

Attribution Responsibility to a State in the Case Law of International Courts

*Ani Rukhadze**

I. Introduction

The issue of international legal responsibility of the State is often, though still insufficiently, addressed the topic in the legal literature. The standard of attribution responsibility to a State for the actions of a private individual is particularly vague.

According to the Draft Articles on Responsibility of States¹ (“the Draft”) elaborated by the International Law Commission,² a State is imposed international legal responsibility for an internationally wrongful act attributable to the State.

The State cannot operate independently, it acts through humans. However, in international law, the State is considered as a single entity and the person responsible under domestic law does not have importance for holding the State responsible³ Accordingly, it is a matter of international law to determine when the actions of natural persons may be attributed to the State.⁴

Articles 4 to 8 of the Draft exhaustively list the circumstances in the event of which the action would be attributed to the State.⁵

In contrast to State organs, attribution of the actions of a private person or group of persons to the State takes place in exceptional cases, based on article 8 of the Draft. According to the norm, the responsibility for the actions of a private person or group of persons will be imposed on the State in the presence of any of these three circumstances: 1) when that person acts according to the instructions of the State; 2) when the State directs s/he or 3)

* Doctoral Student at the New Vision University Law School.

¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, November 2001, Supplement No. 10, (A/56/10).

² International Law Commission <https://legal.un.org/ilc/>.

³ Ibid, 39, paras. 6-7, Also see, *Ortega, E.*, The Attribution of International Responsibility to a State of Conduct of Private Individuals within the Territory of another State, InDret Vol. 1, 2015, 4.

⁴ Ibid, 35, para. 5.

⁵ Ibid, 39, paras. 8-9.

when the State controls this person. According to the Draft, the instruction by the State, the giving directions, and the control exercised over a person or a group of persons have to be related to a specific international wrongful act.⁶ Moreover, the basis of the attribution is not the legal but the real relationship between the State and the perpetrator of the action.⁷

The first of the three circumstances set out in Article 8 of the Draft is clear enough – giving instructions to a person or group of persons for them to carry out a specific act. Accordingly, the act required to hold a State responsible is plainly defined.

In contrast, it is unclear what actions are considered to be directing or control of a person or a group of persons by the State.⁸ Exercising control implies extending power over a person.⁹ However, what is the degree of control exercised over a private individual to attribute the responsibility to the State? If an instruction is not meant under directing and control, what is required to hold the State responsible? The Draft does not provide detailed answers to these questions.¹⁰

To find out how the standards set by the Draft are interpreted and applied the best way is to get acquainted with the practices established by international courts.

The International Court of Justice¹¹ (I.C.J.) in its 1986 judgment in the Nicaragua case¹² established two tests of control - effective control over the entity¹³ and effective control over the action¹⁴. The International Criminal Tribunal for the former Yugoslavia¹⁵ ("Tribunal") in the *Tadić* case¹⁶

⁶ Ibid, 48, para. 7.

⁷ Ibid, 47, para. 1.

⁸ Ibid, 47, para. 3.

⁹ *Cassese, A.*, The Nicaragua and Tadić Tests Revisited in Light of the I.C.J. Judgment on Genocide in Bosnia, *European Journal of International Law*, Vol. 18 (4), 2007, 649-668, 663.

¹⁰ *Ortega, E.*, *supra* note 3, 37

¹¹ International Court of Justice, <https://www.icj-cij.org/en>.

¹² *Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice (I.C.J.), June 27, 1986.

¹³ The literature also referred to as the "strict control" or "agency" test.

¹⁴ Also referred to as the "effective control" test in the literature.

¹⁵ International Criminal Tribunal for the former Yugoslavia.

questioned the credibility of these tests and used the overall control test to hold the State responsible. In the *Loizidou* case¹⁷, the European Court of Human Rights (the “European Court”)¹⁸ also set its standard of State responsibility – a test of effective control over the area¹⁹. Nevertheless, the Court in the case²⁰ of the Genocide Convention adopted in 2007 criticized other tests because they overstated the scope of the State's responsibility and again upheld its tests of control.

The paper analyzes the control tests established by the Court and the Tribunal and the European Court, their strengths and weaknesses, and their assessments in the literature. Thus, the paper aims to ascertain the most appropriate standard for State responsibility, based on the established norms of international law.

II. Nicaragua Case

According to the Court, the responsibility of the State is determined by the “degree of dependence” of the acting private person on the State; In particular, the extent to which the State controls these persons.²¹ In the Court's opinion, dependence and control are “two sides of the same coin,”²² on the one hand, control derives from dependence and, on the other hand, dependence creates the potential for control²³. The Court distinguishes between two types of control: the first one is based on the affirmation of complete dependence of the entity on the State and the other one is based on the affirmation of the partial dependence of the entity on the State and its effective control over the international wrongful action taken by that entity.

¹⁶ *Prosecutor v. Dusko Tadić* (Appeal Judgment), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), July 15 1999.

¹⁷ *Loizidou v. Turkey*, European Court of Human Rights (ECtHR), Merits, December 18 1996.

¹⁸ <https://www.echr.coe.int/pages/home.aspx?p=home>.

¹⁹ The literature also referred to as the “effective overall control” test.

²⁰ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), I.C.J., February 26 2007.

