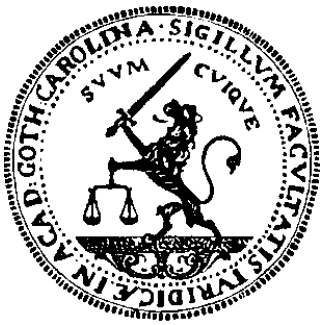

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"Little Green Men" in a Legal Gray Area: International Responsibility for Proxy Wars

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Letizia Lo Giacco
Term: Spring 2020

Table of Contents

Abbreviations

API – Additional Protocol I
APII – Additional Protocol II
AQI - Al Qaeda in Iraq
ASR – Articles on State Responsibility
ATO – Anti-Terrorist Operation
CEDAW - Convention on the Elimination of all Forms of Discrimination Against Women
CPT - Committee for the Prevention of Torture
DNR – Donetsk Peoples Republic
ECtHR –European Court of Human Rights
EJIL – European Journal of International Law
EU – European Union
FRY – Federal Republic of Yugoslavia
FSA – Free Syrian Army
GC – Geneva Convention
HRW – Human Rights Watch
IAC – International Armed Conflict
ICC – International Criminal Court
ICCPR - International Covenant on Civil and Political Rights
ICERD - International Convention on the Elimination of All Forms of Racial Discrimination
ICJ – International Court of Justice
ICJ Rep. – International Court of Justice, Report of Judgements
ICRC - International Committee of the Red Cross
ICRC – International Committee for the Red Cross
ICTR - International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for Yugoslavia
IHL – International Humanitarian Law
ILA – International Law Association
ILC – International Law Commission
IRRC – International Review of the Red Cross
LNR – Luhansk Peoples Republic
LOAC – law of armed conflict
LOAC – Law of Armed Conflict
NDF - Syrian Armed and National Defense Forces
NIAC – Non-International Armed Conflict
OCP – Office of the Prosecutor of the International Criminal Court
OHCHR – Office of the United Nations High Commissioner for Human Rights
OSCE SMM – Organization of Security and Cooperation in Europe, Special Monitoring Mission to Ukraine
SDF - Kurdish Syrian Democratic Forces
SIRPI – Stockholm International Peace Research Institute
SPLA - Sudan People's Liberation Army
UAE – United Arab Emirates
UNCHR - United Nations Council on Human Rights
UNHCR – United Nations High Commissioner for Refugees
UNSC – United Nations Security Council
USSR - Soviet Union, officially the Union of Soviet Socialist Republics
VRS – Army of the Republika Srpska

Summary

The analysis and findings in this paper provide a perspective of the interaction between the theoretical underpinnings of international law, namely law on state responsibility, IHL, ICL and IHRL on the one side, and their actual impact on proxy wars on the other.

The problem this research tackles is the fragmentation of international law and incapacity of legal framework to regulate modern armed conflicts. This gives carte blanche to states who chose to fight wars via proxies and avoid being recognized as part to the conflict, escaping any responsibilityfor their actions.

Thus this research focuses on analyzing the content of existing international rules and standards, which are required to establish international responsibility for proxy wars.

Ambiguity and controversy surrounds the debate over where the lines of international responsibility and attributability of actions of non-state actors to states should be drawn. This paper explores the developments international jurisprudence, namely that of ICJ and ICTY and emphasizes that Nicaragua test has dominated international legal community since 1986, while nature of wars has change significantly and continues to evolve, around 95 percent of present-day wars accounting for hybrid proxy wars conducted clandestinely.

This research highlights the wide gap between classifying the armed conflict as an international and invoking international responsibility, caused by two existing tests of "effective control" and "overall control".

Further, this thesis explores factual and policy implications of such legal gap in present time and considers three cases-studies – that of Ukraine, Syria and the Horn of Africa, which all bring to light legal characteristics and challenges of proxy wars from a different angle. Evidence is presented of international law developing at a much slower pace than reality, leaving human rights at threat and large numbers of civilian population vulnerable and unprotected. IHRL framework can be invoked in proxy war context, but it is reckoned impractical in ensuring international responsibility, since it greatly relies on a good will and diligence of states, which is not the case in proxy wars.

The conclusions are drawn that in absence of an adequate response by international law or interpretation of existing attribution standards in a way that would address the legal gap, further attention to this issue is required from international law-makers. Ultimately, when international law itself fails to establish state responsibility for guaranteeing human rights it is a sign that development is necessary.

