
Abstract

In this paper we analyze the “tests” used by national and international courts in criminal and civil liability cases in order to determine the nature of the conflict and assign responsibility to the state, international organization, non-state actor or individual for the commission and/or failure to prevent mass crimes and genocide. Cases in which the state, international organization and the individual jointly contribute to the overall damage inflicted by a mass crime are becoming more and more frequent. After reviewing important criminal and civil liability cases dealing with the mass crimes and genocide committed during the war in Bosnia and Herzegovina, it is argued that increasingly divergent approaches are being used to reach attribution of responsibility; such a decision will depend upon whether the court has chosen to employ the ‘overall control’ or ‘effective control’ test. Applied in similar contexts, these tests may determine the nature of conflict both in cases of criminal responsibility and tort liability. After an extensive analysis of the case-law, it becomes clear that a new principle is being established: the overall control test is being applied to organized military groups and effective control to non-military organizations. It follows from this that the overall test must apply to criminal liability and effective control to civil liability. The analysis of the effective control test cases indicate that its de facto application has prescribed it to two types of tests: ‘positive effective control’ and ‘positive and negative effective control’. Positive and negative effective control test appears like an extension of the “responsibility to protect” theory yet its practical application seems to allow only for an extraordinary narrow – and hence unsatisfactory, given the gravity of harm inflicted - reading of the responsibility to protect theory. Further, it is claimed that the reasoning used in tort law liability is progressively exerting an influence on the determination of criminal law responsibility and is exemplified in the case of application of ‘overall control’ test. Oddly enough, however, the application of effective control” in ‘pure civil liability cases like Genocide case and Nuhanović appears to restrict liability in a way that is hardly acceptable given that the nature of trial is civil law liability; and the nature of acts and overall damage.

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Authors:
Sarah Lichtermann, PhD candidate Poitier Law School
Assistant Prof. Asim Jusić, AUBiH
Introduction

Public knowledge of mass crimes committed by states, non-state groups and individuals around the world is growing and international legal mechanisms for “protection and prevention” are rapidly following suit. On a theoretical level, current national and international legal mechanisms—whether public or private—place responsibility, restrictions and obligations on states, international organizations and individuals for their actions when mass crimes and mass atrocities are committed. Today, a particularly ironic situation arises when the efforts of victims of mass crimes, potential perpetrators of mass crimes and those who are attempting to prevent them are together inadvertently worsening the final outcome rather than successfully preventing it. These circumstances raise the question of shared responsibility as well as the assignment of criminal and private legal liability of states, international organizations, non-state groups and individuals, an issue whose treatment in the literature has so far been negligible.1

In order to shed some light on this issue, several important criminal and civil liability cases dealing with mass crimes and genocide committed during the war in Bosnia and Herzegovina will be reviewed here. It is argued that there appear to be diverging approaches to attribution of responsibility which depends on court’s decision to apply either the ‘overall control’ or ‘effective control’ test. If, however, the case-law is closely examined, a principle underlying the test choice emerges. This principle directs the application of the overall control test to organized military groups and the effective control test to other groups. Thus, the control test is employed for criminal responsibility and effective control for civil liability.

First and foremost, this article deals with the various “tests” that have been developed by the international courts in criminal and tort law cases to define the nature of the conflict in question and to determine whether a state will be held accountable. Defining the nature of the conflict is the obligatory first step for establishing relevant legal grounding in relation to the Geneva Conventions and their classification of protected persons.

The conventional framework of the Geneva Conventions does not provide for any certain criterion for the determination of the nature of the conflict (1), which makes an examination of the case-law necessary.

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The Tadić Case, a criminal law case, used the international rules of state responsibility to determine the nature of the conflict.\(^2\) In the Genocide Case,\(^3\) a civil liability case about state responsibility, the ICJ used the ‘effective control’ test, evincing a clear distinction between the nature of the armed conflict and state responsibility. Logically then, the Genocide Case cannot be used to determine the nature of the armed conflict in Bosnia and Herzegovina.

The second part of this article assesses the current and potential future effects of the tort litigation in national courts of crimes ranging from mass rape to ethnic cleansing and genocide committed during wars in the ex-Yugoslavia. The first case study is Kadić v. Karadžić and its influence on the development of international law and decisions of international courts, particularly the International Criminal Tribunal for the Former Yugoslavia (ICTY). The second case study involved a recent ruling against the Netherlands Dutch Bat which, acting as an agent of the UN, contributed to the success of the genocide committed by Serbian forces against Bosnian Muslims (Bosniaks) in the UN “safe haven” Srebrenica zone.

