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Detangling the issue of complete dependence and effective control in the case-law of the International Court of Justice

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***Abstract**: Ever since the International Court of Justice rendered its judgment in the Military and Paramilitary Activities In and Against Nicaragua case, discussions were raised on the issue of attribution, effective control and complete dependence. While the ICJ decided on this case more than 30 years ago, the issue of attribution and the standard of control re-emerged in the light of international discussions in the relevant doctrine even more so with the judgments of the Trial and Appeal Chambers in the Tadić cases which challenged the findings of the ICJ, and, lastly, with the latter's judgment in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide between Bosnia and Herzegovina and Serbia and Montenegro. This study wishes to detangle the issues regarding the attribution of the actions of private entities to the State, while clarifying the findings of the relevant case-law.*

***Keywords**: state responsibility, attribution under international law, de facto organs of a State, Military and Paramilitary Activities in and against Nicaragua case, Tadić case, Bosnian Genocide case.*

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1. Introduction

The present study wishes to clarify and demystify the issue of attribution in the context of the actions of private entities. Between the *Military and Paramilitary Activities In and Against Nicaragua* [hereinafter, the **Nicaragua case**], Tadić and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide between Bosnia and Herzegovina and Serbia and Montenegro* [hereinafter, the **Bosnian Genocide case**] cases, there were a lot of issues in need of discussion and a lot to clarify in order to reach a more exact, step-by-step mechanism to determine whether the actions of a private entity were, for the purposes of State responsibility, the actions of the State. Unfortunately, the correlation between the aforementioned cases is frequently misrepresented, the general view being that: the ICJ rejected the findings of the International Criminal Tribunal for the Former Yugoslavia [hereinafter, the **ICTY**], it restated the standard of effective control and complete dependence, and it continued its reasoning in the Nicaragua case. With international law, however, nothing is ever that clear cut and therefore the structure I propose for the present study will first relate certain necessary preliminary regards on the issue of attribution and state responsibility, turning then to the findings of the ICJ in the Nicaragua case and of the ICTY in the Tadić case, briefly discussion the codification of this issue by the ILC, and finally the findings of the ICJ in the Bosnian Genocide case. Lastly, a general overview will be given over the issue, taking into consideration that, while now things are more precise in light of the Bosnian Genocide case, there is still much to be settled in the domain of attribution.

1. Preliminary regards about responsibility and attribution

As responsibility goes, each and every system and domain of law deals with the issue of responsibility. From criminal law to administrative and civil law, from disciplinary sanctions against civil servants, lawyers and doctors, from torts and contractual liability, the issue of responsibility is at the forefront of each and every domain of law. It is natural, in a way, to be so. Rights have the corollary of obligations and failure to fulfill the latter should give rise to certain effects if the subjects of the various domains of law should be incentivized to fulfill their obligations. This reasoning also applies in international law.[1] The latter has the particularity, not singular to it, but important nonetheless, that the state cannot act by itself. The actions of the state are, in reality, actions of individuals which engage the State in the sense

[1] Michael N. Shaw, *International law*, Ninth Edition, Cambridge University Press, 2021, pp. 778.

that the actions of these individuals, if they respect certain conditions, are regarded as the actions of the State itself.[1] In relation to who and how this applies, the normal way is to think that the organs of the State, those who exercise executive, legislative or judicial authority are regarded as individuals whose actions can be attributable. This category is not, however, singular in the domain of whose actions can be attributed to the State, considering that if only the actions of entities which have governmental authority would be considered the actions of the State, it would lead to the growing possibility of States to call upon private entities and individuals to engage in actions contrary to international law under the instruction of the State, the latter being precluded from international responsibility.

