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Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines

Kristen E. Boon[1]

When do subjects of international law bear responsibility for the acts of others? It is often a question of control. Control is an essential element of the doctrine of attribution, defining the legal relationship between states, international organizations (IOs), and individuals.[2] Control is also a factor in determining what is properly within a state or IO's purview, legally demarcating the public and private spheres.[3] Yet while control tests are intended to operate according to objective standards, they have important normative implications. In particular, control tests can determine the outer bounds of state action, define the allocation of responsibility between states and IOs, and they have feedback effects for state sovereignty.[4]

Because the regime of international responsibility remains seriously underdeveloped – in particular, limiting responsibility to states, individuals under international criminal law, and somewhat controversially to IOs[5] – while excluding entities like Multinational Corporations, NGOs, and individuals outside of the criminal context, purportedly objective control tests have been harnessed in a bigger contest about the appropriate reach of international law and the definition of its primary subject: the state.[6] The orthodox view remains that the stringent

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[2] James Crawford & Jeremy Watkins, *International Responsibility, in* PHILOSOPHY OF INTERNATIONAL LAW 288 (Samantha Besson & John Tasioulas eds., 2010) ("[S]tates, lacking bodies of their own, must act through the agency of others.").

[3] Gordon A. Christenson, *The Doctrine of Attribution in State Responsibility, in* INTERNATIONAL LAW OF STATE RESPONSIBILITY TO ALIENS 321(Richard Lillech ed., 1983) ("[P]roperly understood, the doctrine of attribution in international law serves the purpose of allocating responsibility to the State for the consequences of certain wrongful acts or omissions of its organs and officials. It also defines the sphere of private or non-state conduct for which the state bears no responsibility.").

[4] As Alain Pellet writes, "Responsibility interacts with the notion of sovereignty, and affects its definition." Alain Pellet, *The Definition of Responsibility in International Law*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 3 (Crawford, Pellet and Olleson, eds. 2010).

[5] Kristen E. Boon, *New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations*, 37 YALE J. INT'L L. ONLINE, Spring 2011, *available at* http://www.yjil.org/docs/pub/o-37-boon-new-directions-in-responsibility.pdf (describing some of the controversies associated with the Articles).

[6] States, and under certain circumstances, organizations are subjects of international law. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 115 (Oxford University Press ed., 2013) ("[A] subject of

effective control test is appropriate for attributing private conduct to a state and for allocating responsibility between states and IOs, unless primary norms or *lex specialis* dictate otherwise.[7] Nonetheless, efforts to indirectly expand or adapt control tests to multi-level governance situations, joint management arrangements between states and IOs, and corporations or partnerships that perform public functions, are symptoms of the lag between the changing nature of statehood and the limited category of subjects of international law.[8]

Alternative principles and techniques for redressing the limited reach of state responsibility have surfaced in response, among these are lowering thresholds of control, a greater emphasis on attributing acts arising from omissions, a clearer articulation of the duty to prevent certain acts and act with due diligence, and where circumstances and doctrine warrant, recognition of shared responsibility between actors. All of these doctrinal approaches and judicial techniques are being used to navigate the new forms of regulatory power, and bridge the so-called "accountability gap" in international law.[9]

In combination, these techniques of adapting control thresholds, locating responsibility within omissions, the duty to prevent or acting with due diligence, and articulating principles of shared responsibility - demonstrate great movement within attribution doctrines and the potential scope of state and IO responsibility.[10] One consequence of this movement is that it may foretell the eclipse of general, secondary rules of attribution. Another consequence of this dynamism is the perception that the effective control test is an objective, portable, general concept of law is

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international law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims, and (b) to be responsible for its breaches of obligation by being subjected to such claims.").

[7] Indeed, James Crawford has recently written that the standard of control is now a settled question: "so far as the law of state responsibility is concerned, this determination [The ICJ's Genocide Decision] effectively ends the debate as to the correct standard of control to be applied under Article 8. Moreover it does so in a manner that reflects the ILC's thinking on the subject from the time the term 'control' was introduced into then-Draft Article 8. JAMES CRAWFORD, STATE RESPONSIBILITY THE GENERAL PART 156 (2013) [hereinafter "The General Part"].

[8] Nigel White, *Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs*, 31 CRIMINAL JUSTICE ETHICS 233, 239 (2012) ("[D]isputes in international legal dissention about the nature of the control test for the attribution of acts of private actors are set to continue and reflect the failure of international law to keep pace with changes in the structure of states and organizations.").

[9] *See generally*, Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L. 989 (2008); John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 19 EUR. J. INT'L L. 461 (2001); Liesbeth Zegveld, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW (2002).

[10] *See* Jan Arno Hessebrugge, *The Historical Developments of the Doctrines of Attribution and Due Diligence in International Law*, 36 NYU J. INT'L LAW & POL. 265 (2004) (arguing that movement in the law of state responsibility is nothing new).

increasingly suspect. Finally, and most fundamentally, the shifting landscapes around existing doctrines of attribution provide an opportunity to revisit fundamental normative choices in international law.

This article argues that control tests under prevailing doctrines of attribution present a slippage problem. By slippage I mean the decline of government control of oversight over functions traditionally associated with the state, resulting in the actual or perceived failure to meet standards under international law.[11] Slippage is occurring because the essence of the state, as a primary subject of international law, is changing. State sovereignty has evolved with successive waves of globalization, liberalization and privatization, resulting in a shift away from the state as the primary source of regulation. A restrictive or outdated view of the state, or reliance on secondary rules that do not grasp the complexities about how responsibilities are allocated between states and IOs, will only hasten slippage.

Part I of this article explores why control tests are so common in international law. Part II evaluates control tests under the law of state responsibility and explores why high control thresholds are used in some contexts of international law, whereas lower thresholds are being advocated in other contexts. It concludes that control is a very context specific inquiry, which might appear to have objective standards, but is in fact very dependent on the facts. This has meant that despite the ICJ's affirmation of the "effective control" test in the *Bosnian Genocide* case, the test is not as portable as is often assumed. Part III examines the ILC's proposed effective control test for IO responsibility, and the metamorphosis and limits of this distinct joint-management approach in light of IO practice. Part IV of this article is devoted to duties to techniques that have surfaced to overcome the limitations of control tests, namely the duties of states and IOs to prevent and act with due diligence. I argue that the limitations of control tests have indirectly propelled these duties to prevent and due diligence requirements onto center stage which in turn, are affecting the scope and content of state sovereignty. I conclude with some observations about whether these alternative routes to state and IO responsibility address the problem of slippage.

[11] *See* Sheila R. Foster, *Collective Action and the Urban Commons*, 87 Notre Dame L. Rev. 57, 59 (2011) (discussing regulatory slippage in the context of common resources, where private actors are given scope to manage collective resources).

1. The Prevalence of Control Tests in International Law

The concept of control plays a significant role in at least ten different sub-fields of international law:

- Questions regarding whether an act or omission of an individual, organ, or agent, is rightfully attributed to a state, under Article 8 of the Articles on State Responsibility;
- Questions regarding whether an act or omission of an individual, organ, agent or state, is rightfully attributed to an IO, under Article 7 of the Articles on the Responsibility of International Organizations;
- Questions as to whether a military or civilian superior is in effective command or control, or indirect control, of a subordinate under international criminal law;
- Questions as to whether a territory is under effective control of a hostile state, triggering the application of the Hague Regulations and Fourth Geneva Convention;
- Questions as to whether a state exercises control over a territory, which determines whether an armed conflict is considered international or non-international;
- Questions as to whether a new state or government should be recognized, where effective control is an element in international recognition;
- Questions as to whether a state has effective control over a space or territory, and hence has a general responsibility for upholding human rights conventions extraterritorially;
- Questions as to whether a state incurs responsibility for acts on its territory, even if that territory is no longer under its control;
- Questions as to whether a state is in effective control of a vessel flying its flag;
- Questions under as to whether a state can revoke or withhold a transit permit when the air transit enterprise is not under the effective control of a contracting State.

As this list makes clear, control tests have become a default mechanism in multiple issue areas of international law.[12] Their popularity can be explained by their flexibility. Designed to permit case-by-case assessments, control tests appear to offer objective standards to decision makers across sub-fields of international law. Moreover, they permit differentiated burdens on subjects of international law, in that they may confer greater obligations on entities with a strong nexus to the act or omission in question. Because there are different ideological views about the inherent functions of the state, the control test is also attractive because it is a way of sidestepping controversy about public and private functions. As Nigel White explains, control tests focus on the nature of the relationship between a state and private entity, rather than the function being performed, which might be considered public or private, depending on the particular state and context.[13]

Despite their prevalence, however, there are limitations to control tests. One draw back is that control tests with a high threshold, such as effective control, are premised on the concept of limited state responsibility, and as a consequence, they do not always adapt well to modern manifestations of states that outsource functions of a traditionally public nature (law enforcement, immigration, prisons) or states that are themselves embedded in other supra-structures, such as the EU. A second limitation is that the transposition of effective control to the IO responsibility context has not been met with great enthusiasm because it misses the nuances of many relevant practices of IOs.[14] James Crawford himself described the test as one of "essential ambiguity" which ILC members hoped would be fleshed out in practice.[15] Finally, control tests may not in fact be objective enough to provide adequate notice to subjects of international law or be sufficiently keyed to the modern state. Moreover, because the appropriate standard of control is inherently connected to primary rules,[16] the adoption of 'effective control' as a general standard

[12] *See generally*, David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, in IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTIONS TO THE LAW OF STATE RESPONSIBILITY 109-184 (Richard B. Lillich, Daniel B. Magraw, and David J. Bederman, eds., 1998).
[13] White, *supra* note, at 237.
[14] See discussion, infra, Part III.
[15] Crawford [The General Part], *supra* note, at 205.
[16] On the definition of primary rules, see Antonio Cassesse, International Law, 250 – 1 (2nd ed. 2005) ("it is now generally acknowledged that a distinction can be made between 'primary rules' of international law, that is, those customary or treaty rules laying down substantive obligations for States (on State immunities, treatment of foreigners, diplomatic and consular immunities, respect for territorial sovereignty, etc.) and secondary rules, that is, rules establishing (i) on what conditions a breach of a primary rule may be held to have occurred and (ii) legal consequences of this breach.")

says more about presumptions about the state than it does about the currency of the standard in law.

Broadly speaking, there are two distinct categories of control tests: control over territory and control over persons. The first type of control test focuses on spatial control, where a state or IO's territorial presence may trigger positive obligations to act, such as to prevent certain harms from occurring, to ensure respect for human rights, or to protect populations in territories under a subject's control.[17] In contrast, the second kind of control test focuses on the attribution of acts where one entity exercises power over another. The focus of this article is on the latter test - attribution with regards to acts of persons, organs, agents and other entities. In other words, it addresses how control mediates power relationships, as opposed how control affects obligations flowing from control over territory.[18] As the next section will argue, despite the ICJ's position that the effective control test is now *de rigueur*[19], there has been longstanding contest over the appropriateness of the threshold that gives every appearance of continuing.

2. Variety in Approach to Control Tests

The core jurisprudence on the control threshold in the doctrine of attribution comes from three ICJ judgments involving the attribution of acts of non-state entities to states, *Nicaragua*[20], *Armed Activities*[21], and the *Bosnian Genocide*[22] case. In these cases, discussed in more detail *infra*, the ICJ applied an effective control test, and ultimately determined in each case that the state in

[17] *See, e.g.*, Human Rights Committee general comment 31, which provides that states have the duty to guarantee and respect the ICCPR at home and abroad for individuals within their "power or effective control." U.N. Human Rights Committee, General Comment no. 31, *The nature of the general legal obligation imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) at ¶ 10**.** Although practice under the ICCPR and the ECHR is not clear cut, some important cases that address effective control over territory include: Bankovic v. Belgium, App. No. 52207/99 Eur. Ct. H.R. ¶ 7 (2001) and Issa v. Turkey, App. No. 31821/96 Eur. Ct. H.R. ¶ 71 (2004). *See also* R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent), 2007 U.K.H.L. 58 (Dec. 12).

[18] This article also does not address attribution in related fields of domestic law, such as attribution in the Foreign Sovereign Immunities Act or Act of State doctrine, although there are parallels and shared insights.

[19] *See* Crawford, *supra* note.

[20] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. (June 27) [hereinafter "Nicaragua"].

[21] Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 168, ¶ 160 (Dec. 19) [hereinafter "Armed Activities"].

[22] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. v. Serb.), 2007 I.C.J. 401, at 413 (Feb. 26) [hereinafter "Genocide Case"].

question did not specifically and factually control the acts of the relevant non-state actors, despite sometimes extensive state support.[23]

If one were to end the inquiry here, it would be easy to assume that the standard of effective control is settled under the core doctrine of attribution. The ICJ's interpretation of control is, however, distinguishable in several important ways from the International Law Commission's (ILC) approach to control under the ASR, and the ILC's interpretation of control under the ASR and the new Articles on IO Responsibility, are themselves increasingly distinguishable from control based attribution tests in the terrorism, trade, investor/ state, and international criminal law context. While the ICJ's rulings are certainly most weighty they are not formally binding on parties outside of the dispute in question, which affects their generality. This movement indicates the concept of control is a contentious one, which, despite its prevalence, has been harnessed into a larger debate about the potential reach of international law.

A quick *tour d'horizon* reveals that the calculus of control within doctrines of attribution can vary greatly. The best-known test for the attribution of acts to a state or IO is the stringent *effective control* test, which classically requires evidence of factual control over specific conduct. This restrictive approach predominates in ICJ jurisprudence on international humanitarian law (IHL), and in claims against IOs where there is joint management between an IO and state(s) or two IOs. In the context of terrorism, the WTO, investor state arbitration, and in the determination of whether an international conflict exists, in contrast, there have been movements towards lower thresholds because the primary rules in these contexts suggests the requisite level of control should be lesser.[24] Here *meaningful* or *overall* control tests[25] are often advocated on the basis that they are truer to the nature of the problem.[26] The next sections detail how these schisms have been apparent in fundamental texts and decisions in the area.

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[23] See however, discussion of the ICJ's decision in *Military and Paramilitary Activities Against Nicaragua, infra,* where the ICJ found that certain acts were attributable to the US although acts of the Sandinstas were not.

