The application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia

by
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THE 1949 Geneva Conventions on the protection of war victims and their Additional Protocol I of 1977 apply to international armed conflicts. Article 3 common to the Conventions and Additional Protocol II apply to non-international armed conflicts. This "two box" approach to international humanitarian law is conceptually simple. It is the result of a process whereby the representatives of States have indicated a greater willingness to accept restrictions on conduct during international armed conflicts than during internal conflicts. Many modern armed conflicts, however, have both international and internal aspects. When and if conduct in these conflicts is scrutinized by courts with a criminal jurisdiction, it is reasonable to presume that these courts will endeavour to find legally acceptable means to apply similar rules to similar conduct.

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The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) with the issue of conflict classification and the related issue of determining applicable law should be of interest to all those concerned with the application of international humanitarian law by criminal courts. As long as humanitarian law remains in two boxes, courts which address criminal responsibility in complex modern conflicts will be compelled to undergo similar analytical contortions.

Article 2 of the ICTY Statute gives the Tribunal the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva Conventions. Article 2 common to these Conventions indicates that the Conventions apply in their entirety to all armed conflicts involving one or more High Contracting Parties on each side; to all cases of total or partial occupation of the territory of a High Contracting Party by the forces of another High Contracting Party; and to armed conflicts involving powers which are not parties to the Conventions if those powers accept and apply the provisions thereof. A reasonable argument can be made that the grave breach provisions are part of customary law and apply to all international armed conflicts. In any event, the Geneva Conventions applied throughout the territory of the former Yugoslavia during the period of conflict as a matter of treaty obligation. It should also be noted that their Article 3, which applies to non-international armed conflicts, encourages parties to such conflicts to enter into special agreements to bring into force all or part of the Conventions' other provisions. All the parties to the conflict entered into a web of special agreements under the auspices of the International Committee of the Red Cross pursuant to Article 3 common to the 1949 Geneva Conventions or to other general principles of international humanitarian law.

Unfortunately, simply stating that the sovereign entities in the territory of the former Yugoslavia were bound by the Geneva Conventions as a matter of treaty or custom does not resolve the issue of whether or not the grave breach provisions were relevant. At various times, (a) the Socialist Federal Republic of Yugoslavia (SFRY), which was succeeded on 29 April 1992 by the Federal Republic of Yugoslavia (FRY), was engaged in armed conflict against one or more of its neighbours: Slovenia, Croatia, Bosnia and Bosnia and Herzegovina; (b) Croatia was engaged in armed conflict against the SFRY, the "Republic of Serbian Krajina", the FRY, and Bosnia-Herzegovina; (c) the latter was engaged in armed conflict against the SFRY,

the FRY, the Republika Srpska, Croatia, the HVO (the Bosnian Croat entity), and the Bosnian Muslim faction controlled by Fikret Abdic; and (d) Slovenia was engaged in armed conflict with the SFRY.

One is tempted to cut the Gordian knot and simply argue that all the fighting that occurred in the territory of the former Yugoslavia between 1991 and 1995 was part of one large international armed conflict. It is difficult, however, to fit all the fighting into such a framework. For example, it is difficult to see how the fighting between the Bosnian government and the Abdic faction can be regarded as part of an international conflict. The most bizarre incident to date involving the conflict classification issue occurred during the Blaskic Trial when a witness testified that Bosnian Croat forces, theoretically engaged in a conflict with Bosnian Serb forces, opened their lines temporarily to allow Bosnian Serb tanks access to a location where they could shell Bosnian Muslim positions. Once the task was completed, the Bosnian Serb tanks went back to their own side of the confrontation line and recommenced firing at Bosnian Croat forces. There are times when the events in the territory of the former Yugoslavia appear to bear more similarities to those of the Thirty Years War in the 17th century than to contemporary conflicts.

Standards for the classification of armed conflicts

The decision on the *Defence Motion for Interlocutory Appeal on Jurisdiction* (hereinafter *Tadic Jurisdiction Decision*) rendered on 2 October 1995 gave the Appeals Chamber a first opportunity to address the issue of conflict classification.[1] The offences with which Tadic was charged occurred in Bosnia and Herzegovina in 1992; they involved a Bosnian Serb perpetrator and Bosnian Croat or Muslim victims.