Hence, the possibility of private entities, being individuals or group of individuals to act and their actions to be attributable to States. This issue, however, is the exception rather than the rule[2] and therefore, the standard applicable should be higher than, for example, the standard applicable to the actions of the Parliament of a State. While States do indeed have an obligation of due-diligence on their territory,[3] it would impose a disproportionate burden on them to consider the State internationally responsible for each and every action an individual undertakes under the jurisdiction of that State. As such, the next thing which needed clarification is what exactly should the standard be when determining whether the actions of a private entity or of an individual is the action of the State, for the purposes of State responsibility.

As will be shown below, at this point in time, one must take into account two possibilities – the possibility of an entity to be a *de facto organ* of a State and the possibility for an entity to act under the instructions, direction or control of that State. However, these two possibilities were not particularly clear when the issue of attribution was raised, and the following sections will describe the relevant findings of the caselaw in hope of showing the evolution that the concept of attribution of the action of a private entity had in international law.

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[1] James Crawford, *Brownlie's Principles of Public International* Law, Eighth Edition, Oxford University Press, 2019, pp. 545; Michael N. Shaw, *International law*, Ninth Edition, Cambridge University Press, 2021, pp. 786.

[2] Yearbook of the International Law Commission, 2001, vol. II, Part Two – Article 8, para. 1 – "*As a general principle, the conduct of private persons or entities is not attributable to the State under international law*"; MPEPIL, Alexander Kees, *Responsibility of States for Private Actors*, 1.

[3] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits) Judgment ICJ Rep 1949; Riccardo Pisillo-Mazzeschi, *Due Diligence and the International Responsibility of States* in Rene Provost (ed.), *State Responsibility in International* Law, Routledge, 2002, pp. 111.

2. The Nicaragua Case and the Tadić Case

The conflict leading up to the submission of the case to the ICJ between Nicaragua and the United States of America is notorious. The Cold War was governed by a conflict of ideologies between the east and the west and both tried as hard as they could to influence upon others the virtues of one and the evils of another. This was never as apparent as it was in the Americas. Irrespective of the clear-cut motives and reasons, which do not constitute the object of the present study and are rather on the issue of international policy, the United States of America supported, financed and assisted the *Contras*, a paramilitary organization, in their fight against the Sandinista formed government of Nicaragua.[1] Therefore, the question arose. Was the involvement of the United States of America in the actions of the Contras sufficient to consider that the actions of the latter are attributable to the former. There was no relevant case-law at that point, so the World waited for the submissions of the parties, the deliberation of the Court, the judgment, and its reasoning.

It is not in any way groundbreaking to say that the judgment was controversial on the issue of attribution. While the Court found that the actions of the United States did not amount to the necessary degree of control for attribution to exist, it still decided in favor of Nicaragua, finding the United States of America to be in breach of the obligation of non-intervention in the internal and external affairs of the Nicaraguan state.[2] This was cold comfort, however, because the standard that the Court chose was the so called standard of "*complete dependence and effective control*". The Court summarized it as follows: "*the question (for the purpose of attribution) is whether the relationship was one of control and one of dependence*".[3] What did it meant exactly? The Court underlined that control implied a factual relationship of subjection, while dependence presupposed a persuasive factual link. In this regard, the Court explained that Nicaragua should have proven, or, in any case, it should have been clear that the Contras could have not acted without the aid of the United States of America.[4] Generally speaking, he who claims, must also prove, and if not, the claims would be dismissed, but, in the case of proving a negative fact, things are not as clear. Generally, in the national law system of many states, there is a reversal of the burden of proof in the case of

[1] Bogdan Aurescu, Ion Gâlea (coord.), *Drept internațional public – Scurtă culegere de jurisprudență pentru seminar*, Hamangiu, 2018, pp. 60-61.
[2] Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. Unites States of America*) (Merits) Judgment, ICJ Rep 1986, para. 205.
[3] Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. Unites States of America*) (Merits) Judgment, ICJ Rep 1986, para. 109.
[4] Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. Unites States of America*) (Merits) Judgment, ICJ Rep 1986, para. 115.

negative facts since they are almost impossible to prove. This, however, was not discussed by the Court.