[24] *See* in particular *Prosecutor v. Dusko Tadic (Appeal Judgement),* IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999 *(*finding the appropriate test to be overall control for the determination of the existence of an international conflict*).* See discussion below at Part III(b).

[25] The variety of control thresholds, such as 'effective', 'strict', 'overall', 'ultimate', and 'meaningful' control are discussed in the pages that follow.

[26] See discussion, infra, on terrorism, Private Military Contractors, and self-defense against non-state actors.

2.1 The Nicaragua Case and ICJ Jurisprudence

Although attribution based control tests have shared criteria, standards and principles, there are important differences in application that quickly become apparent when one scratches the surface. The historic case on control that defined the current and restrictive paradigm of state responsibility is the ICJ's 1986 decision in *Military and Paramilitary Activities in and Against Nicaragua.*[27] In assessing whether violations of IHL were committed during the civil war in Nicaragua, the Court considered three different categories: acts of members of the US government, certain acts of the Latino Assets (Latin American operatives known as the UCLAs), and acts of the contras. The Court determined that while acts of the first two categories were attributable to the US, acts of the third were not.[28] On this, the key background finding, as Crawford explains, was that although the United States did not 'create' the contra force, it was responsible for financing it and for providing logistical support to the movement. Moreover, it had trained the contras and provided them with intelligence as to Sandinista troop movements, and some contra operations had been planned in conjunction with US military advisers, and that the United States had identified suitable targets for contra attacks.[29] Thus, despite extensive US involvement with and influence over the contras, the ICJ held that the contras were not essentially organs of the US government and further, that while the US supported the contras, it did not control them. [30]

In making this determination, the ICJ identified two relevant levels of control: strict control and effective control. Strict control is based on complete dependence, which involves an assessment of whether or not the acts of an entity are essentially those of a *de facto* state organ.[31] In essence the *de facto* organ must be shown to have no real autonomy or independence, and that it acts as a

[27] Nicaragua, *supra* note, at ¶¶ 109, 392.
[28] Acts of US agents were attributable because they were organs of the US. Acts of the UCLAs were attributable because either because the UCLAs had been given specific instructions by US agents or officials, and had acted under their supervision, or because those agents had planned, directed, or supported specific operations. As the ICJ wrote: "the execution was the task rather of the UCLA's, while United States nationals participated in the planning, direction and support." Nicaragua, *supra* note, at ¶¶ 75-80, 86. See helpful discussion in HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 117 (2011).
[29] Crawford, The General Part, supra note, at 147 (internal citations omitted).
[30] Nicaragua, *supra* note, at ¶ 109. As the International Law Commission notes in the commentary to Article 8 in the Articles on State Responsibility, 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. ASR, *supra* note, Commentary to arts. 8(3) & 8(4) at 47 (also noting that in Nicaragua, the ICJ rejected Nicaragua's claim that the all the conduct of the contras was attributable to the United States by reason of its control over them).
[31] Nicaragua, *supra* note, at ¶ 109; *see also* Genocide Case, supra note, at 386-97.

mere instrument of the outside power.[32] Effective control, in contrast, is based on partial dependence, where specific acts of private individuals or groups are controlled by the state.[33] In order to meet the effective control test in this context, the applicant would have had to demonstrate the existence of (i) a *de facto* link by virtue of factors such as financing, organizing, training selecting targets, and planning, and (ii) control such that it is clear that the acts had been ordered or imposed on the relevant individuals and entities by the State. The court consequently adopted a high control threshold, reflecting a restrictive approach to the state, and consequently state responsibility.[34]

2.2 The ICTY Tadic Decision and the ICJ's response to "overall control"

The most famous schism between courts over control arose when the ICTY challenged the Nicaragua standard of effective control in *Tadic*.[35] Here, the ICTY Appeals Chamber had proposed a lower threshold, an overall control test, in recognition of the influence of organization and hierarchy in groups. Under the overall control test, specific instructions are not necessary, whereas under the effective control test, they would be. The ICTY's less stringent standard was based on the argument that "a member of the group does not act on his own but confirms to the standards prevailing in the group and is subject to its authority."[36]

The overall control test did not meet the ICJ's approval. In two subsequent decisions, the *Armed Activities* case of 2005 and the *Bosnia Genocide* case of 2007 the ICJ reaffirmed the effective control test. In the *Armed Activities* case, the ICJ concluded that there was no probative

[32] Stephan Talmon, *Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT'L & COMP. L.Q. 493, 500 (2009) (arguing it is not enough that an outside power take advantage of an independent group, support it, or share common objectives. Instead, it is necessary to demonstrate that the assistance is so crucial to the entity's operations that dependence and control are mirror images of each other); Crawford, General Part, *supra* note, at 125 (citing Nicaragua, *supra* note, at 14, 62-63, identifies relevant factors as whether a state created the non-state entity, whether the state selected the leaders of the group, and whether state involvement exceeded the provision of training and financial assistance).
[33] Nicaragua, *supra* note, at ¶ 115.
[34] Nicaragua *supra* note, at ¶ 16 (separate opinion of Judge Ago) ("[O]nly in those cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them.").
[35] *See, e.g.*, Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649 (2007).
[36] Crawford, The General Part, supra note, at 153 (noting that the ILC purposely did not make this distinction in the commentary or text).

evidence that Uganda controlled, or could control, the manner in which the rebel group MLC was provided assistance.[37] Nonetheless, the ICJ noted that Uganda had violated the Declaration on Friendly Relations, which constitutes customary international law, through its use of force and intervention.[38] Interestingly, it also noted that even in the absence of attribution, Uganda, the occupying power, had control over the territory which created an obligation to prevent looting that "extends . . . to cover private persons in this district and not only members of Ugandan military forces."[39] As such, the Court partially addressed the slippage problem by upholding a duty to prevent under Article 43 of the Hague Regulations, which extends to private persons.[40]

In the *Genocide* case, the court went further than it had in *Armed Activities*, noting that the competing and broader "overall" control test would "stretch…almost to the breaking point the connection that must exist between the conduct of a State's organs and its international responsibility."[41] The Court reiterated that a state is "responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf."[42] Based on this test, it then found that the massacres at Srebrenica were not committed by organs of the FRY, on the directions or instructions of organs of the FRY, or in operations where the Respondent exercised effective control.[43] It also clarified "that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions

[37] The court continued: "In the view of the Court, the conduct of the MLC was not that of 'an organ' of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC's conduct was 'on the instructions of, or under the direction or control of' Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries." Armed Activities, *supra* note, at ¶ 160.

[38] The ICJ cited the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which provides that:
"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force… no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State" General Assembly resolution 2625 (XXV), 24 October 1970.) Armed Activities, *supra* note, at ¶ 161-2.

[39] *Id*. at 248.

[40] Cf. Jay Butler, *Responsibility for Regime Change*, 114 COLUM. L. REV. 503, 551 (2014) (describing this as a *lex specialis* of attribution in the case of occupation).

[41] *See* Genocide Case, *supra* note, at ¶¶ 399, 400 and 406, (citing Nicaragua, *supra* note 19, at ¶ 115), and Articles 4,5 and 8 of the ASR, which the ICJ notes are customary international law.

[42] Genocide Case, *supra* note, at 406.

[43] *Id*. at 413.

taken by the per- sons or groups of persons having committed the violations."[44] Finally, it rejected the argument that a *lex specialis* on attribution applied to Genocide.[45] As will be discussed below, however, the ICJ did determine the FRY was under a duty to prevent acts of genocide, as a technique to address slippage.[46]

As has been extensively analyzed elsewhere, the apparent difference between the control standards advocated by the ICTY on the one hand, and the ICJ on the other, can be explained with reference to primary rules: the *Nicaragua* decision addressed state responsibility for violations of IHL, whereas *Tadic* involved a different question: the existence of international versus non-international armed conflict. There was no reason why the same test needed to apply to both situations.[47] Nonetheless, the ICJ's adherence to the effective control standard in *Bosnia* indicates its belief that there is a portable, universal standard of effective control that applies to questions of attribution in all contexts, unless primary norms or *lex specialis* dictate otherwise. Moreover, it reaffirms a very high threshold for the attribution of responsibility to the state, a threshold that may not correspond, as an empirical matter, to changes in public authority in many states.

2.3 Slippage and the Law of Responsibility

Slippage refers to the decline of government control or oversight, whether through regulation, ownership, or delegation of functions traditionally associated with the state. The result of slippage may be a change in enforcement of particular standards or laws, whether declining or increasing, or it might be the actual or perceived failure to meet standards of law.[48] I make no

[44] *Id*. at 400.
[45] *Id*. at 401.
[46] *Id*. at 438; *see also* Mukeshimana-Ngulinzira and others v. Belgium and others, ILDC 1604 (BE 2010), *available at* http://www.oxfordlawreports.com.ezproxy.shu.edu/subscriber_article?script=yes&id=/oril/Cases/law-ildc-1604be10&recno=5&module=ildc&category=Belgium.
[47] *See* Nicaragua, *supra* note, at ¶ 17; *see also* Tonkin, *supra* note, at 118-19 ("[T]he former is determined by the primary rules of international law, which govern the substantive obligations on states, whereas the latter is determined by the secondary rules of international law, which govern the circumstances in which states will be considered responsible for wrongful conduct and the legal consequences flowing from that responsibility....").
[48] Daniel A. Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 Harv. Envtl. L. Rev. 297, 299-300 (1999) (Defining positive and negative regulatory slippage. Positive slippage refers to action which gets ahead of regulatory baselines or standards, whereas negative slippage refers to actions that fall behind those baselines or standards).

normative statement about the optimal level of regulation. Rather, my point of departure is that an important debate about control-based attribution tests is whether one high standard, premised on a limited conception of the state, is the appropriate default.

Regulatory slippage may occur for numerous reasons. It might be a product of declining government resources, or the rational choice on the part of a local government to prioritize certain activities. It might be the result of the creation of new forms of partnerships, such as public private partnerships.[49] It may be that public and private actors are nestled together in multi-level governance situations and engage in ongoing negotiation and deliberation.[50] Any of these situations may prompt a move along the regulatory continuum, between, at one end, full government ownership, and the other end, the free market. Between these two poles are are various levels of delegation of powers and self-regulation.[51] The next section will examine how the ILC approached the calculus of control within attribution doctrines, given the changing phenomenon of the modern state.

3. The ILC's Position on Control within the Doctrine of Attribution

Using the ILC's Articles on State Responsibility as a baseline, most of which are considered as constituting customary international law, this section analyses the way control, and specifically effective control, is defined and applied by the ILC on one hand, and courts or tribunals in a variety of contexts on the other. Although the ILC's goal was to supply generally applicable secondary rules, the failure to provide an overarching standard of control either encouraged a

[49] A Public Private Partnership (P3) is an arrangement whereby the private sector is involved in providing public infrastructure. P3s come in many shapes and sizes, the high water mark being the private sector (usually a consortium of various private companies) designing, financing, building, operating and maintaining pubic infrastructure under a long term (30 year plus) contract. P3s have been used for transportation (roads, bridges, tunnels, airports and ports), social infrastructure (hospitals, schools, university, courthouses and civic buildings) and water/wastewater facilities projects.

[50] Simona Piattoni, *Multilevel Governance in the EU: Does it work?* (2009), available at: https://www.princeton.edu/~smeunier/Piattoni ("Multi-level governance can be defined as an arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors – private and public – at different levels of territorial aggregation in more-or-less continuous negotiation/deliberation/implementation, and that does not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels.")

[51] Dan Assaf, *Conceptualizing Use of Public Private Partnerships*, in NON-STATE ACTORS AS STANDARD SETTERS (Peters, Koechlin, Forster, Zinkernagel (eds.) (2009) at 65 (showing a continuum from more interventionist to less interventionist government regulation).

proliferation of different tests in practice, failed to reign in an existing tendency, or it may have been right on the money: control is necessarily dependent on primary norms. The ILC recognized that sub-regimes might develop, and provided states the opportunity to contract around the secondary rules, under Article 55 on *lex specialis*.[52] Nonetheless, an analysis of the ILC's approach to control as an element of attribution has important differences from ICJ jurisprudence, the jurisprudence of other tribunals, and analyses of which control tests should be applied to contemporary problems in international law including terrorism and accountability for the acts of PMCs. The next section will illustrate considerable movement in control based theories of attribution, which has implications for the alleged unity of the law of responsibility.

As a preliminary matter, fundamental to the ILC's approach to the law of state responsibility is the distinction between attribution of conduct and attribution of responsibility.[53] Under the threshold question of attribution, an evaluation is made of whether acts can be attributed to a state directly or indirectly. Although courts will look at formal *de jure* relationships in making this determination, it is well established that control is assessed through *de facto* arrangements as well.[54] The inquiry into attribution is distinct from the secondary determination of whether a given act is contrary to international law, or in the case of positive obligations, is demanded by international law.[55] Because responsibility only follows a wrongful act or omission,[56] it is only upon a positive response to the second inquiry that attribution of conduct will lead to attribution of responsibility.[57]

[52] *Id*. at art. 55.
[53] This separation between attribution and responsibility was considered a great intellectual contribution of Roberto Ago, ILC Special Rapporteur, who produced a series of important and detailed reports on the topic, including the first draft of the articles. *See* First Report on State Responsibility, [1969] 1 YB Int'l L. Commission 125, UN Doc. A/CB.4/217; Second Report on State Responsibility, [1970] YB Int'l L. Comm'n 97, UN Doc. A/CN.4/233 and subsequent 5 reports.
[54] *See infra* discussion of *de facto* arrangements.
[55] *See infra* discussion of omissions, the duty to prevent, and due diligence.
[56] ASR, *supra* note, art. 2 ("[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.").
[57] *See id. supra* note, Commentary to Article 2.

3.1 Control under the Articles on State Responsibility ("ASR")

The attribution tests in the ILC's ASR revolve around three different types of links: institutional (structural and agency based), functional, and control based.[58] Institutional links are based on the status of an entity within a state or IO. Functional links are based on the exercise of governmental authority. Control links involve the conduct of private persons who are acting under governmental instructions or control. Control is a common element in all three categories, although it is most prominent role in the third category of control based inquiries.

