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# Overall Control

The Case against Dusko Tadic and the Concept  
of Control in  
the ILC-Articles on State Responsibility

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# Summary

In this text the author attempts to extract the criteria for establishing “overall control” as described by the Appeals Chamber of the *International Criminal Tribunal for the Former Yugoslavia* in the case against *Dusko Tadic*. This test was formulated by the ICTY Appeals Chamber in an effort to qualify the relationship between the Federal Republic of Yugoslavia and the army of the Serbian Republic in Bosnia. The legal question was whether this armed force could in fact be linked to the Federal Republic of Yugoslavia due to the high level of control the latter exercised over the group, thus making the conflict international and granting the civilians under its control the status as “Protected Persons” in the meaning of *Geneva Convention IV*, Article 3.

The Appeals Chamber argued that the rules of attribution in International Law on State Responsibility must by necessity require the same standard of relationship for attribution of the acts of the armed force to the state, as International Humanitarian Law requires for finding that the participation of that force constitutes foreign involvement in an internal conflict. It thus sought guidance in the rules of attribution from International Law on State Responsibility and the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* of the *International Court of Justice*. Rather than accepting the test devised in *Nicaragua*, often referred to as the “effective control” test, the Appeals Chamber found that it was not suitable for acts of “organized groups”, where instead international law dictated the standard of “overall control”.

The author has examined all the criteria for establishing this standard of control and how it can be used to solve problems of control in International Law on State Responsibility. First, the criteria for concluding what qualifies a group as “organized” and which groups can come into question for use of the standard is investigated. The author examines the cases provided by the Appeals Chamber as illustrations of the use of the standard in international law, to extract the limits of these criteria. Second, the author evaluates the importance of support given to the group in the form of arms, training, funding and intelligence for establishing a potential to exercise control. Having done this the author continues to the level of direct control, exercised by the state over the group, and the standard required to qualify it as “overall control”. Finally, the author uses the conclusions drawn to formulate a suggestion of how to phrase the “overall control” test for use in International Law on State Responsibility.

# Abbreviations

Appeals Chamber	The ICTY Appeals Chamber in the Tadic Trial
ECHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, <sup>1</sup> adopted by the ILC at its fifty-third session (2001) <sup>2</sup>
ILC Draft Articles	Earlier versions of the ILC articles
JNA	Army of Yugoslavia
Tadic	Prosecutor v. Dusko Tadic from the ICTY. In footnotes this refers to the ICTY Appeals Chamber's Judgement of 15 July 1999 <sup>3</sup>
TRNC	Turkish Republic of Northern Cyprus
Trial Chamber	The ICTY Trial Chamber in the Tadic Trial. In footnotes this refers to the Trial Chamber Opinion and Judgment of 7 May 1997 <sup>4</sup>
UN	United Nations
UNSC	United Nations Security Council
VJ	Army of FRY
VRS	The Army of the Bosnian-Serb Republic

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<sup>1</sup> Report of the International Law Commission on the Work of its Fifty Third Session, UN Doc. A/56/10, Ch. IV

<sup>2</sup> The author use the term "Articles" as opposed to "Draft Articles" as they were finalized and adopted in August 2001. This practice is also used by other authors, see "*The Continuing Debate on a UN Convention on State Responsibility*", James Crawford and Simon Olleson in *International Comparative Law Quarterly* Vol. 54 (October 2005), pp. 959-972

<sup>3</sup> "*Prosecutor v. Dusko Tadic (a.k.a "Dule")*", International Criminal Tribunal for the Former Yugoslavia", Case No. IT-94-1, Appeals Chamber Judgment of 15 July 1999 at <http://www.un.org/icty/tadic/appeal/judgement/index.htm> (visited on 080111)

<sup>4</sup> "*Prosecutor v. Dusko Tadic (a.k.a "Dule")*", International Criminal Tribunal for the Former Yugoslavia", Case No. IT-94-1, Trial Chamber Opinion and Judgment of 7 May 1997 at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> (visited on 080111)

# 1 Introduction

The ambition of this text is to examine the potential use of the “overall control” standard in international law on state responsibility. The test was devised to address the question of whether certain persons should be granted the status of “protected persons” in the meaning of international humanitarian law as applied by the International Criminal Tribunal for the former Yugoslavia (ICTY). The question was one of establishing whether these persons, who had been subject to crimes at the hands of the accused, Dusko Tadic,<sup>5</sup> were living on territory occupied by a party to the conflict of which they were not nationals. In fact they were residing in an occupied territory but the occupying force officially belonged to a non-state entity – the Bosnian-Serb Republic, or Republika Srpska. This entity had close ties to the FRY and the occupying force consisted mainly of units from the former Yugoslavian national army, an army de facto controlled by Serbia.

The ICTY thus had to solve the question of whether the occupation was in fact performed by the FRY. A method for establishing this link was found in the “control” discussions of the ICJ in Nicaragua<sup>6</sup> and the ILC draft articles on State Responsibility. It was assumed that the criteria for attributing acts of non-state entities to states were by logical necessity the same as the ones for when a state could be held to perform an occupation through non-state entities. The Trial Chamber thus decided that the link required between the army of the Republika Srpska, the VRS, and the FRY, to attribute the occupation was one of “control”, which it found was not fulfilled. The Appeals Chamber upheld this requirement, but with certain modifications of the control standard set in Nicaragua.

The “overall control” standard, as the Appeals Chamber’s standard has been labelled, was the result of examining and applying sources of international customary law of state responsibility. The Appeals Chamber thus accepted the contention that the rules for attribution are the same in international law on state responsibility and humanitarian law. It came to the conclusion, true or false, that the “overall control” standard existed in customary international law, alongside the “effective control” standard established in Nicaragua, and the Appeals Chamber consequently did not consider itself inventing a new standard.

Regardless of whether the “overall control” standard did exist in international customary law on state responsibility at the time, it can be argued to exist in contemporary international law and as such deserves to be examined. The author will attempt to isolate certain features of the standard

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<sup>5</sup> “*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*” (Nicaragua v. United States), International Court of Justice, Judgment of 27 June 1986 in *ICJ Reports 1986*, pp. 14-150

<sup>6</sup> “*Prosecutor v. Dusko Tadic (a.k.a “Dule”)*”, International Criminal Tribunal for the Former Yugoslavia”, Case No. IT-94-1

to form a series of criteria detailing a test for determining when “overall control” can be held to be exercised, and what legal consequences such a finding will lead to. In doing this the author will base this reasoning entirely in the field of customary international law on state responsibility and the Appeals Chamber’s judgment. The author will separately address the problems arising from the use of the Tadic case, for determining international law on state responsibility, as well as the inconsistencies of the actual process of reasoning.

It is the author’s ambition, however, that the test that can be extracted from the Appeals Chamber’s judgment will be coherent with the structure and system of international law on state responsibility as well as suitable for practical use. To be useful the test must be generally applicable, consequent and give the desired result if applied correctly. This requires some interpretation by the author since the standard suggested in Tadic is not very detailed. At certain points the author will even have to leave the text of the Appeals Chamber altogether to address questions not raised by the chamber. For the sake of clarity, the author will make it clear when such an interpretation is made as opposed to simply restating facts from the judgment.

## **1.1 Methodology**

The main source for this text will be the judgment in the Tadic case, in particular the Appeals Chamber’s reasoning. The author has also made much use of the work of the ILC, especially its articles on state responsibility. This is because the articles relevant to the discussion are largely held to represent international customary law. Although the articles cannot be used as “law” they do serve the purpose of distinguishing various situations and enables easy references to these. It is in many ways simpler to describe a situation as an “Article 8”-situation than attempting to prove a corresponding rule of customary law. The author finds this compromise sufficient for the scope of this text.

## **1.2 Scholarly Positions**

Although the author has focused on the Tadic case as a source of information for this research, this text would not be very valuable as an academic study if the doctrinal and scholar position were not presented and commented. It has been very difficult to find any discussion on the “overall control” test in “the teachings of the most highly qualified publicists of various nations”, to borrow an expression from the ICJ.<sup>7</sup>

The various textbooks on the subject of public international law are virtually silent on the matter. Neither the problem of different standards of control presented by Tadic and Nicaragua nor any discussion on standards of

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<sup>7</sup> Statute of the International Court of Justice (ICJ) art. 38.

control could be found in Akehurst.<sup>8</sup> Shaw<sup>9</sup> observes the different standards of control in Nicaragua and Tadic and finds that the Appeals Chamber “adopted a more flexible approach”.<sup>10</sup> In a discussion he also mentions the ICJ’s *Namibia* case<sup>11</sup> as well as the case of *Loizidou*<sup>12</sup> of the European Court of Human Rights (ECHR). He does not, however, engage in any far reaching analysis of the cases, nor does he take a stand on which control standard is preferable. In Wallace<sup>13</sup> the problem of the different standards is mentioned but in conjunction with ILC article 11. Brownlie<sup>14</sup> appears to approve of the ICTY position explaining that the ICTY “carefully distinguished the Nicaragua case on the facts”. Higgins<sup>15</sup> acknowledges the difference between the Tadic- and Nicaragua tests, but does not take any position on their use or validity. In the *Encyclopaedia of Public International Law*<sup>16</sup> Sperduti discusses the notion of control in a general manner but does not give any conclusions on the Tadic and Nicaragua cases.

## 1.2.1 Chinkin

Having found that the problem presented does not get sufficiently addressed in these works the author extended the search to articles in more specialized media. In the field of human rights and feminist theory, Chinkin<sup>17</sup> has presented the problem with regards to individuals and NGO’s acting on the international arena of human rights. The questions of the UK to the ILC on this subject is commented<sup>18</sup> as well as the tendency of international NGO’s to act with the consent, but without control, of the state on said arena.<sup>19</sup> She does not however suggest a state responsibility mechanism to deal with issues arising from this.

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<sup>8</sup> Akehurst’s *Modern Introduction to International Law*, 7<sup>th</sup> Ed (1997), Peter Malanczuk and Michael Barton Akehurst, ISBN 0-415-16553-9

<sup>9</sup> *International law*, Malcolm N. Shaw, 5<sup>th</sup> Ed (2003), ISBN 978-0-521-82473-6, pp.704-705

<sup>10</sup> Shaw p. 705.

<sup>11</sup> “*Legal Consequences of States for the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*”, International Court of Justice, Advisory Opinion of 21 June 1971 in *ICJ Reports 1971*, p. 17.

<sup>12</sup> “*Loizidou v. Turkey (Merits)*”, European Court of Human Rights, Decision of 18 December 1996, Case No. 40/1993/435/514 in *Reports of Judgments and Decisions 1998*

<sup>13</sup> *International law*, 5<sup>th</sup> Ed (2005), Rebecca M. M. Wallace, ISBN 042-1884 10X, p. 191 (fn 17)

<sup>14</sup> “*State Responsibility and the ICJ*”, Ian Brownlie in *Issues of State Responsibility before international judicial institutions*, Malgosia Fitzmaurice (Ed), 2004, ISBN 1-84113-389-2, p. 17

<sup>15</sup> “*Issues of state responsibility before the International Court of Justice*”, Rosalyn Higgins in *Issues of State Responsibility before international judicial institutions*, Malgosia Fitzmaurice (Ed), 2004, ISBN 1-84113-389-2, p. 2

<sup>16</sup> “*Responsibility of state for private persons*”, Giuseppe Sperduti in *Encyclopaedia of Public International Law* (Vol. IV), Rudolf Bernhardt et al., 2000, ISBN 04444-86247-1, pp. 217-219

<sup>17</sup> “*A Critique of the Public/Private Dimension*”, Christine Chinkin, in *State responsibility in international law*, René Provost (ed), 2002, ISBN 0-7546-2056-6, pp. 469-477

<sup>18</sup> *ibid*, p. 474 (footnote 27)

<sup>19</sup> *ibid*, p. 476



## 1.2.2 Koitos

Koitos<sup>20</sup> suggests the Tadic approach in human rights cases involving private security guards. His view on the nature of the test is quite “traditionalist” in the meaning that the main difference between Tadic and Nicaragua is that the earlier provides lower and more flexible threshold of control to raise state responsibility.<sup>21</sup> The reliance on the *Loizidou* case by the Appeals Chamber in Tadic, in his view, further supports the value of the test in issues of state responsibility arising out of human rights violations. He finds that Canadian case law also follow this test.<sup>22</sup>

In the author’s opinion Koitos makes a good case for use of the Tadic case in situations of human rights violations, although the author does not share his definition of said test. The most interesting part of this text is, however, the situations and practices Koitos target for the test. As the title implies the issue at hand is that of private security guards and the human rights violations that they could perform. Koitos even questions whether the use of private security guards could be a human rights violation in itself, an issue that the author will not address in this paper.

## 1.2.3 van der Hole

Leo van der Hole addresses the issue in some depth.<sup>23</sup> Instead of a state responsibility approach he chooses to look at the concept of “overall control” from a humanitarian law angle, but his conclusions are nevertheless interesting. The starting point for van der Hole is that the popularly perceived conflict between Tadic and Nicaragua is exaggerated or even non-existent. They are both different facets of the “*direction or control*”-test found in *Nicaragua*.<sup>24</sup> He concludes that the Appeals Chamber in Tadic and the ICJ were merely weighing factors, something that has to be done in every first instance court when determining whether a conflict is international or not. van der Hole thus accepts the “overall control” test insofar it can be construed as a weighing of factors. The relevant factors in the “direction or control”-test is presented to be the following:<sup>25</sup>

The first, and most important, one is actual direct interference of the armed forces of the controlling state into the other state to support individuals or military or paramilitary groups. He concludes that this did not occur in Nicaragua but very much so in Tadic. The second factor is that of financial assistance which was at hand in both Nicaragua and Tadic. The third factor

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<sup>20</sup> ““Private” security guards: Privatized force and State responsibility under international human rights law”, Alexis P. Kontos in *Non-State Actors and International Law 4*, 2004, Koninklijke Brill NV (publisher), pp. 199-238

<sup>21</sup> *ibid*, pp. 214-218

<sup>22</sup> *ibid*, p. 220

<sup>23</sup> “*Towards a test of the international character of an armed conflict: Nicaragua and Tadic*”, Leo van der Hole, in *Syracuse Journal of international law and commerce*, Spring 2005 (vol. 32, Issue 2), pp. 269-287

<sup>24</sup> *ibid* p. 279

<sup>25</sup> The factors can be found *ibid* pp. 280-284

is that of military assistance with arms, munitions and intelligence, which likewise existed in both cases. The fourth factor is that of direct supervision. van der Hole points to this as the decisive factor in Nicaragua stating that the lack of direct supervision was what made the ICJ conclude that the USA was not in control of the Contras. In Tadic the supervision by the state was indeed held to be sufficient. The fifth and final factor is that of nationality. van der Hole acknowledges that this factor is not overtly considered by the ICJ and the ICTY but nevertheless considers it to be important. Nationality refers to relations between the group and the state, emphasising that it is not necessarily the formal nationality that is important but rather the factual links. A Bosnian-Serb fighting for greater Serbia would be considered closely aligned with Serbia, which would point in the direction of Serbian control being exercised.

van der Hole proposes that every court of first instance has to do a balanced analysis of all these factors without putting undue emphasis on any single one, in order to determine control. This balanced analysis suppresses the possibility of states evading responsibility simply by emphasizing the ostensible structures and thereby hiding their *de facto* relationship with the group. This approach was used by both courts and their conclusions, however phrased, are not in conflict according to him. Finally van der Hole predicts that these are the factors the ICJ will use in the coming Bosnian genocide case.

In the author's opinion van der Hole makes a good argument. His conclusions are sound and could well be a correct way of summing up the control aspect in ILC article 8. The only problem is that the factors presented are still very general and does not give much added clarity to the enigma of what constitutes "control". In the author's view his factors can prove the point that Nicaragua and Tadic are not in conflict very well, but fails to give a deeper understanding of the actual use of the control criteria.

## 1.2.4 Conor

Reacting to the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,<sup>26</sup> Israeli professor Iris Conor<sup>27</sup> is negative to the ICJ limiting the right to self-defence against attacks stemming from the occupied areas. Instead she supports a large increase in the right to self-defence including application as well towards states that fail to impede terrorist acts if it is within their power to do so.<sup>28</sup> She leans on *Loizidou* in finding that the central criteria for attributing responsibility over territories not formally part of the state, is

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<sup>26</sup> "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", International Court of Justice, Advisory Opinion of 9 July 2004 in *ICJ Reports 2004*, pp. 136-203

<sup>27</sup> "When *Jus ad Bellum* meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories", Iris Conor in the *Leiden Journal of International Law* 19 (2006), pp. 129-149

<sup>28</sup> *Ibid* p. 133

effective territorial control.<sup>29</sup> In comparing different standards of control Conor presents the opinion that Tadic offers a lower or at least different standard of control than Nicaragua.<sup>30</sup> Much like the Appeals Chamber of the ICTY in Tadic, the different standards of control are only used to determine responsibility over territory, and as such she does not go in to very much detail on them.

To elaborate on her point Conor uses a fictive case of terrorists breaking the occupation and thus establishing effective control in certain areas. This makes her take the stand that it would be odd if Israel could use self-defence to defend against a situation it was responsible for. More interesting is a situation where a terrorist attack is directed from the occupied areas at a third state. She rejects Israeli responsibility for such attacks and states that self-defence can only be permitted against the terrorist's bases.

Her conclusion on the matter is that since Israel has effective control over the occupied areas it has an obligation to stop terrorist activities arising out of these. This is no matter of self-defence and should only be governed by the laws of war.<sup>31</sup> Since the war was already started at the time of the occupations UN Charter article 51 does not have to be considered.

In the author's opinion Conor makes a good case for separating the laws for making war from the laws of war. The rules of self defence does not really come into play if the defending state is attacked from within, so to speak. The implications this has for the question presented in this text are less clear. If anything it points in the direction of the Appeals Chamber in the way it solved the problem of territorial control. It does not, however, mean that the chamber's statement can be given more relevance in the field of state responsibility. Control over a piece of territory becomes interesting in cases where states are held to be in violation of passive responsibility, such as the obligation to protect people under its jurisdiction from human rights- or, as in Tadic, humanitarian law abuses. "Standard" state responsibility, on the contrary, seeks to find a relationship between the state and an internationally wrongful act. Applied to the situation presented by Conor the relevant question would rather be which state can be held responsible for the acts of the terrorists based in the occupied territories, in which case a higher requirement must be put on the relationships to the state.

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<sup>29</sup> Ibid p. 141, "*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*", International Court of Justice, Advisory Opinion of 9 July 2004 in *ICJ Reports 2004*, pp. 136-203

<sup>30</sup> Ibid p. 142

<sup>31</sup> Ibid p. 143

## 1.2.5 Villalpando

Villalpando<sup>32</sup> has examined if the rules of state responsibility found in the ILC Articles can be used in the WTO dispute settlement system. Attribution issues in the WTO are solved on a case-by-case basis and often relying on common sense decisions as the system lacks rules thereof. On the subject of Article 8 situations, Villalpando finds that the control standard as used in article 8 originated in Nicaragua,<sup>33</sup> was loosened in Loizidou and finally openly contested in Tadic.<sup>34</sup> He does not subscribe to any opinion on which is the correct standard but does find that the two are different and mutually exclusive.

Villalpando uses the WTO context to construe very interesting situations to test the standards of control necessary for attribution. He concludes that a state forming and owning a company probably does not satisfy the criteria of any standard unless the state had actually used this potential for control to determine the specific actions of that company. He does however find that a use of the "overall control" standard would probably lead to ownership equating control (as companies generally fulfil the group criteria)<sup>35</sup> which he finds "*a very progressive, though probably dangerous, line of reasoning*". He advises that this analogy be made with precaution as it would require extensive interpretation of Tadic (which was made for military groups) and would probably also require that the state uses its ownership in a way similar to how a military commander uses his powers over a group.

Full use of the control standards are complicated by the fact that, in the WTO system, the rules are often of the category "the state shall refrain from restricting trade", meaning that article 8 situations cannot occur. Villalpando suggests that in these cases the acts of individuals or groups shall instead be tried as "catalyst acts", making a comparison with the Teheran Hostages case<sup>36</sup> in which the students' acts made the state breach its passive undertaking to protect the diplomatic and consular staff. The acts of individuals or companies could in this manner provoke and reveal breaches on behalf of the state, but would not amount to direct acts attributed to the state.

The author finds that Villalpando has touched upon a very interesting aspect of the control standards. Clearly, states are today at a much higher rate fulfilling its function through privatized companies rather than the old state agencies. Although it is quite unlikely that internationally wrongful acts will

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<sup>32</sup> "Attribution of Conduct to the State: How the rules of State Responsibility may be applied within the WTO dispute settlement system", Santiago M. Villalpando in *Journal of International Economic Law* (2002), pp. 393-420.

<sup>33</sup> Ibid p. 411.

<sup>34</sup> Ibid p. 412.

<sup>35</sup> See Chapter 2 and subchapters for a full discussion on these criteria.

<sup>36</sup> "Case Concerning United States Diplomatic and Consular Staff in Teheran" (*United States v. Iran*), International Court of Justice, Judgment of 24<sup>th</sup> of May 1980 in *ICJ Reports 1980*, para. 86, p. 40

be performed by postal or railway companies, recent events in Iraq show what problems can arise when a state uses private security forces in a war zone.<sup>37</sup> A compound of the "overall control" standard presented in Tadic and the reasoning of Villalpando could possibly provide a solution of the problems of responsibility of private security firms like American Blackwater Security.

Even though he does not take a direct stand on the strength of the different control standards he does advertise problems that could arise from over-interpretation of Tadic. It seems to the author that Villalpando has seen the potential for Tadic being used to find control in almost any relationship between a state and a group, as well as the problems presented by the very militaristic group criteria. He discusses whether a company could be considered an organized group (which he rightly answers "yes") but would probably encounter difficulties in applying the more specific criteria<sup>38</sup> to such an entity. The author does, however, agree with the conclusion on which types of links would amount to control in a state-corporation relationship and hopes that the discussions in this text will further strengthen Villalpando's conclusions.

