Control in International Law

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Abstract

The concept of control has permeated various disciplines of public international law, most notable international criminal law, international humanitarian law, international human rights law and the law of statehood as well as the law of responsibility for states and international organizations. Often this notion of control has been used to extend the regular parameters in these disciplines to capture more extraordinary situations and apply the same rules originally developed within areas of law, such as the application of the laws of war to occupation, the rules of human rights treaties to extraterritorial situations or state responsibility to non-state actors. This article will examine this notion of control in all its facets in international law while also addressing some of its controversies and disagreements in the jurisprudence of international institutions, which have utilized this concept. The article will then provide an overview of its uses in international law as well as its overlap from one discipline to another with a view of providing some overarching observations and conclusions.

Keywords: Effective / overall control, international human rights law, international criminal law, responsibility of states, statehood.

1 Introduction

1.1 Overview

The function of control in public international law has been described by the International Court of Justice (ICJ) as follows:

> The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other states.[1]

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1 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 118.

This was further clarified by the International Law Commission (ILC) when it said,

> The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of unlawful intervention, occupation and unlawful annexation.[2]

This notion of control has been utilized in various areas of international law, such as international humanitarian law (IHL), international criminal law (ICL), international human rights law (IHRL), the law of state responsibility and the estab-

2 International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries 2001, the text of which was adopted by the International Law Commission at its fifty-third session in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 151, para. 12.

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lishment of statehood.[3] This concept of control has different meanings and different purposes in some of these fields of international law. The main distinction in this context lies among IHL, IHRL, the laws of state responsibility and statehood on one hand and ICL on the other hand. In ICL control has played for the most part a role in delineating the contours of the international core crimes of aggression, genocide, war crimes and crimes against humanity or the parameters of criminal responsibility, all with a view to seek accountability for the actions of individuals in these crimes. In the four other areas of international law, control has been a vehicle to assess the applicability of outlier situations within these legal regimes; in IHL control is used to determine when occupation of a territory has occurred, which is then regulated as part of this branch of international law, while in IHRL control has played an important role to provide jurisdiction for supranational or international institutions to asses human rights violations committed by states within their jurisdiction but outside the territory of such states. The law of state responsibility, which also for the purposes of this article includes

3 The concept of control has also played a role in international refugee law where agents of persecution can not only be states but also organizations, which have effective control of territory and as such are capable of inflicting persecution on victims; this notion of control has taken its meaning from other areas of international law, such as IHL and IHRL; *see* for instance Directive 2011/95/EU of the European parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status, for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Art. 6(b) and M. Lister, 'The Place of Persecution and Non-State Action in Refugee Protection', *in* A. Sager (Ed.), *The Ethics and Politics of Immigration: Core Issues and Emerging Trends*, London, Rowman & Littlefield, 2016, pp. 52-54. Similarly, control has also been referred to in transnational criminal law, which regulates the suppression of serious crimes through multilateral treaties; of the 33 treaties in this area of international law, 13 have references to control, of which seven talk about control in relation to the subject matter of the treaty in question while the other six treaties use the concept of control derived from the areas of international law under discussion in this article; the first category is used in the treaties dealing with hijacking of aircraft (the 1963 *Convention on Offences and Certain Other Acts Committed on Board Aircraft*; the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft* and its 2010 *Protocol*, which deal with control over aircraft), piracy (the 1982 *United Nations Convention on the Law of the Sea dealing* with control over ships) and the penalization of illicit drugs (the 1961 *United Nations Single Convention on Narcotic Drugs*; 1971 *United Nations Convention on Psychotropic Substances* and the 1988 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, dealing with control of drugs) while the second category can be found in the following treaties: the 1994 *Convention on the Safety of United Nations and Associated Personnel*, which refers to the control and authority of the United Nations in article 1(c); the 1998 *International Convention for the Suppression of Terrorist Bombings*, which refers to command and control in relation to the military forces of a state in article 4; the 2000 *United Nations Convention against Transnational Organized Crime*, which refers in article 2(f) to control of a state in another state; the 2000 *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, which in article 9(3)(b) talks about the authority of a flag state to exercise jurisdiction and control over a vessel; the 2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, which refers in article 3(a) to control over a person; and the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*, which has a reference to command/superior responsibility in article 6(1)(b).

the responsibility of international organizations, is concerned with the responsibility of states in their dealings with other states but has extended this responsibility to activities not only conducted by states or international organizations directly but also in an indirect fashion and is concerned with the attribution of responsibility of a state or international organizations with control over the activities of groups of and in a third state. Lastly, in the establishment of statehood control is an element of international recognition for a new government or state after the dissolution of an earlier government or state. These various purposes, distinctions, overlap and possible interchangeability between these areas of law will be further discussed in the conclusion of this article.

This article will examine the parameters of control in some detail in all these international law branches with the exception of ICL as the latter has a very different purpose than the other four areas. As a result ICL would not lend itself to a useful comparison of the notion of control in international law, which is the ultimate aim of this article is the analysis of the various facets of control, their overlap, similarities and trends as well as their conceptual and practical differences with a view of developing an overarching theory, which can used in cross-sectional manner and applicable to all these four areas of international law. To be clear, ICL jurisprudence will be discussed where the judges were called upon to interpret concepts emanating from the abovementioned areas of law, specifically the notions of occupation,[4] state responsibility[5] and statehood.[6]

1.2 Control in ICL

However, for the sake of completeness, this introduction will briefly set out the notion of control in ICL where it has been utilized six times, three times as part of a definition of a crime and three times to clarify forms of accountability.

4 Apart from specifically addressing the notion of occupation and control, the international jurisprudence has also provided clarification of four other concepts in ICL, which have a relationship to occupation as they involve control of a territory; these areas are the meaning of 'in part' in the definition of the crime of genocide, some aspects of the notions of civilian population and organization in the definition of crimes against humanity and the war crime of destruction of religious buildings and will be further discussed below in Section 4.2.

5 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, para. 156; Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, paras. 84, 90, 131, 137-145; *see also* Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, paras. 122-136; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, paras. 297-313; Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, paras. 209-211; Judgment, *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, para. 1675; Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, para. 541; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, para. 86; Judgment, *Stanišić and Simatović* (IT-03-69-T), Trial Chamber, 30 May 2013, paras. 954-955; Judgment, *Katanga* (ICC – ICC-01/04-01/07), Trial Chamber, 7 March 2014, para. 1178; Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, para. 130; Judgment, *Habré*, EAC, TC, 30 May 2016, paras. 1627-1633; Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3014; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, para. 238.

6 This is part of the jurisprudence as to the meaning of the word 'state' in Art. 12 of the Rome Statute.

With respect to crimes, in the Rome Statute of the International Criminal Court (ICC) the crime of aggression is defined as follows:

> means the planning, preparation, initiation or execution, by a person in a position effectively to exercise *control* over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[7]

As this article is quite new, there has been no judicial interpretation so far of what control means in this context, although one scholar has opined that this type of control should be equated with control in the doctrine command/superior responsibility,[8] which is contained in Article 28 of the Rome Statute and which will be discussed below.

Two underlying crimes of both war crimes and crimes against humanity have used the concept of control as part of their definitions.[9] The first one is the crime of torture, which is defined in the Rome Statute as

> the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the *control* of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.[10]

Control in this article has not been interpreted yet at the international level but in an Australian refugee case a court indicated that legal control over a detainee was not necessary but that the test for control required that in practical terms the victim was at the mercy of the accused.[11]

The second underlying crime employing this term is the crime of enslavement, for which it has been generally said that it needs to be shown that any or all the powers attaching to the right of ownership have been exercised over a person.[12] This has been further defined by stating,

> Under this definition, indications of enslavement include elements of *control* and ownership; the restriction or *control* of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often

7 Art. 8 *bis*(1), which came into operation on 18 July 2018.

8 *See* T. Einarsen, 'Prosecuting Aggression Through Other Universal Core Crimes at the International Criminal Court', *in* L. Sadat (Ed.), *Seeking Accountability for the Unlawful Use of Force*, St. Louis, Cambridge University Press, 2018, pp. 378-380.

9 The Rome Statute, the most comprehensive document in enumerating underlying crimes, sets out 11 such crimes in Art. 7(2) for crimes against humanity while Arts. 8.2(a), (b), (c) and (e) do the same for 59 war crimes.

10 Art. 7.2(e).

11 *SZITR v. Minister for Immigration and Multicultural Affairs* [2006] FCA 1759.

12 Judgment, *Kunarac et al.* (IT-96-23/IT-96-23/1), Trial Chamber, 22 February 2001, para. 540; Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, para. 446; the ICC Statute has a similar definition in Art. 7.2(c).

> rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[13]

In the area of individual accountability, control can be found in the doctrines of command/superior responsibility and co-perpetration. For the former, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the ICC Statute, have indicated that for a command/superior to be criminally responsible three requirements need to be fulfilled, namely that the commanders/superiors were in a superior–subordinate relationship with persons implicated in the commission of crimes, that they knew or should have known that crimes had been were committed or were to be committed and that they failed to take all necessary and reasonable measures to prevent or repress the commission of these crimes.[14] A superior–subordinate relationship exists where a superior has effective command and *control* over a subordinate, which means that the superior has

13 Judgment, *Kunarac et al.* (IT-96-23/IT-96-23/1), Trial Chamber, 22 February 2001, para. 542; approved by Judgment, *Kunarac et al.* (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, para. 119; *see also* Judgment, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012, paras. 152-158. It is not required to prove that the accused intended to detain the victims under constant *control* for a prolonged period of time (Judgment, *Kunarac et al.* [IT-96-23/IT-96-23/1], Appeals Chamber, 12 June 2002, para. 122).

14 *See* Art. 28 of the Rome Statute.

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the material ability to prevent or punish the subordinate's criminal conduct.[15] Command/superior responsibility can arise by virtue of the superior's *de jure* or *de facto* power over the relevant subordinates, which can be formal or informal and within a military or civilian hierarchy[16]; the possession of *de jure* power may not suffice for the finding of superior responsibility if it does not manifest in itself in effective *control*.[17]

Co-perpetration, which is form of criminal liability only known in the ICC Statute,[18] focuses on the degree of *control* carried out by a person who is removed from the scene of the crime but has *control* over or is the mastermind behind the commission of the offences. It can be distinguished from other forms of criminal accountability approaches, such as the objective approach where the objective manifestation of the crime (in that all the elements are carried out by the same

15 Judgment, *Orić* (IT-03-68-A), Appeals Chamber, 3 July 2008, para. 20; Judgment, *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, para. 1963; Judgment *Ndindiliyimana et al.* (ICTR-00-56-T), Trial Chamber, 17 May 2011, para. 1917; Judgment *Nyiramasuhuko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011, para. 5647; Judgment, *Perišić* (IT-04-81-T), Trial Chamber, 6 September 2011, paras. 140 and 147-148; Judgment, *Bagosora and Sengiyumva* (ICTR-98-41-A), Appeals Chamber, 14 December 2011, para. 642; Judgment, *Karemera et al.* (ICTR-98-44-T), Trial Chamber, 2 February 2012, paras. 1495 and 1496; Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, para. 111; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, paras. 241 and 244; Judgment, *Ndindiliyimana et al.* (ICTR-00-56-A), Appeals Chamber, 29 September 2014, para. 378; Judgment, *Nizeyimana* (ICTR-00-55C-A), Appeals Chamber, para. 342; Judgment, *Popović et al.* (IT-05-88-A), Appeals Chamber, 30 January 2015, para. 1857; Decision of the Confirmation of Charges, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, para. 418; Judgment, *Karemera* (ICTR-98-44-A), Appeals Chamber, 29 September 2014, paras. 254 and 258; Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, para. 995; Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, paras. 176, 178, and 180-190; Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, paras. 580-582; Judgment, *Habré*, EAC, TC, 30 May 2016, paras. 2175-2190; Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, paras. 3569; in the Rwandan context, it was held that a priest can have effective control, *see* Judgment, *Nsengimana* (ICTR-01-69-T), Trial Chamber, 17 November 2009, paras. 819-828.

16 Judgment, *Mucić et al.* (Čelebići Camp') (IT-96-21), Trial Chamber, 16 November 1998, paras. 195-197; Judgment, *Ndahimana* (ICTR-01-68), Trial Chamber, 30 December 2011, para. 726; Judgment, *Nizeyimana* (ICTR-2000-55C), Trial Chamber, 19 June 2012, para. 1476; Judgment, *Taylor,* (SCSL-03-01-T), Trial Chamber, 18 May 2012, para. 493; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, para. 242; Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, para. 580; Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3569.

