THE RESPONSIBILITY OF OUTSIDE POWERS FOR ACTS OF SECESSIONIST ENTITIES

STEFAN TALMON*

Abstract In August 2008, Georgia instituted proceedings against the Russian Federation before the International Court of Justice (ICJ) to establish its international responsibility for alleged acts of racial discrimination against the ethnic Georgian population in South Ossetia and Abkhazia by 'the *de facto* South Ossetian and Abkhaz separatist authorities [. . .] supported by the Russian Federation'. In order to establish the international responsibility of an outside power for the internationally wrongful conduct of a secessionist entity, it must be shown, inter alia, that the acts or omissions of the secessionist entity are *attributable* to the outside power. International tribunals usually determine the question of attribution on the basis of whether the authorities of the secessionist entity were '*controlled*' by the outside power when performing the internationally wrongful conduct. Attribution thus becomes a question of how one defines '*control*'. The test of control of authorities and military forces of secessionist entities has become perhaps the most cited example of the fragmentation of international law. The ICJ, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, and the European Court of Human Rights have all developed and applied their own tests in order to establish whether a secessionist entity has been 'controlled' by an outside power. There is a lot of confusion about the various tests, usually referred to as the 'effective control', 'overall control' and 'effective overall control' tests. This article sets out the various control tests, their requirements and areas of application, and asks which test or tests should be applied to attribute the internationally wrongful conduct of a secessionist entity to an outside power.

I. INTRODUCTION

Over the last 25 years, several secessionist entities have been created and maintained with the assistance of outside powers. In 1983, the Turkish Cypriots established the Turkish Republic of Northern Cyprus in the northern part of the Republic of Cyprus occupied by Turkish troops. In the wake of the break-up of the former Yugoslavia in the early 1990s, the Serb community in Croatia, assisted by Serbia, proclaimed the Serbian Republic of Krajina, and

* Professor of Public International Law, University of Oxford, and Fellow of St Anne's College, Oxford. stefan.talmon@st-annes.ox.ac.uk

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the Serb and Croat population in Bosnia and Herzegovina founded the Republika Srpska and the Republic of Herceg-Bosna with the help, respectively, of Serbia and Croatia.[1] At the same time, the dismemberment of the Soviet Union led to the creation of various secessionist entities in the territories of the successor States: South Ossetia and Abkhazia separated from Georgia, and in Moldova the breakaway republic of Transdniestria was established, all with Russian assistance, while the region of Nagorno-Karabakh declared its independence from Azerbaijan with the help of Armenia. Five of these internationally unrecognized secessionist entities are still in existence today. The parent State from whose territory these secessionist entities have been carved out by military means or, depending on the circumstances, any other injured State or private individual may consider holding the outside power directly or indirectly sponsoring and supporting these entities responsible for conduct violating international law perpetrated by their authorities. Thus, on 12 August 2008 Georgia instituted proceedings against the Russian Federation before the International Court of Justice (ICJ) to establish its international responsibility for alleged acts of racial discrimination against the ethnic Georgian population in South Ossetia and Abkhazia by, inter alia, 'the *de facto* South Ossetian and Abkhaz separatist authorities [...] supported by the Russian Federation'.[2]

In order to establish the international responsibility of an outside power for the internationally wrongful conduct of a secessionist entity, it must be shown that the territorial scope of application of the outside power's international obligation extends beyond its own territory to that of the secessionist entity, ie that the international obligation in question can be applied extraterritorially,[3] and that the acts or omissions of the secessionist entity which violate that obligation are *attributable* to the outside power.[4] The relevant rules on attribution of a secessionist entity's conduct to an outside power for the purpose

[1] The outside involvement in the case of Kosovo which seceded from Serbia in February 2008 differs from the cases discussed here. While a causal link might be established between the NATO bombardment of the Federal Republic of Yugoslavia in 1999 and the emergence of Kosovo as an independent State in 2008, the creation of Kosovo was ultimately made possible by the inaction of the United Nations Mission in Kosovo (UNMIK) and the NATO-led Kosovo Force (KFOR), that is, the failure to fulfil their mandates under Security Council resolution 1244 (1999) of 10 June 1999.

[2] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation)*, Application Instituting Proceedings, 12 Aug 2008, para 2. See also ibid para 81. All ICJ cases and documents are available at <http://www.icj-cij.org/>.

[3] The question of extraterritorial application of an obligation may, as in the case of obligations under the European Convention on Human Rights (ECHR), depend on whether the outside power exercises 'jurisdiction' over a person inside the territory of the secessionist entity. The question of jurisdiction must not be confused with the question of attribution of conduct. See (n 98–n 100) below.

[4] cp *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation)*, Request for the Indication of Provisional Measures (hereinafter '*Georgia v Russian Federation*'), Order of 15 Oct 2008, para 108.

of determining its international responsibility are laid down in Articles 4 to 8 and 11 of the International Law Commission's Articles on Responsibility of States for International Wrongful Acts (ILC Articles on State Responsibility),[5] which are widely considered to reflect customary international law.[6]

The secessionist entities' authorities will not usually qualify as 'persons or entities' which have the status of de jure organs of the outside power under its internal law.[7] They will not normally belong to the formal State apparatus of the outside power and will not act as such. Even the provision of substantial financial or logistical support, including the payment of salaries, pensions, and other benefits to some of its officials, does not automatically make the secessionist entity or its officials de jure organs of the outside power, since the officials will ordinarily receive their orders from, and will exercise elements of the public authority of, the secessionist entity and not that of the outside power.[8] In addition, the authorities of the secessionist entity will not, as a rule, be empowered by the law of the outside power to exercise elements of that power's governmental authority.[9]

It will also be difficult to prove that State organs of the outside power directly took part in activities of the secessionist entity or that the political leaders of the outside power had a hand in preparing, planning or in any way carrying out a certain activity.[10] Even officials, military units or other *de jure* organs of the outside power transferred, or sent as 'volunteers' on temporary assignment, to the secessionist entity and operating in or from its territory need not necessarily incur the international responsibility of the outside power if it can be shown that they have been placed at the disposal of the secessionist entity.[11] As the ICJ pointed out in the *Bosnian Genocide* case, 'the act of an organ placed by a State at the disposal of *another public authority* [which need not necessarily be another recognized State] shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.'[12] It would have to be shown that the personnel seconded to the secessionist entity received orders from the outside power

[5] For the text of the ILC Articles on State Responsibility, see Annex to General Assembly Resolution 56/83 of 12 Dec 2001. For the requirement of attribution, see Art 2(a) of the ILC Articles. Cp also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Serbia and Montenegro)* (hereinafter '*Bosnian Genocide*'), Judgment of 26 Feb 2007, ICJ Rep 2007, para 379.

[6] cp *Bosnian Genocide* (n 5) paras 385, 398, 401, 407; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* (hereinafter '*Armed Activities*') [19 Dec 2005] ICJ Rep, para 160.

[7] See Art 4(2) ILC Articles on State Responsibility: 'An organ includes any person or entity which has that status in accordance with the internal law of the State.'

[8] cp *Bosnian Genocide* (n 5) para 388; *Georgia v Russian Federation* (n 4) CR 2008/27, 10 Sep 2008, 18, para 46 (A Zimmermann).

[9] See Art 5 ILC Articles on State Responsibility.

[10] cp *Bosnian Genocide* (n 5) para 386.

[11] See Art 6 of the ILC Articles on State Responsibility.

[12] *Bosnian Genocide* (n 5) para 389 (emphasis added). In the *Bosnian Genocide* case, the 'public authority' in question was first, the Republic of the Serb People of Bosnia and

which circumvented or overrode the authority of the secessionist entity.[13] Conversely, it will be equally difficult to establish that officials or organs of the secessionist entity have been placed at the disposal of the outside power making them subject to the latter's exclusive direction and control.

Although the outside power may condone or even politically approve of the alleged international wrongful conduct of the secessionist entity, in practice it will be rather unusual for the outside power openly and clearly to 'acknowledge and adopt the conduct in question as its own.'[14] On the contrary, the outside power will point to the secessionist entity's de facto independence or its status as an independent State responsible for its own acts and omissions.[15] Congratulatory or approving statements following the wrongful conduct will not be enough to engage the responsibility of the outside power.[16]

When called upon to determine the international responsibility of an outside power for the internationally wrongful conduct of a secessionist entity, international courts and tribunals usually examine whether the authorities of the secessionist entity were '*controlled*' by the outside power when performing the internationally wrongful conduct.[17] The question of whether or not an act of a secessionist entity can be attributed to an outside power thus becomes a question of how one defines '*control*'. The test of control of authorities and military forces of secessionist entities has become perhaps the most cited example of 'the fragmentation of international law'.[18] The ICJ, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the European Court of Human Rights (ECtHR) have all developed

Herzegovina and later the Republika Srpska, both of which had not been recognized internationally as a State; they enjoyed however some de facto independence (ibid, para 233).

