Categorization of Conflicts and the Minimum Threshold of Armed Violence in International Humanitarian Law

Selahattin Esmer

23 May 2016

Designation of the qualification of the protracted conflict in Turkey or of its place in humanitarian law is directly related to the clarification of the level of violence defined as the "minimum threshold of armed violence" or "minimum threshold of armed conflict." This matter and the threshold of armed conflict require a more comprehensive approach within the scope of non-international armed conflict or internal armed conflict, also known as civil war, based particularly on the ongoing conflict escalating in Kurdistan. This study firstly investigates the latest developments in international humanitarian law as well as the relationship between this legal field and international human rights law, then explains categories of armed conflict along with internal armed conflict or civil war that will substantially facilitate our identification and signification of the armed conflict between the PKK and security forces ongoing for more than 30 years in Turkey.

When we witness acts of cruelty, barbarity, atrocity and lawlessness in armed conflicts, we rightfully ask: "Do wars have laws too?" Turkey's stand towards war or armed conflicts reminds us of a statement by an author: "When we talk about war, it means that we are not talking about law." This indeed corresponds exactly to the mentality in force in Turkey. If there is a war, then, everything and all kinds of unlawfulness and rights violations can be seen permissible here like massacres, murders; indiscriminate killing of civilians, the elderly, children; forced migration, summary executions, enforced disappearances, torturing dead bodies, dragging the dead on the streets, naked display of the dead bodies of women guerillas, etc. There is no need to go further or back to see this. Solely looking into Silopi, Cizre and Sur would suffice. Nevertheless, we do know that wars have laws as well. There have been laws of war since ancient ages developing in parallel with wars. Not everything is "permissible" in wars. In fact, it will not be wrong to argue that the history of law of war is as old as the history of wars.

International Humanitarian Law

Humanity has always been longing for a world without wars, struggling to achieve this end but such struggle is still ongoing. Yet, today we are far from fulfilling such longing. Wars are ongoing with all their destructive consequences on individuals, societies, and nature. Such state of affairs brings forward the need to protect victims of war. Facing the reality of not being able to prevent wars and armed conflicts, efforts to protect non-conflict persons, civilians, the wounded, the sick and the detainees, nature, environment, historical and cultural property along with conflicting parties brought about humanitarian law. Humanitarian law is also defined as a branch of international law that aims to limit the negative effects of armed conflicts and sets forth achieving a "minimum humanitarian standard" in cases of war. It would also be useful to remind all that the concept was introduced after the 1949 Geneva Conventions. This concept had been referred to as law of war previously. As Sylvain Vité pointed out, the narrow and formalistic concept of war was replaced by a broader and more objective concept of armed conflict. According to the author, those who drafted the convention wanted to show that the applicability of international humanitarian law was henceforth to be unrelated to the will of states by introducing the

concept of armed conflict, instead of the concept of war, to this branch of law for the first time. The recognition of the state of war or the materialization of humanitarian law would now depend on verifiable facts in accordance with objective criteria. This would, in turn, end the contradiction that enabled a state, which in fact was a subject of international law, to decide on its own what the incidents happening in a country signified in international law or how they needed to be defined. This branch of law, in conformity with the significance attached to the individual, is commonly called as "insancıl hukuk" (humanitarian law) in Turkish. There are also those who prefer the term "insani hukuk" (humanist law). The word "insancıl" is used for "humanist" in Turkish. In this regard, the translation of "humanitarian law" into Turkish as "insani hukuk" seems more appropriate. However the common use of the concept "insancıl hukuk" in Turkish has become an established one. Humanitarian law, humanist law, law of war, and law of armed conflict are concepts that are now being interchangeably used.