²¹ *Nicaragua case*, para. 109.

²² *Talmon, S.*, The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist, *International and Comparative Law Quarterly*, Vol. 58 (3), 2009, 493-517, 4.

²³ *Nicaragua case*, para. 277.

Accordingly, two tests were developed - effective control over the entity and effective control over the action.

1. Test of Effective Control over the Entity

In the *Nicaragua* case, the Court had to decide, among other things, the validity of Nicaragua's assertion that the United States was responsible for international wrongful action done by *contras* in Nicaragua, as the United States had "determined the strategy and tactics of *contras* and directly provided military assistance to them during military operations."²⁴

The Court's original task was to determine the extent to which forces opposing Nicaragua were under "strict control" of the United States, which meant a relationship in which a private person or group of persons were so dependent on and obeyed the State that it was legally correct to consider them as a *de facto* State organ²⁵ acting in the interests of the State.²⁶

The Court set three preconditions for such an equalization:

- 1) a private person or group of persons must be fully dependent on the State;
- 2) complete dependence on the State should apply to all spheres of activity of a private person or group of persons;
- 3) The State must exercise a particularly high degree of control over the activities of a private person.

All three conditions must be met to pass the test of effective control over the entity. Accordingly, to equate a person or group of persons with a State organ, complete dependence on the State and control of all spheres of activity of this entity by the State is required.

²⁴ Ibid, 102.

²⁵ "*De facto* organs are entities that (1) are (obviously) not *de jure* organs (2) but nonetheless, by virtue of the strength of the connection between them and the state, the same rules that apply to *de jure* organs apply to them as well, even if they do not possess organ status under the state's domestic law". *Milanović, M.*, State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken, *Leiden Journal of International Law*, Vol. 22(2), 2009, 307-324, 314.

²⁶ *Nicaragua case*, para. 109.

Complete dependence means that a private person or a group of persons has no real autonomy and s/he is only an instrument in the hands of the State through which the State acts.²⁷

Coordinating or cooperating with the actions of a private individual or group of persons alone does not mean controlling them.²⁸ Complete dependence on the State is manifested in the entity's existence and the assistance provided in any form necessary for his/her activities. Complete dependence on the State takes place when, without the State's assistance, the entity cannot exist and the cessation of this aid will lead to the cessation of activities.²⁹ There must be not only the potential for control but it must be exercised³⁰ and applied to all areas of the person's activity;³¹ In the event of proof of such complete control over the entity, to attribute responsibility to the State is not necessary to establish the direct involvement of the State in each of the wrongful acts in question.

In the case of Nicaragua, the Court did not consider it sufficient that all the operations of the contras were carried out according to the strategy and tactics prepared by the USA. The Court held that "the financial support is given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua [was] a fully established fact."³² Moreover, on basis of the evidence, the Court found that the United States had created contras and "gave them direct and critical combat support," "financed, trained, equipped, armed and organized" them.³³

Nevertheless, the Court concluded that there was no unequivocal evidence that the US-controlled all areas of activity of the contras to such an extent as to confirm their acting for the US.³⁴ According to the Court, the assistance provided by the United States to the contras was very important, however, it

²⁷ Nicaragua case, para. 114; Also see, Genocide Convention case, paras. 392, 394.

²⁸ Prosecutor v. *Dusko Tadić* (Opinion and Judgment), IT-94-I-T, ICTY, May 7 1997, para. 598.

²⁹ Nicaragua case, paras. 109-111.

³⁰ *Ortega, E.*, supra note 3, 9.

³¹ Nicaragua case, para. 109; Also see, Genocide Convention case, para. 391.

³² Ibid, para. 107.

³³ Ibid, para. 108.

³⁴ Ibid, para. 109.

was insufficient to prove their complete dependence on the State.³⁵ Therefore, the Court did not deem the contras a *de facto* organ of the United States.

In the Court's view, since the contras were not *de facto* organs of the US, even a general control of high degree by the State over their activities, without additional evidence, alone was not sufficient to attribute responsibility to the US for alleged violations of human rights and humanitarian law. Such acts could be carried out by members of the contras, without the control and involvement of the State. To hold the US responsible, it was necessary to determine whether it had effective control over military and paramilitary operations at alleged violations.³⁶

Effective control over the action should not be equated with assisting alone. It is necessary to determine the involvement of the State in the planning of a particular operation, in the selection of targets, and giving instructions and in directing actions.³⁷

While in case of a test of effective control over the entity, the State doesn't need to control each action of a private individual to pass the test of effective control over an act, proof of the State's direct involvement in a particular operation in question is required.³⁸ This is the main distinguishing feature of the two tests established by the Court.

2. Test for Effective Control over the Action

The test of effective control over the action is of ancillary nature.³⁹ The Court shall use it only if it finds that the control exercised by the State over the entity is not sufficient to regard the entity as a *de facto* organ of the State. However, there is evidence of partial dependence of a person or group of persons on the State.⁴⁰ Examples of such partial dependencies are financial, logistical, or military assistance, the provision of intellectual resources, the

³⁵ Ibid, para. 110.

³⁶ Ibid, para. 115.

³⁷ Ibid, para. 112.

³⁸ *Talmon, S.*, supra note 22, 7.

