Florida Journal of International Law

Volume 18 | Issue 3 Article 3

December 2006

Internationaliztion of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in Tadic

Davis B. Tyner

INTERNATIONALIZATION OF WAR CRIMES PROSECUTIONS: CORRECTING THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA'S FOLLY IN *TADIC*

Davis B. Tyner[*]

---

* Juris Doctor and Master of Business Administration, Cornell University; Member of the Minnesota, D.C., and U.S. Court of Appeals for the Sixth Circuit Bars; and associate at Latham & Watkins, LLP in Washington, D.C. I am greatly indebted to many people for their help with this Article. In particular, I would like to thank Cornell Vice Provost David Wippman and Naval Lt. Cmd. Shane Cooper (J.A.G. Corps) for their insight and comments on multiple drafts of this Article. Any errors or omissions are my own. I would also like to thank the Hon. Cornelia G. Kennedy and Christa Cottrell for their suggestions, and Professor Douglas A. Kysar of Cornell Law School, Professor Juscelino F. Colares of the Syracuse University College of Law, and Jonathan Fischbach for their insights on the publication process.

I. INTRODUCTION

Recently, international courts and tribunals have faced the question of when an armed conflict becomes international for the purpose of war crimes prosecutions. Unfortunately, the most recent court to address the question, the International Criminal Tribunal for the Former Yugoslavia (ICTY), criticized the International Court of Justice's (ICJ) "effective

control" standard on state responsibility.[1] By criticizing the ICJ's "effective control" standard, and in adopting a lower "overall control" standard, the ICTY confused both its own inquiry as well as the inquiry on state responsibility, and it failed to develop a useful test for determining when a conflict becomes international for the purpose of war crimes prosecutions. The drafters of the Articles on State Responsibility have not sufficiently clarified the ICTY's error. In many cases, the scholarly community has compounded the error by applauding the ICTY's lessening of the ICJ's standard.[2]

Initially, the disagreement on the appropriate standard for state responsibility[3] seemed perfectly natural. Many scholars have long criticized the ICJ's "effective control" standard for being too difficult to meet.[4] In addition, many seemed to see a direct conflict between the standard discussed by the ICJ and the ICTY and applauded the ICTY for taking a necessary step in making the standard for state responsibility lower.[5] The ICJ and the ICTY, however, were attempting to do very

---

1. *See infra* Part III.B.

2. *See infra* Part III.E.

3. For an excellent history of *Nicaragua*, *Tadic*, and the general law on international armed conflict, *see* Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. Miami Int'l & Comp. L. Rev. 189, 222-23 (2004).

4. *See* Mark A. Drumbl, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, 37 New Eng.L. Rev. 1037, 1050 (2003); *see also* Carsten Stahn, *International Law Under Fire: Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 Fletcher F. World Aff. 35, 47 (2003) (arguing that the *Tadic* standard represents "A viable and reasonable alternative to the "effective control test").

5. *See* MUCHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 544, 554 (Intersentia 2002); *see also* Cullen, *supra* note 3, at 228-29; RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 80-81 (Oxford University Press, 2004); Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 88-89 (2003); James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, Vol. 85, No. 850 I.R.R.C. 313, 324-26 (2003); Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143, 164-68 (2001) (though Spelliscy goes on to argue that the existence of a conflict is not central to his thesis); *see also* Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELBOURNE U. L. REV. 122, 161-62 (2001); Marco Sassòli & Laura M. Olson, *The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case*, 839 I.R.R.C. 733, 739 (2000) (recognizing a conflict but advocating for a similar and easier standard in all cases); Robert M. Hayden, *Biased "Justice:" Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 568 (1999) (arguing that the U.S. "might

different things. The ICJ was asked to hold a foreign state responsible for the actions of non-state actors acting within another state. In contrast, the ICTY attempted to determine the guilt of an individual for crimes of which he was accused.

Though this new standard is not relevant to the International Criminal Tribunal for Rwanda,[6] the Rome Statute for the International Criminal Court still differentiates between international and internal conflicts.[7] The question of what standard to use to determine when a conflict becomes internationalized in war crimes prosecutions is, therefore, still relevant, and it will remain relevant for the foreseeable future. Furthermore, the ICJ has faced and will continue to face questions involving state responsibility,[8] so the question of what standard to use for state responsibility remains relevant in the context of suits between states as well. Due to the strong probability that other courts will confront similar issues in the future, clarification of these standards is critical.

---

regret elements of the appellate decision in *Tadic*" specifically the change in the standard on state responsibility).

6. *See* Statute of the International Criminal Tribunal for Rwanda, art. 3, 4, *available at* http://www.ictr.org/ENGLISH/ basicdocs/statute/2004.pdf) (last visited July 14, 2005) (which refers only to "serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977."). *See also* THEODOR MERON, WAR CRIMES LAW COMES OF AGE: ESSAYS 234, 265 (1998); RODERIC ALLEY, INTERNAL CONFLICT AND THE INTERNATIONAL COMMUNITY: WARS WITHOUT END? 123 (Ashgate Publishing Ltd. 2004).

7. *See* Statute of the International Criminal Court, Art. 8, *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf (last visited July 14, 2005). *See also* BOOT, *supra* note 5, at 553; INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 89 (René Provost ed., 2002) (Provost argues that the Statute of the ICC implies that individuals not connected with a state cannot commit war crimes).

8. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (merits) (Feb. 26, 2007), *available at* http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm (last visited Mar. 30, 2007). This decision was released after this Article had been accepted for publication but before it was published. In the decision, the ICJ criticized the ICTY's *Tadic* decision and made many of the same arguments made in this Article. *Id.* at 144-45. In particular, the ICJ criticized the ICTY for overstepping its jurisdiction, that "logic" did not compel that the same test be used for the two different legal issues, and that the ICTY's test inappropriately broadens state responsibility. *Id. See also* Leo Van Den Hole, *Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadic*, 32 SYRACUSE J. INT'L. L. & COM. 269, 286-87 (2005); YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT 135 (Routledge 2004) (noting that the ICJ lacks jurisdiction over individual criminals, meaning that its rulings have no bearing on whether a conflict is international for the purposes of international war crimes prosecutions).

Part II of this Article will briefly discuss the history of the conflict in the Ituri region of the Democratic Republic of Congo as the International Criminal Court has issued an indictment in one case and is weighing indictments in others for war crimes in that area. Part III will explore the history of the *Tadic* decision, starting with the ICJ's *Nicaragua* holding, including an exploration of the goals of the Nicaraguan government in bringing the case. Part III of this Article also addresses the *Tadic* case, again focusing on the goals of the Tribunal, by discussing how the ICTY's "overall control" standard developed in that Tribunal, by addressing the International Law Commission's (ILC) Articles on State Responsibility, and by providing two views developed in the scholarly literature. Part IV fully addresses how and why the ICTY erred. It argues that because the different courts did not address the same issue, different standards are appropriate. Furthermore, Part IV argues that the ICTY's repudiation of the ICJ needlessly complicated an otherwise clear-cut issue. In addition, this Article evaluates whether the ICTY's test is a good test for determining when a conflict becomes international for the purpose of war crimes prosecutions. It then provides an alternate standard and, with the use of hypothetical scenarios drawn from the Ituri conflict in the Democratic Republic of Congo (DRC), shows why a standard specifically developed for determining when a conflict has become international for the purpose of war crimes prosecutions is superior to the general standard developed by the ICTY.

II. THE INVESTIGATION OF THE ITURI CONFLICT BY THE INTERNATIONAL CRIMINAL COURT

According to a court press release, the International Criminal Court (ICC) has been investigating "crimes allegedly committed on the territory" of the DRC since July 1, 2002, the date the Rome Statute came into force.[9] The ICC Prosecutor's investigation focused initially on "crimes committed in the Ituri region," but the investigation's focus has apparently expanded to other areas of the DRC.[10]

The conflict in the Ituri region, much like the conflict in the rest of the DRC is immensely complicated and confusing.[11] The Ituri conflict

9. Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), *available at* http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html (last visited September 11, 2005) (hereinafter ICC Press Release).

10. *See id.*

11. Human Rights Watch, Background to the Hema-Lendu Conflict in Uganda-Controlled

primarily relates to an inter-ethnic conflict between the Lendu and the Hema.[12] Various other armed groups, though, fought in the region during the second civil war of the DRC.[13] In particular, the Ugandan military and various militia groups at times backed by Uganda, and at times fighting against Uganda have been involved in this conflict.[14]

According to Human Rights Watch, in the late 1990's the Ugandan military trained members of both the Lendu and Hema tribes.[15] Both the Ugandan military and a militia group formed by these trainees, the Congolese Rally for Democracy-Liberation Movement (RCD-ML)[16] had nominal control over the DRC province of Orientale,[17] of which the Ituri district is a part.[18] In the first part of this decade, reports surfaced that the Ugandan military officers responsible for training recruits of the RCD-ML started favoring Hema trainees.[19] This reported favoritism led to the Lendu recruits leaving the RCD-ML and forming their own rival militias.[20]

Rwanda also reportedly trained and supported a rival rebel group, the Congolese Rally for Democracy-Goma (RCD-GOMA) in a bid to increase its influence in the region.[21] Evidence exists that the Rwandan military, at the very least, provided aid and training (including ammunition), and that it possibly had extensive direction and control over the RCD-GOMA fighters in the area, including, coordinated missions between RCD-GOMA

Congo (2001), *available at* http://www.hrw.org/backgrounder/africa/hemabckg.htm (last visited September 11, 2005) (hereinafter Hema-Lendu Conflict Background).

12. *Id.*

13. Human Rights Watch, Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo, Vol. 15, No. 11, at 5-18 (July 2003), *available at* http://hrw.org/reports/2003/ituri0703/DRC0703.pdf [hereinafter Ituri Report].

14. *See* Hema-Lendu Conflict Background, *supra* note 11.

15. *Id.*

16. Human Rights Watch describes RCD-ML as follows:

> Also known as RCD-Kisangani, the RCD-ML was launched in September 1999 in Kampala when Wamba dia Wamba split from the RCD-Goma. Backed at the start by Uganda, the RCD-ML has been fractured by leadership struggles and in-fighting. The current leader, Mbusa Nyamwisi took power after ousting Wamba dia Wamba. The RCD-ML's military wing is the Congolese Popular Army (APC). The RCD-ML entered into the Sun City agreement of April 2002 and the APC are now being trained and armed by Kinshasa.

Ituri Report, *supra* note 13, at 14.

17. *See id.* at ii.

18. *See id.* at iii.

19. *See* Hema-Lendu Conflict Background, *supra* note 11.