Key words: proxy wars, hybrid wars, international jurisprudence, Nicaragua, Tadić, impunity for war crimes, international responsibility of States, attribution of conduct to a state, the strict control test, the effective overall control test.

Acknowledgments

In memory of my friend Orest Kvach, who has lost his life at the age of 22 fighting in the Eastern Ukraine, whose values, integrity and strong character have always inspired me and stimulated me to do my best in whatever I undertake.

Thank you to Karol Novak who encouraged me to write about this complex yet incredibly significant topic, and who has been a great mentor during this master's programme.

Thank you to the Swedish Institute for choosing me as the Visby scholarship holder, which made my Lund journey possible and my horizons broader.

Thank you to my supervisor Letizia, who managed to transfer her passion for international law to me, who inspired and encouraged me not only throughout the thesis writing process, but helped grow personally and professionally.

Thank you to my family for your love and constant support and, in particular, to my dear little sister Iryna, without whom I would have not succeeded.

I. Introduction

1. Background and problem formulation

Twentieth, and increasingly twenty-first century, is dominated by hybrid wars. In particular, after the Cold War, states started to extensively use proxy forces as a substitute for regular armed forces in order to shield the state from responsibility by making the conflict appear non-international.

Modern-day wars are hardly wars in a classical sense - officially declared, between two or more parties fighting openly and taking pride in military gains. Similarly, modern wars are rarely "won". Instead, they are covert, increasingly protracted, sometimes lasting for decades, leaving cities and their residents in ruin.

In such reality, international law is supposed to be an incredibly useful and theoretically powerful tool to respond to such clandestine was. When conflicts become increasingly protracted, it becomes critically important to mitigate the damage of war, end fighting, and violence, reduce radicalization, and minimize the damage on civilian populations.

The biggest problem with the proxy wars is that they generally happen in covert and invisible environments, where the actions and their attribution is hard to establish.[1] Comprehensive control devices are required, that would ensure adherence to IHL, human rights law, or other legal obligations. It will be shown that traditional categories of international law concerning state sponsorship are unfit to capture the fluid, sophisticated relationship between sovereign states and terrorists, insurgents, and other types of proxies.

This thesis is premised on a fundamental legal principle that those committing an internationally wrongful act shall bear responsibility for their wrongdoing. The ICJ remains on the position that attribution of actions of private actors to the state is an exception to the general rule of non-attribution, which calls for narrow interpretation.

The attribution of private conduct to the State is a timeless topic in the law of State responsibility. Presently there exist two conflicting tests "effective control" and "overall control", and international fora have avoided taking a clear legal stance on the matter of what standard should be applied in which situation, leading to some states actively abusing the legal loophole and avoiding responsibility.

In particular, the attributability test of "effective control" has been dividing international judicial bodies, academics, and practitioners last thirty-five years. From the time when the International Court of Justice introduced it in *Nicaragua* case, the test has been widely discussed and debated.

ICTY, on the other hand, holds that States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.[2] The latter is corroborated by authoritative commentators stating that such an approach is inconsistent with the "logic of the law of State responsibility" as well as with judicial and state practice.[3]

[1] Innes, Michael A. *Making Sense of Proxy Wars : States, Surrogates & the Use of Force*; Foreword p. X.
[2] *Prosecutor v. Dusko Tadić aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, available at: https://www.refworld.org/cases,ICTY,4027812b4.html [accessed 23 April 2020], para 96.
[3] Ibid, para. 124.

The adverse effects of conflict do not end when the shootings have ceased. In the aftermath of the conflict, violations should be addressed at the individual level, but should also necessarily be addressed at the state level. If we adopt the separation between effective and overall control, suggested by ICJ in the *Genocide* case, dealing with consequences of proxy conflicts, the latter might not be achieved.

Hence, the problem can be formulated as follows: currently, international law lacks legal regulation to cover the situations when third states are using non-state armed groups as their proxies as a substitute for regular armed forces in order to make the conflict appear as NIAC and shield the State from responsibility. Specifically, it makes it challenging to establish state responsibility and prosecute for international crimes for waging proxy wars.

