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19 The legal qualification of the conflicts in the former Yugoslavia: double standards or new horizons for international humanitarian law?

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I. Introduction

The armed conflicts in the former Yugoslavia¹ have been in many respects a turning point and a challenge for international law. For International Humanitarian Law² this is true not only because it has been systematically violated, as in many other past and contemporary conflicts, but also particularly because never before has International Humanitarian Law so frequently been invoked by the parties to the conflicts and, to a lesser extent, by third States and often abusively or at least wrongly. In addition, in no other conflict has International Humanitarian Law been so often mentioned in resolutions of the UN Security Council – and neither always correctly nor consistently. Finally, this is true because never before have the international society, *i.e.*, States, and the international community deployed so many efforts to enforce International Humanitarian Law, including establishing for the first time since World War II a tribunal to try the violators: the International Criminal Tribunal for the Former Yugoslavia (ICTY).³ In this tribunal, the late Judge and Professor Li Haopei played an important role as a member of the Appeals Chamber. It may therefore be appropriate to honour his memory with a contribution enquiring into how the

* This article was completed in August 1999. The views expressed in this article are exclusively those of the author who would like to thank his former colleague Ms. Laura Olson for having revised and edited a first version of this text.

1 For a brief history, see Part IV below.

2 International humanitarian law of armed conflicts is the branch of international law protecting the victims of armed conflicts.

3 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, established by the Security Council through Resolution 827 (1993) of 25 May 1993 and functioning under a Statute originally published as an Annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), S/25704, and approved by the Security Council.

conflicts in the former Yugoslavia were legally qualified, a subject on which the Appeals Chamber was subject to criticism.⁴

Indeed, before International Humanitarian Law could be applied, all those institutions necessarily had to determine which International Humanitarian Law applied: the more elaborate rules applicable to international armed conflicts or the more rudimentary rules applicable to non-international armed conflicts? If the international community has not answered this question consistently, serious doubts could be entertained on the claim that events were judged according to the law and not arbitrarily, a claim inherent in the establishment of a tribunal and crucial for its credibility. Such doubts would be particularly troublesome when applying International Humanitarian Law, as the necessity to apply it impartially and independently of any consideration of *jus ad bellum*, i.e., related to the causes of the conflict, is an important legal principle⁵ and moral requirement.⁶ Finally, as far as the Serb people are concerned, the feeling that double standards were applied against them, a feeling exacerbated by their leaders, strengthened many Serbs in their tendency to justify the unjustifiable.

This article first attempts to recall the difference between international and non-international armed conflicts in and for International Humanitarian Law. It will then remind the reader of the recent stages of the tragic history of the Balkans, i.e., the different conflicts in the former Yugoslavia. It will finally analyse, in its main part, the different arguments relevant for the qualification of the conflicts, how they were used by the UN Security Council and the ICTY, whether such arguments reveal double standards, and whether they applied the existing law or opened new horizons for International Humanitarian Law.

II. Double standards in international law

Before it can be analysed whether double standards have been applied, some thoughts may be appropriate on what is a double standard in international law. The prohibition of double standards is addressed to those who apply the law. Identical cases must be treated equally before the law and similar cases similarly

4 See, e.g., G. Aldrich, Jurisdiction of the International Tribunal for the Former Yugoslavia, 99 *AJIL* 90 (1996), 66–67; T. Meron, Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout, 92 *AJIL* (1998), 237–39.

5 This fundamental distinction between *jus ad bellum* and *jus in bello* is recognized in preambular para. 5 of Protocol I (see n. 9 below) and has already been recognized in *US v. Wilhelm List and Others* (The Hostage Case), by the US Military Tribunal at Nuremberg, reproduced in L. Friedman (ed.), 2 *The Law of War, A Documentary History* (1972), 1313–14. On the principle of the equality of the belligerents before International Humanitarian Law, see generally Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (1970), and C. Greenwood, The Relationship between *Jus ad Bellum* and *Jus in Bello*, 8 *Review of International Studies* (1983), 221–34.

6 Indeed, as the aim of International Humanitarian Law is to protect victims of armed conflicts, it could not be justified to deny some of them protection or to offer them different protection according to the side on which they are dragged into the conflict.

according to their degree of similarity. Furthermore, cases may not be treated differently based on distinctions prohibited by or irrelevant under international law. Thus, in our field, because of the strict distinction between *jus ad bellum* and *jus in bello*, two acts of warfare may not be qualified differently under International Humanitarian Law if the only difference between the two is the legitimacy of the cause for which the belligerent concerned is fighting.

To apply or enforce a different rule in a new case than in a previous case because the rule has changed, is, however, not prohibited. In traditional international society, States are not only the subjects of international law, but also its legislators and its main implementing mechanisms. As implementers they should treat identical cases equally, while as legislators they may and should start to create new rules as soon as they discover in a given case that the old rule is not appropriate. Traditional customary law cannot evolve if States may not behave according to a new rule until a sufficient number of other States have already behaved in a sufficient number of cases in the new manner. What makes it even more difficult to blame an individual State of using double standards in applying international law is that international law leaves States a wide latitude of different reactions to a certain legal situation. Under traditional international law, for instance, a State could react to an act of aggression against a third State with everything from the use of force against the aggressor to strict neutrality and if in identical cases very different reactions were chosen, legally there would be no double standard.

The enforcement organs of the organized international community, such as the UN Security Council, have to be more coherent than individual States. The UN Charter gives, however, the Security Council wide discretionary powers in evaluating whether a threat or a breach of the peace exists and how to react to such a situation. This involves "political evaluation of highly complex and dynamic situations."⁷ The Security Council is certainly not "*legibus solutus*" (unbound by law),⁸ but it is also not only a law enforcement mechanism. It is a political organ. The present author would simply submit that if the Security Council chooses to invoke the law, to qualify a given situation under the law, or to state legal consequences of a given situation under existing law, it is bound not to apply double standards.

The prohibition of double standards is obviously most relevant for a court, as a court is bound to apply the law and only the law. It is inherent in the idea of law that a rule must be general and abstract and that, even if it has been laid down on the occasion of an individual situation, it must be meant to apply to all future similar cases. In addition, if the court is a criminal tribunal, the alternative that an apparent double standard could in reality be the application or definition of a new rule becomes less relevant, because the principle "*nullum*

7 *The Prosecutor v. Tadic*, Appeal on Jurisdiction, Decision of the Appeals Chamber of 2 October 1995, ILM 35 (1996), 32 ff., para. 39.

8 *Tadic* Jurisdiction, n. 7 above, para. 28.

crimen sine lege" bars the application of a new rule to an act committed before that new rule evolved.

Due to the foregoing, we will limit ourselves, when reviewing the qualification of the different conflicts in the former Yugoslavia under International Humanitarian Law, to pronouncements of the ICTY and to instances in which the UN Security Council implicitly or explicitly invoked the rules of International Humanitarian Law of international or of non-international armed conflicts.

III. International and non-international armed conflicts

III.A. Two similar real life situations

From a humanitarian point of view, the same rules should protect victims of international and of non-international armed conflicts. The same problems arise and the victims need the same protection. In both situations, fighters and civilians are arrested and detained by "the enemy", civilians are forcibly displaced, or the places where they live come under control of the enemy, attacks are launched against towns and villages, food supplies need to transit through front lines, and the same types of weapons are used. Furthermore, a different law for international and for non-international armed conflicts obliges humanitarian actors and victims to qualify the conflict before they can invoke the applicable protective rules. Such qualification is sometimes theoretically difficult and always politically delicate. Sometimes, *e.g.*, in the case of Croatia discussed below, to qualify the conflict obliges one to implicitly pass judgement upon questions of *jus ad bellum*.

III.B. Two very different situations for the States

International Humanitarian Law, however, offers two different sets of written rules for international and for non-international armed conflicts. As far as treaties are concerned, the former are regulated by the comprehensive and detailed regime of the Hague Regulations of 1907, of the four Geneva Conventions of 1949 and of the Additional Protocol I of 1977.⁹ The latter are regulated only by a much more

9 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land ("Hague Regulations"), The Hague, 18 October 1907, reproduced in Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (3rd ed. 1918), 100–32; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 75 UNTS 31–83 ("Convention I"); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 75 UNTS 85–133 ("Convention II"); Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, 75 UNTS 135–285 ("Convention III"); Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, 75 UNTS 287–417 ("Convention IV"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, 1125 UNTS 3–434 ("Protocol I").

summary regime, contained in one single article of the Geneva Conventions, namely in their common Article 3, and in Additional Protocol II of 1977.¹⁰

This difference in the treatment of the two types of conflicts by international law is due to the fact that, despite all modern theories, international law is basically made by States and States have never agreed to treat international and non-international armed conflicts equally.

