
The Requirement of 'Belonging' under International Humanitarian Law

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Abstract

This article argues that the notion of 'belonging to a Party' to an international armed conflict under Article 4A(2) of the Third Geneva Convention is a necessarily low-threshold requirement. It is submitted that the requirement of 'belonging' demands no more than a de facto agreement between a state and an irregular armed group to the effect that the latter will fight on the state's behalf against another state. The article critically examines how the ICTY Appeals Chamber in the Tadić case applied the requirement to 'belong' under Article 4A(2) not in order to classify persons, but rather to classify the conflict in the former Yugoslavia as 'international'. The Appeals Chamber also considered that the same test should apply for the purpose of attributing state responsibility. It will be argued that there should be no underlying assumption that the same test applies for different purposes. Rather, it is to be expected that different tests developed for different purposes are different. This heterogeneous content of international law does not mean that international law is fragmented. Rather, an argument is made for the application of tests according to their respective purposes.

1 Introductory Remarks

The relationship between a state and individuals who appear to act for this same state has been examined under the microscope of international law, through many different lenses. What the eye of the scholar has beheld has been coloured by the purpose for which the specimen on the slide has been examined, and the relationship has consequently been described in a number of different ways. The aim of such examinations has been to develop legal tests with specific purposes: a test to determine which rules of

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International Humanitarian Law (IHL) apply to an individual (the focus of this article); a test to determine if a state is responsible for the actions of the individuals concerned; a test to determine if what may at first appear to be a non-international armed conflict has in fact become ‘internationalized’; a test to determine if a state’s human rights law obligations extend to the actions of the individuals acting under the state’s control.

These various tests formulated to apply to this same relationship have provoked a number of concerns among scholars, two of which will be raised here.

One concern is what is the appropriate test to apply in a particular situation where there appear to be conflicting views about the correct test to apply. The celebrated examples on point are the conflicting tests formulated by the International Court of Justice (ICJ) in the *Nicaragua* case¹ and by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case² for the purpose of attributing state responsibility. The ICTY was called upon to classify an armed conflict for the purpose of determining the *ratione materiae* of applicable crimes in order to proceed with an analysis of individual criminal responsibility. In classifying the conflict in the former Yugoslavia as having been ‘internationalized’ by the involvement of an outside state in what would otherwise be a non-international armed conflict, the ICTY relied upon the 1986 judgment of the ICJ in the *Nicaragua* case in which the ICJ had articulated a test for determining state responsibility based on the criterion of ‘effective control’ of a state over an armed group. Admittedly, the issues before the ICJ in the *Nicaragua* case were very different from those faced by the ICTY: the former was concerned with issues of state responsibility and did not have to classify an armed conflict; the latter was charged with addressing issues of individual criminal responsibility where the classification of the armed conflict was vital to determining the applicable law with which to try the accused. The ICTY Appeals Chamber nevertheless found the ICJ decision to be a stimulating precursor, but not reflective of customary international law, and it controversially departed from the *Nicaragua* test. The Appeals Chamber articulated its own test which it considered suitable not only for the purpose of classifying an armed conflict under IHL as having become ‘internationalized’, but also for the purpose of attributing state responsibility,³ an issue the ICTY did not have to address. This was the lower threshold criterion of ‘overall control’.

This ICTY judgment ruffled many feathers. In terms of doctrinal developments, it led to claims that international law is ‘fragmented’. The President of the ICJ in 2000, Judge Gilbert Guillaume, invoked the *Tadić* case as an example of the ‘serious risk . . . [of] loss of the overall perspective’ due to the ‘growing specialization of international courts’.⁴ The International Law Commission’s Study Group on Fragmentation, in a

¹ *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14 (*Nicaragua* case).

² *Prosecutor v. Tadić* (Judgment of 15 July 1999) ICTY AC, Case IT-94-1-A (*Tadić* case).

³ This was stressed by Cassese, ‘The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, 18 *EJIL* (2007) 649, at 657, 663, and 668. See also Simma, ‘Universality of International Law from the Perspective of a Practitioner’, 20 *EJIL* (2009) 265, at 280.

⁴ Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 Oct. 2000, available at: www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1.

report headed by Martti Koskenniemi, cited the different tests formulated by the ICTY Appeals Chamber in the *Tadić* case and the ICJ in the *Nicaragua* case as demonstrative of 'fragmentation through conflicting interpretations of general law'.⁵ The judicial dialogue – or, as Judge Bruno Simma has called it, the '*dialogue des sourds*'⁶ – between the ICJ and the ICTY continued with the ICJ responding to the *Tadić* case in 2007 by reasserting the applicability of its *Nicaragua* test of 'effective control' for the purpose of determining state responsibility in the *Genocide* case.⁷ The ICJ attempted to diffuse any perceived fragmentation by pointing out the different purposes that the conflicting tests serve. As Judge Rosalyn Higgins noted in her speech as President of the ICJ in 2007, in the *Genocide* case 'the International Court clearly addressed this perceived fracture in the jurisprudence and demonstrated that its significance should not be inflated'.⁸

A second concern which has arisen with respect to the relationship between a state and the individuals who appear to act for this same state is the very fact that different tests with their respective different purposes have been developed to describe this relationship. This proliferation of different tests has perplexed some scholars. Theoretical problems have been fashioned out of considerations of how these different tests interrelate, such as how the test of 'effective control' which has been developed for the purpose of attributing state responsibility relates to the test of 'overall control' developed for the purpose of classifying an armed conflict as having become 'internationalized'. For example, some scholars have been troubled by the fact that an application of the 'overall control' test articulated for the purpose of classifying an armed conflict under IHL would lead to the result that a state may not incur responsibility for violations committed by some individuals fighting on its behalf, because the test of 'effective control' for attributing state responsibility is more difficult to establish than the test for determining whether a non-international armed conflict has become 'internationalized'. In this vein, one author has asked whether it is 'possible to regard a state as a party to an armed conflict although no acts of the persons involved in the fighting are attributable to it?'.⁹

The two different concerns outlined above will be addressed in this article through the vehicle of one of the tests which applies to the relationship between a state and

⁵ International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi', 13 Apr. 2006, UN Doc A/AC.4/L.682, 31–33, paras 49–52. See also Rao, 'Multiple International Judicial Forums: a Reflection of the Growing Strength of International Law or its Fragmentation?', 25 *Michigan J Int'l L* (2004) 929, at 957–958.

⁶ Simma, *supra* note 3, at 280.