International Human Rights Law and Humanitarian Law

At this point, it would be useful to review the relationship between international humanitarian law and international human rights law. These two branches of international law with a common aim to protect individuals against rights violations have both overlapping and different characteristics. Françoise Hampson, who had brought rights violations in Kurdistan in the 1990s before the European Court of Human Rights (ECtHR) with Kevin Boyle and successfully defended cases, described the relationship between these two branches of law as the "two sides of the same coin." When it comes to the differences between the two, humanitarian law is only applicable in states of war, in other words, states of armed conflict while human rights law is applicable at all times, including both times of war and times of peace. The International Court of Justice designates the relationship between these two branches of law in its 2004 "Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" as such:

> [T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

The co-application of both branches of law at times of war or armed conflict, brings forth the question of which one of these two branches of law would be given priority or precedence over the other. In line with the rule *lex specialis derogat legi generali*, which should be abided by in cases of conflict of norms, humanitarian law rules are primarily applied in states of armed conflict because humanitarian law qualifies as *lex specialis* and has a special field of application in comparison to human rights law that incorporate more general principles. Another distinction between these two branches of law is the fact that international human rights documents allow for the restriction of or derogation from rights other than such core rights as the right to life and the prohibition of torture under states of emergency depending on certain conditions. It is not possible to restrict humanitarian law rules under any circumstances.

The Geneva Conventions and the 1977 Additional Protocols I and II to these conventions form the fundamental resources of humanitarian law. To these, we should also add Article 8 (2)(c, f) of the Rome Statute of the International Criminal Court.

International humanitarian law documents that regulate armed conflict have not been able to clearly designate the scope of the categories although they classify conflicts in different categories and prescribe different rules for each. More importantly, there is no direct definition of an armed conflict whatsoever in these documents.

Definition of Armed Conflict

The latest developments starting with the International Criminal Tribunal for the former Yugoslavia point to a new era in humanitarian law. In this era the concept and categories of armed conflict were considerably clarified through the judgments of international judicial institutions on one hand, objective criteria were set forth facilitating distinctions between other types of conflict and violence that did not fall under armed conflict and international humanitarian law on the other hand. Judgments delivered by the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda as well as the statute and judgments by the International Criminal Court constituted the building blocks of this new era and it will not be wrong to argue that it was initiated through the International Criminal Tribunal for the former Yugoslavia's judgment in the case of *Prosecutor v. Duško Tadić*. The tribunal's Tadić judgment is of historical significance in terms of the clarification of a fundamental issue, that is, the concept of "armed conflict." The significance of the Tadić judgment derives from the fact that it filled in a gap, or to put it more accurately, it eliminated uncertainty about the issue by setting forth a definition that would be recognized as a basic reference by international judicial authorities and documents on the subject. The Tadić judgment, which was a pilot judgment, was one that allowed for the development of case laws from one case to another through its implementation in different cases of conflict. The definition of armed conflict adopted by the court in its Tadić judgment is as follows: "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."

The point that should not go unnoticed in the definition is that conflicts are divided into two categories and different conditions are prescribed for each. While "resorting to armed force" suffices on its own for armed conflict between states, only resorting to armed force is not considered to be sufficient in order for armed conflict between governmental authorities and organized armed groups or between such groups to be defined within the scope of humanitarian law; the conflict should at the same time bear the qualification of "protracted armed violence." We see that the keyword for such conflicts is the concept of "protracted." "Protracted" is mostly translated into Turkish as long-term or long-standing but it also corresponds to a state of being "chronic."

Minimum Threshold of Armed Conflict

Rules of international humanitarian law apply when there is a war, in other words, when there is armed conflict. When one takes into account the fact that humanitarian law goes into force as soon as conflict starts and ends when conflict stops, the major problem that needs to be resolved is from which stage or which level on armed violence can be qualified as armed conflict. "Minimum threshold of armed conflict" criterion is called upon here. Minimum threshold of armed conflict signifies the threshold that differentiates between armed conflict and other forms of conflict and violence that do not qualify as armed conflict under international humanitarian law. In other words, forms of violence that are below this threshold do not fall under the scope of humanitarian law, while cases of armed violence that cross the threshold fall under humanitarian/humane law or law of conflict/war that are interchangeably used. Another related issue pertains to under which category the conflict falls or what kind of a conflict is faced.

The following part will elaborate on the distinction between armed conflict and other acts of violence in each category of conflict handling these two problems together.

The Geneva Conventions and its Additional Protocols I and II draw a distinction in armed conflict dividing them into two categories as "international armed conflict" and "non-international armed conflict." Today, different categories of conflict that do not conform to such binary typology and are defined with concepts like internationalized, mixed etc. have become matters for court rulings and studies.

