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**The attribution of international responsibility to a State for
conduct of private individuals within the territory of another
State**

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Abstract

The issue of the attribution of international responsibility to States for conduct of a group of individuals within the territory of another State has become a question of control. International jurisprudence has addressed this question by advancing several different control tests that allegedly better resolve the attribution question. The ICJ put forward two control tests in the *Nicaragua case*, the so-called *strict control* or *agency test* and the *effective control test*. The Appeals Chamber of the ICTY found it unpersuasive and used instead what named the *overall control test*. Moreover, the ECtHR has developed yet another test: the *effective overall control test*. These control tests will be set out explaining the different rationales that argue for and against their adoption and it will be seen that they show a tension between the need for what has been called “real accountability” of States and the attribution of responsibility to States only for their own conduct. It will be argued that while accountability is an important purpose, especially when dealing with international humanitarian law, it is necessary to ensure that States are only held responsible for conduct with which there is a sufficient close link so as to be considered its own.

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Introduction

This paper deals with the attribution to States of international responsibility for the conduct of private individuals within the territory of another State. The reason for choosing this issue as the subject of my paper is that, as some scholars have pointed out, this has become a paradigmatic instance of fragmentation in public international law¹. Different international tribunals have advanced their own control tests in order to answer the question of attribution to a State of the conduct of private individuals in the territory of another State. Hence, this is an issue that keeps evolving as different cases reach the tribunals and which has an important practical dimension in a globalised world in which States have many different ways to influence groups placed in distant territories. The most relevant point is appreciating how the different control tests advanced by the international tribunals respond to different principles that underlie the law of State responsibility: they show a tension between the will of preventing States avoiding responsibility by acting through non-official individuals and the principle of holding States responsible only for their own conduct. However, since States are legal entities always need to act through persons and the determination of when someone's conduct can be regarded as an act of the State is a normative decision² which needs to take into account the principles that lie behind this area of public international law.

For the writing of this paper I read the leading cases of the different international tribunals which have advanced their own tests, set out the main lines of their reasoning and elaborated on the rationales for putting forward one test or another. Later I contrasted them and, taking into account the principles for favouring each and some scholars opinions about them, I share my view on which test should be preferred. I defend that the *strict control test* and the *effective control test* put forward by the ICJ are to be preferred since are the ones which best guarantee that a State is only held responsible for acts with which there is enough connection as to be considered their own. Moreover, I consider this does not involve allowing States avoiding responsibility by acting

¹ In this sense see: Talmon, Stephan : “The responsibility of outside powers for the acts of secessionist entities” in *International and Comparative Law Quarterly* (vol. 58, July 2009 pg. 493-517): “*the test of control of authorities and military forces of secessionist entities has become perhaps the most cited examples of “the fragmentation of international law”*” (pg. 496).

² See Crawford, James: *The International Law Commission's Articles on State Responsibility: introduction, text and commentaries*. Cambridge University Press, 2002 (pg. 83)

through non-officials because, even if attribution of a private group's conduct is denied, the State can still be held accountable for its own conduct in relation to the group.

1- The attribution of international responsibility to a State

This essay deals specifically with the attribution to States of international responsibility for the conduct of private individuals within the territory of another State. This issue has turned into a question of control³ with the International Court of Justice (hereafter, ICJ), the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereafter, ICTY) and the European Court of Human Rights (hereafter, ECtHR) advancing different control tests responding to different levels of stringency in order to solve the attribution issue of the conduct to the State.

First of all, it is important to recall that the reference text in this area is the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001)⁴. The International Law Commission (hereinafter, ILC) recommended the General Assembly of the United Nations to take note of the Articles- the drafting of which had lasted for forty years- and to annex them in a General Assembly Resolution, with the possibility of later converting them into a convention. This second step has not been taken and no convention has been adopted. Therefore, the ILC Articles are not binding law as such but, despite their nature, they are an essential piece in the area of State responsibility for internationally wrongful acts and to a large extent they codify international law⁵.

1.1- The ILC Articles on Responsibility of States for Internationally Wrongful Acts

The ILC Articles on Responsibility of States for Internationally Wrongful Acts, as their own name expresses, deal only with the international responsibility of States. They do not regulate the

³ See Talmon, *op cit* (2009): "*the question of whether or not an act of a secessionist entity can be attributed to an outside power thus becomes a question of how one defines "control"*"(pg. 496).

⁴ *The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts* (2001) will be subsequently referred merely as the "ILC Articles".

⁵ See Talmon, *op cit* (2009): he claims that the ILC Articles "*are widely considered to reflect customary international law*" (pg. 495).

international responsibility of international organisations, as article 57 makes clear⁶ or other entities different than States. Moreover, they do not affect or replace individual responsibility under international law of any person acting on behalf of the State, as article 58 points out. These articles only deal with the international responsibility of a State that flows from an internationally wrongful act and not from permitted activities which have potentially dangerous consequences in case of accident⁷.

To adequately define the scope of the ILC Articles it is important to stress that these articles are secondary rules in so far as they only conform a general set of rules that regulates the conditions for international responsibility to arise, its content and consequences but do not rule on when a specific obligation binding on a State has been violated- this is a matter for the primary rules as substantive rules. They set a frame of secondary rules which apply in case of any breach of an international obligation by a State, without ruling on the characteristics or substance of that primary obligation which is violated. In Crawford's words: *"the law relating to the content and the duration of substantive State obligations is as determined by primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework – those rules, denominated "secondary", which indicate the consequences of a breach of an applicable primary obligation"*⁸.

The ILC Articles are structured into Four Parts. Part One deals with the notion of Internationally Wrongful Act of a State. Part Two deals with the Content of International Responsibility of a State. Part Three deals with the Implementation of the International Responsibility of a State, and Part Four sets out some General Provisions. This essay deals with the topic of attribution and therefore it will focus on Part One, Chapter II, which sets out the rules for the Attribution of Conduct to a State. However, a brief reference will be now made to the General Principles of Chapter I, so as to have a general view of the notion of "internationally wrongful act", the elements it comprises and the consequences it generates.

⁶ The international responsibility of international organisations is specifically dealt with by the *ILC Draft Articles on the Responsibility of International Organisations* (2009)

⁷ On this topic, it is relevant to notice the *ILC Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities* (2006).

⁸ Crawford, *op cit* (2002, pg. 16)

Article 1 sets out the essential principle that “*every internationally wrongful act of a State entails the international responsibility of that State*”. An internationally wrongful act is an expression that covers both actions and omissions and the wrongfulness or otherwise of such conduct is to be judged according to the requirements of the allegedly violated obligation. The production of a wrongful act entails the emergence of a new set of legal relations which are referred to as “international responsibility”. These relations may be between the responsible State and one or several injured States, or the international community as a whole, depending on the nature of the breached obligation. The content of this new set of legal relations is the object of regulation by these articles.

Article 2 sets out the two elements of an internationally wrongful act: (a) the conduct (action or omission) which is attributable to the State under international law and (b) constitutes a breach of an international obligation of the State. The issue of attribution is a “*necessarily normative operation*”⁹ since the State cannot act by itself and attribution consists on considering certain conduct as belonging to the State. The rules of attribution will be set out in the next section but now it is important to point out that while certain scholars have identified attribution with a “subjective” element, the ILC Articles do not use this contrast between subjective and objective elements. Crawford has pointed out that “*whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard*”¹⁰. It is also relevant to recall that the State as a subject of international law is treated as a unity and is a single subject of attribution of conduct, regardless of who would be the responsible organ under internal law. The *LaGrand* case made this point clear, with the ICJ asserting the international responsibility of the United States for an act which was within the competence of the Governor of Arizona.

Article 3 makes clear that the characterisation of an act as internationally wrongful is a question for international law which cannot be affected by the characterisation as lawful under the internal law of the State. This principle is well-established and has been repeatedly asserted in many judicial and arbitral procedures. Internal law may be relevant for that determination but “*in such*

⁹ Crawford, *op cit*, (2002, pg.83)

¹⁰ Crawford, *op cit*, (2002, pg 82)

cases it is international law which determines the scope and limits of any reference to internal law”¹¹.

1.2-The issue of Attribution of Conduct to a State: articles 4 to 11

The focus will now be placed on analysing the rules of attribution, which are set out in articles 4 to 11. These are taken to “*reflect existing customary international law*”¹². Attribution, as mentioned above, is a normative operation, which means that it responds to the application of rules which determine when there is a sufficiently close link between a certain conduct and a State so as to consider that conduct as an “act of the State”. These rules respond to normative criteria and not merely to a factual relation, since the State as a legal person cannot act by itself but through human beings, and it is for international law to determine when an act can or cannot be attributed to a State: “*the attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality*”¹³. Articles 4 to 11 are taken to be a *numerus clausus* and, except in cases where a *lex specialis* is applicable (as foreseen in Article 55) attribution of conduct to a State can only be based on one (or several) of the grounds of Part One, Chapter II¹⁴.

Article 4 establishes a basic rule of attribution of conduct of any of its organs to the State. Here the unity principle applies and it is irrelevant the level or the functions that the organ has. It includes all organs, being irrelevant their hierarchical position, irrespectively of whether they exercise legislative, executive, judicial or other functions and whether they are part of the central government or an autonomous territorial unit. Paragraph 2 of this article says that “*an organ includes any person or entity which has that status in accordance with the internal law of the State*”. In his commentaries, Crawford points out that the term “includes” implies that the classification of an entity as an organ cannot be limited to those which have that condition under internal law because that status may be exercised in practice without being recognised in the internal law of the State and “*a State cannot avoid responsibility for the conduct of a body which*

¹¹ Crawford, *op cit*, (2002, pg 89)

¹² Dixon, Martin: *Textbook on International Law*. Oxford University Press, Sixth edition (2007), pg.247

¹³ Crawford, *op cit* (2002, pg 91)

¹⁴ Crawford, *op cit* (2002, pg 93)

*does in truth act as one of its organs merely by denying it that status under internal law*¹⁵. Dixon also claims that *“it is also clear that a person or group or entity may be equated with an organ of the State even if it does not have that status officially under internal law”*¹⁶. International tribunals have advanced several tests for determining when a group of persons can be considered as a *de facto* organ and therefore its conduct can be attributed to the State. This issue has turned into a matter of control over the group and will be analysed in the next sections. The organs’ conduct is attributable when they are acting in their official capacity, not as merely private persons, and even if they exceed their competence or contravene instructions (as clarified by article 7) but it may be difficult to distinguish in practice between an *ultra vires* act carried out under the official capacity of the organ and a private act, not attributable to the State. For attribution to be possible it is only needed that the organ is acting *“in an apparently official capacity or under colour of authority”*¹⁷.