⁷ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 1 (*Genocide* case).

⁸ Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the meeting of Legal Advisors of the Ministries of Foreign Affairs, 29 Oct. 2007, available at: www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1&pt=3&y=2007, at 4.

⁹ Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia', 5 *J Int'l Criminal Justice* (2007) 829, at 832. She concludes, at 836, that '[a]lthough the issue would need to be further explored, it seems indisputable that this view could be maintained'.

individuals who appear to be acting for this same state. The focus of this article is the test of ‘belonging to a party’ to an international armed conflict for the purpose of classifying individuals under IHL.¹⁰ This is a test which, unlike the tests set out in the *Tadić* and *Nicaragua* cases, or the test formulated for determining the applicability of human rights treaties,¹¹ is rarely discussed, despite its important role in determining the application of IHL rules to individuals in the context of international armed conflicts. The ‘belonging’ test merits clarification as it appears to have been misinterpreted by the ICTY in the *Tadić* case, when the Appeals Chamber classified the armed conflict as having become internationalized. Furthermore, a discussion of the ‘belonging test’ can assist in unravelling the legal reasoning of the ICTY in the *Tadić* case, and can form the basis of a robust critique of the use of the test in *Nicaragua* by the ICTY Appeals Chamber. Clarification of the ‘belonging test’ is thus also a useful contribution to broader debates concerning the perceived fragmentation of international law.

In setting out the test to apply to determine whether an individual ‘belongs to a party’ to an international armed conflict, this article will incorporate responses to the two concerns outlined above. With respect to the first concern about the existence of conflicting tests, it will be argued that not only was the ICTY not called upon to address issues of state responsibility in the *Tadić* case, but the very fact that it examined the test formulated in the *Nicaragua* case at all is problematic. The approach taken by many scholars in citing the application of the *Nicaragua* test by the ICTY as evidence of the ‘fragmentation through conflicting interpretations of general law’ should not blunt the prickly truth that this was an erroneous application ‘*tout court*’. As Theodor Meron noted over a decade ago, with respect to the ICTY Trial Chamber’s examination of the *Nicaragua* test in the *Tadić* case:

the problem in the trial chamber’s approach lay not in its interpretation of *Nicaragua*, but in applying *Nicaragua* to *Tadić* at all. Obviously, the *Nicaragua* test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal.¹²

As will be argued in this article, it was the ICTY Appeal Chamber’s misuse of the ‘belonging test’ that led to the unnecessary examination of state responsibility, and the erroneous application of the *Nicaragua* test.

With respect to the second concern outlined above, regarding the proliferation of different tests and how these tests interrelate, this is not a concern manifested in practice, and although considerations of how different tests interrelate is theoretically interesting, it is not at all problematic. Each test which has been formulated serves a very specific purpose, sometimes in relation to a particular area of international law such as IHL or human rights. It is thus not only unproblematic, but expected, that the tests which have developed for different purposes are different. On the contrary, it

¹⁰ Art. 4A(2) of the Geneva Convention relative to the Treatment of Prisoners of War, adopted 12 Aug. 1949, entered into force 21 Oct. 1950, 75 UNTS 135 (Third Geneva Convention).

¹¹ *Loizidou v. Turkey* (Preliminary Objections) (1995) 20 EHRR 99.

¹² Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout’, 92 *AJIL* (1998) 236, at 237. The ICJ, in the *Genocide* case, considered state responsibility not to be something on which the ICTY was ‘called upon to rule . . . since its jurisdiction is criminal and extends over persons only’: *Genocide* case, *supra* note 7, at 144, para. 403.

would rather be worrying if, in order to apply the rules of IHL of international armed conflict to a particular individual, it was first necessary to establish that the actions of this individual could be attributed to a state which consequently incurred responsibility for his or her actions.

The structure of this article is as follows. First, the requirement of 'belonging' is discussed in section 2. It is argued that, bearing in mind the purpose of this requirement, 'belonging' under IHL should amount to nothing more than a *de facto* agreement between a state and a group of individuals to the effect that the latter fight on the state's behalf. It is essential to consider the 'belonging' requirement before re-examining the ICTY Appeal Chamber's *Tadić* judgment in section 3 in order to analyse this well-known judgment with fresh eyes. Section 3 will criticize the ICTY for assuming that the belonging requirement amounts to a test for establishing state responsibility. Finally, in section 4 it will be shown that, unlike the assumption of the ICTY Appeals Chamber in the *Tadić* judgment, it is not necessarily the case that a state will incur responsibility for the actions of an individual who fights for this same state in an international armed conflict. This fourth section will examine how a state may only in certain situations be responsible for the actions of individuals who 'belong' to it, in accordance with the rules of attribution for establishing state responsibility, and on the basis of due diligence.

2 Test of 'Belonging to a Party' to an International Armed Conflict

Suppose the following description is reflective of a group of individuals captured in the context of an international armed conflict between the Democratic Republic of Congo (DRC) and another state: 'one of the newest groups to emerge [in the DRC] is called the Rastas, a mysterious gang of dreadlocked fugitives who live deep in the forest, wear shiny tracksuits and Los Angeles Lakers jerseys and are notorious for burning babies, kidnapping women and literally chopping up anybody who gets in their way'.¹³

Could such a group of individuals be regarded as prisoners of war (POWs) under IHL in accordance with the requirements set out under Article 4A(2) of the Third Geneva Convention?¹⁴ One may perhaps start by analysing whether the bright tracksuits and

¹³ Gettleman, 'Rape Epidemic Raises Trauma of Congo War', *New York Times*, available at: www.nytimes.com/2007/10/07/world/africa/07congo.html?_r=1&em&ex=1191902400&en=28e9336839fa9a1b&ei=5087%0A&oref=slogin (accessed 18 Oct. 2007).

¹⁴ Art. 4(A) Third Geneva Convention provides: '[p]risoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging to a Party to the conflict* and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war . . .' (emphasis added).

