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The Parameters of Internal Armed Conflict in International Humanitarian Law

Anthony Cullen*

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I. Introduction

The concept of internal armed conflict in contemporary international humanitarian law has been, to a considerable extent, fashioned by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹ The case that sets out the standard for judging the parameters of internal armed conflict is that of *Prosecutor v. Dusko Tadic*.² The

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¹ See generally C. Byron, *Armed Conflicts: International or Non-international?*, 6 (1) JCSL 63 (2001).

² The following three decisions will be examined in some detail: *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2

universal significance of the *Tadic* case for international humanitarian law is underlined by the following statement of the ICTY Trial Chamber:

[I]t is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal, the International Tribunal being the first such tribunal to be established by the United Nations. The international military tribunals at Nürenberg and Tokyo, its predecessors, were multinational in nature, representing only part of the world community.³

This article elucidates the parameters of internal armed conflict using the conceptual framework provided by the ICTY in the *Tadic* case. In doing so, the grounds for distinguishing situations of internal armed conflict from internal disturbance are investigated alongside the conditions propounded by the Tribunal for recognizing an armed conflict's change in status from internal to international.

The article is structured in two parts. The first part examines the grounds for recognizing the existence of armed conflict. In doing so, conditions that trigger the application of international humanitarian law in situations of internal armed conflict are discussed. The second part unpacks two decisions of the Tribunal, each advocating a different means of assessing the involvement of the Federal Republic of Yugoslavia (FRY) in Bosnia and Herzegovina after May 19, 1992.⁴ Also in part two,

October 1995) [hereinafter *Tadic Jurisdiction Decision*]; Prosecutor v. Dusko Tadic, Appeals Chamber Judgment, Case No. IT-94-1 [hereinafter *Tadic Appeals Judgment*]; and Prosecutor v. Dusko Tadic, Trial Chamber Judgment, Case No. IT-94-1-AR 72 (7 May 1997) [hereinafter *Tadic Trial Judgment*].

³ *Id.* ¶ 1.

⁴ *Tadic Trial Judgment*, *supra* note 2, ¶ 1; *Tadic Appeals Judgment*,

the grounds for the classification of armed conflict as either internal or international are examined.

The overall objective of this article is to outline the parameters of internal armed conflict utilizing case law of the ICTY in order to elucidate some important distinctions that are required in determining the status of an armed conflict and thus also the applicable body of international law.

II. The Recognition of *De Facto* Armed Conflict

This section illustrates the cardinal conditions determining the applicability of international humanitarian law to situations of non-international armed conflict. It is structured in three parts. The first examines the body of law governing internal armed conflict, explicating the conditions that govern the scope of its application. The thresholds at which Common Article 3 and Additional Protocol II are applicable as well as the problems that surrounding their respective implementation are discussed. The second part analyzes the formula propounded by the ICTY Appeals Chamber, defining the concept of armed conflict. In doing so, the requirements of the concept are elucidated, illustrating the grounds for the application of Common Article 3. The formula provided by the ICTY Appeals Chamber is discussed further in the third section, its adaptation in the Rome Statute of the International Criminal Court (Rome Statute) is scrutinized.

A. The Grounds for Applying International Humanitarian Law

One of the most problematic areas of international humanitarian law, in terms of its implementation, is the law that governs the conduct of hostilities in situations of internal armed conflict. Hersch Lauterpacht stated in 1952: "if international law is at the vanishing point of law, the law of war is at the vanishing point of international law."⁵ More recently, Rein Müllerson

supra note 2, ¶ 5.

⁵ H. Lauterpacht, *The Problem of the Revision of the Law of War*, 39

added to Lauterpacht's metaphor, asserting "international humanitarian law applicable in internal armed conflicts is at the vanishing point of international humanitarian law."⁶

The main body of codified law governing situations of non-international armed conflict consists of Article 3 common to the four Geneva Conventions of 1949 (Common Article 3),⁷ Additional Protocol II of 1977,⁸ and Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.⁹ Other instruments that contain provisions pertaining to non-international armed conflicts include the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices of 1996,¹⁰ and the Rome

BYBIL 139 (1952).

⁶ R. Müllerson, *International Humanitarian Law in Internal Conflicts* 2 JACL 125 (1997).

⁷ Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 3, 6 U.S.T. 3114, 3116, 3118, 75 UNTS 31, 32, 34; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, art. 3, 6 U.S.T. 3217, 3220, 3222, 75 U.N.T.S. 85, 86, 88; Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, art. 3, 6 U.S.T. 3316, 3318, 3320, 75 U.N.T.S. 135, 136, 138; Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 3520, 75 U.N.T.S. 287, 288, 290.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (*adopted* June 8, 1977) 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

⁹ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 19, 249 U.N.T.S. 240, 256.

¹⁰ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the 1981 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol II), *adopted* May 3, 1996, art. 1(3), *reprinted in* 35 I.L.M. 1206, 1209.

Statute of the International Criminal Court.¹¹ The present discussion focuses on Common Article 3 and Additional Protocol II in order to highlight their respective thresholds of application and to demonstrate common problems in their implementation.

1. Common Article 3

When the existence of armed conflict is recognized, certain provisions of international humanitarian law that seek to ensure a minimum standard of humane treatment automatically come into force. This occurs irrespective of whether the parties to the conflict have agreed to be bound by the Geneva Conventions or have ratified either of the Additional Protocols.¹² Article 3, common to the four Geneva Conventions of 1949, embodies such mandatory provisions. It is the only Article in the Conventions that is concerned specifically with non-international armed conflict. According to the International Court of Justice, Common Article 3 represents a codification of customary international law.¹³ This view is supported by statements of the International Committee of the Red Cross (ICRC)¹⁴ and the jurisprudence of the ICTY¹⁵ and the ICTR¹⁶ in addition to

¹¹ Rome Statute of the International Criminal Court, art. 8(2)(f) (17 July 1998), *reprinted in* 37 I.L.M. 999 [hereinafter Rome Statute].

¹² Protocol I, June 8, 1977, 1125 U.N.T.S. 3; Protocol II June 8, 1977, 1125 U.N.T.S. 609.

¹³ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) [hereinafter *Nicaragua*].

¹⁴ See Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary, at 36, International Committee of the Red Cross (ICRC) (1958): [Common Article 3] merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.

¹⁵ See e.g., Tadic Jurisdiction Decision, *supra* note 2, ¶ 116, 134.

writings of eminent scholars of international humanitarian law.¹⁷ As a codification of customary international law, it is binding on all parties to an armed conflict, including non-state actors, irrespective of their recognition of the law governing armed conflict.¹⁸

The context for the Common Article's application is stated as being an "armed conflict not of an international character." However, it contains no definition of the term "armed conflict" and does not provide conditions governing its application. As there is no set of criteria contained in the Geneva Conventions outlining conditions for the recognition of armed conflict, the characterization of a situation using only the common Article is problematic. The drafting history of Common Article 3 offers some indication of the kinds of conditions deemed to merit the application of international humanitarian law. The Final Record of the Diplomatic Conference notes the following criteria, which distinguish situations reaching the threshold of non-international armed conflict:

- (1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against

¹⁶ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ¶ 608 (2 September 1998) [hereinafter *Prosecutor v. Akayesu*].

