the second sentence and the term ‘protracted armed conflict’). This means that the term ‘protracted armed conflict’ has found its way in the African context and that in the future it might be important to see how this term will be interpreted. While it is clear that the inspiration for the definition of war crimes in Malabo Protocol was the ICC Statute, these definitions slightly differ and include different crimes.[144] Also, the word for word transposition of ‘protracted armed conflict’ notion might indicate that drafters of the Malabo Protocol were not concerned too much with the dilemmas about the interpretation of this term in the ICC practice. Moreover, the fact that the wording is borrowed from ICC does not mean that its interpretation will be the same. As Amnesty International points out:

> just because the provisions of these international instruments [Rome Statue, instruments relating to the International Criminal Tribunal for Rwanda (ICTR) and the Special Tribunal for Lebanon, Statute of the International Court of Justice] are incorporated into the Malabo Protocol does not mean that the ACJHR will necessarily build upon their experience. The jurisprudence of the ICC for example is limited at present and it is not clear how much assistance this will therefore provide to the ACJHR in interpreting the Malabo Protocol.[145]

Therefore, even though we already warned that the adoption of the Rome Statute was the fruit of complex diplomatic compromise and that it should not have general reach, the inclusion of the term ‘protracted armed conflict’ in the Malabo Protocol illustrates the fact that institutions such as ICC are not isolated islands. Other international criminal judicial institutions as well as national courts will arguably rely on the terms of the Rome Statute and perhaps even on its jurisprudence. However, one should be patient to see whether these tendencies will bring about the fragmentation of ICL.

5. Conclusion

IHL doctrine insisted for decades that intensity of the violence and organisation of the parties to the conflict are the criteria for the existence of NIAC. The practice of the ICTY, as well as the ICTR and the SCSL cemented the relevance of these criteria. However, the use of the word ‘protracted’ in the definition of NIAC by the ICTY raises some difficulties. Ambiguities about the interpretation of this notion are illustrated by the yet unsettled practice of the ICC and in

[144] See: Amnesty International (n 138) 17.
[145] ibid 15.

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the practice of institutions outside the ICL field. Therefore, this article sought to explore the use of the terms 'protracted armed violence' and 'protracted armed conflict' in the doctrine of IHL and ICL as well as in the jurisprudence of various international judicial institutions.

The authors of the article made several conclusions in this regard. First, there are convincing arguments that the intensity of the violence and organisation of the parties to the conflict should be considered as the only criteria for the existence of NIAC, both from the perspective of *lex lata* and *lege ferenda.* In the same vein, duration of the conflict is and should remain only one of the indicators for intensity of the violence. Doctrine of IHL and jurisprudence of some of the ICL judicial institutions confirm this stance.

However, the adoption of ICC Statute illustrates that States are usually more interested in their own concrete interests than in abstract interest of coherence in International Law. A direct consequence of this reality are the difficulties concerning the proper interpretation of the Article 8(2)(f) of the ICC Statute and the term 'protracted armed conflict'. By using the strategy of proclaiming that conflicts under its jurisdiction were *both* intense and lasting, ICC eschewed making a final definition of this term. Even though in most situations of NIAC conflicts will indeed be both intense and lasting, *La Tablada* case illustrates the fact that this is not always the case.

It is important to stress that even if one advocates that Article 8(2)(f) of the ICC Statute introduces a new threshold for its application, that fact should not influence the general criteria for the existence of NIAC in IHL. In that regard, authors of this contribution strongly support the argument that establishment of the duration of the conflict as the independent criterion for the existence of NIAC would undermine the main goal of IHL—protection of victims of armed conflicts. Moreover, at the beginning of the conflict it would create uncertainties whether IHL is even applicable or not.

Finally, even though there are strong arguments in favour of the position that the duration of the conflict should be a part of the intensity criteria in IHL, there are some indicators that institutions outside the system of IHL and ICL will interpret the term 'protracted armed violence' as prolonged armed violence. If this is done in special context of other legal regimes, as it was the case in the *Diakité* case before CJEU, this should not raise too many problems for interpretation of 'protracted armed violence' in IHL or ICL. On the other hand, different legal regimes are not isolated islands. The inconsistent interpretation of the same notions across different legal settings can act as a catalyst for fragmentation of International Law. Therefore, it is important that the subjects involved in interpretation of complex concepts make an additional effort in order to enhance coherence.

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