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## Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law*. [AQ4](#)

**Left running head:** Book Review

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Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law*. London: Routledge, 2021, 217pp. ISBN 978-0-367-47664-9

In this highly inspiring book, Natia Kalandarishvili-Mueller, a professor of public international law at Tbilisi Open University, Georgia, ventures into thorough analyses of varying modalities of control under international humanitarian law (IHL) and international human rights law (IHRL). Above all, the author considers control in territorial terms and variants of control in the personal nexus between a supporting State and a non-State organised (armed) entity. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* famously suggested that ‘overall control’ should serve as a common standard for assessing three issues that are interrelated but conceptually distinct: conflict classification (namely, internationalisation of an armed conflict, and the determination of applicability of the law of occupation); State responsibility under general international law; and the question of an affiliation of an armed group to a State Party to an international armed conflict (IAC) under Article 4A(2) of the Third Geneva Convention (GCIII).<sup>1</sup> While largely following its reasoning, the book’s parameters of analysis transcend this, covering varying modalities in which the author considers the notion ‘control’ to operate either expressly or implicitly under IHL and IHRL. [AQ2](#)

The introduction, which foregrounds the author’s working assumption, systemically maps out different modalities of control that are used in the wider context of public international law. The bulk of examinations in subsequent chapters focus on the following iterations of ‘control’: the tests of attribution based on different degrees of control over persons or another non-State organised entity, which serve to ascertain the responsibility of the supporting State (‘complete dependency’; ‘effective control’; and ‘overall control’); control over persons as the device for recognising the extraterritorial applicability of human rights treaties; some distinct notions developed by the European Court of

Human Rights (ECtHR) to recognise the Member States and its own jurisdiction under the European Convention on Human Rights (ECHR), such as ‘effective overall control’ and ‘decisive influence’ over non-State entities (what the author calls the ‘State agent authority and control test’); and ‘control’ over persons which the author argues to be inherent in the concept of ‘protected persons’ under Article 4 GCIV. As other indicators of ‘control’, the Introduction also discusses: ‘effective control’ over persons as a criterion for command responsibility under international criminal law; what the author calls ‘normative control’ exerted by an international organisation over a State in the context of the Draft Articles on the Responsibility of the International Organizations (DARIO); and the United Nation (UN) Security Council’s ‘ultimate control and authority’ over peacekeepers pursuant to Chapter VII of the UN Charter. ‘Effective control’ in territorial terms, which is indispensable for establishing the legal regime of belligerent occupation and triggering the law of occupation, also operates as a criterion for recognising the extraterritorial applicability of treaties of IHRL. The way in which the factual element of effective control activates the normative corpus of the law of occupation typifies the notion of *ex factis jus oritur*. ‘Effectiveness’ plays a bridging role between normativity (*Sollen*) and socio-factual reality (*Sein*),<sup>2</sup> the role that has been explored by neo-Kantian German constitutional law theorists.<sup>3</sup>

Chapter 1 takes stock of the notion ‘effective control’ over territory in the light of the author’s laborious examinations of the *travaux préparatoires*, the jurisprudence and doctrines. One of the salient questions in Chapter 1 turns on debates over whether one needs actual or potential control over territory for determining occupation (pp 32–35). As noted by the author (at p 32), the text of Article 42 Hague Regulations seems to create some ambiguity. On one hand, the first paragraph leans towards actual control over territory when speaking of ‘territory...actually placed under the authority of the hostile army’. On the other, the second paragraph admits of more nuanced and potential control when referring to ‘territory where such authority...can be exercised’. It is generally understood that what matters is not much the actual presence of foreign troops all over the territory concerned as the ‘ability’ of an adverse party to wield authority (namely governmental power) over a specific area.<sup>4</sup> Hence, as the author argues (p 29), any narrower interpretation, as suggested by the International Court of Justice (ICJ) in *DRC v Uganda*, by demanding the notion of ‘territorial control’ to entail not only the physical presence of a foreign State’s troops but even the substitution of the local government by those invading troops,<sup>5</sup> is untenable. On the other hand, it ought to be noted that there is much of support in the case law<sup>6</sup> and doctrines<sup>7</sup> for the thesis that to recognise the legal status of occupation, it is necessary for the occupying forces or agents to be present at least in some part of the relevant territory to have its authority felt over the territory (the ‘boots-on-the ground theory’).<sup>8</sup> The question whether or not it is essential for a foreign army or agent to be stationed *within* the territory concerned can be most acutely raised by the doctrine of the so-called ‘virtual occupation’. Proponents of such modality of occupation may argue that it is sufficient that effective authority of the supposed occupier can be exercised within a short period of time even from *outside* the territory. This issue will be

analysed in Chapter 3 of this book with special regard to the legal status of post-2005 Gaza Strip (pp. 112–23).