20. *See id.*

21. Ituri Report, *supra* note 13, at 10-11.

fighters and the Rwandan military.[22] The RCD-GOMA reportedly has links with the Union of Congolese Patriots (UPC),[23] a local Hema dominated militia that, for a time, controlled some of the major areas of Ituri, including the city of Bunia.[24] Members of the UPC, in addition to most other parties to this conflict, have been implicated in massive human rights abuses, including mass-murder, genocide, mass rape and other sexual violence, torture, and forced labor.[25]

Though the ICC's mandate is not limited to the conflict in Ituri,[26] the clear involvement of foreign states in this area of the DRC makes it almost inevitable that the ICC will be forced to determine at what point, if any, the conflict in Ituri was international. Because the ICC is not constrained by any other court's decision on determining when a conflict becomes international, it has the opportunity to break new ground in this area. In determining the appropriate standard, however, it will undoubtedly look to what other courts have done in the past. A historical understanding of how different courts have handled the internationalization of conflicts is, therefore, necessary.

III. DEVELOPING STANDARDS FOR THE INTERNATIONALIZATION OF CONFLICTS

A. Nicaragua v. United States of America

On June 27, 1986, the ICJ released its merits opinion in the landmark case of *Military and Paramilitary Activities in and against Nicaragua*

---

22. *See id.*
23. *See id.* at 21, graphic entitled Web of Alliances in Ituri.
24. Human Rights Watch describes the UPC as follows:

> Purportedly launched to promote reconciliation, the UPC quickly became a predominately Gegere-led political party intent on promoting the interests of the Hema and related Gegere. It came to power in Bunia in August 2002 with the help of the Ugandans and used Hema militia as part of its armed forces. It turned to Rwanda for support and formed an alliance with the Rwandan-backed RCD-Goma after being excluded by the RCD-ML and the MLC from the Mambasa ceasefire talks in December 2002. Having turned from Uganda politically, the UPC was ousted from Bunia by the Ugandan army in March 2003 but fought its way back into town in May.

Id. at 15.

25. *See generally id.*
26. *See* ICC Press Release, *supra* note 9.

(*Nicaragua v. United States of America*).[27] In that case, the Sandinista government of Nicaragua sought to hold the United States responsible for the acts of the rebel Contras.[28] The ICJ first rejected the U.S. attempts to avoid its jurisdiction and evaluated the merits of the case.[29] The ICJ, though, refused to attribute the actions of the Contras to the United States because, in the ICJ's eyes, the United States lacked the necessary "effective control" over the Contras.[30] This "effective control" standard was among the first articulations of a test to determine when actions of non-state actors could be attributed to a state.[31]

1. Background on the Case

The U.S. government consistently opposed the Sandinista government of Nicaragua due to its leftist policies and its close relations with the Soviet Union and Cuba.[32] The United States used many different methods in an attempt to undermine the regime, including cutting off aid, leading a trade embargo, and supporting counter-revolutionary forces, including the Contras.[33] The United States also used Unilaterally Controlled Latino Assets or UCLAs to engage in covert actions, including mining Nicaragua's main export harbor.[34] In 1984, Nicaragua brought suit against the United States in an attempt to hold it responsible for violations of international law due to its mining of the harbor as well as its support of the Contras.[35]

---

27. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14 (June 27), *available at* http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19860627.pdf (last visited Mar. 25, 2007) [hereinafter Nicaragua]. For a good general discussion and background on the Nicaragua case, see also THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 7-9 (1987).

28. *See Nicaragua*, 1986 I.C.J. Rep. ¶ 15.

29. Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Jurisdiction, 1984 I.C.J. Rep. 392 ¶ 11 (Nov. 26, 1984), *available at* http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19841126.pdf (last visited Mar. 25, 2007).

30. *See Nicaragua*, ¶ 110-116.

31. *See id.*

32. *See* InfoPlease Encyclopedia, Article on Nicaraguan History, *available at* http://www.infoplease.com/ce6/world/A0859996.html (last visited Sept. 22, 2005) [hereinafter Nicaragua History]. *See also Nicaragua*, 1986 I.C.J. Rep. ¶ 15,at 18-19.

33. *See* Nicaragua History, *supra* note 32. *See also Nicaragua*, 1986 I.C.J. Rep. ¶ 15, at 18-19.

34. *See* Nicaragua History, *supra* note 32. *See also Nicaragua*, 1986 I.C.J. Rep. ¶ 81, at 48.

35. *See Nicaragua*, 1986 I.C.J. Rep. ¶ 15, at 18-19.

2. Background on the Relevant Allegations

The Nicaraguan government argued that the U.S. intervention in Nicaragua through its use of UCLAs and its support of the Contras constituted unlawful intervention in its affairs.[36] The Nicaraguan government also argued that both the Contras and the UCLAs were either direct agents or de facto agents of the U.S. government, making the United States itself responsible for the acts of those groups.[37] Nicaragua asserted that because U.S. agents violated the Geneva Conventions, and because the United States' involvement made this conflict an armed conflict between two states, the Nicaraguan government deserved monetary damages from the United States.[38] Since the United States rejected the ICJ's holding on jurisdiction, the United States did not argue the merits of the case.[39]

3. Relevant Law on State Responsibility

As far as the UCLAs were concerned, the ICJ had little trouble determining that the United States was responsible for their actions.[40] The ICJ determined that they were agents of the United States acting on its orders in such acts as the mining of the harbor.[41] As a result, the ICJ determined that the United States was liable to Nicaragua for the UCLAs' illegal acts and that the U.S. actions constituted unlawful intervention in Nicaragua's affairs.[42]

The ICJ came to a striking conclusion with regard to the question of whether the United States was responsible for the acts of the Contras.[43] It held that U.S.:

---

36. *See id.*

37. *See id.* ¶¶ 110-116, at 62-65.

38. *See id.* ¶ 15, at 18-19.

39. *See id.* ¶ 10, at 17 ("The United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims.") (quoting the United States representative).

40. *See Nicaragua*, 1986 I.C.J. Rep. ¶ 86, at 50.

41. *See id.*

42. *See id.* at 146-50.

43. *See id.* ¶ 110, at 62.

> 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 itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.[44]

According to the ICJ in *Nicaragua*, the actions of the Contras were, therefore, not the responsibility of the United States.[45] As a result, the United States was not liable for damages to the Nicaraguan government for the violations of the Contras.[46]

Interestingly, the ICJ was careful to draw a distinction between denying the Nicaraguan government's request to hold the United States responsible for the Contras' actions and the question of whether the Contras themselves engaged in the specified actions:

> What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them.[47]

The question of the Contras' liability for their actions and the question of whether the United States was liable for the conduct of the Contras were, in the eyes of the ICJ, distinct and separate questions that likely would require different analyses.[48]

---

44. *See id.* ¶ 115, at 54.
45. *See Nicaragua*, 1986 I.C.J. Rep. ¶ 116, at 65.
46. *See id.*
47. *Id.*
48. *See id.* ¶ 116, at 65.

B. The Prosecutor v. Dusko Tadic

One and a half decades after *Nicaragua*, the Appeals Chamber of the ICTY released its judgment in the case of *Prosecutor v. Dusko Tadic*.[49] In that case, the Appeals Chamber rejected the *Nicaragua* standard of "effective control," finding that the standard was not logical given the goals of the law on state responsibility.[50] The Appeals Chamber also found that the effective control standard was at variance with judicial and state practice.[51] Consequently, the Appeals Chamber adopted a lower standard of state responsibility, the "overall control" standard, and used this standard to uphold Tadic's conviction for crimes against humanity, as well as other serious crimes.[52] Subsequent decisions in the ICTY have solidified and further developed this new and less stringent test for state responsibility.

1. History of the ICTY

The Security Council created the International Criminal Tribunal for the former Yugoslavia to address ethnic cleansing and other atrocities committed during the war in the Balkans. The goal of the Tribunal, like the Nuremberg Tribunal, was to punish individual wrongdoers guilty of violations of international humanitarian law as established in the Geneva Conventions and Customary International Law, as well as those guilty of committing crimes against humanity.[53] The ICTY's mandate never extended so far as to determine whether a state was responsible for the actions of any of the individuals charged with war crimes.

---

49. Prosecutor v. Tadic, No. IT-94-1-A (July 15, 1999) [hereinafter Tadic Appeal]. The full text of the judgment is available at the ICTY's Internet Home Page, *available at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf (last visited Sept. 22, 2005). For a good general discussion of the pertinent issues the Appeals Chamber raises, *see* Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L L. & POL. 167, 195-98 (1998).

50. *See* Tadic Appeal, *supra* note 49, ¶ 131, at 47-59.

51. *See id.* at 47-56.

52. *See id.* ¶ 156, at 69.

53. *See* Prosecutor v. Tadic, No. IT 94-1-T, Opinion and Judgment, ¶ 3-4 (July 14, 1997) [hereinafter Tadic Trial], *available at* http://www.un.org/icty/tadic/trialc2/judgement/tad-sj970714e.pdf) (last visited Sept. 22, 2005). For a good summary of the Yugoslav conflict, background on the Tribunal, and the *Tadic* judgment, *see* Kristijan Zic, *The International Criminal Tribunal for the Former Yugoslovia: Applying International Law to War Criminals*, 16 B.U. INT'L L.J. 507 (1998).

2. Background on the *Tadic* Case

Dusko Tadic was a former café owner who became embroiled in Serb Nationalism.[54] During the war in the Balkans,[55] he was accused of beating and murdering several prisoners,[56] and reportedly ran one of the prison camps in which atrocities took place.[57] Because of his participation in these and other crimes, the ICTY indicted, tried, and convicted him for various offenses including breaches of the Geneva Conventions and crimes against humanity.[58]

3. Background on the Relevant Charges

The charges that instigated both this discussion and the Appeals Chamber's eventual break with the International Court of Justice stem from Article Two of the ICTY's Statute.[59] This section of the statute authorizes the Tribunal "to prosecute persons committing or ordering

---

54. *See* Tadic Trial, *supra* note 53, ¶ 3-4.

55. *See generally id.* *See also* Indictment of Dusko Tadic, Case No. IT-94-1-I (Dec. 14, 1995) [hereinafter Tadic Indictment], *available at* http://www.un.org/icty/indictment/english/tad-2ai951214e.htm (last visited Sept. 22, 2005).

56. *See generally* Tadic Trial, *supra* note 53; Tadic Indictment, *supra* note 55.

57. *See generally* Tadic Trial, *supra* note 53; Tadic Indictment, *supra* note 55.

58. *See* Tadic Trial, *supra* note 53, ¶ 2, at 1.

59. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by Resolution 827) (as amended 13 May 1998 by Resolution 1166) (as amended 30 November 2000 by Resolution 1329) (as amended 17 May 2002 by Resolution 1411) (as amended 14 August 2002 by Resolution 1431) (as amended 19 May 2003 by Resolution 1481), specifically Article Two, the full text of which reads:

> Article Two
> Grave breaches of the Geneva Conventions of 1949
> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
> (a) willful [sic] killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully [sic] causing great suffering or serious injury to body or health;
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> (f) wilfully [sic] depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

Id., *available at* http://www.un.org/icty/basic/statut/stat11-2003.htm (last visited Sept. 19, 2005).

to be committed grave breaches of the Geneva Conventions of 12 August 1949."[60] Dusko Tadic was charged with several violations of the Geneva Conventions.[61] The Trial Chamber characterized the legal standard for conviction as requiring a three-pronged test.[62] The first and second prongs were that the victims of the crimes had to be "in the hands of" (first prong) a "Party to the conflict or [an] Occupying Power" (second prong).[63] The third prong was that the civilian victims not be nationals of that Party or Occupying Power.[64] Because only the second prong of the test is relevant to this Article, this Article will not describe the Trial Chamber's discussion of any of the other prongs in any detail.

The "Party to the conflict or Occupying Power" prong of the test asked a simple question: could the party or parties committing the crimes be tied to an occupying power or state different from the state of the victims?[65] If the link between the state and those perpetrating the crimes was not present, then Article Two would not be available to the Prosecution, as Article Two relied on the Fourth Geneva Convention,[66] the relevant portion of which only applied to conflicts between states.[67]

4. Relevant Holdings

The discussion on whether Tadic's paramilitary organization was a party to the conflict occupied many pages of both the Trial Chamber's and the Appeals Chamber's opinions.[68] The Trial Chamber's majority opinion

---

60. *Id.*

61. *See* Tadic Trial, *supra* note 53, ¶ 45-51, at 16-18 (charging Tadic with "grave breaches.").

62. *See id.* ¶ 578, at 200.

63. *Id.*

64. *Id.*

65. *Id.* ¶¶ 586, 607, at 204-17.

66. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950, *available at* http://www.unhchr.ch/html/menu3/b/92.htm (last visited Sept. 22, 2005). The preamble to the fourth Geneva Convention specifically lays out the requirement that two or more parties be engaged in a state of war for the relevant portions of the convention to apply:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Id.

67. *Id.*

68. Tadic Trial, *supra* note 53, ¶¶ 586, 607, at 204-17; Prosecutor v. Tadic, No IT-94-1-A (July 15, 1999) (Opinion and Judgment) [hereinafter Tadic Appeal]. The full text of the judgment

determined that the *Nicaragua* effective control test was the appropriate standard and that the Prosecution had not proved a sufficient link to convict Tadic of charges under Article Two.[69] Presiding Judge McDonald dissented and argued that the majority incorrectly interpreted *Nicaragua* and that the Federal Republic of Yugoslavia (FRY) had effective control over the Bosnian Serb Army.[70] In a separate part of her opinion, Judge McDonald argued that the effective control standard was inappropriate in the *Tadic* case and instead advocated for a "dependency and control" test.[71]

a. The Trial Chamber's Majority Holding

The majority of the Trial Chamber believed that the appropriate standard for many of the Article Two charges hinged on whether the Bosnian Serb Army's actions could be imputed to the FRY.[72] To impute those actions to the FRY, the majority believed that the Bosnian Serb Army would have to meet at all times the effective control test developed by the ICJ in *Nicaragua*.[73] The majority did not believe that after the FRY pulled out of Yugoslavia, sufficient direction and control of the Bosnian Serb Army existed to find effective control on the part of the FRY.[74] As a result, the majority dismissed all of the Article Two charges against Tadic that took place after Yugoslavia's exit from the conflict.[75]

b. Judge McDonald's Dissent

Judge McDonald, the presiding judge, disagreed with both the majority's conclusion as well as its legal standard.[76] She believed that if the *Nicaragua* effective control standard was the appropriate one, that the Prosecution had proven sufficient control on the part of the FRY to find

---

is available at the ICTY's Internet Home Page, *available at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf (last visited Sept. 22, 2005).

69. Tadic Trial, *supra* note 53, ¶ 607, at 217.

70. Prosecutor v. Tadic, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article Two of the Statute, Case IT-94-1-T 292 (May 7, 1997) [hereinafter Tadic Dissent], *available at* http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf) (last visited Sept. 22, 2005) (giving full text of opinion). For a good summary and discussion of Judge McDonald's dissent, *see* Deborah L. Ungar, *The Tadic War Crimes Trial: The First Criminal Conviction Since Nuremberg Exposes the Need for a Permanent War Crimes Tribunal*, 20 WHITTIER L. REV. 677, 708-713 (1999).

71. *See* Tadic Dissent, *supra* note 70, at 297-99.

72. Tadic Trial, *supra* note 53, ¶¶ 586, 607, at 204-17.

73. *Id.*

74. *Id.*

75. *Id.* at 285.

76. *See* Tadic Dissent, *supra* note 70, at 297-99.

that the actions of the Bosnian Serb Army were attributable to the FRY at all relevant times for the purposes of the trial.[77]

Judge McDonald also argued that a lesser standard than effective control was the appropriate standard.[78] She argued, first, that *Tadic* and *Nicaragua* dealt with very different issues,[79] one of imputability for monetary damages in *Nicaragua*, and one of individual criminal responsibility in *Tadic*:

> A determination of imputability was appropriate in Nicaragua, where the moving party sought to determine fault and liability of a State for the acts of the contras as against the United States, but is not suitable here, where the issue of responsibility is solely for the purpose of identifying the occupying power. This is recognized even by the majority, which notes that Nicaragua "was concerned ultimately with the responsibility of a State for the breach, inter alia, of rules of international humanitarian law, while the instant case is concerned ultimately with the responsibility of an individual for the breach of such rules". The primary issue in Nicaragua was whether the acts of the contras could be imputed so as to impose legal responsibility for monetary damages on the United States.[80]

Instead, Judge McDonald believed that the commentary to Article Twenty-Nine of the Fourth Geneva Convention provided a more helpful standard for gauging whether enough of a connection existed between the FRY and the Bosnian Serb Army.[81] Under this commentary, the Trial Chamber would have disregarded the formal military structure and instead concentrated on whether the local agents were carrying out the will of the authority in question.[82] Judge McDonald argued that this standard provided sufficient basis to find an agency relationship necessary to support charges under Article Two.[83]

---

77. *See id. See also* Dorothea Beane, *After the Dusko Tadic War Crimes Trial: A Commentary on the Applicability of the Grave Breaches Provisions of the 1949 Geneva Conventions*, 27 STETSON L. REV. 589, 598-99 (1997).

78. Tadic Dissent, *supra* note 70, at 297-99.

79. *Id.*; *see also* Beane, *supra* note 77, at 599.

80. Tadic Dissent, *supra* note 70, at 297.

81. *Id.* at 298-99.

82. *Id.*

83. *Id.*

c. The Appeals Chamber's Holding

The Appeals Chamber did not agree with the Trial Chamber's formulation of the standard for attributing the actions of the Bosnian Serb Army to the FRY.[84] First, the Appeals Chamber rejected the Prosecution's contention that the differences in *Tadic* and *Nicaragua* implied different standards.[85] It rejected the Prosecution's argument, holding: "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary question*: that of *the conditions on which under international law an individual may be held to act as a de facto organ of a State.*"[86]

The Appeals Chamber also spent a good deal of time explaining why the *Nicaragua* standard was both contrary to the logic of the law of state responsibility as well as against judicial and state practice.[87] In its arguments on the logic of the law of state responsibility, the Appeals Chamber pointed out that state responsibility:

> 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.[88]

The Appeals Chamber then cited several examples from the Mexico-U.S. Claims Tribunal,[89] the Iran-U.S. claims Tribunal,[90] and the European Court

84. Tadic Appeal, *supra* note 68, ¶ 115, at 47.

85. *Id.* ¶ 88-89, at 35-36.

86. *Id.* ¶ 104, at 41 (italics in original).

87. *Id.* ¶¶ 116-145, at 47-62.

88. *Id.* ¶ 123, at 51.

89. Tadic Appeal, *supra* note 68, ¶ 125, at 51 (citing United States v. Mexico (Stephens Case), Reports of International Arbitral Awards, vol. IV, at 266-67). The Appeals Chamber discusses the case as follows: "the Mexico-United States General Claims Commission attributed to Mexico acts committed during a civil war by a member of the Mexican 'irregular auxiliary' of the army, which among other things lacked both uniforms and insignia. In this case the Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of the United States national by that guard." In this case, however, the member was part of a branch of the army (even if it was irregular), therefore a strong argument could be made that these irregular forces fall more closely in line with what was contemplated by Article 5 of the ILC's Articles on State Responsibility which deals with the "conduct of persons or entities exercising elements of governmental authority" given that the army, however it is organized, is a governmental unit.

90. Tadic Appeal, *supra* note 68, ¶¶ 126-127, at 52-53 (citing Kenneth P. Yeager v. Islamic

of Human Rights,[91] in support of its position that the ICJ set too high a standard of attribution in *Nicaragua*.

Instead, the Appeals Chamber proposed a standard of overall control.[92] This standard, the Appeals Chamber argued, allowed for the flexibility necessary in dealing with violations of the type dealt with by the ICTY.[93] The standard also allowed the ICTY to find a sufficient link between Tadic's army and the FRY to find him guilty of all charges under Article Two.[94]

Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, at 92). *Yeager* involved a band of revolutionary guards that detained American citizens in a hotel, escorted them to an airport and then robbed them. The Appeals Chamber argued that the Tribunal attributed the actions of these guards to the government of Iran because they were acting as de facto agents despite the fact that the government of Iran had not ordered them to conduct the raid. The attribution could just as easily come from the ILC's Articles on State Responsibility Article 5, Article 7 (Excess of authority or contravention of instructions), Article 9 (Conduct carried out in the absence or default of the official authorities), Article 10 (Conduct of an insurrectional or other movement), or Article 11 (Conduct acknowledged and adopted by a State as its own) rather than Article 8. Indeed, it seems most likely that the conduct in question fell under one of those other categories given the unique situation in Iran and that the Revolutionary Guard became part of the next government.

91. Tadic Appeal, *supra* note 68, ¶ 128, at 54 (citing Loizidou v. Turkey (Merits), Eur. Court of H.R., Judgment of 18 December 1996 (40/1993/435/514)). The court, in this case, had to determine whether the continued denial of property rights to the applicant by the governing authority in the Turkish part of Cyprus was Turkey's conduct. Turkey claimed that it was not, but the ECHR found otherwise and held Turkey liable for the loss of the property. The Appeals Chamber argued that this attribution was similar to the others:

> In reaching the conclusion that the restrictions on the right to property complained of by the applicant were attributable to Turkey, the Court did not find it necessary to ascertain whether the Turkish authorities had exercised 'detailed' control over the specific "policies and actions" of the authorities of the "TRNC." The Court was satisfied by the showing that the local authorities were under the "effective overall control" of Turkey.

Id. While this analysis may, at first blush appear convincing, the level of control Turkey commands over the northern part of Cyprus is likely enough to reach the standard elaborated by the ICJ in Nicaragua. *See* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, A PROBLEM ORIENTED APPROACH, 31-65 (2002). Plus, the fact that the ECHR used the phrase "effective . . . control" provides further evidence that the standards used in Nicaragua and the standards used by that court were not substantially different.

