Occupation Law and Paradigms of Control

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This thesis is dedicated with gratitude to

Mother Mary

Preface

My interest in military occupation arose whilst working at the Office of the State Minister for Reintegration of Georgia (currently known as the State Ministry for Reconciliation and Civic Equality), when I held the position of Chief Legal Specialist in International Law, focusing on matters of international humanitarian law (IHL). In applying IHL, I could experience the complexity and uncertainty in delineating the integral elements of the notion of military occupation. It is then that I decided to commence my PhD studies in the field of IHL.

Looking back, my PhD studies have indeed provided me with an exciting and rewarding time – both professionally and personally. First and foremost, I would like to express my deep gratitude to Professor Noam Lubell, under whose supervision I wrote this thesis. Professor Lubell's profound knowledge of IHL, his critical and constructive engagement, and his unfailing support were crucial throughout the entire process. I also thank Professor Françoise Hampson and Dr. Daragh Murray, who acted as chairs of PhD supervisory board in different years and whose insights were of great value and source for reflection. Next, I would like to thank the University of Essex, School of Law, for the opportunity to study there and the Irish Centre for Human Rights, NUI Galway, for awarding me a Doctoral Research Fellowship in 2011–12, and particularly Professors William Schabas and Ray Murphy. I am also grateful to the Library of Law, University of Bern, especially Bernhard Dengg and Agathe Künzi, for providing me a visiting doctoral researcher workplace. Professors Levan Alexidze, Ketevan Khutsishvili and Konstantin Korkelia, all of Tbilisi State University, International Law Institute, are thanked for their collegial support.

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Abstract

This thesis analyses the notion of control in the law of military occupation. It addresses the following research question: what does control denote and what are its implications for military occupation? More specifically, it demonstrates that in present-day occupations, control as such occurs in different forms and variations. The polymorphic features of occupation can be seen in the way states establish control over territory either directly or indirectly, and in the manner in which they retain, relinquish or regain it. The thesis also evidences that control found in Geneva Convention IV 1949 affords the most favourable and practicable protection to civilians and comes forward with a very adaptable application with the view of enhancing and reinforcing the protection of civilians. The thesis encompasses five chapters. Chapter I deals with control in general international law, revealing that different forms of control are used by different branches of international law for different purposes. Chapter II offers a clear test for establishing control over territory for the purposes of military occupation in International Humanitarian Law. Chapter III untangles the concept of indirect effective control, which gives rise to situations of military occupation by an intermediary. Chapter IV deals with relinquishing control over territory, thus establishing a test for occupation ending, determining the end of occupation to be at variance with assessing its beginning. Finally, Chapter V analyses the effect of control on a state's substantive obligations both under International Humanitarian Law and International Human Rights Law.

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List of Abbreviations

CPA	Coalition Provisional Authority
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
GA	General Assembly
GC	Geneva Convention
HCJ	High Court of Justice, Israel
HR	Hague Regulations
HVO	Croatian Defence Council
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defence Force
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
MLC	Congo Liberation Movement
MNF	Multinational Force
NIAC	Non-International Armed Conflict
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
PCIJ	Permanent Court of International Justice
PIL	Public International Law
POW	Prisoner of War
SC	Security Council
SCSL	Special Court for Sierra Leone
SR	State Responsibility
UN	United Nations
UNMIK	United Nations Mission in Kosovo
WWII	World War II

Introduction:

Occupation Law and Paradigms of Control:

Overview

Expanding territories through use of force can be cited among the most frequent phenomena in the context of conflict between states. Along this line, international law has progressed by starting to codify the law of war (known also as International Humanitarian Law, hereafter IHL) as early as in the 19th century. After World War II (WWII), the creation of the United Nations (UN) brought the long awaited international obligation for states to refrain "[…] in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[1] Nevertheless, in the 20th and still in the 21st century, states have continued to use force for various reasons: for lawful self-defence,[2] curbing civil uprisings by armed groups on their own territory,[3] or claiming "legitimate territories" as theirs.[4] In short, armed conflicts both of an international (IAC) and a non-international (NIAC) character persist to plague modern reality.

Often, states also strive to avoid the status of "military occupant", claiming not to be exerting the required degree of control over the territory in question. This might be owing to the fact that "the concept of occupation has a pejorative connotation and

[1] Art. 2(4) UN Charter; T. Ruys, *Armed Attack and Article 51 UN Charter: Evolutions of Customary Law and Practice* (Cambridge: Cambridge University Press, 2010).
[2] See Y. Dinstein, *War, Aggression and Self-Defence* (5th edn., Cambridge: Cambridge University Press, 2011).
[3] J. Holliday, *Middle East Security Report: The Struggle for Syria in 2011* (Institute for the Study of War, December 2011) at 12, available at http://www.understandingwar.org/sites/default/files/Struggle_For_Syria.pdf (visited 2 November 2016); see also *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, UN Human Rights Council A/HRC/31/CRP.1, 3 February 2016.
[4] The recent example of Russia 'claiming back' Crimea can be thought of at this point, see further S.L. Myers and E. Barry, 'Putin Reclaims Crimea for Russia and Bitterly Denounces the West', *The New York Times*, 18 March 2014, available at https://www.nytimes.com/2014/03/19/world/europe/ukraine.html?_r=0 (visited 2 November 2016); see also US Government Information, One Hundred Fifteenth Congress of the United States of America, An Act, H.R. 244, Countering Russian Influence and Aggression, Annexation of Crimea, at 571, available at https://www.congress.gov/115/bills/hr244/BILLS-115hr244enr.pdf (visited 6 May 2017).

has often been characterized, usually by its critics, as 'unlawful' and contrary to the overall objective of international peace and security set by the United Nations Charter."[5] Moreover, the classification of a territory as occupied is a complex exercise due to different IHL sources not using clear wording and failing to provide what level and/or type of control is needed to determine the existence and ending of military occupation. Thus, Article 42 of the Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (hereafter: Hague Regulations 1907 (HR 1907)) reads:

> 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.[6]

Questions are therefore raised first and foremost about the concept of 'authority' and the level of control required to establish military occupation. Attention should also be drawn to the fact that no explanation is given as to what ought to be construed under *actually placed under the authority*. Furthermore, common Article 2.2 to the Geneva Conventions of 1949 (hereafter: GC I, II, III, and IV 1949) considers that: "The convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[7] Finally, Article 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

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[5] T. Ferraro, *Occupation and Other Forms of Administration of Foreign Territory: Expert Meeting* (Geneva: ICRC, 2012) at 4, available at https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf (visited 2 November 2016).

[6] Art. 42 *Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907 (hereafter: HR 1907). See also Art. 5 *The Convention for the Protection of Cultural Property in the Event of Armed Conflict* with Regulations for the Execution of the Convention, The Hague, 14 May 1954; Art. 1 *First Protocol to the Convention for the Protection of Cultural property in the Event of Armed conflict*, The Hague, 14 May 1954; and Arts. 3, 9, 21 and 44 *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 26 March 1999.

[7] Common Art. 2 to the four Geneva Conventions of 1949, which are: *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*; *Convention (III) relative to the Treatment of Prisoners of War*; and *Convention (IV) relative to the Protection of Civilian Persons in Time of War*; all at Geneva, 12 August 1949. Hereafter: GC I, GC II, GC III, and GC IV.

of 8 June 1977 (hereafter: AP I 1977), while restating the instrument's applicability to the same situations as envisaged by common Article 2 GCs, adds situations of

> […] armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations […][8].

However, this article too fails to provide an explanation of the notions used. More questions than answers, therefore, emerge: neither is a precise definition of a situation of occupation provided, nor are its constitutive elements presented.

What is more, it also seems that there is no uniformity in the usage of terms by the international law scholarship with regards to defining *actually placed under the authority* either. Yutaka Arai Takahashi, for instance, uses "effective control", stating that a territory is considered occupied when the hostile army establishes effective control on such territory.[9] Sassòli and Bouvier, on the other hand, state that "[t]he rules of IHL on occupied territories apply whenever a territory comes, during an armed conflict, under control of the enemy";[10] while Bothe considers that the law of occupation begins its application "with the establishment of actual control over the territory".[11] But do "actual control", "effective control" and simply "control" all relate to the same legal phenomenon, i.e. *actually placed under the authority*?

To answer these and related questions, this thesis aims to study the notion of control in the law of military occupation, addressing in particular the following research question: what does control denote and what are its implications for military occupation? Thus, the notion of control will be examined through the lens of the beginning and ending of military occupation. Approaching establishing occupation through identifying the necessary test of control over territory will be carried out in detail in order to generate systematic analysis of the notion of control over territory in IHL. Ultimately, this will clarify the concept of control on which military occupation

[8] Art. 1 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977* (hereafter: AP I 1977).
[9] Y. Arai Takahashi, *The Law of Belligerent Occupation Continuity and Change in International Humanitarian Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2009), at 6.
[10] M. Sassòli and A.B. Bouvier, *How Does Law Protect in War?,* Vol. 1 (2nd edn., Geneva: International Committee of the Red Cross, 2006), at 187.
[11] M. Bothe, 'Occupation, Belligerent', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (Amsterdam: Elsevier, 1997) 763–768, at 764.

rests. In other words, control is a critical issue for occupation law as the classification of a specific situation hinges on this very element, in turn giving rise to the responsibility of a state under IHL. This thesis, amongst others, endeavours to offer control tests for establishing when occupation commences and when it ceases.

Structure of the Thesis

The thesis is structured into five chapters. Chapter I on *Tracing Control in International Law* distils different usages of the notion of control in wider international law and aims to bring clarity to this concept. It will be seen that the element of control is used in multiple tests for multiple purposes. This creates confusion. In fact, control surfaces in the law of state responsibility (SR), international humanitarian law (IHL), international criminal law (ICL) and international human rights law (IHRL) in different ways. Each branch of international law uses and positions control in different tests, with various thresholds. Chapter I therefore maps the way control is understood by the respective branches to establish what impact control as found in these branches might have on occupation law. It also highlights that different tribunals use different notions of control – and that sometimes even the same tribunal, notably the ICJ or the ICTY, interprets and considers control differently over time.

Chapter II on *Effective Control in Occupation Law* will show in more detail the complexities of establishing control over territory in IHL through the HR 1907, the GCs 1949, and AP I 1977. It firstly examines control exercised without intermediary, that is solely through a state's own armed forces. The level of control needed to determine the beginning of occupation based on the *travaux préparatoires* for the HR 1907, the GCs 1949 and AP I 1977 will also be analysed. This helps to outline the elements of the effective control test for the purposes of determining military occupation. To answer when effective control commences, the difference between actual and potential control is examined, too. The question then becomes whether potential control is sufficient to make a state an occupant. I will argue that yes, potential control, that is the *ability* to control, may indeed render a state an occupant because

of the "protection gap"[12] that would otherwise result. Finally, the chapter explores the concepts of joint and shared control, that is control exercised by multinational forces and UN endorsed control, respectively.

Chapter III on *Indirect (effective) control, or occupation by an intermediary,* explores a type of control that states employ to avoid the status of military occupant. In some cases, states employ an intermediary actor, such as de facto authorities, subordinate military administrations, or an armed group, to exercise effective control over territory. Whether and when in such scenarios that state may be a military occupant pursuant to IHL will therefore be analysed. Principally, the question of whether the foreign state's military presence on the ground is important to consider a situation as one of occupation will be examined. Consequently, the following questions will be answered: what type and level of control is needed to prove the connection of a state with the intermediary? Is the ECtHR's concept of decisive influence a form of effective control, sufficient to deem a state a military occupant under IHL? Finally, does IHL possess its own mechanism of control over armed group X via which a territory can be considered occupied?

With Chapter IV on *Relinquishing Control Over Territory*, I move from analysing the establishment of control over territory for the purposes of the beginning of military occupation to relinquishing control over territory for determining the end of occupation. The aim of that Chapter is to demonstrate when the end of control over territory takes place and what the difference is between control as a criterion for the beginning of military occupation and in the event of its termination. Is it conceivable that the test of control for the purposes of military occupation might mean something different at the beginning than at the end? Overall, Chapter IV discusses six forms of relinquishing control over territory pursuant to occupation law:

1. Complete and gradual loss of control over territory;
2. Temporary and partial loss of control over territory;
3. The potential for regaining control over the territory;
4. Control retained over territory after a state has militarily withdrawn;

[12] T. Ferraro, *supra* note 5, at 19.

5. The ending of indirect effective control; and
6. Remaining based on a United Nations Security Council mandate.

Chapter V on *The Effect of Control on Substantive Obligations* deals with states' substantive obligations pursuant to IHL and IHRL based on the level and type of control exercised by a state at a specific point in time. Under IHL, a state may exercise control either over territory, in light of Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977, or over persons, pursuant to Article 4 GC IV. As for IHRL, state control can equally be exercised either over territory (effective overall control) or over individuals (state agent authority and control). In discussing the ensuing state obligations, this Chapter tries to answer the question as to whether occupation law and IHRL share the same test for their application. Having examined this question, the nature and basis of a state's situational (contextual) IHRL obligations will be analysed. The Chapter concludes with a brief discussion of the inter-application of IHL and IHRL.

The thesis' *Conclusion* is dedicated to deducing the central arguments from the various chapters and summarising the main findings of the work. In this way, it will be possible to answer the question posed above on control and its implications for military occupation.

Lastly, a number of specific terms will be used and elaborated upon throughout the thesis. To facilitate the reading and for ease of reference, a Glossary of these terms concludes this introduction.

Glossary of the tests used (alphabetically)

Complete Dependency (SR): A test used by the ICJ for the purposes of establishing the responsibility of a state for internationally wrongful acts. The legal basis of this test is found in Article 4 of the ILC Draft Articles on Responsibility of States For Internationally Wrongful Acts (2001). Basic elements are de jure and de facto organs over which the state in question has total control. The object of state control is a person or an entity.

Decisive influence: Test used by the ECtHR to establish the extraterritorial application of states' human rights responsibilities based on the relationship between the state party of the Convention and local de facto authorities. The legal basis of this test is the notion of jurisdiction as enshrined in the ECHR. The basic element is military, economic and political support given by the outside state to the de facto authorities (Ilaşcu and others v. Moldova and Russia, Ivantoc and Others v. Moldova and Russia, Catan and Others v. the Republic of Moldova and Russia, Case of Mozer v. The Republic of Moldova and Russia).

Effective Control (ICL): In International Criminal Law, effective control is used to ascertain imputed command responsibility (Article 28 ICC Statute). It aims to establish the responsibility of the superior over the actions of persons lower down the chain of command.

Effective Control (IHRL): Control over territory, used by human rights bodies (Human Rights Committee, ECtHR, IACHR for example) to establish the extraterritorial application of states' human rights responsibilities.

Effective Control (OL): Control over territory, used for establishing military occupation, see Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977.

Effective Control (SR): 1) The ICJ uses it for the purposes of establishing the responsibility of a state for internationally wrongful acts. The Legal basis of this test is found in Article 8 of the ILC Draft Articles on Responsibility of States For Internationally Wrongful Acts (2001). Basic elements are de facto organs over whose specific operations and acts the state has effective control. The object of

state control is a person or group of persons. 2) The ICTY uses it to establish whether an individual is a de facto state agent based on the Article 8 of ILC Draft Articles on Responsibility of States For Internationally Wrongful Acts (2001), where it has to be shown that a state in question issued specific instructions to the person to commit the wrongful act. 3) Also used to establish the responsibility of International Organizations pursuant to Article 7 of the Draft Articles on the Responsibility of the International Organizations.

Effective Overall Control (IHRL): Test used by the ECtHR to establish the extraterritorial application of states' human rights responsibilities. The legal basis of this test is the notion of jurisdiction as enshrined in the ECHR. The basic elements of this test are: 1) the presence of a foreign state's large army on the territory in question; and 2) the subordination of local authorities to that foreign state through such presence. This entails the foreign state's responsibility for the actions and policies of the subordinate local administration/de facto authorities (Loizidou v. Turkey, ECtHR Judgment on Merits, § 56). The object of state control is the local subordinate administration/de facto authority.

Indirect effective control: A concept developed by the ICRC to for the purposes of establishing military occupation. Two conditions have to be met: 1) A foreign state exercises overall control over de facto local authorities or other organized groups on the territory in question; and 2) the latter have to have effective control (OL) over a territory. In short: overall control (SR/IHL) + effective control (OL) = indirect effective control.

Normative Control: Governs a relationship between an international organisation and a state, based on the former's values and judgments. Typically, normative control takes the form of explicit authorisations as understood by Article 17 §2 of the Draft Articles on the Responsibility of the International Organizations (acts "committed *because* of that authorization").

Overall Control (SR/IHL): A test developed by the ICTY for the purposes of establishing a) state responsibility and b) foreign state participation in a prima facie NIAC. The legal basis for both is Article 8 of the ILC Draft Articles on Responsibility of

States For Internationally Wrongful Acts (2001). It pertains to organized and/or armed groups and operates via financial support, training assistance, and the general planning and supervision of military activities.

Partial effective control (OL): situation in which a state exercises some aspects of effective control (OL) over a given territory from its outside. Here, control is retained by a state to a certain extent over certain aspects, for example land, air and sea access, making the population dependent on the provision of electricity or managing some aspects of governmental authority such as civil registry and finances. At the same time, another power controls and provides for the day to day affairs of the territory/local population. This type of control is related to the situational application theory of GC IV 1949.

Protected Persons: status accorded by Article 4 GC IV 1949 to civilians who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Here, control is exerted by a state over persons because they may either happen to be present or live in an area which is under the control of a party to an armed conflict *or* a military occupant.

State Agent Authority and Control Test: 1) Control over persons, establishing a state's jurisdiction extraterritorially (e.g. in detention centres); or 2) control over persons' particular rights, establishing a state's jurisdiction extraterritorially (e.g. the right to life when passing through a checkpoint or climbing a flagpole).

Total Control (SR): see complete dependency (SR).

Ultimate control and authority: A form of responsibility attribution used by the ECtHR in Behrami and Behrami v. France and Saramati v. France, Germany and Norway. Used to distinguish the UN Security Council's "retained ultimate authority and control" from the "effective command of the relevant operational matters" by NATO.

Chapter I:
Tracing Control in International Law

This Chapter identifies the way in which control is perceived by four different branches of public international law, namely the law of state responsibility (SR), international criminal law (ICL), international human rights law (IHRL), and international humanitarian law (IHL). It will be shown how the element of control is used by these branches in multiple tests and with varying thresholds. This serves the purpose of ascertaining how these tests of control relate to or have an impact on occupation law. Section 1 deals with the broadest branch of international law: state responsibility. Section 2 analyses international criminal law, section 3 international human rights law. The Chapter ends with section 4 on international humanitarian law, which also contains occupation law.

1. Control in the Law of State Responsibility

1.1 Overview

Control – the power to direct, influence, regulate, or possess authority over people's behaviour or a designated territory – is a multifaceted phenomenon, with different manifestations in daily human life[1]. It is also an occurrence that is used to trigger the responsibility of a state under international law. For this reason, control in the law of state responsibility is best comprehended when examining a state's relationship with its de jure or de facto organs.

In fact, the entire idea of the state as a legal and political entity rests on control. In order that a state even exists, it has to control the territory it possesses and the

[1] Control is defined as "the direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee", see B. A. Garner, *Black's Law Dictionary* (9th edn., St. Paul, MN: Thomson Reuters, 2009), at 378.

population residing therein:[2] "there must be a degree of effective government control over the territory in question",[3] and "the government should itself be sovereign in that it is not dependent on the instructions of another state."[4]

The state, as an abstract entity, then exercises control via its organs[5] that are formed to ensure the management or implementation of a certain task that is given by the state:

> The expression 'State organ', as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf.[6]

On the national and international level,[7] a state is a machinery running the day-to-day life of human beings by means of these organs – such as ministries, agencies, embassies, or other legal entities – that have distinct rights and obligations for which they can be sued and are ultimately responsible.[8] Every state, therefore, has a general responsibility to control its organs:

> However aberrant the conduct of a subordinate arm of the administration may be, the Government has the responsibility to control its officials and agents. The principle of ostensible and apparent authority and the concept of holding out must apply with particular force to all normal and regular agencies of government, whatever their formal status in the municipal law system.[9]

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[2] M. N. Shaw, *International Law* (6th edn., Cambridge: Cambridge University Press, 2011), at 199; L. Oppenheim, *International Law: A Treatise,* Vol. 1 (London/New York: Longmans Green, 1921), at 111–115; see also more generally F. H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1986).

[3] J. O'Brien, *International Law* (London: Cavendish Publishing Limited, 2001), at 141.

[4] Ibid., at 142.

[5] *German Settlers in Poland*, 1923 PCIJ, Series B, No 6., at 22: "States can act only by and through their agents and representatives."

[6] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, § 388, available at http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf (visited 15 July 2017).

[7] On agents representing a state internationally, see W. E. Hall, *A Treatise on International Law* (Oxford: The Clarendon Press, 1924), at 351–378.

[8] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2005), at 82.

[9] I. Brownlie, *System of the Law of Nations: State Responsibility* (Oxford: Clarendon Press, 1983), at 142.

In other words, the relationship between a state and its organs (excluding failed states[10]) is based on a stringent control-and-subordination mechanism. In addition to this, the state has its own internal political organization and constitutional provisions to manage its organs and the day-to-day life of its territory.[11]

Since the state is an abstract construct, all that can be imputed to it are the acts or omissions of an individual or a group of individuals.[12] Everything, therefore, boils down to a state effectively controlling such individuals, as it is control through imputability/attribution which triggers a state's responsibility. Through such control, a state is prima facie responsible for all acts or omissions that take place within its *own* territory.[13] However, as will be seen (in section 3 and Chapter V), a state may also be responsible for acts or omissions taking place outside of its territory, particularly with regards to human rights violations.[14] The international law of state responsibility is therefore the backbone and a fundamental principle of international law,[15] arising out of the nature of the international legal system and based on the principles of state sovereignty and equality of states.

In this manner, Oppenheim maintained that the external responsibility of a state to fulfil its international legal duties was a quality of a state as an international person,

[10] N. Akpinarli, *The Fragility of the 'Failed State' Paradigm* (Leiden/Boston: Martinus Nijhoff Publishers, 2010), at 5–29.
[11] *Western Sahara*, advisory opinion of 16 October 1975, § 94, available at http://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf (visited 15 July 2017): "No rule of international law […] requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment of 27 June 1986, § 205, available at http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (visited 2 December 2016): Here, the ICJ reconfirmed that states have the freedom to choose "… a political, economic, social and cultural system, and the formulation of the foreign policy."
[12] Brownlie, *supra* note 9, at 37.
[13] W. E. Hall, *supra* note 7*,* at 268 (original emphasis).
[14] W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), at 129; see also K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff Publishers, 2013).
[15] A. Pellet, 'The Definition of Responsibility in International Law', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010) 3–16, at 4.

"without which the family of Nations could not peaceably exist."[16] State responsibility is therefore considered "a mechanism having its function for condemnation of breaches by subjects of international law of their legal obligations and the restoration of international legality."[17] However, it was not until 2001 that forms of attribution for triggering the responsibility of a state became clear and that the ILC Draft Articles on Responsibility of States For Internationally Wrongful Acts (2001) (hereafter: ILC Draft Articles on Responsibility of States) were adopted.[18] State responsibility is engaged when a state commits an internationally wrongful act, i.e. when it breaches its international obligations.[19]

[16] L. Oppenheim, *International Law: A Treatise,* Vol. 1 (London/New York: Longmans Green, 1921), at 206.
[17] A. Pellet, *supra* note 15, at 15.
[18] The process of the codification of the law of state responsibility had a difficult start and has had three phases, spanning from 1924 to 1930; see S. Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility* (Dordrecht: Martinus Nijhoff Publishers, 1991), at 1–34. The ILC Draft Articles on Responsibility of States as adopted on second reading in 2001 are regarded as the codification of customary international law by an international arbitration institution, the International Centre for Settlement of Investment Disputes (ICSID), *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11) award of 12 October 2005, § 69, available at http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf, and *Jan de Nul N. V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), decision on jurisdiction of 16 June 2006, § 89, available at http://www.italaw.com/sites/default/files/case-documents/ita0439.pdf (both last visited 15 July 2017).
[19] *Case of Miguel Castro-Castro Prison v Peru*, Merits Reparations and Costs, IACHR, judgment of 25 November 2006, Judge Cancado Trindade Separate Opinion, § 32. The elements of an internationally wrongful act are spelled out in Art. 2 Responsibility of States for Internationally Wrongful Acts (2001): "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
- Is attributable to the state under international law; and
- Constitutes a breach of an international obligation of the State."
Concerning a state being responsible for the committed internationally wrongful act, see further *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, supra note 6, § 385; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* judgment of 19 December 2005, § 251, available at http://www.icj-cij.org/en/case/116 (visited 15 July 2017); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), decision on annulment of 25 September 2007, §121, available at http://www.italaw.com/sites/default/files/case-documents/ita0187.pdf (visited 2 December 2016); Guyana/Suriname, Award 17 September 2007, § 439–440, available at http://legal.un.org/riaa/cases/vol_XXX/1-144.pdf (visited 2 November 2016).

According to Article 7 of the Vienna Convention on the Law of Treaties (VCLT), Heads of State, Heads of Government, Ministers of Foreign Affairs, Heads of diplomatic missions, and representatives accredited by states to an international organisations or one of its organs[20] are automatically considered to represent their state, thus having an "inherent authority to bind the state",[21] as "their acts are easily imputable to the state because of their authority to represent the state according to its internal law".[22] On the other hand, "other officials act upon the basis of express or ostensible authority."[23] The internationally wrongful act attributable to a state may be committed by any state official, be that on the local, national or international level.[24]

When a state acts via its organs, agents or representatives based on "express or ostensible authority", this signifies that their action is carried out and based on a direct and consequential control, i.e. they receive their orders as well as financial means and other logistical support directly from the government:

> Although theoretically a state is responsible […] for all acts or omissions taking place within its territory, it is evident that its real responsibility varies much with the persons concerned. Its administrative officials and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. Presumably therefore acts done by them are acts sanctioned by a state, and until such acts are disavowed and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them […].[25]

Against this background, chapter II of the ILC Draft Articles on Responsibility of States gives the bases of attribution.[26] For the purposes of this thesis, Article 4[27] and Article

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[20] Art. 7 *Vienna Convention on the Law of Treaties*, 1969, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (visited 1 December 2016).

[21] J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in M. D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010) 441–471, at 452.

[22] L.-C. Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (3rd edn., Oxford: Oxford University Press, 2015), at 501.

[23] J. Crawford and S. Olleson, *supra* note 21, at 452.

[24] Ibid., at 452.

[25] W. E. Hall, *supra* note 7*,* at 268.

[26] On rules of attribution, see further L. Condorelli and C. Kress, 'Rules of Attribution: General Considerations', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 221–236.

[27] Article 4 of the ILC Draft Articles on Responsibility of States deals with state organs "in the most general sense", see J. Crawford, *supra* note 8*,* at 95; see also R. Ago, *Third Report on State Responsibility*, Doc. A/CN.4/246 and Add.1-3 (extract from *Yearbook of the*

8 of this instrument will be analysed in greater detail since they set forth two of the most important tests of control via which state responsibility may be engaged: complete dependency (SR) and effective control (SR). As will be seen below, the level of control varies between these two.

Even though the commentary does not directly mention the mode of control that the relationship between the state and its organs hinge upon, Article 4 para. 2 of the aforementioned Draft Articles suggests that such a relationship presupposes and rests on direct, total control (SR). In this way, the conduct, act or omission that is aimed to be attributed to a state must be sufficiently connected to it. Control is the key element establishing this connection. Control – or rather a certain level of control – should thus be considered the trigger of the responsibility of a state for certain acts or omissions. In Article 4, the level of control is the highest and most stringent as that provision primarily deals with the identification of state organs *stricto sensu*. By definition, a state has to wholly exercise control over its organs' actions. States and their organs base their very existence on such a connection: in this hierarchical subordination of the lower to the higher element, the latter totally controls the former via issuing orders and directives. Otherwise, how could a state function if not through such a connection with its organs and entities?

Matters nevertheless become more complex when the relationship between a state and its non-formal organs needs to be proven, along with the actions of the latter, so

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International Law Commission, vol. II(1), 1971), at 243–262. State organs include the central government as well as organs of any territorial or governmental entity (no distinction is made between judicial, legislative or executive organs), organ rank, or field of activity – be it international or national. Roberto Ago, elaborating on the relationship between the state and its organs, had the following to say: "With regard to the difference between such expressions as 'organs' and 'person or group of persons possessing the status of organs', it was true that the state was a real organism, but it had no physical existence, and it was wrong to consider the relationship between the State and its organs in the same way as the relationship between natural person and his organs. […] the organs of the State were always reduced to persons, taken individually or collectively, it was true that the will of the collective entity was not the sum of the wills of its members, but what concerned was always the collective will of a group of persons […]. […] an act or omission of a private person was attributed to the State only in so far as that person was an organ of the State according to its internal legal order and had acted in that capacity", see 1212th Meeting, 'State Responsibility', A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add. 1 to 3 A/CN.4/264 and Add.1. (extract from *Yearbook of the International Law Commission*, vol. I, 1971), at 50.

that the responsibility can be attributed to the former. In contrast to de jure organs, "persons or entities which do not form part of the State in any sense are nevertheless to be regarded as 'de facto' organs, such that all of their conduct is attributable"[28] to the state. The de facto organ concept, used in a broad sense, "covers those individuals or entities which are to be considered as organs of a State under international law, although they are not characterized under municipal law"[29], in other words their status is not determined by the municipal law and they have that status on "the basis of a factual link with that organization."[30] There are two main avenues through which the de facto relationship between the state and its non-formal organs may be established.[31] Article 4 of the ILC Draft Articles on Responsibility of States provides the possibility that state responsibility of a group or an individual is established based on "the role that they in fact perform within the structure of the State."[32] This was for example made clear in Yeager v. Islamic Republic of Iran, concerning the Iranian Revolutionary Guard acting "with the knowledge and acquiescence of the revolutionary Government […] as customs and security officers."[33] Chapter III of the thesis, which examines Indirect Effective Control, will consider Article 4 further, when pro and contra arguments about the effective and overall control tests are presented in order that proxy occupation is established.

[28] D. Momtaz, 'Attribution of Conduct to the State: State Organs and Entities empowered to exercise elements of Governmental Authority', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 237–246, at 239; on that the conduct of persons who are not state organs *strictu sensu* "in such a situation in relation to the State is also attributed to the State in international law and may thus be the source of international responsibility for the State", see further R. Ago, Special Rapporteur, *Third Report*, *supra* note 27, at 239.

[29] P. Palchetti, 'De facto Organs of a State', in *Max Planck Encyclopedia of Public International Law* (Max Plank Institute for Comparative Public Law and International Law, November 2010), § 2, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1394?prd=EPIL (visited 2 December 2016).

[30] Ibid., § 3.

[31] D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International Law and Classification of Conflicts* (Oxford: Oxford University Press, 2012) 32–79, at 59.

[32] Palchetti, *supra* note 29, § 10.

[33] M. Leigh, 'Yeager v. Islamic Republic of Iran', 82 *American Journal of International Law* (1988) 353–362, at 355.

Another way to give rise to state responsibility for the actions of a person or a de facto organ is through Article 8 of ILC Draft Articles on Responsibility of States. Its final version[34] is entitled "Conduct Directed or Controlled by a State" and reads:

> 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.

Although under International Law the conduct of private persons or entities is not generally attributable to a State,[35] attribution is possible when there is a factual link, i.e. a specific factual relationship, between the person or entity engaging in the conduct and the state in question[36] under either of two scenarios:

a) When the person or entity carrying out the conduct in question is "acting on the instructions of" the state, or
b) When the person or entity carrying out the conduct is "under the direction or control" of the state.[37]

The commentary to Article 8 fails to explain what "acting on the instructions of" and "under the direction or control" are meant to signify more specifically. The commentary to the article considers the terms instructions, direction and control to be disjunctive, since "it is sufficient to establish any of them".[38] Here, it is regarded that all three constitute instances of control.

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[34] See further A.J.J. De Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The Tadić Case and Attribution Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', 72 *British Yearbook of International Law* (2001) 255–292, at 255; C. Kress, 'L'Organe de facto en droit international public: réflexions sur l'imputation à l'état de l'acte d'un particulier à la lumière des développements récents', 105 *Revue Générale de Droit International Public* (2001) 93–144.

[35] J. Crawford, *supra* note 8, at 110.

[36] *In Yeager v. Islamic Republic of Iran,* the Tribunal considered that "to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State" see *Yeager v. Islamic Republic of Iran (1987)*, Iran-United States Claims Tribunal Reports, Vol. 17 (Cambridge: Grotius, 1988), at 101–102.

[37] J. Crawford, *supra* note 8, at 110. However, see A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *The European Journal of International Law* (2007) 649–668, at 663–664.

[38] The International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, at 48; see also M. den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing, 2012), at 76–77.

The attribution of acts of individuals or an entity to a State on whose "instructions" they have acted seems to be less problematic to prove than "direction" or "control". Nevertheless, the jurisprudence may be at variance with the ILC's view and appears to be also inconsistent. In United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), the ICJ opined that the policy announced by Ayatollah Khomeini of maintaining the US Embassy occupation and keeping the hostages detained was

> […] complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. […] The approval given to these facts by Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the state itself was internationally responsible.[39]

The ILC termed this incident "a subsequent adoption by the State of a particular conduct", codified in Article 11 ILC Draft Articles on Responsibility of States.[40] However, the ICTY Appeals Chamber in Tadić considered this instance one of giving instructions. [41]

The question of the degree of control needed for the attribution to a state of the conduct of entities (in this case: armed groups) that are not its de jure organs so to trigger that state's responsibility came to the forefront more pronouncedly in Military and Paramilitary Activities in and against Nicaragua (Nicaragua case); the ICTY Appeals Judgment on Tadić; and in Application of the Convention on the Prevention and Punishment on the Crime of Genocide (Genocide case). We thus proceed by examining the tests of complete dependency (SR)[42], effective control (SR), and overall control (SR) through these landmark cases.

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[39] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* judgment of 24 May 1980, para. 74, available at http://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf (visited 15 July 2017).

[40] P. Palchetti, *supra* note 29, § 8.

[41] Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§133–134, §137.

[42] This test is also known as 'strict control test', 'agency test', or 'dependence and control test'; see further S. Talmon, 'The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist', *Legal Research Paper Series*, *University of Oxford*, May 2009, at 5 (footnote 29).

1.2 Complete dependency (SR) and effective vs. overall control (SR)

1.2.1 The Nicaragua case

In Nicaragua v. United States of America, Nicaragua contended that the USA was recruiting, training, arming, equipping, financing, supplying, encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua.[43] According to Nicaragua, the US Government was "effectively in control of the Contras, […] devised their strategy and directed their tactics, and […] the purpose of the Government was, from the beginning, to overthrow the Government of Nicaragua".[44] Nicaragua also held the USA mined its waters and carried out certain attacks on its ports and oil installations.[45] Nicaragua also claimed these acts were committed by US "military personnel or persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel. These persons were apparently referred to in the vocabulary of the CIA as 'UCLAs' – 'Unilaterally Controlled Latino Assets'."[46]

The ICJ established that in late 1983 and early 1984, attacks were indeed carried out by UCLAs[47] and that the pilots were US civilians contracted by the CIA. And although it was not proven that US military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations, while the execution was the task of the 'UCLAs', hence the imputability to the USA of these attacks was established by the Court.[48]

The court then turned to examining the genesis, development, and activities of the Contras. Nicaragua claimed the US "conceived, created and organized a mercenary army, the contra force".[49] To tackle the matter, the ICJ started to reason – based on Article 4 ILC Draft Articles on Responsibility of States – 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

[43] Nicaragua Case*, supra* note 11.
[44] Ibid., § 20.
[45] Ibid.
[46] Ibid., § 79.
[47] Ibid., §§ 80–86.
[48] Ibid., § 86.
[49] Ibid., § 93.

legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."[50] The Court decided that the evidence available to it indeed indicated that the various forms of assistance provided to the contras by the United States were crucial for their activities, yet that this was still "insufficient to demonstrate their complete dependence on United States aid."[51] In its reasoning and based on the available evidence, the ICJ considered that "despite the heavy subsidies and other support provided to them by the United States, there is 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."[52] A fortiori, the ICJ was unable to determine that the Contras could be equated, for legal purposes, with the US armed forces.[53]

The ICJ next considered whether the United States – due to their financing, organising, training, equipping, selection of military and paramilitary objects and planning of the Contras' operations – was responsible for the specific violations of IHL committed by the Contras.[54] It bears mentioning that the ICJ did not clearly employ Article 8 ILC Draft Articles on Responsibility of States for its analysis. The Court decided that in order for the acts of the Contras to give rise to the responsibility of the US, "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"[55]. In other words, the ICJ took the view that the Contras (and not the USA) were responsible for their acts, but that the US was responsible for its own actions "vis-à-vis Nicaragua, including the conduct related to the acts of Contras".[56] According to the Court, while all actions of the UCLAs had been under tight US grip and complete control, the Contras did not enjoy the same oversight and control, despite the great amount of US

[50] Ibid., § 109; emphasis added NKM.
[51] Ibid., §110.
[52] Ibid., § 109.
[53] Ibid., § 110.
[54] Ibid., § 115.
[55] Ibid.
[56] Ibid., § 116; see also A. Cassese, *supra* note 37, footnote N 8, at 652–653.

material and financial support. The ICJ, therefore, stated that the effective control (SR) test had not been met.[57]

1.2.2. The Tadić case

The reasoning of the ICJ in the Nicaragua case was afterwards applied by the ICTY in the Tadić case, where the test of overall control (SR) as an alternative for giving rise to state responsibility was introduced. In Tadić, the Appeals Chamber adopted a different reading of the law of state responsibility compared to the ICJ and stated that it "does not hold the Nicaragua test to be persuasive."[58] It considered that the principle of the attribution to states of acts performed by private individuals was not based on rigid and uniform criteria and that the degree of control could vary according to the factual circumstances of a case.[59]

According to the ICTY, so that a state's responsibility is triggered and the person considered its de facto agent, it has to be shown that the state issued specific instructions as to how to commit the act; alternatively, it would be necessary to show that the State gave its approval to the individual's action retroactively and publicly.[60] Consideration was given to the attribution to the state of actions of organized and hierarchically structured groups not belonging to state organs. The ICTY opined that such groups had a structure and chain of command and that the members of such groups were subject to the authority of the head of the group. For attributing to a state the acts of these groups, it was sufficient that the group was under the overall control (SR) of the state.[61] Such control over a military group, coupled with the fact that the state would be responsible for acts performed by a group independently from any instructions, or even *contrary* to instructions issued, in the ICTY Trial Chamber's view "to some extent equates the group with state organs proper".[62] In other words,

[57] See also Separate Opinion of Judge Ago, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* judgment of 27 June 1986, § 15 and § 16, available at http://www.icj-cij.org/files/case-related/70/070-19841126-JUD-01-05-EN.pdf (visited 15 July 2017).
[58] Tadić Case, *supra* note 41, § 115.
[59] Ibid., §117.
[60] Ibid., §118.
[61] Ibid., §120.
[62] Ibid., §121.

if a group is under the overall control (SR) of a state, based on such a control a state's responsibility is engaged for the former's activities, irrespective of whether these were specifically requested or directed by the state[63]: "it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity"[64] but there is no need that the state issues "either to the head or to members of the group instructions for the commission of specific acts contrary to international law".[65]

As regards the effective control (SR) test, the ICTY considered it to be suitable for acts of individuals triggering state responsibility. A divergence in reasoning between the ICJ and the ICTY Appeals Chamber can thus be clearly identified. That divergence will be further analysed in section 4 of this Chapter when considering conflict classification in IHL.

1.2.3. The Genocide case

In 2006, seven years after the ICTY Appeals Chamber had issued its Tadić decision, the ICJ returned to the issues raised there by adjudicating the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)[66] (hereafter Genocide case). The impression created by the relationship between the ICJ and the ICTY, due to Tadić, is one of "*dialogue des sourds*".[67]

In the Genocide case, the ICJ clarified what it had said in Nicaragua, making the division between the tests of control more apparent, in addition to setting out a hierarchy between the complete dependency (SR) and effective control tests (SR). Here, the ICJ had to grapple with the question of responsibility for events in Srebrenica, notably whether the responsibility of the Federal Republic of Yugoslavia (FRY) would be engaged via the actions of persons or entities that were not its de jure

[63] Ibid., §122.
[64] Ibid., §131.
[65] Ibid.
[66] Genocide Case, *supra* note 6.
[67] B. Simma, 'Universality of International Law from the Perspective of Practitioner', 20 *The European Journal of International Law* (2009) 265–297, at 280.

organs.[68] Employing a reasoning based on Articles 4 and 8 ILC Draft Articles on Responsibility of States,[69] the Court dealt with the matter in two steps. It first found that the criteria of Article 4 of the ILC Draft Articles on Responsibility of States were simply not met,[70] as it was not shown that the FRY army had taken part in the massacres, nor that the political leaders of the latter had a hand in preparing, planning, or in any way carrying them out. While there was a lot of evidence of direct or indirect participation by FRY's official army, together with the Bosnian Serb's armed forces (VRS), in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica, it was however not shown that there had been such participation in the massacres committed at Srebrenica – hence, "neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law."[71] The ICJ also stated that by providing substantial support, including paying the salaries of Republika Srpska officials and some VRS officers, the FRY did not automatically turn them into its de jure organs.[72] The ICJ also had to consider whether the FRY could have been responsible for the actions of the so-called "Scorpions". Judging on the basis of the materials presented to it, the ICJ was unable to find that the Scorpions were, in mid-1995, de jure organs of the FRY.[73]

Having identified that the groups listed above did not *per se* constitute organs of the FRY under Article 4, the court then turned to consider whether it was possible, under the same article, to attribute to the FRY the conduct of persons – or groups of persons – who did not have the legal status of state organs, but which factually acted under such a strict control by the state that they must be treated as its organs for purposes of engaging the responsibility of the state for an internationally wrongful act.[74] The Court, having verbatim repeated the test enunciated in Nicaragua required for equating an armed group (the "Contras") to a state organ[75], considered that pursuant

[68] Genocide Case, *supra* note 6, § 379.
[69] Ibid., § 384.
[70] Ibid., § 386.
[71] Ibid.
[72] Ibid., § 388.
[73] Ibid., § 389.
[74] Ibid., § 391.
[75] Ibid.

to its jurisprudence persons, groups of persons, or entities, for purposes of international responsibility, may be equated with state organs even if that status was not stated by the internal law of the state, "provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument."[76] Such an equation, according to the ICJ, was exceptional, "for it requires proof of a particularly great degree of State control over them."[77] The ICJ did not find that such dependence on the FRY existed: at the relevant time, in July 1995, neither the Republika Srpska nor the VRS could be regarded as instruments via which the FRY had acted. Despite the fact that the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, as well as the connections between the Yugoslav army and the VRS, had been and continued to be strong, they "were not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY"[78]. According to the Court, the differences in military strategy between the Yugoslav authorities and the Bosnian Serb leaders served as evidence that the latter had some real "margin of independence."[79]

The ICJ then continued to consider attributing the Srebrenica genocide to the FRY via the "instructions", "direction" or control as provided by Article 8 ILC Draft Articles on Responsibility of States.[80] In the ICJ's view, whether during the events in Srebrenica the perpetrators of the genocide were acting on the FRY's instructions, or under its direction or control, was a completely separate issue.[81] An affirmative answer to this question would not imply that the perpetrators should be regarded as organs of the FRY. It would, however, mean that the FRY's international responsibility became engaged based on the conduct of those of its organs which issued the instructions or exercised the control that resulted in the breaches of its international obligations. According to the ICJ, it therefore had to be determined whether the FRY organs having that status under the state's own internal law had ordered the genocide via issuing

[76] Ibid., § 392.
[77] Ibid., § 393.
[78] Ibid., § 394.
[79] Ibid.
[80] Ibid., § 396.
[81] Ibid., § 397.

instructions to the perpetrators or via exercising direction or control.[82] The ICJ thus viewed the test of effective control (SR) to be different from complete dependency (SR) in two regards: it was not necessary to show that the persons who performed the alleged acts were in a general relationship of 'complete dependence' on the state in question, but it had to be established that they acted in accordance with the instructions of that state organs or under its 'effective control' (SR). However, according to the Court, it had to be demonstrated that such 'effective control' (SR) was indeed exercised, i.e. that specific instructions were issued with regards to each operation and that they were not just generally given with respect to the overall actions taken by the persons or groups of persons that committed the violations.[83]

Because Bosnia-Herzegovina questioned the validity of the application of Nicaragua to its case and instead drew attention to Tadić, the ICJ used its chance to set the record between itself and the ICTY straight, thereby separating the issue of state responsibility from other matters, such as conflict classification (see below, section 4). The ICJ observed that in Tadić the ICTY had not been called upon, nor was it in general called upon, to rule on the issue of state responsibility, that its jurisdiction was limited to criminal matters and that it extended over persons only.[84] What is important, according to the ICJ, is that the ICTY's test of overall control (SR) broadened the scope of state responsibility:

> In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.[85]

In the Genocide case, the ICJ was clearer in its reasoning than in Nicaragua. The ICJ formulated two tests of control, that of complete dependency (SR) enshrined in Article 4 of the ILC Draft Articles on Responsibility of States, and that of effective control (SR) contained in Article 8 of the same instrument. The following points should

[82] Ibid.
[83] Ibid., § 400.
[84] Ibid., § 403
[85] Ibid., § 406; see also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* judgment of 26 February 2007, *Dissenting Opinion* of Vice President Al-Khasawneh § 37-39, disagreeing with this stance (§ 39), available at http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-01-EN.pdf (visited 15 July 2017)

be made with regards to these two articles. It seems that, for the Court, in Article 4 control results from dependence. Or, put differently, dependency creates a potential for control.[86] In this regard, when ascertaining if the complete dependence test is met, the outside power must have made use of that potential and actually exercised total control (SR) over the armed group. In other words, if there is total control (SR) then each and every action of the group is attributed to the outside power by virtue of the former's status as the latter's de facto organ. Total control (SR) therefore generates state responsibility under Article 4 ILC Draft Articles on Responsibility of States. Additionally, total control (SR) need not be exercised over each and every action of the armed group during which the internationally wrongful act occurs; instead, "what is important is that such control is exercised in general."[87] I therefore suggest that the *complete dependency test* (SR) has to be viewed in light of three cumulative elements:

1. The armed group/entity has no autonomy whatsoever, neither as regards financing, ideology, targeting, strategy and tactics, nor regarding the selection of its leaders, but is a mere tool of another state;
2. The dependency of the armed group/entity extends to all fields, from the smallest to the biggest; and
3. The state must have actually made use of the potential for control inherent in that complete dependency (SR), i.e. it must have actually exercised its control.

If the complete dependency test (SR) is not met, and one still needs to establish whether an outside state is responsible for *specific* actions of an armed group, then the *effective control test (SR)* is employed. This subsidiary test is based on Article 8, ILC Draft Articles on Responsibility of States and also has to be viewed in light of three cumulative elements; nonetheless, they are not as stringent as the former, as the bar for this test is lower:

1. The group is less than totally dependent on the foreign power. This means that, for example, only some finances are provided, that the group has some ideological autonomy, or that it can choose its overall strategy;
2. The de jure organs of the outside state need to exercise effective control (SR) over the armed group/entity: this involves planning the operation, choosing targets, giving specific instructions and directions, and providing operational

[86] S. Talmon, *supra* note 42.
[87] Ibid., at 7.

support in addition to the outside power being able to control the beginning of the operation, the way it is carried out, and the way it ends. In other words, the de jure organs of the outside state need to control and supervise the entire operation; and

3. Such a control must be exercised in relation to each act or omission constituting the wrongful act. Hence, such control is focused on the specific actions of a group, and not on the group as such (like in the complete dependency test (SR)).[88]

Therefore, the mechanism and level of control needed for attributing the actions of an entity or armed group to a state in the Law of State Responsibility is either complete dependency (SR) or effective control (SR).[89] The overall control test (SR) crafted by the ICTY for the purposes of establishing state responsibility in international law was dismissed and not accepted by the ICJ, the principal judicial organ of the UN.[90] However, as will be seen in section 4 of the thesis, I uphold the suitability of the overall control (SR) test not only for state responsibility but also for conflict classification purposes in IHL when there is foreign state involvement. We next take up examining the importance of control in International Criminal Law (ICL).

2. Control in International Criminal Law (ICL): Command Responsibility

Comprehending control in International Criminal Law (ICL)[91] is linked to establishing a relationship between a superior and his/her subordinates, not only in a military but also in a civilian setting. Also, rendering accountable individuals instead of states[92] unwaveringly links ICL to the law of state responsibility, since it is one of the avenues

[88] Ibid., at 8.
[89] On the overall control test being suitable for establishing state responsibility, see generally A. Cassese, *supra* note 37.
[90] Art. 1 Statute of the International Court of Justice; see also F. Messineo, 'Attribution of Conduct', in A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2014) 60–97, at 66.
[91] A. Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), at 15: ICL is a branch of PIL, "designed both to proscribe international crimes and to impose upon states the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes."
[92] W. A. Schabas, *International Criminal Law* (4th edn., Cambridge: Cambridge University Press, 2012), at 224. On the dual responsibility of the state and the individual, see A. Cassese, *International Criminal Law, supra* note 91, at 19.

for implementing the latter. That is, it is the members of the (de jure or de facto) organs of a state who committed grave breaches of IHL, war crimes, or crimes against humanity that are held responsible.[93]

The doctrine of superior responsibility, also known as command responsibility,[94] makes the commander or a superior responsible for acts of his/her forces or subordinates. To give rise to the superior's responsibility, three conditions have to be met: first, that there is a superior-subordinate relationship; second, that the superior knew or had a reason to know that the subordinates committed or were about to commit a crime; and third, that the superior failed to take necessary and reasonable measures to prevent or punish the criminal act.[95] The ICC Statute provides for two types of criminal culpability: "direct" command responsibility (Article 25) and "imputed" command responsibility (Article 28). Under Article 25 fall those who order, solicit or induce the commission of a crime. It regulates individual culpable behaviour.[96] As for imputed command responsibility, the liability arises from the relationship between the superior and the subordinate, and not from the direct action of the superior.[97] In other words, the imputed command responsibility is based on the failure of a commander or superior to act,[98] i.e. a failure to control. Comprehending the *type* of control on which the superior-subordinate relationship rests is, therefore, of primary concern.

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[93] *France et al. v. Goering et al*., (1946) 22 IMT 203; (1946) 13 ILR 203 41 *American Journal of International Law* 172, (1946) at 221: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

[94] I. Bantekas, S. Nash and M. Mackarel (eds), *International Criminal Law* (New York: Cavendish, 2001), at 108; see also B. Bing Jia, 'The Doctrine of Command Responsibility in International Law with Emphasis on Liability for Failure to Punish', XLV *Netherlands International Law Review* (1998) 325–347.

[95] J. A. Williamson, 'Some Considerations on command responsibility and criminal liability', 90 *International Review of the Red Cross* (2008) 303–317, at 306–307.

[96] G. R. Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court', 25 *The Yale Journal of International Law* (2000) 90–143, at 99.

[97] Ibid.

[98] Ibid., at 100.

2.1. Responsibility of military commanders and other superiors

The relationship between military commanders and their subordinates rests on control resulting in subordination and requires the existence of a certain chain of command.[99] Generally speaking, military commanders are required, with respect to "members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches"[100] of the 1949 GCs and 1977 Protocols. The Commentary to the AP I 1977 aligns the term "command" with "control".[101] The above spelled-out standard of control is reflected in Article 87(3) and may be considered to have customary nature.[102] This relationship of military commanders with their subordinates has a decidedly vertical axis, and control exercised by the superior should be effective.[103] The US Military Commission, in the Yamashita judgment, emphasised that the core duty of a military commander was to effectively control his own troops:

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[99] I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester: Manchester University Press, 2002), at 80; see also Judgment, *Delalić, Mucić, Delić and Landžo* (IT-96-21-T), Trial Chamber Judgment, 16 November 1998, § 647 (also known as Celebici case): "The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a sine qua non for superior responsibility."

[100] Art. 87(3) AP I 1977.

[101] Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC: Martinus Nijhoff Publishers, 1987), at 1018–1020.

[102] Judgment, *Delalić, Mucić, Delić and Landžo* (Celebici Case) (IT-96-21-A), Appeals Chamber, 20 February 2001, § 195.

[103] Y. Sandoz, C. Swinarski and B. Zimmerman, *supra* note 101, at 1013: "This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act […]. Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However, it should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed. … The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control." See also *Delalić, Mucić, Delić and Landžo* (Celebici Case) (IT-96-21-A), *supra* note 102, § 303.

> […] assignment to command military troops is accompanied by broad authority and heavy responsibility. […] where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops […].[104]

To engage a superior's criminal responsibility for the actions of his subordinates, it ought to be shown that the accused was in a superior-subordinate relationship either on a de jure basis, that is a relationship sanctioned by law, or on a de facto basis, where subordination is formed on factual or personal factors.[105] However, being at the top of a hierarchy does not automatically signify that a person's duties and responsibilities are understood to cover *all* the duties and responsibilities of those officers or state officials who are located further down the chain of command between him and the perpetrators.[106] The criminal responsibility of commanders is engaged only if they knew, or had information which should have enabled them to conclude, that a person under their command was committing or was going to commit a crime and if they did not take all the feasible measures within their power to prevent or punish such actions. Article 28(a) ICC Statute thus considers:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces […].[107]

The formulations "effective command and control" and "effective authority and control" both contain the word control, which is a sort of "umbrella term encompassing both command and authority" – while command refers in a rather material sense to an order or directive, possibly backed by threats, authority seems to have a rather formal meaning in the sense of "the right or permission to act

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[104] *Trial of General Tomoyuki Yamashita* (Case No. 21) (IV Law Reports of Trials of War Criminals, United States Military Commission, Manila, 8th October – 7th December, 1945), at 35, available at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf (visited 2 December 2016)

[105] G. Mettraux, *The Law of Command Responsibility* (Oxford/New York: Oxford University Press, 2009), at 138.

[106] Ibid., at 152. See also High Command Trial, *The United States of America v. Wilhelm von Leeb et al.*, judgment of 27 October 1948, US Military Tribunal Nuremberg, § 543, available at http://werle.rewi.hu-berlin.de/High%20Command%20Case.pdf (visited 2 December 2016); Judgment, *Halilović* (IT-01-48-A), Appeals Chamber, 16 October 2007, §§ 214–216.

[107] Art. 28(a) ICC Statute.

legally".[108] In Bemba, the ICC Pre-Trial Chamber found both notions to require the same degree of control, i.e. effective control (ICL).[109]

The relationship between superior and subordinates is premised on the awareness of a relationship of authority.[110] This awareness, then, has to be put to practice in the form of effectively exercising such power: "it is necessary to look to the effective exercise of power and not to formal titles".[111] In the *Orić* Appeal Judgment, the ICTY thus opined that the prosecution had to prove effective control (ICL) beyond reasonable doubt in establishing a superior-subordinate relationship; for that purpose, *de jure* authority was not synonymous with effective control.[112] According to the ICTY, the prosecution still bore the burden to provide such evidence, as simple "possession of de jure authority, without more, provides only some evidence of such effective control".[113]

In the context of de facto command, the responsibility of commanders too is primarily about wielding effective control (ICL): a de facto relationship of command is understood to be one where the superior has acquired authority over one or more people and can prevent them from committing crimes or can punish them when they

[108] K. Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta and J. R.W.D. Johnes (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 823–872, at 839.
[109] The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§412–413; note § 413: "… the term 'effective authority' may refer to the modality, manner or nature, according to which, a military or military like commander exercise 'control' over his forces or subordinates."
[110] G. Mettraux, *supra* note 105, at 139; see also Judgment, *Kunarac* (IT-96-23-T and IT-96-23/1-T), Trial Chamber, 22 February 2001, § 397;
[111] *Delalić, Mucić, Delić and Landžo* (Celebici Case) (IT-96-21-A), *supra* note 102, §197; and in § 306: "… this title or position as deputy commander of the Celebici camp is not dispositive of the issue … it is necessary to look to whether there was evidence of actual authority or control exercised by Delic." See also Judgment, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001, §418: "… actual authority however will not be determined by looking at formal positions only. Whether de jure or de facto, military or civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused."
[112] Judgment, *Orić* (IT-03-68-A), Appeals Chamber, 3 July 2008, § 91.
[113] Ibid., §92; see also Judgment, *Hadžihasanović* (IT-01-47-A), Appeals Chamber, 22 April 2008, §§ 20–21; Judgment, *Halilović* (IT-01-48-A), Appeals Chamber, 16 October 2007, § 85, §§ 211–214; Judgment, *Nahimana* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, §625, § 787; Judgment, *Bagilishema* (ICTR-95-1A-A), Appeals Chamber, 3 July 2002, § 50.

have done so.[114] The application of the doctrine of superior responsibility lies in the dominant party's ability to exercise effective control (ICL) over the other party in that relationship, otherwise there may be no finding of guilt based on this doctrine.[115] In Halilović, the ICTY Appeals Chamber noted the Prosecution failed to show how Halilović's alleged position as the de facto commander of a military operation in which the perpetrators were said to have participated was sufficient to establish a chain of command or a hierarchical relationship between him and the perpetrators amounting to a superior-subordinate relationship. The Appeals Chamber noted that a position of 'overall command', if not accompanied by a duty and the ability to prevent or punish crimes, would not suffice to find that the person who possessed that authority was in fact in effective control (ICL) of the perpetrators and that he had a duty to act in relation to their crimes.[116]

Be it de jure or de facto command, it has to be established that a superior has wielded similar powers in terms of 'intensity' or degree of control over subordinates.[117] Indicators for this include the practice of issuing and obeying orders, and the expectation that insubordination is sanctioned.[118] Additionally, the manner in which the accused exercised his authority is also relevant.[119] In case a superior cannot effectively control his/her subordinates, or when the issued orders are modified by the chain of command that can stretch over various levels, unless it can be proven that the accused could indeed exercise effective control (ICL) directly over the perpetrators, and if that chain of control was broken at any point in the hierarchical structure, the superior, in principle, would not be held criminally responsible.[120] Some exceptions are found in times of military occupation with regards to military commanders or governors. Here, it seems that effective control (ICL) to prevent and

[114] G. Mettraux, *supra* note 105, at 142–143;
[115] Ibid., at 143.
[116] Judgment, *Halilović* (IT-01-48-A), *supra* note 113, § 211, § 214.
[117] *Delalić, Mucić, Delić and Landžo* (Celebici Case) (IT-96-21-A), *supra* note 102, §197; Judgment, *Bagilishema* (ICTR-95-1A-A), *supra* note 113, § 52 and § 55.
[118] Ibid., Judgment, *Bagilishema* (ICTR-95-1A-A) § 53
[119] Judgment, *Kajelijeli* (ICTR-98-44A-A), Appeals Chamber, 23 May 2005, § 87.
[120] G. Mettraux, *supra* note 105, at 152.

punish crimes is exercised in a general manner, as these commanders hold a general duty to ensure the wellbeing of the civilian population within the occupied territory:

> This duty of occupation commanders to prevent and punish crimes extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility […]. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence.[121]

This stance of the Tribunal can be understood to rest on the fact that an occupation commander is the ultimate commander of the troops stationed on the territory. This implies that because the troops occupy the territory via effective control (OL) as understood by occupation law (see further Chapter II), a commander possesses a broader ability to control the territory and actions of his/her troops. That is, he/she controls the territory in a general manner[122] and in this way ensures general compliance not only with IHL rules, but also with other rules of internal discipline.

2.2. Civilian Command Responsibility[123]

Civilian superiors who are clearly part of a chain of command, directly or indirectly, and with actual powers "to control or punish the acts of subordinates may incur

[121] *Hostages Case*, US Military Tribunal, Judgment of 19 February 1948, Nuremberg, § 1256.
[122] *Trial of Wilhelm List et al*., United States Military Tribunal Nuremberg, 8 July 1947 to 19 February 1948 (Case No. 47), at 71 available at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf (visited 2 December 2016): „The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordination are [sic] relatively unimportant. His responsibility is general and not limited to a control of units directly under his command."
[123] Situations of civilian superiors incurring responsibility for international crimes is linked to the aftermath of WWII. In the Justice Cases, the sixteen defendants were members of the Reich Ministry of Justice who enforced grossly unjust laws and were required to prevent the crimes the Jewish population was subjected to; see further *Josef Altstötter et al*, US Military Tribunal Nuremberg (The Justice Cases), judgment of 4 December 1947, especially § 993–994, available at http://werle.rewi.hu-berlin.de/Justice%20Case%20Judgment.pdf (visited 2 December 2016).

criminal responsibility".[124] What crystallises from the case law is that be it de jure or de facto authority, located in a military or civilian setting, the same degree of effective control (ICL)[125] must be met in relation to any superior whose responsibility ought to be engaged, i.e. regardless of the manner in which he/she exercises authority over the subordinates and regardless of the nature of the former's role or mandate.[126] The ICTY in Blaškič underlined the indicators of effective control (ICL) to be those showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators.[127] The requirement of 'effective control' (ICL) accentuates that an individual is in a superior position (de jure or de facto), leads others, and that he/she is actually exercising such authority. If the individual was not exercising such authority, he/she "may not be held responsible for crimes committed by those formally – but not effectively – under his authority".[128] This leads us to conclude that there is no other type of control than effective (ICL) that engages a superior's responsibility, both in military and civilian settings.[129] Having addressed control in ICL, control in IHRL is investigated next.

[124] Judgment, *Kordić and Čerkez* (IT-95-14/2-T), *supra* note 111, § 416; Judgment, *Kajelijeli* (ICTR-98-44A-A), Appeals Chamber, 23 May 2005, § 84–85; Judgment, Kajelijeli (ICTR-98-44A-T), Trial Chamber, 1 December 2003, §773–774;

[125] Judgment, *Aleksovski*, (IT-95-14/1-T), Trial Chamber, 25 June 1999, § 78; Judgment, *Musema* (ICTR-96-13-A), Trial Chamber, 27 January 2000, §135; Judgment, *Bagilishema* (ICTR-95-1A-A), Appeals Chamber, 3 July 2002, §§51–55; Judgment, *Kayishema* (ICTR-95-1-T), Trial Chamber, 21 May 1999, §§ 479–483; Judgment, *Bagosora et al* (ICTR-98-41-T) Trial Chamber I, 18 December 2008, §§2030–2031; Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, § 76; Judgment, *Fofana and Kondewa* (SCSL-04-14-T), Trial Chamber, 2 August 2007, §§238–241; Judgment, *Brima et al* (SCSL-04-16-T) Trial Chamber, 20 June 2007, §§782-790; Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 491.

[126] G. Mettraux, *supra* note 105, at 29.

[127] Judgment, *Blaškič* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 69. Note: it is only within such manifestations that effective control would be exercised and mere possession of de jure authority and formal titles would not suffice, see *Delalić, Mucić, Delić and Landžo* (Celebici Case) (IT-96-21-A), *supra* note 102, §197; see also Judgment, *Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, §144.

[128] G. Mettraux, supra note 105, at 142.

[129] Judgment, *Bagilishema* (ICTR-95-1A-A), *supra* note 113, § 56–57.

3. Control in International Human Rights Law

In recent years, the debate in international law, led in both case law[130] and doctrine,[131] has increasingly centred on whether and to what extent states are compelled by IHRL when acting outside their own territory in armed conflict situations and during peace time alike. The former context received much more attention than the latter, probably due not only to the rise of states' involvement in armed conflicts but also because awareness of IHRL obligations has increased. The ICJ in its cases on the Wall,[132] DRC v. Uganda,[133] and Georgia v. Russian Federation[134] has unequivocally upheld the premise that states can be bound by IHRL when acting outside their territories. Despite such authoritative pronouncements, the debate still begs the question as to what precisely triggers the extraterritoriality of IHRL obligations.

Lubell suggests the process to "rest on the interpretation and understanding of a number of terms and tests. These include matters of jurisdiction, the questions of control over areas and over persons, and the possibility of a contextual approach to

[130] References to the respective case law will be made through this section.
[131] N. Lubell, 'Challenges in applying human rights law to armed conflict', 87 *International Review of the Red Cross* (2005) 737–753; F. J. Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', 871 *International Review of the Red Cross* (2008) 549–571; N. Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate', 40 *Israel Law Review* (2007) 648–660; C. Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 40 *Israel Law Review* (2007) 310–355; R. Wilde, 'Triggering State Obligations Extraterritorially: the Spatial Test in Certain Human Rights Treaties', 40 *Israel Law Review* (2007) 503–526; R. K. Goldman, 'Extraterritorial application of the Human Rights to life and personal liberty, including habeas corpus, during situations of armed conflict', in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (UK: Edward Elgar Publishing, 2013) 104–124; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010); M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011); K. Da Costa, *supra* note 14.
[132] *Case Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, §§ 107–113, available at http://www.icj-cij.org/en/case/131 (visited 15 July 2017).
[133] *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, *supra* note 19, §§ 219–220.
[134] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Request for the Indication of Provisional Measures, Order of 15 October 2008, § 109, available at http://www.icj-cij.org/en/case/140 (visited 15 July 2017).

the nature of obligations".[135] This provides grounds to regard control as a central element in the extraterritorial application of IHRL.

3.1. Jurisdiction and Control

Considered in earlier times exclusively a matter of states' internal affairs, the emergence of IHRL as a distinct branch of PIL is linked to the aftermath of WWII.[136] IHRL, an aggregation of "fundamental and inalienable rights which are essential for life as a human being"[137], is found to be codified in conventions that are "universal and regional, binding or exhortorary, concerning the whole subject, its implementation only, specific rights or their relationship only"[138]. IHRL was "originally devised to protect the individual against the arbitrary exercise of power by the authorities of the territorial state",[139] and is deemed to be applicable to "everyone everywhere".[140] For this reason, IHRL binds states with both negative and positive obligations: the former oblige a state to respect human rights, that is not to commit human rights violations; the latter require the state to ensure or secure the human rights of persons within its jurisdiction and prevent human rights violations by third states or private individuals.[141]

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[135] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 195.
[136] C. Droege, *supra* note 131, at 313; I. Brownlie, *Principles of Public International Law* (7th edn., Oxford: Oxford University Press, 2008), at 553. See also Art. 1 and Art. 55 UN Charter.
[137] R. M. M. Wallace, *International Law* (London: Sweet and Maxwell, 1997), at 205.
[138] M. Sassòli and A. A. Bouvier, *supra* note 10, at 341.
[139] F. Coomans and M. T. Kaminga, 'Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties', in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004), 1–7, at 1.
[140] M. Sassòli and A. A. Bouvier, *supra* note 10, at 341. Note: it has also been advanced by some that IHRL is divided into three generations of rights. First generation rights include civil and political rights (such as right to life, freedom of conscious); second generation rights are economic, social and cultural rights (e.g. right to claim social benefits from the state, right to education, etc.); and third generation rights are such as the right to peace, self-determination, or clean environment, see further R. M. M. Wallace, *supra* note 137, at 205. Such a division, however, is not favoured as "it abolishes the concept of human rights as the basic rights of individual human beings" and the unity of IHRL should to be preserved; see further P. Malanczuck, *Akehurst's Modern Introduction to International Law* (7th edn., London: Routledge, 2004), at 210.
[141] M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008) 411–448, at 441–442; see

Being applicable to "everyone everywhere" raises the question of whether IHRL instruments apply primarily on a state's own territory or extend their application also beyond. There are some treaties, such as the Genocide Convention, that have no territorial restrictions of application: "the obligation each state has to prevent and to punish the crime of genocide is not territorially limited by the convention".[142] By contrast, other, no less important instruments – such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR), to name but a few – lack clarity as to their territorial reach. Precisely in relation to these treaties, as well as several others, difficulties arise when contemplating their extraterritorial application: some contain "specific application clauses which form the basis for the discussion on their reach while others have no application clauses at all."[143]

Thus, a difference in wording across key IHRL conventions transpires. The ECHR, in Article 1, states that members "shall secure to everyone *within their jurisdiction* the rights and freedoms". Article 2 ICCPR, when defining its scope of application, uses the sequence "*within its territory and subject to its jurisdiction*". Article 2 CAT pledges "to prevent acts of torture *in any territory under its jurisdiction*", whereas Article 1 ACHR uses the formulation "subject to their jurisdiction". Note that neither the ECHR nor the ACHR use the word "territory". The challenge then is to grasp what each of these formulations means. Notably, is jurisdiction analogous to control? Or is control just *one* element thereof? As Wilde put it: "It is clear that a state's 'jurisdiction' covers its own territory under its control; less clear are the precise circumstances in which it can subsist extraterritorially".[144]

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also B. Hofstotter, 'European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom', 2 *International Journal of Constitutional Law* (2004) 525–560.

[142] *Case Concerning Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina v. Yugoslavia)* preliminary objections, judgment of 11 July 1996, § 31 available at http://www.icj-cij.org/docket/files/91/7349.pdf (visited 2 November 2016).

[143] C. Droege, *supra* note 131, at 325; see more generally K. Da Costa, *supra* note 14.