17 Judgment, *Halilović* (IT-01-48-A), Appeals Chamber, 16 October 2007, para. 204; Judgment, *Hategekimana* (ICTR-00-55B-T), Trial Chamber, 6 December 2010, para. 654; Judgment *Nyiramasuhuko et al.* (ICTR-98-42-T), Trial Chamber, 24 June 2011, paras. 5650 and 5651; Judgment, *Perišić* (IT-04-81-T), Trial Chamber, 6 September 2011, paras. 142-144; Judgment, *Casimir Bizimungu et al.* (ICTR-99-50-T), Trial Chamber, 30 September 2011, para. 1873; Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, paras. 112 and 113 or if it only amounts to influence, see Judgment, *Casimir Bizimungu et al.* (ICTR-99-50-T), Trial Chamber, 30 September 2011, paras. 1891-1893; Judgment, *Nizeyimana* (ICTR-2000-55C), Trial Chamber, 19 June 2012, para. 1476; Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, para. 493.

18 Art. 25(3)(a).

person) is the focal point of investigation or such as the subjective approach, which does not primarily examine the level of contribution but instead focuses on the shared intent to carry out a crime, which is done in the joint criminal enterprise (as exemplified in the ICTY/ICTR jurisprudence as well that of the Special Court of Sierra Leone or SCSL) or the common purpose doctrine set out in Article 25(3)(d) of the Rome Statute.[19] The notion of *control* has been especially used in a form of perpetration not specifically set out in Article 25(3)(a) but read into this article by the judiciary, namely the indirect perpetration through an organization with the following criteria:

- the leader must have *control* over the organization;
- the organization must consist of an organized and hierarchical apparatus of power;
- the execution of crimes must be secured by an almost automatic compliance with the orders issued by the leader.[20]

Lastly in the ICL context, one of the defences,[21] which can mitigate or eliminate a person's liability for the commission of crimes, is necessity, which has been defined in the ICC Statute as follows (together with the defence of duress):

> The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
> - made by other persons or
> - constituted by other circumstances beyond that person's *control*.[22]

19 Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, paras. 327-331; Decision of Confirmation of Charges, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, paras. 346 and 347; Corrigendum of the Decision on the Confirmation of Charges, *Nourain and Jamus* (ICC-02/05-03/09), Pre-Trial Chamber I, 7 March 2011, para. 126; Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11), Pre-Trial Chamber II, 8 March 2011, para. 39; however, *see* Judgment *Chui*, Concurring Opinion of Judge Christine Van den Wyngaert (ICC-01/04-02/12), Trial Chamber, 18 December 2012, para. 6; Judgment, *Katanga* (ICC – ICC-01/04-01/07), Trial Chamber, 7 March 2014, paras. 1390-1397; Judgment, *Lubanga* (ICC-01/04-01/06 A5) Appeals Chamber, 1 December 2014, paras. 460-473; Judgment, *Jean-Pierre Bemba Gombo et al.* (ICC-01/05-01/13), Trial Chamber, 19 October 2016, para. 62.

20 Decision of the Confirmation of the Charges, *Katanga and Chui* (ICC No. ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, paras. 511-518; Judgment, *Katanga* (ICC – ICC-01/04-01/07), Trial Chamber, 7 March 2014, paras. 1404-1413; Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber, 8 July 2019, paras. 777-778. The ICC judges have further expanded the reach of Art. 25(3)(a) by also utilizing the concept of indirect co-perpetration by combining co-perpetration and indirect perpetration.

21 *See* Arts. 31-33.

22 Art. 31(1)(d).

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This defence has not been the subject of judicial discussion at the international level so far.[23]

The constituting ICL documents and their jurisprudence have used the notion of control primarily in two situations (apart from the just mentioned defence), namely firstly to establish a relationship of intense dependence between the perpetrators of international crimes and their victims (as in the crimes of torture and enslavement), while the second situation pertains to scenarios where a relationship of a criminal nature was sought between persons removed from the scene of the crime and the actual perpetrators of such crimes (as in aggression, command/superior responsibility and forms of co-perpetration). It should be pointed out that with respect to the first situation all crimes of humanity and a large number of war crimes contemplate people as victims and all of these crimes contemplate a relationship of dependence, which is sometimes expressed as the result of coercion (as in the crimes of rape[24] and deportation and transfer[25]) or in other cases (such as the crimes of imprisonment or inhumane treatment) is not further fleshed out. It is not clear from the jurisprudence whether control connotes a higher level of dependence than coercion or whether the distinction lies in duration. A comparative analysis has not been made in the jurisprudence and is also beyond the scope of this article.

23 There has only been a brief reference but no discussion in Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, paras. 52 and 54.

24 Judgment, *Kunarac et al.* (IT-96-23/IT-96-23/1), Appeals Chamber, 12 June 2002, paras. 129 and 130; Judgment, *Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, paras. 147-157; Judgment, *Karemera et al.* (ICTR-98-44-T), Trial Chamber, 2 February 2012, para. 1676; Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, paras. 415-417; Judgment, *Ngirabatware* (ICTR-99-54-T), Trial Chamber, 20 December 2012, para. 1381; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, para. 69.

25 Judgment, *Krajišnik* (IT-00-39-A), Appeals Chamber, 17 March 2009, para. 304; Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, para. 891; *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, para. 1738; Judgment, *Perišić* (IT-04-81-T), Trial Chamber, 6 September 2011, para. 113; Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, para. 61; Judgment, *Stanišić and Simatović* (IT-03-69-T), Trial Chamber, 30 May 2013, para. 992; Judgment, *Đorđević* (IT-05-87/1-A), Appeals Chamber, 27 January 2014, para. 705; *see also* the ICC Statute, Art. 7.2(d) and Decision on the Confirmation of Charges, William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012, paras. 244 and 245; Judgment, Case 002/01 (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014, paras. 450 and 451; Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, para. 488; Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3118.

2 The Notion of Control and the International Responsibility of States

Since a state can only act through actions of individuals, the attribution of conduct is a major factor to engage international responsibility of a state.[26] Two main principles are relevant for the international responsibility of states. First, without exception, the acts of any state organ that has that status in its national legal order will be attributed to that state. Secondly, exercise of control of the state over private actors results in responsibility.[27] The notion of control is an essential tool to determine if the conduct of non-state actors operating on behalf of the state could be attributed to the latter for the purposes of responsibility.[28] A major challenge is to determine the extent or threshold of control that a state has to exercise over a private actor in order to have his conduct to be attributable to the state.[29]

The notion of control initially became the subject of debate in a case before the ICJ. In the *Nicaragua* case, the ICJ had to determine first whether or not

> the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[30]

The Court concluded

> despite the heavy subsidies and other support provided to them by the United States, there [was] no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.[31]

Therefore, it considered

> United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of

26 For a more complete overview regarding the attribution of internationally wrongful acts to states, *see* among others: L. Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances', *Collected Courses of the Hague Academy of International Law*, Vol. 189, 1984, pp. 9-167; P. M. Dupuy, 'Quarante ans de codification du droit de la responsabilité internationale des États: un bilan', *Revue générale du droit international public*, Vol. 107, 2003, pp. 305-348.

27 D. Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations', *Buffalo Human Rights Law Review*, Vol. 13, 2007, p. 100.

28 V. Lanovoy, 'The Use of Force by Non-state Actors and the Limits of Attribution of Conduct', *European Journal of International Law*, Vol. 28, 2017, p. 574.

29 *Idem.*

30 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, para. 109 (hereinafter, Nicaragua Case).

31 *Idem., see also* para. 110.

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> its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general *control* by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the *control* of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.[32]

Next, the discussion with respect to the notion of control was raised in the *Tadić* case by the ICTY in order to establish that the conflict in the former Yugoslavia between Bosnia and Herzegovina and Serbia was still an international armed conflict (IAC) even after the Serbian army had withdrawn from Bosnian territory but continued to support one party in the conflict in that territory. While it was agreed between the parties that IHL was the appropriate area of law to make such a determination and it was agreed that IHL provides a test for such a determination, this test only refers to the notion of control in general terms without specifics. As a result, in the words of the Chamber, it was

> imperative to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is prima facie internal.

The appropriate body to find guidance would be general international law to supplement IHL, specifically the law of state responsibility.[33]

The ICTY Appeals Chamber refused to subscribe to ICJ interpretation in the *Nicaragua* case as it felt it was "unconvincing based on the very logic of the entire system of international law on State responsibility".[34] In the words of the Chamber,

> The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. … States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international

32 *Idem*., para. 115; emphasis added.

33 Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, paras. 96-98; *see also* S. Darcy, 'Assistance, Direction and Control: Untangling International Judicial Opinion on Individual and State responsibility for War Crimes by Non-State Actors', *International Review of the Red Cross*, Vol. 96, 2014, p. 260.

34 Judgment, *Tadić*, para. 116.

> 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. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[35]

The Chamber distinguished among several situations. First, the situation of a private individual engaged by a state to perform some specific illegal acts in the territory of another state would require the proof that the initial state issued

> specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent [since] a generic authority over the individual would not be sufficient to engage the international responsibility of the State.

Secondly, an unorganized group of individuals committing internationally wrongful acts would be in a similar situation. For their acts to be considered as those of the state,

> it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it *ex post facto* publicly endorsed those acts.[36]

Third, when an individual or a group of individuals are entrusted with the specific task of performing lawful actions on a state's behalf but then in discharging that task violate an international state obligation,

> by analogy with the rules concerning State responsibility for acts of State officials acting *ultra vires*, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.[37]

The major distinction, justifying the development of a different, overall control, test, lies between

> the situation of individuals who are acting on behalf of a State without specific instructions from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Nor-

35 *Idem.*, para. 117.
36 *Idem.*, para. 118.
37 *Idem.*, para. 119.

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> mally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the *overall control* of the State.[38]

The ICTY provided some details as to the parameters of the overall control test by saying this level of control exists when a state "*has 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".[39]

Although the overall control test has been criticized because it caused a risk of fragmentation in international law as a result of a rift in the jurisprudence of the ICTY and ICJ and the insistence by the ICTY on effective control, it nevertheless has remained a constant position held by the Tribunal.[40] Also, the ICC considered it as a "persuasive precedent [as] armed conflicts must also be classified in the light of the distinctions within Article 8 of the Rome Statute",[41] notably by affirming that it was the 'correct approach' to determine if a non-international armed conflict (NIAC) was internationalized.[42]

On the other hand, the ICJ continued to reject the overall control test by reaffirming that the appropriate approach in determining the international responsibility of state in case of violations committed by non-state groups was the effective control test as can be seen in the *Uganda v. Democratic Republic of Congo* (*DRC*) case[43] and especially in the *Genocide in Bosnia* case.

In the latter case, the ICJ strengthened its attachment to the effective control test by considering it was not able to subscribe to the ICTY's view regarding the overall control test in part because the purpose of the Tribunal was to establish

38 *Idem*., para. 120, emphasis added.

39 *Idem*., para. 137.

40 Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, paras. 122-136; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, paras. 297-313; Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, paras. 209-211; Judgment, *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, para. 1675; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, para. 86; Judgment, *Stanišić and Simatović* (IT-03-69-T), Trial Chamber, 30 May 2013, paras. 954 and 955; Judgment, *Katanga* (ICC – ICC-01/04-01/07), Trial Chamber, 7 March 2014, para. 1178; Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, para. 130; Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3014; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, para. 238.

41 Darcy, 2014, p. 261.

42 Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, para. 541; Judgment, *Katanga* (ICC – ICC-01/04-01/07), Trial Chamber, 7 March 2014, para. 1178; Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, para. 130.

43 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para. 160 (hereinafter, *Congo v. Uganda* Case), which describes the test as "on the instructions of, or under the direction or control of".

the nature of an armed conflict, while the Court had to deal with questions related to state responsibility.[44] Indeed, the ICJ considered that

> 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 involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[45]

In the Court's view with respect to the test for state responsibility,

> [T]he "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 [of the Draft articles on international responsibility of State]. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must

44 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, paras. 403 and 404 (hereinafter, Genocide Convention Case).

45 *Idem.*, para. 405.

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> exist between the conduct of a State's organs and its international responsibility.[46]

In addition, the Court reminded that "duality of responsibility continues to be constant feature of international law",[47] referring to Article 25(4) of the Rome Statute which says that "no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law" and to Article 58 of the ILC's *Draft Articles of the Responsibility of States for International Wrongful Acts*, which provides that "these articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State".[48] In its commentary on this provision, the ILC highlighted that

> [w]here crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. […] Article 58 [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term 'individual responsibility' has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.[49]

46 *Idem*., para. 406. For a critical point of view, *see* H. Ascensio, 'La responsabilité selon la Cour internationale de justice dans l'affaire du génocide bosniaque', *Revue générale du droit international public*, Vol. 111, 2007, p. 291; the author considers that the 'relationship of complete dependence' between a state and non-state actor is too strict and impossible to satisfy. *See also* the Dissenting Opinion of Vice-President Al-Khasawneh in the Genocide Convention Case, para. 39, which states that "to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives states the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore." Lastly, *see* B. Simma, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law*, Vol. 20, 2009, p. 280; the author considers that the ICJ exercised 'judicial diplomacy' in this case without taking into account the difficulties that arise from requiring a such strong link of dependence.