Article 5 attributes to the State the conduct of a person or entity which, not being an organ of the State, is empowered by its internal law to exercise elements of governmental authority, provided that the entity is acting in that capacity. This article responds to the phenomenon of privatisation of formerly public functions and seeks to prevent States escaping responsibility by delegating functions which involve the exercise of authority to entities which are not legally recognized as State organs. These entities engage the responsibility of the State even if they are autonomous and they have discretion to exercise the authority as long as the conduct in question was an exercise of the elements of authority which the internal law empowers them to carry out. In contrast with article 8, here it is not necessary to prove the existence of control over the entity since the link with the State for the attribution operation is the empowerment by the internal law to the entity to exercise that element of governmental authority.

Article 6 deals with the specific situation of the attribution of conduct of an organ placed at the disposal of a State by another State: the conduct has to be attributed to the former State if the organ is exercising elements of authority of the State at whose disposal it is been situated.

¹⁵ Crawford, *op cit* (2002, pg 98)

¹⁶ Dixon, *op cit* (2007, pg. 248)

¹⁷ Crawford, *op cit* (2002, pg. 99)

Article 7 clarifies that the conduct of an organ of a State or a person empowered to exercise elements of authority are to be attributed to the State if they act in that capacity, even if they exceed their authority or contravene instructions. The State is responsible for *ultra vires* acts of its organs or entities empowered to exercise its authority as long as they have acted under that official capacity, being irrelevant whether the excess “*was manifest or undiscoverable*”¹⁸ - all that is relevant is that the act was done in their official capacity and not acting as a private person. Any other position would allow the State to invoke its internal law to escape from the attribution of international responsibility.

Article 8 deals with the attribution of conduct of a private person or group to the State on the basis that they are “*in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*”. This article attributes conduct on the basis of instructions or control. Therefore, attribution is not based on a legal relationship between the actors and the State but on the basis of a factual link: conduct following the State’s instructions or under its direction or control. These situations are consequently an exception to the general principle that acts of private persons are not to be attributed to the State. It is foreseen in order to prevent a State escaping responsibility for conduct which it instructs or controls. In regard to the issuance of instructions there may be practical difficulties of evidence but the concept is quite clear. On the other hand, the direction and control requirement needs further specification, which has been given by jurisprudence, with different international tribunals advancing several different control tests to resolve this attribution issue. The definition of the required degree of control is the central issue of this essay and it will be set out in the next sections.

Article 9 attributes to the State the conduct of a person or group if they are in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstances that call for that exercise.

Article 10 deals with the conduct of an insurrectional or other movement. If the insurrectional movement becomes the new government of the State its conduct will be considered an act of state under international law. The conduct of a movement which establishes a new State in part of the

¹⁸ Dixon, *op cit* (2007, pg. 248)

territory will be considered an act of that new State. Therefore, if the movement does not succeed in becoming the government or creating a new State the conduct will not be attributed to the State but to the persons who constitute the movement. However, the State may still have responsibility for its own conduct in relation to the acts of the movement, which may be subsumed in any of the other grounds for the attribution of conduct to the State, for instance for failing to prevent, to minimise the disruptive effects, or to punish the movement's conduct if it was able to do so.

Article 11 establishes that if the State acknowledges and adopts a conduct which is not attributable to it on the basis of the previous provisions, then that conduct will be attributable to it to the extent of that acknowledgment and adoption.

1.3- Attribution of responsibility as a question of control: different standards

From now on this essay will focus on a specific controversial issue within the operation of attribution of conduct to a State: on the requirements for attributing to a State the acts of a private group carried out in the territory of another State.

The conduct of a private group that acts in a State can be attributed to another State by considering the group an organ of that latter State, and therefore all the conduct in that capacity will be potentially attributable; or by proving that the group was in fact acting on the instructions of the latter State or under its direction and control, case in which those specific acts will be attributable to the directing State. Both, the equation with an organ, and the direction and control of specific operations of a private group have become a question of control¹⁹. The degrees of control for both grounds of attribution are different between them, and they also differ depending on the case law examined, with different control tests advanced by the ICJ, the ICTY and the ECtHR. The following sections set out the leading cases in which these international tribunals have set forward their control tests and compare the different standards of control they involve. Finally, they will be contrasted taking into consideration the different rationales that lie behind them and a preference among them will be favoured.

¹⁹ See Talmon, *op cit* (2009, pg. 496)

2- The control tests put forward by the International Court of Justice

The International Court of Justice (hereafter, the ICJ) has set forward two control tests²⁰ in order to determine whether the acts of groups of individuals within the territory of a State can be attributed to another State. The leading case is *Military and Paramilitary Activities in and against Nicaragua*²¹, which was questioned by the Appeals Chamber of the ICTY. The ICJ maintained its position in two subsequent important cases which will be examined: the *Armed Activities case*²² and the *Genocide Convention case*²³.

2.1- *Military and Paramilitary Activities in and against Nicaragua case*

In *Nicaragua v USA* the Court had to decide, among other issues, whether to uphold Nicaragua's claim that the United States had "*devised the strategy and directed the tactics of the contra force, and provided direct combat support for its military operations*"²⁴. The ICJ said that it was not satisfied that all the operations of the *contras* followed a strategy and tactics set by the United States but the Court considered that "*the financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact*"²⁵. The ICJ asserted that taking into account the evidence, it was not satisfied that the United States had created the *contras* nor that it provided "*direct and critical combat support*" to them but "*holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN*"²⁶.

²⁰ Talmon *op cit* (2009) points out that "*the literature and decisions of other international courts, with very few exceptions, refer only to one test in connection with the ICJ- the "effective control" test. The ICJ, however, has in fact applied two different tests*"(pg. 497).

²¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 (hereafter, *Nicaragua v USA*).

²² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J Reports 2005, p. 168 (hereafter, *Armed Activities case*).

²³ *Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (hereafter, *Genocide Convention case*).

²⁴ *Nicaragua v USA* (para 102)

²⁵ *Nicaragua v USA* (para 107)

²⁶ *Nicaragua v USA* (para 108)

2.1.1-The so-called “strict control test” or “agency test”

The ICJ first analysed what later on has been called the “strict control test” or “agency test”: the Court enquired itself “*whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government*”²⁷. The Court relied on the assessment of the Intelligence Committee of May 1983 to establish that the unique factor of control that the United States could exert was the “*cessation of aid*”²⁸ and concluded, *a sensu contrario*, that there was a “*potential for control inherent in the degree of the contras’ dependence on aid*”²⁹. In spite of this finding the Court concluded that “*there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf*”³⁰. The ICJ considered that the assistance of the United States to the contras had been crucial “*but it is insufficient to demonstrate their complete dependence on the United States aid*”³¹.

Therefore, the so called “strict control test” or “agency test” developed by the ICJ to equate a group of individuals with an organ of a State requires a relationship of dependence and control to the degree that it can be qualified as “complete dependence” on the State. Dependence and control can be considered two correlative elements³²: the group is dependent in the extent to which it is controlled by the State³³, and that dependence and control must be “complete”. The ICJ analyses the elements of control the State has and that control requirement has to be proved at two levels: the potential for control and the actual exercise of control. Moreover, that actual exercise of control must extend to “all fields” of the group’s activity.

The ICJ accepted that during the initial periods of contra activities they were so dependent but to claim that the United States directed the strategy and tactics “*depends on the extent to which the*

²⁷ *Nicaragua v USA* (para 109)

²⁸ *Nicaragua v USA* (para 109)

²⁹ *Nicaragua v USA* (para 109)

³⁰ *Nicaragua v USA* (para 109)

³¹ *Nicaragua v USA* (para 110)

³² See Talmon, *op cit* (2009): he argues that “*dependence and control are thus two sides of the same coin*” (pg. 498)

³³ See Talmon, *op cit* (2009): “*control results from dependence or, looking at it from the other side, dependence creates the potential for control*” (pg. 497)

*United States made use of the potential for control inherent in that dependence*³⁴ and the Court considered insufficient the evidence so as to decide on that actual exercise of control. Thus, the ICJ concluded that the contras could not be equated with an organ of the United States for legal purposes. This denial led the Court to reject Nicaragua's claim which attributed responsibility to the United States for all the activities of the contras, which Nicaragua regards as *“essentially the acts of the United States”*³⁵.

Hence, the control test used by the ICJ to decide whether a group can be equated with a State organ (what would be tantamount to characterising them as a *de facto* organ of the United States), or be considered to be acting on its behalf, is a highly demanding one in terms of evidence. It requires proving the complete dependence³⁶ of the group, which in turn involves complete control of the State over it, and the examining of the element of control involves assessing the potential for control and also the actual exertion of that capacity of control *“in all fields”* of activity of the group. These requirements are very demanding and it is very difficult for an applicant State to provide enough evidence to the Court to satisfy this high threshold. On the other hand, this demanding threshold of evidence ensures that the equation of a group with an organ of a State is only carried out in cases in which there is a firm basis supported by enough evidence so as to attribute the State acts of private individuals, which must be exceptional, taking into account that the general principle is that States are only responsible for their own conduct and that equation with a State organ involves the holding of responsibility also for *ultra vires* acts, according to Article 7 of the ILC Articles.