3.1.1 Institutional Links

From some perspectives, institutional links constitute the clearest form of control in the sense that an organ of a state is viewed as acting as the state itself.[59] In other words, attribution is automatic because the link between the physical actor and the state is organic and absolute: acts by *de jure* state organs are attributable to the state *prima facie* due to the principle of the unity of the state.[60] As the ICJ wrote: "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule …. is of a customary

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[58] *See id*. at arts. 4, 5, 8; *see also* Francesco Messineo, *Multiple Attribution of Conduct*, at 5-6 (2012), *available at* http://www.sharesproject.nl/wp-content/uploads/2012/10/SHARES-RP-11-final.pdf (whose approach places functional and institutional in the same category, on the basis that de facto and de jure organs exercise functions of the state / IO, and factual in a separate category, where factual is understood as constituting instructions, direction or control).

[59] De jure organs might be anywhere in the hierarchy, and in practice, acts by municipal authorities, courts, government agencies, cities, and ministries are all attributable to central governments. Tokio Tokeles v. Ukraine, Case No. ARB/02/18, I.C.S.I.D. 2004 (actions of municipal authorities are attributable to the central government); Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10 2004) (actions by the International Trade Commission (agency of US gov't) attributable to the US); Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R (May 1, 2000) (state responsible for answers given by ministry of commerce); Medioambientales Tecmed SA v. United Mexican States, Case No. ARB (AF)/00/2, I.C.S.I.D., 2003 (actions by National Ecology Institute of Mexico attributable to Mexico); Compania de Aquas del Aconquija SA and Vivendi Universal v. Argentine Republic, Case No. ARB/97/3, I.C.S.I.D. 2007 (acts of province of Tucuman are attributable to Argebtuba); LaGrand (Germany v. U.S.), 2001 I.C.J. (June 27), Provisional Measures Order of 3 March 1999, 1999 I.C.J. Reports 28 ("[I]nternational responsibility of a State is engaged by the action of the competent organs and authorities acting in that State.").

[60] *See* ASR, *supra* note, art. 4 (which provides: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity that has that status in accordance with the internal law of the State.").

character."[61] The organic connection means attribution goes farther than control however. Even *ultra vires* acts of an organ will be attributable to the state, where the organ is formally independent and the state does not control it.[62]

A second theory for attribution of conduct to the state on the basis of institutional links is a *de facto* test, where entities are completely dependent on a state.[63] In the *Nicaragua* case, for example, the ICJ posited that if the relationship between the contras and the US Government was so much one of dependence and control, it would be right to equate the contras with an organ of the government or as acting on its behalf.[64] Although the ICJ concluded in that situation that despite the heavy subsidies and support provided to the contras by the US, "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", the vitality of the "strict control" test remains.[65]

The first clue of discord arose when the ILC was silent on the strict control doctrine in the ASR, neither mentioning the test itself nor the status of *de facto* organs.[66] It is true that the ILC shied away from specifying any thresholds for control in the ASR on the basis that control depends on the context.[67] But the explanation for the gap is not clear.[68] What is apparent is that Article 4

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[61] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, 1999 I.C.J. 62 (April 29).
[62] ASR, *supra* note, art. 7.
[63] Talmon, *supra* note, 499-501.
[64] Nicaragua, *supra* note, at 109 ("What the court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."); *see also* Genocide case, *supra* note, at ¶ 397 (if "[a]t the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.").
[65] Nicaragua, *supra* note, at ¶ 109; Genocide Case, *supra* note, at ¶ 397.
[66] As Olleson notes, "the question of the possibility of attribution to the State of conduct of a persons, groups or entities on this basis is not dealt with expressly by the ILC's Articles, nor is it discussed in the ILC's Commentaries to Chapter II." Simon Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW 145 (2010), *available at* www.biicl.org/stateresponsibilty).
[67] In its commentary to Article 8, as discussed *infra*, the ILC acknowledged such variations were appropriate when it stated: "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it." ASR, *supra* note, at 48.
[68] For a general discussion of how to interpret the "de facto" category, see Jorn Griebel & Milan Plucken, *New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia*, 21 LEIDEN J. INT'L L. 601 (2008); and the response by Marko Milanovic, *State Responsibility for Acts of Non-state Actors: A Comment on Greibel and Plucken*, 22 LEIDEN J. INT'L L. 307 (2009).

refers to the "internal law of the state", and prioritizes municipal legal systems in determining what constitutes the apparatus of the state such as organs and agencies.[69] In addition, ASR Art. 4(2) states that "an organ *includes* any person or entity which has that status in accordance with the internal law of the State."[70] This formulation leaves open the possibility that this category is not restricted to designations under internal law, but instead depends on who exercises governmental functions on a permanent basis.

Nonetheless, states may also create organs on a *de facto* basis, where both internal and international law will be relevant. Crawford, in fact, might be seen as taking a more liberal view of this category than the ASR, explaining: "in some legal systems, the status of state organ may be bestowed not only by internal law but also by internal practice, creating a category of *de facto* organ,"[71] although he considers this status "exceptional."[72] A first difference is therefore apparent: unlike the ILC, the ICJ explicitly acknowledges the category of *de facto* organ under a state's strict control. This approach opens the door to an expansionist approach to responsibility in the case of institutional or legal (as opposed to factual) links.[73]

3.1.2 Functional Links and Differences in Approach to Control

The second category envisaged by the ILC involves functional links based on governmental authority under Art. 5 of the ASR.[74] Here, the focus is on bodies that are authorized to exercise governmental authority such as parastatal elements that exercise or retain certain public, governmental or regulatory functions.[75] Although such authority might be manifested by

[69] ASR, *supra* note, art. 4.
[70] *Id*. at art. 4(2) (emphasis added); see in this regard Aurel Sari and Ramses A. Wessel, *International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime*, *in* THE LEGAL DIMENSION OF GLOBAL GOVERNANCE: WHAT ROLE FOR THE EU? (B. Van Vooren, S. Blockmans and J. Wouters eds., 2012).
[71] Crawford, The General Part, *supra* note, at 124.
[72] *Id*.
[73] *See* Claus Kress, *L'organe de facto en droit international public. Reflexions sur l'imputation a l'Etat de l'acte d'un particulier a la lumiere des developments recents* 105 RGDIP 93 (2001) (describing the doctrine of attribution as expansionist).
[74] *Articles on State Responsibility*, *supra* note, art. 5 (the text reads: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.").
[75] *Id.* at art. 5, ¶ 1. Common examples are prisons and immigration functions.

control, it does not need to be.[76] In fact, in its commentary on Article 5, the ILC was exceedingly clear that "there is no need to show that the conduct was in fact carried out under the control of the State."[77]

The resort to control in certain sub-fields like WTO law is still, however, common. In the 2003 case of *Canada – Dairy*, for example, the Appellate Body stated that the essence of government is that it enjoys the effective power to regulate, *control*, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority.[78] Provincial dairy boards, in other words, fulfill a governmental function through industry supervision and control, and they can incur liability for their acts and omissions in this regard.[79] This same approach was adopted in a 2012 case addressing the interpretation of "public body" under the Subsidies and Countervailing Measures Agreement. In *United States – Countervailing Duty Measures on Certain Products from China,* where the WTO Appellate Body decided that "what matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved."[80] One way of demonstrating government authority under Article 5, according to the panel, is evidence that an entity exercises *meaningful control*.[81]

A difference in approach is thus apparent. The ASR indicates control is irrelevant to Article 5, while the WTO's emphasis on meaningful control indicates the contrary: control matters when evaluating corporate identify.[82] In this regard, WTO panels appear circumspect in recognizing corporate separateness from a parent state where those corporate bodies exercise regulatory functions. When corporate bodies exercise public functions like regulation, therefore, their connection to a state may be assessed on the basis of control. Thus while Article 5 was meant to

[76] *See, e.g.*. *id*., at commentary to art. 5, ¶ 3 (noting that executive control is not a decisive criteria).
[77] *Id.* at article 5, ¶ 7.
[78] Panel Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/33, at ¶¶ 97, 102 (May 15, 2003) (finding that provincial milk marketing boards are "Agencies" of Canada's governments, and nothing that although the provincial boards enjoy a high degree of discretion, government retain "ultimate control" over them).
[79] Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (Article 21.5 II), WT/DS103/AB/REW, at ¶¶ 95-96 (Jan. 17, 2003) (finding liability for the failure to properly supervise the acts of private citizens).
[80] Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, WT/DS437/1 (May 30, 2012) (where the US Department of Commerce had determined that various Chinese State Owned Entities (SOEs) and State Owned Commercial Banks (SOCBs) should be characterized as "public bodies"). *See also id*. at ¶ 318 (finding that a government must exercise 'meaningful control' over an entity for conduct to be attributable).
[81] *Id.* at ¶ 318 (emphasis added).
[82] *Compare* EDF (Services) Limited v. Romania, Case No. ARB/05/13, I.C.S.I.D. 2007, at ¶ 170 [hereinafter "EDF v. Romania"](discussing the importance of corporate separateness).

address the end result of a process of outsourcing for the ILC, including public corporations, semi-public entities, agencies, and even private companies on occasion,[83] the control based approach opens the door for tribunals to address a range of issues including cultural attitudes on public and private functions that go far beyond orthodox attribution doctrines.[84] While, this stands in sharp contrast to a fundamental precept in international law, that attribution should not follow state ownership because of separate legal personality.[85]

3.1.3 Effective Control and Non-State Actors

The concept of control is most important to the third category of the ILC's schema: the indirect attribution of acts of irregular groups, individuals, or entities that act under a state's direction, control, or instructions. This category deals with individuals or groups of individuals that are not formally part of the state, but that still act under its influence (the principal inquiry of the *Nicaragua* decision). This is consequently a second *de facto* category; in addition to the *de facto* organ test under Article 4, Article 8 creates a subsidiary *de facto* category that addresses acts carried out by irregular groups or entities.[86] Nonetheless, it is a subsidiary test, as Talmon notes, in that "the ICJ only resorts to it when it has found that the requirements of the 'strict control' test for the determination of an agency relationship cannot be proved."[87]

In the ASR, Art. 8 reads as follows:

> 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.[88]

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[83] Crawford, The General Part, *supra* note, at 127.
[84] Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 390 (1999) (who argues that any universal claims to a strict public/private dichotomy are not sustainable, and a state responsibility regime that assumes a commonly accepted rationale for distinguishing between the conduct of State organs and that of other entities in fact depends upon philosophical convictions about the proper role of government and government intervention).
[85] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1964 I.C.J. Rep. 6, 1970 I.C.J. Rep. 3 (Feb. 5), p. 39.
[86] Tonkin, *supra* note, at 93-94.
[87] Talmon, *supra* note, 502.
[88] ASR, *supra* note, art. 8.

Instructions refer to situations where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' outside of the official state structure.[89] Directions typically require a showing of a situation where corporations attempt to achieve a particular result.[90]

While the heart of Article 8 involves control, controversially, the ILC did not specify the level of control required for attribution, indicating instead, in reference to the *Tadic* decision, that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it,"[91] and that "full factual circumstances and particular context" need to be assessed.[92] Despite the absence of a threshold, the principal is that private entities can act on behalf of a state as an "extended arm." As such, a flexible and fact based view of what falls within a state's control is required.[93]

As discussed above, the ICJ has identified the appropriate standard of control in *Nicaragua*, *Armed Activities* and the *Genocide* case as "effective control" that requires evidence of specific conduct over operations.[94] Although the issues before the court were framed in the context of IHL, the ICJ's wording suggested a general application.[95] To prove effective control, the claimant must show direct interference, such as financial assistance, military assistance,

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[89] Crawford, The General Part, *supra* note, at 145; Tonkin, *supra* note, at 114-15. A contemporary example might involve a private military corporation who is hired by a state to take on certain activities, with instructions being incorporated into their contract or issued by the state while they are in the field. Here, the state would not need to exercise any particular level of control, because the instructions would fall within the scope of Article 8.

[90] *See, e.g*. 2009 award in EDF v. Romania, where an ICSID Tribunal found that Romania was using its ownership interest and control of the corporations AIBO and TAROM to "achieve a particular result," namely bringing the contractual arrangements to an end with two entities, which met the Article 8 test. EDF v. Romania, *supra* note.

[91] ASR, *supra* note, commentary to art. 8; *see also* Report of the Appellate Body, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R (June 27, 2005) (citing Commentary to Article 8, ¶ (5)).

[92] ASR, *supra* note, at 20, ¶ 4

[93] Crawford, The General Part, *supra* note, at 141.

[94] *Cf*. Genocide Case, *supra* note, at ¶ 401 (argument that genocide was of 'a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space' with the consequence that the Court would be justified in assessing the effective control over the entirety of the operations carried out by the individuals committing genocide, rather than in relation to each specific act making up the genocide). S*ee also* Simon Olleson, *supra* note, at 85.

[95] This is reinforced by the ICJ's later decision in Bosnia in which it rejected the ICTY's approach to control in Tadic, supra. *See also* Crawford, The General Part, *supra* note 6, who states that the ILC thought about control in the same way.

intelligence sharing, selection, support and supervision of the leadership.[96] Moreover, the control must be over the activities or operations giving rise to the internationally wrongful act, not over the entities as such.[97] This level of control is to be contrasted with "overall" control, which is generic, flows from a general mandate, and is based on a legal relationship.[98] As Talmon writes , "unspecified claims of 'involvement' or 'direct participation' […] will not be enough to establish effective control over a particular activity or operation."[99]

This view of control is closely linked to the issues before the court in the Nicaragua and Genocide cases. Indeed, as Trapp writes, the test of "effectiveness" was designed to address non-inherent acts contrary to international law such as violations of IHL: "[i]n Nicaragua, the ICJ was dealing with two separate levels of activity: the first was the paramilitary operations of the contras…The second level of activity involved violations of humanitarian law perpetrated in the course of those paramilitary operations."[100] As such, the elements developed by the ICJ were intended to apply to the determination of effective control during a military operation subject to the laws of war. This approach meant that the portability of the effective control test has been problematic from the start, because it is tied to violations of IHL.

