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When is a conflict international? Time for new control tests in IHL

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Abstract

This article clarifies the control a State should have over an armed group for the triggering act of an international armed conflict and for the internationalization of non-international armed conflicts in international humanitarian law. It explains the reasons for the distinction between these two types of attribution and details the specificities of each test, with an innovative approach. The author proposes new control tests for both triggering and internationalization, rejecting the effective and overall control tests regarding internationalization proposed by the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia. For instance, regarding the internationalization of a non-international armed conflict, a general and strict control test is proposed. Finally, this article addresses specific issues like the difficult question of the control required for an occupation through an armed group.

Keywords: internationalization, control tests, classification, effective control, overall control, responsibility, indirect occupation, direct intervention.

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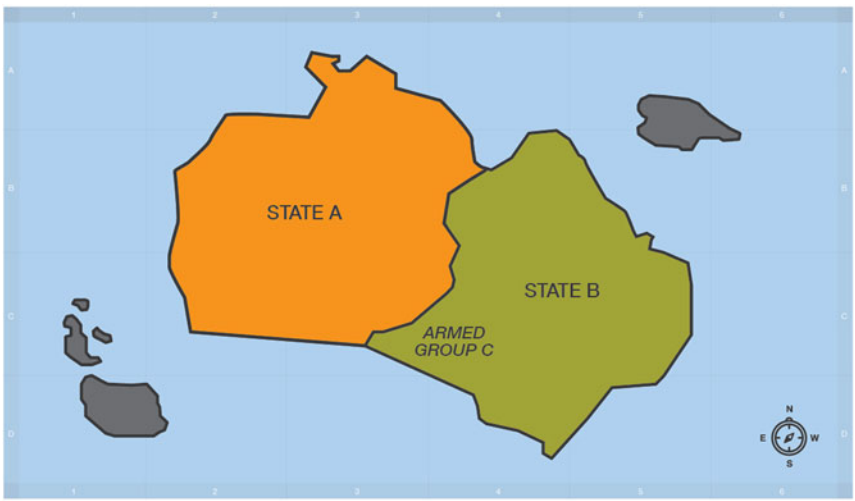
Introduction

Imagine an armed group C engaged in massive hostilities against State B within the territory of this State B. Now, imagine a State A endorsing the actions of armed group C with arms supplies, finances and military advisers. Does this support transform the pre-existent non-international armed conflict (NIAC) between armed group C and State B into an international armed conflict (IAC) between States A and B? What is the control State A should have over armed group C for an IAC between States A and B to occur? Should such a control be the same if armed group C *starts* its hostilities against State B with the support of State A (i.e., without the pre-existence of a NIAC between armed group C and State B)? This theoretical case will be used throughout this article to determine what type of control a State should have over an armed group for an IAC to exist. This case resembles real conflict situations such as the support provided by the United States to the Contras in Nicaragua in the 1980s,[1] the endorsement of the Bosnian Serb armed forces (Vojska Republike Srpske, VRS) by the Federal Republic of Yugoslavia (FRY) in the 1990s,[2] or more recently, the backing of separatists in Ukraine by Russia.[3] In all these concrete examples, there is a crucial need to determine the point at which the support of a State for an armed group that is engaged in hostilities against another State makes the endorsing State a party to an IAC.



1 This relationship between the Contras and the United States is analyzed in depth in International Court of Justice (ICJ), *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986.

2 The link between VRS and the FRY is scrutinized in International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Appeals Chamber), 15 July 1999.

3 For a text on the classification of the situation between Russia and Ukraine, see Laura R. Blank, "Ukraine's Crisis Part 2: LOAC's Threshold for International Armed Conflict", *Harvard National Security Journal* (Online), 25 May 2014, available at: http://harvardnsj.org/2014/05/ukraines-crisis-part-2-loacs-threshold-for-international-armed-conflict/ (all internet references were accessed in November 2016).

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These challenging questions are not new – for instance, many authors and judicial instances have already dealt with the tricky issue of internationalization of NIACs.[4] Throughout this contribution, the above interrogations will be addressed with an innovative approach, focusing on the concrete consequences of the emergence of an IAC – principally the application of the law of IACs.[5] It is nevertheless accepted for this article that international humanitarian law (IHL) recognizes only two types of armed conflicts, IACs and NIACs,[6] and that these two categories of armed conflicts lead to the application of specific sets of norms – the law of IACs and the law of NIACs – with few, but crucial, differences.[7] A widely shared definition of NIACs will also be endorsed, requiring an organized armed group and hostilities of a certain level.[8]

The broad issue addressed in this article will be divided into two sub-questions: (1) What is the control a State should have over an armed group engaged in a NIAC to internationalize this NIAC into an IAC (control for internationalization)? (2) What is the control a State should have over an armed group for the creation of an IAC without the pre-existence of a NIAC (control for triggering)? These two control tests are slightly different one from another, and should be separated from a third – the control leading to State responsibility in international law and IHL – despite the fact that all revolve around the issue of attribution. Indeed, the three control tests aim to determine what the State's

4 For references on internationalization, see the section on "Control for Internationalization", below.

5 See, among others, Article 2 common to the four Geneva Conventions of 1949, which states that each of the Geneva Conventions "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".

6 See common Articles 2 and 3; Article 1, paragraph 3 of Additional Protocol I (AP I); and Article 1 of Additional Protocol II (AP II). Customary IHL also recognizes this IAC-NIAC dichotomy. Indeed, for each rule of the International Committee of the Red Cross (ICRC) Customary Law Study, it is mentioned whether the rule is customary in IACs and/or in NIACs; see the ICRC Customary IHL database, available at: www.icrc.org/customary-ihl/eng/docs/home. For scholars who emphasize this dichotomy, see, among many others, Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 37–39; Marko Milanovic and Vidan Hadzi-Vidanovic, "A Taxonomy of Armed Conflict", in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, Edward Elgar, Cheltenham, 2013, pp. 272–273; Dino Kritsiotis, "The Tremors of Tadić", *Israel Law Review*, Vol. 43, No. 2, 2010, pp. 264–266.

7 For instance, in the law of NIACs, there is no recognition of the statuses of combatant and prisoner of war equivalent to those existing in the law of IACs. Consequently, in NIACs, members of an organized armed group could, for example, be arrested and prosecuted for their military actions. See, for instance, Robert Kolb, *Ius in bello: Le droit international des conflits armés: Précis*, Helbing Lichtenhahn, Basel, 2009, pp. 448–450; Jean d'Aspremont and Jérôme de Hemptinne, *Droit international humanitaire: Thèmes choisis*, Pedone, Paris, 2012, p. 46.

8 For more details on these two criteria, see ICTY, *The Prosecutor v. Limaj, Bala and Musliu*, Case No. IT-03-66, Judgement (Trial Chamber II), 30 November 2005, para. 84; ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Judgment (Trial Chamber II), 10 July 2008, paras 175–206; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report to the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, pp. 8–11; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 164–180 (and attached references); Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 122–133.