Lakers jerseys worn by Rastas members could amount to a ‘distinctive sign’ under Article 4A(2)(b) of the Third Geneva Convention, or whether their practice of ‘burning babies, kidnapping women and literally chopping up anybody who gets in their way’ disqualifies the group from being combatants on the basis of not fulfilling the Article 4A(2)(d) criterion of ‘conducting their operations in accordance with the laws and customs of war’. If so, the often brushed aside but essential requirement contained in the *chapeau* of Article 4A(2) of ‘belonging to a Party to the [international armed] conflict’ may have been overlooked.¹⁵

The ‘belonging to a Party’ requirement is pivotal to the definition of a POW and, before surrender or capture, a combatant. As has been aptly noted, ‘combatant . . . is a term of art. It does not apply as it would in a lay sense to anyone who is engaged in fighting. When in common parlance we say somebody is engaged in combat, we just mean someone who is fighting. In humanitarian law [of international armed conflicts], however, a combatant specifically identifies someone who is fighting *on behalf of the state*.’¹⁶ It is thus the requirement which immediately distinguishes between (i) those individuals fighting on behalf of a state party to the armed conflict, and who are thus participating in the international armed conflict as ‘combatants’,¹⁷ and (ii) those individuals who are simply fighting on a territory where an international armed conflict is taking place, but who are not fighting on behalf of a state party to the conflict, and are thus not fighting as ‘combatants’.

In addition to the criteria for POW/combatant status contained in Article 4A(2) of the Third Geneva Convention, there are three other types of combatant deduced from the categories of persons described as POWs under Article 4 of the Third Geneva Convention.¹⁸ Unlike those in Article 4A(2), these other categories of combatants need not expressly demonstrate that they fulfil the ‘belonging’ criterion. Armed forces, including ‘militias or volunteer corps forming part of such armed forces’ under Article 4A(1) of the Third Geneva Convention constitute the armed forces of a state party to an international armed conflict. The ‘belonging’ requirement is thus implicit for these individuals because the fact that they constitute the state’s armed forces means that they are fighting on behalf of that state. Similarly, combatants under Article 4A(3) of the Third Geneva Convention also implicitly fulfil the ‘belonging’ requirement as they too are members of the armed forces of a state, even though the government of this state is not recognized by the adverse state party to the conflict. Lastly, the rather exceptional situation of a *levée en masse* requires only that those fighting to demonstrate that they are inhabitants of a non-occupied territory who spontaneously take

¹⁵ ‘*l’appartenance à une Partie au conflit*’ in the French version.

¹⁶ Whippman, ‘Redefining Combatants: Comment on Richard Arneson’s *Just Warfare Theory and Noncombatant Immunity*’, 39 *Cornell Int’l LJ* (2006) 699, at 702 (emphasis added). Cf. Arneson, ‘Just Warfare Theory and Noncombatant Immunity’, 39 *Cornell J Int’l L* (2006) 663, at 666–669.

¹⁷ Assuming such individuals also fulfil the other requirements under Art. 4A(2) Third Geneva Convention.

¹⁸ Six different types of individuals are described under Art. 4A Third Geneva Convention as qualifying for POW status, but only individuals falling within 4 of these categories also have, prior to capture or surrender, combatant status in the conduct of hostilities.

up arms to resist the invading armed forces, provided that they carry arms openly and respect the laws and customs of war.

'Belonging' to a state party to the conflict is thus a criterion that needs only be expressly demonstrated by combatants falling under Article 4A(2) of the Third Geneva Convention: the members of *other* militia and volunteer corps, including armed resistance groups. These individuals should not be confused with the 'members of militias or volunteer corps *forming part of* . . . [the] *armed forces*' (emphasis added) of a party to the conflict pursuant to Article 4A(1) of the Third Geneva Convention. Unlike those persons falling under Article 4A(1), individuals falling under Article 4A(2) of the Third Geneva Convention do not form part of the regular armed forces of a state party to an international armed conflict.¹⁹

What is sufficient to demonstrate that an armed group 'belongs' to a state party to the armed conflict?

One approach to answering this question, the approach favoured in this article, is to say that a low-threshold requirement is sufficient to be considered to 'belong'. According to this approach, 'belonging to a party to a conflict' would amount to an analysis of the motivation or intention of the armed group and the reaction of the state concerned: is the armed group fighting for the state, and does the state – either expressly or tacitly – accept that the group is fighting on its behalf? This interpretation is supported by the commentary to Article 4 of the Third Geneva Convention, in relation to Article 4B where the wording 'belonging' also appears. According to this commentary, since the conclusion of the Hague Conferences, resistance movements have been considered to fight on behalf of a party to the conflict simply if there is a *de facto* relationship with this party. A *de facto* relationship may find expression merely by tacit agreement.²⁰

This '*de facto* relationship' has been described by one author as 'support' or 'allegiance' displayed by the militia/volunteer corps towards the state party to the conflict which is accepted expressly or tacitly by the latter.²¹ The 'belonging' requirement is

¹⁹ Nahlik, 'L'Extension du Statut de Combattant à la Lumière du Protocole I de Genève de 1977', III *Collected Courses of the Hague Academy of International Law* (1979) 171, at 202. See also E. David, *Principes de droit des conflits armés* (3rd edn, 2002), at 422, para. 2.253.

²⁰ 'Resistance movements must be fighting on behalf of a "Party to the conflict" in the sense of Article 2 [common to the Geneva Conventions] . . . since such militias and volunteer corps are not entitled to style themselves a "Party to the conflict". International law has advanced considerably concerning the manner in which this relationship shall be established. The drafters of earlier instruments were unanimous in including the requirement of express authorization by the sovereign, usually in writing, and this was still the case at the time of the Franco-German war of 1870–1871. Since the Hague Conferences, however, this condition is no longer considered essential. It is essential that there should be a "de facto" relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration': J. de Preux *et al.*, *Geneva Convention relative to the Treatment of Prisoners of War: commentary* (1960), at 57.

²¹ R. Kolb, *Ius in Bello* (2003), at 160. 'Allegiance' is also used to describe the requirement of 'belonging' under Art. 4B(1) Third Geneva Convention, which provides *inter alia* that '[p]ersons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them'.

thus a much easier test to fulfil than the ‘overall control’ test developed by the ICTY in the *Tadić* case. Whereas ‘overall control’ amounts to control exercised by a state over individuals insofar as the state ‘organis[es], coordinat[es] or plan[s] the military actions’ of the individuals,²² the ‘belonging’ requirement demands nothing more than a form of acceptance, either express or tacit, on the part of the state and the individuals concerned that the latter are fighting on behalf of the state.