Since Nicaragua, questions about the portability of the effective control test have percolated in important sub-fields of international law because the primary rules of law, and the relationship between states and private entities is changing. In the investor state context, for example, a number of prominent and recent awards have interpreted the effective control test as requiring "both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake."[101] Despite superficial similarity to the ICJ's Nicaragua test, and liberal citing of ICJ jurisprudence by arbitral tribunals, there are two

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[96] Nicaragua, *supra* note, at 112; Genocide Case, *supra* note, at 241, 388, 394. While Nicaragua's pleadings identified US involvement in the contra movement in general, including funding, organizing, training, supplying and equipping of a group, they did not identify support for individual missions. Nicaragua, *supra* note, at 160.
[97] Talmon, *supra* note, at 502.
[98] Tadic , *supra* note, at ¶ 145. This standard goes beyond equipping and financing a group, and also involves "participation in the planning and supervision of military operations." It does not require issuance of specific orders.
[99] Talmon, *supra* note, at 502.
[100] KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 43 (2011)
[101] White Industries Australia Ltd. v. Republic of India UNCITRAL, Final Award, at ¶ 8.1.2., 30 November 2011, (citing Jan de Nul NV and Dredging International NV v Egypt (ICSID Case No ARB/04/13, Award of 6 November 2008), at ¶ 173 (emphasis added), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf)). *See also* Gustav F Hamester GmbH and Co KG v Ghana (ICSID Case No ARB/07124, Award of 18 June 2010), at ¶ 179.

important differences. First, in the context of state owned companies or companies that are *de facto* controlled by states, the element of hierarchy is deemphasized.[102] Instead, tribunals have assessed whether or not a state exercises general control over an entity, and specific control over the particular acts in question.[103] Second, arbitral tribunals do not always inquire into what effective control would require under the applicable primary rules of law.[104] In the context of the Nicaragua decision, for example, the test of "effectiveness" was designed to address non-inherent acts contrary to international law such as violations of IHL.[105]

Decision makers in other contexts have picked up on these tremors. In *Bayinder*, a case involving a contract dispute between an investor and a public authority appointed to run the national highways in Pakistan, the tribunal stated

> the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.[106]

Similarly, the application of the effective control standard to the topical questions of terrorism, private military contractors, and the right to use force in self-defense against non-state actors, has been problematic.

On terrorism, for example, the ASR predate the terrorist attacks of 9/11, and there was little deep analysis about the applicability of the Articles to what is now a pressing international problem.[107] The obligations to comply with anti-terrorism measures, including by treaty and through Security Council resolutions, led to spirited debates about whether the existing responsibility framework is

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[102] *See, e.g.*, Tribunal's dismissal of arguments relating to organizational structure at ¶ 8.1.5 or 8.1.6.
[103] White Industries, *supra* note, at ¶ 8.1.18.
[104] *See, e.g., id.* at ¶¶ 8.1.19 – 8.1.21 (discussing absence of Indian control over particular acts, but not referring to primary rules of international law).
[105] KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 43 (2011) ("In Nicaragua, the ICJ was dealing with two separate levels of activity: the first was the paramilitary operations of the contras…The second level of activity involved violations of humanitarian law perpetrated in the course of those paramilitary operations.").
[106] Bayinder Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, Case No. ARB/03/29, I.C.S.I.D. 2005, at 130 (contract dispute involving Bayinder and National Highway Authority, a public corporation established by Pakistani Act No. XI (National Highway Authority Act) to assume responsibility for planning, development, operation and maintenance of Pakistan's national highways and roads).
[107] *But see* Luigi Condorelli, *The Imputation to States of Acts of International Terrorism*, 19 ISR. Y.B. N.R. 233 (1989).

sufficient.[108] Because state entanglement with terrorist groups can range from the rare situation in which a state directs and controls a terrorist group (which would meet the Article 8 test), to the much more common scenario in which a state provides some logistical support, financing, or safe harbor, there are only limited situations in which the stringent effective control test would be met.[109] The result is that the universe of other common but potentially dangerous activities would fall through the cracks of the existing state responsibility framework.[110]

The legality of the use of state force against terrorists in self-defense is also problematic under the effective control standar. Article 51 of the UN Charter permits states a right to respond to armed attacks, but does it permit the use of force (in self-defense) against non-state actors?[111] When Al-Qaida attacked American targets in 1998, for example, the UK and US responded with an invasion of Afghanistan under Operation Enduring Freedom. The legality of these actions rested on whether Afghanistan controlled Al Qaida, because attribution of Al Qaida's acts to Afghanistan would elevate it into a traditional state-to-state conflict. As Jutta Brunee explained, however, it was apparent the links between terrorists and states that harbor them would not typically meet the effective control standard, necessitating a new standard: **"**Since inter-state force may be used only in self-defence, military action against another state will require that the state is implicated in the relevant attack. And it is precisely with respect to the nature of the link between the target state of a self-defence action and perpetrators of attacks, such as terrorists, that certain adjustments to the self-defence regime are required. The *Nicaragua* decision of the International Court of Justice required agency, assessing the use of force within the framework of state-responsibility. State practice and *opinio juris* since September 11th suggest that a shift away

[108] *See, e.g.*, S.C. Res. 1373, U.N. DOC. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1540, U.N. DOC. S/RES/1540 (Apr. 28, 2004); S.C. Res. 1989, U.N. DOC. S/RES/1989 (June 17, 2011); TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 239 (2006) ("[T]he prevailing conceptions of State responsibility […] are inappropriate, from a theoretical perspective, for the particular problems posed by terrorism."); *see also id.* at 258: ("[I]t is difficult to understand why a State should be spared direct responsibility for the consequences of wrongful private conduct that it has knowingly helped bring about, simply because its conduct does not fit tidily into an agency construct."); *see also* A.M. Slaughter and W. Burke-White, *An International Constitutional Moment,* 43 HARV. INT'L L.J. 1 (2002); R. Wolfrum, *State Responsibility for Private Actors: An Old Problem of New Relevance*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 423 (Raggazzi, ed., 2005).

[109] *Id*. at 240; *see also* Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM J. INT'L L. 905 (2002) (arguing that harbouring terrorists should give rise to state responsibility).

[110] Trapp, *supra* note, at Chapter 2.

[111] Charter of the United Nations, Oct. 24, 1945, 1 UNTS SVI, art. 51.

from this approach is underway."[112] Along these lines, scholars like Tams argued for a much lower threshold of control in this context, such as complicity.[113]

The same criticism of the accountability gaps perpetrated by the effective control standard under the state responsibility framework has arisen with regards to Private Military Contractors (PMCs). PMCs are a common element of the conflict landscape today, and like national soldiers, they may engage in acts that violate international law. Because PMCs are rarely integrated into national militaries, their conduct would only be attributable on the basis of Article 4 of the ASR in narrow circumstances. When they exercise governmental authority, they may fall within the scope of Article 5, although as White notes, this too is unlikely.[114] If neither Articles 4 nor 5 applies, the "effective control" test under Article 8 will become relevant to determine whether a PMC is acting under the direction or control of the state. It has been argued that traditional principles of state responsibility are sufficiently flexible to accommodate PMCs, and that the contract itself will be particularly relevant to determining whether or not a state exercises control. [115] Most PMCs are independent entities with different clients including states that enter into contractual relationships. Sometimes states will have a great deal of control over these situations, however, if a PMC is hired to escort an aid convoy, and the state agrees that force can be used to protect the convoys, and lethal force is in fact used, the question may arise whether the PMC is acting under the instructions of the state in using force. White argues that it

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[112] Jutta Brunnée, *The Security Council and Self-Defence: Which Way to Global Security?, in* THE SECURITY COUNCIL AND THE USE OF FORCE 107-132 (Leiden: Brill eds., 2005); *see also* Gibert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537 (2004); Sean Murphy, *Terrorism and the Concept of an Armed Attack in Article 51 of the UN Charter*, 43 HARV. INT'L L.J. 41 (2002).

[113] *See, e.g.*, Christian Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 385 (2009) ("Contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defense directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory – either because of its support below the level of direction and control or because it has provided a safe haven for terrorists.").

[114] White, *supra* note, 237. *But see* Tonkin, *supra* note, at 111.

[115] Tonkin, *supra* note, at 80, 121. If courts were to adopt context specific approach and examine a particular contract, Tonkin argues the effective control test would be satisfied. ("Yet the elements of control identified by the Court would be highly significant if exercised over a single PMSC operation, rather than over the company itself. The hiring state will generally have a preponderant or decisive role in selecting, financing, organizing and planning the particular PMSC operation to be performed under the contract, and in some cases the state will also supply and equip the contractors for the operation. The contract will ordinarily set out the specific goals of the operation, and in some cases it may also detail how the contractors must be trained, as well as identifying any specific weapons or equipment that must be supplied by the company itself. Any failure on the part of the company to comply with these terms may result in contractual penalties and even termination.").

would seem that the effective control test would apply.[116] This slippage becomes more apparent with the reality that *ultra vires* acts of PMCs will not captured by Article 8.[117]
It would be a mistake to assume that the challenges posed to the effective control standard by terrorism, self-defense, and PMCs are aberrations or isolated examples. In fact, in light of the profound changes occurring within and around states, they represent what is becoming a common phenomenon: greater assumption of functions and standard setting by non-state actors, which leads to a real or perceived accountability gap. I say real or perceived because it is clear that some non-state actors are active and often effective standard-setters, but there may be no central locus of authority to discuss the proper application, interpretation or enforcement of such standards, which could be provided in the context of state regulation.[118]

Despite the ICJ's efforts in *Bosnia* to settle the matter - the ongoing dialogue about effective control indicates that tribunals and commentators concerned with diverse questions and different primary rules of law are reassessing the relationship between control, attribution and ultimately responsibility. On the one hand, the elaboration of elements in recent ICJ cases has not quieted the debate about what level of control is truly "effective." Talmon takes the position that "control must not be confused with support", and argues that unlike complete dependence, "partial dependence does not allow the Court to treat the authorities of the secessionist entity as a *de facto* organ of the outside power whose conduct as a whole can be considered acts of the outside power."[119] In counter-position, Messineo argues that "planning, direction, and support" could trigger the test under Art. 8, which would support the less onerous approach advocated in the context of terrorism.[120] While Cassesse wrote that "it seems clear […] that by 'effective control' the [ICJ] intended either (1) the issuance of directions to the contras by the US concerning specific operations (indiscriminate killing of civilians, etc.), that is to say, the ordering of those operations by the US, or (2) the enforcement by the US of each specific operation of the contras, namely forcefully making the rebels carry out those specific

[116] White, *supra* note, 238. *See also* Oliver Jones, *State Responsibility for the Actions of Private Military Firms*, 20 CONN. J. INT'L L. 239 (2009).
[117] Hoppe, *supra* note, at 991.
[118] Julia Black, *Legitimacy, Accountability, and Polycentric Regulation, in Non-State Actors as Standard Setters* (Peters et al, eds., 2009) at 247.
[119] *Id*. at 503.
[120] Messineo, *supra* (discussing ¶ 86 of the Nicaragua judgment on the Latino Assets).

operations."[121] On the other hand, some courts have addressed the slippage problem by using alternative judicial techniques, including finding states internationally responsible for breaching primary norms, such as a duty to prevent, in the absence of meeting the effective control test.

In sum, what has become apparent is that the definition of effective control is heavily dependent on primary norms, the portability of effective control outside of the context of IHL has not been seamless, and to avoid a perception of an accountability gap, commentators and some tribunals have advocated lower control thresholds. In the next section, I will analyze the migration of the effective control standard into one final context: the 2011 Articles on the Responsibility of IOs, and discuss slippage and the accountability gap in this context. I will then turn to a discussion of omissions, the duty to prevent and act with due diligence, and conclude with a discussion about how attribution should be conceptualized in light of the changing nature of the state in international law.

3.2 Control and the Responsibility of International Organizations

In the 2011 Draft Articles on the Responsibility of International Organizations (ARIO), the ILC proposed a theory of attribution for IOs.[122] This was the first time that an attempt had been made to articulate general principles of attribution applicable to IOs, which are both subjects of international law and possess separate legal personality.[123]

In developing its Attribution articles, the ILC adopted the principle of effective control as a "base unit of analysis"[124] with Article 7, the key provision on attribution of conduct between IOs and states, providing:

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[121] Cassese, *supra* note, at 653.
[122] Prior to the *Draft Articles on the Responsibility of International Organizations* [hereinafter "ARIO"], the ILC had not addressed he relationship of international responsibility between states and IOs, as indicated by Article 57 of the ASR which provides that the articles are without prejudice to any question of responsibility under international law of an international organization. ASR, supra note, art. 57.
[123] *Reparation for Injuries Suffered in the Service of the UN*, ICJ Rep. 1949, p. 174, 179.
[124] Crawford, The General Part, *supra* note, 195-96 ("The emphasis on effective control in determining the division of international responsibility between the UN and contributing states, was adopted as the base unit of analysis by the ILC in developing the Draft Articles on Responsibility of International Organizations.").

> 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.[125]

The ILC's point of departure is that *prima facie*, the conduct at issue is attributable to the lending entity, since it would be an organ of a state or an organ or agent of an IO.[126] Nonetheless, in some circumstances, an organ or agent will fall under the effective control of an international organization. The question regulated by Article 7 is therefore whether the circumstances are such that an act should be attributable solely to the borrowing entity, or, or potentially to the borrowing and lending entity, under the principle of shared responsibility.

The ILC does not define effective control in the ARIO or indicate the extent to which the *Nicaragua* and *Bosnia* decisions influence its application in this context, although the commentary emphasizes that the determination is heavily dependent on the facts.[127] Tellingly, Crawford describes "effective control" as a principle of essential ambiguity that ILC members hoped would be fleshed out in practice.[128]

While the common reference to control in the state and IO responsibility context might suggest a shared standard, there are in fact significant differences. The starting premise under the ASR is that the state is only responsible for the acts of its organs or agents. If the state exercises a high degree of control over irregular groups that conduct may also be attributable to the state as discussed with reference to Article 8 above, but the structure of the ASR leaves open the possibility that certain conduct will not be attributable to a state at all. In other words, irregular groups that do not operate under a state's control fall outside the purview of the ASR, leading to

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[125] International Law Commission, ARIO, ¶ 7-8, U.N. Doc. A/CN.4/637-Add. 1, art. 7 (Feb. 14, 2011).