92. Tadic Appeal, *supra* note 68, ¶ 131, at 56.

93. *Id.*

94. *Id.* ¶ 171, at 75.

d. Separate Opinion of Judge Shahabuddeen

In a separate opinion concurring in the judgment, Judge Shahabuddeen questioned whether the Appeals Chamber should directly challenge the ICJ's effective control standard.[95] In his view, the goal of prosecuting international war crimes and the goal of holding a state accountable for the actions of others required different tests.[96] Judge Shahabuddeen argued that *Nicaragua* is consistent with a finding of internationalized conflict because the ICJ determined in *Nicaragua* that the United States illegally used force or the threat of force against Nicaragua.[97] Judge Shahabuddeen, concluded that "[o]n the basis of *Nicaragua*, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS."[98]

C. *The ICTY's Development of the "Overall Control" Standard*

Though the ICTY first developed the overall control test in *Tadic*, it has used the standard in many other cases. As the Appeals and Trial Chambers have used the new test, it has developed several criteria that distinguish it from the ICJ's "effective control" test.

1. *Aleksovski*

The *Aleksovski* case was the first time the Appeals Chamber addressed the question of whether its previous decisions were binding.[99] The defense in this case raised the question of whether the *Tadic* overall control test was the appropriate test for determining when a conflict became international in character.[100] The Prosecution submitted that the overall control test was the appropriate test.[101] After determining that the principle of stare decisis applied, in most instances, to both the Appeals Chamber[102]

---

95. *See id.* (Separate Opinion of Judge Shahabuddeen) at 154-56.

96. *See id.* at 156.

97. *See* Tadic Appeal, *supra* note 68, at 152-54.

98. *See id.* at 154.

99. *See* Prosecutor v. Zlatko Aleksovski, Opinion and Judgment, Case No. IT-95-14/1-A (Mar. 24, 2000), *available at* http://www.un.org/icty/aleksovski/appeal/judgement/ale-asj000324e.pdf (last visited Sept. 22, 2005).

100. *See id.* at 37, 39-40.

101. *See id.* at 36-37, 39.

102. *Id.* ¶ 107, at 46.

and the Trial Chambers,[103] the Appeals Chamber reaffirmed the overall control test.[104] The Prosecution, however, made an interesting argument discussed by the Appeals Chamber. According to the Appeals Chamber, the Prosecution argued that: "had [the overall control test] been applied, the Trial Chamber would have concluded that the acts of the HVO, *were attributable to Croatia*."[105]

The Appeals Chamber, after rejecting defense arguments, reiterated its understanding of what the ICTY was attempting to do in *Tadic*:

> The *Tadic* Judgment was concerned, *inter alia,* with the legal criteria for determining the circumstances in which the acts of a military group could be attributed to a State, such that the group could be treated as a *de facto* organ of that State, thereby internationalising a prima facie internal armed conflict in which it is involved.[106]

In essence, the Appeals Chamber adopted its earlier understanding of the need to attribute the actions of the individual to a state in order to internationalize the conflict.[107]

The Appeals Chambers then proceeded to analyze the Trial Chambers' use of the standard.[108] It determined that the Trial Chamber improperly focused on the entity giving instructions or orders.[109] The Appeals Chamber then held that the overall control test does not contain any requirement that orders pass from a state to an individual.[110]

2. *Celebeci*

In the *Celebeci* case,[111] the Appeals Chamber first affirmed its earlier rejection of the *Nicaragua* "effective control" standard in *Tadic*.[112] Then, applying *Alekovski*, the Appeals Chamber determined that there were no

---

103. *See id.* at 47-48.

104. *See Zlatko*, Case No. IT-95-14/1-A,¶ 134, at 54.

105. *See id.* ¶ 120, at 49 (emphasis added). The HVO is an element of the Croatian Defense Council, which is the Croatian Army.

106. *See id.* ¶ 129, at 54.

107. *See id.* at 55-57.

108. *See id.*

109. *See Zlatko*, Case No. IT-95-14/1-A, at 55-57.

110. *See id.*

111. *See* Prosecutor v. Delalic, Mucic, Delic, and Landzo (Celebici Case), Case No. IT-96-21-A (Feb. 20, 2001), *available at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf (last visited Sept. 22, 2005).

112. *See id.* at 6-8.

reasons that would cause it to depart from the *Tadic* holding in this case.[113] Applying the overall control standard, the Appeals Chamber determined that the Trial Chamber used the overall control test rather than the effective control test because the Trial Chamber did not require orders or instructions from a state in order to determine that the conflict was international in character.[114] Consequently, the Appeals Chamber rejected the appellant's grounds for appeal on these points.[115]

3. *Kordic and Cekez*

The *Kordic and Cekez* case was one of the most recent cases in which the Appeals Chamber addressed the overall control test in any detail.[116] In this case, the Appeals Chamber first upheld its earlier rulings with respect to the application of the overall control test rather than the effective control test.[117] The Appeals Chamber also reiterated its disagreement with the ICJ on the level of control necessary to impute the actions of individuals to states, despite defense arguments that the Appeals Chamber confused individual and state responsibility.[118]

The major development in this case, however, comes from the Appeals Chamber's discussion of the overall control standard. After affirming the Trial Chamber's finding that an armed conflict existed at the relevant time,[119] the Appeals Chamber affirmed the Trial Chamber's finding that "a reasonable trier of fact could have found beyond [a] reasonable doubt" that the conflict was international in character.[120] In determining whether the conflict had been internationalized, the Chamber focused on two questions. First was their evidence relating to whether a state provided "financial and training assistance, military equipment and operational support," and second, did that state "[p]articipat[e] in the organisation, coordination or planning of military operations?"[121]

The Appeals Chamber agreed with the Trial Chamber that evidence related to both of these prongs was present in the record, and consequently,

113. *See id.* at 26.
114. *See id.* at 10-16.
115. *See id.* at 16.
116. *See* Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A (Dec. 17, 2004), *available at* http://www.un.org/icty/kordic/appeal/judgement/cer-aj041217e.pdf (last visited Sept. 22, 2005).
117. *See id.* at 82-83.
118. *See id.* ¶ 300, at 81.
119. *See id.* at 88-90.
120. *Id.* ¶ 369, at 96.
121. *Kordic and Cerkez*, Case No. IT-95-14/2-A, ¶ 361, at 94.

it affirmed the Trial Chamber.[122] The above two-prong test represents the first time that the Appeals Chamber crystallized its overall control test. This case provided a clear, concise formula for what is required to establish overall control. Prior opinions only indicated what was not needed to establish overall control (i.e., that direct orders from a state to the accused were not necessary to establish overall control).

4. Notable Trial Chamber Uses of Overall Control

Other than the above cases, several Trial Chambers have addressed the question of whether the Prosecution established that a state had overall control over the accused.[123] In the case of *Naletilic and Martinovic*,[124] the

---

122. *See id.* at 94-96.

123. The Trial Chamber in *Prosecutor v. Delalic and Delic* (*Celebici*), Case No. IT-96-21-T (Nov. 16, 1998), *available at* http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf (last visited Sept. 22, 2005). This case provided a particularly interesting discussion on the rationale behind using the overall control standard rather than the ICJ's effective control standard:

> 230. A lengthy discussion of the *Nicaragua Case* is also not merited in the present context. 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 responsibility of the United States for the actions of the contras in Nicaragua.
>
> 231. With this in mind, we can consider a very important point of distinction between the *Nicaragua Case* and the one here at issue. In that case, the ICJ was charged with determining whether there had been a use of force in violation of customary international law and article 2(4) of the United Nations Charter by the United States against Nicaragua, as well as an unlawful intervention in the internal affairs of Nicaragua on the part of the United States. This issue rests on the predominant, traditional perception of States as bounded entities possessed of sovereignty which cannot be breached or interfered with. More specifically, what was in question was the incursion of the forces of one such distinct, bounded entity into another and the operation of agents of that entity within the boundaries of the other. In contrast, the situation with which we are here concerned, is characterised by the breakdown of previous State boundaries and the creation of new ones. Consequently, the question which arises is one of continuity of control of particular forces. The date which is consistently raised as the turning point in this matter is that of 19 May 1992, when the JNA apparently withdrew from Bosnia and Herzegovina.

Trial Chamber used the overall control test as a second basis to find that the conflict in question was international in character.[125] The Trial Chamber's formulation of the test for whether overall control existed did not differ in any significant respect from the Appeals Chamber's discussion of the standard.[126]

In *Simic et al.*[127] the Trial Chamber determined that an indictment was defective because it did not specifically identify which state had overall control over the accused.[128] Additionally, in the *Brjdjanin and Zupljanin* case,[129] the Trial Chamber determined that the Prosecution presented sufficient evidence to satisfy the overall control test.[130] Other decisions by the Trial and Appeals Chambers address various minor aspects of the overall control test. Those mentions are too minor and too numerous to discuss exhaustively.[131]

D. *The International Law Commission's Articles on State Responsibility*

1. History of the Draft Articles on State Responsibility

The International Law Commission (ILC) has been involved in a laborious process of codifying international law on the subject of state

---

Id. at 86-87. *See also* AKSAR, *supra* note 8, at 131 (noting that this discussion by the Trial Chamber is consistent with Judge McDonald's dissent in the Trial Chamber in *Tadic.*).

124. *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T (Mar. 31, 2003), *available at* http://www.un.org/icty/naletilic/trialc/judgement/nal-tj030331-e.pdf.

125. *Id.* at 61, 67. Interestingly, the Trial Chamber uses the two test formulation later adopted by the Appeals Chamber in *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A (Dec. 17, 2004), at 94, *available at* http://www.un.org/icty/kordic/appeal/judgement/cer-aj041217e.pdf.

126. *See id.* at 67-69.

127. Prosecutor v. Simic, IT-95-9-T (Oct. 17, 2003), *available at* http://www.un.org/icty/simic/trialc3/judgement/sim-tj031017e.pdf.

128. *See id.* at 37-38.

129. Prosecutor v. Brdanin, Case No. IT-99-36-T (Sept. 1, 2004), *available at* http://www.un.org/icty/brdjanin/trialc/judgement/brd-tj040901e.pdf.

130. *See id.* at 62-66.