What the requirement therefore seeks to define is those persons taking part in hostilities during an international armed conflict on behalf of one of the states parties to the conflict (combatants), as distinguished from those individuals – regardless of whether they are fighting or partaking in some other form of violence – who are not (civilians). This is based on a reading of the last paragraph of Article 4 of the Fourth Geneva Convention,²³ according to which all persons who are not combatants are necessarily civilians. This reading of Article 4, which prescribes a dichotomy of either being a combatant or a civilian during an international armed conflict, has been challenged by some commentators who advocate for a third category of individuals: the ‘unlawful’ or ‘unprivileged’ combatant.²⁴ Arguments concerning this third category of individuals do not affect the discussion concerning the ‘belonging to a Party’ requirement as ‘unlawful’ or ‘unprivileged’ combatants ‘belong’ to a state party to the conflict. They fail however to fulfil other criteria listed under Article 4A(2) of the Third Geneva Convention.

The requirement of ‘belonging’ thus excludes members of armed groups operating in the context of an international armed conflict, like the Rastas, from being afforded combatant status and, if they surrender or are captured, POW status. It also excludes those non-state actors who claim to be fighting for a just cause, but who have no agreement with a state party to the conflict that they are fighting on the state’s behalf. Article 1(4) of Additional Protocol I enlarges the notion of what entities may constitute a party to an international armed conflict beyond states to include ‘peoples who are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’.²⁵ However, this should not be confused with the requirement to ‘belong to a Party’ under Article 4A(2) of the Third Geneva Convention. Whereas groups falling under Article 1(4) of Additional Protocol I style themselves as parties to the armed conflict, ‘other’ militias and volunteer groups under Article 4A(2) of the Third Geneva Convention are not claiming *themselves* to be parties to the armed conflict, only that they are fighting *for* a party to the conflict.

²² *Tadić*, *supra* note 2, at para. 137, reaffirmed in *Prosecutor v. Zejnir Delalic, Zdravko Mucic (aka ‘Pavo’), Hazim Delic and Esad Landzo (aka ‘Zenga’) (Celebici case) (Judgment of 20 February 2001)*, ICTY AC, IT-96-21-A, at para. 15.

²³ Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted 12 Aug. 1949, entered into force 21 Oct. 1950, 75 UNTS 287.

²⁴ See, e.g., Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’, 96 *AJIL* (2002) 892.

²⁵ Protocol I Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, entered into force 7 Dec. 1978, UN Doc.A/32/144 Annex I, 1125 UNTS No. 17512, reprinted in 12 *ILM* (1977) 1391.

An example where the requirement of 'belonging' was considered by a court not to have been sufficiently demonstrated is the case of *Military Prosecutor v. Abu-Kabar et al.*, where El-Fatah members were prosecuted before the Israeli military court on the administered territories in the 1970s. In relation to the defendants' argument that they should be treated as POWs, the court found that it was not enough to determine whether El-Fatah could be considered an 'organized resistance movement'; it had to show that it was an 'organized resistance group that belong[ed] to a Party to the armed conflict'.²⁶

It is submitted that the requirement of 'belonging' is a necessarily low-threshold requirement, the purpose of which is to constitute the first of five criteria to apply to individuals forming irregular armed groups in the context of an international armed conflict to determine whether they are combatants and later, if necessary, POWs.²⁷ It is a requirement designed to grant combatant status, and thus combatant's privilege, to those fighting for a state party to the conflict, or to trigger the applicability of the Third Geneva Convention governing the treatment of such individuals whilst interned as POWs.

The above argument for a low-threshold test for the requirement of 'belonging' for the purpose of classifying individuals under IHL, based on the commentary to the Third Geneva Convention, will meet its toughest challenge in practice where there is an unfortunate tendency on the part of states to want to make the requirements for attaining combatant status, and thus POW status, difficult to fulfil. This tendency derives from the desire of states to treat captured individuals as 'civilians' (and even so-called 'unlawful combatants'), who may be prosecuted for the simple fact of participating in hostilities, rather than POWs who have combatant privilege in the sense that it is lawful for them to participate in hostilities *per se*.²⁸ It is, however, submitted that this tendency of states may give way in practice to the equally strong desire of states for those fighting against them in an armed conflict to adhere to the applicable rules of IHL. States thus have an interest in encouraging individuals to respect IHL and thus to accord combatant privilege to those individuals who fulfil the requirements set out in Article 4A(2) of the Third Geneva Convention, including a low-threshold test of 'belonging'.

²⁶ *Military Prosecutor v. Abu-Kabar et al.* Sh/330/68 2 S.J.M.C. 45 (1972), reprinted in 7 *Israel Yrbk on Human Rights* (1977) 9, at 265–266.

²⁷ The other 4 criteria listed under Art. 4A(2) Third Geneva Convention, *supra* note 1, are: '(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war'.

²⁸ 'States have insisted that non-state actors fighting against a state be treated as either rebels or criminals, and that is why we have different rules for internal armed conflicts and international armed conflicts. Only soldiers fighting for the state in an international armed conflict are deemed to have the combatant's privilege, which is essentially a way of saying that it is not illegal for them to participate in hostilities. They have a right to use force – to use violence against enemy soldiers and enemy forces. Otherwise we could not wage war, which, of course, would be a terrible thing [*sic*]. So, for international humanitarian law, legal rights turn on combatant status. You are either fighting for a state or you are not': Whippman, *supra* note 16, at 701.

3 The ‘Belonging to a Party’ Requirement as Interpreted by the ICTY Appeals Chamber in the Tadić Case: Mixing Tests with Different Purposes

In 1949, when the ink was dry on Article 4 of the Third Geneva Convention, it was uncontroversial that the purpose of the Article was to set out the requirements for attaining POW status. In the absence of a well-articulated definition of a ‘combatant’ to be found elsewhere, Article 4 also served, and continues to serve, as a reference point for the definition of a combatant. It would have been difficult in 1949 to imagine the requirements contained in Article 4 being used in any way other than for the purpose of classifying individuals in the context of international armed conflicts.

However, the unique factual situation which arose in the former Yugoslavia led international criminal law judges in the 1990s to look at Article 4 in a new light. The situation in the former Yugoslavia was not one of a direct state vs. state armed conflict lending itself to a straightforward application of Article 2 common to the 1949 Geneva Conventions;²⁹ the armed forces of one state were not fighting the armed forces of another state. Rather, the Bosnian armed forces were fighting a group who did not constitute the armed forces of Serbia, but who were heavily supported by that state. Thus while there was a direct armed conflict between Bosnian armed forces and an armed non-state actor, there was, on the other hand, an ‘indirect’ international armed conflict between the two states because of Serbia’s support of the Bosnian Serb army (VRS). Could Serbia’s support of the VRS render the armed conflict between Bosnia and the VRS ‘international’ and, if so, on what basis?

