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Under domestic and international law, when does non-international armed conflict begin, and when does it end?

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MEMORANDUM FOR THE MILITARY COMMISSIONS

ISSUE: UNDER DOMESTIC AND INTERNATIONAL LAW, WHEN DOES NON-INTERNATIONAL ARMED CONFLICT BEGIN, AND WHEN DOES IT END?

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I. Introduction and Summary of Conclusions

The law of armed conflict is a complex legal arena that plays a crucial role in determining the application of international humanitarian law. As the nature of conflict in the international system transitions from interstate to intrastate conflict, questions regarding the application of international humanitarian law in situations of non-international armed conflict are now, more than ever, of truly pressing importance. As such, it is necessary to fully understand the application of both international and domestic law in determining the commencement and duration of non-international armed conflict (NIAC). This memorandum seeks to clarify these issues by addressing when NIAC commences under international law, when NIAC ends under international law, and by addressing the same issues under domestic law.* The memorandum also briefly addresses the emergence of transnational armed conflict as a potential type of non-international armed conflict and discusses the potential legal framework surrounding transnational armed conflict as an emerging type of NIAC.

A. The Commencement of Armed Conflict in International Law is defined by Both Prongs of the *Tadić* Test.

Though the term "armed conflict" is used both in the Geneva Conventions and the Additional Protocol to the Geneva Conventions, the term is never explicitly defined. As such, the onset of armed conflict is instead defined by its negation: it is a threshold point in which violence is no longer isolated and sporadic.[1] Correspondingly, this

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* Under both domestic and international law, when does a non-international armed conflict begin and when does it end?

[1] Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 Int'l Review of the Red Cross, (2009), at pg. 76 [Electronic copy provided in accompanying USB flash drive at Source 25]

memorandum determines that there is no clear bright-line rule for determining when a NIAC commences under international law. However, it proposes that the commencement of armed conflict is best defined by the *Tadić* jurisdiction test implemented by the ICTY.[2] This test presents a two-prong approach with which to analyze the emergence of an armed conflict. Prong one examines the existence of protracted armed violence.[3] Prong two examines the level of organization of the combating parties.[4] This memorandum clarifies the application of the *Tadić* factors by referencing their application in the case law of the ICTY and the ICTR, as these tribunals present the best legal authority of when NIAC commences under the *Tadić* factors. Further, this memorandum suggests that the *Tadić* threshold is equally applicable in situations of transnational armed conflict.

B. Armed Conflict in International Law Ends When There is a General Close of Military Activities and a General Conclusion of Peace.

Much like the commencement of NIAC, there is very little commentary on the legal end of NIAC. This memorandum presents three possible endpoints for NIAC, as suggested by the relevant literature. The first is the language of the *Tadić* decision: a "peace settlement,"[5] which this memorandum conceptualizes as a formal peace agreement between conflicting parties (such as a ceasefire or peace treaty). The second possible endpoint presented is the lack of existence of one or both of the *Tadić* factors.

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[2] Prosecutor v. Dusko Tadić, Case No. IT-94-I-T, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995). [Electronic copy provided in accompanying USB flash drive at Source 7]

[3] *Id*. at para. 70

[4] *Id*.

[5] *Id*.

This memorandum discusses the potential issues inherent in each of these approaches and instead advocates a third approach to determining the end of a NIAC; a "general close of military activities and a general conclusion of peace."[6] Though this definition does incite more ambiguity than other potential endpoints for NIAC, this memorandum argues that a bright-line rule for determining the end of armed conflict is both impractical and undesirable.

C. The Supreme Court of the United States has Validated That United States Law Shall Include an Expansive Reading of Common Article Three, Thus Reading the International Law of Armed Conflict as an Incorporated Part of Domestic Law.

Though international law regarding NIAC is best described as ambiguous, United States law on the topic is instead almost non-existent.[7] United States law is nearly entirely silent on the emergence and duration of NIAC. However, the Supreme Court of the United States has held that there should be a very encompassing reading of Common Article Three of the Geneva Conventions in United States law.[8] To date, the opinion in *Hamdan v. Rumsfeld* presents the most legitimate domestic discussion of the issue of NIAC under US law. Nonetheless, many international authorities have instead argued

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[6] Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač, Case. No. IT-06-90-T, Judgment, (April 15, 2011), at para.1694. [Electronic copy provided in accompanying USB flash drive at Source 4]

[7] Graham, David A., *Defining Non-International Armed Conflict: A Historically Difficult Task*, 88 International Law Studies, at page 52. [Electronic copy provided in accompanying USB flash drive at Source 17]

[8] John P. Cerone, *Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*, 10 American Society of International Law (2006), at para. 12. [Electronic copy provided in accompanying USB flash drive at Source 13]

that these domestic holdings are unnecessary, as the international law of armed conflict is binding customary international law, and thus, applies to the United States.[9]

II. Factual Background

International humanitarian law references two types of armed conflict in the international system. The first, international armed conflict, is defined as armed conflict between two or more sovereign state parties.[10] The second, non-international armed conflict, is defined as armed conflict between a state and other armed forces within its own territory, or conflict between non-state armed forces within the territory of a state.[11]

Although the dichotomy between international and non-international armed conflict has been a classical distinction in international humanitarian law, the changing nature of conflict has prompted significant discussion on the proper designation of a third type of armed conflict, transnational armed conflict. As defined by Horowitz and Modirzadeh,[12] transnational armed conflict is a "term of art for a NIAC where hostilities cross international borders and/or where NIAC targetable individuals cross international

[9] For example, see Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 International Review of the Red Cross 189–225 (2011). [Electronic copy provided in accompanying USB flash drive at Source 21]

[10] Int'l Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, (Opinion Paper, 2008), pg. 1. [Electronic copy provided in accompanying USB flash drive at Source 26]

[11] *Id*.

