Chapter 12

Hostilities in Occupied Territory, Protected Persons, and Participants in Hostilities

1. The Threshold for Determining Hostilities in Occupied Territory

1.1. The Resumption of Hostilities or the Outbreak of New Hostilities

Hostilities in a juridical sense can be considered to arise from activities of members either of armed forces of an occupied country or of armed resistance groups.¹ In assessing this, the occupying power must take into consideration such elements as the intensity, duration and geographical scope of violence, any linkage to the occupied state or any foreign state. If the law enforcement measures are considered sufficient to apprehend members of armed groups and to capture their bases (including arsenals or factories of munitions) without significant risk to law enforcement officers, then the law enforcement measures of arrest and capture must be favoured over resort to lethal force.

It may be suggested that the occupying power should be able to invoke IHL rules on the conduct of warfare once the existence of international armed conflict (IAC) or non-international armed conflict (NIAC) is established.² The hostilities may be classified as resumption of IAC if the protagonists of hostilities are members of armed forces of the occupied state. They may form independent militia or volunteer corps who belong to the State parties to the conflict and meet the conditions set out in Article 4A(2) GCIII. In contrast, if an armed group is not deemed “belonging to a Party to the conflict” within the meaning


² Ibid., at 28 (a view by one expert).
of Article 4A(2) GCIII, the hostilities may be described as the start of NIAC. In this context, the determination of the existence of a NIAC depends on the applicability of common Article 3 GCs. In *Prosecutor v. Tadić*, the Appeals Chamber of the ICTY enunciated that the threshold for identifying non-international armed conflict can be established if there exists armed violence between governmental authorities and organised armed groups or between such groups within a state of certain intensity and duration between an armed group and a state, and if such armed violence meets the requisite elements of: (i) intensity; (ii) large-scale nature; and (iii) protracted duration. As is well-known, the standard set forth by common Article 3 GCs is lower than the threshold for determining NIAC under APII, which requires more detailed and stringent criteria: the existence of responsible command; the sufficient degree of control over a part of the adverse state’s territory to enable them to launch sustained and concerned military operations and to implement APII. Admittedly, the threshold for determining the applicability of common Article 3 GCs in itself is unclarified. There is a downward trend based on humanitarian grounds to lower the threshold level of this common provision. Greenwood proposes that

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3 In contrast to the standard “belonging to a Party to the conflict”, the four conditions set out in GCIII Article 4A(2) for qualifying for a prisoner of war (PoW) should not be considered relevant to determining whether international armed conflict exists. These four conditions are strictly for establishing the qualification of captured soldiers for PoW status. The fact that the captured members of the resistance movement fail to meet any of these conditions collectively and individually, and that they hence risk being treated as unprivileged belligerents does not change the legal characterisation of the armed conflict in question. Insofar as their allegiance lies in the occupied state which supports, endorses or acquiesces in their action as its own within the meaning of Article 11 of the ILC's Draft Articles on State Responsibility, then it is clear that the hostilities in question are international armed conflict. Article 11 of the Draft Articles read that “[c]onduct which is not attributable to a State…shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own”.

4 ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, para. 70. As for the threshold for an international armed conflict, in the same passage in *Tadić*, the Appeals Chamber held that an international armed conflict can be identified “whenever there is resort to armed force between states”: *ibid*.

5 Indeed, isolated, sporadic attacks against the occupying power by a resistance movement are not sufficient to trigger the application of common Article 3 GCs: CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 29.

6 APII, Article 1(1).

7 This downward trend may not be necessary, if the monitoring bodies of international human rights law continue to expand the scope of protection of the right to life to encompass armed conflict situations.