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control should be over an entity to attribute to this State the actions and omissions of this entity. As we will see in depth, the author of this article proposes new control tests for both triggering an IAC and internationalization of a NIAC into an IAC, rejecting for instance the overall and effective control tests regarding internationalization, and arguing instead that a State A should have a general and strict control over an armed group C already engaged in hostilities against a State B for those hostilities to be internationalized. Pointedly, this means that according to the author, the degree of control required for internationalization should be higher than that of overall control supported by the majority opinion. State A's training, equipping, financing and help in the general planning of armed group C's military operations against State B would therefore not suffice to internationalize the conflict. As a result, fewer situations would be covered by the law of IACs, but this set of norms would apply to violence on the ground *de facto* taking place between two States.

The first section of this article will explain the control necessary for State responsibility and the reasons for which this test must be differentiated with the control tests for triggering and internationalization. Then the details of the control tests for triggering and internationalization will be highlighted. Finally, some remarks on this topic will be addressed, such as the impact of occupation over a pre-existent NIAC.

Control leading to State responsibility

What is the control a State should have over an armed group to make that State responsible for the armed group's actions and omissions? This question addresses one of the crucial issues of international law of the past decades. In order to clarify the author's reflections on why the controls for triggering and internationalization do not need to be in conformity with the control test for State responsibility, a brief summary of the different positions on the latter will be explained in this section.

Description of the control leading to responsibility

In international law, it is principally the rules on responsibility of States for internationally wrongful acts that have raised the question of attribution of actions and omissions to a State.[9] Indeed, one of the conditions for this responsibility is the attribution of conduct to a State.[10] Adopted by the

9 See United Nations (UN), Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by UNGA Res. 56/83, 12 December 2001 (Draft Articles), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

10 Article 2 of the Draft Articles states that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State". For a detailed analysis of attribution for responsibility of States in international law, see Jérôme Reymond, *L'attribution de comportements d'organes "de facto" et d'agents de l'etat en droit international: Etude sur la responsabilité internationale des etats*, Schulthess, Geneva, 2013.

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International Law Commission in 2001, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles)[11] essentially clarify the law on attribution for responsibility by, in sum,[12] making a distinction between the attribution of actions and omissions by *de jure* (Article 4) and *de facto* (Article 8) organs of a State.[13]

According to Article 4, paragraph 2 of the Draft Articles, *de jure* organs of a State are mainly defined by domestic law, with some limitations posed in international law.[14] It is a broad category, encompassing all of a State's organs, regardless of their function and hierarchical position.[15] For instance, armed forces and police forces are *de jure* organs of a State. In the *Nicaragua* judgment of 1986 and the *Genocide* judgment of 2007, Article 4 of the Draft Articles was also interpreted by the International Court of Justice (ICJ) to encompass a person or a group of persons under "complete dependence" of a State.[16] This complete dependence control requires very close scrutiny over a person or group of persons, given that all their actions and omissions are attributable to the State in question.[17] Such a person or group can be described as a "*de jure de facto*" organ.

According to Article 8 of the Draft Articles, a *de facto* organ of a State is a "person or group of persons … acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The Commentaries to Article 8 of the Draft Articles explain that the decisive element is the existence of "a real link between the person or group performing the act and the State machinery".[18] There are few difficulties with the attribution of persons or groups acting on *instructions*; the delicate point arises when faced with persons and groups under the *direction* or *control* of a State. According to the same Commentaries, a

> conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only

11 The Draft Articles of the International Law Commission have not yet been adopted by the General Assembly but were annexed to three UN resolutions in 2001, 2004 and 2007. See UN, Meetings Coverage, 6th Committee, GA/L/3395, 19 October 2010.

12 The Draft Articles distinguish between *de jure* and *de facto* organs of a State but also between persons or entities exercising elements of governmental authority (Article 5), organs placed at the disposal of a State by another State (Article 6), persons or groups of persons exercising elements of governmental authority in the absence or default of the official authorities (Article 9), and insurrectional or other movements which become the new government of a State (Article 10). These articles are left out of this contribution as they are not fundamental to the issues discussed herein.

13 Note that terminology varies from one author to another and from one instance to another. For example, the ICJ does not consistently use references to *de jure* or *de facto* organs.

14 Draft Articles, above note 9, p. 42.

15 *Ibid.*, p. 41.

16 ICJ, *Nicaragua*, above note 1, para. 109; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paras 391–395.

17 According to the ICJ, "to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them". *Ibid.*, para. 393.

18 Draft Articles, above note 9, p. 47.

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> incidentally or peripherally associated with an operation and which escaped from the State's direction or control.[19]

The particular extent of the control that a State must have over a person or group to be responsible for their actions and omissions under Article 8 of the Draft Articles is at the heart of a major controversy in international law between the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY).[20] In broad terms, the ICJ holds that if a person or group does not fulfil the test to become a *de jure de facto* organ of a State (complete dependence), it could only fall into the responsibility of a State if that person or organ were to be under the *effective control* of the State – an effective control that has to be fulfilled for each of the operations concerned.[21] If an organized military group were to be concerned, the ICTY considers that an *overall control* would be sufficient for such an attribution.[22] Indeed, in the famous *Tadić* judgment of 1999, the ICTY had to decide on the existence of an IAC between the FRY and Bosnia and Herzegovina. To address this issue, the Tribunal had to determine what the control should be of the FRY over the VRS forces in order to attribute actions of the VRS to the FRY, and thus transform the NIAC between Bosnia and Herzegovina and the VRS into an IAC between Bosnia and Herzegovina and the FRY. The ultimate goal of the exercise was to decide on the responsibility of Duško Tadić, leader of the Serb Democratic Party, on the basis of Article 2 of the ICTY Statute; this Article only applies in IAC situations.[23]

When assessing the question of control for internationalization of the armed conflict, the ICTY based its argumentation on Article 8 of the Draft Articles.[24] In other words, according to the ICTY, attributions for responsibility and for internationalization must obey the same criteria and be based on the Draft Articles.[25] Yet the ICTY rejected the interpretation made by the ICJ on the control test under Article 8 and opted for an overall control, broader than the effective control defined by the ICJ. The ICTY believed that the effective control

19 *Ibid.*, p. 47.

20 See, for instance, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, para. 4-32; ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, Dissenting Opinion of Judge McDonald, paras 16–34; Marko Milanovic, "State Responsibility for Genocide", *European Journal of International Law*, Vol. 17, No. 3, 2006, pp. 575–604; Antonio Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18, No. 4, 2007; Leo Van den Hole, "Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadic", *Syracuse Journal of International Law and Commerce*, Vol. 32, No. 2, 2005; Theodor Meron, "Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua*'s Fallout", *American Journal of International Law*, Vol. 92, No. 2, 1998; Christine Byron, "Armed Conflicts: International or Non-International?", *Journal of Conflict and Security Law*, Vol. 6, No. 1, 2001, pp. 66–90.

21 ICJ, *Nicaragua*, above note 1, paras 109–117; ICJ, *Genocide*, above note 16, paras 398–415.

22 ICTY, *Tadić*, above note 2, paras 88–145; ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-4/I, Judgment, 24 March 2000, paras 130–134.

23 ICTY, *Tadić*, above note 2, paras 80–87.

24 *Ibid.*, paras 98, 103–104, 117.