[12] Jonathan Horowitz is the Associate Legal Officer at the Open Study Justice Initiative's National Security and Counterterrorism Project. Naz K. Modirzadeh is a Senior Fellow at The Harvard Law School-Brookings Project on Law and Security.

borders."[13] Although this definition is correct in its essentials, the problem of when (or if) international humanitarian law applies in such situations is a contentious issue among international legal scholars. While some scholars have advocated that transnational armed conflict is simply a new type of NIAC,[14] others have suggested that it is necessary to craft an entirely new category in the law of armed conflict in order to better represent the changing face of conflict in the international system.[15] Encompassing both conflict spillovers and transnational non-state actors, such as terrorist organizations, has become incredibly important in the post-9/11 world, regardless of which approach one takes in creating a typology of armed conflict. [16, 17]

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[13] Jonathan Horowitz & Naz Modirzadeh, *How International Law Could Work in Transnational Non-International Armed Conflicts* (Opinio Juris, 2013), pg. 1. [Electronic copy provided in accompanying USB flash drive at Source 18]

[14] *Id*.

[15] "Such armed conflicts justify a more precise interpretation of the de facto conditions that trigger the foundational principles of the laws of war, supporting the conclusion that any de facto armed conflict serves as such a trigger. Common Articles 2 and 3 would then serve to trigger layers of more defined regulation in some ways redundant to and in other ways augmenting these principles. This layered methodology will ensure no conflict falls outside the scope of essential baseline regulation while preserving the technical triggers for more detailed regulation required by application of specific treaty provisions." Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 Vanderbilt J. Int'l L. (2007), at pg. 331 [Electronic copy provided in accompanying USB flash drive at Source 15]

[16] Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 Int'l Review of the Red Cross (2011). Pg. 194. [Electronic copy provided in accompanying USB flash drive at Source 21]

[17] For an in-depth discussion, see Marco Sassóli, *Transnational Armed Groups And International Humanitarian Law* (2006). [Electronic copy provided in accompanying USB flash drive at Source 29]

A. Key Treaty Provisions Defining NIAC

As current law and academia stand, NIAC is codified in two key treaty provisions: Common Article Three of the Geneva Conventions and Article One of Additional Protocol Two of the Geneva Conventions. In order to address the emergence and duration of NIAC, it is important to discuss each treaty provision and its implications regarding the application of international humanitarian law.

Non-international armed conflict is defined as "armed conflict not of an international character occurring in the territory of one of the high contracting parties" under Common Article Three of the Geneva Conventions.[18] Although the Article's original intention was to be limited to its signatories, the universal ratification of the four Geneva Conventions effectively denotes that the distinction of "high contracting parties" no longer applies in the practice and implementation of international humanitarian law under the Article.[19]

Notably, Common Article Three makes no mention of which status parties must have for the Article to apply. As such, Common Article Three encompasses armed conflicts between governmental armed forces and non-governmental armed groups, or between non-governmental armed groups alone without the involvement of a state party.[20]

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[18] Int'l Committee Of the Red Cross, *supra*. at pg. 3. [Electronic copy provided in accompanying USB flash drive at Source 26]

[19] *Id*.

[20] See also Rome Statute of the Int'l Criminal Court, A/CONF.183/9, at Article 8(2) for a full practical application of the principles of Common Article 3. [Electronic copy provided in accompanying USB flash drive at Source 1]

The second key treaty provision that applies to NIAC is Article One of Additional Protocol Two of the Geneva Conventions. Additional Protocol Two provides a narrowly tailored definition of NIAC. The relevant text of Article One defines NIAC as armed conflict

> "which take[s] place in the territory of a high contracting party between its armed forces and dissident armed forces or other organized armed groups which, under reasonable command, exercise such control over a part of its territory as to enable them to carry out a sustained and concerted military operations and to implement this protocol."[21]

This definition is more precise than the definition of NIAC within Article Three in two key ways. First, Article One requires an element of territorial control that is unnecessary for the application of Common Article Three. Further, unlike Common Article Three, Additional Protocol Two imposes requirements on the legal status of parties involved, as one of the parties to the conflict must be the government of a sovereign state.[22]

Though these distinctions are important in determining which international humanitarian law applies in NIAC, one definition of NIAC is not superior to another. Instead, these definitions are complementary and non-competitive, as both exist to ensure the uniform applicability of international humanitarian law during NIACs.[23] Additional Protocol Two sets forth a more nuanced type of conflict covered by Common Article Three, as it is logical that state parties to a conflict should reasonably be able to

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[21] International Committee Of the Red Cross, *supra*. at pg. 4. [Electronic copy provided in accompanying USB flash drive at Source 26]

[22] *Id*.