The ICTY turned to the *Nicaragua* case where the issue which had arisen before a different court, the ICJ, also was very loosely analogous insofar as the situation in *Nicaragua* also concerned the degree of involvement from an outside state in a series of events which transpired between an armed group and another state. In the context of this dispute between *Nicaragua* and the United States of America, the ICJ had articulated a test for attributing the actions of individuals to a state, thereby resulting in the latter’s responsibility, based on the notion of ‘effective control’ of a state over an armed group. The issues before the ICJ in the *Nicaragua* case were very different from those faced by the ICTY: the former was concerned with issues of state responsibility and did not have to classify an armed conflict; the latter was charged with addressing issues of individual criminal responsibility where the classification of the armed conflict was vital to determining the applicable law with which to try the accused. The ICTY nevertheless found the ICJ decision to be a stimulating precursor.

Whereas at the trial stage, the Chamber had found that ‘effective control’ had not been established, and thus the conflict could not be classified as international,³⁰ the Appeals Chamber took a very different approach and rejected the very test of

²⁹ Para. 1 of Art. 2 common provides: ‘the present Convention shall apply 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 recognised by one of them’.

³⁰ *Tadić* case, *supra* note 2, at paras 584–608.

'effective control', establishing its own test by following a peculiar route. Article 4 of the Third Geneva Convention, albeit setting out the requirements for the classification of individuals, was used by the ICTY Appeals Chamber as a roundabout way for it to reason that the armed conflict in the former Yugoslavia should be classified as being international. One of the categories of combatants set out in Article 4, as discussed above, is that of an irregular armed group under Article 4A(2). While such an armed group does not constitute the 'armed forces' of a state party to the armed conflict, it is nevertheless deemed to be a group of 'combatants' if the group 'belongs to a Party' to the armed conflict. It was this 'belonging' requirement that the Appeals Chamber latched onto for the purpose of classifying the armed conflict. The Appeals Chamber reasoned that because the Bosnian Serbs 'belonged' to Serbia, there was an international armed conflict between two states.

However, when using the 'belonging to a Party' requirement for the purpose of classifying the armed conflict, rather than for the intended purpose of the Article (the classification of individuals in order to apply rules of IHL), the ICTY interpreted the requirement as demanding a higher threshold test than the mere '*de facto* relationship' described above. The Appeals Chamber considered that what had to be established to demonstrate that the armed conflict was internationalized by Serbia's involvement was that Serbia exercised 'overall control' over the VRS to render the armed conflict between the VRS and Bosnia of an international character, and that this amount of 'overall control' was also sufficient for Serbia to incur state responsibility for the unlawful acts committed by members of this group. When discussing Article 4A(2) of the Third Geneva Convention the Appeals Chamber thus stated as follows:

States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities *only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces*. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These may then be regarded as the ingredients of the term 'belonging to a Party to the Conflict'. The Appeals Chamber thus considers that the Third Geneva Convention, by providing in Article 4 the requirement of 'belonging to a Party to the conflict', implicitly refers to a test of control.³¹

The Appeals Chamber thus considered that when an armed group was under the control of an a state to the effect that the state incurred responsibility for the unlawful acts carried out by members of this group, and the group in turn was dependent upon the state to which it held allegiance, this relationship could internationalize the conflict between the armed group and another state.³²

Both praise and criticism may be levelled at the Appeals Chamber for its use of Article 4A(2) of the Third Geneva Convention. The legal ingenuity with which the Chamber grappled with the complex factual situation before it led ultimately to a commendable

³¹ *Ibid.*, at paras 94–95 (emphasis added).

³² *Ibid.*, at para. 145.

result: the articulation of a new test of ‘overall control’ for establishing when an otherwise non-international armed conflict becomes internationalized by the involvement of an outside state. This test, inspired by the reasoning of the ICJ in the *Nicaragua* case, created a new understanding of inter-state armed conflicts which are fought indirectly through the support of an armed group by one state to engage in hostilities against the armed forces of another state.

The test developed by the ICTY for the purpose of classifying an otherwise internal conflict as international also led to an increased scope of application of the 1949 Geneva Conventions, Additional Protocol I, and other rules of IHL applicable during international armed conflicts, thereby increasing the protection under IHL afforded to persons in armed conflict. The ‘overall control’ test has even gained restrained support from the ICJ when it noted in the *Genocide* case that the test enunciated by the ICTY may indeed be the ‘applicable and suitable’ test to apply for the purposes of evincing the ‘internationalization’ of an armed conflict.³³

However, there are three reasons why it is problematic that the Appeals Chamber considered that the same ‘overall test’ should also be used for the purpose of attributing state responsibility.

First, it mixes the distinct legal analysis of classifying an armed conflict as either international or non-international with the classification of individuals under IHL. Indeed, the classification of individuals under IHL can occur only once an armed conflict has been classified as international, as the categories of ‘combatant’, ‘protected person’ under Article 4 of the Fourth Geneva Convention, and ‘civilian’ more generally under the Fourth Geneva Convention do not apply in non-international armed conflicts. It is thus logically confusing to mix the two tests for the purpose of applying IHL alone.

Secondly, there seems to have been an underlying assumption in the *Tadić* case that the test of ‘belonging’ for the purpose of classifying individuals under IHL must equate with the test for establishing state responsibility. As the ICTY Appeals Chamber stated, ‘[s]tates have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces’.³⁴ The practice that the Tribunal alludes to does not include the ICRC commentary to Article 4A(2), which is dismissed as being too vague,³⁵ but rather consists only of the Israeli case of *Kassem et al.*,³⁶ discussed *infra*. The force that drives the reasoning of the Appeals Chamber seems instead to be a general underlying assumption that state responsibility is incurred for the unlawful acts committed by individuals who ‘belong’ to a state party to an armed conflict, thereby rendering the conflict international.³⁷ This is curious reasoning.

³³ *Ibid.*, at para. 404.

³⁴ *Ibid.*, at para. 94.

³⁵ ‘The authoritative ICRC Commentary does not shed much light on the matter, for it too is rather vague’: *ibid.*, at para. 93.

³⁶ *Ibid.*

³⁷ In the words of the Chamber, ‘[s]hould the conflict eventually be classified as international, it would *inter alia* follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf’: *ibid.*, at para. 97.