The third part of this article is a critical analysis. The first critique is positive, because the separation of criminal and civil liability renders coherent the jurisprudence of different courts. The second discusses the ‘effective control’ test case, arguing that its de facto application separates it into two distinct categories: ‘positive effective control’ and ‘positive and negative effective control’ tests. Further, it is claimed that tort law liability reasoning is increasingly exerting influence on the process of determining criminal law responsibility, as exemplified in the application of the ‘overall control’ test; oddly enough, in ‘pure’ civil liability cases such as Nuhanović and Genocide Case, the application of ‘effective control’ appears to restrict the possibility of establishing liability in a way that is hardly satisfying when one considers that the nature of the trial is civil law liability; and the nature of acts and overall damage.

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1. The Matter of Determining the Nature of the Conflict for War Crimes Accountability

The application of international humanitarian law (IHL) is triggered as soon as a conflict is qualified as armed, be it international or non-international conflict, because the qualification of armed conflict is necessary starting point in the pursuit of war crimes accountability. While the Geneva Conventions andProtocols I and II refer to both types of armed conflict, their criteria are not precise enough to establish nature of conflict; the Geneva Conventions do not even define the meaning of the term “armed conflict.” In short, even though, logically, inter-state relations are governed by the law of international armed conflict and other situations are governed by the law of non-international armed conflict, no rules of international humanitarian law assist in determining the nature of an armed conflict.5

1. The Inability of Conventional International Frameworks to Determine the Nature of an Armed Conflict.

An armed conflict can be qualified as international even if it is occurring on the territory of a single state if a foreign state intervenes with its armed forces fighting on the side of the rebels who are combatting government forces.6 Does foreign military intervention in a non-international armed conflict trigger the internationalization of the entire conflict or only the conflict between the two states? One possibility is that the two different types of conflict are taking place at the same time.7 The international armed conflict is legally framed by the four Geneva Conventions of 1949, particularly by Common Article 2 and the 1977 Additional Protocol I8, with the exception of Common Article 3. Common Article 2 from the four Geneva Conventions of 1949 also applies to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation faces no armed resistance.9

4. “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” ICTY, Prosecutor v. Tadic, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 70 (hereinafter Tadic Jurisdiction Case); See also Natasha Balendra, Defining Armed Conflict, 29 Cardozo L. Rev. 2462 2007-2008, pp. 2461-2516.
5. Sylvain Vité, Typology of Armed Conflicts in International Humanitarian Law Legal Concepts and Actual Situations, International Review of the Red Cross, Volume 91 Number 873 March 2009, pp. 69-94.
8. Paragraph 1 of Common Article 2 of the four Geneva Conventions of 1949 stipulates that ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’.
Armed conflicts of a non-international character are legally framed by the following treaty provisions: Common Article 3 of the 1949 Geneva Conventions and Article 1 of the 1977 Additional Protocol II of the 1949 Geneva Conventions. The Protocol’s field of application is contained in the broader field referred to in Common Article 3. If the conditions of application of the Protocol are met, the Protocol and Common Article 3 will apply simultaneously. However, in a conflict where the level of strife is low, and in which the characteristic features demanded by the Protocol are not included, only Common Article 3 will apply. Common Article 3 may be invoked autonomously because its applicability is not limited; nor is it affected by the Protocol’s limitations. This constitutes a guarantee against any attempt to reduce the level of protection of Common Article 3.10

Control of a portion of territory by a non-state armed group is not a requirement but it serves as evidence for the application of Common Article 3. The ICRC commentary states that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side, similar to an international war, but taking place within a single country. Generally speaking, Parties are in possession of a portion of the national territory, with some sort of military front.11 For the application of 1977 Additional Protocol II, the required conditions are: confrontation between the armed forces of the government and opposing “dissident” armed forces12; dissident armed forces are under a responsible command13; and control a part of the territory enabling them to “carry out sustained and concerted military operations”.14 The element of territorial control is often the distinguishing factor between the two types of internal conflicts: the first one is a situation where only Common Article 3 applies and the second where both Common Article 3 and 1977 Additional Protocol II apply.15