At the trial level, the defence argued that the conflict in question was not international and that there were no Article 3 agreements bringing the grave breach provisions into effect. The prosecutor argued that for a variety of reasons the conflict was international and, to the extent that the conflict had internal aspects, the grave breach provisions applied as a result of relevant Article 3 agreements. The United States, in an *amicus* brief, argued that the events in the former Yugoslavia should be regarded as parts of a

1 *In re Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (The Prosecutor v. Dusko Tadic)*, 1995 I.C.T.Y. No. IT-94-1-AR72 (2 October 1995). Majority decision reprinted in 35 I.L.M., 1996, p. 32 .

single international conflict and that violations of Article 3 common to the Geneva Conventions could be prosecuted under the grave breach provisions of those Conventions. On appeal, the prosecution also argued that the Security Council had determined that the conflict in the former Yugoslavia was international and that this determination should be given full effect.

The Appeals Chamber declined to decide on the nature of the conflict, leaving the issue to be resolved as a matter of mixed fact and law by the Trial Chamber. It did indicate in its decision that classification was a complex issue and that the Security Council was also aware of this complexity:

> "[W]e conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context."[2]

The Appeals Chamber went on to adopt a relatively conservative approach to Article 2 of the ICTY Statute, deciding that "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[3]

Although the defence would appear to have conceded the point and the prosecution argued in support of it, the Chamber was unwilling to consider the possibility of prosecuting under Article 2 of the Statute for grave breaches occurring in an internal conflict if appropriate agreements under Article 3 of the Geneva Conventions had been concluded. It did, however, envisage the possibility of such prosecution under Article 3 of the Tribunal's Statute. Implicitly, the Chamber decided that it was not possible to prosecute violations of Article 3 common to the Geneva Conventions under their grave breach provisions. The relatively cautious approach to interpretation of Article 2 of the ICTY Statute taken by the majority can be contrasted with a much more progressive approach adopted in a separate opinion by Judge Abi-Saab. He was of the view that the Tribunal should assume jurisdiction under Article 2 of the Statute for acts committed in internal conflicts on the basis of either a new interpretation of the Geneva Conventions or the establishment of a new customary rule ancillary to those Conventions.[4]

2 *Ibid.*, para. 77, p. 57.
3 *Ibid.*, para. 84, p. 60.
4 Separate Opinion of Judge Abi-Saab, *ibid.*, p. 6: — not reprinted in I.L.M.

The majority judgment in the *Tadic Jurisdiction Decision* set the standard for consideration by the Trial Chambers of the issue of conflict classification.

The major decisions at the trial chamber level addressing the classification issue have to date been the *Rule 61 proceeding concerning Ivica Rajic*,[5] the *Tadic Trial Decision*,[6] and the *Celebici Trial Decision*.[7] These decisions have tended to focus on three related questions: (a) did an international conflict exist when the offences were committed? (b) was the accused linked in an appropriate fashion to one side of the international conflict? and (c) were the victims in the hands of a party to the conflict or occupying power of which they were not nationals? Most of the victims were civilians, and Article 4 of the Fourth Geneva Convention (on the protection of civilians) states that: "[p]ersons protected .... are those who ..... find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals." In the absence of any other relevant international decisions, particular heed has been paid, for better or worse, to the *Nicaragua* decision of the International Court of Justice[8] when considering conflict classification in the *Rajic* and *Tadic* proceedings. The *Nicaragua* decision was concerned with State responsibility for violations of international humanitarian law, not with individual criminal responsibility. Further, it was concerned with the peculiar facts of the US-supported struggle of the *contras* in Nicaragua, and these facts are not necessarily similar to the facts arising in the territory of the former Yugoslavia.

In the *Rajic Rule 61 proceeding*, a trial chamber consisting of Judges McDonald, Sidhwa, and Vohrah reviewed and reconfirmed an indictment against Ivica Rajic alleging that Bosnian Croat forces under his command had attacked the Bosnian Muslim village of Stupni Do on 23 October 1993 and committed several offences for which Rajic was responsible including wilful killing, a grave breach under Article 2(a) of the ICTY Statute. Bearing in mind the *Tadic Jurisdiction Decision*, the trial chamber was of the view that it was necessary to establish an undefined quantum of third-State (Croatian) involvement in the clashes between Bosnian government and

5 *Prosecutor v. Ivica Rajic Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, ICTY No. IT-95-12-R61 (13 September 1996).

