# Paras 1 to 193

[**See also** ICTY, The Prosecutor v. Tadic]

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: ICTY, The Prosecutor v. Ljube Boškoski and Johan Tarčulovski, IT-04-82-T, Judgement of 10 July 2008, available at www.icty.org. Footnotes partly omitted]

[**N. B.**: For reasons of clarity, the other cases discussed in this book, when relevant, are referred to in the footnotes, and not in the core of the text.]

**PROSECUTOR**
**v.**
**LJUBE BOŠKOSKI**
**JOHAN TARČULOVSKI**

**JUDGEMENT**

[…]

## I. INTRODUCTION

1. The Indictment charges the Accused, Ljube Boškoski and Johan Tarčulovski, with crimes committed between 12 and 15 August 2001 against ethnic Albanians from Ljuboten village in the northern part of the former Yugoslav Republic of Macedonia (“FYROM”). These acts are alleged to have occurred during an armed conflict that, as alleged, began in January 2001 and continued until at least late September 2001, between the Security Forces of FYROM, i.e., the army and police, on the one hand, and the

ethnic Albanian National Liberation Army ("NLA") on the other. It should be noted that this case is the only one before this Tribunal concerning allegations arising out of the situation in FYROM in 2001.

[…]

# V. GENERAL REQUIREMENTS OF ARTICLE 3 OF THE STATUTE

1. The Accused are each charged with three counts of violations of the laws or customs of war pursuant to Article 3 of the Statute, namely one count of murder, one count of wanton destruction of cities, towns or villages not justified by military necessity, and one count of cruel treatment. There are several preliminary requirements which must be satisfied for the applicability of Article 3 of the Statute. In addition to being satisfied that the crimes charged fall under this provision, it must be established that there was an armed conflict, whether international or internal, at the time material to the Indictment and that the acts of the Accused are closely related to this armed conflict.

[…]

## A. Armed Conflict

### 1. Law

1. The test for armed conflict was set out by the Appeals Chamber in the Tadić Jurisdiction Decision: "[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". [1] This test has been consistently applied in subsequent jurisprudence. Given the circumstances of that case, the Trial Chamber in Tadić interpreted this test in the case of internal armed conflict as consisting of two criteria, namely (i) the intensity of the conflict and (ii) the organisation of the parties to the conflict, as a way to distinguish an armed conflict "from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law". [2] This approach has been followed in subsequent judgements, although care is needed not to lose sight of the requirement for protracted armed violence in the case of an internal armed conflict, when assessing the intensity of the conflict. The criteria are closely related. They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.
2. […] Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case. The Chamber will examine how each of these criteria has been assessed in practice.

#### *(a) Intensity*

1. Various indicative factors have been taken into account by Trial Chambers to assess the "intensity" of the conflict. These include the seriousness of attacks and whether there has been an increase in armed clashes, [3] the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and

whether any resolutions on the matter have been passed. [4] Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; [5] the type of weapons used, [6] in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns [7] the extent of destruction [8] and the number of casualties caused by shelling or fighting; [9] the quantity of troops and units deployed; [10] existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.

2. At a more systemic level, an indicative factor of internal armed conflict is the way that organs of the State, such as the police and military, use force against armed groups. In such cases, it may be instructive to analyse the use of force by governmental authorities, in particular, how certain human rights are interpreted, such as the right to life and the right to be free from arbitrary detention, in order to appreciate if the situation is one of armed conflict. As is known, in situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force, but, where applicable, human rights law restricts such usage to what is no more than absolutely necessary and which is strictly proportionate to certain objectives. […] However, when a situation reaches the level of armed conflict, the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law, where a different proportionality test applies.

[…]

1. […] [S]ome national courts have qualified […] situations as conflicts not of an international character to which Common Article 3 of the Geneva Conventions applies. In this respect, the Chamber notes the factors that led these courts to make such a qualification. The Constitutional Court of the Russian Federation recognised in a 1995 judgement that Additional Protocol II applied to the armed conflict in the Chechen Republic. The Court observed that the use of the armed forces under the Constitution did not require a link with a declaration of a state of emergency or a state of war and that when the State Duma adopted a resolution in 1994 on the use of the armed forces, it had declared that the disarmament of the illegal regular armed units in the Republic, which were equipped with tanks, rocket installations, artillery systems and combat planes “is in principle impossible without the use of the forces of the army”. [11]
2. In Peru, the National Criminal Chamber held that activities of the armed group Peruvian Communist Party – Shining Path, and counter-actions to these by the Government forces, which resulted in more than 69,000 deaths and severe damage to public and private infrastructure, constituted an armed conflict and that Common Article 3 applied. The Chilean Supreme Court recognised the applicability of Common Article 3 to the situation in Chile in 1973, having had regard to the Government’s decree of 12 September 1973 which qualified the internal situation as “a state of war” which had the effect of making certain penal provisions becoming applicable.
3. The Supreme Court of the United States held in 2006 that the United States was in a state of armed conflict with the non-State group known as Al Qaeda on the basis that Common Article 3 applies when there is resort to armed force between a State and a non-signatory to the Geneva Conventions of 1949 which is party to an armed conflict. [12] In Israel, the Supreme Court held that “[s]ince the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is

