THE TREMORS OF TADIĆ

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This Article considers the impact, or tremors, of paragraph 70 of the decision on interlocutory appeal on jurisdiction of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Tadić, which was delivered in October 1995. It establishes, and seeks to make clear, that the commitment of the Appeals Chamber in paragraph 70 of that decision was to provide definitions for both of the concepts of international and non-international armed conflicts, even though some impressions might be that the Appeals Chamber tended to run together these different concepts in order to provide a singular and overarching definition of “armed conflict.” In separate and successive turns, the Article explores the specific components of each concept as identified by the Appeals Chamber—first, for international armed conflicts, and, then, for non-international armed conflicts—before testing them against particular facts from practice as well as hypothetical examples, but the Article also makes use of a comparative investigation as to what the Appeals Chamber said for each form of armed conflict when contrasted with each other. We examine the extent to which these components have threaded themselves through subsequent practice—specifically the relationship of the 1998 Rome Statute of the International Criminal Court with the concept of non-international armed conflict—so as to chart the full progress of the jurisprudence of the Appeals Chamber in the afterlife of Tadić: hence the designation of the “tremors” of Tadić.

INTRODUCTION

It has become difficult to configure the precise significance of the decision on interlocutory appeal on jurisdiction of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Prosecutor v. Tadić,1 as that decision has come to represent many different things since it was handed down in October 1995—spanning from the rejection of a singular classification for any given set of armed conflicts, to the state of customary regulation of non-international armed conflicts as it stood at that point in time.2 The tremors of Tadić under discussion here

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1 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (Oct. 2, 1995) [hereinafter Tadić (Appeals Chamber)].

relate to neither of these points, important though they of course are, but, rather, to the “seminal declaration” in that case awarding definitions to the concepts of both international and non-international armed conflicts.\(^3\) That declaration might be regarded of course as an inevitable consequence of these other findings of the Appeals Chamber that we have mentioned, but its contents have nevertheless been reflected in the subsequent jurisprudence of the ICTY as well as elsewhere,\(^4\) and they have also been monumentalized in conventional form in Article 8 of the 1998 Rome Statute of the International Criminal Court (which deals with war crimes that come within the Court’s jurisdiction). The purpose of this Article is to focus on that aspect of the jurisprudence of the Appeals Chamber—found in paragraph 70 of its decision—responsible for these tremors and to provide an account of what the Appeals Chamber actually said on this front as well as what it did not say, before taking on the progress of its positions in the afterlife of the decision on interlocutory appeal on jurisdiction in Tadić.

I. THE SEMINAL DECLARATION OF THE APPEALS CHAMBER

The interlocutory appeal in Tadić arose from the decision of the Trial Chamber in August 1995, in which the defendant, Dusko Tadić, had challenged the ICTY’s jurisdiction on the grounds that it had been unlawfully created by the Security Council in Resolution 827 (1993); because of the wrongful primacy of the ICTY over national courts as provided in Article 9 (2) of its Statute adopted pursuant to Resolution 827;\(^5\)

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\(^4\) Where Trial Chamber II of the ICTY described it as “[t]he test for determining the existence of an armed conflict”—which has been “applied consistently” by the Tribunal in Tadić Trial Judgment, paras 561-571; Aleksovski Trial Judgment, paras 43-44; Čelebići Trial Judgment, paras 182-192; Furundžija Trial Judgment, para 59; Blaškić Trial Judgment, paras 63-64; Kordić Judgment, para 24; Krstić Judgment, para 481; Stakić Trial Judgment, para 568. See also Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu, Case No. IT-03-66-T Judgment, (Trial Chamber II) (Nov. 30, 2005) para. 84 and n.294, and, further, EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 10-12 (2008).

\(^5\) The Statute was originally published as an annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993): U.N. Doc. S/25704 (May 3, 1993). Article 9(2) of the Statute provides for the concurrent jurisdiction of the ICTY and of national courts: “The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”
and, finally, for its lack of subject-matter jurisdiction (ratione materiae) over the crimes Tadić was alleged to have committed. Tadić had been indicted by the ICTY in February 1995 for grave breaches of the Geneva Conventions of August 1949, violations of the laws or customs of war and crimes against humanity committed in the opština of Prijedor in Bosnia and Herzegovina between May and August 1992, in the hostilities that accompanied the dissolution of the Socialist Federal Republic of Yugoslavia.\(^6\)

Part of Tadić’s claim before the Trial Chamber was that the crimes for which he had been indicted were committed in the context of a non-international armed conflict—whereas Articles 2 (grave breaches), 3 (violations of the laws or customs of war) and 5 (crimes against humanity) of the Statute of the ICTY, which marked out the jurisdictional provenance of the tribunal,\(^7\) all rested on the requirement of an international armed conflict as the law then stood. With respect to the applicable law as set down by the Security Council in Resolution 827, Tadić was therefore seeking to give optimum significance to the dual régime for the regulation of international and non-international armed conflicts as devised in the Geneva Conventions and their First and Second Additional Protocols of June 1977. The Conventions discriminate between the scope of laws applicable in the event of international armed conflicts (which would activate the Geneva Conventions in their totality save for Common Article 3 of the Conventions) as opposed to non-international armed conflicts (where only Common Article 3 of the Geneva Conventions would be applicable),\(^8\) and set


\(^7\) Alongside the power to prosecute persons violating the crime of genocide (Article 4). This itinerary of the jurisdiction ratione materiae of the Tribunal is usefully contrasted with Article 1 of the Statute of the Tribunal—specifically its mention of “the power to prosecute persons responsible for serious violations of *international humanitarian law*” (emphasis added)—since both grave breaches (Article 2) and the laws or customs of war (Article 3) are dependent on the existence of a “war” or, to be more precise, some form of armed conflict. The same is true with respect of crimes against humanity (Article 5), defined in the Statute as “crimes *when committed in armed conflict, whether international or internal in character*, and directed against any civilian population” (emphasis added). The crime of genocide (Article 4) is, however, fastened to no such condition: see, further, WILLIAM A. SCHAAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 7 (2d ed. 2009).

down very different schemes for their respective enforcements (the system of “grave breaches” of the Conventions designed specifically for international armed conflicts would not pertain to non-international armed conflicts). This dichotomized régime is reinforced by the provision in Common Article 3 that the parties to non-international armed conflicts “should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention,” whereas the Geneva Conventions provide that, for international armed conflicts, “[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.”

The advent of the Additional Protocols in June

9 According to the second paragraph of Article 49/50/129/146 of the four Geneva Conventions (respectively) (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; GC III and GC IV, supra note 8) each High Contracting Party “shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may, also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case”—an arrangement that is altogether different from that designed for those war crimes deemed not to be grave breaches, including those war crimes committed in non-international armed conflicts (the subject of the third paragraph of Article 49/50/129/146): “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.” See Bert V.A. Röling, Criminal Responsibility for Violations of the Laws of War, 12 Revue Belge de Droit International 8, 13 (1976) and Denise Plattner, The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts, 30 Int’l Rev. Red Cross 409 (1990). See also infra notes 34 and 35 (and accompanying text).

10 Article 6/6/6/7 of the four Geneva Conventions as observed in Tadić (Appeals Chamber), supra note 1, at 490-492, para. 73. The concept of “protected persons” is defined, for example, in GC IV, supra note 8, art. 4(1) (“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party the conflict or Occupying Power of which they are not nationals”) (emphasis added). This
1977—the First Additional Protocol specifically for international armed conflicts, and the Second Additional Protocol for specified non-international armed conflicts—was further confirmation of these essential structures of regulation as articulated in the Geneva Conventions\textsuperscript{11} that had themselves expressed earlier and historical differentiations known to humanitarian warfare.\textsuperscript{12}

The Trial Chamber disagreed with Tadić, however, and found that Articles 2, 3, and 5 of the ICTY Statute were indeed applicable to both international and non-international armed conflicts. Upon appeal, Tadić changed argumentative tactics by claiming that, in point of fact, no “legally cognizable armed conflict,” i.e., whether international or non-international in character, had come into existence in the opstina of Prijedor in Bosnia and Herzegovina at the relevant times mentioned in his indictment (i.e., between May and August 1992), but that the developments occurring there were defined by “a political assumption of power by the Bosnian Serbs,” though tank movements were admitted.\textsuperscript{13} In direct response to this claim, and by way of preface to its findings that Article 2 of the ICTY Statute “only applies to offences within the context of international armed conflicts,”\textsuperscript{14} and that Articles 3 and 5 were applicable to international and non-international armed conflicts alike,\textsuperscript{15} the Appeals

\textsuperscript{11} As the High Contracting Parties would put it in the preamble of the First Additional Protocol (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3), they deemed it “necessary” to “reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.” In the preamble of the Second Additional Protocol (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609), the High Contracting Parties simply emphasized “the need to ensure a better protection” for the victims of non-international armed conflicts. Furthermore, the First Additional Protocol adopts and expands the system of “grave breaches” to “the repression of breaches and grave breaches of this Protocol” (Article 85(1)); the Second Additional Protocol does not even mention the term.


\textsuperscript{13} Tadić (Appeals Chamber), supra note 1, at 486, para. 66.

\textsuperscript{14} Id. at 499, para. 84.