Minimum Threshold of Armed Violence in International Armed Conflicts

International armed conflicts are those whenever there is resort to hostile armed force between at least two states. The Geneva Conventions (except for Common Article 3) and Additional Protocol I apply to international armed conflicts. Common Article 2 of the Geneva Conventions that regulate international armed conflict does not set forth a minimum threshold for the level and severity of conflict. Yet, the International Criminal Tribunal for the former Yugoslavia defined armed conflict in its judgment in the case of Tadić as such: "[A]n armed conflict exists whenever there is a resort to armed force between States."

Resorting to force in such conflicts is regarded to be sufficient. No other criterion other than this is prescribed. Issues like the reasons of conflict, its intensity, its duration, the number of victims, mortality rate, official declaration of war are not decisive for the existence or recognition of such a conflict. Incidents in the field, factual situation, whether armed force is resorted to due to a discord between states are taken into account. As can be seen, the minimum threshold of armed conflict is quite low.

The issue that matters here is that resorting to force or arms should not be by mistake, should not be an accidental act (like entering a foreign country's lands by mistake). The attack should be intentionally carried out to harm the enemy.

Under Article 1 § 4 of Additional Protocol I to the Geneva Conventions, there are three types of conflict within the scope of international armed conflict. According to the Protocol, international armed conflict arises when "[P]eoples are fighting against colonial domination and alien occupation and against racist régimes 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." Before Additional Protocol I, rules for non-international armed conflict had been implemented for conflicts waged by peoples for self-determination. Such state of affairs still remains valid for states that have not ratified Additional Protocol I.

Non-International Armed Conflict

There are two types of non-international armed conflict as regulated by Additional Protocol II and Common Article 3 of the Conventions.

Minimum Threshold of Armed Conflict in Non-International Armed Conflicts under Additional Protocol II

Article 1 § 1 of the Protocol provides a framework for which non-international conflicts it would apply. Accordingly, Protocol II prescribes that armed conflicts are those "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."

Article 1 § 2 of the Protocol, further, sets the minimum level for the field of implementation by listing conflicts that do not fall under the scope of the protocol. Accordingly, the 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."

As has been underlined in the 1987 commentary on the Protocol by the International Red Cross Committee (ICRC), certain objective criteria were ascertained in order to specify the material field of application of the protocol. The three criteria that were adopted on the side of the insurgents are: the existence of a responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the Protocol. Here it will not be wrong to argue that control over part of the territory constitutes the basic criterion. The level of territorial control has been a matter of different interpretations in the doctrine. There is no clarity about which part of the territory or the extent to which it needs to be controlled. When one adopts a larger interpretation, the field of application for non-international conflict within the scope of this document comes close to the concept in Common Article 3. Even temporary control in a limited space, then, would suffice for the implementation of Protocol II. When one adopts a narrowed-down interpretation, on the other hand, the non-state party is expected to have a state-like control in cases that fall under the scope of the document; and the conflict herein naturally bears similar qualifications to those of international armed conflict. Strong criticism has also been raised about the fact that the level of territorial control prescribed to be sustained by armed groups in part of the territory of a state was too limiting and such effective control was impossible to attain.

The ICRC seems to have adopted a middle-of-the-road stand on this matter. The ICRC emphasizes that the responsibility for the effective application of the rules of Protocol II nonetheless requires "some degree of stability in the control of even a modest area of land" while pointing to the fact that territorial control can sometimes be relative as in cases where rural areas escape the authority of the government while urban centers remain in government hands.

To sum up, the minimum threshold of armed violence in non-international armed conflicts subjected to Protocol II is very high. In addition to the exclusion of situations of internal disturbances and tensions - which constitute the minimum threshold of violence, in other words, that correspond to the minimum limit in Common Article 3- from the field of application, an insurgent armed group needs to have domination that would enable it to carry out sustained and concerted military operations in a certain area of the territory while having the ability to implement the protocol. It should also be noted that conflicts among dissident or insurgent armed groups to which the armed forces of the state are not a party do not fall under the scope of Protocol II.

Minimum Threshold in Non-International Armed Conflicts under Common Article 3

In order for us to specify the place of conflicts in Turkey in humanitarian law, conflicts in this category need to be handled in a more comprehensive manner.