not police activity. It is an armed struggle." In coming to this holding, it took into account that since the end of September 2000 until 2002, more than 600 Israeli citizens had been killed and more than 4,500 injured, and that "many" Palestinians had also been killed and wounded. To counter the "terrorist" attacks, the Israeli Defence Forces had, *inter alia*, conducted special military operations since June 2002 "to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks". [13]

4. These cases demonstrate that national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces in deciding whether an armed conflict exists. The high number of casualties and extent of material destruction have also been important elements in their deciding whether an armed conflict existed.
5. The Boškoski and Tarčulovski Defences have argued that since international law distinguishes between armed conflict and acts of "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law", [14] acts of a terrorist nature may not be taken into account in the determination of the existence of an armed conflict. The implication of this argument would seem to be that all terrorist acts should be excluded from the assessment of the intensity of violence in FYROM in 2001. Without prejudice to the question of the qualification of the acts of the NLA as terrorist in nature, the Chamber considers that this interpretation is a misreading of the jurisprudence of the Tribunal, reviewed below.
6. The Trial Chamber in *Tadić* relied on the ICRC Commentary to the Geneva Conventions of 1949 to explain that the elements of intensity and organisation of the parties may be used solely for the purpose, as a minimum, to distinguish an armed conflict from lesser forms of violence such as "terrorist activities". The part of the Commentary relied upon noted that the Conventions' drafters did not intend the term "armed conflict" to apply "to any and every isolated event involving the use of force and obliging the officers of the peace to have resort to their weapons". Rather, Common Article 3 was to apply to "conflicts which are in many respects similar to an international war, but take place within the confines of a single country", that is, where "armed forces" on either side are engaged in "hostilities". The essential point made by the Trial Chamber in *Tadić* is that isolated acts of violence, such as certain terrorist activities committed in peace time, would not be covered by Common Article 3. This conclusion reflected the Appeals Chamber's determination in *Tadić* that armed conflict of a non-international character exists when there is "protracted violence between governmental authorities and organized groups or between such groups within a State". In applying this test, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterised as terrorist in nature. This interpretation is consistent with the Appeals Chamber's observation in *Kordić*, that "[t]he requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism."
7. The element of "protracted" armed violence in the definition of internal armed conflict has not received much explicit attention in the jurisprudence of the Tribunal. It adds a temporal element to the definition of armed conflict. The Chamber is also conscious of Article 8(2)(d) of the Rome Statute of the International Criminal Court relating to serious violations of Common Article 3 which "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, *isolated and sporadic acts of violence* or other acts of a similar nature".
8. The view that terrorist acts may be constitutive of protracted violence is also consistent with the logic of international humanitarian law, which prohibits "acts of terrorism" and "acts or threats of violence the

primary purpose of which is to spread terror among the civilian population" in both international and non-international armed conflicts and to which individual criminal responsibility may attach. It would be nonsensical that international humanitarian law would prohibit such acts if these were not considered to fall within the rubric of armed conflict.