\textsuperscript{15} Id. at 524, para. 137 (“In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber
Chamber concluded in paragraph 70 of its decision of October 1995 that: 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. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal [armed] conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.\(^{16}\)

This constitutes the “seminal declaration” of \( Tadić \).\(^{17}\) It is important, however, to identify at the outset precisely what it was that the Appeals Chamber was defining in the above \textit{dictum}: by its choice and use of words, the Appeals Chamber might be taken to have been defining the concept of an “armed conflict” as a generic proposition—one that serves as a common denominator for both international and non-international armed conflicts—for it is with this formulation (“an armed conflict exists”) that the Appeals Chamber begins its declaration and apparent definition.\(^{18}\) However, nothing could be further from the truth for it becomes immediately apparent upon reading this \textit{dictum} in full that the Appeals Chamber was in fact committing itself to the provision of not one but \textit{two} definitions: it proceeded to define the concept of an \textit{international armed conflict} (“a resort to armed force between States”)—which it interspersed with

\(^{16}\) \textit{Id.} at 488, para. 70.

\(^{17}\) \textit{Supra} note 3.

\(^{18}\) See also Mary Ellen O’Connell, \textit{Defining Armed Conflict}, 13 J. CONFLICT & SEC. L. 393, 395 (2008) (“The Geneva Conventions … while stating in Common Article 2 that they apply in ‘armed conflict’, do not define armed conflict’). While it is true that the Geneva Conventions make their application contingent upon the occurrence of an “armed conflict” as opposed to a “war” (although see \textit{id.} at 396 (meaning of war and meaning of armed conflict)), Common Article 2 tethers this concept of an armed conflict to that “which may arise between two or more of the High Contracting Parties.” In so doing, Common Article 2 hints at the qualification of the armed conflict to which it refers—that is an \textit{international armed conflict}—to be distinguished from a so-called “armed conflict not of an international character,” or \textit{non-international armed conflict}, the concern of Common Article 3 of the Geneva Conventions. Consider, further, Natasha Balendra, \textit{Defining Armed Conflict}, 29 CARDOZO L. REV. 2461 (2008).
its definition of the concept of a non-international armed conflict ("protracted armed violence between governmental authorities and organized armed groups or between such groups within a State")—an approach that is reflected throughout this dictum as it is in the decision when read as a whole.\(^{19}\)

This interpretation might seem counter-intuitive to what the Appeals Chamber had said elsewhere in the same decision—where it had found that for there to be a violation of international humanitarian law “there must be an armed conflict”\(^{20}\)—but the Appeals Chamber had also contended that “[t]he definition of ‘armed conflict’ varies depending on whether the hostilities are international or internal,”\(^{21}\) suggesting that the operational premise of its thinking concerned the co-existence—rather than the actual synonymy—of these concepts. Furthermore, at an earlier point in its decision, the Appeals Chamber had considered the temporal and geographical dimensions of “both internal and international armed conflicts,” concluding that both forms of armed conflict (which the Appeals Chamber treated as separate normative propositions) extend beyond the exact time and place of hostilities.\(^{22}\) We should therefore be alert to, and most cautious of, the littering of references to “armed conflict” that occur within the \textit{Tadić} jurisprudence of the sort recalled here; these should be regarded as a convenient form of abbreviation for pluralized references to both international and non-international armed conflicts—but only as and where such references are appropriate and make genuine and accurate legal sense. A prime example of this hails from the Appeals Chamber’s own stipulation in \textit{Tadić} of the need for an armed conflict—in one of the forms envisaged in the 1949 Geneva Conventions or the 1977 Additional Protocols—for any violation of international humanitarian law to occur;\(^{23}\) other examples of this useful descriptive harness in operation can be found outside the jurisprudence, as, for instance, in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,\(^{24}\) and the 2000 Optional Protocol to

\(^{19}\) \textit{Infra} notes 118-120 (and accompanying text).

\(^{20}\) \textit{Tadić (Appeals Chamber)}, \textit{supra} note 1, at 486-487, para. 67. Consider, however, what is said in Article 1 of the ICTY Statute: \textit{supra} note 7.

\(^{21}\) \textit{Id.}

\(^{22}\) \textit{Supra} note 19.

\(^{23}\) \textit{Supra} note 20.

\(^{24}\) Notwithstanding the reference to “armed conflict” in its title, and to “cultural property [which] has suffered grave damage during recent armed conflicts” and “the principles concerning the protection of cultural property during armed conflict” in its preamble, the Convention goes on to pronounce that it is applicable (in Article 18(1)) “in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them” and, also, “[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties,”
the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,\textsuperscript{25} but we also find it at work in the resolutions of the Security Council.\textsuperscript{26}

\textsuperscript{25} In the preamble to the Optional Protocol, States Parties made reference to “the harmful and widespread impact of armed conflict on children” and condemned “the targeting of children in situations of armed conflict.” See Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002. They perceived “a need to increase the protection of children from involvement in armed conflict” and welcomed the unanimous adoption of the International Labour Organization Convention No. 182 on the Prevention and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, inter alia, “forced or compulsory recruitment of children for use in armed conflict,” before recalling the obligation “of each party to an armed conflict to abide by the provisions of international humanitarian law.” The preamble also speaks of “the full protection of children, in particular during armed conflict and foreign occupation,” and of “taking into consideration the economic, social and political root causes of the involvement of children in armed conflict” and “the need to strengthen international cooperation in the implementation of this Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict.” Even so, the preamble notes the inclusion in the Rome Statute of the International Criminal Court of the war crimes “of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict” (emphasis added). Note, too, the treatment of armed conflicts in the plural in Article 38 of the 1989 United Nations Convention on the Rights of the Child, art. 38(1), Nov. 20, 1989, 1577 U.N.T.S. 3: “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child” (emphasis added); “[i]n accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict” (Article 38(4) (emphases added)). See Geraldine Van Bueren, The International Legal Protection of Children in Armed Conflicts, 43 INT’L & COMP. L.Q. 809, 812 and 817-820 (1994). For other possible invocations of this style, see O’Connell, supra note 18, at 395 (although note, also at 395, that “[t]he United Kingdom argued against demands that the conflict in Northern Ireland be labelled an armed conflict” (emphasis added)).

\textsuperscript{26} One of which—Resolution 1820 adopted on June 19, 2008—is considered in some detail below: see infra notes 73 to 74 (and accompanying text). In the preamble to Resolution 1325, adopted on Oct. 31, 2000, the Security Council recognized “that an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security,” and noted “the need to consolidate data on the impact of armed conflict on women and girls” (tenth and eleventh preambular paragraphs respectively). That the Security Council intended its directive to refer to both international and non-international armed conflicts is evident from the ninth operative paragraph of the resolution, where the Council:
The Appeals Chamber’s dichotomization of the \textit{form} of an armed conflict in paragraph 70 of the \textit{Tadić} decision, and the \textit{definitions} it then awarded to each of these forms, “sw[u]m … against the tide of much of the literature on the conflicts in the former Yugoslavia that has tended to treat the entirety of the conflicts as a single entity and as international in character.”\textsuperscript{27} The Appeals Chamber therefore embraced complexity over and above simplicity and convenience in its analysis, but it was a necessary complexity that the Appeals Chamber embraced, for, as we have already noted, it had found that crucial differences existed in the \textit{scope} of international humanitarian law applicable in international when compared to non-international armed conflicts.\textsuperscript{28} This contrasted with the substantive conclusions reached by the Trial Chamber in its decision of August 1995; the Trial Chamber had, it is true, made “no finding regarding the nature of the armed conflict in question,”\textsuperscript{29} but it had also observed that “the requirement of international [armed] conflict did not appear on the face of Article 2 [of the Statute].”\textsuperscript{30} For the Trial Chamber, it was therefore possible to de-anchor the concept of grave breaches of the Geneva Conventions from the context of an international armed conflict, or what it called “internationality”:

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Furthermore, in the tenth operative paragraph of the resolution, the Council called upon “all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.” Here, “situations” of armed conflict is clearly intended to denote that the special measures for protection called for are not to be confined to any one of the forms of armed conflict emanating from the Geneva Conventions: \textit{see also} Jessica Neuwirth, \textit{Women and Peace and Security: The Implementation of U.N. Security Council Resolution 1325, 9 Duke J. Gender L. \\& Policy} 253 (2002).

\textsuperscript{27} See Greenwood, \textit{supra} note 2, at 270.
\textsuperscript{28} \textit{Supra} notes 8-10 (and accompanying text).
\textsuperscript{29} Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction (Trial Chamber)) Aug. 10, 1995), para. 53 [hereinafter \textit{Tadić} (Trial Chamber)].
\textsuperscript{30} \textit{Id.} at 442, para. 50, which continues: “nothing in the words of the Article expressly require [the] existence [of an international armed conflict]; once one of the specified acts is allegedly committed upon a protected person of the power of the [Tribunal] to prosecute arises if the spatial and temporal requirements of Article 1 are met”. This is a reference to the specification in the Statute of the Tribunal that the competence of the tribunal extends to the prosecution of persons responsible for serious violations of international humanitarian law “committed in the territory” of the former Yugoslavia “since 1991.” See, further, \textit{supra} note 7.
When what is in issue is what the Geneva Conventions contemplate in the case of grave breaches, namely their prosecution before a national court and not before an international tribunal, it is natural enough that there should be a requirement of internationality; a nation might well view with concern, as an unacceptable infringement of sovereignty, the action of a foreign court in trying an accused for grave breaches committed in a conflict internal to that nation. Such considerations do not apply to the International Tribunal, any more than do the references in the Conventions to High Contracting Parties and much else in the Conventions ...