[23] For a detailed discussion and historical background, see Anthony Cullen, *The Concept of Non International Armed Conflict in International Humanitarian Law* (2010), pp. 7-18. [Electronic link provided in accompanying USB flash drive at Source 28]

implement the requirements of a heightened level of international law. As such, when there are territorial concerns and the government is a party in a NIAC, there is a higher level of legal obligation for the parties involved in order to comply with international law, as they are bound by both the minimum protections of Common Article Three and the more nuanced elements of Article One of Additional Protocol Two.

B. The Role of International Humanitarian Law in Transnational Armed Conflict

Though the role of international humanitarian law in transnational armed conflict has been frequently debated, it is very doubtful that such instances of conflict operate within a legal black hole free from the confines of international humanitarian law.[24] However, the authors of Common Article Three of the Geneva Conventions clearly did not have transnational conflict in mind at the time of drafting the article, as there is a clear territorial element written into the plain language of the Article. Mindia Vashakmazde[25] argues that this language is simply a function of the time of the Article's drafting and does not speak to legislative intent. He instead theorizes that the territorial element in Common Article Three has become irrelevant in the practice of modern international law, much like the designation of "high contracting parties" has become practically irrelevant in determining which states are bound by the Geneva Conventions. Under this logic, Vashakmadze suggests that Common Article Three applies as a

[24] Mindia Vashakmadze, *The Applicability of International Humanitarian Law to "Transnational" Armed Conflicts*, 2009, at pg. 7 [Electronic copy provided in accompanying USB flash drive at Source 32]

[25] Mindia Vashakmadze is a visiting Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law at the European University Institute Max Weber Programme for Postdoctoral Studies.

minimum assurance of rights in any form of armed conflict, as this was the intention of the article at the time of its drafting.[26]

Under this theory, the law of transnational armed conflict would operate as a distinct type of NIAC in which the protections of Common Article Three function as a cloud over individuals involved in a NIAC that originated in a separate sovereign state.[27] Though some scholars have suggested the need for an entirely new typology of armed conflict in order to encompass the protection of non-combatants in such a situation, this argument fails in modern law, as the distinction between international armed conflict and NIAC has significantly diminished regarding the conduct of hostilities in an armed conflict.[28, 29]

Though there is still substantial debate regarding the designation of transnational armed conflict as a form of NIAC as opposed to creating a unique category in the laws of armed conflict for transnational actors, courts have held that an armed conflict's designation has very little impact when determining the applicability of Common Article Three. For example, in dealing with cases of transnational terrorism, the Israeli Supreme Court held that while the conflict was international in nature, "even those who are of the

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[26] Vashakmadze, *supra*. pg. 4. [Electronic copy provided in accompanying USB flash drive at Source 32]

[27] Horowitz and Modirzadeh, *supra*. at pg.1 [Electronic copy provided in accompanying USB flash drive at Source 18]

[28] Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. Conflict Security Law 245-274 (2010) at pg. 258 [Electronic copy provided in accompanying USB flash drive at Source 20]

[29] Claus Kreß is a professor of Public International Law and Criminal Law at the University of Cologne, Germany.

opinion that the armed conflict between Israel and the terrorist organizations is not of an international character think that international humanitarian law or international human rights law applies to it." [30] Thus, international courts have indeed held that the basic principles of Common Article Three are still applicable in cases of transnational armed conflict.

Despite this precedent, minorities of scholars have suggested that the basis for adherence to Common Article Three is based in reciprocity, and that many transnational actors, such as terrorist organizations, completely disregard the law of armed conflict in their practices.[31] In spite of this, legal scholars have suggested that reciprocity is a practical consideration for actors adhering to the confines of Common Article Three, but that reciprocity is not the main intent of the Article.[32] Instead, Common Article Three presents a judicially cognizable framework for the application of human rights in conflict scenarios. Thus, a party involved in an armed conflict still has an obligation to adhere to the principles in Common Article Three, even when other parties in the conflict are not abiding by international humanitarian law.

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[30] Public Committee Against Torture v. Israel, Case No. H.C. 5100/94, Judgment, (December 13, 2006) at para.16. [Electronic copy provided in accompanying USB flash drive at Source 11]

[31] For an illustrative example, see Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 Int'l and Comparative L. Quarterly, 1-15 (2004) [Electronic copy provided in accompanying USB flash drive at Source 23], but note that this logic has been rejected by both courts and scholars, including in domestic law in Boumediene v. Bush, 553 U.S. 723 (2008) [Electronic copy provided in accompanying USB flash drive at Source 8]

[32] Vashakmadze, *supra* at pg. 2 [Electronic copy provided in accompanying USB flash drive at Source 32]

In spite of these conclusions, however, blindly applying Common Article Three in all scenarios could also be problematic, as the plain language of the Article suggests a level of militaristic organization within combatting groups. As Claus Kreß notes,

> "[W]hen Common Article Three was included in the G[evena] C[onventions] in 1949, the basic question was to what extent States were prepared to accept restrictions in an area that was not (yet) governed by (hard) international human rights law. Nowadays, however, the primary effect of the application of the law of non-international armed conflict is no longer the imposition of legal restraints because the now existing *lex generalis* of international human rights law contains restraints that very significantly exceed those of armed conflict regarding targeting and detention. Instead, for States that are faced by a non-State armed attack, the resort to the armed conflict model offers the advantage of applying, as the *lex specialis*, a targeting and detention regime that is appreciably more permissive than under international human rights law." [33]

Thus, there is certainly a danger of over-simplifying the nature of conflict by applying the Law of Armed Conflict in situations of sporadic violence. As such, this memorandum advocates addressing the commencement of transnational armed conflict under the *Tadić* framework as a form of NIAC, at this option requires the requisite level of organization necessary to substantiate a NIAC under existing case law while ensuring the protection of fundamental human rights under the Geneva Conventions.