9. In addition, the Chamber notes that some national courts have not excluded acts of a terrorist nature when considering the evidence of armed conflict. The National Criminal Chamber of Peru found that the threshold of Common Article 3 had been met in respect of the situation related to acts committed by the Shining Path, such as murder of civilians, acts of sabotage against embassies and public and private enterprises' facilities, and armed ambushes against State forces and responses to these. […] The Supreme Court of the United States did not refrain from the determination that Common Article 3 applied to the armed conflict it identified between the United States and Al Qaeda in spite of the "terrorist" acts perpetrated by Al Qaeda or the US Government's view that the latter was a terrorist organisation. [15]
10. The Supreme Court of Israel has also qualified the situation between Israel and "terrorist organizations" as armed conflict in a number of judgements. In a 2006 judgement, the Israeli Supreme Court recognised that a "continuous situation of armed conflict" existed between Israel and the various "Palestinian terrorist organizations" since the first *intifada*, due to the "constant, continual, and murderous wave of terrorist attacks" and the armed response to these. The Court observed that "in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law." [16] Furthermore, the UN Commission of Inquiry on Lebanon concluded that "the hostilities that took place from 12 July to 14 August [2006] constitute an international armed conflict", but noted "its *sui generis* nature in that active hostilities took place only between Israel and Hezbollah fighters". In its report, the Commission stated that the fact that Israel considered Hezbollah to be a terrorist organisation and its fighters terrorists did not influence its qualification of the conflict. [17]
11. These cases indicate that national courts and UN bodies have not discounted acts of a terrorist nature in their consideration of acts amounting to armed conflict. Nothing in the jurisprudence of the Tribunal suggests a different approach should be taken to the issue provided that terrorist acts amount to "protracted violence". In view of the above considerations, the Chamber considers that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.

[…]

1. In view of these considerations, the Chamber will apply the test laid down by the Appeals Chamber in the *Tadić* Jurisdiction Decision in its examination of the events in FYROM in 2001. It will treat the indicative factors identified above, together with the systemic consideration of the use of force by the State authorities, as providing useful practical guidance to an evaluation of the intensity criterion in the particular factual circumstances of this case.

**Footnotes**

- [1] Haradinaj Trial Judgement, para. 60 [**See** ICTY, The Prosecutor v. Tadić [Part E., para. 60]]
- [2] Ibid. paras 60, 65-68
- [3] Ibid. para. 60
- [4] *Ibid*. para. 49
- [5] *Ibid*. paras 49 and 97
- [6] *Ibid*. para. 49
- [7] *Ibid*. para. 96
- [8] *Ibid*. para. 49
- [9] *Ibid*.
- [10] *Ibid*.
- [11] *See* Russia, Constitutionality of Decrees on Chechnya
- [12] *See* United States, Hamdam v. Rumsfeld
- [13] *See* Israel, Ajuri v. IDF Commander [paras 1-4]
- [14] *Tadić* Trial Judgement, para. 562 [*See* ICTY, The Prosecutor v. Tadić [Part B., para. 562]]
- [15] *See* United States, Hamdam v. Rumsfeld
- [16] *See* Israel, The Targeted Killings Case
- [17] *See* Israel/Lebanon/Hezbollah, Conflict in 2006

# Paras 194 to 206

*(b) Organisation of the armed group*

1. The jurisprudence of the Tribunal has established that armed conflict of a non-international character may only arise when there is protracted violence between governmental authorities and organised armed groups or between such groups within a State. The required degree of organisation of such an armed group for the purpose of Common Article 3 has not been specifically defined in legal texts or in jurisprudence. Nevertheless, certain elements of this minimal level of organisation have been elaborated by the Tribunal's jurisprudence.
2. In *Tadić*, the Appeals Chamber distinguished between the situation of individuals acting on behalf of a State without specific instructions from that of individuals making up "*an organised and hierarchically structured group*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels." The Chamber observed that "an organised group […] normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority" and that its members do not act on their own but conform "to the standards prevailing in the group" and are "subject to the authority of the head of the group". Thus, for an armed group to be considered organised, it would need to have some hierarchical structure and its leadership requires the capacity to exert authority over its members.
3. The issue of the degree of organisation of an armed group was considered by the Trial Chamber in *Limaj* in deciding whether the Kosovo Liberation Army (KLA) was an organised armed group. The Chamber rejected the more stringent tests for organisation submitted by the Defence based upon the "convenient criteria" of the ICRC Commentary and the submissions that an armed group must possess a method of sanctioning breaches of Common Article 3 or fulfil the conditions of Additional Protocol II,

instead holding that "*some degree of organisation* by the parties will suffice to establish the existence of an armed conflict". The leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented. National case law is also consistent with this minimal requirement of control. For instance, a Belgian military court refused to characterize the situation prevailing in Somalia in 1993 as an armed conflict to which Common Article 3 would apply on the basis that the groups involved were irregular, anarchic armed groups with no responsible command.