¹⁷ See, e.g., Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 35 (1989). See also Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265 (1996).

¹⁸ See Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 246 (1996).

insurgents organized as military and in possession of a part of the national territory.

(3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or

(b) that it has claimed for itself the rights of a belligerent; or

(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organisation purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.

(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.¹⁹

It ought to be noted however that the above criteria are not obligatory for the application of Common Article 3, nor were they intended to be.²⁰ Rather, the purpose of the criteria is to indicate the kind of conditions that were deemed to manifest a genuine situation of armed conflict as distinguished from “a mere act of banditry or an unorganized and short-lived insurrection”²¹ at the diplomatic conference where the Geneva

¹⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary, 49 (1952)

²⁰ *Id.* at 50.

²¹ *Id.*

Conventions of 1949 were negotiated. As such, their utility as a point of reference is limited. The criteria can not be applied as a test determining the status of a *prima facie* situation of armed conflict.²²

In terms of its substance, at the very heart of Common Article 3 is a standard of humane treatment for the victims of armed conflict, considered by the International Committee for the Red Cross (ICRC) to be "the fundamental principle underlying the four Geneva Conventions."²³ Parties to an armed conflict are obligated to adhere to its provisions as a "minimum" and are invited "by means of special arrangements" to bring into force the norms of international humanitarian law contained in the other articles of the Geneva Conventions. Also included in the Article is a clause that is often referred to as embodying a "right of humanitarian initiative,"²⁴ which permits the involvement of an impartial humanitarian body, such the ICRC, to provide humanitarian assistance and mediate between parties in an armed conflict.

Perhaps the most important provision contained in Common Article 3 for its contemporary acceptance by state authorities is the final clause, which states its application "shall not affect the legal status of the Parties to the conflict." According to the ICRC this clause

makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere

²² This is supported by the decision of the Diplomatic Conference not to include a definition or list of conditions for the recognition of armed conflict. *See Id.* at 49.

²³ *Id.* at 50.

²⁴ *Id.* at 57-59.

and under all circumstances and as being above and outside war itself.²⁵

The final clause of Common Article 3 verifies the fact that it serves a strictly humanitarian purpose and, as such, poses no threat to the security of a state by compromising any of the legal means at its disposal to suppress insurgency. Despite the presence of the provision stating that the legal status of parties to the conflict will not be affected, the main problem with the implementation of Common Article 3 is in the recognition of internal armed conflict as such by state authorities. Governments often find it less expedient to formally recognize the existence of armed conflict than to treat it as a mere internal disturbance, aggressively suppressing it.²⁶

The act of formally recognizing the existence of an armed conflict is, from the State's point of view, disadvantageous for a number of reasons. First, it highlights the failure of the state in preventing such a situation. Second, it is possible for it to contribute to the *perceived* recognition of insurgents as legitimate combatants. Third, acknowledging the existence of an armed conflict automatically brings into force the most basic provisions of international humanitarian law, limiting the State's use of repressive measures. These three reasons serve as examples of the underlying issues which motivate States in refusing to acknowledge the existence of armed conflict. It is important to appreciate, however, that a State's refusal to recognise *de facto* armed conflict does not decide the inapplicability of international humanitarian law. As rightly emphasized by the ICRC, "the ascertainment whether there is a non-international armed conflict does not depend on the

²⁵ *Id.* at 60.

²⁶ Examples of armed conflicts where the application of international humanitarian law has been denied include situations in the West Bank, Kuwait, and East Timor. The parties denying applicability in these situations are, respectively, Israel, Iraq and Indonesia. See T. Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 261 n.119 (2000).

subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria.”²⁷ Hence the need for clarifying the conditions deemed to constitute a *de facto* situation of armed conflict, thus triggering the application of Common Article 3.

As there is no set of criteria built into Common Article 3 determining the conditions of its application, the act of recognizing the existence of armed conflict is usually left to the discretion of the central government authorities of the State hosting the conflict.²⁸ The lack of a formula distinguishing situations of internal armed conflict arguably undermines the implementation of international humanitarian law.²⁹ Although the conditions for the application of Additional Protocol II are contained therein, the instrument still faces the same problem of recognition in its implementation. The section that follows examines the scope of the Protocol in terms of its material field of application. In doing so, some of the main impediments to its implementation are analyzed.

2. Additional Protocol II

Until the adoption of Additional Protocol II by the ICRC Conference in 1977, Common Article 3 encapsulated the main body of law governing non-international armed conflict—hence

²⁷ See ICRC Working Paper, at http://www.igc.org/icc/html/icrc8_2e19990629.html (June 29, 1999) (submitted by the ICRC as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the International Criminal Court).

²⁸ See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 45 (Cambridge University Press 2002). See also P.K. Menon, *Recognition of Belligerency and Insurgency*, in *THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES* 109-137 (Edwin Mellon Press 1994).

²⁹ According to Jean Pictet, “it must be acknowledged that some [states] evade their responsibilities simply by denying the existence of an armed conflict.” Jean Pictet, *Development and Principles of International Humanitarian Law* 47 (1985).

its description as a “mini-convention.”³⁰ According to Roberts and Guelff,³¹ the need for a new instrument applicable to internal armed conflict is evidenced by the way in which

experience demonstrated the inadequacy of the common article. While its provisions do extend certain fundamental humanitarian protections to non-combatants, they do not provide any definitive codification of the laws of war for non-international armed conflicts. Moreover, the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents in such conflicts.³²

Additional Protocol II was created to expand on the protection provided by Common Article 3.³³ Its application, however, is dependent upon a higher intensity of armed conflict. It applies to “situations at or near the level of a full-scale civil war.”³⁴ Article 1(1) states that the Protocol is applicable only to non-international armed conflicts which “take place in the territory of a High Contracting Party between its armed forces

³⁰ 1 Pictet et al, *id.* at 48.

³¹ ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 481, 482 (3d ed., 2000).

³² *Id.*

³³ Article 1.1 states that the Protocol “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application.” Additional Protocol II, *supra* note 8, art. 1.1, 1125 U.N.T.S at 611. The first paragraph of the Preamble underlines to the importance Common Article 3, stating “that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949 constitute the foundation of respect for the human person in cases of armed conflict not of an international character.” Additional Protocol II, *supra* note 8, art. 1.1, 1125 U.N.T.S at 611 (footnote omitted).

³⁴ Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, U.N. Doc. E/CN.4/1998/87, ¶ 79 (1998).