Conflicts among armed groups as well as conflicts between an armed group and governmental forces are now evaluated within the scope of Common Article 3 of the Geneva Conventions, which came to be known as a "convention within the convention" or "mini-convention." There is, in fact, no definition of the parties involved in conflict in the said article. Such situations had not been characterized as armed conflict because governmental forces had not been a party to them until the judgement of the International

Criminal Tribunal for the former Yugoslavia in the case of Tadić. Specifically, how important the Tadić judgment for humanitarian law was in this respect too has been revealed recently when one takes into account some cases where a "failed state" has been at stake. Such significant expansion in humanitarian law has also been reflected in the Rome Statute of the International Criminal Court. The concept of internal armed conflict prescribed in Article 8 (2)(f) of the Statute also includes conflicts that take place between organized armed groups in which governmental forces are not involved and which had not been covered by humanitarian law before.

The text of Common Article 3 does not offer a definition or clarity about a minimum threshold. There is, however, no controversy over the fact that the definition provided by Additional Protocol II which excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" from non-international armed conflicts can also be applied to Common Article 3. As is seen, armed groups are required to have a certain degree of organization in conflicts under Common Article 3 as well, similarly to Additional Protocol II. However, here armed groups are not necessarily required to establish control over a certain part of the country. Thus, the minimum threshold of armed violence in conflicts within the context of Common Article 3 is lower than that of Additional Protocol II. This, in turn, means that all conflicts within the scope of Additional Protocol II at the same time fall under the application field of Common Article 3 as well. Yet, each situation regarded as armed conflict under Common Article 3 may not be included in the scope of Additional Protocol II.

It will not be wrong to argue that the International Criminal Tribunal for the former Yugoslavia contributed the most to the clarification of the scope of non-international armed conflict, also referred to as internal conflict or civil war, and of minimum threshold of conflict within this context by eliminating the uncertainty and ambiguity in their definitions to a large extent. It will be useful to briefly mention conflicts that do not fall under either the two mentioned categories and do not conform to the binary typology before talking about important developments in humanitarian law that began with the judgements of the court. The binary distinction between international and non-international conflicts is far from explaining the fact of armed conflict in its entirety. Indeed, a group of armed conflicts that emerge in complicated aspects and vary are studied under the title "Internationalized Armed Conflict" today. There is consensus as to the fact that the intervention of another state, which is a party to the Geneva Conventions, into an internal conflict taking place in the territory of a specific state makes this conflict internationalized. This may usually take the form of a foreign power's sending forces to support a movement fighting against a local government. In such a case, the conflict becomes internationalized by turning into armed conflict between two states. The intervention may also be carried out only by providing remote support and direction, in other words, by proxy. For instance, in conflicts taking place in Syria, it is known that various armed groups wage war by proxy in the name of various states. While the issue of after which stage war by proxy would be characterized as international war is dependent on the level of control a foreign government has over an armed group fighting against a local government, it has also been evaluated at length in the judgments of international judicial authorities.

In some situations of conflict referred to as mixed conflicts, some factors specific to each international and non-international armed conflict categories coexist. It has been argued that in such conflicts rules that apply would vary from one incident to another depending on the conflicting parties.

Nevertheless, the application of different rules of law of conflict to each by dividing armed conflicts into different categories has been receiving intensive criticism. According to some commentators, the distinction between international and non-international armed conflict is "altogether artificial," "arbitrary," "undesirable," "difficult to justify" and one that frustrates the humanitarian purposes of law to a great extent. For instance, Duxbury argues that the boundary drawn between international and non-international armed conflicts is one that cannot be defended and is a futile effort emphasizing that it is

hard to believe that such distinction is drawn for humanitarian purposes of applying rules that aim to protect the victims of armed conflict or that regulate the means and methods of warfare.

Another point that needs to be underlined within this context is that there is only a very limited number of regulations on non-international armed conflicts although international armed conflicts have been subject to detailed regulations. The 1949 Geneva Conventions incorporate 394 articles on international armed conflict. The total number of articles that regulate these conflicts is 496 when one takes the 1977 Additional Protocol I to the Conventions applied in international armed conflict. Non-international armed conflict, in return, is regulated by Common Article 3 of the Geneva Conventions that prescribes the minimum standards along with the 1977 Additional Protocol II with 28 articles that apply to some conflicts in this category. The fact, however, is that armed conflicts in the world are mostly non-international and these conflicts, which are usually ethnically characterized, take place in a much more violent and cruel manner due to the fact that civilian peoples are the primary targets.