131. *See, e.g.*, Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Decision pursuant to Rule 72(E) as to Validity of Appeal, ¶ 11 (Feb. 21, 2003), *available at* http://www.un.org/icty/hadzihas/appeal/decision-e/030221.htm) (last visited Jan. 16, 2006). *See, e.g.*, Prosecutor v. Radislav Brdanin and Momir Talic, Case No. IT-99-36, Decision on Objections by Momir Tadic to the Form of the Amended Indictment, ¶¶ 52, 55(iv)(b) (Feb. 20, 2001), *available at* http://www.un.org/icty/brdjanin/trialc/decision-e/10220FI214869.htm) (last visited Jan. 16, 2006); Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Chamber Judgment, ¶ 101-01 (Mar. 3, 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf) (last visited Jan. 16, 2006).

responsibility for the past several decades.[132] The ILC's study of state responsibility began in 1955 when a special rapporteur was asked to study the question and provide reports to the ILC.[133] In 1962, the ILC established a sub-committee to prepare a preliminary report based on the research of the special rapporteur.[134] In 1975, moving at a lightning pace, the subcommittee decided that the Draft Articles on State Responsibility needed to address three separate aspects of responsibility.[135] The first draft of part one was completed and given to the ILC in 1980.[136] In 1996, the special rapporteur completed work on parts two and three and provided those parts to the ILC.[137]

Though the drafting of the articles has taken quite a bit of time, the articles themselves have evolved considerably in certain areas.[138] The ILC recommended the articles to the U.N. General Assembly.[139] The General Assembly took notice of those articles and accepted them in Resolution 56/83 on December 12, 2001, and provided them to member governments for a comment process.[140] Recently, the ILC engaged in a process of reading and reviewing the draft articles in an attempt to incorporate the comments made by various member governments.[141]

2. Article Eight

Article Eight of the draft articles attempts to address the question of when states are responsible for the acts of private individuals.[142] Thus, Article Eight attempts to codify the existing law on when private actors should be considered de facto state agents, thereby answering the question

---

132. International Law Commission, Report on the work of its fifty-third session, A/56/10, at 29-32 (Apr. 23-June 1 and July 2-Aug. 10, 2001), *available at* http://untreaty.un.org/ilc/reports/2001/2001report.htm (last visited Mar. 24, 2007) [hereinafter ILC Draft Articles].

133. *Id.* at 29.

134. *Id.*

135. *Id.*

136. *Id.* at 30.

137. ILC Draft Articles, *supra* note 132, at 31-32.

138. Compare first and second drafts, both drafts, available at http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm#Draft%20Articles%202) (last visited Sept. 22, 2005).

139. ILC Draft Articles, *supra* note 132, at 32. The text of the resolution contained the draft articles of the ILC.

140. Resolution 56/83 Adopted by the General Assembly on 12th December 2001 A/RES/56/83, *available at* http://www.law.cam.ac.uk/rcil/ILCSR/A_56_83(e).pdf (last visited Sept. 22, 2005).

141. ILC Draft Articles, *supra* note 132, at 32.

142. *Id.* at 103.

of when the conduct of those private actors is attributable to the state.[143] The latest draft of Article Eight now reads: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[144]

The language of Article Eight itself does not seem to endorse the ICJ's standard of effective control, in that the specific language of the ICJ was not included in the draft article. However, the commentary to the draft article does draw a distinction similar to the one expressed by Judge McDonald in her dissent,[145] embracing the ICJ's understanding of state responsibility as described in *Nicaragua* and rejecting the ICTY's understanding of the concept.[146] The commentary criticizes the ICTY by stating:

> But the legal issues and the factual situation in that case were different from those facing the International Court in *Military and Paramilitary activities*. The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[147]

Though the reasoning behind the distinction is not made explicit in the commentary, the distinction made in the commentary establishes that the special rapporteur did not see the connection between the facts at issue in *Nicaragua* and the facts at issue in *Tadic*.[148]

E. *Scholarly Discussion on the Standards*

Much has been written about the split between the ICJ and the ICTY over the proper standard for attributing actions of private actors to a state. Two views have emerged in the literature concerning the conflict. The majority view argues that the standards advanced by the different courts irreconcilably conflict.[149] For the most part, this majority view also seems

---

143. *Id.* at 103-09 (both the Article and the commentary).

144. *Id.* at 103.

145. *Id.* at 103-09.

146. ILC Draft Articles, *supra* note 132, at 106-07.

147. *Id.* at 106.

148. *Id.* at 105-07.

149. *See* BOOT, *supra* note 5, at 554. *See also* Cullen, *supra* note 3, at 228-29; Stewart, *supra* note 5, at 324-26; KERR, *supra* note 5, at 80-81; Sassòli & Olson, *supra* note 5, at 739; Hayden,

to approve of the ICTY's standard, arguing that the ICJ's standard is too high.[150] In contrast, the minority view argues that the standards are not in conflict,[151] but the minority view does not elaborate on this point in any detail.[152] Many scholars, regardless of whether they adopt the majority or the minority view, recognize that the question of whether a conflict is international in character is important for reasons beyond prosecution of war criminals.[153] Some scholars advocate a flexible standard where conflicts can have both international and non-international characteristics.[154]

1. Majority View

To call this view the majority view is perhaps misleading as most authors who accept that a conflict between *Nicaragua* and *Tadic* exists do not address the question in any elaborate detail, nor do they devote significant analysis to the topic.[155] This fact, however, does not detract from the large number of commentators who assume or embrace the fact that the two different courts in *Tadic* and *Nicaragua* were in conflict when it comes to state responsibility.

---

supra note 5, at 564-68 (arguing that the United States "might regret elements of the appellate decision in *Tadic*" specifically the change in the standard on state responsibility); Jinks, *supra* note 5, at 88-89; Spelliscy, *supra* note 5, at 164-68; Linton, *supra* note 5, at 161-62; MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 239 (4th ed. 2000); Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1, 101-02 (1999).

150. *See* Drumbl, *supra* note 4, at 1050. *See also* Stahn, *supra* note 4, at 47 (arguing that the Tadic standard represents "A viable and reasonable alternative to the "effective control test").

151. Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J INT'L L. 347, 382-85 (1998); Geoffrey R. Watson, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 871, 877-78 (2003) (quoting Meron).

152. Brown, *supra* note 151, at 382-85; Watson, *supra* note 151, at 877-78.

153. *See* AKSAR, *supra* note 8, at 131-33 (noting that the character of a conflict is relevant in terms of the protections civilians receive under the Geneva Conventions, and also noting that domestic courts must address the question when parties bring suits involving these types of conflicts).

154. Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265, 271-72 (1996) (noting that *Nicaragua* provides an example that the same conflict can have both international and internal characteristics).

155. *See* BOOT, *supra* note 5, at 554. *See also* Cullen, *supra* note 3, at 228-29; Stewart, *supra* note 5, at 324-26; KERR, *supra* note 5, at 80-81; Sassòli & Olson, *supra* note 5, at 739; Hayden, *supra* note 5, at 564-68; Jinks, *supra* note 5, at 88-89; Spelliscy, *supra* note 5, at 164-68; Linton, *supra* note 5, at 161-62; DIXON, *supra* note 149, at 239; Carillo-Suarez, *supra* note 149, at 101-02; Drumbl, *supra* note 4, at 1050; Stahn, *supra* note 4, at 47.

a. A Conflict Between *Nicaragua* and *Tadic* Exists

In the majority view, the two standards conflict with each other. The majority view sees the conflict as coming from a variety of sources. Some see the ICTY's criticism of the *Nicaragua* standard as evidence that the standards are irreconcilable.[156] Others simply assume the conflict exists because the ICTY seemed to indicate that one did.[157]

b. The *Tadic* Standard is the Preferred Standard

Though not all in the majority view take a stand on this issue, many seem to indicate that the ICTY standard is more relaxed and more in line with general international legal thought on the matter of state responsibility.[158] Many who see a conflict also argue that great powers like the United States will come to loathe what they see as the erosion of the ICJ's *Nicaragua* standard.[159] Even among those who do not seem to take a stand, those who identify a conflict rarely criticize the standard as too lax.[160] Indeed, some scholars argue that once a conflict becomes international, it should remain so for the duration of the conflict regardless of whether the international parties withdraw,[161] or, at the very least, that the law should be flexible with respect to the characterization of conflicts.[162] One scholar calls for an end to the distinction between international and internal conflicts, arguing that one standard would "better account for the intricacies of internationalized warfare."[163]

---

156. *See* BOOT, *supra* note 5, at 554. S*ee also* Cullen, *supra* note 3, at 228-29; Stewart, *supra* note 5, 324-26; KERR, *supra* note 5, at 80-81; Sassòli & Olson, *supra* note 5, at 739; Hayden, *supra* note 5, at 564-68; Jinks, *supra* note 5, at 88-89; Spelliscy, *supra* note 5, at 164-68; Linton, *supra* note 5, at 161-62; DIXON, *supra* note 149, at 239; Carillo-Suarez, *supra* note 149, at 101-02.

157. *See* Drumbl, *supra* note 4, at 1050. *See also* Stahn, *supra* note 4, at 47.

158. *See* BOOT, *supra* note 5, at 554. *See also* KERR, *supra* note 5, at 80-81; Sassòli & Olson, *supra* note 5, at 739; Jinks, *supra* note 5, at 88-89; Spelliscy, *supra* note 5, at 164-68; DIXON, *supra* note 149, at 239; Drumbl, *supra* note 4, at 1050; Stahn, *supra* note 4, at 47.

159. *See* BOOT, *supra* note 5, at 554. *See also* KERR, *supra* note 5, at 80-81; Hayden, *supra* note 5, at 568.

160. *See* BOOT, *supra* note 5, at 554. *See also* KERR, *supra* note 5, at 80-81; Sassòli & Olson, *supra* note 5, at 739; Hayden, *supra* note 5, at 568; Jinks, *supra* note 5, at 88-89; Spelliscy, *supra* note 5, at 164-68; Linton, *supra* note 5, at 161-62; DIXON, *supra* note 149, at 239; Carillo-Suarez, *supra* note 149, at 101-02; Drumbl, *supra* note 4, at 1050; Stahn, *supra* note 4, at 47.

161. *See* INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, *supra* note 7, at 91-93. *See also* Christine Byron, *Armed Conflicts: International or Non-International?*, 6 J. CONF. & SEC. L. 63, 84-85 (2001).

162. *See* AKSAR, *supra* note 8, at 131-33; Greenwood, *supra* note 154, at 271-72.

163. Stewart, *supra* note 5, at 314.

2. Minority View

In contrast, a minority of scholars argue that a conflict is not inevitable between the ICTY and the ICJ on the question of state responsibility.[164] One scholar bases his belief in the lack of a conflict on Judge McDonald's *Tadic* Trial Chamber dissent.[165] Generally, those scholars who hold the minority view praise her dissent as an appropriate rejection of the Trial Chamber's reliance on *Nicaragua*.[166] One scholar argues that both the ICTY's overall control standard and the ICJ's effective control standard are really manifestations of a "direction and control" standard and that, consequently, those standards do not really conflict.[167]

a. Minority View Generally

Though many scholars heap praise on Judge McDonald's analysis that the *Nicaragua* standard was actually met in *Tadic*,[168] some scholars also mention that she believed that a lesser standard was the correct one.[169] The discussion of this lesser standard is the crux of the minority view as the true minority view holds that the different issues require different standards.

b. Meron and Moir

Two scholars in particular, Judge Theodor Meron and Lindsay Moir, argue that the Appeals Chamber's reasoning was incorrect.[170] Meron argues that Judge McDonald's dissent is correct because: "even a quick perusal of international law literature would establish that imputability is

164. Brown, *supra* note 151, at 382-85; Watson, *supra* note 151, at 877-78.

165. Brown, *supra* note 151, at 382-85.

166. Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236, 237 (1998); M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law, Overlaps, Gaps, and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 226-27 (1998).