## 1.2.6 Wittich

In the context of the developments of the ILC's work on the Articles, the control standard expressed in Tadic has been analyzed by Stephan Wittich.<sup>39</sup> He finds that the standard expressed in Nicaragua was modified by the Appeals Chamber in the ICTY, applying a "*less strict standard*".<sup>40</sup> Wittich contests the explanation given in the Commentary to the Articles, which points out various external reasons for this discrepancy, finding that the control standard used must be identical in all cases. He, very correctly, points out that the determination of the legal standard that has to be fulfilled is a question very distinct from the question of whether this standard has been fulfilled in the actual case. There is thus a conflict between the standard expressed in Nicaragua and the one created by the ICTY in failing the "effective control" test. He also addresses the problem created by the ICTY's mandate and object, but does not present a real conclusion on this.

The author very much agrees with Wittich in his opinion that Tadic and Nicaragua cannot co-exist representing different standards. The two different standards cannot be distinguished on the facts or on the differences of the tribunals that made them, and still be valid tests of control in

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<sup>37</sup> see "*Blackwater incident: What happened?*" at <http://news.bbc.co.uk/2/hi/americas/7033332.stm> last visited 071217. The issue of private companies violating Human Rights is currently under investigation by UN Special Representative John Ruggie.

<sup>38</sup> Chapter 3.3

<sup>39</sup> "*The international Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading*", Stephan Wittich in *Leiden Journal of International Law* Vol. 15 (2002), pp. 891-919

<sup>40</sup> *Ibid* p. 894

international law on state responsibility. If Tadic has to be distinguished on the fact that it only sought to extend the protection of civilians in a war zone it must be dismissed as a test of attribution, as the legal term control has to have the same meaning in all cases. The ILC Commentaries' explanation that different situations demand different standards of control is therefore incorrect. It is only the application of that standard that can consider differences, and only as long as these fit into the logic of the standard.

As it is the author's belief that the "overall control" test has become a valid test for establishing control, it is necessary that a relationship that passes this test would also pass every other valid test of control. This is confirmed by the Appeals Chamber.<sup>41</sup> The only reason for having different tests must be that different situations are more easily described and tested using different criteria. Even if the "overall control" tests are more geared towards certain types of groups and situations, it must be formulated as generally as possible to fulfil the above-mentioned requisite.

## 1.2.7 Rudolf

In an analysis of the Loizidou case in front of the European Court of Human Rights (ECHR) Beate Rudolf also makes an argument on the meaning of control.<sup>42</sup> The Loizidou case is often mentioned in conjunction with Tadic and Nicaragua when discussing control and addresses violations of the human rights of the petitioner by the authorities of the Turkish Republic of Northern Cyprus (TRNC). The question of attribution was whether the violations of the victim's property rights should be attributable to Turkey, a question to which the court answered "yes" due to the state's effective control over the territory of Northern Cyprus.<sup>43</sup>

Rudolf finds it striking that the court did not test whether Turkey was in effective control over the authorities of the TRNC (the agent performing the act). The Court assumed that Turkey was in control simply based on the large number of Turkish troops present on the territory. She questions this line of reasoning finding instead that the court should at least have examined the possibility that the government of the TRNC were sufficiently independent to be held responsible in lieu of Turkey. Naturally this would mean that the court would have to go against the community of states in actually recognizing the TRNC, as well as excluding the application of the European Convention on Human Rights on its territory. The courts taking of an arguably simpler route might well have been a way to avoid this problem, he concludes.

In the author's opinion the criticism of the route taken by the ECHR can very much be applied to the Appeals Chamber's judgement in Tadic. The

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<sup>41</sup> Tadic para. 104

<sup>42</sup> "Loizidou vs. Turkey", Beate Rudolf in *The American Journal of International Law* Vol. 91, N° 3 (July 1997), pp. 532-537

<sup>43</sup> Ibid p. 594

fact that the chamber quotes Loizidou to prove that a test of "overall control" exist in international law further makes Rudolf's opinion worth analyzing. In Tadic the Appeals Chamber seems to motivate the use of a control test to provide use of rules applicable to international armed conflicts on what was claimed to be a civil war in Bosnia, by the large number of former FRY soldiers in the area. The test was to show whether these were actually acting under the control of the FRY thus making the conflict international.

Neither in Loizidou nor in Tadic was there ever a discussion on whether the control extended to the actual internationally wrongful act, something which is integral to the law of state responsibility and also what Rudolf's critique was essentially about. An easy explanation to this can be found in the character of the obligations the two cases addressed. Human Rights obligations always have an element of passive responsibilities, meaning very simplified that the state has a duty to protect the people under its jurisdiction from having their rights violated, if it is within the state's power to do so. Likewise in Tadic the added protection to the victims was dependant on being in an area controlled by a foreign belligerent. No active action needed to be taken by the state in either case. Phrasing Rudolf's critique in the setting of Tadic: Why didn't the Appeals Chamber test whether the relationship between Tadic and the FRY was one of "overall control" which would have made his acts attributable to the FRY? In the author's opinion the answer to this question must be the same as Rudolf herself found in the case of Loizidou: It wouldn't solve the problem! The object in Tadic was not to find state responsibility but to find the conflict international. Tadic being shown to be under the control of the FRY would not achieve that object.

This is indeed one of the main problems in assessing Tadic. The fact that there is no actual act to attribute makes it difficult to analyze many parts of the Appeals Chamber's reasoning in terms of state responsibility. The same goes for Loizidou and the author would advertise caution in over-interpreting this case.

## 1.2.8 Doermann

The problems of attribution is also discussed by Doermann,<sup>44</sup> but from from the refugee law perspective. He does not analyze Tadic or Nicaragua but still settles on a standard on attribution of actions to the state, namely:

“[For acts of] all those [persons] over whom [the state] has authority”<sup>45</sup>

and

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<sup>44</sup> “*Individual and State Responsibility in the Field of Humanitarian Law*”, Knut Doermann in *Refugee Survey Quarterly* Vol. 1, N° 3 (1999), pp. 78-83

<sup>45</sup> *ibid* p. 81

“[For acts of] all people under [the state’s] jurisdiction”<sup>46</sup>

In the author’s opinion this standard goes much too far in attributing responsibility to the state and could possibly be the result of a misunderstanding of the rules of state responsibility. The use of the word “authority” could be a reference to the “overall control” standard expressed in Tadic and could be used to further specify the concept of “control”. The author does not, however, find that the word is much more specific than “control” and therefore will not elaborate on this suggestion in trying to elaborate on the control standard in Tadic.

### 1.3 Analysis of Doctrinal Positions

Studying the literature presented above certain trends can be spotted that need to be addressed. There appears to be a relatively strong consensus that the standards set by Nicaragua and Tadic are different, not only in the situations that they should be applied to but also in the “strictness” of the actual standard, in short that the “sum” of control required by the different tests are different. This is more or less clearly stated but appears to be truer for the authors that address the issue in a more generalized fashion. Another, admittedly rarer opinion, is that Nicaragua and Tadic can regardless of this, both be correct.

In writing this text the author has assumed a fundamentally different, and possibly more legalistic approach. To be a valid rule of international customary law the standard expressed as “control” must by necessity be applied equally to all situations and as such the standards expressed in Nicaragua and Tadic must show the same “sum” of control to both be valid. It has also been assumed that the Tadic standard has been assimilated into customary law, which means that it cannot be interpreted contrary to this law. The same goes for the standard expressed in Nicaragua. This assumption may or may not be correct, but as it is the author’s opinion that the scholar’s role in the development of international law is to fit its rules into a coherent system of law, which in itself hinges on the presumption that the system of law is, or should at least be treated as if it was, perfect.

Another problem not sufficiently treated by the literature presented is found in Tadic’s focus on groups and their relationship to the state. State responsibility can only be discussed in relation to an internationally wrongful act and this does not receive enough attention in the academic doctrine or by the Appeals Chamber. In this text, the test will only be investigated with regards to the actual act, which will highlight certain problems.

Apart from these two positions presented it has been difficult to extract any doctrinal positions from the literature above. Many authors address the issue

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<sup>46</sup> *ibid*



in passing and therefore do not go sufficiently deep to encounter the questions investigated in this text. This fact makes it all the more warranted to undertake the investigation. While it is certainly true that the ICJ in its next case of an Article 8 situation will address both Tadic and Nicaragua and set the matter straight, it may be some time before such a case emerges. Until then, the actual extents of the standards in Nicaragua and Tadic will be an issue in all matters of state responsibility for acts performed by independent agents and as such deserves to be investigated. The fact that this issue remains largely unaddressed in literature is an interesting issue in itself but should not be a reason for avoiding the task. It has, however, presented the author with certain problems.

## 1.4 The Problems Presented by the Lack of Sources

Having shown that very little in the way of actual sources exist the author feels a need to explain certain things: The reader would no doubt have good reasons to question whether the problem addressed in this text actually exists in international law and not merely in the imagination of the author. The fact that it has been largely ignored by more established scholars could indeed point at this. Could it be that the Appeals Chamber's "overall control" test does not in any way influence international law on state responsibility and that is why it is never addressed? The author believes that the mentioning of Tadic and the "overall control" test in the Commentary to ILC Article 8<sup>47</sup> is a clear indication that it does have an influence.<sup>48</sup> The author believes that the lack of sources on the interpretation of control makes Tadic very important when it comes to defining its limits, and as such needs to be studied. This lack of sources has made the work of the author somewhat complicated and possibly difficult to evaluate.

Upon starting this work the author was not aware of this acute lack of literature on the subject and struggles to find a reasonable explanation for it. The conclusions in the Nicaragua case and the concept of "effective control" were widely debated at the time of the delivery of the judgment, but Tadic seems to have passed by quietly. Tadic was the first case in front of the ICTY and had to address the internationalization of the conflict in a way that could be used in all of the subsequent cases, but yet the control reasoning have not given rise to much literature.

The author will not speculate as to the explanation but can only conclude that a proper examination of the actual impact of Tadic on international law on state responsibility would raise a variety of very difficult questions, not addressed in this text. This starts with issues of whether the ICTY actually can address issues of state responsibility in cases of individual

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<sup>47</sup> *Draft articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, adopted by the ILC at its fifty-third session (2001), appears in the *Yearbook of the International Law Commission*, 2001, vol. II, pp 106-107

<sup>48</sup> This issue will be further addressed in Chapter 3.1.3

responsibility<sup>49</sup> and, even worse, the fact that the ICTY in arguing “control”, in *dictum* actually proclaiming the FRY responsible for violations of the prohibition of the use of force and other rules of international law. Another problem arise from its apparent rejection of Nicaragua and the ICJ, whose judgements are not binding upon the court for future judgements *de jure* but has *de facto* been upheld.<sup>50</sup>

For the purpose of this text it will simply have to be sufficient to conclude that a comprehensive analysis of the “overall control” standard as expressed in Tadic has not been performed in the literature encountered by the author. Such an analysis needs to be done by anyone intending to use this standard on an actual case where the rather vague language of the Appeals Chamber is insufficient. It is the endeavour of the author to address this issue and propose a more detailed, and useable, expression of the “overall control” standard.

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<sup>49</sup> The ICTY is an organ of the UNSC and as such cannot have a wider competence than that organ. This would bring into question whether the UNSC could address questions of state responsibility and overlapping competences between it and the ICJ.

<sup>50</sup> ICJ statute art. 59

# 2 The Agent Performing the Act

## 2.1 Formal Criteria

The first part of the overall control test is that of the individual performing the alleged unlawful act. According to the Appeals chamber this individual must be a member of an “organized and hierarchically structured group”<sup>51</sup> for the “overall control” test to be applicable. But what special characteristics and features merit labeling a group as organized and hierarchically structured? The Appeals Chamber gives some explanation to this in its judgment.<sup>52</sup>

Military units or “armed bands of irregulars or rebels”,<sup>53</sup> in the case of civil wars, are given as examples of these kinds of groups, as well as “any other hierarchically organized group”.<sup>54</sup> In the text of the judgments references are made to the *Irregular Auxiliary of the Mexican army*<sup>55</sup>, the *Iranian Revolutionary Guards*<sup>56</sup> and the government of the *Turkish Republic of Northern Cyprus*<sup>57</sup> as organized groups, motivating use of the Overall Control test. Examples of groups that are not sufficiently organized are the students in the hostage taking of the US embassy in Teheran,<sup>58</sup> the armed “revolutionaries” in Iran,<sup>59</sup> the Latin American mercenaries under US employment (UCLA’s) in the insurgency in Nicaragua,<sup>60</sup> and of course, the Nicaraguan *Contrarevolucionarios* (Contras). Before closer examinations of these groups the author will first account the additional information on this matter, given by the Appeals Chamber. In the words of the Chamber:

“[...] an organized group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as outward symbols of authority”<sup>61</sup>

These will be examined as criteria in the following sub-chapters. The author is aware that the naming of the criteria is somewhat inconvenient as they overlap to a large extent. Also, it is not likely that the Appeals Chamber sought to introduce them as different criteria but rather as a way of pointing out the differences of an organized group from an individual or an

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<sup>51</sup> Tadic para. 120

<sup>52</sup> Tadic paras. 120-137

<sup>53</sup> Tadic paras. 120, 146

<sup>54</sup> Tadic para. 146

<sup>55</sup> Tadic para. 125

<sup>56</sup> Tadic paras. 126-127

<sup>57</sup> Tadic para. 128

<sup>58</sup> Tadic para. 133

<sup>59</sup> Tadic para. 135

<sup>60</sup> Tadic para. 134

<sup>61</sup> Tadic para. 120

unorganized group. The use of the word “normally” makes it even harder to draw any definitive conclusion on the exact wording of the rule. The author will, however, for the purpose of analysis, treat these as criteria in order to try to devise a legal test. The criteria used will be structure, chain of command, a set of rules and outward symbols of authority.

### 2.1.1 Structure

The word “structure” must be interpreted as “military structure”, a term used to describe these kinds of groups elsewhere in the judgment.<sup>62</sup> Other than a chain of command this implies that the individual clearly fit into a specific, defined position in the group, as do all other members. This is not likely meant to be interpreted in such a way that only military or paramilitary units can fulfill the criterion. The Chamber itself, makes reference to the government of the Turkish Republic of Northern Cyprus in its chapter on case law;<sup>63</sup> an entity that is not a military unit. Also, the claim of the Chamber that the test is an existing test in customary international law makes it hard to limit to units with a certain label. If only units labeled military or paramilitary were subject to this “extended” rule on state responsibility the labeling would quickly rise to become the main issue, which in effect would bring the question back to square one. In the view of the author, the term “structure” should be read as “a group order that all members of the group fit into and have their place”. This is the kind of order normally found in military or paramilitary groups but other groups, such as private police forces,<sup>64</sup> could fulfill it.

The limit on this criterion can be, if not deduced then at least hinted at by the Chamber’s mentioning of the Teheran hostages case.<sup>65</sup> In the author’s opinion the lack of organization is the main reason why the Chamber found that the relationship between Iran and the Iranian students was not discussed in terms of “overall control”.

In discussing cases the Appeals Chamber sometimes<sup>66</sup> puts the word “armed” in conjunction with “organized”. This raises the question of whether “armed” is also a criterion. The use of this word is especially interesting in describing the *Short* case<sup>67, 68</sup> where the Iranian revolutionaries are by the Appeals Chamber describes as “armed but not comprising an organized group”.<sup>69</sup> This could be taken to imply that the

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<sup>62</sup> Ex. Tadic para. 132

<sup>63</sup> Tadic para. 128

<sup>64</sup> The author is aware that activities of these groups normally to a large extent are covered by ILC article 5, but situations could arise when these groups undergo change of their legal status or are employed in such a way as to raise questions on their status.

<sup>65</sup> Tadic para. 133

<sup>66</sup> In discussing the *Short* and *Teheran Hostages* cases.

<sup>67</sup> *Alfred W. Short v. Islamic Republic of Iran*, Award No. 312-11135-3, 16 *Iran-U.S. Claims Tribunal Reports* 1987, p. 76

<sup>68</sup> Tadic para. 135

<sup>69</sup> Tadic para. 135, sentiment is not expressed in *Short*. For further discussion on the Appeals Chamber’s interpretation of *Short*, see pp. 72-74.

armaments in themselves have some relevance for the designation of the group, otherwise why would they be mentioned? In the author's opinion the question of armaments should not be taken into considerations simply because it tells nothing about the connection between the state and the individual, and the potential for control. It is difficult to understand why the Appeals Chamber choose to explicitly mention whether the groups are armed in the same sentence as the words defining their character, but since it cannot have a bearing on the question of control it must be disregarded as a criterion. However, it is important to note that arms in conjunction with other things can constitute "symbols of authority".

## 2.1.2 Chain of Command

The existence of a command structure is the second criterion mentioned by the chamber. It is of course difficult to draw the line between this and "structure" as one is to some extent a continuation of the other. What the chain of command adds to the structure is hierarchy. A group must have defined leaders or commanders that are routinely obeyed to fulfill this criterion. These words by the Appeals Chamber serve as a good explanation:

"Normally a member of the group [...] is subject to the authority of the head of the group"<sup>70</sup>

Thus, an elaborate chain of command with different levels and responsibilities is not required. What is required, however, is that the members of the group do not act mainly on their own whims but upon instructions by their superiors. Although this is not mentioned by the chamber it is unlikely that these instructions have to be elaborate, specific or in a certain format as long as they show that the superior's wishes are routinely being carried out within the group. This part is naturally very important as the rationale behind the different, arguably lower, requirement for direct control in the Overall Control test, is that the general control exercised by the group over its members is so high.<sup>71</sup>

## 2.1.3 Set of Rules

It is also assumed that the group has certain internal rules, written or unwritten, that tells it how to conduct itself in the course of its actions. This is quite easy to recognize and it is basically just another inherent part of being organized. A group that is organized in a military fashion and has a chain of command must also by definition have a system of rules (for instance a rule of "obey the leader" for chain of command to work). The real question is if something else is required.

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<sup>70</sup> Tadic para. 120

<sup>71</sup> This will be discussed further in Chapter 2.2

Most groups with a military structure would probably also have codes of conduct to supplement the system of direct orders. Soldiers are trained to act in certain ways when confronted with different situations. It is unclear whether clear codes of conduct are required by the tribunal to fulfill the criteria set forth. In the authors opinion this may be the case. The groups in all cases referred by the tribunal seem to have had some codes of conduct. Even the Irregular auxiliary to the Mexican army had directives on how to conduct inspections of cars.<sup>72</sup>

## 2.1.4 Symbols of Authority

This criterion also points in the direction of military or paramilitary groups. The mental image one gets from reading the words is that of a uniformed soldier or policeman but does the symbol need to be this obvious? In mentioning the Stephens case<sup>73</sup> the tribunal indicates that this is not the case. Stephens was shot by a member of the Mexican irregular auxiliary to the army. The irregular auxiliary sprung up as an informal municipal guards organization at a time when the federal army was occupied fighting the rebellion of Adolfo de la Huerta in the south of the country. Its main function was:

“[P]artially to defend peaceful citizens, partly to take the field against the rebellion if necessary.”<sup>74</sup>

The Claims Commission had difficulty determining the status of the auxiliary as they lacked both uniform and insignia, and mainly consisted of civilian volunteers, but concluded that they were “acting for” the state of Mexico.<sup>75</sup> At the time of the shooting, Stephens was driving his car at night when the irregulars, who had set up a checkpoint on the road, tried to stop and search it. This they were authorized to do in accordance with the “General ordinance for the army” and this document also obliged Stephens to stop the car and allow for it to be searched.<sup>76</sup> The irregulars were also authorized to use their weapons if necessary.

It is unclear what exactly happened but one of the irregulars, Lorenzo Valenzuela, shot and killed Stephens. The Claims Commission found that Valenzuela in doing so acted with utter recklessness and that the irregulars should have realized that under the conditions at hand in the state of Chihuahua at the time the un-uniformed irregulars could easily have been

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<sup>72</sup> *Charles S. Stephens and Bowman Stephens (U.S.A.) v. United Mexican States*, General Claims Commission, Decision of July 15, 1927, *Reports of International Arbitral Awards*, vol. IV, pp. 265-268

<sup>73</sup> Tadic para. 125

<sup>74</sup> Stephens para. 4, p. 267

<sup>75</sup> *ibid*

<sup>76</sup> Stephens para. 5 p. 267

mistaken for bandits, and they should have shown more leniency.<sup>77</sup> Mexico failed to try the irregular for the act despite having him in its custody.<sup>78</sup>

It is not doubtful, stated the Claims Commission, that acts of soldiers in cases like the present one, under the orders of a superior, that the state is responsible.<sup>79</sup> Valenzuela must be considered as, or assimilated to the position of, a soldier. The Claims Commission thus found Mexico liable for the reckless killing of Stephens and responsible for the denial of justice by not trying Valenzuela.<sup>80</sup>

It is hard to see how the Mexican irregular auxiliary fulfills the criterion of displaying symbols of authority. They did have arms but no uniform or insignia of any sorts. Their appearance clearly was such that they could be mistaken for highway robbers. The inclusion of the Stephens case shows that the Appeals Chamber does not give this criterion much weight. The Mexican irregular auxiliary seems to fulfill every criterion but this. So why did the Appeals Chamber chose to include this criterion? The other three criteria deal with inherent qualities of the group, whereas the criterion of symbols of authority seems attempt to describe to how easily the individual group members are identified as part of the group. One possible answer is that the chamber found that this is the easiest criterion to see and if it is fulfilled it may indicate that the others also are fulfilled. If a group has uniforms it probably has some structure as well... Another answer could be that the Appeals chamber is trying to find a criterion that shows the connection between the group and the state, something that is inherently wrong at this stage.

As mentioned earlier the fact whether a group is armed or not may be a symbol of authority. Although the Appeals Chamber does not mention this explicitly, the uses of armaments are in most countries associated with governmental authority. In most western countries the use of handguns and automatic weapons are restricted to military and law enforcement use and are as such symbols of authority. In light of the Stephens case armaments may be the only symbol of authority a group needs.

## 2.1.5 Other Implied Criteria

A group is obviously nothing without the members it's made up of. The earlier criteria examined the group from the outside. Now the group shall be viewed from the inside perspective to see if there are further criteria to be found. The starting point for this discussion will be the Appeals Chamber's statement that:

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<sup>77</sup> Stephens para. 6 p. 267

<sup>78</sup> Stephens para. 1 pp. 266-267

<sup>79</sup> Stephens para. 7 p. 267

<sup>80</sup> Stephens para. 8 p. 268

“Normally a member of the group does not act on his own but conforms to the standards prevailing in the group”<sup>81</sup>

What does this imply? Obviously it says something about the chain of command and structure of the group but taking the “inside perspective” more can be found. Here lies the essence of the group criterion of the overall control test: Even though individuals are performing the acts in question their positions in the group and the group structure makes it right to claim that the acts are also performed by the group itself. In the concept of overall control lies an assumption that groups can in some ways perform acts in a legal sense although the individuals that are members of it commit the actual actions.