[13] cp *Prosecutor* v *Tadić* ICTY-94-1-T (1997) 36 ILM 908, 931, para 601. All ICTY cases are available at <http://www.un.org/icty/>.

[14] See Art 11 of the ILC Articles on State Responsibility. See also *Military und Paramilitary Activities in und against Nicaragua (Nicaragua v USA)* (hereinafter '*Nicaragua*'), ICJ Pleadings, Vol IV (Memorial of Nicaragua (Merits)) paras 270–274. The ICJ did not deal with this question.

[15] See eg *Loizidou v Turkey (Preliminary Objections)* (1995) ECtHR Ser A, Vol 310, 1, para 47. In this case Turkey submitted that the TRNC was an independent State established in the north of Cyprus with which it had close and friendly relations. See also *Solomou and Others v Turkey*, Application No 36832/97, Judgment of 24 Jun 2008, para 37. All decisions of the ECtHR are available at <http://echr.coe.int/echr/en/hudoc>.

[16] cp *United States Diplomatic and Consular Staff in Tehran (USA v Iran)*, [1980] ICJ Rep 3, para 59. But see also ibid paras 74–75.

[17] cp *Nicaragua* (n 14) para 277. The importance of the element of 'control' is also shown by the standard reference to Russia's 'direction and control' of the South Ossetian and Abkhaz separatist authorities in Georgia's Application Instituting Proceedings (paras 2, 81, 82) and its (Amended) Request for the Indication of Provisional Measures of Protection (paras 3, 17, 21 and paras 16, 17, respectively) in *Georgia v Russian Federation* (n 4). See also ibid, CR 2008/22, 8 Sep 2008, 43–44, paras 18–20 (P Akhavan). The question of 'control' will have to be decided at the merits stage of the proceedings.

[18] See Speech by HE Judge Rosalyn Higgins, President of the ICJ, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 Oct 2007, 4. See also the Report of the Study Group of the International Law Commission finalized by M Koskenniemi on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' UN Doc A/CN.4/L.682, 13 Apr 2006, 31–32, paras 49–52.

and applied their own tests in order to establish whether a secessionist entity has been 'controlled' by an outside power. There is a lot of confusion about the various tests, usually referred to as the 'effective control', 'overall control' and 'effective overall control' tests. This article sets out the various control tests, their requirements and areas of application, and asks which test or tests should be applied to attribute the internationally wrongful conduct of a secessionist entity to an outside power.

II. THE TWO CONTROL TESTS DEVELOPED BY THE INTERNATIONAL COURT OF JUSTICE

The literature and decisions of other international courts, with very few exceptions,[19] refer only to one test in connection with the ICJ—the 'effective control' test.[20] The ICJ, however, has in fact applied two different '*tests* [. . .] of control'[21] in the two leading cases on the subject: the *Nicaragua* case[22] and the recently decided *Bosnian Genocide* case,[23] with the latter shedding some light on the ruling in the former. While the first case concerned the responsibility of the United States of America for acts of the *contras*, an armed opposition group operating in and against Nicaragua, the second case dealt more squarely with the responsibility of Serbia and Montenegro for the activities of the Republika Srpska, a secessionist entity that had been created in 1992 with the assistance of the Federal Republic of Yugoslavia (FRY)[24] in the territory of Bosnia and Herzegovina and that 'enjoyed some *de facto* independence'.[25]

According to the ICJ, control results from dependence or, looking at it from the other side, dependence creates the *potential* for control.[26] Dependence

[19] That the ICJ formulated two tests was recognized by the Prosecution and Judge McDonald in her dissent in the *Tadić* case; see *Prosecutor v Tadić* (n 13) paras 22, 34 (sep and diss op McDonald); *Prosecutor v Tadić*, ICTY-94-1-A (1999) 38 ILM 1518, paras 106, 111 ('both an "agency" test and an "effective control" test'). The Prosecution had termed what is here called the 'strict control' test the 'agency' test. For the literature, see M Milanovic, 'State Responsibility for Genocide' (2006) 17 EJIL 553–604, 576.

[20] For some examples from the most recent literature, see A Abass, 'Proving State Responsibility for Genocide: The ICJ in Bosnia v Serbia and the International Commission of Inquiry for Darfur' (2008) 31 Fordham ILJ 871, 890–896; D Groome, 'Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?' (2008) 31 Fordham ILJ 911, 923, 947–948; SA Barbour and ZA Salzman, '"The Tangled Web": The Right of Self-Defense Against Non-State Actors in the Armed Activities Case' (2008) 40 NY Univ JILP 53, 70–79; A Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649, 653; DB Tyner, 'Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in "Tadić"' (2006) 18 Florida JIL 843, 850.

[21] See *Armed Activities* (n 6) para 160 ('the requisite *tests* are met for sufficiency of control' [emphasis added]).

[22] *Military und Paramilitary Activities in und against Nicaragua (Nicaragua v USA), (Merits, Judgment)* (hereinafter '*Nicaragua*') [1986] ICJ Rep 14.

[23] See above (n 5).

[24] The FRY became 'Serbia and Montenegro' with effect from 4 Feb 2003, and the 'Republic of Serbia' with effect from 3 Jun 2006.

[25] *Bosnian Genocide* (n 5) para 233.

[26] cp *Nicaragua* (n 22) para 277.

and control are thus two sides of the same coin.[27] For the Court, the question of responsibility is a question of 'degree', namely the secessionist entity's 'degree of dependency' on the outside power, which, in turn, is indicative of the outside power's 'degree of potential control' over the secessionist entity, and the 'degree of control' the outside power actually exercises over the secessionist entity.[28] The ICJ distinguishes two degrees of control and dependency—strict control based on complete dependence and effective control in cases of partial dependence—which, in turn, give rise to two control tests which may be referred to as the 'strict control' and 'effective control' tests.[29]

A. The 'Strict Control' Test

If called upon to decide whether an outside power is responsible for the internationally wrongful conduct of a secessionist entity, the ICJ will first determine whether or not the secessionist entity is 'under such strict control' by the outside power,[30] that is, whether the relationship of the secessionist entity to the outside power is 'so much one of dependence on the one side and control on the other' that it will be right to equate the authorities of the secessionist entity, for legal purposes, with a de facto organ of the outside power that acts on its behalf.[31] This raises the question of when the authorities of a secessionist entity are 'under such strict control' of the outside power that they may be equated with the authorities of the outside power. In the *Nicaragua* case, the ICJ identified three requirements of strict control:

(1) The secessionist entity must be completely dependent on the outside power.
(2) This complete dependence must extend to all fields of activity of the secessionist entity.
(3) The outside power must actually have made use of the potential for control inherent in that complete dependence, ie it must have actually exercised a particularly high degree of control.

For the secessionist entity to be equated with a de facto organ of the outside power according to the 'strict control' test, all three requirements must be fulfilled.

[27] *Nicaragua* (n 22) para 109.
[28] See *Nicaragua* (n 22) paras 109, 111–113, 115; *Bosnian Genocide* (n 5) paras 391, 393.
[29] The 'strict control' test is sometimes also referred to as the 'dependence and control' test, the 'complete dependence' test or the 'agency' test.
[30] Counsel for Nicaragua had spoken of 'total or predominant control'; see *Nicaragua* (n 14) ICJ Pleadings, Vol V, 162 (I Brownlie).
[31] cp *Bosnian Genocide* (n 5) paras 391, 397; *Nicaragua* (n 22) para 109. See also *Armed Activities* (n 6) para 160.

First, the secessionist entity must be 'completely [totally or wholly] dependent' on the outside power in order to create the potential for strict control which is inherent in complete dependence.[32] Complete dependence means that the secessionist entity is 'lacking any real autonomy' and is 'merely an instrument' or 'agent' of the outside power through which the latter is acting.[33] The use of the same currency or the fact that the leadership and large parts of the population of the secessionist entity have held, hold, or may claim the nationality or citizenship of the outside power, in and of themselves, is not sufficient to make the secessionist entity an 'agent' of the outside power. The same is true for the payment of salaries, pensions, and other benefits to the leaders of the secessionist entity. In general, close political, military, economic, ethnic or cultural relations between the outside power and the secessionist entity, and the provision of logistical support in the form of weapons, training and financial assistance do not, without further evidence, establish a relationship of complete dependence. This is so even if the secessionist entity and the outside power share largely complementary military or political objectives, or pursue the same end of ultimately incorporating the secessionist entity into the outside power. Common objectives may make the secessionist entity an ally, albeit a highly dependent ally, of the outside power, but not necessarily its organ.[34] In no case does the maintenance of some unspecified 'ties' or a 'general level of coordination' between the outside power and the secessionist entity, or the notion of 'organic unity' between the two, suffice.[35]

In *Nicaragua*, the ICJ identified two factors from which 'complete dependence' may be inferred. The fact that the outside power conceived, created and organized the secessionist entity, or the armed opposition group that established the secessionist entity, seems to establish a strong presumption that the secessionist entity—as its creature—is completely dependent on the outside power and is nothing more than its instrument or agent.[36] However, it is not sufficient that the outside power merely took advantage of the existence of a secessionist movement and incorporated this fact into its policies vis-à-vis the parent State.[37] Complete dependence on the outside power is also demonstrated if the multifarious forms of assistance (financial assistance, logistic support, supply of intelligence) provided by it are crucial to the pursuit of the secessionist entity's activities. The secessionist entity is completely dependent upon the outside power if it cannot conduct its activities without the

[32] cp *Nicaragua* (n 22) paras 109–110; *Bosnian Genocide* (n 5) paras 392, 393.