[144] R. Wilde, *supra* note 131, at 506.

3.2. "Within their Jurisdiction"

Brownlie considers jurisdiction (and sovereignty) to be part of a terminology "which is not employed very consistently in legal sources such as works of authority or the opinions of law officers, or by statesmen, who naturally place political meanings in the foreground. The terminology as used by lawyers is also unsatisfactory in the complexity and diversity of rights, duties, powers, liberties, and immunities of states are obscured by the liberal use of omnibus terms like 'sovereignty' and 'jurisdiction'."[145] Brownlie, nevertheless, observes that "Jurisdiction is an aspect of sovereignty and refers to judicial, legislative, and administrative competence. […] The starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial."[146] Similarly, Shaw regards jurisdiction "as the power of the state under international law to regulate or otherwise impact upon people, property and circumstances […] for it is an exercise of authority which may alter or create or terminate legal relationships and obligations".[147] A state therefore exercises its jurisdiction through its legislative, executive, administrative and judicial bodies.[148]

Accordingly, jurisdiction "is a term used in more than one way, and the meaning has, therefore, to be understood in the context within which it is being used".[149] In other words, jurisdiction is an all-inclusive principle of state power and Justice Holmes' point – that "[t]he foundation of Jurisdiction is physical power"[150] – proves instructive. The physical power of states, then, is instilled in their capacity not only to control their territories and boundaries, but also to exert *control* in their internal matters in a wider sense, allowing them to exercise jurisdiction in all relevant directions.

For the present writer, therefore, "within their jurisdiction" (Article 1 ECHR), "within its territory and subject to its jurisdiction" (Article 2 ICCPR), and "in any territory under its jurisdiction" (Article 2 CAT) all imply the contracting states' ability of exerting

[145] I. Brownlie, *supra* note 136, at 105–106.
[146] *Ibid.*, at 299.
[147] M. N. Shaw, *supra* note 2, at 645.
[148] Ibid., at 645 and at 647–683.
[149] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 208.
[150] *Henry McDonald v. F.A. Mabee*, decided 6 March 1917, 23 U.S. 90, 91, Justice Holmes delivered the opinion of the Court, available at https://law.resource.org/pub/us/case/reporter/US/243/243.US.90.135.html (visited 2 December 2016).

control *not just* over their own territory. Jurisdiction in these formulations has to be seen in a broad sense because, from an IHRL perspective, jurisdiction is "referred from a different angle, […] focusing on the responsibility of states towards an individual",[151] present not only on its own territory, over which the state per se has de jure control, but on any territory under its de facto control or even when the state is sending its agents or representatives abroad for discharging certain tasks, be it in official diplomatic engagements or cases of detention of high profile suspects, like Eichmann[152] or Öcalan.[153]

In such situations, being subject to a state's jurisdiction should be construed as the state using its power of control either over a certain space or over certain individuals. Human Rights bodies consider the notion of "being within the jurisdiction" in two ways: firstly, when the state in fact exercises jurisdictional authority over a territory, even if this is not sovereign territory, as in the case of military occupation; and, secondly, by exercising authority and control over an individual, thus bringing the person within the jurisdiction of the state.[154] The case law and other authoritative statements on the ICCPR, ECtHR, ACHR and the CAT understand the term "jurisdiction" "in the extraterritorial context in terms of the existence of a factual connection between the state and either the territory in which the relevant acts took place – a spatial connection – or the individual affected by these acts – a personal connection".[155] Due to this thesis' space constraints, only the application clause of the ICCPR and the ECHR will be examined. We shall firstly examine the ICCPR's and the ECHR's extraterritorial application in light of territorial control (3.3) and then in section 3.4 deal with authority and control over individuals.

[151] N. Lubell, *Extraterritorial Use of Force, supra* note 131*,* at 209.
[152] D. Casarani, *Eichmann: His Life and Crimes* (Boston, MA: Da Capo Press, 2004).
[153] *Öcalan v. Turkey*, ECtHR (2005) *(*App. no. 46221/99).
[154] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 211.
[155] R. Wilde, *supra* note 131, at 507–508.

3.3. State Territorial Control

3.3.1. ICCPR

The issue of states' extraterritorial action within the ICCPR context came to the attention of the Human Rights Committee in its General Comment 31:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[156]

There was, of course, some criticism voiced regarding the extraterritorial applicability of the ICCPR, namely that "*within its territory and subject to its jurisdiction*" and the congruous clauses should be understood as limited to a state's own territory. In this context, it is instructive to consider the argument of Denis, who considers that Article 2.1 ICCPR "on the basis of the plain and ordinary meaning of its text […] establishes, in the conjunctive, that every state party is required to ensure the rights in the Covenant only to individuals who are both *within* its territory *and* subject to its sovereign authority".[157] The *travaux préparatoires* to the ICCPR also need to be touched upon, as it seems that the insertion of "within its territory" has caused some confusion. Eleanor Roosevelt, the US representative during the Covenant's drafting process, added the following reference to "within its territory":

> The purpose of the proposed addition was to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting States. The United States was afraid that without such an addition the draft Covenant might be construed as obliging the

[156] *General Comment No 31 (80) Nature of the General Legal Obligation Imposed On State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004,* § 10. See also *Working Paper on the Relationship Between human rights law and international humanitarian law*, *United Nations, Economic and Social Council, E/CN.4/Sub.2/2005/14,* (2005).

[157] M. J. Dennis, 'Application of Human Rights Treaties Extraterritoriality in Times of Armed Conflict and Military Occupation', 99 *American Journal of International Law* (2005) 119–141, at 122 (original emphasis); see also M. Waxman, Head of the U.S. Delegation and Principal Deputy Director, Policy Planning Staff presenting the US view to the UN Human Rights Committee on ICCPR Application, Opening Statement, 17 July 2006, available at https://2001-2009.state.gov/s/p/rem/69126.htm (visited 2 December 2016).

> contracting States to enact legislation concerning persons who, although outside its territory, were technically within its jurisdiction for certain purposes.[158]

What can be incurred from this and what was really the matter of the discussion, as noted by Lubell, was primarily whether state A was obliged to ensure the ICCPR provisions to its own nationals in State B.[159] This view is further corroborated when reading the exchange between the representative of the Philippines and Eleanor Roosevelt: "Mr Mendez (Philippines) remarked that a United States citizen abroad would surely be entitled to claim United States Jurisdiction if denied the rights recognized in the covenant."[160] Ms. Roosevelt replied:

> If such a case occurred within the territory of the State party to the covenant, the United States Government would insist that the State should honour its obligations under the covenant; if, however, the State in question had not acceded to the covenant, the United States Government would be unable to do more than make representations on behalf of its citizens through the normal diplomatic channels. It would certainly not exercise jurisdiction over a person outside its territory.[161]

The reference to "the territory" can be understood to mean that states were aware of the possibility that they would be unable to provide the guarantees for implementing all of the ICCPR provisions in territories over which they did not have the powers to do so.[162] Similarly, the ICJ considered in the Wall case that:

> The travaux préparatoires of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to

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[158] UN ESCOR Human Rights Committee, Summary Record of the 138th Meeting, UN Doc E/CN4/SR.138 (1950) §§ 33–34.

[159] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 200.

[160] *UN ESCOR Human Rights Committee, Summary Record of the 194th Meeting, UN Doc E/CN 4/SR.194* (1950) § 15.

[161] Ibid., § 16. It should also be noted that the US statement was supported by the Uruguayan representative, Mr. Oribe, considering that "Since no State could provide for judges, police, court machinery, etc. in territory outside its jurisdiction, it was evident that States could effectively guarantee human rights only to those persons residing within their territorial jurisdiction." See ibid., § 30.

[162] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 201. In general, such situations can be armed conflicts where the rebel group has taken control of the territory. In this regard, the ECtHR in *Ilaşcu and others v. Moldova and Russia*, ECtHR (2004) (App. no. 48787/99) § 341 noted: "In the Court's opinion, when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation (…), there was little Moldova could do to re-establish its authority over Transdniestrian territory. That was evidenced by the outcome of the military conflict, which showed that the Moldovan authorities did not have the means to gain the upper hand in Transdniestrian territory against the rebel forces supported by 14th Army personnel."

> 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.[163]

The ICJ's stance then has to be extended not only to the ICCPR, but to all other treaties that protect human rights. In this regard, Cassesse views the case law of human rights bodies and the ICJ's stance on a state's extraterritorial actions to be "consistent with the object and purpose of human rights obligations: they aim at protecting individuals against arbitrariness, abuse, and violence, regardless of the location where the State conduct occurs".[164] If a state engages in extraterritorial activity, it certainly possesses the human and technical resources to exert control, too. In this manner, jurisdiction is nothing other than holding effective power. Meron noted this correctly when considering human rights' territorial reach and the US role in Haiti: "Because it holds effective power in Haiti, the United States must respect its obligations under the Covenant."[165] McGoldrick, too, seems to equate jurisdiction with control and differentiates between a state being able to exercise control over a territory effectively and state not being able to do so:

> In the normal context, a state party takes measures (in the broadest sense) within its own territory with effect on individuals within its own territory. However, it is possible to have a situation where individuals are within the 'territory' of a State but they are not within the state's 'jurisdiction'. Examples would be where part of the territory is under foreign occupation or under the control of an internal opposition force, or where the individuals are affected by the action of an international organisation situated on the territory of the State.[166]

The Human Rights Committee (HRC) equally considered jurisdiction to be the same as being able to exercise control. In 1998, the HRC in its Concluding Observations on Cyprus stated that

> […] the state party, as a consequence of events that occurred in 1974 and resulted in the occupation of part of the territory of Cyprus, is still not in a position to

[163] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* supra note 132, § 109.
[164] A. Cassese, *International Law* (2nd edn., Oxford: Oxford University Press, 2005), at 386.
[165] T. Meron, 'The 1994 U.S Action in Haiti: Extraterritoriality of Human Rights Treaties', 89 *American Journal of International Law* (1995) 78–82, at 82.
[166] D. McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political rights', in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004) 41–72, at 49. McGoldrick also considers that the meaning of "jurisdiction" must be determined in light of the object and purpose of the ICCPR and OP1; ibid.

> exercise control over all of its territory and consequently cannot ensure the application of the covenant in areas not under its jurisdiction.[167]

Let us now extend our consideration of "within the jurisdiction" to the ECHR.

3.3.2. ECHR

As with the ICCPR, a similar question arises on how the ECHR comprehends "within the jurisdiction". First of all, in the words of the European Commission of Human Rights:

> The term 'within the jurisdiction' is not equivalent to or limited to the territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the high Contracting Parties are bound to secure the said rights and freedoms to all persons *under their actual authority and responsibility*, whether that authority is exercised on its own territory or abroad.[168]

Furthermore,

> […] authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they *exercise authority over such persons or property*. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[169]

So "authority" is construed as the power of influencing and enforcing obedience, giving orders, or having administrative power or control.[170] The European Commission on Human Rights considers both "actual authority and responsibility" as well as authorised agents of a state exercising authority over persons or property to connote a state exerting control either on a territory or over individuals. Obviously if the state does not exercise such a form of control, it will be difficult to maintain its responsibility under IHRL. Thus, in the Southern Lebanon context, the Human Rights Committee (HRC) noted that

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[167] UN Human Rights Committee: Concluding Observations: Cyprus, CCPR/C/79/add.88, 6 April 1998, §3; see also UN Human Rights Committee*:* Concluding Observations: Sudan UN Doc. CCPR/C/79/Add.85, 19 November 1997, § 3–4.

[168] *Cyprus v. Turkey*, ECommHR (Appl. nos. 6780/74 and 6950/75) (1975) § 136 (emphasis added NKM).

[169] Ibid.

[170] Oxford Dictionaries, Definition of Authority in English, http://www.oxforddictionaries.com/definition/english/authority?q=authority (accessed 2 December 2016).

> […] the process of national reconstruction remains handicapped by […] non-Lebanese military forces control[ling] parts of the State party's territory, which contributes to undermining the control of the central government and may prevent the application of the State party's laws and the Covenant in the areas not under the Government's control.[171]

It is also relevant to consider how spatial control was dealt with by ECtHR, and specifically how the court came up with the test of *effective overall control of an area*. Before actually examining this test, it should however be mentioned that the spatial reach of the ECHR has mostly been discussed in the context of military occupation, as this is indeed the most straightforward example of a state losing control over its own territory. In this case, an occupying power has to live up to the IHRL obligations as envisaged by the above-mentioned instruments (see further Chapter V).

3.3.2.1. State effective (overall) control of an area

In the case of Loizidou, the ECtHR dealt with the issue of the extraterritorial application of the ECHR. Ms Loizidou, a Cypriot national from the northern part of Cyprus, claimed she had been prevented by the Turkish forces to return to Kyrenia to enjoy her property there. Turkey in turn contended that granting access to the property was outside its jurisdiction and that it was Northern Cyprus to whom the complaint ought to have been addressed, as

> […] the mere presence of Turkish armed forces in northern Cyprus was not synonymous with 'jurisdiction' any more than it is with the armed forces of other countries stationed abroad. In fact, Turkish armed forces had never exercised 'jurisdiction' over life and property in northern Cyprus.[172]

Despite Turkey's assertion the ECtHR adopted the view, not different from the one expressed already by the Human Rights Committee, that under Article 1 ECHR the concept of jurisdiction was not restricted to the national territory of signatory states and that the responsibility of states can be invoked by acts of their authorities performed both within and outside their national boundaries. The Court then at least implicitly raised the issue of military occupation and found that the state, in this case,

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[171] *Concluding Observations of the Human Rights Committee: Lebanon UN Doc. CCPR/C/79/Add.78,* 5 May 1997, § 5.
[172] *Loizidou v. Turkey*, ECtHR (preliminary objections) (1995) (15318/89) § 56.

had to secure the rights of the Convention because it exercised effective control (OL) over the area:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[173]

In the very same case the ECtHR, in the merits stage, employed the formulation *effective overall control:*

> 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 Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.[174]

While Turkey is militarily present in northern Cyprus, it might not control every nook of the territory or have a fully-fledged administration set up, instead using the TRNC for the daily management of the territory. Does this suggest Turkey is not just an occupant *stricto sensu*, but also under the obligation to secure human rights in the entire territory of Northern Cyprus? The ECtHR, in a later stage of deliberating on the Cyprus v. Turkey case, again used the effective overall control test, this time with somewhat more information:

> […] it is to be observed that the Court's reasoning is framed in terms of a broad statement of principle as regards Turkey's general responsibility under the Convention for the policies and actions of the 'TRNC' authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration, which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional

[173] Ibid., § 62.

[174] *Loizidou v. Turkey*, ECtHR (Judgment) (1996) (App. no. 15318/89) § 56; *effective overall control* was also mentioned in Djavit v. Turkey, ECtHR (2003) (Appl. no. 25781/94), §18–23.

> Protocols which she has ratified, and that violations of those rights are imputable to Turkey.[175]

On the other hand, in Al-Skeini v. UK, Justice Brook from the UK Court of Appeal[176] seemed to depart from that very same ECtHR reasoning and rejected the argument of five claimants

> […] to the effect that occupation for the purposes of the Hague Regulations must necessarily be equated with effective control of the occupied area for ECHR purposes […]. It is a feature of Strasbourg jurisprudence that the Court will examine the facts of each particular case to see if the requisite control is in fact exercised […] and the status of the British military forces in Basrah City was markedly different from that featured [in the text on which Mr Singh relies].[177]

In other words, for Justice Brook control as found in occupation law does not suffice to trigger the obligations of a state in light of IHRL. That is, even as an occupant, one might not possess sufficient control for the purposes of IHRL application. Two questions arise against this backdrop: first, what does *effective overall control* mean? After all, Article 42 HR 1907, as we shall see, makes no mention of the word "overall". Why did the ECtHR insert this epithet? Second, do control in IHRL and control in occupation law base themselves on the same test as regards IHRL extraterritorial application or are there different tests at play? These questions will be dealt with in more detail in Chapter V, the purpose here merely being to outline the different types of control used in different PIL branches for different purposes.

3.4 Authority and control over individuals

In addition to viewing territorial control as the trigger for the extraterritorial application of IHRL instruments, there are other instances of the extraterritorial exercise of jurisdiction, such as cases involving the activities of a state's diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.[178] While these are relatively clear examples, problems arise in assessing

[175] Cyprus v. Turkey, ECtHR (2001) (25781/94) § 77.
[176] Court of Appeal (Civil Division), R. (on the Application of Mazin Mumaa Galteh Al-Skeini and others) v. Secretary of State for Defence [2005] EWCA Civ 1609 (leading judgment by Lord Justice Brooke).
[177] Ibid., § 127.
[178] See Art. 22 Vienna Convention on Diplomatic Relations (18 April 1961); *M.v. Denmark*, ECtHR (1992) (App. no 17392/90); Banković et al. v. Belgium et al., ECtHR (Grand Chamber Decision as to the Admissibility of) (2001) (App. no. 52207/99) §73; Al-Skeini and others v.

state extraterritorial jurisdiction when persons are in detention, abducted, or when they are implicated in an armed conflict, for instance in the case of the deceased in Banković.[179]

While jurisdiction and state responsibility are not interchangeable, "the former is necessarily the pathway to establishing the latter".[180] In consequence, states usually do not acknowledge to be exercising their jurisdiction for IHRL instruments' purposes, as that would trigger their obligations under the relevant instruments. Still, a state's IHRL responsibilities arise when a person is under the authority or effective control of an agent of that state. Such control or authority is then considered to be the basis of state jurisdiction.[181] Consequently, even if a person is not situated on the territory of a state party to the ICCPR, that state must respect and ensure the rights laid down in the ICCPR to anyone within the power or effective control of its agents. The Human Rights Committee thus considered that:

> […] 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.[182]

In a like manner, Meron contemplates jurisdiction as not only exercising de jure power and authority on a state's own territory, but also as state agents, military or civilian,

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Secretary for Defence (2004) EWHC 2911, 14 December 2004, § 270; Al-Skeini and others v. Secretary of State for Defence (2005) EWCA Civ 1609, Court of Appeal, 21 December 2005; House of Lords Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant); Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent) (2007) UKHL 26, 13 June 2007, § 109; See also Vienna Convention on Diplomatic Relations (18 April 1961), Article 22.

[179] *Banković et al. v. Belgium et al*., *supra* note 178.

[180] M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A comment on Life After Banković', in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004) 125–140, at 131.

[181] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 216.

[182] *General Comment No 31 (80) Nature of the General Legal Obligation Imposed On State Parties to the Covenant*, supra note 156, § 10. See also *Working Paper on the Relationship Between human rights law and international humanitarian law*, United Nations, Economic and Social Council, E/CN.4/Sub.2/2005/14 (2005).

exercising power over persons outside a state's national territory: "the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise."[183]

A distinction can be made between authority or control exercised over persons in official detention facilities and authority and control exercised over persons outside such facilities.[184] In such situations, for establishing extraterritorial jurisdiction, the key lies in the individual being held powerless and under the direct control of state agents,[185] in other words when s/he is submitted to the unfettered discretion of such agents. For example, in Lopez Burgos v. Uruguay, the applicant claimed that her husband LB, a worker and a trade union leader in Uruguay, had been kidnapped in Buenos Aires by members of the "Uruguayan security and intelligence forces", aided by Argentine para-military groups, and then secretly detained in Buenos Aires. During his detention, both in Argentina and Uruguay, LB was continuously subjected to physical and mental torture and other cruel, inhuman or degrading treatment.[186] The Human Rights Committee considered the following:

> The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' […] in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.[187]

It can be inferred that the responsibility of the state is not tied to its own territory but can manifest itself wherever the jurisdiction in the meaning of the Covenant (i.e. authority or effective control exercised over persons) is shown to exist. The Committee was of the view that the state party – in this case Uruguay – was under the obligation to provide effective remedies to the applicant. The HRC in Celiberti de Casariego v. Uruguay further specified that the state would be responsible even if the

[183] T. Meron, *supra* note 165, at 81.
[184] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 219.
[185] Ibid., at 220.
[186] Sergio Euben Lopez Burgos v. Uruguay, Communication No 12 12/52, UN Doc., (1981) A/36/40, 176, §§ 2.2-2.3.;
[187] Ibid., §12.2.

violation of a right happens on another state's territory *regardless* of whether that state's government gave its consent:

> Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.[188]

The ECtHR has also upheld the idea of the ECHR's extraterritorial application when state agents exerted power over persons outside a state's own territory. The level of control wielded by the state servicemen must amount to being effective. In the case of Öcalan, arrested with the help of Kenyan officials by members of the Turkish security forces on-board a Turkish aircraft in the international zone of Nairobi Airport, the ECtHR upheld the extraterritorial application of the ECHR based on the applicant being under the effective authority of the agents:

> […] after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention […].[189]

Further, in Al-Skeini and Others v. the United Kingdom, for the Court it was also clear that whenever a state, through its agents, exercises authority and control 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."[190] Similarly in the case of Coard,

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[188] *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, U.N. Doc. CCPR/C/OP/1 at 92 (1984) §§ 10.1-10.3. See further *Chitat Ng v. Canada*, HRC 5 November 1993, UN Doc. A/49/40; *Kindler v. Canada*, HRC 31 July 1993, UN Doc A/48/50, 138; *Mabel Pereira Montero v. Uruguay*, Communication No. 106/1981, U.N. Doc. CCPR/C/OP/2 at 136 (1990); see UN Human Rights Committee Concluding observations on the seventh periodic report of the Russian Federation CCPR/C/RUS/CO/7, 28 April 2015; UN Human Rights Committee Concluding Observations: Israel, CCPR/C/79/Add.93, 18 August 1998; UN Human Rights Committee Concluding Observations: Israel UN Doc. CCPR/C/ISR/CO13 29 July 2010; UN Human Rights Committee Concluding observations: Uganda, CCPR/CO/80/UGA, 4 May 2004.

[189] Öcalan v. Turkey, *supra* note 153, § 91; see also *Sanchez Ramirez v. France*, Decision of 24 June 1996 on the Admissibility of the Application (Decision of the European Commission of Human Rights) (App. no. 28780/95).

[190] *Al-Skeini and Others v. the United Kingdom*, ECtHR (2011) (App. no. 55721/07) § 137; *Issa and Others v. Turkey*, ECtHR (2004) (App. no 31821/96) § 55, § 79 and § 82; see also *Drozd and Janousek v. France and Spain*, ECtHR (1992) (App. no. 12747/87) § 91.

the Inter-American Commission on Human Rights (IACHR) spelled out a test where the key was not nationality or physical presence in a specific geographic area, but rather "whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."[191] In the context of Guantanamo prisoners, the IACHR based its reasoning on a similar test.[192]

There are some cases when the IHRL obligations of a state are triggered despite the person not being physically in the hands or custody of state agents. However, the level of control demonstrated by the agents needs to be effective and should be exercised over the individual's particular right. Thus, on 23 April 1999 a missile launched from a NATO aircraft hit the building of Radio Televizije Srvije (RTS) in Belgrade. In Banković, the ECtHR had to adjudge whether the applicants and their deceased, as a result of this act, came "within the jurisdiction" of the respondent States under Article 1 of the ECHR.[193] Without referring to the issue of the *espace juridique,*[194] what should be taken into account is the issue of state control over specific rights of persons in a concrete situation, in this case an individual's right to life. The ECtHR disregarded the fact that when states launch an attack, not only do they have control over this process, but they also possess control over the target to be hit, and consequently they need to ensure an appropriate analysis of casualties also in light of – in this case – the right to life. So the Court should have considered the applicant's submission that the

[191] Coard vs. United States, IACHR (Case 10.951, Report no 109/99) (1999), § 37: "…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."

[192] Inter-American Commission on Human Rights, *Precautionary Measure 259/02 – Detainees Held by the United States in Guantanamo Bay, Cuba* (March 13, 2002): "… no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.", available at http://hrlibrary.umn.edu/cases/guantanamo-2003.html (visited 23 July 2017).

[193] *Banković et al. v. Belgium et al*., *supra* note 178, § 54.

[194] On this see S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention', 20 *The European Journal of International Law* (2009) 1223–1246; M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg', 23 *The European Journal of International Law* (2012) 121–139; C. Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights', 28 *Utrecht Journal of International and European Law* (2012) 57–60.

determination of "jurisdiction" could be done by adapting the 'effective control' criterion, thereby securing rights under the ECHR proportionate to the level of control actually exercised.[195] This is poignant, as unlike in a situation of military occupation, during active combat or when state parties strike "a target outside their territory, they are not obliged to do the impossible (secure the full range of Convention rights) but rather are held accountable for those Convention rights within their control in the situation in question."[196] In other words, from the point of view of state control over persons' specific rights, the ECtHR should have ruled jurisdiction existed. That it did not was an error.

In another case, Solomou and others v. Turkey, the ECtHR had to consider S. Solomou entering the UN buffer zone in Cyprus, crossing the ceasefire line and arriving on TRNC territory. He was pursued by a United Nations Peacekeeping Force in Cyprus (UNFICYP) officer who attempted to pull him back.[197] Breaking free from the officer, Solomou tried to climb a pole where a Turkish Flag was flying.[198] Two soldiers in Turkish uniform and a man in civilian clothes standing on the balcony of the Turkish observation post fired in his direction as he was climbing.[199] He was hit by five bullets and died. The conclusion the Court then reached was that Solomou was killed by agents of the respondent government,[200] that the use of force was not justified by any of the exceptions laid down in paragraph 2 of Article 2 ECHR, and that "there has been a violation of the substantive limb of this provision."[201] It follows from this that while the state agents had no effective control over the person *stricto sensu,* they still

[195] *Banković et al. v. Belgium et al*., *supra* note 178, § 46.
[196] Ibid., § 47.
[197] *Solomou and Others v. Turkey*, ECtHR (2008) (App. no. 36832/97), § 10.
[198] Ibid., § 12.
[199] Ibid., § 71.
[200] Ibid., §§ 73–74; see also *Pad and Others v. Turkey*, ECtHR (2007) (App. no. 60167/00) (As to the Admissibility of Application) § 54: Turkey was found to have jurisdiction whilst seven Iranian nationals were killed by shots from Turkish helicopters. The ECtHR considered "it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives, who had been suspected of being terrorists".
[201] *Solomou and Others v. Turkey*, *supra* note 197, § 79; additionally, see *Isaak v. Turkey*, ECtHR (2008) (App. no. 44587/98) § 110–120; *Andreau v. Turkey,* ECtHR (2009) (App. no. 45653/99) § 41–51.

had effective control over his right to life, as the individual's right to life was "in the hands of the state".[202]

The authority and control over individuals should, therefore, be interpreted as encompassing situations going beyond mere detention facilities or physical contact, such as apprehension. At the end of the day, effective control by state agents over an individual's enjoyment of human rights can be brought about by such means as "a cruise missile, an anthrax letter sent from the neighbouring country, a sniper's bullet in the head from the distance of 300 meters, or a poisoned umbrella tip on a crowded street".[203] Mention should also be made of the Cuban authorities downing civilian aircrafts outside their airspace in 1996. The IACHR found "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority"; consequently, the Commission was able to apply IHRL extraterritorially to Cuba in connection with the events that took place in international airspace.[204]

Lastly, it should be emphasised that state responsibility arises not solely with regards to the right to life. In fact, a state may also interfere with or impact individuals' other rights such as the right to privacy, e.g. by surveilling their internet activity and thus having effective control over their communications.[205]

To conclude this section, it should be noted that the extraterritorial applicability of IHRL instruments "is likely to arise more and more frequently as a result of progressing globalisation and growing military intervention. More sophisticated solutions to this

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[202] N. Lubell, *Extraterritorial Use of Force, supra* note 131, at 223–224.
[203] M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia, 2004) 73–83, at 77–78.
[204] *Alejandre Jr and Others v. Republica de Cuba (Brothers to the Rescue)* 11.589, Report no 86/99 OEA (1999) §25 and §53.
[205] See the stance of *Human Rights Committee, Concluding Observations on the fourth report of the United States of America, UN CCPR/C/USA/CO/4*, 23 April 2014, calling on the US to § 22.a): "Take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance."

challenge will certainly need to be found"[206]. One possible solution, if not the sole, is that states adhere to their obligations under IHRL instruments and do not evade them.[207] Conceptualising and understanding the role of control will certainly assist in this regard. In last section of this Chapter, the element of control in IHL is assessed.

4. Control in International Humanitarian Law

Control equally plays an important role in IHL, and this is in two ways: first, it is a major indicator for qualifying a situation as one of military occupation; second, the element of control is linked to conflict classification as of the late 1990s (effective and overall control over an armed group).[208] Neither of the two is fully clear, however, with both mechanisms the subject of debates. Therefore, one cannot proceed to exploring the test of control in military occupation without examining the test of control for the purposes of conflict classification in IHL. It will be seen that the element of control in IHL is linked to the notion of *armed conflict involving foreign intervention*, formerly called *internationalised non-international armed conflict*.[209]

In accordance with IHL, solely two types of armed conflicts exist: International Armed Conflict (IAC), including a situation of occupation, and Non-International Armed Conflict (NIAC).[210] IHL instruments are far from clear what kind of violence amounts

[206] F. Coomans and M. T. Kaminga, *supra* note 139, at 7.
[207] See for example the UK Government statement, Government to protect Armed Forces from persistent legal claims in future overseas operations, 4 October 2016 available at: https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations (visited 2 December 2016).
[208] see Judgment, *Tadić*, *supra* note 41, § 98–145.
[209] T. Ferraro, 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of Conflict', 97 *International Review of the Red Cross* (2015) 1227–1252.
[210] IHL scholars have been exploring whether there are other types of armed conflicts, i.e. apart from IAC and NIAC, that fall under the regulation of IHL; see further D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* (Alphen aan den Rijn: Sijthoff & Noordhoof, 1979); S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal concepts and actual situations', 91 *International Review of the Red Cross* (2009) 69–94; M. Milanović and V. Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in N. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post Bellum* (UK: Edward Elgar Publishing, 2013) 256–314.

to either an IAC or a NIAC.[211] Qualifying a situation as a NIAC is more complex, and even more sensitive politically,[212] as the state in question may deny that the level of violence has reached the NIAC threshold, claiming to be engaged in "law enforcement" or "counter-terrorist" operations.[213] Political considerations also crop up when the parties to the conflict involve a government's armed forces, a dissident armed group, and a third state intervening overtly or covertly. Covert interventions are most often seen in support of a dissident armed group. The question then is how one should classify the situation: as a NIAC or IAC? How to assess the involvement of the third state? The identification of the involvement hinges on establishing the nature and degree of the third state's participation. It is precisely here that the dichotomy between the effective and overall control tests becomes most apparent. I first discuss *armed conflicts involving foreign intervention* more generally (section 4.1) before contrasting the effective and overall control tests (section 4.2).

4.1. Armed conflict involving foreign intervention

If state A is engaged in an armed conflict with a non-state armed group and calls for state B's assistance, then the conflict remains of a non-international character. What would raise concerns and entail complications for the purpose of conflict classification is the covert intervention of state B in favour of the armed group. While IHL is silent about foreign, i.e. another state's, involvement in a non-international armed conflict, the international law scholarship has been pondering about this matter for some time.[214]

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[211] See especially common Art. 2 GCs 1949 and Art. 1, AP I 1977.

[212] H.-P. Gasser, 'Internationalised Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon', 33 *The American University Law Review* (1983) 145–161, at 157.

[213] J. Pejic, 'Status of Armed Conflicts', in E. Wilmshurst and S. Brea (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007) 77–100, at 79.

[214] Ibid.; D. Schindler, *Different Types*, *supra* note 210; D. Schindler, 'International Humanitarian Law and the Internationalization of Internal Armed Conflict', San Remo, International Institute of Humanitarian Law, 1981, at 15; H.-P. Gasser, *supra* note 212; T. Ferraro, 'The ICRC's legal position', *supra* note 209.

After WWII, the number of NIACs has risen since "during the Cold War this trend was coupled with the phenomena of 'proxy wars' where many internal conflicts were fought through the intervention of foreign States. […] the period after the end of the Cold War has continued to see increased foreign intervention in what otherwise are internal conflicts between a State and non-state groups".[215] Hence Gasser considered that: "An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power."[216] Verhoeven defined internationalized internal armed conflicts to be "waged in a State between government forces and rebel factions or between armed groups with the intervention of one or more third States supporting the government, the rebel factions or armed groups."[217] Schindler referred to such conflicts as "mixed conflicts", i.e. "non-international armed conflicts in which foreign States or international organizations intervene with armed troops".[218] More recently, the ICRC proposed to replace the notion of internationalised non-international armed conflict with that of *armed conflict involving foreign intervention.*[219] This type of armed conflict is not a third category of an armed conflict and does not fall outside the scope of IHL regulation. Rather, it is a factual situation, where either

a) An outside state intervenes and militarily supports the *state* party to the conflict with a non-state actor;
b) An outside state intervenes and militarily supports the *non-state* party to the conflict with the state actor;
c) *One* outside state intervenes and militarily supports the state party to the conflict and *another* state intervenes and militarily supports the non-state party to the conflict;
d) An outside state *controls* the non-state party to the conflict; or

[215] D. Akande, *supra* note 31, at 57; see also H.-P. Gasser, *supra* note 212, at 145.
[216] Ibid., H.-P. Gasser, *supra* note 212, at 145.
[217] S. Verhoeven, 'International and Non-international armed conflicts', *Institute for International Law*, Working Paper N 107, K.U. Leuven Faculty of Law, (2007) 3–22, at 15.
[218] D. Schindler, *Different Types, supra* note 210, at 150. Note: The ICRC in 1971 and 1972 during the expert conferences suggested that in case there was a foreign intervention in the civil war, the entire rules of IHL should have applied "or at least those on the treatment of prisoners of war and internees, should be applicable. However, this suggestion was rejected.", see *Ibid*.
[219] T. Ferraro, 'The ICRC's legal position', *supra* note 209.

e) *One* outside state intervenes and militarily supports the state party to the conflict and *another* state controls the non-state party to the conflict. [220]

It should be noted that situations solely involving financial and political support have "no bearing on the application of IHL."[221] In situations d) and e), ultimately a NIAC becomes an IAC through state B directing and controlling the armed group who is fighting against state A. This armed group would eventually be acting on behalf of state B. On the other hand, if the direction and control test is not satisfied (situations b) and c)), the armed confrontations between the intervening state and the territorial sovereign will be regulated by the IHL governing IACs, whereas the confrontation between the territorial state and the armed group will be governed by the IHL of NIACs.[222] In other words, within the context of one broad conflict, the coexistence of IAC and NIAC is possible, giving rise to the so called "double classification".[223]

This stance is based on the test for identifying whether a NIAC became an IAC, put forward by the ICTY in Tadić, when it had to classify the armed conflicts occurring in the former Yugoslavia:

> […] in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.[224]

The steps put forward by the ICTY are to be read disjunctively, as the two scenarios may arise separately. Scenario (i) may easily be identified as an overt form of foreign state action: on the territory of state A, an armed conflict has ensued between the state's armed forces and a dissident armed group. When state B intervenes with its own armed force in favour of the rebels, the conflict can be qualified as international. Scenario (ii) raises more questions as the intervention by the outside state is done via covert actions. Here, the state intervenes indirectly, without using its own armed force, and the armed group fighting its territorial state in fact acts on behalf of the

[220] Ibid., at 1239–40.
[221] Ibid., at 1228.
[222] N. Melzer, *International Humanitarian Law* (Geneva: ICRC, August 2016) at 113
[223] Ibid; see also T. Ferraro, 'The ICRC's legal position', *supra* note 209, at 1246–48.
[224] Judgment, *Tadić,* supra note 41, § 84.

outside state. But based on what did the ICTY come up with such scenarios and mechanisms? How can the intervening state's actions be identified, especially given covert intervention (scenario ii)? What does *act on behalf of that other state* mean for IHL and what relationship ought to exist between the foreign state and the armed group to classify the conflict as international?

As a corollary to this section, it should be pointed out that the degree of control needed to render a state responsible for the conduct of an organized armed group is not settled in international law. In practice, so that an armed group belongs to a party to the conflict, "it appears essential that it conducts hostilities on behalf and with the agreement of that party".[225] Chapter III of the thesis addresses these questions in more detail, also unpacking the concept of *belonging*.

With this in mind, we now move on to consider the effective and overall control tests through the lens of IHL for the purposes of conflict classification.

4.2. Effective and overall control dichotomy

Let us again consider Tadić, but this time from the perspective of IHL and for conflict classification purposes.[226] Initially, the ICTY Trial Chamber considered that the conflict in Bosnia-Herzegovina after 19 May 1992 was of a non-international character. However, in order to determine whether the grave breaches regime applied,[227] the ICTY Appeals Chamber needed to re-examine the classification of the conflict and found it to be an IAC. To classify the conflict as an IAC, the ICTY had to analyse whether the acts of the VRS could be attributed to Serbia (i.e. the former FRY). Because IHL

[225] N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: ICRC, 2009), at 23.
[226] See further K. Huszti Orban, *The Concept of Armed Conflict in International Humanitarian Law,* PhD Thesis, Graduate Institute of International and Development Studies, 2014.
[227] There is no combatant status in NIAC, nevertheless there is the ICRC's right to visit the detainees. The principle of distinction between civilians and combatants is of customary nature, applicable both in times of IAC and NIAC. See further Rule 1, the Principle of Distinction between Civilians and Combatants, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1; see also Rule 3, Definition of Combatants, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3; and Rule 106, Conditions of the Prisoner of War Status, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule106 (all visited 2 December 2016).

itself is silent on this link, the ICTY had to look at the attribution mechanism in the law of state responsibility, i.e. the attribution to a state of acts of an armed group which is not that state's de jure organ. On what grounds, that is through what relationship does such an attribution arise?

To answer this, the ICTY examined the notion of control and its threshold as propounded by the ICJ in Nicaragua (see above, section 1): There, effective control in terms of attribution required a high level of control over the course of the operation, including decision-making and total operational control, i.e. controlling each and every step of the operation and its participants. In other words, this type of control goes beyond mere financing or generally influencing the armed group. But while the ICTY Trial Chamber adhered to the ICJ, the ICTY Appeals Chamber overturned the decision on law and came up with an completely novel approach to control, namely the standard of overall control, thus lowering the bar set by the ICJ.

The ICTY Appeals Chamber upheld the Trial Chamber in finding of fact that the armed conflict prior to 19 May 1992 was an IAC, but whether the armed conflict after 19 May 1992 continued to be an IAC or degenerated into a NIAC was dependent on

> […] whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as de iure or de facto organs of a foreign Power, namely the FRY.[228]

The reasoning that the ICTY engaged here mirrors Article 8 of the ILC Draft Articles on Responsibility of States – in other words, so that the conflict could be said to have become international, it had to be proved that the Bosnian Serb Army (VRS) and the Republika Srpska were not acting on their own, but on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro/FRY), i.e. that both were under the control of the FRY. The question then is: what kind of control? In this regard, the Appeals Chamber postulated that:

> It is nevertheless 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 […]. Should the conflict eventually be classified as international, it would inter alia follow that

[228] Judgment, *Tadić*, *supra* note 41, § 87.

> a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.[229]

The Appeals Chamber continued to state that IHL did not contain any criteria for determining when a group of individuals could be thought to be under the control of a state (i.e. acting as de facto state officials/agents). Hence, the ICTY Appeals Chamber had to

> […] examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as de facto State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.[230]

This made the ICTY have recourse to the law of state responsibility and analyse the notion of control propounded in Nicaragua by the ICJ. According to the ICTY Appeals Chamber's understanding:

> In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.[231]

Thus, the ICTY considered and contemplated one and the same test for state responsibility and for conflict classification. The ICTY deliberated that in order for an individual or a group to be considered as an agent of the state, the degree of control could vary depending on the circumstances.[232] For individuals that are members of an organized armed group, like a military unit or, in case of a NIAC, armed bands of irregulars or rebels, the state ought to wield overall control: "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."[233]

[229] Ibid., § 97.
[230] Ibid., § 98.
[231] Ibid., § 104.
[232] Ibid., § 117.
[233] Ibid., § 120.

Such a control "to some extent equates the group with state organs proper".[234] In the view of the ICTY, so that the acts of a military or paramilitary group are attributed to a state, it must be shown:

> that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. […] it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[235]

What is the exact meaning of the overall control threshold that the ICTY Appeals Chamber has carved out? What amounts to this control of an outside state over armed groups? Such control is lower than effective control (SR), as it does not include giving specific orders or directing each and every operation; but is higher than the mere provision of financial assistance, military equipment or training of soldiers. It seems that the State has to have "a role" and generally direct the actions of such groups.[236] It is therefore not necessary that the controlling authorities plan all the operations of the dependent units, choose every target, or issue specific instructions on the conduct of military operations. Instead, control required by international law may exist:

> … when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[237]

In this vein, the ICTY Appeals Chamber based its reasoning regarding the classification of the conflict solely on the overall control test.[238] Pursuant to this test, the ICTY Appeals Chamber found the Bosnian Serbs' actions to be in fact attributable to the FRY and the conflict in Bosnia-Herzegovina after 19 May 1992 to be an IAC between the Bosnian Serbs and the central authorities of Bosnia-Herzegovina.[239]

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[234] Ibid., § 121.
[235] Ibid., § 131.
[236] Ibid., § 137.
[237] Ibid.
[238] Ibid., § 145.
[239] Ibid., § 162.

However, the ICTY Appeals Chamber in Tadić ventured into the jurisdiction of and against the ICJ as well as against the Nicaragua standard of effective control (SR) for the purposes of establishing state responsibility, thus suggesting and crafting a single test for both state responsibility and conflict classification. Whether in doing so the ICTY crossed the line should be examined pursuant to Article 92 UN Charter, which regards the ICJ to "be the principal judicial organ of the United Nations".[240] The ICJ deals with general matters of PIL, whereas the ICTY's jurisdiction concerns only matters of individual criminal responsibility. One could, therefore, argue that since the law of state responsibility is a question of general PIL, the ICJ's dicta possess supremacy. But the ICTY's approach, according to the present writer, was based on the *absence* of a clear test in IHL that would deal not only with conflict classification but also with measuring outside state involvement in prima facie NIACs. Whether the ICTY committed an audacity or has given a fresh look to matters and paved the way to harmonize two issues – state responsibility and conflict classification – that are separate but nevertheless very close to one another will be discussed next, via the ICJ and its approach in the Genocide case.

According to the ICJ, that the ICTY used the overall control test both for determining state responsibility and conflict classification purposes was a mistake. For the ICJ, to use the overall control test to determine whether an armed conflict was international or not was suitable.[241] But this test was *not* suitable for establishing state responsibility. The ICJ did not further explain why the overall control test might be suitable for conflict classification, considering not to "think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment."[242] But that the ICTY had presented the overall control test to be equally suited for the purposes of establishing state responsibility, i.e. for determining when a state is responsible for acts committed by paramilitary units

[240] Art. 92 UN Charter.
[241] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 6, § 404.
[242] Ibid.

(armed forces which are not among its official organs), in the view of the ICJ is an "argument in favour of that test [being] unpersuasive."[243] Hence, according to the ICJ,

> […] logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: 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.[244]

International legal scholars too offer divergent views on the effective vs. overall control dichotomy. Meron also considers the road taken by the ICTY as not sound, since "even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to internationalization of the conflict."[245] Instead, this authoritative scholar advised that the ICTY Appeals Chamber rejected the consideration of the Nicaragua imputability test and returned to the logical, time tested approaches of international law, namely

> […] the reality, dimensions, scope and duration of foreign military intervention, the foreign state's direct participation in the hostilities, the nature of the states and political entities involved in the conflict, their recognition by other states, the position of the United Nations Security Council, the relative involvement of local and foreign forces, and in general, relevant strategic, factual and military considerations […].[246]

By contrast, Cassese believed that the ICTY Appeals Chamber's "approach was methodologically quite appropriate. Any international court charged with applying a specific body of international law (human rights law, the law of the sea, humanitarian law, international criminal law, etc.) is authorized to apply rules belonging to other bodies of international law, or even municipal law, incidenter tantum, that is for the purpose of construing or applying a rule that is part of the corpus of legal rules on which it has primarily to pronounce (on which it therefore adjudicates

[243] Ibid.
[244] Ibid., § 405.
[245] T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', 92 *The American Journal of International Law* (1998) 236–242, at 239.
[246] Ibid., 241.

principaliter)".[247] Moreover, Cassese was of the view that the effective control test was suitable for establishing the responsibility of a state for the actions of *private individuals*, whereas the overall control test was the one to establish state responsibility for the actions of *organised armed groups*/*military units*.[248]

Nevertheless, Milanović and Hadzi-Vidanovic consider that IHL may contain its own solution for solving the tension and that it

> […] can adopt its own solution regarding the link between a state and a non-state actor that would suffice for internationalization of a conflict, and that link need not be attribution as a matter of state-responsibility. […] the internationalization of a prima facie NIAC […] – an intervention into a civil conflict by a third state – […] depends on the nature of the relationship between the intervening state and a non-state actor. The relationship may, but need not be, attribution. A relationship of overall control, which does not suffice for attribution, may suffice for internationalization, as the ICJ itself allows.[249]

For the present writer, in the Genocide case the ICJ, in its mind – that is, theoretically, since it is not that easily put to practice – delineated the tests establishing state responsibility and conflict classification. How far such a delineation is consonant with the logic and reality of IHL is a matter for appreciation. It would have been instructive if the ICJ had explained precisely why there is no requirement for the same test resolving both conflict classification and state responsibility, in addition to elaborating on why overall control was suitable for the purposes of conflict classification. Had the ICJ engaged in such an analysis, not only would it have avoided the emergence of a double standard, under which the ICJ may continue to apply its theory to inter-state disputes,[250] but it would also have avoided creating a rift between IHL and the Law of State Responsibility.

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[247] A. Cassese, 'The Nicaragua and Tadić Tests Revisited', *supra* note 37, at 662. Note: Cassese also contemplates the overall control test advanced by the ICTY to be suitable and helpful for holding states accountable not only for the proxy's actions, but also for terrorist groups supported by states, as well as in the use of national military contingents for peacekeeping purposes by international organizations. Here, too, the overall control standard would make it possible that the responsibility of a state or international organization which was exercising a global control over the members of the military contingent in question arises; ibid., at 665–667.

[248] Ibid., at 657 and at 661.

[249] M. Milanović and V. Hadzi-Vidanovic, *supra* note 210, at 295.

[250] M. Sassòli and L. M. Olson, 'The judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case', 839 *International Review of the Red Cross (*2000) 733–769, at 740.

The ICJ's reasoning complicates the matter since considering a state to be a party to an armed conflict via exercising overall control could mean that a state is a party to an armed conflict but is *not held responsible* for the actions of the armed groups it controls during that conflict. Being a party to the conflict also means that the state engages in certain actions that are based on control. Through such participation, the responsibility of the state is thus established. The question then is why two mechanisms that are so closely related are regulated so differently?

As stated before, it is often difficult to classify and identify the applicable law to a foreign power's intervention in a NIAC or when an IAC is fought via proxies.[251] Classifying such instances is challenging as the facts on the ground may rapidly change. This also leads to unsatisfactory results in the form of an imbalance in according POW status. Therefore, determining what law applies to such armed conflicts should be done by looking at "who is fighting whom"[252] along the typology a) to e) provided above.[253]

[251] Ibid., at 737.

[252] The logic of "who is fighting whom" was employed by the ICJ already in the Nicaragua case, where the law was divided according to the concrete belligerent relationships (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) supra* note 43, § 219: "The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."

[253] See T. Ferraro, 'The ICRC's legal position', *supra* note 209, at 1239–40; M. Sassòli and L. M. Olson, 'The judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case', *supra* note 250, at 737. For C. Greenwood. "[…] there is nothing intrinsically illogical or novel in characterising some aspects of a particular set of hostilities as an international armed conflict while others possess an internal character. Conflicts have been treated as having such a dual aspect where a Government is simultaneously engaged in hostilities with a rebel movement and with another State which backs the movement. The International Court of Justice in the Case Concerning Military and Paramilitary Activities in and against Nicaragua stated that: the conflict between contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts", see C. Greenwood , 'International Humanitarian Law and the Tadić Case', 7 *The European Journal of International Law* (1996) 265–283, at 271.

It is also worthwhile to mention that, in fact, the overall control (SR/IHL) test threshold was used and upheld by Blaskić,[254] Aleksovski,[255] Kordić and Čerkez,[256] Nalelitić and Martinović[257] and Brdanin.[258] The ICC pre-trial chamber, too, followed Tadić, and just one month before the ICJ would hand down its judgment on the Genocide case, in the Lubanga case the ICC also considered overall control (SR/IHL) to be valid for determining the nature of an armed conflict.[259]

All this, time and again, brings us to the same question: should there not be one test for the law of state responsibility and conflict classification? Already in 2011, the ICRC's Reference Document on Violence and Use of Force favoured overall control for the purposes of conflict classification.[260] More recently, the ICRC explicitly stated that "in the event of foreign intervention resulting in overall control over the non-state party by the intervening power, it is the law of IAC that applies."[261] Such a contemplation excludes the effective control (SR) threshold for the purposes of conflict classification and considers it to be different from state responsibility. The overall control test spelled out by Tadić thus proved to be instrumental in establishing

[254] Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000, §§ 76–102; especially §§100–102. For instance, in § 76 the ICTY further stated: "An armed conflict which erupts in the territory of a single State and which is thus at first sight internal may be deemed international where the troops of another State intervene in the conflict or even where some participants in the internal armed conflict act on behalf of this other State. The intervention of a foreign State may be proved factually".
[255] Judgment, *Aleksovski* (IT-95-14/1-A), *supra* note 125, § 137–146.
[256] Judgment, *Kordić and Čerkez* (IT-95-14/2-T), *supra* note 111, §§ 111–115. In § 115, the ICTY Trial Chamber considers that the overall control test has two parts: "a) The provision of financial and training assistance, military equipment and operational support; b) Participation in the organisation, coordination or planning of military operations."
[257] Judgment, *Nalelitić and Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, §§ 197–202, particularly §§ 199-201.
[258] Judgment, *Brdanin* (IT-99-36-T), Trial Chamber II, 1 September 2004, §§144–156.
[259] Decision of the Confirmation of Charges, *Thomas Lubanga Dyilo* (ICC-01/04-01/06) Pre-Trial Chamber I, 29 January 2007, §§ 209–211.
[260] ICRC Reference, *Violence and the Use of Force* (Geneva: ICRC, July 2011), at 33 (original emphasis). The document gives four different situations for consideration: "1. The relationship between two foreign States intervening on behalf of opposing parties to the conflict is governed by the law of international armed conflict. 2. The relationship between the local government and a foreign State intervening on behalf of insurgents is governed by the law of international armed conflict. 3. The relationship between the local government and insurgents is governed by the law of non-international armed conflict. 4. The relationship between insurgents and a foreign State intervening on behalf of the local government is governed by the law of non-international armed conflict.", ibid.
[261] T. Ferraro, 'The ICRC's legal position', *supra* note 209, at 1249.

whether a prima facie NIAC became international. Based on the foregoing, it is argued that this test is based on two cumulative elements:

1. States providing the armed group/entity with financial support, training assistance, military equipment, and operational support; and
2. State participation and involvement in the organization, coordination or planning of military operations of the armed group/entity.

The state need not be involved in the precise details of each military operations. Such a test can even be met if the armed group/entity chooses means and tactics of the operation on its own.

The International Law Commission's Report on Fragmentation of International Law described the tests formulated by the ICJ and ICTY as a "normative conflict between an earlier and a later interpretation of a rule of a general international law",[262] while Higgins considers that "some differences of perception between ICJ and the ICTY do remain on this control test for purposes of responsibility, but given the different relevant contexts, they hardly constitute a drama".[263] Whether a "drama" or whether a "*dialogue des sourds*",[264] in the opinion of this author, the same test – that of overall control – should be used for establishing state responsibility and classifying armed conflicts in the event of foreign intervention (including military occupation) into a NIAC. Adopting *one test* avoids the fragmentation of the concept of responsibility, as state responsibility is engaged through state action and participation.[265] In times of armed conflicts, the relationship between the belligerents is regulated by IHL, which chiefly aims to render protection to those who are affected. When states engage in armed conflicts, they are usually performing certain actions via their de jure organs (for instance armed forces), thereby assuming full responsibility for the latter's acts or omissions. Similarly, when states are participating in an armed conflict via de facto

[262] International Law Commission Study Group on Fragmentation, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GA A/CN.4/L.682, 13 April 2006, at 32
[263] R. Higgins, 'A Babel of Judicial Voices', 55 *The International and Comparative Law Quarterly* (2006) 791–804, at 795.
[264] B. Simma, 'Universality of International Law from the Perspective of Practitioner', 20 *The European Journal of International Law* (2009) 265–297, at 280.
[265] M. Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia', 5 *Journal of International Criminal Justice* (2007) 829–838, at 832–833.

organs, there is no justification not to consider that state to be responsible for any acts or omissions carried out by them.[266] This is so because a state ought to be held "legally responsible for acts which are really its own …".[267] Considering states to be responsible only for the actions of their de jure but not their de facto organs would, therefore, fragment the concept of state responsibility.

Why should overall control (SR/IHL) be given precedence over complete dependency (SR) and effective control (SR)? On the one hand, applying the complete dependency test (SR) for establishing state responsibility and conflict classification raises the bar to generate the required evidence substantiating the state's participation in a certain armed conflict unrealistically high.[268] Ultimately, this would also allow states to evade their international legal responsibility not only under the law of state responsibility, but also under IHL. On the other hand, while the effective control test (SR) is less stringent than the complete dependency (SR) test, it nevertheless ignores the fact that a state may use armed groups to undertake actions "that are intended to damage, or in the event do damage, other states."[269] Furthermore, it appears that effective control (SR) is better suited to establish the responsibility of a state for the actions of a single private individual. When a state is tasking an individual, it may order him/her to perform either a one-time action or a series of actions. And it is only logical that such an act is based on effective control (SR), since individual actions necessitate specific instructions. In the context of armed groups, however, and consistent with the notion of indirect effective control (see Chapter III), overall control (SR/IHL) suffices to consider non-state actors as state agents under public international law.[270] In sum, the overall control (SR/IHL) test is more realistic to be satisfied, more robust in its application,[271] and consequently affords better protection pursuant to IHL. Henceforth, I am going to proceed on this basis. In Chapter III of this thesis, the analysis of the overall control (SR/IHL) test suitability is continued on this premise,

[266] Ibid., at 835.
[267] D. Akande, *supra* note 31, at 60. However, note that Akande favours the threshold of effective control (SR); ibid.
[268] A. Cassese, 'The Nicaragua and Tadić Tests Revisited', *supra* note 37, at 665.
[269] Ibid., at 654.
[270] T. Ferraro, 'The ICRC's legal position', *supra* note 209, at 1250.
[271] A. Cassese, 'The Nicaragua and Tadić Tests Revisited', *supra* note 37, at 661 and 665.

particularly when discussing the indirect effective control phenomenon in the context of military occupation.

Conclusion

This Chapter has traced control in the form of various tests in the laws of state responsibility, international criminal law, international human rights, and international humanitarian law. It was shown that each branch comprehends control in its own way and uses it for different purposes:

- In state responsibility, control is used to trigger a state's responsibility for the actions of its de jure organs, private persons, or de facto organs (total dependency/complete control and effective control tests);
- In international criminal law, control is linked to the issue of command responsibility, both in a military and a civilian hierarchy (effective control (ICL));
- In international human rights law, the issue of extraterritorial application is determined by control over territory or individuals; and
- In international humanitarian law, control is used to identify the type of foreign state involvement in an armed conflict: when there is overall control (IHL) of an outside state over a non-state party to a conflict with another state, that armed conflict assumes an international character.

The following two Chapters directly build on the conceptual distinctions developed here. Chapter II will examine the concept of establishing effective control over territory for the purposes of identifying situations of military occupation in IHL. In doing so, it will centre on direct control exercised by a state over territory that is not its own, i.e. without the involvement of any intermediary, as opposed to indirect effective control (or occupation by an intermediary), which is discussed in Chapter III.

Chapter II:
Effective Control in Occupation Law

1. Introduction

In 2007, the ICRC initiated a project on occupation law "to analyse whether, how and to which extent occupation law might need to be reinforced, clarified or developed."[1] It further indicated that "some have challenged occupation law on the basis it was ill-suited for the polymorphic features of contemporary occupations".[2] While the project culminated in an extensive report entitled "Occupation and Other Forms of Administration of Foreign Territories", questions remain as to what exactly constitutes the test of establishing control over territory for the purposes of military occupation. In other words, what is it that makes a state an occupant? And what "polymorphic features of contemporary occupations" may there be?

Throughout this thesis, it will be seen that control over territory can take various forms and play out at different levels, that it can be exercised directly or indirectly, and that it can include one or more actors – a state, its armed forces, several states, an international organisation, or an armed group. This Chapter centres on effective control exercised by states directly and consists of two sections.

The first examines establishing control over territory for the purposes of military occupation, that is control exercised without an intermediary, solely through a state's own official armed forces. The level of control needed to determine the start of occupation based on the *travaux préparatoires* for the Hague Regulations 1907 (HR 1907), Geneva Conventions 1949 (GCs 1949) and Additional Protocol I of 1977 (AP I 1977) will be looked at. This will clarify the different elements of the control test. The first section also discusses the question of when control over territory commences and deals with the difference between actual and potential control.

[1] ICRC, *Contemporary Challenges to IHL – Occupation: Overview*, available at: http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/occupation/overview-occupation.htm (visited 27 April 2014).
[2] Ibid.

Section 2 explores the concept of joint control, which is a form of direct control (i.e. without intermediary actor) but involves more than one state's armed forces, for example control exercised by a Multinational Force (MNF). The second section finishes with assessing the possibility of the UN itself being an occupant and analyses the concept of UN SC-endorsed control.

2. Establishing Control

2.1. Stepping back in time, from Brussels through Oxford to The Hague: The control enigma and Article 42 HR 1907

Since this thesis primarily concerns the concept of control in military occupation, and thus is interested especially in what control means and what its implications are for military occupation, this first sub-section looks at developments leading to the GCs 1949. It will emerge that, for a long time, there was no consensus over the concept and content of occupation in the laws of war. One particular divide can be found between the concepts developed by the Brussels and Hague conferences, on the one hand, and the Oxford Manual (1880), on the other. As shall be discussed in more detail, the different elements around which the pre-1949 understanding of occupation centred are: authority and control, uprising and effectivity, exercising authority, and occupation duration. In what follows, the required level of control for the purposes of establishing military occupation is thus extrapolated from the conference proceedings at Brussels and The Hague, both constituting an important step in the process of IHL codification.

2.1.1. Authority and control

Our analysis begins with the 1874 Brussels Conference, convened by the Russian Czar Alexander II.[3] In summer 1874, the delegates of 15 European states met to examine the draft of an international agreement concerning the laws and customs of war, in which one section was entitled "On military authority over the territory of the hostile State". The Conference adopted the Russian draft with only minor alterations, yet not

[3] Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, available at http://www.icrc.org/ihl/INTRO/135 (visited 3 December 2017).

all governments were willing to accept the document as a binding instrument. Consequently, it was not ratified. The Conference nevertheless marked an important step towards IHL codification.[4] It notably constitutes the first attempt at providing a definition of military occupation and its integral elements, specifically of the level of control needed for occupation to be established.

Therefore, military occupation is associated with state A's hostile military forces' unwelcomed presence on and control over state B's territory. The underlying element, and the backbone of such control, are a state's military forces, i.e. its troops through which it is able to show force and ultimately secure control over the territory. In fact, the project of an International Declaration concerning the Laws and Customs of War (hereafter: Brussels Declaration of 1874) put this very requirement at the forefront of its definition of occupation:

> A territory belonging to one of the belligerents is considered as occupied when it is actually placed under the authority of the hostile army. The occupation only extends to those territories where this authority is established and lasts only so long as it can be exercised.[5]

It is noteworthy that the word "control" was neither explicitly mentioned nor discussed in greater detail. However, control's omnipresence is felt when exploring the Conference records via the notion of *authority*. These records, as a result, provide a rather flawed and uneven conceptualisation of the level of control required. Nonetheless, if territory "actually placed under the authority of the hostile army" signifies territory under the *control, power* and *discretion* of an adversary state's military forces, quite simply the word authority has been substituted for control – without defining either of the two any further. Still, despite the absence of the term of control from that formulation, it is found to be firmly instilled in the notion of power.[6] A state having territorial control would prima facie rule out uprisings against its control occurring on that territory; an aspect discussed next.

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[4] Ibid.

[5] Article 1 Project of an International Declaration concerning the Laws and Customs of War (Brussels 27 August 1874), "Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare" (United Kingdom Parliamentary Papers), Miscellaneous No 1 (1875), at 202.

[6] Ibid., at 236.

2.1.2. Uprisings and effectivity

The Conference delegates viewed uprisings as a major challenge to the occupant's control over territory. Only being able to deal away with insurrections suggested that the control possessed by the occupant over territory was effective in nature. Colonel Hammer for example was of the view that "in order to be effective the authority must be exercised"[7] and considered that territories which contrived to free themselves from this authority ceased to be under occupation.[8] General de Leer also emphasised the occupant's power to resist the occupied state's army attacks, in addition to not allowing for an uprising by the local population:

> […] occupation should be deemed to be established when one part of the occupying army has secured its positions and its line of communication with the other corps. That being done the army is in a position to hold its own against the attack of the army of the occupied country, and, against the rising population. If it cannot carry out this double object it is shorn of its authority.[9]

What is significant here is that the number of troops was not deemed to be important, provided both the local population and the ousted sovereign succumbed to the military strength of the occupant. Colonel Hammer thus held that in order to sustain the occupation,

> […] it is not necessary to employ a large number of troops; one man, provided he be respected, a post or telegraph office, a commission of any kind established in the district, and performing its functions without opposition, would suffice; in a word, what is required is some fact proving that the territory as such can be under the military domination of the enemy.[10]

There were contrary views, too. The Dutch delegate regarded it necessary that "[t]he occupier must always be in sufficient force to put down an insurrection should one break out."[11] Yet, *being in sufficient force* does not mean the armed forces of the occupant have to be constantly present on the territory in certain numbers. In fact, this can also be understood as a potential occurrence: The population of the occupied territory has to constantly feel that any attempt on their part to eject the occupant

[7] Ibid.
[8] Ibid.
[9] Ibid., at 236–237.
[10] Ibid., at 237.
[11] Ibid.

would be put down and supressed by virtue of the occupant's military force. It was also understood that the occupant had the right to protect its control over the territory: General de Leer considered it "his right as an occupier"[12] to suppress an insurrection. Nevertheless, this raises the issue of the occupant's capability to actually exercise control over territory.

2.1.3. Exercising Authority

The Conference records also furnish a glimpse of the occupant actually exercising his authority (i.e. control). If the occupier was *in a position* to exercise his authority, the occupation was a reality; but the moment this power no longer existed, occupation ceased.[13] What was presumed under that expression was not explained. Based on the subsequent discussions, it may be inferred that this formulation meant that the occupant possessed not only sufficient military personal and equipment to have taken control over the territory, but also to sustain it without any difficulties. An occupant exercising its powers, according to Baron Lambermont, likewise showed the occupant's authority – but not one based on mere assumptions. Rather, it had to be a factual matter. Its powers had to be real and sufficient, something which however presented great difficulty to practically ascertain.[14]

The occupant's power, according to Lambermont, may also have been established gradually and not all at once. The Baron based his thinking on the danger of a resistance occurring from within the occupied territory, which in turn could be short-lived or prolonged.[15] For an occupant's authority to be practically established, at least for General de Voigts-Rhetz, there had to be no threat coming from the population of the occupied territory; also, the local population had to be disarmed, either through them giving up their arms freely or by having them taken from them by the occupant by force.[16] This further indicates that control over territory is established by the

[12] Ibid.
[13] Ibid., at 259.
[14] Ibid., at 237.
[15] Ibid., at 237–238.
[16] Ibid., at 238.

occupant to such an extent that any opposition from the side of the occupied territory is, or at least can be, rapidly dealt away with.

2.1.4. Occupation Duration

The delegates also briefly touched upon an occupation's duration, linking it to the duration of the occupant's control. This is seen in Baron Jomini's thought: "occupation lasts as long as it is practically carried out",[17] denoting that as long as control of a territory lasts, occupation continues.

In sum, while the Brussels Conference records provide a convoluted picture of the notion of occupation, with little agreement on fundamental issues such as the number of troops required or the level of control needed, the delegates' explanations still have to be duly taken note of as they "threw light on the sense" [18] of military occupation at that time.

2.1.5. The Oxford Manual of 1880

Another instrument, more to the point in dealing with the notion of occupation, and one that actually offers more clarity for extrapolating its integral elements, was drawn up by the International Law Institute in 1877. The 1880 Manual of the Laws and Customs of War at Oxford (Oxford Manual) offers the following view on territory being occupied:

> Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation.[19]

Compared to the Brussels text, this definition is distinguished by the wording of the ousted sovereign *ceasing to exercise its authority,* as well as by the invading state being *in a position to maintain order* on the territory in question. The control

[17] Ibid., at 237.
[18] Ibid., at 239.
[19] Article 41, *The Laws of War on Land* (Oxford 9 September, 1880), also known as the Oxford Manual.

requirement is mirrored in these two conditions as it is impossible to secure control over territory without first ousting the sovereign. The ability by the invader's military to control the territory should trump the military capacity of the former sovereign. Maintaining order then must be understood as the occupant being in charge of the territory in lieu of the displaced sovereign. It is therefore presumed that a hostile force possessing a high degree of military power is a prerequisite for the occupant's authority in this regard.

The mentioned conditions should be deemed as stating elements of a high degree of control – which according to the present writer, is nothing other than effective control (OL). The last sentence of the 1880 definition restates the requirement of such control to be exercised by the occupant, as without such there would be no occupation – thus, the moment an occupant stops exercising such control, occupation is over (see also Chapter IV).

Another point in this definition that needs to be addressed is the formulation "in a position", which did not figure in the Brussels Declaration. The important question is whether this can be read as including a potential of control which is *not* exercised by the occupant, for example because it chooses not to. In other words, what happens if a sovereign is ousted and only an invading army could – but does not – exercise authority? Should this be linked to the duty to maintain law and order? Or to the occupant setting up a military administration apparatus in the territory? These concerns will be addressed below.

2.1.6 The Hague

In 1899, the international community assembled again, this time in The Hague, to revise the 1874 Brussels text – and the issue of occupation was discussed anew. The Hague delegates did not adopt the Oxford Manual's definition,[20] instead reverting back to 1874.[21] This result should not be seen to diminish the importance of the

[20] D. Appel Graber, *The Development of the Law of Belligerent Occupation, 1863–1914: A Historical Survey* (New York, Colombia University Press, 1949), at 59.
[21] J. Brown Scott and Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences, Translation of the Official Texts: The Conference of 1899,* Second

discussions at The Hague, as more precision was brought to understanding the *level* of control required for establishing military occupation. This time, three elements stand out from the deliberations of the delegates: establishing occupation/control (as opposed to authority and control in Brussels), the occupant's military presence and access to the occupied territory (as opposed to exercising authority), and the status of the legal authorities (as opposed to uprisings, effectivity and occupation duration). Taken together, all three elements demonstrate what the delegates prioritised at the time in constructing the notion of military occupation.

The discussions commenced with examining the perception of an occupant's power and considering when occupation was established. Again, as in Brussels, neither the term control nor its required threshold were explicitly and unequivocally specified. For this reason, the meaning of control must be read between the lines of the delegates' reasoning. Colonel Gross von Schwarzhoff from Germany proposed to delete the second paragraph of the Brussels definition, as it was

> […] necessary to provide for the case in which a belligerent has effectively established his authority in a territory, but in which communications between the army or the occupying bodies and the other forces of the belligerent are interrupted and in which uprisings occur in that territory and are momentarily successful.[22]

Another delegate, General den Beer Poortugael, considered this amendment too extensive in scope and thought that occupation could be recognized only when "the authority of the belligerent is actually established."[23] However, what the "authority of the belligerent actually established" signified was not explained. What may be further understood is that, for the delegates present in The Hague, the existence of military occupation was more clearly based on the requirement of the occupant's army being present on and controlling the territory than had been the case with the Brussels text. This meant that the occupant had overcome the powers of the ousted sovereign – exactly what the Oxford Manual had proposed.

Commission: Second Sub-commission, Seventh Meeting, 8 June 1899 (London: Oxford University Press, 1920) 509–512, at 512.

[22] Ibid., at 509.

[23] Ibid., 509–510.

