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Additional Protocol II: Elevating the minimum threshold of intensity?

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Abstract

This paper examines the notion of intensity in the context of common Article 3 and Additional Protocol II (AP II) to the Geneva Conventions in order to establish whether AP II demands a different intensity threshold from the minimum threshold of intensity contemplated in common Article 3. The paper considers the question of whether the inclusion of the term "sustained" in the phrase "sustained and concerted military operations" intrinsic to the threshold in Article 1(1) of AP II introduces a temporal requirement in addition to mere protracted armed violence. The paper argues that the inclusion of the term "sustained" in Article 1(1) of AP II potentially demands prolonged protracted armed violence. The research aims to contribute to the existing literature on the notion of intensity demanded by the scope of application inherent in AP II through an interrogation of the phrase

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"*sustained*" *military operations by employing the rules of treaty interpretation and by examining relevant case law and scholarly debate. In this way, the author hopes to contribute towards filling a lacuna with regard to the minimum threshold for intensity in the context of treaty law concerned with the classification of non-international armed conflicts.*

Keywords: Additional Protocol II, intensity, sustained military operations, protracted armed violence, prolonged violence, duration of violence, non-international armed conflict.

Introduction

It is estimated that by mid-2020 there were more than fifty non-international armed conflicts in at least twenty-two different countries, of which at least six arguably meet the threshold requirements needed to trigger the application of Additional Protocol II to the Geneva Conventions (AP II).[1] AP II remains significant as it is the most comprehensive treaty aimed at regulating non-international armed conflicts. It serves to supplement and develop the regime codified in common Article 3 to the Geneva Conventions.[2]

This paper explores the relationship between the notion of intensity and the ability of an organized armed group to launch "sustained and concerted military

1 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978). See Annyssa Bellal, *The War Report: Armed Conflicts in 2018*, Geneva Academy, April 2019 (2018 War Report), available at: www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf (read together with Annyssa Bellal, *The War Report: Armed Conflicts in 2017*, Geneva Academy, March 2018, available at: www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf; and Annyssa Bellal, *The War Report: Armed Conflicts in 2016*, Geneva Academy, March 2017, available at: www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202016.pdf (all internet references were accessed in July 2021)) for a summary of situations that were continuing in 2018. These include the violent situations in Afghanistan (p. 51), Egypt (p. 64), Mali (p. 80), South Sudan (p. 87), Ukraine (p. 94) and Yemen (p. 104). See also Geneva Academy, "Conflicts", *RULAC*, available at: http://www.rulac.org/browse/conflicts.

2 Common Article 3 is common to all four Geneva Conventions. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). AP II, 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 AP II as well as an analysis of its content, see Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2003, pp. 89–132; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 9–34. In essence, AP II expands on the contents of common Article 3 by incorporating detailed rules that regulate fundamental guarantees of humane treatment (Articles 4 and 5); judicial guarantees (Article 6); the treatment of the wounded, the ill and the shipwrecked (Articles 7 and 8); and the use of the red cross emblem (Article 12).

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operations" as necessitated by Article 1(1) of AP II. The paper aims to determine whether there is a necessary interaction between "sustained military operations" included in Article 1(1) of AP II and the minimum threshold intrinsic to the notion of intensity demanded to trigger the application of this treaty. The author of this contribution specifically questions whether the description "sustained military operations" presupposes that the notion of intensity demanded by AP II requires prolonged and protracted armed violence. If AP II necessitates a temporal requirement as intrinsic to its intensity requirement, it may be interpreted to mean that the notions of intensity under common Article 3 and AP II differ.

Two broad types of armed conflict exist: international armed conflict[3] and non-international armed conflict.[4] An international armed conflict occurs when there is fighting between the State armed forces belonging to two or more different high contracting parties,[5] or in situations detailed in Article 1(4) of Additional Protocol I to the Geneva Conventions (AP I).[6] Treaty law, however,

3 Common Article 2 gives content to the notion of "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 recognized by one of them" (emphasis added). In its *Ntaganda* decision of 8 July 2019, Trial Chamber VI of the International Criminal Court (ICC) defined an international armed conflict to exist "whenever there is a resort to armed force between states": ICC, *Situation in the Democratic Republic of the Congo, in the Case of The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Judgment (Trial Chamber VI), 8 July 2019, para. 700. For a better understanding of the construct "international armed conflicts", see Marco Sassòli, "Scope of Application: When Does IHL Apply?", in M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, London, 2019, pp. 169–180.

4 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 the *Tadić* Opinion and Judgment, Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (ICTY) determined that a non-international armed conflict in the context of common Article 3 exists when the fighting unit of the organized armed group involved in the conflict is sufficiently organized and the violence associated with the conflict is protracted in nature. ICTY, *Prosecutor v. Duško Tadić AKA "Dule"*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber I), 7 May 1997, para. 562: "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 organization 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, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." See also ICTY, *Prosecutor v. Duško Tadić AKA "Dule"*, Case No. IT-94-1-A, A.Ch, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 19 July 1998, para. 70; ICC, *Ntaganda*, above note 3, para. 703. 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, pp. 9–23.

5 Common Article 2 to the Geneva Conventions gives content to the difference between the actors involved in an armed conflict that 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 recognized by one of them."

6 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978). AP I expands the notion of international armed conflict to include armed conflicts in which peoples oppose colonial governments, racist regimes or alien occupation, or are asserting a right to

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provides for two distinct categories of non-international armed conflict.[7] The first category is non-international armed conflicts that meet the minimum threshold requirements under common Article 3.[8] The second category refers to those non-international armed conflicts that satisfy the material scope of application under AP II.[9] The application of common Article 3 is triggered once an armed conflict not of an international character comes into existence.[10] The Geneva Conventions do not define the concept "armed conflict not of an international character", and the wording of common Article 3 does not explain which constitutive elements underpin it.[11] In the *Tadić* case, however, the definitional criteria that serve to determine the existence of a non-international armed conflict or a common Article 3-type armed conflict were associated with two notions: the notion of intensity, and the notion that the organized armed group fighting in the conflict must possess a certain degree of organization.[12]

It should be highlighted that the *Tadić* threshold is also the threshold that triggers the application of the rules of customary international humanitarian law (IHL) applicable to all non-international armed conflicts.[13] The corpus of

self-determination. Article 1(4) of AP 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."

7 The two categories are common Article 3-type non-international armed conflict and AP II-type non-international armed conflict. It is important to mention that the existence of distinct categories under treaty law does not mean that more than one category of non-international armed conflict exists under IHL.

8 Trial Chamber I of the ICTY refined the *Tadić* formula (see ICTY, *Tadić*, Decision on the Defence Motion, above note 4, para. 70) to serve as the definitive criterion for determining the existence of a non-international armed conflict under common Article 3, specifically in the *Tadić* Opinion and Judgment, above note 4, para. 562. For a discussion of the organizational criterion, see Martha M. Bradley, "Revisiting the Notion of 'Organized Armed Group' in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements", *African Yearbook on International Humanitarian Law*, 2018, pp. 55–58. For an overview of the intensity requirement under common Article 3, see Martha M. Bradley, "Revisiting the Notion of 'Intensity' Inherent in Common Article 3: An Examination of the Minimum Threshold which Satisfies the Notion of 'Intensity' and a Discussion of the Possibility of Applying a Method of Cumulative Assessment", *International Comparative Law Review*, Vol. 17, No. 2, 2017, pp. 13–27.

9 See Article 1(1) of AP II, which determines its scope of application.

10 See Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, p. 38. Dinstein describes this moment when the application of common Article 3 is triggered thusly: "Whenever the preconditions of a NIAC [non-international armed conflict] are met, the first threshold is crossed. This threshold marks the timeslot when the bare bones of intra-state violence suffice for it to be classified as a NIAC. Once they are past the first threshold, common Article 3 – given the bland formula used in its *chapeau* … – is activated."

11 Andrew J. Carswell (ed.), *Handbook on International Rules Governing Military Operations*, International Committee of the Red Cross (ICRC), Geneva, 2013, pp. 68–70, para. 2.5, p. 59, para. 2.3.3.2, available at: www.icrc.org/en/publication/0431-handbook-international-rules-governing-military-operations. Because a textual interpretation of common Article 3 does not provide insight, Article 31 of the Vienna Convention on the Law of Treaties cannot be employed to aid interpretation. Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (Vienna Convention),

12 ICTY, *Tadić*, Opinion and Judgment, above note 4, para. 562.

13 M. Sassòli, above note 3, p. 181.

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customary law includes the rules of AP II that have achieved customary international law status. The two categories of non-international armed conflict that are distinguished exist in the realm of treaty law alone.

The second category of non-international armed conflict under treaty law refers to those armed conflicts that satisfy the scope of application under AP II.[14] Articles 1(1) and 1(2) of AP II contain the material scope of application of this instrument.[15] The parties to AP II-type non-international armed conflicts differ from the first category of non-international armed conflict in that one party to the conflict must be the State armed forces of the territorial State and the other an organized armed group that satisfies the requirements listed in Article 1(1) of AP II. Article 1(1) establishes that for AP II to find application to organized armed groups, an organized armed group should be under responsible command and should exercise control over territory. Territorial control should be exercised to the extent that the organized armed group can carry out concerted military operations and is able to implement AP II.[16] Article 1(2) determines at the outset that situations of internal disturbance and tension, such as riots or isolated and sporadic acts of violence, are excluded from the material scope of application of AP II, as such situations do not constitute armed conflicts.

