

TOWARDS A TEST OF THE INTERNATIONAL CHARACTER OF AN ARMED CONFLICT: *NICARAGUA* AND *TADIĆ*

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INTRODUCTION	269
I. RELATION BETWEEN THE NATURE OF THE CONFLICT AND THE PROBLEM OF STATE RESPONSIBILITY	270
II. FACTS OF THE <i>NICARAGUA</i> AND THE <i>TADIĆ</i> CASES	270
III. GENERAL TEST TO DETERMINE THE INTERNATIONAL CHARACTER OF AN ARMED CONFLICT IN <i>TADIĆ</i>	273
IV. INTERPRETATION OF THE HOLDING OF <i>NICARAGUA</i> BY THE <i>TADIĆ</i> APPEALS CHAMBER	275
V. <i>TADIĆ</i> TRIAL CHAMBER FOLLOWS <i>NICARAGUA</i>	276
VI. <i>TADIĆ</i> APPEALS CHAMBER REVERSES	276
VII. "DIRECTION AND CONTROL" TEST, AND THE WEIGHING OF THE FACTORS	279
VIII. FACTORS	280
<i>A. Direct interference</i>	280
<i>B. Financial assistance</i>	280
<i>C. Military assistance</i>	282
<i>D. Supervision</i>	282
<i>E. Nationality</i>	284
IX. TASK OF EVERY COURT OF FIRST INSTANCE	285
CONCLUSION	
<i>A. The Bosnian Genocide Case</i>	286

INTRODUCTION

Two international Tribunals recently examined what level of direction and control has to be wielded by a State over military or paramilitary groups to make a non-international conflict an international one. The general view perceives the holdings of both tribunals to be in conflict, this article maintains that they are not. It argues that both tribunals were weighing factors, and that every court of first instance always has to weigh these factors to decide whether acts of armed groups can be attributed to a State.

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I. RELATION BETWEEN THE NATURE OF THE CONFLICT AND THE
PROBLEM OF STATE RESPONSIBILITY

The question whether the conflict is international or not, is closely related to the problem of State responsibility, and the question whether acts of military or paramilitary groups who oppose the government of State A are attributable to State B.¹

If the acts of the military or paramilitary group are attributable to State B, for instance, because State B trained, financed and supervised the military or paramilitary groups, then on the one hand State B will be responsible under general international law for their acts. However, on the other hand, the conflict in State A will be considered international under the Geneva Conventions and their Additional Protocols because foreign State B has intervened in, at the first sight, a non-international conflict in State A.

II. FACTS OF THE *NICARAGUA* AND THE *TADIĆ* CASES

Two Tribunals have developed a test to determine the international character of conflicts and the responsibility of an intervening State in cases of military or paramilitary groups.

First, the International Court of Justice (ICJ) had to decide a case of pure State responsibility.

In 1984, the Republic of Nicaragua charged the United States with violations of customary and treaty law by its involvement in military and paramilitary activities against Nicaragua. Nicaragua accused the United States of attacks on oil pipelines, storage and port facilities, as well as Nicaraguan naval patrol boats. Further complaints pertained to the mining of Nicaraguan ports, violations of Nicaraguan air space, and the training, arming, equipping, financing and supplying of counter-revolutionary forces (known as *contras*) seeking to overthrow the government of Nicaragua.² Nicaragua also claimed that the United States was responsible for violations of international humanitarian law

1. *Contra Commentary on the Draft Articles on Responsibility of States for International Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session*, 53 U.N. GAOR Supp. 10, U.N. Doc. A/56/10 (2001), pp. 106-07, art. 8, Comm. 5, available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf#pagemode=bookmarks) (last visited Feb. 10, 2005). The commentaries explain that the two legal issues can be different and that “[t]he [ICTY]’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in [the *Tadić*] case concerned not responsibility but the applicable rules of international humanitarian law.” *Id.*

2. LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW* 955 (2001).

committed by the *contras*.

To decide whether the United States was responsible, the ICJ had to decide whether the acts of (1) individual mercenaries hired by the CIA and of (2) the *contras* were attributable to the United States.

Second, the International Criminal Tribunal for the Former Yugoslavia (ICTY) faced the same problem from a slightly different perspective.³

The ICTY was established in 1993⁴ to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia.⁵

The ICTY has jurisdiction (or “competence”) under its Statute to prosecute persons who committed or who ordered to be committed grave breaches of the 1949 Geneva Conventions,⁶ who violated the laws or customs of war,⁷ who committed genocide,⁸ or who committed crimes against humanity.⁹

The ICTY held that the international or non-international character of the armed conflict *is not* relevant for its jurisdiction over violations of the laws or customs of war under Article 3 of the ICTY Statute.¹⁰ *Neither* is the character of the armed conflict relevant for the

3. *Statute of the 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*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th Mtg., art. 5, U.N. Doc. S/RES/827, 32 I.L.M. 1192 (1993), *amended by* S.C. Res. 1166 of May 13, 1998; S.C. Res. 1329 of Nov. 30, 2000; S.C. Res. 1411 of May 17, 2002, S.C. Res. 1431 Aug. 13, 2002; S.C. Res. 1481 May 19, 2003, U.N. SCOR, 4759th meeting, S/RES/1481, *available at* <http://www.un.org/icty/basic/statut/statute.htm> (last visited Apr. 22, 2005) [hereinafter *ICTY Statute*].