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[.]³⁵

The Protocol was originally intended to apply to all situations of non-international armed conflict, with the same threshold of application as Common Article 3. However, in the drafting of the instrument it became apparent during negotiations that the consensus required for its adoption would never be reached without raising the threshold of its application.³⁶ As a result, it now stands as a self-contained instrument with a material field of application distinctly higher than that of Common Article 3. According to the ICRC, “[k]eeping the Protocol separate from Common Article 3 was intended to prevent undercutting the scope of Article 3 itself by laying down precise rules. In this way Common Article 3 [retains] an independent existence.”³⁷ By not developing Additional Protocol II as an extension of Common Article 3, delegates at the ICRC Conference avoided any changes to the scope of the Article’s application.

Article 1(2) of Additional Protocol II states that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” do not amount to an armed conflict.³⁸ According to the ICRC Commentary on Additional Protocol II, the application of the term “armed conflict” requires “the existence of open hostilities between armed forces which are organised to a greater

³⁵ Additional Protocol II, *supra* note 8, art. 1.1, 1125 U.N.T.S at 611.

³⁶ See Sylvie-Stoyanka Junod, Int’l Comm. of the Red Cross, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1307, 1919-1364 (Yves Sandoz et al. eds., 1987).

³⁷ *Id.* at 1350.

³⁸ Additional Protocol II, *supra* note 8, art. 1.1, 1125 U.N.T.S at 611.

or lesser degree.”³⁹

Internal disturbances and tensions, characterised by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense . . . [N]on-international armed conflict seems to be a situation in which hostilities break out between armed forces or organised armed groups within the territory of a single state. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new state.⁴⁰

Although Additional Protocol II distinguishes more substantively than Common Article 3 its context of application, it nevertheless faces the same obstacle in its implementation: the non-recognition by a state of the existence of armed conflict. In this way, “the first line of [sic] against international humanitarian law is to deny that it applies at all.”⁴¹ The third Article of Additional Protocol II concerns the principle of non-intervention and reinforces the discretionary power of the State not to recognize the existence of armed conflict:

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

³⁹ Junod, *supra* note 36, at 1319.

⁴⁰ *Id.* at 1319-1320 (footnotes omitted).

⁴¹ R.R. Baxter, *Some Existing Problems of Humanitarian Law in the Concept of International Armed Conflict: Further Outlook* 1, 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels) (1974).

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.⁴²

The formal recognition of armed conflict by a neighboring country or international body may be deemed to impinge on the internal affairs of the state hosting the conflict. Thus the act of recognition, according to P.K. Menon, "[if] given too early may be tantamount to intervention and lead to international friction. Premature recognition is . . . looked upon by the parent State as a gratuitous demonstration of sympathy which may amount to an unfriendly act."⁴³ In view of the lack of objective criteria contained in common Article 3 and the problematic nature of the those contained Additional Protocol II, the issue of recognition is one that is central to the implementation of international humanitarian law. In the next section, the concept of armed conflict employed by the ICTY is examined in order to consider how it might assist in the recognition of internal armed conflict.

B. Tadic: A Formula for the Recognition of Armed Conflict

The International Criminal Tribunal for the Former Yugoslavia expounded the following notion of armed conflict in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between

⁴² Additional Protocol II, *supra* note 8, art. 3, 1125 U.N.T.S at 611-12.

⁴³ Menon, *supra* note 26, at 136-37.

governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁴⁴

The characterization of “protracted armed violence between governmental authorities and organized armed groups” as a situation of armed conflict merits particular attention. This formula was applied by the ICTY Appeals Chamber to the situation in the Prijedor region of Bosnia and Herzegovina.⁴⁵ In determining the existence of armed conflict in Prijedor the Appeals Chamber held, in accordance with the concept outlined above, that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”⁴⁶ Thus, international humanitarian law does not pertain only to those areas where actual fighting takes place; it applies to the entire territory of the state involved in armed conflict. This is also supported by the position of the ICTY Trial Chamber in the *Delalic* case, holding that “whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable.”⁴⁷

⁴⁴ Tadic Jurisdiction Decision, *supra* note 2, ¶ 70.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 67.

⁴⁷ Prosecutor v. Delalic, Mucic, Delic and Landzo, Trial Chamber Judgment, Case No. IT-96-21-T, ¶ 185 (16 November 1998).

The Tribunal's position concerning the temporal scope of armed conflict confirms the constant applicability of international humanitarian law to situations of protracted armed violence where hostilities are not necessarily to be characterized as continuous.⁴⁸ The inclusion of a peaceful settlement by the ICTY Appeals Chamber as an ending point for internal armed conflict is also significant in that it prevents a party to the conflict from limiting the application of international humanitarian law by refusing to recognize its existence for reasons of self-interest or expediency.

The *Tadic Jurisdiction Decision* arguably embodies an innovative elucidation of the grounds for applying international humanitarian law. The concept of armed conflict outlined therein is also applied in subsequent decisions of the International Tribunal for the former Yugoslavia. The *Tadic* Trial Chamber adhered to the formula expounded in the *Jurisdiction Decision*, interpreting it as a "test" which focuses on "two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict."⁴⁹ The Trial Chamber also stated that in "an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections. . . which are not subject to international humanitarian law."⁵⁰

The formula propounded by the *Tadic Jurisdiction Decision* is again applied by the Tribunal in the *Delalic* case.⁵¹ Similar to the position of the Trial Chamber in the *Tadic* case, the Trial Chamber in *Delalic* stated that the formula may be applied in situations of "internal armed conflict in order to

⁴⁸ See A. Zimmermann, *War Crimes Committed in an Armed Conflict Not of an International Character* (Commentary on Statute of the International Criminal Court) 285 (1999).

⁴⁹ *Tadic* Trial Judgment, *supra* note 2, ¶ 562.

⁵⁰ *Id.*

⁵¹ *Prosecutor v. Delalic, et al.*, Trial Chamber Judgment, Case No. IT-96-21, ¶ 183 (16 November 1998).

distinguish from cases of civil unrest.”⁵² In addition, it asserted that the emphasis in making such a distinction is on “the protracted extent of the armed violence and the extent of organisation of the parties involved.”⁵³

The formula was also applied by the ICTY in the *Furundzija* case to determine the existence of armed conflict between the Croatian Defence Council (HVO) and the Army of Bosnia and Herzegovina (ABiH) during May 1993.⁵⁴ It was similarly employed as the appropriate standard in the *Kunarac* case, supporting the Tribunal’s position on the existence of armed conflict between Bosnian Serbs and Bosnian Muslims in the municipalities of Foca, Gacko and Kalinovik.⁵⁵

The considerable influence of the concept contained in the *Tadic Jurisdiction Decision* is further demonstrated by its adoption by the International Criminal Tribunal for the Rwanda (ICTR): In the *Akayesu* case it refers to the formula in determining the existence of armed conflict in Rwanda.⁵⁶ Here the application of the formula is in line with that of the ICTY. The Rwandan Tribunal conceives *de facto* armed conflict as “the existence of hostilities between armed forces organized to a greater or lesser extent.”⁵⁷ Adopting an approach similar to that previously mentioned in the case law of ICTY, the ICTR held that in order to determine the existence of armed conflict it is

⁵² *Id.* ¶ 184.