25 In the same sense, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (Commentary on GC I), Art. 2, paras 267–268.

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test was not convincing due to "the very logic of the entire system of international law on State responsibility"[26] and "international judicial and State practice".[27] The ICTY explained its test further:

> Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question …. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.[28]

In other words, the ICTY holds that it is important to distinguish between the control for individual persons (effective control) and the control for militarily organized groups (overall control).

From a general perspective, it is interesting to note that the main difference between the effective control of the ICJ and the overall control of the ICTY is one of nature, and not one of intensity of the relationship between the armed group and the controlling State.[29] It is true that the effective control of the ICJ requires a closer scrutiny by a State over an armed group than the overall control, but above all, this effective control necessitates an influence over a specific action, which is not the case for the overall control.[30]

Concerning the test for responsibility, the author supports the effective control adopted by the ICJ for three main reasons. Firstly, the ICJ test corresponds to the logic of the Draft Articles, which reflects the customary law on this topic. The Commentaries to Article 8 of the Draft Articles underline the necessity for a State to have a control over a group for a specific action in order to be held responsible for the behaviour of this group.[31] Therefore, unlike the overall control test, the Commentaries coincide with the effective control test.[32] Secondly, the ICTY control was conceptualized to address an issue of conflict classification and criminal responsibility of individuals, not a State responsibility issue, and this had an influence on the wording of the test. For instance, the overall control differentiates an attribution for persons from an attribution for military organized groups. The organization of an armed group is a key concept in IHL.[33] It seems that the ICTY used this concept because, in reality, its aim was

26 ICTY, *Tadić*, above note 2, para. 116.
27 *Ibid.*, para. 124.
28 *Ibid.*, para. 137.
29 M. Milanovic, above note 20, p. 581. See also L. Van den Hole, above note 20, pp. 280–286, who argues that overall and effective controls do not substantially differ.
30 ICJ, *Genocide*, above note 16, para. 400.
31 Draft Articles, above note 9, p. 48. See also M. Milanovic, above note 20, pp. 582–583.
32 Draft Articles, above note 9, p. 47.
33 See above note 8.

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to classify a conflict for criminal purposes, not to address State responsibility issues. Thirdly, in the author's view, the logic of the ICTY's test is flawed. It questions the ICJ effective control with an inaccurate reading of it,[34] and has an interpretation of Article 8 of the Draft Articles that does not correspond to their Commentaries.[35] In reference to the illustrative case, the author therefore endorses the view that State A is responsible for actions of armed group C only if it has an effective control over this armed group for the actions concerned. This reasoning does not preclude the possibility, supported by many authors and instances,[36] that the control necessary for internationalization could be the one identified by the ICTY even though the reference to rules on responsibility was not necessary.

Is it necessary to adopt this control test for responsibility in establishing the existence of an IAC?

As explained above, for a State to be held responsible for the actions and omissions of an armed group, it must have effective control over members of the armed group. For the control tests for triggering and internationalization, there would be some advantages to using the test for responsibility. For instance, with one single attribution test, the security of law would, most likely, be better conserved.[37] That being said, there are three main reasons why the controls necessary for triggering and internationalization do not need to follow the control leading to responsibility.

Firstly, the rules on responsibility are secondary rules of international law, whereas IHL rules are primary rules of international law. As explained by Marko Milanovic and Vidan Hadzi-Vidanovic, it seems "conceptually inappropriate for secondary rules of attribution to determine the scope of application of the primary rules of IHL".[38] Indeed, secondary rules have the specific goal of sanctioning violations of primary rules and could not, at the same time, define the material scope of application of those primary rules – it would be a circular argumentation. As mentioned by Katherine Del Mar,

> it would … be worrying if, in order to apply the rules of IHL of international armed conflict to a particular individual, it was first necessary to establish that the actions of this individual could be attributed to a state which consequently incurred responsibility for his or her actions.[39]

34 In the same sense, see M. Milanovic, above note 20, pp. 583–588.
35 See the section "Description of the Control Leading to Responsibility", above.
36 See, among others, ICJ, *Genocide*, above note 16, para. 404; Marko Milanovic, "What Exactly Internationalizes an Internal Armed Conflict?", *EJIL: Talk!*, 7 May 2010, available at: www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/; Marco Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford University Press, New York, 2014, pp. 138–139.
37 ICTY, *Tadić*, above note 2, paras 103–105.
38 M. Milanovic and V. Hadzi-Vidanovic, above note 6, p. 294.
39 Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law", *European Journal of International Law*, Vol. 21, No. 1, 2010, pp. 108–109. See also M. Milanovic, above note 20, pp. 583–585.

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Secondly, there is no structural reason to adopt the control test leading to State responsibility when assessing what control a State should have over an armed group for an IAC to exist, since these are completely different questions.[40] On the one hand, with the control leading to responsibility, the goal is to establish what the control of a State should be over an armed group to make this State responsible for actions and omissions of the armed group – i.e., the link is sufficient to make a State responsible for those actions and omissions. For instance, in the theoretical case described at the beginning of this article, if massive killings by armed group C are attributed to State A because of its control over armed group C, State A is considered as the author of these killings and has obligations to repair towards the victims or their families.[41] On the other hand, for the controls for triggering and internationalization, the aim is to define the type of control of a State over an armed group necessary to make the State a party to an IAC because of the actions of the armed group – i.e., the link is sufficient to engage a State in an IAC. Since States have many obligations when partaking in an IAC, the consequences of this attribution are extensive. For instance, States Parties have the duty to protect cultural objects and the natural environment, to take precautions in the conduct of military operations, to ensure that legal advisers are available to instruct military commanders, to repress breaches of the Geneva Conventions and their Additional Protocols, etc.[42] Also, the existence of an IAC could have effects outside of the battleground. For example, if State A is engaged in an IAC with State B because of its control over armed group C, State A is authorized to arrest and detain citizens of State B on its territory under certain conditions even though State A is not directly engaged in hostilities with State B on the ground, and *vice versa*.[43]

Thirdly, and more substantially, the rules of attribution for responsibility do not take into account the peculiarities of attribution for triggering and internationalization. This is completely understandable, because this is not their object. According to the author, the control tests for triggering and internationalization should have, at their core, their consequences – i.e., the existence of an IAC and the application of the law of IACs. In other words, the central point is to ensure the relevancy of applying the law of IACs to hostilities that concretely, on the ground, take place between an armed group and a State. More precisely, it is important to keep in mind that in the absence of strong control by a State, an

40 Many authors and instances have underlined the differences between the controls for responsibility and internationalization. See, among many others, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, paras 17–19; ICTY, *Tadić* (Trial Chamber), above note 20, Dissenting Opinion of Judge McDonald, para. 27; ICJ, *Genocide*, above note 16, paras 402–406; ICTY, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, paras 230–231; Andrew Yuile, "At the Fault-Lines of Armed Conflict: The 2006 Israel-Hezbollah Conflict and the Framework of International Humanitarian Law", *Australian International Law Journal*, Vol. 16, No. 1, 2009, pp. 197–199; T. Meron, above note 20, pp. 237–242; C. Byron, above note 20, pp. 83–84.

41 See Articles 28 *et seq.* of the Draft Articles, above note 9.

42 See, for instance, Articles 53, 57, 82 and 85 of AP I, among other provisions of the Geneva Conventions, Additional Protocols, IHL treaties and customary IHL.