C. Other Key Literature Defining NIAC

Though Common Article Three and Additional Protocol Two are the two key treaty provisions in international law which apply to NIAC, the International Committee of the Red Cross has expanded the Common Article Three definition of armed conflict through the application of factors of the *Tadić* test, which is discussed in detail in the following section of this memorandum. As such, the ICRC requires that Common Article

[33] Kreß, *supra*. at pp. 260-261 [Electronic copy provided in accompanying USB flash drive at Source 20]

Three come into force when there is a "minimum level of intensity" and a "minimum of organization" of the parties involved in a NIAC.[34]

Thus, international definitions of NIAC are more apt to define what a NIAC is not: it is not international in nature, it is not sporadic violence,[35] and the conflicting parties are not entirely disorganized. Examining an affirmative definition of NIAC becomes significantly more complex. While Common Article Three and Additional Protocol Two lay out the international humanitarian law that come into play during NIAC, they fail to truly define armed conflict in any legally cognizable way. As such, it is necessary to turn to case law in order to develop a legal analysis for determining the commencement and cessation of NIAC in international law.

III. Legal Discussion

A. When does NIAC Begin?

a. The Application of the *Tadić* Jurisdiction Test

The inconclusive nature of international treaties regarding the commencement of NIAC creates a legal problem that is best addressed through the utilization of case law. Logically, international tribunals have had to establish jurisprudence to complement Common Article Three and improve its practical application. The most commonly utilized test in such cases is the *Tadić* jurisdiction test, which was established by the ICTY to test for the existence of an armed conflict. The language of *Tadić* states that "an

[34] International Committee Of the Red Cross, *supra*. at pg. 5 [Electronic copy provided in accompanying USB flash drive at Source 26]

[35] For further discussion on levels of violence, see Sandesh Sivkumaran, *The Law of Non-International Armed Conflict*, (2012), pp. 30-39. [Electronic link provided in accompanying USB flash drive at Source 31]

armed conflict exists when there is protracted armed violence[36] between governmental authorities and organized armed groups or between such groups within a state."[37] This test can thus be interpreted as a two-prong test, where the first prong is protracted armed violence, and the second is the level of organization of armed groups involved in NIAC.

Though the *Tadić* test is by no means a bright-line measurement, it has become the most widely utilized test in determining the existence of an armed conflict. Not only has the framework been utilized in the ICTY, it has also been represented as a test for "intensity" of violence and "organization of the parties in the conflict" by the ICTR in order to determine the presence of an armed conflict.[38] The *Tadić* test is also utilized in the Rome Statute of the International Criminal Court in Art. 8(2)(f).[39] The wide acceptance of the *Tadić* framework by key international actors characterizes *Tadić* as the best and most relevant test to determine the emergence of an armed conflict in international law. Thus, it is essential to further analyze the practical implications of each prong of the *Tadić* test.

[36] Note that this prong corresponds with the ICRC "level of intensity" requirement.

[37] Prosecutor v. Dusko Tadić, *supra*. at para. 70. [Electronic copy provided in accompanying USB flash drive at Source 7]

[38] For example, see Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), at para. 620. [Electronic copy provided in accompanying USB flash drive at Source 2]

[39] Rome Statute of the Int'l Criminal Court, *supra*. at Article 8(2)(f). [Electronic copy provided in accompanying USB flash drive at Source 1]

1. Prong One: Protracted Armed Violence

The first prong of the *Tadić* test is protracted armed violence. Scholars have argued that this prong encompasses elements of both duration and intensity, and that these elements are in a "dynamic relationship" to one another.[40,41] For example, in *Juan Carlos Abella v. Argentina*, the IACHR found that thirty hours of conflict on a military base met the burden of "protracted armed violence" due to the intensity of the conflict and the level of organization of the armed groups.[42] Thus, the first prong of the *Tadić* test does not exist in a vacuum: the test for protracted armed violence rests upon a determination based on the totality of the circumstances in a particular conflict.

Despite the highly subjective nature of this prong of the test, the ICTY has presented criteria that can be considered when determining if a given level of armed violence has met the *Tadić* burden. In the *Prosecutor v. Dordević*, the ICTY lists several criteria that can be considered in determining if violence has meet the *Tadić* requirements. The consideration of the tribunal includes the seriousness of the conflict, increases in armed clashes, UN Security Council involvement, the number of civilians forced to flee as a result of the conflict, and the type and sophistication of weapons used in the

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[40] Robert Chesney, *Transatlantic Dialogue on International Law and Armed Conflict: When Does LOAC Cease to Apply?*. The Lawfare Institute (2014), at pg. 2. [Electronic copy provided in accompanying USB flash drive at Source 14]

[41] Robert Chesney is a professor of law at the University of Texas School of Law, a non-resident Senior Fellow at the Brookings Institution, a senior editor for the Journal of National Security Law & Policy, and a Distinguished Scholar with the Robert S. Strauss Center for International Security and Law.