⁵³ *Id.*

⁵⁴ Prosecutor v. Furundzija, Trial Chamber Judgment, Case No. IT-95-17/1, ¶ 59 (10 December 1998).

⁵⁵ Prosecutor v. Kunarac, Kovac and Vukovic, Appeals Chamber Judgement, Case No. IT-96-23, ¶ 56 (12 June 2002). Other ICTY cases employing the standard propounded in the *Tadic Jurisdiction Decision* include Prosecutor v. Milorad Krnojelac, Trial Chamber II Judgment, Case No. IT-97-25, ¶ 51 (15 March 2002); and Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac, Trial Chamber Judgement, Case No. IT-98-30/1, ¶ 123 (2 November 2001).

⁵⁶ Prosecutor v. Akayesu, *supra* note 16, ¶ 69.

⁵⁷ *Id.* ¶ 620.

“necessary to evaluate both the intensity and organization of the parties to the conflict.”⁵⁸

As noted by Claus Kress, much of the debate surrounding decisions of the ICTY has focused on the classification of armed conflict.⁵⁹ There is relatively little published specifically on the *Tadic* formula by scholars of international humanitarian law. Filling this gap, however, are publications on the Rome Statute of the International Criminal Court, referring to the origins of Article 8(2)(f).⁶⁰ The next section examines this provision as an adaptation of the *Tadic* formula.

C. The Adaptation of the Tadic Formula in Article 8(2)(f) of the Rome Statute

The *Tadic* formula for the recognition of internal armed conflict is included, albeit slightly amended, in the Rome Statute of the International Criminal Court. The controversial inclusion of jurisdiction over war crimes committed in non-international armed conflicts arguably represents a significant achievement in securing a greater degree of protection for the victims of such situations. According to Darryl Robinson and Herman von Hebel,

it remained controversial throughout the negotiations whether war crimes in internal armed conflict should be included in the Statute at all. Some delegations strongly believed that

⁵⁸ *Id.*

⁵⁹ C. Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 *ISR. Y.B. Human Rights* 103, 117-118 (2001).

⁶⁰ See Zimmermann, *supra* note 47, at 285; M. BOOT, *NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES* 529 (Oxford: Intersentia 2002) WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 124 (Cambridge University Press 2001).

the ICC Statute should not include such norms, as it was feared that ICC competence over such crimes would be an unacceptable intrusion on sovereignty and would undermine the general acceptability of the Statute.⁶¹

Delegations holding a position against the insertion of provisions relating to non-international armed conflicts included India, China, Turkey, Sudan and the Russian Federation.⁶² According to Thomas Graditzky, “[t]he issues of whether to include a non-international armed conflicts clause and what threshold should be adopted dominated discussions.”⁶³ In support of jurisdiction extending over situations of non-international armed conflict, it was pointed out at the Conference that “most of the armed conflicts that have raged around the world since World War II have been conflicts of a non-international character, and that it is precisely in internal armed conflicts that humanitarian considerations are most brutally disregarded and national criminal justice systems least likely to adequately respond to violations.”⁶⁴ Taking into account the frequency of internal armed conflict, and also that the Statute of the ICTR had expressly covered situations of non-international armed conflict,⁶⁵ it was eventually recognized during negotiations that the exclusion of provisions relating to such situations would result in an unacceptable restriction on the jurisdiction of the Court.⁶⁶

⁶¹ D. Robinson & H. von Hebel, *War Crimes in Internal Conflicts: Article 8 of the ICC Statute*, 2 Y.B. INT’L HUM. L., 193, 199 (1999).

⁶² *Id.*

⁶³ T. Graditzky, *War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court*, 5 U.C. DAVIS J. INT’L L & POL’Y, 199, 210 (1999).

⁶⁴ See Robinson & von Hebel, *supra* note 61, at 199.

⁶⁵ Statute of the International Criminal Tribunal for Rwanda (1994), reprinted in 33 I.L.M. 1598.

⁶⁶ *Id.* at 1604.

Article 8(2)(f) of the Rome Statute states that the Court's jurisdiction will include situations of non-international armed conflict taking place in the territory of a State where there exists a situation of "protracted armed conflict between governmental authorities and organized armed groups or between such groups."⁶⁷ Here the term "protracted armed conflict" is substituted for "protracted armed violence." This sentence has been criticised for introducing a new category of armed conflict.⁶⁸ Theodor Meron states, however, that the provision "should not be considered as creating yet another threshold of applicability."⁶⁹ Nonetheless, he also remarks that "it may well exacerbate the previous lack of clarity" concerning the concept of non-international armed conflict.⁷⁰

Kress describes the provision contained in Article 8(2)(f) as "slightly inaccurate"⁷¹ on the basis that it was not the intention of the drafters to substitute "protracted armed conflict" for "protracted armed violence."⁷² He states that, as the French version of the Rome Statute includes the original wording of the *Tadic* formula,⁷³ the English version should not give rise to misunderstanding.⁷⁴ (This is significant as paragraph one of Article 128 of the Rome Statute states that "Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.")⁷⁵ Kress's position also appears to be supported by the analysis contained in an ICRC working paper which states that "[t]he addition of the word "protracted" to armed conflict seems to be redundant since protracted violence is a constituent

⁶⁷ Rome Statute, *supra* note 11, at 1006.

⁶⁸ Kress, *supra* note 59, at 117-118.

⁶⁹ T. Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 260 (2000).

⁷⁰ *Id.* at 260.

⁷¹ Kress, *supra* note 59, at 118.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Rome Statute, *supra* note 11, art. 128.

element of an armed conflict not of an international character.”⁷⁶

The authority of the *Tadic* formula as a test for distinguishing situations of armed conflict is supplemented by its application to situations in regions including the Middle East,⁷⁷ Somalia⁷⁸ and Kosovo.⁷⁹ It is arguable that there exists scope for its future development into a more substantive measure for determining the existence of armed conflict. Although its employment by the ICTY,⁸⁰ the ICTR,⁸¹ the United Nations Commission on Human Rights⁸² and the Rome Conference drafting the ICC Statute⁸³ demonstrate the utility of the definition, further refinement is needed to ensure clarity in distinguishing situations that reach the threshold of internal armed conflict. As noted by the Trial Chamber of the Rwanda Tribunal in the *Rutaganda* case, the *Tadic* formula is still “termed in the abstract, and whether or not a situation can be described as an ‘armed conflict’ . . . is to be decided upon a case-

⁷⁶ International Committee of the Red Cross (ICRC) Working Paper, 29 June 1999, *available at* http://www.igc.org/icc/html/icrc8_2e19990629.html.