2. Purpose and research question

Framing the armed conflict as proxy war is not a useful basis for bringing the perpetrators to justice.[4]

Before rendering any kind of juridical judgment, the complicated political and socioeconomic configuration of the proxy conflicts present a factual puzzle – who and what influences the current situation? International lawyers face a tough challenge to respond to the blurring of fundamental legal categories in the proxy wars, such as the conflict in Ukraine, Syria, or in Africa, such as public vs. private, state vs. individual, war vs. peace, aggression vs. defense, and the underlying difficulty of identifying legitimate agents of control.[5]

Hersch Lauterpacht once said that *"if international law is at the vanishing point of law, the law of war is at the vanishing point of international law.*"[6] In situations where international actors disregard rules, and when international legal sanctions do not produce designated effects, international law "implementers" are facing the charge of their irrelevance.[7]

The author will argue that IHL is not grounded on formalistic postulates. Instead, it's a realistic body of law grounded on the notion of effectiveness and inspired by the aim of deterring deviation from the standards to the maximum extent possible.[8]

The purpose of this thesis is not limited to problematizing the issue of proxy wars in general terms, but rather to show that available corpus of applicable instruments is not developing at the same pace as everchanging military and political situation in the world.

[4] Ross, A. (2008). The Body Counts: Civilian Casualties and the Crisis of Human Rights, in *Human Rights in Crisis*. Ashgate, 2008. Web. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.2030018&site=eds-live&scope=site.

[5] Outi Korhonen. *Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars.* 16 Vol. , 2015. Web. pp. 452–478. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&db=edshol&AN=edshol.hein.journals.germlajo16.27&site=eds-live&scope=site.

[6] Lauterpacht, Hersch, "The Problem of the Revision of the Law of War", in BYIL, Vol. 29, 1952-53, pp. 381-382, *in* Emily Crawford and Alison Pert. *International humanitarian law.* Cambridge University Press, 2015. Web. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.4877019&site=eds-live&scope=site.

[7] Korhonen, p. 455.

[8] *Prosecutor v. Dusko Tadić aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, available at: https://www.refworld.org/cases,ICTY,4027812b4.html [accessed 23 April 2020], para 96.

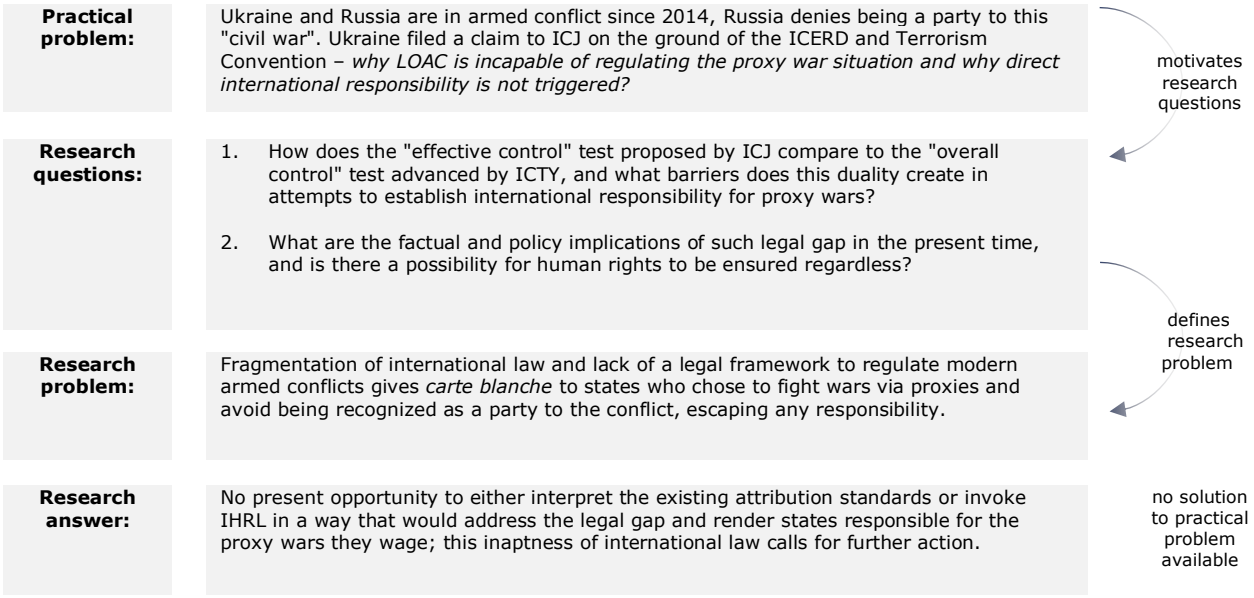
In the author's opinion main challenge lies in being able to determine the exact scope or concrete list of rules that shall apply to the parties to the conflict, as well as create a possibility to make hidden wars public, so the responsibility is rightly allocated.