11. ICRC Commentary on the Four Geneva Conventions of 1949, p. 36.
12. This is the case, for example, where there is a rebellion by a government army faction, or where the government’s armed forces are fighting against insurgents who are organized in armed groups. This criterion shows the collective character of the confrontation; it may not consist of uncoordinated isolated individuals: see the ICRC Commentary on the 1977 Additional Protocols to the Geneva Conventions of 1949, p. 1351.
13. According to the ICRC, a responsible command implies that the armed group has some degree of organization; but the requirement is not of a military hierarchical system: the organization must be capable of planning and carrying out sustained and concerted military operations, and of imposing discipline in the name of a de facto authority. Id., p. 1352.
14. “(…) if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.” Id., pp. 1352-1353.
The case-law is helpful in assessing the two categories of non-international armed conflict. The qualification of a non-international armed conflict requires a higher threshold of intensity than an international conflict (when the situation is regarded as “protracted armed violence”\textsuperscript{16}). This can be assessed by evaluating the presence or absence of the two necessary conditions. The first is the intensity of the violence, which can be ascertained, for instance, by examining the collective nature of the combat, the obligation of the State to use its army because its police forces are unable to control the situation, the duration of the conflict, the frequency of acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims etc. The second condition involves the organization of the parties, especially in the case of non-governmental armed groups, determined by, for example, the existence of a written command structure and internal rules, the authority to launch operations with different units, the possibility to recruit and train new combatants, etc.\textsuperscript{17}

The narrow application of Article 1 of Additional Protocol II, which requires a particularly high level of organization of the non-governmental forces and the territorial control of said forces, enables the application of Common Article 3 as well. The International Criminal Court Statute also provides for two types of internal armed conflict:\textsuperscript{18} one concerns serious violations of Common Article 3 and the second concerns other “serious violations of the laws and customs of war that are applicable in those situations” - which adds a time requirement.\textsuperscript{19} In the Dyilo Case, the ICC Pre-Trial Chamber provided two of the conditions: the degree of intensity of protracted violence and the degree of organization of the armed group.\textsuperscript{20} On the specific matter of determining the nature of an armed conflict (international or internal), the case-law had set up two tests: the effective and the overall control tests.

\textsuperscript{16} See Tadić Jurisdiction Case IT-94-1, paragraph 70 and Tadić Trial Case, paragraph 562; Limaj Case, paragraph 84; ICTY, Prosecutor v. Boskoski, IT-4-82, Trial Judgment, 10 July 2008, paragraph 175 (hereinafter Boskoski case); ICTY, Prosecutor v. Haradinaj, IT-04-84-T, Trial Judgment, 3 April 2008, paragraph 49 (hereinafter Haradinaj Case): adoption of a broader position, which includes all means available to evaluate the degree of intensity; ICTR, Prosecutor v. Rutaganda, ICTR-96-3, Trial Judgment, 6 December 1999, paragraph 93; International Commission of Inquiry on Darfur, Report Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, paragraphs 74–76.

\textsuperscript{17} Boskoski Case, paragraphs 199-203; Haradinaj Case, paragraph 60; Limaj Case, paragraphs 94-134 and paragraph 70 draw attention to the irrelevance of the the notion that “the purpose of the armed forces is to engage in acts of violence or also achieve some further objective (...)

\textsuperscript{18} Rome Statute of the I.C.C.: 8(2)(c) and 8(2)(e) and 8(2)(d) and (f).

\textsuperscript{19} There is an indication that this is the application of customary law which does not differentiate between the types of internal armed conflicts, according to some doctrines the time standard creates a specific category; see Sylvain Vité, op. cit. p. 82; see also I.C.C. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007, paragraphs 229-237 (hereinafter Dyilo Case): reference to Additional Protocol II

\textsuperscript{20} See Dyilo Case, paragraph 234: “the ability to plan and carry out military operations for a prolonged time period”
2. The Connection and Separation of Criminal and State Responsibility through an Analysis of “Control Tests”: from Nicaragua to Genocide through Tadić

The Nicaragua Case is the first to deal with the issue of state responsibility. As such, it is cited in the cases referred to below. The ICTY Tadić Appeal Case dealt with the determination of the nature of the armed conflict in BiH in order to establish which type of war crimes are committed and what the accused would be prosecuted for. On the other hand, the ICJ Genocide Case ruled on state responsibility. The latter will be carefully examined, especially because it involved interpreting the first two cases. The Genocide Case had to rule on whether the Srebenica acts of genocide committed by Serbian armed forces in Bosnia would be imputed to the Federal Republic of Yugoslavia (FRY). The case discussed the application of the ‘effective control’ and ‘overall control’ test.

