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# The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia

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## Abstract

*In its recent Genocide judgment, the International Court of Justice discussed the question of whether the acts of genocide carried out at Srebrenica by Bosnian Serb armed forces must be attributed to the Federal Republic of Yugoslavia (FRY), as claimed by Bosnia. It applied the 'effective control' test set out in Nicaragua, reaching a negative conclusion. The Court also held that the broader 'overall control' test enunciated by the International Criminal Court for the former Yugoslavia (ICTY) in Tadić did not apply, on two grounds. First, the test had been suggested by the ICTY with respect to the question of determining whether an armed conflict was international and not with regard to the different issue of state responsibility; secondly, in any case the test would have overly broadened the scope of state responsibility. The author argues that the ICTY admittedly had to establish in Tadić whether the armed conflict in Bosnia was internal or international. However, as no rules of international humanitarian law were of assistance for such determination, the Tribunal explicitly decided to rely upon international rules on state responsibility. The ICTY thus advanced the 'overall control' test as a criterion generally valid for imputation of conduct of organized armed groups to a particular state. The test was based on judicial precedents and state practice. In addition, the ICTY did not exclude the applicability of the 'effective control' standard, stating however that it only applied for the attribution to a state of conduct by single private individuals. Judicial decisions, even subsequent to Tadić, support the view that whenever conduct of organized armed groups or military units is at stake it suffices to show that the state to which they may be linked exercises 'overall control' over them, in order for the conduct of those groups or units to be legally attributed to the state. Hence, any sound critique of Tadić should not suggest that it dealt with a matter different from state responsibility. It should instead be capable of showing that state and judicial practice do not corroborate that test.*

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## 1 The Court's Ruling on Attribution of State Responsibility

In its judgment on genocide in Bosnia, the International Court of Justice (ICJ),<sup>1</sup> after satisfying itself that the Bosnian Serb armed forces (VRS) had perpetrated genocide in Srebrenica, and only there, discussed a crucial question – whether, as claimed by Bosnia, those armed forces had in reality acted on behalf of the Federal Republic of Yugoslavia (FRY), in which case responsibility for genocide would have to be attributed to that state.

After establishing that General Mladić and other officers, authors of the Srebrenica genocide, were not *de jure* organs of the FRY, nor could they be equated with such organs on account of possible 'complete dependence' on the FRY (paras 386–394), the Court discussed the question whether those officers could nevertheless be regarded as *de facto* organs of the FRY. For this purpose, the Court applied the 'effective control' test enunciated in *Nicaragua*.<sup>2</sup> In the opinion of the Court, this test substantially coincided with the standards required by the International Law Commission (ILC) in Article 8 of the ILC Articles on State Responsibility which, according to the Court (para. 398), reflects customary international law. As is well known, that article attributes to a state conduct by persons or groups of persons acting 'on the instructions', or 'under the direction' or 'under the control' of the state. These three tests are not cumulative; as stated in the Commentary to the Articles, they are disjunctive.

The Court then considered the test propounded in 1999 by the International Criminal Court for the former Yugoslavia (ICTY) Appeals Chamber in *Tadić*<sup>3</sup> and rejected it on two grounds. First, the ICTY, in touching upon questions of state responsibility, 'addressed an issue which was not indispensable for the exercise of its jurisdiction'. The Court was therefore free not to take into account rulings of the Tribunal concerning 'issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it' (para. 403). Thus, the Court implicitly took up, to a large extent, a point made by Judge Shahabuddeen in his Separate Opinion in *Tadić*.<sup>4</sup>

<sup>1</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 Feb. 2007.

<sup>2</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, judgment of 27 June 1986, at paras. 105–115.

<sup>3</sup> ICTY, Appeals Chamber, *Tadić*, 15 July 1999 (Case no. IT-94-1-A).

<sup>4</sup> According to the distinguished Judge, the issue of whether the conflict was international was different from that of state responsibility. The ICTY was called upon to rule only on the former issue and therefore did not need to go into the latter. He stated the following: 'the Appeals Chamber considered that *Nicaragua* was not correct and reviewed the general question of the responsibility of a state for the delictual acts of another. It appears to me, however, that that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through the VRS against BH, not whether the FRY was responsible for any breaches of international humanitarian law committed by the VRS. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation

Secondly, according to the Court, the ‘overall control’ test resorted to in *Tadić*, if it can possibly be applicable when determining whether an armed conflict is international, is ‘unpersuasive’ if used to establish whether a state is responsible for acts performed by armed forces and paramilitary units that are not among its official organs. For the Court, the reason why that test is ‘unpersuasive’ is twofold: (1) ‘logic does not require the same test to be adopted in resolving the two issues, which are very different in nature’, with the consequence that the degree of a state’s involvement in an armed conflict may well differ from that required for state responsibility to arise (para. 405); (2) the ‘overall control’ test overly broadens the scope of state responsibility because it goes beyond the three standards set out by the ILC in Article 8 of the Articles on State Responsibility (para. 406).

I respectfully submit that these arguments are not convincing. The Court’s basic assumption, that Article 8 of the ILC Articles reflects customary law, is undemonstrated, being simply predicated on the authority of the Court itself (the *Nicaragua* precedent), as well as the authority of the ILC. The logical sequences of propositions in which the Court’s holding is grounded could perhaps be set out as follows: (1) The Court in *Nicaragua* enunciated the test [as an apodictic truth in the Kantian sense, namely as enouncing an absolute and necessary truth] (2) the ILC upheld the same test (based only on *Nicaragua*); (3) hence the test is valid and reflects customary international law.

Similarly, the proposition that the test for determining the nature of an armed conflict *may* differ from the test for establishing state responsibility seems only to be put forward as a gracious concession to the ICTY: it concedes that probably the Tribunal was right when dealing with issues concerning the nature of armed conflicts, but warns that it should not, however, suggest solutions for more general international law problems. It bears recalling that the ICTY instead took the contrary view, holding that although the two questions differed, the test was to be the same.<sup>5</sup> It would have been appropriate for the Court to prove that this proposition was wrong, being inconsistent with judicial precedents and state practice.

Thus, the Court’s assertion that the ‘overall control’ test has ‘the major drawback’ of excessively broadening state responsibility by going beyond the three ILC standards, simply begs the question: as I have just pointed out, the Court should have proved that, if applied to state responsibility, ‘overall control’ was unsupported by state practice and *opinio juris*.

