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HAGUE INTERNATIONAL TRIBUNALS

New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia* v. *Serbia*

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Abstract
The article analyses the approach concerning the rules of attribution of conduct to a state followed by the ICJ in the *Bosnia* v. *Serbia* case, and contrasts it with that of the International Law Commission. How far the Court modified its own jurisprudence in this field of law is also addressed. Moreover, the question will be discussed of whether the standards applied in the Court's decision are appropriate, considering the needs of the international community regarding the harmful action of private actors conspiring with states.

Key words
attribution; de facto organs; International Court of Justice; International Law Commission; state responsibility

1. INTRODUCTION

Questions of attribution to a state of internationally wrongful acts have frequently been at the heart of cases before international courts and tribunals. Reference can be made to the International Court of Justice's (ICJ or the Court) prominent *Nicaragua* case,[1] which concerned the responsibility of the United States for atrocities committed by the contras, the ICJ's *Teheran Hostages* judgment[2] and the *Tadić Appeals Chamber* case,[3] decided by the International Criminal Tribunal for the former Yugoslavia (ICTY). Attribution issues also played a significant role in the ICJ's judgment of 26 February 2007 in the case concerning the *Application of the Convention on the*

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1 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep. 1 (hereinafter *Nicaragua* case), at 14 ff.

2 *United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 1 (hereinafter *Teheran Hostages* case), at 3 ff.

3 *The Prosecutor v. Dusko Tadić a/k/a 'Dule'*, Judgement (Appeals Chamber), Case No. IT-94-1-A, 15 July 1999 (hereinafter *Tadić Appeals Chamber* case).

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro)* (hereinafter *Bosnia* v. *Serbia*),[4] which will be the subject of this analysis. After the Court found that the massacres at Srebrenica committed by various groups of Bosnian Serbs constituted acts of genocide in violation of the Genocide Convention,[5] it dealt with the question of whether these acts could be attributed to Serbia and Montenegro (hereinafter Serbia).[6]

Without anticipating the later analysis, one can say that the Court in several respects presented an overall conception of attribution which is not only in conflict with established principles of international law but also contrary to the needs of the international community. It is the purpose of this article to describe and comment on the conception followed by the ICJ. In this context reference will be made to earlier cases before international courts and tribunals dealing with questions of attribution as well as to the International Law Commission's (ILC) Articles on State Responsibility[7] (hereinafter ILC Articles) considered for the most part as reflecting customary international law.[8]

After recalling the importance of attribution rules (section 2) and a brief summary of the relevant passages of the judgment in the *Bosnia* v. *Serbia* case regarding attribution (section 3), a closer look at various aspects of the decision will be taken (section 4). The article concludes by considering the future relevance of the ICJ's concept of attribution in the *Bosnia* v. *Serbia* case (section 5).

2. The relevance of attribution as a precondition of state responsibility

Rules of attribution are of considerable relevance in international law.[9] The reason for this lies in the simple fact that states as legal persons can only act through natural persons.[10] Without attribution the state is incapable of acting on the international

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (hereinafter *Bosnia v. Serbia* case).

5 Ibid., para. 376; 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (hereinafter Genocide Convention).

6 The claim was originally brought against the Federal Republic of Yugoslavia (FRY), later for reasons of state successions the respondent changed with effect from 4 February 2003 to Serbia and Montenegro and with effect from 3 June 2006 to the Republic of Serbia. *Bosnia v. Serbia* case, *supra* note 4, para. 1.

7 UN Doc. A/RES/56/83 (2001), also found at (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 797, Annex. See for a general introduction C. J. Tams, 'All's Well that Ends Well – Comments on the ILC's Articles on State Responsibility', (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 759.

8 A. Cassese, *International Law* (2005), 244. The ILC Articles profited from the input of many excellent legal academics and jurists including as far as the ICJ is concerned Judge Simma, who served on the ILC from 1997 to 2002 and in 1998 as chairman of the drafting committee concerned with state responsibility, Judge Al-Khasawneh (1987–99), Judge Bennouna (1987–98), Judge Tomka (1999–2002, in 2001 chairman of the drafting committee), and Judge Sepúlveda Amor (1997–2005), all of whom served in the ILC during the final phase of deliberations on state responsibility.

9 See L. Condorelli, 'L'imputation à l'état d'un fait internationalement illicite: solutions classiques et nouvelles tendances', (1984/VI) 189 *Recueil des Cours* 19; C. Kress, 'L'organe de facto en droit international public – réflexions sur l'imputation à l'état de l'acte d'un particulier à la lumière des développements récents', (2001) 105 RGDIP 93.

10 *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, Advisory Opinion, (1923) PCIJ Series B, No. 6, at 22; R. Jennings and A. Watts, *Oppenheim's International Law*, vol. I: *Peace*

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plane. Therefore the ILC raises in the context of state responsibility[11] for the purpose of determining whether a breach of international law has occurred, first, the question of attribution in order to define whether a certain act is an '(international) act of the State', one which is of relevance under international law. Only in a second step is it asked whether this act of the state is contrary to international law and therefore an 'internationally wrongful act of a State'. This order is emphasized not only by the ILC in Article 2 of the ILC Articles but also in the ICJ's judgment in the *Teheran Hostages* case.[12]

The circumstances under which acts can be attributed to states have always been subject to intense discussion. What is agreed is that there is no easy rule that defines the requirements for attribution. This is because there is not a rule which would require a state's responsibility for all the acts committed on its territory, and nor is there a rule for all the acts committed by its nationals.[13] In order to determine the required link between the state and the acting natural person, different rules apply in different situations. The ILC has proposed altogether eight different attribution rules within Articles 4–11 of the ILC Articles. This analysis will demonstrate that there are different understandings of the content and function of some of these rules.

Attribution is accordingly an important element in the system of state responsibility. As such it forms part of this system's body of secondary rules, rules which are meant to apply to all situations in which primary rules providing for certain obligations are breached.[14]

(1992), 540, para. 159; Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987), 183; J. G. Starke, 'Imputability in International Delinquencies', (1938) 19 *British Yearbook of International Law* 105.

11 Questions of attribution may also arise concerning other subject matter of international law. The 1969 Vienna Convention on the Law of Treaties, (1969) 1155 UNTS 331, provides for rules which determine under which circumstances an expression of consent to be bound by a treaty can be attributed to a state. Here other considerations are of relevance than the field of state responsibility: see J. Griebel, *Die Zurechnungskategorie der de facto-Organe im Recht der Staatenverantwortlichkeit* (2004), 10 ff.

12 Here the Court in the *Teheran Hostages* case, *supra note* 2, para. 56, stated as follows, 'The principal facts material to the Court's decision on the merits of the present case have been set out earlier in this judgment. Those facts have to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rule of international law that may be applicable'. See also Commentaries to the ILC Articles on Responsibility of States for internationally wrongful acts, UN Doc. A/56/10, (2001) *Yearbook of the International Law Commission*, vol. 2 (part 2) (hereinafter ILC Commentaries), at 81, para. 4. That the ICJ in the *Bosnia v. Serbia* case proceeded differently, first addressing the question of the genocide and only afterwards the attribution matter, shall not be of further concern for this paper. Obviously, the Court considered it to be important to seize the moment and elaborate on the various legal requirements of the prohibited forms of genocide. Considering the outcome of the case and the negative answer given to the attribution question this would not have been the case if attribution had been addressed first. And there may also have been considerations of practicability, considering that against the background of quite broad claims the relevant acts had to be identified before the question of attribution was addressed.