With one deft stroke of the judicial hand as it were, the Trial Chamber went on to announce that these considerations “are simply inapplicable” to the competence of the Tribunal because, as it maintained, the Tribunal “is not in fact, applying conventional international law but, rather, customary international law ... and is doing so by virtue of the mandate conferred upon it by the Security Council.” As for violations of the laws or customs of war in accordance with Article 3 of the ICTY Statute, the Trial Chamber concluded that such violations “are a part of customary international law,” and that this was so “whether the conflict is international or national” in its orientation.

The Appeals Chamber could not have disagreed more with the Trial Chamber in respect of its understanding of the system of grave breaches introduced by the Geneva Conventions: it accused the Trial Chamber of a misconception of the law, noting that “[t]he international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents,” as well as of a misinterpretation of the reference made to the Geneva Conventions in Article 2 of the Statute of the Tribunal:

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31 Id. at 443, para. 52. For a countenance against literal enforcement and “the height of legalism” in interpreting the concept of grave breaches, consider Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout, in War Crimes Law Comes of Age: Essays* 286, 290-291 (Theodor Meron ed., 1998).
32 Id. at 443, para. 52 (“In the case of what are commonly referred to as ‘grave breaches’, this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions.”)
33 Id. at 447, para. 65.
34 Tadić (Appeals Chamber), *supra* note 1, at 497, para. 80, adding that “States parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts—at least not the mandatory universal jurisdiction involved in the grave breaches system”. *See also* Theodor Meron, *International Criminalization of Internal Atrocities, 89 Am. J. Int’l L.* 554, 568-571 (1995); Sonja Boelart-Souominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary International Law Moving Towards a Uniform Enforcement Mechanism for All Armed*
[The] reference [to “persons or property protected under the provisions of the relevant Geneva Conventions” in Article 2] is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as “protected” by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of “protected persons or property” must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc (protected property) of Geneva Convention IV on civilians. Clearly these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.  

The Appeals Chamber not only reached this conclusion—of the need for a close and studied dissection of all of the armed conflicts at hand in the territory of the Socialist Federal Republic of Yugoslavia since 1991—but it did so in a manner that

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35 Id. at 497-498, para. 81. By contrast, it is worth noting at this point that when the Security Council adopted Resolution 955 on Nov. 8, 1994, creating the International Criminal Tribunal for Rwanda “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens,” no provision was made for the prosecution of grave breaches of the Geneva Conventions. According to the Statute annexed to Resolution 955, the Tribunal was to have competence for prosecuting genocide (Article 2), crimes against humanity (Article 3) and violations of Article 3 common to the Geneva Conventions and of the Second Additional Protocol (Article 4)—perhaps making the assumptions of the Security Council a touch more explicit this time round: see L.J. van den Herik, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 204 (2005).

36 Cf. Meron, supra note 34, at 556: The offences listed in Articles 2 and 3 of the Yugoslavia Statute (grave breaches of the Geneva Conventions and violations of the laws or customs of war) indicate that the Security Council considered the armed conflicts in Yugoslavia as international. The facts on the ground and the applicable rules of international law strongly support this conclusion. Treating the conflicts in Yugoslavia as international armed conflicts enhances the corpus of the applicable international humanitarian law and fully respects the principle of nullum crimen sine lege (footnote omitted).
showed some strength of conviction, and, at one and the same time, it highlighted the difficulties that can attend the conscription of certain treaty propositions into the corpus of customary international humanitarian law. The Appeals Chamber proved much more sanguine on the matter of the violations of the laws or customs of war which, it said, the Tribunal had jurisdiction over “regardless of whether they occurred within an internal or international armed conflict.” These representations all indicate the powerful resonance that the concepts of international and non-international armed conflicts from the Geneva Conventions and their Additional Protocols have asserted as a matter of customary international humanitarian law, true to the overall design

37 Even though Common Article 3 concerns “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.” See also Lindsay Moir, The Law of Internal Armed Conflict 58-61 (2002) and Gerhard Werle, Principles of International Criminal Law 302 (2005).

38 It is in subsequent jurisprudence that the Appeals Chamber emphasized “substantial relations more than … formal bonds” for protected persons: Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, (Appeals Chamber) July 15, 1999, para. 166. See, further, Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context: Law, Politics, Morals 1269 (3rd ed. 2008). Note, though, the observation of the International Court of Justice in the Nicaragua case (1986), that “a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defense that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed.” See Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.A.) 1986 I.C.J. Rep. 14, 105, para. 200 (June 27). The Court was here referring to the “reporting requirement” of Article 51 of the United Nations Charter—that “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” Consider, for example, the customary possibilities for the internationalization of non-international armed conflicts with the procedural provision as set out in the First Additional Protocol (supra note 11 and infra note 47).

39 Tadić (Appeals Chamber), supra note 1, at 524, para. 137. See also the approach of the Trial Chamber on this question (supra note 33) and, further, Payam Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 90 Am. J. Int’l L. 501, 503 (1996).

40 Note, however, the observation of Secretary-General Boutros Boutros-Ghali, in respect of the 1994 Statute of the International Criminal Tribunal for Rwanda, supra note 35, that “the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of
of, and intentions for, the Tribunal—which was to “apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”

II. THE CONCEPTS OF INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

Given the significance attached in the decision on interlocutory appeal in Tadić to the distinction between international and non-international armed conflicts, it then became incumbent on the Appeals Chamber to explicate its definition of each of these concepts as a matter of law—and it is to this set of tasks that it turned in paragraph 70 of its decision. I shall now consider the approach of the Appeals Chamber in defining both of the concepts of international and non-international armed conflicts and I will do so in separate and successive sections.

A. THE CONCEPT OF AN INTERNATIONAL ARMED CONFLICT

For the Appeals Chamber, an international armed conflict exists “whenever there is a resort to armed force between States.” Although the Appeals Chamber did not use the concept of an international armed conflict in terms in paragraph 70 of its decision, it is clear that it was referring to international armed conflicts when it spoke of the occurrence of armed force “between States,” as much as it was referring to non-international armed conflicts when it went on to speak of those armed conflicts occurring “between governmental authorities and organized armed groups or between such groups within a State.” Several observations would appear to be in order in respect of this bare construction that the Appeals Chamber gave for the concept of an international armed conflict in Tadić:

1. It is remarkable that the Appeals Chamber pursued its definition of international armed conflict without any reference to “war” in its formulations; this might
be regarded as the reigning triumph of Common Article 2 of the Geneva Conventions:43 its purposeful strike against the defining significance that the concept of war once held in demarcating the remit of relevance for the so-called “laws of war.”44 Following the adoption of the Geneva Conventions, it would therefore be technically much more accurate to refer to this corpus as the laws of international armed conflict which apply, as Common Article 2 frames it, “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”45 An international armed conflict—and not a “war”—therefore becomes the governing tripwire for the activation of the Geneva Conventions.

2. The transposition of “States” instead of “High Contracting Parties” as the actors who enter the legal relationship that is called an “international armed conflict” is, of course, a necessary move for the Appeals Chamber to have made in defining the concept of an international armed conflict from the perspective of custom given the intrinsically conventional idiom of High Contracting Parties.46 Yet, the

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44 Although the tradition continues to persist in certain quarters, see Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (2010). One is tempted to ask after the qualification contained in the title to this volume—of international humanitarian law “in war”—in view of the claim, at 21, that “not all armed conflicts are wars, but all wars are armed conflicts.” If it is accepted that international humanitarian law applies in (international and non-international) armed conflicts—as would appear to be the case from the first half of the title—what is the point of then affixing international humanitarian law to “war”? Is this meant to suggest that, contrary to the terms of Common Article 2 of the Geneva Conventions, the concept of war is coterminous with the concept of an (international) armed conflict? Or does it imply a life and relevance for international humanitarian law outside of the condition of war—but excluded from the remit of this volume? It is a point I emphasize each and every year in my classes on international humanitarian law, using one of the assigned texts of the syllabus—that of Adam Roberts and Richard Gueff and the third edition of their Documents on the Laws of War (supra note 8)—as an obvious and perfectly placed counterfoil for the point I am making here.

45 Emphasis added. The alternative nomenclature of “international humanitarian law” might suggest itself for this corpus but it would not instantly convey the respective specificities pertaining to the law for international armed conflicts or that for non-international armed conflicts. It has occasioned criticism, too, on the grounds of its “slightly Orwellian ring”: Vaughan Lowe, International Law 266 (2007) (though admitting, at 266-267, that the term “does emphasize one very important aspect of this body of law, of rapidly growing importance, which is that in modern conflicts the role and responsibilities of the armed forces are likely to extend well beyond the cessation of fighting and into the period of reconstruction and re-establishment of the social structure in areas blighted by the fighting.”)

46 Lassa Oppenheim has emphasized the historical significance of States in this respect—well before the advent of the Geneva Conventions, see Lassa Oppenheim, International Law: A Treatise (Vol. II: Disputes, War, Neutrality) 203, para. 56 (Hersch Lauterpacht ed., 7th ed. 1952).
Appeals Chamber does not inform us definitively as to whether this is the full extent of the concept as it is understood in custom—or whether the empirical evidence is able sustain a broader scope for the concept of an international armed conflict, that includes States but which is not limited to States.47 A good recent example of the sort of practice that we would catalogue under this rubric is Israel’s invocation, in respect of Operation Cast Lead in the Gaza Strip (2008–2009), of selected provisions of the First Additional Protocol—even though Israel is not a party to this treaty and even though its operation on that occasion did not occur against another State.48

Consider, though, the implicit assumption that the Appeals Chamber adverted to on the possible internationalization of non-international armed conflicts—which

47 As has been the way with conventional international humanitarian law: Article 1(4) of the First Additional Protocol (supra note 11) provides that international armed conflicts shall “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” However, this is followed by the procedural provision of Article 96(3) of the First Additional Protocol:

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.


would occur where a second State (in that case, the Federal Republic of Yugoslavia (Serbia-Montenegro)) became involved in Bosnia and Herzegovina:

If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro).