Thirdly, by equating the 'belonging' requirement with the notion of 'control' exercised by a state over an armed group, the ICTY imported a higher threshold requirement for individuals seeking to attain combatant status and, if captured, POW status. The raising of the threshold for attaining these two statuses is contrary to the purpose of IHL which the Appeals Chamber so neatly set out in its judgment, namely that IHL 'is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible'.³⁸ To require a demonstration of 'overall control' in order to establish that members of an armed group 'belong' to a party to the armed conflict makes it considerably more difficult for combatant status to be attained. This, in turn, acts as a deterrent for members of armed groups to adhere to the other requirements in Article 4A(2) of the Third Geneva Convention, in particular to distinguish themselves from the civilian population.³⁹ To discuss the 'belonging to a party' requirement in terms of demonstrating 'overall control' may thus reduce respect for IHL in practice.

The above critique of the *Tadić* decision should not, however, be read as suggesting that the tests developed by the ICJ concerning state responsibility should go unquestioned. Indeed, it is the role of scholars to examine and debate every legal development, and the reasons set out by Antonio Cassese for arguing why the 'overall control' test is more reflective of customary international law and thus more suitable than the 'effective control' test are perfectly in order,⁴⁰ as are contributions made by other scholars concerning the most suitable test for establishing state responsibility.⁴¹ The above analysis of the *Tadić* decision is simply a critique of the ICTY Appeals Chamber approach of assuming that the content of different tests must be the same and consequently for mixing different tests developed for different purposes.

4 The Relationship between Combatant Status under Article 4A(2) and State Responsibility

The universality of international law does not require its content to be homogeneous. That different tests have been developed to apply to the relationship between a state and individuals who appear to act on behalf of that state is not problematic, given that these tests have different purposes. At the same time, this heterogeneity does not mean that international law is fragmented. Rather, the fact that different tests have been developed for different purposes simply means that each test should be applied pursuant to its purpose, and not pursuant to an unrelated purpose. This section will set out how the test of 'belonging' under IHL, for the purpose of classifying individuals, relates to the tests developed to establish the responsibility of a state. According to the

³⁸ *Ibid.*, at para. 96.

³⁹ See Jensen, 'Combatant Status: Is It Time for Intermediate Levels of Recognition for Partial Compliance', 46 *Virginia J Int'l L* (2005) 209, at 213.

⁴⁰ Cassese, *supra* note 3.

⁴¹ See, e.g., Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', 58 *ICLQ* (2009) 493.

tests currently developed for the purpose of establishing state responsibility, in some instances a state may incur responsibility for the acts of individuals who 'belong' to it under IHL. In other instances, this will not be the case. This section is divided into two sub-sections. The first will examine the requirements for responsibility to be attributed to a state concerning acts committed by individuals who 'belong' to this same state. The second will then examine how a state may nevertheless incur responsibility for individuals who 'belong' to it on the basis of due diligence.

A Attributing Responsibility to a State for the Acts of Individuals Who 'Belong'

In the *Tadić* case, the ICTY Appeals Chamber considered the requirement of 'belonging to a party' under Article 4A(2) of the Third Geneva Convention to equate with an attribution of state responsibility. According to the Appeals Chamber, as a result of a person being classified as a combatant under Article 4A(2), the unlawful acts or omissions of this person incur state responsibility.

The Chamber is not alone in making such an association. As evinced from the *Tadić* judgment, the ICTY relied heavily upon a domestic law case which made the same connection between the two different tests. In the case of *Military Prosecutor v. Omar Mahmud Kassem and Others*,⁴² the Israeli Military Court interpreted Article 4A(2) of the Third Geneva Convention and reasoned as follows:

In view . . . of the experience of the two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.⁴³

The Israeli Military Court consequently found that the defendants, members of the Popular Front for the Liberation of Palestine who were captured in occupied Jordan, were not POWs, because *inter alia* '[n]o Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine'.⁴⁴ This link between combatant status under Article 4A(2) of the Third Geneva Convention and attributing state responsibility has also been drawn more recently by a distinguished author who looks to the ILC's Draft Articles on State Responsibility⁴⁵ as an aid to determining the meaning of 'belongs' under Article 4A(2).⁴⁶

However, an examination of the rules of attribution of responsibility in the ILC's Draft Articles does not lend support to the proposition that the actions of individuals classified as combatants under Article 4A(2) of the Third Geneva Convention are

⁴² Decision of 13 Apr. 1969, *Law and Courts in the Israel-held Areas*, Jerusalem, 1970, reprinted in 42 ILR (1971), at 470–483.

⁴³ *Ibid.*, at 476–477.

⁴⁴ *Ibid.*, at 477.

⁴⁵ Draft Articles on Responsibility for States for Internationally Wrongful Acts, adopted by the International Law Commission in its fifty-third session (2001), GAOR, 56 Sess., Supp. No. 10, UN doc. A/56/10 chp. IV.E.1.

⁴⁶ David, *supra* note 19, at 423, para. 2.253.

necessarily attributable to a state, as a consequence, would incur responsibility for their violations. In an internationalized armed conflict, there are two different bases upon which the acts of an irregular armed group *may* be attributed to a state, but will not be so attributable in all situations.

First, as the ICJ has made clear in the *Genocide* case, a group of individuals who are not *de jure* organs of a state, and who are fighting state A on behalf of state B, will be considered *de facto* state organs of state B only if 'proof of a particularly great degree of State control over them' is demonstrated whereby they are shown to be 'completely dependant' on state B.⁴⁷ Secondly, state responsibility may also be attributable to the actions of such a group of individuals if state B exercises 'effective control' over the group, or provides specific orders for each military operation undertaken by the group against state A.⁴⁸

The attribution tests under Articles 4 and 8 of the ILC's Draft Articles demand very different factual requirements from the 'overall control' test for establishing the existence of an indirect international armed conflict. It is not difficult to imagine an armed conflict deemed to be international by virtue of the 'overall control' exercised over an armed group by a state, for which no state responsibility is attributable under the ILC's Draft Articles for the unlawful acts committed by the armed group fighting on the state's behalf.

Indeed, in the *Genocide* case, the ICJ held that in the same armed conflict which was analysed in the *Tadić* case, the unlawful acts committed by the VRS in Srebrenica were not attributable to Serbia because there was no evidence that the VRS had acted as organs of Serbia or under its effective control or in accordance with its specific orders. Thus, the same situation, deemed by one international court (ICTY) to be an international armed conflict, was found by another international court (ICJ) not to lead to a finding of responsibility of Serbia, a party to the international armed conflict, on the basis of the rules of attribution.