47 *Idem*., para. 173.

48 *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the United Nations (UN) General Assembly, Res. 56/83, 12 December 2001 (hereinafter, Draft Articles on Responsibility of States).

49 *Idem*., Commentary on Art. 58, para. 3.

Therefore, the ICJ projects the notion of duality of responsibility through the perspective of the control test and the notion of 'complete dependence' since it concludes in its *Genocide* Case, that according to its jurisprudence,

> [P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious. [...] However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence."[50]

A notable development with respect to question of state responsibility was the work of the ILC with its work on the 2001 *Draft Articles on Responsibility of States*, already referred to in both the *Tadić* and *Bosnian Genocide* cases. These articles distinguish between the attribution of actions and omissions committed by *de jure* organs in Article 4, and the ones of *de facto* organs of a state in Article 8. Acts of *de jure* organs are not the one in discussion in this article since it is said that those organs are mainly defined by domestic law, referring to a broad category of institutions as it encompasses all of a state's organs, regardless of their function and hierarchical position.[51] As interpreted by the ICJ in the *Nicaragua* and *Bosnian Genocide* cases, this article includes a person or a group of persons under 'complete dependence' of a state.[52] Such a person or a group of persons were described as '*de jure de facto*' organ since the criterion of the 'complete dependence' implies very close scrutiny over those persons since all their actions and

50 Genocide Convention Case, paras. 492 and 493. For further readings on the dual responsibility of both states and individuals and linked more specifically to the crime of genocide, *see* A. Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 875-887; A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law*, Vol. 18, 2007, pp. 649-668; P. Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?', *European Journal of International Law*, Vol. 18, 2007, pp. 631-648; Nina H. B. Jorgensen, 'Complicity in Genocide and the Duality of Responsibility', *in* B. Swart, A. Zahar, & S. Goran (Eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2011, pp. 247-274.

51 *See* Draft Articles on Responsibility of States, Commentary on Art. 8, paras. 6-8; *see also* D. Carron, 'When is a Conflict International? Time for New Control Tests in IHL', *International Review of the Red Cross*, Vol. 98, 2016, p. 1023.

52 *See* Nicaragua Case, para. 109; Genocide Convention Case, paras. 391-395 and 400.

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omissions are attributable to the state.[53] The *Bosnian Genocide* case added that this mean

> that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[54]

Article 8 states that

> 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.

While the level of control is not specified in the article or with a great deal of detail or clarity, it would appear that the ILC favours the effective control test as it points out when referring to both the *Nicaragua* and *Tadić* case[55] that the ICTY was dealing with individual rather than state responsibility while also mentioning effective control in another part of its commentary.[56]

There is a connection between state responsibility and the characterization of armed conflicts. The number of conflicts which start out as purely NIACs in that they are taking place on the territory of one state, which then morph into internationalized non-international armed conflicts (INIACs) due to the involvement of a third state in connection with one of the original parties, has been increasing in the last few decades. This type of situation can lead to two intertwined but separate questions, the first one of which is whether the level of control exercised by the third party is sufficient to elevate the armed conflict from a NIAC to an IAC, which can result in the application of different rules of IHL and the broader possibility of individual accountability under ICL; the test for this question is the overall control test as identified by the ICTY and endorsed by the ICC.[57] Secondly, there is the question whether the third party can be held responsible as a state for infractions committed by the party in the NIAC it is supporting; this question is answered with reference to the ICJ test of effective control.

Another main difference between the overall control and the effective control test lies in the fact the first one has to be exercised with respect to militarily organized groups while the second one is the one exercised for individual persons. It has been said that what distinguishes the effective control test defined by the ICJ in the *Nicaragua* case and the overall control test adopted by the ICTY in the *Tadić* case is a difference of nature and not of intensity regarding the relationship between the armed group and the controlling State.[58] Indeed, if the effective con-

53 Genocide Convention Case, para. 400.
54 *Idem*.
55 Draft Articles on Responsibility of States, Commentary on Art. 8, paras. 4 and 5.
56 *Idem*., para. 8.
57 Carron, 2016, p. 1020.
58 *Idem*., p. 1025.

trol criterion requires a closer scrutiny by the state over an armed group, above all, it requires an influence over specific actions that may equal to violations of international law, while the overall control envisions actions in a general way, requiring control on operations but not on each specific actions leading to acts that could be attributed to a state.

3 Control and the International Responsibility of International Organizations

The question of the attribution of responsibility to an international organization can arise when states and international organizations conduct activities in a third state in the case of multilateral operations. States responsibility and international organizations responsibility are not mutually exclusive. They can complement each other and even overlap in the same situation depending on the party that exercised control over the operations.[59] Therefore, it is necessary to clarify the meaning of control in the context of multilateral operations in the *Draft Articles on the Responsibility of International Organizations (Draft Articles)*.[60] The first approach with respect to attribution of conduct to an international organization is specified in Article 6, which deals with the conduct of organs or agents performing functions for that organization.[61] In the second approach, Article 7 establishes that the conduct of organs of a state or agents of an international organization placed at the disposal of another international organization will be considered as an act of the international organization if the latter exercises effective control over that conduct.[62]

The question can be raised as to what the meaning of effective control is in Article 7 and whether it has the same meaning as in case of international responsibility of states. It can be related to United Nations (UN) peacekeeping operations, in which the international organization exercises command and control over the

59 *See* for instance, K. Boon, 'Regime Conflicts and the U.N. Security Council: Applying the Law of Responsibility', *George Washington International Law Review*, Vol. 42, 2010, pp. 787-833.

60 Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, adopted by the International Law Commission at its sixty-third session, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87), *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, (hereinafter, Draft Articles on the Responsibility of International Organizations); for an overview of the Draft Articles in general as well as Art. 6 specifically, including the responsibility for omissions, *see* J. Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act', *European Journal of International Law*, Vol. 28, 2018, pp. 1145-1147.

61 Art. 6 of the Draft Articles on the Responsibility of International Organizations says: "1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization apply in the determination of the functions of its organs and agents."

62 Art. 7 of the Draft Articles on the Responsibility of International Organizations says: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

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conduct of the troops and for which states have placed national contingents at its disposal. Their status is complex since they are both organs of their respective states and of the international organization simultaneously. The test of the effective control detailed in Article 7 has been applied by domestic jurisdictions dealing with attribution of conduct of the UN peacekeeping forces. If the notion of effective control would have the same meaning as within the context of the international responsibility of the state, it would be necessary to prove that an unlawful act committed by a member of a UN peacekeeping force was taken under the instructions or the direction and control of the UN, which would be extremely difficult.[63]

This was not the option chosen since the Commentary of Article 7 given by the ILC suggests that a lower degree of control would be sufficient to attribute a conduct to the international organization without providing clear indications on this particular issue.[64] Indeed, the Commission considered that in the context of the attribution of conduct of an organ or an agent of an international organization, control plays a different role in comparison with the attribution of conduct to a state for the purpose of its international responsibility.[65] If the UN has exclusive control of the deployment of national contingents in a peacekeeping force, the question of the attribution of conduct to the state can arise if the latter retains powers over its national contingent and exercises a form of control.[66] Therefore, it seems that the formal transfer of powers from the state to the organization generates

> a presumption that the conduct is to be attributed to the organisation, without the need to demonstrate that the conduct was the result of specific instructions or of effective control over the specific conduct.[67]

Nevertheless, for the purposes of attribution, a combination of legal and factual elements has to be taken into account to determine if the conduct of an organ of a state that is placed at the disposal of an international organization is to be attributed to that international organization or to the sending state that either

63 P. Palchetti, 'The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations', *International Review of the Red Cross*, Vol. 95, 2013, pp. 732-733.

64 *Idem*.

65 Draft Articles on the Responsibility of International Organizations, para. 5.

66 *Idem*., paras. 6 and 7.

67 Palchetti, 2013, p. 734. The author adds that "Such a presumption should not be confused with the status of a subsidiary organ of the organization. What matters here is not the status of the force under the rules of the organization but the agreement between the organisation and the sending state, as one may presume that the delimitation of the respective powers agreed upon by the two parties provides an indication as to which entity, in principle, has control over the troops in relation to a given conduct. Obviously, this presumption may be rebutted. It may happen that a force, while acting under the formal authority of the organisation, has undertaken a certain conduct because of the instructions given to it by the contributing state. In such circumstances, the act must evidently be attributed to the state and not to the organization."

retained power overs its national contingent or addressed specific instructions during the operation.[68]

The notion of effective control exercised by international organizations has been discussed in the European Court of Human Rights (ECtHR)'s jurisprudence in *Behrami and Saramati* cases, where the use of '*ultimate authority and control*' became the preferred language.[69] The *Behrami* case was related to the killing of a child and injury caused to another child because of the explosion of undetonated cluster bombs that had not been eliminated by the UN Interim Administration Mission in Kosovo (UNMIK).[70] The Court considered the status of the UNMIK and concluded that it was "a subsidiary organ of the UN created under Chapter VII of the Charter as a result of which the impugned inaction was, in principle, 'attributable' to the UN".[71] In the *Saramati* case,[72] the applicant accused Norway, Germany and France for their involvement in his allegedly unlawful arrest and detention by their respective armed forces participating in the authorized mission in Kosovo on the basis of Security Council's resolution 1244 (1999) establishing the Kosovo Force (KFOR) peace-support operation. The ECtHR considered that the Security Council had the 'ultimate authority and control' over the operation since Chapter VII of the UN Charter allows the Council to proceed to a 'delegation of powers' to the states while defining clear limits to their mandate. Therefore, the conduct of the armed forces of the KFOR mission had to be attributed only to the UN.[73]

68 *Idem*. *See* the judgment of The Hague Court of Appeal, *Nuhanović v. The Netherlands*, Appeal Judgment, 5 July 2011, ILDC 1742 (NL2011), para. 5.9 affirming that "when applying this criterion, significance should be given [not only] to the question whether that conduct constituted the execution of a specific instruction, issued by the United Nations or the state, but also to the question whether, if there was no such specific instruction, the United Nations or the state had the power to prevent the conduct concerned". *See* the final decision of The Dutch Supreme Court, *Stichting Mothers of Srebrenica et al v. The Netherlands*, Judgment, 19 July 2019, ECLI:NL:PHR:2019:785, affirming a contrary position as it holds at para. 3.5.3. that "[T]he argument that effective control can also be evident from the circumstance that the State was in such a position that it had the power to prevent the specific act or acts of Dutchbat … is also based on an incorrect interpretation of the law. According to the Commentary (at 4) to Article 8 [Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA)], effective control only exists in the event of 'actual participation of and directions given by that State'". *See also*, for a critical position regarding this decision, T. Dannenbaum, 'A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands', *European Journal of International Law – Talk!*, 23 July 2019.

69 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, Grand Chamber, Decision on Admissibility, 71412/01 and 78166/01, 2 May 2007.

70 *Idem.*, paras. 5-7.

71 *Idem.*, paras. 143. *See also* Palchetti, 2013, pp. 730-731.

72 *Idem.*, paras. 8-17.

73 *Idem.*, paras. 133-141; *see also Kasumaj v. Greece*, Decision on Admissibility, 6974/05, 5 July 2007; *Gajić v. Germany*, Decision on Admissibility, 31446/02, 28 August 2007; *Berić and others v. Bosnia and Herzegovina*, Decision on Admissibility, 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, D45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; and *Al-Jedda v. the United Kingdom*, Grand Chamber Judgment, 27021/08, 7 July 2011.

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The position of the Court has been criticized, as the 'delegation of powers' does not seem to equal to the exercise of an effective control by the UN and that the sending states appear exempted from their international responsibility for the conduct of national contingents acting under their full control.[74] The validity of the notion of 'ultimate control and authority' test was questioned. Indeed, in the situation of multinational operations, in which the international organization is the one that gives the authorization to a military intervention but states retain full control over their national contingents, operate outside a chain of command within the organization, are not seconded to it and are not given the status of an organ under the rules of the organization, this notion might not be workable. The international organization exercises only a form of 'factual control' limited to receiving periodic reports.[75] Without any formal or factual link to the organization, the criteria of effective control required by Article 7 of the *Draft Articles* is not applicable and the conduct of national contingents must be attributed exclusively to the sending states according to Article 4(1) of the same articles.[76]

Finally, the notion of control can also apply to the responsibility of the international organization in case of actions taken by a state in the context of a multilateral operation. Article 17(2) of the *Draft Articles* establishes that

> [a]n international organisation incurs international responsibility if it circumvents one of its international obligations by authorising member States

74 Palchetti, 2013, p. 737. *See also* P. Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt Behrami et Saramati', *Annuaire Français de Droit International*, Vol. 53, 2007, pp. 43-66 and 55; L. A. Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force', *Collected Courses of the Hague Academy of International Law*, Vol. 339, 2008, p. 376. *See also* the Commentary on the Draft Articles, p. 58, n. 129, which states "Various authors pointed out that the European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission" while at p. 59, para. 10 of the Commentary, the Secretary-General of the United Nations distanced himself from this test and stated, "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control" (UNDOC S/2008/354, para. 16). For further readings on the notion of delegation of powers and the international responsibility of international organizations, *see* K. J. Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control Test', *European Journal of International Law*, Vol. 19, 2008, pp. 509-531; N. D. White & S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', *European Journal of International Law*, Vol. 19, 2008, pp. 965-988; M. Milanović & T. Papić, 'As Bad As It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law', *International and Comparative Law Quarterly*, Vol. 58, 2009, pp. 267-296; F. Hoffmeister, 'Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations', *European Journal of International Law*, Vol. 21, 2010, pp. 723-747.