4. While the jurisprudence of the Tribunal requires an armed group to have "some degree of organisation", the warring parties do not necessarily need to be as organised as the armed forces of a State. Neither does the degree of organisation for an armed group to a conflict to which Common Article 3 applies need be at the level of organisation required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in "protracted violence" is lower than the degree of organisation required to carry out "sustained and concerted military operations". In this respect, it is noted that during the drafting of Article 8(2)(f) of the Rome Statute of the International Criminal Court covering "other" serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of Additional Protocol II to the section, and instead accepted a proposal to include in the chapeau the test of "protracted armed conflict", as derived from the Appeals Chamber's decision in *Tadić*. This indicates that the latter test was considered to be distinct from, and a lower threshold than, the test under Additional Protocol II. This difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts, which mean that "there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol". By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application.
5. Further guidance as to the degree of organisation required for parties to armed conflicts governed by Common Article 3 may be found in *Haradinaj*, in which the Trial Chamber, after having reviewed the practice of Trial Chambers in interpreting the criterion of organisation, concluded that "an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means". In order to ascertain whether an armed group might be sufficiently organised, the Trial Chamber examined the indicative factors taken into account by Trial Chambers, "none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled". [18]
6. Trial Chambers have taken into account a number of factors when assessing the organisation of an armed group. These fall into five broad groups. In the first group are those factors signalling the presence of a command structure, such as the establishment of a general staff or high command, [19] which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply, [20] authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit's area of responsibility. Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military

actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.

7. Secondly, factors indicating that the group could carry out operations in an organised manner have been considered, such as the group's ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units; the capacity of operational units to coordinate their actions, and the effective dissemination of written and oral orders and decisions.
8. In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members; the providing of military training; the organised supply of military weapons; the supply and use of uniforms; and the existence of communications equipment for linking headquarters with units or between units.
9. In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members.
10. A fifth group includes those factors indicating that the armed group was able to speak with one voice, such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords.
11. The Tarčulovski Defence submitted that the "terrorist" nature of the activities of the NLA and alleged violations of international humanitarian law militated against the NLA being considered as a party to an armed conflict because they showed that the "NLA did not have [the] authority to control the forces on the ground". The Chamber accepts that a high number of international humanitarian law violations by the members of an armed group may be indicative of poor discipline and a lack of hierarchical command in the group in some instances. It is noted that one national court has held that a pattern of violations of rules of international humanitarian law such as terrorist attacks indicates a lack of responsible command under Article 1 of Additional Protocol II, although the court nonetheless found that Common Article 3 applied. However, the Chamber also recognises that some terrorist attacks actually involve a high level of planning and a coordinated command structure for their implementation. In other words, this question is a factual determination to be made on a case-by-case basis.
12. Where members of armed groups engage in acts that are prohibited under international humanitarian law, such as "acts of terrorism", "acts or threats the primary purpose of which is to spread fear in the civilian population", hostage-taking, the use of human shields, feigning protected status, attacking historic or religious monuments or buildings or using such objects in support of the military effort, or serious violations of Common Article 3, they are liable to prosecution and punishment. However, so long as the armed group possesses the organisational *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict. The Chamber cannot merely infer a lack of organisation of the armed group by reason of the fact that international

humanitarian law was frequently violated by its members. In assessing this factor the Chamber needs to examine how the attacks were planned and carried out – that is, for example, whether they were primarily the result of a military strategy ordered by those leading the group or whether they were perpetrated by members deciding to commit attacks of their own accord.

13. In view of the above analysis, the Chamber will apply the test laid down by the Appeals Chamber in the *Tadić* Jurisdiction Decision in its examination of the facts of the events in FYROM in 2001, using the indicative factors identified above as a practical guide to determining whether the criterion of organisation of the parties was met.

**Footnotes**

- [18] *Tadić* Jurisdiction Decision, para. 70. [*See* ICTY, The Prosecutor v. Tadić [Part A., para. 70]]
- [19] *Ibid*. para. 562
- [20] *Haradinaj* Trial Judgement, paras 91 and 99 [*See* ICTY, The Prosecutor v. Tadić [Part E.]]

# Paras 207 to 292

**2. Findings**

1. […] The Chamber will discuss below whether the Prosecution has demonstrated that the acts of violence that occurred in FYROM in the material time reached the level of intensity required by the jurisprudence of the Tribunal and that the NLA possessed the characteristics of an organised armed group within the meaning of the *Tadić* test to establish the existence of an armed conflict.