This is obviously not true for every kind of group. Looking at a regular corporation employed by the state for a non-official purpose (such as delivering mail, taxi transport or air travel) the limits of the group criteria become clearer. Observing the employees of this type of company they often fulfill all of the group criteria down to the symbols of authority. Even so, it does seem far-reaching to attribute their acts (subject to the “area of action” theory presented in Chapter 2.2.2) to the state employing the corporation. The “overall control” test does not exclude business as groups in any way but something seems to be missing in the case of a regular company and its employees. This problem has been noted by Villalpando and he proposes that this be solved by a different interpretation of the actual control standard.<sup>82</sup> The author would instead propose that the introduction of an additional criterion.

In the opinion of the author an extra element is presumed to exist between a member and the group. For the sake of simplicity the author will label it “recognition” but it could just as easily be “loyalty”. The recognition criteria is fulfilled when a member of the group in question generally views himself as part of that group and is recognized by the fact that he acts as a part of the group rather than as individual. The members identify themselves as members of the group and when they act within the field of the group, they regularly do so with their group identity in mind. This should not imply that all members are fanatical in their engagement in the group or that all their acts should be understood as group acts.

An even more difficult question is if it is also implied that all members largely share the group’s ideals, morals and goals. This would be a big restriction on which groups can come into question if interpreted strictly, but the author believes there is some sense to this still. Looking once again at the rationale behind the test the real question is: Does this serve to rectify holding a state responsible for an act committed by an individual, which it has no other control over other than the fact that it controls the group he is a member of? Or, put differently; does this create a link through the group to

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<sup>81</sup> Tadic para. 120

<sup>82</sup> Chapter 1.2.6



the individual of control? The author claims this is the case. If an individual has a fanatical belief in the group's goals and ideals, such as a fundamentalist terrorist group, it is a lot more reasonable to see his acts as acts of that group. This criterion, if it exists, cannot be taken too literally though. A mercenary group fighting for money can very well fulfill it.

Evidently it is very hard to put clear boundaries and limits on the criterion of recognition, but in the view of the author it is implied in the test. It may now be time to return to the question of the "symbols of authority"-criteria. As stated earlier,<sup>83</sup> it is difficult to find a rational explanation for the inclusion of the symbols of authority as a criterion in itself. The existence of symbols of authority does not contribute to transforming the acts of individuals into acts of a group. In the opinion of the author the demand for outward symbols of authority should be seen as reflecting an aspect of the criterion of recognition, namely the fact that the individual is identified (and supposedly identifying himself) as a group member by the use of uniforms, insignia and other group related apparel.

## **2.1.6 The Cases Presented by the Appeals Chamber**

The author shall now look at the cases presented by the Appeals Chamber to see how the group criteria are fulfilled by certain real life groups, and if something further can be learned about them through this. Hopefully, by knowing how certain groups are structured and if they fulfill the criteria set by the chamber, it will be possible to determine the scope of the groups that can be considered for the test and further help in formulating a rule.

### **2.1.6.1 The VRS**

The first group that shall be examined is the VRS, the Bosnian-Serb army in Bosnia and Herzegovina. The accused, Dusko Tadic, was not a member of this group, but rather a political functionary of the Republika Srpska.<sup>84</sup> His crimes, however, took place in an area, *Obstina Prijedor*, occupied by the VRS.<sup>85</sup> The status of the victims as protected persons was dependent on whether the occupation was carried out by a foreign power which explains this focus on the VRS.<sup>86</sup> The reason for starting with this group is that the case of Tadic is the only case so far that has made explicit use of the "overall control" test,<sup>87</sup> and as such it must be the most important for any study of said test.

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<sup>83</sup> Chapter 2.1.4

<sup>84</sup> Trial Chamber paras. 186-192

<sup>85</sup> Trial Chamber paras. 137-146

<sup>86</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva Convention IV), article 4, Trial Chamber paras. 578

<sup>87</sup> The author is aware of the claim made by the tribunal that this test already existed in international law and that it has been used in various cases, but is not entirely convinced by this argument. This issue will be further discussed in 2.1.2.3.

The VRS was the armed force of the Serb Republic in Bosnia and Herzegovina (Republika Srpska),<sup>88</sup> a “Serb nation” declared by ethnic Serbs on Bosnian and Herzegovinian territory.<sup>89</sup> The VRS acted as a national military force, continuing the efforts of the JNA<sup>90</sup> in taking and holding territory for the Serb Republic and otherwise promote ethnic Serbian interests in the region.<sup>91</sup> Its soldiers were all former members of the JNA.<sup>92</sup> The only difference in personnel in the VRS from the JNA unit it was formed from was that all non-Serbs were transferred out from the unit and were replaced with Bosnian-Serbs from other units in the JNA.<sup>93</sup> In fact the VRS was in every way still organized as a unit of the JNA, cleared of non-Serbs and renamed.<sup>94</sup> It was equipped with former Yugoslavian equipment, including heavy weapons and vehicles, had largely the same officer corps and was largely structured as it had been before the JNA transfer of the forces.

From this it can be assumed that in every relevant aspect for the group criteria the VRS was organized and essentially functioned in the same way as its predecessor in the JNA. Starting with the structure criterion it is simply enough to say it was structured in a military fashion, implying a strict hierarchy and otherwise a strong structural element. Moving to chain of command the situation is very much the same. It can be assumed that the chain of command remained more or less intact through the switch and as such it was most certainly very well developed. For the same reasons it must be assumed that the VRS kept the JNA’s codes of conduct and other rules, simply because the soldiers were the same and were trained in the JNA. As a military force the VRS also had uniforms, insignias and other symbols of authority. The authors suggested added criteria of recognition would also be fulfilled as the VRS soldiers clearly both saw themselves, and were seen as, members of the VRS.<sup>95</sup>

It is obvious that the VRS fulfilled all the criteria outlined by the chamber; this is true almost regardless of how strictly they are interpreted. The real question is whether the chamber saw the VRS as just meeting the minimal criteria, going well beyond the criteria or somewhere in between. The only indication given by the chamber is the brisk manner in which it addresses the question:

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<sup>88</sup> Hereinafter “the Serb republic”.

<sup>89</sup> Trial Chamber paras. 84-107

<sup>90</sup> The army of former Yugoslavia.

<sup>91</sup> Tadic para. 152, especially footnote 187. Trial Chamber paras. 589, 593-595. It should be noted that the VRS was created on May 19, 1992, which is the same date that the JNA officially withdrew from the fighting in Bosnia and Herzegovina.

<sup>92</sup> Trial Chamber paras. 114, 122-126

<sup>93</sup> Tadic para. 151, especially footnote 181

<sup>94</sup> Tadic para. 151, especially footnote 180.

<sup>95</sup> There could conceivably have been some who saw themselves as soldiers of the JNA but in the author’s opinion that does not leave the criterion unfulfilled.

“[G]iven that the Bosnian Serb armed forces constituted a “military organization” [The control required by international law was “overall control”]”<sup>96</sup>

It would thus seem that the chamber found that the VRS very clearly fulfilled the criteria and did not need to go into a lengthy discussion. For now it will have to be sufficient that a group organized as a regular military unit most probably would fulfill all the criteria set up by the chamber.

### 2.1.6.2 The Contras

By examining the Nicaraguan *Contrarevolucionarios* – “Contras” it is the hope of the author that something can be established about the lower limits of the criteria presented. The Contras, being a paramilitary group, consisted of many different fractions united by their resistance to the Sandinista government. This group originally consisted of members of the former Somoza government National Guard but later incorporated many other groups including indigenous groups and certain communities on the Caribbean coast. Over 20 million dollars was allegedly spent by the US to provide support for around 10,000-15,000 Contras soldiers.<sup>97</sup> An additional 5 million dollars were believed to have been provided by private actors in the US, mainly militant- and ultraconservative groups on the political far right.<sup>98</sup> Although the troops of the Contras were largely peasants its command structure and officer corps were almost exclusively from the former National Guard, many of whom were trained in the United States.<sup>99</sup>

Before the US actively started to support the fighting force of what was to become the Contras, it consisted solely of small bands of ex National Guardsmen operating along the Honduras-Nicaragua border.<sup>100</sup> These bands were poorly armed and thoroughly disorganized.<sup>101</sup> At the demand of the CIA the largest of these bands were merged with a group of exile Nicaraguans living in Miami, USA to form the “*Fuerza Democratica Nicaraguense*” (FDN), the main force of the Contras.<sup>102</sup> After the merger the US started providing training, weapons and funds and the force went:

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<sup>96</sup> Tadic para. 145

<sup>97</sup> “*Who Are the Contras?*”, 1986, Arms Control and Foreign Policy Caucus in *Nicaragua: Unfinished Revolution*, Peter Rosset and John Vandermeer (Editors), ISBN 0-394-55242-3, p. 247, Nicaragua paras. 95-100 provides for substantially larger numbers.

<sup>98</sup> Ibid, Nicaragua para. 98

<sup>99</sup> ibid pp. 248-255

<sup>100</sup> Nicaragua paras. 20, 93

<sup>101</sup> Affidavit of Edgar Chamorro in front of the ICJ, para. 7, appears in *Nicaragua: Unfinished Revolution*, Peter Rosset and John Vandermeer (Editors), ISBN 0-394-55242-3, p. 237, Nicaragua para. 93

<sup>102</sup> ibid, Nicaragua para. 94

“From a collection of small, disorganized, and ineffectual bands of ex-national guardsmen [...] into a well-organized, well-armed, well-equipped, and well-trained fighting force of approximately 4,000 men capable of inflicting great harm on Nicaragua.”<sup>103</sup>

Reading this in conjunction with the group criteria provided by the Appeals Chamber does raise some confusion. The Contras were not, interpreting the chamber, sufficiently organized as a group to merit use of the “overall control” standard.<sup>104</sup> It should be mentioned in this section that the Appeals Chamber never actually express this sentiment, stating instead that judicial- and state practice have upheld the Nicaragua standard in cases of individuals and unorganized groups. In the author’s opinion the chamber purposely excludes the Contras from its list of groups, which does include the UCLA:s, in an effort to not have to address the issue raised in this chapter, and weakening its argument. This could of course have been avoided if the Appeals Chamber would have rejected the “effective control” test outright, but this would obviously have ruined much credibility of the reasoning.<sup>105</sup>

Although this interpretation does create some difficulties it is, in the author’s opinion, the most probable one. The cases are listed to prove that Nicaragua is at variance with international jurisprudence, and to support the contention that international law only stipulates the “effective control” test for unorganized groups and individuals but not for organized groups. As the Appeals Chamber seems to accept that the “effective control” test was used correctly in Nicaragua the Contras must thus be an unorganized group. This means that the ambition of extracting a lower threshold of organization from Nicaragua is futile. The Contras seem to show quite a high level of organization and fulfil most, if not all, of the group criteria. On the other hand, this could also be used to argue that the group criteria should be interpreted in a very restrictive matter.

## 2.2 Theoretical Rationale

As readers can no doubt see, it is difficult to elaborate on the criteria given by the Appeals Chamber. The reason for this is partly because the chamber gives very little actual information on how the criteria should be used and partly because it does not seem that the chamber wanted to give specifics in fear of ruining the test. However, for the “overall control” test to be useful the groups it applies to must be somewhat specified and for this reason the actual contents of the rule will be examined from yet another perspective – that of the theoretical rationale.

It has been mentioned earlier that the idea of “overall control” over a group as a ground for state responsibility rests on the idea that groups can commit acts, something that was likely accepted in international law before

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<sup>103</sup> *ibid* para. 9, p.238

<sup>104</sup> *Tadic* paras. 118, 120, 124, 132

<sup>105</sup> see *Tadic* para. 124

Tadic.<sup>106</sup> The conclusions of the Appeals Chamber rests on the assumption that this meant that acts of individual group members should be considered to be acts of the group in instances where the group is structured in a certain way. After that it needs only to be established that the state was in control of the group and not in any direct control over the individual, which was assumed that the “effective control” test required. In the author’s opinion this cannot be accepted without a discussion. The inclusion of the concept of groups acting in ILC Article 8 needs an elaboration on whom, or more specifically, which individual can act on behalf of the group. Looking on the concept of states acting, an oversimplified, but necessary theoretical construction to serve the purpose of finding states responsible for acts, the elaboration is found in chapter 2 of the ILC Articles.

Having presented the problem the author would state that a solution for it must be included in the “overall control” standard. It is not obvious whether the Appeals Chamber has considered this issue and it is not openly discussed in the text of the case. The author will thus have to try to synthesize a possible solution using what little information can be found in the case. As far as the author can imagine there are three distinct options of doing this.<sup>107</sup> As will be shown these will lead to different conclusions about the specifics of the test as well as ground for evaluating the force of the argument of the chamber. All options will have the purpose of developing a link of control between the state and the individual performing the act.

## 2.2.1 Option One

The relationship between the state and the individual is still the most important factor. The state traces its control over the individual through the organized command structure of the group. This means that when the state exercises control over the group it is actually exercising control over all the individual members on their own. The state in a way assumes the commanding position in the group’s own chain of command and in that sense controls the actual individuals committing the act as a commander of sorts.

Option one is thus not a very far step from traditional thoughts on state responsibility. It can be compared with a judge acting on behalf of the state even though he obviously does not make up the actual state. Instead he traces his mandate to act through the state hierarchy. Indeed the state cannot act at all without relying on actual individuals to perform the actual actions. Option one simply adds another level, the group structure, between the state and the act, tracing the control linearly through the whole hierarchy.

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<sup>106</sup> See for instance Nicaragua

<sup>107</sup> The author wishes to make it very clear that this is not something that can be found in the actual text of the case or any other written source the author is aware of. It is simply the author’s own thoughts on the possible theoretical foundation of this part of the test.

On the outlook this model would seem to put lower demands on all aspects of group structure since it is enough that the state controls an individual member by going through the structure of the group. A certain chain of command still has to exist for the control to pass through the group and reach the individual. The weight of the argument for using this test in line with option one is not easily determined. Since the control exercised by the state actually is over the individual it is naturally not controversial to exert state responsibility for acts of that individual, but the test clearly states that the control exercised by the state only has to be shown over the group. Thus the demands on the structure of the group are not low but merely different. It has to be shown by the group structure that all control exercised over the group has to be identical to the one exercised over the members. The state actually must control the members as individuals by controlling the group. In a way the group is assumed to work as a “staffing agency”.

## 2.2.2 Option Two

In this model the members are still seen as individuals but the group identity is much stronger than in option one. In this thought members of the group normally do not act without order or at least consent from their superiors *when acting in the group's area of action*. In all other areas the members are assumed to be free to act as individuals. The easiest way to determine the group's area of action is to simply look at the nature of the group and the sort of activity that is linked with it. For example, a postal service company would have “mail distribution” as its area of action. A police force would have a somewhat wider area but “law enforcement”, “maintaining public order” and “traffic supervision” could be a few. Military units would probably have “conducting armed operations” as its primary area of action, and so forth.<sup>108</sup>

The area includes all types of acts that are in some form connected with the area. For the postal worker this means sorting and delivering the mail, but usually not what happens on vacations from work or on his spare time. For a military soldier it obviously includes more. Actually, for a soldier in wartime it would be hard finding any type of activity which does not enter under the area of action, simply because almost everything a soldier does in war is tied to the military effort.

What is then the effect of this? The primary effect is that when acting in the area of action for the group the individual is assumed to be following orders, either explicit or implicit ones, distributed through the chain of command. These acts can thus be “attributed” to the group and thus seen as acts of the group. When the individual acts outside the group's area of action he is assumed to act in his own capacity and the acts are thus not group acts.

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<sup>108</sup> For an interesting comparison with domestic legal situations see *Reinventing Governmental Accountability: Public Functions, Privatization, and the Meaning of “State Action”*, Robert S. Gilmour; Laura S. Jensen in *Public Administration Review* Vol.58 N° 3 (May - June 1998), pp. 247-258, where the authors apply a similar standard for attributing governmental responsibility for individuals in private service corporations in the USA.

Extending this to the “overall control” test this means that, assuming the state has “overall control” over the group but not control specifically over the individual, all acts the individual performs within the group’s area of action are attributable to the state whereas all acts performed on the individuals “own time” are not. In the mailman example this means that whatever internationally wrongful acts he could perform in the course of handling the mail can be attributable to the state in control of the postal service company, whereas all the acts he performs in his home after the end of work can not. The individual can be seen as something of a part time group member for the purpose of the test.

The difference between options one and two is of the role of the group in the relation between the state and the individual. In option one the group functions as a medium for relaying the state’s orders to the individual. In option two, the state and the individual does not have a relationship at all. Control is exercised by the state over the group and the group gives orders, instructions, direction and training in procedures to the individual inciting him to perform the act. The state-group and group-individual processes are separated and different.

Option two apparently demands certain characteristics of the group, mainly dealing with structure and chain of command. It has to be evident that, in the area of action, the members are generally told what to do. This is easiest proven with the existence of orders but can also be in the shape of training and general instructions. A security guard does not generally need a specific order to stop somebody from entering the building he’s guarding. It is in his training and job description. It is very important to note that not all acts of everyone always have to be sanctioned by a superior. This discussion will be given further space in the discussion on *ultra vires* acts of the group vis-à-vis the state but for now it is sufficient to say that even if orders in the specific case are contradicted the group structure is not compromised and the act can still be under the group’s area of action.

To use a fictive example: A paramilitary force is conducting military operations in an area populated by civilians. The commander of the unit has given the instructions that civilian lives shall be protected as far as possible. However, following an ambush on a smaller unit of the paramilitary force, where the perpetrators after the deed take shelter in a village, the commander of the smaller paramilitary unit decides to burn the village and kill all the civilians as revenge. As this falls under the area of conducting military operations and the paramilitary force’s members usually act according to their orders, any state in control of the force could possibly be held responsible for the deed.<sup>109</sup>

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<sup>109</sup> The reason the author uses “possibly” and not “certainly” is simply not to get locked up in a definition of a test at this early stage.

### **2.2.3 Option Three**

In this final option the group is assumed to be capable of performing acts on its own and not simply as a collective of its members. An analogy could be that of a body made up of cells. Even though it is only possible through the movement and reactions of the individual cells, it is still the body that acts. When the body does something wrong it is not asked which cell made the body do it, but just conclude that the body did it. In this thought no line of control needs to be traced between the state and the individual performing the act, only between the state and the group. This is since the individual members are assumed to act in unison to achieve the purpose of the group.

This raises a very important question, which distinguishes groups under option three: Who decides the purpose of the group? In the author opinion there are three possibilities. The first is that the leader of the group decides undisputed and all members follow his decision. Obviously this requires a strict hierarchy and order structure. Any truly autocratic group would fall into this category. The second is that the group's purpose is already given and the every member unselfishly seeks to do his part in fulfilling it. This kind of group requires no hierarchy and any leaders would more act as coordinators making sure that the task gets carried out efficiently. An example of this would be fundamentalist terrorist cells. The third is on the surface similar to the second in that it has no leader structure, but the members decide the purpose continually in a democratic manner. In other words the group would only act upon a unison decision by the members. Therefore, all those who act as the group also represent the deciding power in it. Environmental action- or anarchistic groups could fall under this category.

For the sake of this review it will be assumed that all the option three groups that could come under the "overall control" test are either of the first or second variety. This is because a state could hardly exercise control over a group of the third variety without the group loosing its character.

Option three is obviously the most far reaching of the options, and as such also has the most far-reaching consequences. It would put a huge demand on the group structure and the members' loyalty but some groups could be constructed to work this way. It would thus severely limit the number of groups that could come into question but it would also make it a lot easier to justify the test logically as well as legally. If the acts performed by the members truly are completely on behalf of the group, it is indeed sufficient that control can be shown to exist between the state and the group.

### **2.2.4 Evaluation of the Three Options**

The author will now test the three options on the argumentations of the Appeals Chamber as well as the facts of the case to find which one the chamber likely used when construing the test. The author shall start with the formal criteria expressly mentioned by the chamber and which have been



discussed earlier in this chapter namely: Structure, Chain of Command, a Set of Rules and Symbols of Authority.

#### **2.2.4.1 Structure**

Structure is an element that to some extent is vital to all three options but to different degrees and for somewhat different purposes. In option one the structure serves the role of “vehicle” for the state’s control to pass through the group and reach the individual. The kind of structure needed for this is not necessarily a strict hierarchic one but when the state controls the group the structure must secure that it also controls the group members in question. Thus a certain element of “knowing one’s place” is required, as the individual must know that the group is in control over him for the state to be able to channel its control through the group.

In option two the role of the structure is a lot more straightforward. It provides a frame for the chain of command to function in as well as providing support for defining when a member is acting within the area of action. This makes the demands on structure quite a lot higher than in option one since only a highly hierarchical and structured group can have members who routinely act according to orders given by a superior.

It is difficult to analyze option three in terms of structure as it’s used in the other two options. The structure existing in option three would in effect have to ascertain that all members act entirely as parts of the group. It must in such a case be extremely developed and every member must not only know their position in the group, but also almost blindly carry out all actions the group depends on their position for.

#### **2.2.4.2 Chain of Command**

Almost anything said for structure goes equally for chain of command. In option one the chain of command becomes important for the state to control the individual. In a way the state can be assumed to hold the highest command position in the group although the orders given by it are not necessarily specific. The demand put on the chain of command is the same as the one put on structure: To enable the control of the state to pass through the group and reach the individual.

In option two the function of the chain of command is more traditional and straightforward. For a group to fulfill the criterion of chain of command in option two a clear hierarchy must exist, and orders must generally be followed. The level required is thus very similar to that existing in a regular military unit.

Option three once again proves difficult to analyze since the focus is on results rather than methods of achieving them. If it is apparent that the group is performing the act(s) in question it is not important how. The importance of chain of command basically depends on the role of the leader. If the

leader can be seen as the ultimate representative of the group,<sup>110</sup> chain of command is of paramount importance. If the group has a "purpose oriented" structure<sup>111</sup> is more a question of "acting on behalf" of the group than giving and taking orders.