Indeed, wars between States have until recently been accepted as a legitimate form of international relations and the use of force between States is still not totally prohibited today. Conversely, the monopoly of the legitimate use of force within its boundaries is inherent in the concept of the modern State and it precludes that groups within a State may wage armed conflicts against each other or against the government.

Rules of international law protecting victims of international armed conflicts have long since been accepted by States, even by those having the most absolutist concept of their sovereignty. States have very early on accepted that soldiers killing enemy soldiers on the battlefield may not be punished, in other words that they have a "right to participate" in the hostilities.¹¹ On the other hand, the law of non-international armed conflicts is more recent. States have for a long time considered such conflicts as their internal affairs governed by their internal law. No State is ready to accept that its citizens may wage war against their government. No government is ready to renounce, in advance, punishment of rebels for their mere participation, a renunciation which is the essence of the combatant status as prescribed by the law of international armed conflicts. To apply all rules of contemporary International Humanitarian Law of international armed conflicts to non-international armed conflicts would be incompatible with the very concept of a contemporary international society made up of sovereign States. Conversely, if the international community was organized as a world State, a right for combatants to participate in hostilities independently of the cause for which they fight, as foreseen in the present law of international armed conflicts, would be inconceivable.

Theoretically, one should therefore apply International Humanitarian Law of international armed conflicts and International Humanitarian Law of non-international armed conflicts as two separate branches of law. In practice, however, once one is confronted with a question not explicitly regulated by Article 3 common to the four Conventions nor by Protocol II, or forced to interpret those less detailed provisions, one will refer to the law of international armed conflicts. Indeed, International Humanitarian Law of non-international armed conflicts must provide solutions to problems similar to those arising in international armed conflicts; it developed later and it involves the same principles, although they are elaborated, in the applicable written rules, in less detail. Analogies are necessary to

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977, 1125 UNTS 609-99 ("Protocol II").

11 As recalled in Art. 43 (2) of Protocol I.

provide details or to fill logical gaps. Once the solution provided by the law of international armed conflicts is found, an analysis is, however, necessary to determine whether the nature of non-international armed conflicts and the fundamental differences between both protective regimes permit application of that same answer in a non-international armed conflict.

III.C. The law of non-international armed conflicts is, however, better adapted to these conflicts

One should not draw from the above discussion the conclusion that, from a humanitarian point of view, the law of international armed conflicts always offers better protection and that its full application to non-international armed conflicts would be the ideal to be achieved. This would be an oversimplification.

III.C.1. No protected person status and no concept of occupied territory

The protection traditionally offered by the law of international armed conflicts to a person who is in the hands of a belligerent, differs greatly according to the nationality of that person, to whether that person is a civilian or a combatant, and to the status of the territory on which he or she is found. Full protection as "protected persons" is offered to enemy and certain third country nationals,¹² while a Party's own nationals benefit from much more limited, fundamental guarantees.¹³ Combatants may be interned without any further reason until the end of active hostilities, while civilians may only be interned in exceptional circumstances.¹⁴ Protected civilians benefit from much more extensive guarantees in occupied territories, than on the "own" territory of the enemy.¹⁵

In a non-international armed conflict, it would often be difficult to practically determine who is a "combatant" and who is a "civilian". Those categories are not foreseen in the written law as it stands for non-international armed conflicts. We will also discuss later that it would be difficult to replace nationality by another appropriate criterion.¹⁶ Finally, it would be nearly impossible conceptually to consider a government or rebels as an "occupying power" over parts of the territory of the country in which they fight. Even if a line could be drawn between a party's own territory and the territory it occupies, this would never have the slightest chance of being respected by a party in a non-international armed conflict.

12 Cf. Art. 4 of Convention IV.

13 Cf. in particular Arts. 13–26 of Convention IV and Art. 75 of Protocol I.

14 Cf. Arts. 21 and 118 of Convention III and Arts. 41–43 and 78 of Convention IV.

15 Compare Arts. 35–46 to Arts. 47–78 of Convention IV.

16 Cf. below, Part V.D.4.

III.C.2. Protection of all those who do not or no longer take an active part in the hostilities

The law of non-international armed conflicts, conversely, protects according to the actual situation of a person. Most of its rules benefit all persons not or no longer taking an active part in the hostilities, without any adverse distinction.¹⁷ Other, additional rules protect persons in particularly risky situations, *e.g.*, those whose liberty has been restricted for reasons related to the armed conflict or who face penal prosecutions.¹⁸ It is not only champions of the dogma of "State sovereignty" who may consider that such rules are much more appropriate for the necessarily less formalized and more fluid situations of non-international armed conflicts.

III.C.3. The regulation of "ethnic cleansing"

All of the preceding analysis can be illustrated by an example of unfortunate actuality. The horrible practice of "ethnic cleansing", so widely used in the former Yugoslavia, is clearly prohibited by International Humanitarian Law of international and of non-international armed conflicts if the means used to expel the victims are unlawful as such, *e.g.*, murder, rape, pillage, etc. The law of non-international armed conflicts, in addition, prohibits any forced movement of civilians.¹⁹ The law of international armed conflicts is weaker on this point. Only out of occupied territories, does Article 49 (1) of Convention IV prohibit "[i]ndividual or mass forcible transfers, as well as deportations of protected persons [...], regardless of their motive." Out of a Party's own territory, expulsions of "protected civilians", *i.e.*, foreigners, are not explicitly prohibited.²⁰ Nothing is foreseen, in the law of international armed conflicts, concerning the expulsion of civilians who do not fall under the definition of protected persons. The question of the expulsion of the State's own nationals has probably been considered as regulated by national legislation and International Human Rights Law.

III.D. The traditional standards applied to distinguish the two categories of conflicts

Under Article 2 common to the four Conventions, the law of international armed conflicts applies to those conflicts fought between two or more High Contracting Parties. Basically, only States can be High Contracting Parties. The

17 Cf. Art. 3 common to the four Conventions and Art. 4 of Protocol II.

18 Cf. Arts. 5 and 6, respectively, of Protocol II.

19 Cf. Art. 17 of Protocol II.

20 Art. 35 of Convention IV regulates only their right to leave the territory and J.S. Pictet (ed.), 4 *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), 235, considers that "the right of expulsion has been retained".

law of non-international armed conflicts conversely applies to all other armed conflicts occurring on the territory of a High Contracting Party, except that the law of international armed conflicts applies if the government recognizes the belligerency of rebels, or, partially or entirely, through agreements²¹ between the parties to a non-international armed conflict. The international community has, in addition, decided to move a certain category of conflicts from the category of non-international armed conflicts to that of international armed conflicts: Article 1 (4) of Protocol I clarifies that national liberation wars fall under the law of international armed conflicts.

Under this distinction, many conflicts have been obviously of a mixed character, either because foreign powers intervened in a non-international armed conflict or because international armed conflicts were fought, in particular during the Cold War, through local proxies. In such mixed conflicts, the law of international armed conflicts applied to the relation, *i.e.*, the fighting, between (the armed forces of) two States and the law of non-international armed conflicts to the fighting between the government and rebel forces.²² According to the general rules of State responsibility, this necessity to fragment a conflict into its components found its limit in the case in which a party to a non-international armed conflict could be considered as the *de facto* agent of an intervening State, in which case its behaviour fell under the law of international armed conflicts.

IV. The conflicts in the former Yugoslavia

This is not the place to analyse the reasons for the conflicts in the former Yugoslavia. It may however be appropriate to recall some of the events which preceded the conflicts:

- The economic crisis of the Yugoslav system of self-governing economy and economic tension between the richer northern and the poorer southern Republics.
- Bloody riots in Kosovo (1981, 1989, 1990) by the large Albanian majority living in that historical heartland of Serbia, pressing the Serb minority towards emigration; the abolition of the autonomous status of Kosovo, which was an autonomous province within Serbia, but also a subject of the Federation (1988).
- The publication of a Serb nationalist Memorandum by the Serbian Academy of Sciences and the rise to power of the Serb nationalist politician Slobodan Milosevic in Serbia (1986).