*(a) Intensity of the conflict*

[…]

1. The Chamber received differing evidence as to the total numbers of casualties as a result of the events of 2001. Varying sources indicate that 15 to 24 police officers and 35 to 43 to 60 members of the army were killed. […] The [Ministry of Interior's] "White Book" documents 10 civilians killed, while the "Report on the activities of the Ministry of Interior for 2001" states that 16 civilians were killed. Some 150 to 174 police officers and 119 to 211 to 270 army members were injured, while 61 to 75 to 100 civilians were injured, and 20 to 36 civilians reportedly went missing. Although none of these figures are absolutely reliable, the Chamber takes note of them as a broad indication of the numbers of casualties produced by the events of 2001, the majority of which appeared to occur in June and August.
2. In terms of the numbers of persons displaced by the conflict, by the end of August, the United Nations Refugee Agency estimated that there were around 64,000 Macedonian refugees in Kosovo or southern Serbia, and around 70,000 internally displaced persons in Macedonia, 15,000 of whom were "micro-displaced" very short distances from original residence or sleeping in a location different from day time residence. […] FYROM sources put the number of Macedonian refugees at 80,000 and the number of internally displaced persons at over 86,000.

[…]

1. The Chamber received varying analyses of whether the NLA exercised control over territory during 2001. […] While the NLA did not control any of the large towns or cities, the Chamber heard evidence that much of the mountainous areas with predominantly ethnic-Albanian villages were under the "control" of the NLA. The OSCE estimated that 135 to 140 villages were under NLA control, meaning that the police were unable to perform their jobs there. The degree of control did not reach the level of the exercise of governmental control, but the Macedonian forces were unable to enter these villages for prolonged periods of time. […]
2. While NLA armed actions had occurred at times during the first months of 2001, particularly in the more mountainous areas in the north west bordering Albania and the Kosovo region, the evidence described above attests to a significant escalation in the intensity of the events in Macedonia from May to mid-August 2001, […] although it does not always follow from the evidence that the "terrorist groups" involved in all the events were, in fact, the NLA. There was an increase in armed clashes to the point of almost daily incidents of violence, shooting and provocations by the NLA and the standard military response to these by the army or police or both. There was also a geographical expansion of areas of fighting […]. Other relevant factors were the distribution and use of heavy weaponry by the Macedonian forces including combat helicopters and tanks; the growing variety of weapons used by the NLA; the mobilization of the army and units of the police to combat readiness; the calling up of reserve forces; the number of orders for military offensives to "destroy terrorists"; the besieging of towns […] and villages […]; the use of cease fires; the appeals to and intervention of international actors to help resolve the crisis by both sides; the institution of a peace agreement to end active hostilities; and the large number of displaced persons and refugees caused by the conflict. Some other indicative factors of armed conflict were also present: these included the attention of the UN Security Council which adopted a resolution in March condemning the "terrorist activities" and a further resolution in September welcoming the signing of the Ohrid Agreement; [21] facilitation by the ICRC for the release of detainees on both sides and to pass messages to families of detainees; the prosecution by FYROM authorities of persons for service in the aid of an enemy army and other offences only applicable during armed conflict; and the granting of a broad amnesty to all those who participated in the conflict, with the explicit exception of those accused of war crimes who would come within the jurisdiction of the ICTY.
3. The Chamber takes into account that despite this clear escalation there remained relatively few casualties on both sides and to civilians (the highest estimates put the total number of those killed during 2001 as a result of the armed clashes at 168), and material damage to property and housing was of a relatively small scale. These low figures may indicate that, despite the use of heavy weaponry by the FYROM forces, there was generally restraint in the way in which it was used, which could suggest that the operations of the police and army were more directed to law enforcement. However, another factor relevant to the low casualties is that the armed clashes that occurred usually involved small numbers of forces and tended to be localised. While, as indicated earlier, the evidence does not always fully establish whether incidents or clashes were attributable to the "NLA" or to some independently acting groups of individuals, it is noted that in general the tactics favoured by the NLA were of a guerrilla nature in that often they involved a quick strike by a small force making full use of the terrain. Against such tactics there was limited scope for a massive military offensive which would normally produce greater casualties.
4. […] [I]n many regards, the legal and administrative framework that the Government of FYROM applied

to its actions in 2001 reflected that which would be applicable during an armed conflict. Every order of the President in this year was issued pursuant to Article 79(2) of the Constitution, meaning that the President was acting in his capacity of Commander in Chief of the armed forces. […]