### **2.2.4.3 Set of Rules**

The existences of certain rules are of little importance in option one. For the state to control an individual through controlling the group, the only rules that are required are those that promote this purpose.

The rules gain a further more important role in option two. The member is assumed to predominantly act in ways sanctioned by the group leadership but not every action can be ordered. Instead clear codes of conduct tell the member how to act when no direct order is given. This demands that the rules of the group are well known by the members, largely enforced and covers a multitude of situations. The level required corresponds well to the system of rules existing in most modern military and police forces.

In option three the rules are of varying importance. In the autocratic group the rules could be few or many depending on the leader's method of exercising command. In the "purpose oriented" the rules would rather be of a personal and non-formal way, possibly describable in terms of honor and duty.

### **2.2.4.4 Symbols of Authority**

The original meaning of this criterion only really makes any impact in the case of groups of option two. In these groups the outward symbols could help identify the group's area of action. For example, a soldier may only be regarded as a soldier when he is in uniform or a superior's orders may only carry an obligation to follow when at the workplace.

### **2.2.4.5 Identification**

This criterion has different importance to all three options and therefore also has different demands to be fulfilled. In option one it means simply that the individual is not simply an individual but he is also recognized as a member of a group, indicating that he does not act completely on his own but also, more importantly, that his loyalties lie first and foremost with the group. The only way a state can control this individual is through the group. Regardless of this a very low emphasis must be put on this criterion in option one as the group members in this option can typically have a low loyalty and identification with the group and still receive control through it.

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<sup>110</sup> Variety 1

<sup>111</sup> Variety 2

In option two, identification is more important as individuals in this structure typically act as group members first and individuals second while in the groups area of action. This demands that all members have a high level of identification as group members and that they are also easily identifiable as such. Looking at the example of a soldier in a war-zone makes the notion of identification clear. If he does not identify himself primarily as a member of his military group the group is probably not structured in such a way to come under the “overall control” test. When it comes to the other aspect of identification – sharing the group’s motives and goals, it may not hold the same level of importance. Typically the group members in option two would probably share the goals of the group to some extent but it cannot be required. Looking at the VRS in the Tadic case for instance, it is highly unlikely that all the soldiers shared a dream of a Great Serbia. On the other hand it is also unlikely that they were actively against it. The safest conclusion to draw is probably that the members need to identify themselves foremost as members while in the area of action but must not necessarily share all the group’s goals and motives.

In option three, identification takes on a much stronger role than in the two former. An individual could not be a member in the types of groups envisioned in this option without having a very strong identification as such. The member must also largely support and share the group’s goals, as this is the reason to either submit to the whims of a strong leader or, in the other variant, submit to the purpose of the group. Members of these groups would probably have a strong tendency to base their personal identities on the group allegiance and the goals for which it strives. This can be illustrated by referring to certain neo-Nazi groups, terrorist cells, but could the criterion could conceivably be fulfilled by certain regular armed forces. The fact that members would “die for the cause/group/leader” and have internal group cultures, signs, speech and symbols, which they use to build an identity could be examples of how these demands are fulfilled.

## **2.2.5 The Options and the Appeals Chamber**

In the author’s opinion it is possible that the Appeals Chamber could have based its test on either of these options. As it has been shown in the previous chapter they do give rise to some fundamental differences, making it important to try and ascertain which comes closer to the chamber’s reasoning. They will therefore be given a final evaluation based on their similarity to the little that is written in the Tadic case.

Option one emphasizes the relation between the individual and the group structure. When trying the group test as understood in option one on the situation before the tribunal the essential question to answer would be whether through the structure of the VRS the state of Yugoslavia controlled the individuals in the VRS, by exercising “overall control” over it? This test does not seem to bear much similarity to the chamber’s reasoning. The chamber instead seems to focus on the group as such leaving the individual

out. Furthermore the expressed criteria do not describe the reasoning in option one very well.

Option one is therefore, in the author's opinion, not a very viable theoretical background for the group element of the "overall control" test. Some of the elements of it could still be useful in attributing acts of individuals within groups that are on the borderline between the "effective-" and "overall control" test groups. As an investigation aid for the "overall control" test it must however be rejected.

Option two is in a way the middle road option. The formal demands are reasonably high but not so high as to exclude groups that are truly organized, like the VRS. This option makes the group assume the actions of its members due to an "internal control" of sorts, namely the assumption that a member would not act within the group area of action without it being sanctioned by the group. This makes the notion that it is actually the group acting much more reasonable.

The reasoning of the chamber largely supports this approach. The inclusions of all the formal criteria make sense as do the emphasis put on military or paramilitary organization. In the author's opinion this option probably comes very close to the chamber's reasoning.

Option three takes a radically different approach to group structure, emphasizing that the actual group performs the action rather than the act being attributed from individuals to it. The demands put on the structure by option three would not be fulfilled by many groups, certainly not by the irregular auxiliary to the Mexican army but also quite possibly not by the VRS. What has to be decided when evaluating this approach compared to that presented in option two is how strongly linked the "overall control" test really is in international legal custom. If assuming that the "overall control" is a standard in existing customary law option two is likely the most reasonable standpoint. Acts of a larger number of groups, including regular military and paramilitary groups, could hold states to a higher degree of responsibility.

If the reader is not as convinced by the customary character of the test, actually assuming that this standard is fully created by the ICTY, it needs to be motivated by some legal or logical reasoning. This support could more easily be found if the groups were limited to those envisioned under option three. In these groups it is very easy to argue that it is the group that act and not the individuals of which it is made up, since the members would never act without the group so requiring. In the opinion of the author the "overall control" approach is a deviation from existing principles of state responsibility and would thus support this approach. The attribution of acts of individuals to that of larger, more philosophical structures does exist in international law but the larger structure is always the state.<sup>112</sup> This

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<sup>112</sup> See for example ILC articles 4 and 5.

attribution is in many ways a necessity for the system of international law. If the chamber wants to add this procedure to another abstract entity it should have good reasons and arguments for doing so which it could possibly have in an option three-approach.

The “feel” of Tadic gives indications that the Appeals Chamber most likely did not consider this arguably stricter approach to be necessary and the conclusion that must be drawn is that it is not the basis of the group element of the “overall control” test. This does not mean that this approach is without value for the test. The author believes that it is a logical necessity that if option two-groups should be included, so should option three ones. This would in turn mean that it would be possible to substitute fulfillment of some criteria with others. For example option two demands a highly developed command structure and codes of conduct with orders given for most major acts. In an option three-group the role of this could be replaced by dedication to the group purpose and a strong drive to act to achieve it. Why should it matter if a member act based on an order from the group leadership or if he acts based on an understanding of the group goals in a non-hierarchical group? They both act very much on behalf of the group and it’s in both cases reasonable to attribute the act to the group.

## **2.2.6 Conclusion – The Group Test**

Option two should be used to define minimal levels for when the criteria are met. This entails that a high level of organization, structure, hierarchy and chain of command is required. Furthermore it is important to determine when the group is acting as a group i.e. within its area of action, or when it is acting as a mass of individuals i.e. outside its area of action. Only within the area is the acts of individuals attributed to the group and can thus be imputed to the state with “overall control”. The demands on the system of rules are that they should cover the gap left between the direct orders to create an environment where all members know what to do in practically any situation that could arise within the area of action. Certain symbols of authority can come in use when determining this area.

A certain amount of leniency can however be called for concerning the fulfillment of these criteria if the group compensates the lack of a hierarchic structure with the members possessing high levels of identification with the group goals and an extremely strong sense of duty to fulfill them. This has to be done in such a way that it is obvious that the members act on behalf of the group rather than as individuals.

# 3 The Level of Control Labeled “Overall”

Once the character of the group has been established the Appeals chamber moves on to the question of whether the state is in “overall control” of it. The discussion of what this control actually implies can be described in two parts: The preliminary criteria that try whether the “framework” of the state’s relation with the group facilitates the exercise of actual control and the actual control standard which tests whether the actions exercised by the state in relation to the group constitutes “overall control”.

## 3.1 The Preliminary Criteria

In both the Tadic and the Nicaragua case the courts mention the existence of support in the form of weapons, training, money and other, supplied by the state to the agent performing the acts in question. Although both courts argue that this in itself is not enough to establish control in itself it does seem that they find it to have some meaning or even be a criterion in itself.<sup>113</sup> In the Nicaragua case the court finds that:

“[I]t is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case”<sup>114</sup>

In Tadic the wording is:

“[C]ontrol manifested itself not only in financial, logistical and other assistance and support”<sup>115</sup>

The first question that will be addressed in this chapter is the question of whether this financing, arming or training is a criterion in the “overall control” test and, if so, what it entails? To find out which types of support the Tribunal imagines the author will start by listing the support that have been discussed in the actual Tadic case. Arguably the most important aid given to the VRS by Serbia and Montenegro was to provide the VRS the arms that allowed it to continue the war in Bosnia.<sup>116</sup>

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<sup>113</sup> Tadic paras. 131, 137

<sup>114</sup> Nicaragua para. 111

<sup>115</sup> Tadic para. 156

<sup>116</sup> Tadic para. 150

The ICJ in Nicaragua has deemed the arming of an insurgent group a breach of the obligation for all states not to use force in its international relations.<sup>117</sup> This rule is one of the fundamental ones of customary international law<sup>118</sup> and arguably the most important one of the UN Charter.<sup>119</sup> On the other hand states have been aiding guerrillas in different ways both before and after the Nicaragua judgment, without any state trying to impose state responsibility. The Appeals Chamber in Tadic gives the PLO, ANC and SWAPO as examples of groups that have been supported by states financially and militarily as well as the states up letting their territory as bases, without other states holding them responsible for internationally wrongful acts.<sup>120</sup> This is not, however, the issue at hand in the Tadic. While the arming of a guerrilla group may be a violation of international law it does not, in itself, make the acts of the group imputable to the state.

Serbia and Montenegro also paid the salaries of all former officers of the *1:st Krajina Corps* and admitted responsibility for financing the whole of the VRS, including the logistics for providing this financing.<sup>121</sup> Financing as a source of control was discussed in the first chamber but eventually dismissed.<sup>122</sup> The Appeals Chamber took the same stand.<sup>123</sup> However one chooses to see it, the financing of various groups is something many states participate in and it is not held by the state community to invoke state responsibility for the acts of these groups. Therefore the conclusion must be that financing in itself has not been acknowledged as grounds for imputing the acts of groups to states in international customary law.

Serbia and Montenegro furthermore assisted the VRS by providing logistical support, intelligence and was naturally also responsible for the training of its soldiers.<sup>124</sup> The tribunal didn't find that this, in itself, created control either.

Examining all these different kinds off support the tribunal did not find that either one of these or indeed all of the together amounted to Serbian control over the VRS. It stated that the level of control required by international law over organized groups was:

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<sup>117</sup> Nicaragua para. 209 (pp. 109-110) and para. 228 (pp. 118-119) affirmed in “*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*” (Friendly Relations Declaration), General Assembly Resolution 2526 (XXV)

<sup>118</sup> *ILC Yearbook, 1966*, Vol. II, p. 247

<sup>119</sup> Charter of the United Nations Article 2(4), Shaw pp. 1017-1021, Akehurst p. 309

<sup>120</sup> Tadic para. 130

<sup>121</sup> Tadic paras. 150, 151 and 154

<sup>122</sup> Trial Chamber paras. 585, 602

<sup>123</sup> Tadic para. 130

<sup>124</sup> Tadic para. 151(ii)

“[G]oing beyond the mere financing and equipping of such forces...”<sup>125</sup>

This leaves it open to interpretation whether financing and equipping are simply examples of insufficient levels of control or actually describing a primary criterion before evaluating the actual control. In the author’s opinion the Appeals Chamber meant to express both sentiments.

Starting with the first possibility, the Appeals Chamber was simply restating the opinion of the ICJ in Nicaragua.<sup>126</sup> The notion that these forms of support are not sufficient to create control is not controversial and has repeatedly been affirmed by state practice.<sup>127</sup>

Concerning the other possibility, it is the author’s interpretation that the tribunal actually considered some form of support in the way of materials, training or otherwise to be a condition to actually start pursuing a test of the level of control. Support for this interpretation can be found in the previously cited paragraph 145 of the case:

“[The level of control demanded by international law] was overall control going beyond the mere financing and equipping of such forces **and involving also** participation in the planning and supervision of military operations.”<sup>128</sup>

The use of the words “*and involving also*” could in theory mean that what was required was “overall control”, with all that implies, as well as participation in the planning and supervision of military operations. This would mean that support isn’t necessary a criterion in itself, but rather is taken as an example of a fact insufficient to create “overall control”. This is by no means an impossible interpretation but becomes rather unlikely considering these words of the Appeals Chamber when describing the VRS:

“[Overall control] manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the [planning and supervision of the VRS’ operations]”<sup>129</sup>

It seems that the “overall control” possessed by the FRY over VRS included both support and participation in planning of operations etc, thus

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<sup>125</sup> Tadic para. 145

<sup>126</sup> Nicaragua para. 115, Trial Chamber para. 585

<sup>127</sup> For example Germany and Italy gave aid to Franco’s uprising in Spain in 1936, the US supported Pol Pot’s assumption of power in Cambodia in the 1970’s and 80’s; Cuban dissidents in the Bay of Pigs invasion; the Afghani *Mujahedin* the 1980’s; Guatemalan military coup in 1954; foreign support of SWAPO/ANC all went by without incurring state responsibility for the acts of said group. One recent exception can be seen in the development after 9/11 where Afghanistan has been held responsible for the (armed attack) of *Al Quaida*, but the legal grounds for this are unclear.

<sup>128</sup> Tadic para.145. Emphasis added.

<sup>129</sup> Tadic para.156



contravening the interpretation that “overall control” and participation in planning etc. were two separate criteria. For this reason the author proposes the other interpretation, namely that support has a role in, or even is primary criterion, when determining “overall control”. Bohlander supports this interpretation.<sup>130</sup>

It is not surprising, however, that the Appeals Chamber did not investigate this much further. In the case of the VRS, which owed everything in its organization to the FRY, whatever this criterion required it was so obviously fulfilled that the tribunal likely didn’t see it necessary to enter into a discussion on the role of support in the control test. There are some hints, however, that point to the rationale of requiring support for “overall control”.

### 3.1.1 Dependency

The fact that support in the form of equipment, finance and supplies did in a way create a dependency of the VRS on the JN and FRY, was acknowledged by the earlier Trial Chamber.<sup>131</sup> This factor was deemed insufficient to establish control by said Trial Chamber, instead focusing on the existence of direct orders, but the Appeals Chamber clearly made a different interpretation.<sup>132</sup> In the opinion of the author it did sadly not sufficiently examine this and analyze the support-criterion and its weight in the “overall control” concept. Through an interpretive reading of the Appeals Chamber’s judgment,<sup>133</sup> it appears that the perceived role of support in the “overall control” was twofold: On one hand it created a dependency, which created a potential for control,<sup>134</sup> on the other, it could be used to demonstrate,<sup>135</sup> as well as quantify,<sup>136</sup> the link between the state and the group. The author will in the following subchapters try to expand on these two roles.

#### 3.1.1.1 Dependency as a Vehicle for Control

The Appeals Chamber addresses this subject when dismissing the conclusions of the Trial Chamber on the importance of support. The Trial Chamber was clearly stuck in the impression that, regardless of other factors, the establishment of control required that there was evidence of a direct order from the state to the agent.<sup>137</sup> It found that these factors can

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<sup>130</sup> Bohlander, p. 224

<sup>131</sup> Trial Chamber para. 588

<sup>132</sup> Tadic para. 155

<sup>133</sup> Mainly Tadic paras. 153-156

<sup>134</sup> Tadic paras. 154-155

<sup>135</sup> Tadic para. 154 Concerning the value of support “*While the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind a clear intention to mask the commanding role of the FRY*”.

<sup>136</sup> Tadic para. 154, regarding the discrepancy between what Belgrade said and what it did.

<sup>137</sup> Trial Chamber paras. 584-585, 601-606

only be used to establish the potential for control inherent in dependency,<sup>138</sup> but dismissed the support as one of many consequences of the cooperation in which the VRS and the VJ were engaging.<sup>139</sup> This very unimaginative approach by the Trial Chamber, which was criticized as setting the bar to high to achieve control,<sup>140</sup> might offer an explanation as to why the Appeals Chamber chose to take such a strong stand against the “effective control” test found in Nicaragua. It is notable that the Trial Chamber does not exclude that the support given by the VJ and the FRY actually amounted to control, but it was not “effective”.<sup>141</sup>

This approach by the Trial Chamber was heavily criticized by its president Judge McDonald who found that although the control standard set in Nicaragua was high, the standard required by the chamber was even higher.<sup>142</sup> She found that, correctly interpreted, the “effective control” test would have been fulfilled in regards to the relationship between the FRY and the VRS.<sup>143</sup> A different approach was, however, advocated by McDonald. She found that the standard set out in Nicaragua was not relevant to the case before the chamber as it actually was phrased to test whether the Contras was performing certain specific acts on behalf of the US as opposed to testing the general agency relationship between the two.<sup>144</sup> Her suggestion was that the situation should instead have been solved using rules of humanitarian law.<sup>145</sup>

The role the Appeals Chamber saw for dependency is very unclear and based on the case one could argue many ways. It is considered an established fact by the Trial Chamber, and later the Appeals Chamber that the VRS was:

“[A]most completely dependant on the supplies of the VJ to carry out offensive operations.”<sup>146</sup>

It is quite clear that the Appeals Chamber does not see this as sufficient in itself. This is perhaps most apparent in this passage:

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<sup>138</sup> Trial Chamber para. 602

<sup>139</sup> Trial Chamber paras. 603-604

<sup>140</sup> “A victory for process”, James Podgers in *ABA Journal*, July 1997

<sup>141</sup> Trial Chamber para. 605

<sup>142</sup> “Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute”, ICTY Trial Chamber, 7 May 1997, para. 3

<sup>143</sup> *ibid* paras. 5-15. This opinion was shared by Judge Shahabuddeen of the Appeals Chamber see “Separate Opinion of Judge Shahabuddeen”, ICTY Appeals Chamber, 15 July 1999, paras. 7-14

<sup>144</sup> *ibid* paras. 24-33

<sup>145</sup> *ibid* para. 33

<sup>146</sup> Trial Chamber para. 605, restated *Tadic* para. 155

“[Overall control] manifested itself not only in [support], but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS.”<sup>147</sup>

The quote also gives an indication of the lower limit of importance for support; actually leaving the possibility that “overall control” could manifest itself in any possible way, allowing the interpretation that support might not be required at all. To start answering this question the author will examine the Appeals Chamber’s legal interpretations of two “factors” that were held by the Trial Chamber to:

“[N]ot amount to, or not be indicative of, effective control by Belgrade over the Bosnian Serb forces.”<sup>148</sup>

The two factors were the transferring of non-Bosnian Serb officers out of the units that were to make up the VRS and the continuation of payments from FRY to VRS officers.<sup>149</sup> The Appeals Chamber finds that:

“[T]hese two factors in addition to others shown by the Prosecutor did indicate control.”<sup>150</sup>

It seems that the Appeals Chamber found that the financing and manipulation of the officer corps of what would later be VRS’ units, taken together with other factors did indicate that the FRY had control over the VRS. This brings up the question of whether the chamber was addressing a potential to exercise control, what the author would like to label “dependency”, or an actual exercise of control. In this case it would seem that the chamber did not see these factors as exercises of actual control. Financing cannot be an exercise of control as it, in itself, requires nothing by the VRS other than accepting the money. Likewise, the transferring of officers before the VRS was even created cannot be an exercise of control. Both of these factors do however create a possibility to exercise control in the future as the VRS were dependant on the FRY for wages and since its officers were in a way selected by the FRY. For this reason the author believes that the Appeals Chamber saw these factors as a way to establish a dependency and a potential for exercising control.

In this conclusion it is also interesting to mention these words on the importance of financing by the Trial Chamber, which were also quoted by the Appeals Chamber:

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<sup>147</sup> Tadic para. 156

<sup>148</sup> Tadic para. 150, Trial Chamber paras. 601-602

<sup>149</sup> Tadic para. 150

<sup>150</sup> Ibid

“[The financing of the VRS] establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced.”<sup>151</sup>

This statement also supports the conclusion that dependency creates a potential for control and can be established by the existence of support. This interpretation also finds support in Nicaragua.<sup>152</sup> Having made the argument that the Appeals Chamber saw the existence of support as something that could establish dependency the author will now move on to the question of the importance of said dependency in the “overall control” test. In the Tadic case it is quite apparent that the VRS is largely dependant on the FRY, but for the test to be useful it must be established if dependency is a criteria of the test. Phrased another way, the question is if “overall control” can exist without some degree of dependency? Can a completely independent group be controlled by a state?

As a starting point for this discussion the author will once again create an imaginary example:

The Group is a guerilla group operating to liberate State A from the tyranny of its capitalist government. This ambition is shared by neighboring State B, which up until now, has been completely passive in this endeavor. The Group and State B have no factual connections at all.

In this situation there is no element of support or dependency whatsoever. The Group is completely prepared to carry out its struggle on its own and State B has no intention of actively helping them. Now, assume that the foreign minister of State B approaches the leader of The Group and orders him to attack the capital of State A rather than just fighting in the countryside, without promising any reward of any kind, and Group A complies and seizes the capital murdering innocent civilians in the process. Afterwards it can be proven that the order was given and that The Group did what was ordered. It can neither be proven however if it attacked because of the order or for some other reason, nor has State B reacted in any way from the attack. The question is thus: Was State B controlling The Group?

This is of course a very unlikely scenario but it is, in the author’s opinion, the best way to illustrate the importance of dependency as a presumption for control. To answer the question raised in the last paragraph the immediate answer would be that State B cannot be held to control The Group simply because it listens to the state’s advice. The author uses the word advice since without any dependency, that’s all it can be. The Group could just as well have ignored the order without any repercussions whatsoever. It is implied in the concept of giving orders that some sort of dependency exist.