Concerning the ‘effective control’ test, in the Nicaragua Case the ICJ was of the opinion that the legal basis was Article 8 of the International Law Commission Articles on State Responsibility. The test consists of three disjunctive criteria reflecting customary international law:21 the attribution of conduct by persons or groups of persons acting “on the instructions”, “under the direction” or “under the control” of the state. It requires that (i) a Party must not only be in effective control of a military or paramilitary group but also that (ii) the control must be exercised with respect to the specific operation in the course of which breaches may have been committed.22 After having assessed international law practice in order to establish whether an international law or customary rule was at stake here, the Tadić Case confirmed that this test was to be applied to individuals or groups which are not organized into military structures.23

Hence, with regards to criminal law, the overall control test can be quite helpful in defining the character of an armed conflict. Other factors that help to determine the nature of an armed conflict may be found in the case-law. The ‘overall control’ test establishes a logical link between determination of the level of control and determination of the international or non-international nature of an armed conflict.24

21. See Nicaragua Case, par. 398.
22. Id., par. 115.
23. See Tadic Case, par. 132 and 137.
24. Tadić Appeal Case, paragraph 84: “...In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.” See also Prosecutor v. Kordić and Čerkez, IT-95-14/2-A, Appeals Judgment, 17 December 2004, paragraphs 306 and 308.
The overall control recognizes logistical support (financial assistance, military equipment or training) but does not require orders issued by the state\textsuperscript{25} or individual direction of each operation and, therefore, application of overall control test does not imply that the foreign state is directing everything done by the group.\textsuperscript{26} ‘Overall control’ is established when the foreign state plays a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.\textsuperscript{27} It is applied to “military organizations”\textsuperscript{28} or to individuals or groups organized into military structures.

In the Genocide Case, the ICJ decided that the overall control test went beyond the ILC Article 8 criteria. Moreover, it states that, as a tool used in determining the nature of an armed conflict, the ‘overall control’ test could not be applied to the question of state responsibility. ICJ reasoned that the degree of state participation in an armed conflict may differ from that which would normally be required for state responsibility to be triggered.\textsuperscript{29} However, the ICJ accepted that the criterion of overall control may be “applicable and suitable” as a means of determining the nature of an armed conflict. This follows the Tadić Case jurisprudence.

Yet, the Genocide Case seems to contradict Tadić, as the ICJ refused to apply the Tadić overall control test all the way. The Tadić Case introduced a clear definition of the overall control test to be applied to military organized groups, meaning that the effective control test was to be applied to non-military organized groups. The ICJ applied effective control to state responsibility, and explicitly demonstrated why the overall control test could not be applied to state responsibility. Thus, the distinction between the two types of tests, that is, applicability to two different types of liability, depending on the nature of the group at stake, is a jurisprudential creation of the ICTY.

Therefore, if the Genocide Case separates the issue of state responsibility from that of the nature of an armed conflict, it logically cannot be used, either explicitly or implicitly, as a ground for defining the nature of the armed conflict in Bosnia and Herzegovina.

\textsuperscript{25} See Prosecutor v. Aleksovski, IT-95-14/1-A, Appeals Judgment, 24 March 2000, paragraphs 143-146.
\textsuperscript{26} See Prosecutor v. Gotovina, Ćermak, Markač, IT-06-90-T, Trial Judgment, 15 April 2011, par. 1675-1676.
\textsuperscript{27} Tadic Appeal Case, par. 137 and 145; see also I.C.T.Y. Prosecutor v. Naletilic, IT-98-34-T, Trial Judgment, 31 March 2003, par. 198.
\textsuperscript{28} Tadic Case, par. 145.
\textsuperscript{29} Genocide Case, par. 405 and 406. For a discussion on the application of the same test to organized armed groups see Article 7 of the ILC Articles on State Responsibility, the Statement by the Spanish Government reported in the ILC Commentary to Art. 7 of the ILC Arts, par. 3 and Antonio Cassese, The Nicaragua and Tadic tests revisited in light of the ICJ Judgment on Genocide in Bosnia, EJIL, September 2007, p. 4 (hereinafter Cassese).
With regards to civil liability cases, we can clearly distinguish two kinds: one that applies reasoning which resembles the overall control test (the Kadić Case) and one that applies the effective control test, namely, the Genocide Case in front of the ICJ as well as Nicaragua and Nuhanović v. Netherlands. The overall control test has taken an expansive approach that looks at overall damage. The effective control test – as applied and discussed in the Genocide as well as the Nuhanović Case – has taken a restrictive approach with regard to establishing liability, focusing instead on formal links between perpetrators as agents, principals and the act committed; it also restricts its analysis to a straightforward and “piecemeal” causality between the act committed and the proximate perpetrator. The analysis in part three below critically analyses these two approaches.

II. Tort Responsibility for the Actions of Individuals, the State and International Organizations

With regard to the “means” for assigning responsibility in cases dealing with past and ongoing mass atrocities, authors identify five types of accountability mechanisms: international criminal tribunals, truth commissions, transnational accountability efforts, the Alien Tort Claims Act (ATCA) of the United States and the new hybrid courts. With regard to methods used for “overcoming the past”, there seem to be primarily two: apologies and reparations. Neither are without controversy. As Bradford states, “the age of apologies” is a global phenomenon which attracts a good deal of public attention without necessarily leading to practical remedies, while reparations as a tort-based model for compensating victims are much more frequent. Further, monetary compensation is not the primary or even an important objective of some (or perhaps most) of the groups that make damage claims. The problems of applying tort law as a remedy for mass atrocities and/or systematic social discrimination are raised, for example, in work on reparations for slavery. Irrespective of the problems that may arise, it is primarily law suits for historic injury and recent mass violence that occupy the courts.