6 *Prosecutor v. Dusko Tadic*, Opinion and Judgment, ICTY No. IT-94-I-T (7 May 1997).

7 *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Judgment, ICTY No. IT-96-21-T (16 November 1998).

8 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

Bosnian Croat (HVO) forces to convert an internal conflict into an international armed conflict. The prosecution advanced two theories. First, the conflict was international because of the direct military involvement of Croatian forces engaged in combat with Bosnian forces in Bosnia and, second, the conflict was international because, in the hostilities between Bosnia and Herzegovina and the Bosnian Croats, the Bosnian Croats were closely related to and controlled by Croatia and its armed forces.

The Chamber found that there was an international conflict between Bosnia and Herzegovina and Croatia during the appropriate period but this was not enough, by itself, to establish that grave breaches had been committed by Bosnian Croats. It was also essential to establish that Croatia exerted such political and military control over the Bosnian Croats that the latter might be regarded as an agent or extension of Croatia. After reaching this conclusion, the Chamber went on to decide that the Bosnian civilian victims were protected persons in that they were effectively "in the hands of" Croatia, a country of which they were not nationals.

The Trial Chamber in the *Tadic* case consisted of Judges McDonald, Vohrah, and Stephen. As indicated earlier, Tadic is a Bosnian Serb who committed offences against Bosnian Muslims or Croats in Bosnia and Herzegovina in the summer of 1992. In brief, the majority, consisting of Judges Vohrah and Stephen, held implicitly that the Geneva Conventions did apply in Bosnia throughout the period covered by the indictment because of an ongoing international armed conflict between Bosnia and the SFRY/FRY.[9] The majority then made two unsubstantiated assertions in a single paragraph: firstly that the armed forces of the Republika Srpska (Bosnian Serb army) and the Republika Srpska as such were, at least from 19 May 1992 onwards, legal entities distinct from the armed forces of the FRY and from the FRY itself, and secondly that members of the Bosnian Serb forces were nationals of Bosnia.[10] The date 19 May 1992 was significant as that of the dissolution of the old SFRY national army into two new components – the Bosnian Serb army and the FRY army – and the formal withdrawal of the latter from Bosnia.

Relying on these assertions the majority went on to review the *Nicaragua* case in order to determine the proper rule for applying general principles of international law relating to State responsibility for *de facto* organs

9 *Op. cit.* (note 6), paras 118-120, 569.

10 *Ibid.*, para. 584.

or agents to the specific circumstances of rebel forces fighting a seemingly internal conflict against the recognized government of a State, but dependent on the support of a foreign power in the continuation of that conflict. The majority noted that the International Court of Justice (ICJ) had set a particularly high standard for determining whether or not the United States was responsible for the activities of the *contras*. The central portion of the ICJ Judgment on this point was as follows:

> "585 ... United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua .... 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."[11]

The majority identified two substantial differences between the facts of the *Nicaragua* case and the facts in the *Tadic* case. First, the Bosnian Serb army was an occupying force, not a raiding army, and second, the FRY clearly did control Bosnian Serb military activities until approximately 19 May 1992.

It was the position of the majority that the law applicable to State responsibility was also relevant to determining which body of law applied for individual criminal responsibility. In order to establish State responsibility, it was necessary to establish that the FRY exercised effective control over the Bosnian Serb army or the Republika Srpska. Logistical support, personnel support and common aims were insufficient. To establish effective control, the Prosecution must establish either that the FRY army controlled the Bosnian Serb army by giving it orders and directing its operations, or that the FRY government controlled the government of the Republika Srpska. In the view of the majority, all that the prosecution succeeded in establishing was that the Republika Srpska and the Bosnian Serb army received financial and other support from the FRY and armed forces of the FRY, and

11 *Ibid.*, para. 585, quoting from the ICJ *Nicaragua* Judgment, *op.. cit.* (note 8), para. 115.

that they coordinated their activities to reach common goals. This was not enough.