[33] cp *Nicaragua* (n 22) para 114; *Bosnian Genocide* (n 5) para 394 and para 392.

[34] cp *Prosecutor v Tadić* (n 13) paras 601–606.

[35] cp *Armed Activities* (n 6) CR 2005/3 (translation), 12 Apr 2005, 27, para 10 (O Corten); *Bosnian Genocide* (n 5) CR 2006/8 (translation), 3 Mar 2006, 23, para 57 (A Pellet). See also *Prosecutor v Tadić* (n 13) para 604.

[36] cp *Nicaragua* (n 22) paras 93, 94, 108. In *Armed Activities* (n 6) para 160, the Court also examined the question of whether the Congo Liberation Movement (MLC) had been 'created' by Uganda, a question ultimately denied.

[37] cf *Nicaragua* (n 22) para 108.

multi-faceted support of the outside power and if the cessation of aid results, or would result, in the end of these activities.[38] In the *Nicaragua* case, the ICJ distinguished between the initial and later years of United States assistance to the *contras*. It found that the *contras* were initially completely dependent on the United States, but that this was not the case later on, as *contra* activity continued despite the cessation of United States military aid.[39] Where the secessionist entity has some qualified, but real, margin of independence as evidenced, for example, by differences with the outside power over strategic options, a state of complete dependence cannot be assumed.[40] In addition to the two factors identified by the ICJ, the complete integration of the territory of the secessionist entity into the administrative, military, educational, transportation and communication systems of the outside power, leading to a de facto annexation of the secessionist entity, will also signify a state of complete dependence.

Secondly, this complete dependence must extend to 'all fields' of the secessionist entity's activity.[41] For this, it must be shown that 'all or the great majority of [...] activities' of the secessionist entity received this multi-faceted support from the outside power.[42] Only in fields where assistance is provided by the outside power can there be complete dependence and thus potential for strict control, for example, by way of cessation of aid.[43] That the secessionist entity cannot 'conduct its *crucial or most significant* [...] activities' without the assistance of the outside power is not enough to establish its total dependence on the outside power.[44] It is this complete dependence across the board that distinguishes a de facto organ from other persons and entities whose conduct may, on a case-by-case basis, be attributed to the outside power.

Thirdly, the outside power must actually have 'made use of the potential for control inherent in that [complete] dependence'.[45] Dependence alone, even complete dependence, is not sufficient to hold the outside power responsible for the internationally wrongful conduct of the secessionist entity. A relationship of dependency establishes nothing more than the *potential* for control.[46] The outside power must have made use of that potential and actually exercised a particularly high degree of control over the secessionist entity. Coordination of activities and cooperation are not the same as control.[47] The outside power must have wholly devised the strategy and tactics of the

[38] cp *Nicaragua* (n 22) paras 109–110, 111.
[39] *Nicaragua* (n 22) paras 110, 111.
[40] cp *Bosnian Genocide* (n 5) para 394.
[41] cp *Nicaragua* (n 22) para 109; *Bosnian Genocide* (n 5) para 391.
[42] cp *Nicaragua* (n 22) para 111.
[43] cp. *Nicaragua* (n 22) para 109; *Bosnian Genocide* (n 5) para 391.
[44] *Bosnian Genocide* (n 5) para 394 (emphasis added); *Nicaragua* (n 22) para 111.
[45] *Nicaragua* (n 22) para 110; *Bosnian Genocide* (n 5) para 393. See also *Prosecutor v Tadić* (n 13) para 588.
[46] cp *Prosecutor v Tadić* (n 13) paras 602, 605.
[47] cp *Prosecutor v Tadić* (n 13) para 598.

secessionist entity.[48] For this to be established, it is not sufficient that the outside power provides advisers who participate in the planning of a number of military or paramilitary operations and the discussion of strategy or tactics, supplies the secessionist entity with intelligence and logistic support for its activities,[49] or provides funds coinciding with the launch of a new offensive or a certain activity.[50] However, it is not necessary that the outside power actually exercises strict control over the particular activity during which the internationally wrongful conduct occurs; what is important is that such control is exercised in general. This distinguishes the 'strict control' from the 'effective control' test.[51] In the case of the former, it is the general relationship of complete dependence on the one side and strict control on the other which allows the Court to equate the authorities of the secessionist entity, for legal purposes, with a de facto organ of the outside power.

The attribution of conduct of any State organ (either de jure or de facto) is governed by rules of customary international law which are reflected in Articles 4 and 7 of the ILC Articles on State Responsibility.[52] All acts committed by the authorities of the secessionist entity in their capacity as de facto organs of the outside power, even those ultra vires, are thus attributable to the outside power.[53] The likelihood of attributing the conduct of a secessionist entity to an outside power is thus much higher if the strict control test is satisfied. However, as the Court pointed out in the *Bosnian Genocide* case, 'to equate persons or entities with State organs when they do not have that status under internal law must be exceptional'.[54] The required proof of 'complete dependence' of the secessionist entity on the one side and the ensuing 'particularly high degree of control' of the outside power on the other will, in most cases, be very difficult, if not impossible, to advance.[55] It is for

[48] cp *Nicaragua* (n 22) paras 102–106, 108 and 110.

[49] cp *Nicaragua* (n 22) paras 104, 106.

[50] cp *Nicaragua* (n 22) para 103.

[51] On the 'effective control test', see below sec II.B.

[52] Art 4(1) provides: '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 [...].' Art 7 reads: 'The conduct of an organ of a State [...] shall be considered an act of that State under international law if the organ [...] acts in that capacity, even if it exceeds its authority or contravenes instructions.' For the view that de facto organs fall under Art 4 of the ILC Articles, see 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) 76 BYBIL 255, 268, 269, 289–290.

[53] cp *Nicaragua* (n 22) para 116 and para 277 ('any acts they have committed are imputable to that State'); *Bosnian Genocide* (n 5) para 397 ('all their actions performed in that capacity would be attributable to the State'). See also *Bosnian Genocide* (n 5) CR 2006/8 (translation), 3 Mar 2006, 22, para 55 (A Pellet); CR 2006/9 (translation), 6 Mar 2006, 50, para 13 (L Condorelli). See further *Prosecutor v Tadić* (n 13) para 586 ('imputing the acts [...] as a whole'), and *Prosecutor v Tadić* (n 19) para 121.

[54] *Bosnian Genocide* (n 5) para 393.

[55] cp *Nicaragua* (n 22) para 111 ('adequate direct proof [...] has not been, and indeed probably could not be, advanced in every respect'). See also *Prosecutor v Tadić* (n 13) para 585 (the ICJ 'set a particularly high threshold test for determining the requisite degree of control').

this reason that discussion normally focuses on the second test developed by the ICJ—the 'effective control' test.

B. The 'Effective Control' Test

The 'effective control' test is, in effect, a subsidiary test.[56] The ICJ only resorts to it when it has found that the requirements of the 'strict control' test for the determination of an agency relationship cannot be proved.[57] The ICJ thus does *not* use the 'effective control' test to determine whether a person or group of persons qualifies as a de facto organ of a State.[58] The Court applies the 'effective control' test in cases where there is evidence of 'partial dependency' of the secessionist entity on the outside power. Such partial dependency may be inferred, inter alia, from the provision of financial assistance, logistic and military support, supply of intelligence, and the selection and payment of the leadership of the secessionist entity by the outside power.[59] Partial dependence also creates *potential* for control, albeit for a more limited degree of control than in situations of complete dependence. However, unlike complete dependence, partial dependence does not allow the Court to treat the authorities of the secessionist entity as a de facto organ of the outside power whose *conduct as a whole* can be considered acts of the outside power. Instead, responsibility for *specific conduct* has to be established on a case-by-case basis. Responsibility cannot be incurred simply owing to the conduct of the authorities of the secessionist entity but must be incurred owing to the conduct of the outside power's own de jure organs.[60] The relevant conduct to consider is the exercise of 'effective control' by the de jure organs of the outside power over the authorities of the secessionist entity. Furthermore, the object of control is no longer the secessionist entity but the activities or operations giving rise to the internationally wrongful act. Here the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility 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.[61]

[56] For a similar view, see Milanovic (n 19) 577.

[57] cp *Armed Activities* (n 6) para 160. See also *Bosnian Genocide* (n 5) CR 2006/9 (translation), 6 Mar 2006, 49, para 11; CR 2006/10 (translation), 6 Mar 2006, 21, para 43 (L Condorelli); CR 2006/10 (translation), 6 Mar 2006, 29, para 4 (A Pellet). See further *Prosecutor v Tadić* (n 13) para 22 (sep and diss op McDonald).