Tadić (Appeals Chamber), supra note 1, at 493-494,para. 76. See also Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 27-28 (2d ed. 2010) and Claus Kress, War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice, 30 ISRAEL Y.B. HUM. RTS. 103, 105 (2000). Tadić, of course, produced as part of its ensuing jurisprudence the test of overall control for the internationalization of non-international armed conflicts—but this came much later, in July 1999. See Prosecutor v. Tadić, Case No. IT-94-1-AR72, Judgment (Appeals Chamber) (July 15, 1999), paras. 83-171, and, further, Marko Milanovic, State Responsibility for Genocide, 17 EUR. J. INT’L L. 553, 576-581 (2006). Therein, the Appeals Chamber ruled that “in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending on the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State” (para. 84), and at para. 131:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.
3. The formulation of the Appeals Chamber might be taken to set a (very) low threshold of armed force required for an international armed conflict, since the idea would appear to be that any armed force ("whenever there is a resort to armed force") would activate these laws: in other words, no de minimis threshold of "armed force" was articulated for the occurrence of an international armed conflict. This could suggest a perfect coincidence between the occurrence of force as that term is used in Article 2(4) of the 1945 United Nations Charter and the relevance of the Geneva Conventions and the First Additional Protocol in practice, although the view might well be taken that there can no equation of the meaning of "force" from the *jus ad bellum* (the concern of the Charter) to the *jus in bello* (the concern of the Geneva Conventions and the First Additional Protocol), and that the Appeals Chamber meant something different entirely with its reference to "a resort to armed force" of States in *Tadić*. That said, in the *Nicaragua* case of June 1986, a case in which the International Court of Justice addressed aspects of both the *jus ad bellum* and *jus in bello*, the Court maintained that "[c]learly, [the] use of force
may in some circumstances raise questions of such law,” i.e. the law pertaining to international armed conflicts. The Court, therefore, did not seem to hold to the view that the use of force would in all circumstances create an international armed conflict; it intimated the need to distinguish between those uses of force which would amount to an international armed conflict and those which would not. It is telling that in neither of the rulings compared here—the interlocutory decision and the judgment in the Nicaragua case—was there any systematic engagement of how State practice has settled this matter since the adoption of the Geneva Conventions, if settled it indeed be. States, we discover, have taken divergent positions within their own individual practices as to the precise threshold of force that is necessary for an international armed conflict to be brought into being. Connected to this factor is the question of the remaining significance that exists within the law for those declarations of war issued without any recourse to armed force—that is, without a single shot being fired between one State and the next—since Common Article 2 of the Geneva Conventions does mention “all cases of declared war” as one form or manifestation of an international armed conflict.

4. In Tadić, the Appeals Chamber suggested that the sole ingredient for an international armed conflict is the resort to “armed force” between States—but, as we have said, it did not elucidate what it meant by this term or whether it shared the same understanding of the concept of force as expressed by the International Court of Justice in the Nicaragua case (which, according to the Court, could include “assistance to rebels in the form of the provision of weapons or logistical or other support,” an instance of what it had earlier labeled “less grave forms of the use of force”).

54 Nicaragua case, supra note 38, at 114, para. 216 (emphasis added).
55 A tactic the Court used when examining the relationship between the concept of force and the concept of armed attack, where the Court distinguished between “the most grave forms of the use of force (those constituting an armed attack)” and “other less grave forms.” See Nicaragua case, supra note 38, at 101, para 191. It did so as part of its analysis of the jus ad bellum; as an instance of “other less grave forms” of force, the Court mentioned “a mere frontier incident”: id. at 103, para. 195.
57 Id. See also Geoffrey S. Corn & Michael L. Smidt, “To Be or Not to Be, That is the Question”: Contemporary Military Operations and the Status of Captured Personnel, ARMY LAWYER 1 (1999).
58 Emphasis added. See also Christopher Greenwood, Scope of Application of Humanitarian Law, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 50 para. 203 (Dieter Fleck ed., 2d ed. 2008).
59 Nicaragua case, supra note 38, at 104, para. 195.
of force”). Furthermore, no mention was made in the analysis of the Appeals Chamber of any mental component as an accompanying ingredient for the armed force—that is of any *animus belligerendi* (belligerent intention)—between the relevant States. The same observation might be made about the concept of force as it is specified in the Charter, but we note that Lassa Oppenheim did write of a “relation of enmity” in his definition of the concept of war, and of the “purpose” of any given war as that of States “overpowering each other.” Even so, Yoram Dinstein has found this to be a rather problematic component for the definition of an international armed conflict all told, “enticing but insupportable” given the objective standard devised to trigger the terms of the Geneva Conventions as set out in Common Article 2. Nevertheless, there might be some scope for taking account of the notion of *animus belligerendi* as an evidential rather than substantive consideration in obscure or contested circumstances—that is, in cases of doubt. For example, an erroneous movement of the armed forces of one State to the territory of another State would not give rise to an international armed conflict, and nor would an intervention or use of force that occurs at the behest of the target State (i.e. through its consent or solicitation). Arguably, another way of putting this is to challenge whether the armed force mentioned in either of these circumstances can truthfully be said to be a resort to armed force “between” the States concerned, or of one State using armed force against another:

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60 Supra note 55 (though this is not to be taken as the Court confirming that force of this kind would itself be sufficient to constitute an international armed conflict as envisaged by the Court: supra note 54).


62 Id. at 208, para. 58.

63 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 14 (4th ed. 2005). To be sure, Dinstein considers the matter in the context of the concept of war, but his argument is perhaps even more prevalent in light of the legislative intention behind Common Article 2: “an objective inquiry … may prompt the conclusion that [two States] are in the midst of war, although from the subjective standpoint of its intentions (*animus belligerendi*), neither country desires war.”

64 See Hampson, supra note 52, at 553, and Vité, supra note 53, at 72-73. Conceivably, this factor would assist us in working through different forms of declarations of war: on this point, see also Greenwood, supra note 58.

65 As occurred in Mar. 2007 when a routine training exercise of a company of Swiss soldiers ended with them getting lost and marching into neighboring Liechtenstein: Swiss Troops Get Lost in Liechtenstein, N.Y. TIMES, Mar. 3, 2007, at A3.


67 See Hampson, supra note 52, at 553.
Case Concerning Armed Activities on the Territory of the Congo (2005), the International Court of Justice remarked that the consent given to Uganda to place its forces in the Democratic Republic of Congo (DRC) was “was not an open-ended consent,” before finding no evidence to “constitute consent by the DRC to the presence of Ugandan troops on its territory after July 1999, in the sense of validating that presence in law.” To be sure, the Court was working through its assessment of the jus ad bellum on that occasion, but it is worth questioning after the transformative effect any expiration or withdrawal of consent would have for the purposes of the jus in bello (in terms of creating an international armed conflict inter partes or, indeed, any condition of belligerent occupation).

5. If it is “armed force” that is meant to define the legal condition of an international armed conflict, does that condition know of other manifestations and other realities? Could an international armed conflict result, for instance, solely from the direct use of sexual violence by the armed forces of one State against the citizens of another State? Could rape and other forms of sexual violence, prohibited in warfare, in and of themselves constitute an international armed conflict with “wartime scale response, complete with military mobilization, finance, ordnance, rhetoric, and alliances”—and, of course, the momentous legal consequence of the plenary application of the Geneva Conventions? Consider, for example, the Security Council’s designation of sexual violence as a “tactic” of warfare in Resolution 1820 (2008), noting that “women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group,” and that “sexual violence, when used or commissioned as a tactic of war

69 Id. para. 105.
70 Rule 93 of the ICRC study on customary international humanitarian law provides that, for both international and non-international armed conflicts, “[r]ape and other forms of sexual violence are prohibited.” See Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 87 INT’L REV. RED CROSS 175, 206 (2005).
72 MacKinnon identifies war crimes trials, military tribunals, potentially justified acts of self-defence—and prisoners-of-war: id. See, however, Hampson, supra note 52, at 553.
in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict any may impede the restoration of international peace and security.”\textsuperscript{74}\ The Security Council here emphasizes sexual violence for its \textit{exacerbation} of an existing (international) armed conflict (“situations of armed conflict”), but to what extent could and should the use of this tactic alone trigger the plenary application of the Geneva Conventions? And what of a State undertaking to “attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, crops, livestock, drinking water installations and supplied and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive,” in violation of the prohibition of starvation in the First Additional Protocol?\textsuperscript{75} If starvation is recognized as a \textit{method} of warfare—and, indeed, as an unlawful method of warfare at that\textsuperscript{76}—could it not also be regarded as a method of \textit{initiating} warfare, or, \textit{pace} the Geneva Conventions, an international armed conflict?