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<sup>151</sup> Trial Chamber para. 602, Tadic para. 154

<sup>152</sup> Nicaragua paras. 109-111

If a very limited level of dependency is added this point will be further illustrated. Let us assume that State B is one of the few states in the world that shares The Group's view that State A should change government. This is widely known but State B has not made any public statements or taken other actions than simply entertaining that belief. This creates something of a connection in which to base the control. It is now very much more possible that The Group carried out the attacks because of the order than by some other reason. Although nothing has been promised there is still a small dependency since State B was the one potential ally it would have if it came to power. This may not be enough to base control on but it shows the direction.

Moving on to a situation that is more plausible in the world, now assuming that State B has publicly supported the struggle of The Group, the discussion of whether the order was actually the state exercising control becomes more valid. The author believes that it is in fact impossible for a state to exercise control over an entity that is not in any way dependant on it. The level of dependency required is one that has not been established in international law. The example above is in a way the critical point for how much dependency is required for the state to start exercising control. Looking at the practices of states it has not been uncommon for states to condemn or praise acts of "freedom fighters" and others but whether that has created a basis for control is unclear.

The author will leave this discussion for now and return in Chapter 3.6 when discussing a general control test. It is sufficient to say that the idea of exercising control over an entity that is not in any way dependant on the state should be impossible. The conclusion for Tadic is thus that even though the Appeals Chamber did not discuss this it is, in the author's opinion, safe to say that the "overall control" test assumes some level of dependency by the group on the state.

One discussion in the case does however put this opinion in doubt. In paragraph 153 of the Appeals chamber's verdict<sup>153</sup> the chamber is addressing the Trial Chamber's reliance on the "effective control" test and especially its interpretation that this test required a direct order from the state to the entity to create control. In this discussion the Appeals Chamber concludes that although the reliance on orders implied a use of the wrong test it was also questionable in the context of the case. The VRS and VJ, it said, had as a distinguishing feature that they:

"[...] possessed shared military objectives."<sup>154</sup>

As a result of this, the Appeals Chamber concluded that:

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<sup>153</sup> Tadic para. 153

<sup>154</sup> *ibid*

“[...] it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders would have even been necessary as these forces were of the same mind”.<sup>155</sup>

In other words, no orders have to be given since the officers of the VRS were essentially of the same mind as the High Command of the VJ, and they could be assumed to have acted in the same way with or without those orders. This brings some doubt to the author’s conclusion that dependency was required to be able to exercise control. If the VRS officers really could be assumed to have the same goals and methods as Belgrade, how can one make the assumption that the wide support it was given really made it dependant? If the VRS carried out its military operations based on its own preferences there is a chance that they weren’t dependent on the VJ and thus not controllable. The fact of the matter is however that the VJ did control the VRS through the fact that it provided most of its members, including the leaders.

This problem must be analyzed somewhat further and an example will once again serve as the starting point:

The federative State X is made up of two distinct nations, A-land and B-land. The capital, government and all other state functions are situated in A-land. All state officials as well as military officers are recruited from the ethnic A-landers. This practice has been going on for centuries and finally the B-landers have had enough! They proclaim that B-land leaves the federation and forms its own state. The new state is recognized by the community of states and granted UN membership. A-land follows suit and proclaims that it is also a new state, although it will continue the identity of State X and all its international obligations. The name of the national army is changed from the “X-men” to the “A-team”.

A small part of the population of the new state of B-land consists of A-landers. They form an enclave in the middle of the country and consist exclusively of a former regiment of the former X-men and their families. They possess a full military organization as well as heavy equipment. This enclave decides to proclaim a third state “New A-land” on the territory of B-land and immediately start hostilities with the B-land militia. A-land itself does not get involved in this battle, as it is afraid of the international community’s reaction. It does however completely share the New A-landers’ ambition and it can be assumed that the two will adhere to the exact same course of action in any given situation.

The questions are thus whether A-land can control New A-land, and if New A-land is dependant on A-land. The only factor that will be considered for now is the fact that the entire population of New A-land has been provided by the armed forces of A-land. Starting with the question of control, it can be argued that the New A-landers as a group should be seen as a newly formed group and their former involvement in the armed forces of State X should not automatically imply that they are loyal to the new state of A-land. This may be a valid assumption in itself but if the added circumstance

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<sup>155</sup> *ibid*

is added that the formation of the new state occurred on orders from A-land the discussion becomes more complex. It is important to note that the order came when the members of the group were still in the armed forces and were yet to form the group. This is a simplification of the situation at hand in Tadic but it still serves the purpose of examining it.

The author would argue that the fact that the leading member of the group can be held to be loyal to a foreign state would grant that state the possibility to exercise control over the group, thus creating dependency. This does not mean that the group as such has any loyalty towards the state. In the example given the real question would thus be if the members kept their loyalty. This could be indicated by the facts at the forming of the group and the actual structure of the group when it is formed. If, as in Tadic, it can be proven that officers still receive their pay from the state or continue using tactics and plans devised by that state, a presumption could be created.

This does not however solve the problem entirely since the question remains of whether a group automatically is dependant on a state because the state formed the group and provided its members. In the author's opinion this question cannot be answered categorically from the statements by the Appeals Chamber. The question rarely presents itself this clearly, however, and it is the author's view that although this can be sufficient to create dependency, it can only be certain when seen in the light of other factors.

Much of the discussion, presented by the author, on dependency is attempting to set a "lower threshold" and as such is going beyond the questions presented in Tadic. The reason for this is twofold. If the "overall control" test is to set a legal standard for the level of control required by international law to attribute the acts of groups to states it must by necessity be general.<sup>156</sup> This means that although cases similar to the situation in Tadic can be argued successfully to achieve this standard, there will also be cases that are less clear. The other side of this is that most states and other actors on the international legal scene do not have the luxury of seeing all the facts in retrospect and with all the evidence presented. On the contrary, facts implying control are often very hard to prove and as such the lower threshold can be much more relevant. It is not the author's wish, however, to try and lower the demands of control required by international law, something that the international community of states has by tradition been very reluctant to do.<sup>157</sup> Trying to specify the limits of the test, on the opposite, has the purpose of dis-encouraging an argumentation that the Tadic's "arguably lower level of control" means that the field is open for arguing that any connection amounts to control.

### **3.1.1.2 Quantifying Control**

Turning now to the other suggested use for support in the "overall control" test, namely quantifying control, the author would like to suggest that there

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<sup>156</sup> see also Tadic para. 104

<sup>157</sup> See states' reactions to the work of the ILC in its articles on state responsibility.

is more to the dependency question than a simple dependency or no-dependency approach. Looking at the discussions of the Appeals Chamber it seems that the support given to the VRS also strengthens the value of the actual control exercised by the FRY in addition to simply allowing it. It is natural to assume that a higher degree of dependency lowers the amount of actual control that needs to be established for “overall control” to be proven. It is the author’s belief that the “overall control” test was construed to be a test of quantity, meaning that if the total level of control adds up to “overall” the test is passed. It does not matter so much what these different factors are, but rather that they, taken together, do show control. This assumption will however need to be analyzed within the context of the Tadic judgment.

The starting point in this discussion will be the use of the designation “overall control” and the focus on group organization to find this control. In this reasoning lies an element of “adding” different types of control to reach the level required by international law. The Appeals Chamber maintains a discussion of the errors of using the “effective control” test when it comes to acts of organized groups, and specifically the error of the Trial Chamber in using this test.<sup>158</sup> Both the Trial- and the Appeals Chambers take the view, true or false, that the “effective control” test requires a direct order from the state to the non-state actor to commit the act in question.<sup>159</sup> The Appeals Chamber finds that this, arguably high standard of direct control, is suitable for the acts of individuals and unorganized groups but find that organized groups must fulfill a different standard, simply because of the organization factor.<sup>160</sup> This in itself promotes the thought that the chamber was at least open to an additive method of establishing control. The use of the word “overall” when designating the level of control required can also indicate a more flexible approach.

The added factor of a group being organized, seem to add some control or dependency in itself. Otherwise why would the chamber promote a different standard of control for these groups? In the author’s opinion this conclusion is wholly valid. The fact that a group is organized does serve to amplify any dependency already shown in the sense that it serves as an extender of the potential to exercise control. In other words it is much easier to control an organized group than one made up of loosely tied individuals without clear hierarchies and rules, much like any direct control actually exercised is more likely to result in the desired act. The group criteria thus also have a role to play in the dependency argument.

It is also worth mentioning that the Prosecutor, faced with the Trial Chamber’s decision to use the standard in Nicaragua, supports a different approach in front of the Appeals Chamber.<sup>161</sup> The prosecutor argue that the “effective control” standard, as presented by the Trial Chamber was not the right standard in the case. He proposed a different interpretation but held

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<sup>158</sup> Tadic paras. 153, 155-156

<sup>159</sup> Trial Chamber para. 605, Tadic para. 141

<sup>160</sup> Tadic para. 137

<sup>161</sup> Tadic paras. p 68-74



that it should be sufficient that a “demonstrable link” can be proven in cases like Tadic.<sup>162</sup> Furthermore, he asks that the Appeals Chamber distinguish between the standards required in State Responsibility and Individual Criminal Responsibility,<sup>163</sup> claiming that Nicaragua is not valid for issues of individual responsibility.<sup>164</sup> The Appeals Chamber stated that the prosecutor misread the Nicaragua Case and the prosecutor’s “demonstrable link” standard was not further investigated.<sup>165</sup> This further shows that the Appeals Chamber was not prepared to let go of using a control standard to solve the question at hand, even faced with the prosecutor’s very valid criticism. Also, it shows the stern resistance of the chamber to a more relaxed interpretation of the “effective control” standard in lieu of creating an arguably new test.

In the Tadic case the VRS was very dependant on its sponsor, the FRY. It has been concluded that the VRS was completely dependant on the VJ support to carry out offensive military operations.<sup>166</sup> This, in addition to other forms of support mentioned earlier, makes it clear that the FRY had a huge potential for controlling the VRS. It can only be speculated as to whether this was the reason for abandoning the “effective control” test for the “overall control” test, but in the author’s opinion this can well be a likely assumption. Faced with a situation where control clearly existed and limited by the interpretation that “effective control” always required an order; the one thing that could not be proven, the Appeals Chamber took a less rigid approach. The “overall control” test may or may not have existed in international law before Tadic but it does make sense in a situation such as the one therein. It is the author’s opinion that the high level of dependency between the VRS and the FRY was the rationale for constructing a different test.

The author suggests that the factors labeled as “support” and the group criteria are used to establish dependency and a potential for exercising control by the state over the agent. In a way they also create a high lever of “general control” in themselves. This control is shown when it is seen in the light of the direct control exercised by the state. Or rather, the importance of the direct control exercised by the state can only be quantified when seen in the light of the existing dependency and general control. The conclusion will however need to wait until the level of control required to fulfill the requirements of the test has been fully established. The author will return to finish this discussion in Chapter 3.6.2.

The conclusion that can be drawn is that both support and fulfillment of the group criteria are inherent parts of establishing “overall control”. If the group criteria is not fulfilled the test is not even applicable. The importance

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<sup>162</sup> Tadic para. 72. In the author’s opinion this standard is probably similar to the one used in Yeager.

<sup>163</sup> Tadic para. 70, Bohlander pp. 221-222

<sup>164</sup> Tadic para. 70, Bohlander p. 223

<sup>165</sup> Bohlander p. 222 in Tadic paras. 103, 106-107

<sup>166</sup> Trial Chamber para. 605, restated Tadic para. 155

of support is not as clear but the author, in referring to earlier argumentation, would argue that its role is to establish dependency, which is a requirement for “overall control”. It has also been argued by the author that anything that can be used to establish dependency should be labeled support, lacking a better term.

## 3.1.2 The Objective Criteria

### 3.1.2.1 ILC article 8

To establish the level of direct control required by the Appeals Chamber to achieve “overall control”, it is necessary to first examine the chamber’s view on what “control” actually implies. At the time of the chamber’s judgment the main source for determining this was the ILC draft articles on state responsibility as well as the Nicaragua case. When examining the chamber’s findings some things are necessary to keep in mind. First, the actual question in the Tadic case was not one of establishing state responsibility, but rather one of establishing an international armed conflict.<sup>167</sup> In this context the tribunal found that the relevant fact in order for a purely internal conflict to become international was that:

“[...] some of the participants in the internal armed conflict **act on behalf of** that other State.”<sup>168</sup>

This is the standard that the chamber uses rules of international law on state responsibility to fulfill.<sup>169</sup> For the purpose of the case this is determined to be the same as:

“[...] those forces may be **assimilated to organs of a State** other than that one on whose territory they live and operate.”<sup>170</sup>

The chamber states that logically this standard must be the same as the rules of attribution in international law on state responsibility and as no clear rules exist in humanitarian law the rules on state responsibility can be used in its place.<sup>171</sup> This is important as it can potentially be used to understand some of the irregularities in the chamber’s reasoning as well as its use of varying terminology.

Second, as have been stated before, the chamber clearly adopted the Trial Chamber’s interpretation that “effective control” was only possible to

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<sup>167</sup> The logics of using rules on state responsibility are presented in Tadic paras. 98, 103-105.

<sup>168</sup> Tadic para. 84, emphasis added.

<sup>169</sup> Tadic paras. 89-91

<sup>170</sup> Tadic para. 91, emphasis added.

<sup>171</sup> Tadic paras. 103-104

achieve with the existence of a direct order/specific directives/instructions from the state to the non-state entity, and this order had to pertain to the act.<sup>172</sup> This explains the chamber's reluctance to base its reasoning in the "effective control" test and *Nicaragua*. The standard the chamber was seeking to achieve was thus "acting on behalf of a state". This was also the standard suggested by the ILC in the text of article 8 provisionally adopted by the ILC Drafting Committee in 1998.<sup>173</sup> In this text, article 8 encompassed current articles 8 and 9 with the following wording:

"The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

- a) it is established that such person or group of persons was in fact **acting on behalf of** that State; or
- b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority"<sup>174</sup>

James Crawford, who was at the time acting UN Special Rapporteur on the subject, working closely with the ILC in preparing a new draft, suggested another wording, which was the one that was finally used:

"The conduct of a person or group of persons shall be considered an act of state under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"<sup>175</sup>

These two approaches have much in common but have some important differences. The most central one is that the wording of the Drafting Committee places the focus on the agent and Crawford's suggestion places it on the state. This has implications for the way responsibility is argued and, in the end, construed. If the focus is put on the agent and its acting on behalf of the state it minimizes the importance of the states own actions. In the extreme, an agent who commits international crimes in the name of a state could make the state responsible for these acts. It is clear that this interpretation was never intended but it is possible to see some influences from this thinking in the Tadic case. The focus on the structure of the group is one such influence.

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<sup>172</sup> Tadic paras. 106-109, 114

<sup>173</sup> U.N. Doc A/35/10, para. 34, *Yearbook of the International Law Commission*, 1980, vol. II (2)

<sup>174</sup> Ibid, emphasis added.

<sup>175</sup> *First Report on State Responsibility by the Special Rapporteur J. Crawford*, U.N. Doc. A/CN. 4/490/Add.5, pp. 16-24.

### 3.1.2.2 Ultra Vires Acts

In the Appeals Chamber's view states have to assume responsibility for acts *ultra vires* under both current article 8 and 5 cases, provided that the actor is an organized and hierarchically structured group.<sup>176</sup>

The reason is stated to be the structure and rationale of international law on state responsibility. It is the chamber's view that states can not escape legal responsibility for acts it has performed through agents, simply by hiding behind the fact that these agents are not official representatives of the state. This is largely uncontroversial and this thought has been implemented in the ILC articles. The chamber however, takes this to also include article 8 cases into the *ultra vires* rule in article 7. Whether this is a characteristic of the "overall control" standard or something that should apply to all cases under ILC article 8 is not clear. In use of the "overall control" standard the Appeals Chamber has made it very clear that no direct orders are required so further question arise on what would constitute acts *ultra vires*. A discussion of this is thus required.

The chamber seeks and finds support in a ruling from the US-Mexico Claims Commission in the Youmans claim of 1926.<sup>177</sup> In this case American citizen were killed by members of the Mexican security forces employed to protect them from an angry mob. The Americans were working as supervisors for a tunnel project in *Michoacán*, Mexico.<sup>178</sup> An argument broke out between one of the Mexican employees and one of the Americans over an issue of wages. A mob soon formed outside Youmans' house and began to throw stones. One of the rioters was shot by the American supervisor involved in the argument, and chaos erupted. The Americans sent for the town's mayor who dispatched troops to protect them. When the soldiers arrived they joined forces with the mob and opened fire on the Americans, eventually killing them.<sup>179</sup> The next day the Mexican federal army arrived and reestablished order, arresting several members of the mob.<sup>180</sup>

Mexico claimed that international law did not allow for attribution of acts committed by soldiers in disobedience with orders or contrary to instructions.<sup>181</sup> The Claims Commission answered that if states were only responsible for acts committed inside its official's competence no wrongful acts could ever hold a government liable.<sup>182</sup> In the opinion of the Tadic Appeals Chamber this reasoning should also, to a large extent:

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<sup>176</sup> Tadic paras. 120-123

<sup>177</sup> Tadic para. 122, *Thomas H. Youmans (U.S.A.) v. United Mexican States*, Decision of 23 November 1926, *Reports of International Arbitral Awards*, vol. IV, pp. 110-117

<sup>178</sup> Youmans para. 2 p. 111

<sup>179</sup> *ibid*

<sup>180</sup> Youmans para. 3 p. 112

<sup>181</sup> Youmans paras. 9-12 pp. 114-115

<sup>182</sup> Youmans para. 13 p. 115

“[...] hold true for acts of organized groups over which the state exercises overall control.”<sup>183</sup>

In the author’s opinion this statement is not supported in customary international law on state responsibility. Responsibility for acts *ultra vires* or *contra legem* is established in international law for acts of state organs or organs empowered by national law to exercise state authority.<sup>184</sup> The armed forces of the Mexican state of *Michoacán* clearly fall under this description. This does not in any way indicate that the responsibility extends to acts of groups controlled by the state, which has also been expressed in the ILC articles.<sup>185</sup>

The other reason for the chamber’s standpoint, which in the author’s opinion is more valid, is that an organized group normally engages in a series of activities. All these activities are held to engage the responsibility of the state:

“[...] whether or not each of them was specifically imposed, requested or directed by the state.”<sup>186</sup>

In the author’s opinion this statement should be interpreted as meaning that when an organized group, under a state’s “overall control”, is acting, there is nothing that it does that can be described as *ultra vires*. This is simply because since the state does not have to give specific instructions which can be overstepped or broken. The argument needs to be criticized, however, from several points. If the amount of responsibility that arises from a state having “overall control” is this high, it would in fact be identical to the responsibility a state has for acts of its own organs.<sup>187</sup> The chamber indeed observes that:

“[...] the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper.”<sup>188</sup>

It does not, however, see any problem with this but rather uses this fact as further evidence for its conclusion. It is worth mentioning that the chamber argues in a style that implies that the “overall control” test is well established in international law and its existence does not need to be proven. Despite this the chamber constantly gives various amounts of proof and it seems to give a theoretical explanation to the inclusion of *ultra vires* acts into the test. It points out that there is a distinction between the cases of state

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<sup>183</sup> Tadic para. 122

<sup>184</sup> Expressed in ILC articles 4, 5 and 7.

<sup>185</sup> Ibid, note, however, ILC Commentary to Article 8, para. 8 pp. 108-109

<sup>186</sup> Tadic para. 122

<sup>187</sup> ILC Articles 4 and 7.

<sup>188</sup> Tadic para. 121

officials on one hand and organized groups on the other, but the inclusion of acts *ultra vires* still holds validity. In the case of state officials, the Chamber states, the legal responsibility for *ultra vires* acts follow objectively from the wording of articles 7 and 10 of the ILC draft, which probably should be interpreted to imply that the chamber is indeed basing this in international customary law. In the case of organized groups:

“[...] State responsibility is instead the objective corollary of the overall control exercised by the State over the group.”<sup>189</sup>

The author cannot draw any conclusions about the inclusion of *ultra vires* acts from this statement. It seems to be a statement pertaining to find states responsible for acts of organized groups, but it is placed between the explanation for why state officials *ultra vires* acts are considered acts of state, and a conclusion that *ultra vires* acts does give rise to state responsibility. It does seem, however, that this is the only explanation the chamber is prepared to offer on the subject. The actual conclusion opens up for further doubts. The chamber concludes that acts of state officials incur state responsibility even if the acts occur *ultra vires* or *contra legem*<sup>190</sup>. Secondly it concludes that acts of organized groups under a state’s “overall control” also incur state responsibility. It goes on to state that international law renders the state responsible whether or not the state has issued specific instructions to the individuals in question, clearly referring to both these situations. Both an interpretation to the fact that *ultra vires* acts can give rise to state responsibility under the “overall control” test, and the opposite are possible.

The use of this ambivalent wording brings the author’s attention back to the chambers need to distinguish the “overall control” test to that in Nicaragua. Perhaps the reason for the inclusion of *ultra vires* acts into article 8 is to further this endeavor. The assumption that the “Effective control” test demands a direct order could possibly be the motivation to strive to include these acts. If the inclusion of *ultra vires* acts is accepted into article 8 it would on the surface substantially weaken the argument that a direct order has to be given to find that control exists. This is however not entirely true. The concept of *ultra vires* instead presupposes that some form of order or instruction has been given. Furthermore article 8 does not, in the author’s opinion, go well with the inclusion of *ultra vires* acts. International customary law is generally restrictive in finding states responsible under article 8,<sup>191</sup> which makes a thorough argumentation and presenting ample reasons, all the more important.

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<sup>189</sup> Tadic para. 123.

<sup>190</sup> Contrary to (national) law.

<sup>191</sup> The best example here is probably the Nicaragua case, but the fact that states have not in any large scale found other states responsible for founding guerrillas or terrorists, even though it is obvious that they have been founded, is an indication of this. This tradition has to some extent changed during the last couple of years’ war against terror, spearheaded by the U.S.A., but in the author opinion this has far from created any change in international customary law in the field in question.

Without examining this further, the author will conclude that at least in today's legal reality the inclusion of *ultra vires* responsibility into article 8 has not won support.<sup>192</sup> In its Commentary to the ILC articles the ILC explains that an agent going beyond instructions or direction of a state can only make the state responsible if:

“[The unlawful conduct] was really incidental to the mission or clearly went beyond it.”<sup>193</sup>

Acts under the “*effective control*” of the state, however, are still attributable even if certain instructions are ignored or disobeyed. In the author's opinion this makes perfect sense but does not amount to *ultra vires* responsibility as it is detailed in ILC article 7. It is natural that acts going beyond instructions are attributable under control responsibility as the relevant link is not instructions but control which is much wider in its scope. This does not mean, as the Appeals Chamber's reasoning would imply, that all acts of a “controlled” group are attributable to the state like the acts of official state representatives.