21 See Part V.B. below. The law applied based on such agreements is not the agreement itself but International Humanitarian Law, as such application is foreseen by Art. 3 (3) common to the four Conventions and the substantive law applied is that of the law of international armed conflicts.

22 See the judgement of the ICJ in the case *Nicaragua v. United States*, Merits, ICJ Reports 1986, 14 ff., para. 219, and D. Schindler, The different types of armed conflicts according to the Geneva Conventions and Protocols, 163 *RCADI* (1979-II), 150.

– The disbanding of the communist one-party system with the formation of opposition parties in the Republics of Slovenia and Croatia (1988) and multi-party elections in all six Republics bringing nationalist parties to power.

In 1991, the fragmentation increased to such a degree that the Republics of Slovenia and Croatia wanted to become independent and the central Yugoslav institutions were increasingly blocked by a stalemate between the “Serb bloc” and those two Republics.

IV.A. The conflicts in Croatia (and Slovenia)

On June 25, 1991, Croatia and Slovenia declared their independence. At the request of the European Community, these declarations were suspended, under the Brioni Agreement of 7 July 1991, until 7 October 1991. It was, however, only in 1992 that third States started to recognize Croatia and Slovenia. On 22 May 1992, Croatia and Slovenia were admitted to the United Nations.

In Slovenia, the armed conflict lasted for only ten days in the summer of 1991 and was successful for Slovenia, in that it resulted in the retreat of the Yugoslav Peoples’ Army from Slovenia.

In Croatia, the situation was much more complicated. The Serbs living in Eastern Slavonia, Western Slavonia, and the Krajinas did not agree with the independence of Croatia and opposed it violently. The Yugoslav Peoples’ Army tried to hinder Croatia from what it qualified as a secession and to maintain itself in at least the parts of Croatia preponderantly inhabited and controlled by the Serb minority by first trying to intercede between Croat and local Serb forces and later more and more openly supporting local Serb forces. As a result, the Yugoslav Peoples’ Army obtained or maintained, through fierce fighting, control over one third of the territory of Croatia. This armed conflict continued until the first days of 1992. On January 4, 1992, the 15th cease-fire agreement between Croatia and the Yugoslav People’s Army entered into force and was long-lasting. On February 21, the UN Security Council established, through Resolution 743 (1992), the United Nations Protection Forces (UNPROFOR), which were deployed, in particular, in the Serb held territories in Croatia, with the mandate of ensuring that these “UN Protected Areas” (UNPAs) were demilitarized and that all persons residing in them were protected from fear of armed attack. In reality, UNPROFOR could only partly fulfil this mandate as local Serb forces remained in control of the areas and continued to expel local Croats.

Those local Serbs continued to receive support from Belgrade and formed the “Republic of Serbian Krajina”, which controlled nearly one third of the territory of Croatia in its frontiers within the former Yugoslavia. In May 1995, Croatian forces again took control over Western Slavonia, and in August they took control over the rest of the UNPAs except Eastern Slavonia. In both cases nearly all Serb inhabitants fled to the Serb controlled regions of the former Yugoslavia. Control over Eastern Slavonia was gradually handed over to Croatia between 1996 and 1998 under the Dayton Agreement.

IV.B. The conflicts in Bosnia and Herzegovina

IV.B.1. The independence of Bosnia and Herzegovina

Bosnia and Herzegovina is ethnically divided between a relative majority of Bosniac Muslims (considered as a nationality called "Muslims" in the former Yugoslavia), Serbs, and Croats. In April 1992, it declared its independence following a referendum, boycotted by Serbs, in which Muslims and Croats voted in favour of independence. An armed conflict broke out between (Muslim and Croat) forces loyal to the government and supported by Croatia, on the one hand, and Bosnian Serb forces opposing the independence of Bosnia and Herzegovina, supported by the Federal Republic of Yugoslavia (FRY), on the other. On 7 April 1992, Bosnia and Herzegovina was recognized by the Member States of the European Union and many other States soon followed. On 22 May 1992, it was admitted as a Member State to the UN. Officially, the Yugoslav Peoples' Army withdrew from Bosnia and Herzegovina on 18 May 1992. However, its units made up of Bosnian Serbs remained on the spot, with all their heavy military material, and functioned as the army of the "Republika Srpska" which had declared its independence on 7 April 1992.

This conflict, in which Bosnian Serb forces gained control over vast areas previously inhabited mainly by Muslims and Croats, whom they expelled, lasted until 1995.

In 1995, following NATO air-strikes and successful military offensives by Croatian and Bosnian government forces in the Croatian Krajinas and Western and Central Bosnia, the international community, led by the US, persuaded the parties to conclude a cease-fire on October 5, 1995. After considerable pressure and exhausting negotiations with the Presidents of Bosnia and Herzegovina, Croatia, and Serbia (the latter two also representing the Bosnian Croats and Serbs, respectively) the Dayton Peace Agreement was reached in Dayton, Ohio on November 21 and signed in Paris on December 14.

IV.B.2. The Croat-Bosniac conflict

In the beginning of 1993, the Co-Presidents of the International Conference on the Former Yugoslavia, Cyrus Vance and Lord Owen, presented a peace plan for Bosnia and Herzegovina (the Vance-Owen Plan), which involved dividing it into 10 nationally defined cantons. While Bosnian Croats were delighted by the plan which increased their territory, Bosnian Serbs rejected it coolly. The Bosnian (Muslim) President was undecided. The Bosnian Croats which had declared their independence as the "Croatian Community of Herceg-Bosna" on 4 July 1992, tried to implement the plan forcefully in central Bosnia. They demanded that the Bosnian government forces withdraw from within the borders of their assigned cantons and that a joint command of the forces of the Croat Defence Council (HVO) and the Army of Bosnia and Herzegovina be established. If not, HVO threatened to implement the Vance-Owen Plan itself. After the deadline expired, on April 16, 1993, HVO forces carried out a co-ordinated attack on a dozen villages in the

Lasva Valley (belonging to a Croatian canton under the Vance-Owen Plan). Troops from Croatia were present on HVO-controlled territory but did not fight in the Lasva Valley. Croatia financed, organized, supplied, and equipped HVO. After causing extensive human suffering in Central Bosnia and in the Mostar region, this conflict was stopped only under considerable US pressure through the Washington Agreement of 2 March 1994.

IV.B.3. The conflict in the Bihac area

The Bihac area in the western-most part of Bosnia and Herzegovina is inhabited nearly exclusively by Bosnian Muslims. Mr Fikret Abdic, a Muslim businessman and politician, and his followers (mainly the employees of his "Agrokommerc" industry near Velika Kladusa) controlled the northern part of this area and were not ready to follow the politics of the Bosnian government. They claimed autonomy and aligned themselves with the Bosnian Serbs and the neighbouring Croatian Serbs. An armed conflict followed, with Bosnian government forces in the Bihac enclave also besieged by Bosnian and Croatian Serb forces. In 1995, this two-and-a-half-year siege was ended by an offensive of Croatian forces against the Croatian Serb forces. When Bosnian government forces subsequently took Velika Kladusa, the followers of Mr Abdic fled into neighbouring Croatia.

IV.C. The conflict in Kosovo

The tragedy of the former Yugoslavia started in the eighties in Kosovo. Tensions then continued there all during the nineties between the Albanian majority population and the Serb security forces. In 1998, these tensions intensified into an armed conflict between the "Kosovo Liberation Army" and Serb forces. In 1999, this conflict was aggravated by massacres against the Albanian civilian population, NATO air-strikes against the FRY and the expulsion of large parts of the Albanian majority population from their homeland. One can only hope that the recent agreement to put Kosovo under the control of international forces and the retreat of the Serb forces, permitting the return of the refugees, was the last act in the Yugoslav tragedy. Recent massacres perpetrated against local Serbs raise some doubts in this respect.

V. The arguments used to qualify the conflicts

V.A. From which moment on does a war of independence become an international armed conflict?