On the basis of its assessment of the law as contained in the *Nicaragua* decision (the effective control test) and its assessment of the facts, the majority found that the Bosnian Serb army and the Republika Srpska could not be regarded as *de facto* organs or agents of the FRY. As a consequence, the civilian victims in the *Tadic* case could not be regarded as protected persons within the meaning of the Fourth Geneva Convention, because they were not in the hands of a party — of which they were not nationals — to an armed conflict. The Bosnian victims were in the hands of their fellow Bosnian (Serb) nationals. As a consequence, the grave breach provisions of the Geneva Conventions recognized in Article 2 of the ICTY Statute did not apply.[12]

Judge McDonald, continuing to adopt the approach she had formulated in the *Rajic Rule 61 Proceeding*, filed a robust dissent in which she argued that the majority had misinterpreted the *Nicaragua* decision and in any event had misapplied its mistaken interpretation to the facts. In her view, *Nicaragua* established two distinct tests for attributability: effective control and agency. She summarized her analysis as follows:

> "25. The separate opinion of Judge Ago [in the *Nicaragua* case], also cited by the majority, explains with lucidity the concept that a State can be found legally responsible even where this is no finding of agency. He states:
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> '[T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does

12 *Ibid.*, para 587.

international law recognize, as a rare exception to the rule, *that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State.* The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.'[13]

Therefore it appears that there are two bases on which the acts of the VRS [Bosnian Serb army] could be attributed to the Federal Republic of Yugoslavia (Serbia and Montenegro): where the VRS acted as an agent of the Federal Republic of Yugoslavia (Serbia and Montenegro), which could be established by a finding of dependency on the one side and control on the other; or where the VRS was specifically charged by the Federal Republic of Yugoslavia (Serbia and Montenegro) to carry out a particular act on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro) thereby making the act itself attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). In *Nicaragua*, the court required a showing of effective control for this latter determination."

If "effective control" is the proper test, Judge McDonald, interpreting the same evidence and accepting the same facts, concluded that the FRY did effectively control the Bosnian Serb army, that the creation of that army was a legal fiction, and that the attack which provided the opportunity for Tadic to commit offences had to have been planned before the Bosnian Serb army was created on 19 May 1992.[14]

In the *Celebici Trial Decision* addressing incidents that occurred in 1992 and involved Bosnian Serb victims and perpetrators linked to the Bosnian government, the Trial Chamber has adopted a different approach to the issue of conflict classification. It explicitly adopted the premise that "should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory

13 *Loc. cit.* (note 8), Separate Opinion of Judge Ago, para 16 (emphasis added).

14 *Op. cit.* (note 6), Separate Opinion of Judge McDonald, paras 7, 8.

until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict."[15]

The Chamber appears to have neatly side-stepped the *Nicaragua* decision and its various tests as irrelevant to the situation in Bosnia and Herzegovina and as of limited relevance to the determination of individual criminal responsibility. In lieu thereof, the Chamber considered the first relevant question to be: "Was there an international armed conflict in Bosnia and Herzegovina in May 1992 and did that conflict continue throughout the rest of that year, when the offences charged in the indictment are alleged to have been committed?"[16] The Chamber held that an international armed conflict existed in Bosnia-Herzegovina at the date of its recognition as an independent State on 6 April 1992 and the parties were Bosnia-Herzegovina and the FRY. Further, there was no general cessation of hostilities in Bosnia-Herzegovina until the signing of the Dayton Peace Agreement in November 1995. The Chamber went on to consider whether the nature of the conflict changed after the purported withdrawal of FRY forces in May 1992. It concluded:

> "234. The Trial Chamber is in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature. The withdrawal of JNA [SFRY army] troops who were not of Bosnian citizenship, and the creation of the VRS and VJ [FRY army], constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the armed forces of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law."

Having reached this conclusion, the Chamber went on to consider whether the victims of the alleged acts were persons protected under the Geneva Conventions. It held that none of the victims, all Bosnian Serbs, appeared to meet the criteria to be regarded as prisoners of war under the

15 *Op. cit.* (note 7), para 209.