[42] Jonathan Crowe & Kylie Weston-Scheuber, *Principles of International Humanitarian Law*, (2013), pp. 11-12. [Electronic link provided in accompanying USB flash drive at Source 27]

conflict.[43] The ICTY applied the *Dordević* examples as criteria for determining the existence of the first prong of the *Tadić* test in *Prosecutor v. Haradinaj* [44] as well, thus demonstrating that the elaboration on Prong One in *Dordević* is precedent, as opposed to dicta. Therefore, not only does *Dordević* provide useful clarification on the application of *Tadić*, it also presents practical factors that can be heavily weighed in determining the requisite circumstances necessary to support the first prong of the *Tadić* test.

While the *Dordević* examples are clearly useful in determining the existence of "protracted armed violence," there is no dispositive threshold for the requisite level of confrontation necessary for legal designation as an armed conflict. However, the ICTY has accepted that the use of military force (as opposed to police force) is sufficient in itself to satisfy the first prong of the *Tadić* test.[45] Thus, while there is no bright-line definition of when a conflict becomes more than "sporadic violence," the ICTY has clarified the first prong of the *Tadić* test through practical examples and implementation. The factors discussed above remain the best examples of determining if a conflict reaches the "protracted armed violence" requirement of *Tadić*.

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[43] Prosecutor v. Vlastimir Dordević, Case No. IT-05-87/1-T, Judgment (February 23, 2011), at para. 1522-1526. Electronic copy provided in accompanying USB flash drive at Source 3]

[44] Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84*bis*-T, Judgment (November 29, 2012), Note: para. 394 references this framework, and the following section applies it to the facts of the case. [Electronic copy provided in accompanying USB flash drive at Source 5]

[45] See Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-T, Judgment, (November 30, 2005) para.135-170 for an application of this principle. [Electronic copy provided in accompanying USB flash drive at Source 6]

2. Prong Two: Organization of Armed Groups

The second prong necessary to analyze the presence or emergence of an armed conflict is the assessment of the level of organization of the armed groups involved in the violence. Much like the first prong of the *Tadić* test, prong two has been clarified primarily by its practical application in cases following the *Tadić* ruling. In *Prosecutor v. Haradinaj*, the ICTY provides five key factors that signal the minimum level of organization necessary for the legal existence of an armed conflict. They include an organized command structure, an ability to carry out operations in an organized manner, a cognizable level of logistics, the discipline and ability to implement the requirements of Common Article Three, and the ability to speak with one voice.[46]

Though these factors do contribute significantly to determining if an armed conflict is present in a situation, much like the other *Tadić* prong, the organization of the armed groups involved in a conflict is not a bright-line test. The criteria above provides useful tools for engaging in this analysis, but no one factor is dispositive in determining if the second *Tadić* prong is satisfied. As such, the second prong of the *Tadić* test is also based on a subjective understanding of the totality of the circumstances. Because of this, the severity of violence could be weighed more heavily than organization of the armed groups, or vice versa.

B. The Application of the *Tadić* Test to Transnational Armed Conflict

In order to address transnational armed conflict as a form of NIAC, it is important to assess the plausibility of applying the *Tadić* test to transnational conflicts. Scholars

[46] Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, *supra*. at para. 395. [Electronic copy provided in accompanying USB flash drive at Source 5]

have suggested that it is entirely possible to apply the *Tadić* factors to these conflicts, though they have also recognized that doing so may prove to be more challenging than applying the test to traditionally defined NIAC. [47]

As discussed above, the first prong of the *Tadić* test has been conceptualized through weighing both the intensity of violence and the protracted nature of the conflict. This presents a unique challenge when evaluating transnational terrorist activities, as one large-scale terrorist attack is not likely to surpass the "isolated" barrier that negates the definition of armed conflict in black letter law.[48] Noting this, the intensity of violence can certainly weigh heavily in a judicial evaluation of the totality of the circumstances of the first prong of *Tadić*. Thus, high levels of intensity could overpower rather minimal support for a conflict's protracted nature, as long as there is a reasonable belief that the violence in question has satisfied the first prong of the test.

Similarly, the second prong of the test presents unique challenges in cases of transnational armed conflict, as the level of organization of terrorist groups is very difficult to comprehensively assess. Furthermore, terrorism itself cannot become a party to an armed conflict under *Tadić*.[49] In order to substantiate the second prong of the test, the armed conflict must include a named terrorist group or organization.[50]

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[47] Kreß, *supra*. at pp. 258-260 [Electronic copy provided in accompanying USB flash drive at Source 20]

[48] Vashakmadze, *supra*. at pg. 6. [Electronic copy provided in accompanying USB flash drive at Source 32]

[49] *Id*. at pg. 5.

[50] *Id*.

Despite these challenges, it is still legally feasible to apply the legal framework of NIAC to transnational armed conflict, as it is still possible to both conceptualize and operationalize each of the *Tadić* prongs in situations of transnational violence.