75 Palchetti, 2013, p. 736.

76 Art. 4(1) of the Draft Articles on Responsibility of States establishes that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".

> or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorisation.

This provision echoes the 'ultimate authority and control test' developed by the ECtHR in considering that if the organization gives its authorization to commit unlawful acts, it exercises a form of 'normative control' over states, which prevails on the factual control of operations.[77]

4 Control and Occupation in IHL

4.1 Control and Occupation in IHL – General[78]

There are two forms of occupation, belligerent and pacific. Military or belligerent occupation within the meaning of IHL is coercive and in the absence of consent from the occupied state as opposed to pacific occupation to which the sovereign government of the occupied state consents.[79] Pacific occupation can turn into a belligerent occupation if the occupier refuses to remove its troops from the occupied territory after consent has been withdrawn.[80]

Belligerent occupation was first regulated in Article 52 of the 1907 Hague Regulations, which state that

> territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

77 Palchetti, 2013, p. 738. *See also* T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member State Troop Contingents serving as United Nations Peacekeepers', *Harvard International Law Journal*, Vol. 51, 2010, p. 192; the author considers that the notion of 'effective control' as applied in peacekeeping operations should be adjusted. Indeed, he considers that 'effective control' is the correct governing principle, but rather than 'overall operational control' as it has thus far been understood in the peacekeeping context, 'effective control' must be understood to mean 'control most likely to be effective in preventing the wrong in question.' By applying this revised principle, he proposes a five-category framework through which to assess the appropriate locus of responsibility for peacekeepers' human rights violations.

78 This part of the article will not discuss the issue of attempted control over territory by armed groups and the corresponding dilemma of states whether to resort to armed force or police enforcement tactics in the situation of counterinsurgency operations; for more information regarding this issue, *see* K. Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, Oxford, Oxford University Press, 2016, pp. 228-237.

79 Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, ICC OTP, 6 November, 2014, para. 24, n. 30; regarding the notion of consent, *see* T. Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law', *International Review of the Red Cross*, Vol. 94, 2012, pp. 152-155.

80 Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, para. 318; Ferraro, 2012, pp. 152-155.

When dealing with belligerent occupation, two prerequisites need to be fulfilled, namely that there exists an armed conflict between two countries[81] and that occupation is usually the result of an intervention or invasion into the territory of one country into the other[82] or the presence of foreign forces of one country in the second country.[83]

The fact that a territory is occupied does not exclude the possibility that hostilities may continue or resume. If the occupying power continues to maintain control of the territory in spite of resistance and sporadic fighting, the territory is still considered occupied.[84]

After these requirements have been fulfilled, it will be necessary to assess whether the essential element of occupation, namely whether the occupying forces had *effective control* over the territory they had taken, is present.[85] The notion of effective control has been addressed in the ICL jurisprudence and is present where the following elements are fulfilled:

- the occupying power must be in a position to substitute its own authority for that of the occupied power, rendered incapable of functioning publicly from that time forward;
- the enemy's forces have surrendered, been defeated or withdrawn; in this respect, battle areas may not be considered as occupied territory; however, sporadic local resistance, even successful, does not affect the reality of occupation;
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- a temporary administration has been established over the territory;

81 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, I.C.J. Reports 2004*, paras. 95 and 101; Pictet et al., *Commentaries to the 1949 fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, pp. 21-22 on Art. 2, para. 2. P. Spoerri, 'The Law of Occupation', *in* A. Clapham & P. Gaeta (Eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, p. 185.

82 Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, para. 318; *Congo v. Uganda* Case, para. 173; Ferraro, 2012, pp. 141, 146 and 148.

83 International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory*, 11 June 2012, p. 9; for a historical overview of the notion of occupation, *see* E. Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford, Oxford University Press, 2012, pp. 43-49.

84 Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, para. 319.

85 Report ICC OTP, 2014, paras. 23 and 24 (relying on both ICTY and ICC jurisprudence); Ferraro, 2012, pp. 139-140; International Committee of the Red Cross, 2012, p. 10.

– the occupying power has issued and enforced directions to the civilian population.[86]

Of the above requirements, the first one has been the subject of some controversy in the sense whether it is necessary for the occupying authority to exercise actual control over the occupied authority or whether it sufficient that it can project or has the ability to exercise such control. The majority of the academic commentators as well as the ICL jurisprudence have opted for the second approach.[87] Some confusion had been created by the ICJ, which opted for the actual control test,[88] but this has not been followed by other international tribunals and as such it can be said that ability to control test has the most traction at the moment.[89]

With respect to the other aspects of effective control, authority is to be considered in relation to the exercise of governmental authority and while it is possible to have shared authority between the occupying force and the remaining local authorities, the continued operation of the local government will ultimately depend on the occupiers' willingness to let the local government carry out its functions.[90] In regards to temporary administration, normally a period of relatively short duration of at least a few months is required, although there is some precedent for occupation lasting only a couple of weeks and in one extreme example, even a couple of days.[91] Lastly, the discussion regarding limits of the imposition of directions by the occupying forces on the local population has fluctuated between the position that no change can be made to the existing government structures on one hand and the position that transformative occupation whereby such structures can be reformed on the other with the preponderance of opinion staying on the cautious side of the discussion by stating that some changes can be made as long they do not amount to a wholesale upending of the existing government machinery.[92]

Multilateral forces, including those under UN command and control, can also be occupiers under the same conditions as mentioned above.[93] Effective control can be exercised by an occupier directly or indirectly through a proxy through de

86 Judgment, *Naletilić & Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, paras. 210-223 and 587; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, paras. 88-97 and 152-163; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, paras. 320, 335 and 340; Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, para. 542; Judgment, *Katanga* (ICC – ICC-01/04-01/07), Trial Chamber, 7 March, 2014, paras. 1179-1182; Spoerri, 2014, pp. 188-189; Ferraro, 2012, pp. 141, 142 and 155; Y. Dinstein, *The International Law of Belligerent Occupation*, Oxford, Cambridge University Press, 2009, pp. 42-45.

87 Ferraro, 2012, pp. 150-152; Spoerri, 2014, p. 190.

88 *Congo v. Uganda* Case, para. 173.

89 The most recent and authoritative view on this matter has been expressed in late 2017 by the Appeal Chamber of the ICTY, which not only follows previous and consistent precedents at both the ICTY and ICC but also when referring to the ICJ judgment in question prefers one of the concurring opinions rather than the majority to advance this position; *see* Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November, 2017, para. 322, n. 979.

90 Ferraro, 2012, pp. 148-149.

91 Dinstein, 2009, pp. 29-40.

92 Spoerri, 2014, pp. 196-197; ICRC, 2012, pp. 67-72.

93 Spoerri, 2014, p. 197; Ferraro, 2012, pp. 160-162.

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facto organized and hierarchically structured groups. The rationale behind this, according to the ICTY, is that states should not be allowed to evade their obligations under the law of occupation through the use of proxies.[94] Of interest to the notion of proxy forces is that the relationship between a main party and a proxy is one of overall control, a concept, which has been discussed above. However, the connection between overall control and effective control was addressed by the ICTY, which was of the view that

> the Chamber is of the view that there is an essential distinction between the determination of a state of occupation and that of the existence of an IAC. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation.[95]

This almost seem to denote a sequential approach whereby the relationship with respect to the proxy forces is examined first and then in how these proxy forces had effective control over a territory to amount to occupation.

4.2 Other Types of Control Over Territory in IHL

As indicated above, occupation can only occur as part of the regime regulating IACs. However, *control* over territory can also play an important role in NIACs and this concept can be found in Article 1(1) of Additional Protocol to the 1949 Geneva Conventions, which states that

> [t]his Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such *control* over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

This type of control operates at a much lower level than what is required for occupation[96] and has been characterized as temporary domination over a territory.[97]

94 Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, paras. 322 and 334; Ferraro, 2012, pp. 158-160.

95 Judgment, *Naletilić & Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, para. 214.

96 S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford, Oxford University Press, 2012, p. 187.

97 Y. Sandoz, C. Swinarski, & B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, 1987, p. 1352, para. 4465, n. 13.

The control must be sufficient to allow sustained and concerted military operations to be carried out, which is the crucial aspect of the above provision.[98]

While the above definition to distinguish IACs from NIACs has undergone an adjustment in ICL in that it has deleted specifically the element of control over a territory,[99] there have been a number of references to this type of control in the ICL jurisprudence. It has mentioned this concept of control when discussing aspects of the crimes of genocide, crimes against humanity and war crimes.

With respect to the crime of genocide, the notion of control has been used to elucidate the term 'in part' in the preamble of the definition of genocide,[100] which has been interpreted as being a substantial number or a significant section of the intended group. As well, the numeric size of the part of the group targeted, evaluated in absolute terms and relative to the overall group size, "is the necessary and important starting point in assessing whether the part targeted is substantial".[101] Other factors can include the prominence within the group of the targeted part, whether the targeted part of the group is emblematic of the overall group or is essential to its survival and the area of the perpetrators' activity and *control* and limitations on the possible extent of their reach.[102]

Crimes against humanity and control have been the subject of debate in two of its elements. First of all, the ICTY has held that an individual civilian, or a civilian population, falls into the hands of an adverse or hostile party to the conflict when it comes under the *control* of its members; in the hands of a party should not be interpreted literally but includes persons who find themselves in a territory that is under the *control* of an occupying power.[103] The second aspect of

98 *Idem*., para. 4466; *see also* Sivakumaran, 2012, p. 187.

99 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, para. 70; Judgment, *Perišić* (IT-04-81-T), Trial Chamber, 6 September 2011, para. 72; Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, para. 533; Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, para. 563; Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, para. 682; Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, para. 32; Judgment, *Stanišić and Simatović* (IT-03-69-T), Trial Chamber, 30 May 2013, para. 953. This jurisprudential development is also reflected in the Rome Statute, Art. 8(3), second sentence, which was discussed in Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, para. 533.

100 Art. 6 of the Rome Statute says: "for the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such": this definition has remained the same since it was first included in the 1948 Genocide Convention and was also part of the definition of the Statutes of the International Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR).

101 Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, paras. 6-23, Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, para. 832; Judgment, *Gatete* (ICTR-2000-61-T), Trial Chamber, 31 March 2011, para. 582; Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, para. 749; Judgment, *Popović et al.* (IT-05-88-A), Appeals Chamber, 30 January 2015, paras. 419 and 415; Judgment, *Tolimir* (IT-05-88/2-A), Appeals Chamber, 8 April 2015, para. 186; Judgment, *Mladić*, (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3437.

102 Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, para. 832; Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, para. 749; Genocide Convention Case, para. 142; Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, para. 555.

103 Judgment, *Martinovic* (IT-98-34-T), Trial Chamber, 23 March 2003, para. 208.

crimes against humanity of interest is the definition of this crime in the Rome Statute, which uniquely says,

> Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[104]

In order to determine what the requirements of an organization are, the ICC Pretrial Chamber has indicated,

> In the view of the Chamber, the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, inter alia: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises *control* over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.[105]

104 Art. 7(2)(a).

105 Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, majority decision, para. 93; Decision on the Confirmation of Charges, William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012, paras. 184 and 185; *see also* ICC, OTP, Art. 5, Report re the Situation in Honduras, 28 October 2015, para. 83; The Dissenting Opinion of Judge Hans-Peter Kaul, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010 (arguing for the narrower interpretation of organizations, namely state-like entities) says in para. 51: "1 read the provision such that the juxtaposition of the notions 'State' and 'organization' in Art. 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a state. Those characteristics eventually turn the private 'organization' into an entity which may act like a state or has quasi-state abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale." By way of observation it seems odd that while saying that Kaul's definition is narrower he does not insist on territorial control, which seems an obvious element for a narrower interpretation as well an attribute of a state-like entities; it equally odd that the majority does the exact opposite.