4. *Id.*

5. *Id.*

6. *Id.* at art. 2.

7. *Id.* at art. 3.

8. *ICTY Statute*, 32 I.L.M. 1192, at art. 4.

9. *Id.* at art. 5.

10. The *Tadić* Jurisdiction Appeals Chamber held that Article 3 of the *ICTY Statute* applies to both international and non-international armed conflicts. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Judgment, at para. 137 (Oct. 2, 1995) [hereinafter *Tadić* Appeals Judgment]; Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, para. 132 (Dec. 10, 1998); Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, para. 161 (Mar. 3, 2000); Prosecutor v. Kunarac, Case No. IT-96-23-T&IT-96-23/1-T, Trial Judgment para. 402 (Feb. 22, 2001); Prosecutor v. Kordić, Case No. IT-95-14/2-T, Trial Judgment, para. 163 (Feb. 26, 2001); Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Trial Judgment, para. 123, (Nov. 2, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, para. 51 (Mar. 15, 2002).

prosecution of persons who committed genocide¹¹ or crimes against humanity.¹² However, the ICTY held that the character of the armed conflict *is* relevant for the jurisdiction of the ICTY over grave breaches of the 1949 Geneva Conventions.¹³

Duško Tadić was the first accused who appeared before the ICTY. He was a supporter of the Greater Serbia nationalist cause. During the armed conflict in 1992 in Bosnia-Herzegovina, Serb forces unlawfully confined thousands of Muslims and Croats in the Omarska, Keraterm and Trnopolje prison-camps. Tadić participated in the attack, seizure, murder and maltreatment of Muslims and Croats both within the three camps and outside the camps. He was indicted by the Prosecutor of the ICTY and charged with grave breaches of the Geneva Conventions,¹⁴

11. *ICTY Statute*, 32 I.L.M. 1192, at art. 4 (Article 4 of the ICTY Statute does not require that the genocide take place during an international armed conflict).

12. *Id.* at art. 5 (Article 5 of the ICTY Statute reads that crimes against humanity are within the jurisdiction of the ICTY “when committed in armed conflict, whether international or internal in character.”)

13. The argument of the ICTY is that the 1949 Geneva Conventions establishes a twofold “grave breaches” system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute “grave breaches,” and closely bound up with this enumeration a mandatory enforcement mechanism was set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for “grave breaches.” The ICTY held that the universal jurisdiction is however limited to the grave breaches committed in “international” armed conflicts. *Tadić Jurisdiction Appeals Judgment* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72, October 2, 1995, para. 79. This “international” armed conflict requirement was a necessary limitation in 1949 on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. The ICTY argued that State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their domestic armed conflicts—at least not the mandatory universal jurisdiction involved in the “grave breaches” system. *Id.* at para. 80. Thus, to have jurisdiction under article 2 of its Statute, the ICTY had to find that the conflict in the Former Yugoslavia was international. When the 1949 Geneva Conventions were updated with the two Additional Protocols in 1977, the drafters quite explicitly excluded any suggestion that there could be “grave breaches” during a non-international armed conflict. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 42 (Cambridge University Press, 2001). However, Judge Abi-Saab stated in his Separate Opinion in the *Tadić Jurisdiction Appeals* case that “a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict.” (Separate Opinion of Judge Abi-Saab, *Tadić*, IT-94-1-AR72, Jurisdiction Appeals Judgment, at para. 5 (Oct. 2, 1995)); see also *Čelebići*, Case No. IT-96-21-T, Trial Judgment, at para. 202 (Nov. 16, 1998); and Dissenting Opinion of Judge Rodrigues, *Aleksovski*, Case No. IT-95-14/1-T, Trial Judgment, at para. 44 (June 25, 1999). Christine Byron, *Armed Conflicts: International or Non-International*, 6 J. OF CONFLICT AND SEC. LAW 63, 66, n. 18 (2001); see also *ICTY Statute*, 32 I.L.M. 1192, at art. 2.

14. *ICTY Statute*, 32 I.L.M. 1192, at art. 2.

violations of the laws or customs of war,¹⁵ and crimes against humanity.¹⁶

Tadić first contested the legitimacy of the creation and the subject matter jurisdiction of the ICTY. The ICTY refuted his arguments in the *Tadić* Jurisdiction Trial Judgment,¹⁷ and again on appeal in the *Tadić* Jurisdiction Appeals Judgment.¹⁸ On the merits, the *Tadić* Trial Chamber¹⁹ found the defendant guilty on most of the counts. The *Tadić* Appeals Chamber partially reversed the legal reasoning of the Trial Chamber.²⁰

In the four Judgments in the *Tadić* case, the ICTY interpreted its Statute and developed the fundamental principles on which its entire jurisprudence afterwards was based. One of the fundamental problems faced by the ICTY was whether the conflict in Bosnia-Herzegovina was international because of the military assistance received by the Bosnian Serb Army from the Army of the Federal Republic of Yugoslavia.