C. Conclusion

The widely utilized *Tadić* test presents the best legal test for determining the existence of an armed conflict. Though the test does provide two key elements necessary to elevate a conflict from sporadic violence into armed conflict, both prongs of the *Tadić* test rely on a subjective analysis. It is arguable that the causes and manifestations of NIAC are so diverse that the creation of a bright-line doctrine to establish the existence of NIAC is nearly impossible. However, the impact of the ambiguities of the law results in significant room for judicial discretion in determining when an armed conflict has begun, as both the requirements of protracted armed violence and a minimum of organization of the armed groups are based on the totality of the circumstances in an individual conflict.

As such, a court may find that long-enduring violence may weigh more heavily than the level of a group's organization, or that relatively short durations of violence can indeed fulfill the "protracted" requirement due to their intensity. Similarly, a group that is highly organized and able to carry out the obligations of Common Article Three may be found to be a party in a NIAC, even if the violence occurring may be comparatively less than in other situations. This analysis also holds true in assessing the application of the *Tadić* framework to instances of transnational armed conflict. Essentially, as long as a court can find some cause to substantiate each of the *Tadić* prongs, it will likely opine that an armed conflict did indeed occur and that Common Article Three of the Geneva Conventions (and possibly Additional Protocol Two) applies to the conflict in full force.

D. When Does NIAC End?

Much like determining when an armed conflict begins, there is no clear definition of when an armed conflict ends. Literature on the topic presents three possible points in which a NIAC can be deemed "ended." These include formal peace settlements, the absence of the *Tadić* factors discussed above, and a "general close of military operations and a general conclusion of peace." [51] Each of these approaches has benefits and drawbacks.

a. Option One: Peace Agreement

While the *Tadić* case provides a detailed discussion regarding the commencement of armed conflict, the holding states that an armed conflict ends either when there is a general conclusion of peace, or "when a peaceful settlement is achieved."[52] Unfortunately, there is no explanatory definition on what a "peace settlement" truly is. As such, one must turn to the relevant literature in order to conceptualize the term. The literature presents two possible interpretations: a formal peace settlement, such as a treaty, ceasefire, or armistice,[53] and the more complex "general conclusion of peace" discussed later in this section. As such, this section addresses the merits and detriments of the formal peace settlement approach.

Clearly, there are benefits to adopting this approach to determining the duration of a NIAC. A formal peace agreement presents a bright-line measurement and resolves

[51] Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač, *supra*. at para.1694. [Electronic copy provided in accompanying USB flash drive at Source 4]

[52] Prosecutor v. Dusko Tadić, *supra*. paragraph 70. [Electronic copy provided in accompanying USB flash drive at Source 7]

[53] Chesney, *supra*. at page 2 [Electronic copy provided in accompanying USB flash drive at Source 14]

much of the grey-area present in the law of armed conflict. Additionally, a peace settlement requirement can be used uniformly across cases of armed conflict, which could be beneficial to both academics and practitioners. However, the detriments of the peace agreement approach far outweigh the benefits of uniformity and administrative ease.

First and foremost, there is a legitimate concern that formal peace agreements absent effective implementation are in no way dispositive.[54] Even if all parties involved in a conflict have signed as parties to a peace agreement or ceasefire, armed conflict can still occur de facto.[55] Thus, while suggesting a legal bright-line for the end of conflict may seem appealing, conditions on the ground certainly may not represent the conditions of a peace treaty.

Further, the peace agreement standard could prove to be problematic in terms of duration in two ways.[56] As mentioned above, conditions on the ground should ideally be weighed much more significantly than a formal agreement to end hostilities. As such, predicating the end of a conflict on a formal peace agreement could end the protection of international humanitarian law prematurely, as Common Article Three (and Additional Protocol Two) cease to apply when the conflict in question is no longer considered an "armed conflict." Conversely, the opposite problem could occur. It is possible that waiting for a formal peace agreement to manifest could result in the continued

[54] *Id.*

[55] *Id.*

[56] *Id.*

designation of violence as an armed conflict, even when an armed conflict is no longer present on the ground.[57]

b. Option Two: Lack of Presence of One of the *Tadić* Factors

A second possible way to determine an end to an armed conflict under international law is by examining if there is a negation of one or both of the *Tadić* prongs. As the *Tadić* test requires both protracted armed violence (or violence of a "certain intensity") and a minimum level of organization of armed groups in order to actuate the protections of international humanitarian law, it would appear rational to conclude that the absence of one or both of these factors would result in a legal end to an armed conflict[58]

This approach to determining the end of NIAC avoids some of the problems apparent in the peace settlement approach. For example, recognizing the absence of one or both *Tadić* factors is entirely based on the de facto status of the conflict. Theoretically, violence in a given conflict could still exist on the ground and meet (or even surpass) each *Tadić* factor despite the signing of a peace agreement. This would result in a *de jure* end to the conflict under the peace settlement approach, but fail to represent the reality of the conflict on the ground. The absence-of-*Tadić* approach avoids this problem by weighing the legal analysis of when a conflict has ended entirely upon the *de facto*

[57] *Id*.