43 See GC IV, Art. 42.

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armed group does not have the capacities and the attributes to respect the law of IACs. For instance, many articles of the law of IACs refer to a State's territory, legislation, government, etc.[44] In the same sense, a State would need strict control over an armed group to ensure that it respects the extensive rules of IACs mentioned above, like the detailed obligations regarding the conduct of military operations.[45] Finally, the State attacked by the armed group would accept the application of the law of IACs against its adversary only if the armed group was tightly controlled by another State.[46] States have indeed agreed to apply the law of IACs only to hostilities between sovereign entities.[47]

In sum, the control tests for triggering and internationalization may substantially – if accidentally – correspond to the effective control of the ICJ, although there is absolutely no obligation to do so. The tests for triggering an IAC and for internationalization, and their specific content, will be addressed in the next section.

Control for triggering

What is the control that a State should have over an armed group for an IAC to be created without the pre-existence of a NIAC between this armed group and another State? This is a seriously neglected question in doctrine and jurisprudence. There have been a large number of articles and judgments on control tests for responsibility and internationalization of a NIAC, but very few on control for triggering an IAC – most authors and instances simply transpose their reasoning with the other types of existing control tests.[48]

As previously addressed, the control necessary for State responsibility should be distinguished from the control tests for triggering and internationalization. In the author's view, the test for triggering is also slightly

44 See Alan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, Institute for Human Rights, Åbo Akademi, Turku, 2005, p. 247; Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 15–20; S. Sivakumaran, above note 8, pp. 72–77.

45 As explained above, States have many obligations when they are parties to an IAC. To ensure the respect of those obligations by an armed group, the State must have close control over the armed group.

46 See, for instance, M. Milanovic and V. Hadzi-Vidanovic, above note 6, pp. 272–273; Katie A. Johnston, "Transformations of Conflict Status in Libya", *Journal of Conflict and Security Law*, Vol. 17, No. 1, 2012, p. 85; Jed Odermatt, "'New Wars' and the International/Non-international Armed Conflict Dichotomy", International Institute of Higher Studies in Criminal Sciences, 2009, pp. 14–17; Marco Sassòli, "The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?", in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London and New York, 2001, p. 311.

47 Note that the State's control over an armed group does not necessarily mean that the armed group's members would acquire the status of prisoners of war if caught by another State.

48 See, for instance, Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *Collected Courses of The Hague Academy of International Law*, Vol. 163, Sijthoff and Noordhoff, Alphen aan den Rijn, 1979, p. 131.

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different from the one for internationalization, and this is with regard to two main elements. Firstly, when analyzing the case of internationalization, the focus is on the power that a State acquires over an armed group which is *already engaged in a NIAC*. This means there are ongoing hostilities of a certain level, an organized armed group and the application of the law of NIACs – a set of rules that matches with the identity of the parties fighting on the ground.[49] In this situation and in reference to our theoretical case, the central question is, thus, on the level of control that State A must gain over armed group C in order to consider that State A is fighting through armed group C against State B, and consequently to determine if an IAC exists between States A and B. With the control for triggering, there is no previous NIAC between armed group C and State B. Therefore, the focus is on the control of State A over armed group C when hostilities start between C and State B. Secondly, for the control for triggering, it is important to ensure that a State is behind the armed group for the particular use of force that will lead to the emergence of an IAC. This is different for the control test for internationalization, which requires a general relationship between the armed group and the supporting State[50] and therefore does not require the control of a State over an armed group for a specific act.

In order to analyze the specificities of the control test for the triggering act of an IAC, a short explanation of some of the author's positions is needed. The triggering act of an IAC must be a use of force that can be defined as a physical act leading directly to deaths, injuries, damage or destruction to people or objects.[51] The majority view, supported by the author,[52] also holds that IACs do not require any threshold of violence to be triggered.[53] This is contrary to NIACs,

49 The IAC-NIAC dichotomy is mainly based on the identity of the parties to the hostilities. The law of IACs applies to "armed conflict which may arise between two or more of the High Contracting Parties", i.e. States (common Article 2), whereas the law of NIACs applies to "armed conflict not of an international character", i.e. between a State and an armed group or between armed groups (common Article 3). See Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the War on Terror", *Fletcher Forum of World Affairs*, Vol. 27, No. 2, 2003, pp. 58–59; Marco Sassòli, "Transnational Armed Groups and International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University, Cambridge, MA, 2006, p. 4.

50 M. Milanovic, above note 20, p. 581.

51 This is thoroughly explained in the author's PhD thesis. Many authors and instances support partly or totally the different elements of this definition. See the references provided in Djemila Carron, *L'acte déclencheur d'un conflit armé international*, Schulthess, Geneva, 2016, pp. 139–200.

52 See, among many others, ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70; ICTY, *Delalić*, above note 40, paras 184, 208; International Criminal Court (ICC), *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, paras 207–209; ICRC, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?", Opinion Paper, Geneva, March 2008, pp. 1–3, 5; UN Human Rights Council, Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, 23 November 2006, para. 51; D. Akande, above note 6, pp. 40–42; Masahiko Asada, "The Concept of 'Armed Conflict' in International Armed Conflict", in Mary Ellen O'Connell (ed.), *What Is War? An Investigation in the Wake of 9/11*, Martinus Nijhoff, Leiden and Boston, MA, 2012, pp. 55–67; Jann K. Kleffner, "Scope of Application of International Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2013, pp. 44–45; M. Roscini, above note 36, pp. 132–136.

53 D. Carron, above note 51, pp. 201–254.

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which only exist if a certain level of hostilities occurs.[54] In other words, when defining what the control should be of State A over armed group C for the creation of an IAC between States A and B without the pre-existence of a NIAC between armed group C and State B, the control of State A over armed group C must be determined in order for the first use of force by C to create an IAC between States A and B. For example, the first gunshot by a fighter of armed group C against a soldier of State B triggers an IAC between A and B, with the application of the law of IACs in its entirety.[55] Yet, as explained previously, the law of IACs confers obligations to a State Party that could only be ensured if State A is closely linked to armed group C. In addition, an armed group will only be able to respect the law of IACs if it is tightly connected to a State, and States will accept the application of the law of IACs only when they consider that the conflict is between States.[56] Therefore, it is solely when an armed group is very well connected to a State that the law of IACs is the appropriate set of norms to govern hostilities between this controlled armed group and another State.

Such specificities and consequences must be at the heart of attribution of the triggering act. The author proposes a new test of control for the purpose of triggering an IAC between States A and B. In the test suggested, control necessary for triggering an IAC must be firstly specific regarding its *scope*. In other words, the focus should be on the control over an armed group for a specific act, like for attribution for responsibility. Indeed, as it is solely a use of force that can trigger an IAC, this specific act must be controlled by the State. Secondly, concerning the *intensity* of the control, the author is in favour of a strict relationship between the States – i.e., for an IAC to exist between States A and B, State A must closely control armed group C that is using force against State B. For instance, when armed group C uses force for the first time against State B, State A should have a crucial and leading role in organizing, coordinating and planning this specific military action. It must finance, train, equip, counsel and provide operational support to armed group C. State A may also provide to armed group C part of its infrastructure if necessary, like its detention facilities, justice mechanisms or part of its territory. This attribution test ensures a strong presence of a State beyond the triggering act of an IAC, which also corresponds to an interpretation of Article 2 common to the four Geneva Conventions.[57] In the authors' view, the test which suggests control to be specific regarding its scope and strict regarding

54 See above note 8.

55 This "first shot theory" was developed by Jean Pictet in the ICRC Commentaries to common Article 2 in 1952. It is still the view of the ICRC, as confirmed in its Commentary on GC I, above note 25, Art. 2, paras 236–244.