Both the ICJ and the ICTY had to determine the nature and closeness of the relationship between the military or paramilitary groups and the intervening State for liability purposes. The traditional view, as presented by the ICTY, is that the tests of both Tribunals are in conflict. However, at a closer look, this conflict appears to be exaggerated or even non-existent.

III. GENERAL TEST TO DETERMINE THE INTERNATIONAL CHARACTER OF AN ARMED CONFLICT IN *TADIĆ*

The traditional view, which perceives the holdings of *Nicaragua* and *Tadić* to be in conflict, is generated by the way the *Tadić* Appeals Chamber read the *Nicaragua* case.²¹

The *Tadić* Appeals Chamber articulated, first, a more general legal

15. *ICTY Statute*, 32 I.L.M. 1192, at art. 3.

16. *Id.* at art. 5.

17. Prosecutor v. Tadić, Case No. IT-94-1-T, Jurisdiction Trial Judgment (Aug. 10, 1995).

18. *Tadić Appeal*, Case No. IT-94-1-AR72, Jurisdiction Appeals Judgment (Oct. 2, 1995).

19. *Tadić*, Case No. IT-94-1-T, Trial Judgment (May 7, 1997).

20. *Tadić*, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999); and the Corrigendum to Judgment of the Appeals Chamber of July 15, 1999 (19 Nov. 1999).

21. The *Tadić Jurisdiction Appeals Chamber* did not resolve the issue whether the armed conflict in Bosnia-Herzegovina was international or not, implicitly leaving the decision and the test to be elaborated to the Chambers who would hear the merits of the case. *Tadić*, Case No. IT-94-1-AR72, Jurisdiction Appeals Judgment, at para. 77 (Oct. 2, 1995). *Contra id.* at paras. 17-20 (Separate Opinion of Judge Li on the Defense Motion for Interlocutory Appeal on Jurisdiction); see also Byron, *supra* note 8, at 67.

test to determine the character of an armed conflict.

It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in cases of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if

(i) another State intervenes in that conflict through its troops, or alternatively if

(ii) some of the participants in the internal armed conflict act on behalf of that other State.²²

The first hypothesis, the intervention of another State, can be proven factually. Analyzing the second hypothesis, however, is more complex.²³

IV. INTERPRETATION OF THE HOLDING OF *Nicaragua* BY THE *Tadić* APPEALS CHAMBER

To determine whether “some of the participants in the internal armed conflict act on behalf of” another State, the *Tadić* Appeals Chamber drew guidance from the *Nicaragua* Judgment of the ICJ.²⁴

The *Tadić* Appeals Chamber read the *Nicaragua* Judgment to mean that the ICJ made a distinction between the acts of three individuals or groups of individuals.

According to the ICTY, the ICJ first established that acts were imputable to the United States if the individuals concerned were officials of the United States (for instance high-altitude reconnaissance flights by U.S. airplanes).²⁵

Second, the ICJ discussed whether individuals, not having the status of United States officials, but allegedly paid by and acting under

22. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 84 (July 15, 1999) followed by *Blaškić*, Case No. IT-95-14-T, Trial Judgment, at para. 75 (Mar. 3, 2000); *Kordić*, Case No. IT-95-14/20-T, Trial Judgment, at para. 66 (Feb. 26, 2001).

23. *Blaškić*, Case No. IT-95-14-T, Trial Judgment, at para. 76 (Mar. 3, 2000).

24. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 99 (July 15, 1999).

25. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27), 52-53, para. 91 [hereinafter *Nicaragua*]; see also the dissenting opinions on the principle of State responsibility and the “effective control test.” *Id.* at 181, 185-190, paras. 11, 14-19; (separate opinion of Judge Ago). *Id.* at 259, 388 para. 257 of Part IV; “The Law,” Chapter U “Responsibility for Violations of the Law of War” (dissenting opinion of Judge Schwebel); *Id.* at 528, 537-538 (dissenting opinion of Judge Sir Robert Jennings).

2005] **The International Character of an Armed Conflict** 275

the instructions of United States organs, could legally involve the responsibility of the United States.

These individuals in the *Nicaragua* case were nationals of unidentified Latin American countries, referred to in the vocabulary of the CIA as UCLA's (Unilaterally Controlled Latino Assets). The UCLA's carried out specific tasks such as the mining of Nicaraguan ports or waters in early 1984, and attacks on Nicaraguan port and oil installations in late 1983 and early 1984.²⁶

According to the ICTY, the ICJ developed, in the *Nicaragua* case, the "effective control" test; holding that the acts of the UCLA's are imputable to the United States in two ways, either on account of the fact that, in addition to being paid by United States agents or officials, they had been given specific instructions by these agents or officials and had acted under their supervision and with their logistic support,²⁷ or because "agents of the United States had participated in the planning, direction, support and execution of the operations."²⁸

The ICJ found that the "effective control" test was met for the UCLA's, and that the attacks by the UCLA's, if proven, were imputable to the United States.