13 Griebel, *supra* note 11, at 156 ff. and at 163 ff.; S. Hobe and O. Kimminich, *Einführung in das Völkerrecht* (2004), at 235 ff.

14 R. Ago, 'Third Report on State Responsibility', (1971) *Yearbook of the International Law Commission*, vol. 2 (part 1), at 202, para. 15; J. Combacau and D. Alland, 'Primary and Secondary Rules in the Law of State Responsibility – Categorizing International Obligations', (1985) 16 *New York Journal of International Law* 81; C. Annacker, 'Part Two of the International Law Commission's Draft Articles on State Responsibility', (1994) 37 *German Yearbook of International Law* 209; Condorelli, *supra* note 9, at 21; K. Ipsen, *Völkerrecht* (1999), at 536.

If the preconditions for an internationally wrongful act are met, the rules of state responsibility provide for two types of consequence according to the conception of the ILC: first, substantial consequences and, second, instrumental consequences.[15] Substantial consequences require the responsible state to make good the violation, which can be done by way of restitution or, if this is not possible, by way of compensation or satisfaction.[16] The instrumental consequences indicate that the victim state is also entitled to take measures in reaction to the violation, including such non-forcible actions which would otherwise be contrary to international law, that is, countermeasures.[17] This broad understanding of the consequences of state responsibility reflects the fact that the rules are meant to cover 'all forms of the new relationship that may be established by international law by a State's wrongful act'.[18] This wide understanding of the consequences of state responsibility is convincing not only because it reflects the realities of international law but also because it is shared in international jurisprudence.[19] For considerations concerning attribution it is relevant in two respects. The attribution of an act to a state not only determines whether that state may have to grant a *restitutio in integrum* (restitution) or pay compensation; at the same time it determines whether the victim state may take action against the responsible state in order to enforce international law.[20] In considering the appropriateness of the rules of attribution one has to keep both aspects in mind, as will be seen.

3. The ICJ's concept of attribution in the *Bosnia* v. *Serbia* case

After an extensive discussion of the application of various articles of the Genocide Convention, the Court concluded that only the massacres at Srebrenica constituted violations of this Convention.[21] It proceeded with the question of whether the acts of those who committed the massacres were attributable to Serbia.[22] Only if this had been the case could the Court have found Serbia responsible for the massacres. The Court set out the procedure to be followed in this respect as follows:

> First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained

15 G. Arangio-Ruiz, 'Preliminary Report on State Responsibility', (1988) *Yearbook of the International Law Commission*, vol. 2 (part 1), at 10; G. Arangio-Ruiz, 'Third Report on State Responsibility', 1991 *Yearbook of the International Law Commission*, vol. 2 (part 1), at 7 paras. 1 ff.; Annacker, *supra* note 14, at 234 ff.

16 See ILC Articles, Arts. 31 and 34–9.

17 See ILC Articles, Art. 49.

18 W. Riphagen, Preliminary Report on State Responsibility, (1980) *Yearbook of the International Law Commission*, vol. 2 (part 1), at 112.

19 See 'Affaire concernant l'accord relatif aux services aériens', 18 RIAA, at 438 para. 81; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, [1997] ICJ Rep. 1, at 7 and 55.

20 Griebel, *supra* note 11, at 17 ff.

21 *Bosnia v. Serbia* case, *supra* note 4, paras. 297 and 376.

22 Ibid., para. 390: the Republika Srpska and its military forces (Vojska Republike Srpske, VRS), the 'Scorpions', 'Red Berets', 'Tigers', and 'White Eagles'.

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> whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.[23]

The ICJ followed this outline strictly and addressed first, with reference to Article 4 of the ILC Articles, the attribution rule concerning *de jure* organs.[24] As none of the persons or groups involved in the massacres at Srebrenica were found to have held the position of officially entitled organs under the internal law of what was at that time the Federal Republic of Yugoslavia (FRY), the Court denied attribution for actions of *de jure* organs.[25] Still under the heading of Article 4 of the ILC Articles, the Court proceeded, however, by raising the question of whether the acts could be attributed to Serbia as acts committed by de facto organs.[26] In this respect the Court, with reference to the *Nicaragua* case, applied a test of 'complete dependence'.[27] According to the ICJ this test required proof that 'the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument'.[28] In applying this test to the facts of *Bosnia* v. *Serbia* the Court found that no such relationship existed between the FRY and the various examined groups of Bosnian Serbs.[29] This was mostly because 'some qualified, but real, margin of independence' was enjoyed by the Bosnian Serb leaders which signified no total dependence.[30]

The Court then turned to Article 8 of the ILC Articles. Within its introductory explanation it pointed out as follows:

> [T]he 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. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would only mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs – this question having been answered in the negative.[31]

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23 Ibid., para. 384.

24 Ibid., paras. 385–389; Article 4 of the ILC Articles, entitled 'Conduct of organs of a State', reads as follows: '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. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

25 *Bosnia v. Serbia* case, *supra* note 4, paras. 386–389.

26 Ibid., paras. 390–395.

27 Ibid., para. 391.

28 Ibid., para. 392.

29 Ibid., paras. 394 ff.

30 Ibid., para. 394.

31 Ibid., para. 397; Article 8 of the ILC Articles, entitled 'Conduct directed or controlled by a State', 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.'

Article 8 of the ILC Articles, the ICJ found, laid down the applicable customary rule in this context. While the Court understood the notion 'control' within Article 8 of the ILC Articles to signify 'effective control', as provided for in the *Nicaragua* decision, it discussed whether the standard of 'overall control' applied by the ICTY in the *Tadić Appeals Chamber* case was preferable. In this respect the Court found that 'logic does not require the same test to be adopted in resolving the two issues [whether an armed conflict is international and whether state responsibility is given] which are very different in nature'.[32] It furthermore criticized the overall control test as broadening the scope of state responsibility well beyond the fundamental principle that each states is only responsible for its own conduct – that is, the conduct of persons acting on its behalf.[33]

In its application of Article 8 of the ILC Articles and in particular the effective control test, the Court came to the conclusion that it had been established neither that the Srebrenica massacres were committed on the instructions, or under the direction, of organs of the Respondent, nor that the Respondent exercised effective control over the operations in the course of which those massacres were perpetrated.[34]

4. Analysis of the decision

In analysing the concept followed by the ICJ, three main aspects which are strongly related to one another and which overlap in part will be dealt with. In the first place, the distinction made by the Court between on the one side attribution of acts of *de jure* and de facto organs according to Article 4 of the ILC Articles and on the other side responsibility for acts committed by non-organs under the instruction and control of state organs according to Article 8 of the ILC Articles will be addressed (section 4.1). In analysing the ICJ's conception special emphasis will be laid here on a comparison with the concept of the ILC on which the Court relies. Second, the complete dependence test, which is according to the Court's perspective the sole existing attribution rule concerning de facto organs, will be addressed. Where the test possibly stems from will be analysed, and whether it is justified to regard it as the sole test of attribution for de facto organs (section 4.2). Here a closer look will be taken at the Court's own jurisprudence regarding similar situations. Lastly, whether the Court's approach meets the needs of the international community will be discussed (section 4.3).