Whatever their legitimacy under international law or under the constitutional law of the former Socialist Federative Republic of Yugoslavia, the conflicts in Slovenia and Croatia in 1991, the conflict between the "Republic of Serbian Krajina" and Croatia from 1992 to 1995, and the conflicts between Bosnian government forces on the one hand and Bosnian Serb forces, Bosnian Croat forces or the followers of

Mr Abdic, on the other hand, could be seen as cases in which parts of an existing State tried to or were successful in breaking away. To qualify them as international or non-international armed conflicts, the decisive question under traditional law would be whether the part breaking away was already, or when it became, an independent State. From that moment on, the conflict would be an international one. The traditional criteria of statehood are a defined territory, permanent population, and a government clearly manifesting its effectiveness.²³ In all the above mentioned cases, the question arose as to whether a territory over the boundaries of which there is still fighting can be considered as defined. Whatever answer is given to this question of international law, it must be the same for all these cases.

The ICTY Appeals Chamber considered the conflict in Croatia to be an international one "by the involvement of the Yugoslav National Army".²⁴ In his separate opinion, Judge Li was more precise, qualifying that conflict as international from 8 October 1991, since Croatia's and Slovenia's declaration of independence came into effect on this date.²⁵ Conversely, the Appeals Chamber considered that "it cannot be contended that the Bosnian Serbs constitute a State", and their conflict therefore could only be classified as international based on the assumption that they were organs or agents of the Federal Republic of Yugoslavia (FRY).²⁶ Concerning the Bosnian Croats too, an ICTY Trial Chamber considered that their behaviour could only fall under the law of international armed conflicts because of the involvement of Croatia.²⁷ Finally, in the case of the "Serbian Republic of Krajina", an ICTY Trial Chamber did not explain why it simultaneously applied to the "Republic's" conduct of hostilities the law of non-international and international armed conflicts.²⁸ The UN Security Council, however, had

23 Cf., e.g., I. Brownlie, *Principles of Public International Law* (4th ed., 1990), 73; M. Akehurst, *A Modern Introduction to International Law* (6th ed., 1987), 75 ff.

24 Cf. Tadic Jurisdiction, n. 7 above, para. 72.

25 Cf. Ibid. (Sep. op. Li). The Swiss Divisional Court Martial I followed the same approach in the case of G. heard from 14 to 18 April 1997 (in M. Sassòli & A. Bouvier, *How Does Law Protect in War?* (1999), Case No. 165). J. O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 *AJIL* (1993), 647, goes so far as to consider that the conflicts started to be international on 25 June 1991, when Croatia and Slovenia "began declaring their independence".

26 Cf. Tadic Jurisdiction, n. 7 above, para. 76. Judge Kreca considered in his Dissenting Opinion in the case *Application of the Genocide Convention*, Preliminary Objections, ICJ Reports 1996, 765, that there was an international armed conflict between the Republika Srpska and the Republic of Bosnia and Herzegovina. A US Court considered that "Srpska" satisfied the criteria for a State and its leader therefore fulfilled the State Action Requirement for violations of international law under the US Alien Tort Act (see *Kadic et al. v. Karadzic* (US 2d Cir. 1995), 34 *ILM* (1995), 1595-614).

27 Cf. ICTY, *The Prosecutor v. Rajic*, Review of the Indictment (13 Sept. 1996), paras. 9-31.

28 Cf. ICTY, *The Prosecutor v. Martić*, Review of the Indictment (8 Mar. 1996), paras. 8-18. Perhaps the Chamber assumed that the mentioned provisions of the law of international armed conflicts had become part of the law of non-international armed conflicts. In this case one wonders, however, why the Chamber mentioned also some provisions which have exactly the same meaning in Protocol I and in Protocol II (cf., e.g., paras. 12 and 16 of the decision).

called the areas controlled by that "Republic" "integral parts of the territory of the Republic of Croatia." In the same resolution, it nevertheless called for "full respect for [...] the Geneva Conventions in these areas."²⁹

Perhaps the ICTY made an implicit assumption that in all cases other than that of Slovenia and Croatia, the government of the break-away part was not sufficiently independent of external control from Belgrade or, in the case of the Bosnian Croats, from Zagreb, to fulfil the criteria of statehood.³⁰

It may be that the foregoing discussion neglects the important tendency in international law to recognize or deny statehood based on considerations of legitimacy and not only on the traditional three criteria.³¹ Under this criterion, the reaction, whether declaratory or constitutive of statehood, of the existing members of the international society would be decisive. The ability and willingness to act in accordance with international law could thus be described as being the overriding criterion. It has been suggested that cases like Rhodesia, the Turkish Republic of Northern Cyprus, the Republika Srpska, and the Serbian Republic of Krajina, on the one hand, and of Croatia and Bosnia and Herzegovina, on the other hand, prove that this criterion is decisive in the State practice of recognizing statehood.³² Whatever the merits of this theory for explaining some of the apparent double standards of the international society, it is not very helpful for the qualification of the conflict in Croatia. Indeed, with less than 30 States having recognized Croatia on 4 January 1992, when the actual conflict with the Yugoslav Peoples' Army ended, and Croatia having been admitted to the UN only on 22 May 1992, such legitimizing influence was very limited at the decisive moment for International Humanitarian Law. One may notice in this context that on 21 February 1992, the UN Security Council still referred to "Yugoslavia", while on 15 May 1992 it referred for the first time to "the former Socialist Federal Republic of Yugoslavia".³³ At that moment, the authorities in Belgrade themselves no longer claimed that Croatia was a part of their territory.³⁴

Another factor which could make a conflict within an existing State an international one is the right to self-determination under international law. Whether the Croats had a right to break away based on this right is very difficult to determine,

29 Cf. para. 5 of Resolution 815 (1993) of the Security Council.

30 Only Judge Li explained, in his Separate Opinion, n. 25 above, 18, why the conflict in Bosnia and Herzegovina had remained, in his opinion, basically a conflict between that country and the FR Yugoslavia.

31 Cf. Vera Gowlland-Debbas, *Collective Responses to Unilateral Declarations of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations*, 61 *BYIL* (1990), 135–53.

32 Cf. C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkergemeinschaft* (1998), 722–31.

33 Cf. Resolutions 743 (1992) and 752 (1992), respectively, of the Security Council.

34 On 27 April 1992, the constitution of the FR Yugoslavia, comprising only Serbia and Montenegro, was adopted in Belgrade. Once one part of a country declares its independence and the other parts of the country no longer claim that that part is still part of their country, a conflict between the two parts of the former country must be subject to the International Humanitarian Law of international armed conflicts.

as the extent of the right to external self-determination, beyond the clear cases of colonial domination, foreign occupation and racist regimes, which were not those of the former Yugoslavia, is very controversial. The most traditional claim is that a people can exercise the right to external self-determination only once. The Croat people did that when they joined Yugoslavia after World War I. Others would, however, claim that the right to self-determination is an ongoing right, which could give a people a right to secede in extreme cases of human rights violations. In any event, the right to self-determination could only give a people the right to secede where it lives, but not to a federate State to secede within its frontiers as they existed in the former federal State and which included parts inhabited by a majority of a people which do not want to secede, as in the case of the Serbs of the Krajinas in Croatia.³⁵

Finally, whatever the intrinsic merits of all those statehood theories for other purposes, any theory which would make the determination of rules of International Humanitarian Law applicable in a given conflict directly or indirectly dependent on the legitimacy of the claims of a party, is very dangerous. First, it violates the fundamental distinction between *jus ad bellum* and *jus in bello* discussed above,³⁶ which dictates that International Humanitarian Law must apply independently of the legitimacy of the causes espoused by the parties. Second, the legitimacy of their cause is by definition the very controversy over which the parties of a conflict are fighting. The victims of the conflict, however, need legal protection at that very moment. Third, even if the international community ever agrees on the legitimacy of a statehood retrospectively after the conflict, the law applicable to the conflict must be clear during the fighting. The criteria to determine whether and which International Humanitarian Law applies should therefore be as objective as possible and dependent as little as possible on the reasons for the conflict, the aims of the parties or the outcome of the conflict.

V.B. Of what significance are special agreements between the parties?