³⁹ Ibid, 8

⁴⁰ Genocide Convention case, para. 11; Also see *Tadić* case, Appeal Judgment, para. 22.

selection of a secessionist unit in the government and funding it by the outside State, etc.⁴¹

Unlike complete dependence, in the case of partial dependence, a private person or a group of persons is not considered a *de facto* organ of the State, any action which can be equated with the action of the State. According to the Court, the existence of effective control over a wrongful act and, consequently, the issue of the State's responsibility should be determined by the control exercised by the State over the actions of a private person or a group of persons, on a case-by-case basis.

To prove the existence of effective control over the action, it is necessary to have evidence of a State instructing, giving the order to carry out a wrongful act, which is very difficult to obtain, as it is doubtful that the State will publicly demonstrate such actions.⁴² Consequently, although the burden of proof of test of effective control over the action is less than that of test of effective control over the entity, practically it is very difficult to prove that a particular act of a private person or group of persons was carried out under State control. This is one of the main reasons why the Appeals Chamber of the Tribunal and the European Court do not follow the Court's case-law and have developed their tests that require a lower degree of control.⁴³

Cassese notes that in the Nicaragua case, the Court did not explain the legal basis on which it relied in rendering the decisions, did not refer to the case of the law of the Court or practices of the States, or any authoritative source.⁴⁴ Moreover, in the author's view, the test used in the case of Nicaragua is contrary to general international law.⁴⁵ In his view, this test is too narrow and allows States to avoid responsibility when the State uses a private person or group of persons to commit a wrongful act instead of its official organ.⁴⁶ According to the author, even for the *ultra vires* actions of a person, the State should be held responsible in the same way as in the case of authorized persons who legally act on behalf of the State and, in such event, exceed the scope of the granted authority or agreed task. The rule of State responsibility

⁴¹ Nicaragua case, para. 112; Genocide Convention case, paras. 241, 388, 394.

⁴² *Ortega, E.*, supra note 3, 11.

⁴³ *Talmon, S.*, supra note 22, 9.

⁴⁴ *Cassese, A.*, supra note 9, 653.

⁴⁵ *Ibid*, 665.

⁴⁶ *Ibid*, 654-655.

for *ultra vires* actions is enshrined in Article 7 of the Draft, and although it refers literally to the actions of “organ of a State” or “of a person or entity empowered to exercise elements of the governmental authority”⁴⁷, in *Cassese's* view, the norm lays down general rules. The author believes that, otherwise, in most cases, it would have been impossible to prove the fact of the State giving specific instruction to a private person.⁴⁸

The author gives the activities of terrorist groups as an example and believes that using the test of effective control over the action, it cannot be proven that certain terrorist groups acted under the instructions of the State, or under its direction or control, in carrying out a specific terrorist act. Consequently, a terrorist act committed by a private person cannot be considered to be managed by the State and the responsibility will not be attributed to the State.⁴⁹

Therefore, in *Cassese's* opinion, the US should still have been held responsible for the killings, rapes, and tortures committed by the contras. However, it was unlikely that the US would have been instructed to carry out these acts. According to the author, it was sufficient for the imposing responsibility on the US to establish that the contras were acting under US patronage and with its assistance.⁵⁰

In contrast to the test of effective control over action, the test of overall control used in *Tadić* is sufficient to establish that a particular, for example, terrorist group, not only financially and militarily, has been supported by the State, but that the State overall organizes and coordinates its activities (Does not necessarily mean the involvement of the State in the implementation of each terrorist operation).⁵¹

⁴⁷ “[A] person or entity empowered to exercise elements of the governmental authority”.

⁴⁸ For a different opinion, see “The only purely legal difference is that the rule on the attribution of *ultra vires* acts in Article 7 of Draft, by its own terms applies only to a state’s organs or persons empowered by it to exercise elements of governmental authority. That rule conceptually cannot and does not apply to the attribution of acts by non-state organs under Articles 8-11 of Draft, which are not based solely on the identity of the actor but require positive proof of state control, instructions or adoption of the specific act that is being attributed”. *Milanović, M.*, supra note 24, 316.

⁴⁹ *Cassese, A.*, supra note 9, 666.

⁵⁰ *Ibid*, 654-655.

⁵¹ *Ibid*, 666.

III. *Tadić* Case

While the first instance of the Tribunal probably used the test of effective control over the actions established by the Court in the Nicaragua case, believing that the actions of the army Republika Srpska⁵² could not be imputed to the former Republic of Yugoslavia ("FRY"), the Appeals Chamber of the Tribunal came to the opposite conclusion.⁵³ It noted that to impute the armed forces' actions to another State, it was necessary to establish the degree of "direction or control" of another State over the armed forces.⁵⁴ The necessary criteria could be found in general international law, which determined when a private person could be considered a *de facto* State organ.⁵⁵

The Appeals Chamber of Tribunal noted that "in international law, the issue of the attribution of acts of private individuals to the State was not based on firm and uniform criteria."⁵⁶ It cited Article 8 of the Draft as an example, arguing that its essence was to prevent the State from avoiding responsibility for a wrongful act committed by a private person - the State has no right to act through a *de facto* private person and then distance itself from his/her actions.⁵⁷ According to the Appeals Chamber of Tribunal, the law of State responsibility is based on the realistic notion of accountability, it rejects legal formalities and ensures that a State delegating certain functions to a private person or group of persons must be held responsible for their actions, even if they disobey State's instructions.⁵⁸

In the Appeals Chamber of Tribunal's view, the issue of attributing responsibility to the State depends on the control exercised by the State over the entity committing the action. To do this, it is not necessary to prove the existence of a high degree of control, rather it is different in each case.⁵⁹

⁵² For additional information see, *Tadić* case, Opinion and Judgment, para. 78.