4.1. The abolishing of Article 8 of the ILC Articles as an attribution rule, and its consequences

One key aspect of *Bosnia* v. *Serbia* concerns the legal effect ascribed to Article 8 of the ILC Articles. The Court, in distinction to the attribution rule for de facto organs (in its view the complete dependence test), did not regard Article 8 ILC Articles as an attribution rule at all. Considering the very open words by which the Court

32 *Bosnia v. Serbia* case, *supra* note 4, para. 405 (annotation added).
33 Ibid., para. 406.
34 Ibid., para. 413.

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introduced its conception it seems rather surprising that this aspect of the judgment has seemingly not provoked other publicists' comments.[35] The Court introduced the relevance of Article 8 constellations as quoted above, the key passage being the following:

> An affirmative answer to this question [that of whether the requirements of Art. 8 ILC Articles are fulfilled] would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would only mean that the FRY's international *responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control* resulting in the commission of acts in breach of its international obligations.[36]

What can be understood by the Court's expression in this judgment? The plain reading of the wording is that the ICJ is of the opinion that the responsibility incurred by the state under Article 8 of the ILC Articles flows from the conduct of the state's organs in giving the instructions or exercising the control in question, as opposed to the action of the instructed or controlled entities. Considering that the function of the attribution rules is to attribute to the state the conduct of persons who have acted against international law, the Court's refusal to consider the persons acting under such instructions or control as de facto organs, and its foundation of responsibility in Article 8 situations on the wrongfulness of the state organs' instructions or control, entirely stripped Article 8 of the ILC Articles of its character as an attribution rule. In particular, since this was held in such open language, one doubts whether the ICJ could have meant anything different from the plain reading of the judgment. The wording surprises in this respect, as on the one hand the Court uses the ILC Articles in structuring its analysis and as a basis for its examination of the problem in question, but, on the other hand, the Court in its judgment ascribed to Article 8 of the ILC Articles a function entirely contradictory to the ILC's understanding of this article.[37] Leaving aside the specific tests provided for in Article 8 of the ILC Articles, which will be addressed more closely below, Article 8 falls within the same Chapter II as Article 4, both categorized under the title 'attribution of conduct to a state'. This is already an indicator of the effect the ILC intended to give to Article 8 of the ILC Articles. Further confirmation that the ILC understood Article 8 of the ILC Articles as a proper attribution rule is given by the commentaries to the ILC Articles.[38] Roberto Ago, the former Special Rapporteur of the ILC for the topic of

35 While the *Bosnia v. Serbia* case was discussed by a couple of other commentators, these laid emphasis on other important aspects of the judgment. See T. D. Gill, 'The "Genocide" Case: Reflections on the ICJ's Decision in *Bosnia and Herzegovina v. Serbia*', (2007) 2 *Hague Justice Journal* 46; A. Cassese, 'The Nicaragua and Tadić Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 EJIL 631; R. J. Goldstone and R. J. Hamilton, '*Bosnia v. Serbia*: Lessons from the International Court of Justice's Encounter with the International Criminal Tribunal for the Former Yugoslavia', (2008) 21 LJIL 95; M. Milanović, 'State Responsibility for Genocide: A Follow-up', (2007) 18 EJIL 669; Sandesh Sivakumaran, 'Application of the Convention of the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)', (2007) 56 ICLQ 695; K. Oellers-Frahm, 'IGH: Bosnien-Herzegovina gegen Jugoslawien', (2007) 4 *Vereinte Nationen* 165.

36 *Bosnia v. Serbia* case, *supra* note 4, para. 397 (annotation and emphasis added).

37 See for the ILC's understanding notes 38 and 39 *infra*.

38 ILC Commentaries, *supra* note 12, Art. 4 at 84, para. 2, Art. 8 at 103 ff.; see for the drafting history of the ILC Articles, as well as for references to the relevant documents, M. Spinedi and B. Simma, *United Nations Codification of State Responsibility* (1987).

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state responsibility, regarded the preliminary versions of the former Article 8(a) of the 1996 ILC draft version which later turned into Article 8 of the 2001 ILC Articles as the attribution rule concerning de facto organs.[39] As the general concept and the understanding of the rules of Article 8(a) of the 1996 ILC Draft Articles were, apart from being specified, left unchanged during second reading, one can – contrary to the Court – see Article 8 of the ILC Articles regarding questions of terminology as an attribution rule for de facto organs. One can even regard Article 8 of the ILC Articles as one of the key attribution rules within the set of rules proposed by the ILC, as it is of a particular practical relevance considering that states in trying to camouflage their policies in one way or the other make use of private persons and groups. This is also the reason why Article 8 of the ILC Articles has met with special attention in legal writings.[40]

Considering that in such writings the understanding of the ILC regarding Article 8 of the ILC Articles is unanimously supported,[41] it is completely unclear on what authority the Court relied in support of its understanding of the article. Although the Court makes reference to its former jurisprudence, the analysis below will demonstrate that the ICJ is in conflict with its own case law when it points out that the complete dependence test is the only test applicable to de facto organs. From the authors' perspective, the Court in *Bosnia* v. *Serbia* was accordingly the first not to ascribe to Article 8 of the ILC Articles the function of a proper attribution rule.

After this denial of the proper function of Article 8 of the ILC Articles, the way in which the ICJ then proceeds to apply this provision is equally remarkable. The Court seemingly interpreted Article 8 of the ILC Articles just like any other primary rule prohibiting certain acts of support granted by states to private persons or groups such as the indirect forms of violations of international law rules. Such forms found their expression, for example, in the Friendly Relations Declaration,[42] as the following example concerning indirect violations of Article 2(4) of the UN Charter shows: 'Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State'.[43]

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39 R. Ago, 'Third Report on State Responsibility', (1971) *Yearbook of the International Law Commission*, vol. 2 (part 1), para. 191. The rule of Art. 8(a) of the 1996 Draft Articles goes back to Roberto Ago, who from 1962 until 1979, when he became a judge at the ICJ, was the Special Rapporteur regarding state responsibility. His work concerning Part One of the Draft Articles on State Responsibility was left unchanged by his later successors Willem Riphagen and Gaetano Arangio-Ruiz; see Griebel, *supra* note 11, at 49 ff.

40 Many publications were dedicated specifically to this topic, *inter alia* Kress, *supra* note 9, at 93 ff.; Condorelli, *supra* note 9, at 19 ff.; S. Villalpando, 'Attribution of Conduct to the State – How the Rules of State Responsibility May Be Applied within the WTO Dispute Settlement System', (2002) 5 *Journal of International Economic Law* 393; A. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility; The *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', (2001) 72 *British Yearbook of International Law* 255; M. Plücken, 'Probleme einer völkerrechtlichen Verantwortlichkeit von Staaten für Handlungen Privater', B. Schöbener (ed.), *Junge Rechtswissenschaft – Völker- und Europarecht* (2008), 113 at 127; Griebel, *supra* note 11.