⁷⁷ See *Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967* (Mar. 6, 2002), E/CN.4/2002/32, ¶ 18. See also *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, (Oct. 4, 2001), U.N. Doc. A/56/440, ¶ 13 (Oct. 4, 2001).

⁷⁸ See *Report on the Situation of Human Rights in Somalia, Prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmawi, Pursuant to Commission Resolution 1996/57 of 19 April 1996*, U.N. Doc. E/CN.4/1997/88, ¶ 54 (1997).

⁷⁹ See Sonja Boelaert-Suominen, *The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict*, 837 INT’L REV. RED CROSS 217 (2000).

⁸⁰ See *infra*, pp. 13-15.

⁸¹ See *infra*, pp. 16-17.

⁸² See *supra* notes 76-77.

⁸³ *Id.* at 16-19.

by-case.”⁸⁴

III. The Distinction Between Internal and International Armed Conflict

The purpose of this part of the paper is to examine grounds for the classification of the armed conflict, focusing on the conditions contained in the decisions of the *Tadic* case. It is structured in three sections. The first section evaluates the position of the Appeals Chamber in the *Tadic Jurisdiction Decision* on the internationalisation of a *prima facie* internal armed conflict. The second section explicates the Trial Chamber's use of the “effective control” test to assess the involvement of the FRY in Bosnia and Herzegovina. The third section elucidates the test of “overall control” propounded by the Appeals Chamber as an alternative to that of the Trial Chamber. In doing so, some common ground in the positions of the two chambers is highlighted before points of divergence and the influence of the “overall control” test on the subsequent case law of the Tribunal are examined.

A. Proof of Direct Involvement by the Federal Republic of Yugoslavia in Bosnia and Herzegovina as a Condition for Internationalisation

After confirming the existence of armed conflict in Bosnia and Herzegovina, the Appeals Chamber in the *Tadic Jurisdiction Decision* then corroborated that it had jurisdiction over crimes committed in the context of non-international as well as international armed conflicts.⁸⁵ The Appeals Chamber held that the conflict in the Republic of Bosnia and Herzegovina possessed both “internal and international aspects.”⁸⁶ It did so, reasoning that

⁸⁴ Prosecutor v. Rutaganda, Trial Chamber Judgment, Case No. ICTR-96-3, ¶ 91 (6 Dec. 1999).

⁸⁵ *Tadic Jurisdiction Decision*, *supra* note 2, ¶¶ 71-142.

⁸⁶ *Id.* ¶¶ 72, 77-78.

[t]he conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina *at least* until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (*unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven*).⁸⁷

Although the Appeals Chamber does not decide on the nature of the conflict in this decision, it does delineate the condition of direct involvement of the FRY for the recognition of the armed conflict as international during the period in which the alleged offences occurred.⁸⁸ This point is important for demarcating the scope of the concept of internal armed conflict, and thus is of particular significance to future decisions concerning the character of the conflict.

Prior to the *Tadic Jurisdiction Decision* there existed a strong consensus among scholars of international humanitarian law that the situation in the former Yugoslavia was to be characterized as a single international armed conflict and not as a series of distinct conflicts each with a separate status.⁸⁹ By

⁸⁷ *Id.* ¶ 72. Emphasis added.

⁸⁸ *Id.*

⁸⁹ According to Christopher Greenwood, the Decision of the Appeals Chamber "swims against the tide of much literature on the conflicts in the former Yugoslavia, which has tended to treat the entirety of the conflicts as a single entity and as international in character." T. Meron, *International Criminalization of Internal Atrocities*, AM. J. INT'L L.

asserting that the "conflicts" possessed both "internal and international aspects," the Appeals Chamber adopted a position which left undetermined the status of the situation in Bosnia and Herzegovina at the time the alleged crimes were committed.⁹⁰ The task of deciding the character of the armed conflict was thus left to the Trial Chamber.

B. The Test of "Effective Control"

The Judgment of the Trial Chamber⁹¹ does not explicitly characterize the situation in Bosnia and Herzegovina after May 19, 1992 as being either internal or international.⁹² However, in deciding that Article 2 of the ICTY Statute was not applicable to the situation,⁹³ it implicitly determined that character of the armed conflict to be non-international.⁹⁴

In order to establish whether or not the acts perpetrated by Dusko Tadic after May 19, 1992 are to be considered as crimes against "protected persons,"⁹⁵ the Trial Chamber enquired

554, 556 (1995). See also G.H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 A.J.I.L 64, 66 (1996); J.C. O'Brien, *Current Developments: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 A.J.I.L 639, 647 (1993); and T. Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 A.J.I.L 78, 81 (1994).

⁹⁰ Tadic Jurisdiction Decision, *supra* note 2, ¶ 77.

⁹¹ Tadic Trial Judgment, *supra* note 2.

⁹² *Id.* ¶ 86.

⁹³ Statute of the International Tribunal for the Former Yugoslavia, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993), reprinted in 32 ILM 1203.

⁹⁴ Tadic Appeals Judgement, *supra* note 2, ¶ 86.

⁹⁵ According to Article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,

[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

into the relationship between the VRS and the Federal Republic of Yugoslavia (FRY). According to the Chamber's analysis, if the FRY was in a position of "effective control" over the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/*Republika Srpska*) during the time in question, then the victims would qualify as "protected persons" under the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, being "in the hands of an occupying power of which they were not nationals."⁹⁶

This categorization of Tadic's victims as protected persons would automatically imply the existence of international armed conflict. However, if the relationship between the FRY and the VRS constituted one of no more than the latter's dependence on the former, then the conflict would be considered non-international. As it is not considered possible for grave breaches of the Geneva Conventions to occur in the context of a non-international armed conflict, the consequence of such a finding would be that 11 of the 31 counts against Tadic would be deemed inapplicable and thus dismissed by the Tribunal. Thus the question that faced the Trial Chamber,

[was] whether, after 19 May 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro), by its withdrawal from the territory of the Republic of Bosnia and Herzegovina and notwithstanding its continuing support for the VRS, had sufficiently distanced itself from the VRS so that those forces could not be regarded as *de facto* organs or agents of the VJ and hence of the Federal Republic of Yugoslavia.⁹⁷

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949).

⁹⁶ Tadic Trial Judgment, *supra* note 2, ¶ 582.

⁹⁷ *Id.* ¶ 587.