5. More significantly, under this law, combat activities cannot be engaged in by MoI [Ministry of Interior] employees unless there are "conditions of war situation" […].
6. A degree of ambiguity in the applicable legal framework may also be found in the way that captured NLA members were treated by the FYROM authorities. Although one order of the Ministry of Defence was issued to treat "military captured persons" in accordance with "the Geneva Convention", the Chamber received no evidence that this was applied or whether it was supposed to apply to members of the NLA. The Chamber takes into account the fact that large numbers of male ethnic Albanians suspected of terrorism, including those from Ljuboten, were arrested and charged with criminal offences rather than merely detained without charge for the duration of the conflict as is the more usual practice in armed conflict. However, these persons were often charged with offences that would normally only apply during an armed conflict. Moreover, the Amnesty Law that was passed on 8 March 2002 that absolved from prosecution all those persons who had "participated in the conflict", with the exception of those who were accused of crimes within the jurisdiction of the ICTY, is an indication that the situation was one of armed conflict.
7. A significant consideration in support of a conclusion that the situation in FYROM had reached the level of an armed conflict is the extent of the civil disruption being experienced as evidenced by the extensive displacement of persons from their homes and villages, at least 64,000 of whom became refugees and 70,000 of whom were internally displaced.
8. The Chamber is satisfied that at the times material to the Indictment, the conflict in FYROM had reached the required level of intensity.

*(b) Organisation of the armed group*

1. The Indictment alleges that the two major warring parties in the alleged armed conflict were FYROM Security Forces (the army and police units) and the ethnic Albanian National Liberation Army ("NLA").
2. The Chamber has heard evidence and is satisfied that the forces involved in Macedonia in 2001 included substantial forces of the Macedonian Army and the Macedonian Ministry of Internal Affairs, i.e. the police, which constitute "governmental authorities" within the meaning of the Tadić test.

[…]

1. […] [To establish the level of organisation of the NLA,] the Chamber has reviewed the evidence and has been able to reach the following conclusions.
2. In June 2001 the NLA had approximately 2,000 to 2,500 fighters with some non-military support (food, lodging, transport, etc.) being provided by another 1,000. By August 2001 the NLA had four functioning, though not fully manned, Brigades – the 112th, 113th, 114th, and 115th– and two (the 111th and 116th Brigades) still in the process of becoming operational. The 112th Brigade operated in the area of Tetovo, the 113th in the Kumanovo area, the 114th in the Skopje area, and the 115th in the Raduša area.
3. Ali Ahmeti was the leader of the NLA. Although the manner in which he assumed this position was not fully verified in evidence, members of the NLA regarded him as the leader, so did members of the

international community, as indicated by the fact that communications to the NLA were directed to him and that negotiations for cease fires, the withdrawal of troops, and disarmament were carried out with Mr Ahmeti. Gzim Ostreni was NLA's Chief of Staff; he was regarded as the deputy leader of the organisation and the military director.

[…]

1. To establish a functioning organisational system the Prosecution seeks to rely on a number of the rules and regulations which are said to have been applicable to the NLA in 2001. These informal regulations and rules, inter alia, purport to establish a chain of command defining the duties of each level; oblige unit commanders to ensure implementation of the regulations; lay down provisions on disciplinary measures such as detention or arrest; inform the Brigade commanders of their duty to respect civilians and civilian property as well as the obligation to observe the laws of war and international conventions during any military engagements; and recognise the jurisdiction of the ICTY over any crimes committed by NLA members. […]
2. What remains pertinent to the Chamber is whether or to what extent these rules and regulations had actually been applied in practice by the NLA Brigades. […] Although […] there is no direct evidence that these rules and regulations were distributed and implemented throughout the NLA units and structures, the NLA has been described in a NATO document prepared in 2001 and accepted as reliable as "a well armed, well disciplined and a highly motivated organisation" with "a highly developed basic level of organisation and discipline" which allows the group to function effectively at the tactical level. This suggests that while the full content of the purported "Rules" and "Regulations" of the NLA does not credibly reflect the degree of organisation of the NLA, there was nonetheless a basic system of discipline within the NLA that allowed it to function with some effectiveness.
3. […]
4. In evidence are some organisational documents produced by the Brigades, or at the level of a battalion or a company, indicating that weapons and clothing were issued to and received by members of a squad. The Chamber accepts these documents as evidence of some lower-level organisation but not as proof of NLA-wide regulation per se.
5. Indicative of the level of organisation of an armed group is its ability to carry out military operations, including troop movements and logistics. As discussed earlier, the Chamber is satisfied that there was a marked increase in hostilities from May 2001, for the most part concentrated in the north-western part of the country. Most of these hostile incidents consisted of small-scale attacks on police patrols or police stations. Like other ethnic Albanian armed groups in the formative stages of an insurgency such as the KLA in Kosovo in 1998, the tactics of the NLA consisted in large part of hit and run manoeuvres as demonstrated in the number of ambushes carried out in 2001. More serious or prolonged incidents also occurred, such as the 10 day NLA "occupation" of Aračinovo in June, and heavy clashes in Tetovo and Raduša in August.