[58] For the contrary view, see eg Cassese (n 20) 650.

[59] See *Nicaragua* (n 22) para 112; *Bosnian Genocide* (n 5) paras 241, 388, 394.

[60] *Bosnian Genocide* (n 5) para 397.

[61] Art 8 ILC Articles on State Responsibility (emphasis added). Art 8 is sometimes—mistakenly—referred to as laying down the 'very strict standards' for 'the theory of de facto agents'; see *Armed Activities* (n 6) CR 2005/11 (translation), 22 Apr 2005, 14, para 9 (O Corten). Corten

In the relationship between the outside power and the secessionist entity, the focus shifts from the question of dependence to the question of control.[62] For the internationally wrongful conduct of the secessionist entity to be attributed to the outside power, it must be shown that organs of the outside power exercise 'effective control' of the particular operation or activity in the course of which the conduct has been committed.[63] Control must not be confused with 'support'.[64] It requires that the outside power is involved in planning the operation, choosing targets, giving specific directives and instructions, and providing operational support.[65] It is argued that the outside power must be able to control the beginning of the operation, the way it is carried out, and its end. It does not suffice in itself that the outside power exercises 'general control' over the secessionist entity, even in cases of a 'high degree of dependency' of the secessionist entity on the outside power.[66] Similarly, unspecified claims of 'involvement' or 'direct participation' in certain of the secessionist entity's actions will not be enough to establish effective control over a particular activity or operation.[67] In the case of composite acts, which are committed through a series of actions or omissions, effective control must be exercised in relation to each action or omission constituting the wrongful act.[68]

While the burden of proof for the 'effective control' test is lower than that for the 'strict control' test, in practice it is still extremely difficult to establish the exercise of effective control by the outside power over individual operations or activities of the secessionist entity. The ICTY Appeals Chamber and the European Court of Human Rights did not follow the jurisprudence of the ICJ largely for this reason, and instead developed different control tests, requiring 'a lower degree of control',[69] which allowed them to attribute the acts of secessionist entities to outside powers under the customary law of State responsibility.

was responding to I Brownlie who had used the term 'de facto organs' (ibid CR 2005/7, 18 Apr 2005, 20 para 39).

[62] cp *Bosnian Genocide* (n 5) para 400. See also *Nicaragua* (n 22) para 113. This shift in focus is overlooked by J Griebel and M Plücken 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v Serbia*' (2008) 21 Leiden JIL, 601, 606–610, who wrongly conclude that the ICJ no longer regards Art 8 as 'an attribution rule'. For a response, see M Milanovic, "State Responsibility for Acts of Non-State Actors": A Comment on Griebel and Plücken (2009) 22 Leiden JIL 307, 309–314.

[63] cp *Nicaragua* (n 22) para 115; *Bosnian Genocide* (n 5) para 399.

[64] See *Bosnian Genocide* (n 5), CR 2006/16, 13 Mar 2006, 39, para 116 (I Brownlie).

[65] cp *Nicaragua* (n 22) para 112.

[66] See *Nicaragua* (n 22) para 115; *Bosnian Genocide* (n 5) para 400.

[67] cp *Armed Activities* (n 6) CR 2005/3 (translation), 12 Apr 2005, 27, para 10 (O Corten).

[68] *Bosnian Genocide* (n 5) para 401.

[69] See *Prosecutor v Tadić* (n 19) para 124.

III. THE 'OVERALL CONTROL' TEST OF THE ICTY APPEALS CHAMBER

Under Article 2 of its Statute, the ICTY has jurisdiction to prosecute, inter alia, persons committing or ordering to be committed 'grave breaches' of the Geneva Conventions of 12 August 1949.[70] For that power to be exercised, the armed conflict in which those grave breaches have been committed must be of an 'international' character.[71] In the *Tadić* case, the ICTY was called upon to decide whether the accused could be found guilty of grave breaches of the Geneva Conventions during the armed conflict in Bosnia and Herzegovina after 19 May 1992, the date of the formal withdrawal of the Yugoslav People's Army from the territory of Bosnia and Herzegovina. This depended, inter alia, on whether the acts of the armed forces of the Republika Srpska, a Bosnian Serb secessionist entity within the territory of Bosnia and Herzegovina fighting the recognized Government of that State, could be attributed to an outside power, that is the Federal Republic of Yugoslavia, thus making a prima facie internal armed conflict an international one. While the Trial Chamber, supposedly applying the 'effective control' test enunciated by the ICJ in the *Nicaragua* case,[72] found that the conduct of the armed forces of the Republika Srpska could not be attributed to the Federal Republic of Yugoslavia and that, for that reason, the armed conflict in Bosnia and Herzegovina was not of an international character, the Appeals Chamber reached the opposite conclusion. Both chambers based their ruling on the 'general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.'[73] Although concerned with questions of individual criminal responsibility, the ICTY chambers thus framed the question as one of State responsibility, in particular whether the Federal Republic of Yugoslavia was responsible for the acts of the armed forces of the Republika Srpska.[74]

The Appeals Chamber held that the conduct of the Bosnian Serb armed forces could be attributed to the Federal Republic of Yugoslavia, on the basis

[70] Art 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/RES/827 (1993) of 25 May 1993, Annex.

[71] See *Prosecutor v Tadić* (n 19) para 83.

[72] The Trial Chamber in fact imported the requirement of effective control into the 'strict control' test by using the 'effective control' test to determine whether the relationship of the Republika Srpska to the FRY was 'so much one of dependence on the one side and *control* on the other', that it was right to equate the armed forces of the Republika Srpska with a de facto organ of the FRY that acted on its behalf. See *Prosecutor v Tadić* (n 13) paras 588, 595. This interpretation was also confirmed by Presiding Judge McDonald in her separate and dissenting opinion, ibid, para 19. See also de Hoogh (n 52) 280.

[73] *Prosecutor v Tadić* (n 19) para 98. See also *Prosecutor v Tadić* (n 13) para 585 ('applying general principles of international law relating to State responsibility for de facto organs').

[74] See eg *Prosecutor v Tadić* (n 19) para 123 and paras 103, 104. Cp also the dissenting opinion of Vice-President Al-Khasawneh in *Bosnian Genocide* (n 5) para 38, and the judgment itself, ibid para 402.

that these forces 'as a whole' were under the overall control of that State.[75] To reach this conclusion, the Appeals Chamber partly discarded the ICJ's 'effective control' test which it held 'not [. . .] to be persuasive' in the case of organized groups,[76] and instead applied a test of 'overall control'.[77] According to the Appeals Chamber, the 'requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case.'[78] While the 'effective control' test may be applied with regard to 'private individuals' or 'unorganized groups of individuals',[79] in the case of 'individuals making up *an organized and hierarchically structured group*', ie a military unit or, in a case of civil strife, armed bands of irregulars or rebels, a military or paramilitary group, a military organization, or a secessionist or de facto State entity, the appropriate test for attributing the acts to a State was that of 'overall control' of the State over the group.[80] This alternative test was justified because the situation of an organized group was different from that of private individuals. The former normally had a structure, a chain of command, and a set of rules, as well as the outward symbols of authority, and was engaged in a series of activities. If an organized group was under the overall control of a State, so the Appeals Chamber, the group 'must perforce engage the responsibility of that State for its activities'.[81] The Appeals Chamber thus openly went against the ICJ which had applied the 'effective control' test to the *contras*—an organized and hierarchically structured armed opposition group.

In order to attribute the conduct of a secessionist entity to an outside power by applying the 'overall control' test, it must be proved that the outside power wields overall control over the entity, not only by financing, training, equipping or providing operational support to it, but also by having a role in

[75] See *Prosecutor v Tadić* (n 19) paras 120, 131, 144. See also *Prosecutor v Rajić (Decision)* ICTY-95-12-R61 (13 Sep 1996) paras 22–32, where the ICTY Trial Chamber disregarded the tests enunciated by the ICJ in the *Nicaragua* case and found that the conflict in Bosnia and Herzegovina was of an international character on the basis that the Bosnian Croats were 'agents' of Croatia as Croatia 'exercised a high degree of control over both the military and political institutions of the Bosnian Croats' (ibid para 26).

[76] *Prosecutor v Tadić* (n 19) para 115. See also ibid para 124. The ICJ got its own back by finding in the *Bosnian Genocide* case that the argument put forward by the ICTY Appeals Chamber in favour of the overall control test was 'unpersuasive' (*Bosnian Genocide* (n 5) para 404).

[77] Contrary to the claim by M Koskenniemi (n 18), the ICTY did not seek 'to *replace* [the 'effective control'] standard altogether.' (UN Doc A/CN.4/L.682, 13 Apr 2006, 32, para 50). For the view that what was intended was a partial replacement, see Cassese (n 20) 654, 657.