Finally, the ICJ moved to ascertain whether the responsibility of the United States could arise when it supported military or paramilitary groups (the *contras*) in Nicaragua.

The ICTY interpreted the *Nicaragua* judgment to mean that the ICJ applied the same "effective control" test of the UCLA's to the *contras*.²⁹ In the view of the ICTY, the ICJ required that the *contras* not only be paid or financed by the United States, and their action be coordinated or supervised by the United States, but also that the United States should issue specific instructions concerning the commission of the acts of the *contras* in question.

The ICJ found that the "effective control" test was not met as far as the *contras* were concerned, because despite the heavy subsidies and other support provided to them by the United States, there was no clear evidence of the United States having actually exercised such a degree of

26. *Nicaragua*, 1986 I.C.J. at 45-46, para. 75.

27. *Id.* at 48, para. 80.

28. *Id.* at 50-51, para. 86.

29. "[P]erpetration of the acts contrary to human rights and humanitarian law. . . . For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." *Id.* at 64-65, para. 115.

control in all fields as to justify treating the *contras* as acting on its behalf.³⁰

V. *TADIĆ* TRIAL CHAMBER FOLLOWS NICARAGUA

The majority opinion of the *Tadić* Trial Chamber followed the “effective control” test of the ICJ.³¹

The Trial Chamber implicitly found that the Bosnian Serb forces were not under the effective control of the Federal Republic of Yugoslavia after the Yugoslavian army formally withdrew from Bosnia-Herzegovina, and that therefore the conflict was non-international. For that reason, the Trial Chamber found that *Tadić*'s victims only enjoyed the lower level of protection contained in Common Article 3 of the Geneva Conventions, and not the protection of the more specific grave breaches clause, which is applicable to protected persons in the hands of a party during an international armed conflict.³²

VI. *TADIĆ* APPEALS CHAMBER REVERSES

The majority opinion of the *Tadić* Appeals Chamber, however, reversed.

The Appeals Chamber departed from the holding of the ICJ with regard to military or paramilitary groups, as well as the third group in the *Nicaragua* case, and held that the “effective control” test was

30. *Nicaragua*, 1986 I.C.J. at 62 & 139, paras. 109, 277; see also *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at paras. 112, 114 (July 15, 1999).

31. *Tadić*, Case No. IT-94-1-T, Trial Judgment, at paras. 584-88 (1997); see also *id.* (McDonald, G., dissenting), at paras. 32-34 (discussing the applicability of article 2 of the statute, rejecting the “effective control test” and proposing the “dependence and control” test, hereby sewing the seeds of the “overall control” test: “I question why there should be a requirement that effective control was in fact exercised when the Federal Republic of Yugoslavia . . . was assured that, having transferred officers and enlisted men and provided the material, thereby depleting its forces, its plan would be executed The key issue here is whether the VRS [the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] was indeed dependent on and controlled by the Federal Republic of Yugoslavia.”).

32. *Tadić*, Case No. IT-94-1-T, Trial Judgment, at paras. 507-08 (1997); see also *id.* (McDonald, G., dissenting), at paras. 5-15 (suggesting that even if the *Nicaragua* test would be the relevant test, the VRS was under the “effective control” of the Federal Republic of Yugoslavia, which would make the conflict an international one); see also *Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgment, at paras. 214, 230 (1998) (taking a different approach in the *Čelebići* case, the Trial Chamber found it unnecessary to discuss the *Nicaragua* case, on the basis that the ICJ was a very different body from the ICTY and was ruling on issues of State responsibility rather than individual criminal responsibility and further finding that the conflict in Bosnia-Herzegovina was international); see also Byron, *supra* note 8, at 71-72.

against the very logic of the entire system of international law on State responsibility.³³ The Chamber further referred to cases involving the Iran-United States Claims Tribunal, the European Court of Human Rights and State courts, finding that international State and judicial practice had applied another test.³⁴

The *Tadić* Appeals Chamber held that the extent of requisite State control varies.

According to the Appeals Chamber, the “effective control” test is still applicable to the second group in the *Nicaragua* case—the UCLA’s. To hold a State responsible for an act of a single private individual that is not a State official, it is necessary to ascertain “whether specific instructions concerning the commission of that particular act had been issued by that State . . . ; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue.”³⁵

But the majority opinion of the *Tadić* Appeals Chamber rejected the “effective control” test for “armed forces or militias or paramilitary units,” and developed an “overall control” test. The “overall control” must comprise “more than the mere provision of financial assistance or military equipment or training,” but “does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.” Therefore, “[t]he control . . . may be deemed to exist when a State . . . has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”³⁶

Finally the *Tadić* Appeals Chamber referred to the *Belsen* and *Menten*³⁷ cases, which are two cases of German World War II criminals,

33. *Tadić*, IT-94-1-A, Appeals Judgment, at paras. 116-23 (1999); see also *id.*, at para. 5 (Shahabuddeen, M., dissenting) (finding the *Nicaragua* test “both right and adequate”).

34. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at paras. 124-25 (July 15, 1999).

35. *Id.* at para. 137.

36. *Id.* (With Separate Opinion of Judge Shahabuddeen, who reserves the position on the “overall control test,”) followed by *Blaškić*, Case No. IT-95-14-T, Trial Judgment, at para. 75 (Mar. 3, 2000)(with Separate Declaration of Judge Shahabuddeen, who again argues the soundness of the *Nicaragua* test); *Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgment, at para. 134 (Mar. 24, 2000); *Čelebići*, Case No. IT-96-21-A, Appeals Judgment (Feb. 9, 2005); *Kordić*, IT-95-14/2-T, Trial Judgment, at paras. 111-15 (Feb. 26, 2001).

37. *The Belsen Case—Trial of Joseph Kramer and 44 Others*, British Military Court, Luneberg, Sept. 17–Nov. 17, 1945, II Law Reports of Trial of War Criminals, Selected and Prepared by the United Nations War Crimes Commission 1 (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1947) [hereinafter *Belsen Case*]; *Public Prosecutor v. Menten*, Hoge Raad (Supreme Court of the Netherlands), May 29, 1978, *Nederlandse Jurisprudentie*, 1978, 1267; 10 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 514 (1979); 75 INTERNATIONAL LAW REPORTS 331, 346

establishing the view that international law embraced even another test, by which individuals can be assimilated to State organs “on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions).”³⁸

Applying the “overall control” test to the Bosnian Serb Army, the majority of the *Tadić* Appeals Chamber found that Bosnian Serb Forces were under the “overall control” of the Federal Republic of Yugoslavia.³⁹ Hereby, the ICTY triggered the application of the grave breaches provisions of the Geneva Conventions and its own jurisdiction under article 2 of the ICTY Statute.

(1987).

38. *Tadić*, Case No. IT-94-1-A, Judgment, at para. 141 (July 15, 1999). The holding of the *Tadić* Appeals Chamber seems to be incorrect with respect to this fourth group of individuals. The Appeals Chamber drew guidance from the *Belsen* and the *Menten* cases. However, the two cases on which the Appeals Chamber bases its holding deal with individual criminal responsibility, and not with State responsibility through acts of individuals or armed groups. The defendants in the *Belsen* case (also referred to as the *Kramer* case) comprised not only some German staff members of the Belsen and Auschwitz concentration camps, but also a number of camp inmates of Polish nationality and an Austrian Jew “elevated by the camp administrators to positions of authority over the other internees.” *Belsen Case*, *supra* note 37. They were *inter alia* accused of murder and other offences against the other camp inmates. The defence argued that no war crime could be committed by Poles against other Allied nationals. The Prosecutor however replied that “by identifying themselves with the authorities the Polish accused had made themselves as much responsible as the S.S. themselves. Perhaps it could be claimed that by the same process they could be regarded as having approximated to membership of the armed forces of Germany.” *Id.* In the *Menten* case, Peter Menten, a Dutch national, was found guilty by the Dutch courts of having killed, in July 1941 in Poland a number of civilians, mostly Jews, on behalf of German Special Forces. *Public Prosecutor v. Menten*, Hoge Raad (Supreme Court of the Netherlands), May 29, 1978; *Nederlandse Jurisprudentie*, *supra* note 37. The courts applied Article 27 a of the Dutch Decree establishing Extraordinary Penal Provisions (BBS) and convicted Menten for crimes against humanity as defined in Article 6(b) and (c) of the Charter of the International Military Court annexed to the London Agreement of August 8, 1945. *Id.* However, Article 27 a BBS required that the accused, when the offence was committed, was “in military, state or public service of or with the enemy.” *Id.* Menten was assigned to the German Special Forces as interpreter, but was formally not a member of these Special Forces. *Id.* The Court found that it “was justified in assuming that his position in the *Einsatzkommando* and his performances in it were of a more or less official character. *Id.* Thus, the relationship to the enemy in which Menten rendered incidental services was of such a nature that he could be regarded as a functionary of the enemy,” and consequently was individually criminally responsible for the crimes under Art. 27 a of the BBS. *Id.* Both the *Belsen* and the *Menten* cases present questions of individuals’ criminal responsibility, and not of State responsibility.

39. “Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the [Bosnian Serb Forces]. This sort of control is sufficient for the purposes of the legal criteria required by international law.” *Tadić*, Case No. IT-94-1-A, Jurisdiction Appeals Judgment, at para. 156 (July 15, 1999).

In the way the ICTY read the holding of the *Nicaragua* case, the “overall control” test seems to be in conflict with the “effective control” test. However, the *Tadić* Appeals Chamber mentioned that the holding of the *Nicaragua* case “might at first sight seem somewhat unclear.”⁴⁰ Did the Appeals Chamber misinterpret the *Nicaragua* case?

VII. “DIRECTION AND CONTROL” TEST, AND THE WEIGHING OF THE FACTORS

The perceived conflict between the “effective control” test and “overall control” test is exaggerated or even does not exist. Both tests are manifestations of a more general test of “direction and control,”⁴¹ as elaborated by the International Law Commission (ICL) in its Draft Articles on State Responsibility.

