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Demystification of the Tadic Appeals Judgment and the responsibility of a State for non-State Actors under International Humanitarian Law (IHL)

MPIL Agora

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The general law of State responsibility, codified by the International Law Commission (ILC) in the 2001 Articles on State Responsibility (ARSIWA) provides some indicia for how to identify the responsibility of a State for violations of IHL committed by an armed group that operates in another State's territory. This question has often boiled down to the interpretation of the standard(s) of attribution under Article 8 (Conduct directed or controlled by a State) of the ARSIWA. In this respect, as the former ICJ President Rosalyn Higgins has noted, there is a veritable risk of fragmentation or fissure between the standard of 'effective control' suggested by the ICJ in *Nicaragua and Application of Genocide Convention in Bosnia* on one hand and the ICTY Appeals Judgment in *Tadić* and the subsequent judgments on the other. The crux of the *Tadić* Appeals Chamber is that in case an armed group is considered to fall under 'overall control' of a supporting State, the latter's responsibility will be engaged. Much less known is the ICTY Appeals Chamber's implicit suggestion that the standard of 'overall control' may serve as a benchmark for the requirement of belonging contained in Article 4A(2) of the Third Geneva Convention (GC III).

This presentation will critically evaluate the affirmation of the *Tadić* Appeals Judgment that the 'overall control' is the general rule of attribution rather than as a special rule under IHL. Yet, the presenter argues that in accordance with Article 91 of the Additional Protocol I (AP I), read alongside Article 43 AP I, IHL may contemplate the responsibility of a State for acts of the armed group appertaining to it within the meaning of Article 4A(2) GC III. One salient point of this contribution is to highlight that under IHL, the standard of attribution may be lowered to the standard even more than the notion 'overall control' suggests. In this respect, the presentation uncovers some features of the pre-AP I (namely, pre-1977) practice of the International Committee of the Red Cross and Red Crescent (ICRC), which may be taken as supporting this thesis

This presentation will map out several hypotheses that may explain coherently more permissive standard(s) of attribution under IHL. These include the thesis that as recognized under Article 55 ARSIWA, there may be the *lex specialis* on the rule of attribution under IHL.



---Yutaka—Arai-Takahashi is Professor of International Human Rights Law at University of Kent, Brussels (Belgium) and Canterbury (UK) and is currently a Visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Yutaka holds an LLM from Keio University 慶応大学(Tokyo) and LLM & PhD from the University of Cambridge. He also holds visiting professorships at Xi'an Jiaotong University 西安交通大学 China) and Seoul National University (Korea). He has published prolifically in the fields of IHL, international human rights law, and legal theory. His major publications

include The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (2002); The Law of Occupation (2009), and "Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law (IHL) between State Responsibility and Individual Criminal Liability", in C. Chinkin, & F. Baetens, (eds.) Sovereignty, Statehood and State Responsibility (2015) 325; "'Scrupulous but Dynamic' - Freedom of Expression and the Principle of Proportionality under European Community Law", (2006) Yearbook of European Law 2. Yutaka has been invited as an expert to several UN and ICRC expert meetings. His full publications and profiles can be found at <https://www.kent.ac.uk/brussels/people/2380/www.kent.ac.uk/brussels/people/2380/arai-yutaka>

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