[78] *Prosecutor v Tadić* (n 19) para 117. See also ibid para 137.

[79] *Prosecutor v Tadić* (n 19) para 124.

[80] *Prosecutor v Tadić* (n 19) paras 120, 124, 125, 128, 145.

[81] *Prosecutor v Tadić* (n 19) para 122, and also para 120.

organizing, coordinating, planning or directing its military or other activities.[82] Essentially, there are two parts to the test:

a) The provision of financial and training assistance, military equipment and operational support;
b) Participation in the organisation, coordination or planning of military operations.[83]

The provision of economic, military or other assistance, in and of itself, is not sufficient to establish overall control.[84] The same is true for a 'strong connection' between the secessionist entity and the outside power, as evidenced by the ease with which members of the secessionist entity can obtain passports and enjoy the nationality, or vote in elections, of the outside power.[85] On the other hand, it is not necessary that the outside power also plans or directs the particular operation or activity in the course of which the conduct has been committed, chooses the targets of military operations, or gives specific orders or instructions concerning the various activities of the secessionist entity.[86] The 'overall control' test can be fulfilled, even if the secessionist entity has autonomous choices of means and tactics while participating in a common strategy along with the outside power.[87] It is thus evidently 'less strict' than the ICJ's 'effective control' test.[88]

Contrary to the ICJ's view expounded in the *Bosnian Genocide* case,[89] the 'overall control' test, however, was not intended to replace the Court's 'effective control' test in the context of Article 8 of the ILC Articles on State Responsibility but was, in fact, used in lieu of its much more stringent 'strict control' test to determine whether a secessionist entity qualified as a de facto State organ in the sense of Article 4 of the ILC Articles on State

[82] See *Prosecutor v Tadić* (n 19) paras 131, 137, 138, 145.

[83] *Prosecutor v Kordić and Čerkez (Judgment)* ICTY-95-14/2-T (26 Feb 2001) para 115, and *(Judgment)* ICTY-95-14/2-A (17 Dec 2004) para 361. See also *Prosecutor v Naletilic and Martinovic (Judgment)* ICTY-98-34-T (31 Mar 2003) para 198.

[84] See *Prosecutor v Tadić* (n 19) paras 130, 131, 137. See also *Prosecutor v Delalić (Judgment)* ICTY-96-21-A (20 Feb) 2001 (2001) 40 ILM 630, para 15.

[85] See *Prosecutor v Naletilic and Martinovic* (n 83) para 198.

[86] See *Prosecutor v Tadić* (n 19) paras 131, 132, 137, 145. See also *Prosecutor v Aleksovski (Judgment)* ICTY-95-14/1-A, (24 March 2000) para 143 ('specific instructions or orders as a prerequisite for attributing the acts [...] is not required under the test of overall control.'); *Prosecutor v Delalić* (n 84) para 41. See also Milanović (n 62) 317.

[87] cp *Prosecutor v Delalić* (n 84) para 47.

[88] *Prosecutor v Delalić* (n 84) para 20. See also *Prosecutor v Aleksovski* (n 86) para 145 ('the standard established by the "overall control" test is not as rigorous as [the "effective control" test]'); *Prosecutor v Kordić and Čerkez* ICTY-95-14/2-T (n 83) para 112 ('it is clear that the test of overall control is a lower standard than that of effective control').

[89] See *Bosnian Genocide* (n 5) para 406. The ILC in the commentary on its Articles on State Responsibly also mistakenly deals with the 'overall control' test in the context of Article 8; see Report of the ILC, 53rd session, UN Doc A/56/10, 2001, 106, para 5.

Responsibility.[90] The Appeals Chamber in the *Tadić* case held that, on the basis of the 'overall control' test, the Bosnian Serb forces could be regarded as 'de facto organs' of the Federal Republic of Yugoslavia.[91] As such, the Bosnian Serb armed forces engaged its responsibility for all their activities, including those ultra vires, without the need to prove any specific instructions or any other involvement in a particular activity.[92] In the *Nicaragua* case, however, only the 'strict control' test was concerned with the question of whether the *contras* could be equated, for legal purposes, with de facto organs of the United States whose conduct as a whole could be attributed to the United States.[93]

The Appeals Chamber's approach was based on a misreading of the ICJ's *Nicaragua* judgment and a misinterpretation of the rules of customary international law governing State responsibility on which that judgment is grounded.[94] The Appeals Chamber did not subscribe to the interpretation that had correctly been put forward at the time by the Prosecution and by Judge McDonald in her dissent at the trial stage of the *Tadić* case, and which has now been confirmed by the ICJ in the *Bosnian Genocide* case, namely that in the *Nicaragua* case the Court applied two distinct tests: a 'strict control' and an 'effective control' test. Instead, the Appeals Chamber treated the 'effective control' test as setting out one of the requirements of 'dependence and *control*' which form part of the 'strict control' test.[95] It thereby, in effect, replaced the 'strict control' test with the 'overall control' test. By equating the authorities of a secessionist entity with the de facto State organs of the outside power simply on the basis of the latter's overall control over the secessionist entity, without establishing a relationship of complete dependence and control, the Appeals Chamber has stretched too far, almost to breaking point, the connection which must exist between the State and its organs, either de facto or de jure.[96] However, this did not prevent the European Court of Human Rights (ECtHR) from taking matters one step further.

[90] See C Kress, 'L'organe de facto en droit international public, réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents' (2001) 105 RGDIP 93, 131.

[91] See *Prosecutor v Tadić* (n 19) para 167 ('the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY'). See also ibid, paras 137, 145, 147, 156. See further *Prosecutor v Aleksovski* (n 86) para 129.

[92] *Prosecutor v Tadić* (n 19) para 121.

[93] See above, section II.A.

[94] See *Prosecutor v Tadić* (n 13) para 16 (sep and diss op McDonald). See also Milanovic (n 19) 581 ('dramatically misread Nicaragua'); de Hoogh (n 52) 290.

[95] *Prosecutor v Tadić* (n 19) para 112.

[96] In *Bosnian Genocide* (n 5) para 406, the ICJ held, assuming that the 'effective control' test had been replaced by the 'overall control' test, that the letter 'stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.' This is even more true where the 'overall control' test is to replace the much more stringent 'strict control' test.

IV. THE 'EFFECTIVE OVERALL CONTROL' TEST OF THE EUROPEAN COURT OF HUMAN RIGHTS

The ECtHR has jurisdiction to examine alleged breaches of the rights set forth in the European Convention on Human Rights (ECHR) and the protocols thereto.[97] Any finding of a breach of the Convention has a twofold requirement: first, that the conduct complained of is that of a High Contracting Party and, secondly, that the victim of the breach has been within its 'jurisdiction' in the sense of Article 1 of the Convention.[98] In case of breach of the ECHR by the authorities of a secessionist entity, the conduct constituting the breach must be attributable to a High Contracting Party and the High Contracting Party must exercise extraterritorial 'jurisdiction' over persons within the territory of the secessionist entity.[99] For example, in the leading case of *Loizidou v Turkey*, the ECtHR was concerned with two distinct questions: (a) whether, as a result of the presence of a large number of Turkish troops in northern Cyprus, that part of the Republic of Cyprus was within the extraterritorial 'jurisdiction' of Turkey, a High Contracting Party of the ECHR, and (b) whether acts and omissions of the authorities of the Turkish Republic of Northern Cyprus (TRNC), an unrecognized secessionist entity established in the Turkish occupied area of northern Cyprus, was 'imputable to Turkey' and thus entailed her responsibility under the ECHR.[100] These two questions, however, are not always clearly kept apart as the Court seizes on the element of 'control' to establish both extraterritorial 'jurisdiction' and imputability and seems to derive the one from the other.[101] In the *Loizidou* case, the 'imputability issue' was to be decided 'in conformity with the relevant principles of international law governing State responsibility'.[102] The ECtHR

[97] See Arts 33 and 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done on 4 Nov 1950, as amended by Protocols 3, 5, 8, and 11.

[98] cp *Ilaşcu and Others v Moldova and Russia*, Application No 48787/99, Judgment of 8 Jul 2004, ECHR Rep 2004-VII, 179, para 311; *Solomou and Others v Turkey* (n 15) para 43 ('The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention').

[99] The extraterritorial exercise of jurisdiction in the sense of Art 1 ECHR is not limited to secessionist entities situated in the convention area, that is the legal space (*espace juridique*) of the Contracting Parties of the ECHR; see *Issa v Turkey*, Application No 31821/96, Judgment of 16 Nov 2004, para 74.

[100] *Loizidou v Turkey (Merits) (Judgment)* Application No 15318/89 (18 Dec 1996) ECHR Rep 1996-IV, 2216, para 56. See also *Loizidou v Turkey (Preliminary Objections)* (n 15) para 64. On the question of imputability or attribution, see also the note on the *Loizidou* case by B Rudolf in (1997) 91 AJIL 528, 534 and Cassese (n 20) 658, fn 17, and 662, fn 22; de Hoogh (n 52) 272.

