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The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia FREE

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Abstract

In its recent Genocide judgment, the International Court of Justice discussed the question of whether the acts of genocide carried out at Srebrenica by Bosnian Serb armed forces must be attributed to the Federal Republic of Yugoslavia (FRY), as claimed by Bosnia. It applied the ‘effective control’ test set out in Nicaragua, reaching a negative conclusion. The Court also held that the broader ‘overall control’ test enunciated by the International Criminal Court for the former Yugoslavia (ICTY) in *Tadić* did not apply, on two grounds. First, the test had been suggested by the ICTY with respect to the question of determining whether an armed conflict was international and not with regard to the different issue of state responsibility; secondly, in any case the test would have overly broadened the scope of state responsibility. The author argues that the ICTY admittedly had to establish in *Tadić* whether the armed conflict in Bosnia was internal or international. However, as no rules of international humanitarian law were of assistance for such determination, the Tribunal explicitly decided to rely upon international rules on state responsibility. The ICTY thus advanced the ‘overall control’ test as a criterion generally valid for imputation of conduct of organized armed groups to a particular state. The test was based on judicial precedents and state practice. In addition, the ICTY did not exclude the applicability of the ‘effective control’ standard, stating however that it only applied for the attribution to a state of conduct by single private individuals. Judicial decisions, even subsequent to *Tadić*, support the view that whenever conduct of organized armed groups or military units is at stake it suffices to show that the state to which they may be linked exercises ‘overall control’ over them, in order for the conduct of those groups or units to be legally attributed to the state. Hence, any sound critique of *Tadić* should not suggest that it dealt with a matter different from state

responsibility. It should instead be capable of showing that state and judicial practice do not corroborate that test.

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