It follows that the reader expecting a closely-argued decision will be left instead with the impression that the Court’s holdings have a tinge of oracularity (oracles indeed are not required to give reasons).

I submit that it may prove useful to revisit *Nicaragua* and *Tadić*.

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of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an “armed conflict” had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS’: *ibid.*, paras. 17–18. On this view see my critical comments *infra* in note 25.

<sup>5</sup> *Ibid.*, at paras. 103–105.

## 2 The Nicaragua Test

In *Nicaragua* the Court distinguished between two classes of individuals not having the status of *de jure* organs of a state but nevertheless acting on behalf of that state: (1) those totally dependent on the foreign state – paid, equipped, generally supported by, and operating according to the ‘planning and direction’ of organs of that state (these were the UCLAS in that case)<sup>6</sup>; (2) persons who, although paid, financed and equipped by a foreign state, nonetheless retained a degree of independence of that state (these were the Nicaraguan rebels, or *contras*).<sup>7</sup>

The Court stated that acts performed by the first class of persons were to be clearly attributed to a foreign state (the US). As for acts of the *contras*, the Court took a certain position when discussing acts of such rebels involving a violation of the obligations not to intervene in the internal affairs of other states and to refrain from the use of force, whereas it took a different stand with regard to acts performed by *contras* in breach of rules of international humanitarian law.

With regard to military actions and operations by *contras* involving the use of military force in Nicaragua against the territorial sovereignty and political independence of that state, the Court found that the US bore responsibility as a result of its ‘training, arming, equipping, financing, supplying or otherwise encouraging, supporting and aiding’ the *contra* forces. Such responsibility followed from the violation by the US of the obligation not to intervene in the affairs of other states as well as the obligation not to use force in breach of the customary rule of international law corresponding to Article 2(4) of the UN Charter. Contrary to what Judge Shahabuddeen held in his important Separate Opinion in *Tadić*, it would seem that for the Court such responsibility was not grounded in attribution of actions by the *contras* to the US but in acts and conduct of the US organs themselves (their training, arming, equipping, etc. the *contras*).<sup>8</sup>

<sup>6</sup> Acronym for ‘Unilaterally Controlled Latino Assets’: persons of unidentified Latin American countries paid by, and acting on the direct instructions of, US military or intelligence personnel.

<sup>7</sup> According to the Court, the US provided to the *contras* such assistance as ‘logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc.’: *Nicaragua*, *supra* note 2, at para. 106.

<sup>8</sup> Judge Shahabuddeen interpreted para. 228 (in conjunction with para. 292(3) and (4)9 of *ibid.* as postulating a US responsibility for using force against Nicaragua *through* the *contras*. In his opinion the Court took the view that the US arming and training of the *contras* involved the threat and use of force: the US unlawfully threatened and used force against Nicaragua through the *contras*. In his view it follows that on this score the actions of the *contras* were attributed by the Court to the US on the strength of a test of effective control ‘flexibly interpreted’. In other words, in his opinion the Court did not require the issue of specific instructions to the *contras* for the purpose of attributing to the US responsibility for their actions involving the threat or use of force. See paras. 7–19 of Judge Shahabuddeen’s Opinion, *supra* note 3.

It would seem, however, that in fact the ICJ did not attribute responsibility for the *contras*’ use of force to the US. Rather, the US was held to have incurred responsibility *for its own action and conduct* (arming, training, equipping, etc., the rebels). This is borne out by a passage of the Court’s judgment, where the ICJ stated that: ‘[t]he Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for

The Court had then to consider whether some actions by *contras* in breach of international humanitarian law (killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping)<sup>9</sup> could be attributed to the US. It answered this question in the negative. It required for such attribution a very exacting test, namely that of 'effective control' by the US over *contras*' actions in breach of international humanitarian law, a test the Court held had not been met in the case at bar. By such 'effective control', the Court meant that the US should have '*directed or enforced the perpetration* of the acts contrary to human rights and humanitarian law alleged by the applicant State' (para. 115; emphasis added). It seems clear from these words that by 'effective control' the Court intended either (1) the *issuance of directions* to the *contras* by the US concerning specific operations (indiscriminate killing of civilians, etc.), that is to say, the ordering of those operations by the US, or (2) the *enforcement* by the US of each specific operation of the *contras*, namely forcefully making the rebels carry out those specific operations.

### 3 Critical Remarks on Nicaragua

The 'effective control' test may or may not be persuasive. What matters, however, is to establish whether it is based on either customary law (resulting from state practice, case law and *opinio juris*) or, absent any specific rule of customary law, on general principles on state responsibility or even general principles of international law. It is, however, a fact that the Court in *Nicaragua* set out that test without explaining or clarifying the grounds on which it was based. No reference is made by the Court either to state practice or to other authorities. This is in keeping with a regrettable recent tendency of the Court not to corroborate its pronouncements on international customary rules (other than those traditional rules that are largely upheld in case

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their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States': *ibid.*, at para. 116.

Furthermore, were Judge Shahabuddeen's interpretation of *Nicaragua* correct, the Court would have propounded a stridently illogical view: for the attribution of responsibility to a state of acts in breach of the ban on the threat or use of force – a breach of the most momentous prohibition in international law – it would have requested a test less stringent than for the violation of some rules of international humanitarian law.

<sup>9</sup> *Nicaragua*, *supra* note 2, at paras. 20 and 113.

law and the legal literature) with a showing, if only concise, of the relevant practice and *opinio juris*.<sup>10</sup>

One can well appreciate the reasons that prompted the Court to require such a high threshold for attributing serious violations of international humanitarian law by the *contras* to the US government. The Court, while it had unhesitatingly imputed to the US all the actions of US organs aimed at arming, training, equipping, etc. the Nicaraguan rebels, stopped short of considering as attributable to the US Government such gross breaches of international humanitarian law as killing prisoners of war or innocent civilians, or kidnapping, assassinating, torturing or raping. Probably reasons based on practical wisdom and judicial restraint prompted the Court to refrain from making the US Government accountable for those breaches as well, and therefore to set the general threshold so high. The Court's reasoning, however, lends itself to two major objections.

First, as I have already emphasized, that threshold was not based on any judicial or state practice. Had the Court undertaken a close perusal of such practice, it would have concluded that it indeed supported the 'effective control' test but *solely* with regard to instances where *single private individuals* act on behalf of a state<sup>11</sup> (as we will see, international practice uses another test, that of 'overall control', for the attribution to states of acts of organized armed groups acting on behalf of such states).