\section*{B. The Concept of a Non-International Armed Conflict}

The Appeal Chamber’s defined the concept of a non-international armed conflict, as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” To be sure, this formulation of the Appeals Chamber is not immediately recognizable from the concept of a non-international armed conflict as announced in Common Article 3 of the Geneva Conventions—or from the formulation contained in the Second Additional Protocol: Common Article 3 simply makes reference, without more,\textsuperscript{77} to its application to “each

\textsuperscript{74} Id. (first operative paragraph).

\textsuperscript{75} First Additional Protocol, \textit{supra} note 11, art. 54(2).

\textsuperscript{76} Rule 53 of the ICRC study on customary international humanitarian law provides that, for both international and non-international armed conflicts, “[t]he use of starvation of the civilian population as a method of warfare is prohibited.” \textit{See} Henckaerts, \textit{supra} note 70, at 203.

\textsuperscript{77} Note, however, that Common Article 3 is formulated in negative terms and presents itself—at least on its surface—as a default definition for all of those armed conflicts not coming within the compass of Common Article 2 (i.e., it applies “[i]n the case of armed conflict \textit{not of an international character}”) (emphasis added). This appears to have been the approach to the Geneva Conventions taken by the United States Supreme Court in \textit{Hamdan v. Rumsfeld}, 548 U.S. 557, 567 (2006) (“there
to a non-international armed conflict, whereas the Second Additional Protocol addresses itself to those non-international armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

The Second Additional Protocol therefore enters certain qualifications that do not appear at all in Common Article 3 of the Geneva Conventions—in relation to the identification of the actors of the non-international armed conflicts which it concerns (“between … armed forces [of the High Contracting Party] and dissident armed forces or other organized armed groups”), but also in terms of which dissident armed forces or other organized armed groups it is directed toward (i.e. those “under responsible command, [which] exercise such control over a part of its territory as to enable

is at least one provision of the Geneva Conventions [i.e., Common Article 3] that applies here even if the relevant conflict is not one between signatories”). See also Philippe Sands, Torture Team: Rumsfeld’s Memo and the Betrayal of American Values 33-35 (2008) (referring to the “safety net” of Common Article 3). However, the firm intentions behind this provision (see infra note 83) do need to be fully and frankly emphasized: see Hampson, supra note 52, at 554.

An important stipulation, one not to be underestimated because it raises the question of whether governmental armed forces that suddenly turn on the civilian population—with no other “party” in sight—can properly be said to have instituted a non-international armed conflict. As Trial Chamber I of the International Criminal Tribunal for Rwanda said in respect of Common Article 3 in Prosecutor v. Jean-Paul Akayesu, Case No. ICTY-96-4-T (Sept. 2, 1998): “The term ‘armed conflict’ in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict” (para. 620). The Chamber found “there to have been a civil war between two groups”—those of the governmental forces (the Rwandan Armed Forces (FAR)) and the Rwandan Patriotic Front (RPF). “Both groups were well-organized and considered to be armed in their own right” (para. 621). See also Van den Herik, supra note 35, at 215-220.

Second Additional Protocol, supra note 11, art. 1 (1). This qualification is important not only because of its relation with Common Article 3 of the Geneva Conventions—but because it acts as a qualification of the statement, also found in Article 1(1), that the Second Additional Protocol “shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949.” The Second Additional Protocol was therefore not intended as a default mechanism for all of those armed conflicts not coming within the provenance of the First Additional Protocol.

Emphases added. The implication is that one of the Parties to non-international armed conflicts as understood in the Second Additional Protocol must be the armed forces of a High Contracting Party. The provenance of the Protocol would have been different had Article 1(1) been worded so as to apply between armed forces of the High Contracting Party and dissident armed forces or between other organized armed groups: infra note 84.
them to carry out sustained and concerted military operations and to implement this Protocol”). 81 That said, although the language of “protracted armed violence” might be thought innovative and unusual in the Tadić jurisprudence, the consideration that it is meant to reflect is not—and that is the consideration that not all “armed violence” occurring within a State is sufficient to create the legal condition of a non-international armed conflict as defined in Tadić. The Second Additional Protocol stipulates that it “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” 82 The clear intention here is to guard against ready designations of “isolated and sporadic acts of violence” as non-international armed conflicts, so that saying that armed violence must be protracted would seem to be another way of saying the same thing as what is said in the Second Additional Protocol. This language injected a necessary temporal factor into the legal reckoning of the Appeals Chamber, and spoke to the actual duration of the armed violence in question—one

81 Emphases added. See Rosemary Abi-Saab, Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern, in Humanitarian Law of Armed Conflict—Challenges Ahead: Essays in Honour of Frits Kalshoven 209 at 216 (Astrid J.M. Delissen & Gerard J.M. Tanja eds., 1991) and Stewart, supra note 47, at 319. In Akayesu, Case No. ICTR-96-4-T, supra note 78, Trial Chamber I of the International Criminal Tribunal for Rwanda identified the following four “conditions” for the application of the Second Addition Protocol as contained in Article 4 of its Statute:

(i) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
(ii) the dissident armed forces or other organized armed groups were under responsible command;
(iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
(iv) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II (para. 623).

Trial Chamber I further concluded (at para. 627) that:
in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of international humanitarian law. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

82 Second Additional Protocol, supra note 11, art. 1(2).
that does not feature explicitly in Common Article 3 of the Geneva Conventions to be sure, but which did make its mark felt during the deliberations that brought us that particular provision.\(^83\)

Where the *Tadić* definition is interesting and vital is that it does not attach any of the qualifications that we have identified with the Second Additional Protocol: there is no specification of the actors necessary for a non-international armed conflict (according to *Tadić*, protracted armed violence “between governmental authorities and organized armed groups” will do, as will protracted armed violence “between such groups within a State”),\(^84\) and, at least as a formal matter, there is no requirement that organized armed groups be “under responsible command,”\(^85\) or that they “exercise such control over a part of [their] territory” so “as to enable them to carry out sustained

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\(^{83}\) At the Geneva Conference, it was feared by certain delegations that the term “armed conflict not of an international character” was of such vagueness “that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry.” *See Commentary on Geneva Convention (III) Relative to the Treatment of Prisoners of War* 35 (Jean de Preux ed., 1960). However, the preferred option was to set out a series of “convenient criteria” to guide the application of Common Article 3 in practice:

1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory. (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

*Id.* at 35-36. *See also* Vité, *supra* note 53, at 76.

\(^{84}\) Emphasis added.

\(^{85}\) *But see* *supra* note 78, and *infra* note 116. Note, though, that, under the *Tadić* formulation, armed groups must be *organized*, irrespective of whether they are engaged in a non-international armed conflict with governmental authorities or other such organized groups within a State: *id.* *See also* Hampson, *supra* note 52, at 555.
and concerted military operations and to implement this Protocol.” 86 Yet, we find that it is this very formulation—taken and adapted from paragraph 70 of Tadić—87—that has found its way into Article 8 of the Rome Statute of the International Criminal Court for determining the precondition of one cohort of war crimes for non-international armed conflicts: the Statute in fact distinguishes between “serious violations” of Common Article 3 to the Geneva Conventions (as itemized in Article 8(2)(c) of the Statute) and “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character” (which are itemized in Article 8(2)(e) of the Statute), and it is to this latter cohort of war crimes that the adapted Tadić formulation makes its appearance—thus delineating in part the jurisdiction ratione materiae of the International Criminal Court. 88

In truth, it is instructive to consider how the Tadić formulation of non-international armed conflicts came to be adapted in the Rome Statute of the International Criminal Court. 89 To be clear, the Statute announces that neither cohort of war crimes for

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86 See Schabas, supra note 3, at 204. To be sure, the last three words of this statement are Protocol- (or convention-) specific; but the idea of being able/enabled “to carry out sustained and concerted military operations” is not. Even these words do not appear in the Appeal Chamber’s definition—unless one is prepared to read this consideration into the duration of armed violence as discussed above (supra note 83 and accompanying text). That said, it could be argued that the Second Additional Protocol’s use of the word “enable” suggests a criteria of the potential to engage in protracted armed violence, whereas the Tadić formulation appears to require that the protracted armed violence is already in existence or underway.