⁵³ *Talmon, S.*, supra note 22, 10.

⁵⁴ *Tadić* case, Appeal Judgment, para. 97.

⁵⁵ *Ibid*, para. 98.

⁵⁶ *Ibid*, para. 117.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*, para. 120.

⁵⁹ *Ibid*, para. 117.

After analyzing the case-law of the International Court and practices of the States, the Appeals Chamber of Tribunal distinguished two situations: on the one hand, the actions of a private person and an unorganized group, and on the other hand, the actions of an organized group. In these two different cases, different levels of control are required to impose responsibility on the State:

- 1) The actions of a private person or an unorganized group shall be imputed to the State only if that person acts on basis of the specific instructions of the State, or the State subsequently publicly supports and confirms the action.⁶⁰ This is similar to the test of effective control over the action established by the Court in a Nicaragua case. According to the Appeals Chamber, the test is based on the practice of States and it is used only to assess the actions of separate private persons.⁶¹ However, according to the position of the Appeals Chamber, the State must be imposed the responsibility even when the State gives this person a legal instruction, but s/he acts *ultra vires* and violates the norms of international law.⁶²
- 2) In the case of an organized and hierarchically structured group, it is sufficient to establish the State's overall control over the group - giving specific instructions for each operation separately. Consequently, neither confirmation of these facts is required to attribute that group's wrongful act to the State.⁶³ Such overall control is manifested not only in equipping, financing, and training of the group, but also in coordination of the activities, or general planning.⁶⁴ The overall control test is considered to have been met even when the group has the opportunity to make an autonomous decision when choosing its method of action, or tactics; The main thing is that it, as a whole, follows the general strategy developed by the State.⁶⁵

For the responsibility of the State, such differentiation of persons is also agreed on in the literature, for example, *Cassese* believes that when a private

⁶⁰ Ibid, para.118.

⁶¹ For case law, see, *ibid*, para. 132-136, and appropriate footnotes (159 – 167).

⁶² Ibid, para. 119.

⁶³ Ibid, paras. 120-122.

⁶⁴ Ibid, paras. 131, 132, 137, 138, 145.

⁶⁵ Ibid, para. 47.

person or group of persons that are citizens of a particular State, neither are financed nor systematically carry out its tasks, commit an internationally wrongful act and harm another State, imposition of responsibility on the State will be easy by claiming that it acted on behalf of the State. Accordingly, in such an event, a high standard is required and must be proved that the State has given a specific wrongful instruction or order. The case is different regarding organized groups, especially military and paramilitary units. Suppose the State financially, logistically, and organizationally supports such a group and coordinates its actions or participates in developing its plans. In that case, these mean a close connection between the State and this group. Systematic and large-scale assistance logically implies that the State influences the group's activities, the formation, and the organization of its plans. Accordingly, when this group commits a wrongful act, the State must assume responsibility, even if no specific wrongful act has been committed by its order, instruction, or organization.⁶⁶

The Appeals Chamber of Tribunal discussed the test of effective control over the action established by the Court in the Nicaragua case and did not consider it credible on two grounds: The Appeals Chamber held that it did not comply with the “logic of the whole system of international law on State responsibility”⁶⁷ and, besides, it contradicted the practices of the courts and the states.⁶⁸ According to the Tribunal, under case law, the imposition of responsibility on the State has taken place under conditions of lower control than it has been in the case of Nicaragua.⁶⁹

Based on the evidence presented, it was considered that since the armed forces of Bosnian Serbs formed an organized group, the actions of its members should be attributed to the FRY because these forces were, in general, under the general control of the respondent State. As noted above, in the Appeals Chamber of Tribunal's opinion, the test of effective control

⁶⁶ *Cassese, A.*, supra note 9, 659-661.

⁶⁷ “A first ground, on which the Nicaragua test as such may be held to be unconvincing, is based on the very logic of the entire system of international law on State responsibility”, *Tadić* case, Appeal Judgment, para. 116.

⁶⁸ *Ibid*, para. 127.

⁶⁹ *Ibid*, para. 124.

over the action was acceptable in the case of private persons but not organized groups. Accordingly, it set its test of overall control.⁷⁰

The Judgment of the Appeals Chamber of Tribunal has been criticized in many ways in literature and subsequent Court practice. Among them, one opinion concerns the scope of the Tribunal's jurisdiction. The Tribunal's jurisdiction was limited to the issue of liability of private individuals for serious violations of international humanitarian law⁷¹. As *Cassese* argues, in *Tadić*, instead of discussing the State's responsibility, the Tribunal should only have decided, under Article 2 of the Statute of the Tribunal⁷², whether *Duško Tadić* must be held criminally liable for gross violation of the Fourth⁷³ Geneva Convention.⁷⁴