41 R. Higgins, *Problems and Process – International Law and How We Use It* (1994), 150; Ipsen, *supra* note 14, at 636 and 640 ff.; Kress, *supra* note 9, at 99; M. Shaw, *International Law* (2003), 704; Hobe and Kimminich, *supra* note 13, at 243; Villalpando, *supra* note 40, at 410; de Hoogh, *supra* note 40, at 277 ff.; M. Milanović, 'State Responsibility for Genocide', (2006) 17 EJIL 553.

42 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625 (1970).

43 Ibid.

Regarding provisions of this kind a state cannot be held responsible for the person's act itself but only for its own state organ's support of such groups, just as in the same way the Court found that Article 8 of the ILC Articles provided only for responsibility concerning a state organ's instruction or control exercised concerning private actors. The main problem with this interpretation is that Article 8 of the ILC Articles – apart from being meant to belong to the body of secondary rules[44] – can never be regarded as a primary rule since it is lacking the reference to a specific rule of international law. This shows that it was not meant to fulfil such a function. The lack of reference to a specific primary rule prohibition is obvious. Does it follow from this that the Court which relies on the responsibility of the instructing or controlling state organ considers that all prohibitions existing under international law without exception can also be carried out in these indirect ways? Even if this were the case, the question is why Article 8 of the ILC Articles should then still appear in the set of secondary rules on state responsibility. At least for the attribution of the state organ's action of instructing or exercising control it is not needed, since here Article 4 of the ILC Articles applies. There are accordingly a couple of questions left open in seeking to understand the Court's conception.

While one may for all these reasons be forgiven for thinking that the ICJ followed not just a new but also a rather inconsistent approach, another important question arises: are the differences between the understanding of the Court and that of the ILC only of a theoretical or dogmatic nature, or are there real practical differences arising from the different concepts? In other words, does it matter whether an act is directly attributable or whether responsibility is given based on wrongful behaviour in the context of such acts? In *Bosnia* v. *Serbia* the ICJ denied that the requirements for the application of Article 8 of the ILC Articles had been met. Even if the Court had regarded Article 8 of the ILC Articles as a proper attribution rule, it would have come to the same conclusion. For the present case applying a different view would, therefore, not have been of relevance. However, what if the Court had found Article 8 of the ILC Articles to be applicable according to its conception? Is it generally of any relevance if responsibility is based on instructions or exercised control and not on an attributable act?

The answer to this is in the affirmative; it does matter if one can hold a state directly responsible based on attribution or, as the ICJ states, only indirectly, by basing responsibility on acts like instructions or control. While there may not necessarily always be a difference regarding the consequences of attribution, important differences may, however, arise in three respects.

In the first place it makes a difference policy-wise whether the outcome of a legal analysis is that a state is the ultimate offender violating directly an international obligation or whether it is only held to have participated in the wrongful acts of somebody else. Had the requirements for Article 8 of the ILC Articles been fulfilled in the *Bosnia* v. *Serbia* case one would, following the ILC, have regarded Serbia as the 'author' of the massacres of Srebrenica, while the Court would have concluded

44 See *supra* section 2.

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that Serbia gave instructions or exercised control regarding a genocide committed by somebody else. There is a difference as to whether one can regard a state as a mass murderer or merely as an accessory to somebody else's mass murder. Had the Court in the *Nicaragua* case regarded the acts of the contras as attributable to the United States, the international community could have held the United States responsible for *inter alia* some of the gravest violations possible in the field of humanitarian law.[45] Instead the United States was with respect to the contras held responsible only for indirect violations of international law.[46]

In the *Teheran Hostages* case the attribution of the continuing hostage-taking by the students, based on expressions of approval by, *inter alia*, the Ayatollah Khomeini, gave a new dimension to the ICJ's findings irrespective of the fact that Iran was also held responsible for the whole of the situation by reason of its omission properly to protect the US embassy and its personnel as required by the Vienna Convention on Diplomatic Relations.[47] The Court in this context pointed out that the result of this Iranian policy of demonstrating approval 'was fundamentally to transform the legal nature of the situation'.[48] This shows that the Court itself demonstrated a consciousness that it matters whether one can attribute an act, even if responsibility for the consequences of the act can already be based on a certain failure to act. Attribution decides on the state's role as a mere accessory or as an author of the act. In other words it determines whether responsibility is engaged for an everyday peccadillo or a direct violation of international law.

Second, the events of 11 September 2001 have shown that questions of attribution are at the heart of discussions on reaction mechanisms with regard to certain dangers. In the field of self-defence it was and still is of key relevance whether one can regard the act of certain seemingly private groups as attributable to a state.[49] It is obvious that such an attribution is more difficult the more restrictive the attribution rules are. While according to the ILC a state's instruction or exercised control concerning violent acts of a certain group would justify considering that state itself as the author of an armed attack, the same result is not as easily achieved when no attribution is given. Considering the existence of an armed attack of a state based on that state organ's instruction or the exercise of control over somebody else's act is certainly not equally as easy.[50] Moreover, questions of proportionality may also arise as reactions to a state's armed attack will have to be different from reactions to the state's support for an armed attack by somebody else.

The same is true for countermeasures, which are equally subject to the special requirement of proportionality.[51] Can a victim state which is reacting merely to the

45 *Nicaragua* case, *supra* note 1, para. 20.
46 Ibid., para. 292.
47 *Teheran Hostages* case, *supra* note 2, paras. 57 ff. and 69 ff.
48 Ibid.
49 While there are discussions whether it is also possible for private groups to commit armed attacks, the question of attribution has certainly not lost its relevance; see Griebel, *supra* note 11, at 184 ff.
50 In this context one would have to take into account Art. 3(g) of the Definition of Aggression, UN Doc. A/RES/3314 (XXIX) (1974).
51 A. Randelzhofer in B. Simma, *The Charter of the United Nations – A Commentary* (2002), I, Art. 51, para. 42.

instructing or controlling by another state of acts committed by a third party react in relation to that state in the same way as where these acts were attributable? Where the act is attributable to another state the victim can in principle react by suspending the same obligations as those violated which are owed to the other state. However, is the same true where the other state is not to be blamed for the immediate act but only for its participation in these? If there is no attribution this must also have consequences regarding the options of reaction.

Third, while the 'instrumental consequences' are therefore affected by the differentiation, the same is true for the 'substantial' ones – that is, restitution or compensation.[52] If an act is seen as attributable, the state is responsible for all the damage based on this act. Where the state is merely responsible for instructions or control exercised over somebody else's acts, the chain of causation is a different one.[53] The acts the state can be blamed for are more remote than otherwise would be the case and therefore not all the consequences of the ultimate act necessarily fall within the state's responsibility.

This shows that there can be differences following the two conceptions, which in certain cases may have an enormous relevance. The legal consequences ascribed to Article 8 of the ILC Articles is therefore not a marginal question.

Consequently, one can summarize that the Court, although referring to the ILC's conception, applied an understanding of Article 8 of the ILC Articles which is not in conformity with that of the ILC and which leaves many questions open. The differentiation between the concept of the ICJ and that of the ILC matters, since the respective concepts may produce different outcomes.