An illustrative explanation for maintaining control over territory, from a military perspective, was given by Colonel Gilinsky, who emphasized that securing the lines of communication was important in this regard and that even if a resistance occurred, this did not mean that occupation did not exist. But the presence of large numbers of the occupant's army was an essential condition, since the military was the main tool via which control was established and maintained over territory:

> […] an army considered a territory occupied when it found itself therein either with the bulk of its troops or with detachments, and when the lines of communication are insured. On this territory, the occupying army leaves troops to protect its communications in the rear. These troops are often not very numerous, so that an uprising becomes possible. However, the fact of such an uprising breaking out does not prevent the occupation from being considered as actually existing.[24]

The notion of *lines of communication* indicates that in establishing them, the occupant was already in control of at least a part of the territory. As Clausewitz explains, lines of communication form the connecting roads between the army in the field and its base and are considered the artery used by convoys of ammunition, detachments, mail, and agents of the administration.[25] In fact, this is their first purpose. If such lines are compromised, the military force is isolated and prone to be defeated by the enemy. Hence, a second purpose of such lines is to provide a pathway for retreat. Finally, a third and rather different purpose is acquired during occupation:

> […] all the roads which lead from the point occupied by an army to its sources of existence and power, are not on that account necessarily lines of communication for that army. They may no doubt be used for that purpose, and may be considered as supplementary of the system of communication, but that system is confined to the lines regularly prepared for the purpose. Only those roads on which magazines, hospitals, stations, posts for despatches and letters are organised under commandants with police and garrisons, can be looked upon as

[24] *Actes de la Conférence de Bruxelles 1874* (Paris: Librairie des publications législatives, 1874), at 105. Gilinksy also reminded the assembly of the explanation that was adopted by the Brussels Conference on 12 August 1874: "We may consider occupation as established when a part of the occupying army has secured its positions and its line of communications with the other bodies. This being done, it is in a position to cope with the army of the occupied country and the uprisings of the population."; ibid.

[25] C. von Clausewitz, *On war* (translated by Col. J. John Graham, London: N. Trübner, 1873), Book 5 Military Forces, Chapter 16, available at http://www.clausewitz.com/readings/OnWar1873/BK5ch16.html#a (visited 3 December 2016); see also C. James, *An Universal Military Dictionary* (4th ed., London: T. Egerton, 1816) at 439: "In military strategy, that line which corresponds with the line of operation and proceeds from the base point".

> real lines of communication. But here a very important difference between our own and the enemy's army makes its appearance, one which is often overlooked. An army, even in its own country, has its prepared lines of communication, but it is not completely limited to them, and can in case of need change its line […]. An army in an enemy's country on the contrary can as a rule only look upon those roads as lines of communication upon which it has advanced […].[26]

On this account, then, access to the occupied territory is more important than the extent of one's presence there. This stands in stark contrast to the majority view of delegates at Brussels, when military presence alone seemed to determine the establishment of control over territory.

Overall, the conference delegates explained control based on their own experience. However, while they advanced different conceptualisations of control over territory, one commonality remained: firm control by the army over territory was needed to claim that a situation amounted to occupation. Even if such control was challenged from within the occupied territory, provided the occupant's army dealt away with it, occupation continued. The key was thus to possess the power to do so. General den Beer Poortugael stated this as follows: "[w]hen an authority has not power enough to maintain itself, it is not established and there is no occupation."[27]

Finally, a minority of delegates considered that stripping the legal authorities of their powers over the invaded territory indicated that the territory was placed under the occupant's control. Mr. Rolin, for that matter, proposed that the:

> […] fact, easily verified, of the invasion of the territory and the retirement of the legal authorities, may serve best to determine whether there is occupation […] since there is no longer more than one single authority that can be exercised, and that is the authority of the enemy.[28]

Barring the legal authorities from carrying out their professional duties, and more generally hindering the work of the state apparatus, are undeniably signs of an enemy's effective control over the territory. However, this was itself predisposed on having military troops on the ground.

The above reproduced thoughts were all voiced by military experts of that time. However, the lawyers from the period after 1899 had a different regard of occupation

[26] C. von Clausewitz, *supra* note 25, Book 5, Chapter 16.
[27] *Actes de la Conférence de Bruxelles 1874*, *supra* note 24, at 511.
[28] Ibid., at 511.

and the needed threshold of control. Those partaking in the Conference generally demanded more clarity from the military participants, arguing that when "authority" was not of sufficient strength to sustain itself, it was not "established" in the territory and that territory was in no true sense "occupied".[29] It transpires that for the legal scholarship of that time, military force was a *sine qua non* for establishing occupation. It was the first element, which would then gradually give rise to the other elements of occupation. Thus, William Hall, in his work about treaties in International Law, considered occupation to start as soon as local resistance had ceased and to continue for as long as the enemy army remained in the locality. For Hall, the occupant must keep an ample force in the occupied region over which it claims authority; occupation by flying columns or small detachments of troops is therefore inadequate.[30] This in turn means the occupant has to strive to stabilise its power over the territory.

The same link can be seen in the work of Birkhimer. Writing in 1892, Birkhimer highlighted that a military power was needed to enforce occupation, i.e. fundamentally occupation should rest on military force, otherwise it would be an occupation only on paper.[31] He also thought occupation would receive recognition only when the occupied territory's government authorities were expelled and the commander of the occupying army was able to make its authority respected.[32] The requirement of control is therefore identified in not only ensuring respect for one's powers, but also in the ability of the occupant to maintain possession of the territory: "the moment the possession is lost, the right of military occupation is also lost".[33] Maine, on the other hand, advocated the criterion of exercising *sole* control over territory and contended that the invader was said to be "in military occupation of so much of a country as is wholly abandoned by the forces of the enemy"[34] and that "the

[29] W.I. Hull, *The Two Hague Confer*ences (Boston: Ginn and Company, 1908), at 246.
[30] W.E. Hall, *A Treatise on International Law* (Oxford: The Clarendon Press, 1924), at 482–500.
[31] W.E. Birkhimer, *Military Government and Martial Law* (Kansas City, MO: Franklin Hudson, 1914), para. 35.
[32] Ibid.
[33] Ibid., para. 43.
[34] H.S. Maine, *International Law* (Boston: Adamant Media Corporation/Elibron Classics, 2005), at 108.

true test of military occupation is exclusive possession",[35] so that during occupation "the authority of the regular government is supplanted by the invading army"[36] and by nobody else.

As will be seen below (section 2.4), all of this can be interpreted to mean effective control (OL) over territory. Martens, too, although not explaining what "actually under the control" denoted, perceived occupation to be a matter of fact and accepted only those regions to be occupied which were *actually under control*.[37] This suggests that "actually under control" equals the establishment of the occupant's military control over territory and that the ousted sovereign cannot exercise its governmental functions and territorial control anymore.

2.1.7. De lege lata

All these considerations of the notion of occupation and its needed level of control are implied and read in-between the lines of Article 42 HR 1907. This article is couched in Section III, which by its mere title, "Military Authority over the Territory of the Hostile State", suggests to hinge on a military force establishing control over territory:

> 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.

This article has never been subjected to any modification whatsoever since its adoption and has acquired a customary law status.[38] It creates the impression that a clear concept of occupation is spelled out in IHL. Nonetheless, upon closer scrutiny, this impression fades away as the word *considered* does not signify something definite, and the formulation *actually placed under the authority* lacks clarity, too, as

[35] Ibid.
[36] Ibid., at 109.
[37] Cit. in Graber, *supra* note 20, at 57–59.
[38] International Military Tribunal, Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, Vol. I (1947), at 254; *Case Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, § 78 available at http://www.icj-cij.org/en/case/131 (visited 15 July 2017); *Case Concerning Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, §§ 82–83, available at http://www.icj-cij.org/en/case/95 (visited 15 July 2017).

has been demonstrated above. For instance, the French text of Article 42 seems to advance a factual test:

> Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.
> L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

The wording "de fait" appears somewhat inaccurately translated as "actually" instead of "in fact" or *de facto*. Taking this into account, what does *actually/in fact placed under the authority* signify? Does it mean effective control (OL)? What is the level of authority, i.e. control, necessary to qualify a situation as one of military occupation? And how does effective control in Article 42 HR 1907 manifest itself? These questions necessitate answers. Having found no conclusive ones from the delegates' deliberations, it is thought the element of control required for the purposes of military occupation continues its life in common Article 2 GCs as well as Article 1 AP I 1977. Since the forms and degrees of control triggering the application of GC IV will be dealt with in Chapter V, we now move on to consider common Article 2 GCs.

2.2. Common Article 2 GCs

Having discussed the formation process of Article 42 HR 1907, our attention should now be drawn to common Article 2 GCs. The GCs are the next instruments to have been adopted, developing and supplementing the HR 1907 without however superseding them. In particular, common Article 2 GCs determines the scope of application of the GCs, but fails to clearly define not only what is an international armed conflict, but also what exactly may be considered to amount to military occupation. In this way, the level of control needed for the latter to come about is also veiled:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[39]

The origin of the GCs is linked to the ghastly experience of WWII. During the Diplomatic Conference of 1949, when the four GCs were drawn up, the delegates were preoccupied with issues such as the reciprocity of parties engaged in an IAC, whether the regulation of NIAC should be envisaged in common Article 2 GCs, and the status of internal uprisings. The delegates were also engaged in adopting protective mechanisms for civilians, the lack of which had resulted in the commission of atrocious crimes during WWII. Evidently, the roster of the international Conference was teeming, so no room was left for tackling the complexities of determining occupation anew or giving it any further clarifications compared to what had already been raised and was thought to have been clearly addressed. Besides, Article 42 HR 1907 already existed, and the Nuremberg Tribunal considered this instrument to be of customary nature; thus, "sovereignty" and "occupation of territory" seemed to be well-defined ideas of international law.[40]

From the records of the International Conference 1949, it can be discerned that paragraphs 1 and 2 of common Article 2 GCs "did not give rise to any amendments and were adopted according to the Stockholm text".[41] Despite the scarcity of information in the Conference records about the level of control needed to consider territory occupied, the Pictet Commentary to the GCs fills that gap and reflects about

[39] Common Art. 2 to Geneva Convention I, II, III, IV of 1949.
[40] International Military Tribunal (Nuremberg), Judgment and Sentences, 1947, 41 *The American Journal of International Law* 172–333, at 248–9; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II B (Berne: Federal Political Department, 1979), at 75, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-B.pdf (visited 3 December 2016); during the discussions about Protecting Power's and Detaining Power's obligations at the Diplomatic Conference, "Mr. Sokirkin (Union of Soviet Socialist Republics) pointed out that the expression 'freedom to negotiate' was ambiguous, whereas in the first version of the French amendment the words 'sovereignty' and 'occupation of territory' were well-defined ideas in international law"; ibid.
[41] Ibid., at 108; see also the Seventeenth International Red Cross Conference Report (Stockholm, August 1948). at 71–72 and at 95, available at http://www.loc.gov/rr/frd/Military_Law/pdf/RC_XVIIth-RC-Conference.pdf (visited 3 December 2016).

occupation under the realm of common Article 2 GCs. The following considerations about control in the context of military occupation can therefore be advanced.

Pictet's Commentary on the issue of occupation states that paragraph 2 "does not refer to the cases in which territory is occupied during the hostilities",[42] since "in such cases the convention will have been in force since the outbreak of hostilities or since the time war was declared",[43] but that it "only refers to cases where the occupation has taken place without a declaration of war and without hostilities".[44] This suggests that while effective control (OL) over territory might be achieved via fully-fledged military hostilities amongst warring parties, the scenario envisaged by para. 1 of common Article 2 GCs can also be achieved short of armed hostilities and confrontation. That means that state A's military enters state B's territory and takes control over it in whole or in part *without* armed resistance by the latter. Interestingly, Pictet considers the wording of the second paragraph to be "not very clear" and suggests a simultaneous examination of paragraphs 1 and 2, as the last "was intended to fill the gap left by paragraph 1".[45]

This "gap" can be explained through the example of Czechoslovakia at the outbreak of WWII, when the Germans invaded and occupied it. There was no armed resistance from the side of Czechoslovakia.[46] Had there been only paragraph 1 of common Article 2 GCs, the GC IV would not have applied, as that paragraph only applies to armed conflicts and occupations which occur *during* an armed conflict. Hence, paragraph 2 of common Article 2 GCs indeed fills the gap left by paragraph 1, as it extends the GC's application to *all* cases of partial or total occupation – regardless of armed resistance. For that reason, Pictet's analysis is logical. Similarly, in 2014 the Russian military established control over the Ukrainian territory of Crimea without having met any

[42] J. Pictet (ed.), *Commentary of 1958, Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949,* Art. 2 (Geneva: International Committee of the Red Cross, 1958) at 21.
[43] Ibid.
[44] Ibid.
[45] Ibid., at 22.
[46] T. Snyder, *Bloodlands: Europe between Hitler and Stalin* (New York: Basic Books, 2012), at 114.

armed resistance from the side of Ukrainian army.[47] This case equally amounts to occupation in light of common Article 2 para. 2 GCs and will be dealt with in greater detail in Chapter III.

The absence of any elaboration in common Article 2 GCs on occupation and, importantly, on determining the level of control needed for it to come about, indicates that the criteria of Article 42 HR 1907 subsist in it, even if in an expanded manner, i.e. according to common Article 2 GCs, occupation can happen not only through use of force but also without, while Article 42 seems to confine itself to instances of occupation coming about by virtue of fully-fledged armed hostilities only. Still, the required level of control over territory for occupation to be established is the same as in Article 42 HR 1907, namely effective control (OL), which will be dealt with in greater detail in section 2.4.

2.3. Article 1 AP I 1977

The final instrument that should be referred to is AP I 1977 to the four GCs, which also deals with occupation. Article 1 AP I 1977 defines the scope of the application of AP I 1977, but without any additional information on occupation or the level of control needed for the purposes of establishing occupation:[48]

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.
3. This Protocol, which supplements the GCs of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

[47] 'Ukraine Says It Will Not Fight Russia Over Crimea', *The Telegraph*, 12 March 2014, at http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10692122/Ukraine-says-will-not-fight-Russia-over-Crimea.html (visited 3 December 2016).
[48] Art. 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to victims of International Armed Conflicts (Protocol I) 1977 (hereafter: Art. 1 AP I 1977).

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist *régimes* in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Paragraph 3 gives grounds to develop two points. First, Article 1 AP I 1977 enhances the GCs and does not abolish them. Second, it also applies to situations envisaged under common Article 2 GCs, thus adhering to their idea of occupation and its necessary elements as developed in Article 42 HR 1907. This reasoning is further solidified by the Diplomatic Conference records being silent on what could have been considered as occupation according to the then-existing understanding.[49] Instead, lengthy discussions ensued amongst the delegates on the issue of self-determination, i.e. armed struggles for self-determination waged by a people as part of an international armed conflict.[50] On the other hand, clues can be drawn from paragraph 4, which reaches out to cover armed conflicts in time of colonialism and alien occupation. The question then arises as to what could connect instances of military occupation to cases of colonialism and alien occupation. The ICRC Commentary to Article 1 AP I 1977 states that colonial domination frequently occurred

> […] where a people has had to take up arms to free itself from the domination of another people; it is not necessary to explain this in greater detail here. The expression 'alien occupation' in the sense of this paragraph – as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State – covers cases of partial or total occupation of a territory which has not yet been fully formed as a State.[51]

Hence, the elements of colonial domination and alien occupation of a territory are essentially the same as those of Article 42 HR 1907: A military army is needed to take

[49] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977), Vol. VIII (Bern: Federal Political Department, 1978), at 17–51, available at http://www.loc.gov/rr/frd/Military_Law/Geneva-Conventions_materials.html (visited 15 December 2016).
[50] Ibid.
[51] Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC: Martinus Nijhoff Publishers, 1987), § 112, at 54.

control of a territory in question, thereby hindering the process of state formation or self-determination (e.g. through the election of a new government or a constituent assembly). A difference, nevertheless, lies with the *status* of the territory, that is the territory might not (yet) be recognized as (part of) a sovereign state, although this does not exclude it from being considered as occupied. Widely known instances of such cases are the Palestine Territories (discussed in Chapter IV) and Western Sahara.[52]

Having illustrated the characteristics of Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977, the next section examines the anatomy of the effective control (OL) test for the purposes of establishing military occupation.

2.4. Anatomy of the effective control test

So far, it has not become entirely clear what effective control (OL) is or what its integral elements are. It can be recalled that Article 42 HR 1907 does not use the term *control*, nor does it define what type of control is needed for occupation to come about. There is, however, a certain uniformity in the usage of the term by contemporary international law scholars with regards to what is presumed under the *level of control necessary for establishing occupation.* This level of control is labelled "effective", and legal scholarship weighs in heavily on its threshold.

Thus, Dinstein views the level needed for occupation to mean effective control and explains it as "enemy mastery of the area […] substituted by that of the Occupying

[52] S. Casey-Maslen (ed.), *The War Report 2012* (Oxford: Oxford University Press, 2013), at 63; *Western Sahara Advisory Opinion* of 16 October, available at http://www.icj-cij.org/en/case/61 (visited 15 July 2017); see also "Western Sahara remains on the UN Listing as a Non-Self-Governing Territory since 1963", available at http://www.un.org/en/decolonization/pdf/Western%20Sahara%202015%20profile_15Dec2015.pdf; Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Western Sahara, 18 January 2016, A/AC.109/2016/17 (working paper); UN Secretary General Ban Ki-Moon during a press conference said Western Sahara remained occupied by Morocco, see Secretary-General's Remarks to Press with Foreign Minister of Algeria, 6 March 2016, available at https://www.un.org/sg/en/content/sg/press-encounter/2016-03-06/secretary-generals-remarks-press-foreign-minister-algeria (visited 3 December 2016); *Report of the Secretary-General on the situation concerning Western Sahara*, UN SC S/2016/355, 19 April 2016.

Power."[53] Gasser writes that Article 42 HR 1907 has two factual conditions for the applicability of occupation law: "control of territory by armed forces which are foreign to that territory; and the possibility to exercise authority over the population."[54] Kelly considers the law of occupation to come into effect in accordance with the test laid down in Article 42 HR 1907, "requiring that territory has to have passed under the effective control of the forces and does not necessarily depend on whether the forces establish a formal occupation administration. It does not take effect in the combat zone where the forces are preoccupied with fighting the enemy or where forces are merely passing through the territory."[55] Ben-Naftali et al. describe occupation to be extending only to those areas over which the occupant exerts effective control, whereby

> […] control is measured by the authority's ability to assume the primary responsibility that attaches to an occupying power: the ability to issue and enforce directives to the inhabitants of the territory, or in other words, the occupant's ability to have its will prevail everywhere in the territory.[56]

A few thoughts need to be shared concerning the general anatomy of Article 42 HR 1907. Providing a definition of the exact amount of control that will objectively be effective is an "imponderable problem"[57] and may prove to be challenging in practice. The article displays both explicit and implicit criteria to be met for its application. The *explicit elements* of Article 42 are: a) a hostile army of the sovereign that is b) physically present on the territory of the other sovereign and c) that territory being actually placed under the authority (i.e. control) of the hostile army. The *implicit elements* are that a) there is no other power on the territory that can challenge this control (the sovereign has been ousted or is at least divested of any governmental

[53] Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), at 39.
[54] H.-P. Gasser, 'From Military Intervention to Occupation of Territory: New Relevance of International Law of Occupation', in H. Fischer et al. (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berlin: Wissenschaftsverlag, 2004) 139–159, at 154.
[55] M.J. Kelly, 'Iraq and the Law of Occupation: new tests for an old law', 6 *Yearbook of International Humanitarian Law* (TMC Asser Press, 2003) 127–165, at 130.
[56] O. Ben-Naftali, A. M. Gross and K. Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkley Journal of International Law* (2005) 551–614, at 563–564.
[57] Y. Dinstein, *supra* note 53, at 43.

powers to control the territory), and that b) the presence to the hostile force is unconsented to by the previous power in that territory.

Such a conceptualisation of Article 42 HR 1907 is based on reading in-between its lines, as Article 42 "is not at all precise, but is as precise as a legal definition of such kind of fact as occupation can be."[58] For the purposes of illustrating the quandary and legal discrepancy attached to the control element in military occupation, in addition to establishing the required level of control for the purposes of occupation, the expression *actually placed under the authority* should first of all be deciphered.

The word *actually* (or *actual*) is explained as something existing in reality or as a matter of fact. The commencement of occupation is thus "essentially a question of fact".[59] This factuality necessitates, according to the Canadian Military Manual, that occupation is "actual and effective, that is, there must be more than a mere declaration or proclamation that possession has been taken, or that there is the intention to take possession. Occupation does not take effect merely because the main forces of the country have been defeated".[60] The emphasis here is on equating the word *actual* with *factual.* Furthermore, differentiating between the *mere proclamation of occupation* and *exercising occupation* suggests that the authority of the occupant has to be truly established.

Two other factual conditions that have to be met are, "first, the legitimate government should, by the act of the invader, be rendered incapable of publicly exercising its authority within the occupied territory; [and,] secondly, the invader should be in a position to substitute his own authority for that of the legitimate government".[61] The requirement that crystallizes here is thus the legitimate sovereign relinquishing its authority over both the territory and its inhabitants and instead submitting to the invader's power, i.e. its army. The cessation of local resistance, as a consequence of surrender, defeat or withdrawal, as well as the submission of

[58] L. Oppenheim, *International Law: A Treatise, Disputes, War and Neutrality,* Vol. 2 (London/New York: Longmans Green, 1921), at 207–208.
[59] Canada, National Defence, *The Law of Armed Conflict at the Operational and Tactical Levels,* Office of the Judge Advocate General (2001), § 1203, 1.
[60] Ibid., § 1203, 2.
[61] Ibid., § 1203, 4; see also the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) § 11.3, at 275.

inhabitants all point to the fact that occupation has commenced.[62] The exercise of unhindered control over territory is therefore central to situations of occupation:

> Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie, même si celle-ci ne rencontre aucune résistance militaire. L'occupation ne s'étend qu'aux territoires où cette armée est établie et en mesure d'exercer son autorité.[63]

Yet it may happen that there are areas with pockets of resistance or parts of the territory that are temporarily controlled by the adversary state's armed forces. However, this will not mean that the territory is not occupied, as

> […] the fact that a defended location (such as a city or town) still controlled by enemy forces exists within an area declared occupied by the Occupying Power does not render the occupation of the remainder of the area invalid, provided that continued resistance in such place or defended zone does not render the occupier unable to exercise control over the remainder of the occupied territory. Similarly, an occupation may continue to be effective despite intermittent insurgent attacks or temporary seizures of territory by resistance forces.[64]

Heed should also be paid to the fact that occupation does not take effect just because a country's main forces have been defeated, but that it "depends on whether authority is actually being exercised over the civilian population".[65] Yet there is no necessity for troops to be permanently stationed throughout the entire area. It is, instead, sufficient that the national forces have withdrawn, the inhabitants are disarmed, that measures are taken to protect the life of inhabitants, property and to secure order, and that in case of necessity troops are available to enforce authority in the area.[66]

Another aspect concerns how to ascertain whether authority is actually *exercised over the civilian population*. In my understanding, this means that the occupant leaves civilians no prospects to challenge its power, consequently ruling out an uprising, in addition to establishing a curfew on all civilian movement, interning them, or even

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[62] Ibid.; Canada, National Defence, § 1203, 5.
[63] République Française, Ministère de la Défense, *Manuel De Droit De Conflits Armés* (Paris: Ministère de la Défense, 2012), at 88, available at http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf (visited 3 December 2016).
[64] *The US Department of Defense Law of War Manual* (Office of General Counsel Department of Defense, June 2015), at 746.
[65] UK Ministry of Defence, *supra* note 61, at § 11.3.2., at 276.
[66] Ibid.

refusing them the right to leave.[67] Such an interpretation is supported by the wording of Article 43 HR 1907, especially in its original French version:

> L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.[68]

Note should be given to the fact that the French version of Article 43 uses the formulation 'l'ordre et la vie publics' (literally: public order and life), which is wider than the English 'public order and safety'.[69] What is more, the first sentence of this article depicts an occupant establishing effective control by having *taken away* the powers of the ousted sovereign. By reason of such action, then, the occupant is in control in lieu of the ousted sovereign and is obligated, due to such control, to provide for the occupied territory and its population not only regarding basic needs but also through ensuring public order and safety.[70] Rendering the invaded sovereign incapable of exercising its power should then be interpreted not only as the invader being present on the territory, but also as the invader having the possibility (which might not be used) to substitute the vanquished sovereign's authority with its own. However, setting up a military administration is not a *sine qua non,* as a military force effectively capturing the territory is sufficient for occupation:[71]

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[67] Art. 42, Art. 48 GC IV 1949; see also C. Bruderlein, 'Protection, occupation and international humanitarian law in the Occupied Palestinian Territory: a critical appraisal', 28 *Humanitarian Exchange* (Humanitarian Practice Network) (2004) 5–9, at 9.

[68] The English version of the text reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[69] M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *The European Journal of International Law* (2005) 661–694, at 663–664; see also M. Siegrist, *The Functional Beginning of Belligerent Occupation* (Geneva: The Graduate Institute Publications, 2011), at 65.

[70] See for example *Humanitarian Law in Armed Conflicts (Manual)* (The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, 1992), at § 527: a "force invading hostile territory will not be able to substantiate its occupational authority unless it is capable of enforcing directions issued to the civilian population." Where such a control is not established, according to the manual, the territory is not occupied, that is for example over battle areas: areas still embattled and not subject to permanent occupational authority (area of invasion, withdrawal area); ibid*.,* at § 528.

[71] However, see the Russian Federation Legislation Database (definition of Military Occupation) (Военная Оккупация, Законодательная база Российской Федерации) available at: http://zakonbase.ru/dictJur/2587 (3 December 2016). The Russian view of

> […] application of Chapter 3 of the Hague Regulations and application of the parallel provisions of the Fourth Geneva Convention are not conditional upon the set-up of a special organizational system taking the form of military government. The obligations and powers of a military force which stem from its effective seizure of territory exist and come into being due to the very fact of military seizure of the territory, i.e., even if the military force only effects control via its ordinary combat units.[72]

Hence, what is important is that no one else exercises control over the territory; but the setting up of one's own military administration is not per se important.

In sum, the notion of effective control (OL) for the purposes of military occupation is not *per se* mentioned nor coined as a term in IHL: "it reflects an idea developed in the legal discourse pertaining to occupation to describe the circumstances and conditions under which one could determine the existence of a state of occupation under IHL."[73] It is deduced, however, based on the foregoing, that military occupation hinges on control that is actual, firm and unchallenged. Thus, *actually placed under the authority* crystallises as nothing other than effective control (OL), composed of the following cumulative elements: the military presence of state A on state B's territory; this presence being unconsented to by state B; and state A's ability to exercise authority over state B's territory where the latter cannot exercise any governmental powers and/or territorial control. These constitutive elements are next discussed in turn.

2.4.1. Military presence of a foreign force

Can a Gaza-type situation as currently the case be considered a military occupation pursuant to IHL, even though there is no fixed Israeli military force present inside the territory? More generally, regardless of whether an army has withdrawn (and thereby ending, or not, its military occupation: see Chapter IV) or never entered in the first

territory being occupied is paralleled to territorial administrative control. According to the source, control that makes the territory occupied, based on the applicability of Art. 42 HR 1907, GC IV, Art. 1 AP I 1977, is of factual and administrative nature that gives the army both the right and the obligation to restore civilian life in and public order of the occupied territory to the extent possible.

[72] High Court of Justice, Israel (hereafter: HCJ) 102/82 *Tzemel v. Minister of Defence*, (1982) 37 (3) PD 365, at 373.

[73] T. Ferraro (ed.), *Expert Meeting Occupation and Other Forms of Administration of Foreign Territory* (Geneva: ICRC, March 2012), at 17, footnote N 3.

place – is military presence still a necessity to qualify a situation according to Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977?

The situation in Gaza shows that control can involve just the civilian aspects of life without a military presence on the ground, through threatening to cut the power, water and limit food supplies and the flow of goods and persons into the territory. This amounts to so called remote control. Gisha, therefore, argues that the IHL on occupation should be interpreted in light of technological developments and changes in the use of force[74] and that the "legal test for occupation has always been the fact of control – not the means by which it is exercised."[75]

However, this view was not supported by the deliberations of experts during the work on the ICRC Report on Occupation and Other Forms of Administration of Foreign Territory.[76] The majority of experts concluded that the presence of foreign armed forces remains a prerequisite for the establishment of occupation. One argument was for control to be maintained remotely. A certain expert suggested that military presence on the ground would not be a *sine qua non* for maintaining occupation and that once effective control (OL) was established, it "could – to some degree – be exerted remotely."[77] Such a view was however challenged on the basis that

> […] the maintenance of an occupation would still necessitate a military presence on the ground, as an expression of continued effective control over territory in question. Therefore, according to most experts, occupation could not be established or maintained solely through power exercised from beyond the boundaries of the occupied territory; it required a certain number of foreign boots on the ground, as it were.[78]

It was also stressed that

> […] control of airspace did not by itself meet the requirement of 'effective control' for the purposes of IHL. Therefore, only effective control on land would characterize military occupation within the meaning of IHL. It was then specified that the prerequisite of having foreign troops on the ground did not mean that

[74] Gisha – Legal Centre for Freedom of Movement, 'Disengaged occupiers: the legal status of Gaza', Position Paper (2007) at 69ff., available at http://www.gisha.org/userfiles/file/Report%20for%20the%20website.pdf (visited 3 December 2016)
[75] Ibid., at 76.
[76] T. Ferraro, *Expert Meeting, supra* note 73, at 17.
[77] Ibid.
[78] Ibid.

> effective control required their presence on each square meter of the occupied territory.[79]

A majority of experts also thought that the test for occupation should not be "which of the belligerents has the military capability to impose their will, but rather which of them had the military capability by virtue of their presence in a given area to impose their authority and prevent their opponent from doing so, and eventually to be in effective control of that area."[80] In my view, the establishment of authority by the occupier presupposes the deployment of its forces into enemy area and the ability to exercise related military control over it. The two depend on one another:

> Effective control over foreign territory requires the occupying power to be able, because it has already established its authority as the result of the military invasion, to impose its authority in that territory within a reasonable time. Thus, in principle, the ability to exert authority over occupied territory cannot be separated from the physical military presence of the Occupying Power.[81]

This also becomes evident in the way that IHL instruments formulate the obligations to be fulfilled by the occupant (see also Chapter V).[82]

That military presence is a prerequisite for the beginning of occupation can also be seen in the ICJ's reasoning. While, in the Wall Case, the ICJ considered Israel to be an occupying power without practically analysing Article 42 HR 1907,[83] in the case of Armed Activities on the Territory of Congo the ICJ did apply the latter. The Court had to consider whether Uganda was an occupant in those parts of Congolese territory where its troops were present.[84] The ICJ stated that in order to determine:

> […] an "occupying Power" in the meaning of the term as understood in the jus in bello, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was *in fact established and exercised by the intervening State in the areas in question*. In the present case, the Court will need to satisfy itself that the Ugandan armed forces in the DRC *were not only stationed* in particular locations, but *also that they had substituted* their own authority for

[79] Ibid.; see also *The US Department of Defense Law of War Manual*, supra note 64, at 746.
[80] T. Ferraro, *Expert Meeting, supra* note 73, at 18–19.
[81] T. Ferraro, 'Determining the beginning and end of an occupation under International Humanitarian Law', 94 *International Review of the Red Cross* (2012) 133–163, at 144.
[82] *Ibid*. – for instance, ensuring law and order, seizing the properties, providing for the hygiene and medical needs.
[83] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 38, § 73.
[84] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* judgment of 19 December 2005, § 166, available at http://www.icj-cij.org/en/case/116 (visited 15 July 2017).

> that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.[85]

The remaining shortcomings detected in this reasoning will be addressed below (see section 2.4.3 on actual vs. potential control). For the time being, what needs to be highlighted is that the ICJ views physical military presence on a territory as essential for exercising effective control (OL) over territory for the purposes of occupation law.

2.4.2. The element of consent

The second element of effective control (OL) to be analysed is consent. The phenomenon of consent in IHL, and particularly in occupation law, is an unexplored matter, yet it occupies a central role due to its capacity to qualify a territory as occupied (absence of consent) or not (presence of genuine consent). In this regard, Sassòli rightly noted that in "the Westphalian system, the consent of a State is a factor which carries significant legal consequences".[86] At this stage of the thesis, the focus will remain on the *absence* of consent, while the presence of genuine consent will be dealt with in Chapter IV when discussing relinquishing control over territory and occupation ending.

The absence of consent in effective control (OL) is married to the element of military presence. Article 42 HR 1907 uses the wording "hostile army", which clearly denotes the army's unwelcomed presence in the territory. The absence of consent is, then, regarded as "a precondition for occupation"[87] and is deemed to be a central element in the effective control (OL) test. When a state's military forces are on the move and come to being present on the territory in question, their presence should not be agreed to by the sovereign authorities.

A question may arise as to what happens if the territory occupied does not have sovereign authorities, if its status is unclear in international law, and/or if it has not (yet) attained statehood. In such cases, there is no one who can give consent, at least

[85] Ibid., § 173 (emphasis added NKM).
[86] M. Sassòli, *supra* note 69, at 690.
[87] T. Ferraro, *Expert Meeting, supra* note 73, at 21.

on the official governmental level, ergo consent is missing by default. Consent could however be given by the people who live on that territory. They are the ones who should actually decide on the political future and status of their territory. Nevertheless, in Western Sahara, for example, a referendum in which the Sahrawi people would choose to be independent or integrate with Morocco has yet to take place.[88] Thus, and as discussed above in relation to Article 1 AP I 1977, given a foreign state's military presence there, such a territory would be considered occupied since the people have been prevented from expressing their consent. By contrast, if such consent were to be given, the military presence would cease to amount to military occupation, since the "existence of consent is simply incompatible with the institution of belligerent occupation."[89]

In the context of military occupation, consent can take various forms: unwelcomed, welcomed, engineered or coerced. The element of consent was also discussed during the preparatory work of the ICRC Report. Importantly, the experts referred to "engineered consent […] by which States intervening in a foreign territory would ensure, by any means or legal constructions available to them, that the presence of their armed forces would appear to have the consent of the host state",[90] with the view to avoid the deprecatory status of an occupant. Assessing the genuineness and validity of consent is, therefore, a crucial task.[91]

Another form of consent is a coerced consent. The framework for assessing the validity of coerced consent, as well as welcomed consent in general, should be interpreted in accordance with the law of treaties, since IHL does not provide criteria to assess this component of occupation.[92] The formula for assessing a coerced treaty is found in Article 52 VCLT: "A treaty is void if its conclusion has been procured by the

[88] SC Res. 690 (1991) MINRUSO (United Nations Mission for Referendum in Western Sahara); *Report of the Secretary-General on the situation concerning Western Sahara*, UN SC S/2016/355, 19 April 2016; *Report of the Secretary-General on the situation concerning Western Sahara* S/2015/246, 10 April 2015.
[89] T. Ferraro, 'Determining the beginning and end', *supra* note 81, at 153.
[90] T. Ferraro, *Expert Meeting, supra* note 73, at 21.
[91] Ibid.
[92] Ibid.

threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[93]

There is also a question over who has the authority to speak on behalf of the state – the president, the prime minister, the foreign minister, or just anyone from the government? It is also necessary to distinguish between the absence of military opposition to the foreign troops' presence and formal consent given by a local governmental authority.[94] The entity competent to issue consent on behalf of a state or engage in any dealings about the political status of the territory needs to be deduced from the domestic law of that state.[95] Thus, the head of state is often presumed to be the highest authority towards the outside. For example, in the case of the 2008 Russian-Georgian war, the Georgian President signed off on a deal with the help of then EU president Mr. Sarkozy, pledging Georgia would obey the "Six Point Plan" – crucially, however, the Georgian president refused to consent to Russia's continued military presence on Georgian soil.[96]

What permeates the logic of belligerent occupation is that it has an unconsented character, thus clearly setting itself apart from pacific occupation, which does rest on consent.[97] Such a type of occupation is considered by Benvenisti to occur due to an "agreement between the sovereign State and the pacific occupant whereby the former grants the latter, and the latter assumes, powers and responsibilities to maintain public order over a part of its territory and its population."[98] Examples of

[93] Art. 52 Vienna Convention On The Law Of Treaties, 1969.
[94] T. Ferraro, *Expert Meeting, supra* note 73, at 22.
[95] A. Watts, 'Heads of State', in *Max Plank Encyclopedia of Public International Law* (2010), § 3, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418 (visited 5 December 2016).
[96] J. Swaine, 'Russia and Georgia 'agree in principle' to Nicolas Sarkozy backed Peace Plan, *The Telegraph*, 13 August 2008, available at http://www.telegraph.co.uk/news/worldnews/europe/georgia/2550129/Russia-and-Georgia-agree-in-principle-to-Nicolas-Sarkozy-backed-peace-plan.html (last visited 5 December 2016).
[97] Y. Dinstein, *supra* note 53, at 35. See also G. Schwarzenberger, *The Law of Armed Conflict: International Law As Applied by International Courts and Tribunals* (London: Stevens & Sons, 1968), at 184.
[98] E. Benvenisti, 'Occupation Pacific', *Max Planck Encyclopedia of Public International Law*, § 4, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e360?prd=EPIL (visited 5 December 2016).

such occupations are the post-Franco-Prussian war (1870-71) agreements of France temporarily approving the occupation of its territories by Germany or the occupation of Rhineland after World War I.[99] However, pacific occupation is a doubtful phenomenon for the purposes of IHL applicability, as it amounts to a consensual, welcomed presence.

On the whole, consent has the power to tip the balance in qualifying a situation as occupation. For example, the withdrawal of Congolese consent to the presence of Uganda's military troops "lay at the root of the judgment" [100] of the ICJ in the case of DRC v. Uganda.[101] Similarly, in the case of South West Africa (today: Namibia), the GA in its Resolution 2145 (XXI) (1966) declared that South Africa did not duly administer the territory according to the conferred mandate. South Africa, therefore, had no right to administer it any longer, and the territory came under UN responsibility.[102] In other words, the UN GA (and not the state) withdrew the mandate of South Africa to be present on that territory. Withdrawing the mandate in the context of de-colonisation is functionally equivalent to withdrawing consent to a state's presence on the territory. The ICJ, too, decreed that South Africa had to withdraw from the territory and terminate Namibia's occupation.[103]

2.4.3. Actual vs. Potential Control (Authority)

This section deals with the element of exercising authority, where an important inconsistency emerges. The key to this inconsistency lies in understanding the difference between actual and potential forms of control. Article 42 HR 1907 creates uncertainty by using two different wordings: first, in para. 1, "[t]erritory […] actually placed under the authority of the hostile army", and then, in para. 2 "territory where

[99] Ibid.
[100] Y. Dinstein, supra note 53, at 42; *Case Concerning Armed Activities on the Territory of the Congo, supra* note 84, § 292.
[101] *Case Concerning Armed Activities on the Territory of the Congo, supra* note 84, §§ 50–54.
[102] GA Res. 2145 (XXI) (1966); see also F. Carroll, *South West Africa and the United Nations* (Lexington: University of Kentucky Press, 1967), at 21–29.
[103] *Legal Consequences for States of the Continued Presence South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution (276) (1970)*, advisory opinion of 21 June 1971, http://www.icj-cij.org/en/case/53 (visited 15 July 2017) § 118–119.

such authority […] can be exercised", thus pitting *actual authority* and *can be exercised* (the ability or potential to exercise) against each other. Roberts, too, seems to catch this inconsistency and considers the law of occupation to be applicable "when the military force has either displaced a territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear ability to displace it."[104]

The difference between actual and potential control was also examined by the experts working on the ICRC Report. Three main issues were highlighted on the aspect of authority: "the nature of the authority, the necessity – or otherwise – of substantiating such authority, and the legal significance of sharing authority between the occupying power and local government."[105] The experts were unanimous in agreeing that "'authority' should refer to the notion of governmental functions, since occupation had to do with political direction of the territory concerned and could not be enforced by anything short of governmental control."[106] What the invited experts disagreed with, and rightly so, was the approach taken by the ICJ in the Democratic Republic of Congo (DRC) v. Uganda case, where the Court thought it had to be proved that the "Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government."[107]

Hence, the Court had introduced a cumulative test, fitting only some situations, creating the impression that it had succumbed to the misperception that a formal administration apparatus was necessary for a situation of occupation to come into being. The wording "had substituted their own authority for that of the […] Government", however, is rather vague.[108] This could indeed mean to not only incapacitate the former sovereign to exercise its authority by virtue of one's own

[104] A. Roberts, 'What is Military Occupation', 55 *British Yearbook of International Law* (1984) 249–305, at 300.
[105] T. Ferraro, *Expert Meeting, supra* note 73, at 19.
[106] Ibid.
[107] *Case Concerning Armed Activities on the Territory of the Congo, supra* note 84, § 173.
[108] T. Ruys and S. Verhoven, 'DRC v. Uganda: The Applicability of International Humanitarian Law and Human Rights Law in Occupied Territories', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2008) 155–195, at 165.

military presence, but also to set up a new military/civilian administration on the territory. However, this then directly conflicts with the other part of the paragraph, where the ICJ considers this to be irrelevant, provided control was actually exercised.[109]

The experts considered the exercise of actual authority by foreign forces to be "too narrow", emphasizing that upholding *actual* over *potential* control would create "more legal black holes that would remain beyond the scope of responsibility of any authority, resulting ultimately in a protection gap for the individuals trapped in such areas."[110] Hence, "a test based on the *ability* of enemy foreign forces to exert authority over a specific area"[111] was preferred and supported, that is paragraph 2 Article 42 HR 1907. Such a test, in the view of the experts, has a twofold significance: firstly, to render futile any attempts by the occupying power to evade its responsibilities to govern the occupied territories, by refusing to set up a (provisional) civil administration; and secondly, to "prevent it to evade its duties under occupation law through the installation of a government by proxy, which would exert governmental functions on its behalf".[112] Chapter III of the thesis examines proxy occupation in more detail.

To uphold its approach, the ICRC report employed the example of Denmark, where during WWII the German army allowed the Danish Government to remain in office despite their own strong military presence. Here, if one upheld the logic of the ICJ in Congo v. DRC, the case of Denmark would fall short of military occupation.[113] The more consistent view, therefore, is that of the ICRC report.

Furthermore, the ICJ's requirement of the "substitution of the occupant's authority for that of the territorial power" was not supported by all the judges, notably not by Kooijmans. In his separate opinion, Judge Kooijmans considered such an approach to lead to an "unwarranted narrowing of the criteria of the law of belligerent occupation

[109] *Case Concerning Armed Activities on the Territory of the Congo, supra* note 84, § 173.
[110] T. Ferraro, *Expert Meeting, supra* note 73, at 19.
[111] Ibid.
[112] Ibid.
[113] Ibid.

as these have been interpreted in customary law since 1907."[114] Similarly, Ferraro explains that the

> notion of authority under Article 42 of the Hague Regulations should be interpreted as referring to the local government's submission to the foreign forces' military superiority resulting from the successful invasion combined with the ability of these foreign forces to exercise governmental functions in lieu of the local government.[115]

The "substitution of authority" appears to be illustrated differently by the US and the UK military manuals.[116] The UK one uses the wording "in the position to substitute",[117] while the US one employs "must substitute its authority for that of the territorial State".[118] The UK manual, therefore, seems to render better protection to civilians.

While the ICRC's approach is commendable, a question that remains is what should be understood under the *ability* of foreign forces to exert authority over a specific area. I believe this ability to be linked to state A's military forces being present on the territory of state B and, by virtue of such presence, to incapacitate the latter from exercising its governmental authority. This can happen in the form of taking over certain geographical areas and completely isolating them from state B's governmental reach. This means that the hostile army of state A holds on and controls the "nerve centre of governmental authority"[119] of state B, i.e. its vital infrastructure and power-exercising centres such as military bases, airports, ports and key roads of the territory. The result of all this is to bar the sovereign state from exercising its authority, thereby keeping discretion over any actions connected to territorial administration. Thus, the presence of the occupant's military force is a sign of vast abilities for its further action(s). The activities of Russia in Crimea are a useful example of such a control.[120]

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[114] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, Separate Opinion of Judge Kooijmans § 44; also, according to the Judge (§ 45), "military occupation presupposes a hostile invasion, resisted or un-resisted, as a result of which the invader has rendered the invaded government incapable of exercising its authority, and [secondly] that the invader is in a position to substitute its own authority for that of the former government" (§46).
[115] T. Ferraro, 'Determining the beginning and end', *supra* note 81, at 151.
[116] UK Ministry of Defence, *supra* note 61, at § 275.
[117] Ibid.
[118] *US Department of Defence, supra* note 20, at 747.
[119] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Kooijmans, *supra* note 114, § 46.
[120] See also Chapter III of the thesis.

Lastly, the matter of sharing authority between the occupant and the occupied territory's government or local authorities should be examined. During the ICRC report deliberations, one expert thought that "occupation necessitated having exclusive and unique authority over the occupied territory".[121] Other experts were of the view that sharing authority was the very rationale underlining the concept of occupation, that is "the allocation of responsibilities between governments, which helped to fill the vacuum of authority that developed when a legitimate government had been displaced by force."[122] In this regard, it would be important to identify as "who was the ultimate and overall bearer of responsibility in occupied territory."[123] Having determined this, the "occupation law would allow for a vertical, but not a horizontal, sharing of authority."[124]

This concept of the vertical sharing of authority[125] rests on a hierarchical relationship between the occupying power and the local authorities, where the occupying power "maintains a form of control" over the local authorities "through a top down approach in the allocation of responsibilities."[126] A horizontal sharing of power, in turn, is demonstrated by a sort of competition between the hostile troops and the local authorities, raising questions about the ability of the former to impose their will on the latter and, consequently, also about the existence of effective control (OL) over the territory.[127] Vertical authority is implied in the provisions of GC IV, such as Articles 6§3 (the occupant's obligations concerning protected persons), 47 (inviolability of the rights of protected persons), 50 (children) or 56 (hygiene and public health). In fact, Articles 50 and 56 explicitly mention "national and local authorities", stating the latter's cooperation with the occupant. On the other hand, Article 47 merely mentions "authorities". However, Article 55 (provision of food and medical supply to the protected persons) could indeed be an example of implied vertical authority, as it does not directly refer to the local authorities. Power sharing, then, should not affect

[121] T. Ferraro, *Expert Meeting, supra* note 73, at 20.
[122] Ibid., at 20.
[123] Ibid.
[124] Ibid.
[125] R. Kolb, *Theory of International Law* (Bloomsbury: Hart Publishing, 2016), at 62–63.
[126] T. Ferraro, *Expert Meeting, supra* note 73, at 20, footnote N 7.
[127] Ibid.

the occupant's authority, i.e. control, nor interfere with its security and military operations, and must stem from the occupant's "genuine will and not from its inability to displace the legitimate government and/or its surrogates."[128] In other words: the occupant should *willingly* allow for such a vertical relationship to exist. However, this would only assist, not supplant, the occupant in discharging its duties, as in Article 50 GC IV. This stance was also taken by the Supreme Court of Israel in Tsemel v. Minister of Defence:

> […] the occupying military force may determine to what degree it exercises its powers of civil administration through its direct delegates and which areas it leaves in the hand of the former government, whether local or central government officials. Permitting the activities of such governmental authorities does not per se detract from the factual existence of effective military control over the area and the consequences that ensue therefrom under the laws of war.[129]

However, this usually happens in rare cases only. Such is, in sum, the majority position in IHL. There are only few authors who are of another opinion, such as Shraga, who only considers the fact of "exercising exclusive governmental or administrative authority in the territory independently of the displaced sovereign which qualifies the foreign presence as an occupant and the 'source of authority' in the occupied territory".[130] But such a view raises the bar too high in interpreting the essence of effective control (OL), and may undermine the application of IHL in a situation where the foreign state refuses to exercise some of its duties and at the same time keeps the territorial state from exercising its obligations under IHL, leading to a "protection gap"[131] where one state should but does not and the other state can not but would want to fulfil its obligations.

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[128] Ibid.

[129] High Court of Justice, Israel (hereafter: HCJ) 102/82*, Tsemel v. Minister of Defence*, 37 (3), P.D. (1983), at 373–374.

[130] D. Shraga, 'Military Occupation and UN transitional Administrations: the analogy and its limitations', in M.G. Cohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum* (Leiden: Martinus Nijhoff, 2007) 479–498, at 481.

[131] T. Ferraro, *Expert Meeting, supra* note 73, at 19.

2.4.4. Effective control for qualifying a situation as an occupation

Delineating the needed threshold of effective control (OL) and its constitutive elements in terms of occupation law, as seen, is a complex matter. However, occupation is a question of fact. The ICTY Trial Chamber in Naletilić provided factually verifiable examples of what "under the authority of the occupying power actually established" could mean:[132]

1) The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
2) The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered occupied territory. However, sporadic local resistance, even if successful, does not affect the reality of occupation;
3) 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;
4) A temporary administration has been established over the territory; and/or
5) The occupying power has issued and enforced directions to the civilian population.[133]

While the first example shows potential control, illustration four demonstrates actual control in the form of setting up a new territorial administration. All in all, the provided examples suggest that not all occupations are identical, as different forms may materialise at different times or in different places. For example, the occupant can set up a military or civilian administration. However, when Russia occupied Crimea, it did not set up any military government on the territory, instead using the existing Crimean regional authorities to assert control (see Chapter III).[134] By contrast, Israel installed a military government in the West Bank, the Gaza Strip, the Golan Heights and the "Solomon Area" shortly after the 1967 ceasefire.[135] But in 1981,

[132] Judgment, *Mladan Naletilić and Vinko Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, § 217.
[133] Ibid.
[134] Europa Publications (ed.), *The Territories of Russian Federation 2016* (17th edn., London: Routledge, 2016), at 318.
[135] N. Raphaeli, 'Military Government in the Occupied Territories: An Israeli View', 23 *Middle East Journal* 2 (Spring, 1969) 177–190, at 178.

Military Order No. 947 established a *civilian* administration to supply and implement public services in the West Bank.[136]

Further, the ICTY Trial Chamber averred the customary nature of Article 42 HR 1907,[137] distinguishing two types of control: *effective* and *overall control*, reaffirming that Article 42 HR embodies nothing other than effective control (OL):

> The overall control test, submitted in the Blaškić Trial Judgment, is not applicable to the determination of the existence of an occupation. 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 international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation.[138]

According to the parlance of international law, this further degree of *overall control* (SR/IHL) would be *effective* control (SR), as there can be no in-between situation. At least this is what the ICJ seems to have favoured for the purposes of establishing state responsibility. However, for the purposes of occupation of territory in IHL, effective control (OL) is indispensable. Moreover, the *authority of the occupying power actually established* embodies principles of factuality and effectivity. I therefore suggest that for the purposes of qualifying a situation as military occupation, effective control (OL) is comprised of three cumulative elements:

1. State A's military forces are physically present on the territory in question, with this presence not being consented to by the territorial government;
2. The government of the territory has been totally or partially overcome by state A's military presence and, by virtue of such presence, cannot exercise its governmental powers (this covers both occupation following hostilities and occupation after no armed resistance); and
3. State A's military forces are in such a position that they *can* exercise authority over the total territory or parts of it. The condition to being considered an occupant is thus not to have a military or civilian administrative apparatus on the

[136] Israel Military Order No. 947 Concerning the Establishment of a Civilian Administration, http://www.israellawresourcecenter.org/israelmilitaryorders/fulltext/mo0947.htm; and Order regarding the establishment of a Civilian Administration (Judea and Samaria) (Order No. 947) 5742–1981.
[137] Judgment, *Mladan Naletilić and Vinko Martinović*, *supra* note 132, §§ 215–216.
[138] Ibid., at § 214: "Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities."

> ground. Instead, what is meant here is that the armed forces present on the territory of state B are in principle able to set up such a body.

A further question that should now be raised is: at what stage does the authority of the occupying power actually start? Does it envisage ensuring law and order in the territory as soon as the occupant's armed forces set foot on the ground? For instance, should the US have prevented the rampage and looting of museums in Baghdad which happened immediately after the Iraq invasion?[139] Numerous valuables were stolen and as it appears such actions were not prevented by the USA or its coalition partners. Baghdad fell to the US army already on 9 April 2003.[140] On 8 April 2003, museum staff had been asked to leave and thefts took place between 7 and 12 April, with staff attempting to hold back looters until US forces arrived on 16 April.[141] The International New York Times reported that:

> The urgent task now in the occupied areas of Iraq is to bring order and security to cities where the sudden collapse of the government has left a power vacuum that invites lawlessness. In the absence of civil government, there is an ominous potential for strife and bloodshed in a nation riven with ethnic divisions and hatreds.[142]

The authority of the occupying power (i.e. effective control (OL)), in my view, comes into effect when the government of the territory is no longer exercising its governmental functions and when the occupant's forces, by virtue of their established control, can deal away not only with pockets of resistance, but also react to instances of looting and plundering. However, the occupant's forces may not be in a position to ensure law and order – or, in this case, protect the cultural property of the occupied state – immediately, since the territorial state may collapse faster than the occupant is able to firmly establish its effective control (OL). In the case at hand, even once the

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[139] On the looting of the Museums in Baghdad, see M. Bogdanos and W. Patrick, *Thieves of Baghdad* (New York: Bloomsbury, 2005).

[140] Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (section: Synopsis of the Air War) (December 2003) available at https://www.hrw.org/reports/2003/usa1203/index.htm (visited 5 December 2016); 'The Fall of Baghdad', *The New York Times*, 10 April 2003, available at http://www.nytimes.com/2003/04/10/opinion/the-fall-of-baghdad.html (visited 5 December 2016).

[141] The Iraq Museum, *About the Museum*, available at http://www.iraqmuseum.org/pages/about-the-museum/ (visited 5 December 2016).

[142] *The New York Times*, *supra* note 140.

active combat phase was over, the USA had to engage Article 43 HR 1907 only once there were enough ground troops on the territory to do so.

According to Schmitt, "the precise date for commencement of the occupation is difficult to fix because an entire State need not be occupied before occupation rights and duties attach."[143] That means that the US military detachments could have been tasked by the occupying forces' commander to patrol and help maintain order in some parts of Iraq but not (yet) on the streets of Baghdad, although the Iraqi government and military structures were rapidly collapsing[144] and there was no one who could guarantee law and order other than the incoming US and Coalition Forces. Chapter V of the thesis discusses in greater detail the so called functional application of state obligations: for example, when already in the initial stages of an invasion, a state is bound by certain rules of GC IV.

3. Joint and shared control: Control exercised by MNF and UN endorsed control

This section analyses effective control (OL) exercised jointly by military forces, that is where more than one entity is involved. Examples of such a type of control are Iraq or the UN's presence in Kosovo, Timor and Somalia. In particular, this section aims to answer two questions: firstly, who is deemed to be an occupant amongst the Multinational Force (MNF) and on what grounds? Secondly, is occupation law applicable to actions of the UN, i.e. may the UN itself also be treated as an occupying power – and if so: by what criteria – or can only the force-contributing states be considered to hold the status of occupants?

A distinction should therefore be made between effective control (OL) exercised over territory X by MNF and effective control (OL) wielded over territory X by a UN mission. With regards to the former, there may or may not be a UN SC endorsement to their deployment. For example, in the case of the US-led Coalition invasion of Iraq in 2003, no UN SC endorsement was given;[145] whereas the SC authorised the member states

[143] M. N. Schmitt, 'Iraq (2003 Onwards)', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012) 356–386, at 365.
[144] Ibid.
[145] Ibid.

"to use all necessary means to uphold and implement resolution 660 … to restore international peace and security in the area"[146] when in 1990 Iraq had invaded and occupied Kuwait. Such a military operation was authorised by the UN SC but conducted by national contingents operating under national command and control. For the purposes of this thesis, which is concerned with control in occupation law and therefore jus in bello, the legality of authorising a multinational contingent to use force is not pursued further. The two types of missions are therefore considered together but remain different from UN missions, i.e. UN military operations established by the UN SC and conducted under UN command and control (e.g. the UN Protection Force in Yugoslavia, UNPROFOR, or the UN Operations in Somalia, UNOSOM).[147]

The case of MNF exercising effective control (OL) over territory is investigated first, followed by UN missions. It should nevertheless be stated that the fundamental question from the point of view of occupation law is the same in both types of operations, namely whether there is effective control (OL) over territory and lack of consent by the host state/territorial state to the troops' presence. Where the two may differ is with regards to who ultimately bears the responsibility for IHL norms of occupation law.

3.1 Multinational Forces' control over territory

MNF mean the presence of more than one state's armed forces "which are allied to each other, and are perhaps under a unified command system".[148] The US Department Army Joint Publication defines multinational operations as "operations conducted by forces of two or more nations, usually undertaken within the structure of a coalition or alliance."[149] One example is the US-led invasion of Iraq in Spring

[146] SC Res. 678 (1990); see also R. S. Lowry, *The Gulf War Chronicles* (New York: iUniverse, Inc., 2003), at 6–10.
[147] C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *Yearbook of International Humanitarian Law* (1998) 3–34, at 4.
[148] A. Roberts, *supra* note 104, at 289.
[149] US Department of Army Joint Publication 3-16, *Multinational Operations*, 16 July 2013, available at: https://www.fas.org/irp/doddir/dod/jp3-16.pdf (visited 15 July 2017), at I-1.

2003:[150] along with the USA, countries such as the UK, Denmark, Australia, Poland and others were among that MNF's contingent. The USA and the UK spoke of the "liberation" of Iraq, rather than of aggression and occupation,[151] but the UN SC Resolution N 1483 (2003), in its preamble, still referred to the USA and the UK as occupying powers: "[…] recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers […]."[152] This suggests that the SC did not create occupation, but that it recognized an occupation already existed.[153] Resolution 1483 in its preamble also used the same wording: "*Noting further* that other States that are not occupying powers are working now or in the future may work under the Authority […]."[154] This refers to states which provided support to the Coalition Provisional Authority (CPA), but whose engagement did not amount to exercising effective control (OL) over any part of the territory of Iraq.[155] In addition, it indicated that states contributing forces to Iraq would not incur the responsibilities and „the odium that came with being labelled an occupier".[156] The CPA was set up right after the US and the UK, and their allies, had invaded Iraq to topple Saddam Hussein and his regime. In this manner, based on SC Resolution 1483 and the laws of war, the CPA took over the executive, legislative and judicial powers of Iraq between 21 April 2003 and 28 June 2004.[157]

It has to be noted that if one carries out tasks under the command or instruction of an occupying power, the status of an occupant is also conferred upon states that cooperate with the former, particularly when such tasks are crucial to the way in which the authority "executes its role as an Occupying Power and carries out its

[150] K. Dörmann and L. Colassis, 'International Humanitarian Law in the Iraq Conflict', 47 *German Yearbook of International Law* (2004), 293–342.
[151] Ibid., at 297.
[152] SC Res. 1483 (2003).
[153] A. Roberts, 'The End of Occupation: Iraq', 54 *International and Comparative Law Quarterly* (2005) 27–48, at 32.
[154] SC Res. 1483, *supra* note 152.
[155] K. Dörmann and Laurent Colassis, *supra* note 150, at 303.
[156] A. Roberts, 'The End of Occupation', *supra* note 153, at 33.
[157] Coalition Provisional Authority Regulation Number 1, available at: http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (visited 5 December 2016).

administrative responsibilities."[158] Dinstein, too, thinks that within the context of occupying powers acting together as a coalition and governing a single occupied territory, the occupying powers "will bear the brunt of joint responsibility for what is happening within the area subject to their combined effective control."[159] And in case the coalition partners divide the occupied territory into zones, i.e. different areas of control, each occupying power administering its own zone "will assume sole responsibility commensurate with the span of its respective effective control."[160] Similarly, the UK Armed Forces Manual suggests that all coalition members are to be considered as occupants "in case where two or more states jointly occupy territory (following a coalition military campaign, for example), [and] it is desirable that there be an agreement between them setting out the relationship between the occupying powers."[161]

The question then arises about the grounds on which the troops *not* from the US or the UK could be considered occupants. Are they fully bound by the HR 1907 and GC IV? The situation is of evident complexity as there are multiple actors involved, with various tasks, such as carrying out patrolling missions, detentions of persons protected by GC IV, or manning mobile checkpoints.[162] The ICRC found a way out of this conundrum by focusing solely on what the different contingents are actually doing on the ground. It thus differentiated between states according to their functions and duties, centring on states that actually provided combat personnel but excluding those that merely provided engineers or medical staff.[163] The ICRC then examined whether the national contingents in question had been assigned responsibility for, and were exercising effective control (OL) over, a portion of Iraqi territory.[164] If that was the case, the ICRC considered such states to be occupying powers. In a situation

[158] L. Lijnzaad, 'How not to be an Occupying Power: some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation', in L. Lijnzaad, J. van Sambeek and B. Tahzib-lie (eds), *Making the voice of Humanity Heard* (Leiden: Martinus Nijhoff, 2004) 291–306, at 298.
[159] Y. Dinstein, *supra* note 53, at 48–49.
[160] Ibid.
[161] UK Ministry of Defence, *supra* note 61, section 11.3.3.
[162] K. Dörmann and Laurent Colassis, *supra* note 150, at 304.
[163] J.-P. Lavoyer, 'Jus in Bello: Occupation Law and the War in Iraq', 98 *Proceedings of the American Society of International Law* (2004) 117–124, at 122.
[164] Ibid.

where states were exercising control over protected persons and interacted with them, they would have to respect the law of occupation, too. And if the armed forces of any state became involved in hostilities, they would even have to abide by IHL irrespective of their occupant status.[165]

The phenomena of UN operations and UN SC endorsed control over territory are deliberated upon next.

3.2 UN Operations

Multinational National Forces (MNF) operating under UN aegis and as part of a UN mandate (for peace-enforcement or -keeping purposes) have, over the past years, become of broad interest due to the multifaceted nature of such operations. This mostly concerns integrated missions and their deployments into violent environments (both IACs and NIACs). Such missions are also tasked to administer territory.[166] Due to this fact, identifying the legal framework applicable to such instances is needed.[167] May IHL apply to such forces and, if so, under what conditions?[168] Can UN forces be considered occupants? These questions have been the subject of much consideration, but clarity is still lacking.

The essence and spirit of the UN is anti-war; it can thus be difficult to imagine that the UN too may become a military occupant. There are indeed views not favouring the application of occupation law to UN forces. Some consider that the UN can never be party to a conflict, nor a power within the understanding of the GCs, as UN peacekeeping forces have to be seen as impartial, objective, and neutral, "their sole interest in the conflict being the restoration and maintenance of international peace

[165] Ibid.
[166] S. R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', *The European Journal of International Law* (2005) 695–719, at 698; see also ICRC, *Multinational Forces* (Overview), 29 October 2010, available at http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/multinational-forces/overview-multinational-forces.htm (visited 5 December 2016).
[167] Ibid, at 705.
[168] T. Ferraro, 'The applicability and application of international humanitarian law to multinational forces', 95 *International Review of the Red Cross* (2013) 561–612, at 562.

and security".[169] Furthermore, peacekeeping forces, according to Shraga, act pursuant to a mandate conferred upon them by the SC and with the concerned government's consent. Moreover, "whereas the essence of an occupant-occupied relationship is that of conflict of interests, that which characterizes a United Nations 'administration' of a territory is cooperation between the force and the local population".[170] Thus the Belgium Military Court, for example, in the case related to Belgian peacekeeping actions in Somalia, opined that the situation in Somalia in 1993 could not be considered an IAC because peacekeeping forces could not be regarded as a party to a conflict nor, a fortiori, occupants.[171] It was also put forth that because these types of forces have been engaged on behalf of the international community, IHL did not apply to them and they were exempt from the belligerent status.[172] At most, IHL should apply differently or, as a matter of policy, only electively (e.g. laxer rules on the use of force).[173]

Such a standpoint runs, however, counter to the spirit of the *jus ad bellum* and *jus in bello* separation and the principle that IHL application is dependent on facts, irrespective of the mandate or status allotted to a party to the conflict, in this case a UN MNF. This matters for two reasons: first, just because the deployment of a force is consented to by the host state does not mean that consent will remain valid indefinitely. For example, once the UN MNF uses force in self-defence, consent to their presence may be withdrawn by the territorial state. Further, when a peacekeeping force is deployed, a SOFA (status of forces agreement) or SOMA (status-of-mission) is signed between the UN and the receiving state, covering general aspects of the UN forces' presence and including aspects such as the scope of their

[169] D. Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law', 5 (2) *International Peacekeeping* (1998) 64–81, at 67.
[170] Ibid.
[171] Cour Militaire Belge, Jugement concernant des Violations du Droit Humanitaire commises en Somalie et au Rwanda, Nr. 54 A.R. 1997, 20 Novembre 1997 Journal des Tribunaux, 14 Avril 1998, pp. 286–289.
[172] Chatham House, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', International Law Programme Discussion Summary, 20 November 2014, at 2, available at http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141120IHLMultinationalForces.pdf (visited 5 December 2016).
[173] Ibid.

activities and the jurisdiction they submit to.[174] It then might happen that a withdrawal of consent to the peacekeepers' presence occurs, as in the case of United Nations Emergency Force I in Egypt, in 1967.[175] Second, whether IHL applies to UN MNFs hinges "exclusively on the circumstances prevailing in the field, irrespective of the international mandate assigned to these forces by the Security Council, or of the term used for their potential opponents. This determination will depend on the fulfilment of certain legal conditions stemming from the relevant norms of IHL in particular Common Articles 2 and 3 of the Geneva Conventions of 1949."[176]

The 1999 Bulletin on the 'Observance by United Nations Forces of International Humanitarian Law' caused further uncertainty, stating that IHL applied "in peacekeeping operations when the use of force is permitted in self-defence".[177] Ferraro terms this formulation as "misleading", since it could be interpreted as triggering IHL application as soon as force is used for self-defence purposes,[178] when in fact IHL application is triggered the very moment the criteria of its applications are met.[179] But while it might be clear for the purposes of common Article 2.1 GCs and common Article 3 GCs,[180] it is not clear whether UN missions can be considered as occupiers since they do not neatly fit the criteria of Article 42 HR 1907 (which uses the term "hostile army").

In general, operations of international organisations administering territories are seldom referred to as occupations, irrespective of the fact that often a significant

[174] United Nations Peacekeeping Law Reform Project, UN Peacekeeping and the Model Status of Forces Agreement (University of Essex, School of Law, 2010), at 15–17, available at https://www.essex.ac.uk/plrp/documents/model_sofa_peliminay_report_august_2010.pdf (visited 5 December 2016).
[175] Peace and Security Section (in cooperation with the Department of Peacekeeping Operations) Middle East UNEF-1, Completed Peacekeeping Operations, 2003 http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html (visited 5 December 2016).
[176] T. Ferraro, 'The applicability and application', *supra* note 168, at 565.
[177] United Nations, Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999, at § 1.1.
[178] T. Ferraro, 'The applicability and application', *supra* note 168, at 578.
[179] Ibid., at 575–579.
[180] Whether AP II 1977 applies to multinational forces is unclear due to the stringent test expounded by Article 1 of this instrument. Notably AP II applies only to cases of NIAC unfolding on the territory of the contracting party.

civilian and military presence to undertake many of the activities of occupying forces in terms of control and governance is needed.[181] There seems to be no uniform stance on the issue of whether the UN may be an occupant either.[182] UN operations themselves are known for their conceptual muddling-through and line-blurring between the concepts of peacekeeping, -building, -making, and -enforcement, which are often used interchangeably, although they cover different operations.[183] Shraga and Zacklin, for instance, detect a blurring of the distinction between peacekeeping and -enforcement, raising the question of the applicability of IHL to peacekeeping operations (cutting across the peacekeeping/-enforcement divide), as traditional UN peacekeeping operations have "shifted in the course of an evolving conflict from Chapter VI to Chapter VII; others have been transformed into hybrid operations including both peace-keeping and peace-enforcement elements".[184] As such, the traditional peacekeeping mission comprises a force deployed by the UN into a war-affected country to limit the violent conflict occurring there. The requirements for a peace-*keeping* mission are: the consent of the host state, impartiality, and minimal use of force.[185] UN peace-*enforcement* operations, however, do not need a host state's consent,[186] and are "based on a strong Chapter VII mandate addressing serious

[181] S. Ratner, *supra* note 166, at 696.
[182] See for instance S. Wills, 'Occupation Law and Multi-National Operations: Problems and Perspectives', 77 *British Year Book of International Law* (2006) 256–332; M. J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations* (Kluwer Law International, 1999); see further M. Sassòli, 'Protection of Civilians in the mandates of Military Operations: legal and operation considerations: Interview', Professionals in Humanitarian Assistance, 21 January 2015, available at https://phap.org/thematic-notes/2015/january/interview-prof-marco-Sassòli-–-protection-civilians-mandates-military-op (accessed 5 December 2016).
[183] P. F. Diehl, *Peace Operations* (UK: Policy Press, 2008), at 3.
[184] D. Shraga and R. Zacklin, 'L'applicabilité du DIH aux Opérations de Maintien de la Paix de Nations Unies: Questions Conceptuelles et Pratiques', in *Symposium sur l'action humanitaire et les opérations de maintien de la paix*, Rapport, CICR Genève, 1995, at 43.
[185] P. F. Diehl, *supra* note 183, at 6.
[186] T. D. Gill, 'Legal Characterisation and Basis for Enforcement Operations and Peace Enforcement Operations Under the Charter', in T. D. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn., Oxford: Oxford University Press, 2015) 95–109, at 96–99; D. Murray et al, *Practitioner's Guide to Human Rights Law in Armed Conflict* (Oxford: Oxford University Press, 2016), at 260.

human rights violations and threats against international peace and security of a certain state."[187]

The changing nature of UN missions and referencing to UN Chapters VI and VII suggest that situations on the ground may at times be of a combined nature, requiring SC actions under both Chapters. In this light, the UN presence in Kosovo, under Chapter VII (UNMIK),[188] or in Cambodia (UNTAC), under Chapter VI,[189] raises the question of the applicability of the law of occupation to UN forces in terms of their rights and duties as well as of the legal protection this regime extends to the civilian population.[190]

One possibility is to consider these missions as instances of international territorial administration. The actors in international territorial administrations and in situations of occupation are usually different, that is, in the former the actor is an international organisation, while in the latter it is commonly held to be a state. Nevertheless, the two share a major commonality – the element of exerting control over territory through armed forces. In this regard, for Wilde the relationship between an international territorial administration and military occupation has a general institution in international public policy, termed "international trusteeship", and

> […] covers a relationship of administrative control by an international actor or group of such actors – whether States or international organisations – over a territorial unit whose identity is understood as something 'other' than that of the administering actor or actors, in most cases because of the lack of title, and which is conceptualised in terms of the administering actor or actors performing this role on behalf of the administered territory.[191]

[187] B. F. Klappe, 'The Law of International Peace Operations', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn., Oxford: Oxford University Press, 2014) 611–646, at 615.
[188] SC Res. 1244 (1999).
[189] SC Res. 745 (1992); see more generally F.M. Buerger, 'Analysis of UN peacekeeping in Cambodia' (Naval War College, November 1994), available at http://www.dtic.mil/dtic/tr/fulltext/u2/a283479.pdf (visited 5 December 2016).
[190] T. Ferraro, 'The applicability of the law of occupation to Peace Forces', in G.L. Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations* (International Institute of Humanitarian Law, Sanremo 4–6 September, 2008) 133–167, at 136.
[191] R. Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (Oxford: Oxford University Press, 2008), at 356–357.