2.1.2- The effective control test

Having denied the equation of the contras with an organ of the United States, there were still issues of responsibility to decide upon³⁷. The United States may still have been held responsible

³⁴ *Nicaragua v USA* (para 110)

³⁵ *Nicaragua v USA* (para 114)

³⁶ See Talmon, *op cit* (2009) for a definition of complete dependence: *“complete dependence means that the secessionist entity is “lacking any real autonomy” and is “merely an instrument” or “agent” of the outside power through which the latter is acting [...] Common objectives may make the secessionist entity an ally, albeit a highly dependent ally, of the outside power, but not necessarily its organ”* (pg. 499)

³⁷ See Talmon, *op cit* (2009, pg. 502) for an assertion of the subsidiary character of the “effective control” test.

for single acts over which it had control or had given instructions, or it still may have been held responsible for complicity or for inciting the commitment of any such acts³⁸.

The ICJ asserted that “*even the general control by the respondent State over a force with a high degree of dependence on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of acts contrary to human rights and humanitarian law alleged [...] Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*”³⁹.

Therefore, the denial of the equation of the contras with an organ of the United States led the Court to deny the responsibility of the United States for all its acts, responsibility which arises when dealing with State organs even in relation to *ultra vires* acts. Precisely due to the negation of their characterisation as a *de facto* organ, there lacks the necessary link for all their acts to be attributable to the State. The ICJ asserted the general principle that “*the contras remain responsible for 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*”⁴⁰. Consequently, after having denied the equation of the contras with an organ (*id est*, after the application of the so-called “strict control test” or “agency test”) which would have involved to a wider scope for international responsibility, the ICJ applied the *effective control test*, which involves holding a State responsible only for the acts of a group over which the State had effective control, and this responsibility was denied in this case for lack of evidence.

Providing evidence of control over specific operations of a group involves proving the instructions, command or particular instances of State control over the acts in question, access to which is really difficult, since public demonstrations to that effect are unlikely to be done.

³⁸ *Nicaragua v USA* (para 114 *a contrario*, since it denies that these issues would arise in case the contras were equated with an organ of the United States).

³⁹ *Nicaragua v USA* (para 115)

⁴⁰ *Nicaragua v USA* (para 116)

Consequently, the *effective control test*, while more limited in the scope of responsibility engaged and more limited in the sense of evidence required (particular instances of control), remains a demanding test⁴¹ since a general degree of control or dependence of the group is not enough but the applicant State needs to provide evidence of control in relation to the specific acts at issue⁴² (in this case, violations of human rights and humanitarian law) over which responsibility seeks to be attributed to the respondent State.

The United States was held responsible for its own conduct in relation to the *contras*: “*by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State*”⁴³. The ICJ also held: “*and further by those acts of intervention [...] which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State*”⁴⁴. The United States was also held responsible for its own conduct for producing a manual (“*Operaciones psicológicas en Guerra de guerrillas*”) and spreading it among the *contras*, what was regarded as having “*encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America*”⁴⁵.

2.2 – Armed Activities on the Territory of the Congo case

The ICJ in the *Armed Activities case* also had to decide on the attribution to the State parties of armed activities carried out by groups of rebels. Among the many claims put forward by the Democratic Republic of the Congo (hereafter, DRC) one was that the Court declared “*that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic,*

⁴¹ Talmon, *op cit* (2009, pg. 503) considers that “*while the burden of proof for the “effective control” test is lower than that for the “strict control” test, in practice it will be extremely difficult to establish*”.

⁴² As Talmon points out: “*the object of control is no longer the secessionist entity but the activities or operations giving rise to the internationally wrongful act*”, *op cit* (2009, pg. 502)

⁴³ *Nicaragua v USA* (holding, para 3)

⁴⁴ *Nicaragua v USA* (holding, para 4)

⁴⁵ *Nicaragua v USA* (holding, para 9)

economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law [...]”⁴⁶. On the other hand, Uganda claimed that its deployment of soldiers in the territory of the DRC was justified as self-defence for it alleged that the DRC “provided military and logistical support to anti-Ugandan insurgents”⁴⁷.

2.2.1- Non-attribution to the DRC of the attacks by the ADF

Uganda claimed that *“there was a tripartite conspiracy in 1998 between the DRC, the ADF and the Sudan; that the Sudan provided military assistance to the DRC’s army and to anti-Ugandan rebel groups”⁴⁸. The ICJ considered “that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda”⁴⁹. The ICJ focused on the claim that the attacks by the ADF⁵⁰ had increased due to the support allegedly provided by the DRC. Uganda justified its actions as self-defence due to the claimed DRC collaboration with the rebel groups but the evidence provided to satisfy the ICJ of this alleged assistance was not found convincing by the Court, which asserted that “these may all be described as internal documents, often with no authenticating features, and containing unsigned, unauthenticated and sometimes illegible witness statements. These do not have the quality or character to satisfy the Court as to the matters claimed”⁵¹. Therefore, the ICJ concluded that “there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of the General Assembly resolution 3314 (XXIX) on the definition of aggression [...] The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remain non-attributable to the DRC”⁵².*

⁴⁶ *Armed Activities case* (para 24)

⁴⁷ *Armed Activities case* (para 35)

⁴⁸ *Armed Activities case* (para 121)

⁴⁹ *Armed Activities case* (para 130)

⁵⁰ Abbreviation used by the ICJ to refer to the Allied Democratic Forces, a rebel anti-Ugandan group

⁵¹ *Armed Activities case* (para 134)

⁵² *Armed Activities case* (para 146)

2.2.2- Non-attribution to Uganda MLC's conduct and its engagement of international responsibility

The DRC claimed before the ICJ that *“Uganda both created and controlled the MLC rebel group led by Mr. Bemba”*⁵³. Uganda recognised assistance to the MLC *“while insisting that its assistance to Mr. Bemba “was always limited and heavily conditioned”*. Uganda has explained that it gave *“just enough” military support to the MLC to help Uganda achieve its objectives*⁵⁴.

The ICJ reached the conclusion *“that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The court has not received probative evidence that Uganda controlled or could control the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of “an organ” of Uganda (article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC's conduct was “on the instructions of, or under the direction or control of” Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case*⁵⁵.

This means that the ICJ rejected equating the MLC with an organ of Uganda or with a para-statal entity, as well as denied the engagement of its responsibility on the basis of issuance of instructions or control. The ICJ considered that *“Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries”*⁵⁶ and cited *Nicaragua v USA* when mentioning the control tests, which would be applied in case that the ICJ considered that the situation was such as to call for their application in order to decide whether the paramilitaries could be equated with State organs or acted under the control of the Respondent. Since the ICJ denied that there was enough evidence to consider any of these scenarios in this case, the Court did not even enter to apply the control tests to the facts.

⁵³ *Armed Activities case* (para 155). The ICJ uses the abbreviation MLC to refer to the Congo Liberation Movement.

⁵⁴ *Armed Activities case* (para 155)

⁵⁵ *Armed Activities case* (para 160)

⁵⁶ *Armed Activities case* (para 160)

Despite this non-attribution of the MLC's conduct to Uganda, the ICJ claimed that the training and assistance provided by Uganda engaged its international responsibility for violating the international law prohibitions of intervention and of use of force as well as constituting a violation of the sovereignty and territorial integrity of the DRC⁵⁷.

2.3- Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide

In the Genocide Convention case the ICJ had to decide on the claim by Bosnia and Herzegovina against Serbia and Montenegro which affirmed that the Respondent State *“under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a “Greater Serbia”, in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of”*⁵⁸. The ICJ considered as established that the Respondent was *“making considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities”*⁵⁹. The Court only considered proved the *dolus specialis* (necessary for the atrocities at issue to constitute genocide) in relation to the massacres at Srebrenica in July 1995 and, in that regard concluded *“that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent”*⁶⁰. The ICJ first dealt with the issue of attribution of the Genocide at Srebrenica to Serbia and Montenegro (at the time named Federal Republic of Yugoslavia, hereafter FRY) on the basis of different rules of international responsibility of States for internationally wrongful acts (basically articles 4 and 8 of the ILC Articles), then analysed whether the Respondent could be held responsible for acts within Article III, paragraphs (b) to (e), and finally if the Respondent had failed to fulfil its obligation to prevent and punish genocide.

⁵⁷ See *Armed Activities case*, para 165

⁵⁸ *Genocide Convention case* (para 237)

⁵⁹ *Genocide Convention case* (para 241)

⁶⁰ *Genocide Convention case* (para 376)

2.3.1- The question of attribution of the Srebrenica Genocide to the Respondent on the basis of the conduct of its organs

The ICJ first analysed the attribution of the Genocide at Srebrenica to Serbia and Montenegro on the basis of article 4 ILC Articles: whether the acts were carried out by organs of the Respondent. The Court first examined whether the acts were committed by persons or entities which had that status (of organs) of the FRY according to its internal law and answered that question in the negative. The ICJ pointed out that “*neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law*”⁶¹. Having denied that the genocide were committed by *de jure* organs of the FRY, the ICJ analysed the Applicant’s allegation according to which the Republika Srpska, the VRS and paramilitary groups such as the “Scorpions” had to be considered as *de facto* organs of the FRY, so that all their acts in that capacity would be attributable to the FRY. The ICJ referred to *Nicaragua v USA* as leading case regarding the attribution of responsibility to a State for acts of groups which “*in fact act under such strict control by the State that they must be treated as its organs*”⁶². The Court reproduced the relevant paragraphs of *Nicaragua v USA* (see above paragraph 4.1.1). The ICJ claimed that *Nicaragua v USA* shows that the ICJ jurisprudence allows the equation of groups with State organs irrespective of not having that status under internal law since “*any other solution would allow States to escape responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious*”⁶³. However, the ICJ recalled the exceptional nature of this equation and denied it in the present case for considering that “*neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy*”⁶⁴. The Court took the view that they had a margin of independence.