The International Committee of the Red Cross (ICRC) had to face, because of the above-mentioned difficulties in qualifying the conflict, the resulting inability to invoke the protective rules of International Humanitarian Law in its operations. The ICRC therefore, beginning in November 1991, invited plenipotentiaries of the belligerent sides to Geneva in order to agree on rules to be respected in their

35 On this the European Arbitration Commission chaired by Robert Badinter came to the very opposite conclusion. It considered that because of the principle "*uti possidetis*" and provisions of the constitution of the former Socialist Federative Republic of Yugoslavia, the former internal frontiers must be the new international frontiers, and that those frontiers cannot be modified based on the right to self-determination (cf. Opinions 2 and 3, 31 *ILM* (1992), 1499-500).

36 See n. 5 above.

armed conflict.³⁷ The ICRC wished those rules to be as close as possible to those that International Humanitarian Law prescribes for international armed conflicts. On 27 November 1991, a Memorandum of Understanding was concluded between representatives of the Yugoslav Peoples' Army, the Republic of Croatia, the Executive Council of the Socialist Federative Republic of Yugoslavia, and the Republic of Serbia, in which they agreed to respect most, but not all, rules of International Humanitarian Law of international armed conflicts. They did not in particular include the rules on occupied territories of the Fourth Convention. The ICTY has invoked this agreement and the fact that, unlike later agreements on Bosnia and Herzegovina, it was not explicitly based on Article 3 (3) common to the four Conventions,³⁸ as evidence that the parties and the ICRC considered the conflict to be international.³⁹ The agreements on Bosnia, conversely, were based on Article 3 (3) common to the four Conventions and omitted some more rules of International Humanitarian Law of international armed conflicts. These agreements were considered as evidence for the non-international character of that conflict, as the ICRC could not be supposed to suggest an agreement violating the prohibition of agreements depriving protected persons of some of their rights.⁴⁰ If the latter argument is true, it should, however, also apply to the agreement for Croatia and that conflict therefore should also be qualified as non-international.

The present author thinks that such arguments are too formalistic and dangerous from a humanitarian point of view. Confronted with an actual conflict, the first priority of the ICRC as a humanitarian organization must always be to get the parties to apply as much of International Humanitarian Law as possible.⁴¹ To this end, it must avoid any linkage between the application of International Humanitarian Law and the cause for which the parties are fighting, *i.e.*, in a war of independence, the question of whether the entity breaking away is a State or not. The parties to such a conflict should be encouraged to agree to apply as much of International Humanitarian Law as possible, and not be threatened, as the ICTY does with its theory, that so agreeing sets a precedent on the question whether the seceding entity is a State or not. Otherwise, they will no longer conclude such agreements.

37 Cf. Y. Sandoz, *Réflexions sur la mise en oeuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie*, 3 *Revue suisse de droit international et de droit européen* (1993), 464–70. Some of these agreements are reproduced in M. Mercier, *Crimes Without Punishment* (1996), 195–207, and in Sassòli & Bouvier, n. 25 above, Case No. 151.

38 Which calls upon the parties of a non-international armed conflict to “endeavour to bring into force, by means of special agreements, all or part of the other provisions” of the respective Convention.

39 Cf. Tadic Jurisdiction, n. 7 above, para. 73. If this was true, why should they have concluded on 22 May 1992 a supplementary agreement (cf. Sandoz, n. 37 above, 467), bringing all of the law of international armed conflicts into force?

40 Cf. Tadic Jurisdiction, n. 7 above, para. 73, and Art. 6, 6, 6 and 7, respectively of the four Geneva Conventions.

41 Cf. Meron, n. 4 above, 237.

V.C. Condemnation of war crimes as an implicit qualification of a conflict?

An implicit qualification of the conflicts could be seen in the fact that the UN Security Council repeatedly condemned violations of International Humanitarian Law⁴² and reaffirmed the individual criminal responsibility of persons committing such violations.⁴³ Indeed, as Judge Li pointed out in his separate opinion in the *Tadić* case, under international law, the concept of war crimes implying individual criminal responsibility for violations of International Humanitarian Law, was traditionally confined to international armed conflicts.⁴⁴ However, in connection with the conflicts in the former Yugoslavia, the law has developed and this cannot be considered to be a double standard, as the same rule has in the meantime been applied to the clearly internal conflict in Rwanda and has been laid down as a general rule in the Statute of the International Criminal Court.⁴⁵

However, the Security Council went further and condemned the commission of "grave breaches".⁴⁶ This concept of grave breaches should be explained. The Geneva Conventions and Protocol I list and define a certain number of violations as "grave breaches".⁴⁷ They require States Parties to enact legislation to punish such grave breaches, to search for persons who have allegedly committed such crimes, and to bring them before their own courts or to extradite them to another

42 The present author would submit that the numerous calls by the Security Council to respect "the Geneva Conventions" (cf., e.g., SC Res. 764, 771, 780 and 787 (1992)) cannot be understood as an affirmation that they apply in their entirety and not only their common Article 3 and the provisions the parties agreed upon. *Contra* C. Greenwood, *International Humanitarian Law and the Tadić Case*, 7 *EJIL* (1996), 318.

43 Cf. SC Res. 764 (1992), 787 (1992), 913 (1994), 941 (1994), and 1010 (1995).

44 Cf. Judge Li, in his Sep. op., n. 25 above, paras. 5–13, referring also to an opinion expressed by the ICRC in 1993, and D. Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 278 *International Review of the Red Cross* (1990), 414. At least in 1994 this was interestingly enough still the opinion of Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 *AJIL* (1994), 80, and of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), *Final Report of 27 May 1994*, S/1994/674, para. 42.

45 See Statute of the International Criminal Tribunal for Rwanda, Annex to Resolution 955 (1994), Art. 4, and Art. 8 (2) (c) and (e) of the Statute of the International Criminal Court, adopted in Rome on 17 July 1998. What is more delicate, however, is the fact that this very rapid development of International Humanitarian Law was applied, in 1995, to acts committed by *Tadić* in 1992, when most authorities (see n. 44 above) still considered the concept of war crimes to be limited to international armed conflicts. The present author, however, considers that this is no violation of the principle "*nullum crimen sine lege*" because all the acts of which *Tadić* was accused were criminalized by the penal law of the former Yugoslavia (cf. M. Sassòli, *La première décision de la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie: Tadić [compétence]*, *RGDIP* (1996), 128–30). See also the convincing line of arguments by T. Meron, *International Criminalization of Internal Atrocities*, 89 *AJIL* (1995), 565–68.

46 Cf. SC Res. 764 (1992), para. 10, SC Res. 771 (1992), para. 1, and SC Res. 780 (1992), para. 1.

47 Cf. Art. 50 of Convention I, Art. 51 of Convention II, Art. 130 of Convention III, Art. 147 of Convention IV, and Arts. 11 (4), 85 and 86 of Protocol I.

State for prosecution. They confer to all States Parties universal jurisdiction over grave breaches and, what is more, require them to use such jurisdiction, regardless of the nationality of the alleged offender, the nationality of the victim, and where the crime was committed. According to the text and the system of the Conventions and Protocols, the concept of grave breaches does not apply to violations of the law of non-international armed conflicts. First, common Article 3 and Protocol II are silent on the criminalization of their violations. Second, the field of application of the provisions on grave breaches is limited, as for all articles of the Conventions other than common Article 3, by Article 2 common to the Conventions to international armed conflicts. Third, the mentioned provisions limit the concept of grave breaches to acts "against persons or property protected by the present Convention", and the term of "protected person" is, as far as civilians are concerned, limited to "[p]ersons [...] who [...] find themselves [...] in the hands of a Party to the conflict [...] of which they are not nationals."⁴⁸ Fourth, grave breaches include some acts committed against protected persons which are not even prohibited by International Humanitarian Law if committed by a State towards its own nationals. Thus, "compelling a protected person to serve in the forces of a hostile Power" is a grave breach,⁴⁹ while in a non-international armed conflict civilians, although protected by the applicable law, may be under a legal obligation to serve in the armed forces of the government, even if they consider it to be a hostile government.