32. Keith N. Hylton, "Slavery and Tort Law", pp. 2–4 (Boston Univ. Sch. of Law, Working Paper No. 03–02, 2003 Soc. Science Research Network Elec. Paper Collection), at http://www.bu.edu/law/faculty/papers/pdf_files/HyltonK012803.pdf Briefly, Hylton argues that major problems with applying tort law to mass atrocity (in this case slavery) tend to follow. Firstly, tort law cannot compensate for “social torts” – destruction of family life or religious practices. Secondly, the claims of descendants may be too remote to serve as a ground for reparations. Thirdly, mass tort claims can lead to “culture wars”. Finally, procedural hurdles (or costs) can be prohibitive, i.e., statute of limitations, sovereign immunity, identification of victims, and identification of plaintiffs, causation, and measurement of harm.
Without taking a stance on the relative impact and relevance of any of these mechanisms, below we analyze tort cases examining the liability of states, non-state groups and international organizations for damage inflicted in a war that involves the commission of mass war crimes and genocide and in which any one of these actors may be implicated to a greater or lesser extent.


The first US Congress adopted the Alien Tort Claims Act in 1789. The statute has seen slight modifications since its original enactment. The current version reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” From 1789 until the 1979 landmark case Filartiga v. Peña Irala, ATCA was cited as grounds for action only twenty-five times; in the majority of cases it failed, as only two courts recognized it as a proper jurisdictional ground.

In Kadic v. Karadzic the court established that non-state actors can also be held liable for breaches of international law. The Kadic Case was brought as a class action suit of S. Kadic on behalf of herself, her two sons and all other similarly situated persons (1500 Croatian and Bosnian women who were raped during the war in Bosnia) against Radovan Karadzic, leader of the Bosnian Serbs. They were represented by an NGO advocating woman’s rights. Kadic and others claimed that the Bosnian Serb military forces under Karadzic’s command in Bosnia committed acts of genocide, war crimes and torture and especially acts of mass rape of non-Serbian woman (the claimants).

On appeal, the Second Circuit Court of Appeals contended that though Karadzic is a private individual, the universal condemnation of the crimes of genocide, war crimes, torture and mass rape in the XXth century applies in contemporary society not only to states but to individuals as well.

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33. The original Act held that district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States;” see Atif Rehman, “The Court of Last Resort: Seeking Redress for Victims of the Abu-Ghraib Torture through Alien Tort Claims Act”, 16 Ind. Int’l & Comp. L. Rev 493 (2005/06), hereafter Rehman.
35. Rehman, supra.
37. Id., p. 236.
In addition, Karadzic was found to be acting in concert with the former Federal Republic of Yugoslavia and therefore acted under the color of law.\(^{38}\) The Court did not undertake the establishment of a “test”, but its reasoning points to the following conclusion: in terms of tort responsibility for damage resulting from mass crime and genocide, establishment of responsibility does not require a formal link or chain of command between the perpetrator (in this case Karadžić) as agent and its principal (Yugoslavia, i.e., de facto Serbia and Montenegro); neither does it require the planning and orchestration of shared goals. The responsibility is to be inferred from the universal condemnation of such crimes and the context from which it can be concluded that the agent and principal are supportive of or accept the consequences that result from their actions, even when an action is not connected in a straightforward formal or factual manner. However, the Court persistently stated that injurious acts must be perpetrated in some sort of official “legal” capacity, thereby potentially excluding non-state armed groups from the reach of its reasoning.

Several leading cases at the ICTY proceeded down the path established by the Kadic Case, whose significance was expressly recognized both in terms of the new conceptualization of the category of criminal acts and genocidal rape as well as the rejection of the “state action” doctrine. In 2001, the Tribunal ruled on the case of Prosecutor v. Kunarac, Kovac and Vukovic.\(^{39}\) The accused were officers and soldiers in the Karadzic’s Serbian army in Bosnia. As Rosalind Dixon argues, it was the first verdict in the history of international criminal law based solely on crimes of sexual violence against woman.\(^{40}\) According to the Tribunal, these crimes were motivated by ethnic hatred and they represented part of the wider plan of ethnic cleansing in the parts of Bosnia under Karadžić’ control. Kunarac, Kovac and Vukovic were found guilty as principals and accessories to the crimes of rape and enslavement as crimes against humanity and war crimes.