At this juncture it must be mentioned that the notion of "intensity" is not defined in any treaty. The notion was introduced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case.[17] The notion of intensity serves simply to provide for a minimum level of fighting which must be present in order to satisfy the second constitutive element – the threshold of violence – of a non-international armed conflict.[18] The purpose of the minimum threshold of violence test enshrined in the notion of "intensity" under AP II is to

14 See Article 1(1) of AP II, which determines its scope of application.

15 AP II, 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 its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

16 For an in-depth examination of the territorial control requirement under Article 1(1) of AP II, see Martha M. Bradley, "Classifying Non-International Armed Conflicts: The 'Territorial Control' Requirement under Additional Protocol II in an Era of Complex Conflicts", *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 2, 2020.

17 ICTY, *Tadić*, Decision on the Defence Motion, above note 4, para. 70. For a discussion of the role of the jurisprudence of the ICTY in the development of the notion of "protracted armed violence", see Miloš Hrnjaz and Janja Simentić Popović, "*Protracted Armed Violence as a Criterion for the Existence of Non-International Armed Conflict: International Humanitarian Law*, International Criminal Law and Beyond', *Journal of Conflict and Security Law*, Vol. 25, No. 3, 2020, pp. 7–11 (advance copy), available at: https://doi.org/10.1093/jcsl/kraa009.

18 ICTY, *Tadić*, Decision on the Defence Motion, above note 4, para. 70. For a general overview of the notion of intensity, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 167–170; International Law Association, "The Hague Conference (2010): Use of Force: Final Report on the Meaning of Armed Conflict in International Law", in Mary Ellen O'Connell (ed.), *What Is War? An Investigation in the Wake of 9/11*, International Humanitarian Law Series, Vol. 37, Martinus Nijhoff, Leiden and Boston, MA, 2012, pp. 15, 20; ICRC, *Commentary on the First*

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identify two scenarios: situations that are regulated by domestic and human rights law (as depicted in Article 1(2) and excluded from the ambit of AP II) and conflicts that are regulated by AP II (arguably, the notion determined by Article 1(1) of AP II). Accordingly, Article 1(2) identifies scenarios that resemble an armed situation but where the fighting is insufficiently violent for it to elevate such situations above the law enforcement paradigm (regulated by domestic law and human rights law) and into the sphere of non-international armed conflict in general.[19]

This paper argues that the additional positive criteria listed in Article 1(1) of AP II do not relate exclusively to the organizational criteria necessary to transform the non-State party to the conflict into an organized armed group.[20] At least, the requirement of the ability of an organized armed group to launch sustained and concerted military operations relates to the notion of "intensity".[21]

This paper is structured as follows. The following section of the paper explains why a better understanding of the notion of intensity under AP II is needed. The third section explores the notion of intensity under common Article 3 by examining specifically the relationship between protracted armed violence and the element of duration. As one of the research purposes of this paper is to establish whether or not AP II demands a higher or different intensity threshold than that insisted upon by common Article 3, this is a logical point of departure. The fourth section of the paper analyzes the way in which the ability of organized armed groups to carry out sustained and concerted military operations informs the notion of "intensity" necessitated to trigger the application of AP II. Therefore, this section aims to determine the content of the minimum threshold demanded by the notion of intensity under AP II and whether duration is a constitutive element of such intensity. In the fifth section, the paper compares the minimum threshold requirements associated with the notion of intensity under common Article 3 and AP II through the lens of duration and aims to determine whether Article 1(1) of AP II demands a level of fighting greater than "protracted armed violence". At stake is an assessment of whether the inclusion of the term

Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), paras 423–428.

19 International Law Association, above note 18, p. 15, fn. 67. For a discussion of the law enforcement paradigm as applicable to isolated and sporadic acts of violence, see Y. Dinstein, above note 10, pp. 22–23; A. J. Carswell, above note 11, p. 60, para. 2.3.3.5; 2016 Commentary on GC I, above note 18, para. 431, fn. 138.

20 Factors indicating whether the organizational requirement has been met have been categorized to include the existence of a command structure; the military capacity of the armed group; the logistical capacity of the armed group; the existence of an internal disciplinary system and the ability to implement IHL; and the armed group's ability to speak with one voice on its own behalf. ICTY, *Prosecutor v. Boškoski and Tarculovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras 199–203; ICTY, *Prosecutor v. Ramush Haradinaj Idriz Balaj Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 52. These factors, however, are indicative only, and it has not been clarified whether any of them are constitutive. ICTY, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on the Motion for Judgment of Acquittal (Trial Chamber), 16 June 2004, paras 23–24.

21 For a discussion of how these requirements relate to the notion of "organized armed group", see Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2000, pp. 79–80; Sylvie Junod, "Additional Protocol II: History and Scope", *American University Law Review*, Vol. 33, No. 1, 1983, p. 37.

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"sustained" in the construct "sustained military operations" in AP II demands that the armed violence is "prolonged" as well as "protracted". Lastly, a conclusion is drawn in the final section.

As the paper seeks to determine the content of the notion of "intensity" in the context of AP II specifically, the law of treaty interpretation as set out in Articles 31–33 of the Vienna Convention on the Law of Treaties (Vienna Convention) is frequently employed to facilitate the interpretation of the relevant provisions of these instruments. This methodology, which foregrounds doctrinal law, is employed together with an assessment of case law in order to offer a deeper understanding of the benchmark test inherent in the notion of intensity.

The value of clarifying the notion of intensity

Conflict classification is important.[22] 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 conflict,[23] and their conduct is governed by different rules depending on which law applies. Furthermore, in the event that the law of non-international armed conflict applies, different rules pertain depending on whether common Article 3 or AP II applies.[24] The application of the regime under AP II, as part of the corpus of treaty law, for example, provides for more extensive obligations on parties to the conflict, which translate to the enhanced protection of civilians. Even though the majority of the norms codified in AP II are included in the corpus of customary IHL, and consequently apply to all non-international armed conflicts once the *Tadić* threshold has been met, the need for application of AP II under treaty law remains with regard to those provisions that fall outside the realm of customary IHL.

This paper specifically undertakes an inquiry into the notion of intensity under AP II, and the justification for this inquiry is threefold.

22 For a general overview of the importance of conflict classification, see M. M. Bradley, "Revisiting the Notion of 'Organized Armed Group'", above note 8, pp. 55–58; Carl Marchand and Gian Luca Beruto (eds), *The Distinction Between International and Non-International Armed Conflicts: Challenges for IHL? 38th Round Table on Current Issues of International Humanitarian Law (San Remo, 3–5 September 2015)*, International Institute of Humanitarian Law, 2016, pp. 46–49; M. Sassòli, above note 3, pp. 168–203. For an overview of the differentiation of IHL applicable to international and non-international armed conflicts as well as the areas of contention owing to this differentiation, see Marco Sassòli, "International and Non-International Armed Conflicts", in M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, London, 2019.

23 For a discussion of the meaning of the term "the law of non-international armed conflict", see Y. Dinstein, above note 10, p. 3. For a breakdown and comprehensive discussion of the sources of the law of non-international armed conflict, see S. Sivakumaran, above note 18, pp. 101–152; L. Moir, above note 2, pp. 30–210. Under the law of non-international armed conflict, the legal rules applicable to a common Article 3-type conflict apply to all categories of non-international armed conflict.

24 See M. M. Bradley, "Revisiting the Notion of 'Organized Armed Group'", above note 8, pp. 57, 61.

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The first justification is of a legal nature and highlights an existing gap in the understanding of what the minimum threshold of intensity is that is necessary to establish an AP II-type armed conflict. A survey of the existing literature reveals that scholarly work regarding the application of AP II is limited in scope.[25] Although a select few authors clarify the meaning of the additional criteria that underpin the notions of "organized armed groups" and, to an even lesser extent, "intensity" for this instrument, questions with regard to the exact scope of some of these obligations remain unanswered.[26] There are limited sources available that examine the criteria listed in Article 1(1) of AP II as it relates to the notion of intensity.

The second justification is that the battlefield reality demands it.[27] AP II serves to supplement and develop the regime codified in common Article 3,[28] and it is the only treaty that exclusively regulates and provides for obligations and therefore offers protection to civilians in non-international armed conflicts.[29] This treaty has been in force for more than forty years, and its application remains essential. The need for AP II is evidenced by the desperate situation prevailing on the African continent as multiple complex conflicts coexist in single territories,[30] such as the ongoing conflicts in the Central African

25 The available literature concerning AP II is limited compared to scholarly work about common Article 3; an insightful work into AP II is S. Junod, above note 21, p. 29. This neglect may be either because some scholars consider these additional criteria for its scope of limitation to be clear, or because this instrument is not frequently used. For a discussion of the application of AP II in practice, see L. Moir, above note 2, pp. 119–132. As this treaty is the most comprehensive instrument regulating the law of non-international armed conflict, an objective assessment of whether or not an AP II-type armed conflict exists is critical. For an overview of the content of this treaty, see L. Zegveld, above note 2, pp. 9–34; Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International and Comparative Law Quarterly*, Vol. 30, No. 2, 1981, available at: www.jstor.org/stable/759535; L. Moir, above note 2, pp. 109–132.