In answering this question, the Trial Chamber applied a test developed by the International Court of Justice in the *Nicaragua* case. Although the circumstances of the armed conflict in the *Nicaragua* case differed significantly to the conflict being considered by the Tribunal in Bosnia Herzegovina,⁹⁸ the test of "effective control" was deemed an appropriate means of assessing the involvement of FRY. The purpose of its application in the *Nicaragua* case was to determine,

whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.⁹⁹

Similarly, the rationale for its application in the *Tadic* case was to answer the question of whether "the requisite degree of command and control by the VJ, and hence the Federal Republic of Yugoslavia . . . over the VRS is established for the purposes of imputing the acts of those forces operating in opstina Prijedor or the VRS as a whole to the Federal Republic of Yugoslavia."¹⁰⁰ To illustrate the test of "effective control" the Trial Chamber uses the following quotation from the *Nicaragua* case:

. . . United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in

⁹⁸ *Id.* ¶ 586-587.

⁹⁹ *Nicar. V. U.S.*, *supra* note 13, ¶ 109 (Merit Judgment) (1986).

¹⁰⁰ *Tadic* Trial Judgment, *supra* note 2, ¶ 586.

itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.*¹⁰¹

This quotation demonstrates the particularly stringent nature of the test being applied by the Trial Chamber to the relationship between the VRS and the FRY. Adhering to the above concept of “effective control”, the words “directed or enforced” imply that evidence of specific instructions is required in order for the FRY to be held responsible for the violations of international humanitarian law committed by the VRS.¹⁰² The Trial Chamber acknowledges in this regard that the *Nicaragua* case sets a “particularly high threshold test.”¹⁰³

¹⁰¹ *Nicaragua v. United States*, ¶ 115 as cited in *Tadic Trial Judgment*, *supra* note 2, ¶ 585. Emphasis added by the Trial Chamber.

¹⁰² *Tadic Appeals Judgment*, *supra* note 2, ¶ 100.

¹⁰³ *Tadic Trial Judgment*, *supra* note 2, ¶ 585. In order for the United States to be held responsible for violations of international humanitarian law perpetrated by the *contras*, “it would in principle have to be proven

Applying the “effective control” test outlined above, the Trial Chamber held that the FRY was not sufficiently responsible for the command and control of operations in Bosnia and Herzegovina for the conflict to be regarded as international at the time the alleged acts were committed:

The Trial Chamber is [. . .] of the view that, on the evidence presented to it, after 19 May 1992 the armed forces of the *Republika Srpska* could not be considered as *de facto organs* or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), either in opstina Prijedor or more generally. For that reason, each of the victims of the acts ascribed to the accused in Section III of this Opinion and Judgment enjoy the protection of the prohibitions contained in Common Article 3, applicable as it is to all armed conflicts, rather than the protection of the more specific grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals, which falls under Article 2 of the Statute.¹⁰⁴

The Trial Chamber supported this position by arguing that there was insufficient evidence to prove the prosecutor's contention that the VRS acted as *de facto* armed forces of the Federal Republic of Yugoslavia.¹⁰⁵ According to the decision of the majority, the prosecutor had failed to demonstrate that “the FRY exercised the potential for control inherent in that relationship of dependency or that the VRS has otherwise placed

that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” *Nicar. v. U.S.*, *supra* note 14, ¶ 115.

¹⁰⁴ *Id.* ¶ 607.

¹⁰⁵ *Id.* ¶ 606.

itself under the control of the Government of the FRY.”¹⁰⁶ The presiding Judge, Gabrielle Kirk McDonald, however made a strong dissent. She argued that the decision of the majority misinterpreted the *Nicaragua* case, applying a test even more demanding than that required to assess the involvement of FRY. According to McDonald, “the appropriate test of agency from *Nicaragua* is one of “dependency and control” and a showing of effective control is not required.”¹⁰⁷

The position of the Trial Chamber is also criticized by Theodor Meron:

[T]he problem in the trial chamber's approach lay not in its interpretation of *Nicaragua*, but in applying *Nicaragua* to *Tadic* at all. Obviously, the *Nicaragua* test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal. In practice, applying the *Nicaragua* test to the question in *Tadic* produces artificial and incongruous conclusions.¹⁰⁸

¹⁰⁶ *Id.* ¶ 588.

¹⁰⁷ Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, Case No. IT-94-I-AR 72 ¶ 4 (7 May 1997).

¹⁰⁸ T. Meron, *Classification of the Conflict in the Former Yugoslavia: Nicaragua's Fallout* 92 AJIL 236 at 237 (1998). The Trial Chamber in the *Delalic* case rejected the test of effective control for similar reasons:

While this decision of the ICJ constitutes an important source of jurisprudence on various issues of international law, it is always important to note the dangers of relying upon the reasoning and findings of a very different judicial body concerned with rather different circumstances from the case in hand. The International Tribunal is a criminal judicial body, established to prosecute and punish individuals for violations of international humanitarian law, and not to determine State responsibility for acts of aggression or unlawful intervention. It is, therefore, inappropriate to transpose wholesale into the present context the test enunciated by the ICJ to determine the

On the test of "effective control," Meron goes on to say that "even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict and the applicability of those rules of international humanitarian law that govern armed conflicts of an international character."¹⁰⁹ As pointed out by Michael Scharf,¹¹⁰ the Trial Chamber's thinking is also at variance with the approach of Trial Chamber II during the Rule 61 proceedings in the *Rajic* case where the "effective control" test was considered inapplicable.¹¹¹ The inappropriateness of the test for assessing the involvement of the FRY in Bosnia and Herzegovina is demonstrated further by the significantly different circumstances of its original application by the International Court of Justice:

[T]he contras were never United States nationals
or members of the U.S. Army; the United States

responsibility of the United States for the actions of the
contras in Nicaragua.

Prosecutor v. Delalic, et al., Appeals Chamber Judgment, Case No. IT-96-21, ¶ 230 (16 Nov. 1998).

¹⁰⁹ *Id.* at 239.

¹¹⁰ M.P. Scharf, *Prosecutor v. Tadic*, 91 AJIL 718, 720 (1997).

¹¹¹ According to Trial Chamber II,

the ICJ was considering state responsibility for violations of international humanitarian law and therefore focused on U.S. operational control over the contras, whereas the chamber was not considering Croatia's liability for acts committed by Bosnian Croats but merely whether the Bosnian Croats could be considered agents of Croatia for the purpose of establishing subject matter jurisdiction regarding acts alleged to violate the grave breaches provisions of the Geneva Conventions, for which specific operational control was not of paramount importance.

Prosecutor v. Rajic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, Case No. IT-95-12-R61, ¶ 22.

did not create the contras, although their numbers increased once the United States began to offer assistance; and there was no attempt by the United States to annex the territory of Nicaragua. In contrast, the Bosnian Serb army was created by the Federal Republic of Yugoslavia (Serbia and Montenegro); it was commanded by former members of the JNA, who continued to receive their pay[]checks from Belgrade; it acted in furtherance of the goal of the Federal Republic of Yugoslavia to annex parts of Bosnia; and it followed the strategy and tactics devised by the JNA prior to May 19, 1992.¹¹²

The section that follows examines the test of “overall control” proposed by the Judgment of the Appeals Chamber as an alternative to that of the Trial Chamber. In doing so, common ground as well as points of divergence on the characterization of armed conflict are highlighted.