The *Nicaragua* and the *Tadić* judgments distinguished between three categories and groups.

The first category are individuals who enjoy the status of organs under the national law of that State (in the *Nicaragua* case: high-altitude reconnaissance flights by U.S. pilots), or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority. Both the ICTY and the ICJ agree that there can be no doubt that a State incurs responsibility for their acts.⁴²

This view is correct and consistent with article 4 of the August 2001 ILC *Draft Articles on State Responsibility*.⁴³

For the second and third categories (in the *Nicaragua* case, the UCLA’s and the *contras*), the question is what degree of authority or control must be wielded by a foreign State over armed individuals or forces fighting on its behalf in order to define an armed conflict which is *prima facie* internal, as one that is international in character.

40. *Tadić*, Case No. IT-94-1-A, Appeals Judgment at para. 114 (July 15, 1999).

41. See also, *Nicaragua*, 1986 I.C.J. at 62, para. 109 (“What the [ICJ] has to determine . . . is whether or not the relationship of the *contras* to the United States Government was so much one of *dependence* on the one hand and *control* on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government . . .” (emphasis added)).

42. *Id.*; *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 109 (Jul. 15 1999).

43. *Report of the International Law Commission*, U.N. GAOR, 53d Sess., Supp. No. 10, at 44, U.N. Doc a/56/10 (2001). Article 4: Conduct of organs of a State “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.” *Id.*

Article 8 of the August 2001 ILC Draft Articles on State Responsibility requires that “the person or group of persons . . . is in fact acting on the instructions of, or under the *direction or control* of, that State” (emphasis added).⁴⁴ The ILC, however, provides no guidance for what degree of control (e.g., effective or overall) is required.

The principles of international law concerning the attribution to States of acts performed by private individuals or groups are not based on rigid and uniform criteria, as already mentioned by the *Tadić* Appeals Chamber.⁴⁵

On a closer reading, it appears that the ICJ was not setting out an “effective control” test, but was weighing a number of factors to determine the degree of control required to trigger State responsibility.

The following factors can be crystallized from the *Nicaragua* and *Tadić* judgments.

VIII. FACTORS

A. Direct Interference

The first and most decisive factor is the direct interference of the regular armed forces of a State in another State to support individuals or military or paramilitary groups.

In the *Nicaragua* case, the ICJ found that there was no direct interference to support the UCLA’s or the *contras* because “all United States trainers or advisors remain[ed] on the other side of the frontier, or in international waters.”⁴⁶

The ICTY on the other hand found direct interference by active elements of the Army of the Federal Republic of Yugoslavia, which continued to be involved in the conflict in Bosnia-Herzegovina.⁴⁷

B. Financial Assistance

A second very important factor is the financing of individuals or military or paramilitary groups by the intervening State.

In the *Nicaragua* case, the ICJ found that the UCLA’s were

44. *Report of the International Law Commission*, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc a/56/10. (Article 8: Conduct directed or controlled by a State: “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.”).

45. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 117 (1999).

46. *Nicaragua*, 1986 I.C.J. at 60, para. 80.

47. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 151 (1999).

“persons in the pay” of the United States.⁴⁸ Concerning the *contras*, the ICJ found that

[i]nitial activities in 1981 seem to have been financed out of the funds available to the CIA for ‘covert’ actions; . . . \$19.5 million was allocated to these activities. Subsequently, . . . a further \$19 million was approved in late 1981. . . . The budgetary arrangements for funding subsequent operations up to the end of 1983 have not been made clear, though a press report refers to the United States Congress as having approved ‘about \$20 million’ for the fiscal year to 30 September 1983. . . . During the fiscal year 1984 . . . \$24 million . . . was available to the Central Intelligence Agency.⁴⁹

The ICJ further found that

[f]inance for supporting the military and paramilitary activities of the *contras* was thus available from the budget of the United States Government from some time in 1981 until 30 September 1984; and finance limited to ‘humanitarian assistance’ has been available since that date from the same source and remains authorized until 30 September 1986.⁵⁰

The ICTY held that the “financing, training and equipping or providing operational support” of a military or paramilitary group was a relevant factor to determine State responsibility and/or the international character of an armed conflict.⁵¹ The *Tadić* Appeals Chamber found that there was a “continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers [of the Bosnian Serb Army] alike, by the Government of the Federal Republic of Yugoslavia.”⁵² The pay of

all 1st Krajina Corps officers and presumably of all senior Commanders [of the Bosnian Serb Army], as former officers

48. *Nicaragua*, 1986 I.C.J. at 48, para. 80.

49. *Id.* at 55, para. 95.

50. *See also id.* at 58, paras. 97, 99, 100.

51. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 137.

52. *Id.* at para. 150.

of the [Army of the Federal Republic of Yugoslavia], continued to be received from Belgrade . . . acknowledging that a possible conclusion with regard to individuals, is that payment could well 'be equated with control.'⁵³

C. Military Assistance

A third factor is the military assistance provided by a State to individuals or military or paramilitary groups.