56 See the section "Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?", above.

57 D. Carron, above note 51, pp. 280–301. For example, when interpreting common Article 2 according to the interpretative method of the Vienna Convention on the Law of Treaties, the context must be taken into account (Article 31, paragraph 2 of the Vienna Convention) – notably common Article 3, which establishes the existence of NIACs and of the law of NIACs. The author is of the opinion that the definition of IACs should permit NIACs to exist, as the law of NIACs is the appropriate set of rules to govern hostilities between a State and an armed group. Consequently, it is necessary to have a strong presence of a State behind a potential triggering act of an IAC.

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its intensity, as proposed in this article, could be, in substance, comparable to the effective control test developed by the ICJ regarding Article 8 of the Draft Articles.[58] This would also have the advantage of avoiding a State being engaged in an IAC by actions for which it would not be responsible under international law.

This control test may appear restrictive in comparison with the overall control test developed by the ICTY regarding internationalization. As explained above, the control tests for triggering and internationalization of armed conflict should be distinguished, and the next section will address the reasons why the author does not endorse the overall control even for internationalization. Moreover, only a restrictive control test is adapted to the impact of triggering – i.e., the creation of an IAC with the first use of force between an armed group controlled by a State and another State. For the author, if the result of the overall control test would permit a conflict to be classified as an IAC more rapidly and thus the more generous law of IACs would be applied, it would nevertheless be incompatible with the capacities of States and armed groups, and the willingness of States to accept that the law of IACs applies.[59]

Control for internationalization

Preliminary remarks

What is the control that a State should have over an armed group engaged in a NIAC to internationalize this NIAC? The answer to this central question of IHL will have an important place in this article. As demonstrated above, control for internationalization must be distinguished from the control tests for State responsibility and triggering an armed conflict. Therefore, to address the present interrogation, the consequences of internationalization – i.e., the shift from a NIAC to an IAC, and the application of the law of IACs to the hostilities – will be at the centre of this analysis.

Prior to any further investigation, a more precise definition of internationalization is needed. Even if internationalization can encompass many situations, this article focuses on the specific case where State A controls armed group C located in State B and where there is an ongoing NIAC between C and State B. Internationalization is thus restrained to the transformation of a NIAC into an IAC because of the control a State obtained over a non-State party to a NIAC.[60] Internationalization by the direct intervention of a State will not be the main focus of this article.[61] As a reminder, however, a direct intervention is

58 ICJ, *Nicaragua*, above note 1, paras 109–117; ICJ, *Genocide*, above note 16, paras 398–415. See also the section "Description of the Control Leading to Responsibility", above.

59 See the section "Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?", above.

60 There are other situations of internationalization like the recognition of belligerency or the acquisition of statehood by the non-State party to a NIAC.

61 See, nevertheless, the section on "Direct Interventions", below.

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when a State enters a NIAC by directly targeting, with its *de jure* organs, the State party to the conflict, or by occupying part of the territory of this State. For instance, when Russian armed forces bombed Georgian military infrastructure, this was considered a direct intervention.[62] Indirect intervention is when a State enters a NIAC by controlling the non-State party to that NIAC – for example, when the FRY supported Bosnian Serb armed forces engaged in hostilities with Bosnia and Herzegovina.[63]

Contrary to the opinion of many authors, internationalization is also defined here as the shift from a NIAC to a single IAC.[64] According to the author, when an IAC is simply added to a NIAC because of the direct involvement of a second State, there is no internationalization but a mere complication of the original armed conflict.[65] Thus, for an internationalization of the NIAC between State B and armed group C to occur, State A must not only act against State B but must also constitute a single State party to an IAC with C. In other words, it is insufficient for internationalization for State A to act *against* State B or *with* armed group C. To obtain internationalization, State A must act *through* armed group C or armed group C *on behalf of* State A *against* State B.[66] The question of internationalization is therefore restricted to the transformation of the non-State party to a NIAC into a State party to an IAC, even though, concretely on the ground, the operations are led by an armed group.

Doctrine and jurisprudence

When subject to internationalization, doctrine and jurisprudence tend to focus on four main issues: (1) determining the situations leading to internationalization, (2) deciding on the necessary control that a State must have over an armed group in an indirect involvement, (3) fixing the level of direct intervention for internationalization, and (4) deciding on the level of internationalization when confronted with direct interventions. Despite some controversies on each of these issues, the majority opinion believes that (1) direct and indirect interventions of a second State into a NIAC on the side of the non-State party are the two main

62 See, for instance, CNN, "Russian Warplanes Target Georgia", 9 August 2008, available at: http://edition.cnn.com/2008/WORLD/europe/08/09/georgia.ossetia/.

63 "Direct" and "indirect" interventions are generally the terms used in the doctrine and jurisprudence. See, among others, ICTY, *Tadić*, above note 2, para. 84; ICC, *Lubanga*, above note 52, para. 209; J. d'Aspremont and J. de Hemptinne, above note 7, pp. 53–57; R. Kolb, above note 7, pp. 183–186.

64 Many authors analyzed the various situations leading to internationalization (mainly direct and indirect interventions) first, and then scrutinized the level of internationalization in a second phase of analysis. In this second phase, some writings opt for the "theory of pairings", which classifies hostilities between the two States involved as an IAC and violence between the non-State party and the attacked State as a NIAC. See, for instance, J. d'Aspremont and J. de Hemptinne, above note 7, p. 53. In the author's opinion, it would be better to begin by defining the cases of internationalization (shift from a NIAC to a single IAC) and then to continue by analyzing the criteria for such an internationalization. Therefore, in the case of the "theory of pairings", in the author's view, there is no transformation of a NIAC into an IAC (no internationalization) but rather the addition of an IAC to a previously existing NIAC.

65 K. Johnston, above note 46, pp. 99–100.

66 See for instance, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, paras 4–32.

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situations leading to internationalization,[67] (2) an overall control is necessary for internationalization through indirect intervention,[68] (3) a certain level of direct intervention is necessary for internationalization,[69] and (4) a direct intervention of a State in a pre-existent NIAC does not necessarily internationalize the whole NIAC.[70] The goal of the author's contribution is to answer the second of these four issues. The other elements will also be raised when necessary.