26 L. Moir, above note 2, pp. 99–108; S. Sivakumaran, above note 18, pp. 182–9; S. Junod, above note 21.

27 For an overview of contemporary armed conflict, see 2018 War Report, above note 1.

28 AP II, 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 AP II as well as an analysis of its content, see L. Moir, above note 2, pp. 89–132; L. Zegveld, above note 2, pp. 9–34; A. Cassese, above note 25, p. 416. In essence, AP II expands on the contents of common Article 3 by including detailed rules regulating fundamental guarantees of humane treatment (Articles 4 and 5); judicial guarantees (Article 6); the treatment of the wounded, sick and shipwrecked (Articles 7 and 8); and the use of the red cross emblem (Article 12). AP II provides specific rules for the protection of children during non-international armed conflicts (Article 4(3)) and offers rules that provide for the protection of medical personnel and units as well as enabling medical personnel to perform their duties (Articles 9–12). AP II further provides rules for the conduct of hostilities, including for the protection of the civilian population against attacks (Article 13); for protecting objects indispensable to the survival of the civilian population (Article 14); for offering protection to works and installations harbouring dangerous forces (Article 15); and for protecting cultural objects (Article 16). AP II also prohibits the forced movement of civilians (Article 17) and allows for and regulates relief operations (Article 18).

29 For an overview of the content and relevance of AP II, see Fausto Pocar and Gian Luca Beruto (eds), *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*, International Institute of Humanitarian Law, 2018.

30 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 2018 War Report, above note 1, pp. 123–135.

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Republic,[31] the Democratic Republic of the Congo,[32] Mali[33] and South Sudan[34]. As mentioned earlier, the application of AP II, specifically, can offer relief as it provides for more extensive obligations and therefore better protection than that under common Article 3 alone to civilians as well as to parties to the conflict.

Lastly, clear guidance facilitating the categorization of a situation is also necessary from an operational perspective.[35] This is because military commanders and legal advisers face the task of planning operations in accordance with the applicable legal framework.[36] 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 conflict,[37] in which a distinction is made between the rules contained in common Article 3 and in AP II, depending on the enemy they engage.[38]

Protracted armed violence and duration

The Appeals Chamber in *Tadić* understood "intensity" to require the level of violence to match that of "protracted armed violence".[39] Subsequent case law echoes this minimum threshold test.[40] In the *Tadić* case, Trial Chamber I also

31 For an overview of the nature of the conflict in the Central African Republic and the parties involved, see *ibid.*, pp. 82–92.
32 For an overview of the nature of the conflict in the Democratic Republic of the Congo and the parties involved, see *ibid.*, pp. 93–101.
33 For an overview of the nature of the conflict in Mali and the parties involved, see *ibid.*, pp. 102–116.
34 For an overview of the nature of the conflict in South Sudan and the parties involved, see *ibid.*, pp. 116–123. The author wishes to note that the classification of situations by the Geneva Academy as cited in notes 30 to 34 should not be understood as representing the position of the ICRC.
35 Ministry of National Defence of Colombia, Executive Power Military Decree No. 15, 22 April 2016, pp. 4–5, available at: www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/Prensa/Documentos/dir_15_2016.pdf. See also C. Marchand and G. L. Beruto, above note 22, pp. 46–49.
36 A. J. Carswell, above note 11, pp. 68–69, para. 2.5; Charles Garraway, "Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict*, 2nd ed., FICHL Publication Series No. 2, 2010, p. 52. Military manuals serve to disseminate the law of armed conflict for this purpose.
37 For a discussion of the meaning of the term "the law of non-international armed conflict", see Y. Dinstein, above note 10, p. 3. For a breakdown and comprehensive discussion of the sources of the law of non-international armed conflict, see S. Sivakumaran, above note 18, pp. 101–152; L. Moir, above note 2, pp. 30–210.
38 See M. M. Bradley, "Revisiting the Notion of 'Organized Armed Group'", above note 8, p. 57. It is important to emphasize, however, that at all times customary IHL also applies.
39 ICTY, *Tadić*, Decision on the Defence Motion, above note 4, para. 70. See also 2016 Commentary on GC I, above note 18, paras 423–435.
40 To offer a few examples: ICTY, *Prosecutor v. Zejnil Delalic Zdravko Mucic, also known as "Pavo", Hazim Delic Esad Landzo, also known as "Zenga"*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 183–192; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgment (Trial Chamber I), 2 September 1998, para. 627; ICTR, *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and Sentence (Trial Chamber I), 27 January 2000, paras 248–251; ICTY, *Milošević*, above note 20, para. 24; ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, paras 171–173; ICTR, *Prosecutor v. Georges Anderson Nderubumwe*

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considered the use of "protracted armed violence" as a threshold as being "*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".[41] This finding echoes the intent of the drafters of common Article 3.[42]

The 2016 ICRC Commentary on Geneva Convention I (GC I) considers the understanding of the notion of intensity as construed in the *Tadić* case to be widely accepted.[43] The 2016 Commentary interprets the minimum threshold of the intensity of violence test included in common Article 3 to be at a point at which situations formerly regarded as instances of "sporadic violence" are reclassified as being armed conflicts not of an international character in that they come to resemble "protracted armed violence".[44] In this regard, arguably the nature of the violence, a combination of factors associated with the notion of intensity inherent in the conflict in question, is relevant rather than the duration of the conflict alone. A contemporary understanding of the notion of "intensity" thus depends on the meaning of the term "protracted armed violence".[45] This part of the analysis now turns to comment on the minimum threshold of violence that has to be met in order to satisfy the notion of "protracted armed violence".

The drafting history of the Geneva Conventions indicates that at the time it was the understanding of the drafters that a very high level of violence is required for

Rutanganda, Case No. ICTR-96-3-T, Judgment and Sentence (Trial Chamber I), 6 December 1999, para. 93; ITY, *Haradinaj*, above note 20, para. 49; ICTY, *Boškoski*, above note 20, paras 199–203; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/00, Judgment Pursuant to Art. 74 of the Judgment (Trial Chamber), 14 March 2012, para. 538.

41 ICTY, *Tadić*, Opinion and Judgment, above note 4, para. 562 (emphasis added). See also ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), 17 December 2004, para. 341, in which the Court stated that the significance of the term "protracted" in relation to the term "violence" stems from the aim of excluding cases of mere civil unrest or single acts of terrorism from cases of armed conflict not of an international character. This formulation aligns with the wording adopted in Article 1(2) of AP II.

42 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section B, Federal Political Department, Berne, 1949 (Final Record), p. 45, available at: www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html: "[I]t was indispensable to distinguish between rebellion, which was more than an uprising but had not yet taken the proportion of a civil war, as was defined in international law." Cf. ICTY, *Boškoski*, above note 20, para. 175; ICTY, *Haradinaj*, above note 20, para. 39.

43 2016 Commentary on GC I, above note 18, para. 435. The 2016 Commentary on GC I has been consulted to aid the interpretation of the construct "protracted armed violence". Commentaries are important analytical tools, constituting "[a] teaching that explores the meaning of the provision – looking at its object and purpose, situating it in context, considering its drafting history, analysing subsequent practice, and canvassing relevant literature". The ICRC Commentaries constitute an especially invaluable subsidiary source. Sandesh Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law", *International and Comparative Law Quarterly*, Vol. 66, No. 1, 2017, p. 15. These Commentaries fill the role of publicist within the ambit of Article 38(1)(d) of the Statute of the International Court of Justice, TS No. 993, 26 June 1945 (entered into force 24 October 1945). See S. Sivakumaran, above note 18, pp. 3–5, 15–16, for an insightful review of the value of the ICRC's scholarly work in general and its Commentaries in particular.

44 2016 Commentary on GC I, above note 18, para. 427.

45 Anthony Cullen, "Article 3 Common to the Four Geneva Conventions of 1949 and the Threshold of Non-International Armed Conflict in International Humanitarian Law", in A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 27–29.

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civil war to exist.[46] The drafters imposed the minimum threshold of violence test applicable to common Article 3 at the time of drafting to demand the same level of intensity as was associated with the ferocity in fighting of either civil wars or international wars.[47] However, no further clarification is provided for by the drafting history, nor is reference made to "protracted armed violence".

Case law of international courts and tribunals promotes a better understanding of what is meant by the term "protracted", as it suggests several indicative factors that may be employed to determine whether violence is protracted or not.[48] The indicative factors for "protracted violence" developed by the ICTY are considered an important contribution, and other international courts and tribunals have since adopted these.[49] Importantly, these indicative

46 Final Record, above note 42, pp. 12, 42–43, 129; A. Cullen, above note 45, pp. 27–51; G. I. A. D. Draper, "Humanitarian Law and Internal Conflicts", *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, pp. 263–268. See also International Law Association, above note 18, pp. 42–43. The drafting history is employed because the application of Article 31 of the Vienna Convention was not helpful. Article 32 of the Vienna Convention provides that the drafting history may be employed as a supplementary means of interpretation.

47 It appears that the drafters deemed the term "armed conflict not of an international character" to be synonymous in meaning with the contemporary understanding of the term "civil war". A. Cullen, above note 45, pp. 42–43: "The Report drawn up by the Joint Committee and presented to the Plenary Assembly interprets the term 'armed conflict not of an international character' as having the same meaning as 'civil war'. … Although some delegations favoured a more flexible and expansive approach to the application of international humanitarian norms, it appears that *none contested or objected to the use of the term 'civil war' as synonymous with 'armed conflict not of an international character'*" (emphasis added). Final Record, above note 42, p. 129: "At the present Conference, the *question immediately arose of deciding what was to be understood by 'armed conflict not of an international character which may occur in the territory of one of the High Contracting Parties'. It was clear that this referred to civil war*, and not to a mere riot or disturbances caused by bandits. States could not be obliged, as soon as a rebellion arose within their frontiers, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied" (emphasis added). The concept of a "civil war" was understood to be a conflict which in many instances was similar to an international armed conflict contemporary to the time of drafting, but which took place within the borders of one country and where only one of the armed forces confronting each other was the armed force of a state. Final Record, above note 42, p. 11: "As to civil war, the term 'armed conflict' should not be interpreted as meaning 'individual conflict', or 'uprising'. Civil war was a form of conflict resembling international war, but taking place inside the territory of a state. It was not a conflict between a number of individuals."