Some commentators, on the other hand, argue that the distinction in question has less significance today. According to this view, the inclusion of almost all war crimes committed in both types of conflict in ICRC's Customary International Humanitarian Law Study and in the Rome Statute of the International Criminal court proves to be one of the important steps taken in this direction. Another development drawn attention to within this context is the contribution of international courts to the diminishing of the distinction between these two types of conflicts by means of their case law.

It would also be useful to review the obstructive attitudes of the states before the implementation of humanitarian law rules in cases of civil war before tackling the Tadić judgment. States tend to regard such conflicts as internal problems that are entirely impenetrable by external interventions. They have a hard time in admitting the fact that the conflict they are a party to crosses the minimum threshold of conflict within the scope of Common Article 3. As has been underlined by Françoise Hampson, states might be concerned that such an admission would invite international attention, it might appear to suggest that the state was losing control of the situation, and also it would garner some type of legitimacy on the armed group. Indeed, states which argue that they were conducting operations in order to establish public order or to combat terrorism while overlooking the severity of the situation fiercely resist the implementation of humanitarian law and usually opt for denying the state of armed conflict based on their discretionary power on various grounds as much as the general concepts in legal categories allow.

Before and After Tadić

Such state of affairs seems to have changed now in the new era that began with the judgments of the International Criminal Tribunal for the former Yugoslavia. International criminal courts spearhead new developments with their case laws in this era. It will not be an overstatement to argue that this new era began with the tribunal's Duško Tadić judgment. As was underlined by Sylvain Vité, the International Criminal Tribunal for the former Yugoslavia conceptualized the notion of internal conflict with a new content beginning with the Tadić trial and brought about very significant factors concerning conflicts within the scope of Common Article 3 that were not clearly defined in related documents. The tribunal did not only define the two basic factors of the concept (intensity of the conflict and the parties' level of organization) but also set forth many indicative criteria that verified whether each had taken place on the basis of individual incidents.

The tribunal's Appeals Chamber held that the minimum threshold was met in each case in which the situation was defined as protracted armed violence in internal armed conflicts in the aforementioned Tadić judgment. Its Trial Chamber, in turn, clarified the concept of protracted armed violence between governmental forces and organized armed groups set forth by the Trial Chamber. It would, at this point,

be useful to reiterate that protracted armed violence, in other words, internal disturbances and tensions that do not reach the minimum threshold of armed violence do not fall under the scope of humanitarian law.

The tribunal examined whether the conditions of armed conflict were met in terms of the heard cases by using the criteria of intensity of the conflict and the parties' organizational levels, which are the basic factors of the concept of protracted armed conflict, on one hand and it materialized and improved them by putting flesh on the bones of the criteria in question on a case-by-case basis on the other hand. Limaj (*Prosecutor v. Fatmir Limaj, Bala Haradin, Muslu, Izak*), Haradinaj (*Prosecutor v. Haradinaj*) and Boškoski (*Prosecutor v. Boškoski, ljube, Tarculuski, Johan*) judgments are the important rulings that need to be mentioned within this context. In the Haradinaj judgment, for instance, the tribunal emphasized that the armed group's level of organization depended on many indicative factors but none of these on their own could serve as a basis for the determination of "whether the organization criterion was met or not."

Tadić criteria has also been adopted by other international organs, including the International Criminal Tribunal for Rwanda. The tribunal's Akayesu (*Prosecutor v. Akayesu, Jean-Paul*) and Rutaganda (*Prosecutor v. Rutaganda, Georges Andersen Nderubumwe*) judgments are those that should be mentioned within this context. The tribunal held in its Rutaganda judgment:

> It can thence be seen that the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict," meeting the criteria of Common Article 3, is to be decided upon a case-by-case basis. Hence, in dealing with this issue, the *Akayesu* Judgement suggested an "evaluation test," whereby it is necessary to evaluate the intensity and the organization of the parties to the conflict to make a finding on the existence of an armed conflict" [para. 93].