Much has been written on the issue of the necessity of overall control for internationalization through indirect intervention, and it was at the centre of one of the biggest tensions between the ICJ and the ICTY.[71] In the author's view, the debate between these two courts was not on control for internationalization but rather on control for responsibility, as the two jurisdictions pretended to base their argumentation on the Draft Articles. Nevertheless, since the ICTY considered that these two control tests must be the same, the controversy contaminated the issue of internationalization.[72] There are three main positions on the issue of attribution for internationalization. The first one considers that overall control of a State over an armed group is necessary for internationalization.[73] This is the majority view, and the one proposed by the ICTY.[74] Some authors follow this overall control test but maintain that the passage through control for responsibility is unnecessary.[75] The second position

67 See above note 63.

68 See, among others, ICC, *Lubanga*, above note 52, paras 210–211; Commentary on GC I, above note 25, Art. 2, paras 265–273; Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, pp. 79–82; Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 71.

69 This question was largely ignored by doctrine and jurisprudence. For a direct intervention to transform a NIAC into a single IAC, some writings require "significant and continuous military action" by the intervening State (ICTY, *The Prosecutor v. Ivica Rajić*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, para. 13) while others are in favour of a less stringent test (ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Judgment (Trial Chamber), 26 February 2001, para. 108; K. Johnston, above note 46, pp. 96–97; S. Sivakumaran, above note 8, p. 225).

70 As explained in above note 64, the majority view is in favour of the "theory of pairings". See ICJ, *Nicaragua*, above note 1, para. 219; Tristan 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", *International Review of the Red Cross*, Vol. 97, No. 900, 2016, pp. 1240–1251; D. Akande, above note 6, p. 57; Tamàs Hoffmann, "Can Foreign Military Intervention Internationalize a Non-International Armed Conflict? A Critical Appraisal", in ISISC, Ninth Specialization Course in International Criminal Law, 2009; M. Milanovic and V. Hadzi-Vidanovic, above note 6, pp. 302–303; Jelena Pejic, "Status of Armed Conflicts", in Elizabeth Wilmshurst and Susan Carolyn Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge and New York, 2007, pp. 90–91; D. Schindler, above note 48, pp. 150–151.

71 See section "Description of the Control Leading to Responsibility", above.

72 See above note 24.

73 See above note 68.

74 See, for instance, ICTY, *Tadić*, above note 2, paras 88–145. See also ICTY, *Aleksovski*, above note 22, paras 130–134.

75 M. Milanovic and V. Hadzi-Vidanovic, above note 6, pp. 293–295 (without stating a clear position on the issue); M. Milanovic, above note 36; Djamchid Momtaz, "Le droit international humanitaire applicable aux conflits armés non internationaux", *Collected Courses of the Hague Academy of International Law*, Vol. 292, Martinus Nijhoff, The Hague, 2001, pp. 65–66.

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should logically be that of the effective control developed by the ICJ for responsibility. In reality, there are very few texts arguing for an effective control for internationalization.[76] Finally, a minority view is in favour of an alternative position detached from effective and overall controls.[77] According to this latter opinion, neither the effective nor the overall controls are adapted to internationalization, and the focus should rather be on determining the relevant criteria for internationalization.[78]

As demonstrated above, the majority view remains in favour of the overall control test. This is also the position of the International Committee of the Red Cross, recently reaffirmed in its new Commentaries on the Geneva Conventions.[79]

The test adopted

Like for the test for triggering, the scope and intensity of the link between State A and armed group C engaged in hostilities against State B must be closely examined in order to determine the point at which the NIAC between C and State B becomes a single IAC between States A and B. The author rejects the overall and effective controls, and opts for a test that is general (in its scope) and strict (in terms of intensity). This test focuses on the consequences of internationalization – i.e., the application of the law of IACs.

Firstly, the control for internationalization should be general in its scope. In other words, like the overall control developed by the ICTY for internationalization or the complete dependence control articulated by the ICJ for State responsibility, and in opposition to the effective control of the ICJ for responsibility, the endorsing State A does not need to exercise its control over armed group C for a specific action.[80] Indeed, for internationalization to occur, the focus must be on the overall relationship between State A and armed group C and not on the control for specific activities of armed group C, since internationalization must determine the moment when a State is globally acting through an armed group against another State. Consequently, if the specific control seems pertinent for responsibility and for triggering since the cursor is on a particular act, it is not appropriate for internationalization.[81] This general control also has the advantage of avoiding changes of classification according to the control of State A over specific acts of armed group C. Actually, with an effective control test, some actions of armed group C under the control of State A would be governed by

76 See, nevertheless, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, para. 19.
77 This position is well summed up in S. Sivakumaran, above note 8, p. 227.
78 D. Akande, above note 6, pp. 61–62; R. Kolb, above note 7, pp. 185–186; James G. Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict", *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 323–328.
79 Commentary on GC I, above note 25, Art. 2, paras 265–273. See also T. Ferraro, above note 70, pp. 1234–1240.
80 M. Milanovic, above note 20, p. 581.
81 This is one of the reasons why the ICTY opted for a general control for internationalization. See ICTY, *Tadić*, above note 2, para. 131.

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IHL of IACs between States A and B, while others would not. The conflict would thus vary from NIAC to IAC, and *vice versa*, along all the hostilities. This would not permit a stable application of the law of armed conflict.[82] As a result, for hostilities between State B and armed group C to become an IAC between States A and B because of the support provided to C by A, State A does not have to issue instructions to C regarding a particular attack that would mark the entry of State A into the conflict and its internationalization. In the same vein, State A does not need to be behind all the actions of armed group C against State B. It must nevertheless ensure a global presence that should additionally respect the criteria analyzed in the next paragraph.

Secondly, and contrary to the overall control supported by the majority opinion, the level of control for internationalization should be strict in terms of intensity. This criteria requires from endorsing State A a strong presence behind armed group C. The arguments are mainly the same as those developed for attribution for triggering.[83] They refer to the consequences of internationalization: the existence of an IAC and the application of the law of IACs to violence which concretely, on the ground, occurs between an armed group and a State. As has already been stated, a State needs a strict control over an armed group to ensure that the rules of IACs are respected. In the same sense, an armed group would only be able to apply the law of IACs if it was under the close scrutiny of a State. Finally, the State attacked by the armed group would accept applying the law of IACs against its adversary only if the armed group was tightly controlled by another State. For all these reasons, it is essential to establish rigorous scrutiny by a State over an armed group party to a NIAC to conclude that this NIAC has become an IAC. This test also has the advantage of being close to the one for triggering, which is logical since both have impacts on classification.[84] This general and strict control test would, therefore, be reached if State A had a crucial and leading role in organizing, coordinating and planning military actions of armed group C. It is not sufficient for State A to loosely accommodate the activities of armed group C, nor to merely help in the general planning of its military operations, as required by the overall control test. The room for manoeuvre of C should not be too large, and it must be possible to establish a chain of command between the armed group and the controlling State. Additionally, as for the test for triggering, State A must finance, train, equip, council and provide operational support to armed group C, even though this control does not have to be fulfilled for a specific act. State A may also put its infrastructure (such as detention facilities), its justice mechanisms or part of its territory at the disposal of armed group C if necessary.

In addition to the arguments exposed above, the author rejects the overall control for internationalization promoted by the ICTY for several reasons. First, the

82 Commentary on GC I, above note 25, Art. 2, para. 271. For the rest, the Commentary on GC I is in favour of an overall control test for internationalization.
83 See the section "Control for Triggering", above.
84 Both tests require a strict control for intensity. They differ on the scope of the control: specific for triggering, general for internationalization.

