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PROSECUTOR V. DUSKO TADIĆ (ICTY, 1995): REDEFINING THE SCOPE OF ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

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The case of Prosecutor v. Dusko Tadić, decided by the International Criminal Tribunal for the former Yugoslavia (ICTY), occupies a singular place in the development of International Humanitarian Law (IHL). Beyond its significance as the Tribunal's first completed trial, the Appeals Chamber's 1995 jurisdictional decision fundamentally reshaped how international law understands the existence and classification of armed conflict, and in doing so, extended the reach of humanitarian protections in ways the drafters of the Geneva Conventions had not explicitly anticipated.¹

FACTS AND PROCEDURAL BACKGROUND

Dusko Tadić, a Bosnian Serb, was charged with grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity, arising from his alleged participation in the persecution, torture, and killing of Bosnian Muslim and Croat detainees at the Omarska, Keraterm, and Trnopolje camps during the conflict in the former Yugoslavia.² Before the merits of the case could be addressed, Tadić's defence challenged the jurisdiction of the Tribunal itself, arguing, among other grounds, that the ICTY had been unlawfully established and that the conflict in question did not qualify as an international armed conflict, thereby placing the

¹Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, paras 1-5 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

alleged acts beyond the scope of the "grave breaches" regime under the Geneva Conventions, which historically applied only to international armed conflicts.³

THE JURISDICTIONAL CHALLENGE AND THE APPEALS CHAMBER'S RESPONSE

The Appeals Chamber's decision of 2 October 1995 addressed two intertwined questions of profound significance: first, whether the Security Council possessed the authority under Chapter VII of the UN Charter to establish the Tribunal, and second, and more consequentially for the development of IHL, how "armed conflict" should be defined and classified for the purposes of international criminal jurisdiction.

On the classification question, the Chamber articulated what has since become the most widely cited definition of armed conflict in international law: an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."⁴ This formulation was significant for two reasons. First, it established that an armed conflict may exist even in the absence of formal declarations of war or interstate hostilities, focusing instead on the factual intensity and organization of violence. Second, and more radically, it recognised that a single conflict could shift character over time and even possess simultaneously both international and non-international dimensions, depending on the degree of external involvement and control exercised by outside States over local armed groups.⁵

EXTENDING PROTECTIONS TO NON-INTERNATIONAL ARMED CONFLICT

Perhaps the most transformative aspect of the Tadić decision lies in its treatment of customary international law applicable to internal conflicts. Prior to Tadić, the Geneva Conventions' grave breaches regime, and much of the detailed regulatory framework of IHL, was widely understood to apply chiefly to international armed conflicts, leaving internal conflicts governed by the comparatively sparse protections of Common Article 3 and Additional Protocol II.⁶ The Appeals Chamber held that this bifurcation could no longer be sustained as a matter of customary

³Tadić, Case No. IT-94-1-AR72, paras 1-4, 27-48.

⁴Tadić, Case No. IT-94-1-AR72, paragraph 70.

⁵Id. paras 71-72.

⁶Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

international law, finding that a body of customary rules had emerged governing internal conflicts, encompassing not only the protection of civilians but also the regulation of means and methods of warfare traditionally associated with interstate conflict, such as prohibitions on the use of certain weapons and attacks on civilian objects.⁷

This holding effectively narrowed the gap between international and non-international armed conflict for the purposes of individual criminal responsibility, laying essential groundwork for subsequent developments, including the Rome Statute of the International Criminal Court, which incorporated an expanded list of war crimes applicable to non-international armed conflicts under Article 8(2)(c) and (e).⁸

THE OVERALL CONTROL TEST

The Tadić judgment on the merits, delivered in 1997 and affirmed on appeal in 1999, further developed the jurisprudence on conflict classification by introducing the "overall control" test to determine when an ostensibly internal conflict should be characterised as international due to the involvement of a foreign State. The Appeals Chamber held that where a State exercises overall control over an organised armed group, going beyond mere financing or equipping to include a role in organising, coordinating, or planning military operations, the conflict may be internationalised even absent specific instructions for individual operations.⁹ This test departed from the stricter "effective control" standard previously articulated by the International Court of Justice in the Nicaragua case, generating a notable and enduring divergence between the jurisprudence of the ICTY and that of the ICJ on questions of State responsibility and attribution.

SIGNIFICANCE AND CRITICAL ASSESSMENT

The Tadić jurisdictional decision has rightly been described as one of the most influential judgments in the history of international criminal law. Its functional, fact-based approach to defining armed conflict shifted the focus of IHL classification away from formalistic State-centric criteria toward an assessment grounded in the intensity of violence and the organisation of the parties involved, a framework that has since been applied by international and hybrid tribunals in

⁷Tadić, Case No. IT-94-1-AR72, paras 96-127.

⁸Rome Statute of the International Criminal Court art. 8(2)(c), (e), July 17, 1998, 2187 U.N.T.S. 90.

⁹Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, paras 116-145 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

contexts as varied as Sierra Leone, Cambodia, and the ongoing work of the International Criminal Court.

At the same time, the decision has attracted sustained academic scrutiny, particularly regarding the overall control test's compatibility with the law of State responsibility and its potential to lower the threshold for attributing State responsibility for the conduct of non-State armed groups. Critics argue that conflating the tests for individual criminal responsibility and State responsibility risks doctrinal confusion between distinct branches of international law, each serving different purposes and policy objectives.¹⁰ Nonetheless, the practical humanitarian benefit of the Tadić approach, namely, ensuring that victims of internal conflicts are not left without meaningful legal protection merely because of the formal classification of the violence they endure, has secured its lasting influence on the development of IHL.

CONCLUSION

The Tadić decision stands as a foundational moment in the evolution of international humanitarian law, demonstrating the capacity of international criminal tribunals to develop and clarify customary international law even in the absence of comprehensive treaty coverage. By expanding the scope of both jurisdiction and applicable customary rules to non-international armed conflicts, the Appeals Chamber closed critical protection gaps that had persisted since the adoption of the Geneva Conventions in 1949. Nearly three decades later, the Tadić framework continues to shape how international courts and tribunals approach the classification of armed conflict, underscoring the enduring relevance of judicial interpretation in the progressive development of international law.

¹⁰Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l L. 649, 655-668 (2007).