Chapter 2 examines issues of indirect occupation or occupation by proxy and some salient implications flowing from such a legal regime, including the question of the responsibility of the supporting State under IHL and IHRL. This legal regime is discernible when a foreign State wields overall control either over an armed group or over *de facto* authorities, which in turn effectively control part of the territory (p 58). Starting with the *Tadić* Appeals Chamber's premise that the responsibility of a supporting State may be linked to the question of conflict classification (p 57), the author, just like the ICRC, argues that occupation by proxy<sup>9</sup> is part of the broader framework of such conflict classification exercise that should be evaluated by the standard of 'overall control' (pp 57, 65 and 70). One possible challenge to this general approach may be the ICTY *Naletilić* Trial Chamber's proposition that a 'further degree of control' than overall control is needed for determining indirect effective control. The author suggests that the wording 'further degree of control' be grasped as indicating 'effective control' (p 58), albeit acknowledging an alternative reading that the *Naletilić* Trial Chamber may have implicitly recognised as an *intermediate* degree of control between effective control and overall control.<sup>10</sup> At any event, she downplays any potential repercussion of *Naletilić* as an aberration, presumably because the subsequent decision of the *Prlić* Trial and Appeals Chambers reverted to 'overall control'.<sup>11</sup>

The author suggests that the ICRC's notion of 'indirect effective control', which rationalises the activation of the law of occupation, be comprehended as conforming to the ECtHR's edict 'effective overall control' (p 70). Yet, before concluding for such a proposed conceptual linkage, careful scrutiny is needed. The notion 'effective overall control' was enunciated by the ECtHR in *Loizidou* as a benchmark for ascertaining the jurisdiction of the respondent State (Turkey) and the ECtHR, and hence recognising the extraterritorial applicability of the ECHR. As commented by Milanovic,<sup>12</sup> the Grand Chamber in that case grasped this concept *in territorial terms* (namely, control over the occupied territory of northern Cyprus).<sup>13</sup> The *Loizidou* Grand Chamber did not formulate it *in personal connection* (ie, control over the authorities of 'the Turkish Republic of Northern Cyprus') as claimed by the *Tadić* Appeals Chamber.<sup>14</sup> Another question is the requisite degree of control for the ECtHR's criterion 'effective overall control'. Insofar as this criterion is taken as referring to the situation where part of the territory is effectively controlled by a non-State organised entity over which a Member State of the ECHR wields 'overall control', this criterion can correspond to the ICRC's formula 'indirect effective control'. Still, it should be appreciated that to validate the extraterritorial application of the ECHR to acts of proxy, there is no need to establish 'effective control' over territory and 'overall control' over persons conjunctively. Indeed, as the author notes (pp 146–47) in *Jaloud* the ECtHR introduced an even looser degree of 'control' as a new jurisdictional basis such as 'persons passing through a checkpoint' in occupied territory,<sup>15</sup> even though the respondent State's

status as the occupier was uncertain.

Considerable uncertainty surrounds another juridical notion in personal connection developed by the ECtHR to precipitate the extraterritorial application of the ECHR: ‘decisive influence’<sup>16</sup> or ‘effective control and [a] decisive influence’ over a non-State entity.<sup>17</sup> Above all, it is unclear how this can be compared with other notions signifying the degree of personal nexus, such as ‘effective overall control’ discussed above in the ECtHR’s own case law and ‘overall control’ invoked by the ICTY. Some authors suggest that the notion ‘decisive influence’ in *Ilaşcu* be deemed akin to ‘effective control’ over territory.<sup>18</sup> Yet, a serious problem with this suggestion is the confusion between control in personal connection and control in territorial sense. The author’s proposition is that the notion ‘decisive influence’ be understood as equivalent to ‘overall control’ in personal nexus (pp 77–78). To verify such a proposition, it is necessary to examine closely the context and manner in which the notion ‘decisive influence’ was employed in *Ilaşcu*. To start with, this notion appeared when the ECtHR held the Moldavian Republic of Transdniestria to be ‘under the effective authority, or at the very least under the decisive influence, of the Russian Federation’. The adverbial phrase ‘or at the least’ may indicate that ‘effective authority’<sup>19</sup> is a higher threshold than ‘decisive influence’. Yet, the picture is more complex when ‘decisive influence’ is compared both with ‘effective authority’ in the same case, and with the international criminal tribunals’ standard ‘overall control’. While ‘control’ is stricter than ‘authority’, ‘influence’ is certainly looser than ‘control’. Yet, the qualifying word ‘decisive’ is palpably more stringent than the adjective ‘overall’. Taken all together, it seems reasonable that the notion ‘decisive influence’ may boil down to ‘overall control’.