The jurisprudence with respect to the war crime of destruction of religious buildings stems from the ICC and is related to the fact that the ICC Statute, unlike the ICTY jurisprudence, has eliminated the requirement that a cultural, historical or religious building needs to be damaged as part of an attack.[106] In this context, it is said that there is no distinction as to whether the destruction was carried out in the conduct of hostilities or after the object had fallen under the *control* of an armed group.[107]

The above jurisprudence does not clarify, which document is used as the source for these statement with the exception of the ICC judgment, which refers to Article 1(1) of Additional Protocol II.[108]

5 Control in Statehood[109]

There are two theories that provide guidance with regards to legal recognition of an entity's sovereignty in the international community. The first is the declarative theory while the second is the constitutive theory.[110] The declarative theory holds that an entity is recognized as a state when it satisfies the following objective criteria for statehood, which are laid down in Article 1 of the *Montevideo Convention* of 1933, namely that there must be

i a permanent population;
ii a defined territory;
iii an effective government; and
iv the capacity to enter into relations with other states.[111]

This provision was judicially considered by the Trial Chamber of the ICTY in the *Milosević* case with respect to the forming of the statehood of Croatia in October

106 *See* Arts. 8.2(b)(ix) and 8.2(e)(iv); for the interpretation of these articles, *see* Decision on the Confirmation of Charges against Ahmad Al Faqi Al Mahdi (ICC-01/12-01/15), Pre-Trial Chamber I, 24 March 2016, para. 43 and Judgment, *Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 27 September 2015, para. 16; for the ICTY jurisprudence, which insists on this requirement, *see* Judgment, *Martić* (IT-95-11-T), Trial Chamber, 12 June 2007, para. 96; Judgment, *Hadžihasanović and Kubura* (IT-01-47-T), Trial Chamber, 15 March 2006, para. 58; Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, para. 88; Judgment, *Prlić et al.* (IT-04-74), Trial Chamber, 29 May 2013, para. 178.

107 Judgment, *Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 27 September 2016, para. 15.

108 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, majority decision, para. 93, n. 88.

109 For a discussion of the issues surrounding the succession of states and state responsibility and the work done by the ILC in this regard, *see* its Report on the Work of the Seventieth Session, UNDOC A/73/10, Chapter X, 2019, pp. 273-282.

110 J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, Oxford University Press, 2007, pp. 19-28; E. De Wet, 'The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force', *European Journal of International Law*, Vol. 26, 2015, p. 984.

111 Convention on the Rights and Duties of States (Montevideo Convention), 26 December 1933, 165 League of Nations Treaty Series (LNTS), 28, Art. 1.

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1991. It indicated that the criteria set out by the *Montevideo Convention* are well-established principles for the determination of statehood. According to the Trial Chamber, the formation of states is regulated by law and that law is reflected in the four criteria found in the *Montevideo Convention*.[112]

With regards to the first criterion of statehood, the Trial Chamber in *Milosević* noted the importance of the community in Croatia, mentioning that

> the power in the republic derives from the people and belongs to the people as a community of free and equal citizens. The people shall exercise this power through the election of representatives and through direct decision making.[113]

With regards to the second criterion of statehood, a defined territory means that the entity claiming to be a state must be in *control* of a certain area. While the existence of fully defined borders is not a requirement, an effective establishment of a settled community is associated with control over a certain area.[114]

With regards to the third criterion of statehood, in order to qualify as a state, an entity must have an effective government. There are two tests that can be applied to determine whether a government is legitimate for the purposes of accepting jurisdiction. The first is politically based, recognizing a government that came to power by means of a coup, for example. The second is more objective, used to determine whether the government that came to power has *effective control* to accept jurisdiction.[115] Historically, the emphasis has been on the control that the government exercises over relevant territory. However, the degree of control is usually measured by the approach in which the government came to power. Notably, if statehood is opposed internally, then a high degree of control may be necessary, whereas if the prior sovereign in the territory had consented to the rule of a new government, a lower degree of control by the government may be tolerable in adhering to the concept of statehood.[116]

The Trial Chamber was of the view that the notion of a substantial part of the territory as a measure of effective control is not only a mathematical calculation but can also be evidenced by the sway a government holds over its territory and population.[117] It came to the conclusion that Croatia had an effective government as of 8 October 1991 based on the fact that it had a functioning government with

112 Decision on Motion for Judgment of Acquittal, *Milosević* (IT-02-54-T), Trial Chamber, 16 June 2004, paras. 86-88.
113 *Idem*., para. 94.
114 *Idem*., paras. 96 and 98.
115 *Idem*., para. 102; for a reverse situation where a government has lost large parts of its territory to rebel forces but is still internationally presumed to have effective control, *see* De Wet, 2015, pp. 990-992.
116 Crawford, 2007, p. 59.
117 Decision on Motion for Judgment of Acquittal, *Milesović* (IT-02-54-T), Trial Chamber, 16 June 2004, para. 105.

ministerial personnel and other personnel being sent to represent the government at meetings, including some with international institutions, as well as the performance of a variety of other government functions. Further, admitted exhibits evidence the adoption of significant legislation.[118]

6 Control in the Extraterritorial Application of IHRL

6.1 Control in the Extraterritorial Application of IHRL – ECtHR

6.1.1 Introduction

The question of extraterritorial application of IHRL arises when the state activity takes place beyond national borders in a foreign territory. It aims to identify if the state exercises jurisdiction outside its national borders and in which circumstances. Indeed, having jurisdiction leads to the existence of an international obligation for the state that is also the necessary condition to lead to the international responsibility in case of breach.[119] Three stages were identified in the development of international case law on the notion of extraterritoriality. The early period in the practice of the ECtHR was aimed at determining an adequate approach to deal with extraterritoriality of human rights. The second period starts with the *Loizidou* and *Banković* cases decided by this court and is characterized by the domination of the concept of territoriality and the test of territorial control in order to establish jurisdiction in regard to Article 1 of the European Convention on Human Rights (ECHR). The third period represents the post-Banković era, during which the principle of territoriality and its presumption faced numerous challenges and during which the ECtHR uses the control over territory test and one of control over persons in parallel.[120]

In fleshing out this general proposition, the ECtHR distinguishes between two types of situations: on one side, the 'State agent authority' approach and the notion of control over persons while on the other side there is the approach of 'effective control over an area'. Regarding the 'State agent authority' and the notion of 'control', the Court considers

118 *Idem.*, para. 106; this approach was also confirmed in more general terms by the ICC in the Determination of the Office of the Prosecutor on the communication received in relation to Egypt (ICC document, ICC-OTP-20140508-PR1003, 8 May 2014) and alluded to earlier in Situation in Palestine, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, 4 May 2010, paras. 41-47; *see* Crawford, 2007, p. 59 who is of the view that there is no specific requirement as it 'includes some degree of maintenance of law and order and the establishment of basic institutions'.

119 M. Milanović & T. Papić, 'The Applicability of the ECHR in Contested Territories', *International and Comparative Law Quarterly*, Vol. 67, 2018, pp. 2-3. *See also* Arts. 1 and 2 of the ILC's Draft Articles on Responsibility of States on the definition of an internationally wrongful act and its consequences.

120 *See* M. Gondek, *The Reach of Human Rights in a Globalising world: Extraterritorial Application of Human Rights Treaties*, 1st ed., Intersentia, 2009, pp. 122-123. *See also* Gondek, 2009, pp. 123-126 for the earliest cases with an extraterritorial element under the ECHR; and Gondek, 2009, pp. 126-132 for interstate cases concerning Northern Cyprus before the European Commission of Human Rights.

> [i]t is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.[121]

6.1.2 Effective Control Over Territory

In the case of *Loizidou v. Turkey*[122] the Court indicated that Article 1 of the ECHR is related to the obligation to respect human rights and establishes that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" defined by the Convention.[123] The ECtHR observed that the concept of jurisdiction under this provision was not limited to the national territory of the state party enumerating several approaches. Firstly, the state party could engage its international responsibility in case of extradition or expulsion of a person who may face violations regarding Article 3 of the Convention.[124] Secondly, the responsibility of the State could be involved because of acts committed by their authorities, whether within or outside the national territory but having effects outside their own territory.[125] Finally, and of interest to this article, relates to the notion of *effective control* exercised outside the national territory.

The question of *effective control over an area* refers typically to situations "when as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory".[126] Therefore, in this approach,

> [t]he controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.[127]

121 *Al-Skeini and Others v. the United Kingdom*, Grand Chamber Judgment, 55721/07, para. 110; *Jaloud v. the Netherlands*, Grand Chamber Judgment, 47708/08, para. 137.

122 *Loizidou v. Turkey*, Decision re Preliminary Objections, 23 March 1995, Series A no. 310.

123 *Idem*., para. 59.

124 *Idem*., para. 62. *See Soering v. the United Kingdom*, 7 July 1989, para. 91, Series A no. 161; *Cruz Varas and Others v. Sweden*, 20 March 1991, paras. 69 and 70, Series A no. 201; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, para. 103, Series A no. 215.

125 *Drozd and Janousek v. France and Spain*, 26 June 1992, para. 91, Series A no. 240.

126 Al-Skeini, para. 138.

127 *Idem*. *See also Cyprus v. Turkey*, Grand Chamber Judgment, 25781/94, ECHR 2001-IV, para. 77.

This situation refers to the situation of '*effective overall control*' that was considered by the ECtHR in one of its judgments in the *Loizidou* case.[128] The Court has also indicated that the state party does not need to exercise "detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage [its] responsibility".[129] Over the years, the ECtHR has confirmed its initial jurisprudential position and enriched it in regard to the factual circumstances of each case. Also, the Court highlighted that the test to determine state's jurisdiction is different than the one to establish state responsibility for an internationally wrongful act under interna-

128 *Loizidou v. Turkey*, Judgment, 18 December 1996, para. 56, Reports of Judgments and Decisions 1996-VI: "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in Northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC.' Those affected by such policies or actions therefore come within the 'jurisdiction'—of Turkey for the purposes of Art. 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus." The Court reiterated the use of the notion of 'effective overall control' notably in *Cyprus v. Turkey*, Grand Chamber Judgment, 25781/94, para. 77. *See also* Milanović, 2011, pp. 136-137: the author highlights that "the Court's rulings in *Loizidou* and *Cyprus v. Turkey* can reasonably be interpreted in two ways: either the Court thought that the acts of the TRNC were attributable to Turkey, or it thought it unnecessary to deal with this question, finding instead that Turkey had a positive obligation to secure the human rights of the inhabits of Northern Cyprus by virtue of its control over the territory. […] [he] prefer[s] the latter option, because it reconciles the European Court with the ILC's and the ICJ's approach to state responsibility. Hence, while this Art. 1 ECHR 'effective overall control' test bears resemblance to the ICJ's effective control test in Nicaragua, the two are conceptually distinct—the former refers to state control over territory for the purpose of establishing whether the state has jurisdiction over the territory, the latter to state control over actors and their specific acts for the purpose of attributing these acts to the state. Of course, the control by a state over territory must be exercised by its agents, i.e. persons whose acts are attributable to it".

129 *Ilaşcu and Others v. Moldova and Russia*, Grand Chamber Judgment, 48787/99, ECHR 2004-VII, para. 315; *see also Loizidou v. Turkey*, 1996, para. 56.

tional law, developed by the ICJ, notably in *Nicaragua* and *Genocide* cases discussed above.[130]

For the Court, this criterion considers that when one state exercises effective control operating overall, in such circumstances, it is not necessary to prove that there was control of every action and that its exercise was detailed. Indeed, the effective overall control test of a territorial unit implies that everything within that unit will fall within the state's jurisdiction, even if powers are exercised by other actors at lesser levels, in particular when activities are devolved to other states or local actors operating in the same unit.[131] The 'effective overall control' sets a relatively high threshold since it requires a military presence on the ground, in the foreign state. Nevertheless, if the threshold required is high, it is not as high as the one that a state has to exercise over its own territory in peacetime or in normal circumstances. Finally, the 'effective overall control' requires taking into consideration a number of indicators such as visible exercise of administration, *de facto* government or public powers, but also more problematic circumstances where there is no permanent control and of which its characteristics are not clearly defined.[132] It can also be emphasized that control over a territory does not need to be exclusive in order to be considered as effective. Even if it does normally exclude the exercise of control by the territorial state, it is not always necessarily the case.[133]

130 *Catan and Others v. the Republic of Moldova and Russia*, Grand Chamber Judgment, 43370/04, para. 115, ECHR 2012 (extracts), emphasis added: "The Government of the Russian Federation contend that the Court could only find that Russia was in *effective control* if it found that the 'Government' of the 'MRT' could be regarded as an organ of the Russian State in accordance with the approach of the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [...]. The Court recalls that in the judgment relied upon by the Government of the Russian Federation, the International Court of Justice was concerned with determining when the conduct of a person or group of persons could be attributed to a State, so that the State could be held responsible under international law in respect of that conduct. In the instant case, however, the Court is concerned with a different question, namely whether facts complained of by an applicant fell within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. As the summary of the Court's case-law set out above demonstrates, the test for establishing the existence of 'jurisdiction' under Article. 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law." *See also Jaloud v. the Netherlands*, Grand Chamber Judgment, 47708/08, para. 154, ECHR 2014; *Mozer v. the Republic of Moldova and Russia*, Grand Chamber Judgment, 11138/10, para. 98, 23 February 2016; *Chiragov and Others v. Armenia*, Grand Chamber Judgment, 13216/05, ECHR 2015, para. 168.