88 So thought Pre-Trial Chamber II of the International Criminal Court in Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, (June 15, 2009), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo in respect of Article 8(2)(d) and the first sentence of Article 8(2)(f) of the Statute (which “requires any armed conflict not of an international character to reach a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. In the view of the Chamber, this is ultimately a limitation on the jurisdiction of the Court itself, since if the required level of intensity is not reached, crimes committed in such a context would not be within the jurisdiction of the Court” (para. 225)).

non-international armed conflicts—as set out Article 8(2)(c) and in Article 8(2)(e)—applies “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” This the Statute does in Article 8(2)(d) (for Article 8(2)(c) war crimes) and in the first sentence of Article 8(2)(f) (for Article 8(2)(e) war crimes). This form of words is, of course, itself drawn from the Second Additional Protocol,90 but its invocation here for “serious violations of [Common] Article 3” does bring to the fore one of the known undercurrents of Common Article 3 of the Geneva Conventions.91 The second sentence of Article 8(2)(e) then proceeds to state that Article 8(2)(e) “applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”—the form of words that is, of course, subject to one important modification,92 indebted to the formulation of the Appeals Chamber as set out in Tadić.93

That second sentence of Article 8(2)(e), however, is not repeated for the purposes of Article 8(2)(c) war crimes because, as we are well aware, Common Article 3 of the Geneva Conventions was never straddled by the same qualifications that have hedged the application of the Second Additional Protocol, including the restriction of the Protocol that its non-international armed conflicts must involve the armed forces of a High Contracting Party.94 Nevertheless, the stipulation of a “protracted armed conflict” in Article 8(2)(f) of the Statute for Article 8(2)(e) war crimes has led some to speculate that the Statute “provides an intermediary threshold of application” because “[t]here is no longer a requirement for the conflict to take place between governmental

90 Supra note 11.
91 Supra note 83. See also Kress, supra note 49, at 116, and Sivakumaran, supra note 89, at 365.
92 That is that Article 8(2)(f) uses the term “protracted armed conflict” where Tadić used the term of “protracted armed violence.” On this point, see Sivakumaran, supra note 89, at 373 (“The deliberate substitution of ‘protracted armed violence’ with ‘protracted armed conflict’ makes little sense. To define an armed conflict by reference to a protracted armed conflict is singularly unhelpful. And if an armed conflict is defined, in part, as protracted armed violence, then a protracted armed conflict is simply protracted, protracted armed violence. The additional ‘protracted’ adds little value”). See also Cullen, supra note 89, at 435 & ff. Article 8(2)(f) might therefore be regarded as a replica of Tadić—but it is not an exact replica: supra note 87. Dörmann has argued that “[t]he addition of the word ‘protracted’ to ‘armed conflict’ seems to be redundant, since protracted violence is a constituent element of an armed conflict not of an international character.” See DÖRMANN, supra note 89, at 441.
94 See supra note 80. See also Greenwood, supra note 58, at 55, para. 210 (providing examples of Lebanon during the 1980s and Somalia after 1991 for the broader compass of Common Article 3).
forces and rebel forces, for the latter to control part of the territory, nor for there to be a responsible command. *The conflict must however be protracted and the armed groups must be organized.*\(^95\) The suggestion is that, for the purposes of individual criminal liability (at least as far as the International Criminal Court is concerned), the law now knows a *third* modality for the concept of a non-international armed conflict—one that is separate from that which appears in Common Article 3, and separate again to that contained in the Second Additional Protocol.\(^96\)

Close attention to the drafting history of this provision, however, reveals otherwise, and Article 8(2)(f) is best viewed in the legislative context in which it came to light. To begin with, a certain unease existed amongst States in their preparation for the Rome Statute with treating all war crimes for non-international armed conflicts—the war crimes which now appear in the itineraries in Article 8(2)(c) and (e) of the Statute—in the same conceptual bracket,\(^97\) as was originally floated. For the Statute, this would have involved a singular concept of non-international armed conflict without any reference to the dichotomization of non-international armed conflicts as found in Common Article 3 and the Second Additional Protocol, although this initial proposal did set a baseline standard to the effect that the concept of non-international armed conflict endorsed by the Statute would exclude internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.\(^98\)

One way forward, as argued by Egypt and Bahrain, was to invoke the threshold in the Second Additional Protocol, and to do so for all war crimes occurring in non-international armed conflicts in the Statute,\(^99\) but this invariably attracted dissenters for its regressive posture in setting forth criteria for the purposes of the criminal consequences of serious violations of Common Article 3 of the Geneva Conventions that are not, in fact, articulated in Common Article 3 itself. A bureau proposal was then advanced to introduce verbatim the threshold for non-international armed conflicts


\(^{98}\) *Id.* *See also* U.N. Doc. A/CONF.C.1/L.53 (July 6, 1998). This, of course, is now reflected in Article 8(2)(d) and the first sentence of Article 8(2)(f) of the Statute: *supra* notes 90 & 91 (and accompanying text).

\(^{99}\) On how this unfolded, see Cullen, *supra* note 89, at 427 & 431-432.
THE TREMORS OF TADIĆ

contained in the Second Additional Protocol for the purpose of those war crimes in non-international armed conflicts not arising out of violations of Common Article 3. However, New Zealand was of the view that reality dictated that “more and more States are confronted with non-international armed conflicts taking place on their territory involving a number of dissident armed groups fighting against another, or armed groups fighting against the established Government which either does not control part of the territory or does not have a proper chain of command,” and that the proposal to incorporate the threshold from the Second Additional Protocol “not only would represent a step back from existing law but would also be so restrictive that it would prevent the Court from dealing with the types of atrocities in conflicts which the world has witnessed over the past years.” New Zealand was by no means alone in taking this stance: it was joined by States ranging from the United Kingdom to Tanzania, Lithuania to the Sudan—as well as international organizations such as the European Union and the ICRC.

It was Sierra Leone who came up with a compromise proposal in response to these developments—that Article 8(2)(e) war crimes would apply “to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”—and it is this proposal that went on to become Article 8(2)(f) of the Statute. The

101 U.N. Doc. A/CONF.183/INF/11 (July 13, 1998), at 2. For New Zealand: “These types of non-international armed conflicts must also fall under the jurisdiction of the Court.”
102 Id.
103 See Cullen, supra note 89, at 429-431.
105 For an especially useful recounting of the drafting history, consider Sivakumaran, supra note 89, at 371-377. It is interesting that, following Sierra Leone’s experience with non-international armed conflict, the Statute of the Special Court for Sierra Leone awarded competence to the Special Court “to prosecute persons who committed or ordered the commission of serious violations of [Common] Article 3 … to the Geneva Conventions …, and of Additional Protocol II thereto” (Article 3). However, in addition to this provision, Article 4 provides that:

The Special Court shall have the power to prosecute persons who committed the following series violations of international humanitarian law:

a. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

b. internationally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

c. conscripting or enlisting children under the age of 15 years into the armed forces or groups or using them to participate actively in hostilities.

entire purpose of the proposal submitted by Sierra Leone was to avoid the transfer of the higher threshold for non-international armed conflicts contained in the Second Additional Protocol to the war crimes which would ultimately feature in Article 8(2)(e) of the Statute. And, one could further argue, that approach made very good humanitarian sense for there is no reason in principle why the war crimes of Article 8(2)(e) of the Statute—such as intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (Article 8(2)(e)(i)); or pillaging a town or place, even when taken by assault (Article 8(2)(e)(v)); or committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 Common to the four Geneva Conventions (Article 8(2)(e)(vi)) or declaring that no quarter will be given (Article 8(2)(x))—should be made contingent on the exercise of territorial control by dissident armed forces or other organized armed groups and who are engaged with the armed forces of a High Contracting Party to the Geneva Conventions.

A final point should be made here and, as with our earlier treatment of international armed conflicts, it relates to the nature of the “protracted armed violence” (Tadić) or “protracted armed conflict” (to return to the wording of Article 8(2)(f) of the Statute) that is in issue. We appreciate the need for armed violence for the instigation of a non-international armed conflict, but what kind of violence can be taken to be relevant for these purposes—and why? The notion of a non-international “armed conflict” (or “protracted armed conflict”) could well suggest the need for hostilities or military exchanges of some sort between parties to the non-international armed conflict, but what if governmental armed forces, to take an example, commit acts of sexual violence against women within a State, and do so on a systematic and unabated basis?

106 See Sivakumaran, supra note 89, at 375, and Cullen, supra note 89, at 435-437.
107 See supra notes 70-76 (and accompanying text).
108 See also supra notes 78 & 81.
109 See Spieker, supra note 89, at 399. Following through from some of the conventional evidence: Common Article 3(1) is addressed to persons “taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.” As for the Second Additional Protocol, Article 2(2) mentions “the end of the armed conflict”; Article 4(1) all persons “who do not take a direct part or who have ceased to take part in hostilities”; Article 5(2)(c) makes reference to “the combat zone”; Article 6 (5) staples its obligation to “the end of hostilities”; Article 7(1) on the taking part “in the armed conflict”; Article 13(1) concerns the general protection of the civilian population “against the dangers arising from military operations” and Article 13(3) on protection of civilians “unless and for such time as they take a direct part in hostilities.”
110 See Jon Lee Anderson, Downfall, NEW YORKER, Apr. 12, 2010, at 26. Note the findings of a recent study, that more than sixty percent of rape victims in the eastern DRC have been gang-raped.
What about violence against women fails to qualify? Much of it is planned, including many gang rapes and serial murders, much stalking and sexual harassment, a lot of pornography production, and most sex trafficking. Are women somehow not “innocent,” qua women existentially at fault? If the language of war reveals women as de facto conscripts, always non-civilians yet never combatants, the language of terrorism shows that women are seldom innocent enough. And just what about women’s status relative to men is not “political”? If sex is one way power is socially organized, forming a sexual politics, sexual violence is a practice of that politics, misogyny its ideology.111

Again, as we have argued above with regard to starvation, if sexual violence is recognized as an unlawful method of warfare,112 what precludes its status as a method for initiating warfare, or its capacities for the inauguration of a non-international armed conflict in which the protections of Common Article 3 of the Geneva Conventions, the Second Additional Protocol and customary international humanitarian law are potentially applicable? And what if, all other things being equal and it is peacetime,113 a State makes use of chemical or related weapons and nothing else against its own citizens, and, again, does so with regular refrain? Would such an act (or series of acts) be sufficient to constitute a non-international armed conflict for the purposes of the law—or would common Article 3’s more general provision, of at least two parties to the armed conflict, serve as a controlling component for the definition of a non-international armed conflict?114 We should observe that, on this latter front, and following the definition for non-international armed conflicts set out in the Tadić decision on interlocutory appeal in October 1995, the Trial Chamber of the ICTY went on—in the next installment of Tadić, in May 1997—to develop the definition of the Appeals Chamber and espouse a “test” for “the purposes of the rules contained in common Article 3,” one which, it said, “focuses on two aspects of a conflict: the

by armed men—and that there has been an exponential increase in the incidence of civilian rape in the course of this (non-international) armed conflict: HARVARD HUMANITARIAN INITIATIVE, “NOW, THE WORLD IS WITHOUT ME”: AN INVESTIGATION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO (2010), http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/rr_sexual_violence_drc_150410.pdf.