Nor does the ICJ seem perplexed by this lack of attributing state responsibility for actions of individuals fighting on behalf of a state in some armed conflicts. The Court did not consider there to be anything logically problematic in applying one test for the purpose of attributing state responsibility and another, different, test for the purpose of classifying a conflict. It noted that:

The degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of the involvement required to give rise to that State's responsibility for a specific act in the course of the conflict.⁴⁹

⁴⁷ *Genocide* case, *supra* note 7, at 141, para. 393. It would be difficult – if not impossible – when applying the criterion of 'complete dependence' to demonstrate that a group of individuals are *de facto* state organs without showing that the group cannot exist autonomously without the support of the state, that is, that the group was created by the state and has never existed without its support: see *Genocide* case, at paras 392–395. On the difficulty of satisfying the 'complete dependence' test see Griebel and Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v. Serbia*', 21 *Leiden J Int'l L* (2008) 601, at 613.

⁴⁸ *Genocide* case, *supra* note 7, at 143, para. 400. The test was first enunciated by the Court in the *Nicaragua* case, *supra* note 3, at 65, para. 115.

⁴⁹ *Genocide* case, *supra* note 7, at 144, para. 405.

Consequently, there may indeed be situations in which an individual fights on behalf of a state and is deemed to be a ‘combatant’ under IHL, and a POW if captured, but in relation to whose actions the state concerned is not responsible on the basis of the rules of attribution developed by the ILC and the ICJ. If this individual has committed violations of IHL, he or she may still be prosecuted and be held individually responsible. However, the mere fact that this individual has participated in hostilities will not be unlawful, if of course he or she also fulfils the other requirements for attaining POW/combatant status which demand much more than the ‘belonging’ requirement.

The situation is, however, arguably different if Additional Protocol I applies. For states party to this Protocol a specific rule exists under its Article 91 which expressly provides that states parties will be responsible for the acts of their ‘armed forces’ that violate IHL. Article 91, entitled ‘Responsibility’, provides ‘[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’

Article 91 of Additional Protocol I is limited to the actions of the ‘armed forces’ of a state. The scope of the explicit responsibility rule under Additional Protocol I thus turns on a definition of the state’s ‘armed forces’. ‘Armed forces’ are defined under Article 43(1) of Additional Protocol I as follows: ‘[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by the adverse Party’.

It has been argued that the wording of Article 43(1) ‘provides that all armed forces of a party to the conflict have the legal status of an organ of that party’,⁵⁰ and that ‘both organizational forms of militias and volunteer corps now fall within the term “armed forces” of article 43, para. 1, 1st sentence, API’.⁵¹ Following this interpretation, if Additional Protocol I applies, militia and volunteer corps which would otherwise fall under Article 4A(2) of the Third Geneva Convention are combatants forming part of the armed forces of a state party to a conflict, and are also regarded as state organs. State responsibility is consequently attributable to their actions on this basis. The reasoning for considering these groups to be state organs under Additional Protocol I has been explained as follows:

Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict. However, a subject of international law can act only through its own organs. If it uses armed force, the subject can thus act through the instruments organized for this purpose, i.e. through the armed forces. Militias or voluntary corps of which a party to an international armed conflict makes use are therefore part of its armed forces within the meaning of Article 43, para. 1, 1st sentence, API, regardless of whether they are incorporated into the regular armed forces, e.g. the army, or are separate.⁵²

⁵⁰ Frits Kalshoven also regards the ‘armed forces’ of a state to be state organs: ‘State Responsibility for War-like Acts of the Armed Force’, 40 *ICLQ* (1991) 827.

⁵¹ Ipsen, ‘Combatants and Non-Combatants’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), at 85, para. 304.

⁵² *Ibid.*

This interpretation is difficult to place within the framework of the ILC's Draft Articles, unless Article 91 of Additional Protocol I is regarded as a special secondary rule falling within the ambit of Article 55 of the ILC's Draft Articles.⁵³ The ICJ has taken a rather cautious approach to the development of rules of attribution for state responsibility and would, as would indeed states, be reluctant to 'stretch . . . too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'.⁵⁴

B State Responsibility for the Acts of Individuals Who 'Belong' on the Basis of Due Diligence

If in a given situation it cannot be demonstrated that a state incurs responsibility for the acts of combatants falling under Article 4A(2) of the Third Geneva Convention on the basis of either of a rule of attribution or Article 91 of Additional Protocol I, a state may nevertheless be responsible for the effects of violations of IHL committed by such persons on the basis of failing to exercise due diligence. In this respect the commentary to Article 91 of Additional Protocol I provides:

As regards damages which may be caused by private individuals, i.e. by persons who are not members of the armed forces (nor of any other organ of the State), legal writing and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.⁵⁵

Thus, a state may nevertheless be responsible for allowing violations to be committed by armed groups if it has failed to exercise due diligence to prevent or repress the violations. The difference between attributing state responsibility on the one hand, and the responsibility a state incurs for failing to exercise due diligence on the other, may be described as the difference between responsibility for what the state's hands have done, and responsibility for what occurred while the state stood by with its arms folded across its chest. A failure to act with due diligence thus means that a state will not be responsible for the acts of private individuals, but will be responsible 'for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects'.⁵⁶

⁵³ Art. 55 of the ILC's Draft Articles, *supra* note 30, provides: '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law'. On special rules in the field of state responsibility see Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *EJIL* (2006) 483.

⁵⁴ *Genocide case*, *supra* note 7, at 144–145, para. 146. This comment was made by the Court with respect to applying the ICTY test of 'overall control' for the purpose of attributing state responsibility. For a critical analysis of the Court's decision on this point see Cassese, *supra* note 3, at 651.

⁵⁵ J. Pictet *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 1057–1058.

⁵⁶ J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 39 (emphasis added).