Interesting in this regard is the prosecution's position, which did not question the correctness of the test of effective control over the action used by the Court in the case of Nicaragua. The party only sought to prove that citing this case was incorrect because of the distinctiveness between the issues before the Court and the tribunal: in the view of the prosecution, the test of Nicaragua was valid in terms of State responsibility, albeit irrelevant - for serious crimes when reviewing individual criminal liability.⁷⁵

The Appeals Chamber of Tribunal did not share this view. According to the Appeals Chamber, the cases of Nicaragua and *Tadić* were indeed different: in one case, it was necessary to determine whether the State could be held responsible for the actions of private persons because they acted as *de facto* organs of the State; in the second case – whether it was possible to impose private individual criminal liability on the person for violation of international humanitarian law.⁷⁶ However, in the opinion of the Appeals Chamber, the difference in these matters was not significant; In both cases, it was necessary only to determine, under the preconditions set by

⁷⁰ Ibid, paras. 120, 131, 144.

⁷¹ Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on May 17 2002), May 25 1993, article 1.

⁷² Ibid.

⁷³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12 1949, 75 UNTS 287.

⁷⁴ *Cassese, A.*, supra note 9, 655.

⁷⁵ *Tadić* case, Appeal Judgment, para. 69, 71, 89.

⁷⁶ Ibid, para. 103.

international law, when a private person could be considered to have acted as a *de facto* organ of the State; These preconditions were the same in both cases.⁷⁷ Accordingly, the Appeals Chamber of the Tribunal drew a contrast between its test of overall control and test of effective control over the action established by the Court in the Nicaragua case, however, it erred in evaluating that test.

The Appeals Chamber of the Tribunal has deemed it necessary to equate with a State organ for the State to be attributed responsibility for the acts of a private person or a group of persons.⁷⁸ This view is debatable, as the responsibility may be imposed on the State not only when a private person is deemed to be its *de facto* organ, but also in other cases where the State exercises control over or instructs a private person, and in some cases even when it fails to ensure prevention of wrongful actions of a private person.⁷⁹ Accordingly, the Appeals Chamber of Tribunal erred in considering the private persons and groups of persons specified in Article 8 of the Draft as *de facto* organs of the State. Article 4 of the Draft applies to the activities of the latter.⁸⁰

Since the Tribunal's Appeals Chamber did not distinguish these issues, it remained unclear to the chamber whether the test of effective control over the action proposed by the Court as an alternative to the test of effective control over the entity⁸¹ or it clarified the requirements of that test. Appeals Chamber of the Tribunal held that the latter understanding was correct.⁸²

In fact, in the case of Nicaragua, the Court established two different tests, the precondition of one of which is to deem a private person or group of persons as a *de facto* organ of the State, and in the case of another one - the State may be held responsible for the actions of such a private person or group of persons that is neither *de jure* nor *de facto* organ. This reasoning has been shared again by the Court in the case of the Genocide Convention, which explained that equating a private person with a State organ, based on a test of effective control over the entity, is a completely different matter than

⁷⁷ Ibid, para. 104.

⁷⁸ Ibid, para. 114.

⁷⁹ *Ortega, E.*, supra note 3, 6.

⁸⁰ Draft 49, para. 4.

⁸¹ "Test of dependency and control", as the Tribunal's Appeals Chamber calls it.

⁸² *Tadić* case, Appeal Judgment, para. 112.

imputing responsibility to the State for the action of a non-State organ, based on effective control over the act.⁸³

The Court did not establish the requirement of a specific instruction in order private person or group of persons to be equated with a State organ. The existence of such instruction, or order, was required under the test of effective control over the action, to attribute a particular action of a private person or group of persons to a State after that person had not been considered as a *de facto* organ because the requirements of the test of effective control could not be met. Therefore, the test of overall control established by the Appeals Chamber of Tribunal could not replace the test of effective control over the action but might be considered an alternative to the test of effective control over the entity.⁸⁴

However, the Appeals Chamber of Tribunal's decision lists many cases that, in the Appeals Chamber's view, prove that, for private individual action to be attributed to the State, it is not necessary to prove the fact that the State issued a specific unlawful order. However, in addition to the fact that the Appeals Chamber of Tribunal erred in separating the scope of the application of the two tests established by the Court, it relied on irrelevant case law to substantiate its position. In most of the cases cited in the decision of the Appeals Chamber, the basis for the responsibility of the State was not the degree of control exercised by the State over specific actions of private persons but consideration of them as a *de facto* organ, as it happened in the *Stephens* case.⁸⁵ In the Tehran case⁸⁶, Iran was imposed responsibility not due to imputing the actions of private individuals to the State, but for failing to fulfill its duty to prevent an attack, and then for publicly endorsing and *ex post facto* approving the action. Accordingly, the cases cited in the Judgment of the Appeals Chamber are not useful to preclude the validity of the tests established in the Nicaragua case, as *Ortega* points out in her paper.⁸⁷

⁸³ Genocide Convention case, 397.

⁸⁴ *Ortega, E.*, supra note 3, 22-23.

⁸⁵ *Charles S. Stephens and Bowman Stephens (US) v. The United Mexican States*, United Nations Reports of International Arbitral Awards (UNRIAA), Vol. IV, July 15, 1927, 267–268.

⁸⁶ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Order, 12 V 81, I.C.J., May 12, 1981, 3.