[126] See also, in this regard, Amrallah (1976) (cited in Crawford, The General Part, *supra* note, at 190) ("To determine whether an unlawful act is imputable to the UN, the fundamental rule of [the] international law of responsibility …. Should be applied, ie the international responsibility should be borne by the state whose organ or agent had committed the wrongful act. The UN may be held responsible for the unlawful act committed by a member of its force so long as this member could be considered [as] acting as an organ or agent of the UN … The UN should not be held responsible for activities carried out by a member state using its own organs and under its full organic jurisdiction, even if those activities were in application of a decision [taken] by the UN.").

[127] *Id*. at ¶ 4 ("The criterion for attribution of conduct …. is based … on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal."). In a 2004 report, the ILC described "effective control" as "the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal.") Rep. of the Int'l Law Comm'n, 56th Sess., May 3-June 4, July 5- Aug. 6, 2004, U.N. Doc. A/59/10; GAOR, 59th Sess., Supp. No. 10 (2004) at 113, ¶ 7.

[128] Crawford, The General Part, *supra* note, at 205, n. 216 (citing K.M. Larsen, *Attribution and Conduct in Peace Operations: The Ultimate Authority and Control Test*, 19 EUR. J. OF INT'L L. 509, 518 (2008).

slippage and the so-called accountability gap.[129] Moreover, the ASR is silent on the level of control required for attribution of conduct. Although control comes up in the various attribution tests, "effective control" is a judicial standard supplied by the ICJ in Nicaragua, confirmed in Bosnia, and transported by different courts and tribunals into other decisions.

The Articles on IO Responsibility use control in a different way. First, they are more specific: the effective control standard is supplied in Article 7 of ARIO, unlike Article 8 of the ASR, which refers generically to control. Second, the question under ARIO is not "if" conduct is attributable, but rather "to which" entity it should be attributed: the IO or the state.[130] In this sense, there is no accountability gap under ARIO because where there is joint management between states or IOs, either or both entity will be responsible. There is, in other words, no minimum quantitative threshold required to satisfy the "effective control" test: acts could be attributed to either or both entities where an organ is placed at the disposal of another IO. The question of distributing responsibility might, for example, arise where two or more states or international organizations conduct joint military operations in which some soldiers violate international humanitarian law.[131]

Control consequently has a different function under the ASR and ARIO. In the former, the control test is used to determine whether acts of individuals or groups of individuals that do not have status under international law are attributable to the state. In the latter, effective control is part of a comparative inquiry: assuming states and IOs are both involved, which entity (or both) exercises effective control?

Some of these differences in the content of the effective control standard applicable to IOs can be explained by the nature of the relationship. In most joint ventures, for example, the states and IOs involved would have a formal relationship. [132] Additionally, because peacekeepers are, by

[129] Tom Dannenbaum, PUBLIC POWER AND PREVENTIVE RESPONSIBILITY: ATTRIBUTING THE WRONGS OF INTERNATIONAL JOINT VENTURES (forthcoming 2014).
[130] ASR, *supra* note, art. 7, ¶ 5.
[131] Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 Mich. J. Int'l L 359, 361 (2013).
[132] Blanca Montejo, *The Notion of 'Effective Control,' in* RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS ESSAYS IN MEMORY OF SIR IAN BROWNLIE 389, 393 (Ragazzi ed., 2013).

definition, part of a national military and act as organs of their national governments, they will never operate like irregular groups.[133]

The effective control standard for IOs has been largely conceived in the peacekeeping context. This context is important for two reasons. First, in its comments to the ILC, the UN questioned the effective control standard, stating that in principle it has exclusive control over national contingents in a peacekeeping force:

> As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation, entails the international responsibility of the Organization and its liability in compensation.[134]

As such, even the IO with the deepest connection to the context the ILC hoped to develop default rules for, expressed concern about the test. It should be noted, however, that in practice, courts, commentators (and even the UN in other contexts) have recognized that the statement above is not as clear cut as it might appear because who makes the decisions and is in operational command is important in any analysis of attribution.[135] Indeed, a Secretary General report notes: "the principle that operations liability for combat-related damage in violation of international humanitarian law is *vested in the entity in effective command and control of the operation* or the specific action reflects a well-established principle of international responsibility."[136] The UN has thus recognized the importance of factual control, noting that states retain disciplinary control over their troops, and citing instances in which the UN has apportioned damages to a troop contributing country on the basis of fault, or sought refunds from troop contributing states.[137]

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[133] *Id*. (text associated with notes 309 – 310) ("[W]hereas the forces under consideration in Nicaragua and Bosnian Genocide had no *de jure* relationship to any official government—and in particular no official relationship to the United States or the former Federal Republic of Yugoslavia, respectively—peacekeepers have genuine *de jure* connections to both their home states and the United Nations.").
[134] Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN/.4/545, Sect. II.G, cited in the ILC Commentary to the Draft Articles on the Responsibility of International Organizations, at 21; *see also* ARIO, *supra* note, at ¶¶ 7-8.
[135] *Compare* Peck, "the question of who makes the political, strategic, and operational decisions that together comprise the right to command and control United Nations forces is central to determining who is responsible for actions taken by U.N. Soldiers," with Shraga who write that "in enforcement actions carried out by States under the authorization of the Security Council … operational command and control is vested in the States conducting the operation, and so is international responsibility for the conduct of their troops." Larsen, *supra* note, at 513.
[136] U.N. Secretary-General, *Report of the Secretary General on Peacekeeping Operations*, ¶ 18, UN Doc. A/51/539 (1996) (emphasis added).
[137] *Id*.

On the other hand, IOs, including the EU, International Labor Organization[138], and IMF[139] questioned the applicability of the effective control test outside the peacekeeping context. The EU, for example, wrote the commentaries to the draft article were largely devoted to United Nations practice and to a discussion of the case law of the European Court of Human Rights. They also asked whether international practice is presently clear enough and whether there is identifiable *opinio juris* that would allow for the proposed standard of effective control. [140] The application of this effective control standard has thus been challenged by organizations outside of the peacekeeping context, on the basis it does not take an inside-out approach to IOs, but instead anticipates IOs will be able to conform to a set of general rules, regardless of structure.[141]

There are thus three important limitations to the conceptualization and lack of practice associated with the effective control test. First, how should effective control be translated into multi-level governance situations, given the transforming relationship that actors like the EU have with member states?[142] The same concern would appear to apply to the increasingly common practice by IOs of operating through partnerships, including public private partnerships, whereby the traditional distinction between public and private functions change. Second, how does the concept of effective control, an inherently military concept, translate into the civilian context or onto mandates of IOs engaged in development assistance, lending, or other activities that are

[138] UN Doc. A/CN.4/568.Add.1 at 14 (commenting on secondment arrangements and lending officers between organizations).

[139] The IMF noted, in 2004, that "The issue of attribution of the conduct of peacekeeping forces to the United Nations is specific to that organization and, in the absence of particular proposals on this issue, we do not have any comments. We have reservations, however, about including such a specific issue, which applies to a limited number of organizations, in draft articles that aim at setting forth the principles of responsibility of all international organizations. If any principles or rules applicable to peacekeeping operations are included, the scope of such principles and rules should be explicitly limited to peacekeeping activities and organizations that conduct such activities." UN Doc A/CN.4/545 at 17, also relevant are comments at 26.

[140] *See, e.g.*, U.N. General Assembly, *Responsibility of International Organizations: Comments and observations received from international organizations,* UN Doc. A/CN.4/637/Add.1 (2011).

[141] *See id*. at 70.

[142] Pieter Jan Kuijper & Esa Paasivirta, *EU International Responsibility and Its Attribution: Looking from the Inside Out, in* THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION (Evans and Koutrakos eds., 2013) ("[T]he 'organic model' of attribution is unsatisfactory insofar as the EU's acts in a 'vertical mode', ie the case where the EU acts are carried out via the authorities of its Member States, instead of the EU itself having its own administrative presence in its Member States. This is in fact the EU's normal practice, which falls basically in the TFEU context rather than in the CFSP context. In that situation the 'organic model' does not capture the core features of the EU action, since the Member States are seen as remaining sovereign and not constituting organs of the organisation in a formal sense. Consequently, the Member States would always be responsible, as the immediate actors, should acts be attributed on purely organic lines. The fact that normative decisions are taken at the EU level (Council, Parliament) and on the basis of a proposal by an independent institution (Commission) is basically ignored. This is not a satisfactory outcome. It is also out of tune with the fact that the EU is a recognized global actor, alongside states, all across the 'civil' areas falling under the TFEU.").

consent-based? Although the ILC suggested the same principles could apply regardless of context, citing the rather unique situation in which acts of the Pan American Health Organization might be attributed to the WHO, on the basis of a long term contract, it appears that IOs with advisory and consultative mandates will only rarely fall within the purview of Article 7.[143] Finally, assuming effective control can be shared by two or more actors, what factors apply to determining how responsibility should be allocated thereafter?

The slippage problem that arises with regards to IOs is therefore somewhat different from states. For IOs, the real issue is the dearth of primary norms defining IO behavior, and the subsequent development of an effective control test that is almost exclusively derived from the peacekeeping context. The effective control test as a standard for attribution may simply not apply to the majority of IOs in their usual work. Compensating somewhat for this limited scope, however, is the ILC's recognition of shared responsibility[144], which opens up the opportunities to reach partners in joint enterprises.

Despite these concerns, the effective control standard in ARIO quickly migrated into the caselaw. There is a growing corpus of decisions addressing effective control in the peacekeeping context, including a 2007 admissibility decision by the ECHR (*Behrami* and *Saramati* (2007)) which interpreted and applied the effective control standard while the Articles were still in draft form. Subsequently, the effective control standard was applied and interpreted in the *Al-Jedda* case before the UK House of Lords (2007) and later by the European Court of Human Rights (2011), and appeared again in domestic courts in the Netherlands in *Nuhanovic*, which reached the Dutch Supreme Court (2013). These decisions reveal differing views about the content, threshold, and application of the principle of control to complex peacekeeping operations, where two core areas of contestation emerge: legal versus factual control, and positive versus negative control. I discuss these decisions and views in reverse order with the most recent decision – *Nuhanovic* - first.

On September 6, 2013 the Dutch Supreme Court rendered a decision on the hotly anticipated case *Mstafic v. Netherlands* and *Nuhanovic v. Netherlands*, raising the issue of whether the Dutch

[143] U.N. General Assembly, *Responsibility of International Organizations: Comments and observations received from international organizations*, UN Doc A/CN.4/545, at 28.
[144] ILC commentary to Art. 7, ARIO.

state was responsible for the deaths of several people during the Srebrenica massacre who attempted to take refuge in the Dutch compound. The people in issue had sought refuge in the compound of the Dutch battalion (Dutchbat), but commanders decided not to evacuate them along with the battalion and instead sent them away from the compound on 13 July 1995. Outside the compound they were murdered by the Bosnian-Serb army or related paramilitary groups. Citing both the ASR and the ARIO, the decision finds that the Dutch state exercised effective control over Dutchbat pursuant to Art. 8 of the ASR, defined as "factual control over specific conduct."[145] The Court also confirmed that the issue fell under Art. 7 of ARIO because The Netherlands had placed troops at the disposal of a UN peacekeeping mission.[146]

The definition of effective control in *Nuhanovic* emphasizes factual control over specific conduct (as opposed to legal control), noting that all factual circumstances and the special context of the case must be taken into account.[147] The decision picks up the threads of prior case law including the *Nicaragua* decision by emphasizing specific conduct, although the decision does not cite to ICJ jurisprudence. Moreover, it leaves the door open to a positive conception of control, through responsibility for the failure to prevent, as discussed in more detail in Section IV.

One unusual aspect of this case is that the Dutchbat mission had conclusively failed at the time the deaths occurred. Nonetheless, the court invoked the concept of control over territory to support its conclusion that while "Dutchbat could therefore no longer exert any influence outside the compound, this does not detract from the fact that the State had effective control over Dutchbat's conduct in the compound."[148] In so doing, the Court took an expansive view of control in that it found it still to operate even if the mission had failed.[149] The Court was similarly expansive in determining that international law permits dual attribution. Citing Articles 7 and 48 of ARIO, the Supreme Court held that international law does not exclude the

[145] Netherlands v. Nuhanovic, First Chamber, Supreme Court of the Netherlands, Sept. 6, 2013, at ¶ 3.11.3 [hereinafter "Dutchbat"].
[146] *Id.* at ¶ 3.10.2 (explaining that the Netherlands is a troop contributing State that retained control over the personnel affairs of the military personnel, who remained in the service of the Netherlands, and retained the power to punish the military personnel under disciplinary and criminal law.) Here, the Court rejected the arguments of the UN and the Netherlands that Article 6 was applicable. This was also the position taken by the Procurator General, Mr. P. Vlas, in his Advisory Opinion. *See* Andre Nollkaemper, *Procurator General of the Dutch Supreme Court concludes to reject appeal against Srebrenica judgment*, SHARES (May 3, 2013), http://www.sharesproject.nl/procurator-general-of-the-dutch-supreme-court-concludes-to-reject-appeal-against-srebrenica-judgment.
[147] Dutchbat, *supra* note, at ¶ 3.11.3.
[148] *Id*. at ¶ 3.12.3.
[149] *See* Milanovic, *supra* note.

possibility of dual attribution of conduct.[150] This finding enabled the Supreme Court to determine that The Netherlands was responsible, while leaving open the question of whether the UN had effective control in the early evening of July 13, 1995. Unlike the *Behrami* and *Saramati* applications before the ECHR, discussed below, which were struck down at the admissibility stage due to the UN's involvement (and which led the Court to conclude it could not exercise jurisdiction), the shared responsibility approach leaves the door open to attribute conduct to more actors and hence expands the range potential responsibility amongst states and IOs. The possibility of joint control has already been recognized in situations where states share control over individuals in indefinite detention.[151]

On the relationship between the UN and the Netherlands, the Court noted that: "it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently."[152] According to this Court, there is no requirement that the State go against the UN's formal command to determine attribution of conduct and responsibility, which eases the evidentiary burden for demonstrating effective control. Moreover, this decision stands in contrast to the

[150] Dutchbat, *supra* note, at ¶ 3.11.2. This aspect of the decision differs from the May 2013 advisory opinion by the Procurator General, in which he argued that Article 7 of Draft Articles on the Responsibility of International Organizations does not permit dual attribution. As Nollkaemper explains, "he cites Crawford and Olleson for the proposition that the purpose of Article 7 ARIO 'is not to determine whether particular conduct is attributable as such, but rather it addresses the question of to which of two entities (the 'borrowing' international organization or the 'lending' State (or international organization)), the conduct is to be attributed.'") Nollkaemper, *Procurator General of the Dutch Supreme Court concludes to reject appeal against Srebrenica judgment*, ¶ 4.12 available at http://www.sharesproject.nl/procurator-general-of-the-dutch-supreme-court-concludes-to-reject-appeal-against-srebrenica-judgment/ [Hereinafter "dual attribution]. Vlas thus construes Article 7 as a ground for exclusive responsibility, not allowing for 'independent responsibility' of the troop contributing State. *See id*. at ¶ 4.13.