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ICTY based its control on the Draft Articles; in other words, the ICTY assembled the tests for responsibility and internationalization. The author believes that the secondary rules for responsibility are not adapted to attribution for internationalization in their structures and content.[85] Second, the effective control of the ICTY was developed to address a question of criminal law. The ultimate goal of the ICTY was to decide on the guiltiness of a person, not on the classification of conflict.[86] The focus was therefore on international criminal law and not on the law of armed conflict. According to the author, this focus is an explanation as to why the overall control does not take into consideration the concrete consequences of internationalization in IHL, mainly the application of the law of IACs and the extensive obligations it entails for States on and off the battlefield.[87] The test for internationalization should be focused on the law of armed conflict. Even if there is a clear interdependence between this *corpus* and international criminal law, international criminal law is one of the enforcing instruments of IHL.[88] IHL and international criminal law do not have the same objective or the same scope of application. The application of IHL must rely on the concrete existence of hostilities and on the identity of the parties to the violence.[89] It is an operational set of norms that must be applicable at the moment of the hostilities. International criminal law is applied out of the battleground, after hostilities occur, and aims at deciding on the guiltiness of participants to armed conflicts. In the author's view, though the overall control could appear logical in criminal law, it does not coincide with the issue of internationalization of a NIAC. It would indeed lead to a rapid application of the law of armed conflict without taking into account the reality of the battlefield.

With the application of the proposed general and strict test, there would be fewer situations of hostilities covered by internationalization, and thus fewer situations of hostilities dealt with by the application of the law of IACs. It is nevertheless important to underline that when the threshold for internationalization is not met, there is no legal vacuum. Indeed, if the control of State A over armed group C is not sufficient to transform the NIAC between C and State B into an IAC between A and B, the hostilities between C and B remain covered by the law of NIACs,

85 See the section "Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?", above.

86 Article 1 of the ICTY Statute states that the Tribunal has the power "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

87 See at the section "Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?", above.

88 For a critical approach to international criminal law as an IHL means to enforcement, see Rogier Bartels, "Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials", in Mariëlle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald*, TMC Asser Press, The Hague, 2013; Marco Sassòli and Julia Grignon, 'Les limites du droit international pénal et de la justice pénale internationale dans la mise en oeuvre du droit international humanitaire', in Abdelwahab Biad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du XXIe siècle*, Bruylant, Brussels, 2012.

89 See, for instance, common Articles 2 and 3.

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completed by rules of international human rights law and domestic law. Also, the support provided by State B is a violation of the principle of non-intervention of the UN Charter,[90] and B is thus responsible for those actions under international law.[91] Moreover, if State A intervenes directly in the conflict by bombing State B or occupying it, an IAC would emerge between States A and B in addition to the NIAC between State B and armed group C.[92] To conclude, the goal here is not to restrain the application of the law of IACs with a narrow internationalization test but to apply the law of IACs when it makes the most sense. The author is of the opinion that if the State's control over the armed group is not general and strict, the law of IACs is not the appropriate set of norms to regulate violence which concretely, on the ground, occurs between a State and an armed group. For instance, in the absence of such general and strict control, it would be difficult, if not impossible, for armed group C on the ground and endorsing State A to ensure that prisoner-of-war camps are managed according to the elaborate standards of the Third Geneva Convention regarding quarters, food, clothing, canteens, hygiene, medical attention, and activities.[93] In the same vein, armed group C and State A would have to guarantee that prisoners of war – detained by armed group C – were judged for offences through State's A military tribunals.[94] These are only a few examples of the extensive obligations that a State would have to endorse when party to an IAC through its control over an armed group. In contrast, the law of NIACs seems much more appropriate for regulating hostilities when the armed group involved is under the mere overall control of a State. Indeed, the law of NIACs has been drafted for hostilities involving armed groups. For all those reasons, the test of general and strict control should be endorsed for the internationalization of NIACs.

Specific issues

Direct interventions

The test presented above addresses indirect intervention of a State into a NIAC. What happens in cases of direct intervention, for instance when State A bombs positions of State B in State B during the NIAC between B and armed group C? First, it is important to recall that given that force has been used by one State against another, there is clearly a situation of IAC between A and B[95] – an IAC that completes the NIAC between B and C. Second, it is interesting to question the point at which the IAC-NIAC classification evolves into a single IAC. As posited by Sandesh Sivakumaran, "[t]he crucial question is whether a single

90 See Article 2, paragraph 7 of the UN Charter.
91 See Articles 28 *et seq.* of the Draft Articles, above note 9.
92 See common Article 2. See also the section "Control for Triggering", above.
93 GC III, Arts 25–38.
94 *Ibid.*, Art. 84.
95 See the section "Control for Triggering", above.

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armed conflict is being fought, albeit with multiple actors participating in it, or whether parallel armed conflicts are taking place, albeit with some associations within them".[96] This is of course an issue of internationalization, and once again, internationalization requires that a State is fighting *against* another one *through* an armed group engaged in a pre-existing NIAC.[97]

There is very little doctrine and jurisprudence on this issue. Despite the minority view of automatic internationalization in cases of direct intervention,[98] most authors defend the "theory of pairings".[99] According to this latter position, an IAC exists alongside a NIAC in cases of direct intervention. Authors nevertheless have a divided opinion on cases where this direct intervention transforms the IAC-NIAC classification into a single IAC. It is interesting to underline that most texts assert a relationship between internationalization and the level of the direct intervention, rather than looking at the closeness of the relationship between the armed group and the intervening State.[100] The author believes that the situation should be decided by the criteria developed for indirect intervention.[101] If State A intervenes against State B where there is an ongoing NIAC between B and armed group C, this is an IAC-NIAC situation. The law of IACs governs the hostilities between the two States, and the law of NIACs governs the violence between the State and the armed group. The classification evolves to a single IAC only in a specific situation: when State A generally and strictly controls armed group C, and the violence is in fact between States A and B through armed group C. The reasons for such a conclusion are the same as those for internationalization in the case of indirect intervention.[102]

When there is no NIAC

Where there is a very low level of violence between State B and armed group C, and State A is also providing support to armed group C, the question arises of how to regulate this situation. As the criteria for NIACs are not fulfilled, the situation seems to be governed by international human rights law and all the pertinent domestic law.[103] For an IAC to emerge in this particular situation, there should be a triggering act – i.e. a use of force by State A against State B, the occupation of State B by State A, or a specific and strict control by State A over armed group C, which

96 S. Sivakumaran, above note 8, p. 224.
97 See the section "Preliminary Remarks", above.
98 Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2012, pp. 171–178; K. Johnston, above note 46, pp. 97–102.
99 See above note 64.
100 See, nevertheless, D. Akande, above note 6, p. 57; Christopher Greenwood, "The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign", in Andru E. Wall (ed.), *Legal and Ethical Lessons of Nato's Kosovo Campaign*, International Law Studies, Vol. 78, Naval War College Press, Newport, RI, 2002, pp. 45–46.
101 See the section "The Test Adopted", above.
102 See the section "The Test Adopted", above.
103 As a reminder, for a NIAC to exist, even if the author is in favour of a very low threshold of violence, the degree of hostilities is still one of the two criteria recognized for the emergence of a NIAC. See above note 8.