Secondly, the 'effective control' test, to the extent that it is also applied to organized armed groups, is inconsistent with a basic principle underpinning the whole body of rules and principles on state responsibility: states may not evade responsibility towards other states when they, instead of acting through their own officials, *use* groups of individuals to undertake actions that are intended to damage, or in the event do damage, other states; if states so behave, they must answer for the actions of those individuals, even if such individuals have gone beyond their mandate or agreed upon tasks – lest the worst abuses should go unchecked. This is the rationale behind the rule providing that whenever persons lawfully acting on behalf of a state exceed their authority or contravene state instructions, the state is nonetheless answerable for such actions. As one government put it, 'If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.'<sup>12</sup> The rule is now laid down in Article 7 of the ILC Articles on State Responsibility. Although this article relates to acts performed by 'state organs' or by 'a person or entity empowered to exercise elements of the governmental authority', it clearly enshrines a general principle that

<sup>10</sup> This is a tendency aptly pinpointed, back in 1995, by Gaja, 'Sul ruolo della Corte internazionale di giustizia nell'accertamento del diritto internazionale', in F. Salerno (ed.), *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario* (1995), at 233 ff.

<sup>11</sup> Practice and case law on this matter are correctly set out in *Tadić*, *supra* note 3, at paras. 133–136.

<sup>12</sup> Statement by the Spanish Government, reported by the ILC Commentary to Art. 7 of the ILC Arts, at para. 3. See J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (2002), at 106.

also applies to similar situations. For instance, it applies to the case, mentioned in *Tadić* (at para. 119), of a private individual entrusted by a state with performing a lawful task, who in discharging this task, however, breaches an international obligation of the state (in *Tadić* the example is given of a private detective who, commissioned by state authorities to protect a senior foreign diplomat, seriously mistreated the diplomat while performing that task of protection).<sup>13</sup>

In light of this basic principle, the US, although admittedly it was most unlikely to have issued instructions or directives to Nicaraguan rebels to assassinate, rape or torture, was nevertheless to be held accountable for those operations, for such operations had been carried out by individuals acting under the authority and with the (financial, logistical, operational, etc.) support of US organs.

#### 4 *Tadić* and the Two Tests it Propounded

In *Tadić* the International Criminal Tribunal's Appeals Chamber was not concerned with a question of state responsibility, as the ICJ rightly stressed in *Bosnia v. Serbia*. It only had to establish whether the Prosecutor was right in challenging a Trial Chamber's ruling (under such ruling *Tadić* was not criminally liable under Article 2 of the ICTY Statute for committing grave breaches of the Fourth Geneva Convention, because Article 2 only applies to international armed conflicts whereas that in which *Tadić* was involved was internal).<sup>14</sup> The Appeals Chamber therefore had to determine whether the conflict was international, as claimed by the Prosecution in its appeal, for the purpose of establishing whether the Trial Chamber could exercise its jurisdiction over those alleged grave breaches. Since the conflict pitted Bosnian Serb military and paramilitary units against Bosnian Muslims, it proved necessary in order to determine whether it was in fact international in nature to establish whether those Bosnian Serb units were acting on behalf of the Federal Republic of Serbia; in the affirmative, the conflict was to be classified, as claimed by the Prosecution, as international (between Bosnia-Herzegovina and the FRY), and consequently the ICTY Statute provisions on 'grave breaches' of the Geneva Conventions could apply.

To settle this matter the Appeals Chamber drew upon the letter and the spirit of the Geneva Conventions and concluded that a conflict is international when it is either between two or more states or between a state and armed forces that 'belong' to another state, pursuant to the provision of Article 4(A)(2) of the Third Geneva Convention (paras 92–93). How to determine, however, the meaning of the expression 'belonging

<sup>13</sup> 'A State may ... be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected': ECtHR, *Ireland v. the United Kingdom*, judgment of 18 Jan. 1978, at para. 159. See also *Ilaşcu and others v. Moldova and Russia*, judgment of 8 July 2004, at para. 319. An older case is *Caire*, heard by the French–Mexican Claims Commission in 1929, in *V Reports of International Arbitral Awards* (RIAA) 528.

<sup>14</sup> ICTY, Trial Chamber, *Tadić*, judgment of 10 Aug. 1995.

to a party to the conflict' laid down in that provision? The Chamber first noted that it seemed logical to think that, for armed units fighting within a state to 'belong' to another state, it was necessary for this latter state to wield some 'degree of authority or control' over those armed units (para. 97). It then pointed out that international humanitarian law did not contain any criteria for determining the scope and the nature of such authority or control.<sup>15</sup> It added that the necessary criteria were consequently to be found in those general rules of international law that establish when individuals may be regarded as acting as *de facto* state officials: these rules, the Appeals Chamber noted, belonged to the *body of law on state responsibility*. At this point, the Chamber averred that, according to the Prosecution, no reliance could however be placed on the *Nicaragua* test because the issue of state responsibility raised there was totally different from that of whether or not an individual was criminally liable depending on the nature of the armed conflict in which he had been involved. Consequently, for the Prosecution, the *Nicaragua* test was immaterial to the question at stake before the Appeals Chamber. The Chamber dismissed this objection outright, noting the following:

What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the 'grave breaches' regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international (para. 104).

The Chamber then insisted again on the need to rely upon *rules on state responsibility* to draw out legal criteria on imputability, given that international humanitarian law did not contain any such legal criteria.

Having thus decided to turn to general rules on state responsibility, the Chamber looked into the logic of this body of law to infer from its rules the standards for determining the imputability to a state of acts performed on its behalf by individuals devoid of the legal status as state agents. It noted that the rationale for imputing to states acts performed by individuals acting as *de facto* organs was

to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law (para. 117).

<sup>15</sup> Indeed it may suffice to read the authoritative ICRC *Commentary on the Third Geneva Convention* (1958) to realize that the question at issue is not dealt with (at 58–59).