[58] Prosecutor v. Ant Gotovina, Ivan Čermak, Mladen Markač, *supra*. at paragraph 1694. [Electronic copy provided in accompanying USB flash drive at Source 4]

situation of a conflict, and therefore avoids granting judicial merit to arbitrary peace settlements that lack implementation.[59]

However, this approach is not without significant flaws. In *Prosecutor v. Gotovina*, defense counsel advocated the absence-of-Tadić theory and claimed that the armed conflict in question had legally concluded at the time of his client's actions (and accordingly, that Common Article Three no longer applied).[60] The court found this argument unpersuasive for several reasons.[61] First, the court opined that the applicability of the Geneva Conventions should be read as expansively as possible. As such, the binding protocol of Common Article Three must expand beyond the *Tadić* threshold in terms determining an end to an armed conflict.[62] While the *Gotovina* court's analysis was written with regard to an international armed conflict, its holding has become exceedingly important in analyzing transnational armed conflict under existing international humanitarian law. For example, decentralized terrorist cells could exist on the ground long after *Tadić*-level organization has dissipated, and it would be premature to deny those involved in such violence the protections and obligations of Common Article Three.

The most compelling reason the court rejects the absence-of-*Tadić* theory, however, is the concern of uniform applicability of international humanitarian law in

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[59] Chesney, *supra*. at page 2 [Electronic copy provided in accompanying USB flash drive at Source 14]

[60] Prosecutor v. Ant Gotovina, Ivan Čermak, Mladen Markač, *supra*. at 1694. [Electronic copy provided in accompanying USB flash drive at Source 4]

[61] *Id*.

[62] *Id*.

armed conflict. The court suggests that relying upon the *Tadić* test to determine the end of an armed conflict could result in a "revolving door" of application of international humanitarian law.[63] The court holds that at certain points in a conflict, the totality of the circumstances may not meet the *Tadić* threshold in one or both categories, but that it would be unwise to prematurely declare an armed conflict over at these points, as the applicability of international humanitarian law would come into question.[64] For example, there could be a two-week period in which an armed conflict lacks the requisite organization to be termed an armed conflict under *Tadić*. Adopting the absence-of-*Tadić* approach would thus create gaps in Common Article Three's protection, which both complicates prosecution of violations of international humanitarian law and could have significant social policy ramifications.

The *Gotovina* court references the first prong in *Tadić* as legal grounds for rejecting this theory.[65] Because the *Tadić* test calls for "protracted" armed violence, the court opines that the holding in *Tadić* allows for varying levels of intensity, perhaps even falling below the *Tadić* threshold at certain points.[66] Practically, one can determine that the court is concerned with declaring an end to armed conflict prematurely. In the language of the court,

"…[T]he Appeals Chamber has pointed out that the Geneva Conventions

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[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] Chesney, *supra*. at pg. 2 [Electronic copy provided in accompanying USB flash drive at Source 14]

> contain language intimating that their application may extend beyond the cessation of fighting… Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion."[67]

Thus, a certain level of violence and organization must be reached for a conflict to legally become an armed conflict, but that same level of violence and organization need not necessarily endure for the armed conflict to remain legally designated as an armed conflict. Thus, the court instead presents a new standard for determining the end of armed conflict, which is discussed in the following section.[68]

B. Option Three: "A General Close of Military Operations and a General Conclusion of Peace"[69]

The final option presented by the literature to determine the end of an armed conflict is pulled from the language of the *Gotovina* holding, which states that an armed conflict can only be legally concluded when there is a "general close of military operations and a general conclusion of peace."[70] This standard is, again, far from perfect.

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[67] Prosecutor v. Ant Gotovina, Ivan Čermak, Mladen Markač, *supra*. at 1694. [Electronic copy provided in accompanying USB flash drive at Source 4]

[68] Note that the armed conflict in question in the *Gotovina* case is an example of international armed conflict. This distinction, however, is irrelevant in determining whether or not an armed conflict has ended. In terms of NIAC, different international humanitarian law applies. The test for determining the end of armed conflict, however, is consistent both with international armed conflicts and NIAC.

[69] Prosecutor v. Ant Gotovina, Ivan Čermak, Mladen Markač, *supra*. at para. 1694. [Electronic copy provided in accompanying USB flash drive at Source 4]

[70] *Id*.

Unlike the absence-of-*Tadić* and peace settlement options, a general conclusion of peace allows for significantly more judicial discretion in determining the end of an armed conflict. With that being said, the *Gotovina* court's definition is superior to the other two options presented in this memorandum for several reasons. First, the *Gotovina* standard allows for a determination of the end of NIAC to be based upon the totality of the circumstances without making a document or action entirely dispositive. This allows for a much more encompassing application of international humanitarian law than the other two approaches would allow. Further, the *Gotovina* approach aligns with the holdings of courts both domestically and internationally that have advocated for an expenasive reading of Common Article Three and its protections.[71] Additionally, this approach avoids the "revolving door" problem by creating clear-cut dates for the duration of an armed conflict.

Despite these benefits, this approach does create significantly more grey area in determining when an armed conflict has ended, which could prove to be problematic if case law determining the end of NIAC becomes inconsistent over time. However, this risk is worth the benefit of reducing the amount of grey area in prosecutions for the violation of international humanitarian law. As such, the *Gotovina* approach stands as the best legal answer to determining the end of a NIAC.