Similarly, Ratner views occupation in a broader manner, i.e. "control of territory by outside entities",[192] that is control over territory may be exercised not only by states, but by international organisations as well. Occupations thus vary with respect to both their causes and legal bases: states either occupy territory during or after armed conflict, using force in self-defence, pursuant to UN authority or aggressively without UN authorisation. In the last case, the act of using force would typically be regarded as illegal, but as legal in the previous two examples.[193] However, neither of this affects occupation as such because of the fundamental principle, as mentioned above, of the *jus ad bellum* and *jus in bello* separability.[194]

Sassòli, Bouvier and Quintin for their part opine that when a territory is placed under the UN forces' authority or a UN administration, the rules of IHL on occupied territories do not apply if consent has been given: "Beyond that, it is doubtful that a UN presence, if not consented to by the territorial State, can ever be classified as military occupation."[195] But the question then becomes: what else is it? Greenwood for instance considers it "perfectly possible that the United Nations itself or a State or States acting under its authority could occupy part or all of the territory of an adversary in the course of an international armed conflict. In such a case, the law of belligerent occupation would apply".[196] Emanuelli, in turn, attaches the possibility of UN forces being an occupant to Chapter VII of the UN Charter, where Article 42 excludes the consent of the State. For him, the situation of occupation "se présentera seulement lorsque les forces onusiennes agissent en tant que force belligérantes, sur la base des articles 42 et suivantes de la Charte, ou dans le cadre d'une opération

[192] S. Ratner, *supra* note 166, at 697.
[193] Ibid., at 698.
[194] M. Zwanenburg, 'United Nations and International Humanitarian Law', *Max Planck Encyclopedia of Public International Law* (October 2015), at § 23, available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1675 (visited 5 December 2016).
[195] M. Sassòli, A. A. Bouvier and A. Quintin, *How does law protect in War?,* Vol. 1 (3rd edn., Geneva: ICRC, 2011), at 381.
[196] C. Greenwood, *supra* note 147, at 28.

d'imposition de la paix",[197] that is like "regular" armed forces. However, the ICRC considers that for the applicability of the law of occupation,

> it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an "invasion", "liberation", "administration" or "occupation". As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that determine its application.[198]

In this way, wherever effective control (OL) over the territory is exercised by an international organisation and there is no consent of the territorial state, under Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977 the relevant rules of IHL should apply to UN Operations, too.[199] What therefore matters are the UN forces' actions, and the responsibilities they perform, by virtue of which they are exercising effective control (OL) over a specific area, and not so much whether the UN perceives itself as the source of authority in the area of operation.[200]

With regards to the element of consent, I align myself with the view that the absence of consent is an integral element in qualifying the UN as an occupant. This is because, firstly, the nature of occupation as seen before is non-consensual. Secondly, the UN, like any other actor in a situation of occupation (i.e. a state, and even the UN is composed of member states[201]), may keep the territorial government from exercising its authority. This would also extend to a scenario where there is no government in place and the UN force would be the only one to exercise territorial control. If there remains a doubt that consent was extended genuinely, the legality of the given consent should be assessed (see also above, section 2.4.2).

The counter position to this could argue that occupation law only applies in IACs, and that the UN cannot be a party to such an armed conflict simply because it is a supra-

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[197] C. Emanuelli, *Les Actions Militaires de l'Onu et le Droit International Humanitaire* (Montreal: Wilson et Lafleur Itée, 1995), at 40.

[198] ICRC, *Occupation and International Humanitarian Law: Questions and Answers*, Resource Centre, 4 August 2008, available at: https://www.icrc.org/eng/resources/documents/misc/634kfc.htm (accessed 5 December 2016)

[199] ICRC, *Multinational Forces* (Overview), *supra* note 166.

[200] T. Ferraro, 'The applicability of the law of occupation to peace forces', *supra* note 190, at 146.

[201] D. Shraga, 'The United Nations', *supra* note 169, at 67.

national and not a national actor, and therefore not "bound by the same rules as their enemies."[202] Yet UN SC Res. No. 1327 clearly states

> […] the need for any provisions for a peacekeeping operation to meet minimum conditions, including […] compliance with the rules and principles of international law, in particular international humanitarian, human rights and refugee law […].[203]

Still, somehow the transformative aspect of a UN mandate would run counter to the legal obligation of preserving the status quo of an occupied territory's institutions and laws.[204] However, to the extent that UN missions are confined to enforcing peace and nothing more, there is no *a priori* contradiction with the law of military occupation, which equally speaks of maintaining law and order and ensuring the safety and well-being of the local population.[205] This amounts to the same purpose as enforcing and then keeping peace in a loose sense. Hence, that a UN enforcement operation "ousting a legitimate sovereign and administering a territory in accordance with the Hague Regulations and the Fourth Geneva Convention, should not, in theory, be excluded."[206]

All this suggests that one needs to assess whether UN missions, both peace-keeping and peace-enforcement operations, are exerting effective control (OL) as understood by Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977:[207]

1. The UN mission has to be stationed on a territory without the consent of the "receiving" state;

[202] M. Sassòli, A. A. Bouvier and A. Quintin, *supra* note 195, at 381.
[203] UN SC Res.1327 (2000); see also S. Vité, 'L'applicabilité du droit de l'occupation militaire aux opérations des organisations internationales', *Current Challenges to the Law of Occupation: Proceedings of the Bruges Colloquium*, 20–21 October 2005, 93–100, at 95; B. Klappe, *supra* note 187, at 618ff.
[204] S. Vité, *supra* note 203, at 98; on transformative occupation more generally, see A. Carcano, *Transformation of Occupied Territory in International Law* (Leiden: Brill/Nijhoff, 2015); and G. Fox, 'Transformative Occupation and the Unilateralist Impulse', 94 *International Review of the Red Cross* (2012) 237–266.
[205] D. Shraga, 'The United Nations', *supra* note 169, at 69.
[206] Ibid., at 70.
[207] T. Ferraro, 'The applicability of the law of occupation to peace forces', *supra* note 190, at 154.

2. The governmental authorities have been rendered partially or completely incapable to perform their functions due to the presence of the UN mission, or were initially incapable (e.g. in failed states); and
3. The UN mission is capable of exercising governmental functions in lieu of the affected state.

The same stance was adopted by a majority of experts during the discussions on occupation and other forms of administration of foreign territories.[208]

This brings us to the issue of the various states contributing their armed forces to a UN mission, since the UN does not have its own armed forces and member states make theirs available to the SC in case of necessity, based on Article 43 of the UN Charter.[209] The question then arises whether each state contributing such a contingent can be considered an occupant or whether the UN alone carries that status. In fact, when states contribute their armed forces to a UN mission, the mission's members are acting in the name of the UN. Ultimately, it would thus be the UN that has the status of an occupant and not the contributing states. However, differences emerge in the way in which the responsibilities of the UN and the contributed troops are assessed, as shown next.[210]

3.3 The formula for ascertaining the responsibility of the UN and troop contributing states

Article 7 of the ILC Draft Articles on the Responsibility of International Organisations sets forth the criteria for the attribution of responsibility for the conduct of state organs, or agents of another international organisation, that are placed at the disposal of an international organisation:

> 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.[211]

[208] T. Ferraro, *Expert Meeting, supra* note 73, at 33–34.
[209] Art. 43 UN Charter; see also Art. 44 UN Charter.
[210] S. Ratner, *supra* note 166, at 701; C. Greenwood, *supra* note 147, at 18–19.
[211] Art. 7 ILC Draft Articles on the Responsibility of International Organisations (2011).

The crux of the analysis of this article is again "effective control", but this time connecting a specific conduct to an international organisation – or not, in which case it would be the troop contributing state or organisation which is responsible.[212] Pursuant to this article, the seconded organ remains to a certain degree an organ of the seconding state or organisation. For instance, when "a state places its military contingent at the disposal of the UN, the state retains disciplinary powers and criminal jurisdiction over the members of the national contingent."[213] The attribution of the responsibility for the conduct to the seconding actor or to the receiving international organisation is based on the kind of control exercised over the specific conduct of the organ or agent placed at the receiving organisation's disposal.[214] In other words, who is exercising effective control over a specific conduct clarifies which entity – the contributor or the recipient – is responsible for it.[215] In combination with effective control (OL) over the territory, answering this responsibility question determines who is to be regarded an occupant (see also Chapter I).

The main problem relates to determining the meaning of effective control in this context.[216] Unlike in the case of *state* responsibility, here "control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct has to be attributed."[217] In other words, one of the two is inevitably bound to be exercising effective control over the actions of the troops. The advantage to such an approach is that it narrows

[212] B. Montejo, 'The Notion of "Effective Control" under the Articles on the Responsibility of International Organisations', in M. Ragazzi (ed.) *Responsibility of International Organisations* (Leiden: Martinus Nijhoff, 2013) 389–404, at 403.
[213] *Draft Articles on the responsibility of International Organisations, With Commentaries* (United Nations, 2011), at 20; see also S. Ratner, *supra* note 166, at 701. On the issue of international personnel taking part in peace support operations, see F. Hampson, 'Administration of Justice, Rule of Law and Democracy, Economic and Social Council', E/CN.4/Sub.2/2005/42, 7 July 2005.
[214] *Draft Articles on the responsibility of International Organisations, With Commentaries* (United Nations, 2011), at 20.
[215] Ibid., at 21.
[216] P. Palchetti, 'The Allocation of responsibility for internationally wrongful acts committed in the course of multinational operations', 95 *International Review of the Red Cross* (2013) 727–742, at 732.
[217] *Draft Articles on the responsibility of International Organisations, supra* note 213, at 21.

down the search for responsibility to only two options: the sending state or the receiving international organisation. However, which of the two still has to be identified, and the mechanism via which this is done is effective control. The question now is whether *this* effective control is the same as understood in the law of state responsibility (SR). To answer this, the facts on the ground should thus be assessed.

However, once the IHL threshold applicability has been crossed for the purposes of occupation, when ascertaining UN or the troop contributing state's responsibility, one should not examine UN occupation in a manner in which only the contributed troops *or* the UN appointed administration exercise(s) control over the actions of the troops. Certain acts may well occur outside the command and control of the UN, and/or under the control of the troop contributing state. The words of the ILC Special Rapporteur Gaja suggests that effective control in this regard may shift the responsibility accordingly:

> In order to settle the issue of where effective control lies, one needs to consider 'the full circumstances and particular context in which international organizations and their members operated' […]. This implies that, with regard to a United Nations peacekeeping force, while in principle the conduct of the force should be attributed to the United Nations, effective control of a particular conduct may belong to the contributing State rather than the United Nations.[218]

Matters became even more complicated when the ECtHR – in Behrami and Behrami v. France and Saramati v. France, Germany and Norway – interpreted effective control to mean "ultimate authority and control" as opposed to "effective command of the relevant operational matters".[219] The ECtHR found that the UN SC had retained such ultimate authority and control whereas "the operational command" was delegated to NATO, who in turn established KFOR.[220] This delegation rested on UN SC Resolution 1244 and was borne out by five factors:[221]

1. Chapter VII allowing the UN SC to delegate to states and international organisations;

[218] G. Gaja, *Eighth Report on the Responsibility of International Organisations, UN Doc. A/CN.4/640*, 14 March 2011, at 13.
[219] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, ECtHR (2007) (App. no. 71412/01) § 140.
[220] Ibid., § 133.
[221] Ibid., § 134.

2. The relevant power being a delegable power;
3. Delegation being prior and made explicit in the Resolution;
4. Limiting delegation via setting out the objectives, roles and responsibilities; and
5. The leadership of the military presence being required, by Resolution 1244, "to report to the UNSC so as to allow the UNSC to exercise its overall authority and control".[222]

In short, the Court viewed the UN SC to have retained general, i.e. overall authority and control over the entire mission, thus broadening the scope of its responsibility so that the impugned action was attributable to the UN, as opposed to effective control, which would mean controlling a certain action in a material time.

The UN expressed its opposition to this view by firmly upholding the ILC Draft Articles on the Responsibility of International Organisations. The UN Secretary General regarded it "understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control."[223] In other words, UN responsibility would arise based on control strictly relating to a concrete operation in the material time, premised, in my view, on the rationale that *one's actions generate one's responsibility*. The UK's Lord Bingham, too, in the Al-Jedda case concerning UK troop actions in Iraq within the context of the MNF there, upheld the effective control test when inspecting UN responsibility: "It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant."[224]

Thus, when the ECtHR dealt with Al-Jedda v. United Kingdom, it seems to have altered its previous approach and adopted the effective control criterion of Article 7 (then Article 5):

> […] the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions

[222] Ibid.
[223] *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo*, S/2008/354, 12 June 2008, § 16; see also B. Montejo, *supra* note 212, at 402.
[224] R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State For Defence (Respondent) Opinion of Lord Bingham of Cornhill, House of Lords, Session 2007-08, *on appeal from:[2006] EWCA Civ 327* § 23.

> of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations.[225]

But the Court's dictum here is still not clear enough. Note should be taken of the fact that effective control does not stand alone; instead, the formulation – "nor ultimate authority and control" – is repeated from Behrami and Saramati. One therefore wonders why the Court did not fully abandon the latter formulation and what it could possibly mean.

One possible interpretation as to where this test is anchored is Article 17.2 ILC Draft Articles on the Responsibility of International Organisations (2011).[226] Here, under specific conditions, an organisation bears responsibility for having authorised a state to commit an act that is unlawful if committed by the organisation. For Palchetti, Article 17 appears postulated on the idea that since the organisation, by its authorisation, exercised a form of 'normative control' over the State, it has to bear the consequences of its contribution to the wrongful act. In this way, some common characteristics with the *ultimate control and authority test* applied by the ECtHR emerge, as they both appear to rely on the 'normative control' exercised by the organisation rather than effective control.[227] Consequently, how to define normative control? The following explanation may be offered: normative[228] control is a form of control that governs the relationship between an international organisation and a state, based on the former's values and judgments. Typically, normative control takes the form of explicit authorisations as understood by Article 17.2 (acts "committed *because* of that authorization").[229]

It is submitted here that some of the confusion is caused by disregarding the hypothesis of *concrete actions generating responsibility*. If one engages in a certain act, it is only logical that the carrying out of the act is controlled, to a certain extent and via a certain level of control, by an actor. If this action is sought to be successful,

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[225] *Al-Jedda v. United Kingdom*, ECtHR (2011) (App. no. 27021/08) § 84.
[226] P. Palchetti, *supra* note 216, at 738–739.
[227] Ibid., at 739.
[228] Normative is defined as *expressing value judgments or prescriptions as contrasted with stating facts; see* Collins Dictionary, available at http://www.collinsdictionary.com/dictionary/english/normative (visited 5 December 2016).
[229] Ibid.

a *see-through approach* has to be taken so that the act actually materialises – in other words, the act in question has to be controlled effectively. The result would then be that both lawful and unlawful actions generate responsibility. One possible way to view and explain the *ultimate control and authority test* is to regard it in a way that if it were not for effective control, ultimate control would not materialise. Put differently, because effective control (SR) was shown during the action, ultimate control over and thus for the action is shown. One therefore triggers the other.

While the criterion of effective control (SR) is gaining ground in practice, its application by national courts may add additional criteria, which would raise the bar further in its interpretation. At least this is what can be inferred from Nuhanović, where the Hague Court of Appeal employed not only the understanding of effective control embodied in Article 7, but viewed this threshold to also encompass an obligation extending to both the UN and states to prevent certain actions from actually happening:

> Significance should be given not only to the question whether the 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.[230]

Nada v. Switzerland, while not concerned with multinational peace operations, may equally be considered as the ECtHR's attempt to set the record straight regarding the created uncertainty. Here, the intervening French Government argued that the measures taken by a member of the UN to implement SC resolutions under Chapter VII of the UN Charter were attributable to the United Nations – very much as in Behrami and Saramati, where the impugned acts and omissions of KFOR, whose powers had been delegated to it by the Security Council under Chapter VII of the Charter, as well as those of UNMIK, a subsidiary organ of the United Nations set up under the same Chapter, were directly attributable to the UN.[231] However, the Court did not endorse this stance, opining instead that the measures imposed by SC resolutions were implemented at national level by Switzerland itself, hence the

[230] The Hague Court of Appeal, *Nuhanović v. Netherlands*, Appeal Judgment, 5 July 2011, ILDC 1742 (NL 2011), § 5.9.
[231] *Nada v. Switzerland*, ECtHR (2012) (App. no. 10593/08) § 120.

applicant's request for exemption from the ban on entry into Swiss territory related to the *national implementation* of SC resolutions. The alleged violations of the ECHR were, therefore, attributable to Switzerland alone.[232]

To conclude, if the question about UN responsibility should be established for a specific act involving a UN mission and their contributing states within an occupation context, the following should be assessed: Were the forces of country X placed at the disposal of the UN as part of a UN force? Did the UN exercise effective control (SR) over the conduct of these forces? Can the specific conduct of X's forces be attributed to the UN rather than to country X? Did the UN have effective command and control over the conduct of X's forces when a certain action was carried out (e.g. issuing directions during the materialisation of the act, involvement of UN personnel)?[233]

Moreover, should the question arise as to who among the troop contributing states wielded effective control (OL) over the territory, then what the different contingents were actually doing at the specific time should be examined. In this regard, differentiating between coalition members according to their functions and duties is important. When it, therefore, comes to situations of occupation, UN occupation rests on effective control (OL) over territory where more than one entity is involved: the UN as well as troop contributing states. In addition, because the UN is an entity with an international legal personality, it may be in control of certain aspects of the mission, such as the governance of the territory or appointing officials. Nevertheless, while states contribute their troops to the mission, they still have their own officers and troop commanders accountable to them, and a number of their decisions have to be taken in consultation with their home governments before embarking on a task. For some actions, therefore, the UN would be responsible while for others, the contributed troops. That is, one should always look at the actual actions and tasks carried out, and whoever is fulfilling a task is exercising effective control as understood by both the law of state responsibility and the Draft Articles on the

[232] Ibid., § 121.
[233] This formula is based on *R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State For Defence (Respondent), Opinion of Lord Bingham of Cornhill*, § 22.

Responsibility of International Organisations. At the end of the day, both share the same understanding of effective control (SR).[234]

Conclusions

The purpose of this Chapter was to provide clarification as regards the necessary test for establishing control over territory for the purposes of military occupation in IHL. The wording in Article 42 HR 1907, "actually placed under the authority", was shown to mean effective control (OL),[235] which in turn consists of the following, cumulative elements:

1. State A's military forces are physically present on the territory in question. Such a presence is not consented to by the original territorial government;
2. The original government of the territory has been totally or partially overcome by state A's military presence and, because of such a presence, cannot exercise its governmental powers; and
3. State A's military forces are in a position to, that is they *can,* exercise authority over the total or parts of a territory. However, there is no need to actually set up military or civilian administrative apparatus on the ground, although this must remain a possibility *in principle*.

In turn, examining instances of MNF control (whether UN SC endorsed or not) over territory as well as UN operations has revealed that there can be more than one occupant. International organisations such as the UN may obtain such a status, depending on whether they exercise effective control (OL) over a portion of the territory based on Article 42 HR 1907, common Article 2 GCs, and Article 1 AP I 1977. Finally, the way in which the responsibility of the UN or one or more troop contributing state(s) can be established is through assessing who exercises effective

[234] See also Chatham House, *International Law Discussion Group on Legal Responsibility of International Organisations in International Law*, 10 February 2011, at 4, available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il100211summary.pdf (visited 5 December 2016).
[235] See *Sargsyan v. Azerbaijan*, ECtHR (2015) (App. no. 40167/06) § 94; *Chiragov and Others v. Armenia,* ECtHR (2015) (App. no 13216/05) § 96.

control (SR) over a specific action pursuant to Article 7 of the ILC Draft Articles on the Responsibility of International Organisations.

Chapter III:
Indirect (Effective) Control, or Occupation by an Intermediary

1. Introduction

In Chapter I, the effective (SR) and overall control (SR/IHL) tests were examined for the purposes of both establishing state responsibility and determining foreign state involvement in prima facie NIACs. The notion of armed conflicts involving foreign intervention was also illustrated. Further, in Chapter II effective control (OL) for establishing military occupation was dealt with. Effective control (OL) as enshrined in Article 42 HR 1907, common Article 2 GCs and Article 1 of AP I 1977 was said to be needed to determine the existence of military occupation. Additionally, it was ascertained that overall control (SR/IHL) alone was unsuitable for that matter.

However, the armed conflicts involving Russia and Ukraine, Russia and Georgia, Armenia and Azerbaijan, Turkey and Cyprus, and Russia and Moldova bring to the forefront the question whether military occupation can come about via controlling local authorities or armed groups. In all the mentioned examples, the intervening state makes use of *de facto* authorities and armed groups to control the respective territories. For that matter, should effective control (SR) or overall control (SR/IHL) be used? Building on what has been discussed already, this Chapter explores a type of control that states started to rely upon with a view to avoiding the status of military occupant: *controlling a territory through an intermediary, i.e. via de facto local authorities or an armed group.* The ICRC identified this type of control as indirect effective control and the ensuing situation as "long arm occupation".[1] This Chapter thus explores the control of a state over an armed group or a local authority for the purposes of military occupation and *not* the control of that armed group or de facto authority over territory.

[1] T. Ferraro (ed.), *Expert Meeting Occupation and Other Forms of Administration of Foreign Territory* (Geneva: ICRC, March 2012), at 23.

To be clear, when there is a case of an armed group controlling a given territory and fighting a state without any involvement of an outside state, then there is a situation of a NIAC and no laws of military occupation apply.[2] However, if it appears that another state has overall control (SR/IHL) over the armed group, the conflict at hand may in fact be an IAC,[3] and there could be a situation of military occupation. That being so, would the HR 1907 and GC IV also be applicable to the actions of the armed groups and de facto authorities? It is therefore essential to determine what status the intervening outside state has, whether the armed group is its agent, and whether the outside state is an occupant. As a follow-up to this, a further enquiry emerges as to whether certain IHL instruments contain their own test of control over the armed group through which the territory can be considered occupied. Articles 4 of GC III ('belonging to a party to the conflict') and 29 of GC IV ('by its *agents*') will therefore be examined to answer this.

1.1 Preliminary remarks and further queries

During a NIAC,[4] states are often fearful their sovereignty is infringed upon and that the dissident armed forces they are in conflict with gain international recognition.[5] States have never regarded IAC and NIAC as being on the same footing. The use of force within state boundaries "is inherent in the concept of the modern State, which precludes groups within that State from waging war against other factions or the

[2] Y. Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: Cambridge University Press, 2014), at 222.
[3] T. Ferraro, 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict', 97 *International Review of the Red Cross* (2015) 1227–1252, at 1249.
[4] S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), at 529; see also L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002); L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002); A. Roberts and S. Sivakumaran, 'Law making by Non-State Actors: engaging Armed Groups in the Creation of International Humanitarian Law', 37 *Yale Journal of International Law* (2012) 108–152; M. Sassòli, 'Taking Armed Groups Seriously: Way to Improve their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010) 5–51.
[5] R. Bartels, 'Timelines, borderlines and Conflicts', 873 *International Review of the Red Cross* (2009) 35–67, at 47–54.

government."[6] In international law, the recognition of belligerency of an armed group by a state opposing it transforms a NIAC into an IAC.[7] The possibility of a non-state armed group becoming an occupant *strictu sensu*, in times of a NIAC, was spurned by the Special Court of Sierra Leone.[8] It was concluded by the Court that the rights and duties of occupying powers under IHL did not regulate the Revolutionary United Fronts' actions in the Kailahun District, or in any other district, during the NIAC that existed in Sierra Leone.[9] In other words, the "legal architecture of belligerent occupation does not fit NIACs, since neither areas seized by insurgents nor those retained or recovered by the Government can be regarded as occupied territories in the sense of IAC *jus in bello*".[10]

However, outside control exercised by an intervening state over an intermediary may indeed give rise to a situation of occupation. The question is what level of control: effective (SR) or overall (SR/IHL)? There is no unified stance on this question and divergent views are expressed. Sassòli, for instance, considers that effective control (SR) is needed to be shown by the foreign state over the armed group, "which in turn establishes the armed group's effective control of the territory in question."[11] For Benvenisti, too, the test of effective control (SR) by the foreign state over a proxy is more appropriate to establish the responsibility of the former as an occupant, unless its own forces are stationed on the territory, which would make the state directly responsible.[12] Unlike them, Ferraro views the demonstration of overall control (SR/IHL) by a third state over armed groups "that are themselves in effective control

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[6] M. Sassòli, A. A. Bouvier, A. Quintin, *How Does Law Protect in War?,* Vol. 1 (3rd edn., Geneva: ICRC, March 2011), at 323.

[7] Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), at 34; H. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988), at 27; see also N. Bhuta, 'The Role International Actors Other Than States can Play in the New World Order', in A. Cassese (ed.), *Realising Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 61–75.

[8] Judgment, *Sesay, Kallon and Gbao,* (SCSL-04-15-T), Trial Chamber I, 2 March 2009, § 988.

[9] Ibid. §§ 982–988.

[10] Y. Dinstein, *Non-International Armed Conflicts*, *supra* note 2, at 222.

[11] M. Sassòli, 'The Concept and the Beginning of Occupation', in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 1390–1419, at 1400.

[12] E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2013) at 62.

of a territory or part thereof" as the necessary test.[13] Kolb and Vité, on the other hand, do not fully subscribe to the phenomenon of indirect effective control, nor do they exclude it, as they are of the opinion that:

> *…dans le cas d'un exercice d'autorité indirect, par contrôle global ou effective d'une faction interpose, il n'est pas exclu que certains devoirs issus du droit de l'occupation puissant ponctuellement s'appliquer, du moins indirectement.*[14]

Murray et al. consider indirect effective control to refer "to situations where a State exercises effective control over the territory of a third State, not directly through its armed forces, but rather indirectly, as a result of 'effective authority' or 'decisive influence' exercised over a subordinate local administration."[15] Finally, section 11.3.1 of the UK Manual of the Law of the Armed Conflict also reads that:

> In some cases, occupying troops have operated indirectly through an existing or newly appointed indigenous government […]. In such cases, despite certain differences from the classic form of military occupation, the law relating to military occupation is likely to be applicable. Legal obligations, policy considerations, and external diplomatic pressure may all point to this conclusion.[16]

Placing external diplomatic pressure and policy considerations aside, it is important to enquire precisely what renders state A a military occupant when state B lost control of its territory to a de facto authority or an armed group. Is an armed presence of that state necessary for this purpose? What level of control is needed in the connection of state A to the de facto authority and/or the armed group on the territory of state B? Other issues that require examination are the meaning of the term "decisive influence", introduced by the ECtHR in the case of Ilaşcu, and how it relates to control and military occupation.

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[13] T. Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law', 885 *International Review of the Red Cross* (2015) 133–163, at 158; see also T. Ferraro, 'The ICRC's legal position', *supra* note 3, at 1249.

[14] R. Kolb et S. Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actueles* (Bruxelles: Bruylant, 2009), at 180–181: "…in the case of exercising indirect authority, via global or effective control of an intermediary, it is not excluded that certain obligations arising from the law of occupation might be applicable selectively, at least indirectly." (own translation)

[15] D. Murray et al., *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford: Oxford University Press, 2016), at 72.

[16] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), § 11.3.1, at 276.

1.2 Control over armed groups and subordinate governments/de facto authorities

States have often used armed groups and subordinate governments to channel their interests in the aftermaths of military interventions and during situations of military occupation. The latter practice was for example employed during WWII, when Nazi Germany installed collaborationist regimes throughout Europe.[17] These governments were referred to as puppet governments, for instance the Vichy government under Philippe Pétain (1940–44) in France[18] or the Hellenic State (1941–45) in Greece.[19]

From the perspective of international law, labelling a government a puppet regime signifies that it is divested from exercising any legitimate authority. Such an appellation must "be reserved to extreme cases of external dependency."[20] In times of military occupation, the external dependency of a puppet government may more easily be noticeable, as it can often be reduced to be the occupant's very creation and instrument.[21] The Greek Criminal Court of Heraklion in Crete in 1945 for example made this point:

> It is clear that the Governments set up in Greece at the end of the military occupation of this country by the German and Italian armies are not based on the popular verdict or on nomination by the Head of State, who fled with his government out of the country. Nor are these governments based on the power of the armed forces of the country; these had been disarmed and dissolved by the invader. […] these governments are based on the consent and military power of the invader, from whose will they derive their power, which could be exercised only – an essential condition of such exercise – within the limits of the military interests and the political objects of the occupant. In consequence, these governments cannot even be regarded as de facto governments. Actually, they constitute mere organs of the occupant […].[22]

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[17] On WWII, see A. Beevor, *The Second World War* (London: Phoenix, 2013); T. D. Snyder, *Bloodlands: Europe Between Hitler and Stalin* (NY: Basic Books, 2012).
[18] N. Atkin, *Pétain* (London/New York: Routledge, 2014), at 131–156.
[19] M. Mazower, *Griechenland unter Hitler* (Frankfurt am Main: Fischer, 2016), at 42; see also Y. Durand, *Le Nouvel ordre européen nazi* (1938–1945) (Paris: Éditons Complexe, 1990).
[20] G. Nolte, 'Intervention by Invitation', in *Max Planck Encyclopedia of Public International Law* (2010), § 18, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL (visited 3 January 2017).
[21] K. Marek, *Identity and Continuity of States in Public International Law* (Geneva: Droz, 1968), at 114.
[22] Judgment, In re G., (Criminal Court of Heraklion (Crete) (1943–5) 12 AD 437 Case No 151) cited in K. Marek, *supra* note 21, at 114; Col. R. A. Picciotti, 'Problems of Occupied Nations

Constituting 'mere organs of the occupant' indicates that such de facto governments are under the *total control* (SR) and carry out orders of the occupying state, acting according to the latter's will. In such cases the responsibility of the occupant should be ascertained based on Article 4 of the ILC Draft Articles on the Responsibility of States (see Chapter I, section 1).

Clear-cut cases of total dependency in times of military occupation could be thought to be extinct, due not least to the emergence of the obligation by states to respect each other's sovereignty and not interfere with internal matters. Instead, as mentioned above, states covertly intervene, using de facto authorities and/or armed groups. One example includes alleged "serious violations of the Covenant in the Donbas region of Ukraine by forces over which the State party [Russia] appears to have considerable influence which may amount to effective control."[23]

Such interferences also present a challenge for establishing situations of military occupation. In this regard, the ICRC Report on Occupation and Other Forms of Administration of Foreign Territory submitted that a state "would be an occupying power for the purposes of IHL when it enforced overall control over de facto local authorities or other organized groups that have effective control over a territory or part thereof."[24] The ICRC termed this phenomenon the exercise of *indirect effective control*, and the situation in Nagorno Karabakh was adduced as an example. However, the report is not clear on how to contemplate the overall control test part contained therein. Should it be understood as in Tadić, determining the nature of the armed conflict involving foreign intervention, or as controlling the territory in an overall, general manner with fewer troops stationed on the territory?

In Tadić, the ICTY Appeals Chamber advanced that unquestionable evidence was needed to demonstrate a state had overall control (SR/IHL) over a group:

> if […] the controlling State is not the territorial state where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control

After the Termination of Occupation', 33 *Military Law Review* (1966) 25–57, at 33.

[23] Human Rights Committee*, Concluding Observations on the seventh periodic report of the Russian Federation*, CCPR/C/RUS/CO/7, 28 April 2015, § 6 (International Covenant on Civil and Political Rights).

[24] T. Ferraro, *Expert Meeting, supra* note 1, at 23.

> of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.[25]

The Chamber also deemed that in case a third state had territorial aspirations, the link between an armed group and that state would be easier to prove:

> Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.[26]

As shown in Chapter I of the thesis, overall control (SR/IHL) is preferred to be used both for state responsibility and conflict classification purposes under IHL. Building on this, a subsequent analysis of the case law in this Chapter will further argue for the suitability and practicability of the overall control (SR/IHL) test for the purposes of establishing proxy occupation. The following section discusses the outside state control over an armed group, whereas section 3 deals with control over de facto authorities.

2. Control over an armed group

This section deals with defining states as occupants based on them exercising overall control (SR/IHL) over armed groups on the territory of another state.

2.1 Croatia exercising control over the "Croatian Defence Council" (HVO)

It was already stated, in Chapters I and II, that overall control (SR/IHL) alone did not give rise to a situation of military occupation, but that effective control (OL) over territory was needed, too. Yet, the ICTY's Trial Chamber in Tadić considered that the relationship between de facto organs or agents and a foreign power included those circumstances where the foreign power occupied or operated within a certain territory solely through the acts of the local de facto organs or agents.[27] In Rajić, the prosecution argued that when Stupni Do was overrun by forces of the "Croatian Defence Council" (HVO) under the command of Ivica Rajić, and subsequently came

[25] Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 138.
[26] Ibid, § 140.
[27] Opinion and Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, § 584.

under their control, the property of Stupni Do became protected because it was Bosnian property under the control of HVO forces, who in turn were to be regarded as part of the state on the opposite side, namely Croatia.[28] The Trial Chamber held that as the Bosnian Croats controlled the territory surrounding the village of Stupni Do, Croatia could be regarded as in control of the area in question.[29] Thus, when Stupni Do was invaded by HVO forces, the Bosnian village came under the control of Croatia as part of an international armed conflict. Also, the property of Stupni Do became protected for the purposes of the grave breaches provisions of GC IV.[30]

The Trial Chamber furthered this reasoning in Blaškić, regarding the occupied territory as part of Bosnia and Herzegovina (BiH), within the enclaves dominated by the HVO, namely Vitez, Busova and Kiseljak. In these enclaves, Croatia was an occupying power through the overall control (SR/IHL) it had over the HVO, the support it gave and the close ties it maintained with it.[31] Using the same reasoning that applies to establishing the international nature of a conflict, "the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory."[32] Nevertheless, Sassòli regards this reasoning to be leading to an "absurd result":[33] Croatia was legally an occupant in parts of Bosnia where it had never directed an armed group, and the HVO was itself assembled from Bosnian Croats.[34] Also, the HVO fighters had to comply with the rules applicable to an occupying power while "operating on territory inhabited by Bosnian Croats, including when carrying out activity on their own initiative while fighting against the Bosnian Government."[35]

In Naletilić, however, the ICTY Trial Chamber disagreed with the stance advanced in Blaškić. It held that the overall control (SR/IHL) test developed in Blaškić was not applicable when determining the existence of military occupation, since effective

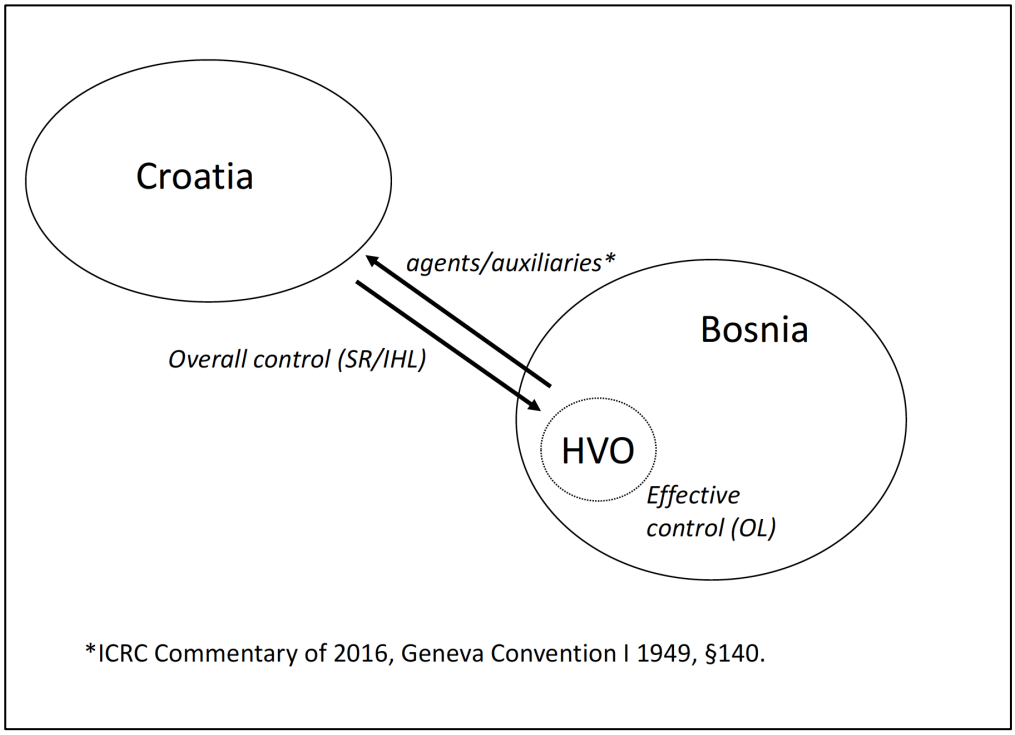
[28] Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Rajić, Trial Chamber, 13 September 1996, § 38.
[29] Ibid. § 42.
[30] Ibid.
[31] Ibid.
[32] Judgment, *Blaškić* (IT-95-14-IT), Trial Chamber, 3 March 2000, § 149.
[33] M. Sassòli, 'The Concept and the Beginning of Occupation', *supra* note 11, at 1399.
[34] Ibid.
[35] Ibid.

control (OL) was needed. This would be so because there is an essential distinction between determining a situation of occupation, on the one hand, and establishing the international nature of an armed conflict, on the other. While the overall control test would be suitable for the latter purpose, a further degree of control was required to establish occupation.[36] Sassòli views such a "further degree of control" to be in need of additional clarification. For him, it was not clear "whether effective control was required and, if so, whether the effective control must be exercised by the foreign state over the group, or alternatively by the group or the foreign state over the territory in question."[37]

In fact, one of the unclear aspects in the ICTY's reasoning is that the Court did not examine whether there might have been an occupation by an intermediary (armed group). Based on what *kind* of control did the property of the Bosnian Muslims come under the control of the HVO and, through it, of Croatia? While Croatia was not itself in control of the territory, the HVO was. Hence, not the test of territorial control is of primary interest here. Instead, what matters is the *connection* between the overall control (SR/IHL) of Croatia over the HVO and, *at the same time,* that latter's effective control (OL) over territory. Neither the first nor the second element alone is sufficient to bring about a situation of occupation by an intermediary (armed group). In other words, neither control by Croatia over the HVO without the latter exercising effective territorial control, nor the HVO exercising effective territorial control without Croatia's involvement, would amount to proxy occupation. Only the presence of both relationships of control at the same time does,[38] as shown in Figure 1.

[36] Judgment, *Naletilić and Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, § 214.
[37] M. Sassòli, 'The Concept and the Beginning of Occupation', *supra* note 11, at 1399.
[38] ICRC Commentary of 2016, Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) Article 2: Application of the Convention, § 331 and § 332 available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518 (visited 3 January 2017).

Figure 1: The indirect effective control test (ICTY)



Note: HVO = Croatian Defence Council

2.2 Uganda controlling the "Congo Liberation Movement" (MLC)

The following reflection concerns the ICJ's stance in DRC v. Uganda.[39] Here, the DRC requested that the ICJ adjudicate, amongst others, that the Republic of Uganda – by virtue of engaging in military and paramilitary activities against the DRC, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces – had violated the principle of non-interference, including providing assistance to the parties of a civil war operating on the territory of another state.[40]

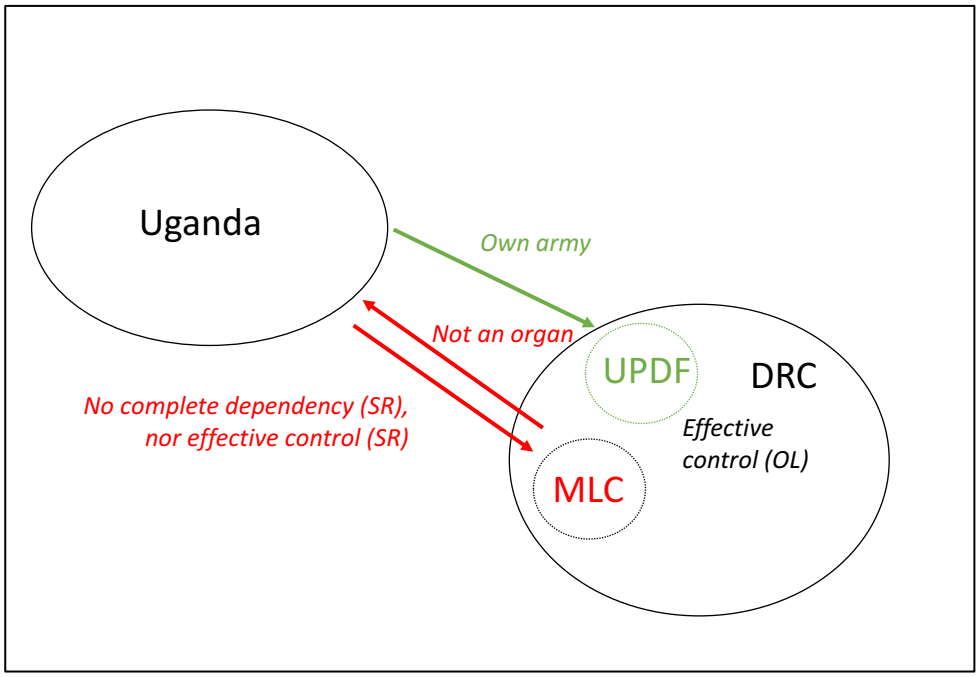
However, the ICJ saw no credible evidence that would have proven that Uganda had spawned the Congo Liberation Movement (MLC). It considered the conduct of the MLC not that of "an organ" of Uganda, as per Article 4 of the ILC Draft Articles on

[39] See generally L. Arimatsu, 'The Democratic Republic of the Congo 1993–2010', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012) 146–203.

[40] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* judgment of 19 December 2005, §24 and §28, available at http://www.icj-cij.org/en/case/116 (visited 15 July 2017).

Responsibility of States, nor that of an entity exercising elements of governmental authority on its behalf, as per Article 5 of that same instrument. The ICJ further examined whether the MLC's conduct took place "on the instructions of, or under the direction or control of" Uganda (Article 8). Again, it found no evidence this had been the case. Accordingly, no issue arose whether the requisite tests were met for the sufficiency of control over paramilitaries.[41] The ICJ, therefore, applied both the complete dependency (SR) and effective control (SR) tests to the armed group, only to conclude that they were not met in this case as shown in Figure 2.

Figure 2: Occupation by intermediary (ICJ)



Note: DRC= Democratic Republic of Congo, UPDF=Uganda Peoples' Defence Forces, MLC=Congo Liberation Movement

In addition, while the DRC referred to the Ugandan officers' "indirect administration" through various Congolese rebel factions and the supervision by Ugandan officers of local elections in the territories controlled by Uganda Peoples' Defence Forces (UPDF), according to the ICJ the DRC did not provide specific evidence such authority was in

[41] Ibid., §160.

fact exercised by the Ugandan armed forces in any areas other than in Ituri. And although Uganda admitted that as of 1 September 1998 it exercised "administrative control" at Kisangani Airport, no proof was shown by the DRC which would have allowed the ICJ to characterize the presence of Ugandan troops stationed at Kisangani airport as constituting military occupation. The ICJ also did not endorse the DRC's claim that Uganda was an occupying power in areas outside Ituri, which were controlled and administered by Congolese rebel movements: the evidence presented did not give rise to the view that these groups were "under the control" of Uganda.[42]

It can thus be understood that, for the ICJ, an occupying state's responsibility for acts of armed groups that do not belong to its own armed forces is only triggered based on the complete dependency (SR) or effective control (SR) tests. Accordingly, it can be deduced that while the ICJ does not dismiss the possibility of a state exercising control over territory through armed groups, to give rise to military occupation the necessary test is not the overall control test (SR/IHL) as advanced by the ICTY.

To be more specific, it thus seems that when the ICJ has to determine the existence of intermediary occupation, the effective control (SR) test is used for establishing state responsibility, whereas the effective control (OL) test is used for establishing whether an armed group controls the territory. In other words, when the ICJ deals with armed groups that do not belong to a state party to the conflict and when the responsibility of said state has to be established, there can only be a situation that either falls under Article 4 or under Article 8 of the ILC Draft Articles on Responsibility of States. Only if either of these two tests is met, and if the group over which control is wielded is in effective control (OL) over the territory, can it be considered that the state in question is an occupant.

2.3 Critical Appraisal

It thus emerges that whereas the ICTY employs the overall control (SR/IHL) test to both establish state responsibility and classify armed conflicts, the ICJ uses the complete dependency (SR) and effective control (SR) tests to establish state

[42] Ibid., §177.

responsibility in international law (see also Chapter I). Therefore, the message that the ICJ conveys is that there are two different tests, one for conflict classification purposes and another for state responsibility purposes (see in detail Chapter I). However, such a stance is problematic, as discussed next.

Firstly, if one follows the logic of the ICJ, even though there may be strong factual evidence to suggest that state A is involved in the armed conflict on the territory of state B through armed group X, for the ICJ state A would still not be responsible for the actions of that armed group. Put differently, having two separate tests could mean that state A is involved in a certain international conflict but would not be responsible for the actions carried out by armed group X, as the group is neither completely dependent on the state nor does the state possess effective control (SR) over it.

Secondly, another problem possibly arising is that when using a less stringent test for conflict classification purposes, i.e. overall control (SR/IHL) as put forth by the ICTY, that overall control test is ultimately also employed for establishing state responsibility. So while there would be a single test both for establishing state responsibility and conflict classification, ascertaining state responsibility would be done through a lower threshold of control – contrary to what the ICJ had advanced. This raises the question of how international law understands state responsibility and attribution *per se*. In the Genocide case, what the ICJ advanced was that the Tadić and Nicaragua tests had been developed for two different situations, thereby separating conflict classification and state responsibility (see Chapter I). However, what the ICJ seems to have omitted from its analysis is that, in practice, when one begins to classify an armed conflict, a party to the conflict is identified based on its actions, because with its actions it actually participates in the armed conflict. This way, in light of military occupation, if one considers that for attributing state responsibility there is a separate test, i.e. not the same as for conflict classification, this could mean that an occupying power is simply not responsible for acts that it engaged in on the territory it controlled whilst being an occupant. In maintaining this view, the more appropriate test to establish the occupant's responsibility: effective (SR) or overall control (SR/IHL) should be selected. Choosing overall control (SR/IHL) would lower the bar for establishing state responsibility and attribution. Yet, there still would *be* a bar which

would ultimately pave the way to qualifying a situation as one of military occupation or not.

The opponents of the overall control (SR/IHL) test could argue that a danger is thus created in that every NIAC might end up being regarded as an occupation, or that even acts which are not committed by a state in question are attributed to that state. Nevertheless, one should not forget that if the armed groups do not exercise effective control (OL) over the territory, there is no such danger. At the same time, it still has to be demonstrated that the state does in fact exercise overall control (SR/IHL) over the armed group. The alternative to what is advanced here would be that, in order to establish intermediary/proxy occupation, the responsibility of state A for the actions of armed group X is only triggered through effective control (SR) as formulated by the ICJ. This would avoid the risk of turning every NIAC with some sort of foreign intervention into an IAC; in addition to this, attributing all acts committed by the armed group to the outside state is avoided. But this would ultimately allow that state to escape from its obligations under international law by creating and using "groups of individuals to undertake actions that are intended to damage, or in the event do damage, other states …".[43]

The supporters of the effective control (SR) test should also perhaps query what happens when the state exerts effective control (SR) intermittently, whilst the proxy maintains effective control (OL) over the territory. In my understanding, for the test to be fully met, the third state should sustain effective control (SR) over the proxy's each and every action continually and unfailingly. This may be difficult to maintain, as it may very well happen that effective control (SR) over the armed group is not constantly wielded but exercised only periodically. For example, when the MH17 airplane was downed while crossing the Ukrainian air space, pro-Russian separatists were widely held responsible. Moscow in turn said that a Ukrainian military jet or a missile launched from Ukrainian government-controlled territory was to blame.[44]

[43] A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *The European Journal of International Law* (2007) 649–668, at 654.
[44] L. Hardin and S. Walker, 'Flight MH17 downed by Russian-built missile Dutch investigators say', *The Guardian*, 13 October 2015, available at

Evidence then emerged pursuant to which a pro-Russian separatist officer claimed the plane had been shot down by a mixed team of anti-Ukrainian separatists and Russian military personnel, thinking they were targeting a Ukrainian military craft.[45] The Ukrainian Government later issued an audiotape of a phone conversation between an alleged pro-Russian rebel and an alleged Russian intelligence office right after the plane crash in which the former told the latter of the circumstances of the accident.[46] A lawsuit was also filed in a Chicago court, accusing Mr. Igor Girkin (former commander of the pro-Russian separatist forces in Eastern Ukraine, also known as "Strelkov") of orchestrating the shooting down, in addition to alleging that the Kremlin was complicit in the act.[47]

For some, this example does not pass the bar of the effective control test (SR); hence, Russia's responsibility is not triggered, although it was involved at least somehow. In other words, Russia could have created, financed and equipped the armed group, as well as developed its overall strategy and directed every other action – but because it did not issue specific instructions for the downing of the plane, it would not be responsible. For others, Russia militarily equipping and financing the armed group and generally planning its activities is enough to establish that Russia had overall control (SR/IHL) over the anti-Ukrainian rebel forces who brought down the aircraft; hence, Russia would be responsible. It also has to be pointed out that even within states, when *de jure* organs are given orders, they are not reporting on the progress of their actions at each and every moment, and for that reason they are not controlled on a constant basis during such time as the act in question is occurring.

So in calling for the adequacy of the effective control (SR) test for the purposes of proxy occupation, one should be aware that this level of control has to be firmly

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http://www.theguardian.com/world/2015/oct/13/mh17-crash-report-plane-partially-reconstruced-blames-buk-missile-strike (visited 3 January 2017).

[45] 'Leaked MH17 Draft Report Blames Pro Russian Rebels', *Radio Free Europe*, available at http://www.rferl.org/content/mh17-draft-report-points-to-pro-russian-rebels-ukraine/27130860.html (visited 3 January 2017).

[46] Ibid.

[47] D. Millward, 'MH17: Russian separatist leader sued for $900 million by crash victims', *The Telegraph*, 16 July 2015, available at http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11742865/MH-17-Russian-separatist-leader-sued-for-900-million-by-crash-victims.html (visited 3 January 2017).

maintained over the proxy's actions, leaving no room for effective control (SR) to be exercised sporadically. But states could deliberately avoid exerting control over intermediaries to such an extent that ultimately effective control (SR) is not met. The danger is that they will keep their control over the proxy somewhere just below the threshold of effective control (SR), retaining however substantial influence and leverage over the armed group. In this way, states do not have to fear for their responsibility to be engaged.

Neither Sassòli[48] nor Benvenisti[49] clearly offer their views on why effective control (SR) is a suitable test for establishing intermediary/proxy occupations. Both create an understanding that because military occupation is determined based on effective control (OL) over territory, the relationship between the outside state and the proxy should be assessed to rest on effective control (SR), too. It appears that the following questions are therefore evaded: Is this so because occupation and state responsibility are based on stringent tests and overall control is a weaker test, therefore the latter is unsuitable? Or is it because, during occupation, a state has to control all the armed forces' actions, consequently proving that the relationship between the proxy and the state for that matter rests on effective control (SR)?

In sum, the debate boils down to our understanding of effective control (SR).[50] If we follow the ICJ's original thinking based on the Nicaragua and Genocide cases, it amounts to state control over armed groups' *specific* operations and acts. However, it is submitted that determining whether a situation is an occupation is already part of the broader conflict classification exercise. It now seems to be accepted that overall control (SR/IHL) as spelled out in Tadić can turn a prima facie NIAC into an IAC.[51] This should not be neglected in this debate. If one employs the effective control (SR) test solely to ascertain proxy occupations while regarding the overall control (SR/IHL) test to be suitable for transforming a NIAC into an IAC, the proponents of effective control

[48] M. Sassòli, 'The Concept and the Beginning of Occupation', *supra* note 11, at 1400.
[49] E. Benvenisti, *supra* note 12, at 62.
[50] K. Schmalenbach, 'International Responsibility for Humanitarian Law Violations by Armed Groups', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (Cambridge: Cambridge University Press, 2015) 470–503, at 477–486.
[51] ICRC, *Violence and the Use of Force* (Geneva: ICRC, July 2011) at 33; see also T. Ferraro, 'The ICRC's legal position', *supra* note 3, at 1249.

(SR) turn a blind eye to a possible rift in the system of conflict classification, suggesting military occupation not to be part of the broader conflict classification exercise. When a third state possesses overall control (SR/IHL) over an armed group, as developed in Tadić, and when this armed group then controls the territory as understood in occupation law, the situation should be labelled one of occupation. Due to the fact that effective control (OL) is not employed for identifying the international nature of an armed conflict, and because overall control (SR/IHL) is not used for ascertaining situations of occupation, marrying the two seems to follow the virtue of the exigencies of the situation on the ground. Ultimately, this avoids a protection gap in the application of GC IV, i.e. even when there is control involved via proxies a state cannot shun its responsibilities under IHL.[52]

Control over de facto authorities is dealt with next.

3. Control over de facto authorities

This section addresses the issue of indirect effective control wielded by a foreign state over de facto authorities. To avoid confusion, in the subsequent analysis a distinction is made between de facto "regimes" and de facto "states". *De facto regimes* are defined as entities exercising at least a certain level of authority over a territory within a state,[53] coupled with a certain political structure and organizational capacity.[54] Such an entity aims to represent the territory it controls in the capacity of its official government.[55] The very aim of this entity is to be recognized as the official

[52] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, ICRC Commentary of 2016 Article 2, *supra* note 38, § 140.
[53] M. Schoiswhol, 'De facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law', 6 *Austrian Review of International and European Law* (2001) 45–90, at 50; see also J. Nijman, *The Concept of International Legal Personality: An inquiry into history and theory of international law* (The Hague: T.M.C. Asser Press, 2004); T. Baty, 'So-called 'De facto Recognition'', 5 *Yale Law Journal* (1922) 469–488; D. Thürer, 'The 'Failed State' and International Law', 836 *International Review of The Red Cross* (1999) available at https://www.icrc.org/eng/resources/documents/article/other/57jq6u.htm (visited 3 January 2017).
[54] J. van Essen, 'De Facto Regimes in International Law', 28 *Merkourios – Utrecht Journal of International and European Law* 74 (2012) 31–49, at 32.
[55] Ibid.

government, leaving the state and its territory intact.[56] "De facto" here means that this power is actually illegal. An example of such an instance is the Ivorian election crisis in 2010, when Laurent Gbagbo refused to concede defeat in the 28 November 2010 second round of the elections to his adversary, former Prime Minister Alassane Ouattara.[57] The latter's electoral victory was strongly backed by the international community,[58] making the administration of Gbagbo a de facto regime, in turn.

A *de facto state*, on the other hand, is a geographical and political entity that has the features of a state but is not recognized and remains illegitimate in the international community's eyes.[59] Its main aim is the legitimization of the secession from its parent state, thus acquiring independent statehood.[60] For example, while Kosovo has attained recognition by many members of the international community,[61] the TRNC, Abkhazia, South Ossetia, Transdniestria, and Nagorno Karabakh are not internationally recognized. Yet all of them claim to have successfully and legitimately seceded from their respective parent state.[62] Except for Kosovo, all these examples also implicate an outside state and are widely referred to as occupied territories.[63] For this reason, the question addressed next is whether these instances constitute situations of military occupation and, if so, on what legal basis. Examining these cases will also assist in identifying the way in which indirect effective control may operate

[56] Ibid., at 33.
[57] United Nations Operation in Côte d'Ivoire (UNOCI), Post-election Crisis, available at http://www.un.org/en/peacekeeping/missions/unoci/elections.shtml (visited 3 January 2017).
[58] J. van Essen, *supra* note 54, at 33.
[59] Ibid.; see also S. Pegg, *International Society and the De Facto State* (Brookfield, Vermont: Ashgate, 1998) at 26; J. A. Frowein, 'De facto Regime', *Max Planck Encyclopedia of Public International Law* (2013) §§1–12, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1395 (visited 3 January 2017).
[60] J. van Essen, *supra* note 54, at 33.
[61] Republic of Kosovo, Ministry of Foreign Affairs, 'International recognitions of the Republic of Kosovo', available at http://www.mfa-ks.net/?page=2,224 (last visited 3 January 2017); see also R. Wilde, 'Kosovo (Advisory Opinion)', *Max Planck Encyclopedia of Public International Law* (2011), §§ 1–29, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1307?prd=EPIL (visited 3 January 2017).
[62] S. Casey-Maslen (ed.), *The War Report 2012* (Oxford: Oxford University Press, 2013).
[63] Ibid., at 29–37, 42–46, and 50–54.

in practice – or, in other words, how overall control (SR/IHL) is wielded by state A over de facto authorities who have effective control (OL) over territory in state B.

3.1 Crimea, Ukraine[64]

A first example of proxy occupation, along with questionable results of self-determination, concerns Crimea.[65] Seeking to sign an Association Agreement with the European Union, Ukraine triggered Russia's political discontent.[66] Civil unrest in Kyiv then resulted in the "Maidan" revolution, when President Yanukovych refrained from signing the Agreement. On 22 February 2014, Russian President Putin declared that work had to commence on "returning Crimea to Russia."[67] The next day pro-Russia demonstrations were held in Crimea. Crimean Prime Minister Anatolii Mohyliov then declared that his government recognized the new provisional government in Kiev, and that the Crimean autonomous government would adhere to all the laws passed by the Ukrainian parliament.[68] The same position was adopted by the Chairman of the Supreme Council of Crimea, who stated that the Crimean parliament would not

[64] See generally C. Walter, 'Postscript: Self-determination, Secession, and the Crimean Crisis 2014', in C. Walter, A. von Ungern-Sternberg and K. Abushov (eds), *Self-determination and Secession in International Law* (Oxford: Oxford University Press, 2014) 293–331.

[65] On Crimean secession and its integration into Russia, see A. Peters, 'The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum', in C. Calliess (ed.), *Staat und Mensch im Kontext des Völker- und Europarechts: Liber Amicorum für Torsten Stein* (Baden-Baden: Nomos 2015), 255–280; E. Milano, 'The non-recognition of Russia's Annexation of Crimea: three different legal approaches and one unanswered question', Questions of International Law 2014, available at http://www.qil-qdi.org/the-non-recognition-of-russias-annexation-of-crimea-three-different-legal-approaches-and-one-unanswered-question/ (visited 3 January 2017).

[66] R. Emmott, 'Putin warns Ukraine against implementing EU Deal Letter', *Reuters*, 23 September 2014, available at http://www.reuters.com/article/us-ukraine-crisis-trade-idUSKCN0HI1T820140923 (visited 3 January 2017).

[67] 'Vladimir Putin describes secret meeting when Russia decided to seize Crimea', *Agence France-Presse/The Guardian*, 9 March 2015, available at https://www.theguardian.com/world/2015/mar/09/vladimir-putin-describes-secret-meeting-when-russia-decided-to-seize-crimea (visited 3 January 2017).

[68] 'Prime Minister of Crimea declared Crimea would support new elected Ukrainian President', *Radio Svaboda*, 24 February 2014, available at https://web.archive.org/web/20140224032704/http://www.radiosvoboda.org/content/article/25274524.html (visited 3 January 2017).

consider separation from Ukraine, and that earlier reports according to which the regional parliament was to hold a debate on this matter were mere provocations.[69]

Nevertheless, on 27 February Russian troops without insignia (known as "little green men" or "polite people"[70]) took over Crimea's Supreme Council, asserting control over key sites across the peninsula such as Simferopol international airport and military bases. After this takeover, the Crimean parliament held an emergency session and under dubious circumstances installed a new government.[71] On 11 March 2014, the regional parliament adopted the "Declaration of Independence" of Crimea with the clear aim that Crimea and the City of Sevastopol would become part of Russia.[72] The Referendum on joining Russia was held just five days later. On 27 March, the UN General Assembly in its Resolution 68/262 (by 100 votes to 11 with 58 abstentions) rejected the results of that referendum, regarding it invalid for constituting the basis for any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol.[73] Nevertheless, in mid-April 2014 the Russian president signed an order appointing Sergey Aksyanov as the interim head of Crimea,[74] and currently Crimea is governed by him as the 'Head of the Russian Republic of Crimea'.[75] Sevastopol and the Republic of Crimea are now regarded as the 84th and 85th subjects of the Russian

[69] 'У парламенті Криму заявили, що не планують відділятись від України' (Crimean Parliament stated they did not plan to separate from Ukraine), *Ukraynskaya Pravda,* available at http://www.pravda.com.ua/news/2014/02/26/7016360/ (visited 3 January 2017).
[70] V. Shevchenko, 'BBC Monitoring "Little Green men" or "Russian Invaders"', *BBC*, 11 March 2014, available at http://www.bbc.com/news/world-europe-26532154 (visited 3 January 2017).
[71] A. de Carbonnel, 'How the separatist delivered Crimea to Moscow', *Reuters*, 12 March 2014, available at http://www.reuters.com/article/us-ukraine-crisis-russia-aksyonov-insigh-idUSBREA2B13M20140312 (visited 3 January 2017).
[72] 'Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol', *Voltaire Network*, 11 March 2014, available at http://www.voltairenet.org/article182723.html (visited 3 January 2017).
[73] GA Res. 68/262, 27 March 2014; A. Peters, *supra* note 65, at 278–281.
[74] A. Nikolsky, 'Putin signed order appointing Aksyanov as interim head of Crimea', *Russian News Agency*, 15 April 2014, available at http://tass.ru/en/russia/727839 (visited 3 January 2017).
[75] Art. 61 Конституция Республики Крым, 11 апреля 2014 года (Art. 61 Constitution of the Crimean Republic, 11 April 2014), available at http://rk.gov.ru/rus/info.php?id=623228 (visited 3 January 2017); see also Article 65 of the Constitution of the Russian Federation of 1993 as amended by 21 March 2014, available at: http://constitution.kremlin.ru/#article-65 (visited 3 January 2017).

Federation, respectively.[76] Needless to say, Aksyanov's installation contravenes the Constitution of Ukraine, according to which the Prime Minister of Crimea is appointed by the Supreme Council of Crimea in consultation with the President of Ukraine.[77]

3.2 Cyprus

The second example is Cyprus. The island has been divided since 1974, when Turkey invaded the North in response to a military coup on the island backed by the Greek government.[78] Cyprus was subsequently partitioned, with the northern third inhabited by Turkish Cypriots and the southern two-thirds by Greek Cypriots.[79] On 15 November 1983, the northern area of Cyprus constituted itself into the Turkish Republic of Northern Cyprus (TRNC),[80] which is however only recognized by Turkey.[81] Turkey is believed to be maintaining more than 40,000 troops in the north of the island.[82] In fact, some sources stipulate that as of 2015 there were some 46,000 troops there.[83]

As this case possesses a much longer history than Crimea, some case law is in fact available that assists in understanding the situation on the ground in legal terms. In

[76] Ibid.; see also OSCE PA, Tbilisi Declaration and Resolutions, Political Affairs and Security, 2016, 1–5 July, at 4, available at: https://www.oscepa.org/documents/all-documents/annual-sessions/2016-tbilisi/declaration-24/3371-tbilisi-declaration-eng/file (visited 3 January 2017).
[77] Constitution of Ukraine of 1996 (amended by 21 February 2014), Articles 37, 85 and Article 136, available at http://iportal.rada.gov.ua/uploads/documents/29523.pdf (visited 3 January 2017).
[78] S. Casey-Maslen (ed.), *supra* note 62, at 35.
[79] Ibid.
[80] SC Res. 541 (1983) considered the TRNC declaration invalid and called for its withdrawal; see also SC Res. 550 (1984).
[81] F. Hoffmeister, 'Case Study on Cyprus', in A. von Arnauld, N. Matz-Lück and K. Odendhal (eds), *100 Years of Peace Through Law: Past and Future* (Berlin: Duncker and Humbolt, 2015) 113–131, at 118–119.
[82] S. Evripidou, 'Turkish Troop Numbers upped in North', *Cyprus Mail*, 2 July 2013, available at http://cyprus-mail.com/2013/07/03/turkish-troop-numbers-upped-in-north/ (visited 3 January 2017).
[83] See also A. Aristotelous, 'What will be the strategy of Akinci?', Cyprus Centre for Strategic Studies, 8 May 2015, available at http://strategy-cy.com/ccss/index.php/el/anaysis-gr/item/276-pia-stratigiki-tha-akoloyuesei-o-akinci-watill-be-the-strategy-of-acinci (visited 3 January 2017).

Loizidou, the ECtHR considered that the responsibility of the party to the Convention could arise

> […] when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.[84]

The Court later added it was not necessary to determine whether Turkey actually exercised *detailed* control over the policies and actions of the subordinate TRNC authorities. This could mean that overall control (SR/IHL) exerted by the outside country over the intermediary would have sufficed. However, the Court came up with a seemingly new term, "effective overall control", which as we will see below does not constitute a new type of control but is equivalent to the above discussed indirect effective control (see also Glossary):[85]

> It is obvious from the large number of troops engaged in active duties in Northern Cyprus […] that her [Turkey's] 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' […].[86]

It should be recalled that the ECtHR explicitly referred to "the occupied area of northern Cyprus"[87] already during the deliberations on the establishment of the facts in the Loizidou case. In other words, the ECtHR may have identified a form of occupation which is based on cloaked control. While the Court did not provide a definition of the *effective overall control* test, it is submitted here that, due to the actors involved, overall control should be understood as developed by the ICTY. In other words, without the support of state A extended to the de facto authorities (i.e. the element contained in overall control (SR/IHL) of state A over the de facto authorities), the latter would not be in a position to exercise effective control (OL) over the territory belonging to state B. In this case specifically, numerous facts suggest

[84] *Loizidou v. Turkey*, ECtHR (1995) (App. No. 15318/89) § 62.
[85] *Loizidou v. Turkey*, ECtHR (Judgment on Merits) (1996) (App. no. 40/1993/435/514) § 56.
[86] *Ibid.,* § 56. See also *Djavit v. Turkey*, ECtHR (2003) (App. no. 25781/94) §§ 18–23; *Demades v. Turkey*, ECtHR (2003) (App. no. 16219/90) §§ 36–37; *Adali v. Turkey*, ECtHR (2005) (App. no. 38187/97) section A.
[87] *Loizidou v. Turkey*, *supra* note 84, § 16; see also SC Res. 541 (1983), SC Res. 550 (1984).

that it was only due to the Turkish military involvement that the TRNC came into existence.[88] This is corroborated by the ECtHR in Cyprus v. Turkey:

> Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.[89]

The other question is whether the ICRC and the ECtHR, in coining two different terms – indirect effective control and effective overall control –, in fact conceptualised them in the same way. Upon closer scrutiny this seems indeed to be the case, since both *indirect effective control* and *effective overall control* when seen in light of occupation law concern the same aspects and possess the same content: a state purporting to veil its control over foreign territory via the control over an intermediary (in this case: local de facto authorities). The ICRC and the ECtHR seem to also converge on the aspect that control by the outside state over the de facto authorities need not be based on effective control (SR). What however creates a caveat are the different names given to that phenomenon. Confusion may, therefore, arise notably when the lawyer is confronted with the dilemma of classifying a situation in view of these two tests so as to determine the applicable law. It would be preferable that for these types of circumstances one test existed with one and the same name only.

In summation, in the Loizidou and Cyprus cases, the ECtHR established that control by an outside state over de facto authorities means overall control (SR/IHL), encompassing not only supplying the de facto authorities with weapons and finances and the general planning of their operations, but also deciding on the wider aspects of the territory, including its political future.