When aligning the benchmark for determining internationalisation of an armed conflict with one of the tests of attribution under the law of State responsibility, the author is inevitably drawn into a contentious issue of ‘fragmentation’ of international law. This relates to the well-known disputes between ‘effective control’ suggested by the ICJ and ‘overall control’ proposed by the ICTY (pp 61–65). The author grasps correctly that the ICJ in *Nicaragua*<sup>20</sup> put forward two different tests of ‘complete dependency’ and ‘effective control’ (pp 60, 61, 81–82). Hence, she implicitly suggests that the *Tadić* Appeals Chamber’s reasoning was partially flawed in conflating the two tests as the unitary one.<sup>21</sup> To recall, the ICTY Appeals Chamber did differentiate its standard for attribution, but this differentiation was based on the addressee of control (an individual person or an organised armed group).<sup>22</sup> Still, as mentioned above, the author’s path converges with the *Tadić* Appeals Chamber’s main judicial strategy to align the three issues (the requirement of an armed group’s affiliation to a Party to an IAC under Article 4A(2) GC III; issues of conflict classification (including identification of occupation by proxy) and the responsibility of a supporting State for acts of the armed group) on the basis of ‘overall control’ (pp 83–86). She is confident that ‘overall control’ is the test for attributing acts of a proxy to its supporting State to ascertain State responsibility (pp 57, 65 and 70), albeit she does not answer the tantalising question if this standard should be recognised in the general law of

State responsibility as held by the *Tadić* Appeals Chamber, or only as a *lex specialis* concerning attribution under IHL. The author's rationale for 'overall control' lies in the need to close the gap in protections and State responsibility (p 62). She endorses the rationale, given by the *ICRC's revised Commentary to Geneva Conventions*, that unless the questions of conflict classification and State responsibility are evaluated by the unified test, a supporting State involved in an IAC is left without accountability for actions of an armed group which it supports.<sup>23</sup> She criticises 'effective control' as being too stringent a test in requiring the proof that a supporting State controls 'each action continually and unfailingly' (pp 62–63 and 65).<sup>24</sup>

When it comes specifically to the requirement of belonging under Article 4A(2) GCIII, the author follows another line of the *Tadić* Appeals Chamber's reasoning that 'the GCIII, by providing in Article 4 the requirement of "belonging to a Party to the conflict", implicitly refers to a test of control.'<sup>25</sup> The idea that the criterion of a group affiliation for assessing the [AQ3](#) POW qualification under this provision is inherently wedded to a broader concept of 'control' was supported by several experts at the ICRC's Expert Meeting on Occupation.<sup>26</sup> The author's original suggestion here is that such a notion of group affiliation forms part of IHL's distinct scheme of control, together with the concept of 'protected persons' under Article 4 GCIV and the principle, enunciated in Article 29 GCIV, that a State must be accountable for its agents' treatment of protected persons under their hand (pp 83–86 and 89).<sup>27</sup> Yet, in this reviewer's opinion, a strong overtone implied by the notion 'control' is unfitting. As affirmed by *Pictet's Commentary*, this requirement is a low-threshold test, which can be fulfilled by a '*de facto* relationship' between an armed group and a State Party to an IAC. What is at least needed for this requirement is a reciprocal acknowledgement, with an armed group declaring to fight on behalf of a Party to an IAC, and with that Party agreeing on this in return at least tacitly.<sup>28</sup> Further, nothing precludes the power relationship between the armed group and the State Party to the conflict being equal or even reversed. Hence, it is more reasonable to propose that the requirement of belonging be satisfied even by a looser standard than 'overall control'.<sup>29</sup>

Further, the author maintains that the requirement of belonging suggests an armed group's allegiance to a Party to the conflict, namely, fighting on behalf of that Party. In her view, this suggests that the group is acting as a '*de facto* organ' of that Party (pp 84–85 and 87). Yet, this suggestion is contestable. The notion '*de facto* organ' is closely associated with the question of attribution for State responsibility. It corresponds to the 'complete dependence' test that is incorporated into Article 4 ARSIWA. Indeed, the author herself employs this term in that way elsewhere in the book (pp 3–4 and 157–58).