Such a failure to prevent or repress violations stems from primary rules such as those in Article 91 of Additional Protocol I, or, for example, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, where the responsibility Iran incurred for failing to fulfil its obligations to protect the premises of the US Embassy and its diplomatic and consular staff, and to protect the US Consulates in Tabriz and Shiraz, arose from a number of its treaty obligations.⁵⁷ Although the Court concluded that the militants who attacked the US Embassy and Consulates had no official status as recognized organs of the Iranian government,⁵⁸ this ‘d[id] not mean that Iran [was], in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations’.⁵⁹ Iran was held in violation of its treaty obligations ‘to take appropriate steps to ensure the protection of the United States Embassy and Consulates’ where, precisely, the attacks were ‘successful because of lack of sufficient protection’.⁶⁰

Human rights treaties, which continue to apply during armed conflicts, have been interpreted as providing an obligation on states parties to prevent or repress human rights violations carried out by members of criminal groups or paramilitary groups, where there is no direct state involvement in the violations. In the American system, this obligation stems from the requirement to ‘ensure’ the exercise of human rights under Article 1(1) of the American Convention on Human Rights,⁶¹ which provides, ‘States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction *the free and full exercise of those rights and freedoms*’.⁶²

A similar conventional obligation to Article 1(1) of the American Convention on Human Rights exists in IHL, under Article 1 common to the Geneva Conventions, restated in Article 1 of Additional Protocol I, which arguably:

could also be seen as establishing a standard of due diligence with regard to private players if the latter find themselves under the jurisdiction of a State, or even with regard to breaches of international humanitarian law by States and non-State actors abroad which could be influenced by a State.⁶³

⁵⁷ (*United States of America v. Iran*) [1980] ICJ Rep 3, at 29–33, paras 57–68.

⁵⁸ *Ibid.*, at 29–30, paras 58 and 60.

⁵⁹ *Ibid.*, at 30, para. 61.

⁶⁰ *Ibid.*, at 30, paras 60–61. A more recent example from the ICJ jurisprudence is the finding that Serbia failed to prevent the Srebrenica genocide and to punish the perpetrators in the *Genocide* case, *supra* note 7. An example where states were held to have failed to exercise due diligence in breach of conventional obligations owed to a non-state actor is *The Channel Tunnel Group Limited and France-Manche SA v. Secretary of State for Transport of the Government of Ireland and Britain and Northern Ireland and le Ministre de l’Équipement, des Transports, de l’Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française*, Arbitration Tribunal, Partial Award of 30 Jan. 2007, reprinted in 132 ILR (2008) 1, at 92–105, paras 278–319. In this case the UK and French Governments were found to have breached cl. 2.1 and 27.7 of the Concession Agreement by failing ‘to maintain conditions of normal security and public order in and around the Coquelles terminal’ with respect to the clandestine migrant problem in the Calais region from Sept. 2000.

⁶¹ American Convention on Human Rights (Pact of San José), signed 22 Nov. 1969, entered into force 18 July 1978, 9 ILM (1970) 673.

⁶² Emphasis added. See on this point *Velasquez Rodriguez Case*, Judgment of 29 July 1988, IACHR (Ser. C) No. 4 (1988), at 173.

⁶³ Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’, 846 *IRRC* (2002) 401, at 412.

To 'ensure respect' of IHL under Article 1 of the Geneva Conventions has been understood to mean that '[s]tates, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict'.⁶⁴ In the *Nicaragua* case the Court interpreted the customary law content of the obligation to 'ensure' respect of IHL under Article 1 common to the Geneva Conventions, and noted that 'to ensure respect' meant that the 'United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of article 3 common to the four 1949 Geneva Conventions'.⁶⁵

In addition to Article 1 common to the Geneva Conventions, there are more specific conventional IHL rules which also require states parties to act with due diligence. Two such Articles, provided as examples by Marco Sassòli, are Article 13(2) of the Third Geneva Convention, and Article 43 of the Hague Regulations.⁶⁶ Violations of these more specific conventional rules, as well as violations of Article 1 common, may be carried out by private individuals, whether or not they fulfil the low threshold requirement of 'belonging' to a state party to the international armed conflict. This would mean that violations of groups which 'belong' to a state party to the conflict, as well as violations of groups which do not 'belong', would engage the responsibility of a state if it has allowed such violations to occur by failing to act with due diligence.

5 Conclusion

There has been little discussion in the literature concerning the requirement of 'belonging to a party' to an international armed conflict as a criterion for attaining combatant/POW status under Article 4A(2) of the Third Geneva Convention. This is unfortunate, as an understanding of this notion is essential to making sense of the status and role of irregular armed groups in the context of international armed conflicts.

In the *Tadić* case the ICTY equated the requirement of 'belonging' with some measure of 'overall control' that the state must exercise over the armed group. This poses a practical danger to the application of IHL. The *Tadić* case also linked the status of a combatant under Article 4A(2) of the Third Geneva Convention to the attribution of state responsibility. While not all factual scenarios will mean that the actions of combatants falling under Article 4A(2) are attributable to a state, this may occur in some situations. In any event, a state may nevertheless incur responsibility on the basis of failing to exercise due diligence obligations for the effects of violations committed by combatants fighting on its behalf.

⁶⁴ Boisson de Chazournes and Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', 837 *IRRC* (2000) 67.

⁶⁵ *Nicaragua* case, *supra* note 3, at 220. Judge Kooijmans, however, did not consider this 'duty of abstention' to amount to 'a positive duty to ensure compliance with the law': Separate Opinion of Judge Kooijmans, at 49.

⁶⁶ Sassòli, *supra* note 63, at 412, note 32.

The legal reasoning of the Appeals Chamber in the *Tadić* case concerning Article 4 of the Third Geneva Convention is difficult to reconcile with the original intention of Article 4 and recent developments concerning rules of attribution. More importantly, the requirement of ‘belonging’ was used by the ICTY not as originally intended – for the purpose of classifying individuals under IHL – but rather for the purpose of classifying an armed conflict as international, and was deemed to share the same content as the control necessary to attribute state responsibility in some circumstances.

It is of course very easy to criticize a decision in light of subsequent legal developments which call into question the reasoning employed many years ago. The purpose of this article is not retrospectively to judge the vanguard *Tadić* case, so important in many respects. Rather, it is hoped that it will be seen as an attempt to recast scholarly attention on the concept of ‘belonging to a party’ to an international armed conflict; a concept which it is useful to bear in mind when examining the role of some non-state actors in international armed conflict situations. It remains to be seen what applications such an analysis of the notion of ‘belonging’ has for other groups operating in international armed conflict situations, including private military companies.

What this article has striven to show on the more general level is that the heterogeneity of international law – illustrated in this article by the different tests which apply to the relationship between a state and individuals acting on behalf of this state – is not problematic if the different tests are applied for the purposes for which they have been formulated. Thus, before calling into question the universality of international law, and arguing that it is fragmented, it may be preferable first to examine whether different legal tests serve different purposes.