3.3 Georgia

Another known case concerns Georgia, whose two breakaway regions, Abkhazia and South Ossetia, also have close links with Russia. After the fall of the Soviet Union, volatile armed conflicts ensued between Georgia and both the South-Ossetian (1988–

[88] N. Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege* (Oxford/Portland: Hart Publishing, 2011), at 28–31.
[89] *Cyprus v. Turkey*, ECtHR (2001) (App. no. 25781/94) § 77.

92) and Abkhaz (1992–93) separatists. These conflicts were ethnically driven, with both regions seeking secession and independence from Georgia.[90] Russia also offered its citizenship and passports to both Abkhaz and South-Ossetian inhabitants.[91] On 8 August 2008, after fighting between South-Ossetia armed forces and the Georgian troops had erupted, Russia entered the Georgian territory as follows:

> Russian forces engaged in the armed conflict, including ground and air forces as well as the Black Sea Fleet, also attacking targets on Georgian territory outside South Ossetia. In the morning of 8 August, Russian air forces reportedly started their attacks in central Georgia (Variani, Gori), gradually extending them to other parts of Georgia including the Senaki military base (9 August), military targets in the port of Poti and the capital of Tbilisi. Some civilian targets were also damaged.[92]

On 12 August 2008, the Russian forces occupied a number of locations on the territory of Georgia.[93] On 14 August, then-French President N. Sarkozy drew up a peace agreement and submitted it to Georgia's (M. Saakashvili) and to Russia's (D. Medvedev) Presidents. The document envisaged "the withdrawal of Russian military forces to the lines they held before hostilities broke out."[94] However, the 2011 "Implementation Review: Six Point Ceasefire Agreement between Russia and

[90] C. Waters, 'South Ossetia', in C. Walter, A. von Ungern-Sternberg and K. Abushov (eds), *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014) 175–190; and F. Mirzayev, 'Abkhazia', in ibid., 191–213.

[91] V. M. Artman, 'Annexation by Passport', *Aljazeera America*, 14 March 2014, available at http://america.aljazeera.com/opinions/2014/3/ukraine-russia-crimeapassportizationcitizenship.html; D. McElroy, 'South Ossetia Police Tell Georgians to Take a Russian Passport, or Leave Their Home', *The Telegraph*, 30 August 2008, available at http://www.telegraph.co.uk/news/worldnews/europe/georgia/2651836/South-Ossetian-police-tell-Georgians-to-take-a-Russian-passport-or-leave-their-homes.html (all visited 3 January 2017); GA Res 62/249, 15 May 2008.

[92] *Independent International Fact-Finding Mission on the Conflict in Georgia*, Vol. II, (September 2009), at 210, available at http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf (visited 3 January 2017)

[93] Ibid., at 211.

[94] 'Georgia: the 6 Points Plan', 14 August 2008, Embassy of France in Washington D.C., 8 September 2008, § 5 available at http://franceintheus.org/spip.php?article1101 (visited 3 January 2017); see also Council of Europe and the conflict in Georgia, CM/Del/Dec(2017)1285/2.1, 1285th Meeting 3 May 2017, § 3 available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168070ec0b (visited 5 May 2017); US Government Information, One Hundred Fifteenth Congress of the United States of America, An Act, H.R. 244, *Occupation of the Georgian Territories of Abkhazia and Tskhinvali Region/South Ossetia*, at 572, available at https://www.congress.gov/115/bills/hr244/BILLS-115hr244enr.pdf (visited 6 May 2017).

Georgia", prepared by the National Committee on American Foreign Policy and the Institute for the Study of Human Rights, raised concerns that

> Russia not only failed to withdraw, it expanded territory under its control beyond the pre-war conflict zones […]. Russia established a troop presence in 51 villages it did not control before the war […]. Russia also deployed new weapons systems […]. Russia signed 49-year lease agreements with automatic 5-year renewals in Gudauta and Tskhinvali. Russia has built 5 permanent military bases in South Ossetia manned by approximately 5,000 security personnel. Another 5,000 are based in Abkhazia. Both deployments include regular army troops, border guards and FSB [Russian secret service] personnel.[95]

In addition to this, the South-Ossetian and Abkhaz separatist forces have enjoyed the strong military, political and financial support of the Russian Federation.[96] On 24 November 2014, Russia and Abkhazia signed a Treaty on Alliance and Strategic Partnership.[97] The document incorporates Abkhazia into Russia's military, economic, social and legal space. It aims to create a common security and defense system for the armed forces of Russia and Abkhazia in the form of joint defense and border protection forces and unifies the standards of warfare management and law enforcement. Moscow also envisages the breakaway region's support with military equipment. The provisions further include the harmonization of the breakaway region's legislation with that of Russia and with the standards of the Eurasian Economic Union. On 18 March 2015, Russia and South Ossetia equally signed a Treaty on Alliance and Integration[98] containing the same provisions as the treaty with Abkhazia. Clearly, then, the relationship between the two territories and Russia rests on tight control, if not even indistinguishable from the full incorporation of the

[95] D. L. Phillips, 'Implementation Review: Six Point Ceasefire Agreement Between Russia and Georgia', The National Committee on American Foreign Policy, August 2011, at 10, available at https://www.ncafp.org/2016/wp-content/uploads/2011/08/implementation-review-russia-and-georgia-aug2011.pdf (visited 3 January 2017).

[96] 'Tension's Rise in Georgia's Breakaway Regions', *Radio Free Europe,* 26 August 2013, available at http://www.rferl.org/a/georgia-breakaway-abkhazia-south-ossetia/25086522.html (visited 3 January 2017).

[97] 'Moscow, Sokhumi Sign Treaty on 'Alliance and Strategic Partnership'', *Civil.Ge*, 24 November 2014, available at http://www.civil.ge/eng/article.php?id=27845 (visited 3 January 2017).

[98] Кавказский Узел, Договор между Российской Федерацией и Республикой Южная Осетия о союзничестве и интеграции: http://www.kavkaz-uzel.eu/articles/259096 (visited 3 January 2017).

territories as in the Crimean example above. The Government of Georgia regards both these treaties as amounting to Russian annexation of Georgian territory.[99]

3.3.1 The interrelationship of Annexation and Occupation

The cases of Ukraine and Georgia necessitate a few remarks on the interrelationship between instances of occupation and annexation. Annexation stands for the forcible acquisition of territory by one state at the expense of another; it often presupposes the effective occupation of the territory in question with the clear intention to take possession of it.[100] Formerly, when a state conquered territory, it also took title to the territory.[101] This is no longer the case in today's international law, as Article 2.4 of the UN Charter suggests that the acquisition of territory by force is illegal.[102] Annexation of territory thus arises from a serious breach of international law,[103] and may be defined as the unlawful acquisition of territory via threat or use of force.

[99] See "Statement of the President of Georgia on Signing the So-called 'Treaty on Alliance and Integration' between the Russian Federation and the Occupational Regime of Tskhinvali", available at https://www.president.gov.ge/en/PressOffice/News?9351 (visited 3 January 2017)

[100] R. Hofmann, 'Annexation', *Max Planck Encyclopedia of Public International Law* (2013), § 1, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376?prd=EPIL (visited 3 January 2017).

[101] N.A. Maryan Green, *International Law: Law of Peace* (London: Macdonald and Evans, 1982), at 168; L. Oppenheim, 'The Legal Relations Between and Occupying Power and the Inhabitants', 33 *The Law Quarterly Review* (1917) 363–370, at 364.

[102] M. N. Shaw, *International Law* (6th edn., Cambridge: Cambridge University Press, 2010) at 502; S. Rosenne, *The Perplexities of Modern International Law* (Leiden: Brill/Martinus Nijhoff Publishers, 2004), at 109–140.

[103] N. Kalandarishvili-Mueller, 'The Status of the Territory Unchanged: Russia's Treaties with Abkhazia and South Ossetia, Georgia', *Opinio Juris*, 20 April 2015, available at: http://opiniojuris.org/2015/04/20/guest-post-the-status-of-the-territory-unchanged-russias-treaties-with-abkhazia-and-south-ossetia-georgia/ (visited 3 January 2017).

Accordingly, the UN has called upon the international community not to recognize[104] the annexation of East Jerusalem by Israel,[105] nor of the Golan Heights,[106] and equally condemned the Iraqi annexation of Kuwait.[107] The ICJ, too, when dealing with the Wall case, noted that the wall's trajectory included the majority of Israeli settlements in the occupied Palestinian territory, including East Jerusalem.[108] The Court therefore opined

> […] that the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.[109]

In other words, the Court took a cautious stance and stated that de facto annexation could be a result of the wall becoming permanent.

Examining annexation through the prism of IHL makes clear that when annexation of territory occurs, the situation of occupation persists. In fact, in the context of de facto authorities effectively controlling territory, annexation denotes effective control (OL) where not only these de facto authorities are totally submitted to the will of the annexor, but where the latter also exercises effective control (OL) over the territory directly, thereby obliterating the intermediary proxy. Such a stance may also be inferred from Article 47 of GC IV:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded

[104] On non-recognition, see S. Talmon, 'The Duty Not to Recognise as Lawful a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?', in C. Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order Jus Cogens and Obligations Erga Omnes* (Leiden: Brill/Martinus Nijhoff Publishers, 2006) 99–125, at 100–120.
[105] SC Res. 478 (1980).
[106] UN Commission on Human Rights, Human Rights Resolution 2005/8: Human Rights in the Occupied Syrian Golan, 14 April 2005, E/CN.4/RES/2005/8 § 4.
[107] SC Res. 662 (1990).
[108] *Case Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, § 119, available at http://www.icj-cij.org/en/case/131 (visited 15 July 2017).
[109] Ibid., § 121.

> between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.[110]

The Pictet Commentary to Article 47 regards an Occupying Power to be bound by the GC IV "even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory."[111] Thus, annexation of the occupied territory is prohibited: the occupant cannot take the title, i.e. possession of the territory it occupies, and the displaced sovereign remains to be holding the title *de jure*.[112] Therefore, "any unilateral annexation of an occupied territory – in whole or in part – by the Occupying Power would be legally stillborn".[113]

Returning to the cases of Georgia and Ukraine, the Georgian example prior to the de facto authorities' treaties with Russia rested on indirect effective control (i.e. proxy occupation), while based on these treaties Russia is now exercising effective control (OL) over the territories in question directly and openly. In Crimea, too, initially territorial control was asserted by Russia covertly, i.e. through proxies, but after Crimea's ambiguous self-determination result Russia fully incorporated the peninsula.[114] However, from an IHL point of view, all these territories continue to be occupied.

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[110] Art. 47, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

[111] J. Pictet (ed.), *Commentary of 1958, Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949,* Art. 47 (Geneva: International Committee of the Red Cross, 1958), at 276

[112] Y. Dinstein, *The International Law of Belligerent Occupation*, *supra* note 7, at 49.

[113] Ibid., at 50; *Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union*, 16 December 1991, available at http://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/ (visited 3 January 2017).

[114] Laws on admitting Crimea and Sevastopol to the Russian Federation, 21 March 2014 available at http://en.kremlin.ru/events/president/news/20625; see also *Ceremony signing the laws on admitting Crimea and Sevastopol to the Russian Federation*, The Kremlin, Moscow, 21 March 2014, available at http://en.kremlin.ru/events/president/news/20626 (both links visited 3 January 2017).

3.4 Nagorno Karabakh

Our next example is Nagorno Karabakh, a territory of Azerbaijan.[115] As early as in 1988, mass demonstrations by Karabakh Armenians demanded a territorial transfer to Armenia.[116] The conflict escalated in 1991, when both Armenia and Azerbaijan became independent states.[117] In February 1992, an armed conflict erupted between the Armenian and Azerbaijani forces, including also the forces of Nagorno Karabakh.[118] Armenian troops then helped the Nagorno-Karabakh rebels occupy the mountainous Nagorno-Karabakh enclave (10 percent of Azerbaijan's total territory) as well as another 10 percent of Azerbaijani territory surrounding Karabakh on the east, south, and west.[119]

Since 1994, Nagorno Karabakh and seven surrounding administrative districts are under the control of Armenia proper and Nagorno Karabakh Armenians.[120] Armenia is not only the "guarantor and supporter of security for the population of the Nagorno-Karabakh Republic and the course of development it has chosen",[121] but has also supplied as much as 90 percent of Nagorno Karabakh's budget. Both the UN SC and the GA recognised that Azerbaijan's territory is thus occupied by Armenia.[122] A GA Resolution from 2008, for instance, demanded "the immediate, complete and

[115] A. Y. Melnyk, 'Nagorny-Karabakh', *Max Planck Encyclopedia of Public International Law* (2013), § 1, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2073?prd=EPIL (visited 3 January 2017).

[116] H. Krüger, 'Nagorno-Karabakh', in C. Walter, A. von Ungern-Sternberg and K. Abushov (eds), *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014) 214–232, at 215–216.

[117] Human Rights Watch, *Azerbaijan: Seven Years of Conflict in Nagorno Karabakh*, 8 December 1994, at 1–3, available at https://www.hrw.org/sites/default/files/reports/AZER%20Conflict%20in%20N-K%20Dec94.pdf (visited 3 January 2017).

[118] S. Casey-Maslen (ed.), *supra* note 62, at 30–31.

[119] Human Rights Watch*, supra* note 117, at 157, Appendix A.

[120] A. Bellal (ed.), *The War Report: Armed Conflict in 2014* (Oxford: Oxford University Press, 2015), at 61–66; H. Krüger, *The Nagorno Karabakh Conflict: A Legal Analysis* (Heidelberg: Springer, 2010), at 93–94.

[121] *The Military Doctrine of the Republic of Armenia*, Preface, Ministry of Defence of Armenia, 2015, available at http://www.mil.am/media/2015/07/825.pdf (visited 3 January 2017).

[122] SC Res. 822 (1993), SC Res. 853 (1993), SC Res. 874 (1993), SC Res. 884 (1993); GA Res. 62/243, 14 March 2008.

unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan".[123]

This case, too, amounts to a situation of military occupation. Such a conclusion is premised on the fact that while the armed forces of Armenia are present on the territory in question, the de facto authorities of Nagorno Karabakh are under the overall control (SR/IHL) of that state. The de facto authorities seem to be stripped of their independence in decision making, in addition to Armenia organising, coordinating and planning the military and political actions of the entity. All the above reproduced facts attest to this. In turn, the de facto entity ensures the effective control (OL) of the territory in question, barring the ousted sovereign, Azerbaijan, to exercise its authority there.

3.5 Moldova

Finally, Russia is also considered to be occupying Transdniestria, a territory of Moldova.[124] It is believed that some 2,500 Russian troops are stationed there.[125] According to Human Rights Watch, Transdniestria and its de facto authorities have enjoyed Russia's military support, especially that of the 14th Army.[126] The ECtHR equally concluded that the Moldavian Republic of Transdniestria (MRT),

> set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the *effective authority,* or at the very least *under the decisive influence*, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.[127]

Pursuant to the Court, it is of little consequence that since 5 May 1998 no agents of the Russian Federation have participated directly in the events complained about by the applicants.[128] The applicants still came within the jurisdiction of the Russian

[123] Ibid., GA Res. 62/243, 14 March 2008.
[124] S. Casey-Maslen (ed.), *supra* note 62, at 50–54.
[125] Ibid., at 53.
[126] *War or Peace? Human Rights and Russian Military Involvement in the "Near Abroad"*, Human Rights Watch Report, 1 December 1993 available at http://www.hrw.org/legacy/reports/1993/russia/ (visited 3 January 2017).
[127] *Ilaşcu and others v. Moldova and Russia*, ECtHR (2004) (App. no. 48787/99), § 392. (emphasis added NKM).
[128] Ibid., § 393.

Federation for the purposes of Article 1 of the Convention, and Russia's responsibility was triggered.[129] It seems that for the ECtHR, exercising effective control is a factual matter, attached also – but not only – to the military presence of the state:

> It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area […]. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region […].[130]

In the case of Catan and Others v. the Republic of Moldova and Russia, the ECtHR maintained its findings of the Ilaşcu judgment: During 2002–04, the MRT was able to continue its existence, and resist Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, only thanks to Russian military, economic and political support.[131] Hence, Russia's military presence and the MRT's high level of dependency on Russian support provide a strong indication "that Russia exercised effective control and decisive influence over the MRT's administration".[132] One can, however, observe a slightly different wording in the Court's dictum in the most recent case of Mozer v. the Republic of Moldova and Russia, in that "Russia continues to exercise effective control and a decisive influence over the MRT authorities".[133] So while in Ilaşcu the court spoke of "or" and in Catan of "and", in Mozer it employed "and a" decisive influence.

3.5.1 Decisive influence

This section unpacks the formulation 'decisive influence' used by the ECtHR in the cases dealing with the Moldavian Republic of Transdniestria (MRT). The question is why the Court did not use the term 'occupation' and instead opted for 'effective authority' and 'under the decisive influence'. One possibility is that the ECtHR was

[129] Ibid., § 394; see also *Ivanţoc and others v. Moldova and Russia*, ECtHR (2011) (App. no. 23687/05), § 115–120.
[130] *Al-Skeini and Others v. the United Kingdom*, ECtHR (2011) (App. no. 55721/07), § 139.
[131] *Catan and others v. the Republic of Moldova and Russia*, ECtHR (2012) (App. nos. 43370/04, 8252/05 and 18454/06) § 122.
[132] Ibid., § 122.
[133] *Mozer v. The Republic of Moldova and Russia*, ECtHR (2016) (App. No. 11138/10) § 110.

trying to use non-IHL terminology, since it was not called to adjudicate on IHL. However, one may still ask: is decisive influence a variant of indirect effective control?

To begin with, it cannot be stated that all forms of influence over de facto authorities, and by extension territory, may be regarded as occupation. In fact, *decisive influence* conveys the impression that it rests on a low threshold of control, where one does not need to establish effective control (OL) over territory. This would mean that decisive influence does not amount to a day-to-day control of territory. It is rather something that does not necessitate too much control, but control is still exerted when taking major decisions. In the case of Northern Cyprus, for example, when Turkey invaded the territory, during the early stages of its presence Turkey wielded effective control (OL) over the territory. But over time the TRNC authorities gained a certain level of freedom in taking decisions, albeit on a small scale. To date, Northern Cyprus and its authorities remain heavily dependent on Turkey's finances and troops, and Turkey simply considers the territory 'as its child'.[134] In the case of Transdniestria, too, its de facto authorities possess a certain level of freedom in taking small-scale decisions but largely remain under the sway of Russia, relying on its finances and troops.[135]

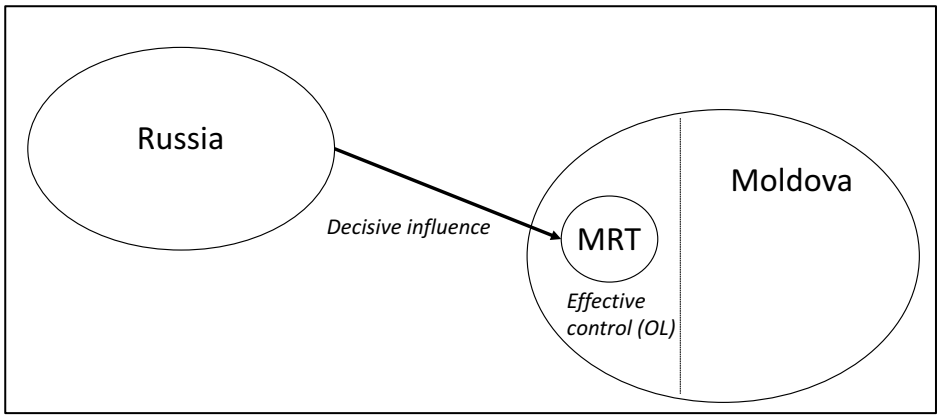
While effective control (OL) denotes the status of an occupant, 'decisive influence' is far from being lucid and not defined by conventional IHL and IHRL. The difficulty is that when dealing with something that does not have a definition in law, there is no right or wrong answer. There may only be an answer that is coherent and practical versus answers that are incoherent and impractical. But, at the end of the day, in IHL one should look at the facts on the ground and apply the law accordingly. In this manner, Mirzayev[136] and Bowring[137], in the context of the case of Ilaşcu, seem to equate decisive influence with effective control (OL) over territory. In other words,

[134] F. Taştekin, 'Northern Cyprus Demands Respect From Turkey', *Turkey Pulse*, 28 April 2015, available at http://www.al-monitor.com/pulse/originals/2015/04/turkey-greece-cypriot-baby-grow-up.html# (visited 3 January 2017).
[135] J. Malling, 'The value of a frozen conflict', *Le Monde Diplomatique*, March 2015, available at http://mondediplo.com/2015/03/04transnistria (visited 3 January 2017).
[136] F. Mirzayev, *supra* note 90, at 208–209.
[137] B. Bowring, 'Transnistria', in C. Walter, A. von Ungern-Sternberg and K. Abushov (eds), *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014) 157–174, at 158.

Russia is occupying Transdniestria on the basis of effective control (OL) over territory. But while I agree that Transdniestria is occupied, I do not agree with their explanation of the type of control. The synonyms of "influence" are control, power, authority, and direction; and "decisive" means something crucial, significant, and critical. Hence, the formulation means not just *any* influence. It is rather an influence that has an impact, ultimately resting with the one who is adopting decisions. Decisive influence in this case, therefore, is the capacity of state A to exercise crucial, critical power, control and authority over entity X in state B. Effective control (OL) over territory, in turn, is exercised by that entity.

As evidenced above, the de facto authorities in cases and places such as the TRNC, Transdniestria, Abkhazia, South Ossetia, and Nagorno Karabakh all cloak the control of a foreign state over the territory of another state (i.e. Cyprus, Moldova, Georgia and Azerbaijan). I therefore consider that the ECtHR, in the various cases having to do with Transdniestria, implicitly opined that the situation was one of occupation through middlemen, but using a different wording. This in turn points to the possibility that a state can wield control over parts of the territory in various forms and degrees. It can control different aspects of the life on the territory, which together amount to a form of control sufficient for establishing military occupation. It is submitted that decisive influence amounts to overall control (SR/IHL) as used by the ICRC in the indirect effective control test. Figure 3 graphically displays how the decisive influence test is met in the case of Transdniestria.

Figure 3: The decisive influence test (ECtHR)



Note: MRT=Moldavian Republic of Transdniestria

3.5.2 The military presence of third states and the element of consent

Some might counter that the above-discussed cases are not situations of occupation from the perspective of IHL. One of the arguments could be that outside states do not possess large military presences there, in addition to being welcomed by the inhabitants of the territory. Two questions, therefore, are in order: whether a large military presence of an outside state is required for classifying a situation as constituting occupation; and whether the local population welcoming the presence of the foreign state, in addition to sharing a common ethnicity, invalidates that conclusion.

Let us first assume there is an intervening state whose population has a different ethnicity than the population of the sovereign state, but the same as the group that is opposing that sovereign. The latter might be a weak but nevertheless internationally recognised state. The group may not be heavily armed, i.e. possess full military capacity, and yet manage to expel the local authorities of the state through the military support of the state whose ethnicity it shares. This state then sends approximately 1,000 armed soldiers into this breakaway region. Such a number amounts to a relatively small presence. The population of the territory does not oppose the forces and the de facto authorities explicitly welcome them. The de facto authorities may or may not have the consent of the local population. Consent to be present on the territory is not given by the sovereign, but rather by the de facto authorities in question. According to international law, are the de facto authorities entitled to give such consent? Or do the people living on the territory have to consent to the presence of the foreign state's troops?

These questions bring us to consider the issue of self-determination in international law. Self-determination may be defined as the right of a people living on a certain territory to determine its own affairs, be that in cultural, social, economic, political and/or legal terms.[138] What is problematic about the concept of self-determination is

[138] Art. 8, Conference on Security and Cooperation in Europe, Final Act (Helsinki, 1975); Art. 1, International Covenant on Civil and Political Rights (1966); Art. 1, International Covenant on Economic, Social and Cultural Rights (1966); M.N. Shaw, *International Law, supra* note 102, at 251–7 and especially at 289–93; see also P. Malantczuk, *Akehurst's Modern Introduction to International Law* (7th ed., London: Routledge, 1997), at 326. On whether

that there is no uniform definition of who constitutes "the people",[139] nor are the exact circumstances of resorting to self-determination identified. While self-determination reflects both a principle and a right in international law,[140] it should not be exercised in contravention of state sovereignty and territorial inviolability.[141]

There are two forms of self-determination, internal and external.[142] *Internal* self-determination encompasses the right of all segments of a population to influence the constitutional and political structure of the system in which they live,[143] and may be interpreted to support human rights and multiparty democracy.[144] It can take various forms, from simple cultural autonomy to the canton system in Switzerland.[145] *External* self-determination, on the other hand, means that a group of people is entitled to

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self-determination has a *jus cogens* nature or not, no uniform stance can be observed in the international legal community; see D. Thürer & T. Burri, 'Self-Determination', in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, December 2008), § 1–47, at § 45, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 (visited 6 December 2017); M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', 11 *Human Rights Law Review*, 609–44, at 634–41; see also *Case Concerning East Timor (Portugal v. Australia)*, judgment of 30 June 1995, § 29, available at http://www.icj-cij.org/en/case/84 (visited 5 December 2017).

[139] I. Jennings, *The Approach to Self-government* (Cambridge: Cambridge University Press, 1958), at 56: 'On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.'

[140] J. Summers, *Peoples and International Law* (2nd ed., Leiden: Brill/Martinus Nijhoff Publishers, 2013) at 71;

[141] The Secretary General of the UN stated that: "… as far as the question of secession of a particular section of a Member State is concerned, the United Nations attitude is unequivocable. As an international organisation, the United Nations has never accepted and does not accept and I do not believe it will ever accept a principle of secession of a part of a Member State." U. Thant, 'Secretary General's Press Conferences', 34 *UN Monthly Chronicle* (1970), at 36.

[142] L. C. Buchheit, *Secession: The Legitimacy of Self-determination* (New Haven: Yale University Press, 1978), at 14; M. Pomerance, *Self-determination in Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1982), at 37–42.

[143] L. C. Buchheit, *supra* note 142, at 14; C.J. Borgen, 'States and International Law: The Problems of Self-determination, Secession, and Recognition', in B. Cali (ed.), *International Law for International Relations* (Oxford: Oxford University Press, 2009) 191–212, at 207.

[144] J. Summers, *supra* note 140, at 343.

[145] See generally C. Dominicé, 'The Secession of the Canton of Jura in Switzerland', in M. G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University, 2006) 453–469.

constitute itself as a nation state or to integrate into or federate with another, already existing state.[146]

Sadly, the circumstances which would pronounce the conditions for external self-determination, i.e. secession, were not dealt with by the ICJ in its advisory opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. Rather, the ICJ examined whether or not Kosovo's unilateral declaration of independence was in accordance with international law.[147] However, the Canadian Supreme Court views external self-determination as a step of last resort and applicable only in particular situations.[148] These were spelled out as follows:

> […] the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[149]

Linking (external) self-determination to military occupation underlines the tension between the principle of the legality of the regime operating on a territory and the continuation of effective control (OL) over the territory. In other words, so that consent is regarded valid, not only must it not be engineered, but it has to be extended by the recognized government (not a de facto regime) of the recognized state (not a de facto state).[150] The alternative argumentation, namely for consent to

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[146] S. Senese, 'External and Internal Self-Determination', 16 *Social Justice* (Human Rights and Social Rights: Views) (1989) 19–25, at 19.

[147] *Accordance of International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, § 49–56 and § 82–83, available at http://www.icj-cij.org/en/case/141 (visited 15 July 2017). In this case, the ICJ did not refer to the dimensions of internal and external self-determination; however, see further Separate Opinion of Cançado Trindade, at 125–218 and 197, § 184, and Separate Opinion of Judge Yusuf, at 219–227 and 222–223, § 9–10; and S.E. Meller, 'The Kosovo Case: An argument for a remedial declaration of independence', 40 *Georgia Journal of International and Comparative Law* (2012) 834–866.

[148] Reference re Secession of Quebec, Supreme Court of Canada (1998) 2. SCR 217, 1998 CanLII 793 (SCC), § 126.

[149] Ibid., §138.

[150] E. Benvenisti, *supra* note 12, at 67; see also F. J. Hampson, 'Afghanistan 2001–2010', in E. Wilmshurst (ed.), *International Law and Classification of Conflicts* (Oxford: Oxford University Press, 2012) 242–279, at 245.

be the legitimate expression of external self-determination by a "people" that was denied internal self-determination, would mean to welcome the very forces that "oppress" them in this case, i.e. the military occupant.

Thus, if the 1,000 soldiers are welcomed by those who live on the territory, while arguably no big number of troops would further be needed, and while the people do not oppose this type of presence there and are even content about it, it may still be the case that the people are not entitled to extend such a welcome. A fortiori, nor is the de facto authority entitled to extend such consent. Pursuant to IHL, the situation on the ground would then still be one of occupation since consent by the legitimate government is lacking.

3.6 Critical Appraisal

The foregoing section discussed proxy occupations through de facto authorities. Unlike armed groups, de facto authorities possess state-like features and some may even be recognized internationally, however controversial this might be. For example, the so called "Republic of Abkhazia" has been recognized only by Venezuela, Nicaragua and of course Russia.[151]

However, when it comes to occupations based on indirect effective control, this Chapter has argued that both armed groups and de facto authorities can be regarded as proxies of the outside state, provided that this state exercises overall control (SR/IHL) over them and that they in turn exercise effective control (OL) over territory. Yet it may also be advanced that some de facto authorities are mere puppet regimes in that they are created, staffed, maintained and disposed of by an outside state, to the extent that they are de facto organs under Article 4 ILC Draft Articles on Responsibility of States[152] (see also section 1.2. of this Chapter and Chapter I, section 1).

[151] See Ministry of Foreign Affairs, Republic of Abkhazia, available at http://mfaapsny.org/en/apsny/historyofabkhazia.php (visited 26 May 2017).
[152] D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed.), *International Law and Classification of Conflicts* (Oxford: Oxford University Press, 2012) 32–79, at 59.

As was discussed in Chapter I of the thesis, such a type of relationship should rest on complete dependency (SR). The advantage of this approach is that one would not need to show that each and every act of that organ has been specifically ordered by the outside state, since automatically the state would be responsible for all acts or omissions of the de facto authorities. Such a proposition would then need to demonstrate evidence of complete dependency (SR) of the puppet regime on the outside state. Generating evidence of such dependency, nevertheless, would be difficult, to say the least (see Chapter I).

A second alternative is to adhere to the requirement of effective control (SR) by the outside state over the de facto authorities. Sassòli for example considers the supporters of the overall control (SR/IHL) test to base their arguments on the ECtHR's reasoning in the Loizidou case, where Turkey's overall control over the TRNC authorities was sufficient to find Turkey responsible for the latter's human rights violations, stating however that:

> […] the difference between this and the question discussed here – whether IHL of military occupation applies – is that human rights obligations had to be complied with by the authorities of the 'Turkish Republic of Northern Cyprus' […] on their own territory, while the IHL of military occupation must only be applied in a foreign territory. It is therefore entirely conceivable that it is sufficient that a state has overall control over unrecognised authorities in another state to make it responsible for their human rights violations, while to make IHL of military occupation applicable, it needs effective control over the conduct triggering such applicability.[153]

A few considerations should however be voiced. Firstly, the ECtHR primarily ascertained Turkey's human rights responsibility through the prism of jurisdiction, which materialised through the actions of the TRNC and the fact that Turkey maintained forces there.[154] In other words, if there was no Turkish *military* involvement in Northern Cyprus, the TRNC would have never existed. This already expresses a close affinity to IHL.

Secondly, while I agree that the IHL of military occupation applies on foreign territory only, the issue here is precisely that: Northern Cyprus was never regarded as Turkish

[153] M. Sassòli, 'The Concept and the Beginning of Occupation', *supra* note 11, at 1400.
[154] *Loizidou v. Turkey*, ECtHR (Judgment on Merits), supra note 85, § 56; *Cyprus v. Turkey*, ECtHR, *supra* note 89, § 77.

territory by the international community.[155] Northern Cyprus, therefore, constitutes a territory foreign to that of Turkey. Consequently, the latter's responsibility for IHRL violations was established not on "own territory", but extraterritorially. When the ECtHR regarded Northern Cyprus to be occupied, it arguably may have kept these points in mind. It thus seems the Court advanced overall control – or, in its own parlance: *effective overall control* – precisely for such situations of proxy occupation. While some shortcomings in the analysis of the ECtHR are visible as it developed this test, the core question is whether the extraterritorial application of Human Rights and the law of military occupation base themselves on the same test. This issue will be taken up for further analysis in Chapter V of this thesis.

Thus far, the above debate about effective control (SR) and overall control (SR/IHL) in the context of proxy occupations (based on indirect effective control) has primarily been dealt with through case law and the stances of various authors. However, it is worthwhile also to resort to IHL and uncover its position on the same set of issues.

4. IHL's own mechanism for control?

4.1. Belonging to a party to the conflict under Article 4 GC III

I now turn to IHL rules to extrapolate a possible mechanism of control that would not only make an armed group X belong to a state under Article 4A (2) of GC III, but through that belonging to the state also render the territory occupied. This is done to avoid the illustrated clash between the tests of effective (SR) and overall control (SR/IHL).

The purpose of Article 4 GC III is to grant POW status to certain categories of persons who have fallen into the power of an adversary. Section A (2) of this article includes persons that are not part of the armed forces of the state *strictu sensu*:

[155] SC Res. 541 (1983); SC Res. 550 (1984) refers to the Northern Cyprus as "…legally invalid 'Turkish Republic of Northern Cyprus'" and in § 3 reiterates the call on all the states not to recognize the purported state of the "Turkish Republic of Northern Cyprus"; see also Permanent Representation of the Republic of Cyprus to the European Union, 'The Cyprus Question', 29 November 2016, available at http://www.mfa.gov.cy/mfa/PermRep/PermRep_Brussels.nsf/page32_en/page32_en?OpenDocument (visited 3 January 2017).

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

What is aimed to examine is the possible test of control that is contained in this section, i.e. in the formulation *belonging to a Party to the conflict*. Since Article 4 does not define this expression, it is important to interpret what "belonging to" means. To this end, let us again resort to the Tadić case.

In Tadić, the prosecution contended that the alleged perpetrator of crimes had to be "sufficiently linked to a Party to the conflict" so as to come under the jurisdiction of Article 2 of the ICTY Statute. It further advanced that the "showing of a demonstrable link between the VRS and the FRY or VJ" was sufficient for this purpose. This link could be proven by showing a general form of control, which was found in the GCs.[156] Determining whether certain armed forces were sufficiently related to a High Contracting Party via the rules relating to State responsibility would lead to absurd results.[157] The Appeals Chamber addressed the question from the perspective of IHL, setting out to consider the conditions under which armed forces may be assimilated to organs of a State other than that on whose territory they live and operate.[158] Under GC III, militias or paramilitary groups or units can be regarded as combatants/POW if they form "part of the armed forces" of a Party to the conflict (Article 4A(1)) or "belong to a Party to the conflict" (Article 4A(2)) and satisfy the other four requirements a) to d) provided for in that Article.[159]

According to the Chamber, one of the logical consequences of this article was that if in an armed conflict paramilitary units "belong" to a state other than the one against

[156] Tadić, *supra* note 25, § 88.
[157] Ibid., § 89.
[158] Ibid., § 91.
[159] J. Pictet (ed.), Commentary to the Geneva Convention (III) relative to the Treatment of Prisoners of War (12 August 1949), Art. 4 (Geneva: International Committee of the Red Cross, 1960) at 57–58.

which they are fighting, the conflict is international. Therefore, serious violations of the GCs may be classified as "grave breaches".[160] For the ICTY Appeals Chamber, the requirement of "belonging to a Party to the conflict" was far from clear. The rationale in this provision was that during WWII it was agreed that States should be legally responsible for the conduct of irregular forces they sponsored.[161] So that the irregulars were categorized as combatants, it was required that a party to an IAC 'controlled' them. This type of control would result in a "relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict. These then may be regarded as the ingredients of the term 'belonging to a Party to the conflict'."[162] The ICTY Appeals Chamber, therefore, considered that in Article 4 the requirement of "belonging to a Party to the conflict" was an implicit referral to a control test.[163]

The Pictet Commentary also makes it explicit that paragraph A2 of Article 4 was based on WWII experience, particularly with resistance movements fighting against occupation regimes. Nevertheless, this does not mean that other categories, such as armed groups, are excluded. However, the Commentary does not explain the meaning of *belonging to a party to the conflict*. It solely speaks of the fact that the resistance movements must be fighting on behalf of a party to the conflict[164] and that

> […] it is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.[165]

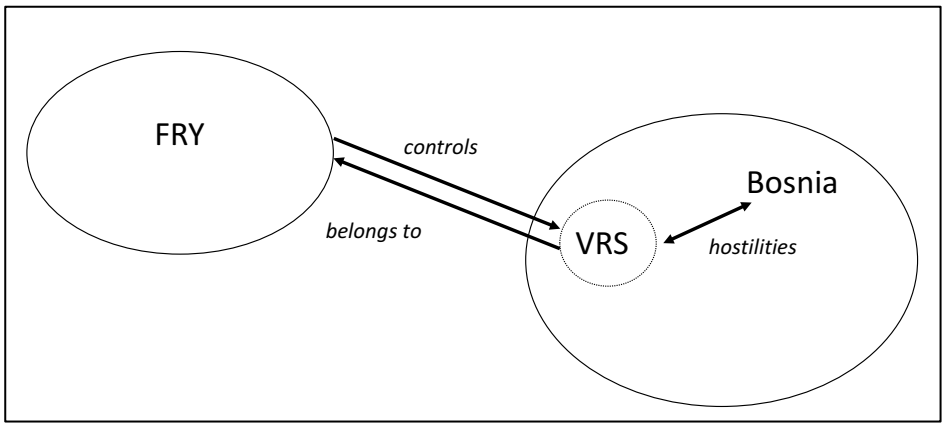
In this manner, for one author the "'belonging' requirement demands nothing more than a form of acceptance, either express or tacit, on the part of the state and individuals concerned that the latter are fighting on behalf of the state."[166] Likewise,

[160] Tadić, *supra* note 25, § 92.
[161] Ibid., § 93.
[162] Ibid., § 94.
[163] Ibid., § 95.
[164] Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; J. Pictet (ed.), Commentary to the Geneva Convention (III), Art. 4, *supra* note 159, at 56.
[165] Ibid.
[166] K. Del Mar, 'The Requirement of 'Belonging' under International Humanitarian Law', 21 *The European Journal of International Law* (2010) 105–124, at 112.

for Melzer "it appears essential that [the armed groups] conduct hostilities on behalf and with the agreement of"[167] the party to the conflict.

It is nevertheless submitted here that there is rarely a "belonging to" without some form of control by the one who is belonged to over the one who belongs. The question, however, is what degree of control such a relationship rests on. Is it effective (SR) or overall control (SR/IHL) that characterizes this relationship? For Akande, the "de facto relationship is probably a looser test then even the 'overall control' test"[168] because even tacit agreement suffices. However, the de facto relationship between the outside state and the armed group signals a form of control that is not at all loose. In fact, the formulation *fighting on behalf of a party to the conflict* encompasses two meanings: in the interests and as a representative of.[169]

Figure 4: Belonging to a party to the conflict (Article 4 GC III 1949)



Note: FRY= Federal Republic of Yugoslavia (Serbia and Montenegro); VRS = Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska

[167] N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: ICRC, 2009), at 23.
[168] D. Akande, *supra* note 152, at 61.
[169] Oxford Dictionary, definition *of behalf* in English, available at https://en.oxforddictionaries.com/definition/behalf (visited 3 January 2017).

Hence, an armed group that belongs to an outside state is not only fighting in the interests of that state, but is also under a certain degree of control by it, as shown in Figure 4 for Bosnia. For example, the state may instruct the group on what and how to perform certain actions. Further, when an armed group "belongs to a party to the conflict", it is bound to this state by ties of dependence or allegiance, and it may follow the state in its ideology and pursue the same aim. Based on such a belonging, the armed group may thus be considered a de facto organ of the state.

The way I view "belonging to a party to the conflict" is that the group is receiving general directions from the state and, based on these, the group is fighting the adversary state. A de facto relationship, while it signifies a factual, existing relationship between the state and the armed group, indicates that it might not amount to a day-to-day control from the side of the state, nor to control exercised specifically over each detail of the operation/task, but rather control exercised in a general manner. This type of control amounts to overall control (SR/IHL) as advanced by the Tadić Appeals Chamber.

For the purposes of military occupation, the test can therefore be linked in a following manner: an armed group which exercises effective control (OL) over territory belongs to a Party to the conflict, i.e. overall control (SR/IHL) is exerted by the state over the armed group. Again, such a link would avoid the protection gap in the application of GC IV.

4.2 The Potentiality of Article 29 GC IV

Another possible basis in IHL that could make state A an occupant via armed group X engaged in an armed conflict with state B can be found in Article 29 GC IV:

> The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

In her dissenting opinion in Tadić, Judge Mcdonald viewed this article useful for classifying a prima facie NIAC as an IAC, particularly with regards to situations of

military occupation via armed groups.[170] According to the Pictet Commentaries, by means of "a general formula" this article defines the persons who by their acts give rise to the responsibility of a certain state.[171] One should thus take notice of the word *agent*, as it may be construed to be including everyone who is in the service of a state, including an armed group, provided the criteria of Articles 4 or 8 ILC Draft Articles on Responsibility of States are met (see Chapter I).

What should again be examined is the relationship between that outside state and the agent: does the state have control over the agents? And if so, what type of control? The Pictet Commentary to Article 29 GC IV purports to explain these aspects:

> The term "agent" must be understood as embracing everyone who is in the service of a Contracting Party, no matter in what way or in what capacity. It included civil servants, judges, members of the armed forces, members of para-military police organizations, etc., and so covers a wider circle than the definition in the Fourth Hague Convention according to which the responsibility of the State could only be involved by "persons forming part of its armed forces". […] On the other hand, it embodies an essential reservation; for the word "agent" limits the scope of the provision to those persons alone who *owe allegiance* to the Power concerned. […] The nationality of the agents does not affect the issue. […] as it means that the occupying authorities are responsible for acts committed by their locally recruited agents of the nationality of the occupied country. […] Various delegations pointed out that an Occupying Power might have certain of its decisions carried out by the local authorities, or it might set up a puppet government, in order to throw responsibility for crimes, of which it was the instigator, upon authorities which were regarded as being independent of it. In order to remove this difficulty, it is necessary to disregard all formal criteria. It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; *what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given.* If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible; if, on the other hand, it was the result of a truly independent decision on the part of the local authorities, the Occupying Power cannot be held responsible.[172]

Several considerations can be made based on this passage. Like "belonging to", "allegiance" does not exist without some form of control. Allegiance denotes loyalty,

[170] Trial Chamber, Prosecutor v. Dusko Tadić, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, 7 May 1997, §§ 31–34.
[171] J. Pictet (ed.), *Commentary of 1958, Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949,* Art. 29 (Geneva: International Committee of the Red Cross, 1958), at 211.
[172] Ibid., at 211–212 (emphasis added NKM).

duty, obligation as well as obedience.[173] Because agents show allegiance to the state, the state controls them to a certain level. Again, it is necessary to establish the level of control in this situation. When the Pictet Commentary employs the wording "what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given", this already indicates a certain level of control to exist. Therefore, the participation of the state in planning the actions of the armed group has to be examined, and/or whether the state was in control of the actions of the armed group when they carried out the act in question.

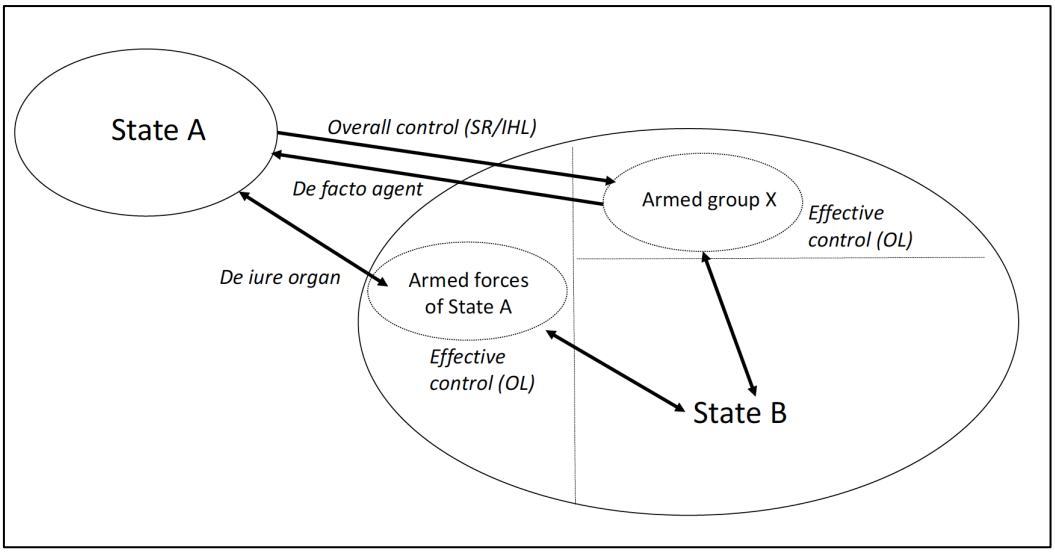
This is even more so the case when the Pictet Commentary invites to pay attention to whether an act was committed on the instigation of the occupant. An occupant instigating an act would mean that it may bring about, actuate, or encourage the materialization of a certain act. Instigation appears to resemble overall control (SR/IHL) as formulated by the Tadić case. Reconciling this test with military occupation may now again be done based on ascertaining whether an armed group *owes allegiance* to the foreign state and whether that armed group exercises effective control (OL) over the territory.[174] With this, the protection gap in the application of the GC IV will again be positively averted.

Conclusion

The purpose of this Chapter has been to analyse occupation by an intermediary. Based on the foregoing, the following example shows the way in which overall control (SR/IHL) triggers military occupation.

[173] English Oxford Dictionary, Definition of *allegiance*, available at https://en.oxforddictionaries.com/definition/allegiance (visited 3 January 2017).
[174] T. Gal, 'Unexplored Outcomes of Tadić: Applicability of the Law of Occupation to War by Proxy', 12 *Journal of International Criminal Justice* (2014) 59–80, at 66: "Accepting that the agent of the occupying state can be a non-state armed group, there is still a need to examine whether a non-state armed groups can exercise the degree of territorial control required by Geneva Convention IV. One can refer by analogy to Article 1 (1) of the 1977 Protocol II Additional to the 1949 Four Geneva Conventions ... Relying on Article 1 (1) of the 2nd Protocol and its Commentary, one can deduce that non-state armed groups can in fact exercise control over the territory."

Figure 5: Indirect effective control, hypothetical case



Let us assume a situation where state A occupies state B's western territories through its own army (see Figure 5). This amounts to the classic understanding of military occupation. In parallel, state B is engaged in a NIAC with armed group X in the north of its territory. That group is said to be having ties with the occupying power, state A. To prove that group X is a de facto agent of state A, the latter should have overall control (SR/IHL) over it. It should clearly be demonstrated that state A provides armed group X with financial, military, and operational support and generally participates in, organises, coordinates or plans its military operations. By contrast, no detailed control over each and every action of the group is needed (see also Glossary: effective control (SR)). It bears mentioning that the situation in the north of state B would not automatically be classified as one of occupation. For this to happen, armed group X additionally needs to exercise effective control (OL) over territory.

As it may be seen, the classic understanding of effective control (OL) over territory has thus developed in several ways: the actors that exercise it do not necessarily have to be de jure organs of the occupant state so long as armed groups and/or puppet governments are under the foreign state's *overall* control (SR/IHL) and it is them, in turn, who exercise *effective* control (OL) over the territory. Still, what should be underlined here is that the state carries the status of occupant, and not the armed group.

The concept of indirect effective control is therefore composed of three aspects:

1. *Two actors*: A foreign state on the one hand and organized armed groups and or de facto local authorities (neither of which is the legitimate government) present on the territory in question on the other;
2. The relationship between the two should rest on *overall control* (SR/IHL), with the actions of the armed group or de facto authorities being attributable to the state in question and the state using it as its pawn; and
3. The armed group or de facto authorities have to have *effective control* (OL) over a territory or its part as envisaged in Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977.

The notion of decisive influence was also addressed in this Chapter. It was interpreted as a situation of occupation where state A exercised crucial, critical power and hence overall control (SR/IHL) over group X in state B, the group in turn exercising effective control (OL) over the territory.

Finally, the Chapter has stated that IHL contains its own mechanism of control, anchored in Article 4A(2) GC III and Article 29 GC IV, which could serve as a mechanism for classifying armed conflicts involving foreign state intervention as IACs, and therefore lead to establishing proxy occupations. The level of control alluded to by the notions of belonging and agents, respectively, corresponds once more to overall control (SR/IHL).

Chapter IV:
Relinquishing Control Over Territory

Introduction

The research question of this chapter is when and how the end of control over territory occurs so that military occupation is considered terminated. Such an enquiry illustrates the "intricate and numerous problems arising at the end of"[1] military occupation and is premised on the fact that IHL fails to provide clear guidelines and appropriate tests in this regard.[2]

As will be seen, the process of occupation ending may be different from the way it is established (on the latter, see Chapter II). While the constitutive elements remain the same – namely, hostile military forces, lack of consent, effective control over territory and the ousted sovereign or a new power –, the *sequence* by which they come about may be different. During the expert meeting on Occupation and Other Forms of Administration of Territory, most experts gathered at the ICRC viewed the criteria assessing the end of occupation to be mirroring the ones used to classify the situation at the start of occupation, but simply in reverse order:

> […] the physical presence of foreign forces, the foreign forces' ability to exert their authority over the territory and the continuing absence of the territorial authorities' consent to such presence, would be the preconditions cumulatively fulfilled in order to conclude that the occupation has not ended. If one of those criteria is unmet, the termination of occupation would occur.[3]

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[1] G. von Glahn, *The Occupation of Enemy Territory: A commentary on the law and practice of belligerent occupation* (Minneapolis: Lund Press Inc., 1957), at 257.

[2] ICRC, *31st International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of Contemporary Armed Conflicts*, Geneva, October 2011 (EN 31IC/11/5.1.2), at 27: "IHL instruments do not provide clear standards for determining when an occupation starts and terminates", available at https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf (visited 5 January 2017).

[3] T. Ferraro (ed.), *Expert Meeting Occupation and Other Forms of Administration of Foreign Territory* (Geneva: ICRC 2012), at 28; see also *Commentary of 2016, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva 12 August 1949, Art. 2, available at

At the same time, different forms of relinquishing control over territory exist, entailing different combinations of the mentioned elements. For example, the complete loss of effective control (OL) over territory may occur either voluntarily, by the army of the hostile state deciding to withdraw, or unwillingly, by being pushed out. By contrast, establishing effective control (OL) never happens unwillingly. The question also arises whether once established, effective control (OL) can only be maintained through the physical presence of a military force, or whether it can also be upheld without boots on the ground.

This Chapter seeks to deepen our understanding of *how* and *when* occupation ends and what role effective control (OL) plays in this context. The Chapter will discuss the interplay of the various constitutive elements of occupation when it is ending and delineate a possible hierarchy among them. More specifically: what happens when the occupant is no longer militarily present – yet still exerts control over the territory and its inhabitants? Or how to deal with situations in which the occupant manages to procure consent for remaining on the territory: is occupation then over?

The ending of occupation will primarily be examined pursuant to the criteria of Article 42 HR 1907, Article 6 GC IV 1949 and Article 3 AP I 1977. Still, there is a different threshold of control for the purposes of ending the application of GC IV, which in turn generates a state's substantive obligations (discussed in Chapter V of this thesis).[4] The following pages address the issue of relinquishing control in a military occupation context with the drafting history of the HR 1907.

https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518 (visited 5 January 2017), § 306.

[4] See generally E. Benvenisti, 'The Law on the Unilateral Termination of Occupation, 93 *Tel Aviv University Law Faculty Papers* (2008) 1–12, available at http://law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps (visited 5 January 2017).

1. Legal History

1.1. From Brussels 1874 to The Hague 1907: Relinquishing Control over Territory

1.1.1. Brussels 1874

The Brussels Declaration of 1874 makes no mention of when or how occupation may end. From the perspective of military occupation, the key therefore lies in analysing Article 1, paragraph 2 of this historic text, which reads that "occupation only extends to those territories where this authority is established, and can be exercised."

In examining the proceeding material, it becomes apparent that the delegates, when reflecting on the notion of occupation and its commencement, inadvertently also dealt with the issue of occupation ending. This is primarily seen in the factor of a possible uprising, which would debilitate the capability of the occupant to exercise power, that is obstruct it to effectively control the territory. For Hammer, for example, the notion of effectivity was synonymous to the possibility to exercise authority without any restrictions, since "territories which contrive to free themselves from this authority cease to be occupied."[5] A similar reasoning was put forth by the German delegate, who considered it important that the authority was visible during insurrections. He also linked occupation ending to a successful uprising.[6] M. de Lansberge questioned whether a victorious army, i.e. an occupant, that had abandoned a town because of a popular uprising would be allowed to punish the insurrection, if it again occupied the same town.[7] But only the considerations of Baron Jomini indicate control to be the key denominator for assessing the end of occupation. He considered that "if the occupier is in a position to exercise his authority, the occupation is a reality; from the moment this power no longer exists, the occupation ceases."[8] However, an example of what "being in a position to exercise one's authority" meant was not offered.

[5] UK House of Commons, *Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare* (United Kingdom Parliamentary Papers, Miscellaneous No 1, 1875), at 236.
[6] Ibid., at 237.
[7] Ibid., at 238.
[8] Ibid., at 259.

Similarly, the Oxford Manual 1880 does not lay out any specific article determining the end of occupation. Like the Brussels text, the key to comprehending the ending of occupation in the understanding of the Manual lies in analysing it Article 41. Particularly the last sentence of that article provides a relevant clue; it can however not be understood if not read within the context of the entire article:

> Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of occupation.[9]

What this article suggests is that as long as the occupant exercises authority and for as long as effective control (OL) enables the occupant to maintain order in the territory, there is no end to occupation. If one fails to exert such control, then the occupation of the territory has ended.

1.1.2. The Hague

The 1899 and 1907 Hague Conferences also did not go further in defining the end of occupation. A reading of the delegates' deliberation concerning Article 1 of the 1874 Brussels Declaration (currently Article 42 of the HR 1907) suggests that territory is no longer occupied if the hostile army's control over the territory is lost via a successful uprising of the inhabitants of the occupied territory. According to the majority view, the occupier must always be in sufficient strength to repress an outbreak, since "he proves his occupation by this act"[10], and an army only establishes an occupation when "its positions and lines of communication are secured by other corps. If the territory frees itself from the exercise of this authority it ceases to be occupied."[11]

During the deliberations of the 1874 Brussels Declaration and the Hague Regulations of 1899 and 1907, the question of the duration of occupation remained equally unaddressed. Therefore, no time clause was specified that would determine the temporal frame for an occupation. Yet, the concept of a lengthy occupation seems to

[9] The Laws of War on Land, Oxford, 9 September 1880, Art. 41.
[10] UK House of Commons, *supra* note 5*,* at 160.
[11] Ibid.

have been recognized.[12] During the 1874 discussions, the fact that determining the duration of an occupation was difficult was equally noted. And on one occasion a reference was even made to a lengthy occupation in connection to taxes[13] – without any further clarifications, however.

1.2 GC IV and relinquishing of control over territory

Let us now turn to GC IV to explore the way in which it addresses the control element as regards the ending of military occupation.[14] GC IV is the only Convention of 1949 which contains specific provisions on the general cessation of its application.[15]

Let us start the analysis with Article 6 of GC IV. At first sight, it might be thought that this article solely deals with residual or continued obligations of the occupant. However, it is suggested that Article 6 in fact also contains answers to questions regarding the end of occupation. It thus uncovers the existence of a close link between the process of occupation ending and the ending of the application of the convention. The issue of residual obligations will briefly be dealt with at the end of this Chapter, and in more detail in Chapter V. Our focus now is with the *ratione temporis* of Article 6 GC IV, which reads:

> The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
>
> In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year

[12] Ibid., at 161.
[13] Ibid.
[14] On the relationship between the HR 1907 and the GCs 1949, see Art. 154 GC IV and the accompanying commentary: J. Pictet (ed.), *Commentary of 1958, Convention (IV) Relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949, Art 154* (Geneva: International Committee of the Red Cross, 1958), at 614: "... the Hague Regulations codify the laws and customs of war and are intended above all to serve as a guide to the armed forces, whereas the Fourth Convention aims principally at the protection of civilians." Available at: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=16CC2F041BDE5AFFC12563CD0042F24E (visited 5 January 2017).
[15] ICRC, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, Commentary of 1958, ICRC, available at https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=030537C0A8EE01DFC12563CD0042A6BE (visited 10 June 2016).

> after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143. Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

No difficulty arises in comprehending paragraph one. But paragraph two should be addressed in-depth, as it raises two important questions: what does "one year after the general close of military operations" signify for the purposes of military occupation? And how to comprehend the wording "however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory […]"?

The Pictet Commentary to this article provides a somewhat one-sided explanation, applicable to limited cases only. It explains that, in the preliminary stages of the drafting process of the Convention, it was thought the GC IV would only cease to apply "when the occupation itself was at an end";[16] and this is what the draft text adopted by the Stockholm Conference advanced. However, during the deliberations at the diplomatic conference, some delegations pointed out that

> […] if the occupation were to continue for a very long time after the general cessation of hostilities, a time would doubtless come when the application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the Occupying Power had been handed over to the authorities of the occupied territory.[17]

At that time, i.e. in 1949, the conference delegates were thinking of the cases of Germany and Japan. Thus, it was decided that in the "occupied territory the Convention would be fully applicable for a period of one year, after which the Occupying Power would only be bound by it in so far as it continued to exercise governmental functions."[18] Pictet considers the one year rule to be reasonable, as one year after the close of hostilities

> […] the authorities of the occupied State will almost always have regained their freedom of action […] communications with the outside world having been re-established, world public opinion will, moreover, have some effect. Furthermore, two cases of an occupation being prolonged after the cessation of hostilities can

[16] J. Pictet, *supra* note 14*,* Art. 6, at 62.
[17] Ibid.
[18] Ibid., at 63.

> be envisaged. When the occupied Power is victorious, the territory will obviously be freed before one year has passed; on the other hand, if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.[19]

Pictet's thinking about not needing stringent measures may be appropriate – however, it seems that full protective measures were left unconsidered and that only the articles extending certain minimal protective guarantees remained applicable: Articles 1 to 12 deal with the general, mostly explanatory provisions of the Convention. Article 27 concerns the treatment of protected persons, and Articles 29 to 34 concern provisions common to the territories of the parties relating chiefly to the treatment of protected persons. Article 47 pledges the inviolability of the rights of protected persons, and Article 49 prohibits deportations and transfers of protected persons from the occupied territories. Article 51 deals with forced labour and enlistment. The protection of workers is covered through Article 52, whereas Article 53 safeguards private property. Article 59 provides relief schemes. Article 61 to 63 regulate the distribution of consignments and individual relief. Issues such as penal legislation, the courts, the death penalty, offences committed before occupation and the right of defence of protected persons are contained in Articles 64 to 77. Finally, Article 143 ensures that the Protecting Powers have access to the interned and detained, as well as to protected persons at their work place.

Whether this selection of articles is sufficient for extending an adequate protection to protected persons after the one-year rule in Article 6 has lapsed, will largely depend on the needs of the local population and the duration of the occupation regime itself. Certainly, an occupation lasting more than a year would necessitate additional rules to the benefit of protected persons, as the rules provided may not be sufficient to respond to the different needs of the population of the occupied territories if occupation lasts, suppose, more than five years. The problem with the given articles is that they only deal with certain rights of protected persons that are very much basic in their nature. And the longer occupation lasts, the more the shortcomings of the IHL

[19] Ibid.

regime may appear,[20] as there will be a need for other rights to fully apply to the benefit of protected persons, for example Article 74 AP I 1977 dealing with the reunion of dispersed families as a result of the armed conflict. Also not covered are refugees and their protection (Articles 44-45 GC IV), the right to leave of non-nationals of the occupied power (Article 48 GC IV), the extensive provisions regarding children's rights and their right to education (Article 50 GC IV), or the duty of the occupant to maintain the public health and hygiene of the territory (Article 56).

1.3 Article 6 and the general close of military operations

The other aspect of Article 6 to be emphasized is that it advances that the general close of military operations, i.e. the termination of hostilities, is moving a situation of occupation closer to its actual end. Paragraph 3 conveys the impression that when hostilities are over, occupation is also over. In fact, such an impression should not arise because of the wording of paragraphs 1 and 2 of the same article. As such, an occupation's end should not be viewed to be dependent on hostilities coming to an end. If it were so, this would flatly contradict the fact that effective control (OL) over territory is needed in the understanding of Article 42 HR 1907, Article 2 common to the GCs and Article 1 AP I 1977 to qualify a situation as one of occupation. For the presumption of a situation of occupation is that, by definition, there are no ongoing hostilities – because ongoing fighting would hinder effective control (OL) to be established over territory.

Also, in actual reality, hostilities may or may not lead to a situation of occupation. If there is no effective control (OL) exerted over the territory and active hostilities amongst the belligerents are ongoing, there would be a situation of an IAC, and the IHL on the conduct of hostilities would apply. On the other hand, there may be cases, and this should not be confused with the foregoing, when during military occupation hostilities erupt between the occupant and a resistance movement. This by itself would not change the fact that the territory is occupied, provided that the effective control (OL) by the occupant over the territory is maintained. Of course, this depends

[20] M. Sassòli and A. A. Bouvier, *How Does Law Protect in War?,* Vol. 1 (2nd edn., Geneva: International Committee of the Red Cross, 2006), at 186.

on the kind, intensity and duration of such hostilities.[21] In other words, while some consider that as soon as hostilities are occurring on a territory, there is no occupation, it is considered here that what matters is whether effective control (OL) is still exercised by the state in question.

Our analysis is linked to the following question: when does the conduct of hostilities model come into play in times of military occupation? During the discussions on the ICRC Report on Occupation and Other Forms of Administration of Foreign Territory, the experts were of the opinion that "active hostilities must be observable in occupied territory in order for the IHL rules on the conduct of hostilities to become applicable."[22] The discussions among the experts then revolved around the armed violence between the occupant's forces and those of the adversary government that were connected to the original IAC leading to the occupation[23] and the classification of the armed conflict in the context of military occupation. During the original IAC, rules on the conduct of hostilities would be activated.[24] In fact, any degree of armed violence involving both sides would justify resorting to these rules.[25] And in the instance of occupation once established, it was pointed out that hostilities and other acts of violence directed towards the occupant could emanate from armed groups that may not formally belong to the occupied state. Then, if the threshold for determining a NIAC (Article 3 common)[26] is met, the rules on the conduct of hostilities apply.[27]

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[21] G. Gaggioli (ed.), *The Use of Force in Armed Conflicts* (Geneva: ICRC, November 2013), at 18–23.
[22] T. Ferraro, *supra* note 3, at 121.
[23] Ibid., including forces that are affiliated militias or other resistance movements satisfying the criteria of Art. 4 (A) (2) GC III 1949.
[24] Ibid.
[25] Ibid.
[26] Ibid., at 122: "The conduct of hostilities' model would therefore apply only when the groups opposed to the occupying power displayed a form of organization enabling them to conduct concerted military operations and when the violence committed by them reached a certain level of intensity. The use of these criteria was justified by the fact that this kind of confrontation would constitute a 'new' armed conflict unconnected to the one that led to the occupation, since the parties challenging the occupying power's effective control would not be identical even if they claimed, as they often do, to fight of behalf or in support of the occupied state."
[27] Ibid.

On this, two additional points should be raised. First, Article 6 GC IV is worded in a way that creates a certain misunderstanding. It should in fact not make any reference to hostilities at all, since when there is a situation of occupation, there should be no active hostilities (this excludes sporadic acts of violence or uprisings that may be dealt with by the occupant quickly; see also below, section 2.2). Hence, the exercise of effective control (OL) by the occupant is neither challenged nor lost. Second, if armed confrontations erupt on the occupied territory between the occupant's forces and an organized armed group or civilians (in both cases not affiliated with the occupied state), the question then is: which rules apply? The rules on the conduct of hostilities, as soon as the threshold of a NIAC is crossed; the rules on the use of force stemming from a law enforcement mode (derived mainly from IHRL); or both in parallel but directed at different actors?[28]

It is submitted here that military occupation presumes the application of the rules in the law enforcement model of the use of force, simply because occupation itself does not include active hostilities and is premised on the occupant exercising effective control (OL) over the territory.[29] However, if violence between the armed group not affiliated with the state whose territory is occupied and the occupant does meet the threshold of a NIAC, then the conduct of hostilities mode would become applicable, in turn. Whether that equals the loss of control over territory and consequently the end of occupation would be dependent on the armed group wrestling away effective control (OL) from the occupying state.

[28] Ibid., 122–124; see further G. Gaggioli, *supra* note 21, at 1: "It is not entirely clear in international law which situations in the context of an armed conflict are governed by the conduct of hostilities paradigm and which are covered by the law enforcement paradigm. […] For example, in a non-international armed conflict, when a State is using force against fighters, it may be considered as simultaneously conducting hostilities and maintaining law and order (since fighters are also frequently criminals under domestic law). Similarly, situations of civilian unrest (such as riots) may arise while combat operations against the adversary are taking place. Sometimes the two situations of violence may even intermingle, for instance when fighters are hiding among rioting civilians or demonstrators. In such cases, it may become difficult to distinguish fighters from rioting civilians and to identify the relevant applicable paradigm." See also ibid., at 25.

[29] D. Murray et al., *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford: Oxford University Press, 2016), at 91 and 99.

The drafting period of GC IV further reveals that Article 6 (then Article 4) generated a debate on whether the termination of hostilities should be construed as the end of an armed conflict or not, while the ending of occupation was not elaborated upon. For the delegates, the latter issue seemed to be clear and was to be regulated through the HR 1907. The delegation from the United States proposed an amendment to Article 4 to the effect that the Civilians Convention should cease its application "not earlier than one year after the termination of hostilities".[30] Noting the Convention did not define the terms "occupied territory" or "military occupation", the delegation viewed obligations imposed by the Convention upon the occupant to be valid during the phase of hostilities as well as the period of disorganization following these hostilities. Experience also showed that an occupant had exercised most governmental functions in occupied territory, and prolonged military occupation was characterized by a progressive return of governmental responsibility to local authorities.[31] Overall, it seemed that the US delegation was in favour of the application of the Convention: "Would it not be better to say that these obligations should continue as long as the conditions provided for in the Convention existed?"[32]

Other delegations also expressed their views on the matter. However, their unwillingness to delve into further considerations of what exactly brought the ending of the entire GC IV, and especially so during a situation of occupation, was apparent. Mexico preferred a reference to be made to a peace treaty. And the UK viewed Article 42 and 43 HR 1907 to constitute "generally accepted principles", whereby the occupant "should not exceed those limits", while prolonging obligations until a peace treaty was concluded would have been going much too far.[33]

The delegate from Monaco believed the article under consideration to be well defined, as Conventions were drawn up for wartime – therefore, for him "the end of hostilities could not mean the armistice (which only marked the suspension of

[30] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II: Section A, Summary Records of 51 Meetings, Committee III, Civilians, Third Meeting (Berne: Federal Political Department, 1949), at 623.
[31] Ibid.
[32] Ibid., at 624.
[33] Ibid.

hostilities); it meant the signing of a peace treaty", that is, that the conflict had ended. The end of occupation, according to him, was defined by the HR 1907, and more important still was the issue of civilian protection.[34] The Norwegian delegate also thought that when "occupation lasted after the termination of hostilities, the responsibilities of the Occupying Power could not all be maintained indefinitely".[35]

The Italian delegate, Mr. Maresca, viewed the term "end of hostilities" not to be interpreted as "the signing of a peace treaty", but rather as the "termination of military operations". As for a situation of occupation, the delegate considered that the article under consideration was referring to wartime occupation as defined by the HR 1907. An occupation that lasted beyond the date of the cessation of hostilities thus "entailed obligations which were to be lifted progressively, as and when the local authority took over administrative powers. As far as protected persons were concerned, the provisions of the Convention should be applied until the time of their repatriation or release."[36]

The reproduced reasoning indicates how the delegates avoided tackling the principles already defined in the HR 1907. They did not regard the issue of military occupation's ending as problematic. Moreover, the conference participants did not distinguish between, and seem to have been confused by, instances of *the ending of hostilities* and the *termination of occupation*. In sum, it is unclear why the delegates at the diplomatic conference viewed occupation ending to be so clearly spelled out by the HR 1907.