[151] *See, e.g.*, Secretary of State for Foreign and Commonwealth Affairs and another v. Yunus Rahmatullah, 2012 U.K.S.C. 48 (Oct. 31) (UK forces had apprehended Mr. Ramatullah in 2004 in Iraq, and handed him over to the US who held him in indefinite detention. Pursuant to a Memorandum of Understanding, his lawyers argued that the UK had the power to request his release from the US under the write of Habeas Corpus. Finding that the UK did not need to have actual custody to exercise control, the transfer of Mr. Rahmatullah to Pakistan was deemed a violation of the Fourth Geneva Convention). *Id*. at 40 (noting that "There can be no plausible argument, therefore, against the proposition that there is clear prima facie evidence that Mr Rahmatullah is unlawfully detained and that the UK government was under an obligation to seek his return unless it could bring about effective measures to correct the breaches of GC4 that his continued detention constituted. It is for that reason that I am of the view that the real issue in this case is that of control.").

[152] Dutchbat, *supra* note, at ¶ 3.11.3.

UN's position in its comments submitted to the ILC during the ARIO drafting process that only direct contradictory orders to the UN can give a state effective control.[153]

Effective control was the centerpiece of another prominent 2011 decision, the ECHR's Grand Chamber decision in *Al-Jedda.* The ECHR was asked to determine whether a security detention in Basra constituted a violation of Art. 5 of the European Convention on Human Rights, and if wrongful conduct should be attributed to the UK.[154] The UK had taken the position that responsibility should be attributed to the UN, because the situation was subject to several Security Council resolutions.[155] Like the House of Lords, the ECHR found that the UK was responsible because

> the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force [….] the applicant's detention was not, therefore, attributable to the United Nations. [However because] the internment took place within a detention facility in Basra City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout.[156]

There are several noteworthy aspects of this decision. First the ECHR indicates that it is common ground between the parties and the UK House of Lords that Article 5 of the ARIO applied, which sets the standard as effective control.[157] The Court then proceeded to identify the effective control test, and the ultimate authority and control test, and states that neither was met in this case. While the Court does not define effective control, it noted that UK responsibility flowed in part from the UK's presence on the ground, because "the internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was

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[153] Berenice Boutin, *Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanovic and Mustafic: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping*, 25 LEIDEN J. INT'L L. 521, 528 (2012) (explaining that the UN is reluctant to admit the possibility that it doesn't control troops).
[154] *See* Al-Jedda v. United Kingdom, App. No. 27021/08, 102 Eur. Ct. H.R. 84-6 (2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":["887954"],"itemid":["001-105612"].
[155] *Id*. at 84.
[156] *Id*. at 86.
[157] R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent), 2007 U.K.H.L. 58 (Dec. 12), at ¶ 3; *see also* Al-Jedda v. United Kingdom, *supra* note, at 22 (citing to statement by Lord Bingham, for the House of Lords, who had framed the issue as follows: "A number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.").

therefore within the authority and control of the United Kingdom throughout."[158] Moreover the decision to hold and continue holding the applicant in internment was exclusively made by the UK.[159] Indeed, the UN had protested the UK's practices of indefinite confinement.[160] Importantly, the decision also indicates the potential for dual attribution between states and IOs, in dismissing the argument that an overarching Security Council resolution transfers responsibility to the UN *prima facie*.[161]

These decisions correct, to a certain extent, the earlier and now infamous ECHR admissibility decision on effective control in *Behrami* and *Saramati*, which involved alleged human rights abuses by states that were both UN members and troop contributing countries for the UN and NATO operations following the 1999 conflict.[162] In determining whether the alleged violations of the European Convention on Human Rights were attributable to the UN or to the states involved, the ECHR purported to apply the effective control standard promulgated in the ILC's Draft Articles. It has been extensively chronicled that the ECHR in fact applied the lower test of 'ultimate authority and control.'[163] It was on this basis that the Court determined that KFOR and UNMIK exercised powers delegated to them by the UN Security Council, and further, that the UN Security Council "retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO, [and] the power to establish, as well as the

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[158] Al-Jedda, supra note, at 85

[159] *Id*.

[160] *Id*. at 82 ("It is difficult to conceive that the applicant's detention was attributable to the United Nations and not to the United Kingdom when United Nations organs, operating under the mandate of Resolution 1546, did not appear to approve of the practice of indefinite internment without trial and, in the case of UNAMI, entered into correspondence with the United States Embassy in an attempt to persuade the Multi-National Force under American command to modify the internment procedure.").

[161] *Id*. at ¶ 80 ("The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – *more importantly, for the purposes of this case* – ceased to be attributable to the troop-contributing nations.") (emphasis added).

[162] Behrami v. France and Saramati v. France, Decision Nos. 71412/01 and 78166/01 Eur. Ct. H.R. (2007). Note, however, that the ECHR in Al-Jedda avoided overruling this decision, and instead distinguished UN presence in Kosovo from Iraq on the facts. Al-Jedda , *supra* note, at 83.

[163] *Id*. at 29-34. *See, e.g.*, Aurel Sari, *Autonomy, Attribution and Accountability: Reflections on the Behrami Case*, *in* INTERNATIONAL ORGANIZATIONS AND THE IDEA OF AUTONOMY, 8-9 (Nigel White ed., 2011) ("While the Security Council might have retained such "ultimate authority and control" over the international security presence as was necessary to render the delegation of its powers lawful under the UN Charter, the question the Court should have asked itself is whether or not the Security Council exercised such control over KFOR as was necessary to render the delegation of its powers lawful under the UN Charter, the question the Court should have asked itself is whether or not the Security Council exercised such control over KFOR as was sufficient to render the conduct of KFOR attributable to the UN in accordance with the law of international responsibility. The widely held view is that the necessary level of control required in this context is that of "effective control" …. [and the Security Council lacked both the practical means and the legal authority to exercise such a degree of control over KFOR….").

operational command of, the international presence, KFOR."[164] As a result, the proceedings were dismissed because the ECHR determined it did not have jurisdiction. Despite widespread criticism, the ECHR did not shy away from the 'ultimate authority and control' test in subsequent decisions. Some commentators have gone so far as to say that politics and uncomfortable confrontations with the collective security system were behind the decision to focus on the issue of attribution.[165] Indeed, there may be truth in this as the ECHR's *Al-Jedda* decision deliberately affirmed both tests.[166]

The concept of effective control played an under examined role in another aspect of these decisions as well: the extraterritorial reach of the Convention.[167] In *Behrami*, the Court determined that Kosovo was no longer controlled by the FRY, and instead that Kosovo was under the "effective control" of the international presences exercising public powers normally exercised by the Government of FRY.[168] As such, the Court decided that the acts should be attributed to the UN because it exercised control over the territory, through their international presence. This reference to effective control over territory is common to other recent decisions including *Nuhanovic* and *Al Jeddah*, where a jurisdictional finding of territorial control was used to bolster the stricter effective control standard for attribution of conduct.[169]

A backwards glance is now in order. As a general rule, the deeds of non-state actors are not attributable to states on the basis that states are only responsible for the acts of their agents or organs. There are, however, a number of exceptions, two of which have been examined so far. First, where an agency relationship exists between a state and a private actor, the latter's conduct may be attributed if it acts under the state's control. Second, where an IO is involved such as in a UN peacekeeping mission, states and IOs may share effective control. The third exception is that

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[164] *Id*. at 140.
[165] P. De Sena and M.C. Vitucci, *The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values*, 20 EUR. J. INT'L L. 193, 202-209 (2009); K.M. Larsen, *Attribution and Conduct in Peace Operations: The Ultimate Authority and Control Test*, 19 EUR. J. INT'L L. 509 (2008).
[166] Al Jedda, *supra* (ECHR decision), at para. 84: ("For the reasons set out above, the Court considers that the United Nations Security Council had *neither effective control nor ultimate authority and control over the acts and omissions of troops* within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.") (emphasis added).
[167] Sari, *supra* note, at 12.
[168] Behrami, *supra* note, at 69.
[169] In an EJIL Talk blog, however, Milanovic suggests control over territory seems less important with regards to surveillance and drones. (Blog available at: http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/#more-9950)

if a state fails to fulfill a primary obligation such as the duty to prevent, it may incur responsibility for any harms that arise as a result. For example, a state may incur responsibility if it did not adequately prevent certain private misconduct subject to a due diligence standard. These exceptions represent three distinct paths to state responsibility for non-state conduct. This article has addressed the first two routes to this point. I will now examine the duty to prevent which has become an increasingly prevalent way of working around the limits of attribution based doctrines, signaling a shift in emphasis from secondary to primary norms.

4. Omissions, the Duty to Prevent, and Due Diligence: Alternatives to the Effective Control approach?

It is uncontroversial that responsibility may arise either by act or omission.[170] Thus it is not only the affirmative act that constitutes a breach of an international obligation, but in some cases a breach can be established by the failure to act.[171] As Crawford reminds us however, "an omission is more than simply 'not-doing' or inaction: it is legally significant only when there is a legal duty to act which is not fulfilled, and its significance can only be assessed by reference to the content of that duty."[172] Primary norms are consequently essential to the analysis of whether or not responsibility for an omission arises. [173]

In the *Bosnia Genocide* case, the ICJ famously illustrated how the secondary rules of attribution and the primary rules containing the duty to prevent interact: while the conduct of secessionist

[170] ASR, *supra* note, at art. 2 provides that "there 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. The identical provision is contained in Art. 4 of the ARIO. *See also* International Law Commission, ARIO, at art. 1, Commentary, ¶¶ 1, 8, Supplement No. 10 (A/56/10) (November 2001). *See also* Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. Reports 4 (nothing was attempted by the Albanian authorizes to prevent the disaster thus, these grave omissions involve the international responsibility of Albania).

[171] The paradigmatic example of liability resulting from the failure to act is the Corfu Channel case, where the ICJ determined that the failure of the Albanian authorities to take measures to prevent British vessels from sailing into mines in the sea was a grave omission that created international responsibility for Albania Corfu Channel, (United Kingdom v. Albania), 1949 I.C.J. 23 (9 April). *See also* Franck Latty, *Actions and Omissions, in* THE LAW OF INTERNATIONAL RESPONSIBILITY 355, 358 (2011) (defining omission as "an abstention consisting of the fact of not doing that which ought to be done").

[172] Crawford, The General Part, *supra* note, at 218.

[173] Daniel Bodansky and John R. Crook, *The ILC's State Responsibility Articles, Introduction and Overview*, 96 AM. J. INT'L L. 773, 783 (2002).

entities and paramilitary groups could not be attributed to the Republica Serbska for lack of control, the Republic was nonetheless responsible for failure to prevent acts of Genocide under Article 1.[174] Thus the failure to fulfill a duty to prevent may lead to international responsibility even in the absence of attribution of conduct, if a state's organs or entities exercising government authority have not fulfilled their duties. While states are not responsible for the acts of private individuals absent a showing of control, they will be responsible for their own failure to protect.[175]

Where the application of the stringent effective control test results in slippage, the duty to prevent has become a favored strategy**.** In the case of terrorism, for example, disconnects between the effective control test and state complicity in modern manifestations of terrorism, are being addressed in part by focusing on primary obligations to combat and prevent terrorism. Some existing sectoral treaties make state participation in terrorist acts an international wrong under Article 4 of the ASR.[176] Shortfalls have been addressed by Security Council resolution 1373, which is binding on all UN member states, and decides that states shall "Prevent and suppress the financing of terrorist acts" and "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."[177] Crawford argues that this is the right approach: better to develop primary norms than artificially extend the effective control test under the doctrine of attribution.[178]

Slippage is a problem for PMCs as well, and two current regulatory efforts are underway to develop primary norms that incorporate a duty to prevent: a Convention on an International Code of Conduct, currently in draft form, and the Montreux Document, a non-binding "soft law"

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[174] *See* Genocide Case, *supra* note, at ¶ 460.

[175] International Law Commission, ASR, *supra* note, art. 8, Commentary, 38, Supplement No. 10 (A/56/10) (November 2001) ("[a] receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct."), discussing the *Tehran Hostages* case, where the ICJ found that the initial phase of the attacks upon the embassy were not attributable to Iran since the attackers were private individuals acting on their own, but nonetheless noted that the state will be responsible if it fails to take all necessary steps to protect the embassy from seizure or to regain control over it. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3 (May 24).

[176] *See* discussion in Crawford, The General Part, *supra* note, at 158.

[177] S.C. Res. 1373, *supra* note, at ¶ 1.

[178] Crawford, supra [The General Part], 161.

document of principles. Both efforts introduce a duty to prevent and due diligence obligations.[179] While these mechanisms would not normally result in the direct attribution of PMC conduct to the state, they would place clearer obligations on the state to regulate and prevent unlawful activities.

Although there is no general duty to prevent, there is a growing list of treaties, Security Council Resolutions, and judicial decisions that articulate a duty to act. For example, (i) The Genocide Convention, the Convention Against Torture, and the Convention on the Suppression of Terrorist Bombings are among contemporary treaties that contain a duty to prevent;[180] (ii) human rights law places positive obligations on states to protect and fulfill,[181] and (iii) the concept has taken root in international criminal law where a superior "should have known" that crimes were being perpetrated under their de facto control, but did not intervene to prevent them.[182] To this we can also add the most developed field, environmental law where states must ensure their territory is not used to cause environmental harm.[183] In this regard, it is important to recognize that a general regime of fault-based responsibility has been proposed in environment law, which contemplates liability for lawful acts.[184]

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[179] White, *supra* note, discusses the Montreux Document and the international Code of Conduct Draft convention in detail.