131 *See* R. G. Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights', *in* S. Sheeran & S. N. Rodley (Eds.), *The Routledge Handbook of International Human Rights Law*, Routledge, 2013, p. 642. *Loizidou v. Turkey*, para. 56; *Cyprus v. Turkey*, para. 77.

132 Milanović, 2011, p. 141. *See, e.g., Issa and Others v. Turkey*, Judgment, 31821/96, 16 November 2004, paras. 71 and 73-76; *Ilaşcu and Others v. Moldova and Russia* paras. 382-385, 387 and 392-394.

133 Milanović, 2011, p. 148.

6.1.3 Control Over Persons

With respect to the test relation to *control over persons*, the ECtHR developed recently case law concerning the issue of jurisdiction under Article 1 of the Convention in respect to the situation pertaining to the Transdniestrian region of Moldova.[134] The Court found on a number of occasions that even though Moldova had no effective control over the Transdniestrian region in terms of control over territory, it still was the territorial state justifying that persons within that territory fell within its jurisdiction. Nevertheless, it concluded that Moldova's obligation was limited to taking diplomatic, economic, judicial and other measures that were both within in its power and in accordance with international law.[135] Regarding the Russian Federation's involvement in the Transdniestrian region of Moldova, the Court ruled that it contributed both militarily and politically to the creation of a separatist regime in this region in 1991-1992.[136] In subsequent cases, it also found that up until July 2010, the MRT separatist force

> was only able to continue to exist, and to resist Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, because of Russian military, economic and political support.[137]

In the case of Mozer, the Court concluded that the

> MRT's high level of dependency on Russian support provided a strong indication that the Russian Federation continued to exercise control over the

134 *Ilaşcu and Others v. Moldova and Russia*, paras. 311-319; *Catan and Others v. the Republic of Moldova and Russia*, paras. 103-107; more recently, *Mozer v. the Republic of Moldova and Russia*, 23 February 2016, paras. 97 and 98; *Mangîr and Others v. the Republic of Moldova and Russia*, Judgment, 50157/06, 17 July 2018, para. 25.

135 *Mangîr and Others v. the Republic of Moldova and Russia*, para. 26; *Ilaşcu and Others v. Moldova and Russia*, para. 333; *Catan and Others v. the Republic of Moldova and Russia*, para. 109; *Mozer v. the Republic of Moldova and Russia*, para. 100.

136 *Ilaşcu and Others v. Moldova and Russia*, para. 382.

137 *Mangîr and Others v. the Republic of Moldova and Russia*, para. 28; *Ivanţoc and Others v. Moldova and Russia*, Judgment, 23687/05, 15 November 2001, paras. 116-120; *Catan and Others v. the Republic of Moldova and Russia*, paras. 121 and 122; *Mozer v. the Republic of Moldova and Russia*, paras. 108 and 110.

> Transdniestrian authorities and that, therefore, the applicant fell within that State's jurisdiction under Article 1 of the Convention.[138]

In a similar way, the Court ruled that Armenia exercised control over Nagorno-Karabakh and consequently that the events, which happened in that territory and the acts committed by the Karabakhi authorities fell within Armenia's jurisdiction for the purposes of Article 1 of the European Convention.[139] Indeed, the Court found it

> to be established that from the early days of the Nagorno Karabakh conflict, Armenia had had a significant and decisive influence over Nagorno Karabakh, that the two entities were highly integrated in virtually all-important matters and that this situation persisted to this day. In other words, Nagorno Karabakh and its administration survived by virtue of the military, political, financial and other support given to it by Armenia, which, consequently, exercised effective control over Nagorno Karabakh and the surrounding territories. [...]."[140]

It also considered that

> by exercising effective control over Nagorno Karabakh and the surrounding territories, Armenia is under an obligation to secure in that area the rights and freedoms set out in the Convention and its responsibility under the Convention cannot be confined to the acts of its own soldiers or officials operating in Nagorno Karabakh but is also engaged by virtue of the acts of the local

138 *Mozer v. the Republic of Moldova and Russia*, paras. 110 and 111; *See also Mangîr and Others v. the Republic of Moldova and Russia*, para. 28. For other recent cases in which the ECtHR adopted the same interpretation taking into account the fact that the main events in the Transdniestrian region of Moldova happened in 2004-2006: *Sandu and Others v. the Republic of Moldova and Russia*, Judgment, 21034/05 and 7 others, 17 July 2018, paras. 32-39; *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, Judgment, 1089/09, May 2018, paras. 41-50, 29; *Braga v. the Republic of Moldova and Russia*, Judgment, 76957/01, 17 October 2017, paras. 19-27; *Draci v. the Republic of Moldova and Russia*, Judgment, 5349/02, 17 October 2017, paras. 23-31; *Soyma v. the Republic of Moldova, Russia and Ukraine*, Judgment, 203/05, 30 May 2017, paras. 19-22; *Vardanean v. The Republic of Moldova And Russia*, Judgment 2200/10, 30 May 2017, paras. 19-25; *Apcov v. the Republic of Moldova and Russia*, Judgment 13463/07, 30 May 2017, paras. 20-26; *Paduret v. the Republic of Moldova and Russia*, Judgment, 26626/11, 9 May 2017, paras. 15-21. For a recent study related to the situation in Ukraine, *see* S. M. Wallace, 'Applying the European Convention on Human Rights to the Conflict in Ukraine', *Russian Law Journal*, Vol. 6, 2018, pp. 8-78. *See also* M. Milanović, 'Russian Agents Charged with Downing of MH17; MH17 Cases in Strasbourg', *European Journal of International Law – Talk!*, 20 June 2019.

139 *Chiragov and Others v. Armenia*, Judgment, 13216/05, ECHR 2015, paras. 169-186; *Zalyan and Others v. Armenia*, Judgment, 36894/04 and 3521/07, 17 March 2016, paras. 214 and 215; *Muradyan v. Armenia*, Judgment, 11275/07, 24 November 2016, paras. 124-126. For further developments, *see* A. Berkes, 'The Nagorno-Karabakh Conflict before the European Court of Human Rights: Pending Cases and Certain Forecasts on Jurisdiction and State Responsibility', *Military Law & Law of War Review*, Vol. 52, 2013, pp. 379-438.

140 *Chiragov and Others v. Armenia* [GC], paras. 169-186; *see also Muradyan v. Armenia*, para. 126.

administration which survives by virtue of Armenian military and other support.[141]

6.2 Control in the Extraterritorial Application of IHRL – Other Courts[142]

In addition to the jurisprudence of the ECtHR, there have also been pronouncements by the ICJ, international human rights treaty bodies and other regional human right courts. On the question on whether or not jurisdiction could have an extraterritorially meaning, the ICJ interpreted the term jurisdiction in international human rights treaties as operating extraterritorially in certain circumstances. In the Wall Advisory Opinion, the question examined was whether the international human rights conventions, to which Israel was a state party, could be applied to the Occupied Palestinian Territory.[143]

The ICJ observed first that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory", considering the object and purpose of specifically the International Covenant on Civil and

141 *Muradyan v. Armenia*, para. 126; *Zalyan and Others v. Armenia*, paras. 214 and 215; *Djavit An v. Turkey*, Judgment, 20652/92, ECHR 2003-III, paras. 18-23; and *Amer v. Turkey*, Judgment, 25720/02, 13 January 2009, paras. 47-49.

142 *See* Gondek, 2009, pp. 132-139 for early cases and the ICCPR before the HRC, esp. p. 136 for details over *Case of López Burgos v. Uruguay*, HRC, 29 July 1981, case no. 52/79, UNDOC. A/36/40, p. 176, paras. 12.1-12.3 in which the reasoning to conclude on the extraterritorial application of the ICCPR is based on the relationship between a person and a state while taking into account logic and morality; the HRC also makes a parallel with Art. 5(1) of the Covenant; *see also* pp. 139-141 on early cases in the Inter-American system: the vast majority of extraterritoriality cases were considered by the Inter-American Commission under the American declaration of Rights and Duties of man. The American Convention entered into force on 18 July 1978 and has not yet been ratified by all the states parties of the Organization of the American States. Since it is not a treaty and makes no reference to the question of jurisdiction, the first reference to the issue of extraterritoriality did not result from individual applications but arisen in the Commission reports on the human rights situation in Chile and Suriname. The first case based on an individual application dealt with boat people arriving from Haiti and trying to reach the US territory, *see* p. 140 for more details on this case.

143 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 102 (hereinafter, Wall Advisory Opinion): "Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace." For a historical overview of the interrelationship between IHL and IHRL, *see* B. Van Wijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions', *American Journal of International Law*, Vol. 112, 2018, pp. 553-582.

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Political Rights (ICCPR) requiring states to comply with its provisions.[144] Therefore, the ICJ concluded that the ICCPR applied "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[145] Regarding the International Covenant on Economic, Social and Cultural Rights (ICESCR), even though it does not contain any provision on its scope of application, the Court reached the same conclusion considering that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".[146] The Court took into consideration the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights and its rejection by the latter, in several communications stating that in "its view [...] the State party's obligations under the Covenant apply to all territories and populations under its *effective control*".[147] For the same reasons related to the relation between IHL and IHRL, the Court observed that the Convention on the Rights of the Child (CRC) was also applicable to the Palestinian Occupied Territory.[148]

At the international human rights body level, there has been the United Nations Human Rights Committee (HRC) interpreting the ICCPR. Unlike the Article 1 of the ECHR, Article 2(1) of the ICCPR makes a reference not only to state jurisdiction but also to territory, indicating that

144 Wall Advisory Opinion, para. 109. The ICJ refers to individual communications of the Human Rights Committee establishing that states exercise their jurisdiction on foreign territories; *see* for instance, case no. 52/79, *Lopez Burgos v. Uruguay*, point 12.3 and case no. 56/79, *Lilian Celiberti de Casariego v. Uruguay*, point 10.3 for decisions related to the legality of acts committed by Uruguay in arrests carried out by Uruguayan agents in Brazil or Argentina; *see also* case no. 106/181, *Montero v. Uruguay* concerning the confiscation of a passport by a Uruguayan consulate in Germany. The Court also mentions the travaux préparatoires of the Covenant confirming this interpretation since they "show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow states to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence."

145 *Idem*, para. 111.

146 *Idem*., para. 112.

147 *Idem*. The Court added "the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, the provisions of the International Covenant on Economic, Social and Cultural Rights bind Israel. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities".

148 *Idem*., para. 113. For an interesting and recent study related to the relationship between IHL and IHRL put through the perspective the duty to investigate in case of violations of international law causing civilian casualties, *see* R. Santicola, H. Wesa, 'Extra-territorial Use of Force, Civilian Casualties and the Duty to Investigate', *Columbia Human Rights Law Journal*, Vol. 49, 2018, pp. 183-266.

> each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.[149]

The HRC, in its interpretation of Article 2(1) in General Comment no. 31, stated the following:

> As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or *effective control* of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[150]

At the regional level, within the African human rights system, the African Commission on Human and Peoples Rights (ACHPR) has considered cases of human rights violations occurring on the territory of other states. In the case of the *DRC v. Burundi, Rwanda and Uganda*, the Commission found the three states to be responsible for the violations of human rights guaranteed by the African Charter because of the occupation of territory of the DRC by the armed forces of these

149 Art. 2(1), ICCPR: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

150 HRC, General comment no. 31 [80], The Nature of the General Legal Obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10; *see also* paras. 11 and 12:

> "11. As implied in General Comment 291, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.
>
> 12. Moreover, the Art. 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their *control* entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Arts. 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters."

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three states.[151] Indeed, it was of the view that states are responsible for the violations of human rights they commit outside their national territory.[152]

The Inter-American system dealt with issues related to state responsibility for acts committed abroad in a slightly different way.[153] On one hand, the more traditional approach, when a perpetrator of a violation of human rights is subject to the authority or *effective control* of that state[154] while on the other, when the actions or omissions have effects outside the national territory of the state.[155]

While Article 2 of the American Declaration on the Rights and Duties of Man has no express jurisdictional scope, the American Convention on Human Rights establishes in Article 1(1) a limited jurisdictional scope which is stated as follows:

> The State Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination [...].