Since the obvious requirement for imputability was control by the state to which acts were to be attributed, the Chamber noted that the degree of control was not required to be rigidly the same for any relationship, but could vary depending on circumstances. The Chamber thus, based on a careful investigation of judicial and state practice, identified *two degrees of control*:

- (i) one for acts performed by *private individuals* engaged by a state to perform specific illegal acts in the territory of another state (or for individuals commissioned to carry out legal actions, who act however *ultra vires* breaching international law); for such actions specific instructions concerning the performance of each action were required in order to attribute the action to the instructing state, or else subsequent public approval of each specific action or conduct was required (paras 118–119, 141); this was clearly the ‘effective control’ test set out by the ICJ in *Nicaragua*. The Appeals Chamber showed that this test was based on state practice, which however supported its applicability solely in instances of single individuals acting on behalf of a state;<sup>16</sup>
- (ii) another degree of control over actions by *organized and hierarchically structured groups*, such as military or paramilitary units; in this case overall control by the state over the group was sufficient, hence specific instructions were not required for each individual operation (para. 120). Such ‘overall control’ resided not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity (paras 131, 137).

The Appeals Chamber thus argued in favour of a flexible approach to the issue of imputability: it favoured both the ‘effective control’ test (as enunciated by the ICJ) and another test, better suited to instances where the persons whose conduct may or may not be attributed to a state, make up an organized and structured group, normally of a military or paramilitary nature.

I believe that the two tests are admissible on the crucial grounds that both are envisaged (and supported) by case law and practice, which assign to each test a different scope and purport. I have already referred to the practice supporting the ‘effective control’ test with regard to private individuals. I should add that practice and case law strongly support the ‘overall control’ standard when state responsibility for actions of organized armed groups or military units is at stake: no instructions or directions concerning each specific action giving rise to state responsibility has ever been requested, but solely control of a global nature consisting of, as I pointed out above, not only

<sup>16</sup> For this practice see ICTY, *Tadić* (Appeals Chamber), Judgment of 15 July 1999, at paras. 132–136, and the relevant footnotes (159–167).

financing, equipping, etc, but also coordinating or helping in the general planning of the group's activity.<sup>17</sup>

It bears stressing that this also applies to international courts' case law subsequent to the *Tadić* case.<sup>18</sup>

<sup>17</sup> See in particular the following cases cited in the ICTY judgment, *supra* note 14, at paras. 125–130: *Stephens*, *Kenneth P. Yeager*, *Loizidou*, and *Jorgić*.

A commentator, M. Milanović ('State Responsibility for Genocide', 17 *EJIL* (2006) 553, at 585–587) has stated that *Tadić* 'is simply wrong in its interpretation of the law of state responsibility. The cases the Appeals Chamber relies on do not support its test of overall control'. I respectfully submit that instead it is this commentator who is wrong. He claims that *Yeager* is not relevant, for it deals with the responsibility of a state for outsourcing to private actors the functions of its governmental authority, and this type of attribution does not require a state's control over the entity in question: the state was responsible only for allowing the entity in question to exercise those functions. Admittedly some passages of the decision may appear not to be crystal clear or may be deemed to lend themselves to differing interpretations. However, what matters is the substance, as patently appears from a careful reading of the whole case. The Tribunal made the following points (1) while Iran had denied responsibility for the wrongful acts of the 'revolutionary guards', arguing that the conduct of such 'guards' was not attributable to it, the Tribunal held instead that it was and that Iran therefore bore responsibility for their conduct; (2) the Tribunal held that the 'guards' had in fact acted on behalf of Iran; (3) the Tribunal did not hold Iran responsible for failing to prevent the violations committed by the 'guards', but imputed to it the acts performed by the 'guards'; (4) the Tribunal held in substance that Iran had wielded control over the 'guards' (see in particular *Yeager*, in 17 *Iran–US Claims Tribunal Reports* (1987), iv, at 92, para. 43; (5) for such control the Tribunal did not demand the issue of specific instructions or directives.

The commentator in question further argues that the case decided by the European Court of Human Rights (ECtHR) and quoted in *Tadić*, namely *Loizidou* (*Loizidou v. Turkey*, ECtHR, Preliminary Objections, judgment of 23 Mar. 1995, Merits and Just Satisfaction, judgment, 18 Dec. 1996), as well as subsequent ECtHR cases in fact did not deal with attribution of responsibility but rather with the question of state jurisdiction. This proposition is, again, without merit. The ECtHR had to establish whether alleged violations of the European Convention had been committed by states having 'jurisdiction' over the alleged victims, pursuant to Art. 1 of the Convention. To this effect, when it was doubtful whether the state complained of had such jurisdiction, the ECtHR had to establish which state exercised such jurisdiction over the alleged victims. It thus had to determine to which state or entity the violations were to be attributed or, in other words, which state or entity bore responsibility for those asserted violations. Thus a question of attribution of state responsibility arose. This holds true for *Loizidou* (quoted in *Tadić*, *supra* note 14), as well as for subsequent cases such as *Issa v. Turkey*, ECtHR, judgment of 16 Nov. 2004.

The only point that perhaps *Tadić* did not sufficiently clarify relates to *Loizidou*: there the ECtHR inferred the finding that control over the authorities that had breached the claimant's rights was in fact exercised by Turkey from the fact that Turkey had overall control over the whole area of northern Cyprus (the Court stated that 'it is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned': *Loizidou* (merits), at para. 56. Thus, the Court preferred to refer to control over the area (from which it inferred control over the authorities operating there) rather than directly to control over the authorities that had violated Ms Loizidou's rights.

<sup>18</sup> See in particular *Cyprus v. Turkey*, judgment of 10 May 2001, and *Ilaşcu v. Moldova and Russia*, *supra* note 13. In *Cyprus v. Turkey* the Court took up the point made in *Loizidou* and referred to above in note 17 (the Court stated that '[w]here a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support': *ibid.*, at para. 77).