[101] See *Loizidou v Turkey (Preliminary Objections)* (n 15) paras 59–64, and *Loizidou v Turkey (Merits)* (n 100) paras 49–57, and in particular para 57 ('is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 *and is thus* imputable to Turkey').

[102] See *Loizidou v Turkey (Merits)* (n 100) para 52. See also ibid, para 49. See further *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* (hereinafter '*Behrami and Saramati*'), Applications Nos 71412/01 and 78166/01, Decision of 2 May 2007, para 122 ('determine State responsibility in conformity and harmony with the governing principles of

held that the conduct of the authorities of the TRNC could be imputed or attributed to Turkey on the basis that her army exercised 'effective overall control' over northern Cyprus. 'Such control, according to the relevant test and in the circumstances of the case, entail[ed] her responsibility for the policies and actions of the "TRNC".'[103]

In the *Ilaşcu* case, which concerned the responsibility of the Russian Federation for violations of the ECHR in the Moldovan breakaway region of Transdniestria and may thus, at first blush, seem to be relevant here, the ECtHR did not deal with the question of attribution of the conduct of the Transdniestrian authorities to the Russian Federation. The Court rather seized on the acts committed by agents of the Russian Government, including the applicants' arrest and detention and their transfer into the hands of the Transdniestrian police and regime where they were ill-treated. In light of the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them.[104] The Russian Federation was held responsible not for the acts of ill-treatment by the Transdniestrian police itself but because, despite having effective authority or at the very least decisive influence over the Transdniestrian authorities, it made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations of the ECHR committed.[105]

Without making any reference to the tests applied by the ICJ and the ICTY, and without giving any further explanation,[106] in the *Loizidou* case the ECtHR developed its own 'relevant test' for what it termed a 'subordinate local administration',[107] a secessionist entity which is under 'the effective authority, or at the very least under the decisive influence, of' an outside power, and 'in any event survives by virtue of the military, economic, financial and political support given to it' by the outside power.[108] For the ECtHR to attribute the conduct of such an entity to the outside power, the test is that of 'effective overall control' of the outside power *over the territory* of the secessionist

international law'). *Contra* Milanovic (n 15) 586 who states that the case does 'not revolve around the general law on state responsibility'.

[103] *Loizidou v Turkey (Merits)* (n 100) para 56. See also *Cyprus v Turkey*, Application No 25781/94, Judgment of 10 May 2001, ECHR Rep 2001-IV, 1, para 77; *Bankovic and Others v Belgium and 16 Other Contracting States*, Application No 52207/99, Decision of 12 Dec 2001, ECHR Rep 2001-XII, 333, para 70; *Solomou and Others v Turkey* (n 15) para 47.

[104] *Ilaşcu v Moldova and Russia* (n 98) para 384. See also ibid, para 385 ('In the Court's opinion, all of *the acts committed by Russian soldiers* with regard to the applicants [. . .], in the context of the Russian authorities' collaboration with that illegal regime, *are capable of engaging responsibility* for the acts of that regime.' [emphasis added]).

[105] *Ilaşcu v Moldova and Russia* (n 98) paras 392, 393.

[106] See Kress (n 90) 108.

[107] See *Loizidou v Turkey (Merits)* (n 100) paras 52, 56.

[108] See *Ilaşcu and Others v Moldova and Russia* (n 98) para 392. See also ibid, paras 316, 341, 382; *Cyprus v Turkey* (n 103) para 77. See further *Assanidze v Georgia*, Application No 71503/01, Judgment of 8 Apr 2004, ECHR Rep 2004-II, 221, para 139 (territories with 'secessionist aspirations').

entity.[109] Such control may be a consequence of military action or presence by the outside power, either lawful or unlawful.[110] It can be established on the basis of the outside power's 'large number of troops' engaged in active duties in the territory of the secessionist entity.[111] The ECtHR placed particular emphasis on the duration of the presence of the troops, their deployment across the whole territory of the secessionist entity, and the fact that they 'constantly patrolled' and had 'checkpoints on all main lines of communication'.[112] According to Judge Kovler 'active duty' of troops in the territory of the secessionist entity 'presupposes control of roads and railways, surveillance of strategic points (telegraph/telephone posts), and control of stations, airports, frontiers, etc.'[113] In order to attribute the acts of a secessionist entity to the outside power it is thus not necessary that it 'actually exercises detailed control over the policies and actions' of the authorities of the secessionist entity.[114]

The ECtHR's 'effective overall control' test differs from the ICTY's 'overall control' test.[115] Like the latter, the ECtHR's test is not used in lieu of the ICJ's 'effective control' test but replaces its 'strict control' test. The effective overall control of the outside power is used as a basis for equating the authorities of the secessionist entity with de facto State organs or 'agents' of the outside power for whose acts it may *generally* be held responsible.[116] Thus, in its Report in *Cyprus v Turkey*, the European Commission of Human Rights held on the basis of the Court's *Loizidou* judgment that 'Turkish

[109] The 'effective overall control' test must be distinguished from the 'ultimate (overall) authority and control' test which was applied by the ECtHR in *Behrami and Saramati* (n 102) paras 133, 134 when attributing conduct to an international organization. For an assessment of the latter test, see KM Larsen 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control Test"' (2008) 19 EJIL 509, 520–522; M Milanović and T Papić, 'As Bad As It Gets: The European Court of Human Right's *Behrami and Saramati* Decision and General International Law' (2009) 58 ICLQ 267, 285–286. In *Dušan Berić and Others v Bosnia and Herzegovina*, Application Nos 36357/04 et al, Decision of 16 Oct 2007, paras 27–28, the ECtHR employed the 'effective overall control' test to determine whether conduct was to be attributable to the United Nations.

[110] See *Loizidou v Turkey (Preliminary Objections)* (n 15) para 62; *Loizidou v Turkey (Merits)* (n 100) para 52; *Ilaşcu and Others v Moldova and Russia* (n 98) para 314.

[111] *Loizidou v Turkey (Merits)* (n 100) para 56.

[112] See *Loizidou v Turkey (Merits)* (n 100) para 16; *Issa and Others v Turkey* (n 99) para 75. In *Georgia v Russian Federation* (n 4) CR 2008/27, 10 Sep 2008, 12, para 20 (A Zimmermann), Counsel for Russia seized on 'the ratio of Turkish troops per square kilometre in northern Cyprus'.

[113] *Ilaşcu and Others v Moldova and Russia* (n 98) 332 at 342 (diss op Kovler).

[114] *Loizidou v Turkey (Merits)* (n 100) para 56; *Ilaşcu and Others v Moldova and Russia* (n 98) para 315.

[115] *Contra* R Lemaître 'Transdniestria before the European Court of Human Rights' (2004) 6 International Law Forum du droit international 111–115, 113.

[116] See the Report of 4 June 1999 of the European Commission of Human Rights in *Cyprus v Turkey (Report)*, Application No 25781/94, 169, where Commissioner Rozakis held in his partly dissenting opinion that 'the authorities in the northern part of Cyprus [. . .] are, as a *fictio juris*, Turkish authorities'. In *Solomou v Turkey* (n 15) para 51, the ECtHR referred to the Turkish-Cypriot forces as 'agents' of Turkey. See also de Hoogh (n 52) 271 and 273.

responsibility extends to *all acts* of the "TRNC", being a subordinate local administration of Turkey in northern Cyprus.'[117]

Effective overall control is a less stringent standard than any of the other tests.[118] The requirement that the secessionist entity only 'survives by virtue of the military, economic, financial and political support given to it' by the outside power is reminiscent of the requirement of 'complete dependence' in 'all fields' under the 'strict control' test. However, complete dependence, according to the ICJ, means that the secessionist entity is 'lacking any real autonomy' and is 'merely an instrument' or 'agent' of the outside power. Being merely under the 'decisive influence' of the outside power, meaning that the outside power has a strong say in, as well as an impact on, the planning and execution of the secessionist entity's activities, is thus not sufficient. Under the ICJ's 'strict control' test, the outside power must actually have made use of the potential for control inherent in complete dependence and exercised a 'particularly high degree of control' over the secessionist entity. Exercising effective overall control over the secessionist entity's *territory*, however, is not the same as exercising a particularly high degree of control over the *secessionist entity* itself. This is also shown by the fact that military occupation of territory as such does not automatically lead to a blanket attribution of the conduct of actors exercising authority in the occupied territory.[119] Actual control over the secessionist entity's authorities or their activities is also a requirement of the 'overall' and 'effective control' tests. Both tests require different levels of participation from the outside power in the organisation, coordination or planning of the secessionist entity's operations—an element which is totally absent from the 'effective overall control' test.

If the ICTY Appeals Chamber has already stretched the connection which must exist between the State and its organs almost to breaking point, the ECtHR, by attributing all the acts of a secessionist entity to an outside power simply on the basis of the latter's effective overall control of the secessionist entity's territory, has gone one step beyond.[120]

V. CONCLUSIONS

The application of different control tests by the various courts raises the questions of whether there is a need for differing tests for attributing the

[117] *Cyprus v Turkey (Report)* (n 116) para 102 (emphasis added). See also *Cyprus v Turkey* (n 103) para 74.