111 See MacKinnon, supra note 71, at 12. See also Hilary Charlesworth & Christine Chinkin, Sex, Gender, and September 11, 96 AM. J. Int’l. L. 600, 602 (2002).

112 Supra note 76.


114 See supra notes 78 & 81.
intensity of the conflict and the organization of the parties to the conflict.”\textsuperscript{115} For the Trial Chamber, “these closely related criteria are used solely for that purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law,”\textsuperscript{116} but, in so doing, it also referred to the “[f]actors relevant to this determination,” which include the legislative intentions behind Common Article 3 of the Geneva Conventions.\textsuperscript{117}

*  

Confirmation that the Appeals Chamber intended to provide separate definitions for each of the concepts of international and non-international armed conflicts is apparent throughout the \textit{Tadić} decision of October 1995. Most crucially, the Appeals Chamber said that “[t]he definition of ‘armed conflict’ varies depending on whether the hostilities are international or internal,”\textsuperscript{118} suggesting that the quantum of hostilities is intrinsic to the very definition of each of the concepts of international and non-international armed conflicts as the Appeals Chamber understood them. Furthermore, the Appeals Chamber concluded that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”\textsuperscript{119} Hence, even though similar considerations shape or affect the scope of international and non-international armed conflicts in practice, and even though a respectable share of the law of the Geneva Conventions and Additional Protocols is applicable to both of these armed conflicts as a matter of custom,\textsuperscript{120} the Appeals Chamber was not prepared to collapse these two forms of armed conflict into a generic concept of armed conflict replete with its own, singular definition. And this is noticeably so. The Appeals Chamber kept a clinical separation of the concepts throughout its reasoning in the interlocutory decision: its approach was to set out the temporal and geographical scope of each of these concepts from the reception of the Geneva Conventions and the Additional Protocols in practice, and, combined with the definitions it gave for international and non-international armed conflicts, we are able to tabulate its analysis as follows:

\begin{itemize}
  \item \textsuperscript{115} Prosecutor v. Tadić, Case No. IT-94-1-T (Trial Chamber: Opinion & Judgment) (May 7, 1997) 193-194, para. 562. \textit{See also supra} notes 78 & 83.
  \item \textsuperscript{116} Id. \textit{See also La Haye, supra} note 4, at 11-13.
  \item \textsuperscript{117} Id. \textit{See also supra} note 83.
  \item \textsuperscript{118} Tadić (Appeals Chamber), \textit{supra} note 1, at 486, para. 67.
  \item \textsuperscript{119} Id. emphasis added. For an important discussion of these topics in relation to international armed conflicts, consider Christopher Greenwood, \textit{Self-Defence and the Conduct of International Armed Conflict, in International Law At A Time of Perplexity: Essays in Honour of Shabtai Rosenne} 273, 275-278 (Yoram Dinsein & Mala Tabory eds., 1989).
  \item \textsuperscript{120} \textit{See Henckaerts, supra} note 70, at 187.
\end{itemize}
### III. An Alternative Interpretation of Paragraph 70

Contrary, therefore, to any initial impression that might be given by paragraph 70 of the interlocutory appeal, that the Appeals Chamber was defining a generic concept of “armed conflict” in October 1995, this article has sought to demonstrate that there

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<td>“a resort to armed force between States” (paragraph 70)</td>
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<td>“each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting” (e.g. Geneva Convention (I), Art. 5; Geneva Convention (III), Art. 5; Geneva Convention (IV), Art. 6) (paragraph 67)</td>
<td>Temporal Scope</td>
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<td>“the provisions [of the Geneva Conventions] suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities” (e.g., Geneva Convention (III); Geneva Convention (IV), Art. 6 (2); First Additional Protocol, Article 3 (b)) (paragraph 68)</td>
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were, in fact, two definitions at work in that paragraph and, indeed, in the decision when taken as a whole—one for the concept of international armed conflicts and the other for the concept of non-international armed conflicts. Notably, though, the Appeals Chamber did not follow the entire conventional lead of also distinguishing between different forms of non-international armed conflict pace Common Article 3 of the Geneva Conventions and the Second Additional Protocol. Nevertheless, it plainly and unmistakably treated each of the concepts of international and non-international armed conflicts as legal terms of art, invested with their own normative pedigree and meaning, as derived from the Geneva Conventions, but also as developed in the Additional Protocols and beyond—although no real effort was made to systematically unpack the details of practice that allowed the Appeals Chamber to frame these legal terms of art in the manner in which it did.

An alternative interpretation of the Appeals Chamber’s jurisprudence would be to claim that it was proposing a generic concept of “armed conflict” in paragraph 70 of Tadić, for it is with these very words that it commenced its definitional labors in that decision. According to this interpretation, the generic concept of an “armed conflict” would serve as a common denominator for the identical laws applicable in international as well as non-international armed conflicts, so that a two-stage analysis would be required: first, it would be necessary to determine whether the facts in any given situation constitute an “armed conflict” in accordance with this definition and then, and only then, and only to the extent necessary, would we move to consider whether the armed conflict in question is “international” or “non-international” in character. (We would undertake this second stage of analysis for the purpose of determining which of the lex specialis of international humanitarian law would also be applicable to the armed conflict before us—in addition, that is, to the international humanitarian law that is applicable to all armed conflicts). At some level, this would seem to

121 Supra notes 77-79 (and accompanying text).

122 See International Law Association Committee on the Use of Force, Initial Report on the Meaning of Armed Conflict in International Law 6 (2008) (“There is nowadays thought to be growing convergence between the rules governing international and non-international armed conflicts and in the future it may be less important to classify the type of conflict”). Though this report maintains the division between international and non-international armed conflicts in its analysis, it provides as examples of “armed conflicts” (id. at 9) the 1956 Suez Invasion and the 1967–70 Biafran War—both in the same breath!

123 Supra note 120. Although one might wonder whether the term “international humanitarian law” properly imparts the extent of the lex specialis for international armed conflicts as it does the lex specialis for non-international armed conflicts, see supra notes 8-10. See, however, infra note 125.

124 Stewart writes that “[a] particular sticking point in developing a single law of armed conflict is defining a generic definition of the term in light of the different levels of intensity that trigger
make considerable sense given that the Appeals Chamber itself concluded later in its decision on interlocutory appeal that “in the area of armed conflict the distinction between inter-State wars and civil wars is losing its value as far as human being are concerned.”\(^{125}\) If an identical set of laws is applicable to both international and non-international armed conflicts, is it not a logical corollary of this finding that the material scope of application of these rules should be cast in one and the same terms?

However, for the reasons discussed above, we do not believe that this was the approach of the Appeals Chamber in October 1995—and nor do we believe that it could have been. We say this because it is clear from the ruling of the Appeals Chamber that these legal terms of art are different to their absolute core:\(^{126}\) a set of acts or actions produced in one context might generate the legal result of an international armed conflict but, were an identical set of acts or actions to be repeated at the hands of different actors (i.e. in an entirely different context), it would not necessarily produce the legal result of a non-international armed conflict. This is presumably what the Appeals Chamber meant when it acknowledged the contingencies of the definition of “armed conflict,” depending, as it said, “on whether the hostilities are international or internal,”\(^{127}\) and is borne out elsewhere in its ruling with the reference to “whenever international and non-international armed conflicts at present”: (supra note 47, at 345). Note how the International Law Association Committee on the Use of Force advances the idea of a generic armed conflict as lex ferenda (supra note 122).

\(^{125}\) Tadić (Appeals Chamber), supra note 1, at 506 para. 97. And the Appeals Chamber continued:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

\(^{126}\) Supra notes 21 & 118.

\(^{127}\) Id.
there is a resort to armed force” by States for an international armed conflict, and to the *de minimis* threshold of “protracted” armed violence for non-international armed conflicts. In other words, if, *arguendo*, the tragic acts that transpired in the United States on September 11, 2001, had been committed by members of the regular armed forces of Afghanistan, there is no question that an international armed conflict would have been inaugurated between Afghanistan and the United States by virtue of those events. However, if the same set of events had occurred at the instigation of members of an organized armed group, all of whom, *arguendo*, had carried the nationality of the United States, it cannot be assumed that as a matter of international law, those acts would have constituted a non-international armed conflict within the United States.

The other matter to relate is that all armed conflicts will require their proper designation under the schemata of the Geneva Conventions and Additional Protocols—and, presumably, their shadow schemata under customary international humanitarian law—from the *outset* because of the particularity of rules that will be applicable thereto: for example, “[p]arties to non-international armed conflicts do not have the right to resort to belligerent reprisals,” and what goes for the outset of a given armed conflict of whatever dispensation will go for its *duration* and its *conclusion*. So, the status of prisoners-of-war and belligerent occupation are not known to non-international armed conflicts, and, according to the Third Geneva

128 *Supra* note 16.