On the other hand, what is clear is the fact that the delegates were concerned about the responsibilities of the occupant. How long would the latter's responsibilities persist? Thus, they were largely concerned with the *duration* of occupation. Matters seem to have cleared up once the explanation provided by the International Committee of the Red Cross (ICRC) representative, Mr. Pilloud, was heard, who was

[34] Ibid.: "The present occupation of Germany was an entirely different case. While it was not desirable to dwell upon the point, it was nevertheless essential that Article 4 should be applicable to protected persons after the end of hostilities and the occupation, so long as those persons remained under conditions which called for such protection."
[35] Ibid.
[36] Ibid., at 625.

asked to shed light on the intentions of the authors of Article 4 (i.e. Article 6 GC IV) when using the word "or" between the expressions "close of hostilities" and "of occupation".[37] The ICRC representative explained that the clause had been condensed and that a "distinction must be made between the application of the Convention in national territory and in occupied territory. In national territory, the Convention would cease to be applicable at the end of hostilities, whereas in occupied territory it would cease at the end of the occupation."[38] However, to our great disappointment, as this would have given more clarity to Article 6, the ICRC's clarification was not included in its wording, and is thought to be incorporated only by the way in which the GC IV is structured. That is, through dividing the rules into those applying in *own* and those applying in *occupied territory*.

The end of hostilities and occupation ending are two different factual occurrences. The delegates were primarily concerned with instances of prolonged occupation[39] and their thinking was prompted by cases of Germany and Japan during WWII. Based on the *travaux préparatoires,* Ben-Naftali advances that "the working assumption behind Article 6 was that the situation of an occupation is bound to be relatively short and that responsibilities of this kind would be transferred to local authorities in a process leading to the end of the exceptional situation of occupation".[40]

[37] Ibid. Also, the text of the article discussed (then Article 4) read as follows: "The present Convention shall be applied from the outset of all conflicts covered by Article 2. Its application shall cease at the close of hostilities or of occupation, except as regards the protected persons whose release, repatriation or reestablishment may take place subsequently and who until such operations are terminated, shall enjoy the benefits of the present Convention", see *The Draft Revised or New Conventions for the Protection of War Victims,* XVII International Red Cross Conference (Stockholm, August 1948), at 155, available at http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-revised.pdf (5 January 2017).
[38] Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 30, at 625.
[39] On prolonged occupation, see further I. Scobbie, 'International Law and the prolonged occupation of Palestine', United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague 20–22 May 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611130 (visited 5 January 2017); A. Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967', 84 *The American Journal of International Law* (1990), 44–103.
[40] O. Ben-Naftali, ''A La Recherche Du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the light of the legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion', 38 *Israel Law Review* (2005) 211–229, at 215.

Be that as it may, Article 6 gives rise to debates and causes misperception, primarily because of the one-year rule. Kolb and Hyde view Article 6(3) to be "in stark contrast to the provisions of the Hague Regulations that govern occupied territories which apply as long as the occupation lasts in fact",[41] and they regard the GC IV as departing from this rule and even complicating the law.[42] When the ICJ opined on the Wall case, it also appears to have misread the law and confused the matter additionally by concluding that long-term occupations reduce the responsibilities of the occupant's power vis-à-vis the civilian population:

> A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. … since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.[43]

Imseis terms the ICJ's interpretation of Article 6 GC IV "[t]he most serious substantive error committed by the Court on IHL issues […] relating to its beginning and end of its application to occupied territories".[44] The general problem with the ICJ's interpretation of Article 6 is "its misguided focus on 'military operations leading to occupation'. Article 6 in fact provides that insofar as occupied territories are concerned, application of the Convention 'shall cease one year after the general close of military operations' […]."[45] The difficulty is that the ICJ unnecessarily narrowed the meaning of 'military operations' to only those having led to occupation, although no such qualifying statement exists in the GC IV.

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[41] R. Kolb and R. Hyde, *An Introduction to the International Law of the Armed Conflict* (Oxford/Portland: Hart Publishing, 2008), at 103.
[42] Ibid., at 104.
[43] *Case Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, § 125–126, available at http://www.icj-cij.org/en/case/131 (visited 15 July 2017). Although the experts during the deliberations on the ICRC Report on Occupation agreed that "the ICJ's statement on this article was incorrect for the purposes of IHL, they contended that – as a consequence – its validity could not be completely disregarded and its desuetude not yet established."; T. Ferraro, *supra* note 3, at 77.
[44] A. Imseis, 'Critical Reflections on the International Humanitarian Aspects of the ICJ Wall Advisory Opinion', 99 *The American Journal of International Law* (2005) 102–118, at 105.
[45] Ibid., at 106.

Instead, the phrase 'after the general close of military operations' should be compared with the formulation in Article 118 GC III: 'after the cessation of active hostilities'. This is so because "[t]he general close of military operations may occur after the cessation of active hostilities", as "[n]o doubt, the cessation of active hostilities can precede a treaty of peace."[46] Moreover, as long as there is no final treaty of peace in force, "even if military operations are deemed closed at a specific point of time, they may reopen at a later date and they will then trigger the renewed operation of Geneva Convention (IV) *in toto*."[47]

To summarise this section, it could not be identified clearly when in the case of occupied territory the GC IV would stop its application. I would argue that this section has demonstrated the impracticable nature of Article 6, incapable of dealing with protracted occupations. Moreover, setting a time limit artificially constrains the application of IHL, as it has the potential to disregard the existing facts, i.e. continuation of effective control (OL) over the territory. Such was also the view of the ICRC delegate, Mr. Pilloud. Thus, so long as occupation persists, that is for as long as the occupant exercises effective control (OL) over the territory, the GC IV should apply. The analysis of Article 3 of AP I 1977, following this section, further supports this claim.

1.4 Article 3 AP I 1977 and relinquishing control over the territory

Article 3 AP I 1977 regulates the beginning and end of the application of the instrument and may be viewed as an attempt to remedy the confusion created by Article 6 GC IV. Whether the nature of this Article is of customary nature remains to be ascertained by practice.[48] Article 3(b) reads that:

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[46] Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge, University Press 2009), at 282.
[47] Ibid., at 282.
[48] On the Customary Status of AP rules, see T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Oxford University Press, 1989); The Honorable F. Pocar, 'To What Extent is Protocol I Customary International Law', 78 *International Law Studies* (2002) 337–351; C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in A. J.M Delissen and G. J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Dordrecht: Martinus Nijhoff, 1991) 93–114; G. Abi-Saab, 'The 1977 Additional Protocols and

> […] the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter.

Unlike Article 6 GC IV, Article 3 AP I 1977 does not confuse situations of military operations and military occupations. It clearly keeps them apart. The Commentary on the Additional Protocols on this part of the article confirms this by explaining "military operations" to mean movements, manoeuvers and actions of any kind that are carried out by the armed forces to fight the adversaries.[49] And the formulation "on the general close of military operations", according to the Commentary, is the same expression as used in Article 6 GC IV.[50] This time the Commentary more clearly articulates that the latter formulation is at "the time of a general armistice, capitulation or just when the occupation of the whole territory of a Party is completed, accompanied by the effective cessation of all hostilities, without the necessity of a legal instrument of any kind."[51]

From the perspective of military occupation coming to an end, this article too does not clearly provide a test when and how occupation is over. The expression "on the termination of the occupation" indicates that there is no time limit given as to when occupation may be over and that its ending is dependent on the moment the occupant desists exercising effective control (OL). In implying that the duration of occupation (the elements of *ratione temporis*) is dependent on the occupant exercising effective control (OL) over the territory, it reaffirms that the termination of

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General International Law: Some Preliminary Reflections', in A. J.M Delissen and G. J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Dordrecht: Martinus Nijhoff, 1991) 115–126. Note: According to Ben-Naftali, while Israel remains a persistent objector of some AP I rules, such an objection does not seem to extend to Article 3 (b): "The argument that Article 6 of the Fourth Geneva Convention limits the Convention's scope of applicability was never raised before the Israeli Courts, and indeed the Israeli High Court of Justice had applied provisions that would have otherwise become inapplicable in light of the language of Article 6. This practice characterizes other prolonged occupations, thereby lending support to the proposition that Article 3(b) of Protocol I enjoys customary status."; O. Ben-Naftali, *supra* note 40, at 216–217.

[49] Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC: Martinus Nijhoff Publishers, 1987), at 67.

[50] Ibid.

[51] Ibid., at 67–68.

occupation is a factual matter. This further suggests that the 1949 Conventions and AP I 1977 stop applying when effective control (OL) is no longer wielded by the occupant. The Commentary to this provision explains that the termination of occupation "may occur a long time after the beginning of that occupation, and can come about in various ways, de facto or de jure, depending on whether it ends in the liberation of the territory or in its incorporation into one or more of its states with the right of the people or peoples of that territory to self-determination."[52]

During the Diplomatic Conference, Article 3(b) AP I 1977 was largely well received. In the words of the Cypriot delegate it constituted a forward development of IHL by expanding its application.[53] The insertion of the word "conventions" was intended to ensure that the provisions concerning the beginning and ending of the application of the two protocols and the four conventions would coincide, otherwise discrepancies could have arisen.[54] I consider this Article to draw the line between a situation of military operation and the termination of occupation, reconfirming that they were contemplated as two separate factual occurrences. For as long as the territory remains under military occupation, the rules of IHL must be fully respected by the occupant. This is what permeates the logic of Article 3 AP I 1977. In sum, the wording of the entire Article 3 AP I 1977 implies that the test of occupation termination is necessarily based on the elements of Article 42 HR 1907 and common Article 2 GCs. This is primarily because AP I 1977 does not replace Article 42 HR 1907, nor does it supply the new instrument with a new test. Additional information is still detected with regards to conceptualizing the ending of occupation, for the wording "on the termination of the occupation" indicates that the territory remains occupied for as long as it is under the effective control (OL) of the hostile army,[55] thereby adopting a broader approach than Article 6 GC IV and its one-year rule.

[52] Ibid.
[53] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977), Vol. VI, at 60 (the Cypriot Delegate).
[54] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977), Vol. VIII, at 67 (Delegate of the Arab Republic of Egypt).
[55] R. Kolb and R. Hyde, *supra* note 41, at 103.

1.5 The needed test for relinquishing control in IHL

The foregoing attempt to discern the position of IHL instruments on how and when the end of control over territory occurs so to consider that military occupation has ended, again shows IHL not to be clear about this aspect. Military manuals provide additional clarifications in carving out and distilling the necessary test. More specifically, the aspect of the *transfer* of effective control (OL) from the occupant to the old or a new power stands out. What is additionally interesting is that these manuals do not share a uniform stance, nor one test on when or how occupation ends.

The Canadian Military Manual states that occupation can be terminated at least in three ways:

> a. The occupying power may withdraw from the occupied territory.
> b. The occupying power may be ejected from the occupied territory by force.
> c. The sovereign of the occupied territory may be totally defeated and part or all of the occupied territory may be annexed by the occupying power.[56]

The manual further considers that the general termination of hostilities does not automatically terminate occupation. In fact, "[o]ccupation does not terminate until a state exercises sovereign authority over the area as part of its own territory."[57] This seems to imply that the transfer of effective control (OL) over territory is possible only to a sovereign over the territory. However, the UK Military Manual considers a transfer of effective control to *anyone* except the former occupant; it further stipulates that occupation ends when the occupant is driven out or evacuates the area. Thus, occupation will end "when effective control transfers to a different authority, such that the territory ceases to be under the authority of external military forces."[58] The UK manual also does not consider a rebellion of inhabitants or the occasional success of guerrilla or resistance movements to bring occupation to its

[56] Canada, National Defence Joint Doctrine Manual (B-GJ-005-104/FP-021) (Issued on Authority of the Chief of Defence Staff) (2001-08-13), § 1204.1 at 12-2. It should be noted, however, that annexation of territory constitutes a breach of International Law; see Chapter 3, section 3.3.1.
[57] Ibid., § 1204.2 at 12-2.
[58] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), § 11.7 at 277

closure. Even a temporarily successful rebellion in parts of the occupied area will not necessarily end the occupation, provided the occupying power takes steps to deal with the insurgency and re-establishes its authority over the area in question.[59]

The US Law of War Manual considers that the "status of belligerent occupation ceases when the invader no longer factually governs the occupied territory or when a hostile relationship no longer exists between the State of the occupied territory and the Occupying Power".[60] Such a stance confirms the point that occupation lasts for as long as effective control (OL) is wielded by the occupant. Only once the occupant has ceased to exert such a control can occupation be said to have ended.

Another question is what degree of control can determine the ending of occupation? Assessing the required level of control for the ending of occupation is considered to be a factual matter:[61]

> In any case, and regardless of the means through which the end of occupation comes about, the relevant criteria from an IHL point of view always remain factual: whether the occupying forces have effective control over the given territory and population.[62]

Let us now revert to Article 42 HR 1907, as the end of an occupation should in effect be determined "by the same two conditions that trigger occupation law's application in the first place, namely the control of territory by hostile foreign armed forces and the possibility of these forces exercising authority over the local inhabitants".[63] The threshold of control required for assessing the ending of military occupation then is nothing other than complete abandonment of effective control (OL) over the territory. The required test for the ending of occupation consists of the same elements

[59] Ibid., § 11.7.1 at 277.
[60] *Department of Defense Law of War Manual*, Office of General Counsel, Department of Defense (USA: DOD, June 2015), at 750.
[61] Program on Humanitarian Policy and Conflict Research (Policy Brief), 'Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law', Harvard University, 2010, at 9, available at http://hhi.harvard.edu/publications/legal-aspects-israels-disengagement-plan-under-international-humanitarian-law-ihl (visited 5 January 2017).
[62] Ibid.
[63] D. Thürer and M. Maclaren, ''Ius Post Bellum in Iraq': A Challenge to the Applicability and Relevance of International Humanitarian Law?', in K. Dicke et al. (eds.) *Weltinnenrecht – Festschrift für Jost Delbrük* (Berlin: Duncker and Humblot, 2005) available at: http://www.ivr.uzh.ch/dam/jcr:00000000-528e-0b9e-ffff-ffff93869fca/FSDelbrueck.pdf (visited 5 January 2017), at 21.

as the one used for determining the establishment of control over territory in IHL in the first place: physical presence of foreign troops, their ability to enforce authority over the territory instead of the local governmental power, and the absence of the local government's consent to such a presence.

However, the main difference lies in the fact that effective control (OL) over territory has to be fully relinquished by the former occupant in a way that some other authority is able to step in and control the territory. But whether that other authority (which can either be the ousted sovereign or a new legitimate power) actually takes over control over the territory is irrelevant for occupation as such to have ended. This does not exclude a scenario in which the occupant peacefully hands over territorial control to the previous sovereign or to a new authority (for example via the self-determination procedure envisaged by PIL). Nor does it mean the former occupant is exempt from certain post-occupation obligations (see Chapter V). What matters is that the former occupant fully exempts itself from any form of control over that new power (if there is one). It should not interfere and allow the new power to govern and fully exercise governmental powers over the area and its inhabitants. Of course, it is possible that when a state withdraws from the territory and there is no new power in place, a power vacuum ensues,[64] where there are only rivalling armed groups left for controlling the territory, for example. In this case, while occupation has ended, a transfer of power over the territory has not taken place. However, there is nothing in the law of military occupation that would suggest that the occupant is obligated to ensure such a transfer.[65]

Alternatively, in case state A obtains consent for its military forces to remain on the territory of state B or parts thereof, occupation has equally ended – provided such a presence is based on the genuine consent (as per Article 25 VCLT) issued by the ousted sovereign or the authority that has come into power. Hence, state A's forces are no longer hostile and the previous sovereign or the new power exercises effective control

[64] Y. Ronen, 'Post-Occupation Law', in C. Stahn, J. S. Easterday and J. Iverson (eds.), *Jus Post Bellum* (Oxford: Oxford University Press, 2014) 428–446, at 435.
[65] C. Stahn, *The Law and Practice of International Territorial Administration* (Cambridge: Cambridge University Press, 2008), at 119.

over the territory and its inhabitants instead. Occupation, therefore, ends if at least *one* of the following three conditions is met:

1. State A's military forces are no longer physically *present* on the territory (they have either wilfully left the territory or have been forcefully ejected).
2. State A's military forces are not in a position or wilfully do not *exercise authority* over the total territory or parts of state B anymore.
3. State A's military forces are no longer *hostile* to state B, as their presence has been consented to by the latter.

In the introduction to this Chapter, it was asked whether the elements identified for the purposes of occupation ending had a hierarchy. The answer to this query is negative, since the presented elements can work in isolation from each other to bring occupation to an end: either lack of consent disappears by obtaining it, or effective control (OL) over the territory vanishes by withdrawing one's army and/or by handing over the authority.

On the face of it, the test may seem straightforward. But applying it in practice, and especially to contemporary instances of occupation, can be difficult. This is so because often an occupant does not fully give up control over territory and finds a way to still exercise it. For example, the armed forces can withdraw from a territory but retain elements of control over it through the air space and maritime zones, like in the case of Gaza (see below, section 2.4); or, after having invaded the territory, an occupant can establish a puppet government and through it wield control over the territory (see Chapter III).

Mindful of these points, the discussion now proceeds to explore the different forms of relinquishing effective control (OL) over territory that the states of late have resorted to and that have emerged from recent occupations. Are these forms and practices of relinquishing control in alignment with IHL instruments?

2. Forms of Relinquishing Control

Benvenisti advances two readings of the ending of occupation that both depend on the level of control, namely the actual and potential control tests. The following interpretation is provided for these thresholds of control:

> Under the test of actual control, occupation ends when the occupant no longer exercises its authority in the occupied territory. Under the test of potential control, occupation ends when the occupant is no longer capable of exercising its authority.[66]

However, the author does not clarify the formulated tests any further. How to conceive of "potential control" or being "no longer capable of exercising its authority"? Should both be understood as no longer having the capacity to reoccupy the territory? Or should it be construed in the same way that Article 42 HR 1907 envisages the potential for exercising control, that is when a hostile army is present on the territory and can, according to its discretion, set up a military administration?

At least six forms of relinquishing control over territory can be identified that states have employed when they claimed situations of occupation did not exist anymore.

2.1 Complete end of control over territory

This type of control takes place when there is no more control over the territory wielded by the occupant as defined by Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977. It might be triggered by the fact that the occupant vacates the territory and leaves, and/or by the hostile forces being pushed out by the ousted sovereign's forces, a new governmental authority, a third party (e.g. by the coalition forces who pushed Iraq out of Kuwait[67]), or by an uprising. This type of relinquishing control will be easiest to identify as the key element of Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977, namely military presence, is no longer given.

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[66] E. Benvenisti, *supra* note 4, at 4.

[67] J. Kostiner, *Conflict and Cooperation in the Gulf Region* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2009), at 260; W. Kälin, *Report On the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Commission on Human Rights, EC/N 4/1992/26, 16 January 1992, available at http://hr-travaux.law.virginia.edu/content/report-situation-human-rights-kuwait-under-iraqi-occupation-prepared-walter-kälin-special (visited 5 January 2017); H. A. Hassan, *The Iraqi Invasion of Kuwait* (Virginia: Pluto Press, 1999).

The complete loss of control may also take place gradually, that is in a prolonged fashion and/or geographically uneven. This type of loss of control occurs when the occupant keeps some territories under a tight grip but others not. It can result from a selective approach by the occupant on where to wield its effective control; however, occupation is not over until the complete withdrawal of troops has taken place. One example of such a gradual loss of control, or of troops "phasing out", is the Soviet Union's dis-occupation of Afghanistan.[68] When the USSR exited the territory, it left behind a protracted civil war with a devastating impact on civilians.[69] The Soviet Union's military withdrawal had been outlined in the bilateral Pakistani-Afghan "Agreement on the Interrelationships for the Settlement of the Situation Relating to Afghanistan":

> In accordance with the timeframe agreed upon between the Union of Soviet Socialist Republics and the Republic of Afghanistan, there will be a phased withdrawal of the foreign troops which will start on the date of entry into force. […] One half of the troops will be withdrawn by 15 August 1988 and the withdrawal of all troops will be completed within nine months. […] The phased withdrawal of the foreign troops will start and be completed within the timeframe envisaged in paragraph 5 […].[70]

The Soviet departure officially commenced on 15 May 1988 and was over by 15 February 1989, all the while monitored by the United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP).[71] The strength of the Soviet Forces, on 14 May 1988, amounted to 100,300 troops, embracing all ranks, out of which two thirds were combat troops.[72] Despite the fact that the Soviet Force had already handed over some positions to the Afghani Armed Forces, it still controlled 18 main garrisons in

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[68] G. Feifer, *The Great Gamble: The Soviet War in Afghanistan* (New York: Harper Perennial, 2009), at 238–241.

[69] Human Rights Watch, *World Report 1989: Afghanistan*, available at http://www.hrw.org/reports/1989/WR89/Afghanis.htm#TopOfPage (visited 5 January 2017).

[70] *Agreements on the Settlement of the Situation Relating to Afghanistan* (Geneva Accords), SC Res. S/19834 (1988), available at http://peacemaker.un.org/sites/peacemaker.un.org/files/AF_880414_AgreementsSettlementoftheSituationRelatingAfghanistan%28eng%29.pdf (visited 5 January 2017); D. Cordovez and S. S. Harrison, *Out of Afghanistan: The Inside Story of the Soviet Withdrawal* (New York: Oxford University Press, 1995), at 396.

[71] UNGOMAP, *Afghanistan/Pakistan Background*, UNGOMAP (2002), available at http://www.un.org/en/peacekeeping/missions/past/ungomap/background.html (visited 5 January 2017).

[72] Ibid.

Afghanistan and was present in 17 of the 30 Afghan provinces.[73] The withdrawal was two-phased: the first phase involved, on 15 August 1988, the Soviet military informing UNGOMAP that 10 main garrisons had been evacuated and handed over to the Afghani armed forces and that 8 main garrisons, located in Kabul, to the north of Kabul and in north-west Afghanistan, remained under Soviet control. Pursuant to the fourth instrument of the Geneva Accords, three months after the entry into force of the instruments, over 50 per cent of the Soviet troops had been withdrawn.[74] In the second phase, starting on 14 May 1988, the UNGOMAP was informed that in August a three-month pause would follow the completion of the first phase of the withdrawal. Such a halt was needed to facilitate preparations for the second phase of the withdrawal, which was to be completed by 15 February 1989. However, when the withdrawal had to resume, the Soviet representatives decided to postpone its commencement in light of the prevailing conditions.[75] On 25 January 1989, the Soviet military informed UNGOMAP about the way in which the final withdrawal of troops would be completed. In the first half of February, troops would be repatriated both by air and road in grouped convoys. On 14 February, an UNGOMAP team visited the remaining main garrison in Tashqurghan and concluded that the troops had been evacuated on 12 February. Thus, the UNGOMAP concluded that the withdrawal of Soviet troops had been completed in compliance with the fourth instrument of the Geneva Accords,[76] hence occupation had ended.

2.2 Temporary and partial loss of control over parts of a territory

A temporary and partial loss of control over a part of a territory occurs when the occupant's effective control (OL) is challenged by an uprising, insurgency or some other armed force. Such an instance does not *per se* mean that the rest of the territory is no longer occupied. In order that the territory over which the occupant lost its effective control (OL) is still considered occupied, as mentioned before, the occupant must successfully curb the uprising and regain effective control (OL) over that

[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.

territory. This obviously depends on the military will and might of the occupant and can take some time. Such an uprising should be substantial and must *disable* the occupant to exert effective control. Small-scale uprisings or hit-and-run operations that can easily be put down by the occupant do not mean that, in that part of the territory where they occur, occupation has ended.

Out of these two forms of loss of control, a merely temporary loss exhibits less problems for the occupant, since it envisages regaining effective control (OL) in a short timeframe. For example, the uprising in the Warsaw Ghetto spurred on 19 April 1943 after the German troops and police had entered the ghetto to deport its surviving inhabitants. The Germans suppressed the insurrection by 16 May 1943, leaving the area in complete ruins.[77] By contrast, the partial loss of control over territory is usually connected to a longer period of time as well as repeated efforts to re-establish control over territory. A case in point of such a partial loss of control over territory are the events surrounding the Coalition Forces in Falluja.[78] This example has two points to refer to: the initial US-led invasion of Iraq in April 2003 and the two instances of trying to re-establish control over Fallujah.

After having asserted effective control (OL) over Baghdad, in April 2003 the Coalition Forces occupied Fallujah. However, tensions between the residents of Fallujah and the Coalition Forces were high since the early stages of the Coalition Forces' presence there. The residents resented the troops patrolling the area as well as their other actions.[79] Facts attest that the Coalition Forces lost effective control (OL) over Fallujah after its initial occupation, though not all at once. The initial occupation phase of Iraq was not marked by Fallujah posing a threat to the hostile forces' control. Nevertheless, according to the US Army National Ground Intelligence Center, on 28 April 2003 a large Iraqi crowd protesting the Coalition takeover of a school turned

[77] Holocaust Encyclopedia, *Warsaw Ghetto Uprising*, 2 July 2016, available at https://www.ushmm.org/wlc/en/article.php?ModuleId=10005188 (visited 5 January 2017); A. Beevor, *The Second World War* (London: Weidenfeld and Nicolson, 2012), at 298–299;
[78] W. C. Martel, *Victory in War* (Cambridge: Cambridge University Press, 2007), at 263.
[79] Human Rights Watch Report*, Violent Response: US Army in al-Fallujah* (16 June 2003), available at https://www.hrw.org/report/2003/06/16/violent-response/us-army-al-falluja (visited 5 January 2017).

violent and 15 Iraqis were killed.[80] Pursuant to that, violence against the Coalition continued well into Fall 2003, causing the US forces to change garrison locations to a series of camps outside Fallujah.[81] At the same time, the infiltration of foreign fighters into Fallujah began.

The culmination of these events was the slaying of four American Blackwater contractors, on 31 March 2004. The images depicting the burning of the deceased and their mutilation were aired around the world. Secretary of Defence Rumsfeld, Commander Abizaid and Coalition Provisional Authority (CPA) chief Bremer then decided that a military response was needed immediately, as "Fallujah had become a symbol of resistance that dominated international headlines."[82] Thus, Operation Vigilant Resolve (also dubbed "first battle of Fallujah") was launched on 4 April 2004 in direct response to the Blackwater incident to deal with the insurgency.[83] But the advance of the Coalition Forces was met with harsh resistance.[84] On 22 April, US Marine Lieutenant General James Conway warned the insurgents that they had days and not weeks to give up their heavy weapons or face a renewed offensive: "Meanwhile the Marines held a cordon around unconquered Fallujah, and Iraqi insurgents controlled the center of the city."[85] This first battle ended on 30 April 2004, when the USA mandated the "Fallujah Brigade" composed of Iraqi soldiers to take over the city under US command.[86]

The resistance was never at bay and a second onslaught was prepared by the Coalition Forces to curb it. On 8 November 2004, further attacks on Fallujah, also dubbed operation "Phantom Fury", ensued.[87] Stiff resistance was encountered by the US

[80] I. Fisher, 'US Troops Fire on Iraqi Protestors, Leaving 15 Dead', *The New York Times*, 29 April 2003, available at http://www.nytimes.com/2003/04/29/international/worldspecial/29CND-IRAQ.html?pagewanted=all (visited 5 January 2017).
[81] US Army National Ground Intelligence Centre (NGIC), *Complex Environments: Battle of Fallujah 1, April 2004,* NGIC, 31.03.2006, available at http://www.expose-the-war-profiteers.org/archive/government/2006/20060331.pdf (visited 5 January 2017) at 4.
[82] Ibid.
[83] V. L. Foulk, *The Battle for Fallujah* (North Carolina: McFarland and Company, 2007), at 21–22.
[84] Ibid.
[85] Ibid., at 41.
[86] Ibid., at 44.
[87] Ibid., at 212–213.

Marines and the other components of the Coalition Forces. The Mosques served the resistance as command and control centres. This second battle of Fallujah continued until 26 November,[88] and only by the end of December 2004 was Fallujah cleared for civilian return.[89]

What to make of this case in terms of temporary loss of control? After the initial American invasion of Iraq, within one year's time, local resistance to occupation in Fallujah was strong and consolidating control over it difficult. The Coalition was thus not in effective control (OL) of the entire area as understood in Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977. Based on the available facts, it would even be difficult to advance that Fallujah was *ever* really occupied by the Coalition Forces between 28 April 2003 and 26 November 2004. This, on the other hand, does not mean that other parts of Iraq were not under the Coalition Force's occupation, since according to common Article 2 GCs, territory can be under partial or total occupation – in other words, over whichever part of the territory a hostile force is capable of exerting effective control (OL), and provided there is no armed resistance to such a control, that part is under occupation. By contrast, where there are successful resistance pockets, it would be futile to claim the territory there to be under effective control (OL). Hence, all appears to depend on the *moment* in which the occupant successfully curbs an uprising, thus redeeming and maintaining effective control (OL) over that territory to an extent that its control is not wrestled away. In Fallujah, this moment occurred only in late 2004.

2.3. Potential for regaining control

The potential for regaining control as a form of relinquishing control over territory, as already mentioned, was raised by Benvenisti as a form of its own, since the occupant is "no longer capable of exercising its authority".[90] Benvenisti's explanation suggests that all possible avenues for the occupant to exercise its authority no longer exist, manifested primarily in the ousted sovereign regaining its original territorial control,

[88] Ibid., at 224.
[89] Ibid., at 225–226.
[90] E. Benvenisti, *supra* note 4, at 4.

thereby impeding the former occupant to wield control over the territory at any time. Alternatively, it may also mean that the former occupant no longer has any interest in re-occupying the territory. However, I primarily consider the potential for regaining control to mean the former occupant's military capacity to re-assert its effective control (OL) over territory any time after its partial withdrawal. In this scenario, the armed forces have partially vacated the territory, leaving behind – based on the consent of the returned sovereign or a new government – a military garrison or a large military base that is in principle capable of asserting effective control (OL) over a part or the whole of the territory. If then consent to the presence of the garrison is withdrawn by the territorial administration, and if the garrison's armed force asserts effective control (OL) over a part or all of the territory, military occupation begins anew.

The potential for regaining control over territory can also be exemplified by the situation in the West Bank. Israel effectively seized the West Bank from Jordan in the 1967 Six-Day War.[91] As a result of that war, Israel occupied the West Bank and Eastern Jerusalem[92] (occupied with the rest of the West Bank), the Sinai Peninsula, the Gaza Strip, and the Golan Heights.[93] While the UN Security Council Resolution 242 called

[91] See generally S. M. Akram and M. Lynk, 'Arab-Israeli Conflict', in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, May 2011), § 1–110, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1246 (visited 5 January 2017).

[92] B. Rubin, 'Israel Occupied Territories', in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, October 2009) §1–125, § 11, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301 (visited 5 January 2017): "In 1980 the Knesset adopted the Basic Law: Jerusalem, Capital of Israel, which provides that '[u]nified Jerusalem is the capital of Israel', hence there is no doubt that Israel regards the annexed area as its own territory."; see also E. Lauterpacht, *Jerusalem and the Holy Places* (London: the Anglo-Israeli Association, 1968/1980); M. Hirsch, D. Housen-Couriel and R. Lapidoth, *Whither Jerusalem* (The Hague: Martinus Nijhoff Publishers, 1995).

[93] Ibid., §§ 1–3; see also US Department of State, 'Israel and the Occupied Territories', available at http://www.state.gov/j/drl/rls/hrrpt/2001/nea/8262.htm (visited 5 January 2017).

for a withdrawal of Israel from territories occupied in that conflict,[94] the West Bank is until today regarded as occupied by Israel,[95] including East Jerusalem.[96]

Nevertheless, some views from Israel consider this situation not to amount to an occupation,[97] upholding instead the 'missing reversioner' theory. This theory maintains that Israel cannot be an occupant of the territories captured from Jordan and Egypt in the 1967 War because neither of these states are displaced legitimate sovereigns of the territories pursuant to Article 43 HR 1907.[98] The Levy Report, whose panel was formed by Prime Minister Netanyahu and headed by former Supreme Court justice Edmond Levy,[99] echoed this theory and concluded the following:

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[94] SC Res. 242 (1967), see also SC Res. 446 (1976), SC Res. 465 (1980), SC Res. 484 (1980) and SC Res. 2334 (2016). The ICJ in the Wall Case opined that: "The territories situated between the Green Line […] and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories […] have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."; *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 43, § 78, §§ 75–77, and §§ 90–101.

[95] *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc. A/71/355, 24 August 2016, § 5, § 10–11; see also Amnesty International, *Israel and the Occupied Palestinian Territories: 2015/2016 Annual Report*, available at https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/ (visited 5 January 2017); *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 43, §§ 90–101.

[96] *Israeli settlements in the Occupied Palestinian Territory, supra* note 95, §3; *Human Rights Situation in Palestine and Other Occupied Arab Territories*, Human Rights Council 34th session, A/HRC/34/L. 41/Rev.1, 24 March 2017*;* see also B'Tsalem – The Israeli Information Center for Human Rights in the Occupied Territories, *47 Years of Temporary Occupation*, available at http://www.btselem.org/download/201406_47_year_long_temporary_occupation_eng.pdf (visited 5 January 2017).

[97] J. Goldberg, 'The West Bank: If it's not Occupation, Then What is it?', *The Atlantic*, 9 July 2012, available at http://www.theatlantic.com/international/archive/2012/07/the-west-bank-if-its-not-occupation-then-what-is-it/259562/ (visited 5 January 2017).

[98] I. Scobbie and S. Hibbin, *The Israeli-Palestine Conflict in International Law: Territorial Issues* (The U.S./Middle East Project, 2009), at 102; see also Y.Z. Blum, 'The Missing Reversioner: Reflections on the status of Judea and Samaria', 3 *Israel Law Review* (1968) 279–301, at 288; see further M. Shamgar, 'The observance of international law in the administered territories', 1 *Israel Yearbook on Human Rights* (1971) 263–266.

[99] T. Lazaroff, 'Legal Report on outposts Recommends Authorization', *The Jerusalem Post*, 7 September 2012, available at http://www.jpost.com/Diplomacy-and-Politics/Legal-report-on-outposts-recommends-authorization (visited 5 January 2017).

> Israel's presence in Judea and Samaria is fundamentally different: Its control of the territory spans decades and no one can foresee when or if it will end; the territory was captured from a state (the kingdom of Jordan), whose sovereignty over the territory had never been legally and definitively affirmed, and has since renounced its claim of sovereignty; the State of Israel has a claim to sovereign right over the territory.[100]

Such a view, however, not only contradicts the opinion of the international community as seen above, but is also contrary to the Israeli HCJ's reasoning in Mara'abe v. The Prime Minister of Israel:

> The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the area is the military commander. He is not the sovereign in the territory held in belligerent occupation […]. His power is granted him by public international law regarding belligerent occupation. The legal meaning of this view is twofold: first, Israeli law does not apply in these areas. They have not been "annexed" to Israel. Second, the legal regime which applies in these areas is determined by public international law regarding belligerent occupation […].[101]

Be that as it may, on 13 September 1993, representatives of the government of Israel and the Palestinian Liberation Organization (PLO) signed the "Declaration of Principles on Interim Self-Government Arrangements" (Oslo I), followed on 28 September by the Israeli-Palestinian "Interim Agreement" (Oslo II).[102]

The overall purpose of the latter was to transfer authority in the West Bank and the Gaza strip over to a Palestinian Council.[103] To do so, the West Bank was divided into three administrative zones: Area A (Palestinian towns), Area B (Palestinian villages and hamlets) and Area C (all the rest, including Israeli army bases and settlements).[104] The yet to be established Palestinian Council was to have maximum jurisdiction over

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[100] The Levy Commission Report, *The Legal Status of Building in Judea and Samaria* (Jerusalem, 2012) (Translated by Regavim, 2014), available at http://israelipalestinian.procon.org/sourcefiles/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria.pdf (visited 5 January 2017), at 8.

[101] High Court of Justice, Israel (hereafter: HCJ) 7957/04 *Mara'abe v. The Prime Minister of Israel* (judgment of 21 June 2005) § 14; see also HCJ, Israel 9593/04 *Rashed Morar, Head of Yanun Village Council and others v. IDF Commander in Judea and Samaria* (a petition, 26 June 2006) § 12.

[102] Israeli-Palestinian 'Interim Agreement on the West Bank and the Gaza Strip' (Oslo II), 28 September 1995, available at: http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx (visited 5 January 2017).

[103] Ibid., Preamble and Art. 1

[104] E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), at 210.

areas A and B while in Area C Israel would only transfer "civil powers and responsibilities not relating to territory."[105]

For Area A, as per the accord, Israel pledged to fully transfer authority to the Palestinian Council, who even was to handle "the powers and responsibilities for internal security and public order"[106]; in Area B, while Israel envisaged the complete redeployment of its military forces, Israel maintained "the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of Terrorism",[107] and Palestinians assumed the responsibility for public order only for Palestinians via forming their own police force,[108] subject however to Israeli restrictions (for example, the Palestinian Police had to inform Israel of the names of its policemen, the number plates of its police vehicles and the serial numbers of their weapons).[109]

The overall impression of the accord is that it clearly set out the transfer of powers in Areas A and B, while provisions relating to Area C remained the vaguest in formulation. But how to interpret the transfer of "civil powers and responsibilities not relating to territory" to mean that occupation is over when in essence the management of *any* population is tied to the management of the territory on which it lives? For even if one argues that the right to education does not fall under powers relating to territory, school buildings still need to be located on a piece of land, and access thereto necessitates roads and supply lines etc. Furthermore, Oslo II does not really envisage anything with regards to the Israeli government giving up territorial control over Area C.[110] Still today, in this area the Israeli military retains full authority

[105] Israeli-Palestinian 'Interim Agreement on the West Bank and the Gaza Strip' (Oslo II), *supra* note 102, Article XI (2.a and c)
[106] Ibid., Art. XIII (1).
[107] Ibid., Art. XIII (2.a).
[108] Ibid., Art. XIII (2.b)
[109] Ibid., Art. XIII (2.b.7).
[110] See further HCJ, Israel 2164/09 *Yesh Din Volunteers for Human Rights et. al. v. Commander of the IDF Forces in the West Bank et. al.* (26 December 2011, Judgment), § 13: in this case Area C is classified by the HCJ to be under prolonged military occupation.

over the development of that area, including control over the planning and zoning of houses, industrial zones, tourism sites, roads and electricity lines.[111]

Area A is an example of Israel's potential for regaining control and re-occupying it. For example, March and April 2002 saw suicide bomb attacks by Palestinian groups against Israelis increasing in frequency.[112] Subsequently, the IDF twice entered Palestinian towns and villages in the West Bank, including areas under the administrative and security responsibility of the Palestinian Authority (i.e. Area A).[113] Thus, on 29 March "Operation Defensive Shield" started with an IDF "incursion into Ramallah, during which IDF seized most of the buildings in the headquarters compound of Chairman Arafat. Operations followed in Tulkarm and Qalqilya on 1 April, Bethlehem on 2 April, and in Jenin and Nablus on 3 April. By 3 April, six of the largest cities in the West Bank, and their surrounding towns, villages and refugee camps, were occupied by the Israeli military."[114]

The IDF announced the official end of the operation on 21 April, as they had withdrawn from Nablus and parts of Ramallah, while continuing negotiations to end the siege of the Church of the Nativity in Bethlehem.[115] Nevertheless, the IDF's withdrawal from Palestinian cities was not to pre-29 March positions, but rather to positions encircling these cities. The IDF continued their incursions into many of the Palestinian towns and cities from which they had withdrawn at the end of Operation Defensive Shield. During each urban incursion, Israeli troops used tanks and armoured personnel carriers, and curfews on the civilian populations were imposed:

> […] the incursions were accompanied by the entry of IDF into nearby villages and refugee camps. The Israeli Defence Forces declared the cities they had entered "special closed military areas", imposing restrictions on, and at times completely barring, the movement of international personnel, including at times humanitarian and medical personnel as well as human rights monitors and journalists. As a result of these restrictions on movement, including the round-

[111] Middle East Quartet*, Report of the Middle East Quartet* (12 February 2016), at 5, available at http://www.un.org/News/dh/infocus/middle_east/Report-of-the-Middle-East-Quartet.pdf (visited 5 January 2017).
[112] Report of the Secretary-General prepared pursuant to GA resolution ES-10/10 (Report on Jenin), *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, GA (A/ES-10/186), 30 July 2002, § 14.
[113] Ibid., § 14.
[114] Ibid., § 23.
[115] Ibid., § 23.

> the-clock curfews that lasted with periodic liftings throughout the incursions, the civilian populations of the cities suffered severe hardships […].[116]

SC Resolution 1402, adopted one day after the start of "Operation Defensive Shield", called for the withdrawal of Israeli troops from Palestinian cities, including Ramallah.[117] Even so, Israel possesses the potential to re-enter the West Bank at will. And even though, as a result of Oslo II, the Palestinians attained a certain level of autonomy, especially as regards urban dwellings (Area A), they remain "subject to overall Israeli belligerent occupation".[118] Vital aspects of territorial management (e.g. security) were de facto retained by the occupant. For example, Israel conducts hot pursuits of Palestinian fugitives wanted on security charges in Area A of the West Bank at will:

> […] the Israeli army can therefore enter Area A whenever it pleases and carry out armed pursuits. Sometimes Israeli authorities inform the PA about it and request intel concerning some armed groups. The Israeli army withdraws its troops after arresting the fugitives it is pursuing, which is what happened in cities such as Hebron, Nablus, Jenin and Ramallah. [119]

Control retained over a territory after the armed forces have fully withdrawn is analysed next through the example of the Israeli disengagement from Gaza.

2.4. Control retained over territory after withdrawal: Gaza

What happens when the occupant fully withdraws from the territory but manages to retain control in various forms and degrees over the territory and its inhabitants? Would the territory still be considered occupied? How much and what kind of control is required for the retired occupying power to retain so that IHL (or some of its rules) is applicable? Factual elements such as the continuation of hostilities or the exercise of some degree of authority by the local authorities or by foreign forces during or after a phasing-out period may complicate a classification of the situation pursuant to

[116] Ibid., § 24.
[117] SC Res. 1402 (2002); see also SC Res. 1397 (2002).
[118] Y. Dinstein, *supra* note 46*,* at 17.
[119] A. A. Amer, 'Does Israel have Justification to enter West Bank's Area A?', *Palestine Pulse*, 14 April 2016, available at http://www.al-monitor.com/pulse/originals/2016/04/israel-hot-pursuits-westbank-incursions-security-pa.html (visited 5 January 2017).

IHL,[120] especially if it is disputed that occupation continues. This section deals with an example where the occupying troops withdraw from a territory yet retain elements of control over it from the outside. Such control varies not only in strength, but also as regards its aspects and the objects that it is wielded over. What this section will strive to unpack is whether this type of control means a state is still considered to be an occupant for the purposes of IHL or whether there are functional obligations of Israel under GC IV.

A background to the case at hand is in order. In 2005, Israel disengaged from the Gaza Strip. Its Disengagement Plan reads as follows:

> 3.1 The Gaza Strip
> 1) The State of Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") as detailed below.
> 2) Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces in the areas of Gaza Strip territory which have been evacuated.[121]

The language of the document insinuates that the vacated areas had been left under the Israeli military forces' control as exercised *peripherally*, that is via borderline control. The peace plan Israel elaborated also provided for the ability to retain significant control over the area, notwithstanding the fact that no Israeli boots and military equipment were present there. In other words, control was retained over Gaza in the form of an Israeli military presence *on the border*, by setting up a security fence, controlling the airspace over and the sea coast off the Gaza Strip, and by reserving itself the right to engage in self-defence at any time:

> B. The Security Fence:
>
> The State of Israel will continue building the Security Fence, in accordance with the relevant decisions of the Government. The route will take into account humanitarian considerations.
>
> 3. Security Situation Following the Relocation

[120] *31st International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of Contemporary Armed Conflicts, supra* note *2,* at 27.
[121] Israel Ministry of Foreign Affairs, Cabinet Resolution Regarding the Disengagement Plan, 6 June 2004, available at http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx (visited 5 January 2017).

> One. The Gaza Strip:
>
> 1) The State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.
>
> 2) The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.
>
> 3) The State of Israel reserves its fundamental right of self-defence, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.[122]

So, was the existing occupation actually terminated by the disengagement plan?[123] The 2007 Human Rights Council Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 considered that, while Israel withdrew its settlers and the military from Gaza in August 2005, the Israeli Government Representative's statements that the withdrawal had ended the occupation of Gaza were "grossly inaccurate":

> Even before the commencement of "Operation Summer Rains" [in summer 2006; NKM], following the capture of Corporal Gilad Shalit, Gaza remained under the effective control of Israel. This control was manifested in a number of ways. Israel retained control of Gaza's air space, sea space and external borders, and the border crossings of Rafah (for persons) and Karni (for goods) were ultimately under Israeli control and remained closed for lengthy periods. In effect, following Israel's withdrawal, Gaza became a sealed off, imprisoned and occupied territory […].[124]

However, in the Case of Gaber Al-Bassiouni v. Prime Minister,[125] the Israeli Supreme Court found that Israel was no longer an occupant of the strip:

> Since September 2005, Israel no longer has effective control over the events in the Gaza strip. The military government that had applied to that area was annulled in a government decision, and Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there. In such circumstances, the State of Israel does not have a general duty to look after the welfare of the residents of the strip or to maintain public order within the Gaza Strip pursuant

[122] Ibid.

[123] I. Scobbie, 'Gaza', in E. Wilmshurst (ed.), *International Law and the Classification of the Conflicts*, (Oxford: Oxford University Press, 2012) 280–315, at 296; see also S. Bashi and K. Mann, *Disengaged Occupiers: The Legal Status of Gaza*, Gisha, January 2007, available at http://www.gisha.org/userfiles/file/Report%20for%20the%20website.pdf (visited 5 January 2017).

[124] *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Human Rights Council, A/HRC/4/17, 29 January 2007, § 6, at 7.

[125] HCJ, Israel 9132/07 *Jaber Al-Bassiouni v. Prime Minister, Minister of Defence* (Judgment of 30 January 2008), § 12.

> to the entirety of the Law of Belligerent Occupation in International Law. Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip.

By contrast, Israel's continued control and ability to make its authority being felt in Gaza should not be forgotten either. Although Israel is not militarily present there, it is able to mobilize the IDF near the Gaza border in a short span of time. Taking this into account, the Arab League's Independent Fact Finding Committee does not view the military presence of a hostile army on the territory to be an indispensable element for establishing military occupation:

> The test for determining whether a territory is occupied under international law is effective control, and not the permanent physical presence of the Occupying Power's military forces in the territory in question. Judged by this test it is clear that Israel remains the Occupying Power as technological developments have made possible for Israel to assert control over the people of Gaza without a permanent military presence. Israel's effective control is demonstrated by the following factors:
>
> 1) Effective control of Gaza's six land crossings;
> 2) Complete control of Gaza's airspace and territorial waters;
> 3) Control through military incursions, rocket attacks and sonic booms: sections of Gaza have been declared "no-go" zones in which residents will be shot if they enter;
> 4) Control on the Palestinian Population Registry which determines who may reside in Gaza and who may leave and enter the territory.[126]

Even after its disengagement from Gaza, Israel and Hamas were involved in several armed conflicts. While it is impossible here to list all these incidents, the most significant ones include operations "Summer Rains" (2006), "Cast Lead" (2008–9), "Pillar of Defense" (2012) and "Protective Edge" (2014).[127] Regarding "Operation Cast Lead", which involved Israel's attempts to stop Hamas rockets being fired into Israel, the Goldstone Report commissioned by the UN Human Rights Council in 2009 observed that Israel's attacks were deliberately disproportionate and aimed to punish, humiliate and terrorize Gaza's civilian population, to radically diminish its local

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[126] *Report of the Independent Fact Finding Commission on Gaza: No safe Place,* presented to the League of Arab States, 30 April 2009, available at http://www.tromso-gaza.no/090501ReportGaza.pdf (visited 5 January 2017) § 403 at 102–3.

[127] J.-P. Filiu, *Gaza: A History* (Oxford: Oxford University Press, 2014), at 294ff. and 316ff.; International Crisis Group, 'No Exit? Gaza & Israel Between Wars', Middle East Report Nr. 162, 26 August 2015, available at https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/israelpalestine/no-exit-gaza-israel-between-wars (visited 5 July 2017).

economic capacity, and to force upon it an ever increasing sense of dependency and vulnerability.[128] Equally, the report affirmed that Israel, beyond all doubt and at all times during the mission, had exercised effective control (OL) over the Gaza Strip and that the circumstances of this control meant that the territory had remained under Israeli occupation.[129]

During "Operation Pillar of Defense",[130] the Israeli Army did not re-enter the territory,[131] save for instances of incursions.[132] Finally, in 2014, the IDF launched "Operation Protective Edge", equally aimed at stopping Hamas rockets flying into Israel. According to the Israeli authorities, Palestinian armed groups fired more than 15,200 rockets and mortars directed at Israel between 2001 and July 2014.[133] The

[128] *Report of the United Nations Fact Finding Mission on the Gaza Conflict,* Human Rights Council, A/HRC/12/48, 25 September 2009, § 1690 at 525. However, Judge Goldstone later retracted some of those findings, particularly with regards to the intentional targeting of civilians by Israel. Nevertheless, his three co-panelists did not endorse his retraction; R. Goldstone, 'Reconsidering the Goldstone Report on Israel and War Crimes', *The Washington Post*, 1 April 2011, available at https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.e640fa9c296f, and H. Jilani, C. Chinkin and D. Travers, 'Goldstone report: Statement issued by members of UN mission on Gaza war', *The Guardian*, 14 April 2011, available at https://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza (visited 5 January 2017).

[129] *Report of the United Nations Fact Finding Mission on the Gaza Conflict, supra* note 128, § 276, at 73.

[130] *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the de facto authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012*, Human Rights Council, A/HRC/22/35/Add.1, 6 March 2013, 1–17, §32–33 at 11–12.

[131] See also Israel Ministry of Foreign Affairs, Operation Pillar of Defense: IDF Updates, 22 November 2012, available at http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Operation_Pillar_of_Defense_Nov_2012-IDF_updates.aspx (visited 5 January 2017).

[132] R. Ahren, 'Israel says it 'fulfilled all its goals', while Hamas 'hails an exceptional victory'', *The Times of Israel*, 22 November 2012, available at http://www.timesofisrael.com/israel-says-it-fulfilled-all-its-goals-while-hamas-hails-an-exceptional-victory-pillar-of-defense-gaza/ (visited 5 January 2017).

[133] Amnesty International, *Unlawful and deadly rocket and mortar attacks by Palestinian armed groups during the 2014 Gaza/Israel conflict* (March 2015), 3–63, at 9, available at https://www.amnesty.org/en/documents/mde21/1178/2015/en/ (visited 5 January 2017).

stated objective of Israel was to stop the rocket attacks by Hamas and to destroy its capabilities to conduct such operations against Israel:

> After an initial phase focused on airstrikes, on 17 July 2014, Israel launched a ground operation, which it declared sought to degrade "terror organisations' military infrastructure, and […] [neutralize] their network of cross-border assault tunnels". A third phase began on 5 August, and was characterized by alternating ceasefires and ongoing air strikes. The operation concluded on 26 August, when both Israel and Palestinian armed groups adhered to an unconditional ceasefire.[134]

The operation resulted in seven weeks of heavy fighting and several Palestinian civilian casualties, countless Hamas rockets, and an Israeli military force ground invasion into northern Gaza and cross-border tunnel attacks. The IDF invasion, albeit brief,[135] was enough to destroy 32 tunnels into Israeli territory.[136]

Next to these armed conflicts, Israel also imposed *a siege* on Gaza after Hamas had come to power in June 2007, closing all border crossings between Israel and Gaza, thereby denying residents of Gaza almost every possibility of exit or entry, in addition to blocking the import and exports of goods.[137] Already in 2009, the Goldstone Report had flagged the following:

> […] the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt […]) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit[s] targets within the Gaza

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[134] *Human rights situation in Palestine and other occupied Arab territories,* UN Human Rights Council, A/HRC/29/52, 24 June 2015, at 6.

[135] J. Rudoren and A. Barnard, 'Israeli Military Invades Gaza, With Sights Set on Hamas Operation', *The New York Times*, 17 July 2014, available at http://www.nytimes.com/2014/07/18/world/middleeast/israel-gaza-strip.html?_r=0 (visited 5 January 2017).

[136] The Meir Amit Intelligence and Terrorism Information Centre at the Israeli Intelligence and Heritage Commemoration Centre, Operation Protective Edge – Update No 21 (As of 12:00 Hours, 6 August 2014), available at http://www.terrorism-info.org.il/ (visited 5 January 2017); see also Amnesty International, *Israel/Gaza Operation Cast Lead: 22 Days of Death and Destruction*, 2009, at 6, available at http://www.refworld.org/docid/4a4db45a2.html (visited 5 January 2017).

[137] HaMoked and B'Tsalem, *So near and Yet so far*, January 2014, at 8, available at http://www.btselem.org/download/201401_so_near_and_yet_so_far_eng.pdf (visited 5 January 2017).

> Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.[138]

In short, with the sole exception of the Rafah border crossing managed by Egypt,[139] Israeli military checkpoints control civilians going in and out of Gaza, not to mention fully controlling Gaza's maritime zone and airspace. According to the OCHA, access to basic healthcare, education, water, sanitation, and shelter remains severely restricted for Palestinians both in the Gaza Strip and the West Bank mainly due to the control that Israel keeps over the right to freedom of movement:

> The severe restrictions to freedom of movement, including the blockade on Gaza and movement restrictions between East Jerusalem and the rest of the West Bank, and within the West Bank, result in the fragmentation of the occupied Palestinian territory. Movement of people and goods between the Gaza Strip and the West Bank, including East Jerusalem, as well as within each of these two areas, remains restricted by a combination of physical (Barrier, checkpoints, roadblocks) and bureaucratic (permits, closure of areas) constraints.[140]

It is of course perfectly legitimate for a state to control who crosses its borders. Nonetheless, with Israel the difficulty arises in its control over Gaza's civilian population and their movement and particularly its control over Gaza's borders, with

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[138] *Report of the United Nations Fact Finding Mission on the Gaza Conflict, supra* note 128, § 278, at 74; see also *Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, Human Rights Council, A/HRC/15/50, 23 September 2010; *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, Human Rights Council, A/HRC/15/21, 27 September 2010.

[139] *Freedom of Movement, Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem*, Report of the Secretary General to the UN Human Rights Council A/HRC/31/44 (February 2016) at 9, 11–12, and 14; *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, Report of the Secretary General, A/70/421 (14 October 2015), at 7–8; see also 'Egypt Closes Rafah Border Crossing after 5 Day Opening', 20 November 2016, *Middle East Palestine PressTV*, available at http://www.presstv.ir/Detail/2016/11/20/494431/Gaza-Rafah-Israel-Egypt (visited 5 January 2017).

[140] OCHA, *2015 Humanitarian Needs Overview OPT*, 2014, available at https://www.ochaopt.org/documents/hno2015_factsheet_final_november_2014.pdf (visited 5 January 2017), at 3; see also *Human rights situation in Palestine and other occupied Arab territories*, UN Human Rights Council, A/HRC/29/52, 2015, at 4 and 17; *Freedom of Movement*, UN Human Rights Council, A/HRC/31/44, 20 January 2016, 1–16.

the sole exception of the Rafah crossing that is controlled by Egypt.[141] Let us assume that a student from Gaza is admitted for an LLM programme in country X, and s/he cannot leave Gaza due to either Israeli or Egyptian control of the respective border crossings. In both cases, because such a control is beyond mere border control since it concerns the border between two other entities, Gaza and country X, it affects all the other rights that are accrued from the freedom of movement.[142] Even from the perspective of the Gaza Strip, the Rafah border crossing only offers a partial relief to this process as it is up to Egypt to decide when and for how long to open it.[143]

Therefore, Israel's cooperation with Egypt on border and security matters becomes poignant. The 1979 peace treaty between Israel and Egypt has been in place for more than 30 years.[144] Based on the Agreement on Movement and Access, it was agreed that the Rafah crossing would be operated by the Palestinian Authority on the Palestinian side and by Egypt on the Egyptian side. In fact, Rafah is the only crossing point between the Gaza Strip and Egypt[145] and serves as a major route for Gaza Strip inhabitants to go abroad. The use of the Rafah crossing is restricted to Palestinian ID

[141] However, according to OCHA (OPT) data, in the year 2015 for instance barely 30,000 people in the whole year were allowed to cross the border at Rafah, down from 420,000 in 2012; see *Gaza Crossings: Movement of People and Goods, United Nations Office for the Coordination of Humanitarian Affairs: Occupied Palestinian Territory,* available at http://data.ochaopt.org/gazacrossing/index.aspx?id=2 (visited 5 January 2017).

[142] Such rights are, for instance, the right to access to education and healthcare, the right to work, or the right to freedom of association.

[143] For example, the Rafah crossing was closed by the Egyptian authorities in October 2014; see *Freedom of Movement*, UN Human Rights Council, A/HRC/31/44, 20 January 2016, at 9.

[144] For example, Binyamin Ben-Eliezer, Israel's former Minister of Defence, qualified the relationship as follows: "Egypt is not only our closest friend in the region, the co-operation between us goes beyond the strategic." See I. Kershner, 'Israeli Concern for Peace Partner', *The Courier*, 27 January 2011, available at http://www.thecourier.com.au/story/915535/israeli-concern-for-peace-partner (visited 5 January 2017). Israeli and Egyptian cooperation on border control in 2014 was marked by Egypt blocking all regular movement of goods at the Rafah crossing and severely restricting the movement of people through the border; see Human Rights Watch, *World Report 2015: Israel Palestine, Events of 2014*, available at https://www.hrw.org/world-report/2015/country-chapters/israel/palestine (accessed 10 June 2016).

[145] Agreed Documents on Movement and Access from and to Gaza, Agreement on Movement and Access (AMA) and Agreed Principles for Rafah Crossing, 15 November 2005, all available at http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/agreed%20documents%20on%20movement%20and%20access%20from%20and%20to%20gaza%2015-nov-2005.aspx (visited 5 January 2017).

card holders and exceptionally others, in agreed categories and with prior notification of Israel and approval of senior PA leadership. The PA must notify Israel 48 hours in advance of the crossing of a person in the agreed categories, and Israel has to respond within 24 hours with any objections it has, including the reasons for its objections.[146]

However, after Hamas came to power in Gaza in June 2007, Israel announced the freezing of the Agreement on Movement and Access.[147] The Palestinian Authority for its part was unable to reach the crossing due to Hamas' control of the Gaza Strip. Israel objected to opening the crossing on the grounds it was unable to monitor the persons passing through, and Egypt too closed the border since it was impossible to implement the AMA.[148] On 2 June 2010, Egypt re-opened the Rafah Crossing on its side of the border, permitting passage for humanitarian and medical needs as well as to students, foreign residents and Palestinians interested in visiting relatives abroad. Until mid-2013, about 20,000 exits were recorded at the crossing every month. In 2015, however, the average number of exits per month was only 1,205, and the crossing was operational for only 32 days (and of those, only on 25 was exit from Gaza possible).[149] Moreover, the Rafah crossing cannot be used for transportation of goods[150] and, because Israel administers the Palestinian population registry, "Israel retains indirect control over the issuing of Palestinian passports, which are required for travel through Rafah."[151]

As already discussed above (see section 2.3), the West Bank too is under Israeli sway. Israel does not allow for free movement between Gaza and the West Bank, although constituting – in theory – one single entity. Its control over Palestinians' movement between Gaza and the West Bank limits their travel to "exceptional humanitarian

[146] Ibid.
[147] See generally B'Tselem, *Gaza Strip, The Rafah Crossing,* 13 January 2016, available at http://www.btselem.org/gaza_strip/rafah_crossing (visited 5 January 2017).
[148] Ibid.
[149] See generally Gisha, *Gaza 2015: A few steps forward and several steps back*, April 2016, available at: http://gisha.org/UserFiles/File/publications/2015_annual_summary/summary_en.pdf (visited 10 June 2016).
[150] Gisha, 'The Gaza Cheat Sheet', 10 August 2016, http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf (visited 5 January 2017).
[151] Ibid.

cases".[152] Such a restriction gives rise to a "separation policy"; maintaining restrictions on travel between Gaza and the West Bank further fragments the Palestinian territory. This fragmentation policy is premised on two levels, geographic and legal, equipping Israel with sole control over the population's movement between the West Bank and Gaza:

> The first level is geographic: travel restrictions split the Palestinian territory into seven major geographical units between which movement is restricted: northern West Bank, center West Bank, southern West Bank, the Jordan Valley and northern Dead Sea, the "seam zones" or enclaves resulting from the separation barrier, east Jerusalem, and the Gaza Strip. Between the north, center and southern West Bank, movement is subject to checkpoints which delay and sometimes prevent travel. Travel between the seam zones and the rest of the West Bank is subject to an individual permit regime and in some cases intermittently staffed gates to allow access to agricultural lands beyond the barrier. […] Movement between Gaza and all other areas – West Bank, east Jerusalem, Israel – is extremely restricted […].
>
> Second, the fragmentation is enforced by a legal regime that categorizes Palestinians based on their residence, or lack thereof, as registered with the Israeli authorities […] and restricts movement accordingly. Israel controls the Palestinian population registry and generally does not allow Palestinians from Gaza to change their address to the West Bank, even if they have been living in the West Bank for decades. […]
>
> Palestinians whose addresses are listed in Gaza or the West Bank are generally not permitted to enter Israel or east Jerusalem. And Palestinians from the West Bank or east Jerusalem and Palestinian citizens of Israel are generally not permitted to enter Gaza.[153]

Because IHL application is determined based on the facts on the ground, wielding control over most border crossings and the general life of the territory, declaring no-go areas within the Strip, and maintaining maritime and air control must not be dismissed lightly. The question that can now be asked is whether all these forms of control *together* amount to effective control (OL). While lacking the element of military presence on the ground, it could be argued that the above given instances of control, when taken together, represent a developed version of effective control – more modern than that of Article 42 HR 1907, which in turn could be seen as a classic form of control that is tied to the physical presence of the hostile army in the territory

[152] S. Bashi and E. Diamond, *Separating Land, Separating People: Legal Analysis of Access of Restrictions between Gaza and the West Bank* (Gisha, June 2015), available at http://gisha.org/UserFiles/File/publications/separating-land-separating-people/separating-land-separating-people-web-en.pdf (visited 5 January 2017), at 5.

[153] Ibid., at 4–5; see also A. Khalil, 'Family Unification of Residents in the Occupied Territory' (European University Institute, Robert Schuman Centre for Advanced Studies 2009) 1–17.

(see Chapter II). In fact, the Gaza example demonstrates how this classical concept of effective control has considerably evolved due not least to the advancement of technology and states' military and technical capacities such as for example airborne surveillance and targeted killing through drones.[154] Thus, effective control (OL) can in principle be wielded by a military force without even being stationed on the territory, and not only over the territory *stricto sensu* but on any number of things that would have the cumulative effect of hindering a new authority or the ousted sovereign to exercise this type of control. For by definition, the effective control of the occupier includes the ability to impede anybody else to possess such control. Articles 42 and 55[155] of the HR 1907 (the latter regarding the occupant "only as administrator and usufructuary of public buildings") as well as Article 47 GC IV imply the territory to be free from a hostile force's control so that a new power is elected or the ousted sovereign can return. Until the full transfer of control over the territory and its inhabitants has not materialised, it will often be problematic to accept the statement that occupation has ended. In addition, being fully in control of the territory presupposes that the entity in control has sovereignty over its internal affairs (i.e. management of the territory via policing, air space and land and sea access).

Those who regard Gaza to be occupied may thus suggest that the control exercised by Israel today shows that it never actually terminated its occupation of Gaza. Accordingly, effective control (OL) is still exercised by the Israeli military and other relevant government agencies over Gaza, the only difference being that it is exercised from *outside* the Strip. For most forms of control in an armed conflict context, especially for airspace, land borders and maritime zone control, military forces are in fact used. But already Oppenheim was of the view that when the legitimate sovereign

[154] A. Gross, *The Writing on the Wall: Rethinking the international law of occupation* (Cambridge: Cambridge University Press, 2017), at 246–47; note that also in earlier times sieges were employed but served the purpose of conquering territory, whereas in the case of Gaza it arguably serves the purpose of putting political pressure on Hamas, see ibid., at 235 and 239.

[155] Art. 55 Regulations Concerning the Laws and Customs of War on Land (HR 1907): "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

was hindered from exercising its powers, and the occupant able to assert its authority by establishing an administration over a territory, "it matters not with what means, and in what ways, his authority is exercised."[156] Being in control of the territory and its inhabitants indicates that one is sovereign in deciding over what to extend one's own control.[157] Sovereignty in turn is born out of the process of self-determination, which should not be hindered:

> Setting imposed constitutionalism against the principle of self-determination presumes that 'among the inhabitants inter se' not only that some constitutional order persists but that sufficient constitutional order persists to permit an end of occupation.[158]

It is surely the case that Israel has lessened its control over Gaza, but neither Hamas nor Fatah have any full control. The Oslo Accords appear to have loosened selected restrictions on certain areas of governance, while they tightened Israel's control in other substantive policy areas.[159] Through a consensus provision in the joint committee system, Israel still holds a veto power over any law enacted, and Israel's capacity or willingness to undermine Palestinian self-governance through military means has not ceased.[160]

At the same time, Israel is unable to ensure law and order in the Gaza Strip as it is provided by Article 43 HR 1907 because of the tensions between itself and Hamas. These tensions are not at bay and expound a certain complexity in themselves: Hamas

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[156] L. Oppenheim, *International law: A Treatise,* Vol. 2 (7th edn., London/New York: Longmans Green, 1952), at 435.

[157] M. De Vattel, *The Law of Nations* (T & J.W Johnson, Law Book Sellers, 1844), § 205, at 98–99: Discussing the establishment of the nation implied possessing control was an important factor: "When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the empire or sovereignty over it at the same time with the dominion. For, since the nation is free and independent, it can have no intention, in settling in a country, to leave to others the right to command, or any of those rights that constitute sovereignty."

[158] P. Stirk, *The Politics of Military Occupation* (Edinburgh: Edinburgh University Press, 2012), at 220; see also Y. Dinstein*, supra* note 46, at 272: "In any event, any Occupying Power harboring the thought of prescription must today take into account the right of self-determination vested in the people inhabiting the occupied territory."

[159] Democracy and Governance Programme, Middle East Project, *Occupation Colonialism, Apartheid?*, Human Sciences Research Council, May 2009, available at: http://www.alhaq.org/attachments/article/236/Occupation_Colonialism_Apartheid-FullStudy.pdf (visited 5 January 2017), at 129.

[160] Ibid.

continuously fires rockets from Gaza into Israel and, because of this, Israel may be viewed as not having effective control (OL) over Gaza – for if it had, it would be able to stop Hamas' actions – and therefore not being an occupant. This view may have gained further grounds since Israel militarily disengaged from Gaza.

In sum, one consideration is that Israel's disengagement plan and its military withdrawal did not factually end its occupation. It might have brought an end nominally, under Article 42 HR 1907, because the element of the military presence on the territory vanished. Hence, Israel relinquishing effective control (OL) over the territory was seemingly satisfied. In reality, however, it is argued by the proponents of this view, that the Israeli military simply relocated and redeployed, controlling the land parameters of Gaza from outside, and continuing to maintain control over Gaza as listed above. It also seems that the Israeli government never actually allowed the independent functioning of the territory, where key state managerial powers such as border control, maintaining a population registry, or checking the movement of persons and goods in and out of Gaza would be fully passed on to either Fatah, Hamas or to any other political authority. What seems to have been created is a security envelope[161] in which Israel placed Gaza.

Thus, Scobbie suggests to view the situation in Gaza as an international armed conflict: "the occupation, and thus an international armed conflict, persists as the over-arching legal structure between Israel and Gaza, and in particular in relation to the obligations Israel owes to the Gazan population qua occupier."[162] At the same time, according to the author a *separate* conflict between Hamas and Israel exists. While primarily a NIAC, the conflict became international by the imposition of the blockade on Gaza on 3 January 2009 during "Operation Cast Lead".[163] Scobbie draws an analogy with declaring a blockade during a civil war: if a state proclaimed a blockade in relation to territory occupied by armed forces, this amounted to a recognition of the belligerent status of those forces, thus making the conflict an IAC.[164]

[161] G. Aronson, 'Issues arising from the implementation of Israel's disengagement from the Gaza Strip', 34 *Journal of Palestine Studies* (2005) 49–63, at 57.
[162] I. Scobbie, 'Gaza', *supra* note 123, at 300–301.
[163] Ibid., at 301–302.
[164] Ibid., at 304.

Hence, according to Scobbie the conflict between Israel and Gaza (or between Israel and Hamas) should be classified as international,[165] and the occupation of Gaza has never factually ended.