2.3.2- The question of attribution of the Srebrenica Genocide to the Respondent on the basis of direction or control

After having denied the claim that the genocide was committed by *de jure* or *de facto* organs of the FRY, the ICJ assessed whether it was committed by persons (who despite not being organs of

⁶¹ *Genocide Convention case* (para 386)

⁶² *Genocide Convention case* (para 391)

⁶³ *Genocide Convention case* (para 392)

⁶⁴ *Genocide Convention case* (para 394)

the FRY) whose acts were attributable to the FRY on the basis of article 8 ILC Articles: for acting on the instructions or under the direction or control of the Respondent. The ICJ underlined that this is a “*completely separate issue*” from the question of equation with organs of the FRY, since answering positively to this question would not involve an equation with State organs but “*would merely mean that the FRY’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations*”⁶⁵.

The Court examined article 8 of ILC Articles taking into account *Nicaragua v USA*, reproducing the relevant paragraphs of that case (see above paragraph 4.1.2) in which the Court put forward the effective control test over specific operations of the group in order to determine whether the State could be held responsible for acts committed during those operations. The ICJ pointed out that the effective control test differs from the strict control test in two regards: now there is no need to show that the group who committed the wrongful acts was in a relation of “*complete dependence*” to the State but that it acted under its instructions or its effective control, which must be exercised in relation to the specific acts at stake and “*not generally in respect of the overall actions taken*”⁶⁶. Moreover, the ICJ addressed the Applicant’s claim that due to the “*particular nature*” of the crime of genocide, in the sense of being composed by a lot of specific acts that are separate but coordinated, the effective control test should be analysed not in relation to the specific acts but to the whole operations. The Court rejected this claim by asserting that “*the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated [...] The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis*”⁶⁷.

2.3.3- The rejection of the tests advanced by the ICTY Appeals Chamber

In this case, the ICJ also addressed the Applicant’s questioning of the validity of applying the test proposed in *Nicaragua v USA*. The Applicant referred to the ICTY Appeals Chamber departure

⁶⁵ *Genocide Convention case* (para 397)

⁶⁶ *Genocide Convention case* (para 400)

⁶⁷ *Genocide Convention case* (para 401)

of the ICJ jurisprudence in the *Prosecutor v Tadić case* (analysed below, in 5.1) by applying their own test: the “*overall control test*”, which was applied to characterise the conflict as international and also to attribute the Bosnian Serbs’ acts to the FRY, and was regarded as satisfied in that case.

The ICJ asserted that it “*has given careful consideration to the Appeals Chamber’s reasoning [...] but finds unable to subscribe to the Chamber’s view*”⁶⁸. The Court claimed that it is not logically necessary to use the same test to decide both issues and that “*insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable [...] the ICTY presented the “overall control” test as equally applicable to the law of State responsibility for the purpose of determining [...] when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive*”⁶⁹.

The ICJ rejected the application of the *overall control test* in the context of attribution of acts when dealing with State responsibility for considering that “*the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct [...] the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility*”⁷⁰.

Therefore, the ICJ analysed the attribution of responsibility on the basis of article 8 of the ILC Articles applying the *effective control test* developed in *Nicaragua v USA* and concluded that, taking into consideration the evidence, it had not been proved that the massacres were committed following the instructions or under the direction or effective control of the Respondent State. Consequently, the acts of genocide could not be attributed to the FRY neither under article 4 nor

⁶⁸ *Genocide Convention case* (para 403)

⁶⁹ *Genocide Convention case* (para 404)

⁷⁰ *Genocide Convention case* (para 406)

under article 8 of the ILC Articles, which were regarded as the only applicable rules among the section of Attribution of conduct to a State (articles 4 to 11)⁷¹ of the ILC Articles.

2.3.4- The question of responsibility, in respect of Srebrenica, for acts of Article III, paragraphs (b) to (e), of the Genocide Convention

The ICJ, after having rejected the attribution to Serbia and Montenegro of the acts of genocide, assessed whether its responsibility could be engaged on the basis of one of the acts enumerated in Article III: conspiracy to commit genocide (paragraph b), direct and public incitement to commit genocide (paragraph c), and complicity in the commission of genocide (paragraph e)⁷². The Court asserted that it was clear from the facts that conspiracy and incitement did not apply in this case since it had not been proved that organs of the FRY or persons acting under its instructions or effective control committed acts of conspiracy or incitement. The ICJ focused on analysing what it regarded as a “*more delicate question*”⁷³: whether the FRY could be held responsible for complicity in genocide within paragraph (e).

The ICJ made some preliminary remarks regarding the nature of complicity: in international law it does not refer to the issuance of instructions to the perpetrators of the acts, for if that were the case the acts would be attributable to the State (under Article 8 ILC Articles). The Court considered that complicity “*includes the provision of means to enable or facilitate the commission of the crime*”⁷⁴ and the ICJ considered it to be similar “*to a category found among the customary rules constituting the law of state responsibility, that of the “aid or assistance” furnished by one State for the commission of a wrongful act by another State*”⁷⁵. Reference was made to article 16 of the ILC Articles, which was taken to reflect custom. For asserting complicity, the Court considered it necessary that the accomplice should at least have acted knowingly, aware of the *dolus specialis* of the perpetrator and “*is not convinced by the evidence furnished by the Applicant that the above conditions were met [...] because it is not established*

⁷¹ See *Genocide Convention case* (para 414) for the reasoning denying the applicability to this case of other Articles of Chapter II, Part One of the ILC Articles for not matching the facts of this case with the circumstances foreseen in the rest of provisions regarding attribution.

⁷² Paragraph d, which refers to attempt to commit genocide is not analysed because there was no claim regarding it.

⁷³ *Genocide Convention case* (para 418)

⁷⁴ *Genocide Convention case* (para 419)

⁷⁵ *Genocide Convention case* (para 419)

beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied- and continued to supply- the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way”⁷⁶. Therefore, the ICJ concluded that the Respondent could not be held internationally responsible for complicity in the commission of genocide.

2.3.5- The question of responsibility for Breach of the Obligations to Prevent and Punish Genocide

The Court also dealt with whether the Respondent fulfilled its obligations under Article I of the Genocide Convention to prevent and to punish genocide. The Court underlined that these are two distinct legal obligations. The ICJ first assessed the fulfilment of the obligation to prevent genocide pointing out that they were not aiming to establish a general jurisprudence in relation to obligations of States to prevent certain conducts and that the Court “*will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention*”⁷⁷.

The ICJ pointed out that “*it is clear that the obligation in question is one of conduct and not one of result*”⁷⁸ which consists in the duty “*to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, [...] In this area the notion of “due diligence”, which calls for an assessment in concreto, is of critical importance*”⁷⁹.

The Court also clarified the distinction of this duty with complicity: “*while complicity results from commission, violation of the obligation to prevent results from omission*”⁸⁰ and that while in complicity the State organs need to be aware that genocide was about to be committed or currently happening, “*by contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; [...] it is enough that the State was aware,*

⁷⁶ *Genocide Convention case* (para 422)

⁷⁷ *Genocide Convention case* (para 429)

⁷⁸ *Genocide Convention case* (para 430)

⁷⁹ *Genocide Convention case* (para 430)

⁸⁰ *Genocide Convention case* (para 432)

or should normally have been aware, of the serious danger that acts of genocide would be committed”⁸¹. The ICJ considered that the FRY authorities “could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave”⁸². The ICJ claimed that the Respondent had not proved to have taken any action to prevent the massacres and concluded “that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility”⁸³.

The ICJ examined the obligation to punish genocide, focusing on the obligation to co-operate with the “international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”⁸⁴. The ICJ asserted that the ICTY is to be regarded an “international penal tribunal” within the meaning of Article VI and that the Respondent must be deemed as having accepted its jurisdiction. In the light of the facts, the ICJ concluded that the Respondent had not co-operated with the ICTY, and had therefore breached its obligation to punish genocide.

In sum, the ICJ considered that “the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged”⁸⁵.

3- The control tests proposed by the ICTY

Now the focus will be put on a case by the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereafter, ICTY).

3.1- Prosecutor v Tadić case

In the *Prosecutor v Tadić case*⁸⁶, the Appeals Chamber of the ICTY had to determine, among other issues, whether the conflict between Bosnia and Herzegovina and the FRY, which was

⁸¹ *Genocide Convention case* (para 432)

⁸² *Genocide Convention case* (para 436)

⁸³ *Genocide Convention case* (para 438)

⁸⁴ Article VI of the Genocide Convention

⁸⁵ *Genocide Convention case* (para 450)

clearly international before the 19 May 1992, also had that nature afterwards in order to determine the applicability of the grave breaches regime of the Geneva Conventions. For this purpose, they had to determine “*whether the Bosnian Serb Forces- in whose hands the Bosnian victims in this case found themselves- could be considered as de iure or de facto organs of a foreign Power, namely the FRY*”⁸⁷.

The Court first analysed international humanitarian law (hereafter, IHL) and the criteria for being considered a lawful combatant, and “*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*”⁸⁸. After underlining that IHL “*is a realistic body of law, grounded on the notion of effectiveness [...] holds accountable not only for those having formal positions of authority but also those who wield de facto power as well as those who exercise control over perpetrators of serious violations of international humanitarian law*”⁸⁹. The Court focused on the need to “*specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is prima facie internal*”⁹⁰. For this specification of the notion of control the Court, although taking note of a position to the contrary (see 5.1.4) claimed that IHL has to be supplemented by the general international law rules of State responsibility for it considers that “*international humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is as acting as de facto State officials*”⁹¹.