Chapter 3 addresses controversies relating to the end of control over territory. One salient question relates to the continued applicability of GCIV in view of the impact of Article 6 GCIV. This so-called 'one-year' rule, albeit with 43 key provisions carved out for continuing applicability, was purported to

cope with the US' concern over its military forces in occupied Germany, Austria and Japan in the wake of WWII. Yet, as the author notes, this sows the seed for more confusion (pp 93–95). Above all, this would lead to an unreasonable result that some provisions of GCIV which are vital to occupied inhabitants, such as provisions on education for children, would cease to apply 1 year after the end of active hostilities.<sup>30</sup> It is well-established in the doctrine that the legal regime of occupation remains in place unless and until there is a withdrawal or ejection of foreign troops, or an end of any hostile relationship between the occupying State and the occupied State as in the case of the latter's consent to the former's presence (pp 96, 104 and 132). The author argues that Article 6 GCIV 'should...not make any reference to hostilities at all'. Underlying this criticism is her assumption that 'when there is a situation of occupation, there should be no active hostilities' (p 96).<sup>31</sup> This assumption may be corroborated by the so-called 'either/or theory', which considers the relationship between the law of occupation and IHL of conduct of hostilities mutually exclusive.<sup>32</sup> Nevertheless, later in the book the author does challenge this 'either/or theory' when recognising 'temporary and partial loss of control over parts of a territory' (pp 106–07).<sup>33</sup>



A more salient controversy in assessing the end of occupation has turned on the legal status of the Gaza Strip after the Israeli troops' disengagement since 2005. As the author writes (p 117), civil life of inhabitants in Gaza, with the closure of the land crossings and the blockade of airspace and maritime access, remains under Israel's tight control. Technological advancement such as an airborne surveillance mechanism facilitates remote and even virtual control. As a way to rationalise the applicability of the law of occupation to the Gaza-like situation, the author relies on the so-called 'functional approach',<sup>34</sup> above all, its specific dimension, the theory of 'varying levels of control'.<sup>35</sup> That theory posits that the controlling power's degree of obligations under GCIV should be assessed in a way commensurate to the degree of control over a particular section of the territory at the material time (pp 120–23).



The theory of 'varying levels of control' is examined at greater depth in Chapter 4. The author explains that this theory assumes the degree and scope of a State's obligations under IHL (above all, GCIV) and IHRL to be ascertained on a 'sliding scale'. She suggests that a nuanced assessment of a controlling State's obligations based on such a 'sliding scale model' hinges on different factors. Among them, she proposes to focus on variables such as not only control in territorial terms, but also different degrees of control in personal connection and the nature of a specific provision at issue (including if this can be implemented with 'partial obligation' or only with 'full obligation')<sup>36</sup> (pp 136–37, 140–42, 160–64).



Admittedly, the author's underlying thesis that a variety of notions indicating a nexus between a State and an organised non-State entity can be conceptualised through the analytical prism of 'control', irrespective of varying purposes for which they serve under IHL and IHRL, is contestable. This reviewer also cautions against concluding hastily that some modes of 'control' may be harmonised





through the standard of ‘overall control’. Yet, this is a matter of difference in perspectives and conceptual schemes. This book, which does not stint on extensive analyses and enriching discussions, is highly commended. It is also marked by the amplitude of original figures and schemes. Overall, this book is a cutting-edge monograph that should occupy a significant place in the doctrinal pedigree of international law.

1 ICTY, Appeals Chamber, *Prosecutor v Tadić*, Judgment, 15 July 1999, paras 88–145. Cf ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 27 February 2007, para 404; ICC, *Lubanga* Decision on the Confirmation of the Charges, 29 January 2007, para 211 (recognising ‘overall control’ only as the standard for internationalizing an armed conflict).  



2 See GI Hernández, ‘Effectiveness’, in J d’Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 237, 239.  

3 J Wildeman, ‘The Philosophical Background of Effectiveness’ (1977) 24 *NILR* 335, 343–46 (referring to theories of von Jhering and Kelsen, and above all, to Jellinek’s idea of ‘normative Kraft des Faktischen’).  



4 T Ferraro (ed), *ICRC’s Expert meeting, Occupation and Other Forms of Administration of Foreign Territory* (ICRC 2012) at 19.  

5 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, decision of 19 December 2005, para 173.  

6 ECtHR, GC, *Sargsyan v Azerbaijan*, Judgment, 16 June 2015, para 94.  

7 See, for instance, Ferraro (n 4) 17. Compare Y Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 44, para 100 (‘the Occupying Power must deploy “boots” on the ground in or near the territory that is under occupation’; emphasis added).  