⁸⁷ *Ortega, E.*, supra note 3, 24; Also see, *Cassese, A.*, supra note 9, 657-659, The source states that the standard set by the test of overall control is supported in practice and court

IV. Case of Genocide Convention

In the case of the Genocide Convention, based on Bosnia and Herzegovina's lawsuit against the FRY, the Court had to determine whether the defendant State disseminated the vision of a "Greater Serbia" among those under the motive of protection of the Serb population living in Bosnia and Herzegovina. It then helped the people, alleged in committing genocide, to carry out wrongful acts.⁸⁸

Initially, the Court found that Bosnian Serb forces killed more than 7,000 Bosnian Muslim men in July 1995, following the capture of Srebrenica. The *actus reus* and *mens rea* (*dolus specialis*) of the crime provided under Article 2 (a) of the Convention on the Prevention and Punishment of the Crime of Genocide⁸⁹ were also present.⁹⁰

Subsequently, the Court discussed whether the operations carried out in July 1995 in Srebrenica under the directions of members of the Republica Srpska Army were to be attributed to FRY. The Court had to determine whether the State organs of the FRY committed the genocide in Srebrenica or were responsible because the perpetrators acted under its control, instructions, or direction.⁹¹

decisions when it comes to the responsibility of the state for the actions of organized armed groups or military units: there has never been required any proof of the fact of giving directions or instructions for each action for which the state is attributed responsibility. It is required only control of general nature, which includes financing, equipping, etc., and coordination of the group's activities or support in general planning. *Cassese* also notes that in the practice of United Nations bodies, the test of overall control is strongly supported. For a different opinion, see, *Milanović, M.*, State Responsibility for Genocide, *European Journal of International Law* Vol. 17 (3), 2006, 553-604, 585, the source states that the *Tadić* case "is simply wrong in its interpretation of the law of state responsibility. The cases the Appeals Chamber relies on upon do not support overall control test."

⁸⁸ Genocide Convention case, para. 237.

⁸⁹ Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, United Nations, Treaty Series, Vol. 78.

⁹⁰ *Ibid*, para. 278-295.

⁹¹ *Ibid*, para. 384.

Accordingly, the Court initially examined whether the preconditions of Article 4 of the Draft were met (i.e., whether the organs of the respondent State committed the genocide).

The Court found that the perpetrators were not FRY organs as none of them had the status of a State organ under domestic law.⁹² Nevertheless, the Court invoked the Nicaragua case to illustrate that the Court was empowered to equate private persons or groups of persons with State organs, regardless of their status, because any other resolution of the issue would allow States to avoid responsibility when the State used only fictitiously independent private persons or organizations for acting.⁹³

The Court noted the exceptional nature of such equating, applied a test of effective control over the entity established in the Nicaragua case, and, even though the respondent State had provided significant military and financial assistance to Republika Srpska and without this assistance, the opportunities of its leader's person would have been substantially limited,⁹⁴ held that in this particular case, "neither the Republika Srpska nor the V.R.S.⁹⁵ could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy"⁹⁶. The Court ruled that they had some freedom and therefore could not be considered as *de facto* organs of the FRY.

After the Court excluded commission of the genocide by *de jure* or *de facto* organs of the FRY, the Court assessed the extent to which this crime was committed by private persons whose actions would be attributed to the State under Article 8 of the Draft, namely in case of acting under instructions, direction or control of the State.⁹⁷ The Court used a test of effective control over the action established in the Nicaragua case to do this. The Court did not consider it necessary to determine that the perpetrators of the wrongful act were completely dependent on the State; It was sufficient to prove that they, in each particular case, acted under the instructions of the State or its effective control.⁹⁸

⁹² Ibid, para. 386.

⁹³ Ibid, para. 392.

⁹⁴ Ibid, para. 241.

⁹⁵ Army of the Republika Srpska.

⁹⁶ Genocide Convention case, para. 394.

⁹⁷ Ibid, para. 397.

⁹⁸ Ibid, para. 400.

In the Court's view, the test of effective control over the action established in the Nicaragua case was fully in line with the standard set out in Article 8 of the Draft, which was the rule of customary international law.⁹⁹

The Court noted that invoking the same test by the Court and the Tribunal would have been incorrect because of the differences in the issues before them. The Court did not consider it credible to use the overall control test in cases where the person performing the act was not an official state organ.¹⁰⁰ In the Court's view, the test of overall control extremely broadened the scope of the State's responsibility because it went beyond the fundamental principle of responsibility of the State under international law - when a wrongful act is committed by a person or group of persons that are not equated with the State, the State can be imposed international legal responsibility only in the presence of the preconditions outlined in Article 8 of the Draft (i.e., when the perpetrators of an unlawful act acted under the order of the State, under its direction, or when the State exercised effective control over the action during which the wrong was committed).¹⁰¹

Accordingly, the Court considered the responsibility of the State under Article 8 of the Draft,¹⁰² applied the test of effective control over the action established in the Nicaragua case, and concluded that there was no evidence that the genocide was carried out under the effective control, on the instructions or under the direction of the respondent State.¹⁰³

⁹⁹ Ibid, para. 398.

¹⁰⁰ Ibid, para. 404.

¹⁰¹ Ibid, para. 406.

¹⁰² Ibid, para. 407.