[118] cp Kress (n 90) 108 ('une réduction significative des conditions de l'imputation').

[119] cp *Armed Activities* (n 6) paras 178–180.

[120] cp the diss op of Judge Bernhardt joined by Judge Lopes Rocha in *Loizidou v Turkey (Merits)* (n 100) para 3 ('I feel unable to base a judgment of the ECtHR exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus'). See also the 1st Report on State Responsibility by James Crawford who places the *Loizidou* case 'in the shadowland between issues of attribution and causation' (UN Doc A/CN.4/490/Add.5, 22 Jul 1998, 21, para 211).

internationally wrongful conduct of a secessionist entity to an outside power; whether, in principle, there can be different tests of attribution in the general international law rules of State responsibility; and, if not, which of the various tests is the correct one.

The two control tests of the ICTY Appeals Chamber and the ECtHR must be seen against the background of the cases in which they were applied. The 'overall control' test was employed to determine that an armed conflict was of an international character and thus allow for the prosecution of grave breaches of the Geneva Conventions, while the 'effective overall control' test was used to avoid what the ECtHR called a 'regrettable vacuum in the system of human rights protection in the territory in question'.[121] In both cases, the choice of test may have been influenced by a belief that, due to a lack of evidence of 'complete dependence' or 'effective control' over specific activities, the application of the ICJ's exacting control tests would have resulted in the court having to deny, at least in part, its jurisdiction. However, this was not an inevitable result.

In the *Loizidou* case, Turkey could not have been held responsible for violations of the ECHR by the TRNC authorities as there was insufficient basis under the 'strict' and 'effective control' tests for attributing the wrongful conduct of the TRNC authorities to Turkey. However, Turkey could have been held responsible for the conduct—acts or omissions—of its own organs in northern Cyprus, including conduct related to the acts of the TRNC.[122] As an occupying power in northern Cyprus,[123] Turkey is under an obligation 'to secure respect for the applicable rules of international human rights law and international humanitarian law' in the occupied territory.[124] It must make every effort, and take every appropriate step, to prevent, bring to an end, and punish violations of its human rights obligations by other actors present in the occupied territory. Turkey's responsibility could thus have been engaged not for the acts of the TRNC authorities but for a breach of its own due diligence obligations, ie the failure on the part of its own organs present in northern Cyprus to prevent violations of the ECHR by the TRNC authorities.[125] A

[121] *Cyprus v Turkey* (n 103) para 78. See also *Loizidou v Turkey (Merits)* (n 100) para 49 where the 'vacuum argument' had been put forward by the applicant.

[122] cp *Nicaragua* (n 22) paras 110, 116. This approach was followed by the ECtHR in the *Ilaşcu* case; see above at nn 104, 105. See also M Milanovic, 'State Responsibility for Genocide: A Follow-up' (2007) 18 EJIL 669, 694.

[123] The ECtHR considered Turkey to be an occupying power in northern Cyprus. See eg *Loizidou v Turkey (Merits)* (n 100) para 13 ('Turkish-occupied part of Cyprus') and para 16 ('Turkish armed forces [. . .] are stationed throughout the whole of the occupied area of northern Cyprus').

[124] *Armed Activities* (n 6) para 178. See also ibid, CR 2005/05 (translation), 13 Apr 2005, 48, para 11 (J Salmon).

[125] cp *Armed Activities* (n 6) para 179. See also the Award of the German-Portuguese Arbitral Tribunal in the Award of 30 June 1930 concerning *Portuguese claims against Germany*: '[T]he occupying State incurs responsibility for any act contrary to the law of nations ordered or

separate control test was thus not necessary in order to hold Turkey responsible for violations of the ECHR in northern Cyprus.

In the *Tadić* case, what was at issue was not a question of State responsibility but whether the armed conflict in Bosnia and Herzegovina was of an international character. The ICTY Appeals Chamber held that the answer to the question might be found in international humanitarian law and examined whether the Bosnian Serb forces fighting in the territory of Bosnia and Herzegovina could be said to belong to an outside 'Party to the conflict' within the meaning of Article 4(A)(2) of the Third Geneva Convention.[126] For the Appeals Chamber, the requirement of 'belonging to a Party to the conflict' implicitly referred to a test of control.[127] As international humanitarian law did not specify the degree of control necessary for holding that the armed forces of a secessionist entity belonged to an outside power, the Appeals Chamber resorted to the general international rules on State responsibility which set out a control test for attributing to a State acts performed by individuals who do not have the formal status of State officials. Belonging to a Party to the conflict was interpreted as being under the same degree of control required to treat individuals as de facto State officials.[128] However, as the ICJ in the *Bosnian Genocide* case observed:

> [L]ogic does not require the same test to be adopted in resolving the two issues, which are very different. The degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of the involvement required to give rise to that State's responsibility for a specific act in the course of the conflict.[129]

It is suggested that there are at least two alternative tests, independent of the question of attribution and the general international law of State responsibility, to establish whether a prima facie internal armed conflict is of an international character. In the *Jorgić* case, the *Oberlandesgericht* [Higher Regional Court of Appeal] of Düsseldorf found that, after 19 May 1992, the conflict in Bosnia and Herzegovina was an 'international armed conflict' for the purposes of Article 2 of the Fourth Geneva Convention on the basis of the 'close personal, organisational and logistical interconnection [*Verflechtung*] of the Bosnian Serb army, para-military groups and the army of the Federal

tolerated by the military or civilian authorities in occupied territory.' (2 RIAA 1040 (emphasis added)).

[126] *Prosecutor v Tadić* (n 19) paras 90–92.

[127] *Prosecutor v Tadić* (n 19) para 95.

[128] *Prosecutor v Tadić* (n 19) para 98.

[129] *Bosnian Genocide* (n 5) para 405. See also the declaration of Judge Shahabuddeen in *Prosecutor v Blaskić ('Lasva River Valley')(Judgment)* ICTY-95-14-T, (3 March 2000).

Republic of Yugoslavia'.[130] The Court relied on the following circumstances as indications of an international armed conflict:

> [T]he participation of organs of a State in a conflict on the territory of another State, eg the participation of army officers in the hostilities, or the financing and provision of technical equipment to a party to the conflict by the outside State; the latter at least when there exists the aforementioned interconnection between personnel.[131]

The Court of Appeal nowhere referred to any 'control' test or examined whether the acts of the Bosnian Serb army could be attributed to the Federal Republic of Yugoslavia. Similarly, in an earlier decision in the *Tadić* case, another ICTY Appeals Chamber held that an internal conflict may 'become internationalized because of external support' without making any reference to the question of attribution.[132] A test to determine whether an armed conflict can be characterized as international may thus simply look at the interconnection of the secessionist entity and the outside power (or the scope of the outside power's intervention in the armed conflict) rather than the degree of control exercised by the outside power over the secessionist entity or its activities.

Another alternative is to disentangle the artificial nexus between the nature of an armed conflict and attribution of conduct in the law of State responsibility and to apply a separate and independent 'control' test to determine whether a prima facie internal conflict can be characterized as international.[133] This approach seems to have been favoured in the *Delalić* case, where another ICTY Appeals Chamber held:

> The Appeals Chamber [in the *Tadić* case], after considering in depth the merits of the *Nicaragua* test, thus rejected the 'effective control' test, in favour of the

[130] *Jorgić*, Oberlandesgericht Düsseldorf, 4. Strafsenat [Higher Regional Court of Appeal of Düsseldorf, Criminal Division, 4th Chamber], Judgment of 26 Sep 1997—IV—26/96, unpublished typescript on file with author, 160 (translation provided). Parts of the judgment are also reproduced in *Prosecutor v Tadić* (n 19) para 129, fn 155. The judgment was upheld by the Federal Court of Justice (*Bundesgerichtshof*) without specifically addressing the question of the nature of the conflict; see BGH, Urteil v 30.4.1999—3 StR 215/98, BGHSt 45, 65–91. The Supreme Court of Bavaria in the *Djajić* case also held that the conflict in Bosnia and Herzegovina was of an international character referring to 'the close organizational, logistical, financial and military connection [*Verknüpfung*] between the armies of the Bosnian Serbs and the FRY; see Bayerisches Oberstes Landesgericht, 3. Strafsenat, Judgment of 23 May 1997—3 St 20/96, unpublished typescript on file with author, 15 (translation provided). See also ibid, 108–113.

[131] *Jorgić* (n 130) 159. The same approach was taken by the Court in the *Sokolović* case; see Oberlandesgericht Düsseldorf, 4. Strafsenat, Judgment of 29 Nov 1999—IV—9/97, unpublished typescript on file with author, 108 (translation provided).

[132] *Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (*Judgment*) ICTY-94-1-AR72 (2 Oct 1995) 35 ILM 32, para 72.