Most important for our purposes here are two other leading cases: Prosecutor v. Delalic\(^{41}\) and Prosecutor v. Furundzija\(^{42}\) in particular. These cases have followed the same lead, but with more elaborate reasoning. Like the US Second Circuit Court, the Tribunal challenged the “act of state” doctrine, which holds that if certain acts are to be considered war crimes or crimes against humanity perpetrators need to act in an official capacity.\(^{43}\)

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\(^{41}\) Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment, 16 November 1998.

\(^{42}\) Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, 10 December 1998 (hereafter Furundžija).

\(^{43}\) Dixon, supra n. 20, p. 700.
The Tribunal stated that if torture is to be established as a crime against humanity, the "characteristic trait of the offence in (the context of humanitarian rather than human rights law) is to be found in the nature of the act committed rather than in the status of the person who committed it."

No clear-cut "control" test was developed, but the reasoning of the court, developed after an extensive review of international customary law and the judgments of various national courts, clearly states that criminal responsibility - whether committed ex ante in a preparatory stage, directly as part of the crime or as an aiding and abetting ex ante or ex post, including aiding in terms of moral support - is not necessarily to be established by a direct link between the perpetrator (agent), principal and act committed. Rather, responsibility should be inferred from the behavior of the person involved (irrespective of official status) and from the evidence leading to the conclusion that a person's actions can be reasonably construed as having an effect or implying acceptance of the substantial effects of the crime in a given situation. This type of reasoning, which focuses on the effects of the crime inferred from the behavior of a person in a given context and from his/her overall control over the criminal consequences rather than "pure" criminal responsibility much more closely approximates the "tests" developed for establishing tort responsibility.


In the very recent decision of July 5, 2011, the Court of Appeal of the Hague ruled that the Netherlands, acting through the Dutchbat, which participated in a "peace mission" to Bosnia and Herzegovina during the 1992-95 war, had acted unlawfully and was liable for evicting Bosnian nationals from the compound of Dutchbat in Srebrenica on 12 July 1995. Ibro Nuhanovic, Muhamed Nuhanovic, Nasiha Nuhanovic and Rizo Mustafic were subsequently killed by Serbian forces as part of what the ICTY and the ICJ later found to be acts of genocide. The facts of the case are the following: Ibro Nuhanović, Nasiha Nuhanović and Muhamed Nuhanović were a father, mother and brother of Hasan Nuhanović (the plaintiff), who worked as an interpreter for Dutchbat, a Dutch battalion under the command of the United Nations peacekeeping force UNPROFOR. The local staff of Dutchbat, who were employed by the UN and possessed a UN identity card, were allowed to stay in the compound.

44. Id.
45. Furundžija, p. 90.
Hasan Nuhanović had such a card, but Ibro, Nasiha and Muhamed Nuhanović were compelled to leave the compound the following day. All three were killed by Serb forces.

The decision brought on appeal to the District Court of the Hague in September, 2008 rejected the claims of the families of Nuhanovic and Mustafic against the Netherlands, holding that the actions of Dutchbat could be attributed to the UN alone. Nuhanovic and Mustafic subsequently appealed the decision. On appeal, the Court of Appeals in the Hague quashed the first instance judgment of the District Court and found that the disputed conduct was attributable to the Netherlands, and that the Netherlands had acted wrongfully. As Noekalimer states, three aspects of this decision are important: the disputed conduct, attribution of the conduct and wrongfulness of the conduct. An important preliminary point is that the Court ruled only on the removal of Nuhanovic and Mustafic from the compound, not on any failure of the Netherlands to subsequently protect them. Hence, the Court’s judgment is limited solely to the wrongfulness of the conduct of the Netherlands in the process of active removal from the compound. However, the Court did also rule on the legal implications of the instructions of General Gobilard (UNPROFOR) “to take all reasonable measures to protect refugees and civilians in [their] care”, and thus it may have broader implications for the obligation to protect of states contributing peacekeeping forces or troops.