The International Criminal Tribunal for the former Yugoslavia's Trial Chambers' Boškoski judgment incorporates a compact and almost definitive inventory of the objective indicative factors for the criteria of "intensity of the conflict" and "organization of the armed group" developed by the tribunal since its Tadić judgment. The judgment, which sheds light on the ways in which these two components of the concept of internal armed conflict, also clarifies the latest point pertaining to the minimum threshold of armed conflict within the context of Common Article 3. How the tribunal dealt with the "intensity" and "organization of the armed group" in the judgment is quite important.

Intensity

According to the Tribunal, the factors that need to be taken into account in order to assess the intensity level of a conflict include:

> [T]he seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization 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. […] The number of civilians forced to flee from combat zones; the type of weapons used, 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; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; 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 organizations to broker and enforce cease fire agreements [para. 177].

The Tribunal also underlined the fact that at a more systemic level, an indicative factor of internal armed conflict was the way that organs of the state, such as the police and military, used force against armed groups.

The Tribunal provided very important arguments closely related to the protracted armed conflict in Turkey while discussing some claims put forth by the Boškoski defense. One of the claims of the defense was that the conflict in question had never reached the required level of intensity, in part by comparing the situation to that of the "troubles" in Northern Ireland, which it was argued, had never been recognized as an armed conflict in state practice, and the confrontation between the Turkish army and the Kurdistan's Workers Party (PKK), "a conflict of much greater scale and intensity," which a Dutch court found not to have amounted to armed conflict. But the Tribunal called attention to the fact that the Supreme Court of the Netherlands had not found that the conflict between Turkey and the PKK did not amount to an internal armed conflict but rather held, in the context of its consideration of the requirement of double criminality under extradition law, that it had been unnecessary for it to pronounce itself on the question. The Tribunal also stated that some national courts had characterized other situations as conflicts not of an international character to which Common Article 3 of the Geneva Conventions applied. In this respect, the Tribunal noted the factors that had led these courts to make such a characterization pointing to the fact that the Constitutional Court of the Russian Federation had recognized in a 1995 judgment that Additional Protocol II had applied to the armed conflict in the Chechen Republic. The Supreme Court of the United States' Hamdan (*Hamdan v. Rumsfeld*) judgment that qualified the state of armed conflict between the United States and the non-state group known as Al Qaeda as non-international armed conflict within the scope of Common Article 3 was one of these. The Tribunal also referred to the conflict between the Peruvian government and the Shining Path, the situation in Chile in 1973 and the conflicts in the Gaza Strip since September 2000 to which Israel was a party within this context.

The defense argued that acts of a terrorist nature could not be taken into account in the determination of the existence of an armed conflict by also referring to international law and case laws as well. The Tribunal reminding that the Trial Chamber in its Tadić judgment had held that isolated acts of violence, such as certain terrorist activities committed in peace time, would not be covered by Common Article 3 called attention to the fact that the essential point in the Tadić judgment was that armed conflict of non-international character existed when there was "protracted" violence according to the Appeals Chamber's Tadić test. It was immaterial whether the acts of violence perpetrated might or might not be characterized as terrorist in nature. The Tribunal referred to the Appeals Chamber's observation in the case of Kordić (*Prosecutor v. Dario* Kordić*, Mario* Čerkez) that the requirement of protracted fighting was significant in excluding mere cases of civil unrest or single acts of terrorism.

The judgment also assessed the fact that the UN Security Council condemned acts by some rebel groups characterizing them as terrorist acts in relation to this matter. The Tribunal recognized that the UN Security Council, in its practice, condemned "terrorist acts" by rebel groups even in situations arguably amounting to internal armed conflict underlining that it was also common practice for states and organizations to characterize the acts of non-state groups as "terrorist" notwithstanding the possibility that the acts might have been committed in the context of an armed conflict. Moreover, according to the Tribunal, resolutions by the UN Security Council, and by states or their officials, were made on a political, not legal, basis, and could not be directly interpreted as evidence of, or a legal interpretation of, a factual state of affairs, despite the fact that such resolutions might have legal consequences.

Another point discussed by the Tribunal in its Limaj judgment was that whether the reasons that prompted non-state groups to conflict needed to be taken into account or not. According to a view, non-international armed conflict only covers groups intending to achieve a political goal. The defense in the Limaj case objected to the argument that the struggle was an armed conflict by claiming that operations carried out by Serbian forces intended to carry out ethnic cleansing in Kosovo not to defeat hostile forces. According to the Tribunal, the existence of an armed conflict rests on solely two criteria: the intensity of the conflict and the organization of the parties to the conflict. Therefore, it held that armed forces' resorting to acts of violence and also attempting to achieve certain further goals were irrelevant. Any contrary situation would bring about problems hard to resolve in practice. Armed groups never have identical goals and they cannot always be clearly defined; most of them pursue a political goal at the same time while committing criminal acts like usurpation and drug trafficking.