In the resolution establishing the ICTY⁵⁰ and in the report of the Secretary-General on which it is based,⁵¹ no attempt is made to qualify the conflicts. The resolution does not refer to "grave breaches", but to "serious violations of International Humanitarian Law". The Statute of the Tribunal and the Report of the Secretary-General count, however, "grave breaches" among the most evident examples of such "serious violations".⁵² The ICTY Appeals Chamber has recognized that this concept of "grave breaches" can only apply in international armed conflicts.⁵³ There are, though, some diverging views.⁵⁴

If grave breaches can only exist in international armed conflicts and the Security Council refers to grave breaches in the context of the conflicts in the former Yugoslavia, some of those conflicts must, necessarily have been considered as international by the Security Council,⁵⁵ although it is not clear to which conflicts it

48 Cf. Art. 4 of Convention IV.

49 Cf. Art. 130 of Convention III and Art. 147 of Convention IV.

50 Cf. SC Res. 827 (1993).

51 Cf. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704.

52 Cf. Art. 2 of the Statute.

53 Cf. Tadić Jurisdiction, n. 7 above, paras. 79–83.

54 Cf. Ibid. (Sep. op. Abi-Saab), Chapter IV; *Amicus curiae* brief presented by the United States of America (17 July 1995), 35–36.

55 One may, however, notice that the Security Council has also referred to "grave breaches" in such a clearly internal armed conflict as the current one in Afghanistan (cf. SC Res. 1193 (1998), para. 10).

referred. In only one resolution referring to Bosnia and Herzegovina did the Security Council refer to "grave breaches" without identifying the party responsible.⁵⁶ When it referred to specific behaviour of the Bosnian Serbs, it usually simply reaffirmed the individual responsibility for violations of International Humanitarian Law.⁵⁷ When referring to acts by Croatian forces when capturing the Krajinas, it simply demanded *Croatia* to judge and punish those responsible for violations of International Humanitarian Law.⁵⁸

V.D. When are rebels sufficiently dependent upon a foreign State to make the law of international armed conflicts applicable to their acts?

As mentioned above, the law of international armed conflicts not only applies to conflicts between armed forces of different States, but also to rebels fighting on the territory of one State against its government, if those rebels appear as *de facto* agents of another State. It is uncontroversial that the Federal Republic of Yugoslavia (FRY) supported the Bosnian Serbs and Croatian Serbs and that Croatia supported the Bosnian Croats. What is controversial, however, is not only the factual degree of this support, but also the legal standard according to which such outside support can make International Humanitarian Law of international armed conflicts applicable to the behaviour of the rebels.

VD.1. Controversies about the applicable standard

The International Court of Justice (ICJ) had to define this standard when it had to decide whether the violations of International Humanitarian Law committed by the Nicaraguan *contras* could be attributed to the US as its own behaviour. The argument of the ICJ for not attributing the acts of the *contras* to the US was that the US

participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. [...] For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that

56 Cf. SC Res. 764 (1992), para. 10.

57 Cf. SC Res. 787 (1992), para. 7; SC Res. 913 (1994), preambular para. 6; SC Res. 941 (1994), para. 2, and SC Res. 1010 (1995), para. 3.

58 Cf. SC Res. 1019 (1995), para. 6.

State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁵⁹

An ICTY Trial Chamber applied this same standard to the *Tadic* case and decided that after 19 May 1992, the Bosnian Serb forces could not be considered as *de facto* organs or agents of the FRY because the latter did not exercise control over the activities of the former.⁶⁰ This standard is also very similar to that suggested by the *ICRC Commentary* which considers that when a violation has been committed by someone who is not an agent of an occupying power, but by local authorities, "what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given."⁶¹

Eminent authors and an ICTY Trial Chamber have strongly argued that the test applied for the purpose of establishing State responsibility cannot be used to determine whether the "grave breaches" provisions apply.⁶² The ICTY Appeals Chamber correctly rejected this argument.⁶³ State responsibility and individual responsibility are admittedly different issues and the ICJ had not to determine in the *Nicaragua* case whether the law of international or of non-international armed conflicts applied, for the simple reason that it considered the prohibitions of common Article 3 to apply, as a minimum yardstick, to both kinds of conflicts.⁶⁴ The preliminary underlying issues are, however, the same in both cases. Indeed, before State responsibility or individual responsibility can be established in a given case, the rules according to which the State or the individual should have acted in that case have to be clarified. Only if the acts of the Nicaraguan *contras* had been attributed to the US, these acts, as acts of the US against Nicaragua, were subject to International Humanitarian Law of international armed conflicts. Similarly, the law of international armed conflicts could only apply to acts of Mr Tadic, a Bosnian Serb, committed, in a conflict with the Bosnian government, against Bosnian Muslims, if those acts could be legally considered as acts of another State, the FRY. In both cases, the *Nicaragua* case and the *Tadic* case, the question therefore arose as to when acts of rebels in an internal conflict can be legally considered as acts of a third State.

59 Cf. *Nicaragua*, Merits, ICJ Reports 1986, 14, paras. 110–15.

60 Cf. ICTY, *The Prosecutor v. Tadic*, Judgement (Merits) (7 May 1997), paras. 578–607.

61 Cf. *Commentary*, n. 21 above, 212.

62 Cf. B. Fenrick, The Development of the Law of Armed Conflict through the Jurisprudence of the International Tribunal for the Former Yugoslavia, in M. Schmitt & L. Green (eds.), *The Law of Armed Conflict: Into the Next Millennium* (71 International Law Studies) (1998), 85–92; Meron, n. 4 above, 236–42, and another Trial chamber of the ICTY in *The Prosecutor v. Delalić et al.* ("The Celebici case") (16 Nov. 1998), paras. 230–31.

63 Cf. ICTY Appeals Chamber, *Prosecutor v. Dusko Tadic*, Judgement (15 July 1999) ("Tadic Appeals Judgement"), paras. 103–5.

64 Cf. *Nicaragua*, Merits, ICJ Reports 1986, 14, para. 219. One wonders why the ICTY could not use the same line of argument. It could thus have avoided many legal controversies. It would, however, also have deprived the present writer of an opportunity to honour the memory of Judge Li.

The ICTY Appeals Chamber, however, decided in the *Tadić Appeals Judgement* case that the test applied by the ICJ in the *Nicaragua* decision was unconvincing even for the purpose of establishing State responsibility, because it was contrary to the very logic of the law of State responsibility and at variance with State and judicial practice.⁶⁵ In its view, when responsibility for a military organization was in question, overall control by a foreign State over that organization was sufficient to render the foreign State responsible for all acts of that organization and to make International Humanitarian Law of international armed conflicts applicable to its acts.⁶⁶

First, one may question whether it is appropriate that the ICTY provides to a question of general international law a different answer than that given by the ICJ, the principal judicial organ of the United Nations.⁶⁷ Even if the theory of the ICTY Appeals Chamber is well reasoned, the ICJ can be expected to continue to apply its theory to inter-State disputes worldwide, and double standards will therefore inevitably result.

Second, with the exception of a German case concerning the former Yugoslavia, the practice mentioned by the Chamber consists mainly of cases where a State was held responsible for armed groups acting on its own territory. There, territorial control might have been the decisive factor. The other case mentioned by the Chamber is that of an occupied territory,⁶⁸ where armed forces of the occupying power were actually present and where International Humanitarian Law expressly prescribed that protected persons cannot be deprived of their rights by any change introduced into the institutions of the territory.⁶⁹ One may doubt whether those precedents can be applied without further arguments to the *Tadić* case, where a local military group was constituted, out of the rests of the army of the former central State, on the territory of a State falling apart.

Third, as far as the logic of the law of State responsibility is concerned, the Appeals Chamber is certainly correct in affirming that a State should not hide behind a lack of specific instructions to disclaim international responsibility for a military group, whether at home or abroad. Abroad, this argument is only convincing if the group has been entrusted with a certain task. As far as the Bosnian Serbs are concerned, one may, however, argue that they were executing their own task. Whether rightly or wrongly, they did not want to join the State of Bosnia and Herzegovina.

65 Cf. *Tadić Appeals Judgement*, n. 63 above, paras. 115–45.

66 Earlier a Trial Chamber of the ICTY had already come to a similar conclusion in the *Celebić* case. Because of the continuing involvement of the FRY, it applied the law of international armed conflicts to the detention of Bosnian Serbs by Bosnian Muslims, considering that the *Nicaragua* test was not applicable to the question of individual responsibility (cf. the *Celebić Judgement*, n. 62 above, paras. 233 and 234).