The Court of Appeal held that the question of attribution should be decided solely on the basis of international law, which implied attribution of wrongful conduct to the UN as well, given that Dutchbat was a part of the UN run operation. Firstly, the Court held that the standard for attribution is ‘effective control’. In doing so, it rejected the standard for attribution of conduct that was used by the District Court (‘operational overall control’), the standard used by the ECTHR in the Behrami and Loizidou cases (‘ultimate authority and control’), as well as the basis of attribution that the UN itself believed to be correct when it claimed that peacekeeping troops are to be considered subsidiary organs of the UN. As Nollkaemper states, the latter claim is a solidly accepted interpretation of international law. Secondly, to determine whether the state had effective control, the Court considered the relevance not only of whether or not the act was an implementation of specific instruction by either the United Nations or the state, “but also whether or not the

47. Id.
48. Id.
49. Id.
50. Behrami and Behrami v. France, ECHR (decision of May 2nd, 2007) and Loizidou v. Turkey (Preliminary Objection, 1995, and Merits and Just Satisfaction, 1996) discussed in Cassese on p. 662, n. 22 and p. 658, n. 17, respectively.
51. See Cassese, supra.
52. Id.
United Nations or the State was able to prevent the conduct in question” (par. 5.9) if there was no such specific instruction. Finally, the Court states that “it is possible that more than one party has ‘effective control’, and that it therefore is not excluded that application of this criterion leads to attribution of conduct to more than one party” (par. 5.9), by so implying joint responsibility of the UN and the Dutchbat as its agent.

III. Analysis and Conclusion: The Parallel Universes of Courts and Applied “Tests” – Tort-like Liability in Criminal Cases or a Mixed Cocktail of Tests?

The Coherence of International Courts in the Application of Tests

If one considers the conclusion on the separation of the nature of armed conflict and the state responsibility reached in the Genocide Case, it becomes clear that this principle, noticeably present in international practice and now presumably considered to be international customary law, explicitly distinguishes between the two tests, two types of liability and two categories of persons authorized to respond to either liability claim: civilians and non-civilians. Regarding the latter distinction, it must be added that it concerns only persons deemed accountable for their actions as political leaders or members of the executive and not to civilians as a protected category under IHL.

The coherence of the international jurisprudence lies first in the distinction between the individual criminal liability and state responsibility, but more specifically speaking, in the criteria that allows the analyst to choose to apply the overall or the effective control test, the status of the group at stake. And yet, if the analysis remains at this stage, one can observe that the Tadić Case and the Genocide Case chose to apply the criteria of the status of the group at stake. Considering the Tadić Case and the kind of groups involved in, military groups, the overall test applies. Regarding the Genocide Case and the kind of groups involved in, political partie are non-military groups, the effective control applies.

The distinction between the issue of the nature of the conflict and state responsibility was fairly well-grounded in Judge Shahabudeen dissenting opinion in the Tadić Case. The main reason for retaining this distinction is to authorize a state to use force, which is not illegal in itself. The perpetration of war crimes is another issue. It is worth considering that it might be easier to recognize the commission of war crimes by a state whose use of force had already been acknowledged, which means that the nature of the conflict must first be defined by the overall control test. If the existence of an international conflict is proven, then the effective control test will be applied in order to determine whether the civilians representing the State involved in the armed conflict had acted under instruction.

53. Id.
However limited the number of cases, what can be discerned from an analysis of the above cases is that the outcome of the case and scope of responsibility of either an individual, a state or an international organization depends decisively on the type of test that will be applied. This may appear obvious, yet the differences are subtle and far-reaching, since difference between types of cases (criminal v. civil liability) and the differences between the type of court (national v. international) will result in great divergence of outcomes and very different procedural tools for arriving at responsibility attribution. If we manage cases according to the ‘test’ that is applied – even if the reasoning of the adjudicating court does not refer to any ‘test’ – we can differentiate cases in the manner detailed below.

On the one side, according to the ‘overall control’ measure, we would find Kadić, as a civil liability case, and Tadić, and on the other Furundžija (alongside cases such as Furundžija et al. and Delalić) as a criminal law case. The defining of overall responsibility as applied in these cases can be summarized along the following lines. Firstly, judgment of the nature of an act takes precedence over formal organizational issues that led to the act itself, and secondly, the official status of a person perpetrating a crime and/or inflicting damage is not a decisive factor when it comes to attribution of responsibility. One’s official capacity is relevant only when viewed in context, that is, when actions of the perpetrator – be it commander or individual perpetrator – are viewed in their entirety, or in terms of the overall consequences of the crime and damage inflicted. Finally, in both civil liability and criminal law cases the scope of the attribution of responsibility is wider in the sense that aggregate repercussions of a criminal act will guide the justices in assigning responsibility. In that sense, the overall beneficiaries of a crime also share a degree of responsibility, including but not limited to moral responsibility, even in cases where perpetrators and “end users” or beneficiaries do not share mens rea and their actions are not necessarily related in any way. That is to say, they are aware that their actions will produce a certain cumulative objective. Thus, we can reasonably argue that there is greater resemblance between the overall responsibility and the tort liability tests than a ‘traditional’ criminal responsibility test, given that the judgment of an act is based, to a much greater extent, on contribution to the alleged crime than on intent to harm or examining an activity which has led to damage. This reasoning resembles the regime of stricter responsibility combined with joint and several liability - a familiar type of reasoning in tort law cases.54

It is no wonder then that the overall responsibility test used in the Tadić Case contributed to the conclusion that the conflict in Bosnia and Herzegovina was both internal and international in nature, given that such conclusion necessary follows if the overall damage, context, and a question of overall beneficiaries are applied to the facts of the case; in Kadić v. Karadžić Karadžić was found to be jointly acting ‘in concert’ with the former FRY without difficulty, with the actions of both parties understood to have contributed to mass crimes and genocide.