48 ICTY, *Boškoski*, above note 20; ICC, *Lubanga*, above note 40, para. 538; ICTY, *Haradinaj*, above note 20, para. 49; 2016 Commentary on GC I, above note 18, para. 432. For a discussion of case law promoting a better understanding of the notion of "intensity" under Common Article 3, see M. M. Bradley, "Revisiting the Notion of 'Intensity'", above note 8, pp. 17–27.

49 See Bradley, who provides examples of international courts and tribunals employing this threshold test: "Other international tribunals and courts, such as the International Criminal Court (ICC), have confirmed the indicative factors developed by the International Criminal Tribunal for the Former Yugoslavia in relation to 'protracted violence'. For instance, in the *Lubanga* case the ICC contributed to the jurisprudence by explaining its understanding of 'protracted violence' in relation to Common Article 3. The ICC utilized the indicative factors used by Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the *Mrksic* case to determine whether the violence was sufficiently protracted. The International Criminal Tribunal for Rwanda referred to these indicative factors as forming part of an 'evaluation test' which it employed to determine whether situations were mere internal disturbances and tensions or whether they constituted armed conflicts in the legal sense. In the *Akayesu* case Chamber I of the International Criminal Tribunal for Rwanda concluded in its assessment of the intensity requirement that the evaluation of this threshold requirement was not dependent on a subjective judgment by the parties to the conflict but that it was an objective test." M. M. Bradley, "Revisiting the Notion of 'Intensity'", above note 8, pp. 21–22, referring to ICC,

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factors are not conditions that need to exist concurrently.[50] Duration in itself, for example, is not a decisive indicator but should be considered when making an assessment of whether or not a situation is sufficiently intense to satisfy the notion of "intensity" in terms of common Article 3.[51]

The status of the requirement of "duration" as merely an indicative factor has been subjected to some scrutiny.[52] The ICRC Commentary on GC I responds to this enquiry by explicitly posing the question of whether duration is an independent indicative criterion of "protracted armed violence",[53] and concludes that duration is but one element that should be considered in the assessment of the threshold intensity of armed confrontation.[54] It specifically offers the *La Tablada* case, decided by the Inter-American Commission on Human Rights (IACHR), as an example of a situation where an international commission considered a short-lived armed confrontation (lasting merely thirty hours) to be a non-international armed conflict because other indicative factors of intensity, absent duration, were present to justify this conclusion.[55]

In *La Tablada*, the IACHR had to determine whether an armed confrontation lasting a mere thirty hours was an example of an internal disturbance "or whether this confrontation constituted an armed conflict not of an international character".[56] In its evaluation of whether this incident satisfied the intensity requirement, the Commission considered a number of factors, including the concerted nature of the hostile acts and the nature and level of the violence attending the events in question.[57] The Commission concluded that despite its brief duration, the clash between the Argentine armed forces and militants had triggered the application of common Article 3 and satisfied the intensity requirement by meeting the threshold of protracted violence.[58]

Sivakumaran comments on the relation between the factors of "intensity" and "duration" as evaluated in the *La Tablada* case.[59] He is of the opinion that if duration alone were to serve as an intensity threshold test, then a situation such as the incident at the La Tablada military base would not be deemed to meet the requirement of "protracted armed violence".[60] He stresses that duration alone cannot be determinative and raises the practical consideration that if duration

Lubanga, above note 40, para. 538; ICTR, *Akayesu*, above note 40, para. 627; ICTR, *Rutanganda*, above note 40, para. 93; ICTR, *Musema*, above note 40, paras 248–251.

50 M. M. Bradley, "Revisiting the Notion of 'Intensity'", above note 8, pp. 21–22; see also p. 19.

51 For a discussion of the relationship between "duration" and "intensity", see 2016 Commentary on GC I, above note 18, paras 438–44; S. Sivakumaran, above note 18, pp. 167–8, paras 88–97.

52 See M. M. Bradley, "Revisiting the Notion of 'Intensity'", above note 8, pp. 22–27, for a summary of the debate.

53 See 2016 Commentary on GC I, above note 18, para. 440.

54 *Ibid.*

55 IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, Inter-Am CHR 271, OEA/Ser.L/V/11.98, doc. 6 rev., 13 April 1998 (*La Tablada*), para. 155.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 S. Sivakumaran, above note 18, pp. 167–169.

60 *Ibid.*

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was indeed determinative, any assessment of the nature of a situation could be made only after a period of time had elapsed.[61] According to Lewis, jurisprudence illustrates that the duration dimension is often factored into the "broader analysis of the intensity of hostilities" as but a single criterion which is taken into account in the assessment of the existence of a non-international armed conflict.[62] Dinstein cautions that the intensity of violence is not an alternative to protracted hostilities, and emphasizes that the approach followed in the *Haradinaj* case is correct.[63] He argues that if duration was meant to be a compulsory indicator of "protracted armed violence", then the *Tadić* formulation would have included it specifically as a third criterion.[64] Dinstein is of the view that according to *Tadić* there are two threshold tests only, suggesting that duration is only one indicator of the existence of protracted armed violence.[65]

Kebebew and Niyo question whether an instant non-international armed conflict is possible – or, to phrase it differently, if some time needs to elapse prior to the classification of an ongoing non-international armed conflict – and whether this is the case in the ongoing situation in northern Ethiopia, where tensions heightened subsequent to an attack by the Tigray People's Liberation Front (TPLF) against the Ethiopian National Defence Force's (ENDF) Northern Command.[66] These authors employ the indicators highlighted in the *Haradinaj* case to assess that due to these factors at the time of publication of their blog post, protracted armed violence existed and common Article 3 applied to the situation.[67] At the time of writing their blog post, the situation in Ethiopia as assessed by Kebebew and Niyo was still evolving. They conclude that to draw a parallel between the facts of the case in northern Ethiopia and the events that transpired in *La Tablada* means that an instant non-international armed conflict is possible – in other words, that time need not lapse prior to classifying an ongoing non-international armed conflict.[68]

61 *Ibid.* Moir agrees with Sivakumaran. Moir interprets the case law of the ICTY to suggest that, in an assessment of protracted armed violence, indicative factors concerned with the method of fighting should bear more weight than duration, and confirms that he also considers duration to be only one factor. Lindsey Moir, "The Concept of Non-International Armed Conflict", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 410, para. 53.

62 Dustin A. Lewis, "The Notion of 'Protracted Armed Conflict' in the Rome Statute and the Termination of Armed Conflicts Under International Law: An Analysis of Select Issues" *International Review of the Red Cross*, Vol. 101, No. 912, 2019, p. 1099.

63 Y. Dinstein, above note 10, pp. 34–35.

64 *Ibid.*

65 *Ibid.*

66 Tadesse Kebebew and Joshua Niyo, "Instant Non-International Armed Conflict? Classifying the Situation in Northern Ethiopia under IHL", *Armed Groups and International Law*, 9 December 2020, available at: https://armedgroups-internationallaw.org/2020/12/09/instant-non-international-armed-conflict-classifying-the-situation-in-northern-ethiopia-under-ihl/.

67 *Ibid.* The factors that Kebebew and Niyo identified included the death toll, injuries and property damage; the involvement of the ENDF; the TPLF's use of air missile systems against airports in Behairdar and Gondar; and the recognition that more than 27,000 refugees had crossed into South Sudan at the time of publication of their blog post.

68 *Ibid.*

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In the opinion of this author, the assessment made by Kebebew and Niyo that the situation in Ethiopia constitutes a protracted armed conflict despite its brevity (at the time of their writing) is indeed credible.[69] This is because, as they point out, duration is but an element of protracted armed violence and not a deciding factor. This author therefore cautiously agrees that it is possible to make a determination of the nature of the conflict early on, and further, that it is possible that the situation in Ethiopia constitutes a non-international armed conflict.

The author of this contribution, however, cautiously questions the conclusion reached by Kebebew and Niyo that owing to the existence of an instant non-international armed conflict, the application of AP II is triggered so early on in an ongoing non-international armed conflict.[70] Kebebew and Niyo maintain that "one could plausibly argue that the requirement for a temporal factor in determining the intensity threshold of violence is overridden by the clear, short, but amplified intensity and concentration of violence in the Tigray region".[71] The application of those rules of AP II that have attained customary status is correct in law, but an instant non-international armed conflict, or a conflict which reaches the *Tadić* requirements so quickly, would not necessarily trigger the application of AP II as a treaty. Whether or not AP II as a treaty finds application to a situation of so-called "instant" non-international armed conflict will depend on whether or not duration is required in addition to protracted armed violence in order to fulfil the notion of intensity under AP II. The relationship between the notion of intensity and the phrase "sustained military operations" is explored in the following section.