129 *Id.*

130 As opposed to members of al-Qaeda—a non-State actor—although membership of al-Qaeda would not necessarily foreclose the possibility of an international armed conflict occurring on September 11, 2001, between Afghanistan and the United States, *depending on the precise nature of the relationship between al-Qaeda and Afghanistan: see Dinstein, supra* note 49, at 27.

131 Rule 148 of the ICRC study on customary international humanitarian law: Henckaerts, *supra* note 70, at 211. *Cf.* Rule 145 (”Where not prohibited by international law, belligerent reprisals [in international armed conflicts] are subject to stringent conditions”). *See also* Rules 146 and 147: *id.* at 210-211 and *infra* note 141.

132 *See* respectively Stewart, *supra* note 47, at 320, and Yoram Dinstein, *The International Law of Belligerent Occupation* 33-34 (2009). On the borderline between a belligerent occupation that lapses into hostilities and “a law and order problem, in relation to which the occupying power has an obligation to restore order,” see Hampson, *supra* note 52, at 554. In *The Public Committee against Torture in Israel v. The Government of Israel*, the Israeli Supreme Court reached the conclusion that at the “centre” of the “normative system” governing relations between Israel and terrorist organizations is “the international law regarding international armed conflict,” and that “[a]n armed conflict which takes place between an occupying Power and rebel or insurgent groups—whether or not they are terrorist in character—in an occupied territory, amounts to an international armed conflict.” *See* HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel, para. 18, [Dec. 14, 2006] (unpublished), English translation, elyon1.court.gov.il/files_eng/02/690/007/
Convention Relative to the Treatment of Prisoners of War, “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities” of an international armed conflict.\textsuperscript{133} A different arrangement exists for those without this status but still captured in the course of an international armed conflict,\textsuperscript{134} separate again to that which prevails for non-international armed conflicts: Article 6(5) of the Second Additional Protocol provides that “[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” The reason for these differences in arrangement for the conclusion of international and non-international armed conflicts was carefully elaborated by the Supreme Court of South Africa in Azanian Peoples Organization (AZAPO) v. President of South Africa in July 1996:

The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such

\textsuperscript{133} See GC III, supra note 8, art. 118 (1).

\textsuperscript{134} Article 75 of the 1977 First Additional Protocol (supra note 11) concerns “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol” (Article 75(1)). According to Article 75(6): “Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.” See also Article 75(3): “Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”
reconciliation and reconstruction. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity.  

Notwithstanding the sound arguments of law and principle that have been put forward here, it could be that an additional fillip for the approach of a generic concept of armed conflict is extracted from the findings of the ICRC and its study, *Customary International Humanitarian Law* (2005), and that is that 146 of its 161 rules of customary international humanitarian law are applicable to both international and non-international armed conflicts. The idea is sure to take hold that, on account of these substantive outcomes of the study, the need is dictated for a unified or generic concept of armed conflict in which all of these 146 rules of customary international humanitarian law would become applicable. Curiously, though, the most important rule in the customary rule-book—the rule or rules that tell us when the other rules of the study become applicable and relevant—is omitted: at no point does the ICRC commit to defining the legal condition (or conditions) that activate any of the (161) rules it identifies. Yet, it cannot and should not go unnoticed that, even where the study proclaims that an identical rule is applicable in international and non-international armed conflicts, it does so on that precise basis: it articulates two separate but identical rules on 146 occasions, one for international and another for non-international armed conflicts, instead of 146 rules pursuant to some generic concept of armed conflict. A unified concept of armed conflict would presumably have created a unified set of rules—rather than the duality of rules that pervades and which has become synonymous with the study. This is not to mention the need for defining

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135 Case CCT 17/96 Azanian Peoples Organization (AZAPO) v. President of South Africa 1996 (4) SA 672 (CC), para. 31 (per Mahomed DP) (S. Afr.).
137 Personal correspondence of Jean-Marie Henckaerts with the author (June 11, 2010) (on file with the author).
139 Hence, on eight of these occasions, the “rule” for non-international armed conflicts is described as being “arguably” customary international humanitarian law, when an identical customary rule has been deemed established for international armed conflicts: *see* Rules, 21, 23, 24, 44, 45, 52, 63, & 82. *See also* Henckaerts, *supra* note 70, at 198.
140 *See* Henckaerts, *supra* note 70, at 198-212.
international and non-international armed conflicts in any event, given that some rules are only applicable in either an international or a non-international armed conflict.\textsuperscript{141}

Furthermore, and to conclude this section, it will be appreciated that the general structure of the first volume of the study—which is devoted to a synthesis of the practice that has been collated in the second volume—is such that it provides its commentaries to a given rule for international armed conflicts separate to those for the identical rule in non-international armed conflicts.\textsuperscript{142} The preferred approach, then, is to retain, develop and refine the distinct integrity of each of the concepts of international and non-international armed conflicts, as has been done by no less than the ICRC, which, in an opinion paper in March 2008, proposed the following definitions that, it said, “reflect the strong prevailing legal opinion”:

1. International armed conflicts exist whenever there is resort to armed force between two or more States.

2. Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.\textsuperscript{143}

\textsuperscript{141} Thirteen rules applicable only in international armed conflicts (Rules 3, 4, 41, 49, 51, 106, 107, 108, 114, 130, 145, 146 and 147) and two applicable only in non-international armed conflicts (Rules 148 and 159)—as per the correspondence with the author (supra note 137). See also supra note 131.

\textsuperscript{142} We emphasize general structure, because even though there are departures to the format of the study—as found for Rule 10 in Henckaerts & Doswald-Beck, I: Rules, supra note 136, at 34-35; Rule 26: \textit{id.} at 86; Rule 30: \textit{id.} at 103; Rule 33: \textit{id.} at 112-113; Rule 35: \textit{id.} at 119-120; Rule 36: \textit{id.} at 120-121; Rule 38: \textit{id.} at 127; Rule 39: \textit{id.} at 131-132; Rule 40: \textit{id.} at 133; Rule 42: \textit{id.} at 139-140; Rule 43: \textit{id.} at 143; Rule 56: \textit{id.} at 200-201; Rule 66: \textit{id.} at 227-229; Rule 67: \textit{id.} at 229-230; Rule 68: \textit{id.} at 231-232; Rule 69: \textit{id.} at 232-233; Rule 73: \textit{id.} at 256-258; Rule 83: \textit{id.} at 285-286; Rule 87: \textit{id.} at 306-307; Rule 88: \textit{id.} at 308-310; Rule 89: \textit{id.} at 311-314; Rule 90: \textit{id.} at 315-317; Rule 91: \textit{id.} at 319-320; Rule 92: \textit{id.} at 320-323; Rule 93: \textit{id.} at 323-336; Rule 94: \textit{id.} at 327-329; Rule 95: \textit{id.} at 330-332; Rule 96: \textit{id.} at 334-336; Rule 97: \textit{id.} at 337-339; Rule 98: \textit{id.} at 340-343; Rule 100: \textit{id.} at 352-354; Rule 101: \textit{id.} at 371-372; Rule 102: \textit{id.} at 372-373; Rule 103: \textit{id.} at 374-375; Rule 104: \textit{id.} at 375-378; Rule 105: \textit{id.} at 379-380; Rule 117: \textit{id.} at 421-423; Rule 132: \textit{id.} at 468-470; Rule 133: \textit{id.} at 472-474; Rule 136: \textit{id.} at 482-484; Rule 137: \textit{id.} at 485-487; Rule 138: \textit{id.} at 489; Rule 139: \textit{id.} at 495; Rule 140: \textit{id.} at 498-499; Rule 141: \textit{id.} at 500; Rule 142: \textit{id.} at 501; Rule 143: \textit{id.} at 505; Rule 144: \textit{id.} at 509-513; Rule 149: \textit{id.} at 530; Rule 152: \textit{id.} at 556-558; Rule 154: \textit{id.} at 563; Rule 155: \textit{id.} at 565-567; Rule 156: \textit{id.} at 568-569; Rule 157: \textit{id.} at 604-605; Rule 158: \textit{id.} at 607-610; Rule 160: \textit{id.} at 614-618 and Rule 161: \textit{id.} at 618-619—these are still articulated in terms of identical rules for both international and non-international armed conflicts.

CONCLUSION

In this Article we have attempted to register the tremors of Tadić as those specifically relate to the definition of the concepts of international and non-international armed conflicts arising from the decision of the Appeals Chamber of October 1995. We found that the Appeals Chamber of the ICTY was at pains to mark out separate provenances for each of these concepts, treating them as legal terms of art rather than as terms open to disaggregation and to compartmentalized meanings of their composite parts. That approach would have involved the Appeals Chamber in a two-stage analysis for the determination of the character of a given armed conflict, but it is clear from the essential thrust of the decision that nothing of the sort was intended or envisaged. The Appeals Chamber set out to define both of the concepts of international and non-international armed conflicts in paragraph 70 of its decision in Tadić, demonstrating scrupulous regard to their respective idiosyncrasies of definition and detail—although we have also attempted in this Article to highlight what the Appeals Chamber stopped short of saying in respect of the scope and meaning of each of these concepts on that occasion. We have then assessed how these definitions from the seminal declaration of paragraph 70 have had tremors much further afield than the jurisprudence of the ICTY, most especially in the impact brought to bear on the framing of Article 8 of the Rome Statute of the International Criminal Court—and all of which need to be digested and fully understood before any agitations for legal change are made. It appears that these tremors are set to remain with us, and will do so for a good while to come.