4.2. The complete dependence test (complete control test) as the only test concerning de facto organs

The second aspect which deserves a closer analysis is the Court's reliance on the 'complete dependence test', which it regarded as the sole test by way of which actions of de facto organs can be attributed to a state as such. In this respect the origin of the test will be analysed (section 4.2.1) as well as whether it can really be regarded as the sole test of attribution, in particular considering the Court's own jurisprudence (section 4.2.2).

The complete dependence test is sometimes also referred to as the agency test[54] or the complete control test,[55] which is unfortunate, as it leads to further confusion.[56] Therefore the term 'complete dependence test' as used by the ICJ is hereinafter followed.

52 *Supra* section 2.
53 See G. Dahm, J. Delbrück, and R. Wolfrum, *Völkerrecht*, (2002) I/3, at 890 ff., 912 n. 54.
54 *Decision of the Trial Chamber in the Prosecuter v. Dusko Tadić a/k/a 'Dule'*, Judgement of 7 May 1997 (Trial Chamber), Case No. IT-94-1-T (hereinafter *Tadić Trial Chamber* case), at 288 (Judge McDonald, Separate and Dissenting Opinion).
55 See Milanović, *supra* note 41, at 576.
56 Ibid.

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4.2.1. The origin and practicability of the complete dependence test

In the *Bosnia* v. *Serbia* case the Court in applying the complete dependence test relied on its *Nicaragua* decision.[57] In the latter judgment the Court made the following statement:

> What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[58]

Attention was hardly ever paid to this passage as a separate test alongside that of effective control applied in paragraph 115 of the *Nicaragua* case. Seemingly, the idea of a separate standard of complete dependence was first prominently advocated in 1997, by Judge McDonald in her dissenting opinion in the *Tadić Trial Chamber* case, which in this respect found only limited support in legal writings.[59] Still, taking a closer look at a statement given by the Court later, in the *Nicaragua* case, concerning the attribution question, it seems fair to conclude that the ICJ in *Bosnia* v. *Serbia* worked on the assumption that complete dependence was meant to be an independent attribution test.[60] In paragraph 277 of the *Nicaragua* case the Court summarized its findings concerning the question of control over the contras as follows:

> The Court is however not satisfied that the evidence available demonstrates the contras were 'controlled' by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the extent of the control resulting from the financial dependence of the contras on the United States authorities cannot be established.

This shows that the Court regarded the considerations concerning complete dependence in paragraph 110 as a proper and independent attribution test.

However, one may wonder why – as indicated – this test was hardly ever regarded as a relevant attribution test. For example, this idea was neither supported by the majority in the *Tadić Trial Chamber* case[61] nor followed by the Tribunal in the *Tadić Appeals Chamber* case. The latter worked on the assumption that the *Nicaragua* judgment established only one test,[62] that of effective control, which it criticized[63] and therefore replaced with the overall control test.[64] The same is true for the ILC, which in its commentaries made it clear that the notion 'control' in Article 8 of the ILC Articles was to be understood as 'effective control'.[65] In these commentaries on Article 8 it made no reference to a test of complete dependence, while quoting the passage in the *Nicaragua* case concerning effective control.[66] In legal writings also

57 *Bosnia v. Serbia* case, *supra* note 4, para. 391.
58 *Nicaragua* case, *supra* note 1, para. 109.
59 See, e.g., Milanović, *supra* note 41, at 576.
60 *Nicaragua* case, *supra note* 1, para. 277.
61 *Tadić Trial Chamber* case, supra note 54, para. 585.
62 *Tadić Appeals Chamber* case, *supra* note 3, para. 112.
63 Ibid., paras. 115 ff..
64 Ibid., paras. 120 and 131 ff..
65 ILC Commentaries, *supra* note 12, at 105 ff.; see also Cassese, *supra* note 35, at 663.
66 Ibid.

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the effective control test is mentioned only when reference is made to the *Nicaragua* case.[67]

One can only speculate about the reasons for ignoring the double-test approach of the ICJ in the *Nicaragua* case. One reason may well be that the wording of the judgment in *Nicaragua* concerning the attribution of the acts of the contras to the United States was interpreted to the effect that the effective control test was a sort of specification of the complete dependence test.[68]

Another reason may be that the complete dependence test is from its conception a problematic test. The practical usefulness of the test must be doubted, considering that the evidentiary threshold of the complete dependence test is an exceptionally high one. Contrary to the opinion expressed by Judge McDonald,[69] one may furthermore have doubts that there are situations where the test is applicable without at the same time the effective control test applying. The practical relevance of the complete dependence test is therefore negligible.

There is another point of concern regarding the application of the complete dependence test. This can be made clear if one compares this test with the attribution rule for *de jure* organs. According to the latter a state is responsible for the persons it has officially designated to perform certain state functions. However, regarding *de jure* organs the state is not responsible for all of their acts, as they can still act within a private capacity. In principle, responsibility arises only for those acts taken in their respective capacities. Although this is contrary to the version of Article 5 of the 1996 ILC Draft Articles on State Responsibility not explicitly mentioned in Article 4 of the 2001 ILC Articles, this requirement is still necessary. This is not only reflected by the ILC's commentaries on Article 4 of the ILC Articles,[70] but also by Article 7 of the ILC Articles, which under certain albeit limited circumstances also provides for the state's responsibility for *ultra vires* acts of its *de jure* organs. Hence the state is not *ipso facto* responsible for all the acts of its *de jure* organs. The general relationship which exists based on a formal link is in itself not enough; it must be reflected in the action itself. The person must have acted within its capacity, which can only be examined focusing specifically on the act itself.

Regarding the complete dependence test the question arises as to whether there is also such a limitation regarding responsibility for private acts of a person. One publicist argues that, where the complete dependence test applies, 'the non-state actor becomes a state organ de facto, and all of its acts, even those committed against explicit state instructions, would be attributable to the state'.[71] On the one hand this seems to be the logical consequence, considering that the test does not rely on any sort of accorded competencies; on the other hand this shows that it is unfortunate to base attribution on a general relationship while ignoring the relevance of that

67 J. O'Brien, *International Law* (2001), 370; Cassese, *supra* note 8, at 249; Villalpando, *supra* note 40, at 411; Higgins, *supra* note 41, at 155; Plücken, *supra* note 40, at 135; Hobe and Kimminich, *supra* note 13, 243 ff.

68 Griebel, *supra* note 11, at 94 ff.; *Tadić Trial Chamber* case, *supra* note 54, para. 585; Kress also seems to regard the elaborations within paras. 108–115 of the *Nicaragua* case as a single test of effective control, *supra* note 9, at 104 ff.

69 McDonald, *supra* note 54, at 299; see also Milanović, *supra* note 41, at 579.

70 ILC Commentaries, *supra* note 12, at 84, para. 3, at 91 para. 7; see also Griebel, *supra* note 11, at 37.

71 Milanović, *supra* note 41, at 579, 602.

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relationship regarding a specific act. The result is a test for de facto organs which is even stricter than the test for *de jure* organs, which can act in a private capacity without giving rise to the state's responsibility.[72] Determining attribution solely on the basis of the general relationship between the state and the person or group and ignoring the relevance of this link concerning the act in question is conceptually doubtful.

All this makes the complete dependence test one which can hardly be regarded as a practicable test leading to satisfactory results.