[…]

1. The NLA lacked large scale transportation means, and largely relied on tractors or transported weapons and supplies by foot or with the use of donkeys and mules over the mountainous terrain.
2. Evidence suggests that new recruits were to have an inauguration ceremony and be given a military

identification card. […]

3. NLA recruits underwent short military training. […]
4. Further, there is some evidence that NLA members were required to wear uniforms during operations, although not all NLA members had a uniform. Some wore black clothing or other civilian clothes. There is also evidence that some NLA members would wear as a minimum the NLA Brigade insignia, but this could be impractical especially if civilian clothes were worn.
5. [W]hile initially, in January and February 2001, the NLA mainly composed individually formed and organised smaller local groups, struggling to secure appropriate weapons and armament and operating substantially on local initiative, there was progressively a development and maturing of the NLA. It grew significantly in membership, both by local recruitment and as volunteers came from abroad. The supply and distribution of weapons and armament became progressively more planned and coordinated and the quantity and variety of weaponry more extensive. Gradually and progressively, uniforms and other equipment were becoming available. A limited system of basic training was implemented.
6. […] In the Chamber's finding the NLA was making significant progress toward the full and effective establishment and implementation of a command structure and the organisation of its localised volunteer groups into Brigades and other more subordinate units. This substantial undertaking had not, however, been fully achieved by August 2001.

[…]

1. It is not the case that the NLA at any time was a modern, well-organised and supplied, trained and disciplined, efficient fighting force. What is established by an extensive body of evidence from FYROM governmental, army and police sources was that the NLA managed to compel the government to commit the full weight of its substantial army including reserves, and the large police force including reserves, to the fight against the NLA. The NLA was seen by the Macedonian government as presenting a most grave threat to the very survival of the country. As contemporary assessments indicate, the country was on the verge of a civil war. […] The NLA was sufficiently organised to enter into cease fire agreements using international bodies as intermediaries, to negotiate and sign a political agreement setting out its common goals with ethnic Albanian political groups in FYROM, and to enter into and abide by an agreement with NATO to gradually disarm and disband.
2. The Chamber is persuaded that the effect produced by the NLA by August 2001, and the level of military success it had achieved against the much larger and better equipped Macedonian army and police force, together with its ability to speak with one voice, and to recruit and arm its members, are sufficient in the particular circumstances being considered, to demonstrate that the NLA had developed a level of organisation and coordination quite markedly different and more purposed from that which existed in the early months of 2001. This had enabled it to conduct military activities and to achieve a measure of military success over more than three months at a level which could not have been expected at the beginning of 2001. It is also of some relevance that it had come to be recognised and applied by the legal system of FYROM that a state of armed conflict existed at the times relevant to this Indictment. In respect of those times, and earlier, there were judicial investigations, charges, and convictions in respect of offences that depended on the existence of an armed conflict.
3. In the Chamber's finding therefore the evidence demonstrates that the NLA possessed by August 2001 sufficient of the characteristics of an organised armed group or force to satisfy the requirements in this respect of the jurisprudence of the Tribunal set out earlier in this Judgement.

### 3. Conclusion

1. Having regard to the law applicable and the analysis of the evidence made above, the Chamber is persuaded that in August 2001, at the times material to the Indictment, there was a state of internal armed conflict in FYROM involving FYROM security forces, both army and police, and the NLA.

[…]

**Footnotes**

- [21] [para. 233: On 13 August, the Ohrid Framework Agreement was signed by the main ethnic Macedonian and ethnic Albanian parliamentary parties, as well as the U.S. and the European Union as guarantors. The NLA was not a party to the Agreement. This Agreement established a "general, unconditional and open-ended cease fire" based on the principle of finding "peaceful political solutions".]