[180] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter "Genocide Convention"], art. 1, Dec. 9, 1948, 78 UNTS 277 ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."); UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 UNTS 85 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); UN General Assembly, Convention for the Suppression of Terrorist Bombings, art. 15, Dec. 15, 1997, 2149 UNTS 284 ("State Parties shall cooperate in the prevention of the offences set forth in article 2….").

[181] *See, e.g.*, the duty of non-refoulement, whereby states must not return someone to their home country in order to protect them from abuse. Cordula Droege, *Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges*, 90 Int'l Rev. Red Cross 669, 670 (2008); Human Rights Committee, General Comments 31 on Art. 2, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, at ¶ 8, UN Doc. HRI/GEN/1/Rev.6. For an extensive discussion of due diligence obligations in the human rights context, see Duncan French and Tim Stephens, *ILA Study Group on Due Diligence in International Law* (2014) at 16, *available at* http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

[182] Michael Duttwiller, *Liability for Omission in International Criminal Law*, 6 INT'L CRIM. L. REV. 1, 2 (2006). *See also* discussion, *infra*.

[183] See generally Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. April 20), and the discussion in Riccardo Pisillio-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN YEARBOOK OF INT'L L. 9, 38 (1992).

[184] See the ILC's work on International Liability for Injurious Consequences Arising out of Acts no Prohibited by International Law.

These duties to act have arisen through custom in certain areas of law,[185] through Security Council resolutions,[186] and in new regulatory instruments.[187] Given their contextual specificity, the scope of any such duty is much narrower than that of a secondary standard like effective control under the attribution doctrine promulgated by the ICJ. Indeed, in the ASR, for example, due diligence is only mentioned in passing, because it addressed a standard of behavior, which is applicable to primary but not secondary rules.[188] Nonetheless, we now turn to a discussion of the areas in which primary norms such as a duty to prevent relate to slippage and state sovereignty.

4.1 The Duty to Prevent and Act with Due Diligence

A duty to prevent creates an obligation on all states, within the jurisdictional reach of a primary rule,[189] and potentially IOs,[190] to curb the effects of conduct of private parties that may breach an international obligation. The duty to prevent has two elements. The first is an obligation to prevent, subject to the due diligence rule.[191] The second is an obligation to punish, which I will not focus on here.[192]

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[185] Pisillio, supra, (arguing that "an analysis of international practice shows that the due diligence rule has been applied in the areas of customary international law concerning: a) the security of aliens and representatives of foreign States; b) the security of foreign States; and c) the conservation of the environment.").
[186] *See, e.g.*, S.C. Res. 1373, *supra* note.
[187] *See, e.g.*, International Code of Conduct (2010) applicable to PMCs, *available at* http://www.icoc-psp.org/uploads/2010.10.08_ _International_Code_of_Conduct_final.pdf.
[188] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 82 (Cambridge University Press ed., 2002).
[189] This can be determined by a jurisdictional clause in a treaty, such as Genocide Convention, supra note, art. 1, which provides that "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." This arguably creates a general duty to prevent genocide. Absent a jurisdictional clause, the spatial effective control test is usually employed to determine the extraterritorial effect of treaties.
[190] *See, e.g.*, Judge Giorgio Gaja, *The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations*, SHARES (2013), http://www.sharesproject.nl/wp-content/uploads/2013/06/SHARES-RP-25-final.pdf (discussing the EU's obligation to prevent in the Swordfish case).
[191] Pissili, *supra* note, at 26.
[192] Marco Milanovic, *State Responsibility for Genocide*, 17 EJIL 553, 568 (2006) (discussing the duty to punish in the context of the Genocide Convention, and noting it includes a duty to criminalize the act in national law, and prosecute or extradite).

With regards to the first element, the *Genocide Decision* clarified that the content of the duty to prevent genocide is dependent on the capacity of states 'to influence effectively the action of persons likely to commit, or already committing, genocide.'[193] Capacity is determined by context: the geographic distance between the state and the events, the strengths of the political links between the state and the main actors, and the legal restrictions of action imposed on the state based on the situation.[194] As Gaja's comment above notes, the same capacity based assessment would presumably apply to an IO's duty to prevent.

While there is no precise definition of the duty of due diligence, given its very close connection to primary rules, three factors have been suggested as to its content: (i) the degree of effectiveness of the State's control over territory, (ii) the degree of predictability of harm, and (iii) the importance of the interest to be protected.[195] In addition, it is generally acknowledged that due diligence is to be measured against an international not a domestic standard, and that it has objective not subjective content.[196] A subsidiary consideration, of general importance to duties to prevent and act with due diligence[197] are the expectation that all states possess and use a legal and administrative apparatus able to guarantee respect for prevention.[198]

Due diligence is an elastic and relative concept, and in this sense it shares commonalities, some of them negative, with the context specificity of the effective control standard.'[199] Although it has been described as a "general principle" of international law, that requires states and IOs to prevent or react to acts or omissions of its organs or agents,[200] capacity in particular, is an inherently variable concept. It could conceivably lead to less diligence for developing countries,

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[193] Genocide Case, *supra* note, at ¶ 430.
[194] *Id*.
[195] *See also* Duncan French and Tim Stephens, ILA Study Group on Due Diligence in International Law (2014), *available at* http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.
[196] Pisillio-Mazzeschi, *supra* note, at 44.
[197] Jan Arno Hessebrugge, *The Historical Developments of the Doctrines of Attribution and Due Diligence in International Law*, 36 NYU J. INT'L L. & POL. 265, 268 (2004). (noting a true obligation of due diligence would be breached by a failure to engage in the specific conduct even if the result did not occur, whereas a duty to prevent requires the event to occur.)
[198] Pisillio-Mazzeschi, *supra* note, at 26 (citing Noyes Claim (U.S. v. Panama) UNRIAA VI, at 311).
[199] *See, e.g.*, Seabed Advisory Opinion, ITLOS (Feb. 1, 2011), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf (cites to art. 153(4) of ITLOS but noting in ¶ 117 that "…"due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.").
[200] Condorelli, *supra* note, at 240.

or for a variable time scale for completion.[201] On the other hand, it might lead to more diligence if there is a greater degree of risk, such as for hazardous activities.

Another limitation of the diligence standard is that it plays a role only in some areas of international law; there is no general duty of diligence.[202] Where there is no duty to prevent or act with due diligence, it will not be an available tool to address the problem of slippage. Nonetheless, because it undermines the public versus private divide that had hitherto strictly separated activities for which the State could and could not be held responsible, due diligence is relevant to the accountability gap.[203]

One issue that the due diligence standard has not resolved is when the obligation to prevent is triggered. The ICJ held that under the Genocide Convention, the obligation arises when there is evidence of a serious risk that genocide will be committed.[204] Because it is construed as one of conduct not result (in the sense that there is no obligation to succeed) the ICJ set a high standard and stated the state must have manifestly failed to take measures to prevent acts of genocide to be found responsible.[205] Those who seek a robust response to perceived accountability gaps, therefore, have not been assuaged by the articulation of a state's duty in this regard. As Marcovic notes, there is no *lex lata* to suggest that all states have a duty to prevent or intervene in Genocide, although it might be possible to distinguish between degrees of state complicity with regards to potential state responsibility.[206]

Typically, the duty to prevent is derived from primary rules, but in at least one instance, it was read into secondary rules. In *Nuhanovic*, the Netherlands Court of Appeals noted that effective control might be demonstrated in one of two ways. By implementing specific instructions by the UN, but if there was no specific instruction, a second basis for effective control rests on the

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[201] ILA Report, supra, 18.
[202] Pisillio, supra at 46, (noting diligence does not constitute an element present in all international obligations of the state and is not a general criterion of international responsibility).
[203] Chinkin, *supra* note, at 387.
[204] *See also* Eyal Mayroz, *The Legal Duty to 'Prevent': After the Onset of 'Genocide,'* 14 J. GENOCIDE RESEARCH 79 (2012) (arguing that a state that has means which are likely to have a deterrent effect on would-be perpetrators is under the duty to make use of them "as the circumstances permit." Nonetheless, the duty to prevent genocide does not include the duty to intervene).
[205] In the Genocide Case, the ICJ wrote that "the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible." The ICJ also noted that responsibility is incurred only if the State manifestly fails to take measures to prevent genocide. *Id*. at ¶ 430.
[206] Marco Milanovic, *State Responsibility for Genocide*, 17 EJIL 553 (2006).

capacity to prevent the wrongdoing.[207] The Court of Appeals consequently used the attribution doctrine to promulgate a positive conception of control, by determining that the Netherlands was responsible *if it had the capacity to prevent* removal of the plaintiffs from the compound.[208] This interpretation both acknowledges the limitations of relying on direct orders and indicates that states and IOs have a range of powers available to them to prevent against wrongful conduct.[209] Under this conception, responsibility is linked to causation.[210]

On appeal, the Supreme Court did not squarely address the duty to prevent, although it would be wrong to suggest it was completely silent on the matter. At various places in the judgment it hinted that Dutchbat could have prevented the conduct in question.[211] Moreover, the Supreme Court specifically approved of the Court of Appeal's interpretation and application of the effective control test, writing: "The Court of Appeal's ruling that the State had effective control over the conduct of which Dutchbat and hence the State as well are accused by Nuhanovic does not reveal an incorrect interpretation or application of the law on the concept of effective control."[212] Thus while the Supreme Court left for another day the robust approach to control that motivated the Court of Appeals' decision, it is a direction that remains open to courts in new cases. Such a direction would have pros and cons. The pros might include attributing conduct to the entity best placed to prevent wrongdoing, which might then close the accountability gap in international law. On the other hand, such a concept of control turns on its head the law making process, and suggests a very different function for secondary rules than those envisioned by the ILC.

4.2 Parallels with Superior Responsibility

The duty to prevent, as a model of a positive duty of control, has parallels to the doctrine of Superior Responsibility in international criminal law. Although state and IO responsibility

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[207] As Nollkaemper explains, "the removal of Nuhanovic and Mustafic from the compound could be attributed to the Netherlands, if the Netherlands was able to prevent that removal." *See Dual attribution*, *supra*.
[208] *Id*.
[209] *See* Boutin, *supra* note, at 529.
[210] *Id*. at 531 (arguing that the duty to prevent includes an element of cause-and-effect in that the evacuation of the victims was related to Dutchbat's control over the evacuation).
[211] *See* Dutchbat, *supra* note, at ¶ 3.12.2.
[212] *Id*. at ¶ 3.12.3.

regimes are *sui generis*, and important differences between these different regimes of responsibility makes comparisons difficult, however some policy questions are relevant by analogy.

Under the doctrine of superior responsibility, superiors, whether military or civilian, who are not directly involved in the commission of a crime may still be criminally liable if they assert control over others.[213] Because the accused must be shown to exercise control over others and demonstrate the requisite intent ("knew or should have known"), the inquiry centers on dominance and influence of one individual over others.[214] Here, the military or civilian superior incurs responsibility for their failure to prevent the acts of subordinates under their control even if that individual is not at the scene of the crime.[215]

Superior responsibility appears in the statutes of all contemporary international criminal tribunals,[216] with three common elements: (i) a superior/ subordinate relationship, (ii) where the superior knew or should have known the forces were committing such crimes; and (iii) the

[213] Prosecutor v. Halilovic, Case No. IT-01-48-T, Judgment, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).
[214] Beatrice Bonafe, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUSTICE 599 (2007) (noting that large-scale atrocities are often carried out by a variety of perpetrators, control theories are one of the primary ways in which ICL can reach the leaders or the masterminds behind the scenes.)
[215] Harmen Van der Wilt, *Command Responsibility, in* OXFORD BIBLIOGRAPHIES 1, (forthcoming).
[216] See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(3), May 25, 1993, U.N.S.C. S/RES/827; Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, U.N.S.C. S/RES/955; and Statute of the Special Court for Sierra Leone art. 6(3), Jan. 16, 2002, U.N.S.C. S/RES/1315; which read virtually the same: "The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Statute of the Special Tribunal for Lebanon art. 3(2), Mar. 29, 2006, U.N.S.C. S/RES/1664. The Statute of the ECCC similarly provides: "the fact that the acts […] were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate…". Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 29**,** Oct. 27, 2004, NS/RKM/1004/006. *See also* Rome Statute of the International Criminal Court art. 28, July 17, 1998, A/CONF.183.9: "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 failure to exercise control properly over such forces, where:(...) (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation." A difference between the ICC Statute and the ad hoc tribunals is that the former requires causality between the superior's dereliction of duties and the commission of crimes, whereas the ad hoc tribunals do not. *Compare* Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 2009 I.C.C. 423 (15 June), *with* Prosecutor v. Delalic, Case No. IT-96-21-A, Appellate Judgment, ¶ 400 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

commander failed to take all necessary and reasonable measures to prevent the commission of the crime.[217] Control is relevant to the first and third elements, in that it defines the nature of the relationship and the ability of the superior to act and influence subordinates. Although most statutes do not specify the standard, "effective command and control"[218] has consistently been incorporated into the jurisprudence and "effective control" is defined as the material ability of the military or civilian leader to prevent, repress or submit the matter to the competent authorities.[219]

Consistent with decisions in other fields, criminal tribunals have generally adopted a fact based approach to control, determining that the actual position and power of a superior is more relevant than any formal rank or position in an organization.[220] Although the core jurisprudence to date addresses military leaders[221], there is a growing number of cases that involve civilians who are not in a position to demand unquestioned obedience.[222] In the Armed Forces Revolutionary Council case, for example, the Special Court for Sierra Leone (SCSL) took the position that the factors which may be useful in assessing effective control outside the military context include

> that the superior had first entitlement to the profits of war, such as looted property and natural resources; exercised control over the fate of vulnerable persons such as women and children; the superior had independent access to and/or control of the means to wage war, including arms and communications equipment; the superior rewarded himself or herself with positions of power and influence; the superior had the capacity to intimidate subordinates into compliance and was willing to do so; the superior was protected

[217] Prosecutor v. Gotovina, Case No. IT-06-90-A, Appellate Judgment, ¶ 128 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (citing Prosecutor v. Oric, Case No. IT-03-68-T, Trial Judgment, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006)).
[218] *Cf.* Statute of the ECCC, *supra* note.
[219] Prosecutor v. Gombo, *supra* note, at 422.
[220] *See, e.g.*, Prosecutor v. Delalic, *supra* note, at 736 ("[W]hereas formal appointment is an important aspect of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purposes of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.").
[221] The superior / subordinate relationship encompasses both military and civilian spheres, and the statutes of the ad hoc tribunals do not distinguish between the two. The ICC Statute does make a distinction, however, by introducing a higher threshold for civilian superiors, and integrating a nexus requirement. Article 28 reads as follows: "The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."
[222] As Van der Wilt writes: "the doctrine of command responsibility […] is strongly wedded to the concept of military hierarchy. Its crucial element, effective control, presupposes a streamlined organization, with adequate channels of information, clear-cut patterns of hierarchy, and unquestioned obedience, which functions even (or should we rather say - in particular?) in the heat of fighting." *Supra* note, at 161.