As far as the author can see, the Appeals Chamber in Tadic does not make a very strong case, seeking support in a weak theoretical argument and a court decision addressing the situation in ILC article 4, which is already established to include *ultra vires* acts. The conclusion must therefore be that this part of the Appeals Chamber's reasoning must be found to be invalid, at least in the context of modern international law on state responsibility.

The author is aware that the most likely reason for why the Appeals Chamber included *ultra vires* and *contra legem* acts is the context within the “overall control” test was that it was meant to be used. In the context of the high demands on evidence of direct control suggested by the Trial Chamber it does seem reasonable to expand the possibility for finding control in any way possible, but in the author's opinion, the fault lies more in the use of a control method than the actual application of the same.<sup>194</sup> As this has no value for determining whether there is an inclusion of responsibility for *ultra vires* acts in article 8 it is, however, of no use, and the author has thus focused on the legal arguments presented by the Appeals Chamber.

To fit this into the system proposed in Chapter 2, the author will now return to the theoretical rationale behind the group criteria suggested by the author and the concept of an area of actions as expressed in Option 2.<sup>195</sup> How can there be an area of actions criterion in the group criteria if the state has to assume responsibility for *ultra vires* acts? The answer to this lies in the

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<sup>192</sup> See the wording of ILC article 7

<sup>193</sup> ILC commentary to article 8 para. 8

<sup>194</sup> See also the “*Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute*”, ICTY Trial Chamber, 7 May 1997, para. 3

<sup>195</sup> Chapter 2.2.2

separation of the group and direct control criteria. An act of an individual only forms an act of the group if it is performed within the group's area of actions. The inclusion of *ultra vires* acts do not extend the area of action as such, since it only extends the group acts that give rise to state responsibility. This means that even though any acts of the group, even acts the state could not directly control, give rise to responsibility, they still have to be acts of the group. These acts are defined as acts of members committed within the area of actions. The acts the members perform outside the group are acts they perform as individuals, and as such are not tried under the "overall control" standard.

### 3.1.2.3 References to Other Articles

When the Appeals Chamber moves on to examine if the stand taken by the ICJ in Nicaragua is consistent with judicial and state practice, it continues to refer to situations that were most likely not dealt with in the framework of ILC article 8.

One such case is the, earlier mentioned, Stephens case from the U.S.-Mexico Claims Commission.<sup>196</sup> In the case the Claims Commission found Mexico liable for the reckless killing of an American citizen and responsible for the denial of justice perpetrated by not trying the killer.<sup>197</sup> The Appeals chamber concludes that, since the commission did not enquire whether specific instructions had been given, it in fact used the "overall control" test in finding Mexico responsible. The author would argue that the Commission in fact tried this case under what would later become ILC articles 4 or 5; the Claims Commission stated that the killer must be considered as, or assimilated to, a soldier.<sup>198</sup> Since the auxiliary did clearly perform a governmental function which it was authorized by law to perform, it is very difficult to see how this could be a case under current ILC article 8. The Appeals Chamber does, however, not explain its interpretation further.

The same problem is at hand when the chamber refers to the *Yeager* case from the Iran-U.S. Claims Tribunal.<sup>199</sup> In this case the U.S. citizen Kenneth P. Yeager was being mistreated and later ejected from Iran by members of the "Revolutionary Guards", during the first month of the revolution. The Tribunal was faced with the question of whether the acts of the Guards could be attributed to the state of Iran as they were affiliated with the Ayatollah who would later seize government.<sup>200</sup> This affiliation was denied by the state.<sup>201</sup> The Tribunal found that the acts should be attributed to Iran since the Guards had acted as *de facto* state organs.

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<sup>196</sup> Tadic para. 125, see also Chapter 2.1.4

<sup>197</sup> Stephens para. 8 p. 268

<sup>198</sup> Stephens para. 7 p. 267

<sup>199</sup> Tadic paras. 126-127, *Kenneth P. Yeager v. Islamic Republic of Iran*, Award No. 324-10199-117, *Iran-U.S. Claims Tribunal Reports 1987*, vol. IV, p. 92

<sup>200</sup> Yeager paras. 35 and 37

<sup>201</sup> Yeager para. 23



The Appeals Chamber notes that the Guards:

“[...] clearly made up organized armed groups performing de facto official functions.”<sup>202</sup>

It also notes that the Claims Tribunal did not enquire whether any specific instructions had been given to the Guards to be able to find that the Guards were acting ‘for’ Iran, and that this practice was upheld in several cases.<sup>203</sup> Although it is not stated, the author sees little reason to interpret these passages as anything else than that the Appeals Chamber found the Iran-U.S. Claims Tribunal to uphold the “overall control” standard in the case.

This conclusion is not entirely satisfactory when reading the Tribunal’s reasoning. It seems that the Tribunal instead took a different path in attributing responsibility to the state of Iran. It states that the “Guards” were not formally recognized as organs of the state, referring to ILC article 4.<sup>204</sup> It then continues to state that the acts of the “Guards” could still be attributed to the state if they were in fact “acting on behalf of” it, using the contemporary ILC draft article 8 (a).<sup>205</sup> The evidence at hand was deemed sufficient to form a presumption that the “Guards” were acting on behalf of the state, which switched the burden of proof to the state, which had to rebut it.<sup>206</sup> This burden was phrased in the terms:

“[S]howin that members of “Komitehs” or “Guards” were in fact not **acting on its behalf**, or were not **exercising elements of government authority**, or that it **could not control** them.”<sup>207</sup>

This quote shows that the Tribunal in fact tested for three different grounds for attribution. The first was synonym with ILC draft article 8 (a) and the second corresponded with article 8 (b), which corresponds to contemporary ILC article 9. The last one, however, presents somewhat of a problem as it is formulated as a standard separate from the other two. The Tribunal found the first two grounds fulfilled by the fact that the act of expelling the employees of Yeager’s company by the “Revolutionary Guards” was of such a size and magnitude that it must have been known to the state, which did not specifically object to it.<sup>208</sup> Furthermore, the state had in other cases largely stood behind the “Guards” despite certain complaints of lack of discipline.<sup>209</sup> The criteria are thus phrased in a negative manner essentially stating that when a group affiliated with the state acts, the state must

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<sup>202</sup> Tadic para. 127

<sup>203</sup> Yeager paras. 42-45

<sup>204</sup> Yeager para. 42

<sup>205</sup> *ibid*, ILC draft article 8 (a) would later become current article 8 but with a different wording.

<sup>206</sup> Yeager para. 43

<sup>207</sup> *ibid*, emphasis added.

<sup>208</sup> Yeager paras. 43-44

<sup>209</sup> Yeager para. 44

distance itself from that group in order to avoid responsibility. Concerning the third standard the Tribunal stated that:

“Because the new government accepted their activity in principle and their role in the maintenance of public security, calls for more discipline, phrased in general rather than specific terms, do not meet the standard of control required in order to effectively prevent these groups from committing wrongful acts against United States nationals.”<sup>210</sup>

This statement is not entirely clear but is followed by an explanation, which is also quoted by the Appeals Chamber:

“Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary “Komitehs” or “Guards” and at the same time deny responsibility for wrongful acts committed by them.”<sup>211</sup>

Read together, these quotes also present a slightly different phrasing of a control responsibility. The relationship between the state and the “Revolutionary Guards” did not express *sufficient* control to *prevent* internationally wrongful acts. It seems that by tolerating the “Guards” the state acquired an almost strict responsibility for their actions. This line of reasoning goes relatively far from the active demands put on the relationship in Nicaragua, where the state has to actively control the agent for attribution to take place.

A similar characteristic of both the *Yeager* and *Stephens* cases is that the internationally wrongful act they address is the failure to uphold international minimal standards.<sup>212</sup> This makes the reference to rules on state responsibility, as envisioned in the ILC articles, somewhat problematic.<sup>213</sup> Much like with human rights, the state not only has an obligation not to actively breach the standards, but more importantly to ensure that the protection that they give is upheld. This added to the fact that questions of international minimum standards have traditionally been addressed as questions of liability, rather than state responsibility,<sup>214</sup> makes the reference to these cases all the more problematic. In the Iran-USA Claims Tribunal the applicant is mostly an individual and states are not found responsible, but rather liable to pay compensation.<sup>215</sup> Likewise, in the

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<sup>210</sup> *Yeager* para. 45

<sup>211</sup> *Tadic* para. 126, *Yeager* para. 45

<sup>212</sup> *Shaw* pp. 734-735

<sup>213</sup> The Commentary to the ILC articles quote the *Yeager* case in a footnote to its comments on Article 8, see *Commentary* p.107 fn. 169

<sup>214</sup> “*Southern Pacific Properties (Middle East) Limited [SPP(ME)] v. Arab Republic of Egypt*”, International Centre for the Settlement of Investment Disputes (ICSID), Case No. ARB/84/3 in *19 Yearbook Commercial Arbitration 51* (1994) and the *Cosmos 954* settlement at [http://www.jaxa.jp/library/space\\_law/chapter\\_3/3-2-2-1\\_e.html](http://www.jaxa.jp/library/space_law/chapter_3/3-2-2-1_e.html) (last visited 071230)

<sup>215</sup> See *Declaration of the Government of the Popular and Democratic Republic of Algeria Concerning the Settlements of Claims by the Government of the United States of America*

Stephens case only compensation to the state, on behalf of the petitioners, was awarded.<sup>216</sup>

The third case presented by the chamber deals with violations of the right to property by the authorities of the Turkish Republic of Northern Cyprus.<sup>217</sup> The petitioner argued that she could not enjoy her property rights to a piece of real estate, which was situated on the side of the island controlled by the Turkish Republic of Northern Cyprus (TRNC). She also claimed that the TRNC was in fact controlled by Turkey, which is a party to the European Convention on Human Rights, making the petition admissible.

Last, the Appeals Chamber examines an unpublished case from the Oberlandesgericht of Düsseldorf<sup>218</sup> where the German national court found that the conflict between certain Bosnian Serbs and the state of Bosnia in Bosnia and Herzegovina possessed an international character. The chamber notes that similarly to the other cases presented, the court did not inquire whether or not the specific acts committed by the accused had been ordered by the FRY. This case clearly deals with the same question as the one in Tadic. Since the sentence is only published in German the author cannot ascertain whether the “overall control” method was used. If this was the case, it can be seen as state practice by Germany in support of the “overall control” standard. This in itself cannot be sufficient to claim that the standard was established as customary international law at the time.

Similarly, the Appeals Chamber presents certain cases where courts have upheld different standards in situations where the agent was not an organized group.<sup>219</sup> These will be addressed more briefly as they do not in themselves support the “overall control” standard. The tribunal starts with commenting the ICJ’s decision in the United States Diplomatic and Consular Staff case.<sup>220</sup> The chamber notes that the students did not comprise an organized armed group and that the ICJ required specific instructions to find Iran responsible for their acts.

Next is the Nicaragua case where the chamber states that the ICJ held the U.S. responsible for the acts of the so called UCLA’s, since they were not only paid by the U.S. but also acted upon the instructions of that state.<sup>221</sup> Last, the chamber comments the *Short* case from the Iran-US Claims

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*and the Government of the Islamic Republic of Iran (Claims Settlement Declaration)*, 19 January 1981, Articles II(1-2) and VII(2)

<sup>216</sup> Stephens p. 268

<sup>217</sup> Tadic para. 128, *Loizidou v. Turkey* (Merits), European Court of Human Rights, Judgement of 18 December 1996 (40/1993/435/514)

<sup>218</sup> Tadic para. 129, “*Case of Jorgic*”, Oberlandesgericht of Düsseldorf, Decision of 26 September 1997, 2 StE 8/96 (Unpublished).

<sup>219</sup> Tadic paras. 133-136

<sup>220</sup> “*Case Concerning United States Diplomatic and Consular Staff in Teheran*” (*United States v. Iran*), International Court of Justice, Judgment of 24<sup>th</sup> of May 1980 in *ICJ Reports 1980*, pp. 3-46

<sup>221</sup> Nicaragua para. 75

Tribunal.<sup>222</sup> The applicant was Alfred L.W. Short and was an employee of Lockheed Aircraft Service Company in Iran. This case was one of many following the expulsions of Americans at the time of the revolution and the Tribunal had to investigate whether:

“[T]he facts invoked by the Claimant as having caused his departure from Iran are attributable to Iran, either directly, or indirectly as a result of its deliberate policies, or whether they reveal a lack of due diligence in meeting Iran's international duties towards the Claimant.”<sup>223</sup>

The agents in this case consisted of “revolutionaries” as opposed to the “Revolutionary Guards”.<sup>224</sup> The “revolutionaries” were armed but not organized according to the Appeals Chamber.<sup>225</sup> The Tribunal does not express this distinction or raise any discussion on whether they were armed or organized. In the author’s reading of the case they were simply Iranian people in general who supported the revolution.<sup>226</sup>

Short claimed that due to the anti-American sentiment spread by declarations by Ayatollah Khomeini, Americans were forced to leave the country.<sup>227</sup> The Tribunal found that although the Ayatollah had made general anti-American declarations, they did not specifically incite the mass expulsion of Americans.<sup>228</sup> Furthermore, the Tribunal found that the acts of supporters of a revolution are not automatically attributable to the new state, much like acts of supporters of the state’s ruling party are not attributable to the state.<sup>229</sup> The claim was thus rejected.

In the author’s opinion there is little in the *Short* case that actually support the contention that the Tribunal used any test, let alone the “overall control” test. There is a discussion on whether the statements made by Ayatollah Khomeini could be seen as an “authorization” to commit the acts, but the Tribunal found that they lacked “the essential ingredient”.<sup>230</sup> The interpretation made by the Appeals Chamber when using *Short* to support its reasoning is thus overly imaginative. *Short* does not contradict the “overall control” standard, but it does not support it either. The Appeals Chamber in *Tadic* finally adds that:

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<sup>222</sup> *Alfred W. Short v. Islamic Republic of Iran*, Award No. 312-11135-3, 16 *Iran-U.S. Claims Tribunal Reports* 1987, p. 76

<sup>223</sup> *Short* para. 29

<sup>224</sup> *Short* para. 34

<sup>225</sup> *Tadic* para. 135

<sup>226</sup> These included the Claimant’s landlord, a man in a dark coat, a mob in the street and strikers with little, or no, common features.

<sup>227</sup> *Short* para. 17

<sup>228</sup> *Short* para. 35

<sup>229</sup> *ibid*

<sup>230</sup> *ibid*

“[...] State practice also seems to clearly support the approach under discussion.”<sup>231</sup>

In a footnote it provides a number of cases from national courts, international tribunals and resolutions of the UN Security Council.<sup>232</sup> As far as the author interprets these mostly pertain to situations solved under current ILC articles 4 or 5.<sup>233</sup> In the ones that would come under current ILC article 8, specific instructions or *ex post facto* endorsement has been required.<sup>234</sup>

### 3.1.3 Conclusion

The author is not of the opinion that the Appeals Chamber has successfully proven that the “overall control” standard existed in international law on state responsibility at the time of the decision. The support it presents for the “overall control” test is not sufficiently based in current ILC article 8 situations, but more often in situations the author believes were solved using rules corresponding to current ILC articles 4, 5 or 10. When it comes to including responsibility for acts *ultra vires* or *contra legem* into article 8 there is little relevance referring to these cases since both articles 4 or 5 almost certainly include responsibility for these acts.<sup>235</sup> It is unclear to the author why the Appeals Chamber sought to include responsibility for acts *ultra vires* and *contra legem* into article 8 but, for the reasons presented above; this endeavor must be held to be unsuccessful.

The chamber’s focus on equating the groups in question with state organs proper adds another question mark. The most probable explanation the author can find for this is that organized groups were in some ways considered to “fall between” articles 5 and 8, giving rise to some of the same consequences and lending standards from both. This discussion requires, however, a complete understanding of the standard of control labeled as “overall”, and as such it will have to wait.

Another reason to question the use of the Appeals Chamber’s reasoning is that the ICTY’s mandate does not extend to issues of state responsibility but only those of individual accountability. Furthermore the “overall control” test was used to solve an issue of humanitarian law, namely whether there was an international armed conflict in Bosnia and Herzegovina, and not to establish state responsibility for the FRY. Although the Appeals Chamber finds that the test exists in international law on state responsibility, it is not in any way, when using it by analogy, bound to the same criteria as the ICJ when it comes to establishing the contents of rules of customary

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<sup>231</sup> Tadic para. 136

<sup>232</sup> *ibid*, footnote 167

<sup>233</sup> The actors in question are either state organs themselves or charged with missions by the state, of a law enforcement character.

<sup>234</sup> See also ILC article 11

<sup>235</sup> ILC article 7

international law. The chamber's approach has received criticism from many directions. Chamber member Judge Shahabuddeen questions the need to challenge Nicaragua in his separate opinion.<sup>236</sup> The above-mentioned is noted in the Commentary to the ILC articles.<sup>237</sup>

Does this mean that the “overall control” standard does not exist in international customary law? The author's answer is ‘no’. The fact that the Appeals Chamber failed to prove that the standard existed in international law does not mean that it does not exist today. Although the author has based most of this reasoning on the ILC articles on state responsibility this is, needless to say, not a source of international law. The author has used the ILC articles to provide a wording to a text, which he believes, largely represents international law in this particular field. The author is of the opinion that the different situations described in the second chapter of part one of the ILC articles, as well as their legal consequences, are supported by state practice and *opinio iuris*. The same interpretation has been made by Crawford and Olleson<sup>238</sup> who, after performing an inventory of state practice, stated that:

“In many cases (e.g. attribution [...]) the Articles have been generally taken to reflect customary international law.”<sup>239</sup>

The author uses the ILC articles as to make references, mainly to help describing the different situations and to simplify for the reader. International law on the subject of state responsibility is primarily found in international customary law. Customary law is generally accepted to be formed by state's actions when faced with a situation where it is expected to act, often labeled “state practice”. In addition to state practice international law requires that the state acted in the way it did, because it “believed” that international law required the state to act in this particular way. The label often given to this is “*opinio iuris*”.<sup>240</sup> One peculiarity following from is that if all states “knew” exactly what international law required them to do, there could never be any new customary law created, since *opinio iuris* for performing an act contrary to international law would not be possible to

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<sup>236</sup> “*Separate Opinion of Judge Shahabuddeen*”, ICTY Appeals Chamber, 15 July 1999, annexed to the Appeals Chamber Judgement para. 5

<sup>237</sup> Commentary to article 8, para.5 pp. 106-107

<sup>238</sup> “*The Continuing Debate on a UN Convention on State Responsibility*”, James Crawford and Simon Olleson in *International Comparative Law Quarterly* Vol. 54 (October 2005), pp. 959-972 and “*The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*”, James Crawford in *The American Journal of International Law* Vol. 94, N° 4 (October 2002), pp. 874-890 (mainly 888-890)

<sup>239</sup> *ibid* p. 968

<sup>240</sup> The concepts of “state practice” and “*opinio iuris*” are well explained in the ICJ “*North Sea Continental Shelf Cases*” (*BRD v. Denmark and BRD v. Netherlands*), Judgement of 20 Feb. 1969, pp. 43-44 paras. 75-78.

achieve. In theory there could only be new rules in a completely unregulated area of law. Existing rules could naturally never be changed.<sup>241</sup>

This is relatively uncomplicated until one imagines a number of states wanting the law to change. As customary law is defined as the opinion of the majority<sup>242</sup> it can also change when the states so desire. This will be explained with a small example:

States A, B, C and D comprise the World Community. No other states exist. They are all of equal size and coastal. For centuries it has been held that a state can legally occupy an area 6 nautical miles outside its coast as territorial waters and extend its sovereignty to this area. State A, which has discovered large petroleum sources 10 nautical miles outside its coast, has for some years claimed territorial waters up to 12 nautical miles outside its coastline. This has met strong protests by the three other states. Some years pass and state A manages to persuade first state B, and later state C that a 12 nautical mile limit is far superior to the old 6-mile limit. State D is the only objector when states B and C also extend their territorial waters.

It is obvious that state A's initial claim cannot have been motivated by *opinio iuris*. Customary law was clearly allowing only a 6-mile limit. State A's claim cannot be used to prove a new rule of customary law. When states B and C also claim 12 miles international law suddenly changes (assuming the majority of 3/4 is sufficient). Although the new claim was not supported in international law before it was made, and subsequently no *opinio iuris* can have existed, it becomes valid the second the claim is made. In a way the change of this rule of customary law is valid because a change of *opinion iuris* has taken place. The belief that international law allows a 12-mile limit becomes true when it is believed by enough states.

This is of course a simplification of how customary law is created. States often act upon other reasons than that they believe international law forces them too. Also the concept of states "believing" is naturally an analogy. States can only act through actual persons and the belief is rather theirs than that of the states'. Herein lays the explanation for the validity of the argument that the "overall control" test exists in international law. The fact that there is an "overall control" test in international law on state responsibility seems to be accepted.<sup>243</sup> It can be assumed that many advisors to the states in matters of international law are familiar with the standard and possibly trained in law faculties where it is taught. When they give advise to states on matters of state responsibility the "overall control" standard is thus probably taken into consideration, which means that states will act on the assumption that this standard exist in international law. If enough states act in this way the "overall control" standard will, as has been

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<sup>241</sup> See "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", Jörg Kammerhofer in *EJIL* Vol. 15, N° 3 (2004), pp. 523-553.

<sup>242</sup> The author will not join the discussion on how big this majority has to be.

<sup>243</sup> Chapters 1.2 and 1.3

explained above, become customary law. The actual content of the standard may or may not be the one imagined by the Appeals Chamber in *Tadic*, but will evolve and find its place in the system. The most visual example of the acceptance of the “overall control” standard is the fact that it is referred in the Commentary published to the ILC articles, under article 8.<sup>244</sup> Although this commentary is by no means a source of law it is widely used as a guide to interpret the ILC articles and as such plays its own role in developing international customary law.