[133] But see M Sassòli and L Olson 'Case Report: *Prosecutor v Tadić*' (2000) 94 AJIL 571, 575, who argue in favour of such a nexus. See also M Spinedi 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 J of Int Crim Justice 829, 837 (the two questions are 'not totally separate and independent' of each other).

> less strict 'overall control' test. *This may be indicative of a trend simply to rely on the international law on the use of force*, jus ad bellum*, when characterising the conflict.* The situation in which a State, the FRY, resorted to the *indirect use of force* against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, *the 'overall control' test is utilised to ascertain the foreign intervention*, and consequently, to conclude that a conflict which was prima facie internal is internationalised.[134]

An international armed conflict, by definition, involves the use of force by one State against another State.[135] Force may be used by a State either directly, through the military action of its own armed forces, or in the indirect form of support for the activities of armed groups fighting in and against another State. The UN General Assembly's Friendly Relations Declaration equates organizing, instigating, assisting or participating in acts of civil strife in another State with the use of force when such acts themselves involve a threat or use of force.[136] Similarly, Article 3(g) of the UN General Assembly's Declaration on the Definition of Aggression, which is reflective of customary international law, provides that the 'substantial involvement' of a State in acts of armed force carried out by armed groups in another State constitutes an act of aggression which is considered to be 'the most serious and dangerous form of the illegal use of force'.[137] Drawing on formulations in these documents, the ICJ found in the *Nicaragua* case that assistance to armed opposition groups in another State in the form of the provision of weapons or logistical or other support constitutes a use of force by the assisting State, when the acts committed by the armed opposition groups in the other State involve a threat or use of force.[138] The mere supply of funds to the rebels, on the other hand, does not in itself amount to a use of force by the assisting State.[139] The test of 'overall control' may thus be employed to determine whether the degree of outside power 'involvement' in the acts of armed force carried out by a secessionist entity in another State is sufficiently 'substantial' that the outside

[134] *Prosecutor v Delalić* (n 84) para 20 (italics added). See also *Prosecutor v Delalić (Judgment)* ICTY-96-21-T (16 Nov 1998) paras 230–235, and especially para 230 ('A lengthy discussion of the *Nicaragua Case* is also not merited'). The same approach was followed by the Pre-Trial Chamber I of the International Criminal Court in *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04/06, Decision on the Confirmation of Charges of 29 Jan 2007, paras 208–211.

[135] cp Common Art 2(1) of the Four Geneva Conventions of 12 Aug 1949 (75 UNTS 31, 85, 135 and 287, respectively). See also *Prosecutor v Thomas Lubanga Dyilo* (n 134) para 209; *Prosecutor v Tadić* (n 19) para 84, and the sep op of Judge Shahabuddeen, ibid paras 7, 24, 26.

[136] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV) of 24 Oct 1970, Principle 1, para 9.

[137] See Declaration on the Definition of Aggression, A/RES/3314 (XXIX) of 14 Dec 1974, preamble, para 5. For the customary international law status of Art 3(g) of the Definition, see *Nicaragua* (n 22) para 195; *Armed Activities* (n 6) para 146.

[138] See *Nicaragua* (n 22) para 228 and paras 205 and 195. See also *Armed Activities* (n 6) paras 161–165.

[139] See *Nicaragua* (n 22) para 228.

power can be regarded as having used force against that other State through the intermediary of the armed forces of the secessionist entity.[140] In this case, the indirect use of force by the outside power against the other State makes the prima facie internal conflict an international one.[141] To the extent that the outside power is using force 'through' the secessionist entity, the armed conflict cannot be divided into two armed conflicts, an internal armed conflict between the secessionist entity and the parent State and an international one between the parent State and the outside power.[142] Such an artificial distinction would lead to 'a crazy quilt of norms that would be applicable in the same conflict' with inconsistent standards of protection for individuals and unequal treatment of the accused.[143] If the outside power exercises overall control over the secessionist entity there is but one single international(ized) armed conflict.[144] There was thus no need to challenge the ICJ's control tests in order to find that there was an international armed conflict in Bosnia and Herzegovina after 19 May 1992.

The question of whether in the cases mentioned above there was a need for different control tests must be distinguished from the more principled question of whether there can be several differing control tests for the attribution of conduct to a State in the law of State responsibility. It has been suggested that the degree of control may vary according to the factual and legal circumstances of the case with the following allowing for a lower threshold of control: a common aim, especially if the aim is the commission of international crimes; ethnic or ideological identity of the secessionist entity and the outside power; the outside power is an adjacent State with territorial ambitions; and

[140] Tyner (n 20) 877–879 finds the 'overall control' test still too stringent a test to determine when an armed conflict is international in character and argues for a still lower standard of control. For a similar view, see Griebel/Plücken (n 62) 621 ('both standards are in principle too restrictive').

[141] For the same view, see the declaration of Judge Shahabuddeen in *Prosecutor v Tihomir Blaskić* (n 129). See also *Prosecutor v Tadić* (n 19) para 84 ('an internal armed conflict [. . .] may become international [. . .] if [. . .] some of the participants in the internal armed conflict act on behalf of [another] State'). For the view that substantial outside involvement may transform an internal armed conflict into an international one, see I Detter, *The Law of War* (2nd edn, CUP, Cambridge, 2000) 47, 82.

[142] On this point, see Spinedi (n 133) 837–838.

[143] See T Meron 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout' (1998) 92 AJIL 236, 238. Meron and others regarded the conflict in Bosnia and Herzegovina as a single international conflict; see ibid 241.

[144] For a similar view, see the sep op of Judge Shahabuddeen in *Prosecutor v Tadić* (n 19) para 14. See also *Prosecutor v Delalić (Judgment)* ICTY-96-21-T (16 Nov 1998) para 209 ('We are not here examining the Konjić municipality and the particular forces involved in the conflict in that area to determine whether it was international or internal. Rather, should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory [. . .], unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict.'). But see *Nicaragua* (n 22) para 219 where the ICJ seems to distinguish between two conflicts, one international (between the USA and Nicaragua) and one non-international (between the *contras* and Nicaragua). According to Spinedi (n 133) 836 the 'importance of this passage of the *Nicaragua* judgment should however not be overestimated.'

the nature of the internationally wrongful act in question.[145] This view, however, fails to appreciate that attribution is a concept of a common currency in international law. As the ICJ pointed out in the *Bosnian Genocide* case: 'The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.'[146] This view is also adopted by the International Law Commission which in the commentary on its Articles on State Responsibility never made any distinction with regard to the rules of attribution.[147]

Precisely what kind and degree of control are then required for the attribution of conduct to a State? It is suggested that both the 'overall control' and the 'effective overall control' tests are unsuitable for determining the question of whether a secessionist entity's conduct as a whole may be attributed to an outside power: these tests broaden the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility, which provides that a State is responsible only for its own conduct; that is to say the conduct of persons acting, on whatever basis, on its behalf.[148] In order to equate the authorities of a secessionist entity with de facto organs of the outside power, the type and degree of control must qualitatively be the same as the control a State exercises over its own de jure organs,[149] a requirement fulfilled only by ICJ's 'strict control' test. In the case of authorities of secessionist entities not qualifying as de facto organs of the outside power, the degree of control must surely be effective control over the wrongful conduct in question, otherwise it is not control.[150] The question of attribution of conduct of the authorities of a secessionist entity to an outside power is thus to be decided on the basis of the two control tests enunciated by the ICJ in the *Nicaragua* case and, it is held, correctly confirmed in the *Bosnian Genocide* case.[151] In the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* currently pending before the ICJ, it is therefore for Georgia to prove either Russia's 'strict control' over the secessionist entities of Abkhazia and South Ossetia or, at least, her 'effective control' over relevant individual operations or activities in order to establish the international responsibility of the Russian Federation for their internationally wrongful conduct.

[145] *Bosnian Genocide* (n 5) CR 2006/8 (translation), 3 Mar 2006, 23, para 57; 26, paras 65–67; 27, para 70 (A Pellet); CR 2006/10 (translation), 6 Mar 2006, 27, para 20 (A Pellet). See also the diss op of Vice-President Al-Khasawneh in *Bosnian Genocide* (n 5) paras 36, 39.

[146] *Bosnian Genocide* (n 5) para 401.

[147] See Report of the ILC, 53rd session, UN Doc A/56/10, 2001, 103–109.

[148] cp *Bosnian Genocide* (n 5) para 406. See also Art 8(a) of the ILC Draft Articles on the Origin of State Responsibility, provisionally adopted in 1980 and the commentary thereto: ILC Yb 1974 II/1, 283–285.

[149] For the same view, see Milanovic (n 18) 577, 587. See also Tyner (n 20) 874–875.

[150] cp *Bosnian Genocide* (n 5) CR 2006/16, 13 Mar 2006, 39, para 112 (I Brownlie).

[151] *Contra* Griebel/Plücken (n 62) 620–622.