> by personal security guards.[..] the superior fuels or represents ideology to which the subordinates adhere, and the superior interacts with external bodies or individuals on behalf of the group.[223]

While some of these grounds seem more relevant to status than control, [224] they nonetheless suggest that :(i) the power to issue superior orders and capacity of taking disciplinary action,[225] and (ii) command structure is very important. For example, to establish Superior Responsibility, the SCSL inquired into whether a commander's orders were obeyed (he could reap the benefits); whether his power remained constant (were not sporadic), whether he could still exercise control over his troops even after they were forced to retreat (despite breakdown of the battalion, the AFRC fighting force was still cohesive),[226] and where the accused fit into the command structure.[227]

These decisions indicate that what are "reasonable and necessary measures" will depend on the circumstances, although they must be lawful and feasible. As such, a heavy emphasis on the facts persists. The primary duty is to prevent future crimes and stop subordinates who are about to commit them, and the secondary duty is to punish past crimes.[228] Finally, effective control means that the accused must not only be able to issue orders, but also that the orders are in fact followed.[229] As a result, resistance or disobedience to the orders will create a presumption against effective control.[230]

The very high level of control required under contemporary Superior Responsibility tests, however, has meant that few prosecutions are successful. The 2012 acquittal of *Gotovina* by the ICTY Appeals Chamber, for example, was justified on the grounds that the trial chamber failed to provide specific information to support the conviction, such as who the accused should have contacted, and what additional steps he should have taken to prevent the acts.[231] Similarly, the

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[223] Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T, Trial Judgment, ¶ 788 (Armed Forces Revolutionary Counsel June 20, 2007).
[224] Van der Wilt, [Justice in the Jungle] (on file with author).
[225] *Id.* at 789.
[226] *Id*. at 1805.
[227] *Id*. (finding that Sesay exercised effective control over subordinates in the RUF).
[228] Prosecutor v. Oric, *supra* note, at 326.
[229] Prosecutor v. Halilovic, *supra* note, at 207.
[230] The ICC makes this point in Prosecutor v. Gombo; effective control is the "material ability" to prevent, repress or submit the matter to the competent authorities. *See* Prosecutor v. Gombo**,** *supra* note. Note that unlike ad hoc tribunals, Art. 28 of the ICC statute requires causality between dereliction of duties and the underlying crimes.
[231] Prosecutor v. Gotovina, *supra* note, at 130.

Chamber indicated that the failure to prevent would need to make a "substantial contribution" to the crimes.[232] These exacting requirements are further illustrated by other cases before ad hoc tribunals that have clarified that in order to prove "effective control" the power to issue orders is not enough, particularly if confirmation of orders required by others.[233] The difficulties of obtaining convictions under the Command Responsibility doctrine mean that another doctrine has come to the fore: indirect co-perpetration, codified by Article 25(3) of the ICC Statute.[234] In contrast to superior responsibility, this mode of liability attaches to positive acts, not to the failure to prevent and punish. As such, the same shift noted in the field of state responsibility, greater reliance on direct responsibility through primary norms, appears to be taking place simultaneously in ICL.

Stepping back, the role of effective control in ICL offers some insights into the control, attribution and responsibility matrix. First, it demonstrates a common emphasis on a bottom up approach, which is heavily dependent on the facts. Second, there are commonalities in reasoning with regards to control and the requirement to prevent and punish. For example, Dannenbaum's argument that "effective control," for the purposes of apportioning liability in situations of the kind addressed by Draft Article 6 under the ARIO, should be held by "the entity that is best positioned to act effectively and within the law to prevent the abuse in question," has many parallels with superior responsibility.[235] Nonetheless, while there has been controversy over lower control thresholds in case they expand the potential for attribution of acts to States and IOs, the same cannot be said of under ICL. International criminal tribunals have been consistent in insisting on more exacting standards, requiring clear evidence that the superior could have produced end results.[236]

[232] *Id*. at 134 (the court also noted that there was ample evidence on the record that he promoted discipline against troops under his command).
[233] Prosecutor v. Halilovic, *supra* note.
[234] Rome Statute of the International Criminal Court, *supra* note, art. 25(3).
[235] *Dannenbaum's* illustrations of levers of controls include the powers to discipline and punish, hire and promote, and train. Dannenbaum, supra, 353.
[236] *Id*. at 134.

5. Primary Norms not Lower Control Thresholds Are the Answer to Slippage

I have argued that the relevance of effective control as a de facto standard for the secondary rules of attribution is waning, despite the ICJ's affirmation of effective control in the Bosnia decision. Four concurrent patterns bear this out: (i) there is a palpable movement towards lower control thresholds in certain fields including WTO law, anti-terrorism, PMCs, and self-defense against non-state actors, (ii) there is a growing interest in basing responsibility on omissions and primary norms that both emphasize the duty to prevent and create due diligence obligations for states and IOs, (iii) there are efforts to develop criteria for effective control shared by two or more actors, which broaden the potential scope of responsibility, and (iv) IO comments suggest the ILC's proposed effective control standard is not relevant to the practice of most organizations, particularly those that engage in consultative functions.

While at first blush it might appear that lowering control thresholds are the best response to the slippage problem, there are several potentially negative consequences of broader state and IO responsibility. First, because the rules of attribution are relevant to defining the nature of the entity suing or being sued, broader rules of attribution can affect the potential liability of a subject under primary rules of international law.[237] In the investment context, for example, ICSID's jurisdiction is limited to investor – state disputes.[238] Typically, the State is a respondent, although sometimes sub-divisions, agencies or corporations controlled by a States are sued in an

[237] *See, e.g.*, Abby Cohen Smutny, *State Responsibility and Attribution: When is a State Responsible for the Acts of State Enterprises? Emilio Agustin Maffezini v. The Kingdom of Spain*, *in* INT'L INVESTMENT LAW AND ARBITRATION 17 (Todd Weiler ed., 2005) (explaining that in regards to claims against States under investment treaties that "rules of attribution […] often constitute a critical aspect of the dispute. When a foreign investor has suffered losses, the question of whether the acts or omissions alleged to have caused the losses may be attributable to the State is assessed at the threshold.").

[238] *See, e.g.*, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, 575 UNTS 159, Mar. 18, 1965, which provides: "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. (2) "National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

effort to reach the state, which may have deeper pockets.[239] Some decisions on attribution of conduct will affect the scope of potential state liability, and some have cautioned that low control thresholds are adopted for the purposes of determining standing ICSID cases could eventually reach state-to-state disputes.[240]

Similarly, questions of attribution have affected jurisdiction over the UN as well. Because IOs are protected by privileges and immunities, the nature of the control test adopted, can determine whether or not a Court has jurisdiction rationae personae. The *Behrami* decision discussed i*nfra*, is a concrete example of this possibility, where the overall control test resulted in an admissibility decision that all acts were attributable to the UN, which was then determined to be outside of the Court's jurisdiction. A higher control test or the incorporation of a shared responsibility paradigm, might have resulted in acts being attributed to member states instead, which have proceeded to be decided on the merits. [241] Recognition of shared responsibility may also affect the availability of a remedy to plaintiffs, and affect the potential scope of state and IO responsibility, as noted above with regards to the *Nuhanovic* decision.[242]

Another consequence of a low attribution threshold is the burden it can place on weak and under-resourced states. As Hessebrugge writes

> today, states more and more share their power with international organizations but even more importantly with non-state or transnational, sub-state actors. Multinational corporations, strengthened by free trade and privatization achieve annual turnovers that dwarf the gross domestic product of developing countries and can wield enormous economic power. Transnational networks of NGOs force countries to adopt new rules of international law such as those embodied in the Ottawa Treaty against landmines… Armed non-state groups also take advantage of the opportunity to control territory that is left unprotected by weak states and then seek to expand their power even further.[243]

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[239] *See* CHRISOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 82 (2001).
[240] Mark Feldman, *Standing of State Owned Entities Under Investment Treaties*, INT'L INVESTMENT L. & POL'Y Y.B. 613, 624 (2010) (advocating a nature and purpose test to curb this eventuality).
[241] *See, e.g.*, Behrami v. France, *supra* note and Saramati v. France, *supra* note (determining that wrongful acts in Kosovo were attributable to the UN on the basis of an ultimate control test, and that the Court had no jurisdiction *ratione personae* over the UN).
[242] Dutchbat, *supra* note, at ¶ 3.11.2.
[243] Hessebrugge, *supra* note, at 303.

The ILC recognized this trend in Article 5 of the ASR[244], and IO comments to the ILC on the ARIO emphasized this reality as well.[245] Where the real power of decision resides in non-state actors in any given area, it places greater burdens on states to police them. As Trapp notes, "while a wrongdoing state's responsibility is not invoked as often as it might be in the terrorism context …. Holding states responsibility as a matter of law for more than they are responsible for as a matter of fact will certainly not encourage more reliance on the regime of responsibility."[246] Developed states typically have better capacity to do so through legislation and controls, but developing states struggle to implement responsibilities of due diligence.[247] Broad responsibility may also increase the implementation gap in these circumstances, and overshadow the alternative approach, which is to develop more comprehensive responsibility regimes for non-state actors.[248]

6. Conclusion

Far from simply providing technical standards, rules on attribution embody judgments about the scope of state and IO obligations, the range of persons bound by a given set of norms, and the potential spread of losses that give rise to remedial rights.[249] Because the content of control tests is heavily dependent on primary norms, superficial similarities in the generic effective control standard tends to mask the very different values at play in subfields of international law. These differences are magnified when one considers how effective control can, depending on the circumstances, implicate not only power relationships (control over persons or entities) but concurrent spatial control (over territory).

While states remain the fundamental building blocks of the international legal system, and in some instances, principal organs and authors of international law, their power is increasingly

[244] *See* note [commentary on Art.5]___, supra.
[245] *See, e.g.*, UN Comments to ILC on ARIO, *supra* note.
[246] Trapp, supra *note*, at 61.
[247] Hessebrugge, *supra* note, at 306.
[248] *See, e.g.*, Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Y.L.J. 443 (2001).
[249] *See* Crawford, *supra* note 1, at 188.

diffuse.[250] High control thresholds have usually been justified on the basis that they safeguard states from being held responsible for too broad of a range of acts; acts which they might not instigate, direct or be able to prevent.[251] However this article has argued that control is inherently context specific, and as such, abstract secondary rules are ceding to factual reality.[252] This shift towards specific contexts is also borne out by greater emphasis on primary rules and direct responsibility from omissions.

The International Seabed Tribunal noted, "while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law."[253] The changing nature of the state, and movement towards new divisions of labour between public and private, state and non-state, and public and commercial actors in international law reinforce the important of this statement. While states remain the fundamental building blocks of the international legal system, and in some instances, principal organs and authors of international law, their power is increasingly diffuse.[254] Innovative power sharing arrangements and new theories about the responsibilities associated with state sovereignty mean that control tests may no longer be fit for the future.[255]

Going forward, some pressing issues remain to be resolved. It is apparent that there are gaps in the architecture of legal responsibility, particularly with regards to non-state actors, which are

[250] H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L. J. 385 (1944) (discusssing how states act as organs of international law).
[251] *See* ASR, *supra* note, at 38 ("In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, where or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.").
[252] *See* ASR, *supra* note, at 70, ("Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery."). *See generally* Hiroshi Taki, *Effectiveness*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (2008).
[253] ITLOS Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, ¶ 112 (citing commentary to Article 8 of the ASR).
[254] H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L. J. 385 (1944) (discusssing how states act as organs of international law).
[255] See generally Amatai Etzioni, Sovereignty as Responsibility (2005) (available at: http://www2.gwu.edu/~ccps/etzioni/documents/A347a-SoverigntyasResponsibility-orbis.pdf); and

increasingly implicated in many of the harms we encounter as a society. An international responsibility framework applicable to corporations, joint partnerships, public private partnerships and non-government organizations, in particular, is in need of development. The development of unified set of principles that address states, IO, non-state actors, and individuals, will resolve some of the struggles and inconsistencies apparent in contemporary control tests. Moreover, given the jurisdictional limitations of international tribunals, it will be important to focus on developing primary rules in particular subject areas, rather than relying on particular subjects of international law, in order to better define the responsibilities of different actors in fulfilling positive obligations.[256]

Better alignment of control with primary norms will also be relevant to principles beyond the law of responsibility.[257] For example, the definition of the "state" is relevant to identifying unilateral acts, recognition, and the identification of customary international law, and norm generation generally. Similarly, where the "state" or "IO" is defined differently for purposes of attribution and immunity, there may be inconsistencies that lead to irrational results.[258] Analogous issues have arisen in international criminal law, with regards to whether a state official who commits an international crime does so in a public or private capacity, which would affect the immunities available.[259]

[256] Hessebrugge, *supra* note.
[257] Luigi Condorelli and Claus Kress, *The Rules of Attribution: General Considerations*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 221, 222-23 (Crawford, Pellet, Olleson eds., 2010).
[258] Smutny, *supra* note, at 33.
[259] On this debate, see I. Wirth, *Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. (2002) 877, and Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?* 13 EUR. J. INT'L L. 895 (2002).