In summary, in the context of common Article 3 the notion of "intensity" required by common Article 3 is satisfied if the violence is of a protracted nature. Whether or not the level of violence that results from a conflict situation is sufficient to be equated to "protracted armed violence", as contemplated in common Article 3, should be assessed on a case-by-case basis. The duration of the conflict may be a factor to be taken into consideration, but it is neither a compulsory nor a determinative element in an assessment.

The relationship between the terms "sustained military operations" and "intensity": Understanding the term "sustained"

This section assesses what factor is operative in terms of the "sustained" nature of military operations[72] in order to determine the minimum threshold of intensity that a situation has to fulfil in order to be categorized as an AP II-type non-international

69 *Ibid.*, citing IACHR, *La Tablada*, above note 55, para. 153.
70 T. Kebebew and J. Niyo, above note 66.
71 *Ibid.*
72 It should be noted that military attacks and military operations are not synonymous. Military "attacks" are defined as acts of violence in offence or in defence, whereas military "operations" do not necessarily involve acts of violence; troop movements, logistics, etc. are covered by this umbrella term. Therefore,

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armed conflict.[73] This section does not analyze the word "concerted", as this term closely relates to the notion of an "organized armed group".[74] The ordinary meaning of "concerted" essentially relates to the organizational ability of the organized armed group to plan sustained operations, and this will not be discussed here in further detail.[75] The two elements of "sustained" and "concerted" are intertwined; military operations have the quality of being "sustained", as they are planned (i.e., "concerted").[76]

The adjective "sustained", however, determines the level of intensity that a situation has to satisfy in order to trigger the application of AP II.[77] The following analysis seeks to identify the minimum threshold of violence requirement that is suggested by the use of this word.[78]

At this juncture Article 1(1) is revisited to examine the term "sustained" in order to promote a better understanding of the notion of "intensity", specifically as it is associated with sustained military operations. At the outset it should be clarified that the common Article 3 requirements (including the notion of "intensity") are inherent in AP II.[79]

However, these common Article 3 benchmarks in themselves are not sufficient for AP II to apply. Four other requirements listed in Article 1(1) of AP II should be fulfilled in addition to the common Article 3 understanding of the *Tadić* benchmarks.[80] It is evident that the notion of "intensity" inherent in AP II

it is military operations (which can include preparations to launch a military attack) that need to be continuous, which is different from requiring that the attacks (violence) be continuous.

73 AP II, Art. 1(1).

74 The adjective "concerted" is defined as "agreement in a plan, or design; union formed by such agreement"; C. T. Onions (ed.), *Shorter Oxford English Dictionary on Historical Principles*, 3rd ed., Clarendon Press, Oxford, 1964, p. 361. *Roget's Thesaurus* regards the term as synonymous with "concordant", "synchronized" and "like-minded"; George Davidson (ed.), *Roget's Thesaurus*, Penguin Books, London, 2006, para. 24. These terms highlight the collective nature of the armed group that is required to coordinate the military operation jointly. The phrase could read "synchronized military operation". "Synchronized relates" to the term "organized"; C. T. Onions, p. 361. The literal interpretation of "sustained and concerted military operations", therefore, implies that an armed group under responsible command exercises such control over a part of its territory as to enable such an armed group to carry out continuous and organized or planned military operations (cf. AP II, Art. 1(1)). 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 continués*) 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." Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on APs), para. 4469. This interpretation echoes the literal interpretation that the term "concerted" relates to the organizational requirement.

75 ICRC Commentary on APs, above note 74, para. 4469. For a general overview of the minimum threshold requirements inherent in "concerted" military operations, see Martha M. Bradley, "Revisiting the Scope of Application of Additional Protocol II: Exploring the Inherent Minimum Threshold Requirements", *African Yearbook of International Humanitarian Law*, 2019, pp. 105–111.

76 Cf. ICRC Commentary on APs, above note 74, para. 4469.

77 AP II, Art. 1(1).

78 Cf. *ibid.*, Art. 1(1).

79 See Y. Dinstein, above note 10, pp. 38–40.

80 *Ibid.*

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requires "protracted armed violence", but what is questionable is whether Article 1 (1) necessitates something more than protracted armed violence alone. The fact that "protracted armed violence" is observed to be present satisfies the benchmark for the minimum degree of fighting needed to trigger common Article 3 as well as being a prerequisite under AP II, but the mere presence of protracted armed violence is insufficient, as is suggested by the use of the term "sustained". "Sustained" is interpreted as adding a constitutive requirement to the notion of "intensity" for the application of AP II to be triggered; essentially, an additional factor by which the fighting is prolonged to the demand of a "protracted armed conflict". The term "sustained" establishes that the demand represents a notion of "intensity" which is greater under AP II and implies that the benchmark test is to be "sustained" "protracted armed violence".[81]

Black's Law Dictionary defines the adjective "sustained" as "support[ed] or maintain[ed], especially over a *long* period".[82] The word "maintain" refers to the continuation of an action.[83] A first reading of the word "sustained" seems to impose the element of duration on military operations and, consequently, the prolonging of intense violence resulting from these military operations. If Articles 1(1) and 1(2) of AP II are read in context, the fact that the literal meaning of "sustained" necessitates an element of prolongation of violence associated with military operations makes sense, as Article 1(2) clearly contrasts below-the-threshold situations, reflecting a low degree of violence for a brief period of time only, with "sustained military operations".[84]

Article 33 of the Vienna Convention addresses the issue of the interpretation of treaties that are authenticated in two or more languages.[85] At this point in the analysis, Article 33 proves helpful. Since the English-language version of AP II does not offer clarity,[86] a look at another authentic text may shed light on the issue of "sustained military operations". Article 33 determines that texts bear equal interpretive weight in each authenticated language;[87] consequently, the terms of a treaty are presumed to have the same meaning in

81 AP II, Art. 1(1), read together with Art. 1(2).
82 Bryan A. Garner (ed.), *Black's Law Dictionary*, 3rd ed., Thomson West, St Paul, MN, 2006, p. 696 (emphasis added).
83 Bryan A. Garner (ed.), *Black's Law Dictionary*, 9th ed., Thomson West, St Paul, MN, 2009, p. 1039.
84 See Y. Dinstein, above note 10, pp. 21–22, for a discussion of below-the-threshold violence.
85 For literature discussing Article 33 in greater detail, see Alain Papaux and Remi Samson, "Art 33: Interpretation of Treaties Authenticated in Two or More Languages", in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. 1, Oxford University Press, Oxford, 2011; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Berlin, 2001, pp. 355–369; Oliver Dorr, "Article 33: Interpretation of Treaties Authenticated in Two or More Languages", in Oliver Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Berlin, 2012.
86 AP II, Art. 1(1).
87 Vienna Convention, Art. 33(1): "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail."

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each authentic text.[88] AP II has been authenticated in English, Arabic, Chinese, Spanish, French and Russian.[89]

AP II was negotiated in both English and French. The French authenticated version of this Protocol is consulted in accordance with Article 31 of the Vienna Convention to establish whether an interpretation of the French text promotes a better understanding of the intended ordinary meaning of the word "sustained".[90] The French text refers to "opérations militaires continués", which is translated into English as "sustained military operations".[91] *Le Petit Larousse* dictionary defines the term "opérations" in a military context "as ensemble des combats et des manoeuvres exécutés par les forces militaires dans une région en vue d'atteindre un objectif précis".[92] The adjective "continué" is defined as "sans interruption, dans le temps ou dans l'éspace".[93] In light of the above definitions, the English translation of the term "opérations militaires continués" refers to fighting and military manoeuvres executed in a region in pursuit of a specific military objective which transpire without interruption in either time or in space.[94] In this context, the adjective "continué" is synonymous in meaning to the English words "continuous", "constant" or "unremitting", emphasizing the temporal rather than spatial dimension of this term.[95] The ICRC Commentaries confirm the literal interpretation of the English and French texts – namely, that the term "sustained" necessitates an element of the prolongation of violence resulting from the conflict, that the violence must be intense, and that such intensity must be ongoing over a period of time.[96] The ICRC considers the

88 *Ibid*, Art. 33(3): "The terms of the treaty are presumed to have the same meaning in each authentic text."

89 AP II, Art. 28: "The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish text are equally authentic, shall be deposited with the depository, which shall transmit certified and true copies thereof to all the Parties to the Conventions."

90 See O. Dorr, above note 85, p. 594, para. 21: "That every authentic text is in a formal sense equally authoritative does not, however, mean that in practice, all of them would be attributed the same weight. For example, if the treaty was negotiated and drafted in only one of the authentic languages, it would seem natural, as a feature of practical usage, to place more reliance on that text as if it is least ambiguous." Dorr argues that Article 33 allows some leeway as to practical considerations when interpreting a treaty provision where there is more than one authentic text. In the present case, this author chose to consider the French text as it was one of the negotiating languages of the treaty.

91 AP II (French version), Art. 1(1): "Article premier. Champ d'application matériel. 1. Le présent Protocole, qui développe et complète l'article 3 commun aux Conventions de Genève du 12 août 1949 sans modifier ses conditions d'application actuelles, s'applique à tous les conflits armés qui ne sont pas couverts par l'article premier du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I) 2, et qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des *opérations militaires continues* et concertées et d'appliquer le présent Protocole" (emphasis added).

92 "[To] have combined combat and manoeuvres carried out by military forces in a region in order to achieve a specific objective." *Le Petit Larousse: Grand Format 2005*, 100th ed., Larousse, Paris, 2004, pp. 756–757.

93 "[W]ithout interruption, in time or in space." *Ibid.*, p. 287.