The research questions were borne out of contemplating on practical legal aspects of current problems. Ukraine is in its sixth year of armed conflict with Russia. It is referred to as Ukrainian-Russian conflict or war all over the world, and parties to this conflict are well known. Yet, international law pulled apart from international politics for a brief moment, does not recognize the participation of the party who started the conflict, and fuels it to this day. This situation on the border of Europe and Asia is not unique – proxy wars have been waged in different parts of the world at different times.

What is that precisely in the international law that makes it blind or unable to address these situations relying on "general principles of law recognized by civilized nations" and values enshrined in the UN Charter.

What elements that are present are stumbling blocks preventing justice, or what elements that are missing are legal gaps allowing for impunity? What is the current situation around the world that would support this finding? Finally, since this thesis concludes the two-year master's program in international human rights law, what is the role of human rights in proxy wars?

The process of defining the research questions can be presented in a schematic summary:



3. Methodology

In the present work, several approaches to legal analysis are combined. Firstly, the contextual background is established without resorting to legal instruments in order to set out the setting for further legal analysis.

Secondly, overview of international legal instruments applicable is conducted. Relevant international legal regimes are identified, and prerequisites for establishing international responsibility are listed.

Thirdly, a thorough scientific analysis is conducted of the two conflicting control standards – what are their elements and how they are different. On basis of this legal gap is identified.

Further, case-studies of three different proxy wars are conducted, happening on different continents and having different characteristics, which all support the theoretical analysis of the international law and the gap identified.

Finally, the circle closes with looking at the international human rights legal framework again to assess whether it is capable of closing or narrowing the legal gap.

The research combines both qualitative elements, for instance, discourse analysis, but also some quantitative elements, employed primarily in case-studies, where a lot of numbers, statistics, and trends are observed. Also, analysis of the two standards of effective control and overall control combines quantitative and qualitative methods.

The empirical material consists of several blocks:

1) Legal documents, both containing rules of hard law and soft law.

    a. Provisions of the Rome Statute, Geneva Conventions.
    b. Judicial decisions: case-law of ICTY, ICC, ICJ, and some domestic higher courts of justice.
    c. Treatises, commentaries, and scholarly articles on relevant issues.

2) Analytics, reports, observations organizations on the Ukrainian, Syrian, and Horn of Africa conflict from international organizations and treaty bodies as well as non-governmental human rights, required for laying out contextual background and highlighting developments.

Concerning the central legal analysis, proxy wars have been the subject of three main trials - *Military and Paramilitary Activities in and against Nicaragua* (1986), *Prosecutor vs. Tadić* (1999) and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia and Montenegro)* (2007).

Close evaluation of proxy wars through the lens of the jurisprudence of both the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, as well as working with secondary sources such as commentaries is employed.

4. Research contribution

Discussion on proxy wars has been very limited.[9] After the work of Antonio Cassese in 2007 the problem was not paid much attention, while proxy wars are on the rise. This thesis will attempt to emphasize a problem and search for available legal solutions.

[9] Alexander Gilder. *Bringing Occupation into the 21st Century: The Effective Implementation of Occupation by Proxy.* 13 Vol. , 2017. Web. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&db=edshol&AN=edshol.hein.journals.utrecht13.6&site=eds-live&scope=site., p. 62.

This work is not a process of filling the legal gap, but rather intervening in the debate on proxy wars from an international law angle and taking it forward. This thesis offers new supplementary knowledge and brings into question established in international law approaches, which the author argues are no longer supported or justified. The author, by this work articulates a problem, which is not taken seriously enough and which has gone virtually unrecognized, apart from the several works, finding of which have not been taking forward yet.

The originality of this work does not lie in coming up with new theories or solutions, but in looking at the same facts and scenarios that have been (in case of Ukraine and Syria) extensively depicted by security and defense scholars, but not by international law professionals.
The author is briefly introducing the issue of fragmentation of international law without elaborating on it extensively since it is not directly connected with the central argument. However, the fragmentation issue is critical to bear in mind concerning the contribution of this work. Most of the works on the topic address the issue of proxy wars in a restricted manner, mostly limited to one field or one legal regime – security and defense, political science, international relations, international criminal law or law on terrorism, and so on.