C. The Test of “Overall Control”

The test of “overall control” employed by the Appeals Chamber on July 15, 1999, is similar in a number of ways to the test of “effective control” used by the Trial Chamber. First, a question both Chambers sought to answer in applying their respective tests was whether the VRS existed, at the time the alleged crimes were committed, as a *de facto* organ of the FRY. In doing so, both held that if this condition was fulfilled the conflict would be rendered international. The Trial Chamber Judgment states that “the acts of the armed forces of the *Republika Srpska* . . . may be imputed to the Federal Republic of Yugoslavia (Serbia and Montenegro) if those forces were acting as *de facto* organs or agents of that State.”¹¹³ Likewise, the decision of the Appeals Chamber asserts that,

¹¹² Scharf, *supra* note 110, at 721.

¹¹³ Tadic Trial Judgment, *supra* note 2, ¶ 584.

[t]he question whether after 19 May 1992 [the armed conflict] continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces - in whose hands the Bosnian victims in this case found themselves - could be considered as *de jure* or *de facto* organs of a foreign Power, namely the FRY.¹¹⁴

Secondly, both Chambers implicitly accepted, as stipulated in the *Tadic Jurisdiction decision*, the direct involvement of the FRY as a condition for the internationalisation of the armed conflict in Bosnia and Herzegovina.¹¹⁵ The Trial Chamber held the character of the armed conflict depends on "the degree of involvement of the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA on 19 May 1992."¹¹⁶ The Appeals Chamber held that in order for the conflict to be rendered international that the level of involvement required by the FRY must go "beyond the mere financing and equipping of [the VRS] and involv[e] also participation in the planning and supervision of military operations."¹¹⁷

Thirdly, the decisions of both the Trial and Appeals Chambers stipulated that in order for the armed conflict to be internationalised a degree of control by the FRY is required over the VRS. It is clear, nonetheless, that the threshold of control required for the internationalisation of the armed conflict in Bosnia and Herzegovina differs fundamentally between the two chambers. The main point of divergence between the test of "overall control" employed by the Appeals Chamber and the test of "effective control" used by the Trial Chamber is that the latter

¹¹⁴ *Id.* ¶ 87.

¹¹⁵ *Tadic Jurisdiction Decision*, *supra* note 2, ¶ 72.

¹¹⁶ *Tadic Trial Judgment*, *supra* note 2, ¶ 571.

¹¹⁷ *Tadic Appeals Judgment*, *supra* note, 3 ¶ 145.

possesses a distinctly higher threshold of application.¹¹⁸ The “overall control” test does not require the issuance of specific instructions by the authorities of the supporting State to either the head or members of the insurgent armed forces for it to be deemed responsible for their actions.¹¹⁹

In refuting the test of “effective control” proposed by the Trial Chamber, the Appeals Chamber summarizes its position on the degree of control required by the applicable test:

[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law.¹²⁰

¹¹⁸ This point is made in the *Aleksovski* case:

Bearing in mind that the Appeals Chamber in the *Tadic* Judgment arrived at this test against the background of the “effective control” test set out by the decision of the ICJ in *Nicaragua*, and the “specific instructions” test used by the Trial Chamber in *Tadic*, the Appeals Chamber considers it appropriate to say that the standard established by the “overall control” test is not as rigorous as those tests.

Prosecutor v. Aleksovski, Appeals Chamber Judgment, Case No. IT-95-14/1, ¶ 134 (24 March 2000).

¹¹⁹ *Tadic* Appeals Judgment, *supra* note 2, ¶ 131.

¹²⁰ *Id.* ¶ 137. Emphasis in original.

Holding that the Trial Chamber erred in its exclusive use of the "effective control" test as a means of assessing the involvement of the FRY,¹²¹ the Appeals Chamber reasoned the more appropriate standard to be one of "overall control." Accordingly,

[i]n order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group.¹²²

Applying the test of "overall control" to the situation in Bosnia and Herzegovina, the Appeals Chamber found that the relationship between the VRS and the FRY fulfilled the test, because FRY manifested control "not only in financial, logistical and other assistance and support, but also, and more importantly, *in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS.*"¹²³ In doing so, it held that "[t]his sort of control is sufficient for the purposes of the legal criteria required by international law."¹²⁴

The test of "effective control," demanding the additional requirement of evidence of specific instructions, was considered by the Appeals Chamber to be an excessively stringent measure for determining the FRY's scale of involvement.¹²⁵ It argued against the use of the test, contending that it is at variance with judicial and state practice¹²⁶ and also that it does not appear to be

¹²¹ *Id.* ¶ 170.

¹²² *Id.* ¶ 131.

¹²³ *Id.* ¶ 156. Emphasis added.

¹²⁴ *Id.* ¶ 156.

¹²⁵ *Id.* ¶ 112.

¹²⁶ *Id.* ¶¶ 124-162.

consonant with the logic of the law of state responsibility.¹²⁷

On the latter point, the Appeals Chamber reasoned that “[t]he principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria.”¹²⁸ The degree of control required for an individual to be regarded as a *de facto* organ of a state varies according to his or her situation.¹²⁹ Accordingly,

[o]ne should distinguish 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. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.¹³⁰

¹²⁷ *Id.* ¶¶ 116-123.

¹²⁸ *Id.* ¶ 117.

¹²⁹ *Id.* The Appeals Chamber held that, aside from the test of overall control, international law provides for two other tests of responsibility depending on the situation of an individual. The first is the test of “specific instructions” and applies to “single individuals or militarily unorganised groups.” The second is the “test is the assimilation of individuals to State organs *on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions).*” *Id.* ¶ 141. Emphasis in original.

¹³⁰ Tadić Appeals Judgment, *supra* note 2, ¶ 120.

The "effective control" test, necessitating evidence of specific instructions for the acts in question, exceeds the standard required by the International Law Commission (ILC).¹³¹ Drawing on the provisions contained in Articles 7, 8 and 10 of the ILC's Draft on State Responsibility, the Appeals Chamber concluded that,

international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals.¹³²

Using the Draft on State Responsibility as a basis for illustrating the doctrine of public international law, the Appeals Chamber held that the situation of an organized armed group is distinctively different to that of a single private individual acting on behalf a state.¹³³ In the case of an armed group, "[i]f it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specially imposed, requested or directed by the State.*"¹³⁴ Thus members of an armed group may be held accountable for their actions as *de facto* agents of a state providing the state "*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational

¹³¹ *Id.* ¶ 117.

¹³² *Id.* ¶ 123. Emphasis in original.

¹³³ *Id.* ¶ 122.