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is the test suggested by the author for triggering an IAC.[104] In the author's view, this control test is appropriate in the given situation, since there is no pre-existent NIAC. Thus, as soon as State A specifically and strictly controls armed group C, and this armed group uses force against State B, an IAC exists between States A and B and no threshold of violence is required precisely because the situation is an IAC.[105]

The influence of the level of violence

What should the test for internationalization be when, in addition to a NIAC between armed group C and State B, State A massively attacks State B without having a general and strict control over C? In other words, does the intensity of violence between A and B transform the IAC-NIAC situation into a single IAC even though the threshold control for internationalization is not fulfilled?[106] The author believes that the level of violence between A and B has no influence on the classification of hostilities between C and B. Under IHL, internationalization depends on the identity of the parties to the conflict, not on the level of violence.[107] Thus, by applying the general and strict control test for internationalization of a NIAC, it is only if State A generally and strictly controls armed group C that the IAC-NIAC becomes a single IAC. Without this control, State A would not be acting through armed group C and there would be no reason to apply the law of IACs to violence that concretely occurred between a State and an armed group. The violence between A and B is thus governed by the law of IACs, and that between B and C by the law of NIACs.

Occupation

What is the influence on classification of an occupation of State B by State A during a NIAC between armed group C and State B? Does this occupation internationalize the NIAC? In terms of occupation, the law of IACs applies between A and B whether or not there are uses of force between these two States.[108] Also, according to the author, a NIAC can exist during an occupation.[109] In other words, an occupation does not preclude the existence of a NIAC between the occupied State and an

104 See the sections "Control for Triggering", above, and "Occupation", below.
105 See the section "Control for Triggering", above.
106 Some authors suggest that a NIAC could become an IAC because of the intensity of a second State's direct interventions. See, for instance, Emily Crawford, "Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non International Armed Conflicts", *Leiden Journal of International Law*, Vol. 20, No. 2, 2007, p. 449; J. d'Aspremont and J. de Hemptinne, above note 7, p. 58.
107 See above note 49.
108 See common Article 2, paragraphs 1 and 2.
109 For the author's arguments on this point, see D. Carron, above note 51, pp. 372–374, 431–432. For authors following this position, see, among others, ICRC, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, ed. Tristan Ferraro, Geneva, 2012, pp. 124–128; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Martinus Nijhoff, Boston, MA, 2009, pp. 301–304; Marko Milanovic, "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case", *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 384–386.

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armed group. This was precisely the situation in Afghanistan after 2001, with an occupation of Afghanistan by the United States and its allies alongside a NIAC between the Taliban (the *de facto* government of Afghanistan) and Afghan rebels. Finally, the author does not think that occupation is sufficient, in itself, to internationalize a NIAC, as occupation does not modify the identity of the parties to the NIAC. For this situation to become a single IAC, a general and strict control by State A over armed group C is required, since it is only in this case that A is fighting against B through C.

There is also the different situation in which State A does not occupy State B but controls armed group C, which itself controls part of the territory of B. Such cases of indirect intervention are not the topic of this article,[110] but in the author's view the general and strict control developed above could be the necessary link between State A and armed group C to recognize this indirect occupation.[111]

Conclusion

This article clarifies the control tests for responsibility, triggering and internationalization of conflict in international law and IHL. It explains the reasons for the distinction between these three types of attribution and details the specificities of each test. Regarding the control leading to State responsibility, the author endorses the effective control developed by the ICJ in its *Nicaragua* (1984) and *Genocide* (2007) judgments. If an armed group C is not under the complete dependence of a State A, this State must control armed group C effectively and for the specific act concerned to be responsible for an act by C. This interpretation corresponds to the Commentaries to Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001. Concerning the control for triggering an IAC, a specific and strict control test is preferred. In other words, for State A to be engaged in an IAC against State B through a first use of force by armed group C against State B, A must strictly control C for the specific military act concerned. Finally, the control necessary for internationalization is closely linked to the control for triggering, since they are both tests for classification of armed conflicts. In the author's view, for a pre-existent NIAC between armed group C

110 The level of sufficient control for indirect occupation is controversial among authors. Interestingly, some writers who are in favour of the overall control for internationalization support a more stringent test for indirect occupation. For further details on indirect occupation, see Commentary on GC I, above note 25, Art. 2, paras 330–332; Tristan Ferraro, "Determining the Beginning and End of an Occupation under International Humanitarian Law", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, pp. 158–160, available at: www.icrc.org/en/international-review/article/determining-beginning-and-end-occupation-under-international; J. d'Aspremont and J. de Hemptinne, above note 7, pp. 128–129 (notably note 50); Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris, 2010, pp. 31–34; Marco Sassòli, "The Concept and the Beginning of Occupation", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, 1399–1400. See also ICTY, *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Judgment (Appeals Chamber), 29 November 2017, para. 334.

111 See the section "The Test Adopted", above.

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and State B to become an IAC between States A and B due to the relationship between C and A, this control should be strict, like for the test for triggering, but general in the sense that A does not need to control C for specific actions. Indeed, for internationalization, there is no obligation to focus on a particular action as the central question is on the global relationship between the controlling State and the armed group.

This article also addresses specific issues such as direct intervention. In cases of direct interventions by State A in a NIAC between armed group C and State B, there is a NIAC parallel to an IAC, except if State A generally and strictly controls armed group C. In this situation, the NIAC becomes a single IAC. Also, the level of direct interventions by State A has no influence on the classification of the conflict.

This contribution places the different attribution tests and additional issues at the heart of their impact in international law and IHL. According to the author, controls for triggering and internationalization must focus on the consequences they create – i.e., the emergence of an IAC and the application of the law of IACs even though concretely, on the ground, the hostilities are between a State and an armed group. Indeed, these three elements should always be kept in mind when deciding on the control tests: (1) a State needs a strict control over an armed group to ensure that the rules of IACs are respected by the armed group acting on its behalf; (2) an armed group is generally only able to apply the law of IACs if it is under the close scrutiny of a State; (3) a State attacked by an armed group accepts applying the law of IACs against its adversary only if this armed group is tightly controlled by another State. The tests proposed by the doctrine and jurisprudence, notably the overall control of the ICTY, do not reflect these crucial elements of IHL and suggest a reasoning which is more adapted to international criminal law. The risk of this approach is in applying a set of norms that is not adapted to the situation, though is admittedly more generous, to the capacities of the entities engaged in hostilities and to the willingness of States.

In sum, the central issue was to determine the controls for triggering and internationalization without challenging IHL provisions. With such a starting point, the strict control tests were endorsed because the current law of IACs would only be adapted to hostilities concretely taking place between a State and an armed group if the non-State party to the violence was under the close scrutiny of another State. Consequently, control tests have been developed taking for granted the definitions of IACs and NIACs that are largely supported by doctrine and jurisprudence and the existing laws of IACs and NIACs. An alternative position would have been to support less stringent attribution tests, like the overall control test of the ICTY, but to adapt IHL norms for the specific situation where an armed group acts against a State and under the control of another State. This is certainly an area that would require further research and reflection.

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