Organization of an Armed Group

It is clear that the essential addressee of the "level of organization of the parties," which is the second factor in the Tadić judgment, is armed organization that is a party to the conflict. According to the Tribunal, although an armed group is required to have some degree of organization, the warring parties do not necessarily need to be as organized as the armed forces of a state. Further, Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organization required within the context of Common Article 3 is lower than the degree of organization required in conflicts subject to Additional Protocol II.

In its Boškoski judgment, the Tribunal emphasized that its trial chambers took into account a number of factors when assessing the level of organization of an armed group. The factors in question were divided into five broad groups in the judgment.

In the first group were those factors signaling the presence of a command structure, such as the establishment of a general staff or high command, which appointed and gave directions to commanders, disseminated internal regulations, organized the weapons supply, authorized military action, assigned tasks to individuals in the organization, and issued political statements and communiqués, and which was informed by the operational units of all developments within the unit's area of responsibility.

Also included in this group were factors such as the existence of internal regulations setting out the organization and structure of the armed group, 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.

Secondly, factors indicating that the group could carry out operations in an organized 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 was territorial division into zones of responsibility in which the respective commanders were 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.

In the third group were 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 organized supply of military

weapons; the supply and use of uniforms; and the existence of informed by the operational units of all developments within the unit's area of responsibility.

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.

The final group included 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 organizations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords.

It should be kept in mind that these criteria compiled from the judgments of trial chambers are assessment criteria that make it possible to ascertain the intensity of violence and the level of organization of an armed group in each case. They are not conditions that need to be present simultaneously in each conflict.

There is also a very important judgment as to how international human rights law authorities defined the conflict between Turkish armed forces and the PKK. Tahir Elçi, chair of Diyarbakır Bar Association, brought the case of *Benzer and Others v. Turkey* to the ECtHR before the was murdered. The ECtHR in its judgment of 12 November 2013 in the case of *Benzer and Others v. Turkey*, which pertained to the killing of a total of 38 individuals in the bombing of Kuşkonar and Koçağılı villages in Şırnak on 16 March 1994 by fighter aircraft, held that in any event an indiscriminate aerial bombardment of civilians and their villages could not be acceptable in a democratic society and could not be reconcilable with any of the grounds regulating the use of force or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts referring to its previous *Isayeva v. Russia* judgment. The Court, thus, paved the way for the implementation of humanitarian law by setting forth that the level of violence in this case reached the level of non-international armed conflict that required the implementation of Common Article 3.

Conclusion

The latest developments in humanitarian law, particularly the criteria developed by the case law of international criminal tribunals, reveal that the protracted conflict between the PKK and the security forces should be defined as "internal armed conflict," in other words, "civil war" within the scope of Common Article 3 of the Geneva Conventions. When we compare the incidents in the conflict zone with the indicative factors about the intensity of the conflict and the level of organization of the armed group, which are the two fundamental components of a state of protracted armed conflict, we see that the situation in Turkey entirely corresponds to the concept of civil war. So much so that an impartial observer may get the idea that the criteria in question were established based on the armed conflict in Turkey. It seems that the factors mentioned in the Boškoski judgment, the related parts of which were cited in full, are all met.

We know that the issue of states' wills were decisive in the implementation of humanitarian law was one of the main concerns in the drafting of the Geneva Conventions and the Additional Protocol II to the Conventions. The commentary to the Additional Protocol II incorporates recommendations to address this issue. The commentary underlines that establishing rules will not be sufficient enough to protect victims of non-international armed conflict by drawing attention to the fact that the lack of clarity in the concept led to very different interpretations while preventing the implementation of the article in practice. The commentary to Additional Protocol II, further, suggests that discretionary powers permitted

for states should be cut down by drawing attention to the need for setting more objective criteria that would determine whether these rules are implemented or not. In this respect, it can be argued that a regulation is set out within the scope of which related authorities cannot deny the existence of a conflict in cases where a set of selected material conditions are present.