It is also interesting to note that the ICJ applies the complete dependence test as falling under Article 4 of the ILC Articles. On the one hand, the Court could not do otherwise, considering its understanding of Article 8 of the ILC Articles; on the other hand, one may have doubts that it fits into the conception of the ILC to apply Article 4 of the ILC Articles to such situations. Admittedly one has to concede that the ILC did not follow a too formalistic understanding of 'organ' as expressed in the commentaries to Article 4 of the ILC Articles, as follows:

> [I]t is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.[73]

However, it is problematic to regard Article 4 of the ILC Articles as a sufficient basis also for attributing acts of groups one would regard prima facie as private groups. The intention of the ILC was rather to emphasize that the internal law need not always be sufficient to perform the task of classification.[74] The internal law's understanding of 'organ' may be a very peculiar or restrictive one.[75] For example, persons may perform public functions within a state based on competencies which have been granted not by way of a formalistic act but by way of a certain practice and use. Their actions are meant to be attributed. From an objective point of view they have to be regarded just like *de jure* organs which have been formally entitled. And as such they also share their denomination as *de jure* organs. Contrary to this, the complete dependence test focuses on persons which prima facie have nothing in common with *de jure* or such quasi-*de jure* organs, but whose acts are attributed on the basis of a different relationship. Such situations are not meant to fall under Article 4 of the ILC Articles, but under Article 8 of the ILC Articles. This is particularly true where the persons concerned do not act 'within' the legal system but outside it.

In this context it should be pointed out that disputes regarding the terminology are in principle of secondary relevance, as long as the same effect is attributed to the applied rules. However, considering the notion of de facto organs as being reserved for Article 4 and that of 'agent' for Article 8 of the ILC Articles – as is sometimes

72 This is true unless the rather exceptional case is given where the state is responsible although the act was *ultra vires*: see ILC Articles, Art. 7.
73 ILC Commentaries, *supra* note 12, at 90 para. 11.
74 Ibid.
75 Ibid., with instructive examples.

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the case in the literature[76] – can be criticized, as it is not useful to distinguish two situations which are so close to each other under different headings and rules.[77]

Accordingly, although one may have strong doubts as to the complete dependence test's usefulness as a practically relevant attribution test, the Court in *Bosnia* v. *Serbia* was, however, correct in relying on the *Nicaragua* judgment as a basis for the complete dependence test. Doubts, however, arise regarding the application of this test under Article 4 of the ILC Articles.

4.2.2. Refutation of the complete dependence test as the sole test of attribution for de facto organs

Even if one therefore concluded that the complete dependence test is a test of attribution under international law, the question arises as to whether, as stated by the ICJ in the *Bosnia* v. *Serbia* case,[78] it is the only applicable test for the attribution of acts of de facto organs. This is the position taken by the Court, considering that it not only omitted to address other relevant tests for de facto organs but also degraded the tests provided for in Article 8 of the ILC Articles, namely the instruction test as well as the (effective) control test, to non-attribution tests.[79] Obviously this question is strongly linked to the discussion already mentioned concerning the abolishment as an attribution rule of Article 8 of the ILC Articles. It was stated above that in this respect the conception followed by the Court was in clear conflict with the ILC conception and also unanimous opinion in legal writings. In analysing the exclusiveness of the complete dependence test the focus of what follows will be on the Court's own jurisprudence in situations of a similar kind.

The ICJ's idea that complete dependence constituted the only attribution test for de facto organs has so far never been advocated elsewhere. As indicated above, in the interpretation of the *Nicaragua* judgment some experts relied on effective control as the only test applied in the *Nicaragua* case[80] while others supported the idea of two independent tests.[81] Apart from this, other judgments as well as the ILC Articles indicated the relevance of other tests not concerned with the criterion of control, in particular the test of instruction. Accordingly, the Court followed a new approach.

Although in doing so the Court seemingly relied on its own jurisprudence, making reference to the *Nicaragua* case on several occasions,[82] the authors are of the opinion that the Court's concept is in conflict with its own earlier case law.[83] This is true, first, considering the instruction test as laid down in Article 8 of the ILC Articles. This

76 De Hoogh, *supra* note 40, at 268.
77 The notion 'de facto organ' is mostly used to denounce persons acting under Art. 8 ILC Articles; see Ago, *supra* note 39, para. 191; Kress, *supra* note 9, at 96, 101; Cassese, *supra* note 8, at 247; Villalpando, *supra* note 40, at 410 ff..
78 *Bosnia v. Serbia* case, *supra* note 4, para. 397.
79 For the purposes of this article it is of no greater relevance that Art. 8 ILC Articles also speaks of 'direction' as a further applicable test. Considering the drafting history of Art. 8 ILC Articles and the ILC Commentaries, it unfortunately remains unclear what the content of 'direction' is; see Griebel, *supra* note 11, at 69 ff., 74 ff..
80 See *supra* notes 66 and 67.
81 McDonald, *supra* note 54, at 295 ff.; Milanović, *supra* note 41, at 576 ff..
82 See in particular *Bosnia v. Serbia* case, *supra* note 4, paras. 399 ff..
83 Although judgments of the ICJ are only binding *inter partes*, the Court in principle tries to follow its earlier judgments.

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test was not only applied by other international courts and tribunals,[84] it was also addressed by the ICJ in the *Teheran Hostages* case. Here, the Court had to deal with the question of whether the attack of the 'militants' on the US embassy engaged the direct responsibility of Iran. The Court described the relevant standard as follows:

> Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.[85]

Although such attribution was denied on the facts of the case,[86] it becomes clear from this statement that the Court regarded the instruction test as an attribution rule.

Further to this Court's holding it is difficult to imagine a case where an attribution is more justified and required than in cases where an instruction by the state to a non-*de jure* organ is given to commit a certain act, for example the murder of a foreign state representative. The ICJ itself in the *Bosnia* v. *Serbia* case emphasized that the attribution rule for de facto organs is meant to prevent a state escaping international responsibility,[87] a view already expressed by many others on various occasions.[88] One cannot doubt that the instruction test is the clearest answer in fulfilling this demand.[89]

While the instruction test was therefore acknowledged by the Court as an attribution rule, the same is true for at least the effective control test also laid down in Article 8 of the ILC Articles. The ICJ in the *Nicaragua* case regarded effective control as a genuine attribution test. To this effect reference can in the first place be made to the Court's elaborations in paragraph 115:

> United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of military and paramilitary targets, and the planning of the whole of its operations, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of *attributing* to the United States the acts by the contras in the course of their military and paramilitary operations in Nicaragua.[90]

For this purpose it would have been required 'that [the] state had effective control of the military and paramilitary operations in the course of which the alleged violations were committed'.[91] These passages are proof that the Court in the *Nicaragua* case regarded the effective control test to be a genuine attribution test. This finding is furthermore supported in paragraph 277 of the Court's judgment in that case. Here

84 See for these ILC Commentaries, *supra* note 12, at 104 n. 161; Griebel, *supra* note 11, at 167 ff.
85 *Teheran Hostages* case, *supra* note 2, at 29, para. 58.
86 Ibid., paras. 58 ff.
87 *Bosnia v. Serbia* case, *supra* note 4, para. 392.
88 See, e.g., W. Riphagen, 'Seventh Report on State Responsibility', (1986) *Yearbook of the International Law Commission*, vol. 2 (part 1), at 11, para. 6; *Tadić Appeals Chamber* case, *supra* note 3, para. 117; D. Blumenwitz, 'Das universelle Gewaltanwendungsverbot und die Bekämpfung des grenzüberschreitenden Terrorismus', (1986) *Bayerische Verwaltungsblätter* 739.
89 Griebel, *supra* note 11, at 169.
90 *Nicaragua* case, *supra* note 1, para. 115 (emphasis added).
91 Ibid.