It should further be noted that the practice of UN bodies has strikingly also substantially upheld the test under discussion.<sup>19</sup>

In addition to the determinative fact that the two tests are envisaged by international customary rules resulting from state practice and judicial precedents, another significant factor needs to be stressed. The rationale behind the two tests is fairly clear. When a private individual or a group of private individuals, nationals of a particular state, who are not on the payroll of the state nor act systematically at its behest, perform an act that is inconsistent with international law and injures another state, it would be easy for such individuals to shift responsibility to their national state, by claiming that in fact they acted on behalf of that state, and therefore it is the state that incurs responsibility for the breach of international law. To avoid such possible abuses, international law requires a stringent test for concluding that the state does

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In *Ilaşcu*, *supra* note 13, the applicants claimed that they had been arrested, detained, and tried in breach of the European Convention on Human Rights, in a region of Moldova (Transnistria) over which the Moldovan authorities claimed they had no authority, in that at the relevant period that region was in fact subject to the control of a secessionist movement supported by the Russian army. The Court had therefore to establish which of the two states exercised effective authority over the secessionist movement at the relevant time and could therefore be held responsible for the breaches of the Convention alleged by the applicants. With regard to the possible responsibility of Russia, the Court noted the following: 'during the Moldovan conflict in 1991–92 forces of the 14th Army (which owed allegiance to the USSR, the CIS and the Russian Federation in turn) stationed in Transnistria, an integral part of the territory of the Republic of Moldova, fought with and on behalf of the Transnistrian separatist forces. Moreover, large quantities of weapons from the stores of the 14th Army (which later became the ROG) were voluntarily transferred to the separatists, who were also able to seize possession of other weapons unopposed by Russian soldiers. ... The Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transnistrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transnistria, which is part of the territory of the Republic of Moldova. The Court also notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime, thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy *vis-à-vis* Moldova. ... The Court considers that on account of the above events the applicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when they occurred the Convention was not in force with regard to the Russian Federation. This is because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transnistrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime. In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them.': *ibid.*, at paras. 380–385. The Court applied the same notions to the period following ratification of the European Convention by Russia in 1998: *ibid.*, at paras. 386–394.

<sup>19</sup> The 'overall control' test was taken up by the UN Working Group on Arbitrary Detention in 2000. The question at issue was whether arbitrary detention in the Al Khiam prison in South Lebanon was to be imputed to Lebanon, Israel, or the South Lebanese Army (SLA). The Working Group first considered the various tests suggested in international case law. It then asked the question: '[d]oes the status of Al-Khiam fall within these criteria? In other words, while it is not and cannot be denied that the Al-Khiam

indeed bear responsibility for the actions of those individuals: it is necessary to prove that the state issued instructions or directives or orders to the individuals concerning

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centre is administered by the SLA ... it must nevertheless be decided, in the light of the above criteria, whether the SLA, as administrator, is acting on behalf of the IDF and hence of Israel': Report of the Working Group on Arbitrary Detention 2000, A/CN.4/2000/4, at para. 15. After considering the opinion of the Israeli Government whereby Israel had withdrawn from the area and hence did not exercise any authority over the prison, the Working Group applied the 'overall test' as follows: '[t]he question to be asked now is whether, in view of the information that has just been analysed, the criteria endorsed by international law at its most recent stage of development are applicable here. This appears to be the case, in the light of the following information extracted from the above-mentioned affidavit:

- (a) Financial assistance: "The State of Israel assists the SLA, among other ways, through financing weapons and maintenance" ... "It was decided to cease the direct payment of salaries to members of the SLA who serve in Al-Khiam, and that will be done starting from the next salary" ...]
- (b) Logistical assistance: – About the by-pass roads that the IDF built: "They were built ... to enable military forces to move without entering [villages] due to the danger that is inherent in driving within the villages" ...; – "In addition, certain detainees under interrogation are examined by means of polygraphs by the Israeli side in the framework of the security cooperation between the parties" ...;
- (c) Other assistance and support: – Training: "Sometimes, Israel carries out professional training for SLA soldiers, such as in the field of navigation" ...;
- (d) Cooperation: "In the framework of the cooperation between the State of Israel and the SLA ... at Israel's request, [SLA] stopped the Red Cross visits and family visits at the facility during the period in which Hizbollah held the body of Itamar Iliya (RIP)" ... – "The release of detainees from the facility was done in the framework of cooperation between the parties" ...; – "There is a connection between the general security service [GSS – Shin Bet] and the SLA as far as concerned the gathering of intelligence and interrogations ...; however, they do not participate in the frontal interrogation of detainees" ...; – "GSS personnel hold meetings several times annually with SLA interrogators at the Al-Khiam prison (three visits in the last six months)" ...; – "Information from the interrogations at Al-Khiam is transferred by the SLA to Israeli security forces" ...;
- (e) Coordination: – "The IDF and the SLA coordinate their routine activity in the security zone ... each of which has a separate command headquarter" ...; – "No one contests that the IDF and the SLA coordinate their military activity, since both forces are fighting the same enemy, and that the IDF has influence over SLA; however, the SLA also has its own judgement concerning its military activities" ...; – Military presence: "The IDF maintains a permanent presence in a very small number of military outposts in the security zone" ...', *ibid.*, at para. 17.

The Working group concluded that '[i]n the light of the foregoing, [it was] justified in addressing the communications and urgent appeals concerning detention at Al-Khiam to the Israeli Government, inasmuch as it has been sufficiently demonstrated that the SLA is acting on behalf of the IDF': *ibid.*, at para. 18.

On the criminal law aspects of the Khiam case, which to some extent are intertwined with international responsibility issues, see Arnold, 'Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Khiam Detention Centre', 7 *Journal of Conflict and Security Law* (2002) 191.

Reliance on the overall control test was also made in one of the UN Secretary-General Reports to the General Assembly on East Timor (*Situation of Human Rights in East Timor*, Report of the UN Secretary-General, 10 Dec. 1999, UN doc A/54/660). In addressing the issue of state responsibility for the atrocities in East Timor, after noting that most such atrocities had been carried out by 'pro-integration militia elements' the Secretary-General stated that there was evidence of 'the direct and indirect involvement of TNI [Indonesian National Army] and police in supporting, planning, assisting and organizing the pro-integration militia groups': *ibid.*, at para. 59. It then noted that '[c]lose cooperation between militia elements and TNI has been witnessed and documented by UNAMET staff, who directly observed joint gatherings of TNI officers and militia groups at various locations throughout the territory. Participants and other witnesses report that a common purpose of these meetings was to convey strategic and tactical plans for acts of violence against supporters of independence. Most witnesses the [UN] Special

the specific wrongful action.<sup>20</sup> Things are different when a state deals with a hierarchically organized group, in particular a military or paramilitary unit. If a state supports such a group financially, logistically, organizationally and, in addition, coordinates its military actions or takes part in such coordination or planning, this means that a strong link exists between the state and the organized group. The systematic and broad support of the group by the state, on the one hand, and the hierarchically organized structure of the group, on the other, cannot but imply that the state normally has a say in, as well as an impact on, the planning or organization of the group's activities. If therefore the group or some of its members engage in prohibited acts, the state must bear responsibility, even if it did not specifically order, organize or instruct the commission of those specific acts: the nature of the state's assistance and the characters of the group lead us to assume that any activity of the group is undertaken under the authority of the state and consequently involves its responsibility in the case of breaches of international law. This conclusion is consistent with the general principle referred to above, whereby states must answer for actions contrary to international law accomplished by individuals over which they systematically wield authority (this principle is, among other things, articulated in the aforementioned rule that a state is responsible for acts of its agents even when such agents exceed their mandate or behave contrary to it).