67 Cf. Art. 92 of the UN Charter.

68 Cf. *Loizidou v. Turkey*, ECHR Reports of Judgments and Decisions 1996, 2216 ff., paras. 56 and 57.

69 Cf. Art. 47 of Convention IV.

VD.2. Application of the standard to the Bosnian Serbs and Croats

When the overall control test had to be applied to the case of the Bosnian Serbs, the Appeals Chamber came to the conclusion that they were under such control by the FRY.⁷⁰ It mentioned, similarly to the Trial Chamber, impressive circumstantial evidence for the existence of such control. Perhaps it neglected the particularities of the situation of a State falling apart into several States, where the armed forces of the former central State necessarily have many links with the former central authorities which are now foreign authorities. As such links are inherent in the situation, they are not necessarily an indication of control. The Appeals Chamber added the argument that the FRY had signed the Dayton Peace Agreement for the Bosnian Serbs. With all due respect, this argument is almost contrary to good faith, when one recalls that it has been the international community, and particularly the US, which has refused to negotiate with the Bosnian Serbs and which obliged the FRY to negotiate and sign for the Bosnian Serbs.⁷¹

Another Trial Chamber of the ICTY came to similar conclusions concerning the involvement of Croatia in the conflict in Bosnia and Herzegovina, in a Review of an indictment against an absent defendant,⁷² the Bosnian Croat commander Ivica Rajic. In that case, the Trial Chamber applied the law of military occupation of the law of international armed conflicts to an attack launched on the Bosnian Muslim village of Stupni Do, because it considered the Bosnian Croats as agents of Croatia. According to this Chamber, this was sufficient to apply International Humanitarian Law of international armed conflicts to all their acts, independently of whether Croatia had specific operational control over these acts.⁷³ This led to the astonishing result that a Bosnian village became a territory occupied by Croatia and its inhabitants were legally in the hands of Croatia, although possibly no one in Croatia ordered or even knew that this village would be taken and the attacking forces were possibly the inhabitants of the neighbouring Bosnian Croat village, or even inhabitants of the village to be "occupied".

VD.3. Risks inherent in the theories adopted by the ICTY and suggested in scholarly writings

In any case, there are some risks inherent in theories like those applied by the Appeals Chamber in the *Tadic* case and by the Trial Chamber in the *Rajic* case.

First, such theories imply an unintended form of judicial ethnic cleansing:

70 Cf. *Tadic Appeals Judgement*, n. 63 above, paras. 146–62. Earlier, Trial Chambers had come to similar conclusions in the Review of the Indictment of a Bosnian Serb (cf. ICTY, *The Prosecutor v. Nikolic* (20 Oct. 1995), para. 30) and in the trial of Bosnian Muslims and Croats in the *Celebici* case, n. 62 above, paras. 233 and 234.

71 Cf. Richard Holbrooke, *To End a War* (1998), 4, 5, 99, 105–7, 139, 140, 148–51, 197, 243, 255, 256, 310, and 341–43.

72 According to Rule 61 of the Rules of Procedure and Evidence of the ICTY.

73 Cf. *Rajic*, n. 27 above, para. 25.

Instead of constituent peoples of Bosnia and Herzegovina, the Serbs and Croats are considered as agents of a foreign State. If their acts can be legally attributed to a foreign State, why should they themselves not be "attributed" to that State, *i.e.*, considered to be foreigners? This is precisely what a Trial Chamber concluded in the *Celebici* case, arguing that Bosnian Serbs detained by the Bosnian government were protected persons because they had not accepted the nationality of Bosnia and Herzegovina.⁷⁴ It did not explain why the will of the persons should be controlling in the determination of their nationality in a State which breaks up, although the Bosnian Serbs were not allowed to choose the State in which they wanted to live. In any event, if those persons are foreigners, their forcible transfer to their "home State" is no longer a war crime, but rather a favour.⁷⁵ Today, after the conflict, such theories are not a helpful contribution to peace and reconciliation. During such a conflict, one cannot imagine obtaining from a military commander the respect of certain rules by arguing that he is an agent of a foreign country while his enemy is at home.

Second, such theories lead to results incompatible with the principle of the equality of belligerents before International Humanitarian Law. We have seen above that this is not only a legal principle, but also the only chance to obtain this law's respect in practice. Even if the conflict was international in relation to the interference of the FRY and Croatia, to apply the law of international armed conflicts to the conflict between Bosnian government forces and Bosnian Serb and Croat forces "legally considered as agents of Serbia or Croatia", puts those fighting on both sides only formally on the same footing. Will the governmental forces consider a captured "agent" as a prisoner of war? May they repatriate him at the end of the conflict to the "country on which he depends", *i.e.*, deport him abroad? The consequences for civilians are even worse. This may be illustrated with the case of rapes, one of the most horrible practices in the conflicts in the former Yugoslavia. Under the traditional concept of protected persons, those committed by the government army of Bosnia and Herzegovina against Bosnian Serb women would not be regarded as "grave breaches", because those women, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Convention IV. By contrast, rapes committed by Bosnian Serbs against Bosnian Muslim women would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of the FRY of which the Bosnian women did not possess nationality. The Appeals Chamber has correctly pointed out in the *Tadić Jurisdiction* case that "this would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina."⁷⁶

74 Cf. the *Celebici* Judgement, n. 62 above, paras. 250–66, in particular para. 259.

75 Cf. n. 21 above.

76 Cf. *Tadić Jurisdiction*, n. 7 above, para. 76.

VD.4. Necessity to redefine the concept of protected persons?

Following suggestions to adapt the definition of protected persons "to the principal challenges of contemporary conflicts,"⁷⁷ the same Appeals Chamber abandoned in the *Tadic Appeals Judgement*, against the same accused, the above-mentioned literal interpretation of the definition of protected persons and it replaced the factor of nationality by the factors of allegiance and effective protection.⁷⁸ The justification provided was very short. It referred on the one hand to some cases for which nationality is not decisive under explicit provisions (or according to the "*travaux préparatoires*") of the Geneva Conventions, namely for refugees and neutral nationals.⁷⁹ The victims in the *Tadic* case were, however, not neutral nationals or refugees. It referred, on the other hand, to the inadequacy of the criterion of nationality for contemporary conflicts and recalled that International Humanitarian Law must apply according to substantial relations rather than formal bonds. The latter reminder is correct for the law of non-international armed conflicts and for the question of whether an armed conflict exists. However, once the law of international armed conflicts applies, the formal status of a party, a territory or a person is relevant for the protective regime applicable.⁸⁰ The logical consequence of this theory is that from now on, all victims of international armed conflicts should benefit from the full protection of the protected persons status under International Humanitarian Law. One may wonder whether States will be ready to treat, in international armed conflicts, their own nationals as protected persons as soon as those persons' allegiance lies with the enemy. In any case, even if this approach has many advantages *de lege ferenda*, one may wonder whether it is admissible to reinterpret *ex post* a constitutive element of a grave breach, *i.e.*, that it must be committed against persons of another nationality. Furthermore, allegiance is difficult to determine in the heat of the conflict. Finally, some acts such as employing protected persons in military activities or enrolling them into the armed forces are only and can only be prohibited in international armed conflicts and if committed against enemy nationals.⁸¹

VE. Uniform qualification due to the complexity of the conflicts?

It is perhaps because of all the aforementioned, and many more, problems of qualification that many have suggested to simply apply the law of international armed conflicts, at least in the former Yugoslavia.⁸²

77 Cf. Meron, *AJIL* (1998), n. 4 above, pp. 238–42; Greenwood, n. 42 above, 273–74; Fenrick, n. 62 above, 91–92, and the ICTY in the *Celebici* case, n. 62 above, paras. 245–66.