Fast forward to the year 1994 and the arrest of Dusko Tadić in Germany and his subsequent trial at the ICTY where the latter was charged with determining whether the Serbian – Bosnian conflict was international in nature on the basis of international humanitarian law. In order to do so, the ICTY Trial Chamber needed to determine whether it could regard the acts of private entities as the actions of Serbia. For these purposes, it relied upon the findings of the ICJ in the Nicaragua case, using the standard of effective control and complete dependence:

"*In sum, while, as in the Nicaragua case, the evidence available to this Trial Chamber clearly shows that the various forms of assistance provided to the armed forces of the Republika Srpska by the [FRY] was crucial to the pursuit of their activities and, as with the early years of the contras activities, those forces were almost completely dependent on the supplies of the [army of the FRY] to carry out offensive operations, evidence that the [FRY] through [its army] made use of the potential for control inherent in that dependence, or was otherwise given effective control over those forces and which it exercised, is similarly insufficient*".[1]

Judge McDonald in the Dissenting Opinion, put forth the approach that one needed to closely examine the reasoning of the ICJ, emphasizing that in the Nicaragua Case it really established two tests: the test for complete dependence which one uses in order to determine the existence of a *de facto organ* of the State and the effective control test, used for determining whether the actions of a private entity, not considered the organ of a State, could still be the actions of that State.[2] Irrespective of the sound reasoning of the dissenting opinion, the Appeals Chamber had a different view of the issue. The Appeals Chamber, after it criticized the Trial Chamber's reliance on the Nicaragua case judgment,[3] noted that "*the Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control*",[4] concluding that indeed there should be two tests, but one of overall and the other of effective control. Specifically, attribution would exist under two separate tests depending on the internal

[1] Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (Trial Chamber) Judgment, para. 216.
[2] Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (Trial Chamber) Dissenting and Separate Opinion of Judge McDonald, para. 22
[3] Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (Appeal Chamber) Judgment, para. 108.
[4] Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (Appeal Chamber) Judgment, para. 117.

organization of the private entity whose conduct is sought to be attributable to the State: if the group is private in nature or unorganized the test is of overall control, but if the entity is military/paramilitary or organized in nature, the test is the effective control.[1]

The two judgments, the ICJ's in the Nicaragua case and the ICTY's in the Appeals Judgment in the Tadić case became the main issue to be discussed in the domain of attribution and State responsibility, considering that they seemed to be contradictory in nature, issue which would later be resolved by the ICJ in the Bosnian Genocide case. Before we proceed, however, I find relevant to briefly point out the work of the International Law Commission on the issue of State responsibility.

3. The International Law Commission's view of the issue

Since 1949, when it chose at its first session State responsibility as a subject for codification, the International Law Commission [hereinafter, the **ILC**] preoccupied itself with discovering and detangling the intricate web of the rules of responsibility under international law, effort concluded with the adoption of the Articles by the General Assembly of the United Nations in 2001. For the purposes of attribution of the actions of private entities, the work of the ILC is of utmost importance considering that, as it will be shown below, the ILC also adopted an approach differentiating between the notion of attribution for the existence of a *de facto organ* of the State (Article 4) and attribution for the actions of a private entity or individual acting under the instructions, direction or control of the State.

Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts [hereinafter, the **ARSIWA**], reads as follows: (par. 1) "*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State*" and (par. 2) "*An organ includes any person or entity which has that status in accordance with the internal law of the State*". The key here is the word "*includes*" which refers to a non-exhaustive list of entities which can be considered as an organ of the state, irrespective of whether they are qualified as such in the national law of that State.[2] The

[1] Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (Appeal Chamber) Judgment, para. 120.
[2] MPEPIL, Pablo Palchetti, *De facto organs of a state*, 10; James Crawford, *State responsibility – The General Part*, Cambridge University Press, 2013, pp. 124.