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Rapporteurs spoke to, including United Nations staff, stated that TNI or police units were often present when human rights violations were being committed by militia groups, but took no action to prevent the violence. On numerous occasions over several months, UNAMET staff directly observed TNI and Indonesian police units engaged in joint military-style operations with militia groups. As noted above, witnesses to the incident in Suai on 5 September implicate TNI and police units as having actively participated in the operation. A spouse of a TNI soldier testified that she had seen militia members being provided with arms at the Kodim (district military command) where her family had taken refuge. Families of TNI officers and police were reportedly moved to safety hours before the result of the popular consultation was to be announced, which would seem to indicate that the authorities were well aware of the violence that was to follow. Consistent eyewitness testimonies of militia attacks against UNAMET offices in several locations indicate that TNI and police units which were present at the scene did nothing to stop or prevent the violence directed against the United Nations compounds': *ibid.*, at paras 60–61. See also at paras 62–65. The Secretary-General concluded his observations on state responsibility as follows: '[e]ven applying the strict standards of the International Court of Justice to establish State responsibility for the acts of armed groups in a context of external intervention (dependency of the group on the State) and the exercise of effective control of the group by the State, a standard which cannot reasonably be applied to a State's own acts and omissions of governance of its own people, there is already evidence that TNI was sufficiently involved in the operational activities of the militia, which for the most part were the direct perpetrators of the crimes, to incur the responsibility of the Government of Indonesia. What still remains to be determined is how much of TNI and to what level in the hierarchy there was either active involvement or, at least, culpable toleration of the activities': *ibid.*, at para. 72.

See also the *Report of the International Commission of Inquiry on Darfur to the UN Secretary-General*. 1 Feb. 2005, UN doc. S/2005/60, at paras 121–123.

On this practice see also Bartolini, 'Il concetto di "controllo" sulle attività di individui quale presupposto della responsabilità dello Stato', in M. Spinedi, A. Gianelli, and M.L. Alaimo (eds), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti* (2006), at 25–52.

<sup>20</sup> It is for the sake of clarity and also to make the example more graphic that I have referred to a national of a state accomplishing actions against another state. Of course, nationality is not at all crucial, nor important.

To assail the reasoning of the Appeals Chamber it would be irrelevant to argue that the Chamber dealt with an issue of state responsibility that did not come within the purview of its jurisdiction. To my mind, the Appeals Chamber's approach was *methodologically* quite appropriate. Any international court charged with applying a specific body of international law (human rights law, the law of the sea, humanitarian law, international criminal law, etc.) is authorized to apply rules belonging to other bodies of international law, or even municipal law, *incidenter tantum*, that is for the purpose of construing or applying a rule that is part of the corpus of legal rules on which it has primarily to pronounce (on which it therefore adjudicates *principaliter*). This authority stems from the inherent jurisdiction of any international court or tribunal. For instance, there are many cases of international courts on human rights incidentally applying rules of international criminal law,<sup>21</sup> or rules on state responsibility,<sup>22</sup> or provisions of national law.<sup>23</sup> Similarly there are many instances of application of municipal law by international courts;<sup>24</sup> by the same token, such courts as the ICJ may have to apply international criminal law – as has happened in the *Genocide* case (Bosnia v. Serbia). Of course, when exercising such incidental jurisdiction, international courts should proceed with the utmost prudence

<sup>21</sup> This occurs when a provision of a human rights treaty refers to criminal law (see, for instance, Art. 7 of the European Convention on Human Rights, providing that no one shall be held guilty of a criminal offence unless the act or omission charged constituted a criminal offence under national or international law). See, e.g., *Touvier v. France*, ECtHR, 23 Jan. 1997; *Papon v. France*, ECtHR, 15 Dec. 2001; *Kolk and Kislyiy v. Estonia*, ECtHR, 17 Jan. 2006 (on this last decision see Cassese, 'Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law', 4 *J Int'l Criminal Justice* (2006) 410.

<sup>22</sup> In various cases the ECtHR had to establish whether acts in breach of the European Convention were imputable to a state party to the Convention, with the consequence that such state was responsible for those acts. For instance see *Loizidou v. Turkey* (preliminary objections), judgment of 23 Mar. 1995, at paras 62–64 and judgment on the merits of 28 Nov. 1996, at paras 49–57; and *Cyprus v. Turkey*, *supra* note 18, at paras 76–80.

In *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (decision of 2 May 2007) the ECtHR stated that 'the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty': *ibid.*, at 122.

<sup>23</sup> For instance, some provisions of the European Convention on Human Rights expressly refer to national legislation (see, e.g., Art. 12: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'). If a claim is made in an application to the ECtHR that the national authorities of the respondent state have denied such right thereby breaching their national legislation, the Court may have to look into that legislation to establish whether Art. 12 has been breached.

In the *Trail Smelter* case, III RIIA 1949–1950, the arbitral tribunal noted that '[i]n deciding in conformity with international law, an international tribunal may and, in fact, does frequently apply national law'.

<sup>24</sup> Typical issues of municipal law on which international courts may be called upon to pronounce by applying national law *incidenter tantum* are those concerning nationality (see the *Nottebohm* case [1955] ICJ Rep 13; the *Flegenheimer* case, 25 ILR (1958-I) 108) as well those relating to the exhaustion of domestic remedies (see, for instance, *Finnish Ships Arbitration*, III RIIA 1490; *Panevezys-Saldutiskis Railway* case, PCIJ, Series A/B, no. 76, at 18–22; *Case Concerning Elettronica Sicula S.p.A. (ELSI)* [1989] ICJ Rep 44) or other national laws made applicable by international treaties (see, for instance, *Guardianship of Infants* case [1958] ICJ Rep 13).

and rely as much as possible on case law developed by the relevant international jurisdictions – unless they find such case law unpersuasive, and convincingly set out the grounds on which they deem it necessary to depart from it.