54. For a similar argument see Nollkaemper and Jacobs, p. 58, noting that in Principles of European Tort Law the preferred term, instead of joint and several liability, is proportional liability.
On the other hand, the effective control test – applied and discussed in the Nicaragua, Genocide and Nuhanović cases – has introduced a restrictive approach with regards to establishing liability, examining the formal links between perpetrators as agents, principals and the alleged crime. It also restricts its analyses to straightforward causality between the act committed and the proximate perpetrator. On the face of it - and allowing that the number of cases are admittedly limited - one can at present distinguish between two types of effective control cases: “positive” effective control cases (Nicaragua) and “positive and negative” effective control cases (Genocide and Nuhanović). “Positive” effective control would indicate that the state or international organization is charged with having encouraged an alleged crime by advancing certain acts, while “positive and negative” effective control would indicate that a state was charged with and/or found responsible for failing to fulfill its legal obligation to prevent certain acts from being committed – hence making this test a practical extension of the “responsibility to protect” theory. The state or international organization might also be found guilty of contributing to the exacerbation of the consequences of the act, directly, by aiding and abetting, or both.

By point of comparison, consider the ‘positive effective control’ test as applied in the Nicaragua Case. There, it was held that whether persons or groups of persons are acting ‘on the instructions’, ‘under the direction’ or ‘under the control’ of the state must be established in order for a state to be held responsible. However, the judicial process of establishing ‘effective control’ leaves one wondering what courts generally make of the word “control”. On balance, it would seem that in cases of attribution of state responsibility for positive and contributory acts that resulted in an alleged crime, the courts tend to claim that even a very small degree of independence over the course of perpetration of an alleged criminal act is sufficient to absolve the state of responsibility or, more likely, substantially diminish its culpability (even after having established that the level of control over an armed group is substantial).

The Nuhanović and the Genocide Case would fall under “positive and negative effective control” type of tests. In the Genocide Case the ICJ found that Serbia was under an obligation to prevent the genocide committed in Srebrenica by Serbian armed forces in Bosnia which, according to the ICJ, did not have a sufficient degree of effective control to be held responsible for the act of genocide itself. Therefore, in the Genocide Case negative effective control was established, but positive effective control was not. In the Nuhanović Case, unlike Genocide, the attribution of responsibility was dual – both the Netherlands forces and the UN were proclaimed liable for not having acted in accordance with the “obligation to protect”. However, somewhat paradoxically, in the very same breath the Dutch court found that responsibility for failing to engage in “negative effective control” – stemming from a responsibility to protect – could be established only in positive acts which had contributed to the death of Srebrenica victims.
In other words, the effective control in the Nuhanović Case, as construed by the Dutch court, was both negative and positive. It was considered negative to the extent that the duty to protect citizens against the perpetration of crimes was not fulfilled; but at the same time it was positive because The Netherlands and the UN were held responsible only for very limited damage inflicted by the way of positive actions which had contributed to the crimes, i.e., surrendering three persons inside the compound to Serb forces. This is an ironic and, given the facts of the case, extraordinary narrow reading of the responsibility to protect, which would seem reasonable if it were not for the fact that the UN “safe heaven” proclamation in Srebrenica was only targeting three persons on the UN Dutch Bat compound rather than the entire population of the “safe haven” area. Considering that both Genocide and Nuhanović are civil liability cases, this type of reasoning does not resemble the reasoning of “regular” tort law given that little notice had been taken of overall damage, the situation and context or the causality between the concerted actions of parties involved and the overall damage. Rather, the reasoning is circumscribed to a piecemeal causality between actual wrongdoers and the damage that was generated, the existence of their formal legal obligations, and the narrow set of consequences of their actions.\(^{55}\) Such an approach is hardly satisfying considering the extent of damage.

\(^{55}\) See Nollkaemper and Jacobs, p. 38 and accompanying notes, calling attention to the differences between formulation of the standard of causality in Art. 3:101 of the Principles of European Tort Law and the standard of causality used by the ICJ in the Genocide Case, (see Genocide Case, p. 43, par. 462.)