8 More elaborate discussion of this question can be found in Chapter 4 (156–58).  



9 T Ferraro, ‘The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict’ (2015) 97 *IRRC* 1227, 1249–50.  



10 See M Sassòli, ‘Concept and Beginning of Occupation’ in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions—A Commentary* (OUP 2015) 1389, 1399–400, MN 22; K Arai, ‘Purokushi-wo-tsuujita Senryo’ (‘Occupation through a Proxy’) in K Serita and others (eds), *Jisshou-no Kokusaihogaku-no Keisho (Succession of Positivist International Legal Studies)*

(Shinzan-sha 2019) 907, 928.  

11 ICTY, Trial Chamber, *Prosecutor v Prlić et al*, Judgment, 6 June 2014, para 96; Appeals Chamber, Judgment, 29 November 2017, para 322.  



12 M Milanovic, *Extraterritorial Application of Human Rights Treaties—Law, Principles, and Policy* (OUP 2011) 48–49, 51.  



13 ECtHR, Grand Chamber, *Loizidou v Turkey*, Judgment, 18 December 1996, para 56 (‘effective overall control over that part of the island’). Cf ex-European Commission of Human Rights’ use of ‘overall control’ in territorial sense: *ibid*, para 56 (‘overall control in the border area’); and the applicant’s submission that Turkey exercised ‘effective overall control over events in the occupied area’.  

14 ICTY (n 1) para 128.  



15 ECtHR, Grand Chamber, *Jaloud v the Netherlands*, Judgment, 20 November 2014, para 152.  



16 ECtHR, Grand Chamber, *Ilaşcu and Others v Moldova and Russia*, Judgment, para 392.  

17 ECtHR, Grand Chamber, *Catan and Others v Moldova and Russia*, para 122; ECtHR, Grand Chamber, Judgment, 19 October 2012; *Mozer v Moldova and Russia*, Judgment, 23 February 2016, para 110.  

18 F Mirzayev, ‘Abkhazia’ in C Walter, A von Ungern-Sternberg and I Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 191–213, 198, 208–10 (though using ‘effective control over Abkhazia’ to refer to control in both territorial and personal connections); and B Bowring, ‘Transistria’ in Walter and others (eds) *ibid* 157–74, 158.  



19 This notion constitutes a criterion for assessing the responsibility of commanders and civilian superiors under Article 28 ICC Statute.  

20 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, paras 109–10. This test was confirmed by ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Rep 43, Judgment, 26 February 2006, para 392.  



21 See Milanovic (n 12) 43–44.  

22 ICTY (n 1) paras 118–20.  

23 ICRC's revised *Commentary to GCIII*, common art 2 GCs, para 304.  



24 Still, the required element of effective control that can be extrapolated *a contrario* from the *Tadić* Appeals Chamber's reasoning is that an intervening State provides 'specific instructions' to a non-State organised entity, or that it 'controls the specific operation in which the violation occurs': ICTY (n 1) para 131. See also ICRC's revised *Commentary to GCIII*, common art 2 GCs, para 302.  

25 ICTY *ibid* para 95.  



26 Ferraro (n 4) 125.  

27 See also N Kalandarishvili-Mueller, 'Transforming a Prima Facie NIAC into an IAC: Finding the Answer in IHL', (2020) 55(3) *ILR* 334, 351–53.  



28 Pictet's *Commentary to GCIII*, 57.  


29 D Akande, 'Classification of Armed Conflicts: Relevant Legal concepts' in E Wilmshurst (ed), *International Law and Classification of Conflicts* (OUP 2012) 32, 61.  



30 O Ben-Naftali, A Gross and K Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) *Berkeley J Int Law* 551, 595.  

31 The author uses the term 'hostilities' interchangeably with 'military operations', as this provision does not contain 'hostilities'. See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-A, 623–24.  

32 Ferraro (n 4) 112–13.  

33 At the ICRC's expert meetings on occupation, the 'either/or theory' was rejected by most experts in favour of the approach that allows simultaneous application of both models in occupied territory: *ibid*. See also M Longobardo, *The Use of Armed Force in Occupied Territory* (CUP 2018) 198–205.  


34 The so-called 'Pictet's theory' is credited with marking the genesis of the 'functional approach'.  


35 See Ferraro (n 4) 113.  


36 Compare the 'situation-based approach' used by Ferraro: Ferraro (n 4) 113.  

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