3.1.1- The Prosecution position in regards to the Nicaragua test

The Prosecution maintained an interesting position since it claimed that the Trial Chamber of this case was wrong in applying *Nicaragua v USA* and claimed that it should have applied instead “*the provisions of the Geneva Conventions and the relevant principles and authorities of*

⁸⁶ *Prosecutor v Tadic case (IT- 94-1-A)*, Appeals Chamber of ICTY, Judgment of 15 July 1999 (hereafter, *Tadic case*)

⁸⁷ *Tadic case* (para 87)

⁸⁸ *Tadic case* (para 95)

⁸⁹ *Tadic case* (para 96)

⁹⁰ *Tadic case* (para 97)

⁹¹ *Tadic case* (para 98)

international humanitarian law which, in its view, apply a “demonstrable link” test”⁹². The reason for this assertion is that *Nicaragua v USA* dealt with the issue of State responsibility while the issue in this case was about individual criminal responsibility. Hence, the Prosecution considered that “*the Nicaragua test, while valid within the context of State responsibility, is immaterial to the issue of individual criminal responsibility for “grave breaches”. The Appeals Chamber, with respect, does not share this view*”⁹³. The Court considered that the relevant issue was preliminary to these two types of responsibility: “*the conditions on which under international law an individual may be held to act as a de facto organ of a State*”⁹⁴. The Appeals Chamber asserted that logically these conditions must be the same. However, this position is arguable since State responsibility may arise not only when individuals act as *de facto* organs but also in other circumstances, like when a State exercises control or gives instructions to private individuals, but also for its own acts of inciting or not preventing the acts of private individuals when the State had a duty to do so. These situations were analysed by the ICJ in *Nicaragua v USA* and different control tests were applied, although the Appeal Chamber did not share this view of that case either. The Prosecution (and the dissenting opinion of Judge McDonald) argued that in *Nicaragua v USA* the ICJ “*first applied the “agency” test when considering whether the contras could be equated with United States officials for legal purposes, in order to determine whether the United States could incur responsibility in general for the acts of the contras [...] the Court then applied the “effective control” test to determine whether the United States could be held responsible for particular acts committed by the contras in violation of international humanitarian law*”⁹⁵.

The Appeals Chamber considered that this understanding of the case was based on a “misreading” of the case and claimed that “*it is unclear whether the Court is propounding “effective control” as an alternative test to that of “dependence and control” set out earlier [...] or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation*”⁹⁶. The Appeals Chamber therefore analyses *Nicaragua v USA* on the basis that the ICJ only applied a test for determining whether private individuals are

⁹² *Tadic case* (para 69)

⁹³ *Tadic case* (para 103)

⁹⁴ *Tadic case* (para 104)

⁹⁵ *Tadic case* (para 106)

⁹⁶ *Tadic case* (para 112)

acting as *de facto* organs of a State, and this test involves that the State should issue specific instructions⁹⁷. However, a proper reading of *Nicaragua v USA* leads to the position held by the Prosecution and Judge McDonald⁹⁸. This has been clearly confirmed by the ICJ in the *Genocide Convention case*, in which the Court puts a lot of emphasis in clarifying that the equation of private individuals with State organs on the basis of the strict control test is a “*completely separate issue*” (borrowing the words of the ICJ) from the attribution of State responsibility on the basis of instructions or control, which should be appreciated by applying the effective control test⁹⁹. In the *Genocide Convention case* the ICJ was merely reasserting the validity of the tests it put forward in *Nicaragua v USA* after its questioning by the Appeals Chamber, so it must be taken to give the correct interpretation of that case.

The interpretation that the Appeals Chamber does of *Nicaragua v USA* and the confusion of the two tests into one¹⁰⁰ explain why it claims that “*international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as de facto organs of that State*”¹⁰¹. This denial is correct but it assumes that the ICJ asserted what in fact it did not hold, for the ICJ never required the issuance of specific instructions for the equation of a group with a State organ. Those instructions were required, as an *effective control test* for attributing responsibility to a State for the resulting specific acts of a group, after having denied its characterisation as a *de facto* organ, denial which was based not on the lack of specific instructions but on the non-fulfilment of the requirements of complete dependence and complete control which conformed the so-called “strict control” or “agency” test. Therefore, the test set forward by the Appeals Chamber (the overall control test) is not aiming to replace the effective control test (as it claims to be doing when denying that international law requires specific instructions for considering armed forces as *de facto* organs of a State and offering its test as an alternative), but rather the strict control test. It is a much more ambitious position for it means

⁹⁷ See *Tádic case* (para 114)

⁹⁸ See Talmon, *op cit* (2009, pg. 507) where Talmon points out that “*the Appeal Chamber approach was based on a misreading of the ICJ’s Nicaragua judgment and a misinterpretation of the rules of customary international law governing State responsibility [...] the Appeals Chamber did not subscribe to the interpretation that had correctly been put forward by the Prosecution and by Judge McDonald in her dissent at the trial stage*”

⁹⁹ See *Genocide Convention case* (para 397)

¹⁰⁰ This confusion of both tests is apparent, *inter alia*, in paras 109 (*in fine*) and 156.

¹⁰¹ *Tádic case* (para 156)

setting a lower threshold of control for the characterisation of groups as *de facto* organs (responsibility therefore arising under Article 4 ILC Articles) and not the grounding of State responsibility under Article 8 ILC Articles, whose scope is limited to the specific acts controlled.

3.1.2- The Appeals Chamber rejection of the Nicaragua test

*“The Appeals Chamber, with respect, does not hold the Nicaragua test to be persuasive”*¹⁰² and argues this position on the basis of the two following topics: on its inconsistency with the logic of State responsibility and on its contradiction with judicial and State practice¹⁰³.

3.1.2.1- Not consonant with the logic of State responsibility

The Appeals Chamber considers that the test put forward by the ICJ in *Nicaragua v USA* is not consonant with the rationale that underlies the whole system of State responsibility. It claims that *“the principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria”*¹⁰⁴. It uses article 8 ILC Articles as example and claims that *“the rationale behind this rule is 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 [...] States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct”*¹⁰⁵. The Court claimed that attribution in these cases is based on the requirement of control and claims that the degree of control necessary for attribution differs according to the facts of each case and not necessarily always there will be a high threshold. The Court asserts that the law on State responsibility *“is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of*

¹⁰² *Tádic case* (para 115)

¹⁰³ It is interesting to note that Judge Shahabuddeen in his Separate Opinion asserts that while he agrees with the Appeals Chamber that there was an international conflict, he asserts that *“I am unclear about the necessity to challenge Nicaragua (para 5) [...] On the basis of Nicaragua, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS. The FRY and BH were therefore in an armed conflict within the meaning of article 2, first paragraph, of the Fourth Geneva Convention”* (para 14)

¹⁰⁴ *Tádic case* (para 117)

¹⁰⁵ *Tádic case* (para 117)

individuals must answer for their actions, even when they act contrary to their directives”¹⁰⁶. This statement can readily be shared but in answering for their actions when an organised group acts contrary to their instructions, State responsibility seems more logically to arise due to its incitement or support, which is the real own conduct of the State, and not for conduct of the group beyond its control, for which the group alone should be held accountable.

3.1.2.2- At variance with judicial and State practice

The Appeals Chamber also argued that the tests set forward in *Nicaragua v USA* are not persuasive claiming that “*the effective control test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised*”¹⁰⁷. The Chamber considered that test to be appropriate for cases of individuals or disorganised groups but not in cases that dealt with military or paramilitary groups.

First, it is important to point out that this criticism of *Nicaragua v USA* departs from the consideration that it set forward the *effective control test* as “*an exclusive and all-embracing test*”. However, as set out above, the ICJ in fact set forward two tests, and the effective control test was only applied after having denied attribution on the basis of the so- called agency test. This clarification dilutes most of the criticism towards Nicaragua, since the ICJ did not require the issuance of specific instruction for a group to be considered a *de facto organ*, and all the criticisms arguing in that sense are therefore deemed to fail.

The Chamber enumerated many cases that allegedly contradict the need of specific directives to be considered as acting on behalf of the State. However, apart from the confusion amongst both tests, most cases set out in the judgment assert State responsibility on the basis of characterisation as *de facto organs* (which obviously does not require the issuance of specific instructions), like the *Stephens case*. Others merely attribute responsibility on different basis which are not relevant for the equation with State organs or the determination of the level of control required by article 8

¹⁰⁶ *Tadic case* (para 120)

¹⁰⁷ *Tadic case* (para 124)

ILC Articles. This is the case of the *United States Diplomatic and Consular Staff in Tehran case*, in which it was conceded that the group of students did not initially act on behalf of Iran but it was held responsible for its own acts: for failing to prevent the attack, for failing to put an end to it, and finally for publicly approving and endorsing the action *ex post facto*. Therefore, its relevance for excluding the validity of the tests put forward by the ICJ in *Nicaragua v USA* is at most very limited.

3.1.3 - Three tests in general international law: specifically, the overall control test

The Appeals Chamber claims that depending on the facts, different levels of control are to be applied when private individuals or groups can be considered *de facto* State organs: “*where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by the State [...] By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation*”¹⁰⁸.

Regarding the overall control test set forward by the Appeals Chamber of the ICTY for the attribution of responsibility for equating militarily organised groups with State organs it claims that: “*it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity*”¹⁰⁹. Therefore, the overall control test propounded lowers the threshold of control required for attributing responsibility to the State, but this occurs not for not requiring the issuing of specific instructions or control over the specific operation (which was not required either by the ICJ to equate a group with a State organ) but due to the lowering of threshold by the overall control, which is said that must go beyond financial and military assistance or training and include the coordination or help in the planning of its military activity. These requirements

¹⁰⁸ *Tadić case* (para 137)

¹⁰⁹ *Tadić case* (para 131)

are below the *strict control test* which the ICJ applies to equate a group with a State organ: the ICJ requires that there is a relation of complete dependence of the group, the State must correspondingly have complete control over it, that potential for control must have been actually used and have extended to all fields of its activity.