The author believes that this mechanism allows for judges in international *fora* and legal scholars can actually influence the law they are set to interpret. For the author this is the driving force for the studying of international law and the writing of legal texts.

## 3.2 The Standard Expressed in Nicaragua

Although it is outside the scope of this text, the author finds it necessary to summarize the control relationship required in Nicaragua and later labelled the “effective control” test. This chapter is meant to give some background to the following discussion and will not attempt to isolate the requirements of the “effective control” test as this would require space not available in this text. It is, however, impossible to fully understand some of the reasoning by the Appeals Chamber and Trial Chamber without knowledge of the Nicaragua test and the author will attempt to summarize the passages relating to the control relationship between the Contras and the US.

As a part of the US effort to help the Contras defeat the government of Nicaragua massive aid was given in the form of arms, training and extensive funding. The CIA also provided communications and intelligence, which, according to then member of the FDN political directorate Edgar Chamorro, was critical to the Contras’ military operations.<sup>245</sup> Chamorro also claimed that the CIA had a virtual command over the Contras, “instructing” or “ordering” the various military operations.<sup>246</sup> The ICJ did not find this fact to be proven, stating that it was:

“[N]ot satisfied that all the operations launched by the contras force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States.”<sup>247</sup>

On the other hand it was found clear that a number of the operations were decided and planned, if not by US advisors, at least in close collaboration

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<sup>244</sup> Commentary para. 5, pp. 106-107

<sup>245</sup> *Affidavit of Edgar Chamorro in front of the ICJ*, para. 17, appears in *Nicaragua: Unfinished Revolution*, Peter Rosset and John Vandermeer (Editors), ISBN 0-394-55242-3, pp. 241-242, Nicaragua para. 101

<sup>246</sup> Nicaragua para. 104

<sup>247</sup> Nicaragua para. 106



with them.<sup>248</sup> Likewise the ICJ could not satisfy the evidential criteria to find that the US created the Contras, as counterrevolutionaries already existed when the funding started.<sup>249</sup> It did find, however, that the US had:

“[L]argely financed, trained, equipped and organized the FDN”<sup>250</sup>

What the ICJ eventually came to focus on was, in the author’s opinion, the relationship between the state and the internationally wrongful act. The order criterion expressed by the Tadic Trial Chamber is never expressly phrased, but the author would agree that the standard that had to be achieved for “effective control” would have been fulfilled if acts including actual violations of humanitarian law had been ordered by the US. This was the case with the so-called UCLA:s that mined the Nicaraguan harbour, among other acts, which was found to be attributable to the US state. It is however unclear if a lower standard than “direct order” could have fulfilled the criteria of “effective control”.

In the author’s opinion less “strong” acts of the US could have sufficed to evidence that it was controlling the specific operation in which the violations were committed. A large problem in Nicaragua came from the evaluation of evidence presented by one party when the other party was not present to refute it.<sup>251</sup> The author believes that this coerced the ICJ to place very high standards of evidence, which in the end led to the criteria of the “effective control” test not being fulfilled. The arguably high levels of control in Nicaragua are thus possibly little more than high standards of evidence. Other possible interpretations, including the ones made by the chambers in Tadic, are of course also possible.

The problematic of interpreting Nicaragua will have to remain unexplored in this text but it is the author’s aspiration that this chapter will at least have given the reader sufficient background to better comprehend the reasoning in the following chapters. Thus, having finished this parenthesis, the author will now continue the exploration of what level of actual control exercised by the state over the group satisfies the standard of “overall control”.

### **3.3 The Standard Labeled as “Overall Control”**

Having examined the group criteria as well as the preliminary criteria the author will now move on to the direct control a state has to be proven to have exercised, to find that it was in “overall control” of a group. In this part the Appeals Chamber gives plenty of information as to this standard and how it differs from the “effective control” standard formulated in the

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<sup>248</sup> *ibid*

<sup>249</sup> Nicaragua para. 108

<sup>250</sup> *ibid*

<sup>251</sup> Nicaragua paras. 57-73

Nicaragua case. The author will start with presenting selected quotes as a starting point for the discussion:

“[...] not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”<sup>252</sup>

“[...] when a state (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”<sup>253</sup>

“Acts performed by this group or members thereof may be regarded as acts of de facto state organs regardless of any specific instructions by the controlling state concerning the commissions of those acts.”<sup>254</sup>

The first two quotes deal with the requirement set by the Appeals Chamber for “overall control”, and the last with separating the test from the perceived demand of an order presented in Nicaragua. Immediately certain general conclusions can be drawn about the “overall control” standard. The direct involvement from the state has to be high. Involvement in planning, organization and coordination of military operations shows a high level of involvement by the state. This involvement does not, however, have to go so far as to direct specific operations or give specific instruction. The author would argue that these two differences from what the Appeals Chamber’s interpreted was demanded for establishing “effective control”, would first of all serve to make an alleged violation easier to attribute to the state.

It is arguable if the Appeals Chamber suggests that the “overall control” standard requires a lower level of control than the “effective control” standard established in Nicaragua. Certain statements by the chamber can be interpreted to point in this direction:

“[Control is a requirement for attribution in international law] The **degree of control** may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”<sup>255</sup>

“[International legal practice] has envisaged state responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised.”<sup>256</sup>

The author will now investigate what the standard proposed by the Appeals Chamber in Tadic requires and how it can be used in different situations. On

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<sup>252</sup> Tadic para.131

<sup>253</sup> Tadic para.137

<sup>254</sup> Tadic para. 137

<sup>255</sup> Tadic para. 117 (emphasis in original)

<sup>256</sup> Tadic para. 124

the subject of whether the control standard expressed in Tadic is lower than the one in Nicaragua see Chapter 3.5 and Tadic para. 99.<sup>257</sup>

### 3.3.1 The Test

The chamber itself phrases the requirement for the “overall control” standard two different ways. In the context of international law of state responsibility it is twice determined to amount to:

“[The state] has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”<sup>258</sup>

In its conclusion of Part 3 of the judgment the chamber makes this statement about the standard required by international humanitarian law for attributing the occupation to the FRY:

“[The standard required was] overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”<sup>259</sup>

It is the author’s belief that the chamber meant for these two statements to set the same standard of control.<sup>260</sup> Both will thus be used when discussing the “overall control” standard in international law on state responsibility. The author will suggest a phrasing that encompasses both wordings as a basis for further investigations. As the support criterion has already been dealt with in Chapter 3.1, the elements of support will be excluded from this phrasing:

The overall control standard requires that the state in question has a role in organizing, coordinating or planning the military actions or operations of the military group, as well as some supervising of these operations.

Some comments are due on the choice of this phrasing. First, the author chose to exclude participation as a requirement since it is implied in the normal interpretation of “having a role in”. The author is aware that it is possible to stretch the definition of “having a role in” to include situations where the state has a none-participating role but for the purpose of this thesis these possibilities will be excluded when addressing the planning activity. Second, although it is unclear whether the standard only requires participation in the supervision of operations or full supervision by the state the author for the time being will assume that they are the same. Third, the

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<sup>257</sup> “*Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute*”, ICTY Trial Chamber, 7 May 1997, para. 3

<sup>258</sup> Tadic paras. 131, 137

<sup>259</sup> Tadic para. 145

<sup>260</sup> See Tadic paras. 97, 120 etc. (expressed in multiple passages)

inclusion of both “military actions” or “operations” are based on the chamber’s reasoning that the control required really is “overall” as opposed to “specific”. Both these terms are assumed by the author to refer to higher-level military operations or campaigns rather than specific missions. The author includes both terms as they together better reflect this interpretation. Forth, this definition is not meant to be static, and will probably be changed during the course of the text, but will be used only as a starting point to the investigation.<sup>261</sup>

It is the author’s finding that, although the definitions presented by the Appeals Chamber are quite clear, certain terms must be discussed and specified for them to be useful in a legal test. The author will therefore address the following terms trying to give them more specific meanings. These will be discussed in the context they are in as well as separately:

- Having a role in
- Organizing
- Coordinating
- Planning
- Military actions or operations
- Supervising

### **3.3.1.1 “Having a Role in”**

What does it mean to have a role in some activity? Or to use the other definition; participating in something? Immediately it can be assumed that a state that does not involve itself in any way in how the group acts does not have a role in its organizing, coordinating or planning military operations. It can also be established that having a role in is not the same as giving orders in every single operation, from the aforementioned quotes by the Appeals Chamber. The threshold is however unclear, but surely it lies between these two points. The spectrum of situations that could fall under the definition presented is large. The terms “participate” or “have a role in” could very easily involve the state being present in the planning of operations and asked to give its opinions but these being disregarded. This cannot amount to control in any theory of state responsibility, however low the standard of control is in Tadic.

In the author’s opinion the key word when discussing the “overall control” test is still “control”. It must be obvious that any interpretation of the wording of the test must still be used to show that the state was exercising control over the agent with respect to the acts in question. Therefore it is not advisable to be unduly bound by the words of any definition without interpreting it in the light of the control criteria. The wording set out by the Appeals Chamber must also be interpreted in this light.

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<sup>261</sup> Chapter 3.4

When applying this line of thought to the term “having a role in” the spectrum gets substantially smaller. A state cannot exercise control over military operations if the role it has in the organizing, planning and coordination of these does not permit control being exercised through it. The role a state has to have is thus one that permits the exercise of control over the group. This substantially limits the situations that can be envisioned. It is no longer possible to imagine a situation of a state participation without its input being considered. Yet, even this smaller definition is too large to say anything certain about the qualifications of the participation required. It is not sufficient that the state is put into a position where it can actually exercise control. The participation of the state must show that it actually used the potential to exercise this control in the actual case.

Continuing the search for the lower threshold for participation to find “overall control”, it is necessary to shrink the spectrum further. By examining the object of the participation this can be achieved. It has been established that “overall control” does not require a specific order to commit the specific act in question.<sup>262</sup> It is sufficient with a lower level of direct control since other factors required, such as group organization, command structure as well as direct state support; create a large general control or “dependency”.<sup>263</sup> Furthermore it has been established that showing control over the individual smaller operations is not required to reach the standard.<sup>264</sup> It is assumed that an “overall control” over the larger series of actions of an organized group also grants the state *de facto* control over the individual part of the smaller operations. Thus, the control over the smaller operations exists but does not have to be shown in each individual case.

By examining this line of thought the spectrum can be made to further decrease in size. First it indicates that the participation must only exist in the general level of planning, organizing or coordinating of operations. In many ways this follows from logical considerations as well. It is impossible for even the high command of a military group such as the VRS to control every aspect of the operations the group performs. This responsibility is instead delegated to lower levels in the command structure. If for example in the scope of a large offensive operation, a roadblock has to be established to prevent civilians from entering the area of fighting, the details of these missions are likely not known by the high command. There is, however, no doubt that acts performed by the soldiers manning the roadblock are acts of the group.<sup>265</sup> For this reason it seems unreasonable to demand that the state controlling the group is involved in the planning of this mission to be held responsible. The Appeals Chamber in Tadic appears to take this somewhat further. The chamber states that:

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<sup>262</sup> Tadic para. 137

<sup>263</sup> See discussion in Chapter 3.1.1.

<sup>264</sup> Tadic para. 137

<sup>265</sup> Subject to the “area of action” standard suggested in Chapter 2.2.2.

“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. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the unit **dependant** on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law.”<sup>266</sup>

It seems that the object of the state’s participation required for “overall control” is very general indeed. The state does not have to be involved in hardly any part of the specifics of the individual operations the larger military act is composed of. It can be held responsible for all acts arising out of its involvement on the general level of planning. When using the “overall control” test it is thus sufficient to examine the state’s participation on the higher levels of planning, organizing or coordinating in large military operations. The state’s involvement in the actual operation in which the violations examined took place does not have to be established.

The chamber is not clear on whether a state’s involvement in the smaller operations in question can “cure” lacking involvement in the larger sense. Assume that a state incites a national liberation movement to seize certain oilfields in the country of the conflict, for the benefit of the state’s own oil companies. The inciting state provides support and a detailed plan for the group but takes no interest in the larger conflict. It can only be speculated if the chamber would perceive this as “overall control”. The author believes that the existence of direct control in the actual operation can substitute the more general control demanded in the test but could just as well be solved referring to the Appeals Chamber’s interpretation of “effective control”.

The distinction does become more valid when a limited level of participation exists in both the general and specific level. If these can be “added” to total a sufficient level of participation responsibility can be established. As has been explained earlier, the author is of the opinion that international law supports an additive method in establishing control and that the “overall control” test supports this method. It is therefore sufficient that the “sum” of participation is sufficient to show that the state indeed exercised control over the group in the specific operation. How this “sum” is established is irrelevant as long as it shows that the state was in fact exercising control.

It seems now that the scope of participation required is now sufficiently narrow for drawing a conclusion about the level of involvement, participation or having a role in the planning, organizing or coordinating of military operations required by the “overall control” test. If the level of involvement on the general level of planning, organizing or coordinating of the overall structure of military operations shows that the state was exercising control over the operation in question, all acts committed within the scope of this are also considered to be performed under the state’s

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<sup>266</sup> Tadic para. 137, emphasis added.

control. This is true regardless of whether the state had any direct involvement in, or even knowledge of, the planning of the individual missions or operations the act was part of. Specific control over the smaller operation can possibly be used to substitute lacking involvement in the larger.

### 3.3.1.2 Planning

The involvement must also be qualified. It is not sufficient that the state is involved in the operation. The involvement must be in the form of organizing, coordinating or planning the operations in question.

Starting with “planning”, it is quite obvious what the Appeals Chamber was imagining when using this word. In the context of military operations planning would mean the creation of strategic and tactical plans for the achievement of military goals. These goals can be of many natures and the author will not attempt to give a list. For the purpose of this discussion any goals are assumed to be valid whether they are specific or unspecific, grand or small, legal or illegal and so forth. The interesting question is whether the state has to participate in phrasing the goals as well as the methods of achieving them or just one of these? This is not unproblematic as national liberation movements and terrorists usually have clear goals without any state involvement. The states that use them do so to achieve their own goals sometimes different from the goals of the group. From this it is easy to conclude that the state does not have to formulate the goal of the operations. In the author’s opinion, however, this is not entirely true. If a state uses a group to achieve its goals the group’s goals will also change somewhat. Even if the state and the group have the same goal, as was the case in Tadic, they both formulate it together when making the plan to achieve it.

If a state only supports a group with “know-how” and help with making plans to achieve its goal, without anything to gain of its own, can it control the group in any real sense? Or in other words; can a state be held responsible for violations of international law that occurred in the scope of an operation it had helped plan, but did not want for itself? As in Nicaragua this could probably be considered a breach of the non-intervention rule in customary international law, if the group was a national liberation movement and fighting the state, but it does not seem just to attribute acts to the state. If international wrongful acts were not a part of the plan it is almost a matter of a *culpa* responsibility that the state would be subjected to.

The other question is whether the state has to be involved in the planning of the methods of the operation. Interpreted widely this would come close to involvement in individual operations, which is not required according to the Appeals Chamber. The author does think, however, that a certain level of participation in this planning is required to attribute responsibility to the state. This does not go as far as formulating goals for the individual smaller

operations,<sup>267</sup> but require that state has participated in conceiving the overall methods and strategy. If the state is not involved at this level, it is unreasonable to award responsibility and few states would probably consent to assuming it. For this reason the author suggests that the word “planning” should be taken to mean formulating both the higher goals and grand strategy of operations.

### 3.3.1.3 Organizing

The meaning of the word “organizing” is not as obvious as the one of “planning”, but put into the context of military operations it becomes clearer. The organizing of a military operation comes very close to planning but deals more with the practicalities than grand strategy. A matter of organizing could be appointing commanders to subunits, organizing supply-chains, assigning support-assets such as artillery to individual operations and everything else that is involved in the management of military operations. The criteria must be interpreted somewhat narrower, however, since the object of it is really to show an exercise of control. A state cannot control a group by simply participating in organizing the supply logistics. It takes a more substantial participation in the organizing.

The author interprets the use of the three different terms planning, organizing and coordinating to basically mean the same thing. The reason the chamber used three terms instead of one is open to interpretation. In the context of the Tadic case the author draws the conclusion that the Appeals Chamber was aware of the possibility for states to avoid responsibility based on a labeling technicality. Rather than allowing interpretation of one term it settled for three, and the criteria was met whenever one of them was fulfilled. This would prevent states from hiding behind statements that they were “only organizing, not planning” and so forth.

Therefore the author suggests that they cannot be seen and interpreted separately but with reference to the others. The author believes, however, that the planning criteria is the central one for determining the threshold of control imagined for “overall control”, partly because it is the clearest and only one mentioned in the second definition,<sup>268</sup> but also, that it is the criteria most coherent with the reasoning of the chamber. The author thus suggests that the “organizing” criteria should be interpreted in such a way that it shows control in line with the reasoning regarding “planning”. In line with this reasoning, qualified participation in organizing would require a high level of participation in the overall organizing of military operations, which in fact would almost certainly also amount to planning.

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<sup>267</sup> Tadic para. 137

<sup>268</sup> Tadic para. 145



### 3.3.1.4 Coordinating

Like “organizing”, the word “coordinating” can, taken out of context, be used to describe a vast number of acts. But like the former criteria it must also be interpreted in the light of its context. The word in the context of military operations finds a meaning somewhere in between planning and organizing. It deals with both aspects merging them together. In this context it is difficult to imagine coordination on a lower, mission-based level and this is also true for the proposed interpretation of the word. Once again, it is sufficient that the coordination participated in by the state is of a general, overall level for control to be possible. What would come closest in reality would probably be the coordination of sub-operations making up the overall campaign. The participation in coordination is qualified when it is sufficiently important to show that the state is exercising control over the group.

The author is aware that the use of control as a criterion to find the exercise of control is somewhat impractical for the user. To explain this line of thought the author wishes to clarify the use of the same word in these two contexts. The second use is meant to imply the level of control sufficient to establish state responsibility in international customary law on state responsibility, as reflected in ILC article 8. This level of control is what the “overall control” test attempts to prove. The first way the author uses control is somewhat wider and less rigid. The meaning of this term is what is generally meant with the word control i.e. directly or indirectly directing someone’s actions with little possibility for him to disobey. This level of control does not need a legally defined spectrum when used in this sense since it is different depending on the situation. The author believes that control in this sense is obvious to anyone looking for it. The problems with the use of this terminology prevents it from being considered as a criteria and is only provided as an aid to qualify the actual criteria.

### 3.3.1.5 Supervising

The use of the word “supervising” in the second definition raises some problems. First, it is unclear whether the state has to perform this act itself or only participate in a general supervision. Second, as it does not fit into any of the wording in the first definition without a violently imaginative interpretation, there is room to argue that the criterion is not valid. Third, it adds an extra criterion that may be uncalled for if the others are fulfilled. The author would suggest the possibility that the criterion adds an element of continuity to the test. Further indication of this is given by the Appeals Chamber in its reasoning on whether the VRS was a continuation of a branch of the JNA, and not merely an ally of its reformed Serbian equivalent, the VJ.<sup>269</sup> The supervising of military operations would imply some sort of follow-up. If a state participates in the larger planning in the beginning of an operation which will take years to fulfill, it is in theory responsible for everything that happens within the next couple of years, regardless of

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<sup>269</sup> Tadic para. 152

whether the state terminates all cooperation with the group during this time. The author will argue that this must be the reason for adding this criterion.

It is the author's opinion that the supervising criterion should be interpreted in such a way that if the state discontinues its cooperation with the group, a point in time arrives when the state can no longer be held to control it. This point should arrive within a reasonable time after the discontinuation when the control the state once exercised over the group can be held to no longer direct its acts. The delay is necessary since states can otherwise withdraw from control whenever something is about to happen and later resume it, only to avoid responsibility, which is not a method generally promoted by the system of international law on state responsibility. The third question, of whether the criterion is useful, is thus given an answer.

Continuing to the first question, whether the test only requires participation in the supervision, the answer must be that it does not matter. Keeping in line with the former reasoning, the supervision is used to show that the state is still exercising control even though there is no planning to participate in. For this reason it is sufficient to show that the supervision is effective, in the sense that the state is continuing its engagement.

The question of validity is not as easily answered. The demand for supervision cannot be interpreted into the first phrasing of the test and four distinct solutions are possible:

- The word supervision must be reinterpreted to fit into the first definition.
- The first phrasing of the test must be reinterpreted to allow supervision to fit into it.
- The supervision criterion is invalid.
- The two phrasings are meant to be read in conjunction meaning that the criterion does exist in the combined test.

Without commenting the others the author will argue that the final solution is preferable. The author has demonstrated the usefulness of a criterion allowing the state to seize its exercise of control and believes that such a criteria was what the Appeals Chamber was intending to include when it added the supervision criterion. In the alternative the author suggests that the criterion of continuity of control exists in the test and can be interpreted from the general logic of state responsibility.

To conclude, the author proposes that the supervision criteria is interpreted to ensure that a state which very clearly is no longer exercising control, due to lack of participation, can not be held responsible for acts of the group even if it has participated sufficiently to show the exercise of control earlier. This possibility should be narrow, however, as the state has to have participated in the planning of the actual operation in which the acts take place, for the exception to be usable. It should have to be proven that the operation in which the state participated has changed into something the

state would no longer support and it is no longer monitored by the state or, in the alternative, the state can no longer exercises control over it.

### **3.3.1.6 Military Actions or Operations**

This wording immediately raises a very important question, which was also discussed within the context of the group criterion: Is the “overall control” standard only valid in the scope of military operation involving military units? This question cannot be answered conclusively from only the Appeals Chamber’s application of it in the case of Tadic. It would seem at first glance that the words military actions or operations immediately exclude all possibilities of using the “overall control” standard on non-military groups. In the author’s opinion, the distinction between a military, paramilitary, police or other type of operation is not made in international law on state responsibility.

The chamber does not touch upon this problem in the case. Perhaps the answer to this can once again be found in the body of law the chamber was actually applying; international humanitarian law. In the context of this body of law all imagined cases involve military operations in some form, and perhaps the chamber did not see the need to further complicate the test by considering other types of activities as well.

The author does not find any compelling reasons to exclude all types of non-military activities from the scope of the “overall control” test. It is noted that few non-military groups will fulfill the group criteria and it is also hard to imagine that more than few groups will employ the sort of elaborate planning of operations required for the participation criterion. The main reason the author proposes abolishment of a military requirement is yet again one of practicality and reason. Whenever a criterion needs a formalistic qualification there is space for states to argue against state responsibility based on an artificial labeling of a situation. This has been something international law on state responsibility has otherwise tried to avoid,<sup>270</sup> and so also in the case of “overall control”.