¹⁰³ Ibid, para. 413, 415.

V. Loizidou Case

In *Loizidou*, the European Court has established a test of effective control of an area, a less stringent test than other tests.¹⁰⁴ This test extended the scope of responsibility of States. It held that a State could be held responsible for violating rights provided by the Convention in another State's territory if it exercised effective control of that area.¹⁰⁵ As the European Court noted in the Cyprus case¹⁰⁶ citing the *Loizidou* case, when a State exercises overall control outside its territory, its responsibility is not limited to the actions of its soldiers or officials within the area of action, but also extends to the activity of local government that exists with its military or another type of help.¹⁰⁷ Accordingly, in *Loizidou*, there was no need to establish how closely Turkey controlled the actions of the Turkish Republic of Northern Cyprus leaders. The large number of Turkish troops stationed in Northern Cyprus, and thus the exercise of "effective overall control" over the area, was sufficient to attribute the actions of the Turkish Republic of Northern Cyprus to Turkey.¹⁰⁸

Loizidou is cited by the Appeals Chamber of the Tribunal in *Tadić* to affirm the validity of the overall control test. However, *Milanović* sees no connection between the two judgments, noting that the European Court's decision defines the scope of the State's jurisdiction and not the issue of imputation responsibility to the State.¹⁰⁹ *Cassese* disagrees with *Milanović* and considers this view unfounded. According to *Cassese*, the European Court had an obligation to determine which State had jurisdiction over the alleged victims to determine which State was responsible for those violations.¹¹⁰

Despite *Cassese's* well-founded argument, citing the Judgment of the European Court in *Tadić* is irrelevant to confirming the validity of the overall control test. According to the European Court, imposition of responsibility on Turkey did not require proof of control over the actions of

¹⁰⁴ *Loizidou v. Turkey*, ECtHR, Preliminary Objections, February 23 1995.

¹⁰⁵ *Ibid*, para. 62.

¹⁰⁶ *Cyprus v. Turkey*, 25781/94, ECtHR, May 10 2001.

¹⁰⁷ *Ibid*, para. 77.

¹⁰⁸ *Ibid*, para. 76. Also see, *Loizidou v. Turkey*, Merits, para. 56.

¹⁰⁹ *Milanović, M.*, supra note 87, 586-587.

¹¹⁰ *Cassese, A.*, supra note 9, 658.

persons who had violated the plaintiffs' rights, but rather the proof of State's control over the area where the internationally wrongful act took place.¹¹¹ In this respect, the test of overall control established by the Chamber of Appeal of the Tribunal and the test of the effective control of the area established by the European Court differ and do not reinforce each other.

VI. Analysis of International Case Law

As *Ortega* pointed out, the tests of effective control over the entity and effective control over the action established by the Court best ensure the responsibility of the State only for the action with which the connection of the State is confirmed.¹¹²

The test of effective control over the entity implies the attribution of responsibility to the State based on deeming the person or group of persons committing acts as a *de facto* organ of the State because of the close link between the State and that entity, its complete dependence on the State. In the event of such a relationship being established, there is no need to prove the direct involvement of the State in a specific wrongful act committed by that entity;

The test of effective control over action deals with a different case. It is of a subsidiary nature and is used only when the preconditions for a test of effective control over the entity are not met, i.e. when a private person or group of persons is not equated with a State organ. Instead, the State will be held responsible under Article 8 of the Draft, by the special rule in case of establishing a close link between the State and a specific wrongful act committed by a private individual, namely, only if the State has instructed, directed, or controlled the action.

As for the position of the Appeals Chamber of the Tribunal, it errs in arguing that responsibility for the actions of a private individual in a State can only be imputed if that private individual or group of persons is considered as a *de facto* organ of the State. Article 8 of the Draft deals with the case where the State is responsible for the actions of the private individual who is neither a *de jure* nor a *de facto* organ of the State. Accordingly, the Appeals Chamber

¹¹¹ *Loizidou v. Turkey*, Preliminary Objections, para. 56.

¹¹² *Ortega, E.*, supra note 3, 1.

of the Tribunal incorrectly compares the tests of effective control over the action established by the court and the overall control test established by the Chamber itself.

Unlike the test of effective control over the action, the overall control test refers not to control of the State over the action but to control over the entity.¹¹³ It is an alternative to the test of effective control over the entity established by the Court and not to the test of effective control over the action, as the Appeals Chamber of the Tribunal itself considers.

As noted, the Appeals Chamber of the Tribunal erred in finding that, based on a test of effective control over the action, it was necessary to deem a private person or group of persons as a *de facto* organ of the State to attribute responsibility to the State. The test of effective control over the action is used at a time when the connection of the entity perpetrating the action with the State is not sufficient to equate it with the State organ. Accordingly, criticism of the test of effective control over the action by the Appeals Chamber of the Tribunal, that it imposes unreasonably high requirements for attributing act of *de facto* State organ to the State, is unfounded.