However, according to my reflection, the occupation of Gaza by Israel has ended after Israel's disengagement; nevertheless, the latter's obligations under the GC IV functional application persist. While the functional application of GC IV and its legal basis will be discussed more fully in Chapter V of this thesis, it is necessary here to briefly apply it to the Gaza Strip. As mentioned above, Israel continues to control the Strip through most of its land crossings, airspace and territorial waters, carrying out incursions, declaring "no-go" zones, and controlling who may reside in the Strip. The characteristic feature of a functional application of the GC IV is that obligations under this instrument towards protected persons apply not only before the situation of occupation is established (during the invasion phase, for instance), but also when some elements of effective control (OL) are retained. Accordingly, the functional application of the GC IV is to be construed as comprising obligations that are proportionate to the retained control and powers of the state whose armed forces are in the process of vacating or have already left the territory. In both cases, the applicability of GC IV obligations would then depend on the retained functions as well as on the exercised level of control; simultaneously, GC IV would not apply to those obligations and powers that were already handed over, for instance to a local government.[166]

The GC IV therefore provides varying levels of control that differ from Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977. It is submitted that there can be full or partial control; this in turn has effects on the types of obligations pursuant to the GC IV. Such a view echoes the ICRC's standpoint regarding Gaza, considering Israel to be bound "by obligations under occupation law that are commensurate with the degree to which it exercises control".[167] More generally, a functional ending of occupation is conceptualised as follows: according to the ICRC, when foreign forces

[165] Ibid., at 305.
[166] T. Ferraro*, supra* note 3, at 31.
[167] P. Maurer, 'Challenges to Humanitarian Action in Contemporary Conflicts: Israel, the Middle East and Beyond', 47 *Israel Law Review* (2014) 175–180, at 179.

withdraw from occupied territory but nevertheless hold on to authority or other important governmental functions that were once performed by them, the law of occupation may continue its application within the territorial and functional limits of such competences.[168] Furthermore, according to the ICRC, despite the lack of the physical presence of an occupant's army in the territory, the retained authority may amount to effective control for the purposes of the law of occupation. It can thus give rise to the continued application of the relevant provisions of IHL norms, implying that occupation is not fully over yet.[169] This is what is referred to by the ICRC as the "functional approach" to the application of occupation law. In fact, technological and military developments made it possible to exercise effective control (OL) over a foreign territory without unceasing military presence. What should be considered instead is the *extent of authority retained* by the foreign forces, as opposed to focusing exclusively on *the means* by which such authority is actually exercised.[170] The geographical proximity of two belligerent states could also enable the remote exercise of effective control (OL) – for example, a state that has relocated its troops outside the territory but is able to reassert its full control quite quickly.[171]

A considerable specificity is espied from the ICRC's stance on the functional ending of occupation. Yet, three additional points need to be made. First, the concept of *territorial and functional limits* should be construed as exercising control over certain parts of the territory, with certain tasks performed for the purposes of controlling that very territory. Second, the military presence of the occupant's army is no longer a sine qua non, at least not in the understanding of GC IV. Third, a difficulty arises in measuring and ascertaining the extent of authority retained by the outside power. Put differently, how is one to prove that the retained authority indeed triggers GC IV obligations? This question should be answered by establishing whether the retained authority is debilitating for the local authorities, its inhabitants, or any other power: Nobody else should be able, because of such retained authority from the outside, to

[168] ICRC, *International Humanitarian Law and the Challenges of contemporary armed conflicts* (ICRC, October 2015), at 12.
[169] Ibid.
[170] Ibid.
[171] Ibid.

fully control the territory, to entirely discharge the governmental functions, or to engage in other acts necessary for controlling the territory.

In the case of Gaza, the *extent of authority retained,* i.e. the intensity and degree of control retained by Israel from outside, may be termed *partial effective control* (OL) as neither Hamas, nor Fatah, nor any other power completely controls the Strip. Israel relinquished only some aspects of territorial control. Israel's military relocated from within Gaza to its outside but continues to control Gaza's borders by land, air and sea, not to mention controlling civilian access to basic needs (e.g. restricting their freedom of movement in and out from the Strip, policing no-go zones, Gaza being dependent on Israeli electricity,[172] as well as the import of goods).

It can thus be argued that the notion of *partial effective control* (OL) finds its roots in the functional application of GC IV (dealt with more extensively in Chapter V). For this purpose, Israel remains duty bound to discharge its obligations, even if it refuses to be bound by the GC IV in Gaza. According to the Israeli Supreme Court, Israel observes the humanitarian provisions of GC IV, and this for the purposes of the petition before them was "sufficient."[173] Israel's Supreme Court provided no further elaboration on why this was sufficient or in what way such a sufficiency was manifest.

It follows that there may be at least three types of obligations a state could be bound by:[174]

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[172] HCJ, Israel, 9132/07 *Jaber Al-Bassiouni v. Prime Minister, supra* note 125*,* §12; HCJ, Israel 201/09 and 248/09 *Physicians for Human Rights and others v. Prime Minister of Israel et al, and Gisha Legal Centre for Freedom of Movement and others v. Minister of Defense*, HCJ (judgment of 19 January 2009), § 14.

[173] HCJ, Israel, 769/02 *Public Committee Against Torture v. Governmen*t (a petition, 14 December 2006) § 20.

[174] On the issue of reparations in armed conflict, see B. Oswald and B. Wellington, 'Reparation for Violations in Armed Conflict and the Emerging Practice of Making Amends', in R. Livoja and T. McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Milton Park: Routledge, 2016) 520–537; Arts. 1, 28 and 31 of ILC Draft Articles on Responsibility of States; Case Concerning *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, judgment of 25 September 1997, §152, available at http://www.icj-cij.org/en/case/92; *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, judgment of 31 March 2004, §§ 119–120, available at http://www.icj-cij.org/en/case/128; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* judgment of 19 December 2005, §§ 259–261, available at: http://www.icj-cij.org/en/case/116 (all visited 15 July 2017).

1. Ongoing obligations. Here, there are two forms of obligations:
    a) *full* ongoing obligations in case of full effective control (OL) exerted by the occupant over the territory (when the criteria of Article 42 HR 1907, Common Article 2 GCs and Article 1 AP I 1977 are fully met), and
    b) *partial* ongoing obligations, which stem from partial effective control (OL), that is obligations commensurate to the level of control retained – when the state does not have full effective control (OL) but nevertheless exercises control over the territory from the outside.
2. Residual obligations. Even once occupation is over, i.e. when the former occupant does not have effective control (OL) over the territory anymore, some obligations such as the repatriation of POW[175] or civilian internees[176] still apply. After WWII, Russia for example did not repatriate all Japanese POWs and used them for forced labour in Siberia.[177]
3. Obligations raised based on past violations. Here, it is the responsibility of the former occupant to take certain actions that remains. While there are no ongoing obligations under IHL in this case, because of previous violations of IHL norms during occupation, there may still be some responsibility of the once occupant to take certain action. SC Resolution N 687 for example reaffirmed that Iraq was "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural

[175] With regards POW repatriation, Art. 118 of GC III does not allow for repatriation if there is no orderly plan concluded by the parties to the conflict. In case there is no such plan, the detained power can draw one up, see S. Krähenmann, 'Protection of Prisoner in Armed Conflict', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn., Oxford: Oxford University Press, 2013) 359–411, at 408.
[176] Art. 132 GC IV, Art. 75 (3) AP I 1977; see generally H.-P. Gasser and K. Dörmann, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn., Oxford: Oxford University Press, 2013) 231–320.
[177] Memory of the Reconciliation of Asia Pacific, *Official Statements: Russia*, available at https://www.gwu.edu/~memory/data/government/russia_pow.html (visited 5 January 2017); H. Kimura, *Distant Neighbours: Japanese-Russian Relations under Gorbachov and Yeltsin* (New York: Routledge, 2000), at 164–166; see also Tokyo (District Court) Claims for Compensation for forced labor in Siberia, *Tomoya Kanbayashi et al vs. Japan*, judgment of 4 April 1989, available at: https://www.icrc.org/ihl-nat.nsf/0/e9c4adb3e1d50d3ec125708f004e3712/$FILE/Case%20Law%20-%20Kamibayashi%20-%20Japan.pdf (visited 5 January 2017).

> resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."[178]

Chapter V of this thesis will continue to assess the functional application of GC IV in more detail through the concept of *partial ongoing obligations* of IHL. It will also look at IHRL application based on the level of control exercised by an occupant.

2.5 The ending of indirect (effective) control/occupation exercised by an intermediary

Already Chapter III dealt with the concept of indirect effective control, or occupation exercised by an intermediary, and the test to identify this type of occupation was provided. "Decisive influence" and IHL's own mechanism of control over an armed group (Article 4 GC III and Article 29 GC IV) were also discussed. This section now considers how can it be determined that this type of occupation has ended.

In Crimea (Ukraine), Northern Cyprus (Cyprus), Abkhazia and South Ossetia (Georgia), Nagorno Karabakh (Azerbaijan) and Transdniestria (Moldova), to date outside states have not relinquished control. Instead Russia, Turkey and Armenia all continue to exercise control over a part of the territory of another state through puppet regimes and subordinate military administrations, which by the same token makes them occupants (see Chapter III).

However, the test for assessing whether occupation based on indirect effective control has come to an end differs from the one which establishes it. Establishing indirect effective occupation comprises the following cumulative components: de facto local authorities/other organized armed groups opposed to State B under the overall control (SR/IHL) of State A; de facto local authorities/other organized armed groups physically stationed on the territory of State B, their presence being unconsented to by the territorial authority; an overpowered territorial authority, unable to exercise its governmental powers due to the military presence of dissident or other armed forces; and de facto local authorities/other organized groups exercising effective control (OL) over the territory in question.

[178] SC Res. 687 (1991), § 16.

More particularly, the relationship of overall control (SR/IHL) outlines[179] and devolves certain tasks from the intervening state to the local actors. Through such foreign state control over the de facto authorities/armed groups, the affected state loses its ability to effectively control the territory; additionally, any other opportunity for the inhabitants' voice to be heard through self-determination is reduced (see Chapter III). So long as such a relationship persists and the foreign state does not relinquish overall control (SR/IHL) over the proxy, the territory should be regarded occupied. George Kennan describes the relationship between the de facto authorities/armed groups and State A who wields overall control (SR/IHL) over them as follows:

> In internal matters, it has exactly the same independence as a dog on a leash. As long as the dog trots quietly and cheerfully at his master's side – and in the same direction – he is quite free; if he starts out on any tangents of his own, he feels the pull at once.[180]

Establishing the end of occupation based on indirect effective control would thus firstly depend on the outside state giving up overall control (SR/IHL) over the de facto authorities/other organized armed groups, who would then cease to be its pawn, i.e. they no longer act on its behalf. Once such overall control is no longer wielded, the armed group or de facto local authority maintaining effective control (OL) over the territory would not be associated with the foreign state anymore. The entity's actions will not, therefore, be attributed to the outside state. Until the territorial state regains control over its territory militarily by overpowering the armed group, or until through free and fair elections either the armed group, the de facto authority, or another entity becomes the legitimate government (see Chapter III), there would be a

[179] Such control may mean issuing tasks and directives for the territorial management and foreign policy, the third state's armed forces providing for the security of the borders and performing police functions for maintaining law and order, in addition to conducting detentions, catering for the civilians' humanitarian needs, financing and paying the wages not only of the proxy regime's members, but also of its governmental entities, in addition to having high-profile military officials holding decisive positions in the proxy administration.

[180] Kennan speaks about the so called independent government of Slovakia under Axis domination just before WWII would commence; G. F. Kennan, *Report to the State Department on about 1 May 1939: From Prague After Munich* (Princeton: Princeton University Press, NJ 1968), at 135.

situation of a NIAC, provided the criteria of common Article 3 GCs and AP II 1977 are met.[181]

The ending of indirect effective control based occupation may be also claimed by the occupant when setting up a new government or a state. However, occupation in this case only ends if the new government is *not* a subordinate to the former occupant. By contrast, the approach of conventional IHL is that Article 47 GC IV makes the occupant duty bound by the GC IV as a whole even if it has made changes in the institutions or government structures of the occupied territory, concluded agreements with the authorities of the occupied territory, or annexed the whole or parts of the territory (see also Chapter III). According to Pictet, especially concluding agreements with the occupied authorities is a "subtle" way to escape one's obligations under IHL, applying it to cases where the lawful authorities in the occupied territory have concluded a derogatory agreement with the occupying power as well as to cases where the occupant has installed and maintained a government regime.[182] In this vein, the spirit of Article 47 GC IV enables the continued application of the GC IV, affording protection notwithstanding any covert action the occupant might engage in.[183] Even the occupant declaring the formation of a new government would not mean that occupation is over.

The final way in which occupation based on indirect effective control can end is through the loss of effective control (OL) over territory by the armed group/de facto local authorities. Thus, while the outside state may continue to wield overall control

[181] On AP II 1977 and the element of the territorial control, see S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), at 185–187. The author in this regard notes at 187: "The essential point is that it is the ability to carry out sustained and concerted military operations and to implement the Protocol that is crucial feature of the Protocol and not the quantum of territory controlled by the armed group. The territorial control is an enabling element for the operations and the implementation of the Protocol." Additionally, see D. Péclard and D. Mechoulan, *Rebel Governance and Politics of Civil War* (Berne: Swisspeace, 2015), at 5–32, available at https://www.files.ethz.ch/isn/191183/WP_1_2015.pdf (visited 5 January 2017); and A. Arjona, N. Kasfir and Z. Mampilly (eds), *Rebel Governance in Civil Wars* (New York: Cambridge University Press, 2015).

[182] J. Pictet (ed.), *supra* note 14, Art. 47, at 274–275.

[183] J. Grinion, 'The Geneva Conventions and the End of Occupation', in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 1575–1596, at 1587.

(SR/IHL) over the group or entity, because the latter is – for whatever reason – not exercising territorial control anymore, occupation has ended.

2.6. Remaining based on a UN SC Mandate

This section discusses the relationship between UN SC Mandates and the termination of occupation. It starts with a more general question, namely whether the SC should be involved in categorizing situations as IAC or NIAC at all, only to then narrow the focus down to two issues: first, the UN SC deciding the end of occupation; second, UN endorsed control, i.e. an occupant remaining on the territory based on a UN SC resolution. These issues will be discerned from the example of Iraq in 2003–04 and UN SC Resolution 1546.

2.6.1 The UN SC

This subsection tackles a general question regarding the SC's powers: what provides the legal basis for the SC to categorize armed conflicts? More specifically, can the SC expressly state a situation to be either an IAC or a NIAC?

In order to answer these questions, some basic actualities should first be recalled. The SC is given primary responsibility by the UN Charter to maintain and re-establish international peace and security.[184] It is intended to operate as an efficient UN executive organ with assigned political functions[185] and consists of five permanent members with veto power: China, France, Russia, the UK and the USA. Their decisions (as well as those of most other SC members) may be said to be based on political benefits as opposed to the objective criteria relating to non-compliance.[186] The SC

[184] R. Kolb, *An Introduction to the Law of the United Nations* (Portland: Hart Publishing, 2008), at 133; M. N. Shaw, *International Law* (6th edn., Cambridge: Cambridge University Press, 2012), at 1206; see generally V. Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions* (Leiden: Martinus Nijhoff Publishers, 2004).
[185] See *Case Concerning Military and Paramilitary activities in and Against Nicaragua* (Jurisdiction) (Nicaragua v. USA), judgment of 26 November 1984, §§ 94–95, available at http://www.icj-cij.org/en/case/70 (visited 15 July 2017).
[186] M. Sassòli and Y. Issar, 'Challenges to International Humanitarian Law', in A. von Arnauld et al. (eds.), *100 Years of Peace Through Law: Past and Future* (Berlin: Duncker and Humbolt,

acts under Chapters VI and VII of the UN Charter, determining the existence of any threat to peace, breach of peace, or act of aggression (Article 39 UN Charter),[187] and it makes recommendations or decides what measures are needed pursuant to Articles 41 and 42 of the UN Charter to maintain or restore international peace and security (see also Chapter II, section 3).[188]

The SC's interaction with international law is two-dimensional. The first dimension is represented by those SC resolutions where its support for the validity and enforcement of relevant international norms and instruments is advanced – such as subscribing to and upholding the non-interference in internal affairs or respect for humanitarian law and human rights.[189] The second dimension is represented by resolutions via which the SC purports to impact, qualify or modify legal positions under international law.[190] The impact of SC resolutions is most salient in combination with Articles 103 and 25 UN Charter.[191] Yet the resolutions cannot override the *jus cogens* norms of international law; in fact, any "SC decision in conflict with a norm of *jus cogens* must necessarily be without effect".[192]

In general, UN SC resolutions can entail three types of legal effects: 1) creating obligations, rights and powers (substantive effects); 2) making determinations of facts

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2015) 181–235, at 213; see additionally H. Kelsen, *Collective Security Under International Law* (5th edn., New Jersey: The Law Book Exchange, 2009), at 39–49.

[187] D. Akande, 'The International Court of Justice and the Security Council: The Political Organs of the United Nations', 46 *International and Comparative Law Quarterly* (1997) 309–343, at 314–315.

[188] Art. 39 UN Charter; V. Gowlland-Debbas 'Security Council Enforcement Action and Issues of State Responsibility', 43 *International and Comparative Law Quarterly* (1994) 55–98; V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Dordrecht: Martinus Nijhoff Publishers, 1990) at 437–441 and 459–460.

[189] A. Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review', in A. von Bogdandy and R. Wolfrum (eds.), 11 *Max Planck Yearbook of United Nations Law* (2007) 143–195, at 145.

[190] Ibid.

[191] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Arial Incident at Lockerbie* (Libyan Arab Jamahiriya v. USA), provisional measures order of 14 April 1992, § 42 http://www.icj-cij.org/en/case/89 (visited 15 July 2017).

[192] D. Akande, *supra* note 187, at 322; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia 1993)*, Request for the indication of provisional measures, order of 8 April 1993, provisions m and o at 6, and Separate Opinion of Judge Lauterpacht, §§ 98–104, both available at http://www.icj-cij.org/en/case/91 (visited 15 July 2017).

(something that is true) on legal situations and/or stating that certain obligations were violated, thus triggering the substantive effect (causative effect); and 3) prescribing how and when the substantive effects operate (modal effect).[193] As will be seen, the capacity of the UN SC to determine facts on legal situations and whether certain obligations were violated is of importance. The UN SC has also opined on the formation of new states or delineated the territorial boundaries of a state in the context of an armed conflict. It is, however, debatable whether the SC has a right to abrogate, delineate or alter a state's territorial borders:

> The Security Council might, after making the necessary determinations under Article 39 of the Charter, order occupation of a country in order to restore peace and security, but it could not thereby or as part of the operation, abrogate or alter territorial rights […]. It was to keep the Peace that the SC was set up not to change world order.[194]

One author considers that Chapter VII of the UN Charter does not expressly grant power to the SC to abrogate, delineate or alter a state's territorial borders. The UN SC's capacity can be inferred from the wording of Article 41 of the Charter, which grants the SC exceptionally broad powers in order to maintain peace and security.[195] Based on Chapter VII and with the aim of strengthening international peace, certain SC resolutions have declared regimes as violating norms of non-discrimination on the grounds of race with regards to not recognizing the declaration of independence of Southern Rhodesia.[196] The SC has also pronounced itself on the boundaries of contested territories, thus overlooking the principle of the territorial integrity of states and altering territorial boundaries, for instance in the Iraq-Kuwait Boundary Demarcation resolution (where the SC demanded that Iraq and Kuwait respected the

[193] M. Divac Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of ICJ', 16 *European Journal of International Law* (2006) 879–906, at 881–882.
[194] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Dissenting Opinion of Sir Judge Gerald Fitzmaurice Namibia Advisory Opinion, § 115, available at: http://www.icj-cij.org/en/case/53 (visited 15 July 2017).
[195] M. Goodwin, 'From Province to Protectorate to State: Sovereignty Lost, Sovereignty Gained?', in J. Summers (ed.), *Kosovo: A Precedent?* (Leiden: Martinus Nijhoff Publishers, 2011) 87–108, at 99–102; *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion of 11 April 1949, § 182, available at http://www.icj-cij.org/en/case/4 (visited 15 July 2017).
[196] SC Res. 216 (1965); SC Res. 217 (1965).

inviolability of the boundaries and allocated islands as per the "Agreed Minutes between the state of Kuwait regarding the restoration of Friendly Relations, Recognition and Related Matters"[197]) and adopting a resolution on the partition of Palestine (implementation of the GA resolution).[198]

What is poignant about all these resolutions is that the UN SC usually avoids categorising armed conflicts as either IACs or NIACs and uses general terms, for instance: conflict or "parties to the conflict". Sometimes the existence of an armed conflict is merely implied by the text of the resolution. The SC also does not employ factual tests of IHL or cite the Nicaragua or Tadić case to arrive at the conclusion that there is a NIAC or IAC. In this manner, the resolution on the situation in Darfur employed the term "parties to the conflict"; [199] the resolution regarding Syria called for all parties in Syria "including the opposition, immediately to cease all armed violence in all its forms";[200] and in the case of Ukraine, the SC expressed its grave concern at "the tragic events and violence in eastern regions of Ukraine".[201] What can also be observed is that when it comes to identifying situations as military occupation, the SC has indeed explicitly and directly employed this term. Thus the UN SC resolution on Namibia considered the "continued occupation of Namibia by the government of South Africa" as a defiance of relevant resolutions of the UN and the UN Charter.[202] With regards to Israel, the SC explicitly referred to it as an occupant and deemed the Palestinian and other Arab territories occupied since 1967.[203] And in the context of the Nagorno Karabakh conflict, the SC adopted at least four resolutions in 1993 considering the Azerbaijani territories to be occupied by Armenian forces.[204]

Not all the resolutions relating to occupation, however, employ this term – especially not when the political interests of one of the permanent members are at stake. In the case of Georgia, during the SC meeting Russia blocked a draft resolution concerning

[197] SC Res. 687 (1991).
[198] GA Res. 181 (II), 29 November 1947, SC Res. 42 (1948); M. Goodwin, *supra* note 195, at 100.
[199] SC Res. 1593 (2005).
[200] SC Res. 2042 (2012).
[201] SC Res. 2202 (2015).
[202] SC Res. 276 (1970).
[203] SC Res. 446 (1979).
[204] SC Res. 822 (1993), SC Res. 853 (1993), SC Res. 874 (1993), SC Res. 844 (1993).

the 2008 August war which called on Russia to immediately withdraw from Georgian territories;[205] the concept of "the territorial integrity of Georgia within its internationally recognized borders" was also rejected by Russia, regarding this principle to be obsolete since the Moscow-backed breakaway regions Abkhazia and South Ossetia would refuse to be part of Georgia.[206]

The capacity of the UN SC to deem and proclaim a situation of occupation to be over is discussed next. The broader topic of the SC determining that armed conflicts have come to an end from the perspective of IHL lies however outside the scope of this thesis.

2.6.2. Iraq

There was no dispute that, between April 2003 and 28 June 2004, Iraq was occupied in light of IHL.[207] In Resolution 1546, the UN SC welcomed the fact that occupation would end at a certain point in time by "looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004."[208] Yet, something is amiss in the SC's stance, for one ought to question whether the situation after 30 June 2004 is equivalent to the assumption of full authority by the Iraqi government. That is, was the CPA's effective control (OL) over Iraq, including its internal affairs, genuinely relinquished?

[205] 'Russia Blocks draft Security Council resolution on Georgia Crisis', *CBC News*, 20 August 2008, available at http://www.cbc.ca/news/world/russia-blocks-draft-security-council-resolution-on-georgia-crisis-1.725452 (visited 5 January 2017).
[206] 'Russia blocks U.N. Security Council draft on Georgia', *UNIAN*, 20 August 2008, available at http://www.unian.info/world/138913-russia-blocks-un-security-council-draft-on-georgia.html (visited 5 January 2017); UN SC Press Release, 'Security Council Holds Third Emergency Meeting as South Ossetia Conflict Intensifies, Expands to other Parts of Georgia' (SC 9419), 10 August 2008, available at http://www.un.org/press/en/2008/sc9419.doc.htm (visited 5 January 2017).
[207] A. Roberts, 'The End of Occupation: Iraq 2004', 54 *International and Comparative Law Quarterly* (2005) 27–48, at 30.
[208] SC Res. 1546 (2004).

As pointed out by Roberts, Resolution 1546 mentions "sovereignty" eight times.[209] However, the question remains whether the new government of Iraq was actually sovereign. Roberts views sovereignty to mean "the idea of a situation in which there is a centre of decision-making power over a specific territory, not subject to a higher sovereign."[210] This would, in essence, also mean that the government ensures by itself the security of its territory, in addition to having a parliament, which incidentally was not at that time elected in Iraq. Moreover, for its survival and security the Iraqi government clearly depended on foreign assistance and military presence. Attention should also be given to the operative paragraph of Resolution 1546, where the UN SC, while endorsing the formation of the new Iraqi government, at the same time keeps it on a tight leash in terms of its future actions: The SC

> […] Endorses the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq *while refraining from taking any actions affecting Iraq's destiny* beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below.[211]

This temporal constraint on the substance of possible decisions taken by the interim government violates the very idea of a sovereign government, which as stated above implies the absence of any higher authority. A second point to be given consideration is the establishment of the MNF, composed of the same forces that were previously occupants, tasked to ensure security and to fight the remaining enemies in addition to conducting internments.

Stating that the Iraqi occupation was in fact never over, based on Resolution 1546, can be challenged by arguing that the MNF's presence in Iraq was requested by the new Iraqi Government. Like the word "sovereignty", the word "request" is equally frequently used throughout Resolution 1546. This is suggestive of the SC's attempts to justify the presence of the MNF and possibly restore the good name of the USA and its Coalition. Hence, the MNF was mandated to

> […] have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq […] inter alia, the Iraqi request for

[209] A. Roberts, 'The End of Occupation', *supra* note 207, at 39.
[210] Ibid.
[211] Ibid., at 42 (emphasis added NKM).

> the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism […].[212]

Contributing to the maintenance of security and stability with all necessary measures can encompass numerous tasks. In turn, discharging any such tasks is based on a tight and thorough control of territory. In fact, the MNF's outlined duties mirror the language of Article 43 HR 1907, save for the fact that the SC decreed occupation would end in Iraq:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[213]

In other words, the SC declared Iraq to be no longer occupied and then established the MNF with functions akin to those of an occupying army. In this context, Schmitt argues that a non-international conflict predated the transfer of sovereignty of 28 June, and that armed conflicts may be horizontally mixed, that is a NIAC and an IAC might coexist.[214] Furthermore, there was no situation of occupation after the SC's actions. Roberts, on the other hand, considers this to be the case, since while "clearly not a case of occupation coming to an end when an occupying power withdraws from the territory […] 28 June 2004 marks an important stage on the road to the full resumption of Iraqi sovereignty, not arrival at that destination."[215]

So, did the Iraqi occupation continue even after the SC had declared it to have ended, under its own sanctioned effective control (OL) as exerted by the MNF? In such a case, it should be assessed whether the effective control (OL) over territory was fully passed on to the new Iraqi government and whether the presence of the MNF was requested by the latter without any third-party intervention. That the Iraqi government unaffectedly consented to such a presence in this regard is germane. If either of the two criteria had been established, the occupation would indeed have been over. Yet

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[212] SC Res. 1546 (2004) § 10; on conducting internments, see B. J. Bill, 'Detention Operations in Iraq: A View from the Ground', in R. A. Pedrozo (ed.), *The War in Iraq: A Legal Analysis* (New Port: Naval War College, 2010) 411–455.

[213] Art. 43 Regulations Concerning the Laws and Customs of War on Land (HR 1907).

[214] M. N. Schmitt, 'Iraq (2003 onwards)', in E. Wilmshurst (ed.), *International Law and the Classification of the Armed Conflicts* (Oxford: Oxford University Press, 2012) 356–386, at 371–372.

[215] A. Roberts, 'The End of Occupation', *supra* note 207, at 46.

the factual circumstances in the case of Iraq suggest otherwise. The tasks the MNF was expected to carry out at that time also have to be taken into account. For as long as the coalition forces were engaged in combat actions to extinguish pockets of resistance as well as "exercising at least some administrative authority in certain areas of Iraq, the occupation has come to a close only 'notionally'."[216] So when the occupation of Iraq was formally declared to be over, *neither* of the two conditions had in fact materialized to substantiate the SC's position – neither had effective control (OL) over territory and its inhabitants been relinquished, nor had there been an actual transfer of governing authority to the Iraqis:

> […] the coalition forces remained in direct and effective control of the territory and the population, as "Multinational Forces operating in Iraq pursuant to […] Resolutions 1511 and 1546" […]. The Interim Iraqi Government, whose members were designated by the CPA, now formally in charge, derived its authority from the CPA orders […]. In fact, during the weeks and even days leading up to the formal transfer of authority, the CPA continued to issue extensive modifications to the Iraqi Law that the Iraqi authorities would have no power to rescind for many months. Although the very last CPA Order used the terms "transfer of full governing authority" or "inherit full responsibilities" to describe a seeming delegation of powers from the CPA to the interim Iraqi Government, it effectively insulated the CPA-made law from change by the interim Iraqi administration.[217]

The case of Iraq provides an example of UN SC endorsed effective control (OL) of territory. The SC's previous account of adopting resolutions on various armed conflicts suggests that such a phenomenon has emerged gradually, commencing with the SC *not* endorsing effective control (OL) over certain territories. The SC, for example, demanded the withdrawal of South Africa from Namibia in its resolutions.[218] Resolution 276 (1970) declared the continued presence of South African officials to be illegal, in addition to pronouncing South Africa's occupation of Namibia to have grave consequences for the rights and interests of the people of Namibia.[219] The language of this resolution submits that the UN did not endorse South African control of the territory. The ICJ in the Namibia Advisory Opinion also found that while the General Assembly had the power to terminate the mandate, the withdrawal of the

[216] Y. Dinstein*, supra* note 46, at 273.
[217] E. Benvenisti, *The International Law of Occupation*, *supra* note 104, at 255.
[218] See SC Res. 385 (1976); SC Res. 435 (1978); C. Thornberry, 'Namibia', in D. M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (London: Lynne Rienner Publishers, 2004) 407–436.
[219] SC Res. 276 (1970).

illegal administration could only have been enforced by the SC through a binding resolution.[220] As seen, in its resolutions the SC dealt similarly with the Kuwait crisis of 1990.[221] SC Resolution 678, adopted after Iraq had invaded and occupied Kuwait in 1990, authorized all UN Member States cooperating with the government of Kuwait to use "all necessary means" to ensure that Iraq would withdraw.[222] Similarly, NATO's intervention in Kosovo – not authorized by the SC – culminated in the SC adopting Resolution 1244 (1999), approving the international security presence in Kosovo.[223] This can be interpreted as a retrospective approval of the use of force against (the former) Yugoslavia, in addition to raising wider issues of jus ad bellum outside the scope of this thesis. It also reveals the SC developing a notion of SC-endorsed effective control (OL) over territory exercised by foreign states, coalitions thereof, or international organizations. Such points are a matter of jus ad bellum: whether occupation X has come about through lawful or unlawful use of force. However, this question needs to be kept apart from that establishing the *de facto* existence of occupation (see Chapter II, section 2).

In sum, the purpose of the offered analysis is that no matter if the SC does or does not endorse the existence or termination of military occupation, the test for determining the beginning and ending of territorial control for the purposes of military occupation is still a factual one. In other words, the SC dealing with the legality of attained control does not change the fact that one is in effective control (OL) of a given territory and hence an occupant. Sassòli therefore rightly considers that Resolution 1546 overrides the rules of IHL under UN Charter Article 103 and views it to be

> […] regrettable and a dangerous precedent to make thus the (end of) the application of IHL dependent on criteria which are at best related to the desired legitimacy of the new government and at worst to the needs of a US administration in an election year, as both considerations blur the fundamental

[220] E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004), at 35.
[221] On the Iraqi-Kuwait crisis generally, see *supra* note 67; also K. Manusama, *The United Nations Security Council in the Post-Cold War Era* (Leiden: Martinus Nijhoff Publishers, 2006), at 62–75.
[222] SC Res 678 (1990), §2; see also SC Res. 660 (1990), § 2.
[223] SC Res. 1244 (1999), § 5, § 8 and § 19.

> separation between jus ad bellum (the rules on the legitimacy of the use of force) and jus in bello (the rules on how force may be used, which comprise IHL).[224]

Resolution 1546 is the only one of this kind in the record of the SC,[225] and is unlikely to be repeated anytime soon, most probably due to the veto power vested with the SC's permanent members and their politically dominant interests.[226]

Conclusion

This Chapter has identified the test for assessing the end of control over territory for the purposes of determining the end of military occupation. It can now be concluded that occupation has ended if at least *one* of the following three conditions is met:

1. State A's military forces are no longer physically present on the territory (they have either wilfully left the territory or have been forcefully ejected).
2. State A's military forces are not in a position to or wilfully do not exercise authority over the total territory or parts of State B anymore.
3. State A's military forces are no longer hostile to State B, as their presence has been consented to by the latter.

The transfer of effective control (OL) over the territory and its inhabitants may also serve as an indicator that occupation has terminated; however, such a transfer should not be bogus and the previous occupant should not interfere with the governmental functions of the new power. Only such non-interference would confirm that the former occupant has actually terminated its own effective control (OL) over the territory.

The above provided test does not seem to present any difficulty. However, contemporary military occupations coming to an end may not be fitted easily. This is either because the occupant's forces have physically left the territory but still retain elements of control over it from the outside (as in the case of Gaza); the occupying state has set up a puppet regime, or uses an armed group, over which it wields overall control (SR/IHL) and which in turn exercises effective control (OL) over territory; or

[224] M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *European Journal of International Law* (2005) 661–694, at 684.
[225] Y. Dinstein, *supra* note 46, at 273.
[226] M. Sassòli and Y. Issar, *supra* note 186, at 213.

because the UN SC precipitately declares the end of occupation. In this context, at least six forms of relinquishing control over territory have been identified: the complete end of control over territory, the temporary or partial loss of control over parts of the territory, the potential for regaining control, control retained after withdrawal, the ending of indirect effective control, and remaining based on a UN SC mandate.

Through an analysis of the case of Gaza, this Chapter also revealed that relinquishing effective control (OL) over territory does not discharge the (former) occupant from its obligations under GC IV 1949. This is because under a functional approach, GC IV obligations apply not only in times of military occupation, but they can also do so before occupation materialises, as well as after it has ceased. More particularly, state obligations are retained commensurate to the level of control still exercised by the outside state. However, the functional application of GC IV should not be confused to mean a situation of military occupation as such. There are thus three types of obligations the outside power could continue to be bound by:

1. Ongoing obligations, with two subtypes: (a) full ongoing obligations in case of full effective control (OL) exerted by the occupant over the territory; and b) partial ongoing obligations which flow from partial effective control (OL) (i.e. when the foreign state does not have full effective control (OL) but still exercises control over the territory from the outside);
2. Residual obligations: when occupation is over, i.e. the former occupant no longer has effective control (OL) over the territory; and
3. Obligations based on past violations: when the responsibility of the once occupant to take a certain action remains intact.

Lastly, the UN SC declaring a situation of occupation to be over was addressed and certain concerns were voiced in this regard. In this context, the facts on the ground have to be assessed impartially and their interpretation should be devoid of political considerations, e.g. the attempt to clear certain states from pejorative and unpalatable terms such as “unlawful invader” or “occupant”.

Chapter V:
The Effect of Control on Substantive Obligations

Introduction

This last Chapter of the thesis focuses on the occupying power's substantive obligations as envisaged by IHL and IHRL, triggered based on the level of control exerted by a state at a specific point in time, i.e. in a concrete situation. Pursuant to IHL, a state may exercise control as defined by Article 42 HR 1907 in one case (*effective control (OL)*, see Glossary) and control as understood by GC IV 1949 in another (*protected persons*, see Glossary). In other words, the state might also exercise a type of control that does not amount to a situation of military occupation, for example during the invasion phase.[1] It may also retreat from the territory or lose swathes of it fully, temporarily, or partially (see Chapter IV). All this provides the ground to examine a state's substantive obligations in view of IHL, i.e. obligations triggered commensurate to the level of control that this state exercises in a specific situation.

At the same time, this Chapter aims to identify whether occupation law and IHRL share a common test for triggering obligations. It will be seen that while the control tests for occupation law and for IHRL's extraterritorial application are based on common elements (control over persons and control over territory), important differences can still be noted. At the same time, military occupation's test of effective control (OL) appears to automatically trigger human rights obligations,[2] since when a state's military force asserts effective control (OL) over a foreign territory, it automatically assumes the responsibility over it which previously rested under the ousted sovereign's control. However, control for human rights purposes does not automatically make a state an occupant.

[1] M. Sassòli, 'A Plea in Defence of Pictet and the Inhabitants of Territories under Invasion: The case for the applicability of the Fourth Geneva Convention during the invasion phase', 94 *International Review of the Red Cross* (2012) 42–50, at 43.
[2] N. Lubell, 'Human Rights Obligations in Military Occupation', 94 *International Review of the Red Cross* (2012) 317–337, at 334.

The Chapter starts by exploring the substantive obligations of a state in times of military occupation as understood by IHL. After that, the particulars of states' contextual obligations pursuant to IHRL will be addressed. The last section briefly illustrates the inter-application of IHL and IHRL in enquiring whether they can overpower one another.

1. The occupying power's substantive obligations from the perspective of IHL

While IHRL primarily articulates the rights of persons (emphasising individual rights),[3] IHL establishes obligations of states with regards to extending protection to those concerned as well as defining what states can or cannot do whilst at war. An occupying power's substantive obligations are not as extensive as in IHRL and can be divided into obligations vis-à-vis the displaced sovereign and obligations towards civilians. An occupant's substantive obligations include the respect of private property – it can for example not be confiscated by the occupant. The destruction or seizure of enemy property is also prohibited, unless absolutely required by military necessity during the conduct of hostilities. The occupant must not acquire ownership of immovable public property in the occupied territory, since it only acts as a temporary administrator, but it can make use of public property such as natural resources in accordance with the usufruct law.[4] As regards the welfare of the civilian population, GC IV lists a cohort of rights, ranging from the provision of food supplies and hygiene to the running of hospitals, the internment and welfare of civilians, in addition to classifying torture and inhumane treatment as grave breaches of the GCs.[5] To better understand a state's

[3] C. Lekha Sriam, O. Martin-Ortega and J. Herman, *War, Conflicts and Human Rights: Theory and Practice* (2nd edn., New York: Routledge, 2014), at 51.

[4] Practice Relating to Rule 51, Public and Private Property in Occupied Territory, Section B: Immovable public property in occupied territory, Customary IHL, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule51_sectionb (visited 29 January 2017).

[5] H. P. Gasser and K. Dörmann, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn., Oxford: Oxford University Press, 2014) 231–320, at 234–235; see also *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967,* UN Doc. A/HRC/25/67, 13 January 2014, § 55, at 16, § 62–63, at 17, and § 78, at 20; S. Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc

substantive obligations, the threshold of control found in GC IV should thus be probed further.

1.1 Forms and degrees of control in GC IV

This section centres on the element of control as a trigger for the application of GC IV (see also Chapter IV). For this purpose, control can be wielded not only over territory, but also over persons, enhancing the applicability of GC IV as opposed to Article 42 HR 1907. According to Sassòli, the "concept of control could be interpreted in a functional way, with a different threshold for different rules",[6] meaning that while a situation may not directly be one of occupation, some rules from GC IV would still be applicable:

> […] under such a functional understanding of occupation, an invaded territory could at a certain point in time already be occupied for the purpose of the applicability of Article 49 (prohibiting deportation), but not yet occupied for the purpose of the applicability of Article 50 (on education).[7]

To take one step back, it should be recalled that a significant difference can be identified in the GC IV and HR 1907 application thresholds. GC IV centres on the protection of civilians, possessing a lower threshold of application. That is, as soon as a protected person finds his-/herself in the "hands of a Party to the conflict or Occupying Power", GC IV starts to apply. On the other hand, Article 42 HR 1907, which concerns establishing authority over territory (effective control (OL)) and the powers and obligations of the occupant along with its relationship with the ousted sovereign, contains more stringent application criteria (see Chapter II). Therefore, there is a difference not only in the *aim* of the two instruments, but also in the *application*

Tribunals', 18 *Leiden Journal of International Law* (2005) 541–556; L. D. Beck and S. Vité, 'International Humanitarian Law and Human Rights Law', 293 *International Review of the Red Cross* (1993), available at https://www.icrc.org/eng/resources/documents/article/other/57jmrt.htm (visited 29 January 2017); H.-J. Heintze, 'On the Relationship between human rights protection and international humanitarian law', 856 *International Review of the Red Cross* (2004) 789–813, at 798–811; and R. Kolb, 'Human Rights and Humanitarian Law', *Max Plank Encyclopaedia of Public International Law* (March 2013), §1–44, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e811?prd=EPIL (visited 29 January 2017).

[6] M. Sassòli, *supra* note 1, at 43.

[7] Ibid., at 49.

thresholds, although both potentially concern the same situation, namely military occupation (see also Chapters II and IV).

Pictet also considered the application of GC IV to be much broader than one might have thought: "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2."[8] In so far as individuals are concerned, he further reasoned that

> […] the application of the fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of Article 42 (of the 1907 Hague Regulations) […]. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.[9]

In other words, already during the enemy forces' invasion phase, GC IV "should be applied as soon as troops are in foreign territory and in contact with the civilian population there"[10] – including to a certain extent the provisions of GC IV Part III, Section III, on occupied territories.[11] This means that "the applicability of the Fourth Geneva Convention during the invasion phase would be based on effective control over persons rather than on effective control over foreign territory (or parts of it)."[12]

Pictet's theory was later termed to amount to a "functional" beginning of belligerent occupation.[13] It is, however, submitted that this term, and even the general idea of the functional application, is too vague as it does not clearly convey the mode and

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[8] Art. 6 Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949.
[9] J. Pictet (ed.), *Commentary of 1958, Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949,* Art. 6 (Geneva: International Committee of the Red Cross, 1958), at 60.
[10] Ibid., at 59.
[11] See *Eritrea-Ethiopia Claims Commission – Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26* (19 December 2005), § 27, available at http://legal.un.org/riaa/cases/vol_XXVI/291-349.pdf (visited 29 January 2017); see also G. H. Aldrich, 'The Work of The Eritrea-Ethiopia Claims Commission', 6 *Yearbook of International Humanitarian Law* (2003) 435–442.
[12] T. Ferraro (ed.), *Expert Meeting Occupation and Other Forms of Administration of Foreign Territory* (Geneva: ICRC, 2012) at 25.
[13] M. Siegrist, *The Functional Beginning of Belligerent Occupation* (Geneva: Graduate Institute Publications, 2010).

boundaries of GC IV's application. What does "functional" really mean? The conventional understanding of that word relates to the way in which something works or operates.[14] In essence, a situational and a functional application both lead to the same result: whatever is functional is to be considered practical as opposed to decorative. Consequently, it is applicable to various situations. It is thought that the more adequate term would, therefore, be a "situational application", as GC IV itself (in Article 6) envisages various situations: armed conflict, invasion, or occupation. This consideration flows from the fact that as soon as a soldier encounters a person in *any* of these situations, GC IV applies, placing that person under GC IV protection.

Grasping Pictet's theory therefore is dependent upon drawing a sharp line between the invasion phase and actual occupation. The difference between the two is that an invasion does not hinge on the concept of effective control (OL) as envisaged by Article 42 HR 1907:

> Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while occupation indicates the exercise of governmental authority to the exclusion of the established government.[15]

Oppenheim, too, separates the two and states that invasion is the "marching or riding of troops – or the flying of a military air vessel – into enemy country."[16] For Oppenheim, then, occupation "is invasion *plus* taking possession of enemy country

[14] English Oxford Living Dictionary: *functional*, available at https://en.oxforddictionaries.com/definition/functional (visited 29 January 2017)

[15] US Tribunal at Nuremberg, Hostages trial, Law Reports of Trial of War Criminals, vol. III, UN War Crimes Commission, 1949, London, at 55–56. Also: "This presupposes the destruction of organised resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied" (USA vs. Wilhelm List et al., Law Reports of Trials of War Criminals, vol. VIII, UN War Crimes Commission, London, 1949, at 56.). Similarly, in case N 45 12, the Permanent Military Tribunal at Dijon, when applying Article 2 of the HR 1907, stated that "any part of territory in which the occupant has been deprived of actual means for carrying out *normal* administration by the presence of opposing military forces, would not have the status of 'occupied' territory within the terms of articles 2 and 42 of the Hague Regulations. The fact that other parts of the occupied country as a whole, are under effective enemy occupation, would not affect this situation", see Trial of Carl Bauer, Ernst Schrameck and Herbert Falten, Law Reports of Trials of War Criminals, UN War Crimes Commission, vol. VIII, London, 1949, at 18.

[16] L. Oppenheim, *International law: A Treatise,* Vol. 2 (7th edn., London/New York: Longmans Green, 1952), at 207.

for the purposes of holding it, at any rate temporarily."[17] Dinstein agrees that occupation should not be confused with a full-scale invasion "consisting e.g. of a Blitz campaign by armed formations across a territory"[18], as belligerent occupation is

> […] innately different from a mere hit-and-run raid by commandos or the passage of flying columns of troops on a reconnaissance mission. […] The fact that the invasion is under way does not necessarily connote that the operation constitutes a prelude to a regime of belligerent occupation: everything depends on whether or not the contested area is solidly seized by the invader and the sovereign is actually displaced.[19]

Yet the question remains as to what law is applicable during the invasion phase. Such a inquery is further complicated by the exercise of identifying when invasion is transformed into occupation. The transition from invasion into occupation may be gradual and without clarity.[20] At the same time, if a situation of occupation coincides with clashes with a resistance movement, or with a combat situation between the ousted sovereign and the occupant, it is only logical that in such circumstances the rules of conduct of hostilities apply next to the corpus of occupation law (see also Chapter IV, section 1.3), as "the law of occupation and the law of hostilities are not mutually exclusive, but may apply in parallel to different activities occurring within the same territory at the same time."[21] In this context, Article 4 of GC IV states that

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals.[22]

Here, the French text uses "*au pouvoir*", which literally translates as "in the power of", or also under the control. Also, the wording "in the hands of" is explained by Pictet to be "used in an extremely general sense":[23]

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[17] Ibid. (original emphasis).
[18] Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), at 38; see also R. Kolb. and S. Vité, *Le droit de l'occupation militaire* (Geneva: Bruylant, 2009), at 138–139.
[19] Ibid.
[20] However, see *US Department of Defence Law of War Manual* (General Counsel of the Department of Defence, June 2015), at 741.
[21] N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), at 157.
[22] Art. 4 Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949.
[23] J. Pictet, *supra* note 9*,* Art. 4, at 47.

> It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or "hands" of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.[24]

The wording "at any given moment and in any manner whatsoever" is furthermore intended to ensure that "all situations and cases were covered."[25] It should, nevertheless, not be forgotten that Article 4 GC IV does not stretch its application to situations of hostilities, which are regulated by the rules spelled out in the HR 1907 and AP I 1977. The ICTY, in Naletilić and referring to GC IV, also considered that the "application of the law of occupation to the civilian population differs from its application under Article 42 of the 1907 Hague Regulations".[26] The ICTY Trial Chamber further noted that the application of the law of occupation,

> as it affects "individuals" as civilians protected under Geneva Convention IV, does not require that the occupying power have actual authority. For the purposes of those individuals' rights, a state of occupation exists upon their falling into "the hands of the occupying power." Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established.[27]

This would then hold true "regardless of the stage of hostilities" and there "would be no further need to establish that an actual state of occupation as defined under Article 42 of the 1907 Hague Regulations existed".[28] The ICTY Trial Chamber therefore formulated two legal tests, both sharing the element of control but exercised over different objects: control over territory and control over people, through both of which occupation law then applies:

> Consequently, the Chamber will have recourse to different legal tests to determine whether the law of occupation applies, depending on whether it is dealing with individuals or with property and other matters. In the present case, it finds that the forcible transfer […] and the unlawful labour […] of civilians were prohibited from the moment that they fell into the hands of the opposing power, regardless of the stage of the hostilities. There is no further need to establish that

[24] Ibid.
[25] Ibid.
[26] Judgment, *Naletilić and Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, § 219.
[27] Ibid., § 221.
[28] Ibid.

> an actual state of occupation as defined under Article 42 of the Hague Regulations existed at the relevant time in the relevant place.[29]

However, not everybody agrees with Pictet's approach. Zwanenburg for example reflects that

> [a]ccepting the Pictet theory would lead to a situation in which the determination whether a person is a 'protected person' is conflated with the test for determining whether there is an occupation. […] There is nothing in the travaux préparatoires of the Geneva Conventions to suggest that the drafters intended to depart from the previously accepted notion of occupation. If it had been their intention to include such a radical departure in the Fourth Geneva Convention, one would at the very least expect that such an intention would have been mentioned during the debates.[30]

The present writer has also advanced that the criteria of Article 42 HR 1907 continue to live on inside common Article 2 GCs and Article 1 AP I 1977 (see Chapters II, III and IV). However, the structure of common Article 2.2. GCs and Articles 4 and 6(1) GC IV, as well as the object and purpose of GC IV, all point towards a *situational* application of the Convention. Bothe, too, considers Pictet's theory an "oversimplification"[31] since a "hit-and-run raid across the border does not establish a situation of control and, thus, an occupation. While an invading army advances, fighting its way into foreign territory, a situation of control is not established immediately."[32] He then provides the following example:

> If a tank advances to join a battle that is raging a kilometre ahead and passes a burning house, the driver is not supposed to stop and help the firefighters. He or she must not shoot on the firefighters as they are civilians, and he or she must let them do their job as they are a protected civil defence unit. But in that stage of the conflict, the invading force does not yet have the duty of an Occupying Power to see to the welfare of the population of the occupied territory, which might indeed include help in firefighting.[33]

It is submitted that precisely here the issue of different degrees of control and the ensuing different obligations come into play: different obligations start at different

[29] Ibid., § 122.
[30] M. Zwanenburg, 'Challenging the Pictet Theory', 885 *International Review of the Red Cross* (2012) 30–36, at 33.
[31] M. Bothe, 'Effective control during invasion: a practical view on the application threshold of the law of occupation', 885 *International Review of the Red Cross* (2012) 37–41, at 38.
[32] Ibid., at 39.
[33] Ibid.

times, depending on the degree and type of control exerted by the invading force or the occupant in a concrete situation. In other words:

> On such a sliding scale of obligations according to the degree of control, obligations to abstain would be applicable as soon as the conduct they prohibit becomes materially possible (the person benefiting from the prohibition is in the hands of the invading forces), while obligations to provide and to guarantee would apply only at a later stage.[34]

This later stage would be constituted by a situation of military occupation under Article 42 HR 1907 and common Article 2 GCs, while the former stage describes an invasion scenario, as just described by Bothe. Therefore, obligations contained in certain rules apply if they are materially possible to be carried out, while others do not apply because the means to carry them out do not exist (yet). Another way of classifying the differential application of IHL rules was put forth during the expert deliberations on the ICRC Report on Occupation:

> […] negative obligations and individual-related rights would apply immediately during the invasion phase while positive obligations and governance-related norms would take effect gradually. The fulfilment of positive and governance-related duties would be based on the level of control exerted, the constraints prevailing in a situation of invasion, and the resources at the foreign forces' disposal.[35]

What is more, disregarding the potential and adjustability afforded by GC IV, along with Pictet's theory, would run contrary to the logic and spirit of IHL. If the threshold of effective control (OL) over territory in Article 42 HR 1907 to GC IV is narrowly applied, then a gap is created as in several scenarios (for example during invasions) persons protected under GC IV risk to be left outside the safeguards of IHL. Put differently, different situations entail different forms of control, which in turn lead to different obligations. The provisions related to the law of military occupation as well as GC IV start to apply as soon as protected persons fall into the hands of a party to the conflict, even if there is no military occupation *stricto sensu*. It is, therefore, put forward that due to humanitarian reasons and based on the general spirit of IHL, GC IV has a more flexible understanding of control and applies to different situations. To the term "functional applicability", "situational" should however be preferred so as

[34] M. Sassòli, *supra* note 1, at 49.
[35] T. Ferraro, *supra* note 12, at 25.

to avoid confusion in the application of the law and make it easier to comprehend its intentions and usage. This term also more clearly conveys the *ratione materiae* of IHL.

GC IV, in consequence, affords the most favourable and practicable protection to civilians and comes forward with a very adaptable application – a "different threshold for different rules."[36] While a given situation might not directly present itself as one of occupation, some rules from GC IV become applicable already in the invasion phase, the purpose being to enhance and reinforce the protection of civilians.

1.2. State obligations during the temporary or partial loss of control over territory

When the occupying power loses its effective control (OL) over the territory and cannot regain it, IHL rules on occupation law will no longer apply. However, when the occupying power loses effective control (OL) over the territory only temporarily or partially, this does not automatically indicate the territory is no longer occupied (see Chapter IV), nor that the IHL rules of military occupation are no longer applicable. Local resistance does not preclude the applicability of the law of occupation.[37] The main aspect here is that the occupying power eventually re-establishes its authority over the territory.[38] While trying to reclaim its power, the state will not be practically able to meet the threshold of the HR 1907 (one possible explanation for this being hostilities between the occupant and its adversaries). However, based on the situational application of GC IV, it must live up to those obligations that are commensurate to the level of control exercised in a concrete situation. GC IV applicability is instrumental when the state loses effective control (OL) over the territory or a city either fully or temporarily. The thresholds of control in GC IV, based on the ability of a state to exercise control at a specific point in time (a certain situation triggering a specific obligation), would thus determine the obligations of that state.

[36] M. Sassòli, *supra* note 1, at 43.
[37] H. P. Gasser and K. Dörmann, *supra* note 5, at 273.
[38] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), § 11.7.1, at 277.

Hence, which articles operate when a state either completely or temporarily lost effective control (OL) over territory and when a group of its soldiers encounters some farmers and detains them on security grounds? Under GC IV, the farmers would be entitled to the immediate protection of Article 27, which safeguards their honour and family rights, religious convictions, manners and customs, and their right to be humanely treated at all times. Article 27 GC IV, therefore, applies in all circumstances. The GC IV Commentary advocates that this article's application has to be understood broadly,[39] encompassing all possible scenarios, including one in which the occupant has either fully, temporarily, or partially lost control over the territory. Such a modus operandi is for instance shown by Articles 28–34 as well as 13–26 of the GC IV.

Difficulties nonetheless may arise when the armed forces are confronted with a demand for ensuring *all* the rights contained in GC IV, as not all of them may be provided for.[40] For example, Article 24 regulates the issue of child welfare and may be difficult to implement once an occupant's effective control (OL) over the territory has been challenged by a local resistance. It is thought that Article 24 GC IV requires uninterrupted effective control (OL) over territory, as opposed to Article 18, which is designated for the protection of civilian hospitals caring for the wounded, sick and maternity cases. These facilities may under no circumstances be the object of attack and shall always be respected and protected by all parties to the conflict. It follows that certain GC IV rights are adaptable to the occupant's level of control, while some others have to be provided for even if the occupant's effective control (OL) over the territory is facing challenges or has to be secured anew. Following on from this, the next section examines whether IHRL and occupation law admit for the same test of control.

2. Is control construed the same way in IHRL and occupation law?

Some examples of substantive rights under IHRL, to name just a few, are the rights to life, to a fair trial, to freedom of speech, or to freedom of movement, all enshrined in

[39] J. Pictet, *supra* note 9, Art. 27, at 199–207.
[40] For a counter-stance advocating that all the articles would be applicable, see H.-P. Gasser and K. Dörmann, *supra* note 5, at 274.

the cohort of human rights treaties concluded on an international level.[41] These instruments permit persons to live in freedom and dignity[42] and states are the duty bearers bound by them.[43] Hence, states need to ensure the enshrined rights not only to their citizens, but also to whomever is present on their territory.[44] The overall responsibility for the protection of human rights rests with states, while regional and international bodies exercise a supervisory role over how the states fulfil their obligations.[45]

Chapter I (section 3) has already raised the issue of human rights' extraterritorial application and the place of control in the context of state jurisdiction. It was also shown that the extraterritorial application of IHRL – regardless of the various wordings of human rights treaties such as the ECHR, ICCPR, or the American Convention on Human Rights – rests on one key element: "exercise of jurisdiction".[46] In other words, all IHRL instruments base their applicability on a state exercising control over an individual (personal connection) and over territory (spatial connection).[47] The level of control needed to be exerted for the purposes of the spatial connection, based on the practice of Human Rights Committee, the ECtHR, and the Inter-American Commission of Human Rights, is that of effective control (*effective*

[41] C. Tomuschat, *Human Rights* (3rd edn., Oxford: Oxford University Press, 2014), at 112.
[42] Ibid.; see also R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2003), at 43–49.
[43] C. Tomuschat, *supra* note 41, at 119. Under international law, states become bound by treaties only through acceptance (VCLT Article 11), that is the state has to ratify the treaty. On the issues of prevention of human rights violations, see generally C. Bourloyannis-Vrailas and L.-A. Sicilianos (eds.), *The Prevention of Human Rights Violations* (Brill/Martinus Nijhoff Publishers, 2001).
[44] W. Mansell and K. Openshaw, *International Law: A Critical Introduction* (Oxford: Hart Publishing, 2013), at 47–48.
[45] R. K.M. Smith, *International Human Rights* (2nd edn., Oxford: Oxford University Press 2005), at 173.
[46] T. Ruys and S. Verhoeven, 'DRC v. Uganda: The Applicability of International Humanitarian Law and Human Rights Law in Occupied Territories', in R. Arnold and N. Quénvet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden: Martinus Nijhoff, 2008) 155–195, at 174.
[47] R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', 2 *Israel Law Review* (2007) 503–526, at 508.

control (IHRL), see Glossary). However, with regards to the personal connection, the adjective "effective" has not been used.[48]

The UN Secretary General rejected a narrow application of human rights by stating that they "apply always and everywhere".[49] Nevertheless, it remains to be ascertained whether IHRL applies in times of military occupation and on what basis. Does it apply *because of* occupation? This issue is far from clear and its explanation has been somewhat avoided by the ICJ, its dicta only remarking IHRL to be applicable in times of armed conflict, including situations of military occupation.[50] The ECtHR, on the other hand, purported to shed light on the matter in its case law, albeit with shortcomings addressed on the pages to come.

The following question is thus raised: during military occupation, do IHRL obligations arise based on the same test and in par with military occupation? Or are they founded on a different test?[51] I shall first assess a state exercising *control over persons*/*individuals* in light of IHRL and discuss how this test may manifest itself for occupation law. I will then examine the test for establishing *control over territory* in IHRL and what impact and meaning this may have under occupation law.

2.1 A state exercising control over persons: authority and control over individuals

Already section 3 of Chapter I discussed the extraterritorial applicability of IHRL instruments and state extraterritorial jurisdiction arising when a state agent exerts

[48] However, see C. Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 2 *Israel Law Review* (2007) 310–355, at 325.

[49] *Respect for Human Rights in Armed Conflict*, *Report of the Secretary General*, UN DOC. A/8052 (1970) § 25.

[50] See *Case Concerning Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, § 24–25, available at http://www.icj-cij.org/en/case/95; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, § 106–114 available at http://www.icj-cij.org/en/case/131; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, § 178–180, available at http://www.icj-cij.org/en/case/116 (all visited 15 July 2017).

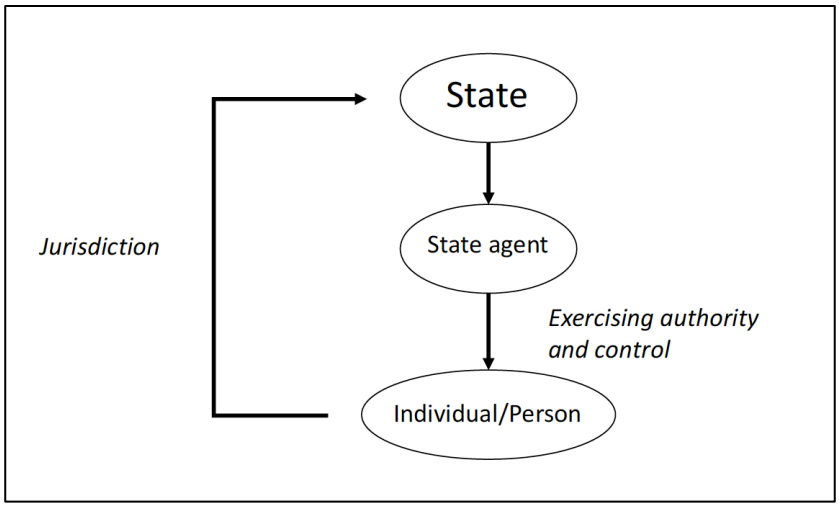
[51] F. J. Hampson, 'The Relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', 871 *International Review of the Red Cross* (2008) 549–572, at 567: "Is the test for occupation the same under IHL and human rights law?"

authority and control over individuals. Such cases include, for instance, abduction, detention, or any form of ill-treatment of a person. State agents can exercise control over persons both in peace time and during armed conflicts, including situations of military occupation. While this aspect has been extensively covered by the ECtHR, what has not been elaborated upon is the impact of and the relationship this trigger of jurisdiction has with occupation law. In Al-Skeini v. UK, the ECtHR referred to "state agent authority and control" in the following way:

> It 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 [of the ECHR] to secure to that individual the rights and freedoms under section 1 of the convention that are relevant to the situation of that individual.[52]

The breakdown of this relationship as explained by the court is displayed in Figure 6.

Figure 6: State Agent Authority and Control over Persons/Individuals (ECtHR)



The level of control needed to be exerted by the state agent over an individual which would give rise to that state's jurisdiction under the ECHR does however not clearly emerge from the above given passage. In Öcalan, the ECtHR described the required level of control as follows: "the applicant was effectively under Turkish authority and therefore within jurisdiction of that State […] forced to return to Turkey by Turkish

[52] *Al-Skeini and Others v. the United Kingdom*, ECtHR (2011) (App. No. 55721/07) § 137.

officials and was under their authority and control following his arrest and return to Turkey."[53] In Issa and Others v. Turkey, which concerned the activity of a state's armed force, the ECtHR noted that a state could also be held accountable under the ECHR for violations of the rights of persons "who are in the territory of another State but who are found to be under the former *State's authority and control through its agents* operating – whether lawfully or unlawfully – in the latter State."[54] This can, but does not have to, mean that there is a military occupation or a situation of armed conflict. In Al-Sadoon and Mufdhi, within a military occupation context, and having stated that "during the first months of the applicants' detention the United Kingdom was an occupying power in Iraq",[55] the ECtHR in its decision of admissibility maintained that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities *over the premises in question* [a prison], the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction."[56] Finally, Medvedyev and Others v. France considered that the applicants were under French jurisdiction in light of the ECHR because the French agents had "exercised full and exclusive control over the *Winner* and its crew" from the time the ship and the crew were intercepted in international waters, "in a continuous and uninterrupted manner until they were tried in France".[57] In all these cases, state agents were responsible for discharging the state's obligations under the ECHR.

It thus appears that the ECtHR does not consider jurisdiction to be arising solely from control exercised by a state over buildings, aircrafts, or ships in which individuals are held. In such cases, what is decisive "is the exercise of the physical power and control over the person in question."[58] In turn, exercising physical power over a person implies that this person is not at full liberty over his own physical situation. What is more, this form of control also always results in *specific* control over a person's ability to enjoy *specific* rights. However, control over specific rights does not necessarily

[53] *Öcalan v. Turkey Judgment*, ECtHR (2005) (App. no. 46221/99) § 91;
[54] *Issa and Others v. Turkey*, ECtHR (2005) (App. no. 31821/96) § 71; emphasis added NKM.
[55] *Al-Saadoon and Mufdhi v. United Kingdom,* ECtHR (2009) (App. no. 61498/08) § 87.
[56] Ibid., at 88.
[57] *Medvedyev and Others v. France*, ECtHR (App. no. 3394/03) (2010) § 67.
[58] *Al-Skeini and Others v. the United Kingdom*, *supra* note 52, § 136.

result in full physical control over the person: for example, in Chapter I the case of Solomou and others v. Turkey showed that the ECtHR found the Turkish agents to have violated the applicant's right to life without however having had full physical control over him. In fact, had they exerted such full physical control, Solomou would never have been able to climb the flagpole to begin with.[59] This does, however, not mean that the agents did not have control over a specific right guaranteed by the Convention (see Chapter I, section 3.4).

The analysis of the ECtHR's case law takes yet another interesting turn with Jaloud v. The Netherlands. The complaint in Jaloud was brought by an Iraqi national whose son met his death on 24 April 2004 at a checkpoint in Iraq through shots fired by Dutch troops.[60] The applicant contended that the investigation into the death of his son had been inadequate and that the Netherlands had violated their procedural obligations under Article 2 ECHR. The Netherlands, on the other hand, argued that the deceased did not fall under their jurisdiction within the meaning of Article 1 ECHR and that they did not consider themselves to be an occupant in terms of IHL.[61] Only the UK and the USA were occupying powers, as designated by UN SC Resolution 1483.[62] For that reason, the Netherlands would not have assumed any public powers in Iraq normally exercised by the sovereign government.[63] The Court, however, noted that for the purposes of establishing jurisdiction, it only took into account the factual context and the relevant rules of international law.[64] Regarding jurisdiction, the ECtHR further opined that:

> […] the status of "occupying power" within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative. Although it found that concept relevant in *Al-Skeini* […] and in *Al-Jedda v. the United Kingdom* […] the Court did not need to have recourse to it in finding that the responsibility of Turkey was engaged in respect of events in northern Cyprus […] or that of Russia in respect of the situation in Moldovan territory east of the Dniester […].[65]

[59] *Solomou and Others v. Turkey*, ECtHR (App. no. 36832/97) (2008) § 71, § 75 and § 79.
[60] *Jaloud v. The Netherlands*, ECtHR (App. no. 47708/08) (2014) §§ 10–38.
[61] Ibid.
[62] Ibid., § 113.
[63] Ibid., § 114.
[64] Ibid., § 141.
[65] Ibid., § 142.

As already explained in Chapter III, what the Court found in the Northern Cyprus and Transdniestrian cases amounted to effective overall control and decisive influence (see Glossary and below, section 2.2.). In Jaloud, however, the Court crafted a *new* basis for jurisdiction based on "persons passing through a checkpoint", since Jaloud died

> […] when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 […] to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its "jurisdiction" within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.[66]

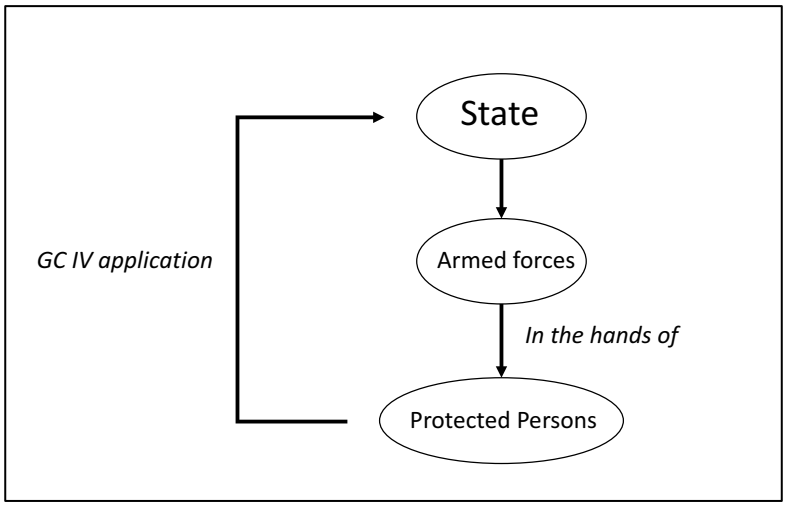
The Court thus found Dutch jurisdiction under Article 1 ECHR to be given because Mr. Jaloud came within the sphere of authority and control established through the checkpoint. The Court did not directly consider the concerned state to be an occupant, although it referred to UN SC Resolution 1483. The open question now is whether jurisdiction is only triggered by setting up a checkpoint during military occupation, or also regardless of occupation.[67] While in theory a checkpoint can be set up anytime and anywhere, it is of course very improbable that a state enters the territory of another state solely for that purpose. In practice, checkpoints will inevitably be connected to military occupations or at least ongoing armed conflicts.

At this point, it should be recalled that the key question here is what impact the *state agent authority and control over a person* test may have and how it can manifest itself in times of military occupation. What commonalities does it share with occupation law, and particularly with GC IV's threshold of control over protected persons? The key provision here is Article 4 GC IV.[68] In this Article, the main formulation points towards various contexts – "at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict

[66] Ibid., § 152.
[67] A. Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?', 53 *Military Law and the Law of War Review* (2014) 287–318, at 296–302.
[68] See J. Pictet, *supra* note 9, Art. 4, at 45–50.

or Occupying Power" – and insinuates that a person may be under the control of an adversary not only when placed in detention, but also when members of the armed forces are passing through a certain area. This means that "the applicability of the Fourth Geneva Convention during the invasion phase would be based on effective control over persons rather than on effective control over foreign territory (or parts of it)."[69] Control over a person "in a territory that is not the invader's own must therefore be sufficient to trigger the application to that person of Convention IV's provisions applicable in occupied territories."[70] Figure 7 shows the operating mechanism that triggers the application of GC IV – be that during invasion, occupation, or an armed conflict more generally.

Figure 7: State obligations regarding protected persons (Article 4, GC IV 1949)



Concluding this section, both IHRL and IHL cognise control over persons. The *'state agent authority and control over individuals'* and '*in the hands of*' tests concern the same object –civilians – and the same subject – a representative of the state, namely its agents or members of its armed forces. Both IHRL and IHL therefore ensure that persons' rights are protected when members of the armed forces or state agents more generally exercise control over them.[71]

[69] T. Ferraro, *supra* note 12, at 25.
[70] M. Sassòli, *supra* note 1, at 45.
[71] See J. Pictet, *supra* note 9, Art. 4, at 47.