E. Conclusion

Courts, counsel, and academics have suggested several approaches to determining the end of NIAC. The three most prominent of these approaches are the peace settlement

[71] Pejic, *supra*. at pg. 190. [Electronic copy provided in accompanying USB flash drive at Source 21]

approach, the absence-of-*Tadić* theory, and the *Gotovina* theory, which is based on the totality of the circumstances. Though none of these approaches are legally ideal, the *Gotovina* approach allows for a wider application of Common Article Three, a more uniform application of international humanitarian law, and reduces administrative difficulties in practice. As this approach has been the most widely accepted of those discussed,[72] NIAC ends when there is a general conclusion of peace and a general close of military activities.

F. The Law of NIAC in US Law

To date, there is essentially no domestic law regarding the duration of NIAC. However, the Supreme Court of the United States opined in *Hamdan v. Rumsfeld* that there should be a very expansive reading of Common Article Three, and that the article should be construed to be as encompassing as possible.[73, 74] Thus, the overall impact of the *Hamdan* ruling suggests that the "international law of armed conflict [is] judicially cognizable in US courts, at least insofar as the Court has construed it to be incorporated by reference in an Act of Congress."[75] Presumably, the requisite Act of Congress in this instance was the ratification of the Geneva Conventions.

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[72] For examples, see Schmitt, Michael N.; Garraway, Charles H.B.; Dinstein, Yoram, *The Manual on the Law of Non-International Armed Conflict with Commentary* (2006). [Electronic copy provided in accompanying USB flash drive at Source 30]

[73] Graham, David A., *Defining Non-International Armed Conflict: A Historically Difficult Task*, 88 International Law Studies. Page 55 [Electronic copy provided in accompanying USB flash drive at Source 17]

[74] For full text, see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). [Electronic copy provided in accompanying USB flash drive at Source 9]

[75] Cerone, *supra*. at pg. 1 [Electronic copy provided in accompanying USB flash drive at Source 13]

This holding also applies to the treatment of transnational armed conflict under domestic law. Regardless of the classification of transnational conflict within the law of armed conflict, the Court's ruling that Common Article Three shall be read expansively renders the tenets of the article as bare minimum protections that should apply in all forms of conflict. Presently, literature and legal discussion surrounding transnational conflict is heavily debated, but under *stare decisis*, domestic law mandates the applicability of Common Article Three to all forms of armed conflict, regardless of the armed conflict's legal distinction.

Additionally, the Supreme Court has held that adherence to Common Article Three has been incorporated by reference in the Uniform Code of Military Justice. [76] This is the only treaty that formally binds the US to the law of armed conflict.[77] Despite this limited body of law, however, legal scholars have long suggested that the law of NIAC armed conflict is binding customary international law.[78] Thus, the legislative intent in adopting the Geneva Conventions has coupled with the Supreme Court's expansion of the role of Common Article Three in *Hamdan* to imply that international precedent can

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[76] *Id*. at pg. 2

[77] *Id*.

[78] See Schmitt, Michael N.; Garraway, Charles H.B.; Dinstein, Yoram, The Manual on the Law of Non-International Armed Conflict, Pg. 3, footnote 1, which reads: "The International Court of Justice has opined that Common Article 3 represents customary international law in both international and non-international armed conflict. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 4 (June 27), at paras. 118-120." [Electronic copy provided in accompanying USB flash drive at Source 30]

indeed be used to fill in the gaps for defining the duration of NIAC in US law. As the Supreme Court famously opined in *The Paquete Habana*,

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction…where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations…"[79]

Thus, the international law set forth by the international criminal tribunals to determine the duration of NIAC does apply to the determination of the existence and duration of NIAC under United States law as well.

G. Conclusion

Despite the emerging importance of NIAC in international law, there are no bright-line rules that determine its onset. The most widely applied and utilized test in international law to determine the existence of NAIC under international law is the two-prong *Tadić* test, which examines the presence of protracted armed violence and the level of organization of armed groups involved in an armed conflict. International tribunals, most importantly the ICTY have provided practical framework to clarify the criteria that can push sporadic violence into the realm of armed conflict in which international humanitarian law applies.

Similarly, determining the end of an armed conflict is ambiguously defined in international law. There are three endpoints to NIAC suggested by courts and literature: the emergence of a formal peace settlement (such as a ceasefire, treaty, or armistice), the lack of presence of one or both of the two *Tadić* factors, and a general cessation of military activities and general conclusion of peace. The third option allows for more

[79] The Paquete Habana 175 U.S. 677 (1900) at para. 2. [Electronic copy provided in accompanying USB flash drive at Source 10]

judicial discretion in determining the end of an armed conflict and prioritizes the situation on the ground as opposed to the legal situation of combating parties. Furthermore, the *Gotovina* holding's requirement of a general conclusion of peace promotes a more uniform application of international humanitarian law.

United States Law is comparatively silent on issues of NIAC and its duration. The best domestic authority on these issues can be found in *Hamdan v. Rumsfeld*, in which the Supreme Court opined that Common Article Three should be read as expansively as possible. Additionally, the United States has ratified the Geneva Conventions domestically, this incorporating them into domestic law. In the absence of domestic holdings, the law of NIAC can be viewed as binding customary international law, and thus, applies to United States law as well.