The Appeals Chamber pointed out that in addition to the “*test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)*”¹¹⁰. The Court does not elaborate much on this test but cites some cases in which individuals acting as if they were state organs are assimilated to them. However, this can be reconducted to a relation of complete dependence and complete control or the issuance of instructions. Otherwise, it is difficult to see how the State would have consented to that private persons acting in their behalf so as to be able to consider their conduct an act of that State. Responsibility could be based on these cases also on the basis of article 9 ILC Articles if those persons were exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for that exercise. In any other case, the State could be held responsible for its own conduct for failing to prevent a private person from acting if he were in authority when he was not.

3.1.4- International humanitarian law as a *lex specialis*?

The Appeals Chamber, when analysing the degree of control by a foreign State to convert into international a *prima facie* internal conflict, first analysed IHL, and concluded that it “*does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State [...] Consequently, it is necessary to examine the notion of control by a State over individuals laid down in general international law*”¹¹¹. However, the Court made reference in a footnote to the existence of “*another approach taken to the question of imputability in the area of international humanitarian law. The Appeals Chamber*

¹¹⁰ *Tadic case* (para 141)

¹¹¹ *Tadic case* (para 98)

is referring to the view whereby by virtue of Article 3 of the IVth Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this *lex specialis* States are responsible for all acts committed by their “armed forces” regardless of whether such forces acted as State officials or private persons. [...] This opinion was authoritatively set forth by some members of the International Law Commission (“ILC”) (Professor Reuter¹¹² [...] Professor Ago¹¹³ [...] This view has also been forcefully advocated in the legal literature”¹¹⁴. However, the Court considered that “even if this approach is adopted, the test of control as delineated by this Chamber remains indispensable for determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State”¹¹⁵.

This approach which considers IHL as a *lex specialis* is a really interesting one since it may have far-reaching consequences. Article 55 ILC Articles establishes that “these articles do not apply where and to the extent that the conditions for the exercise 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”. The ILC Commentary to the Articles points out that Article 55 “reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time”¹¹⁶. The consequences of the application of this maxim are not straightforward, since the notion of *lex specialis* covers a wide range of rules¹¹⁷. The ILC Commentaries clarify that “article 55 is designed to cover both

¹¹² “Professor Reuter observed that “it was now a principle of codified international law that States were responsible for all acts of their armed forces” (Yearbook of the International Law Commission, 1975. Vol. I. p.7, para. 5” (cited in footnote 117 of the *Tádic* case)

¹¹³ “Professor Ago stated that the IVth Hage Convention of 1907 “made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons (ibid, p 16, para 4)” (cited in footnote 117 of the *Tádic* case)

¹¹⁴ *Tádic* case (footnote 117)

¹¹⁵ *Tádic* case(footnote 117)

¹¹⁶ Crawford, *op cit* (2002, pg. 306)

¹¹⁷ For an interesting discussion about the *lex specialis* maxim and its “major built-in problems” see: Simma, Bruno/ Pulkowski, Dirk: “Of Planets and the Universe: Self-contained regimes in International Law”, *European Journal of International Law* (2006). In this article the authors set out the difficulties in determining when a rule can be considered more special than another, the extension of that specialness and how the consequences of these considerations should be determined since they recall that “lawyers make use of various (and sometimes contradictory) “tools” of interpretation, including the *lex specialis* principle, to reconcile competing rationalities

“strong” forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as “weaker” forms such as specific treaty provisions on a single point”¹¹⁸.

The position of international tribunals seems to be reluctant in accepting the existence of a *lex specialis* as to depart from the general rules of state responsibility. The ICTY did not consider IHL as *lex specialis*, and claimed that even if the contrary approach was taken, there would be still need for the test for determining when a group can be considered as part of the armed forces of a State, test which would be based on the general rules of state responsibility. In the *Genocide Convention case*, the ICJ rejected the Applicant’s claim which asserted that because of the “particular nature” of genocide the *effective control test* should be analysed not in relation with specific acts but as a with all of them as a whole. The ICJ held that “in the absence of a clearly expressed *lex specialis*”¹¹⁹ the Court is not justified in departing from the general rules. This restrictive view of the existence and scope of *lex specialis* is consonant with what Simma and Pulkowski call an *universalistic* concept of international law (in contrast with a *particularistic* view which regards international law “as the sum total of loosely interrelated systems”¹²⁰), adherents to which “choose as their starting point the perspective of general international law. Derogation from the general international law on state responsibility is only accepted to the extent that state parties have clearly stated such an intention”¹²¹.

4- The control test advanced by the European Court of Human Rights

The European Court of Human Rights (hereafter, ECtHR) has advanced its own test, which lowers even more the threshold required for the attribution of State responsibility.

expressed in different rules of law [...] their function may resemble what Vaughan Lowe labeled as interstitial norms: “the choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of extraneous factors” [...] the true function of the lex specialis principle lies precisely in its capacity to give articulation to such values and experiences of the international decision-maker”.

¹¹⁸ Crawford, *op cit* (2002, pg. 308)

¹¹⁹ *Genocide Convention case* (para 401)

¹²⁰ Simma & Pulkowski, *op cit* (2006, pg. 495)

¹²¹ Simma & Pulkowski, *op cit* (2006, pg. 495)

4.1- *Loizidou v Turkey*: effective overall control test

In *Loizidou v Turkey*¹²², the ECtHR had to decide whether there had been an interference with the Applicant's property rights. This interference was alleged to be Turkey's responsibility, with the special circumstance that the right was said to have been interfered with by the privation of access to her goods that were in the Turkish Republic of Northern Cyprus (TRNC)¹²³, which claims to be a State but is not recognised as such by the international community. The Applicant argued that "*A State cannot by delegation avoid responsibility for breaches of its duties under international law*"¹²⁴. The Cypriot Government contended that "*Turkey is in effective military and political control of northern Cyprus. It cannot escape from its duties under international law by pretending to hand over the administration of northern Cyprus to an unlawful "puppet" regime*"¹²⁵.

The ECtHR decided what it called "*the question of imputability*" asserting that States can be held responsible for acts outside their territory and recalled what the Court held in the *Loizidou Judgement (Preliminary objections)*: "*that the responsibility of a Contracting Party could also arise when as a consequence of military action- whether lawful or unlawful- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether be it exercised directly, through its armed forces, or through a subordinate local administration*"¹²⁶.

The ECtHR considered that "*it is not necessary to determine whether [...] Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according*

¹²² *Loizidou v Turkey (Merits) Judgment, Application n° 15318/89 (18 December 1996)*, hereafter, *Loizidou v Turkey*.

¹²³ Talmon *op cit* (2009, pg. 508) points out that "*the ECtHR was concerned with two distinct questions: (a) whether, as a result of the presence of a large number of Turkish troops in northern Cyprus, that part of the Republic of Cyprus was within the extraterritorial "jurisdiction of Turkey, a High Contracting Party of the ECHR, and (b) whether acts and omissions of the authorities of the Turkish Republic of Northern Cyprus (TRNC), an unrecognized secessionist entity established in the Turkish occupied area of northern Cyprus, was "imputable to Turkey" and thus entailed her responsibility under the ECHR. These two questions, however, are not always clearly kept apart as the Court seizes on the element of "control" to establish both extraterritorial "jurisdiction" and imputability seems to derive one from the other*".

¹²⁴ *Loizidou v Turkey* (para 49)

¹²⁵ *Loizidou v Turkey* (para 50)

¹²⁶ *Loizidou v Turkey* (para 52)

to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the “TRNC”¹²⁷. Talmon makes reference to how the ECtHR talks about the “relevant test” but “without making any reference to the tests applied by the ICJ and the ICTY, and without giving any further explanation, in the *Loizidou* case the ECtHR developed its own “relevant test” for what it termed a “subordinate local administration”¹²⁸. The ECtHR asserted that it need not pronounce on the lawfulness or otherwise of Turkey’s military intervention since it was not relevant for the determination of State responsibility and merely recalled that the international community does not accept that the TRNC constitutes a State. However, this issue is relevant since Turkey had alleged that “its armed forces are acting exclusively in conjunction with and on behalf of the allegedly independent and autonomous “TRNC” authorities”¹²⁹. Therefore, if the TRNC were regarded as an independent State and Turkey’s aforementioned allegation were proved, the situation may fall within article 6 ILC Articles¹³⁰.

Moreover, in regard to the test applied, it is relevant to point out that the ECtHR applied an “effective overall control test”, whose requirements did not enumerate, but claimed that there was no need for detailed control over the authorities of the TRNC. The test put forward by the court, in addition to the lower stringency in regards to the level of control, differs from the tests previously advanced by other international tribunals in that it does not refer to control over the individuals or groups whose acts are attributed to the State but to the territory in which those individuals are and where the acts have been committed¹³¹. This, too, diminishes the stringency of the test, since such a general and diffuse control over the territory does not necessarily involve a relevant level of control of the group activities¹³². It would seem more appropriate to attribute responsibility to the State for failing to prevent the acts of the group, since the proof of such a

¹²⁷ *Loizidou v Turkey* (para 56)

¹²⁸ Talmon, *op cit* (2009, pg. 509)

¹²⁹ *Loizidou v Turkey* (para 54)

¹³⁰ According to Article 6 the conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of governmental authority of the State at whose disposal it is placed.