Given that the overall control test is intended to replace the test of effective control over the entity, these two tests must be compared. The test of effective control over the entity and overall control tests are used to deem a person or group of persons as a *de facto* organ of the State and not attribute a specific action of a private person or group of persons to the State. As for the substantive part, by the test of effective control over the entity, to equate it with the organ of the State, the complete dependence of the entity on the State must be established; The degree of control required by the overall control test is too soft to deem an individual or a group of persons as a *de facto* state organ. As *Ortega* rightly pointed out, the overall control test is more ambitious because it considered the proof of a “partial dependence” of a private person or group of persons on the State to be sufficient to equate it with a State organ and to apply Article 4 of the Draft.¹¹⁴

Despite making inaccuracy by the Tribunal in its deliberations, it is an interesting division of persons into two categories to attribute responsibility

¹¹³ *Milanović, M.*, supra note 24, 13.

¹¹⁴ *Ortega, E.*, supra note 3, 22-23.

to the State, namely, on the one hand, private individuals and unorganized groups, and, on the other hand, organized, structured groups. To attribute the group's actions to the State, it is necessary to prove not to control over a specific wrongful act by the State but an overall involvement in the group's activities – “partial dependence”. The Appeals Chamber of the Tribunal considers that different approaches are needed to these two categories: higher standards apply to private individuals and unorganized groups, and it is needed to prove State control over the specific wrongdoing of those individuals (that is similar to the test of effective control over the action used by a Court), whereas, in the case of organized groups, the Appeals Chamber of the Tribunal found it appropriate to use the overall control test.

As for the test of effective control of the area established by the European Court, it is necessary to equate a private individual or a group of persons with a State organ to impose responsibility on the State for their acts. Consequently, as *Talmon* points out, the test of effective control of the area replaces the test of effective control over the entity established by the Court but not the test of effective control over the action.¹¹⁵ As noted, to hold the State responsible, the test established by the European Court does not consider it necessary to deem a private individual as a *de facto* organ of the State or prove State control over a specific action taken by it. Its key point is the effective control exercised by the State over the area where the wrongful act was carried out, which unreasonably extends the scope of the responsibility of the State. Based on a test of effective control of the area, the State may be held responsible for an act with which it has nothing to do except that it was carried out in an area controlled by the State.

VII. Conclusion

The European Court of Justice has developed its test of effective control over the area, thereby significantly lowering the requirements of Standard to attribute responsibility to State. It does not consider it necessary to prove the existence of a direction or give instructions by the State regarding a particular wrongful act of a private person, but to only prove the control of the area where the wrongful act was committed. Control over a particular area does not mean that the State has any influence on the person's activities perpetrating the action. Consequently, although the test of effective control

¹¹⁵ *Talmon, S.*, *supra* note 22, 15.

of the area precludes the opportunity for the State to avoid responsibility when using a private person or group of persons only as a tool to perform an illegal task, it does not provide the requirement of proving a close link between the State and the perpetrator. This is contrary to the rule of responsibility of the State only for its actions.¹¹⁶

Based on the test of effective control over the entity, the person committing the wrongful act is considered a *de facto* organ of the State. This is an exceptional case and the standard is correspondingly high - proof of the complete dependence of this entity on the State.

When the preconditions for considering a person as a *de facto* State organ are not met, the test of effective control over the action ensures a close link between the State and the entity perpetrating the act necessary to impose responsibility on the State. Given the significance of the consequences of such attribution, control of the State over each wrongful act must be proved separately. On the one hand, it is a quite strict test, however, on the other hand, it neither leaves victims of human rights or international humanitarian law violations without legal protection nor does it unreasonably broadens the scope of State responsibility.¹¹⁷

The test of overall control is less demanding. It is considered sufficient for the responsibility of the State to prove the “partial dependence” of the entity perpetrating the act on the State. While this low standard is used to impute the activities of a private individual or an unorganized group to the State, the overall control test may be used to impose responsibility on the State for the activities of an organized group. This is the case when an organized group is not so dependent on the State to be considered as its *de facto* organ. Still, the State assists it, for example, financially, logistically, with intellectual resources, and is overall involved in planning and coordinating its activities. Accordingly, based on this relationship, it is possible to impose responsibility on the State for a wrongful act committed by an organized group without proving the State's direct connection to a particular wrongful act.

Like the test of effective control over the entity, the overall control test determines the degree of State control over an entity. In contrast, the test of

¹¹⁶ *Ortega, E.*, supra note 3, 35.

¹¹⁷ *Ibid*, 38.

effective control over the action is used to attribute the responsibility based on the State's direct involvement in a particular wrongful act. Accordingly, the overall control test is an alternative to the test of effective control over the entity, except that in the first case, the “partial” dependence of the entity on the State, and in the second case, the “complete” dependence must be determined. Despite the seemingly interchangeable nature of these tests, it is not necessary to choose between them. In the case of a private individual and an unorganized group, it is appropriate to use the stricter test of effective control over the entity. In the case of an organized group, it is sufficient to meet the requirements of the established standard by an overall control test to impose responsibility on the State.

Finally, it is inappropriate to use the test of effective control of the area established by the European Court to attribute an internationally wrongful act to the State; As for the tests of effective control over the entity, effective control over the action, and overall control used by the Tribunal, all three of them have their place in the imposition of international legal responsibility on the State: the test of effective control over the entity is relevant to consider as the *de facto* State organ; If there is insufficient evidence to this effect, depending on whether the perpetrator is a private individual or an unorganized group or an organized group, tests of effective control over the action or of overall control should be used, respectively, to attribute the actions of those persons to the State.