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the Court stated, following the considerations concerning complete dependence quoted above, as follows: 'and it has not been able to conclude that the contras are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above)'. The two tests of complete control and effective control may according to the Court in *Nicaragua* enjoy an independent character; however, both of these tests were meant to be proper attribution tests.

This is true even though the Court did not give a positive definition of what it understood by effective control. From the long elaborations on what did not suffice in this respect one may infer that the Court required that the state have a direct influence on the act or operation in question.[92] The state must be able to define its beginning and the way it is carried out, as well as its end.[93] An attribution under such circumstances is justified.

Another case in which the ICJ regarded the tests provided for in Article 8 of the ILC Articles as an attribution test is the comparatively recent judgment of the Court in *Congo* v. *Uganda*.[94] Although the Court did not here elaborate to any great extent on this topic, it becomes clear from the judgment that it regarded the tests embodied in Article 8 of the ILC Articles as proper attribution tests. After discussing the application of Articles 4, 5, and 8 of the ILC Articles,[95] the Court summarizes this analysis as follows: 'the evidence does not suggest that the MLC's conduct is attributable to Uganda'.[96] Accordingly the tests reflected by Article 8 of the ILC Articles were given the same effect as those of Articles 4 and 5.

As indicated above, it was in part the reliance on the *Teheran Hostages*[97] and *Nicaragua* cases which led the ILC under the guidance of James Crawford to the current version of Article 8 of the ILC Articles as an attribution rule for de facto organs, and to draft it with explicit reference to the instruction test and the (effective) control test instead of referring simply to 'in fact acting on behalf of that state', as was provided for in the original draft elaborated under the direction of Roberto Ago.[98] Also Judge Simma, at that time chairman of the drafting committee concerned with state responsibility, worked on the assumption that the cases falling under Article 8 of the ILC Articles concerned cases of attribution.[99]

92 There is a certain dispute whether the control must be exercised concerning the operation or a specific action. While the Court in the *Nicaragua* case focused on control over the operation in the course of which the act is committed, the ILC adopted an even more restrictive approach, focusing on control over the act itself; see Griebel, *supra note* 11, at 172.

93 Ibid., at 172; see for a similar understanding Kress, *supra* note 9, at 105.

94 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005.

95 Ibid., para. 160.

96 Ibid., para. 161.

97 Although the ILC in its Commentaries on Art. 8 ILC Articles did not explicitly rely on the *Teheran Hostages* case, it is the same test as that embodied in Art. 8.

98 See for the evolution of the rule laid down in Art. 8 ILC Articles Griebel, *supra* note 11, at 47 ff..

99 Statement of the Chairman of the Drafting Committee B. Simma, International Law Commission, 13 August 1998, at 7. See also B. Simma, 'The Work of the International Law Commission at its Fiftieth Session (1998), (1998) 67 *Nordic Journal of International Law* 452. At that time Judges Al-Khasawneh, Bennouna, and Sepúlveda Amor were also members of the ILC; see (1998) *Yearbook of the International Law Commission*, vol. 2 (part 2), at 13.

It is accordingly not convincing that the Court in the *Bosnia* v. *Serbia* case considered the complete dependence test as the sole test for de facto organs. This is not only contrary to the well-established and widely accepted concept of the ILC as pointed out above, it is in particular not in accordance with the Court's own jurisprudence concerning the attribution of de facto organs. The approaches in the *Teheran Hostages* and *Nicaragua* cases are well founded, considering that it would seem rather too removed from reality not to regard a state which is initiating a murder by instructing the murderer or which is effectively controlling a massacre committed by a group of non-*de jure* organs as responsible based on an attribution.

4.3. The restrictive character of Article 8 of the ILC Articles as applied by the Court

A third aspect of the ICJ's judgment to be addressed is the restrictive character of the tests advocated by the Court in applying Article 8 of the ILC Articles. By rejecting Article 8 of the ILC Articles as an attribution rule the Court took a very restrictive perspective regarding the whole of the attribution concept. This restrictive approach is mirrored by regarding the complete dependence test as the sole existing attribution test for de facto organs – a test, which for reason of its required preconditions, is not likely ever to be applied in practice.

Although the Court followed – as discussed above – a very peculiar understanding of Article 8 of the ILC Articles, the way it applied the tests provided for therein is equally an expression of the Court's overall restrictive approach. In its judgment the ICJ discussed, in the context of the effective control requirement of Article 8 of the ILC Articles, whether the notion 'control' should not rather be understood as overall control instead of effective control. This idea of operating with the less restrictive standard of overall control introduced as mentioned above by the ICTY was dismissed by the Court for reasons to which one can in part easily subscribe. There is indeed no reason why the same rules need to be applied regarding issues which are so fundamentally different in nature.[100] However, the ICJ also reasoned that a move of the required standard from effective control to overall control would be broadening the scope of responsibility too far. Considering the requirements of the effective control test it must be regarded as a very restrictive test.[101]

In this context it is regrettable that the Court did not address any of the new tendencies regarding attribution of acts of de facto organs which occurred after the events of 11 September 2001. After all, since the question was raised as to whether the acts of al-Qaeda could be attributed to Afghanistan, based on a so-called 'safe-haven doctrine' or acquiescence, a debate has been opened on the appropriateness of the more restrictive standards laid down in Article 8 of the ILC Articles.[102] In the *Bosnia* v.

100 *Bosnia v. Serbia* case, *supra* note 4, para. 403 ff.; Griebel, *supra* note 11, at 170 ff.; see for a different view Cassese, *supra* note 35, at 655 ff..

101 Milanović, *supra* note 41, at 577; Griebel, *supra* note 11, at 179.

102 See for a short summary of the new views on this question Griebel *supra note* 11, at 147 ff.; see also Milanović, *supra* note 41, at 583 ff..

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Serbia case the Court did not address this at all. All it addressed in this context was the idea of an overall control test to be applicable also in the field of state responsibility, a test which the ICJ found – as indicated – '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'.[103]

One easy reason for not considering any of the other new ideas would be a silent application by the Court of the concept of intertemporal law.[104] The ICJ has to apply the law as it stands at the time when the dispute arises or the situation in question occurs and has accordingly to consider the wrongfulness of an act against the background of the law at the time when that act was committed. The Court relied – although in the unique way as discussed above – on the rules used in the *Nicaragua* case of 1986. If one takes a look at the period from the mid-1980s to the mid-1990s, when the massacre of Srebrenica took place, it is difficult to argue in favour of a change of the rule of effective control. This is also supported by the fact that the ILC in early 2001 presented its current version of the ILC Articles which in Article 8 also relied on effective control and which in December 2001 was commended to the attention of governments by the UN General Assembly.[105] Obviously one was at that time incapable of reacting to the new challenge which had just occurred three months before.