167. Van Den Hole, *supra* note 8, at 279-85.

168. Brown, *supra* note 151, at 382-85; Meron, *supra* note 166, at 237.

169. Meron, *supra* note 166, at 237.

170. *Id.* at 236 (Judge Meron was a professor of law at New York University when he wrote the material in question. He has since joined the ICTY and the ICTR as a judge.); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 49-50 (2002).

not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict."[171] Thus, Meron argues that the issues in *Tadic* and *Nicaragua* are different enough to make it an error for the Appeals Chamber to criticize the ICJ's *Nicaragua* standard.[172]

Meron goes the furthest of any scholar when he argues that the Appeals Chamber went down the wrong path in criticizing or even using the *Nicaragua* standard.[173] Meron argues that the ICTY's use of the *Nicaragua* standard "produces artificial and incongruous conclusions."[174] Meron makes this argument because he believes that:

> this was not an issue of (state) responsibility at all. Identifying the foreign intervenor was only relevant to characterizing the conflict. Thus, the 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.[175]

Meron is the only scholar who makes this argument as forcefully as he does:

> Indeed, 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.[176]

Meron's discussion does not carry as much weight as it might, however, because he does not provide any reference or citation to the literature he mentions.[177]

Meron does provide his reader with significant criticisms of the *Tadic* Appeals Chamber in Part IV of his work, in which he criticizes the *Tadic* Appeals Chamber's inappropriate juxtaposition of the ICJ's discussion of

---

171. Meron, *supra* note 166, at 239.
172. *Id.*; Bassiouni, *supra* note 166, at 226-27.
173. Meron, *supra* note 166, at 237; Bassiouni, *supra* note 166, at 226-27.
174. Meron, *supra* note 166, at 237; Bassiouni, *supra* note 166, at 226-27.
175. Meron, *supra* note 166, at 237; Bassiouni, *supra* note 166, at 227.
176. Meron, *supra* note 166, at 239.
177. *Id. See also* Bassiouni, *supra* note 166, at 226-27 (Bassiouni only cites to Meron).

attributability in *Nicaragua* with its conclusions on humanitarian law.[178] This criticism of the Appeals Chamber, however, is as far as he is willing to go in drawing the distinction between the two standards at issue in the respective cases.

Moir also criticizes the Appeals Chamber: "In what seems an unnecessary (and indeed dubious) piece of reasoning, the Appeals Chamber decided to use the test of 'overall control,' holding that the 'effective control' test, as used in the *Nicaragua* case was not persuasive for two reasons . . . ."[179] Moir goes on to argue, however, that the test used by the Appeals Chamber reached the correct result.[180] She also argues that the different bodies of law applicable to internal and international armed conflicts may be converging.[181] She calls any remaining distinction between the two bodies of law outmoded.[182]

3. Discussion of the ILC's Articles and Draft Articles

The ILC's Draft Articles on State Responsibility are quite celebrated in the academic literature. Very few scholars, however, have addressed the question of whether the ILC's draft articles draw the appropriate distinctions discussed in this Article. While many scholars take note of the conflict,[183] they do not take a position on the conflict, nor do they discuss whether the ILC's Article Eight or the commentary to Article Eight appropriately remedy the conflict.[184]

---

178. Meron, *supra* note 166, at 240-41.

179. MOIR, *supra* note 170, at 49-50.

180. *See id.* at 50.

181. *See id.* at 51.

182. *Id.*

183. *See* Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635, 637-39 (1997). *See also* Danya L. Kaufman, *Don't do What I Say, Do What I Mean!: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State*, 70 FORDHAM L. REV. 2603, 2610-12 (2002). *See generally* Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773 (2002); Shabtai Rosenne, *State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 N.Y.U. J. INT'L L. & POL. 145, 145-51 (1998).

184. *See* Townsend, *supra* note 183, at 637-39. *See also* Kaufman, *supra* note 183, at 2610-12. *See generally* Bodansky & Crook, *supra* note 183; Rosenne, *supra* note 183, at 145-51.

IV. ANALYSIS

Any conflict between the ICJ and the ICTY over the appropriate standard for determining when a conflict is international in character is a superficial conflict based on a misunderstanding of the motivations of the ICJ's use of the effective control standard in *Nicaragua*. In addition, perhaps because of the ICTY's improper criticism, it articulates too high a standard for determining when an armed conflict becomes internationalized.

A. *Different Goals for* Nicaragua *and* Tadic

As the McDonald dissent, Meron, and the Prosecution in the *Tadic* appeal attempted to convey to the Appeals Chamber, the goals of the litigants in *Nicaragua* and *Tadic* were different.[185] *Nicaragua*, on the one hand wanted to attribute the actions of the Contras or the UCLAs to the United States and make the United States liable for the violations of the laws of war of both the Contras and the UCLAs. The Prosecution in *Tadic* merely sought to hold Tadic and others responsible for grave breaches of the Geneva Conventions, which required a determination that the conflict was international in character.

Indeed, the commentary to the Geneva Conventions indicates that the reason the Geneva Conventions differentiated between international and non-international armed conflicts was to provide greater protection to combatants and civilians in non-international armed conflicts than was available before the Geneva Conventions.[186] The goal was not to provide explicitly lower standards for non-international armed conflicts.[187] Most of the commentary focuses on the delegates' concerns that including internal conflicts in the Geneva Conventions would confer too much recognition on terrorists or common criminals.[188] The concern does not appear to have been that victims of atrocities in otherwise internal conflicts deserve less protection than do victims of international armed conflicts.[189]

---

185. As Judge Shahabuddeen recognized in his separate concurring opinion. United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Prosecutor v. Du[Ko Tadi], Case No. IT-94-1-A, July 15, 1999, *at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf.

186. Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War, International Committee of the Red Cross, Geneva, 1960, First reprint, Geneva, 1994 (commentary on Common Article III).

187. *Id.*

188. *Id.*

189. *Id.*

Furthermore, the *Tadic* court made a leap in logic in arguing that internationalization of a conflict for all purposes was necessary in order to internationalize the conflict for the purpose of war crimes prosecutions.[190] Thus, the ICTY's error was not grounded in any earlier distinction made between international and internal armed conflicts.

Nor were its criticisms of the ICJ's heightened state responsibility standard warranted. While a defense of the ICJ's effective control standard is beyond the scope of this Article, the ICJ did have some compelling reasons for ruling as it did. First, in the case of war crimes, genocide, or crimes against humanity, attributing the actions of individuals guilty of those crimes to a state would mean that the state is responsible for those crimes.[191] When a state's army is directly guilty of war crimes, as was the case with the Armies of Germany and Japan in World War II, this form of attribution only makes sense. When, however, as was the case in Nicaragua and in Bosnia-Herzegovina, a state only has nominal control over the belligerents responsible for the crimes, attributing the actions of those individuals to the state becomes much more problematic and vexing. To attribute the actions of those belligerents to a state, a court would have to hold that though a state did not give the order to commit the crime and, in many circumstances, know that the crime occurred until after the fact, the state is nonetheless responsible for criminal acts.[192]

That is why, when addressing a question of whether a state is responsible for the actions of an individual, the ICJ looked for specific instances of orders by a state organ to that individual before it would impute the actions of the individual to the state. For example, while the United States certainly supported the aims of the Contras and contributed money, equipment and man-hours to their cause, it is quite another thing to say that the United States intended for the Contras to violate the laws of war with that money or equipment, or directed or encouraged the violation. Thus, unless Nicaragua could offer substantial proof of the United State's desire for the Contras to conduct themselves in an illegal manner, a court

190. As Judge Shahabuddeen recognized in his separate concurring opinion.

191. Again, the ICJ does not have jurisdiction over individual criminal prosecutions, so the question in front of the ICTY was never before it. *See* AKSAR, *supra* note 8, at 135.

192. It is possible that an individual could be found guilty of the crimes under a command responsibility theory. In light of the fact, though, that such a command responsibility theory would assume tremendous control over one's subordinates, to hold a state responsible for the actions of individuals that it does not control in a manner akin to a commander who does control his or her troops, would stretch the notion of state responsibility much further than the Articles on State Responsibility intended, and much further than logic allows. In short, states cannot ever act in the same manner as military commanders. Thus, any analogy between the two would be flawed.

should be reluctant to attribute the actions of the Contras to the United States.

One could certainly argue that the United States was negligent or reckless in its support of the Contras, given that contributions of weapons, money and training would likely lead to attacks on civilians. To hold that the United States desired or even knew of attacks when they were occurring, or that the United States wanted those attacks to occur without specific evidence of that intent on the part of direct agents of the United States, however, could lead to the United States being responsible for specific intent war crimes that it did not even know were occurring. At best, absent clear evidence to the contrary, one could assert that the United States knew or should have known about the atrocities the Contras would likely commit/were committing with the weapons they were given by the United States. But, if an individual only had this sort of knowledge, a court would not convict that individual of war crimes.[193] If an individual could not be guilty of a war crime under the same circumstances, why should a state be responsible for the crime? Indeed, if a state could be responsible for a war crime for simply knowing about the likelihood of such a transgression taking place, a court could be faced with the incongruous result of holding a state responsible for a war crime without having sufficient evidence to convict any individual of that same crime.

A potential counterargument is that in cases involving the actions of government officials, soldiers of the state, and other people normally associated with the state, the state is held accountable for the actions of those people regardless of whether they were working within the bounds of the state's law or the directions they were given. Why then should international law require a higher standard for more informal arrangements than it does for government officials? Why not assume the connection exists?

The answer lies in the different degrees of formality between normal government officials and private individuals that might be de facto state actors. While it is certainly true that the Contras were, to some extent, doing the bidding of the United States, and while it is also true that the Bosnian Serb Army was operating with the approval of the FRY, the necessary informality of those ties meant that that United States and the FRY were not able to exercise the same degree of control over those groups as one would expect those countries to have over their own direct agents.

193. *But see id.*

This lack of control over de facto agents means that to attribute the actions of those agents to the governments of either country, absent a finding of specific direction, would hold those nations to a standard where they could be held accountable for actions that they might never condone or tolerate among officials of their respective governments. In contrast, a country normally has a very high degree of control over its agents and soldiers. The specific direction and control over actions that the ICJ was looking for in *Nicaragua* is assumed because it is normally present. The above is not meant to imply that a state will or should be able to act through proxies without legal sanction. Indeed, the ICJ found the United States liable for a violation of Nicaragua's sovereignty and interference in its affairs. Such a finding was, arguably, sufficient vindication of Nicaragua's rights based on the evidence it was able to present.