In the *Nicaragua* case, the ICJ found that the *contras* received arms, ammunition, food, and equipment, including uniforms, boots and radio equipment from the CIA. Further, the CIA "supplied the [*contras*] with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites."⁵⁴

The *Tadić* Appeals Chamber found that the forces of the Bosnian Serb Army were "almost completely dependent on the supplies of the [Army of the Federal Republic of Yugoslavia] to carry out offensive operations."⁵⁵

D. Supervision

A fourth factor is the degree of supervision by a State over persons or military or paramilitary groups.

The ICJ found, in the *Nicaragua* case, this factor decisive when it required proof that the State issued specific instructions concerning the commission of the unlawful acts in question. The ICJ was satisfied that these specific instructions existed for the UCLA's. There was sufficient evidence that the UCLA's were "persons . . . acting on the instructions . . . under the supervision and with the logical support of United States agents."⁵⁶ Thus, the UCLA's had attacked according to an established pattern.

A 'mother ship' was supplied . . . by the CIA;. . . Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by UCLA's. . . agents of the United States participated in the planning, direction, support and execution of the operations.

53. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 154 (1999).

54. *Nicaragua*, 1986 I.C.J. at 59, para. 101.

55. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 155 (1999).

56. *Nicaragua*, 1986 I.C.J. at 48, para. 80.

The execution was the task rather of the UCLA's, while United States nationals participated in the planning, direction and support.⁵⁷

The ICJ required the same threshold of "effective control" for the *contras* as it did for the UCLA's. Although there was "considerable material in press reports of statements by [*contra*] officials indicating participation of CIA advisers in planning and the discussion of strategy or tactics,"⁵⁸ there was no proof that specific instruction had been issued by the United States concerning the acts of the *contras*. Therefore, the ICJ found that the United States was not responsible under international law for the acts of the *contras*.

The *Tadić* Appeals Chamber also held supervision to be a relevant factor. The Appeals Chamber made a distinction between individuals not organized into military structures, where "specific instructions or directives aimed at the commission of specific acts" had to be given, and military or paramilitary groups, where no specific instructions were required, but only general coordination or "helping in the general planning of its military activity."⁵⁹ The Appeals Chamber found that "the [Army of the Federal Republic of Yugoslavia] controlled the political and military objectives, as well as the military operation, of the [Bosnian Serb army]."⁶⁰ Officers who were not of Bosnian Serb extraction were transferred from their postings in the army of the Federal Republic of Yugoslavia to equivalent postings in the Bosnian Serb Army. "[T]he [Army of the Federal Republic of Yugoslavia] directed and supervised the activities and operations of [the Bosnian Serb Army]. As a result, the [the Bosnian Serb Army] reflected the strategies and tactics devised by the [Federal Republic of Yugoslavia and its army]."⁶¹ Further,

[i]t was apparent that . . . the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and [the headquarters of the Bosnian Serbs] was presented to the Trial Chamber and the Trial Chamber accepted that the [Bosnian Serb Army's] Main

57. *Nicaragua*, 1986 I.C.J. at 50-51, paras. 86.

58. *Id.* at 60, para. 104.

59. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 155 (1999)

60. *Id.* at para. 150.

61. *Id.* at para. 151.

Staff had links and regular communications with Belgrade.⁶²

E. Nationality

A last factor, although not expressed in the judgments of the ICJ and the ICTY, could be the relationship between the intervening State and the nationality of the individuals or military or paramilitary groups.

An international tribunal is, however, not automatically bound by the nationality granted by a State on the basis of its domestic laws.⁶³ The nationality of persons or members of armed groups should not be determined on the basis of formal national characterizations, but rather upon an analysis of their substantial relations, taking into consideration the different ethnicity of the persons or members of armed groups, and their bonds with the foreign intervening State.⁶⁴ For example, Bosnian Serbs who support the Greater Serbia cause are not Bosnians, they are Serbs.

A common nationality between the individuals or the members of the armed group and the intervening State can lead to a shared military objective. The *Tadić* Appeals Chamber found that a “distinguishable feature of the [Army of the Federal Republic of Yugoslavia] and the [Bosnian Serb Army] was that they possessed shared military objectives. As a result, it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders [of the Bosnian Serb Army] would have ever been

62. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para. 152.

63. See Advisory Opinion No. 4, *Nationality Decrees issued in Tunis and Morocco*, 1923 P.C.I.J. 1 (ser. B) No. 4: “it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.” *Id.* at 24; see also *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (making a distinction between on the one hand the right of every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and on the other hand the international community which determines whether a State is entitled to exercise protection and to seize the ICJ). “International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily or automatically binding on other States or which are binding on them only subject to certain conditions.” *Id.* at 21. “Guatemala is under no obligation to recognize a nationality granted in such circumstances.” *Id.* at 26; see also *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* 1970 I.C.J. 83-84, at paras. 33-34 (separate opinion of Judge Fitzmaurice).