¹³¹ Talmon, *op cit* (2009, pg. 511): he claims that “actual control over the secessionist entity’s authorities or their activities is also a requirement of the “overall” and effective control” tests. Both tests require different levels of participation from the outside power in the organisation, coordination or planning of the secessionist entity’s operations- an element which is totally absent from the “effective overall control test”

¹³² Despite the lowering of control requirements, as Talmon claims, “the ECtHR’s test is not used in lieu of the ICJ’s “effective control” test but replaces its “strict control test” [...] is used as a basis for equating the authorities of the secessionist entity with *de facto* State organs or “agents” of the outside power for whose act sit may generally be held responsible” (Talmon *op cit*, 2009, pg. 510).

level of control may give the State influence to act in the territory (so as to require it to prevent harm to individuals) but not necessarily proves influence over the group to direct its conduct in any more specific way than taking measures to prevent them from acting.

4.2- *Behrami and Saramati*: ultimate authority and control test

In *Behrami and Behrami against France, and Saramati against France, Germany and Norway*¹³³, the Grand Chamber of the ECtHR had to decide upon the admissibility of both claims. The Court, when dealing with the relevant law, made reference to *the Draft Articles on the Responsibility of International Organisations* and analysed article 5, which deals with the conduct of organ or agents placed at the disposal of an international organisation by a State or another international organisation and attributes the conduct to the organisation at whose disposal they are placed “*if the organisation exercises effective control over that conduct*”¹³⁴.

The ECtHR quotes part of the ILC Commentary on these articles which asserts that article 5 applies to cases of “*military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction [...] the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization [...] Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect. [...] The decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question*”¹³⁵.

The claims about which ECtHR had to decide were in relation to two organisations: the KFOR¹³⁶ and the UNMIK¹³⁷: “*KFOR was mandated to exercise complete military control in Kosovo. UNMIK was to provide an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC comprised all legislative and executive power as well*

¹³³ *Agim Behrami and Bekir Behrami against France* (Application no. 71412/01) and *Ruzhdi Saramati against France, Germany and Norway* (Application no. 78166/01)- Grand Chamber Decision on the Admissibility of the claims (hereafter, *Behrami and Saramati*).

¹³⁴ *Behrami and Saramati* (para 30)

¹³⁵ *Behrami and Saramati* (para 31)

¹³⁶ KFOR is the abbreviation used by the ECtHR to refer to the Kosovo force.

¹³⁷ UNMIK is the abbreviation used to refer to the United Nations Interim Administration Mission in Kosovo

as the authority to administer the judiciary [...] Kosovo was, therefore, on those dates under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY”¹³⁸. The ECtHR analysed “whether the impugned action of KFOR (the detention in Saramati) and inaction of UNMIK (failure to de-mine in Behrami) could be attributed to the UN [...] the Court has then examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN”¹³⁹. The ECtHR “considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK’S mandate”¹⁴⁰.

In relation to the attribution of action by the KFOR to the UN, the ECtHR pointed out that the absence of article 43 Agreements makes it necessary for the UN to rely in its member States and other international organisations to provide military means to fulfil its collective security role and that such multilateral missions have a complex structure which makes necessary some delegation of command¹⁴¹. In this context, the ECtHR “considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated”¹⁴² and held that this could be answered positively in this case. For this conclusion the Court took into consideration that “the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control”¹⁴³. The Court admits that TCN (Troops Contributing Nations) keep some authority over the troops they decide to contribute with to the mission but considers that this involvement does not affect the fact that they were commanded by the NATO and “finds that the UNSC retained ultimate authority and control and that the effective command of the relevant operational matters was retained by NATO”¹⁴⁴. The ECtHR further notes that “KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, “attributable” to the UN”¹⁴⁵.

¹³⁸ *Behrami and Saramati* (para 70)

¹³⁹ *Behrami and Saramati* (para 121)

¹⁴⁰ *Behrami and Saramati* (para 127)

¹⁴¹ See *Behrami and Saramati*, para 132

¹⁴² *Behrami and Saramati* (para 133)

¹⁴³ *Behrami and Saramati* (para 134)

¹⁴⁴ *Behrami and Saramati* (para 140)

¹⁴⁵ *Behrami and Saramati* (para 141)

The control tests used by the ECtHR here are effective control and ultimate authority and control, which applies in spite of the retention by the TCN of some authority over the contingents they send to the mission. The Court considers that NATO's command, although was not exclusive, was "effective"¹⁴⁶. In the end, the test applied by the ECtHR is also based on the effectiveness of command by the NATO over the peacekeeping forces. The ultimate authority and control test does not replace the effectiveness test but merely it is applied to transfer the responsibility from the NATO to the UN, by following the chain of command. The effectiveness of control or command here seems to be a less stringent concept than the effective control test in *Nicaragua v USA*, since responsibility is asserted, even recognising that some authority is kept by the TCN. However, it is important to recall that the facts are different since here the military have the legal status of organs of the lending states. If TCN did not retain any control, it is clear that article 5 would apply and the NATO would be responsible for their conduct. The effectiveness of command is examined to determine which impact that retention of some authority over the troops by TCN should have, and the Court considered that conduct should be attributed to the international organisation or the TCN on the basis of effective control over it. The ILC Report quoted by the Court favours a use of the effective control test similarly as was used by the ICJ in *Nicaragua v USA*: analysing for each conduct whether it was carried out under the effective control of the international organisation or the TCN. The ECtHR applied the test claiming that TCN keep authority over certain areas, citing discipline and accountability and remains responsible for providing uniforms and equipment¹⁴⁷ and held that "*the court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of NATO's operational command. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter*"¹⁴⁸.

In relation to the UNMIK, the attribution issue was much easier. The ECtHR asserted that the "*UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC*"¹⁴⁹, so the Court concluded that its actions were in principle attributable to the UN.

¹⁴⁶ See *Behrami and Saramati*, para 138

¹⁴⁷ See *Behrami and Saramati*, para 138

¹⁴⁸ *Behrami and Saramati* (para 139)

¹⁴⁹ *Behrami and Saramati* (para 142)

The Court finally denied its competence *ratione personae* in this case, since the conduct was attributable to the UN which, as asserted in by the ICJ in *The Reparations case*, has separate legal personality and the UN is not a contracting party of the ECHR¹⁵⁰.

5- The rationales behind the different control tests

The advancing of the several control tests analysed above responds to different views on the appropriate stringency and threshold of the evidence which needs to be provided to the Court for it to consider established that a group of individuals could be equated with a State organ or were in fact acting under the direction or control of a given State. These different thresholds in turn involve different considerations about the proper balance between the principles which clash and need to be taken into account in cases which may potentially fall within articles 4 or 8 ILC Articles: there is a need to ensure that responsibility is attributed to the State for its own conduct. As set out above, the articles on attribution are a *numerus clausus*, and the general rule is that the acts of private individuals do not engage the responsibility of the State *per se* (but only if one of the ILC Articles applies). On the other hand, there is a need to protect the population from international wrongful acts (even if they are not carried out by formal officials) if they are in fact being directed or controlled by a State. This idea has become more important lately with the emergence of the recognition of human rights and the concept of sovereignty as responsibility.

5.1- The will of ensuring real accountability of States

All the international tribunals whose control tests are analysed in the previous sections make reference to the need of preventing States from escaping responsibility by instructing private individuals to carry out acts that would engage their responsibility if carried out by their organs, by delegating those functions or by controlling or directing its perpetration by private groups.

The ICJ, the tribunal which puts forward the most demanding control tests in terms of evidence, is also aware of this need to ensure accountability of States and makes it clear in its reasoning. However, also shows its concern to limit that responsibility to acts over which the State actually

¹⁵⁰ See *Behrami and Saramati*, paras 144-152.

had direction or control. For this purpose, it advances two tests which are to be applied in a subsidiary way: first the *strict control test* should be applied to decide whether the individuals can be considered *de facto* organs. If this is answered in the negative, the *effective control test* has to be applied to determine whether the specific operations at stake were done under the State's direction or control. The ICJ recognises the need to look beyond the lack of formal recognition of those individuals to prevent States escaping responsibility simply by denying their characterisation as organs under internal law: "*it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious*"¹⁵¹. However, the Court also pays attention to another principle: "*so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them [...] complete dependence*"¹⁵². This consideration explains the high threshold of evidence required by the ICJ in both tests.

5.2- The need of limiting attribution only to State's own conduct

The Appeals Chamber of the ICTY also expresses its awareness of the need to prevent States avoiding responsibility in that way, and claims that "*generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives*"¹⁵³. This last assertion is an analogy with the responsibility of States for *ultra vires* acts of its organs. However, as *Gutiérrez Espada* has pointed out, this analogy should not be done so readily¹⁵⁴. In case of *de jure* organs, the extension of responsibility

¹⁵¹ *Genocide Convention case* (para 392)

¹⁵² *Genocide Convention case* (para 393)

¹⁵³ *Tadić case* (para 121)

¹⁵⁴ Gutiérrez Espada, Cesáreo in *El hecho ilícito internacional*. Cuadernos Internacionales 5 (Universidad Autónoma de Madrid) editorial Dykinson, SL (Madrid, 2005) argues against the readiness in extending by analogy the responsibility of the State for *ultra vires* acts of its organs to cases in which it is proved the existence of instructions or control over individuals who have acted beyond those instructions or control asserting: "*La tentación es evidente, pero hay un argumento en contra: Como regla general los hechos de los órganos son del Estado mientras que en el caso de los particulares ocurre precisamente lo contrario*" (pg. 104).

for *ultra vires* acts can be grounded on their formal characterisation as organs¹⁵⁵, whose acts are “acts of the State” by virtue of that legal characterisation, which is a clear expression of the State consent to those individuals acting on its behalf. On the other hand, individuals whose conduct engages State responsibility under Article 8 do not enjoy that presumption of acting on behalf of the State by any formal recognition nor by complete control over them, and all efforts have to be placed in the proving of that control or direction over the specific operation. This situation is different enough as to limit that extension of responsibility. As *Gutiérrez Espada* points out, the ILC Commentaries give some guidance by asserting that “*such cases can be resolved by asking whether the unlawful or unauthorised conduct was really incidental to the mission or clearly went beyond it.*”¹⁵⁶.