Whether the threshold of control over territory is the same in IHRL and IHL is addressed next.

2.2. Control over territory

As seen in Chapter I, in international law it is primarily the state who controls the territory, irrespective of whether it has a title over it or whether its military presence there is lawful or not.[72] Due to such control, a state is responsible for what happens on the territory. For example, in the Namibia case the ICJ viewed South Africa to be unlawfully occupying Namibia and accountable for any violations "of the rights of the people" of Namibia.[73] The fact that South Africa had no title to administering that territory did not release it from its obligations under international law, as the "physical control of a territory, and not sovereignty or legitimacy of the title, is the basis of State liability for acts affecting other States."[74] In short, a "state ought not to be able to escape from duties that befall it when it is acting in its own territory by 'relocating' its activity in some other territory".[75]

That IHRL can apply to military occupation "is now widely, but by no means universally, accepted."[76] Non-acceptance is principally demonstrated by states shunning their responsibilities for their extraterritorial actions under the respective conventions.[77] However, the ICJ in the Wall case found that the IHRL instruments

[72] See R. Wilde, *supra* note 47, at 508–511; V. P. Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility', 36 *Michigan Journal of International Law (2014)* 129–178, at 129–130.

[73] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, § 118, available at http://www.icj-cij.org/en/case/53 (visited 29 January 2017).

[74] Ibid.

[75] M. Koskenniemi, 'Occupation and Sovereignty – Still a Useful Distinction?', in O. Engdahl and P. Wrange (eds), *Law at War: The Law as it Was and the Law as it Should Be* (Leiden/Boston: Martinus Nijhoff Publishers, 2008) 163–174, at 169.

[76] A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in M. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff Publishers, 2007) 439–495, at 458.

[77] Israel, with regards to the application of the ICCPR in the occupied territories, considers "that the Convention, which is territorially bound, does not apply, nor was it intended to apply, to areas beyond a state's national territory." See *Human Rights Committee, Consideration of Reports submitted by States parties under Article 40 of the Covenant*

(International Covenant on Economic, Social and Cultural Rights/ICESCR, International Covenant on Civil and Political Rights/ICCPR and the Convention on the Rights of the Child) were applicable also in times of occupation. To reach such a conclusion, the Court had to determine whether these instruments were applicable only on the territory of states parties, or whether they also applied outside of it and, if so, under what circumstances.[78]

The ICJ observed that while the jurisdiction of states was primarily territorial, it could sometimes subsist also outside the national territory of a state. Taking into consideration the object and purpose of the ICCPR, the latter would in fact apply during such cases.[79] To solidify its reasoning, the ICJ had recourse to the Human Rights Committee, subsequently basing its stance on the latter's analysis. The Human Rights Committee found the ICCPR to be applicable wherever a state had exercised its jurisdiction on foreign territory. Here, jurisdiction is revealed to be synonymous to control. The Committee viewed the wording employed in Article 2 ICCPR as not intending to allow states to evade their obligations when they exercised jurisdiction outside their national domain.[80] During the preparation of its report to the Committee, Israel however advanced that "the Covenant and similar instruments did not directly apply to the current situation in the occupied territories".[81] The Human Rights Committee in its concluding observations expressed concern over such a stance and pointed "to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein".[82] Moreover, it found the ICCPR to be applicable in the occupied territories "for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined

Pursuant to the optional reporting procedure, Fourth periodic report of States parties due in 2013, Israel, CCPR/C/ISR/4, 12 December 2013, § 48.

[78] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 50, § 107.

[79] Ibid., § 109.

[80] Ibid.

[81] Ibid., § 110.

[82] Ibid.

in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law."[83]

The ICESCR, too, was regarded by the ICJ to be applicable to the occupied territories.[84] The ICESCR contains no provision that would delineate its scope of application, probably due to the fact that it guaranteed rights that are prima facie territorial. In the ICJ's consideration the ICESCR was, therefore, applicable both to territories over which a state had sovereignty and to those over which that state exercised territorial jurisdiction, that is territorial control.

In advancing that the IHRL extraterritorial obligations of a state are also triggered in times of military occupation, the ICJ aligned itself with the Human Rights Committee's perception of the level of control. Through the Wall advisory opinion, the Court considered extraterritorial jurisdiction to be arising based on the exercise of effective control (OL). The ICJ viewed Israel as an occupant because it subjected the territories to its territorial jurisdiction. In the exercise of the powers available to it on such a basis,[85] Israel was bound by the ICESCR as well as by the ICCPR. In the view of the ICJ, also the Convention on the Rights of the Child was applicable to Israeli policies.[86] Article 2 of that Convention provides that "State Parties shall respect and ensure the rights set forth in the […] Convention to each child within their jurisdiction".[87] The ICJ thus viewed jurisdiction extending to every child that was subject to Israel's effective control (OL), i.e. which was based on territory under Israel's military occupation.[88]

Unlike in the Wall case, in DRC v. Uganda the ICJ only briefly considered the extraterritorial applicability of IHRL in times of military occupation. Before actually finding that IHRL was applicable to Ugandan actions, the Court firstly considered

[83] Ibid.
[84] Ibid., § 112.
[85] Ibid., § 109 and § 112.
[86] Ibid., § 113; see further *Defence for Children International Palestine, Shadow Report to the Fourth Periodic Report of Israel, Impact of Israeli Military Offensives in the Gaza Strip on Palestinian Children* 112th Session of the Human Rights Committee, 7–31 October 2014, at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT_CCPR_CSS_ISR_18223_E.pdf (visited 29 January 2017).
[87] Art. 2 Convention on the Rights of the Child (1990).
[88] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 50, § 113.

whether Uganda was an occupant for the purposes of IHL. The ICJ concluded that Uganda was indeed an occupying power in Ituri at the relevant time:

> As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[89]

The second part of this quotation suggests that the way the ICJ reasoned was due to Uganda being an occupant pursuant to IHL, and because it also had the general obligation flowing from IHL to take all the measures in its power to restore and ensure, as far as possible, public order and safety in the occupied area – including IHRL obligations. It is thus submitted that it was effective control (OL) over territory that gave rise to IHRL obligations. It also seems that in this case the Court went further and considered IHRL, along with IHL, to give rise to a wider responsibility of the occupant, making it not only responsible for acts and omissions of its subordinates, but also for generally preventing *any* violations:

> Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.[90]

Consequently, in the Court's view Uganda possessed constant responsibility for all actions and omissions of its own military forces in the territory of the DRC "in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."[91] Thus, it appears as if in DRC v. Uganda the ICJ tried to push ahead and touch a new frontier in the expansive applicability of IHRL instruments to an occupying power's actions. The ICJ, therefore, held that "international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own

[89] Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), *supra* note 50, § 178.
[90] Ibid., § 179.
[91] Ibid., § 180.

territory, particularly in occupied territories".[92] The ICJ also attempted to identify the basis for the application of IHRL in situations of military occupation: based on the above analysis, the trigger for this applicability is distilled to be the same test that determines the existence of military occupation under IHL, i.e. effective control (OL).

The Human Rights Committee, too, conceptualises a state exercising effective control over another state's territory as the trigger for the ICCPR's extraterritorial application:

> […] 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.[93]

A different term is used by the ECtHR, which coined the term *effective overall control*, addressed already in Chapter III for the purposes of establishing proxy occupation (see also Glossary). Can this test be regarded as the ECtHR's own threshold of applying human rights in situations of military occupation? Like the ICJ, the ECtHR considers the jurisdiction of a state to be stretching primarily over its own territory (territorial principle). It also contemplates state jurisdiction to arise in times of military occupation and, more generally, when a state acts extraterritorially, thereby hindering the respective state to absolve itself from responsibility arising under the ECHR.[94] In the ECtHR's case law, the test of *effective overall control* was introduced when dealing with the Turkish occupation of Northern Cyprus and cases involving Transdniestria. However, the Strasbourg Court provided no exact meaning of this test.

Tomuschat observes that the ECtHR's *effective overall control* is used for establishing military occupations.[95] According to this author, the criterion applied both to the

[92] Ibid., § 216.
[93] *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, § 10; emphasis added NKM.
[94] L. Zwaak, 'General Survey of the European Convention', in P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn., Antwerp/Oxford: Intersentia, 2006) 1–93, at 19–22.
[95] C. Tomuschat, *supra* note 41, at 99.

Turkish occupation of Northern Cyprus and Russian support for the insurgents in the Transdniestrian part of Moldova, but not to the short-term Turkish operation in Northern Iraq.[96] However, the purpose of the ECtHR was not to qualify the situation as an occupation or not, but to determine the application of the ECHR to the Turkish and Russian governments, respectively. In the preliminary objections phase of Loizidou v. Turkey, the ECtHR employed the term effective control over territory (without the word "overall") as understood in military occupation[97] (see also Chapter I, section 3). Already then, the ECtHR seemed to contemplate not only classic situations of occupation as envisaged by Article 42 HR 1907, but also situations where the effective control of a state was wielded via subordinate military administrations (see also Chapter III, section 3).[98] In other words, although this passage suggests that various forms of military occupation exist, they still give rise to the IHRL obligations of a state under the ECtHR on the grounds of exercising effective control (OL) over territory. In the later stage of the Loizidou case, notably in the judgment, the ECtHR seems to have gone even one step further in resorting to a different threshold for the application of the ECHR. The ECtHR inserted the word "overall" after "effective", resulting in a threshold of *effective overall control*. As already pointed out, the ECtHR did not provide an explanation, nor did it qualify the situation there as one of occupation. Instead, the ECtHR centred on the general applicability of the ECHR:

> 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 …[99]

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[96] Ibid.

[97] *Loizidou v. Turkey (Preliminary Objections)*, ECtHR (1995) (App. no. 15318/89), § 62–64. Note: SC Res. 541 (1983) considered the attempt to create the TRNC as invalid, and SC Res. 550 (1984) explicitly referred to Northern Cyprus as occupied: "Gravely concerned about the further secessionist acts in Occupied part of the Republic of Cyprus […]."

[98] Ibid.

[99] *Loizidou v. Turkey,* ECtHR (1996) (App. no. 15318/89) § 56. Note: the test of effective overall control was used in *Djavit v. Turkey*, ECtHR (2003) (App. no. 25781/94), §21–23; Cyprus v. Turkey, ECtHR (2001) (App. no. 25781/94), § 77; however, see *Adali v. Turkey,* ECtHR (2005) (App. no. 38187/97); *Demades v. Turkey*, ECtHR (2008) (App. no. 16219/90).

In Chapter III, it was argued that effective overall control and indirect effective control (see also Glossary) concern the same aspects and possess the same content, namely a state purporting to conceal its effective control (OL) over territory via overall control (SR/IHL) over an intermediary. The key questions to be addressed now are the circumstances and effect of such control on a state's substantive obligations.

In Issa, the ECtHR used a structural analysis of existing case law: state military action, whether lawful or unlawful, giving rise to effective control (OL) over the territory, and the obligation to provide in such an area the rights enshrined in the ECHR, stemming from the fact of such control – whether exercised directly, through its armed forces, or through a subordinate local administration.[100] This time, the Court seemed to acknowledge that effective control (OL) over territory as understood in occupation law triggers the application of IHRL: even if a state does not have its forces stationed on every square meter of a territory, because it has effective control (OL) over the territory in question it is generally responsible under the ECHR for the territories. Issa thus reads:

> It is not necessary to determine whether a Contracting Party actually exercises 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 the responsibility of the Contracting Party concerned.[101]

Pursuant to such a reasoning, the Court appears not to exclude the possibility that, as a consequence of Turkish military action, Turkey could be considered to have exercised, temporarily at least, *effective overall control* of a particular portion of the territory of Northern Iraq. But still the Court appears to have showed caution and did not open the door for a laxer interpretation of that threshold. It consequently required factual evidence of Turkish military action. If there had been a sufficient factual basis proving this, and if the victims had been in the specific area, it would have followed that they were within the jurisdiction of Turkey.[102] At the end, however, the ECtHR did not establish that Turkey had exercised *effective overall control* of the entire area of Northern Iraq. Also, according to the Court the situation there was different from the one in Northern Cyprus as adjudicated in the *Loizidou v. Turkey* and

[100] Issa and others v. Turkey, *supra* note 54, § 69.
[101] Ibid., § 70 (emphasis added NKM).
[102] Ibid., § 74.

Cyprus v. Turkey cases.[103] This stance was however not followed by further clarifications.

In the more recent case of Al-Skeini and Others v. UK, the UK argued that the acts in question took place in southern Iraq, outside its jurisdiction under Article 1 ECHR; the sole exception being the killing of the sixth applicant's son, which occurred in a British military prison over which the UK admitted to have had jurisdiction.[104] In the UK Government's submission the fact that, between May 2003 and June 2004, it was an Occupying Power within the meaning of the HR 1907 did not give rise to the UK's obligation to secure the rights enshrined in the ECHR to the inhabitants of south-east Iraq.[105] The ECtHR subsequently took into consideration the territorial principle, state agent authority and control, and effective control over an area of the ECHR to trigger the jurisdiction of the Convention. For the purposes of this thesis, particular attention has to be paid to the way the ECtHR approached the understanding of *effective overall control* over territory. While the Court did not mention *effective overall control* explicitly, it mentioned the idea implicitly in § 138 by referencing to its previous case law of Loizidou, Cyprus v. Turkey, Banković, and Ilaşcu – but not to Issa. In fact, upon further examination of the judgment, in § 139 the ECtHR seems to offer two separate tests: one modelled on the reading of Article 42 HR 1907, the other on the understanding of *overall control*, thereby resembling the reasoning employed in Tadić, Loizidou and Ilaşcu:

> It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area […]. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region […].[106]

In determining whether the UK had jurisdiction over any of the deceased, the ECtHR did not base its reasoning on the effective overall control test. After all, it considered the UK to be an occupying power, alongside the USA, within the meaning of Article 42

[103] Ibid., § 75.
[104] *Al-Skeini and Others v. the United Kingdom*, *supra* note 52, § 101, see also § 111–112.
[105] Ibid., § 114.
[106] Ibid., § 139.

HR 1907,[107] including the time frame of the CPA up until the formation of the sovereign interim government of Iraq (SC Res. 1546) and, in the event, occupation coming to an end on 28 June 2004 (see also Chapter IV, section 2.6.2). Based on such events, and particularly following the removal of the Baath regime and until the accession of the Iraqi interim government, the UK (with the USA) assumed the exercise of some of the public powers in Iraq that were normally exercised by a sovereign government. Furthermore, the ECtHR established a jurisdictional link between the UK and the deceased family members of the applicants on the basis of the fact that the UK

> assumed the authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances […] the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations.[108]

The given quotation is however not clear: is the ECtHR referring to the state agent authority and control test over individuals or control over an area? It commences with control over the area ("south-east Iraq"), but then the next sentence refers to control over individuals. There is thus a concoction[109] of the two tests and which one the Court is engaging for its analysis is not clear. Further, in Hassan v. UK, the ECtHR advanced that because the UK had assumed authority for the maintenance of security in South East Iraq, "it was unnecessary to determine whether jurisdiction also arose on the ground that the UK was in effective military control of South East Iraq during that period".[110] An additional confusion is thus created by the attempt of separating the action of *assuming authority for the maintenance of security* from the act of *effective military control*: does the former not relate to effective control (OL) pursuant to Article 42 HR 1907, which in turn enables the application of Article 43 of the same instrument? In Hassan, the Court did not find it necessary to decide whether the UK was in effective control (OL) of the area during the relevant period, as UK jurisdiction over Hassan, according to the Court, arose on a different ground:

[107] *Ibid.*, § 143.
[108] Ibid., § 149.
[109] N. Lubell, *supra* note 2, at 321.
[110] *Hassan v. the United Kingdom*, ECtHR (2014) (App. no. 29750/09), § 75.

> Following his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom Jurisdiction […].[111]

The stance of the Court suggests that *assuming authority for the maintenance of security* constitutes a different threshold and is not part and parcel of military occupation. In other words, a situation of military occupation is different from a situation where a state *assumes authority for the maintenance of security.* Evidently, with such a dictum the Court blurs the lines of the ECHR's extraterritorial application during military occupations, where assuming authority for the maintenance of security is an integral task of the state's armed forces – if not the sole, considering that the occupying power's own security has to be ensured and maintained, too. Or did the Court view *assuming authority for the maintenance of security* to be a part of armed conflicts, short of military occupation, that is when fighting is on-going and the invading state is still in the course of establishing its effective control (OL) over the territory? In Iraq, the date of 23 April 2003 was not regarded as falling within the period of military occupation, since such occupation started only on 1 May 2003.[112]

What Hassan may in fact be advancing – and what the ECtHR should have made clear – is that during military operations, in case someone is detained on a military base, the ECHR applies because of the physical power and control the invading soldiers of a state party to the ECHR exercise over the person in the material time. In my understanding, this case shows the fine line that separates state jurisdiction based on control over territory from that based purely on control over persons (see above, section 2.1). In other words, although at the end of the day the UK troops exercised "physical power and control" over Mr. Hassan, such a state of affairs was only possible because of the territorial control exercised by the British troops at that time and in that area (army patrol, capture and detention).

Now what does all this mean? On what basis is IHRL triggered in times of military occupation properly – does human rights law have its own trigger of applicability in this particular setting? Unfortunately, the ECtHR's recent case of Chiragov and Others

[111] Ibid., § 76.
[112] Ibid., § 75.

v. Armenia further obstructs an answer to these questions. The most notable discrepancies are detected in the wording used with regards to the test of effective control (OL) over territory during military occupation. The case concerned six Azerbaijani nationals who claimed they had been prevented from returning to the district of Lachin in territory occupied by Armenia, thus not being able to enjoy their property located on that territory, nor having received any fitting compensation. The Court had to determine whether Armenia had exercised and continued to exercise effective control over the mentioned territories and whether, based on such a control, it could be held answerable for the alleged violations.[113]

Such an assessment, according to the Court, would principally depend on the state's military involvement, but other indicators such as economic and political support could also be of relevance. The Court stressed that Lachin was a territory situated farthest away from the line of contact with Azerbaijan, sheltered by Nagorno Karabakh to the east, and by other districts such as Kelbajar, Gubadly and Jabrayil. To determine whether Armenia had jurisdiction over these territories, it was necessary to establish whether Armenia exercised effective control (OL) over Nagorno Karabakh and the surrounding territories.[114] It should be observed that the word *overall* is not included, since the Court seems to introduce other criteria for establishing Armenian responsibility.

Regarding the element of military involvement, according to the Court, irrespective of the fact that the number of Armenian forces in the "Nagorno Karabakh Republic" (NKR) was disputed, it did not need to solve the issue. The Court found that Armenia, through its military presence and the provision of military equipment and expertise, was significantly involved in the Nagorno Karabakh conflict ever since it had broken out. Such military support "had been – and continues to be – decisive for the conquest of a continued control over the territories in issue."[115] The integration of the two entities was also evidenced by several politicians who assumed high positions in Armenia after previously having held similar positions in the NKR.[116] The NKR's

[113] *Chiragov and Others v. Armenia*, ECtHR (2015) (App. no. 13216/05), §169
[114] Ibid., § 170.
[115] Ibid., § 180.
[116] Ibid., § 181.

political dependency on Armenia was also shown in NKR residents obtaining Armenian passports for traveling, as the NKR is not recognised as a state,[117] in addition to the substantial financial support given to the NKR from or via Armenia.[118] The ECtHR consequently concluded that

> […] the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.[119]

Here, the ECtHR is again fusing the language from Loizidou and the cases concerning Transdniestria; however, this time it more visibly employs the effective control (OL) threshold from Article 42 HR 1907 for establishing the responsibility of Armenia.[120] According to Judge Motoc's concurring opinion, in Chiragov the ECtHR raised the threshold of effective control compared to earlier cases such as Loizidou.[121] It seems that this was due to the fact that the Court considered the elements of military presence, a high integration of the two entities, and financial support at the same time. However, according to the Judge, the Court did not "consider it necessary to draw a distinction between effective control and the type of control that it had established in the case of Ilaşcu".[122] The Court employs the words "a significant and decisive influence over the 'NKR'", used also in the cases of Ilaşcu and Catan. Chiragov can be comprehended in such a way that the ECtHR attempts to more lucidly formulate its own understanding of effective control (OL) for the purposes of establishing not only a situation of military occupation, but also the ECHR's application. The Court uses the element of military presence from Article 42 HR 1907, along with the elements of overall control (SR/IHL), such as the Armenian government

[117] Ibid., § 182.
[118] Ibid., § 183.
[119] Ibid., § 186.
[120] Ibid., § 187.
[121] *Chiragov and Others v. Armenia Judgment – Separate Opinions*, Concurring Opinion of Judge Motoc, at § 84.
[122] Ibid.

extending financial and political support to the Nagorno Karabakh de facto entity. In sum, it seems that effective control in the understanding of the Court is comprised of military presence, high political integration of the entities, and significant financial support extended from one to the other.

Another possible means through which the Court could have approached this case would have been to employ Article 4 ILC Draft Articles on Responsibility of States (see Chapter I, section 1.2, and Chapter III, section 3.6).[123] Based on this, and on the available facts at hand as reproduced above (especially the NKR being "highly integrated in virtually all important matters" with Armenia), the Court could have eventually regarded the de facto authorities of the region, i.e. the 'NKR', as Armenia's de facto organ, triggering thereby the responsibility and jurisdiction of Armenia.

In another case Sargsyan v. Azerbaijan, the applicant was an Armenian national bringing a case against Azerbaijan, alleging the denial of his right to return to the village of Gulistan, thus having no access to his property and the graves of his relatives.[124] The applicant claimed violations of Article 1 of Protocol I and Article 8 ECHR, whereas Azerbaijan argued that because of the circumstances it was "unable to exercise its legitimate authority" over the village of Gulistan.[125] Gulistan is in fact situated on the front line between Azerbaijan and the NKR, and was at that time short of civilian inhabitants, in addition to being heavily mined.[126] The ECtHR noted that because Gulistan is located on the internationally recognised territory of Azerbaijan, the presumption of Azeri jurisdiction applied.[127] To assess whether Gulistan was occupied, the Court resorted to Article 42 HR 1907 and concluded that this was not the case, since the effective control of foreign forces over that territory would require their presence there.[128] This led the Court to conclude that the facts out of which the violations had arisen were within the jurisdiction of Azerbaijan, hence dismissing the

[123] See however the Dissenting Opinion of Judge Gyulumyan, who calls for Article 8 of the ILC Draft Articles on Responsibility of States to have been employed; *Chiragov and Others v. Armenia Judgment –Separate Opinions,* Dissenting Opinion of Judge Gyulumyan, § 86.
[124] *Sargsyan v. Azerbaijan*, ECtHR (2015) (App. no. 40167/06), § 3.
[125] Ibid., § 123 and § 145.
[126] Ibid., § 137 and § 233.
[127] Ibid., § 139.
[128] Ibid., § 144; see also § 142.

respondent government's objections and activating its responsibility under the ECHR but absolving Armenia.[129]

What is especially noteworthy is that in its reasoning the Court used Article 42 HR 1907, thereby sidestepping its usual formulations of *effective overall control* and *decisive influence*. This may be due to the fact that the case was concerned with ruling *out* the jurisdiction of a respondent government over *own* territory, instead of establishing it extraterritorially. Also, while historically the ECtHR has hardly ever referred to IHL, it can be observed that this practice is slowly changing.

The ECtHR, nevertheless, displays no consistency in its usage of the tests of *effective control (OL), effective overall control,* or *decisive influence* (see also Chapter III). The question then is why the ECtHR keeps shifting between these formulations, not to mention having more clearly employed Article 42 HR 1907 in two of its recent cases as just illustrated. Providing explanations and achieving and maintaining consistency in the usage of these tests would help to clearly identify the required threshold that gives rise to the application of the ECHR.[130]

To conclude this section, in case a state is a military occupant, the threshold of effective control (OL) over territory alone would suffice to give rise to the application of IHRL: once occupation is established, "the full spectrum" of IHRL is applicable.[131] By contrast, the *effective overall control test* may be conceptualised as a two-tiered test, where overall control (SR/IHL) over a group or entity gives rise to effective control (OL) over the territory (see also Chapter III). Both types of control require a state to fully ensure the application of *all* the human rights enshrined in the ECHR (and/or other instruments of IHRL of which the state is a member) and demand that the state lives up to its duties across the entire territory under its control. Figure 8 shows how these two tests operate.

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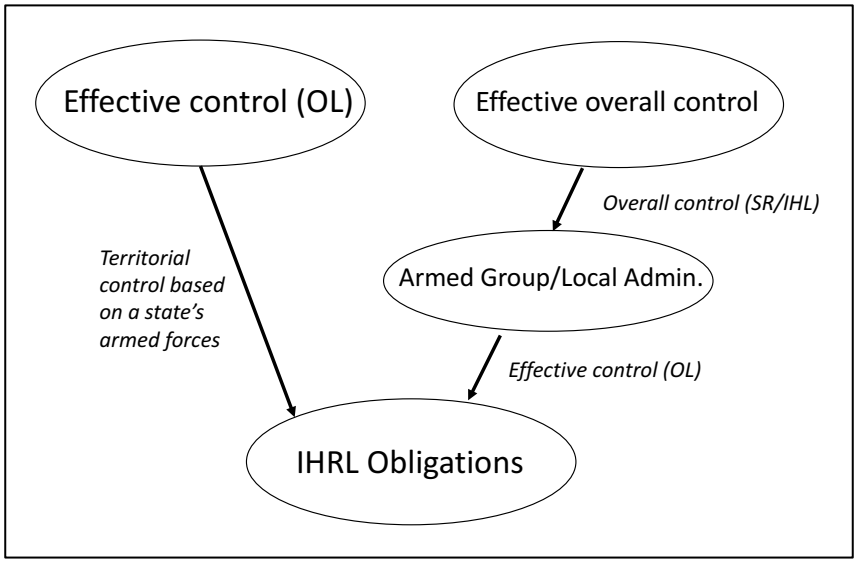
[129] Ibid., § 151.

[130] For alternative views, which consider *effective overall control* to be a general territorial test, see C. Droege, *supra* note 48, at 328–330; W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), at 136–137.

[131] D. Murray et al., *Practitioners' Guide to Human Rights Law* in Armed Conflict (Oxford: Oxford University Press, 2016), at 70; see also *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), supra* note 50, § 178.

Figure 8: Territorial Control and IHRL Obligations



The next section addresses the counter claim, namely that IHRL obligations may not apply in toto or at least not to the same degree due to complexities existing on the ground.

2.3 Degrees of IHRL obligations according to specific contexts

The above conducted analysis culminates in the ensuing outlook: control for human rights purposes can be construed in two ways, separating control over territory from control over persons. With control over territory, there seems to be an automatic applicability of human rights law. Still, the question is: how does one determine the existence of control for human rights purposes? Similarly, control over persons directly (e.g. patrolling, security operations or holding a person in custody) also entails certain IHRL obligations. Such obligations include treating the person humanely, i.e. not inflicting torture or arbitrarily depriving them of their life. In other words, a state agent would have control over certain rights.

This interpretation allows us to view control in IHRL disjunctively: control over territory and control over persons. In the latter case, control widens its reach by the mere fact that IHRL is applicable to various situations: persons may be affected by it during peace time, in situations of riots or sporadic acts of violence, or during armed

conflicts, including military occupation. Such an interpretation seems to be more flexible in allowing the state to fulfil certain human rights obligations, especially because, in IHRL, if the state is exercising control over X (e.g. the right to life), this does not automatically mean that it also has control over Y (e.g. the right to education).[132] Hence, control in IHRL may differ in its degrees as to the actual provision of human rights. IHRL obligations apply insofar as control is exerted, but their nature and scope is determined by the level of control demonstrated by a state in a specific context: *full* state control would entail full state obligations, while *partial* state control would only entail its partial obligations. On the other hand, one could also question whether under occupation the exact same human rights standards have to be provided, given that although exercising effective control (OL), the state is still dealing with and present on alien territory.[133]

But just because a state may not have complete control does not mean that it possesses none.[134] This point was made clear in Ilaşcu, when the ECtHR considered that Russia and Moldova did not have the same amount of obligations, but rather divided and tailored ECHR obligations to each respective country according to the state party's ability to exercise territorial control. Particularly, for Moldova the ECtHR considered that

> […] even in the absence of effective control over the Transdniestrian region, Moldova still has a *positive obligation* under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures *that it is in its power to take* and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[135]

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[132] F. Hampson and N. Lubell, *Georgia v. Russia* (II) 38263/08, Amicus Curiae Brief of the Human Rights Centre, University of Essex, § 4, at 2, available at http://repository.essex.ac.uk/9689/1/hampson-lubell-georgia-russia-amicus-01062014.pdf (visited 29 January 2017).

[133] N. Lubell, 'Applicability of Human Rights Law in Situations of Occupation', in *Current Challenges to the Law of Military Occupation* (34 Proceedings of the Bruges Collegium, 2006) 50–56, at 55.

[134] F. Hampson and N. Lubell, *supra* note 132, § 4, at 2.

[135] *Ilaşcu and Others v. Moldova and Russia*, (2004) (Application no. 48787/99), § 331 (emphasis added NKM); in § 352, the ECtHR concluded that "Moldova's responsibility could be engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001." See also *Ivanţoc and Others v. Moldova and Russia*, ECtHR (2011) (App. no. 23687/05), §§ 118–120; *Catan and Others v. Moldova and Russia*, ECtHR (2012) (Apps. nos. 43370/04, 8252/05 and 18454/06), §§ 121–122; A. Gioia, 'The Role of the European Court of Human Rights in

A limited and tailored state responsibility under IHRL was also an issue in Sargsyan v. Azerbaijan, where the ECtHR apportioned responsibility according to Azerbaijan's exercised level of control over the territory, that is, over the village of Gulistan.[136] Apportioned responsibility in turn may be construed as giving rise to IHRL jurisdiction on a sliding scale, i.e. resembling a cause and effect understanding of control.[137] Thus, fully ensuring all obligations in times of military occupation may be problematic due to a number of reasons: the state's effective control (OL) of the entire territory may be challenged by an insurgency, or the state may not possess the means and ability to ensure certain rights. The UK Court of Appeal, for example, in deciding the Al-Skeini case, found that

> […] it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the Banković judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR.[138]

Hampson also considers that, in Al-Skeini, the English Courts determined territory could be occupied for the purposes of IHL, but not occupied for the purposes of IHRL, as they read the ECtHR case law to require the *full* respect of the ECHR in occupied territory but that providing this full respect was unrealistic in southern Iraq.[139] The UK stance on the indivisibility of Convention rights, however, has been superseded in a more recent case, *Smith v. Ministry of Defense*, where Lord Hope advanced that:

> The concept of dividing and tailoring goes hand in hand with the principle that extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. The court need not now concern itself with the question whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached

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Monitoring Compliance with Humanitarian Law in Armed Conflict', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011) 201–249, at 208.

[136] *Sargsyan v. Azerbaijan*, *supra* note 124, § 140, § 143 and § 151.

[137] R. Wilde, *supra* note 47, at 524.

[138] The UK Court of Appeal Judgment, Case No: C1/2005/0461, C1/2005/0461B, 21 December 2005, Lord Justice Brooke LJ, § 124.

[139] F. Hampson, 'The scope of the extra-territorial applicability of international human rights law', in G. Gilbert, F. Hampson and C. Sandoval (eds.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (New York: Routledge, 2011) 157–182, at 180. See also D. McGoldrick, 'Human Rights and Humanitarian Law in the UK Courts', 40 *Israel Law Review* (2007) 527–562, at 527.

[…].[140]

In view of avoiding unrealistic expectations and ensuring the protection of victims, it is certainly worthwhile to divide and tailor a state's IHRL obligations according to specific situations and/or based on the degree of control that a state is exercising in a material time and place.[141] The next section thus addresses the understanding of control in IHRL according to specific situations.

3. Adopting A Contextual Approach to State Obligations

Neither IHL nor IHRL explicitly provide an explanation of what contextual obligations could be. Lubell considers the contextual approach to IHRL to mean two things: firstly, that during military occupation context affects the *content* of obligations ("their mode of application"); secondly, that outside of military occupation context determines *which* obligations apply ("their applicability").[142] In the latter case, this reasoning closely follows the state agent authority and control test outlined above (section 2.1), namely that the state must ensure "those rights that the state agents have the power to control in the circumstances".[143] In the former case, although in principle a state must guarantee *all* human rights when being a military occupant, specific circumstances – like the territory being volatile or lacking access to it – might obstruct the state from providing them.[144] In both cases, the IHRL obligations of a state thus hinge on the precise level and type of control exerted in a particular context.

[140] UK Supreme Court Judgment, [2013] UKSC 41, 19 June 2013, Lord Hope, § 49. For possible ramifications of this, see I. Scobbie, 'Human Rights Protection During Armed Conflict: What, When and For Whom?', in E. de Wet & J. Kleffner (eds.), *Convergence and conflicts of human rights and international humanitarian law in military operations* (Pretoria: Pretoria University Law Press, 2014) 1–17, at 11–17.

[141] F. Hampson, 'The scope', *supra* note 139, at 180; see also M. Sassòli, 'The Role of Human Rights and International Humanitarian Law in Types of Armed Conflicts', in O. Ben Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011) 34–94, at 65–66.

[142] N. Lubell, *supra* note 2, at 323–4.

[143] Ibid., at 323.

[144] Ibid., at 324.

In IHRL, control can be exercised during various situations – be that in peacetime or during riots, internal disturbances and armed conflicts, including a state's military invasion and occupation. As already stated, the level of control on which this branch rests its application is effective control exercised over individuals or over territory. A contextual (situational) approach to IHRL obligations may be helpful especially during scenarios in which a state has not fully established control over territory as envisaged by Article 42 HR 1907 but merely maintains a certain level of control over the lives of the civilians residing on that territory. Let us for a moment consider that there is no occupation of Gaza and that the Israeli army is not stationed inside Gaza *stricto sensu*, consequently Israel is not exercising effective control (OL). Accordingly, it is not an occupying power. However, Israel controls all the *ins* and *outs* of Gaza (see Chapter IV, section 2.4). Israel also governs the basic aspects of the general life of the territory, such as the provision of electricity, the flow of food and other supplies, as well as tax collection. What law applies in this case and under which law may Israel be held answerable for its actions?

Following the contextual approach, in this situation Israel would have IHRL obligations towards the population of Gaza in relation to those rights that are in its power to ensure, such as rights related to border-crossing and freedom of movement. Israel would, therefore, not have *all* the human rights obligations vis-à-vis Gaza's population, also because there is a certain level of control exercised by the rivalling Hamas Government over the daily life of the territory. Put differently, Israel is responsible merely for those violations that are within its power to control. This way, it appears that there may be *something else* in IHRL that allows to contemplate certain types of control that do not just correspond to the obvious tests of control that trigger a state's full extraterritorial jurisdiction. In other words, there may be a level of control that entails only *some* obligations of the state under IHRL, but not all of them. Through this, IHRL can render a state responsible for certain violations stemming from the concrete situation under its control. In the provided example, Israel could thus be held responsible for violating any rights which in a given moment its agents were actually able to infringe upon.

In the same vein, Fraenkel views that an international bill of rights should apply in times of military occupation "at least after the purely military phase of the occupation has ended".[145] Fraenkel's words suggest that the occupant has to have the ability to discharge and provide for the rights guaranteed under the IHRL instruments and not be asked impossible requests that it simply cannot implement. In Al-Skeini, Lord Justice Sedley equally considered that while the occupant is the guarantor of human rights, it just has to do all it can at the material time:

> […] it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art 12. Or the equality guarantees vouchsafed by Art. 14. But I do not think effective control involves this. If effective control in the jurisprudence of the [European Court of Human Rights] marches with international humanitarian law and the law of armed conflict, as it clearly seeks to do, it involves two key things: the de facto assumption of civil power by an occupying state and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights […] [but places] an obligation on the occupier to *do all it can*.[146]

In Sassòli's opinion, a functional approach to the application of the ECHR is equally practicable, that is "distinguishing the degree of control necessary according to the right protected."[147] While such a sliding scale approach was rejected by the ECtHR in Banković,[148] according to that scholar it

> […] would reconcile the object and purpose of IHRL to protect everyone with the need to bind states by guarantees they cannot deliver outside their territory and the protection of the sovereignty of the territorial state […]. This functional

[145] E. Fraenkel, *Military Occupation and the Rule of Law* (New York: Oxford University Press, 1944), at 205–206.

[146] *Al-Skeini v. Secretary of State for Defence* (2005) EWCA 1609 (Civ.), § 196–197 (Lord Justice Sedley); emphasis added NKM; see also G. Verdirame, 'Human Rights Law in wartime: a framework for analysis', 6 *European Human Rights Law Review* (2008) 689–705, at 693: "In applying human rights, we should not persuade ourselves that a human rights-compliant war is ever a possibility. This is one of those situations where the law is mandatory, but full respect of it is an impossibility. Different degrees of inobservance are however possible: some states will violate human rights less than others in war, and it is entirely appropriate that human rights NGOs, or human rights courts when seized of these cases, should assess the various instances of non-compliance with human rights standards despite their axiomatic unattainability in wartime. Moreover, while there is insoluble conflict between war and human rights, no such conflict exists with international humanitarian law: premised on a more pragmatic balance between norm and fact, the obligations international humanitarian law imposes and the rights its confers are always fully attainable in armed conflict."

[147] M. Sassòli, 'The Role of Human Rights', *supra* note 141, at 65.

[148] *Banković and Others v. Belgium and Others,* ECtHR (2001) (Decision as to the Admissibility) (App. no. 52207/99), § 74–76.

> approach would for example mean that international forces have to respect the right to life of a person simply by omitting to attack that person as soon as those forces could affect that right by their attack. On the other hand, it is only while they physically detain a person that they would have to respect the procedural guarantees inherent in the right to personal freedom, but not if they hand an arrested person over to the custody of another state.[149]

Here, too, I consider the terms functional application and responsibility arising on a 'sliding scale' as rather vague, since they are not clearly conveying and delineating the scope, reach and anticipated result of the application of the ECHR. I therefore believe the term "situational application" to be more practice-oriented, as it defines a concrete situation necessitating a concrete obligation in light of IHRL.

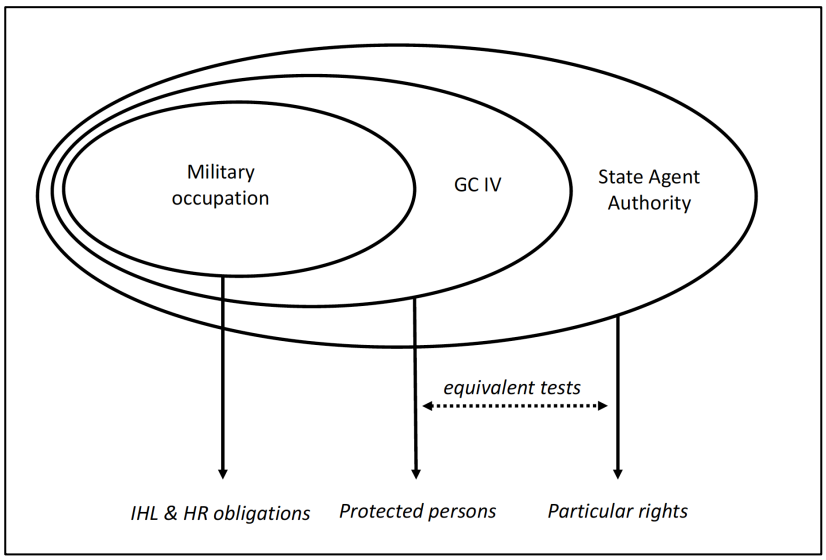
Reverting back to IHL, let us consider a situation where effective control (OL) is not secured over the entire territory, e.g. being an occupant of state B's western part but not of its east. Now it is possible, due to the volatility of the situation, that not all IHL rights are provided for by the occupant. Would the military traversing state B's east be obligated to ensure law and order under Article 43 HR 1907 when they come across a group of civilians beating up a lone man, who subsequently dies?[150] Would they be required merely to stop the beating or also to set up a fair trial? How far do the state's obligations extend under IHL? Again, the point of the offered example is that the precise obligations of a state may be assessed pursuant to the level of control it exercises on the ground at a specific point in time. Fully established control over territory would signify full obligations, albeit with possible variation on the delivery mode, while partially established control (e.g. encountering resistance) activates specific obligations only.

For the purpose of summarising the above provided tests triggering the application of IHRL and IHL obligations, it may be seen that the test of effective control (IHRL) over persons' particular rights and the test of the situational application of the GC IV are equivalent, since both deal with *specific rights* (such as Article 24 GC IV ensuring child welfare; Article 75 AP I 1977 enshrining fundamental guarantees; or Article 2 ECHR dealing with the right to life) of *specific persons* (civilians, protected persons and

[149] M. Sassòli, 'The Role of Human Rights', *supra* note 141, at 65–66.
[150] F. Hampson and N. Lubell, *supra* note 132, at 4 (§ 11).

individuals under the jurisdiction of a state party to the ECHR) at a *specific point in time* (for example during the invasion phase or during demonstrations).

Figure 9: GC IV Situational Application and Control (IHRL) Over Persons' Particular Rights



Note: the circles display the scope of application of the tests in different scenarios: anytime (including peace time, armed conflict, invasion and occupation), armed conflicts (including invasion and military occupation) and military occupation alone.

There are three aspects to such a situational application of the ECHR and for that matter to a state's situational obligations. First, there is a particular right enshrined in the ECHR that is applicable to a certain situation. Second, the situation arises against the backdrop of a certain threshold of control that the state is exercising at the material time; that threshold of control would be the benchmark for whether the state is able to provide the fulfilment of this right or not. Third, concrete situations determine a state's ability to control, and the latter in turn commands the feasibility of ensuring a specific right. Therefore, not all situations of military occupation may be of the same kind. As much as armed conflict scenarios can have different dynamics of setbacks and advancements, so different occupying states may face different insurgencies while purporting to establish effective control (OL) over territory, while others may secure effective control (OL) over territory instantaneously. Instead, the

all-or-nothing approach to applying IHRL instruments would have a pernicious effect on those who necessitate protection and release a state from its obligations, arguing that because it was not in the position to provide some obligations, it had to ensure none. Thus, and as shown in Figure 9, the tests of control in occupation law and IHRL can lead to different substantive obligations.

The final issue to be dealt with in this Chapter is whether occupation law overrides human rights law or the other way around; or if the two are complementary in light of contextual/situational obligations.

4. IHL and IHRL inter-application

In the 18th century, the Law of War began to pay attention to humanitarian considerations, which also constitute the essence of human rights.[151] Pictet therefore famously remarked that "Humanitarian Law comprises two branches: the law of war and the law of human rights."[152] While the two fields are interrelated, they are also distinct, however much they share the same origin: they both stem from the need "to protect the individual against those who would crush them."[153] The ICJ has addressed the inter-application of IHRL and IHL in three of its landmark cases, namely those on Nuclear Weapons, the Wall, and the DRC v. Uganda. In the first two, the ICJ accorded IHL the status of lex specialis.[154] Notably in the Wall case, the Court spelled out three modes of the inter-application of IHL and IHRL:

> […] there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to

[151] G.I.A.D. Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflicts', 1 *Israel Yearbook on Human Rights* (1971) 191–207, at 191.
[152] J. Pictet, *Humanitarian Law and the Protection of the War Victims* (A.W. Sijthoff-Leyden: Henry Dunant Institute Geneva, 1975), at 14; however, see K. Suter, 'An Inquiry into the Meaning of the Phrase "Human Rights in Armed conflicts"', 15 *Military Law and Law of War Review* (1976) 393–439, at 397–402.
[153] J. Pictet, *Humanitarian Law, supra* note 152, at 15.
[154] *Case Concerning Legality of the Threat or Use of Nuclear Weapons*, *supra* note 50, § 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 50, § 106; see also W. Jenks, 'The Conflict of Law-making Treaties', 30 *British Yearbook of International Law* (1953) 401–453, at 446.

> take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.[155]

However, in DRC v. Uganda the ICJ abandoned the lex specialis principle and instead forged "a complementary approach to the concurrent application of" IHRL and IHL.[156]

The nature of IHRL is such that it applies both during peacetime and to everyone, containing no special categories of persons. IHL, on the other hand, differentiates between own and enemy civilians (protected persons) as well as combatants (and POWs), primarily cognizing these two statuses. Nevertheless, a tendency transpires that the provisions of the GCs are not only considered as obligations to be discharged by the High Contracting Parties, but also as individual rights of protected persons.[157] Buergenthal views IHL as "the human rights component of the law of war", [158] whereas Draper considers the essential nexus between IHL and IHRL to be "that the former is an essential part of the latter", i.e. the law of war being a derogation from the normal regime of human rights.[159] Some even argue that IHL is a branch of IHRL, as it strives to retain a "modicum of civilization amid the worst of all cataclysms human communities can experience",[160] that is in times of war. Legally speaking, however, it is IHL that came first (see Chapter I and Chapter II). Generally, both branches extend their protection to persons. Suffice to mention Article 75 AP I 1977 which conveys and expresses some major human rights principles,[161] in addition to the fact that IHL enshrines the Martens Clause (the "principles of humanity" and

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[155] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 50, at § 106.

[156] N. Lubell and N. Prud'homme, 'Impact of Human Rights Law', in R. Liivoja and T. McCormarck (eds.), *Routledge Handbook of the Law of Armed Conflict* (London/New York: Routledge, 2016) 106–120, at 117.

[157] See generally D. Schindler, 'The International Committee of the Red Cross and Human Rights', 208 *International Review of the Red Cross* (1979), available at https://www.icrc.org/eng/resources/documents/article/other/57jm9z.htm (visited 29 January 2017).

[158] T. Buergenthal, *Public International Law in a Nutshell* (2nd edn., St Paul, MN: West Publishing 1990), at 142.

[159] G.I.A.D Draper, *supra* note 151, at 206.

[160] C. Tomuschat, *Human Rights Between Idealism and Realism* (2nd edn., Oxford: Oxford University Press, 2010), at 292.

[161] J. K. Kleffner, 'Scope of Application of International Humanitarian Law', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn., Oxford: Oxford University Press, 2014) 43–78, at 72.

"dictates of the public conscience").[162] Nonetheless, when it comes to applying the two branches in actual armed conflicts, their norms may either overlap or clash. That is, if the issue of child education has to be assessed during military occupation, IHRL appears to be better at supplementing the IHL of occupation law and provides the occupant with much more detailed guidance regarding educational policies,[163] in addition to the mere access to and provision of food as per GC IV.[164] Yet the occupant may not be in a position to ensure such a right instantly, nor ensure all the rights on the entire territory it controls (see previous section). IHL, in turn, would be better able to deal with POWs in detention who do not possess the same degrees of individual freedom as those arrested and jailed in peacetime.

The best approach to be adopted, therefore, appears to be one that is geared towards *interaction* between the two branches rather than substitution or simple addition. Meron also suggests that, rather than competing or antagonistic, "human rights and international humanitarian law should work in tandem to protect victims of conflict."[165] Simple *addition* would mean that in any situation obligations and rights stemming from both branches apply concomitantly. For instance, the right to life would have to be guaranteed next to the application of the principles of distinction, proportionality and precautions in attack as enshrined in IHL.[166] However, the right to

[162] On the Martens Clause, the International Law Commission stated that "even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." See *Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May – 22 July 1994*, UN GAOR A/49/10, at 317; R. Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause (comments)', 25 *European Journal of International Law* (2014) 847–870; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky', 11 *European Journal of International Law* (2000) 187–216.

[163] *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (General Comment 11)*, UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C. 12/1994/4, 10 May 1999, § 6 at 2, § 9 at 3.

[164] Art. 55 GC IV 1949; see C. McCarthy, 'Human Rights Standards During Military Occupation', in R. Arnold and N. Quénivet (eds), *International Humanitarian Law and Human Rights Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2008) 121–132, at 127–132.

[165] T. Meron, 'Convergence of International Humanitarian Law and Human Rights Law', in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality* (The Hague: Martinus Nijhoff Publishers, 1997) 97–105, at 100.

[166] *Case of the Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, IACtHR, judgment of 30 November 2012, § 211–30; see also *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR (2005) (Apps. Nos. 57947/00, 57948/00 and 57949/00).

life has to be viewed through the lens of IHL and its relevant rules.[167] *Substitution*, in turn, would mean one or the other branch applies. Thus, in our example the state would either have to give precedence to the right to life or to IHL rules governing its conduct. But the case law as well as the legal doctrine have by now established that IHRL obligations need to be ensured whenever a state exercises jurisdiction, even during armed conflict and/or extraterritorially (see also above, section 2).[168]

Since neither addition nor substitution are feasible, the only solution therefore seems to be *interaction*, which means that rules of one branch inform the precise application of rules from the other. This can work in two directions: either an IHL rule is used to specify an IHRL rule, or an IHRL rule is employed to interpret an IHL rule. For example, even where the judicial guarantees of IHL are much more precise, such as Article 105 GC III on bringing POWs before a court, the case law of the human rights bodies should be evoked "to know what details must be given and when those details may be modified."[169] Since the protective provisions of IHL rights are non-derogable,[170] in Sassòli's view, ''one must refer not only to the non-derogable core of human rights guarantees but to their entirety – all the while taking account of the fact that the IHRL adapts more flexibly to a particular situation."[171]

The question at this juncture, however, is: what is the primary and what is the secondary legal framework to begin with? One opinion in the literature follows the perception that IHL is a *lex specialis*, which in turn trumps IHRL as *lex generalis*. In the words of de Vattel:

> Of two laws or two conventions, we ought […] to prefer the one which is less general and which approaches nearer the point in question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision and appears to have been pointedly intended.[172]

[167] *Case Concerning Legality of the Threat or Use of Nuclear Weapons*, *supra* note 50; Arts. 50–52, AP I 1977.
[168] N. Lubell and N. Prud'homme, *supra* note 156, at 112.
[169] M. Sassòli, 'The Role of Human Rights', *supra* note 141, at 74.
[170] Ibid., at 75.
[171] Ibid.
[172] E. De Vattel, *The Law of Nations* (Philadelphia: T. & J. W. Johnson, 1844), § 316 at 272.

Jenks for example argues that the laws of war have to be viewed as the lex specialis in relation to instruments defining peacetime norms concerning the same subjects.[173] Sassòli and Olson, on the other hand, break that principle down to the level of rules:

> This principle seeks to establish, through an objective standard corresponding to the regulated subject matter, a preferential order for two rules that apply to the same problem but regulate it differently. The reasons for preferring the more special rule are that it is closer to the particular subject matter and takes better account of the uniqueness of the context […]. The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it determines which rule prevails over another in a particular situation. Each case must be analysed individually.[174]

But the lex specialis nature of IHL has also been looked at more critically. Notably Milanović[175] proposes to forsake seeing it "as a sort of magical, two-word explanation of the relationship between" [176] IHL and IHRL, and a tool that "is nothing more than a sub-species of harmonious interpretation, a method of norm conflict avoidance",[177] assisting in the interpretation of general terms and standards in either IHL or IHRL by referencing more specific norms from the other branch.[178]

Murray et al. outline two frameworks that apply to different situations and which are constructed in two different ways. First, under the "active hostilities framework", IHL provides the primary point of reference and IHRL is applied in its context. Second, under the "security operations framework", IHRL provides the primary point of reference and IHL is applied in its context, in turn.[179] The "active hostilities framework" applies whenever there is active fighting, both in IACs and NIACs.[180] The "security operations framework" applies to situations of the nature of law

[173] W. Jenks, *supra* note 154, at 446.
[174] M. Sassòli and L. M. Olson, 'The Legal Relationship between international Humanitarian Law and Human Rights law where it matters: admissible killing and internment of fighters in non-international armed conflict', 871 *International Review of the Red Cross* (2008) 599–627, at 603–604.
[175] M. Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', in O. Ben-Naftali (ed.), *International Humanitarian Law and Human Rights Law* (Oxford: Oxford University Press, 2011) 95–125.
[176] Ibid., at 98.
[177] Ibid., at 115.
[178] Ibid., at 116.
[179] D. Murray et al., *supra* note 131, at 88.
[180] Ibid., at 90.

enforcement, including situations of occupation,[181] traditional law enforcement operations during an IAC,[182] as well as low intensity fighting in a NIAC.[183]

Turning to situations of military occupation, this means that "the content of the occupying power's international human rights law obligations in relation to the administration of the occupied territory are determined by the framework of permissible activity established by the law of armed conflict".[184] More specifically, an occupant "may impose certain restrictions on movement, association, and assembly" because although the respective rights are guaranteed by IHRL, the IHL obligation to provide public order and civil life may be a reason to restrict them.[185] Similarly, the right to manifest one's religion or belief may be restricted provided the principles of legality, necessity and proportionality are adhered to.[186]

The overall deduction from this section therefore is that IHL and IHRL should not be construed as barriers for one another, least of all in times of occupation. Both IHL and IHRL norms may operate individually, with each branch capable of providing standards for the assessment of state action.[187] However, the way forward would seem to be to specify their interplay even further and thus assess their complementary application.[188]

Conclusion

By way of conclusion, the following can be observed: both IHL and IHRL obligations can be triggered by control over persons and/or territory. Regarding the former, GC IV (Article 4) and its formulation "in the hands of" were found to be equivalent to IHRL's "state agent authority and control" test, which in turn triggers state

[181] Ibid., at 91.
[182] Ibid., at 93.
[183] Ibid., at 98.
[184] Ibid., at 238.
[185] Ibid., at 244–245.
[186] Ibid., at 249.
[187] A. Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence', 19 *The European Journal of International Law* (2008) 161–182, at 168.
[188] N. Lubell and N. Prud'homme, *supra* note 156, at 120.

jurisdiction. A state agent may also be in a position to exercise control over and thus be held liable for breaching a person's *particular* right, such as the right to life in the case of Mr. Solomou.[189] However, while there may be GC IV obligations arising during the invasion phase, what is needed to establish occupation is effective control (OL) over territory (see also Chapter II). In other words, GC IV obligations may exist before the actual materialisation of occupation.

Yet, to determine *which* obligations the state has to abide by, a situational approach to IHRL as manifested in the state agent authority test essentially relies on specific control exercised by state agents over specific individuals. For example, when a person is passing through a checkpoint or held in a detention centre, the obligations to secure the right to life and freedom of movement exist. This means that the obligations of states apply insofar as authority and control is exercised by a state's armed forces/agents, and their nature and scope is proportional to the level of control.[190]

It was also found that effective control (OL) over territory gives rise to IHRL obligations in toto, either directly (in the case of military occupation) or indirectly, through effective overall control (see also Glossary). Nevertheless, even when a state military force asserts effective control (OL) over a foreign territory, not all IHRL obligations may actually have to be provided to the fullest extent, but the state should do all it can.

Finally, that in situations of military occupation only IHL should apply would undermine the rationale and idea of the inter-applicability of the two branches. The principle of *inter arma enim silent leges* (the laws fall mute in times of war) can now be considered obsolete, as both IHL and IHRL are very much vocal about and capable of rendering the required protection to those in need. However, their precise interplay and suitable interaction in a particular situation should be determined on a case by case basis.

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[189] *Solomou and Others v. Turkey*, *supra* note 59, § 79; *Ergi v. Turkey*, ECtHR (1998) (App. no. 66/1997/850/1057), § 25 and §§ 81–82.

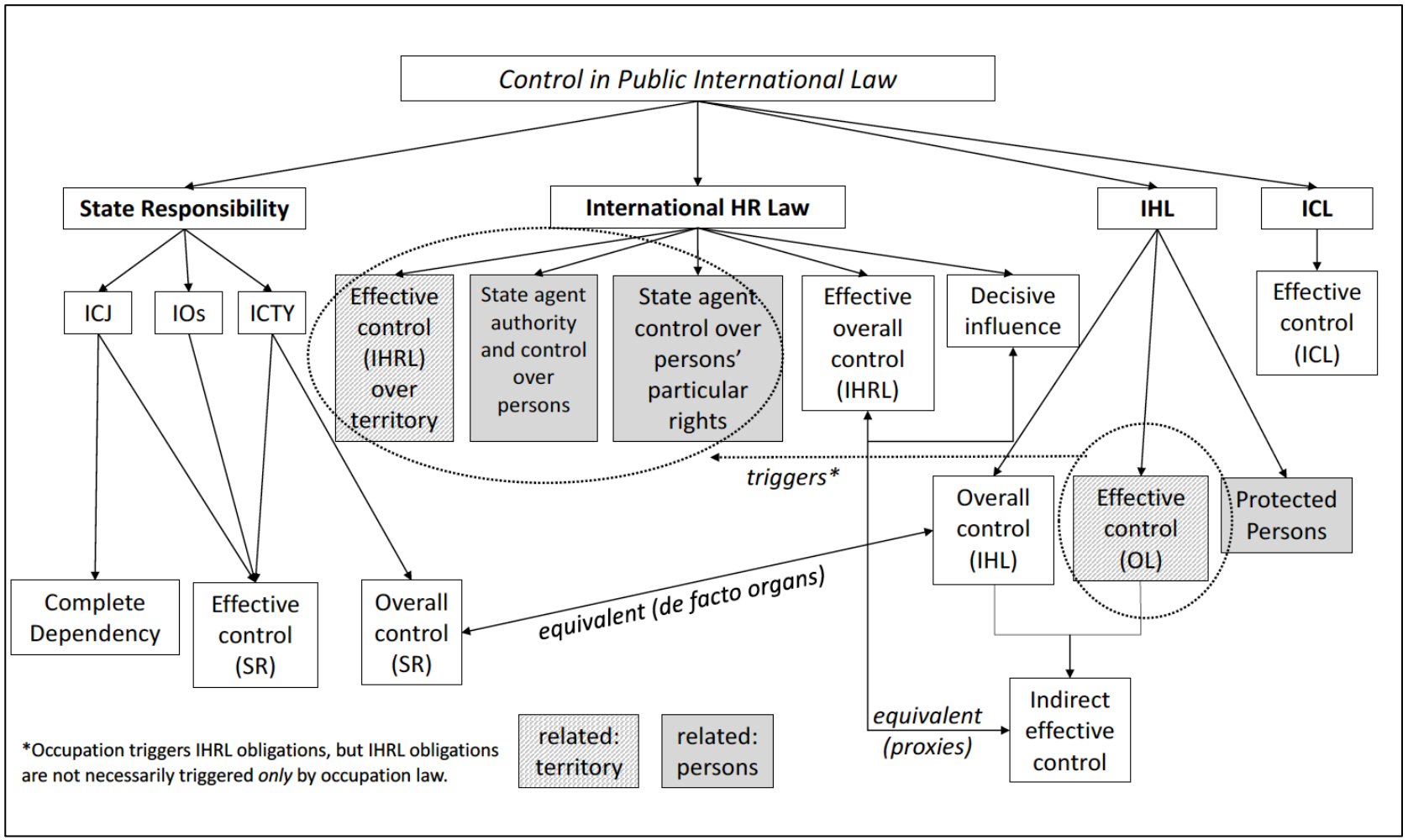
[190] R. Wilde, *supra* note 47, at 524. The author bases this test on *Banković v. Belgium*, ECtHR, *supra* note 148, § 75.

Conclusion

When a state is militarily present on another state's territory without the latter's consent and yet argues that it does not occupy that state's territory, it will most likely not abide by the norms relating to situations of military occupation. This deprives civilians living on that territory of the pertinent and timely protection envisaged by occupation law. The state in question may argue that its military presence does not amount to a situation of occupation there, either because it does not exercise sufficient control over territory, or because it has obtained consent to its presence by the de facto local authorities. Given such a possibility, this thesis has endeavoured to unravel the notion of control for the purposes of rendering a state an occupant. It also offered alternatives to this status, still making the state bound by IHL norms. More specifically, the thesis has not only identified the importance of control for the purposes of military occupation, but also tried to present different forms of control and their impact on state obligations during and outside of military occupations.

The thesis' main findings can be summarised as follows. Chapter I has dealt with control in general international law. It has revealed that different forms of control are used by different branches of international law for different purposes. In the law of state responsibility, complete dependency (SR), effective control (SR) and overall control (SR) are used to establish a state's responsibility for the actions of its *de jure* and *de facto* organs. By contrast, international criminal law conceives of effective control (ICL) over subordinates as command responsibility in both a military and civilian hierarchy. In international human rights law, in turn, the extraterritorial application is determined by effective control over territory (IHRL), state agent authority and control over persons/individuals, or effective overall control. Finally, international humanitarian law employs overall control (IHL) to establish the involvement of a foreign state in *prima facie* non-international armed conflicts and effective control (OL) for considering a territory occupied. Figure 10 maps all these branches and their respective usages of control conclusively.

Figure 10: Control in Public International Law



Building on this, Chapter II has identified a clear test for establishing control over territory for the purposes of military occupation in IHL. Therefore, the formulation "*actually placed under the authority*" of Article 42 HR 1907 is to mean effective control (OL). Multinational Forces' control over territory (including UN operations) show there can also be more than one occupant. In fact, the UN may also be regarded as an occupant, depending on whether it exercises effective control (OL) over territory as understood by occupation law or not. The responsibility of the UN or the troop contributing state can then be established by examining whether effective control (SR) over a given act is exercised pursuant to Article 7 of the ILC Draft Articles on the Responsibility of International Organisations (see also left-hand side of Figure 10).

Moving on to more complex manifestations of control, Chapter III has deciphered the concept of indirect effective control, which gives rise to situations of military occupation by an intermediary. This type of control consists of overall control (SR/IHL) and effective control (OL) and was shown to be equivalent to the notion of effective overall control (IHRL; see also Figure 10 and Glossary). The notion of decisive influence was also inspected. It was concluded that it amounted to a situation of occupation where state A exercised crucial, critical power and hence overall control (SR/IHL) over an armed group/de facto authority X in state B who in turn had effective control (OL) over territory. Finally, it was argued that IHL would seem to enshrine its own mechanism of control that can be used to internationalize a prima-facie NIAC, useful particularly for determining proxy occupations. Thus, Article 4 A2 GC III and Article 29 GC IV comprise a threshold of control that corresponds to that of overall control (SR/IHL).

Chapter IV then dealt with relinquishing control over territory, thus establishing a test for occupation ending. Because determining the end of occupation is at variance with assessing its beginning, occupation has ended if at least *one* of the following three conditions is met:

1. State A's military forces are no longer *physically present* on the territory, that is they have either wilfully left the territory or have been forcefully ejected;
2. State A's military forces are not in a position to or wilfully do not *exercise authority* over the total territory of State B or parts thereof anymore; or

3. State A's military forces are no longer *hostile* to State B, which is the case only if their presence has been consented to by the legitimate government of the latter.

Furthermore, at least six forms of relinquishing control over territory were identified and discussed: the complete end of control over territory, temporary and partial loss of control over parts of a territory, the potential for regaining control, control retained over territory after withdrawal, the ending of indirect (effective) control (or occupation exercised by an intermediary), and remaining on the basis of an UN SC Mandate. It has also been argued that relinquishing control over territory would not instantaneously release the former occupant from its obligations, especially not from those of GC IV. Pursuant to this thesis, the (former) occupant's obligations are retained commensurate to the level of control still exercised by the state at a material time. A situation of occupation declared to be over by the SC was approached with concern, however, as when embarking on this exercise the facts on the ground have to be assessed impartially and independently of the (political) views of the SC and its members.

Finally, Chapter V has analysed the effect of control on a state's substantive obligations. It has been contended that in times of military occupation, IHRL obligations apply fully because effective control (OL) triggers state jurisdiction (see also Figure 10). The ECtHR's and the ICJ's dicta also indicate the occupation test of effective control over territory as understood in Article 42 HR 1907, common Article 2 GCs and Article 1 AP I 1977 to automatically activate human rights obligations. In other words, a state military force establishing effective control (OL) over a territory automatically assumes the general responsibility over that territory which formerly lay with the (now expelled or incapacitated) sovereign. However, both IHL and IHRL can also give rise to a state's situational obligations because both branches may apply pursuant to a state's control at a material time, i.e. in conformity with the level of control exercised not only over territory but also over persons/individuals. Thus, in IHL already during the invasion phase some of the provisions of GC IV benefiting protected persons apply. In IHRL, in turn, it is the state agent authority and control

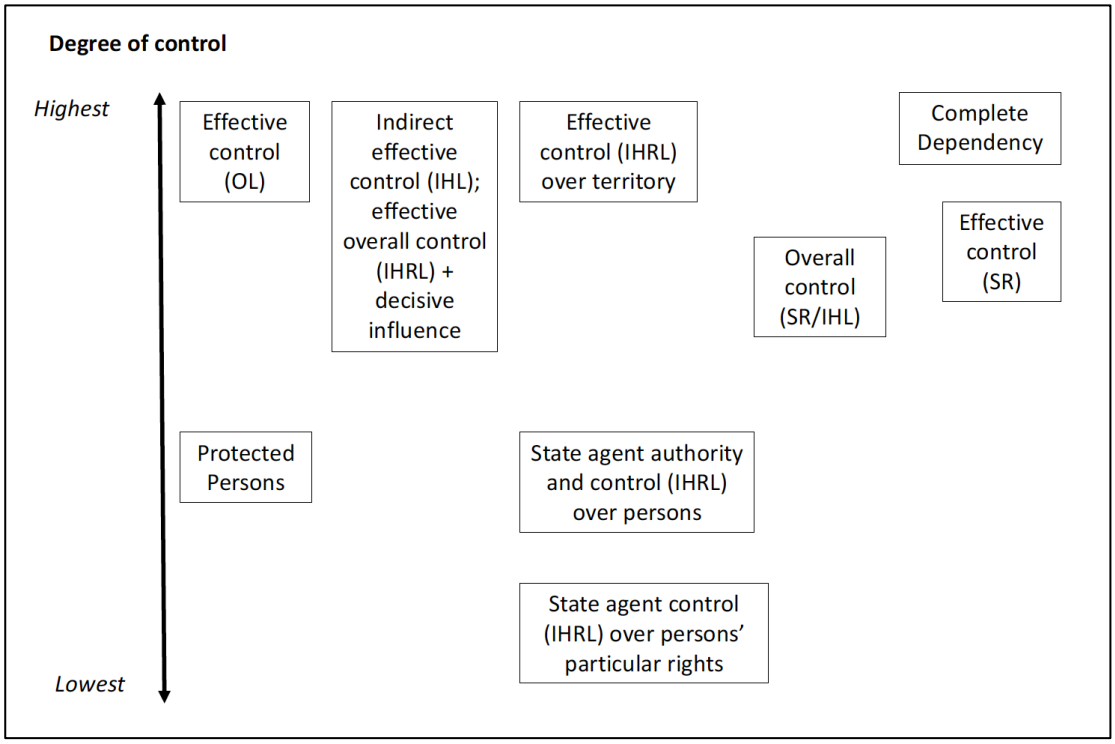
test which establishes a state's responsibility either over persons or persons' particular rights, e.g. the right to life.

In showing the anatomy of the test of effective control which determines the beginning and end of situations of occupation, this thesis has made a contribution to the understanding and application of IHL in times of military occupation. Chapters III, IV and V in particular have demonstrated that in present-day occupations, control as such occurs in different forms and variations. The polymorphic features of occupation can be seen in the way that states establish control over territory either directly or indirectly, and in the manner in which they retain, relinquish or regain it. This thesis also evidenced that control found in GC IV affords the most favourable and practicable protection to civilians and comes forward with a very adaptable application. This means that while a given situation might not directly present itself as one of occupation, some rules from GC IV become applicable already in the invasion phase, with the view of enhancing and reinforcing the protection of civilians.

Now, where does all this leave us? IHL is very well able to cope with contemporary situations of military occupation, despite states refusing to assume the responsibilities of an occupant. This means that IHL, notwithstanding its unclear wording concerning military occupation, *does* and *will not* let states evade their obligations. In other words, even if a state claims that it is not supporting an armed group against another state, IHL will still engage the former's responsibility if it can be proven it exercises overall control (SR/IHL) over the armed group.

In fact, occupation law understands effective control (OL) in a both restrictive and flexible way. Thus, while Article 42 HR 1907 can be regarded as a legal straightjacket in that its application criteria are very strict, the provisions contained in GC IV, notably Article 4, are triggered by a laxer understanding of control, namely one for which control over persons is sufficient. More generally, Figure 11 shows all the mentioned notions of control arranged by their degrees. It emerges that control over persons' particular rights (IHRL) requires the lowest degree of control; at the other end of the spectrum we can place complete dependency (SR) as well as effective control (IHRL) and effective control (OL) over territory.

Figure 11: Degrees of control



It is hoped that the analyses contained in this work contributes to providing clarity in debates surrounding the concept of military occupation and the role of control. It is also hoped this thesis re-enforces the idea that no one should be left outside the protection of IHL.[1]

[1] Reports and Documents, 'International humanitarian law and the challenges of contemporary armed conflicts: Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva. *Switzerland, 26–30 November 2007*', 86 International Review of the Red Cross (2007) 719–757 at 727.

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