Third Geneva Convention. On the other hand, at the urging of the prosecution the Chamber adopted a very progressive approach towards identifying persons protected under the Fourth Geneva Convention. Civilians protected under that Convention must be "in the hands of" a party to the conflict of which they are not nationals. It should be recollected that in the *Tadic* case, the Trial Chamber held that the victim group (Bosnian Muslims and Bosnian Croats) were not persons protected under the Fourth Convention because they were in the hands of Bosnian Serbs, a group which shared their Bosnian nationality. In the *Celebici case*, the Trial Chamber held that the victim group (Bosnian Serbs) should be regarded as protected persons and therefore they should not be regarded as sharing the nationality of their Bosnian Muslim and Bosnian Croat captors. Instead of taking for granted that the Bosnian Serbs automatically assumed Bosnian nationality when Bosnia and Herzegovina became an independent State, the Chamber adopted a more flexible approach, relying in particular on the ICJ decision in the *Nottebohm* case[17] and its requirement for an effective link, but also on the emerging right under international law to the nationality of one's own choosing in cases of State succession:

> "264. The law must be applied to the reality of the situation before us and thus, to reiterate, the relevant facts are as follows:
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> - Upon the dissolution of the SFRY, an international armed conflict between, at least, the FRY and its forces and the authorities of the independent State of Bosnia and Herzegovina took place;
> - A segment of the population of Bosnia and Herzegovina, the Bosnian Serbs, declared their independence from that State and purported to establish their own Republic which would form part of the FRY;
> - The FRY armed and equipped the Bosnian Serb population and created its army, the VRS;
> - In the course of military operations in the Konjic municipality, being part of this international armed conflict, the Bosnian government forces detained Bosnian Serb men and women in the Celebici prison-camp.
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> 265. Without yet entering the discussion of whether or not their detention was unlawful, it is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their

16 *Ibid.*, para 211.

17 *Lichtenstein v. Guatemala*, I.C.J. Reports 1955, p. 4.

> Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been 'protected persons' within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State."

Further developments

The approaches taken by the chambers in the *Tadic* and the *Celebici* trial decisions are diametrically opposed. The prosecution has appealed the Trial Chamber decision in Tadic, arguing that:

- the Trial Chamber erred in relying upon the *Nicaragua* case and the "effective control" test to determine the applicability of the grave breach provisions of the Geneva Conventions;
- for the grave breach provisions to be rendered applicable, the provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law only require that the perpetrator be demonstrably linked to a party to an international armed conflict of which the victim is not a national;
- assuming the *Nicaragua* case is to be relied upon, that decision also applied an "agency" test, which is a more appropriate standard for determining the applicability of the grave breach provisions;
- in any event, assuming that the "effective control" test mentioned in the *Nicaragua* case is applicable to determining the applicability of grave breach provisions, the Trial Chamber erred in finding that this test is not satisfied on the facts of this case, which also satisfy the "agency" test outlined in the *Nicaragua* case.

The main argument advanced by the prosecution is that the *Nicaragua* case is not relevant to determining the applicability of the grave breach provisions or to determining individual criminal responsibility. It is essential to establishing the existence of an international armed conflict in Bosnia and Herzegovina at the time when Tadic is alleged to have committed his crimes. It is then necessary to establish that the perpetrator (Tadic) has a demonstrable link to one party to the international armed conflict while the victim is linked to a neutral or to a party on the other side. Further, as an aside, although Article 4 of the Fourth Geneva Convention defines "protected persons" as persons in the hands of a party of which they are not

nationals, determination of nationality is not a simple process when States are in the process of decomposition. A simplistic assumption that persons must be nationals of a new State simply because they are living in its territory at the moment of creation is inappropriate.

One might hope that the forthcoming decision of the ICTY Appeals Chamber in the *Tadic* case will set forth clear rules which will allow the Trial Chambers to determine when the law for international armed conflicts should regulate events occurring in the territory of the former Yugoslavia. If it does so, it will also provide helpful guidance for future courts compelled to apply the "two box" approach of current international humanitarian law to the complex reality of modern conflict.

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Résumé

L'application des Conventions de Genève par le Tribunal pénal international pour l'ex-Yougoslavie

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Selon le droit international humanitaire en vigueur, un conflit armé est soumis à un régime juridique différent selon qu'il a un caractère international ou, au contraire, non international. Cette dichotomie ne donne cependant pas toujours de réponses adéquates aux questions auxquelles le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) se voit confronté quand il doit qualifier une situation conflictuelle concrète. L'auteur examine la jurisprudence du Tribunal à ce sujet, en commentant notamment les différentes décisions dans les affaires Tadic et Celebici. Toutefois, le TPIY n'a pas encore tranché d'une manière définitive la question de l'applicabilité du droit international humanitaire à une situation aussi complexe que celle prévalant en ex-Yougoslavie. Son avis aura sans doute valeur de précédent.