However, considering that the Court has frequently taken the opportunity progressively to develop the law[106] against the background of the newly discussed tests, one might ask if such an opportunity was not missed regarding the attribution of acts of de facto organs. At least to elaborate on these new tendencies would have been useful, as the degree of uncertainty is enormous and there are still many questions, such as: have new attribution rules been accepted in customary international law? What is their possible character? Must the general rules as laid down in Article 8 of the ILC Articles be regarded as the universal ones which are, however, modified by a *lex specialis* in certain areas of international law?

From the Court's decision one could draw conclusions concerning at least some of these questions. The attribution rules are stricter than ever; states have to establish a relationship to the non-*de jure* organ which is almost similar to that of *de jure* organs. The standard of requirements for holding a state directly responsible for acts of non-*de jure* organs is accordingly extremely high, or, to put it in the words of the ICJ, 'to equate persons or entities with State organs when they do not have that status under internal law must be exceptional'.[107] Further, regarding the question of *lex specialis* the Court pointed out that '[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*'.[108]

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103 *Bosnia v. Serbia* case, *supra* note 4, para. 406.
104 See for the concept of intertemporal law Shaw, *supra* note 41, at 429 ff.; I. Brownlie, *Principles of Public International Law* (2003), 124 ff.; A. D'Amato, 'International Law, Intertemporal Problems', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1995), II, at 1234 ff.
105 See *supra* note 7.
106 M. D. Evans, *International Law* (2006), at 587; Higgins, *supra* note 41, at 202; Shaw, *supra* note 41, at 1005.
107 *Bosnia v. Serbia* case, *supra* note 4, para. 393.
108 Ibid., para. 401.

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Still, one may have doubts whether these findings will at the same time fulfil the ICJ's target of trying to prevent states escaping responsibility.[109] Here lies another major weakness of the Court's overall conception. Is it not true that regarding attribution states can presently easily escape international responsibility? The *Nicaragua* case is an extreme example, where even massive forms of support, without which many of the atrocities committed by the contras would never have occurred, were regarded as insufficient for an attribution. This is remarkable, considering that the support was sufficient for the contras to increase in number from 500 to more than 12,000.[110] It seems obvious that one can find private groups to act for the cause of almost any interest which exists. States no longer need to act by way of their *de jure* organs if they wish to achieve certain aims; they can make use of the existing private groups. It is obvious that such groups can be as dangerous as states, as al-Qaeda has demonstrated. States do not need to control effectively or instruct these groups in order to have their aims fulfilled; considering that far too often the state's aims are shared with a private group certain forms of support will be enough. Considering the dangers flowing from private groups, the difficulties of fighting them under international law, and the abuse of such groups for political purposes by states, reflected by their enormous support for these groups, one might well raise the question of whether restrictive attribution rules are still justified. Rather, would a certain deterrent effect not be achieved by applying less restrictive rules? One may well discuss and even have doubts as to whether acquiescing in certain private acts (or a safe-haven doctrine) can in this context be regarded as a sufficient basis for attribution; however, if a substantial involvement of the state during the preparatory phase of an act or its execution can be proven, the state should not be able to escape direct responsibility for these acts.[111] In this way states would be prevented from conspiring with private groups for the purpose of violating other state's rights. Such rules have been overdue for quite some time. Considering that the judges of the ICJ have had before their eyes cases of the dark side of public–private partnership, such as the co-operation between the United States and the contras or the Taliban and al-Qaeda, it is regrettable that the Court did not see the international community's need for less restrictive attribution rules as well as the need to address this problem.

5. Conclusion and future prospects

From the above it can be concluded that without any apparent reason the Court applied a concept regarding attribution which in several aspects strongly deviates from commonly accepted concepts reflected in its own jurisprudence and the ILC Articles.

It is mostly its denial of Article 8 of the ILC Articles as an attribution rule which is the major point of concern. In arguing that responsibility in cases of control or

109 Cassese, *supra* note 35, at 654.
110 *Nicaragua* case, *supra* note 1, para. 94.
111 Griebel, *supra* note 11, at 229.

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instructions can only be based on the wrongfulness of the controlling or instructing *de jure* organs, the Court abolished a well-established concept and at the same time established an attribution standard which is even more restrictive than the approach followed by the Court in earlier cases, as well as that of the ILC. And instead of contributing to the certainty of law, the Court in this respect has clearly contributed to an increased uncertainty of law.

From the authors' perspective it is quite understandable that the Court in the light of such scenarios as that of 11 September 2001 did not consider attribution based on low-threshold requirements such as acquiescence, a safe-haven doctrine, or forms of substantive involvement. Apart from the fact that not all these tests would necessarily have been of relevance in *Bosnia* v. *Serbia*, it must be doubted – with substantial regret regarding an attribution based on substantive involvement – that they have acquired the status of universally applicable international law.[112] If at all they may play a role as *lex specialis*. However, considering the high degree of uncertainty of the law and the many divergent views found in legal writings, it would have been useful had the Court discussed attribution rules not only with regard to the *Tadić Appeals Chamber* case but also more generally. It is interesting to what degree the 'conflict'[113] between the two institutions – the ICJ and the ICTY – concerning the required degree of control distracted the Court from the fact that both standards are in principle too restrictive and are not appropriate to meet the needs of the international community. One may accordingly regret that a chance to establish less restrictive standards, as may be due in today's world after the events of 11 September 2001, was missed.

Considering that the conception is at least in part confusing, it must be doubted that all members of the Court fully realized the eventual impact of the passages in the judgment concerning the effect of Article 8 of the ILC Articles. Considering also the special expertise of many of the members of the Court in the field of state responsibility, one may even be surprised that such an approach was followed.[114] That the Court's approach concerning attribution has not yet provoked strong criticism is seemingly due to the fact that it would not have made a difference regarding the outcome of the case had one applied the effective control test as a genuine attribution rule. However, while this is fortunately not the case, the remarkable restrictiveness of the Court's approach may have negative implications in future cases, although it must be doubted that the ICJ's perspective will prevail in the future. It seems to be a misapplication of established rules which is unlikely to find much support. One is even tempted to speak of a legal mistake made by the Court, one which it might be difficult to correct in the future.

It will be interesting to see how the Court will deal with its unfortunate approach should cases similar to *Nicaragua* or *Bosnia* v. *Serbia* occur again. The ICJ will probably

112 Ibid., at 178 ff.; Plücken, *supra* note 40, at 148.

113 As indicated above, the authors are not of the opinion that there is a conflict, as one may regard the two tests as applicable in a different context; however, this might be seen differently from the perspective of the ICTY, see *supra* section 4.3; see in this respect Goldstone and Hamilton, *supra* note 35, in particular at 99–103.

114 See *supra* note 8.

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find an opportunity to address the question of attribution in the pending proceedings of *Croatia* v. *Serbia*.[115]

When considering questions of attribution there unfortunately seems still to be a lot of truth in the words written years ago by the Court's president, Rosalyn Higgins: 'In the law of state responsibility one might be forgiven for thinking that there is almost nothing that is certain.'[116]

115 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro).*

116 Higgins, *supra* note 41, at 146.

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