ILC also recognized this fact in the Commentary of ARSIWA, noting that "*on the other hand, it is not sufficient to refer to internal law for the status of State organs*".[1]

Article 8 reads as follows: "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*". It must be mentioned, with a preliminary title, that the criteria of instructions, direction and control are not cumulative in nature, but alternative.[2]

It is worth noting, however, in light of the ILC's work on attribution, that the distinction between *de facto organs* and entities or individuals acting under the control of the State was never particularly clear before the judgment of the ICJ in the Bosnian Genocide case, rather, after the adoption of Article 8 on first reading of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the opinion was that Article 8 encompassed in "*both de facto agents and private individuals in the expression 'persons acting in fact on behalf of the State*".[3] Therefore, in order to determine the distinction between the two and clarify the partly contradictory judgments in the Nicaragua case and the Tadić case, a closer attention must be given to the judgment of the ICJ in the Bosnian Genocide case.

4. The ICJ's reasoning in the Bosnian Genocide case

The question arose, after the judgment of the Appeals Chamber in the Tadić case, if the standard applied by the ICTY was relevant in light of ICJ's reasoning in the Nicaragua case and if the latter was still applicable. The question was whether the FRY (and, later, Serbia) was responsible for acts of genocide committed by Bosnian Serb militias during the Bosnian War. Considering that the ILC in their Articles did not firmly take an approach to favor either the reasoning in the Nicaragua case or in the Tadić case, the ICJ took the time to examine its earlier judgment in the Nicaragua case in light of the findings of the ICTY and of Article 8 of ARSIWA. The general view of the public was as follows: the ICJ disregarded the decision of the ICTY, deciding not to apply it and it reinforced the reasoning it previously had in the Nicaragua case. While this interpretation is partially correct, it is neither clear,

[1] Yearbook of the International Law Commission, 2001, vol. II, Part Two, Article 4, para. 11.
[2] James Crawford, *State responsibility – The General Part*, Cambridge University Press, 2013, pp. 144; Carlo de Stefano, *Attribution in International Law and Arbitration*, Oxford University Press, 2020, pp. 78.
[3] Carlo de Stefano, *Attribution in International Law and Arbitration*, Oxford University Press, 2020, pp. 83.

not exact in its explanation. The ICJ did indeed state that the standard applicable in this instance is the standard of effective control, just as it did in the Nicaragua case, but it did not fully reinforce its earlier judgment and it did not completely disregard the findings of the ICTY. Therefore, one must take a closer look in relation to the considerations of the Court in relation to the Appeal Chamber's findings in the Tadić case and its analysis of the standard of effective control, in correlation with both its earlier findings in the Nicaragua case and Article 8 of ARSIWA.

In relation to findings of the Appeals Chamber of the ICTY, the Court noted that the expertise of this international tribunal was in the domain of international humanitarian law and not in general international law. As a result, it considered that while the findings of the ICTY may be relevant in the specific domain of international humanitarian law and particularly in determining whether a conflict must be regarded as international or non-international in nature and character, they do not affect the earlier findings of the ICJ in respect to the applicability of the effective control test.[1] Moreover, regarding the overall control standard, the Court expressed the unsuitability of this particular standard noting that:

"[*T]he overall control test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in [ARSIWA Article 8]. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the overall control test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility*."

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) Judgment ICJ Rep 2007, para. 210.

In regards to the standard that one should apply, the ICJ in the Bosnian Genocide case made an incredibly relevant distinction, one which is generally lost when talking about attribution under the criteria of control. The ICJ distinguished between the issue of effective control and complete dependence.[1] While in the Nicaragua case it emphasized that both these conditions need to be met in order for attribution to exist, in the Bosnian Genocide case it stated that while the standard for control under Article 8 of ARSIWA still remains the effective control one, in all cases, the standard of complete dependence does not relate to the issue of attributing the actions of a private entity or individual under Article 8, but rather as a standard for determining whether the entity is a *de facto organ* of that State:

"*The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs de facto, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control*".[2]