The Inter-American Commission on Human Rights (IACHR) has interpreted this article as not being limited to the national territory as

151 ACHPR, Communication 227/1999, *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda*, 20th Annual Activity Report, 2006, paras. 93-96 and 98.

152 *Idem.; see also* T. S. Bulto, 'Patching the "Legal Black Hole": The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System', *South African Journal on Human Rights*, Vol. 27, 2011, pp. 260-263; the author also mentions the communication 157/96, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, 17th Annual Activity Report, 2004, para. 52; this case dealt with the imposition of an embargo from the defendant states but "the '*effective control*' element was not a requirement in the Burundi Embargo case while it was a constitutive element of state responsibility in the DRC Invasion case". For a complete overview of extraterritoriality in the African system, *see* L. Chenwi & S. Bulto, *Extraterritorial Human Rights Obligations from an African Perspective*, 1st ed., Intersentia, 2018.

153 *See* for a review on the question of extraterritoriality in the Inter-American system, D. Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations', *Buffalo Human Rights Law Review*, Vol. 13, 2007, pp. 136-140.

154 IACHR, *Victor Saldaño v. Argentina*, report no. 38/99, 11 March 1999, paras. 17-20.

155 *Idem.*, paras. 15-20; the Commission refers to and supports the case law of the European Commission and Court of Human Rights; IACHR, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia, Inter-State Petition PI-02*, report on Admissibility, No. 112/10, emphasis added, 21 October 2010, para. 91: "In international law, the bases of jurisdiction are not exclusively territorial, but may be exercised on several other bases as well. In this sense, the IACHR has established that 'under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain.' Thus, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent in all human beings and are not based on their citizenship or location. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the *control* of its agents. This position accords with that of other international organizations that in analyzing the sphere of application of international human rights instruments have assessed their extraterritoriality" (citations omitted). *See* paras. 92-97: The Commission refers to the HRC position and to the case law of the ECtHR.

> a State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agent which produce effects or are undertaken outside that State's own territory.[156]

It also took into account the ECtHR case law by reminding that it has been confirmed and elaborated in the European system of human rights that "[t]his understanding of jurisdiction and therefore responsibility for compliance with international obligations [is] a notion linked to authority and effective control, and not merely to territorial boundaries".[157]

As a result, the IACHR has ruled that foreign military occupation, military actions or detention fall within the extraterritorial application of both the American Declaration and the American Convention[158] because of "acts occurring on the territory of another State, when the alleged victims were subjected to the authority

156 *Idem*., para. 17.

157 *Idem*., paras. 18 and 19. *See also* IACHR, *Coard et Al. v. United States*, case no. 10/951, report no. 109/99, 29 September 1999, para. 37: "[…] Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *See also* IACHR, *Haitian Centre for Human Rights v. the United States* ('United States Interdiction of Haitians on the High Seas'), case no. 10.675, report no. 51/96, 13 March 1997; IACHR, *Salas and others v. the United States* ('US Military Intervention in Panama'), case 10.573, report no. 31/93, 14 October 1993; T. S. Bulto, 'Public Duties for Private Wrongs: States' Extraterritorial Duties pertaining to the Regulation of Multinationals under the African Charter on Human and People's Rights', *in* M. Gibney & W. Vandenhole (Eds.), *Litigating Transnational Human Rights Obligations – Alternative Judgments*, Routledge, 2014, pp. 239-249.

158 Regarding the extraterritorial application of the American Declaration, *see* IACHR, *Armando Alejandre JR., Carlos Costa Mario de la Peña and Pablo Morales v. Cuba*, case no. 11.589, report no. 86/99, 29 September 1999; IACHR, *Decision on Request for Precautionary Measures regarding the situation of Detainees at Guantamo Bay, in Cuba*, 12 March 2002; regarding the extraterritoriality of the American Convention: IACHR, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, 2010, paras. 98 and 99.

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and control of [...] agents" of the sending state[159] but not because of the exercise of control over an area or over a person. As such, the IACHR has never found that a state was responsible for extraterritorial violations of human rights outside the regional area, while the Inter-American Court on Human Rights (IACtHR) did not deal with cases regarding extraterritorial application of the Convention until recently.[160]

In a recent Advisory Opinion on 'The Environment and Human Rights' issued on 15 November 2017, the IACtHR seems to have established a new link for extraterritorial jurisdiction based on *control over domestic activities with extraterritorial effect*. Even though the scope of this advisory opinion goes beyond IHL, IHRL and ICL and has been the subject of international litigation and work by the ILC,[161] it is interesting to discuss the position of the Court on this particular matter, which could have further implications in the future if used as a source of

159 IACHR, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, 2010, paras. 98 and 99, emphasis added: "98. In a way, similar to the international organs previously mentioned, the Inter-American Commission has considered that it has competence *ratione loci* with respect to a State for acts occurring on the territory of another State, when the alleged victims were subjected to the authority and control of its agents. There would otherwise be a legal *lacuna* in the protection of those individuals' human rights that the American Convention seeks to protect, which would run counter to the object and purpose of this instrument. 99. Thus, the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual (citations omitted)."

160 Kamchibekova, 2007, p. 149: *see* for a summary table on circumstances of extraterritorial applicability of human rights treaties; on extraterritoriality in the Inter-American human rights system, *see also* Bulto, 2011, pp. 271-274.

161 *See* the *Trail Smelter Arbitration Case (United States vs Canada)*, United Nation Reports in International Arbitration Awards, Vol. III, 16 April 1938, pp. 1905-1982; *see also* the International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries 2001, the text of which adopted by the International Law Commission at its fifty-third session, in 2001, and was submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, Vol. II, Part Two. Arts. 2(c) and (d) of this document state:

> "(c) 'Transboundary harm' means harm caused in the territory of or in other places under the jurisdiction or *control* of a State other than the State of origin, whether or not the States concerned share a common border;
>
> (d) 'State of origin' means the State in the territory or otherwise under the jurisdiction or *control* of which the activities referred to in Art. 1 are planned or are carried out."
>
> These concepts are further explained in para. 12 of this document.

inspiration be other international jurisdictions adding a new approach to the question of control.[162]

In its advisory opinion requested by Colombia,[163] the IACtHR had to determine if a state party could have jurisdiction under Article 1(1) of the American Convention of Human Rights outside its national territory if a person's rights were violated as a consequence of a damage to the environment or because of the risk of environmental damage that could be attributed to that state party. By recognizing this new jurisdictional link, the IACtHR

> opens the door to extraterritorial jurisdiction in various scenarios where a State is factually linked to extraterritorial situations, without physical control over territory or persons, and where it has the knowledge on the risk of wrongful acts and the capacity to protect due to its effective control over activities within its territory.[164]

Indeed, it goes further than the effective control test over a territory or persons by establishing a nexus between conducts performed on the territory of the state and a human rights violation occurring abroad justified by the general international principle of due diligence while broadening the content of this principle.[165] It appears that the IACtHR has not given yet a precise guideline on the use of this new jurisdictional link since the Advisory Opinion only focuses on damages to the environment abroad having a significant or a serious impact that may entail a violation of the right to life and the right to personal integrity. Also, it is not sufficiently clear if extraterritorial jurisdiction could be established only in case of vio-

162 T. Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-border Contexts', *European Journal of International Law*, Vol. 29, 2018, pp. 590-594; the author advocates adding a third test of "effective control over situations", by adopting a "transnational interpretation of human rights jurisdiction" (p. 594); he considers that "the standard test of jurisdiction should be extended to the (effective) 'control over situations' (with extraterritorial effects on the enjoyment of human rights). In this way, the physical presence of state agents in foreign territory would no longer be a necessary condition of jurisdiction. Instead, in this transnationalized version of the jurisdictional test, the focus lies on the control of (harmful) circumstances (*e.g.* large-scale pollution, cross-border surveillance activities targeting individuals)" (p. 590).

163 IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/18, series A, No. 23, 15 November 2017.

164 *See* para. 104(h) of the Advisory Opinion; *see also* A. Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR', *European Journal of International Law – Talk!*, 28 March 2018.

165 *See* paras. 95, 101 and 102 of the Advisory Opinion; *see also* Berkes, 2018; according to the author, "with the new jurisdictional link, the Court opens the door to extraterritorial jurisdiction in various scenarios where a State is factually linked to extraterritorial situations, without physical control over territory or persons, and where it has the knowledge on the risk of wrongful acts and the capacity to protect due to its effective control over activities within its territory"; he adds that in "[d]oing so, the Inter-American Court followed the numerous recommendations of UN treaty monitoring bodies, requiring the States not only to respect human rights abroad, but to prevent third parties from violating human rights in other countries, if they are able to influence these third parties".

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lations of only of one of those rights resulting from damage caused by domestic activities, over which the state has control and that have consequences abroad.[166]

7 Conclusion

This conclusion will examine three aspects of the inquiry into the notion of control in the various areas of international law discussed above, namely IHL (both with respect to the characterization of armed conflict and the concept of occupation), IHRL, the law of international responsibility of states and international organizations as well of establishing statehood. These aspects are the various terminologies used in these areas of law, the contents of the notion of control in these various areas and the possible overlap and interchangeability of these different concepts of control. Finally, the latter question re interchangeability will not only be discussed from a *lex lata* point of view in the sense of whether it has occurred in the jurisprudence and literature discussed above but also from a *lex ferenda* or normative angle, namely whether such interchanges are desirable and if so, in what circumstances.

To begin with the terminology aspect, the term control has almost never been used in isolation, it has in virtual all cases been qualified by another term and there have been a number of such qualifiers, which will be set out here along a spectrum, namely from the highest or strictest form of control to the lowest or broadest. This spectrum will be further explained below when the contents of the various forms of control will be described. The highest form of control can be found in the law of state responsibility as described by the ICJ in the *Nicaragua, DRC and Bosnian Genocide* cases, where control of a state over private actors, typically when operating outside the territory of that state, can result in being attributed to that state if it exercised effective control over such private actors. The term effective control is also used in the law responsibility of international organizations, namely in Article 7 of the *Draft Articles on the Responsibility of International Organizations* where acts of organs of a state or an organ or agent of an international organization placed at the disposal of another international organization will be attributable to that second organization if the latter exercised effective control over the former. Effective control can also be found in the law of occupation in IHL where a stricter legal regime in terms of rights and obligations of both the occupier and the armed forces carrying out the occupation will come into effect as compared to the (often earlier) state of IAC. Lastly, effective control can also be found in the law related to statehood and in IHRL, where this type control is used to extend the jurisdiction to human rights bodies in situations where a state has exercised its powers beyond its territory; in the latter situation, ECtHR has also used the term effective overall control, as has the ICJ, the HRC and IACtHR. Lastly, the notion of effective control has been used recently by the

166 Advisory Opinion, para. 140; *see also* Berkes, 2018; for more on the background and possible implications of this advisory opinion, *see* M. L. Banda, 'Inter-American Court of Human Rights Advisory Opinion on the Environment and Human Rights', *American Society of International Law – Insights*, Vol. 22, 10 May 2018.

IACtHR in a situation where a state had effective control within its own territory over activities, which had extraterritorial effect in respect to the environment. While all these forms of control operate at the upper end of the spectrum, it is useful to point out that there is difference between this concept in a situation related to persons or groups of persons as opposed to territory; this difference will be further explored later in this conclusion.

Another term used to denote a relationship of control has been overall control, which is lower form of control than effective control in the law of state responsibility and which is utilized by international criminal institutions such as the ICTY and ICC to elevate what on its face looks like a NIAC to an international one with a result that a more detailed legal regime comes into play. As well, in giving meaning to the concept of effective control in the law of responsibility of international organizations, the ECtHR has coined the notion of ultimate authority and control, while the Secretary General of the United Nations has indicated that effective control should be understood as effective operational control; it would appear that both these interpretations of effective control are of a less strict nature than effective control as used in the situations in the previous paragraph. At the lowest end of the spectrum is the notion of control without any further adjective as has been used described temporary domination over a territory during a NIAC rather than occupation in relation to an IAC.

These various levels of control are set out in Table 1, where the levels of control are set out on the vertical axis from the most stringent level to the least amount of control and where the horizontal axis represents the areas of public international law,[167] in which these levels of control are being deployed.

167 The areas of international refugee law and international environmental law are not included here as the main principles related to control are derivative of other areas of international law, *see* n. 5 and the text related to nn. 160-165. In this context the debate whether these two areas or for that the matter IHL should be considered *lex specialis* of international human rights law is beyond the scope of this article.