The goal in *Tadic* was to determine if Tadic was guilty of crimes as laid out in Article Two of the statute of the ICTY. That portion of the statute only required that the war itself be international in character, not that those who committed crimes be de facto organs of a party to the conflict. When seeking to hold individuals accountable for their crimes, the concern of whether the state endorsed or knew of the crimes becomes irrelevant.

In such a framework, a state connection does not necessarily imply that the state is responsible for the crimes, merely that enough of a connection exists to make the conflict international. While it would be true that if a conflict could be imputed to a state such a conflict would be international for the purposes of international war crimes prosecutions of individuals, it does not follow that a state must be responsible for the actions of an individual in order to successfully prosecute that individual for war crimes committed in an international conflict.

The Appeals Chamber was, therefore, simply incorrect to criticize the ICJ standard. Even if the *Nicaragua* effective control standard sets too high of a bar in terms of state responsibility, the Appeals Chamber should not have criticized that standard, because the two courts did not share the same goals. The only question the Appeals Chamber needed to ask in *Tadic*, and the only question it answered, was whether enough of a state connection existed to the crimes in question such that those crimes could be said to have occurred in an international context.

The ICTY is also guilty of another error in *Tadic*, heretofore not discussed in the literature. The ICTY's error stems from its apparent belief that either a conflict must be international in its entirety or it must be internal in its entirety. In other words, to prosecute war criminals under the grave breaches regime allowed by the ICTY statue for international war crimes prosecutions, all aspects of the conflict must be international. The ICTY adopts this implicit belief without discussing whether all aspects of

the conflict would be international. For instance, in light of the ICTY Appeals Chamber's decision in *Tadic*, would the Bosnian government have been obligated to designate captured Serbian militia fighters as prisoners of war? Was the conflict international for the purpose of allowing Bosnia to invade Serbia proper in self defense due to the connection between the Serbian militia and the Serbian government? While it is entirely possible that the ICTY or another court might so find, by painting the inquiry set before it with such a wide brush, the ICTY's holding implies all of those results without explicitly deciding those questions. In contrast, the ICTY could have limited its inquiry to ask whether the conflict was international for the purpose of war crimes prosecutions and fashioned a standard for internationalization that identified only factors relevant to that inquiry. By attempting to go further, the ICTY has stepped beyond its mandate and raised serious questions as to the impact its ruling would have on other areas of law that it likely did not even consider.

Thus, criticism of the ICTY's error has not gone nearly far enough. The draft articles, though they head in the right direction, do not provide a clear enough repudiation of the ICTY's rejection of *Nicaragua*. The draft articles themselves on first read seem to open the door to a lower standard for state responsibility than that adopted by the ICJ in *Nicaragua*. Though the commentary does criticize the Appeals Chamber for addressing a question that was not directly before it, the drafters should have gone further and drawn the relevant distinctions between the two cases as well as spelling out the reasons for those distinctions. Instead, the drafters were content to adopt a limited view of the problem.

Judge Meron, Judge McDonald, and Judge Shahabuddeen appropriately keyed into the major difficulty with the *Tadic* case, though all seemed to have missed just how much the ICTY's analysis implied. Judge McDonald's and Shahabuddeen's criticisms, additionally needlessly further complicated the issue by arguing that the Prosecution had met the burden of *Nicaragua* when the question of whether it had met that burden was not relevant. If, Judge McDonald had dissented solely on the grounds in the second part of her opinion and argued for a different standard, her opinion would have more sharply drawn the distinction between the internationalization of a conflict and the ability to hold a state accountable for the actions of private parties. Instead, the opinion's imprecision allowed the Appeals Chamber to compound the error.

Judge Meron goes further than Judge McDonald, but he too does not provide nearly enough of a rationale to concretely establish his position. Rather than addressing the majority opinion of the Appeals Chamber directly, he refers to a survey of international humanitarian law literature

that he then fails to cite. Though Judge Meron is right in the end, refutation of the Appeals Chamber requires a more thorough analysis than the one he provided.

B. *Does the Overall Control Test Achieve the Goal of Determining When a Conflict Becomes International?*

In criticizing *Nicaragua*, the ICTY necessarily adopted a new standard for determining when a conflict becomes international. Given that the goals of the two courts were so different and need not conflict, one wonders whether the overall control test developed in ICTY jurisprudence achieves the goals of determining when a conflict has become international in character. Most recently, the ICTY in *Kordic and Cekez*, held that two criteria were necessary to establish overall control; first, whether a state provided "financial and training assistance, military equipment and operational support," and second, whether that state "[p]articipat[ed] in the organisation, coordination or planning of military operations."[194] The ICTY, though, has stressed that specific orders or command and control, per the effective control standard, is not necessary to meet the second prong of the test.

This standard of overall control is still too stringent a standard to determine when an armed conflict is international in character for the purpose of war crimes prosecutions. Instead, the appropriate standard of control would be one that could be met by showing either the first or the second prong of the ICTY's overall control test. If a state provides financial and training assistance in addition to operational support to a group, it stands to reason that the conflict has become international for the purposes of war crimes prosecutions by virtue of the support offered by that state.[195] Similarly, if a state coordinates military activities with a group, as the Trial Chamber found in *Kordic and Cekez*,[196] by, for

194. Prosecutor v. Kordic and Cekez, *supra* note 116, ¶ 361, at 94.

195. In Prosecutor v. Kordic and Cekez, the Appeals Chamber focused on the evidence of logistical support in terms of shipping military equipment, logistical communications support, training assistance, medical assistance, uniforms, vehicles, and other supplies, and the payment of salaries of militia members. *See id.* at 94-96.

196. To quote the Appeals Chamber:

> 371. Likewise, the Trial Chamber reasonably based its finding that Croatia provided leadership in the planning, coordination and organisation of the HVO on reliable evidence. The Appeals Chamber notes that the Trial Chamber considered a multitude of factors when making its analysis. It not only assessed the broad political context of President Tudman's territorial ambitions, but also included several other elements in its analysis, such as General Bobetko's involvement and

example, paying militia's salaries as well as coordinating its troop movements and deployments to coincide with a militias activities, such findings should be sufficient to internationalize a conflict for the limited purpose of prosecuting war criminals.

Why then did the ICTY require both factors to find overall control? Though the answer is unclear, a reasonable explanation is that the ICTY was adopting a weakened version of the ICJ's effective control test. A weakened effective control test would still require proof of logistical support or training as well as some direction and control. When the need to weaken the ICJ's effective control standard is eliminated, and when one focuses solely on what is needed to determine when a conflict has become international, it seems apparent that one factor or the other should be sufficient to deem a conflict international for the purpose of war crimes prosecutions.

While caution is necessary lest a test eliminate all distinctions between internal and international conflict, and while commentators point out that "most apparently 'internal' wars do, in fact, receive some kind of outside support,"[197] that fact does not mean that only using one factor of the ICTY's test to determine when a conflict is international in character will make all conflicts international. The ICTY required specific and detailed factual evidence to determine that a conflict was of an international character, meaning that the ICTY implicitly believed that when a conflict became international was a matter of factual degree. Small provisions of arms or support by a foreign state to internal belligerents would probably not suffice to internationalize a conflict. Substantial logistical support probably would. Given that this inquiry is a fact intensive one, the line of when a conflict becomes international and when it remains internal may never be clear. That problem is difficult to solve with a legal test as it is, necessarily, a fact driven inquiry, but it will not be solved by commingling two distinct bodies of international law.

The standard proposed in this Article has several significant advantages over the Appeals Chamber's formulation. First, two distinct areas of international law need not be commingled. Second, crimes committed during conflicts can be punished under the stricter grave breaches regime of the Fourth Geneva Convention more easily under this weaker standard. Thus, those scholars who call for a weakened standard for prosecution of

---

> the payments made by Croatia towards the salary of Witness CW1, all of which indicate Croatian involvement in the HVO's organisation.

Id. at 96.

197. INGRID DETTER, THE LAW OF WAR 47 (2002).

international war criminals can be placated without undermining settled ICJ jurisprudence and without risking finding a state liable for an action that the state did not intend to occur. Additionally, the standard is limited in that it addresses only the issue to which it is relevant. If the standard is designed to determine when a conflict becomes internationalized for the purpose of war crimes prosecutions, no danger exists that a court that uses it will mistakenly address issues not before it as the *Tadic* court did by implication.

A potential objection to the above formulation could come from the idea that international law should hold states accountable for crimes committed during their proxy wars and that separating the two inquiries identified in this Article maintains too high of a standard for state responsibility. The rebuttal to this objection remains that while states should certainly be held accountable for unlawful intervention in another sovereign's affairs, holding them liable for the acts of individuals necessitates the use of the effective control standard under current jurisprudence. If sufficient proof is unavailable to hold a state responsible for the actions of individuals, let the blame remain with the blameworthy party, the individuals that perpetrated the unlawful acts in the first place. Furthermore, a state that fights a war via proxies is almost always guilty of unlawful intervention in the affairs of another sovereign as the ICJ found in *Nicaragua*. If a state violates another state's sovereignty by waging a proxy war within that second state's borders, it is likely that the state will suffer many of the same penalties it would if a court found that the actions of the non-state actors were attributable to it. In light of these arguments, it is difficult to see why scholars would rally around the *Tadic* decision in their call for an easier test for state responsibility.

1. Comparing the Proposed Standard with the *Tadic* Standard

Because the ICC is currently investigating human rights abuses and violations of the laws of war in the DRC, it appears likely that, at some point, the ICC will be faced with the same question faced by the Trial and Appeals Chambers of the ICTY. As was previously mentioned, the Statute of the ICC also differentiates between international and internal conflicts; therefore, in order to prosecute a war criminal under a grave breach regime, the prosecution must prove that the conflict was, at the time the crime was committed, international. Though specific cases are, at this point, unavailable, as the prosecution for the ICC has only charged one

person with war crimes and those charges are not relevant to this Article,[198] hypothetical examples drawn from possible scenarios the ICC might confront provide a useful vehicle for exploring how the ICTY's *Tadic* standard and the standard proposed in this Article differ and overlap.

a. Scenario One: Both Prongs of *Tadic* Are Met

Assume for the purposes of this scenario that members of the RCD-ML militia conduct an operation against a Lendu village. The purpose of this mission is to destroy a local Hema dominated militia based in the village. During the operation, members of the RCD-ML militia torch several homes, shoot suspected militia members, and beat others in an attempt to gather information about the rival militia's activities. The RCD-ML militia members receive arms, ammunition, and equipment from the Ugandan military to carry out their mission. In addition, they received their initial training and instruction from Ugandan military commanders. Finally, evidence in the record indicates that the RCD-ML commander met with the local Ugandan military commander prior to the attack, that the Ugandan troops in the region were moved out of the area of the village before the attack, and that they remained outside of the village until after the RCD-ML militia members had completed their operation. During the attack, the RCD-ML militia commits war crimes against Lendu civilians.