94 This translation was done with the aid of the *Larousse Dictionnaire Général: Francais/Anglais, Anglais/Francais*, Larousse, Paris, 1994.

95 *Le Petit Larousse*, above note 92, p. 287.

96 ICRC Commentary on APs, above note 74, para. 4469.

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formulation to be an objective assessment, and that the drafters wanted to avoid the application of subjective judgement to AP II's material scope of application.[97]

There is only one reference in the drafting history of AP II that provides limited insight into the relationship between the notion of "intensity" and the duration of hostilities.[98] This reference is found in Pakistan's proposed redraft of Article 1 of AP II.[99] The Pakistani draft requires that hostilities should be of "some" intensity (which admittedly is not very telling).[100] What is of particular interest is that such intensity is required to continue for a "reasonable period of time".[101] The drafting history does not elaborate on how long a "reasonable period" of time is considered to be.[102] Scholars have commented on the significance of the fact that the meaning of neither "intensity" nor "duration" is explicit in the wording of AP II.[103] A further analysis of the word "sustained" reveals that an intensity threshold test is nonetheless included in Article 1(1), albeit not explicitly, because the "notion of intensity" itself is an integral characteristic of the term "sustained".[104]

In the *Musema* case, which was decided by the International Criminal Tribunal for Rwanda (ICTR), Alfred Musema was charged, *inter alia*, with counts of murder and torture in violation of common Article 3 and AP II and, consequently, with a violation of Articles 4(a) and 4(e) of the Statute of the ICTR.[105] In its assessment of the applicability of AP II, Trial Chamber I made an interesting observation concerning the material requirement of territorial control and the ability of an organized armed group to exercise such control over territory and engage in sustained and concerted military operations.[106] Its comment on this material requirement relates to the notion of "intensity".[107] The Trial Chamber formulated the requirement as follows: "[T]hese dissident armed

97 *Ibid.*

98 CDDH/I/26, Pakistan, 11 March 1974, and CDDH/I/79, Brazil, 21 March 1974, as included in the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. 4, Federal Political Department, Bern, 1978, p. 6.

99 *Ibid.* "Redraft Article 1 to read: The present Protocol which elaborates and supplements Article 3 common to the four Geneva Conventions of August 12, 1949, shall apply to all cases of armed conflict referred to in Article 3 occurring in the territory of a High Contracting Party and in which: (a) Organized armed forces engage in hostile acts against the authorities in power and the authorities in power employ their own armed forces in response. (b) The *hostilities* are of *some intensity* and *continue for a reasonable period of time*. (c) The armed forces opposing the authorities in power occupy a part of the territory of the High Contracting Party. (d) 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" (emphasis added).

100 *Ibid.*

101 CDDH/I/26, above note 98, p. 6.

102 *Ibid.*

103 See S. Junod, above note 21, p. 37, para. 4; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd edited reprint, Martinus Nijhoff, Leiden, 2013, para. 2.9; L. Moir, above note 2, p. 107, fn. 76; ICRC Commentary on APs, above note 74, para. 4469.

104 M. Bothe, K. J. Partsch and W. A. Solf, above note 103, p. 719, para. 2.9.

105 ICTR, *Musema*, above note 40, para. 285, counts 8 and 9.

106 *Ibid.*, para. 258.

107 *Ibid.*

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forces *must be able to dominate* a *sufficient part* of the territory as to *maintain* these sustained and concerted military operations and the insurgents must be in a position to implement this Protocol."[108]

The use of the term "maintain" is significant. *Black's Law Dictionary* defines this verb to indicate a continuation of an action: "To continue (something)."[109] As shown in this section, the literal interpretation of the adjective "sustained", read together with the term "military operations", confers a temporal element on those operations. The organized armed group has to be able to maintain military operations over a period of time.[110] The terms "continued" and "sustained" imply an uninterrupted motion or a level of consistency through the persistent launching of violent military operations.[111] This formulation of the intensity test in the *Musema* case reflects both the literal interpretation and the ICRC interpretation of "sustained armed conflict".[112] It implies that military operations not only have to take place over a period of time but possibly that they should also be uninterrupted or continuous. This requirement sets a very high threshold of intensity that situations would have to satisfy in order to be classed as AP II-type armed conflicts.

It remains unclear how long military operations must continue in order to be considered "sustained", thus satisfying the minimum threshold of intensity as required by Article 1(1) of AP II. Does the term "sustained" imply that no interruptions, however brief, in the fighting or launching of military operations are allowed? The Special Court for Sierra Leone (SCSL) provides some clarity in relation to this question in the *Sesay* case.[113]

In the *Sesay* case, Trial Chamber I assessed whether or not operations undertaken by the Armed Forces Revolutionary Council and Revolutionary United Front (RUF) forces, which occurred between February 1998 and January 2000, were sufficiently violent to be considered "sustained" military actions within the material scope of application of Article 1(1) of AP II. The case specifically addresses the question of whether or not violence has to be uninterrupted in order to fulfil the notion of "intensity".[114] Trial Chamber I highlighted that territory had changed hands and that territory was lost and regained[115] during the period concerned, and consequently, that military operations were at times interrupted[116] and that the level of violence associated with these operations fluctuated.[117] Nevertheless, the RUF always had control

108 *Ibid* (emphasis added).
109 *Black's Law Dictionary*, above note 82, p. 1039.
110 *Ibid.*, pp. 696, 125. *Black's Law Dictionary* defines the word "sustain" as "to support or maintain, esp over a long period; to persist in making (an effort) over a long period".
111 *Black's Law Dictionary* furthermore defines the adjective "continuing" to mean "uninterrupted", and defines the noun "continuance" to mean "the act of keeping up, maintaining or prolonging, duration; time of continuing": *ibid.*, p. 393.
112 *Ibid.*
113 SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T (Trial Chamber), 2 March 2009.
114 *Ibid.*, para. 947.
115 *Ibid.*, paras 12–17, 947, 980.
116 *Ibid.*
117 *Ibid.*, para. 947.

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over some territory[118] and from time to time launched several "major" operations.[119] These operations were not uninterrupted, but were not regarded by the Chamber as sporadic.[120] In fact, the Chamber considered all these operations to be "sustained and concerted", even though there were periods of no or low-intensity conflict,[121] and found that AP II continued to apply throughout the period concerned.[122]

In terms of Trial Chamber I's assessment in the *Sesay* case, the requirement of the ability to launch "sustained operations" as it relates to the notion of "intensity" therefore does not demand the level of violence to be consistently high or on a permanent basis throughout the conflict. Nevertheless, sustained military operations should be conducted at least frequently or frequently enough not to be sporadic in nature.[123] The application of AP II does not cease if there are brief interludes of lower-intensity fighting or brief periods of inaction when preparations are being made for the next series of military operations.[124] It is important at this juncture to stress that once all four of the requirements listed in Article 1(1) of AP II have been met, AP II does not fade in and out in terms of applicability.[125] The jurisprudence of the ICTY confirms that IHL applies until a peace settlement is reached and that a decrease in the intensity of fighting or the degree of organization of an organized armed group fighting in the conflict cannot be viewed as bringing to an end the applicability of IHL.[126]

In essence, the minimum threshold of the notion of "intensity" inherent in the word "sustained" requires that military operations are prolonged in time. Case law illustrates that intense violence resulting from military operations does not necessarily have to be uninterrupted, but that a sequence or pattern of military operations should occur on a fairly frequent basis. As discussed previously in this contribution, the "instant" nature, or rather, instant evaluation of the armed conflict at its initial stages between the TPLF and the ENDF in northern

118 *Ibid.*, paras 12–17, 947, 979–980.
119 *Ibid.*
120 *Ibid.*, para. 981: "The Chamber therefore finds that the requirements of Additional Protocol II have been proved beyond a reasonable doubt."
121 *Ibid.*, para. 980.
122 *Ibid.*, paras 979–981.
123 Author's interpretation of *Sesay*, above note 113, paras 947, 980, 981, read together with AP II, Art. 1(2).
124 *Ibid.*
125 Gabriella Venturini, "Temporal Scope of Application of the Conventions", in A. Clapham, P. Gaeta and M. Sassòli, above note 61, p. 61, para. 53.
126 Venturini comes to this conclusion when reading *Tadić*, above note 4, together with *Haradinaj*, above note 20. See G. Venturini, above note 125, p. 61, para. 53. ICTY, *Tadić*, Decision on the Defence Motion, above note 4, para. 70: "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, *in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States* or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there" (emphasis added). The instructive part of *Haradinaj*, above note 20, para. 100, reads: "[S]ince according to the *Tadić* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period."

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Ethiopia, assessed by Kebebew and Niyo, is possible. However, at the time that Kebebew and Niyo considered the Ethiopian classification, the conflict was too brief to satisfy the notion of intensity under Article 1(1) of AP II and, owing to the brevity of its duration, the fleeting moments of territorial control exercised by the TPLF meant that there was a failure by this organized armed group to launch sustained and concerted military attacks.[127] Of course, this ongoing situation could be reassessed after some time has passed, and indeed, such an assessment could lead to a different result. Unfortunately, the question of the length of the minimum duration of sustained military operations remains to be answered as only clear-cut cases have been decided by international courts and tribunals. A comparison between an interpretation of "protracted armed violence" and "sustained military operations" would possibly assist in refining the notion of "intensity" as it relates to "sustained armed conflicts". This comparison is drawn below.