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Tabel 1 *Levels of Control in Various Areas of International Law*

	Law of Responsibility of States (persons)	**Law of Responsibility of International Organizations (persons)**	**International Criminal Law (persons)**	**International Human Rights Law (persons)**	**International Human Rights Law (territory)**	**International Humanitarian Law (territory)**	**International Law of Statehood (territory)**
Effective control	X	X (ILC)		X	X	X (occupation)	X
Ultimate authority and control		X (ECtHR)					
Effective overall control		X (UNSG)					
Significant and decisive influence				X			
Overall control			X (characterization of armed conflict)				
Control						X (temporary domination)	

In terms of the contents of the various tests, the most detailed one can be found in IHL with respect to occupation over a territory. In this test, a number of factors are in play. The most important ones are the fact that the occupying power is in a position to substitute its own power (although with respect to this factor the ICJ has taken as a minority position in IHL and ICL that only actual control rather than the ability to control), that enemy's forces have surrendered, that the occupying power has a sufficient power present or the capacity to send troops to make its authority felt and that a temporary administration has been established resulting in the issuing of enforced directions to the civilian population in the occupied territory. Some of these same factors have also been considered by the ECtHR when determining overall effective control in order to establish its jurisdiction, namely a military presence of the ground of the foreign territory, the visible exercise of administration, *de facto* government or public powers, although for the latter it is not necessary to prove that there was control over every action or every detail over the policies and actions of the authorities in the foreign territory. In the area of establishing statehood, it has been said that effective control is demonstrated by the effective establishment of a settled community and the fact there is a functioning government in a territory. The lower test of control over territory in NIAC must be sufficient to allow sustained and concerted military operations to be carried out.

The effective control test in relation to groups or individuals as expressed by the ICJ in the context of state responsibility calls for a relationship between a state and an organized group or persons in a third country of complete dependence. This implies very close scrutiny by the state and that instructions were given by it in respect of each operation in which alleged violations of international law occurred and not generally in respect of the overall actions taken by such a group or persons. The ICJ also made it clear that such a relationship goes beyond financing, organizing, training, supplying and equipping; the selection of its military or paramilitary targets and the planning of the whole of its operation by a state. It would appear that the ECtHR used an equivalent test in similar situations when using language, such as high level of dependency, highly integrated and that a government only survived by virtue the military, political, financial and other support given to it by another country.

If the standard required is rigorous even in the ECtHR's jurisprudence, the complete dependence criterion as detailed by the ICJ in the *Genocide* case seems very difficult to satisfy. Indeed, it can be concluded that the criterion of an effective control requiring a complete dependence between the non-state actors and the state in order to be able to attribute the wrongful acts to the state appears very restrictive. It seems that the standard to prove the existence of control of a state on non-state actors is so high that it could only be satisfied by a *de jure* organ of the state, provided that this organ has no discretionary power and no margin of appreciation for these acts. If the only the link to hold a state responsible when intervening in a third state in case of violations of international human rights and IHL is one of complete dependence, this ignores the fact that without the substantial support of that state, the non-state actors would not have been able to conduct military operations and commit international law violations, even

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though the state did not give specific instructions or directions to commit the wrongful acts.

The lest stringent test of overall control applied by the ICTY and ICC with respect to the characterization of armed conflicts finds it sufficient that a state has a role in organizing, coordinating or planning the military actions of the organized group or persons in addition to financing, training and equipping or providing operational support to that group. Nevertheless, if the ICTY and the ICC have a preference for the overall control test rather than the effective control one requiring a link of complete dependence between the state and the non-state actors this could be justified by the fact that international criminal institutions deal with the individual criminal responsibility, whereas the ICJ deals with international disputes opposing states as equal sovereigns in order to establish the international responsibility of states. This is a fundamental difference. For instance, if the ICJ would adopt a more flexible standard of the notion of control, it would have as an effect to attribute more easily the conduct of non-state actors to a state intervening on the territory of a third state. This qualification and attribution of private actors conduct to a state goes beyond the matter of the international responsibility. If a state can be considered as exercising effective control over private actors acting on the territory of another state, indirectly it could be held responsible for a violation of the principle of non-intervention in the internal affairs of the hosting state. When the intervention of the third state reaches an enough threshold through control exercised over an armed group in opposition with the official government, this finding will not only be an internationalization of the conflict but could also then possibly be seen as an act of aggression if this intervention reaches a sufficient level of intensity during the hostilities and takes place without the consent of the hosting state, giving to the latter the right

to self-defence.[168] The difference between the pursued objective clearly influences the preference either for effective control or for overall control. This may explain the ICJ's reluctance to adopt the overall control criterion given its potential consequences in terms of public international law, whereas the use of such control test by the international criminal institutions does not entail the same scope but rather the application of a set of rules, namely IHL related to an IAC in order to establish the international criminal liability arising from the violation of such rules.

Lastly, the various tests used to impute liability to international organizations have not gone much further than stating the definitions set out above of ultimate authority and control or effective operational control apart from indicating attribution could occur if the conduct leading to an international wrong resulted from a specific instruction or, if there was no such specific instruction, the international organization had the power to prevent the conduct concerned.

Before discussing the issue and desirability of interchangeability of the various concepts to define control from one area of international law to another, it would be useful first to determine the role of control in these areas and the differences in those usages. At the most fundamental level, control can be differentiated between control over territory and control over persons. Control over persons is used in ICL and partially in IHRL (the law of responsibility, which also relies on control over persons will be discussed below). In the areas of IHRL and ICL, control is used to extend the jurisdiction of an international judicial institution beyond what had been traditionally accepted until that time. For ICL it was the characterization of the boundaries and implications of the concept of an IAC

168 On one side, in its resolution 3314 (XXIX) adopted on 14 December 1974, the UN General Assembly has given the first definition of an act of aggression attributable to the state and that can be characterized either by a direct than an indirect action from the state. First, Art. 1 defines aggression as the "use of force against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". Then, Art. 3 indicates that can be qualified as an act of aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein". This provision was interpreted by the ICJ in its Nicaragua case as reflecting customary international law by affirming that "the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states. It is also clear that it is the state which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation" (para. 195). Indeed, the ICJ has concluded that United States support to the contras did not reach the enough level to conclude that their wrongful acts were attributable to the US government but condemned their intervention in the Nicaraguan internal affairs (para. 292), nevertheless without qualifying their acts as reflecting an indirect act of aggression, maybe in order to avoid the enforceability of Art. 51 of the UN Charter which states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. […]".

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to a situation, which arose from a NIAC with international dimensions and a strong connection between a governing force in area outside its jurisdiction and another state. Similarly, for IHRL, it was the extension to examine and protect human rights in an area, which was not under the jurisdiction of the institution but the government of that particular area had a strong connection with a state, which was under the jurisdiction of this institution. While the wording used for these situations has been different (overall control vs. effective control or significant and decisive influence), the reasoning as well as the level of control utilized are similar and as such it would be reasonable and desirable to use the same term, namely overall control, and apply the same criteria to these two situations.

Control over territory is set out in the areas of IHL, the law of statehood and partially in IHRL. Control in this context is to denote a legitimate change in the authority over a territory from one country to another or one group to another within one country. Occupation is based on the desire of IHL during armed conflict to ensure that there is no vacuum in power structures during a temporary change of fortunes between two warring states while the same is the reason behind the concept of temporary domination during a NIAC. The law of statehood, on the other hand, addresses the permanent change in a governing structure within one state. Both occupation and the law of statehood employ the notion of effective control over a territory, which is at a high level and can be justified because of its profound effect on the nationals of the territory where the occupation or change of government has occurred, either on a temporary but often a lengthy or permanent basis; as such the notion of control in these two situations has been and could be used in an interchangeable manner. Given the fact that temporary domination in a NIAC is often short-lived and fluid, a lower level of control is justified in that situation.

Having said this, it is possible that the situations of control over persons and territory in the above four situations can at times be connected in a sequential manner in that a third party state is not satisfied with the outcome of its influence on a governmental structure within another state, which is in conflict with that other state and decides to support it militarily (bringing into play the ICL characterization of an armed conflict) or even go further and initiate a conflict with this other state eventually leading to its occupation (as per IHL) and setting up that original government structure as its puppet regime. It is also possible that such original support of the internal government structure does not lead to any armed conflict but results in sufficient internal popular support and the overthrow of the original government (in either a peaceful or violent manner, the latter again possibly leading to armed support by the third state) with the original government structure then becoming the new government bringing into play the law of statehood. However, while it is difficult to conceive that most of these variations will occur at the same time, the above scenarios indicate that when there is a shift from control over persons to control over territory where the intensity of the control has reached a higher level from a factual perspective, a higher level of the legal requirements is justified.

The law of responsibility operates on an entirely different level. This area of law can only be applied when there has been a violation of the rights to be pro-

tected in either IHL or IHRL have been violated. This is clear from the ICJ cases discussed above in Chapter 2 as well the interaction between the law of responsibility and ICL in the conclusion of that same chapter. It is also clear from Articles 2 and 12 of the *Draft Articles on Responsibility of States* and Article 4 and 10 of the *Draft Articles on the Responsibility of International Organizations*, which indicate that responsibility can only follow after a breach of an international obligation. Lastly, this is clear from the jurisprudence of the ECtHR where damages imposed on states for the violations of the rights of individuals can only occur after there has been a finding of these violations.[169] This different interaction of the law of responsibility with the other areas of law described in the above paragraphs has three aspects. The first aspect is that responsibility of states, including that of individuals and organizations who have acted on behalf of such states and international organizations, can occur at any time during the time periods in the above paragraphs, be they during occupation, an armed conflict or other times where human rights are being protected as long as violations of those rights during those time periods have occurred. Secondly, it has to be shown that those protected rights have been violated and thirdly that not all violations of these rights would result in responsibility of states or international organizations but only if they amount to an international wrong. Given the fact that the consequences of a finding of an international wrong are serious, both in terms of legal and reputational consequences,[170] it would stand to reason that an attribution to a state for such international wrong should be set at a high level of control, which has been the case with the notion of effective control for the responsibility of states and international organizations. This would also mean that this high level of control over persons in this context as well as the different nature of this type of control as opposed to control over territory makes the interchangeability between the control in the law of responsibility and the other areas of international law discussed in this article, difficult and problematic.

For the sake of completeness, as it was already discussed in Section 1.2, the notion of control in ICL outside the area of the characterization of armed conflict should not play a role in a discussion of interchangeability as this part of ICL is even further removed from most areas of discussion in this article than the law of responsibility. Like the law of responsibility, this part of ICL only comes into play after a violation of human rights has occurred while secondly, as pointed out in Section 2.1, ICL only deals with individual responsibility as a result of which the notion of control has different meanings with no connection to state behaviour at all and as such is not helpful in determining control as it pertains to states or international organizations.[171]

169 *See* J. Hendry, 'Just Satisfaction for Individuals When States Sue Each Other for Treaty breaches', *Philippe Kirsch Institute Global Justice Journal*, Vol. 3, 2019, 45.

170 Arts. 34-39 of both the *Draft Articles on Responsibility of States* and *Draft Articles on the Responsibility of International Organizations*.

171 In general, this is also made clear in Art. 58 of the *Draft Articles on Responsibility of States*, which says "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State".

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In terms of the issue of interchangeability at the jurisprudential level, the ECtHR has pointed out when discussing effective control of territory that the test to determine its jurisdiction is different than the one to establish state responsibility for an internationally wrongful act under international law as developed by the ICJ. This stands in contrast to the reasoning of the ICTY where it did rely on the jurisprudence of the ECtHR with respect to control over territory when developing its doctrine of characterization of armed conflict and the notion of overall control. The ICTY relies on ECtHR judgments and justified its position likely because of the use of the words effective overall control and some statements in those judgments about control over persons. This seems to be a misapprehension of the ECtHR judgments where the possible control of persons was expressed as a factor related to control over territory and then only in terms of persons as representatives of government institutions. This is not to say that the development of the overall control notion by the ICTY is not a valid one, only that in its search for precedents it might have overreached.

This latter comment leads to the observation that borrowing and utilizing concepts of control from one area of international law for another is not necessary a practice to be frowned upon but it is clear from the examination of the various concepts of control discussed that caution needs to be exercised. The main division with respect of control are control over territory and that over persons. From the jurisprudence of the international institutions, it is clear that those two concepts are conceptually different, which should result not only that the criteria emanating from those concepts will also be different but that they should not be used interchangeably. On the other hand, there is no conceptual or empirical problem by using concepts of control within the two main areas of international law separately.

However, as can be seen from the above observations, on the whole the interchangeability of the notions of control is limited while the language used in the various situations of control has at times been confusing in that sometimes different terms are being used to convey the same or similar concepts (especially in the case of the law of responsibility for international organizations) while at other times the same term is used to describe different situations with different requirement (such as effective control for control over persons by the ECtHR). To remedy this confusing situation, decision makers employing concepts of control should either be more precise in the use of their terminology in order to distinguish different concepts (as was done by the ECtHR when discussing control over persons and, in addition to using the term effective control, also referred to significant and decisive influence) or use the same terminology with a clear understanding and explanation that the same terms might mean different things in different circumstances.