Here, the RCD-ML militia members meet the criteria established in *Tadic*; in other words, the RCD-ML militia members would be held to be part of an international conflict for the purposes of a war crimes prosecution. First, a foreign military provided "financial and training assistance, military equipment and operational support." As was previously mentioned, the RCD-ML members were trained by a foreign military. A foreign military also provided arms, ammunition and equipment for the mission. Such evidence would be more than enough to satisfy the first prong of the *Tadic* standard as the support by the foreign military was akin to the support provided the Serbian militia in *Tadic*.

Additionally, sufficient evidence exists that a foreign state "[p]articipated in the organisation, coordination or planning of military operations." The meeting between the RCD-ML commander in charge of the operation and the local foreign military commander would, alone, likely be enough for a fact-finder to infer, at the very least, coordination

198. *See* Press Release, International Criminal Court, Pre-Trial Chamber I commits Thomas Lubanga Dyilo for Trial (Jan. 29, 2007), *available at* http://www.icc-cpi.int/pressrelease_details&id=220&l=en.html (last visited Mar. 31, 2007) (noting that the accused was charged with using children as soldiers).

of military activities. The additional fact that the foreign military in the area left the village prior to the attack is further evidence of the RCD-ML militia's coordination with the Ugandan military.

Because both prongs of the *Tadic* standard are met, under this scenario, the standard proposed in this Article is also satisfied. This scenario might seem unimportant at first glance, but when the slight factual changes between this scenario and the other scenarios are taken into account, the rationale for a lesser standard than that proposed by the ICTY in *Tadic* becomes apparent and logical.

b. Scenario Two: Prong One of *Tadic* is Met

In this scenario, the RCD-ML operation described in scenario one takes place again with the following differences. The Ugandan military still provided the initial training and financing of the RCD-ML, and it provided arms, ammunition, and equipment for the operation. There is also evidence that the RCD-ML commander had, at one point met with Ugandan military officers. The evidence in this case, however, does not provide for the inference that the Ugandan military helped plan the attack or otherwise coordinated troop movements in anticipation of the attack. As a result, the evidence with respect to this attack would not support a finding that the conflict was international for the purposes of war crimes prosecutions under the *Tadic* standard. In contrast, because sufficient evidence exists to meet the first prong of the standard in *Tadic*, the standard proposed in this Article would be satisfied.

This scenario provides a critical example of the error of the ICTY in *Tadic* while simultaneously showing the benefits of a lesser standard not linked to state responsibility. The differences between this scenario and the first scenario, in which the *Tadic* standard is met, are slight. The only major difference between the two scenarios is the absence of direct evidence of a coordination of troop movements or planning for the operation in question. The absence of such evidence, though, as has been argued above, is not truly relevant to determine when a conflict has enough of an international component to hold the militia members accountable for international war crimes. This author would submit that this second scenario is, in a practical sense, no less international than the first scenario for the purpose of prosecuting war criminals, especially given that the only difference stems from the absence of direct coordination with the military forces of a particular state. Such a difference is not relevant to determine whether a militia is sufficiently supported by another state so as to render the conflict international for the

purpose of war crimes prosecutions in light of the significant influence and support provided by a foreign state.

c. Scenario Three: Prong Two of *Tadic* is Met

In this scenario, members of the UPC attack a village in an attempt to quell the formation of a rival political party. They are armed by another militia group, which in turn was armed by a foreign state but without the state's knowledge. Before the attack, the members of the UPC involved in the attack meet with the Ugandan military to plan the attack. Prior to the attack, the Ugandan military in the area of the village surround the village and set up checkpoints to stop all traffic entering and exiting the village. The Ugandan military abandons the checkpoints several hours after the attack finishes.

In this scenario, the first prong of the *Tadic* standard is not met. No government provided training, arms, ammunition, or financing for the UPC directly. It seems odd, however, that in such a scenario the conflict would be deemed other than international for the purpose of war crimes prosecutions. A foreign state's military helped plan the attack and without their checkpoints, in all likelihood, the UPC could not have carried out the attack. The military of the state in question clearly intended that the attack take place, and they helped ensure that it would succeed. Why, in such a circumstance would a prosecutor not be able to prosecute the perpetrators of the attack as international war criminals? Surely the concern that bandits and terrorists would be unduly recognized is not implicated by the facts of this hypothetical when a state's military coordinated its activities with those that perpetrated atrocities. This author can posit no reasonable rationale for denying a prosecutor the flexibility of prosecuting the perpetrators under the international war crimes framework in a scenario such as this. The standard proposed in this Article eliminates the above concerns.

d. Scenario Four: Neither Prong of *Tadic* is Met

In this scenario, local Hema villagers take up arms against their Lendu neighbors. Hema villagers, motivated by grievances over land ownership decide to forcibly reclaim land they believe their Lendu neighbors stole. Armed with pistols, and rifles stolen from an arms cache of the RDC-GOMA, the Hema attack Lendu farms, killing many Lendu farmers and their families. In addition, many Lendu women are raped during the attack. The Ugandan military in the area are aware of the conflict but they do not react to stop any of the violence.

In this scenario, the conflict would not be internationalized under either the *Tadic* standard or the standard advocated in this Article. First, no evidence exists that the Hemas involved were trained, equipped, or financed by a foreign state or army. The Hema villagers did take weapons from an arms cache of the RDC-GOMA, which, in turn, likely got its arms from a foreign government, but no foreign state intentionally provided the Hema with the arms. In addition, the a foreign military did not coordinate or help plan the attack. That military's inaction is not, alone, indicative of any coordination. Because this scenario does not implicate either prong of the *Tadic* standard, the standard proposed in this Article would also lead to the conclusion that, for the purposes of war crimes prosecutions, the conflict was not international.

The reason this scenario is important to explore is that it indicates that the standard proposed in this Article does not cast too wide of a net in defining the circumstances in which conflicts become internationalized for the purpose of war crimes prosecutions. As was previously discussed, one of the major objections to a lesser standard for the internationalization of conflicts in war crimes prosecutions stems from the belief that if prosecution for international war crimes becomes easier, conflicts that would otherwise be considered internal under the Geneva Conventions, might be deemed international thereby raising the standard of care owed to rebel combatants. This scenario helps mitigate that concern.

Another concern is that if otherwise internal conflicts become internationalized by a lesser standard for prosecution of war crimes, the internationalization of such conflicts would lead to a broader recognition of the rebel group, thereby undermining the flexibility of the sovereign in effectively quashing internal revolts. Again, this concern is somewhat lessened by the fact that the standard proposed in this Article is limited only to determine when a conflict becomes international for the purposes of war crimes prosecutions. The scenario mitigates any further concern along those lines because the scenario shows that criminal or terrorist conduct not part of an armed conflict would not be deemed suitable for prosecution of war crimes under the standard proposed in this Article.

e. Scenario Five: Both Prongs of Tadic, Different States

As was mentioned above, the Ituri conflict, much like the conflict in the DRC as a whole, is immensely complicated and involves shifting alliances. In this scenario, a rebel group, originally trained, armed, and equipped by the Ugandan military, switched allegiances and joins up with a pro-Rwandan rebel group. This group attacks a local village in order to target a rival militia. Prior to this attack, the local militia leader meets with

Rwandan army officers where they plan the appropriate time and method of the attack. In addition, the Rwandan army provides limited artillery fire against Ugandan army regulars while this rebel group attacks so as to distract Ugandan forces away from the targeted village.

This scenario highlights one of the potential problems the ICC could face if it uses the *Tadic* standard. It is reasonably clear that a foreign state helped arm, train, and equip the militia in question. It is also clear that a foreign state helped plan the attack and coordinated its forces with the militia. It is not clear, under *Tadic*, however, that the conflict was international, because the *Tadic* standard implicitly requires that the same foreign state be implicated in both prongs of the test. Despite the inability of prosecutors to prove enough of a connection to attribute the actions of the militia, in this case, to one state in particular, this scenario cries out for international war crimes prosecutions due to the obvious connections to multiple states by the perpetrators of the crimes. The standard proposed in this Article, however, would allow the ICC to charge the militia members with international war crimes. The flexibility and desirability of the standard proposed in this Article in such a situation becomes readily apparent. Such flexibility will likely become increasingly necessary as conflicts involving multiple states become more common.

2. What These Scenarios Tell Us

As should be apparent from these scenarios, the standard proposed in this Article meets all of the objectives of the *Tadic* standard without suffering from some of its defects. It appropriately internationalizes conflicts for the purpose of war crimes prosecutions in circumstances that the *Tadic* standard does not, including a circumstance not envisioned by the *Tadic* court. Simultaneously, the standard proposed in this Article is not so broad as to catch common criminals or terrorists in its net. This Article's standard also does not err by attempting to do too much. It does not attempt to determine conclusively when an armed conflict has become international for all purposes. Rather, it limits its scope to determining when a conflict has become international for the purpose of prosecuting war criminals.

Undoubtedly the standard proposed in this Article, like the *Tadic* standard, is imperfect. It is this author's hope, however, that future courts involved in war crimes prosecutions, particularly the ICC, even if they decline to adopt the very standard proposed in this Article, will not, at the very least, repeat the mistakes of the ICTY. If the ICC or another court addressing war crimes prosecutions decides to head in a different direction, it must remember its objective, fashion a test limited to that

objective, and properly separate out irrelevant areas of law in designing the new test. If a future court follows the above advice, whatever test it ends up devising will certainly move this area of law in a positive direction.

V. CONCLUSION

The Appeals Chamber in *Tadic* created a conflict in international law that split the scholarly community. While most scholars lauded the Appeals Chamber's repudiation of the *Nicaragua* standard, a smaller group of scholars questioned the wisdom of the Appeals Chamber's finding. This smaller group, led by Judge Meron, appropriately focused on the differences between the questions asked in *Nicaragua* and in *Tadic*. Yet, even those scholars did not provide a sufficient critique of the ICTY.

The differences between the two cases provide the key to showing why the Appeals Chamber should not have rejected the *Nicaragua* standard: it was not truly implicated by the facts presented. The only question that the Appeals Chamber needed to answer was whether the Yugoslavian conflict was insufficiently international to use Article Two of the ICTY Statute. By going further than that question and questioning the wisdom of another court's standard not truly implicated by the facts of the case before it, the ICTY created needless friction with other courts and engendered confusion with regards to the condition of state responsibility law.

The irony of the dispute is that the ICTY did not need to create the conflict in the first place. In addition, the lesser standard that it adopted may still be too high to determine when a conflict has become international. Future international war crimes prosecutions should not make the ICTY's mistake of confusing different goals and should adopt a standard that will simultaneously differentiate between international and internal conflicts without imposing needless requirements borrowed from other areas of international law.