# Discussion

## I. Material Field

1. *(Para. 175)* What is the twofold test used by the Tribunal to determine the existence of an armed conflict? Are those criteria cumulative? Are those criteria also applicable to international armed conflicts? (GC I-IV, Arts 2 and 3)

## II. Intensity

1. Does the required level of intensity vary between non-international armed conflicts to which common Art. 3 applies and those to which Protocol II applies? How do you assess the level of intensity for both of them? Which is the decisive criterion for the customary IHL of non-international armed conflicts, as identified by the ICRC Study on Customary International Humanitarian Law? [**See** ICRC, Customary International Humanitarian Law]
2. *(Para. 178)* Does the way in which armed force is used and how persons are detained depend on whether an armed conflict exists or not? Are there indicators of whether an armed conflict exists? Or rather, does not the existence or not of an armed conflict indicate which methods may be used?
3. *(Paras 184-190)*
    a. Are terrorist activities necessarily excluded from the scope of IHL? If not, when does IHL apply to acts of terrorism? When determining whether IHL applies to a given act, should this act be considered on its own or within the broader framework in which it occurs?
    b. May a terrorist act be taken into account when assessing the intensity of violence? May the repeated occurrence of acts of terrorism be sufficient to conclude that there is an armed conflict? Conversely, may the existence of an armed conflict render IHL applicable to any terrorist act perpetrated on the territory where that conflict is taking place?
    c. Is the protracted character of violence in the sense of temporal duration decisive for the qualification of a situation as a (non-international) armed conflict? Is it an indicator? Must IHL be

respected from the very beginning of an armed conflict or only from the time when it turns out to be protracted? Is it foreseeable at the outset of a conflict how long the conflict will last?

4. *(Paras 244-249)* What are the Tribunal's main arguments for concluding that the necessary level of intensity was reached in FYROM? Is it sufficient that violence carries on, or even escalates, over a long period of time for the situation to be deemed to have reached the level of an armed conflict? Is it sufficient that the combat methods used, and the legal terms employed by the parties, are related to warfare rather than law enforcement?

## III. Organization

1. a. *(Paras 195-196 and 199-203)* What is required of an armed group for it to be considered as sufficiently organized for the purpose of common Art. 3? Is it sufficient for it to be hierarchically structured? Does it need to reach the same level of organization as that of the State? Would it be realistic to require such a level of organization from an armed group?
   b. *(Para. 196)* What do you think of the Limaj Defence's argument that an armed group must possess a method of sanctioning breaches of common Art. 3 or fulfil the conditions of Additional Protocol II in order to qualify as a party to a non-international armed conflict?
   c. *(Paras 199-203)* What are the categories identified by the Tribunal in order to attest to the degree of organization of an armed group? Are they all relevant? Is any of them, if taken individually, sufficient to indicate the level of organization?
2. *(Para. 197)* What is the difference, if any, between the degree of organization required for common Art. 3 to apply and that for Protocol II to apply? What might the reasoning behind this difference be? Is there a difference between "protracted violence" and "sustained and concerted military operations"?
3. *(Para. 205)* Does the fact that an armed group systematically commits violations of IHL necessarily indicate a lack of organization and/or control over its members? When assessing the level of organization of an armed group and its ability to respect IHL, what should be taken into account: theoretical ability to comply with IHL rules, or actual compliance? If the criterion were actual compliance with IHL rules, could IHL ever be violated?
4. *(Paras 267-291)*
   a. Does the NLA seem to qualify for any of the five categories listed by the Tribunal in paragraphs 199-203? On which factors does the Tribunal base its conclusion that the NLA was sufficiently organized?
   b. Does the Tribunal assess the possible applicability of Protocol II? According to you, could Protocol II apply to the situation in FYROM? From the information given by the Tribunal, do you think that the NLA could qualify as a party to a Protocol II armed conflict? Which elements required by P II, Art. 1, could be problematic here?

## IV. Conclusion

1. *(Paras 1, 239-291)*
   a. Do you think it was obvious, at the beginning of 2001, that violence would reach the level of an armed conflict? Was it clear that the NLA was sufficiently organized for common Art. 3 to apply? May we conclude that IHL became applicable as early as January 2001, although these two elements could not be foreseen at that time by the parties to the conflict? Or do you think that IHL only started to apply in August 2001?

b. In such conditions, is it realistic to expect the parties to the conflict to apply IHL as soon as violence breaks out? What are the difficulties for the parties' forces on the ground if they do not know the legal qualification of the situation? Would it be fair to conclude that IHL started to apply in January 2001, only because it has now become clear that the situation did amount to an armed conflict?