Not only because of this extension of responsibility in cases of private groups’ conduct contrary to instructions, but also due to the lowering of the threshold of control required by the Appeals Chamber for the group to engage the international responsibility of the State, the ICJ considers that “the overall control test has the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for his own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. [...] the “overall control” test is unsuitable, for it stretches too far, almost to breaking point the conduct of a State’s organs and its international responsibility”¹⁵⁷. The ICJ asserts that the test stretches almost to breaking point the relation that must exist between the State organs and its international responsibility for considering that the overall control test does not require specific instructions by the organs to the individuals in respect of each individual operation in order to assert the responsibility of the State. As *Talmon* has pointed out, the ICTY did not use the overall control test to replace the effective control test “but was, in fact, used in lieu of its much more stringent “strict control” test to determine whether a secessionist entity qualified as a de facto State organ in the sense of Article 4 [...] It

¹⁵⁵ In cases of *de facto* organs *Talmon* argues in favour of the extension of responsibility also to *ultra vires* acts: “all acts committed by the authorities of the secessionist entity in their capacity as de facto organs of the outside power, even those *ultra vires*, are thus attributable to the outside power” (*Talmon, op cit*, 2009, pg. 501). This extension makes sense in regards to *de facto* organs since the holding of responsibility for all those acts is the logical result of equating them with State organs, and the basis for attribution is article 4 ILC Articles, in contrast with cases of responsibility under article 8. Article 4 in relation to Article 7 ILC Articles make clear the extension of responsibility for *ultra vires* acts.

¹⁵⁶ *Crawford, op cit* (2002, pg. 113)

¹⁵⁷ *Genocide Convention case* (para 406)

thereby replaced the “strict control” test with the “overall control” test”¹⁵⁸. Hence, the ICJ’s criticism of stretching the relation to breaking point is even more so, for the test is used to consider the group as a *de facto* organ, all whose conduct is attributable to the State¹⁵⁹.

The ECtHR applies its own test: the *effective overall control test*. This involves an important decrease in the stringency of the control which has to be proved in order to ascertain the state responsibility, since it does not refer anymore to the ability to control or direct the group. Certain control over the territory- which need not be detailed- is no guarantee of any relevant level of control over an organised group. Thus, the *effective overall control test*, although it is true that may ensure that States avoid responsibility by delegating tasks to a group, and protects the rights granted by the ECHR, it does so at the cost of asserting the engagement of State responsibility for acts with whose perpetrators there has not been required a sufficiently close control connection, so the principle of only holding the State responsible for its own conduct seems affected.

5.3- Responsibility for inciting or failing to prevent a third’s conduct

These problems may be overcome by holding the state responsible for its own conduct in relation to the perpetrators. If the evidence of control is not enough to regard the group’s conduct as attributable to the State, it still may be sufficient to consider the State responsible for its own conduct in relation to the group. It may be the case that the State had the ability, and thus, the responsibility to act and prevent the group carrying out those acts. This means asserting responsibility for the conduct of its *de jure* organs in relation to the group, which allows protecting human rights without holding the State responsible for conduct which is not clearly established to be its own. As Dixon has put it: “*irrespective of the question of Attributability, a state may incur primary responsibility because of a breach of some other international obligation, even though this obligation arose of the situation created by a non-attributable act*”¹⁶⁰. This is done in *Nicaragua v USA*, where the ICJ held responsible the United States for its own conduct in relation to the *contras*. The ICJ considered that the United States was in breach of

¹⁵⁸ Talmon, *op cit* (2009, pg. 506-507)

¹⁵⁹ The same criticism would apply to the effective overall control test used by the ECtHR which, as Talmon has indicated “*is not used in lieu of the ICJ’s “effective control test but replaces its “strict control” test*” (Talmon, *op cit*, 2009, pg. 510)

¹⁶⁰ Dixon, *op cit* (2007, pg. 252)

the principle of non-intervention, the prohibition of the use of force and violation of the sovereignty of Nicaragua. In the *Genocide Convention case*, the ICJ held Serbia and Montenegro responsible for not fulfilling its obligations to prevent and punish genocide. This allows overcoming the problems of attribution of conduct to a State.

Conclusions

The tendency in international jurisprudence

There seems to be no clear evolution in international jurisprudence in relation to the preferable control test to be applied. The ICJ set forward its tests in 1986 in *Nicaragua v USA*, and later the ICTY questioned its persuasiveness in the *Tadic case*. The ECtHR did not follow the ICJ jurisprudence and applied its own test too. However, the ICJ reaffirmed its position and the applicability of its tests in 2007, in the *Genocide Convention case*, when it criticised how the *overall control test* extended the scope of responsibility beyond the well-established principle of holding a State responsible for its own conduct. Fragmentation seems likely to continue. Nonetheless, as Talmon has suggested “*the choice of test may have been influence by a belief that, due to the lack of evidence of “complete dependence” or “effective control” over specific activities, the application of the ICJ’s exacting control tests would have resulted in the court having to deny, at least in part, its jurisdiction. However this was not an inevitable result*”¹⁶¹.

The ILC Articles do not give an answer to the problem either for they do not specify the level of control required for attribution. However, Gutiérrez Espada claims that the ILC has showed its preference for the ICJ position in the Commentary to the Articles “*al considerar que la “jurisprudencia Tadic” no se refiere a la misma cuestión que la del TIJ ni, por ende, exactamente al tema tratado en el artículo 8. Esta interpretación resulta evidente cuando se manejan los trabajos preparatorios y se comprueba la crítica que de la jurisprudencia en este punto del TPIY efectuó el Relator Crawford*”¹⁶².

Talmon distinguishes “*the more principled question of whether there can be several differing control tests for the attribution of conduct to a State in the law of State responsibility. It has been*

¹⁶¹ Talmon, *op cit* (2009, pg. 512)

¹⁶² Gutiérrez Espada, *op cit* (2005, pg. 99)

*suggested that the degree of control may vary according to the factual and legal circumstances of the case [...] This view, however, fails to appreciate that attribution is a concept of a common currency in the international law*¹⁶³ and he shares the view of the ICJ in the *Genocide Convention case* that the requirements cannot differ except in the case of a clear *lex specialis*.

The preferable control test

Gutiérrez Espada claims that he understands that the *overall control test* “*cuando las circunstancias del caso permiten una prueba inequívoca de su extensión e intensidad (...), puede parecer base suficiente para la imputación, y comprendo asimismo que permitiría, como el TPIY ha “visto”, ampliar los supuestos de imputación, proteger mejor a las víctimas civiles de los conflictos armados [...] pero también entiendo que puede, en un caso dado, ser injusto atribuir a un Estado, que en conjunto controla a una persona o grupo de personas, un determinado comportamiento de ésta en un incidente puntual que el Estado no dirigió ni controló [...] podría considerarse acaso que quien ejerce un control general se presume que ejerce el efectivo siempre, y quien afirme lo contrario (pues, obsérvese, la presunción sólo es iure tantum) que lo pruebe*”¹⁶⁴. I do not share the view that presuming the existence of effective control in cases where overall control has been proved is the solution to get the right balance. It would merely lead to the application of the *overall control test*, since it may be difficult for a State to prove the lack of instructions over a certain operation, or that the instructions were carried out in a way different or beyond its orders. It should be for the Applicant State to prove the relation between the group and the respondent State so as to consider the first’s conduct attributable to the latter. In the same sense, Talmon argues that “*in order to equate the authorities of a secessionist entity with de facto organs of the outside power, the type and degree of control must qualitatively be the same as the control a State exercises over its de jure organs, a requirement fulfilled only by the ICJ’s “strict control” test. In the case of authorities of secessionist entities not qualifying as de facto organs of the outside power, the degree of control must surely be effective control over the wrongful conduct in question, otherwise it is not control*”¹⁶⁵. I share this position, and thus believe that the presumption of effective control in cases of proof of overall control is not an

¹⁶³ Talmon, *op cit* (2009, pg. 516-517)

¹⁶⁴ Gutiérrez Espada, *op cit* (2005, pg. 100)

¹⁶⁵ Talmon, *op cit* (2009, pg. 517)

appropriate solution. Moreover, I consider this technique not to be necessary since the escaping of responsibility can be prevented by holding the state responsible for its own conduct in relation to the group. For instance, in the *Loizidou case*, Talmon argues that “*Turkey’s responsibility could thus have been engaged not for the acts of the TRNC authorities but for a breach of its own due diligence obligations, ie the failure on the part of its own organs present in northern Cyprus to prevent violations of the ECHR by the TRNC authorities*”¹⁶⁶.

To sum up, the important issue is the effect that each position has and, as it has been set out, denying the attribution of a group’s conduct to a State does not necessarily involve denying its responsibility in the case. The State can still be held primarily responsible for conduct which is indisputably his own in relation to the conduct of the group: for failing to prevent its actions, for inciting them, for failing to punish them, or because its acts amounted to a violation of international obligations like the prohibition of intervention or the use of force. In this respect, it is important to point out that, after having denied attribution of the group’s conduct to the State, in *Nicaragua v USA*, in the *Genocide Convention case* and the *Armed Activities case* (in relation to Uganda), the ICJ asserted responsibility of the respondent States for their own conduct. This shows that States can be prevented to escape international responsibility in these cases and, at the same time, not holding them responsible for acts with which there is not a sufficiently clear link as to be considered its own. Therefore, I consider that the tests put forward by the ICJ are the ones which best specify the close relation that must exist for attributing responsibility to the State for the conduct of private individuals, which is exceptional and, at the same time, do not leave victims of human rights or humanitarian law violations unprotected since the State may still have “primary responsibility” for its own conduct in relation to the group.

¹⁶⁶ Talmon, *op cit* (2009, pg. 512)

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