This does not mean that the types of activities imagined by the Appeals Chamber are limitless. The use of the wording military activities or operations does serve a purpose in qualifying the participation criterion. The factors required for qualifying the operations can be found by examining this criterion. The operations imagined are large scale, organized and consist of many elements. An operation of just one act would arguably demand a different level of direct control. The author will not try to define the operations possible further since this may well be counterproductive in avoiding a formalistic approach. The definition proposed is instead one based on the participation criterion. If any of the criteria that make up participation appear as insignificant or unsuitable when seen in the context

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<sup>270</sup> See wording of ILC article 5 for example.

of the actual operation, there is an indication that the operation may not qualify. This will have to be decided from situation to situation.

The author would like to suggest, however, that certain types of corporations could fulfil most, in not all, of the criteria presented herein.<sup>271</sup> It is the author's opinion that the "overall control" standard could, in the form given in this text, be used to address the interesting situation of large multinational corporations, such as Halliburton, acting in close conjunction with the state in a setting where violations of international law could take place. When the relationship between the state and a corporation is one of ownership, it is well established that the state can be held responsible when it uses its ownership as a vessel for control.<sup>272</sup> If the corporation is privately owned this link cannot exist but that cannot mean that the state never has to take responsibility for the acts of it.<sup>273</sup> A possible link of control could possibly be found in certain cases where the relationship between the state and the company is close. The threshold for establishing this could potentially be lower when the corporation is given certain privileges bordering on classic state functions, such as the managing of oil concessions or strategically and commercially important infrastructure such as the Panama Canal or the Öresund Bridge.

### 3.3.1.7 The Subjective Criterion

When discussing the planning criterion the author touched upon the question of an implied subjective criterion. This would address the question of whether states could be held responsible for participation without the purpose of exercising control. There is no general rule in customary international law on state responsibility, as expressed in the ILC articles, that award responsibility for purely reckless, or *culpa*, acts. There are some situations in international law where state's obligations are phrased in terms of strict responsibility, *culpa* responsibility, a responsibility to protect, or a responsibility not to act in a certain way, but these responsibilities are phrased in the first order rule as opposed to the second order one of state responsibility.<sup>274</sup> What must be established is whether states under the "overall control" standard have a strict responsibility for their cooperation with organized groups.

If a state participates in the planning, organizing or coordination of military operations, as well as giving the group support, it would possibly be enough for awarding state responsibility for any acts performed within the scope of this plan and its sub-operations. This regardless of whether the state had any influence on the planning of the mission in which the act in question took

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<sup>271</sup> See also Chapter 1.2.5 on the thoughts of Villalpando on the subject.

<sup>272</sup> See case quoted in Commentary para. 6, pp. 107-108.

<sup>273</sup> "The Privatization of Human Rights Violations: Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq", Nils Rosemann in *Non-State Actors and International Law* Vol. 5 (2005), pp. 77-100.

<sup>274</sup> For an example of how this works in humanitarian law see "Individual and State Responsibility in International Humanitarian Law", Knut Doermann in *Refugee Survey Quarterly* Vol 18, N° 3 (1999), p. 81

place. Since the level of commitment suggested by the author is quite high there is a lower possibility that states could be held responsible for acts they had no control over, but the possibility still exists. If the state gave its aid for another reason than wanting to exercise control, the logic of state responsibility would suggest that no control can be held to have been exercised. The author believes that this is more a matter of evidence than of the actual rule, but will suggest solutions to both matters.

When it comes to matters of evidence the most reasonable solution would probably be to assume that states are exercising control when the criteria are fulfilled, but to give the state a chance to disprove the assumption by proving that it did not seek to exercise control. This would obviously be very hard for the state to do but would by no means create strict responsibility.

In the question of theory, the author would argue that a state couldn't be exercising control without having a desire to do so. The importance of state consent cannot be overrated in international law, and holding a state responsible for acts outside its control is not consistent with this system. States have a large leeway in how they can act and although an interference in another state's domestic affairs, such as participating in the planning of a guerilla force's military operations, may be a violation of international law in itself; it does not automatically give rise to responsibility for all the group's acts. Keeping this in mind the author suggests that it is irrelevant whether this is solved by formulating another criterion or by using the ones provided by the court. The fact that the participation in planning, organizing and coordination is qualified by showing the exercise of control would exclude all situations where the state did not seek to exercise control. The reason the question of a subjective criterion is addressed is to further try to escape a formalistic test, like the order/instruction criterion the Trial- and Appeals Chambers interpret from Nicaragua.

## 3.4 Suggested Phrasing of the Direct Control Aspect

The discussion above makes it necessary to rephrase the “overall control” standard suggested earlier:

The direct control required of a state over the agent performing the act is a degree of participation in the overall level of planning, organizing or cooperation of military operations, or other activities involving a series of acts or of an otherwise complex nature, which shows that the state was exercising *de facto* control over the agent and activity.

### 3.4.1 Supplementary Factors

The Appeals Chamber also suggested three situations where higher or lower levels of evidence might be required to establish control. These situations are:

- When the controlling state is not the state in whose territory the acts are being committed.
- When there is a state of turmoil in the state where the acts are being committed.
- When the controlling state is a neighbor of the state on whose territory the acts are being committed, and also have territorial ambitions on that state.

The first two were held to require more compelling and extensive evidence to fulfill the criteria, and the last one to lower the demands. All three factors are at hand in *Tadic* but as they are all quite vague, largely self explanatory, and most significantly, not mentioned in the evaluation of the actual situation in *Tadic*, the author must conclude that they are not meant to be an integral part of the test. The author feels that they have been given due attention by their mentioning in this text.

In this chapter it is also warranted to comment on the suggested test made by Leo van der Hole.<sup>275</sup> Rather than accepting the reasoning of the Appeals Chamber in *Tadic* van der Hole finds that the ICJ in *Nicaragua* actually used a general test applicable to all attribution situations. This is labeled the “Direction and Control test” and in van der Hole’s view it has been used by the ILC when devising the articles.<sup>276</sup> In short it refers to the existing articles 4, 5 and 8 in the ILC articles. Article 4 and 5 situations are handled in the usual fashion. For solving “control” situations van der Hole suggests

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<sup>275</sup> See Chapter 1.2.3.

<sup>276</sup> van der Hole, p. 279

that all tests come down to the weighing of factors that show control.<sup>277</sup>  
From Tadic and Nicaragua he manages to isolate five factors:

- Direct interference:<sup>278</sup> The most decisive factor which pertains to direct involvement in the conflict by the state's own military forces.
- Financial assistance:<sup>279</sup> Economic assistance by the state to the non-state actor.
- Military assistance:<sup>280</sup> Assistance in the form of military equipment, arms and intelligence.
- Supervision:<sup>281</sup> Interaction between the state and the agent. This can include instructions, orders or other non-specified acts of exercising control.
- Nationality:<sup>282</sup> This does not pertain to the legal nationality of the agent but rather the relationship that can be shown by ethnicity or political views, and show a relationship with the state. An example given is that of a Bosnian-Serb of Bosnian nationality supporting a Greater Serbia being equated with a Serb.

van der Hole suggests that every court of the first instance have to carefully weigh these factors to determine control, which was also done in Tadic and Nicaragua. In the author's opinion van der Hole provides a suitable test but his emphasis lie in the wrong factor. As the object of van der Hole's test is to determine whether a conflict is international, as opposed to determining state responsibility his focus end up in the objective, rather than the subjective criteria.

In a test of determining state responsibility factors 2, 3 and 5 can only have a supporting effect. Factor 1, suggested as the central one, would have an even smaller effect. The focus would instead be put on factor 4 which actually shown the state's willingness to exercise control as opposed to the potential to do it.<sup>283</sup> These points of disagreement between the author and van der Hole are however very useful when attempting to understand the difficulty of using a test from international law on state responsibility to address situations in humanitarian law and vice versa, and could thus aid understanding of the problems in Tadic.

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<sup>277</sup> *ibid* p. 280

<sup>278</sup> *ibid*

<sup>279</sup> *ibid* pp. 280-282

<sup>280</sup> *ibid* p. 282

<sup>281</sup> *ibid* pp. 282-284

<sup>282</sup> *ibid* pp. 284-285

<sup>283</sup> In this text labelled "Dependency"

### 3.5 The Standard as Expressed in Tadic

Having set the standard required the Appeals Chamber moved on to use it in the situation in question, namely the relationship between the VRS and the FRY. The Appeals Chamber reevaluated the same evidence presented to the Trial Chamber but came to a different result.<sup>284</sup> When examining the legal conclusions drawn from this evidence a very clear difference appears between the control test used by the Trial Chamber and the “overall control” test used by the Appeals Chamber: The Trial Chamber focused on finding proof of direct control being exercised over the VRS but was unable to find any conclusive evidence. This methodology of the Trial Chamber was clearly inspired by the approach of the ICJ in Nicaragua. Although it is not expressly stated, the Trial Chamber can be held to have applied a very strict standard of evaluating evidence, similar to the one used in national criminal proceedings. This is further indicated by the chamber’s express statement that the burden of proof for the control lies solely on the prosecution. In a way the prosecution was expected to prove that the VRS and was run from Belgrade, something that is very hard to prove if you are not allowed to rely on circumstantial evidence.

The author is not, however, convinced that the standard of control required by the Trial Chamber was higher than the “overall control” standard, only the standard of evidence was higher. From the same evidence the Appeals Chamber concluded the following:

“[Even if the exercise of control was less explicit after May 19, 1992] the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade.”<sup>285</sup>

“[The VRS] continued to act in pursuance of the military goals formulated in Belgrade.”<sup>286</sup>

“[...] clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber”<sup>287</sup>

The Appeals chamber argued that the Trial Chamber’s ultimate focus on the FRY’s overt declarations, that it had discontinued its involvement in the conflict as well as in relation to the troops making up the VRS, was flawed and potentially harmful.<sup>288</sup> It concludes that such a focus on the formal structures rather than the reality of the relationship would mean that states could very easily avoid responsibility by formally distancing themselves from its agents. The discussion of the Appeals Chamber starts in the direction suggested by the author, i.e. presenting the original link and the failure of the FRY to sufficiently distance itself from the VRS. Nevertheless

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<sup>284</sup> Tadic paras. 148-149

<sup>285</sup> Tadic para. 152

<sup>286</sup> Ibid

<sup>287</sup> Ibid

<sup>288</sup> Tadic para. 154



this does not seem to be sufficient for the chamber as it moves on to focus on actual control exercised by the FRY after the formation of the VRS. It concludes that the evidence presented to it is sufficient to establish “overall control”, without specifically referring to the criteria of that test, other than restating them.<sup>289</sup>

When reading the actual discussion on the facts by the Appeals Chamber it is very difficult to see any use of the “overall control” standard in as phrased by the chamber. The author is of the opinion that the chamber successfully managed to prove that a relationship of control existed between the FRY and the VRS but the actual methods in doing so are quite unclear. It can be assumed from the degree of evidence presented to the chamber that almost any sort of control test could have been used to come to this conclusion, and the “overall control” test may well have been the one used. This is unfortunate for an investigation of the “overall control” standard in a state responsibility context as the actual facts of the case give little support. Even though both the Trial Chamber and Appeals Chamber claimed to use the test(s) devised in Nicaragua it is in the author’s opinion highly doubtful if they used these correctly. Due to the limited scope of this text the author cannot develop this reasoning but will simply conclude that the facts of the Tadic case would almost certainly have been sufficient to find the “effective control” sought by the ICJ.

The conclusion of the Appeals Chamber must also be read in the light of its object. It had to find that a part of the conflict in Bosnia and Herzegovina was not a purely internal war, but had an international element. By looking at the actual situation this was obviously the case. The problem facing the ICTY was to describe this in terms of control. Since the leading authority on control at the time was found in the Nicaragua case, which was interpreted to require an element of direct orders or instructions,<sup>290</sup> the control discussion in the two chambers became rigid and eventually provoked the “new” test. The Appeals Chamber was right in its assumption that not all situations dictate a need for this high standard, and found it necessary to challenge Nicaragua.

### **3.6 Practical Use of the “Overall Control” Standard**

As the author has attempted to isolate the “overall control” test to its potential use in modern international law on state responsibility, it will have to be the conclusion of this sub chapter that it is no longer as important how the “overall control” test was used in detail by the Appeals Chamber. It is sufficient to establish that the origins of the test are somewhat problematic. The author believes that the discussions in Tadic, given an interpretation

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<sup>289</sup> Tadic para. 156

<sup>290</sup> This is not stated in the actual merits of the Nicaragua case, but is given this meaning in the *Separate Opinion of Judge Ago* para. 16 p. 189, which is also quoted by the Trial Chamber (Trial Chamber para. 601).

within the context of international law, can be used to address two situations not sufficiently covered by other sources.

### 3.6.1 “Overall Control”

The first situation is the one described by the Appeals Chamber as “overall control”. It assumes a high level of dependency created from the group criteria as well as the support required entailing a high potential to exercise control. The groups that fulfill the group criteria share a lot of characteristics with state military or police forces, as do their perceived activities.

### 3.6.2 General or Direct Control

The “overall control” standard does not base itself in acts of direct control, such as orders, instruction or direction, but rather in general control. In a way the legal consequences of establishing “overall control” places it between ILC articles 5 and 8. There is a limit, however, of how far the control definition in article 8 can be stretched. Although most of the criteria expressed in the “overall control” test mainly indicate a general control, the article requires a measure of direct control. Control has to be interpreted in line with the other factors mentioned in the article, instruction or direction, both indicating a high level of direct control. In the author’s opinion “control” was included to cover situations where a lower level of direct control was at hand but the sum of control was still sufficiently high to make it reasonable to attribute the acts of the agent to the controlling state. This does not mean, however, that no direct control has to be exercised.

The purpose, or function, of the direct control is to qualify the general control. If the reader permits, the author thinks that a fitting term for this qualification is “effective”. The starting point is dependency, which creates a sense of potential. It shows that the state and the agent exist in a hierarchy and create a presumption that if the state so wishes, it can act through the agent. As has been emphasized throughout this text; this does not create control. International law on state responsibility does not accept the idea of states being held responsible simply because they have a potential to perform acts through the agent. The control has to be proven to be “effectively” usable, which can only be proven when it is “effectively” used. The qualifier thus has to be direct input from the state.

In the “overall control” test this input has taken the form of a participation requirement. The author agrees that this does not amount to direct orders or instructions but would put the emphasis on the object of the participation rather than the form of it. This is, in a nutshell, where the “overall control” test sets itself apart from the test proposed in Nicaragua. In the “overall control” concept a state’s participation in the overall planning, coordination or organizing of activities on a general level, makes it responsible for acts performed by members of the groups performing the activities, *due to the fact that the state actually controls the members and the acts*. In other

words, a very limited direct input by the state makes it responsible for acts it may not have been able to imagine, let alone control. For this to be considered equitable a high level of general control has to be established. It had been discussed in Chapter 3.1.1 how this general control is found in the group criteria as well as other forms of dependency. The author will now attempt to merge all the factors creating general control, thereby offering an explanation to the unique qualities of the “overall control” test, as presented herein.

First, the complex relationship between general control and dependency has to be explained, and the reader will hopefully agree that there are indeed two sides of the same coin. Dependency has been used as a term to describe the potential for the exercise of control. It has also been suggested that it can be used to quantify control used. The author will argue that there is no way of completing these two endeavors without referring to general control. A large potential to exercise control can only be verified by the actual exercise of control. Even if a state provides a group with arms, training, supplies and all support it needs, one can never be certain that it will obey the state until the state actually attempts to exercise control. But another side of a large dependency is also that the importance of the actual direct control exercised is increased when there is a high level of dependency. The added control apparent by the exercise of direct control is what the author has designated general control.

The difficult part of the concept of general control and dependency is that they can only be definitively proven when the direct control is exercised. Only then can their existence be shown, although it can be assumed, or even presumed, before. When a state exercises direct control over an entity, which is very dependent on the state, the “value” of the direct control will thus multiply. What might otherwise be seen as an insufficient exercise of direct control if the dependency was disregarded, can be sufficient in the light of the dependency. To lend an example from Tadic; if a state has provided all the troops for a military group, it becomes more valuable from a control standpoint that the state is also participating in the formulation of its military goals. This is because the dependency created from providing the troops, coupled with the exercise of the direct control, creates a fair amount of general control. If the “sum” of the direct and general control is sufficient to create “overall control” it is possible to attribute acts of the group pertaining to the goals formulated, and within each member’s area of action, to the state.

This should not be interpreted as to say that a high level of dependency generally creates a lower threshold for direct control. The dependency that gives rise to general control is further qualified by the fact that it has to show an exercise of general control in conjunction with the direct control exercised. In the “overall control” test this is partially solved by the specific inclusion of certain criteria that serve as pre-qualified forms of dependency, such as the group criteria, the operational qualification as well as the participation requirement, which by necessity include a requirement of

communications and hierarchy. To make the “overall control” test complete other forms of dependency will also have to be considered for their role in creating general control, but due to the constraints on this format the author will not further detail these. It is sufficient to say that the Tadic standard provides support for a less formalistic “control sum” approach to the control requirement, which the author is convinced was also what the ICJ used in Nicaragua.

### 3.6.3 The Situation

This means that the test can be used to solve situations that to an extent use to fall outside of ILC article 8 due to lack of direct control, but it is apparent that the state is *de facto* controlling the organ through other links. Another way of presenting this situation would be; one where the formal links to the state are insufficient to include the group under ILC article 5, but it is obvious that the group is in fact acting on behalf of the state. In these situations the factor motivating the statement that the situation *de facto* is different from the situation *de jure* can often be described in terms of general control. Situations from history where the test could be useful, mostly to simplify the question of evidence, include foreign involvement in the Spanish Civil war of 1936, the connections between North Vietnam and the Viet Cong guerrilla in the 1960’s and 70’s, Swedish involvement in the Finland-Soviet winter war of 1939, U.S. and U.S.S.R. ties to countless insurgencies, Afghanistan’s ties to the 9/11 terrorist acts or responsibilities for acts of private military companies in Iraq. It could possibly also be used in non-military situations, most notably concerning acts abroad of multinational corporations with close ties to the state.

### 3.6.4 Continuity Presumption

The other test that can be derived from Tadic is one that is not definitively used by either chamber. It must be assumed, however, to have influenced the Appeals Chamber in its conclusion. The test is one of continuity. It is the author’s opinion that international law on state responsibility would be well served by such a test and that the suggested test would not be incoherent with the other rules making up the system. The continuity test is discussed and rejected in the Tadic Trial Chamber,<sup>291</sup> which has been criticized in the dissenting opinion of Trial Chamber president Judge McDonald.<sup>292</sup>

In short, the test addresses the situation where a state formally declares that an entity, for whose acts it would have to assume state responsibility, does no longer possess the required status, thereby rendering the state free from responsibility. This can practically only happen to organs formally covered by ILC articles 4 or 5 that are transferred into non-state organs through some measure. These organs may not fall under ILC article 8 since the state

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<sup>291</sup> Trial Chamber para. 587

<sup>292</sup> “*Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute*”, ICTY Trial Chamber, 7 May 1997, para. 2

is not, and may have never, exercised any measure of direct control over it.<sup>293</sup> The test creates a presumption that the state still has a link to the organ keeping the state responsible for its acts. This presumption can be broken if the state takes measures to distance itself from the organ. It does not have to be elaborate measures, but in a situation, such as in Tadic, where state is still providing all the materiel, salaries and other support, the state has to take more active measures for the distancing to be valid. It is not uncomplicated to label the link that is assumed to remain between the state and the organ in terms found in any ILC article, but the author would suggest that the labeling is not important. It is sufficient to say that responsibility has to be accepted.

The author does not suggest that this test should be used in a very strict manner. That would in fact make it incompatible with the structures of international law on state responsibility. The test aims at situations where a state is trying to distance itself from an organ to avoid responsibility, not when the separation is from “natural” causes. If a state, however, distances itself from a part of its armed forces in foreign lands, so called “*black operations*”, to deny responsibility for acts of that force the presumption can be used. As further support for the test it can also be argued that international law neither support the concept of states avoiding responsibility through fraudulent behavior, nor does it especially support the creation of units of “master-less” soldiers for which no state can be held responsible.

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<sup>293</sup> A speculation as to the source of this problem in the Tadic case can be found on p. 99.

## 4 Conclusion

The author has thus presented a phrasing of the “overall control” standard that should be somewhat easier to use in an actual situation. There have been some substantial difficulties in doing this as the main source; the ICTY Appeals Chamber has expressed the test in very general terms without addressing some difficulties in depth. There is also a lack of literature on the subject. The author has thus been forced to make far reaching interpretations of the sources at times, but always trying to keep these in line with the general sentiment of the Tadic case, international law on state responsibility and common sense. Throughout this process the aim has always been to explain and investigate the various criteria in terms of control and examine how they can be used to explain the relationship between the state and the agent performing the act.

It is important to point out that the end result of this text only represents a suggestion for use of the “overall control” test, but the ambition has also been to examine the standard labeled “control” in the ILC articles, and indeed the concept of attribution in international law on state responsibility. It is the author’s opinion that the test devised in Tadic covers a situation not very similar to the one in the Nicaragua case, and as such serves to expand the understanding and usefulness of the attribution rule in ILC article 8. As a final paragraph the author will now attempt to phrase the full extended version of the “overall control” test:

For finding that a state is in “overall control” over a group of individuals performing an internationally wrongful act the following must be at hand: The group must show a high level of organization and structure; must have a developed chain of command and hierarchy; act in their “area of action” where every member knows and follows both direct orders as well as pre-existing rules of conduct. These structural demands can be lowered if the members of the group so strongly identify themselves with the group that it is obvious that they act on behalf of it rather than as individuals.

It is also required that the group is dependant on the state in such a way that the exercised direct control can be presumed to have caused the act in question. This direct control exercised over the agent performing the act must reach a degree of participation in the overall level of planning, organizing or cooperation of military operations, or other activities involving a series of acts or of an otherwise complex nature, which shows that the state was exercising *de facto* control over the agent and activity.

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