As emphasized above, the Appeals Chamber held that the legal criteria it propounded (the ‘effective control’ test and the ‘overall control’ test) were valid both for international humanitarian law and state responsibility. To prove the contrary view, one should show that judicial and state practice evince the existence of different criteria. However, to date nobody, let alone the ICJ, has gone beyond holding out that logical possibility, and shown that in fact the legal criteria applicable in the field of international humanitarian law are *different from or less stringent* than those valid for state responsibility.

In sum, commentators and *a fortiori* international courts are – it goes without saying – entitled to challenge the validity of the tests propounded by the ICTY Appeals Chamber in *Tadić*. However, any well-founded contestation should assail that judgment on the merits of its holdings. It should not be confined to the flimsy argument that *Tadić* was about the nature of armed conflicts whereas *Nicaragua* revolved around state responsibility and therefore the two different tests *may* coexist in that they relate to different subject-matters.

#### 4 Article 8 of the ILC Articles on State Responsibility

As stated above, the ILC suggested three disjunctive standards for the attribution to a state of conduct of private individuals: (1) whether the state has issued instructions to those persons, (2) whether the state has directed the persons to do something, or (3) whether the state has exercised control over those persons. According to the ILC, the instructions, direction or control must relate to the specific conduct that turns out to be in breach of international law.

Close scrutiny of the three standards shows that the first two are rather specific: the issuance of instructions or the fact of directing persons or groups of persons to do something involves ordering or commanding those persons to undertake a certain conduct. Here the two tests can be easily applied for they indicate in a sufficiently clear manner the type of behaviour required of the state towards the persons or group of persons. In contrast, the third test is rather loose. To exercise control involves wielding power or authority over a person. But what is the scope of this authority or control? How penetrating should the control be for the controlling state to incur responsibility? For instance, in the case of acts of genocide committed by armed units over a week, as occurred in the Srebrenica massacre, what was the required degree of ‘control’ by the FRY over the Bosnian Serb forces perpetrating genocide? If one excludes the issuance of instructions, directives or orders, what should a court need to prove to assert that the FRY incurred responsibility? The test does not provide any clear indication.

The judicial or state practice to which the ILC refers for the formulation of the three-pronged standard simply consists of *Nicaragua* and *Tadić*. The Commission opts for *Nicaragua*, for it adheres to the – let it be stated with all due respect – fallacious opinion

of Judge Shahabuddeen.<sup>25</sup> It thus holds that the ICTY's 'mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law'.<sup>26</sup> I have shown above that, instead, the Appeals Chamber decided to turn to the law on state responsibility to solve an issue of international humanitarian law, and this was within its power.

As for the specific question of the 'degree of state control necessary for the purposes of attribution of conduct to the State', the Commission then simply refers to the various cases cited in *Tadić* without taking any stand. It should, however, have underlined that in all those cases no instructions or directives relating to the specific breaches of international law by the de facto organs were required, and that therefore the 'effective control' test as set out in *Nicaragua* was not deemed applicable. Instead of drawing this necessary conclusion, the ILC sums up its arguments by making this Solomonic statement:

In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.<sup>27</sup>

In sum, the ILC, in its Article 8, neither reflected state practice *in its entirety* nor took a clear-cut position. It substantially required that for the conduct of a person to be attributed to a state that person should act under that state's authority in taking that

<sup>25</sup> I have reported *supra*, in note 4, the remarks made by the distinguished Judge. Admittedly the two issues (that of whether the conflict was international and the issue of state responsibility) were different. The ICTY Appeals Chamber showed itself to be aware of that. It held however that to decide on the first issue it was necessary to draw upon the law on state responsibility.

I submit that Judge Shahabuddeen misinterpreted *Nicaragua* in finding that there the ICJ had attributed to the US responsibility for the use of force by *contras*. In his Separate Opinion the eminent Judge developed the following original and lucid argument: (1) '[e]x hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army': *supra* note 4, at para. 7; (2) the ICJ held that by arming and training the *contras* in the circumstances of that case, the US had used force in breach of international law; (3) the Court thus held that the *contras*' use of force was to be attributed to the US; (4) in operating this attribution the Court 'applied a test of effective control, but on the flexible basis that control which is effective for one purpose need not be effective for another. Thus, in holding that the US had used force in arming and training the *contras*, the Court did not rely on *specific* instructions, something on which it otherwise laid stress where state responsibility was sought to be founded on the delictual acts of another': *ibid.*, at para. 19; (5) in the case brought before the ICTY, the test of effective control, flexibly applied, showed that the FRY was using force through the VRS against BH, even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of international humanitarian law committed by the VRS; (6) hence, the armed conflict was international even if it was not proved that the FRY had issued specific instructions to the Bosnian Serb forces concerning each specific operation.

In fact, as I have already pointed out *supra*, in note 8, the ICJ, in attributing to the US responsibility for violating through the *contras* the ban on the use of force, did not regard the *contras* as acting as *de facto* organs of the US and thus generating US responsibility. It is apparent from the ICJ Judgment that the Court held that the US was responsible *for its own conduct* (arming, equipping etc. the *contras*).

<sup>26</sup> Crawford (ed.), *supra* note 12, at 112.

<sup>27</sup> *Ibid.*



specific conduct. This is rather vague (and the ILC was therefore right in emphasizing that ‘each case will depend on its facts’<sup>28</sup>), and it, moreover, strikingly neglects the state practice and case law where no control over each specific action or conduct was required for attribution of responsibility.

## 5 The ‘Overall Control’ Test May Prove Helpful in Legally Appraising New Trends in the Use by States and International Organizations of Armed Groups or Military Units

So far I have argued that the *Nicaragua* test, when it was first propounded by the ICJ, was not supported by any state practice or judicial precedent, and that thereafter it has been taken up only by the ILC. In sum that test does not seem to be validated by general international law.

Having set out my *legal* objections to that test, I will now move to *policy* considerations. Arguably, the persuasiveness of flexibility in using evaluation standards for assessing state responsibility is borne out by the fact that of the two applicable standards of evaluation (the ‘overall control’ and the ‘effective control’ criterion), the former proves more helpful in appraising three widespread trends in the practice of the current world community.