In relation to the issue of complete dependence in order to consider an entity a *de facto organ* of a State, the ICJ held that:

"*According to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in complete dependence on the State, of which they are ultimately merely the instrument.* (…) *However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a*

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) Judgment ICJ Rep 2007, para. 400.
[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) Judgment ICJ Rep 2007, para. 397.

particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as complete dependence".[1]

Should it be the case, attribution would then exist under Article 4 of ARSIWA and not under Article 8. While it might not seem like a relevant issue, this distinction is critical to understanding the evolution of the concept of attribution under the criteria of control. The standard of proof, raised so high in the *Military and Paramilitary Activities In and Against Nicaragua case*, is no longer applicable and one need not demonstrate complete dependence, that an entity could have not acted without the aid of the state, for attribution to exist, because the complete dependence standard appears now as a condition for the existence of a *de facto organ* of that State.[2]

Therefore, the first step in determining whether Article 8 of ARSIWA is applicable in a certain situation, one must first determine whether the entity is an organ of the state, a *de facto organ*. In order to do so, as par. 2 of Article 4 of ARSIWA shows, one must determine whether the municipal or internal law qualifies that entity as such and, even if it does not, it might still be considered a *de facto* organ if there is a relationship of complete dependence between the entity and the State. If there is a positive answer to the above queries, then that entity is to be considered an organ of the State, the latter's responsibility being engaged upon this fact. If, however, there is a negative answer to the questions above, then that entity is a private entity and therefore, Article 8 of ARSIWA comes into question. For Article 8 to apply, the entity or individual must have acted either under the instructions of the state or under the control of the State. In the case of instructions, as the ICJ showed, instructions must be given in respect to "*each operation in which the alleged violations occur, not generally, in respect of the overall actions*".[3] If, however, one wishes to demonstrate the existence of attributability on the basis of control, one must prove the existence of effective control, irrespective of the nature of the entity whose actions sought to be attributable to the State.

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) Judgment ICJ Rep 2007, paras. 392-393.
[2] James Crawford, *State responsibility – The General Part*, Cambridge University Press, 2013, pp. 148.
[3] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) Judgment ICJ Rep 2007, para. 400.

5. Conclusions

The judgment ICJ rendered in the Bosnian Genocide case was long overdue. Not only did the Court clarify the relevance of the findings of the ICTY when it came to attribution under the criteria of control, it also clarified the general issue of attribution under Article 8 of ARSIWA and the relevance of the judgment in the Nicaragua case on this issue. This does not mean, however, that things are as clear as day when it comes to this issue. There is still the pressing matter of what exactly does effective control mean and what exactly must be proven in order for it to exist, an issue still relevant and still subject to interpretation. If the past is to dictate the future, the issue is one which will at some point, come again to be discussed by the ICJ, but in my opinion it remains something that needs to be decided on a case-by-case basis. There is a pressing need to examine exactly what were the actions of the State in relation to the private entity or individual, what type of aid was given and so much more. While other international judicial organs have shed a light on the issue, such as the International Center for the Settlement of Investment Disputes, which stated that for effective control to exist one must prove the existence of general control on an institutional and organizational basis and specific control over the action which one intends on attributing to the State,[1] the ICJ did not make such detailed explanations. Moreover, there is the possibility that the ICJ, while considering relevant the findings of other international judicial organs, will regard them just as it did with the findings of the Appeals Chamber in the Tadić case, considering them relevant only for the specific area of law in which they were decided.

To conclude, it is said that once you learn a magician's trick, as the mystery fades away, you become less enthralled and interested. However, regarding this study's topic this couldn't be further from the truth; and while the ICJ managed to demystify certain issues, the complex and intricate web which is attribution remains as captivating as ever.

[1] Deutsche Bank v. Sri Lanka, Award, ICSID Case No ARB/09/2, 31 October 2012, para. 405.b; Bayindir v. Pakistan, Award, ICSID Case No ARB/03/29, 27 August 2009, paras. 125-129.

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