A comparison between "protracted armed violence" and "sustained military operations"

The comparison conducted in this part of the paper focuses on answering the question of whether the minimum levels of intensity associated with violence resulting from a situation differ in the context of "protracted armed violence" (common Article 3) and "sustained (and concerted) military operations" (AP II).[128] In other words, in the context of AP II, does the notion of "intensity" mean that violence must not only be protracted (as demanded by common Article 3) but also be prolonged (sustained)?

An interrogation of the meaning of "protracted armed violence" confirms that duration or a prolongation of fighting is not required to meet the minimum threshold of "protracted armed violence". This realization is highlighted by the *Haradinaj* case, in which it was determined that in assessing the interpretation of the criterion of protracted armed violence in practice in respect of whether or not a situation is "protracted", greater attention is given to the intensity of the armed violence than to its duration.[129] Consequently, in assessing whether a situation meets the criterion of protracted armed violence, greater weight is placed on the manner in which the fighting is conducted, as well as the consequences of the fighting, than on the duration of the fighting.[130]

On the other hand, the notion of "intensity" associated with the violence resulting from "sustained military operations" (as examined above) entails that the violence should be sufficiently protracted so as also to be prolonged.[131] It is

127 The author refers to the discussion by Kebebew and Niyo. See T. Kebebew and J. Niyo, above note 66.
128 The author refers to "sustained operations" for consistency. The relationship between the word "sustained" and the notion of "intensity", as well as the interplay with the term "concerted", which is an organizational characteristic, is discussed in above note 74.
129 T. Kebebew and J. Niyo, above note 66.
130 ICTY, *Haradinaj*, above note 20, para. 49.
131 ICTR, *Akayesu*, above note 40, para. 602.

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not debatable that violence must be protracted to begin with in order for any type of non-international armed conflict to exist, including that defined by AP II. Article 1 (2) clearly excludes situations that fall short of being protracted from the material scope of application of AP II, and therefore, the requirement that there is protracted armed violence is not disputed.[132]

At this point in the analysis, the relevant question is whether or not the notion of "intensity" associated with the word "sustained" requires more than merely being protracted. At the heart of the comparison is the question of whether or not the notion of "intensity" under Article 1(1) of AP II demands an additional element to protracted armed violence. As is determined in this section, the notion of "intensity" in the context of "sustained military operations" requires that violence resulting from military operations should be long-lasting and should fulfil a temporal requirement. The difference between the two notions of "intensity" seemingly lies in the additional requirement necessitated by the word "sustained", that military operations should be maintained, whereas "duration" is not a requisite to fulfil the minimum threshold of violence associated with "protracted armed violence". Therefore, it is not surprising that the ICTR and the SCSL, both of which were afforded jurisdiction over crimes resulting from the criminalization of violations of AP II, answered in the affirmative the question of whether the notion of "intensity" differs in the contexts of common Article 3 and AP II.

In the *Akayesu* case, Trial Chamber I of the ICTR assessed whether the non-international armed conflict before it met the material scope of application of AP II.[133] The Chamber specifically highlighted the offence as per count 15, which is charged under both common Article 3 and AP II.[134] It therefore considered that it was not sufficient to apply common Article 3 and to take it for granted that AP II automatically was applicable to the situations before it.[135] The Chamber consequently held that in the event that alleged offences are charged simultaneously under both common Article 3 and AP II, the prosecutor has to prove that not only the intensity threshold requirements under common Article 3 but also those under AP II have been met.[136]

In *Akayesu*, Trial Chamber I determined that the relationship between common Article 3 and AP II was such that common Article 3 continues to apply once the application of AP II has been triggered.[137] When the higher threshold of intensity included in Article 1(1) of AP II is satisfied, both treaties apply simultaneously.[138] In its determination, the Chamber implied that there are situations to which common Article 3 alone applies.[139] This implied distinction

132 AP II, Art. 1(2): "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."
133 ICTR, *Akayesu*, above note 40, paras 606–607, 622–627.
134 *Ibid.*, para. 607.
135 *Ibid.*
136 *Ibid.*, para. 618.
137 *Ibid.*
138 Cf. *ibid.*, para. 603.
139 Cf. *ibid.*, para. 602.

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refers to non-international armed conflicts in the traditional sense (armed conflicts not of an international character) where violence is protracted in nature only.[140]

With reference to the SCSL, the *Sesay* case provides insight into the differing nature of the notion of intensity as it relates to "protracted armed violence" and "*sustained* military operations".[141] In *Sesay*, at the outset Trial Chamber I of the SCSL stated that the RUF had been sufficiently organized in terms of the requirement of AP II.[142] In March 1991, the RUF launched its first attack in Sierra Leone[143] with the support of the National Patriotic Front of Liberia from a training camp situated in Liberia.[144] Only at the end of 1991 was the RUF able to exercise consolidated control over the Kailahun district in the east and parts of the Pujehun district to the south of Sierra Leone.[145] The attacks by the RUF in March 1991 satisfied the minimum threshold of intensity as protracted armed violence existed from this point on in the territory of Sierra Leone,[146] and consequently, the application of common Article 3 was triggered.[147] Trial Chamber I found that the armed conflict in Sierra Leone was of a non-international character and that it existed between March 1991 and January 2002.[148] Common Article 3 applied throughout the duration of this conflict.[149]

The crimes of which Mr Sesay had been accused took place later in the conflict, after the end of 1991.[150] The SCSL therefore did not have to comment on when exactly AP II became applicable to the conflict in Sierra Leone. However, for the sake of the comparison drawn in this analysis, AP II would have become applicable at the end of 1991 at the earliest, when the RUF exercised control over the Kailahun and Pujehun districts, which enabled it to launch sustained and concerted military operations.[151] From this point on, both common Article 3 and AP II applied to the conflict as the intensity threshold had been met.[152]

As is the case in the determinations of the ICTR and the SCSL, most scholars agree that AP II necessitates a higher degree of intensity than does common Article 3.[153] Sivakumaran, however, questions whether it can be said with certainty that the criteria with regard to an organized armed group's ability

140 *Ibid.*
141 SCSL, *Sesay*, above note 113, paras 964, 966.
142 *Ibid.*, paras 970, 978.
143 *Ibid.*, para. 12.
144 *Ibid.*
145 *Ibid.*, para. 14.
146 *Ibid.*
147 *Ibid.*, para. 969.
148 *Ibid.*, paras 969, 977.
149 *Ibid.*, para. 981.
150 *Ibid.*, section IX.
151 See facts in *ibid.*, para. 14.
152 *Ibid*, para. 981. In the *Sesay* case, Trial Chamber I of the SCSL commented that since AP II has a higher threshold of application extending the two requirements inherent in common Article 3, a situation that satisfies the criteria of an AP II-type armed conflict logically would automatically satisfy the common Article 3 threshold.
153 S. Junod, above note 21, pp. 35, 37; Y. Dinstein, above note 10, pp. 38–39; L. Moir, above note 2, pp. 10, 106.

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to launch "sustained and concerted military operations" presuppose a higher level of violence than the degree of intensity of violence associated with the term "protracted armed violence".[154] Sivakumaran highlights two approaches to this question. The first approach flows from the reasoning in Trial Chamber II of the ICTY in the *Boškoski* Trial Judgment, as well as the reasoning in Trial Chamber I of the ICTR in the *Akayesu* Trial Judgment.[155] In *Boškoski*, Trial Chamber II stated that the level of organization required from an armed group to be able to launch sustained and concerted military operations is greater than the degree of organization required from such an armed group to engage in protracted violence.[156] In *Akayesu*, Trial Chamber I suggested that operations must be continuous, which may be interpreted as imposing a temporal requirement on the notion of intensity under AP II.[157] Sivakumaran proposes that the reasoning of these courts indeed presupposes that "sustained armed violence" necessitates a level of violence higher than protracted armed violence.[158] The author of this contribution aligns herself with this interpretation. Sivakumaran, however, cautions that a second approach to the issue challenges this interpretation.[159]

Sivakumaran suggests this second approach in respect of clarification of establishing whether the minimum threshold of intensity under "sustained military operations" and "protracted armed violence" is the same.[160] This approach is based on the reasoning that duration (implied by the use of the term "sustained") is but one indicator of protracted armed conflict.[161] Consequently, this element is already included in the idea of protraction, and therefore, the minimum threshold for the notion of intensity under AP II and common Article 3 is the same.[162] According to Sivakumaran, it is possible that the degree of violence associated with the notions both of "protracted armed violence" and "sustained and concerted military operations" refers to protracted armed violence.[163] The author of this contribution disagrees with this second approach,[164] the reason being that "duration" is not an absolute requirement to

154 S. Sivakumaran, above note 18, p. 188. Sivakumaran reasons as follows: "Whether the notion of sustained and concerted military operations does indeed presuppose a higher level of violence than protracted armed violence depends in large part on the meaning attributed to the latter concept. Sustained is an element of duration and means ongoing rather than non-stop; and this notion is covered by the idea of protraction. Thus, it is not entirely clear that the Additional Protocol II notion does require a greater level of violence than that required for a non-international armed conflict *simpliciter* …"

155 See Sivakumaran's discussion of *Boškoski* and *Akayesu* in the context of the duration of intensity possibly necessitated by the wording "sustained military operations". *Ibid.*, p. 188; ICTY, *Boškoski*, above note 20, para. 197; ICTR, *Akayesu*, above note 40, para. 626.