78 Cf. *Tadic Appeals Judgement*, n. 63 above, paras. 163–69.

79 Cf. Arts. 4 (2), 44, and 70 (2) of Convention IV.

80 Cf. above, Part III.C.1., and nn. 12–15.

81 Cf. Arts. 50 and 130 of Convention III and Arts. 40, 51, and 147 of Convention IV.

82 Cf. Separate opinion Li, n. 25 above, para. 17; Aldrich, n. 4 above, 66–67; Meron, *AJIL* (1998), n. 4 above, 238–39; Meron, *AJIL* (1994), n. 44 above, 81; Meron, *AJIL* (1995), n. 45 above, 556;

This is a questionable finding of the facts of the case. It would, indeed, be an oversimplification to consider all fighting in the former Yugoslavia as part of one conflict of "Belgrade" against all other States and parties in the region. The Bosnian Serbs, the Croatian Serbs and Mr Abdic were not simply "puppets" of President Milosevic and the Bosnian Croats were not simply puppets of President Tudjman. At least Milosevic repeatedly had serious difficulties imposing solutions of the international community on his "puppets".⁸³

The other possible reason to uniformly apply the law of international armed conflicts would not be based on an interpretation of the facts, but on an interpretation of the law: that in this case or in all cases the law of international armed conflicts should also apply to non-international armed conflicts. The Commission of Experts established pursuant to Security Council Resolution 780 (1992) has expressed this most bluntly. First, it made the correct legal analysis: "Under existing treaty law [...] to classify the various armed conflicts in the territory of the former Yugoslavia as international or internal ones would require it to determine whether a given situation amounts to an armed conflict [...] between two or more States or one being waged in the territory of one State. Further determinant factors would be the dates on which the several States in the region are deemed to have acquired statehood and the dates from which the treaties in question are regarded as applicable to each of them." But then it continued stating that it "is of the opinion, however, that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia."⁸⁴

Such an approach may be expedient for a commission called upon to establish facts. It is, however, inappropriate and even unacceptable if applied beyond that. First, the fact that a situation is difficult to qualify under existing law is, except for first-year students, no argument to apply a new, easy solution. In many branches of law difficult distinctions have to be made. If they correspond to a social reality, they are not abandoned simply because they are particularly difficult to apply in an important case, neither in that case nor for the future. Second, the solution is in fact not at all an easy one, as it requires defining in each of the conflicts who are the genuine parties and who are their agents, who are the protected persons (or whose

O'Brien, n. 25 above, 647; US *Amicus curiae* Brief, n. 54 above, paras. 26–34 and to a certain extent the ICTY in the *Celebici* case, n. 62 above, para. 266. Greenwood, n. 42 above, 270–77, supports the differentiated approach of the Appeals Chamber of the ICTY in *Tadic* Jurisdiction.

83 Cf. David Owen, *Balkan Odyssey* (1995), 153, 155, 301, 309, 326, 348, 353, 354, and Holbrooke n. 71 above, 151, 159, 218, 292–93, 310.

84 See UN Doc. S/25274, 10 February 1993, paras. 44 and 45, confirmed in the Final Report UN Doc. S/1994/674, 27 May 1994, para. 44.

allegiance is with which side) and which side is an occupying power over which territory. Third, even the proponents of this theory would not seriously suggest applying the law of international armed conflicts to such a conflict as that between the followers of Mr Abdic and the Bosnian government. Fourth, to treat a situation, which "under existing treaty law" falls under certain rules, under another set of rules can only be a proposal for the future, not a solution applied to a past situation. Otherwise, it would seriously violate international legality and openly apply double standards. Why should a situation which "under existing treaty law" is a non-international armed conflict, and would and will therefore be qualified as such if it happened elsewhere, be judged under the law of international armed conflicts only because it arises in a region where other conflicts make the situation complex? How are soldiers, parties and humanitarian actors to know, when a conflict just breaks out, that the situation will later become complex and that they should therefore immediately apply the law of international armed conflicts? The fact that this results in some instances to render behaviour criminal which would not be criminal "under existing law", makes things even worse if this solution is applied *de lege lata*. Fifth, the reference to the web of agreements concluded among the parties cannot justify applying the law of international armed conflicts in cases where this is not foreseen by those agreements.

Finally, one may be wondering under which law the champions of this approach, i.e., of simply applying the law of international armed conflict, will judge the horrible practices of Serb forces against Kosovo Albanians and the more recent atrocities of Kosovo Albanians against local Serbs in Kosovo. Will they apply the law of international armed conflicts because most of those acts were committed during an international armed conflict between NATO member States and the FRY? Or will they apply it because the crimes were committed during the same, ongoing "complex conflict" in the former Yugoslavia which started in 1991? Or because the Kosovo Albanians have declared their independence? Or because the latter could never exercise their right to self-determination? If the law of international armed conflicts applies, the Kosovo Albanians would certainly qualify as protected persons by the ICTY Appeals Chamber, because their allegiance was certainly not with the FRY. Or will the champions of this approach apply the law of non-international armed conflicts, because the independence of the Kosovo Albanians, unlike that of Croatia, Slovenia, and Bosnia and Herzegovina, is, for the time being, not on their political agenda?⁸⁵ The only consolation for those puzzled by such questions is that, whatever law is applied, those horrible practices were prohibited.

85 It is interesting to notice that the Indictment against Slobodan Milosevic and others (Case IT-99-37) of 22 May 1999 and its Review by the ICTY of 24 May 1999 (for acts committed in Kosovo before the NATO forces intervened), make no reference to grave breaches or to the law of international armed conflicts.

VI. One law for international and non-international armed conflicts?

The idea underlying many suggestions to apply the law of international armed conflicts to all conflicts in the former Yugoslavia, is the old idea of applying the same law to all armed conflicts, not only in the former Yugoslavia, one hopes, but everywhere. As seen above, this wish must be shared from a humanitarian point of view. Until now, States, who are still the legislators in the international community, have not wished to do so. As explained above, at least the present author considers, in addition, that the idea is incompatible with the still predominant nature of the international community as a society of States. This nature is certainly in the process of changing and armed conflicts change simultaneously. Conflicts are, however, clearly not yet all internal conflicts in one world. In those happening between States it is still meaningful to have a prisoner-of-war status implying that those participating may not be punished for their mere participation and a concept of occupied territories which fall under the power of another sovereign during an armed conflict. These concepts cannot be applied to conflicts within an existing State, but they continue to protect human beings in international armed conflicts. Furthermore, the suggestion to apply International Humanitarian Law of international armed conflicts to all conflicts rests on the assumption that it always offers better protection for the victims. We have seen that this is not true. The law of non-international armed conflicts is, in addition, easier to apply and has a better chance of being respected in the chaotic and "complex" situations of current conflicts.

The present author would therefore suggest that the solution cannot be to apply one law to the situations for which the other law was made, but, if ever, to create a new law applicable to all situations – a challenge for the new millennium. If States, as they are today, undertook such a codification exercise, the risk would, however, be so high that they would reduce the protection foreseen for international armed conflicts rather than dramatically increase that for non-international armed conflicts.

For the time being it is also very important not to forget that the distinction between international and non-international armed conflicts in the former Yugoslavia has important implications in terms of fairness and the rule of law, but there and elsewhere it has only a minor impact on the victims. The problem is not that the wrong set of rules has been respected, but that no rules have been respected. None of the horrible crimes which have destroyed that region and others would be lawful if only the law of non-international armed conflicts applied. All the war criminals violated even the simple rules of Article 3 common to the four Conventions.

VII. Conclusion

The conclusion of this chapter is frustrating and yet permits hope. When analysed without preconceived ideas or in view of a certain result, the conflicts in the former Yugoslavia are very complex and show how complex International Humanitarian

Law can be, although its principles are obvious. The conflicts in the former Yugoslavia were a serious blow to the old dichotomy between international and non-international armed conflicts in International Humanitarian Law. They have led to nearly instant developments which may be perceived by those affected as double standards. Some of these developments, such as the international criminalization of violations of the law of non-international armed conflicts, have been confirmed and are positive. Others, such as the attribution of hostilities to third States or the reinterpretation of the concept of protected persons, still need to be refined. Only the future will show whether those developments are developments of the law for the benefit of all victims of all conflicts or double standards applied for political reasons. The application of International Humanitarian Law to recent conflicts in which permanent members of the Security Council or their close allies were involved leads to some scepticism in this respect.

What we need, however, is that all those committed to International Humanitarian Law and the rule of international law fight to refine the new solutions applied to the former Yugoslavia. We must ensure that future generations can say that the application of International Humanitarian Law to the conflicts in the former Yugoslavia was not an instance of double standards, but opened new horizons for the protection of all victims of all conflicts. This would also honour the memory of those who perished as victims of violations of International Humanitarian Law in those conflicts, and of those who left us while applying International Humanitarian Law to those conflicts, such as Judge Li Haopei.