¹³⁴ *Id.* ¶ 122. Emphasis in original.

support to that group.”¹³⁵

In supporting its claim that the effective control test is at variance with judicial and state practice, the Chamber referred to the jurisprudence of the Iran-U.S. Claims Tribunal,¹³⁶ the European Court of Human Rights¹³⁷ and the International Court of Justice.¹³⁸ It also alluded to the decision of the *Oberlandesgericht* of Düsseldorf in *Jorgic* case:

[T]he Court held that the Bosnian Serbs fighting against the central authorities of Sarajevo had acted on behalf of the FRY. To support this finding, the court emphasised that Belgrade financed, organised and equipped the Bosnian Serb army and paramilitary units and that there existed between the JNA and the Bosnian Serbs ‘a close personal, organisational and logistical interconnection [*Verflechtung*]’, which was considered to be a sufficient basis for regarding the conflict as international. The court did not enquire as to whether or not the specific acts committed by the accused or other Bosnian Serbs had been ordered by the authorities of the FRY.¹³⁹

As a means of assessing the character of an armed conflict, the value of the “overall control” test proposed by the *Tadic* Appeals Chamber is supported by its continued usage in the subsequent case law of the ICTY. The cases of *Aleksovski*,¹⁴⁰

¹³⁵ *Id.* ¶ 137.

¹³⁶ Kenneth P. Yeager v. Islamic Republic of Iran, 17 IRAN-U.S.C.T.R. 92 (vol. IV) (1987).

¹³⁷ *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2217. For a summary of the case, see B. Rudolph, *International Decisions: Loizidou v. Turkey*, 91 AJIL 532 (1997).

¹³⁸ *Nicar. v. U.S.*, *supra* note 13.

¹³⁹ *Tadic Appeals Judgment*, *supra* note 2, ¶ 129.

¹⁴⁰ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals

*Blaskic*¹⁴¹ and *Kordic* and *Cerkez*¹⁴² each employ the standard as a means of deciding the status of an armed conflict. The test is applied in the *Aleksovski* case to assess the relationship between the Army of the Republic of Croatia and the Croatian Defence Council.¹⁴³ The Appeals Chamber held unanimously in this case that “[t]he overall control test, set out in the *Tadic* Judgment is the applicable law.”¹⁴⁴

The *Blaskic* Trial Chamber applied the standard, stating that “it is justified to speak of overall control” and thus the armed conflict under consideration was rendered international.¹⁴⁵ Similarly, in the case of *Kordic* and *Cerkez* the test was used to assess whether the conflict between the Bosnian Croats and Bosnia Muslims had been internationalised by the involvement of Croatia.¹⁴⁶ In its decision on the matter, the Trial Chamber stated that

Croatia exercised overall control over the HVO through its provision to the HVO of financial and training assistance, military equipment and operational support, and by its participation in the organisation, coordination and planning of military operations of the HVO. The Chamber therefore finds that, on that basis, the conflict between the HVO and the ABiH was rendered

Chamber Judgment, ¶ 134 (20 March 2000), *available at* <http://www.un.org/icty/judgement.htm>.

¹⁴¹ Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Chamber Judgment, ¶ 100–101 (3 March 2000), *available at* <http://www.un.org/icty/judgement.htm>.

¹⁴² Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Trial Chamber Judgment, ¶ 115 (26 February 2001), *available at* <http://www.un.org/icty/judgement.htm>.

¹⁴³ Prosecutor v. Aleksovski, *supra* note 140, ¶ 27.

¹⁴⁴ Id. ¶ 134.

¹⁴⁵ Prosecutor v. Blaskic, *supra* note 141, ¶ 122.

¹⁴⁶ Prosecutor v. Kordic and Cerkez, *supra* note 142, ¶ 109.

international.¹⁴⁷

Given the above mentioned usage of the test of “overall control,” and the problems surrounding the test of “effective control,” it appears likely that the standard set by the *Tadic* Appeals Chamber will continue to be applied in future judgments of the Tribunal, characterizing situations of armed conflict as either internal or international.¹⁴⁸

The decision of the Appeals Chamber has, however, been criticized by Marco Sassoli and Laura Olsen for answering a question of general international law using a standard substantively different to that provided by the International Court of Justice (ICJ), the principle judicial organ of the United Nations: “Even if the theory of the Appeals Chamber is well reasoned, the ICJ can be expected to continue to apply its own theory to inter-state disputes world-wide. Double standards will therefore inevitably result.”¹⁴⁹ This argument against the test of “overall control” is, however, defeated by the fact that the Statute of the ICJ does not provide for precedent.¹⁵⁰ Taking this into account, as stated by Machteld Boot, “[i]t would be strange if the decisions of the ICJ, not being strictly binding on itself, would be binding on the Tribunal.”¹⁵¹ Also worth noting in this regard is the view expressed by the Appeals Chamber in the *Delalic* case that the Tribunal

[is] an autonomous international judicial body,

¹⁴⁷ *Id.* ¶ 145.

¹⁴⁸ See C. Byron, *Armed Conflicts: International or Non-international?*, 6 No. 1 J. CONFLICT & SECURITY L. 63, 79 (2001).

¹⁴⁹ M. Sassoli and L. Olsen, *The Judgment of the ICTY Appeals Chamber on the Merits of the Tadic Case*, 839 INTERNATIONAL REVIEW OF THE RED CROSS 739-769 (2000).

¹⁵⁰ MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 556 (Intersentia 2002).

¹⁵¹ *Id.*

and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.¹⁵²

IV. Conclusion

The concepts provided by the jurisprudence of the ICTY serve as useful tools for distinguishing the status of situations, enabling the application of the appropriate body of international humanitarian law. The purpose of exploring the *Tadic* case in this article has been twofold: to illuminate the formula provided by the Tribunal for the recognition of *de facto* armed conflict and to examine the tests proposed in its case law for assessing the status of an armed conflict as either internal or international.

Analysed in the first part of the article, the body of law governing non-international armed conflict is deemed problematic in relation to its lack of sufficient provision for conditions of implementation. The formula provided by the ICTY Appeals Chamber in the *Tadic Jurisdiction Decision* has arguably had positive impact in the elucidation of the conditions signifying the existence of armed conflict. Its contribution, as a standard for determining the existence of armed conflict, is evidenced by its inclusion in the Rome Statute as well as by its continued application by the ICTY, the ICTR and the United Nations Commission on Human Rights.

The test of "overall control" proposed by the Appeals Chamber for determining the status of situations of *prima facie* internal armed conflict represents another positive development in international humanitarian law. As an alternative to the test of "effective control" employed by the Trial Chamber, it represents

¹⁵² Prosecutor v. Delalic, *supra* note 51.

a less restrictive, more flexible standard for determining the status of an armed conflict as either internal or international.

Using the formula expounded in the *Tadic Jurisdiction Decision* and the “overall control” test proposed by the *Tadic* Appeals Chamber, it is possible to delineate parameters of internal armed conflict. Although greater clarity is still needed in the process of differentiating situations of internal armed conflict, the conceptual framework provided by these decisions represents a significant advance in the development of international humanitarian law.