156 ICTY, *Boškoski*, above note 20, para. 197.

157 ICTR, *Akayesu*, above note 40, para. 626.

158 S. Sivakumaran, above note 18, p. 188.

159 This author's interpretation of Sivakumaran's reasoning between notes 250 and 253. *Ibid.*, p. 188.

160 *Ibid.*, p. 188.

161 *Ibid.*

162 This author's interpretation of Sivakumaran's reasoning between notes 253 and 256. *Ibid.*, p. 188.

163 *Ibid.*, p. 188.

164 It is submitted that the "correctness" of Sivakumaran's second approach depends on the understanding of the relationship between "protracted armed violence and duration, and that other scholars may deem such an interpretation as correct".

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be met to constitute a "protracted armed conflict".[165] On the other hand, as is argued by this author in the previous section of this contribution, duration is necessitated by the term "sustained". The author, therefore, interprets as correct the approach followed in *Sesay* and the ICTR that "sustained" military operations demand a certain degree of duration and therefore differ from "protracted armed violence".

To sum up this section, it has been argued that the degree of violence associated with AP II-type armed conflicts is prolonged and is ongoing as a result of sustained military operations as articulated in Article 1(1) of this treaty. The case study of events in the Democratic Republic of the Congo (DRC) will now be provided as a concrete representation of the requirements in order to clarify the abstract reasoning in the argument.

The DRC is bound by common Article 3 as well as by AP II, and thus, a non-international armed conflict or an internal conflict under common Article 3 and/or an AP II-type armed conflict can exist or coexist on the territory if the notion of "intensity" is satisfied.[166] In respect of the DRC, a fleeting period of territorial control was documented when the National People's Coalition for the Sovereignty of Congo (Coalition Nationale du Peuple pour la Souveraineté du Congo, CNPSC) briefly captured a number of strategic towns in June 2017 and controlled a kilometres-wide section of territory in the city of Uvira on Lake Tanganyika.[167] This operation called for United Nations intervention and the deployment of the Armed Forces of the Democratic Republic of the Congo (Forces Armées de la République Démocratique du Congo, FARDC) to drive out the armed group.[168] The situation as documented satisfies the definition of "protracted armed violence" under common Article 3.[169] However, the brevity of the duration (approximately a month) falls short of the requirement of an armed group being able to use the territory under its control to launch "sustained and concerted military operations".[170] Practically, the brevity and the fleeting nature of territorial control in this case did not enable the CNPSC to give effect to the other requirements under Article 1(1) of AP II. It is unlikely that an armed group would be able to give effect to those requirements within the first month of fighting.

The fighting between the Ugandan Allied Democratic Forces (ADF) and the FARDC, by way of contrast, meets the level of intensity defined by "sustained protracted armed violence", and AP II applies.[171] The ADF controls territory in

165 See 2016 Commentary on GC I, above note 18, paras 438–440.

166 A list of States party to AP II is available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475. A list of States Parties to Geneva Convention I is available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=365.

167 Fiston Mahamba, "Eastern Congo Rebels Aim to March on Kinshasa: Spokesman", *Reuters*, 29 September 2017, available at: www.reuters.com/article/us-congo-rebels/eastern-congo-rebels-aim-to-march-on-kinshasa-spokesman-idUSKCN1C42R3.

168 *Ibid.*

169 *Ibid.*

170 *Ibid.*; ICTR, *Musema*, above note 40, para. 258.

171 See reports concerning ADF and other attacks from October 2017 up to 17 June 2020 at Kivu Security Tracker, available at: https://kivusecurity.org/reports.

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the North Kivu and Ituri provinces, which enables it to launch continuing military operations against the FARDC.[172] The ADF continually manages to recapture strongholds and to rebuild its military capacity, and attacks occur frequently and on an ongoing basis.[173] Evidence of such an attack was collected as early as 2013, and attacks are recorded as continuing until June 2020.[174] For example, between November 2019 and March 2020, 393 civilians were killed,[175] and from January 2020 until March 2020, at least 300 FARDC soldiers lost their lives and 40 ADF soldiers were killed.[176] The violence resulting from the ongoing conflict between the FARDC and the ADF in the DRC meets the threshold of "sustained protracted armed violence". The situations described demonstrate the difference between the definitions of "protracted armed violence" under common Article 3 and "sustained protracted armed violence" under AP II in that they indicate that in addition to violence being protracted, it also must be prolonged.

There is a cautionary element in that the exact temporal requirement necessitated by the term "sustained" is unclear. Only clear-cut cases have been observed before international criminal tribunals. In the view of this author, it is not feasible that one month's worth of fighting is too short but several months are sufficient to be considered sustained military operations. Faced with the question of whether there is a practical way to measure whether military operations are sufficiently prolonged to fulfil the notion of intensity demanded by the inclusion of the term "sustained" in Article 1(1) of AP II, this author suggests a case-by-case assessment which takes into account all four requirements listed in AP II and specifically the relationship between territorial control and the existence of prolonged protracted armed violence as the benchmark for sustained military operations. It is once again highlighted that this assessment is important from a treaty law perspective only. Even if a situation is interpreted as not sufficiently prolonged to qualify as sustained military operations under Article 1 (1) of AP II owing to the absence of a metric, the corpus of customary IHL, which includes the majority of rules codified in AP II, is triggered once the lower-intensity threshold of protracted armed violence is met and the sufficient degree of organization is satisfied.

The relationship between "sustained armed violence" and the notion of "intensity" under Article 1(1) of AP II links the word "sustained" to the notion of "intensity". It is required that violence resulting from the fighting in an AP II-type armed conflict is prolonged and therefore that the military operations are ongoing for some period of time.

172 Kivu Security Tracker, "After the Death of At Least 77 Civilians, the Congolese Army's Strategy Against the ADF is Called into Question", 25 November 2019, available at: https://blog.kivusecurity.org/after-the-death-of-at-least-77-civilians-the-congolese-armys-strategy-against-the-adf-is-called-into-question/; Kivu Security Tracker, "Congolese Army's Optimism Undermined by New ADF Massacres", 2 March 2020, available at: https://blog.kivusecurity.org/congolese-armys-optimism-undermined-by-new-adf-massacres/.

173 Kivu Security Tracker, "Congolese Army's Optimism Undermined", above note 172.

174 *Ibid.*

175 *Ibid.*

176 *Ibid.*

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Conclusion

This paper examines the minimum threshold of violence that a situation must meet in order to satisfy the notion of "intensity" as demanded by AP II. It has argued that the requirement that demands that the armed group is capable of carrying out sustained and concerted military operations included in Article 1(1) informs the notion of intensity of this instrument and that it differs from mere protracted armed violence, the benchmark test for the application of common Article 3 and the corpus of the customary international law of armed conflict.

In order to determine whether the minimum threshold test inherent in the notion of intensity differs in the case of common Article 3 and AP II types of non-international armed conflict, specifically in the context of duration as a constitutive element of the notion of intensity under AP II, three central questions were asked. First, is duration a constitutive element inherent in the notion of intensity (protracted armed violence) demanded by common Article 3? This question was addressed in the second substantive part of this contribution. Next, does the inclusion of the term "sustained" in the construct "sustained and concerted armed violence", as included in the material scope of application of AP II, inform the notion of intensity required to trigger the application of this instrument, and if so, does its inclusion consider duration as a constitutive element of this notion of intensity? This question was explored in the third substantive part of the contribution. Lastly, the question was raised of whether the relationship between duration and the notion of intensity differs under common Article 3 and AP II. This question was addressed in the final substantive part of the contribution.

An interrogation of the text of common Article 3 through treaty interpretation did not aid in reaching a better understanding of the notion of intensity inherent in this provision. The case law of the ICTY was instructive. The *Tadić* formulation provides that the minimum threshold for the notion of intensity under common Article 3 is equated to "protracted armed violence". A survey of case law highlights the conclusion that several factors can aid an assessment of the fulfilment of the protracted armed violence criteria. None of these factors in itself is a constitutive element in the notion of intensity, and the list of factors is also not exhaustive. Case law emphasizes specifically that "duration" is but one factor to be considered in an assessment of whether or not an incident of fighting equates to protracted armed violence.

Next, the paper interrogated the meaning of the term "sustained". The analysis revealed that from a treaty law perspective it is crucial for the application of AP II that there is a clear understanding of the content of the term "sustained". In order to arrive at that understanding, the relationship between the notion of "intensity" and "sustained" military operations was examined. The results of treaty interpretation and a survey of case law demonstrate that the term "sustained" essentially requires that violence is prolonged in nature. The violence resulting from the military operations must be ongoing for a period of time as a consequence of the operations being launched in a

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systematic way. Therefore, a degree of duration is a constitutive factor in the notion of "intensity" in terms of AP II.

An exact metric of a minimum period of fighting that qualifies as sufficiently prolonged to be "sustained" remains elusive. Case law takes into consideration only clear-cut situations. It is proposed that an assessment of the fulfilment of the intensity requirement under Article 1(1) of AP II should be complemented by a purposive approach which promotes the greatest protection of those most vulnerable to the consequences of non-international armed conflict.

As was explained in the fourth substantive part of this paper, the temporal requirement inherent in "sustained" military operations consequently demonstrates a situation that differs from "protracted armed violence", which serves as the benchmark for the notion of "intensity" under common Article 3. In the context of common Article 3, "duration" is not considered a constitutive factor in fulfilling this notion. Therefore, the notion of intensity demanded by AP II elevates the minimum threshold of protracted armed violence to prolonged or sustained protracted armed violence.

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