64. Principle stated for the determination of the nationality of the victims under the Geneva Conventions. *Čelebići*, Case No. IT-96-21-A, Appeals Judgment, at paras. 81, 84 (Feb. 20, 2001); see also *Kordić*, Case No. IT-95-14/2-T, Trial Judgment, at para. 153 (Feb. 26, 2001).

necessary *as these forces were of the same mind*” (emphasis added).⁶⁵

IX. TASK OF EVERY COURT OF FIRST INSTANCE

This—non exhaustive—list of factors will have to be weighed to determine the responsibility of an intervening State for the acts of individuals or military or paramilitary groups.

Undue emphasis upon one factor, as opposed to a balanced analysis of the reality of the relationship between that State and individuals or military or paramilitary groups, could lead to evasion of responsibility. For instance, stressing the ostensible structures and overt declarations of a State may tacitly suggest to persons or groups who are in *de facto* control of the State, that responsibility could be evaded merely by resort to a superficial restructuring of the groups or by a facile declaration that the reconstituted groups are henceforth independent of their erstwhile sponsors.⁶⁶

Every court of first instance, as a finder of the facts on the record, will have to determine which factors it deems to be relevant, and which degree of direct interference, financial or military assistance, supervision, and nationality it requires to trigger the responsibility of the intervening State, and therefore to change the character of the conflict into an international one.⁶⁷

Therefore, there is no contradiction between *Nicaragua* and *Tadić*. The ICJ, as a court of first instance and a finder of facts on the record, could perfectly require a higher level of supervision (or “effective control”), after it had established that the *contras* were an independent organization. The *contras* were found to exist before the United States started providing financial assistance, and to have continued their operations after the United States had cut off their funds.⁶⁸

The critical language of *Nicaragua* reads:

All the forms of United States participation mentioned above, and even the general control by the [United States]

65. *Tadić*, Case No. IT-94-1-A, Appeals Judgment, at para 153 (July 15, 1999).

66. *Id.* at para. 154.

67. See also *contra Commentary on the Draft Articles on Responsibility of States for International Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session, supra* note 1, at 59, 107, art. 8, comm. 5. (“In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.”).

68. *Nicaragua*, 1986 I.C.J. at 21, 53-54, 61, paras. 18, 93-94, 108 (“Even on the face of the evidence offered by the Applicant, . . . the Court is unable to find that the United States created an armed opposition in Nicaragua.”). *Id.* at para. 94.

over a force with a high degree of dependence on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts For *this conduct* [of a force with a high degree of dependence on it] to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed (emphasis added).⁶⁹

However, nothing in the *Nicaragua* case suggests that the same threshold of “effective control” has to be applied if the factors of the case are different, like in *Tadić*, where the Bosnian Serb Army was just a copy of the Army of the Federal Republic of Yugoslavia, and where all the factors point towards the responsibility of the Federal Republic of Yugoslavia.

CONCLUSION

A. The Bosnian Genocide Case

The ICJ will have a second chance to weigh the factors and to decide whether a State is responsible under international law for the acts of military or paramilitary groups.⁷⁰

The State of Bosnia-Herzegovina brought a case against the Federal Republic of Yugoslavia under the Genocide Convention,⁷¹ and claims that a number of acts constituting genocide have been committed by former members of the Army of the Federal Republic of Yugoslavia and by Serb military and paramilitary forces under the direction of, at the behest of, and with assistance from the Federal Republic of Yugoslavia. More specifically, the case alleges:

military and paramilitary activities, including the bombing

69. *Nicaragua*, 1986 I.C.J. at 64-65, para. 115.

70. In the view of the I.C.J., the Genocide Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugoslavia*), 1996 I.C.J. 595, 615, at para. 31 (July 11, 1996).

71. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III), Dec. 9, 1948.

and shelling of towns and villages, the destruction of houses and forced migration of civilians, and of acts of violence, including execution, murder, torture, and rape which, in the circumstances in which they have occurred, show . . . that acts of genocide have been committed . . . against the Muslim inhabitants of Bosnia-Herzegovina.⁷²

Bosnia-Herzegovina claims that the Federal Republic of Yugoslavia is fully responsible under international law for these acts of the Bosnian Serbs.

It would be logical that the ICJ would apply the five non exhaustive factors in the same way as the ICTY. The ICJ could then find (1) that there has been direct interference by the Army of the Federal Republic of Yugoslavia in the conflict in Bosnia-Herzegovina; (2) that the Bosnian Serb Army is financed, trained, and equipped by Belgrade; (3) that the Army of the Federal Republic of Yugoslavia provided military assistance to the Bosnian Serbs; (4) that the Bosnian Serb Army is under the supervision of Belgrade, and that a more general threshold of “overall control” can be applied in the Genocide case; and (5) that the Bosnian Serbs and Mr. Milosivić were of the same nationality and of “the same mind.”

Hence, the Federal Republic of Yugoslavia is to be found responsible under international law for the genocide of the Bosnian Muslims by the Bosnian Serbs.

72. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugoslavia*), 1993 I.C.J. 3, 21, at para. 40 (Apr. 8, 1993) (Provisional Measures).