The first is the extensive support that states provide to military or paramilitary groups or armed bands fighting abroad against other states or at home against rebellious or secessionist groups. This is a frequent and dangerous occurrence in the world community. It may lead to full-blown international armed conflicts or at any rate to serious threats to peace and security if international law does not have the means available for making the supporting state answerable for violations of international law by the armed groups – at least where the support goes so far as to involve coordinating or helping in the general planning of the military activities of those groups. I submit that the ‘overall control’ test is a valid legal standard for making those states accountable. Thus, on the strength of this standard it can be determined whether the *Janjaweed* militias of the so-called Arab tribes in fact act on behalf of the Sudanese Government in their fight against Darfur insurgents. Those militias are accused of the worst atrocities against Darfur’s population; the Government of Sudan denies backing them. In fact, however, it has been shown by the UN International Commission of Inquiry that that government supports, finances, arms, equips and trains them.<sup>29</sup> Hence the question arises of whether the militias act under the overall control of that government. In the affirmative, the violations of international human rights law and humanitarian law perpetrated by those militias must be attributed to that government – without any need to prove that in each specific instance of violation instructions or directives were issued by the Khartoum authorities.<sup>30</sup>

<sup>28</sup> *Ibid.*, at 113.

<sup>29</sup> See the *Report*, *supra* note 19, at paras 98–126, 225–418.

<sup>30</sup> See *ibid.*, at paras 121–123.

The second current trend in international dealings, regrettably on the increase in the world community, is that of terrorist groups being supported by states. To assess whether violent actions by terrorist groups may be imputed to states aiding and abetting terrorism, with the consequence that such states may be held accountable for them, the 'overall control' test may turn out to be particularly efficacious. Plainly, applying instead the 'effective control' criterion to such actions would prove very exacting and, in addition, raise serious problems of evidence. How could one prove that a particular terrorist group has acted upon instructions or directions or under the specific control of a state in such a manner as to imply that the state has specifically directed the perpetration of individual terrorist actions? The hidden nature of those groups, their being divided up into small and closely-knit units, the secretive contacts of officials of some specific states with terrorist groups, all this would make it virtually impossible to prove the issuance of instructions or directions *relating to each terrorist operation*. If one instead relies upon the 'overall control' test, it suffices to demonstrate that certain terrorist units or groups are not only armed or financed (or also equipped and trained) by a specific state or benefit from its strong support, but also that such state generally speaking organizes or coordinates or at any rate takes a hand in coordinating or planning its terrorist actions (not necessarily each individual terrorist operation). It would then be relatively easy to infer from these links that the state at issue bears responsibility for those terrorist activities. In short, on the strength of the 'overall control' test, it would be less difficult to attribute those actions to the state in question. This test would make it possible to attribute to some specific states of the Middle East responsibility for the gross violations of human rights perpetrated by terrorist groups on which they have exercised a strong influence because, in addition to providing support, financing, training and weapons, such states help coordinate and plan their terrorist activities.

Let me add that the need to rely on this test is not only motivated by evidentiary problems. It is a fact that terrorist organizations are increasingly resorting to new methods of action. If states want international law to take the new *modus operandi* of non-state actors into account and make use of international rules on state responsibility so as to target those states that assist terrorist groups by subterranean means, they must perforce rely on legal criteria well suited to the need to restrain violence. In the fight against terrorism that they are undertaking within their own legal system, states have realized that new approaches are urgently needed: thus, they are targeting the mere financing of terrorism; some countries have also criminalized *per se* membership in terrorist organizations. Parallel to these new approaches taken within *municipal* legal systems, *flexible* ways of linking states to terrorist organizations are better suited at the *international* level than traditional methods, if one intends to target not only terrorist organizations and their members but also those states that increasingly avail themselves of their barbarous methods.

The third trend in international relations that needs to be underscored is the use of national military contingents by international organizations for peacekeeping or other military operations. When this occurs, the question may arise of whether responsibility for possible breaches of international law by members of those contingents is to be

attributed to the international organization rather than to the state to which the military contingent belongs (and which normally retains disciplinary powers and criminal jurisdiction over members of the national contingent). In these cases the problem often may not be settled by simply relying upon Article 5 of the ILC Draft Articles on the Responsibility of International Organizations,<sup>31</sup> because it is unclear whether the relevant members of the military contingent were acting under the 'effective control' (as conceived by the ILC and the ICJ) of their national state rather than of the international organization; or else, it is difficult to establish whether specific instructions or directions were given by either the state or the international organization to accomplish the acts that amount to a breach of international law. If this is the case, the standard of 'overall control' may play a role: under this standard, responsibility will be borne by the particular international subject (state or organization) which was exercising a global control over the relevant members of the military contingent. This, it would seem, is precisely the approach recently taken by the European Court of Human Rights in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*. The question there was whether the death of some Kosovar Albanians caused by undetonated cluster bombs and the allegedly unlawful arrest and detention of another individual were to be attributed to the states complained of, or rather to NATO Forces (KFOR) or to UN forces (UNMIK) that had the mandate to de-mine and detain persons suspected of criminal offences, hence ultimately to the UN (since both forces acted under the authority of the UN Security Council). Before the Court, France claimed that it was not responsible; it contended that the French contingent had been put at the disposal of KFOR, which exercised effective control in Kosovo, and that 'the criterion by which the responsibility of an international organization was engaged in respect of acts of agents at its disposal was the overall effective, as opposed to exclusive, control of the agent by the organization' (para. 82). Norway also noted that the UN had 'overall authority and control' (para. 87). The Court held that the UN had 'ultimate authority and control' (paras 133–134) or in other words 'overall authority and control' (para. 134) over the operations at issue as they fell within the UN mandate; the states complained of were not therefore responsible for the alleged violations.

It would seem that here again the notion of 'overall control' may prove more helpful than that of 'effective control' (which, as repeatedly recalled above, implies that one must show for every single action or conduct at stake that instructions or directions were issued or specific authority was exercised by the responsible authority).

## 6 Concluding Remarks

The contention can respectfully be made that the ICJ missed a good opportunity to elaborate upon and improve the *Nicaragua* test.

<sup>31</sup> 'The conduct of an organ of a state or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.'

The Court, it is submitted, did not do justice to *Tadić* either. The ICTY had held the view that the ‘overall control’ test was also applicable to state responsibility. To prove the ICTY wrong, the Court should not have simply dismissed that test as solely applicable to the question of classification of armed conflict; it should have proved its alleged inconsistency with state practice and judicial precedent, a judicial exercise it declined to undertake, or at any rate preferred not to engage in.

It is warranted to hope that in future the Court, when it returns to this matter, will pay attention to state practice and case law instead of confining itself to uncritically restating its previous views.