We can state that the most material achievement in humanitarian law recently has been the setting of the minimum threshold of non-international armed conflict within the context of Common Article 3 of the Conventions. It can indeed be asserted that the doors are now closed to the arbitrary assessments of states to a great extent in the new era that began with the judgments of the International Criminal Tribunal for the former Yugoslavia. This is quite an important development. The minimum threshold of armed violence in armed conflicts that fall under the scope of international humanitarian law and types of violence that are covered by other normative frameworks have now been defined as it is materialized by detailed objective criteria. It can, therefore, be maintained that the uncertainty and ambiguity in the definition of non-international armed conflict, also referred to as internal conflict or civil war, have been eliminated to a great extent and consequently the days for the states that regarded internal conflicts in their own countries as exclusively their own domestic affairs are indisputably over.

Paper presented by Selahattin Esmer at the "War Crimes, Crimes against Humanity in International Law and Turkey" panel organized by Political and Social Studies Center (Siyasal ve Sosyal Araştırmalar Merkezi -SAMER) on 7 February 2016 in Diyarbakır, Turkey.

References

The Geneva Conventions I-IV.

Additional Protocols I and II to the Geneva Conventions.

Judgments by International Criminal Tribunals:

ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

ICTY, *Prosecutor v. Haradinaj, Ramush; Balaj, İdriz; Brahimaj, Lahi*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008.

ICTY, *Prosecutor v. Boskoski, Ljube; Tarculovski, Johan*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008.

ICTY, *Prosecutor v. Limaj, Fatmir; Bala, Haradin; Isak, Muslu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005.

ICTR, *Prosecutor v. Rutaganda, Georges Anderson Nderubumwe*, Case No. ICTR-96-3-T, Judgment (Trial Chamber I), 6 December 1999.,

ECtHR, *Benzer and Others v. Turkey*, Application No. 23502/06, Judgment (Second Section), 12 November 2013.

Alpkaya, G., (2002). *Eski Yugoslavya İçin Uluslararası Ceza Mahkemesi*. Turhan Kitabevi: Ankara.

Bartels, R., (2009). "Timelines, Borderlines and Conflicts." *International Review of Red-Cross 91, no. 873.*

Buhl, K. Ø., (2009). "Legalization of Civil Wars: The Legal Institutionalization of Non-International Armed Conflicts." *Journal on Ethnopolitics and Minority Issues in Europe: JEMEI 1, no. 1.*

Duxbury, A., (2007). "Drawing Lines in the Sand -Characterising Conflicts for the Purposes of Teaching International Humanitarian Law." *HeinOnline –8 Melb. J. Int.I L. 263.*

Hampson, F. J., (2008). "The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body." *International Review of the Red Cross 90, no. 871: 549-572.*

Henckaerts, Jean-Marie. (2007). "Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of A Forum." *International Human Rights and International Legal Discourse, no. 95 (2007).*

Henckaerts, M., and Doswald-Beck. L. C., (2009*). International Humanitarian Law,* Volume I, Rules. Cambridge University Press.

ICRC (International Committee of the Red-Cross, (2008). How is the term "Armed Conflict" Defined in International Humanitarian Law? *Opinion Paper.*

Öndül, H., (2000). *İnsancıl Hukuka Giriş: İnsan Haklarının Kavramsal Temelleri*. İnsan Hakları Derneği Yayınları: Ankara.

Pazarcı, H., (2006). *Uluslararası Hukuk Dersleri*, 4th Book. Turhan Kitabevi: Ankara.

Taşdemir, F., (2009). *Uluslararası Nitelikte Olmayan Silahlı Çatışmalar Hukuku*. Adalet Yayınevi.

Taşdemir, F., (2012). "İnsan Hakları Hukuku ve İnsancıl Hukuk Açısından Türkiye'nin Ayrılıkçı Terör Örgütü PKK ile Mücadelesi." *Gazi Üniversitesi Hukuk Fakültesi Dergisi, C.XVI. Y.2012, Sa.1.*

Vité, S., "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations." *International Review of the Red-Cross 91, no. 873.*

Yamaner B. M., (2007). *Silahlı Çatışmalarda Sivillerin Korunması*. Arıkan: Ankara.