Proxy wars are incredibly complex phenomena, in which many fields of knowledge are intertwined. Since there is no unified formula to address proxy wars, the majority of researches claim that the only feasible way to approach it would be to "compartmentalize" different aspects of proxy wars and address them through relevant frameworks, in law that would be *lex specialis*. While this is indeed a feasible approach, the author's opinion is that such an approach often risks of missing the big picture. In present thesis, the approach undertaken in the contrary – from general to more specific. In particular, by returning to the basic legal and logical notion - "the wrongdoing must entail responsibility", and that "responsibility must be allocated to an actor who committed it". The proxy wars violate this logic.

The author argues that in the drawing of a future research agenda on legal aspects of proxy wars, interdisciplinarity has to be met with progressiveness in order to achieve results that are comprehensive, practical, and realistic.

5. Delimitations

There are three main points of delimitation in the present thesis.

First, resisting the compelling wish to cover all aspects of conflict in Ukraine – occupation of Crimean peninsula, killings in Kyiv during Euromaidan protests and in Odesa, all of which present an interesting cases from the human rights and international law perspective, the author will limit the case-study of Ukraine only to the proxy war aspect, that is the protracted armed conflict in Donbas region in East Ukraine. Questions of occupation and impunity for mass killings outside armed conflict context fall outside the limits of the present discussion.

Second, since it is the work where interdisciplinarity is intertwined with specific and narrow legal analysis of international courts jurisprudence, some terminology issues demand clarification. While IHL is the proper legal regime to invoke in context of armed conflict, there are only two types of armed conflict IHL operates – international armed conflict (IAC) and non-international armed conflict (NIAC).

As already mentioned, framing the conflict as a proxy war is not a useful basis for bringing the perpetrators to justice. Furthermore, some might argue that internationalized armed conflict is already widely acknowledge to constitute a third category of armed conflicts, it is the authors opinion, that while definitions such as "proxy war", "hybrid war" or "internationalization" of the conflict are undoubtedly useful and used interchangeably in the present thesis, they are not traditional IHL definitions and are not yet embodied in the law or jurisprudence.

Finally, paying due acknowledgement of the fact that the jurisprudence of the European Court of Human Rights (ECtHR) has a lot to offer to enrich the discussion, in particular with regard to defining control or addressing similar proxy situations or, especially, in the last chapter assessing human rights, it is excluded from the present work for the space and time constraints. Although if this research is further developed, it will indubitably be interesting to look at the European regional system of human rights protection. On a further note, while ICTY jurisprudence as well as a few other military courts is invoked, it is caused by the fact that those are specialized tribunal created to address armed conflicts and they pose a particular interest.

6. Outline

Chapter II provides an account of proxy wars, gives definitions, brief historical background, and present-day context. The purpose of this chapter is to provide the reader with enough information on the issue to understand where the main problem lies. It serves as the basis for the arguments and discussion in the following chapters. It shows statistics and dynamic of such involvement and regarding proxy wars suggests that third States engaging proxy forces is piquing now and will only continue to rise in the future if nothing is done. Analytical data provided in this chapter serve to show why this topic needs to be discussed at all and that the problem is more profound than appears on the surface.

Chapter III gives an overview of the international legal framework – IHL and ICL rules on the classification of armed conflict, scope of crimes that can be committed in each type of conflict and attribution of responsibility of alleged perpetrators. The point of the chapter is to see that the existing IHL, ICL, and other frameworks could potentially be applied to proxy wars.

Chapter IV addresses the issue of establishing an international responsibility, in particular state responsibility and individual criminal responsibility. Its purpose is to identify prerequisites to triggering such responsibility and illustrate the challenges in proxy wars.

Chapters V and VI are central to the legal discussion and directly address research questions, by first, laying out the scientific analysis of both effective control and overall control; second, presenting an initial critique of both standards with further focus on effective control; third, analyzing the dichotomy *Genocide* case ruling creates; and finally, in the Chapter VI to deconstruct the legal gap with specifying what exactly is missing and prevents from establishing state responsibility for proxy wars.

Chapter VII presents three case studies, which all allow to look at the legal consequences of proxy wars from different angles. First is the author's country of origin, Ukraine, which over the past years, evolved to be a classic textbook example of proxy wars. Its unique feature is that while being fought at the easternmost border of Europe, it nevertheless presents a security threat to the entire European continent and, to a large extent is shaping the European

politics in the last years. War in Syria moves the reader to another region of the world – the Middle East. It was chosen not only for the number of references to it as a "proxy war", which is also true but for the scope of the war, the number of parties involved, and the unprecedented humanitarian consequences, causing crises in regions thousand miles away. There are apparent reasons why it is named as the biggest human disaster since World War II. Finally, the least apparent continent, known for its perpetual civil wars and domestic strives – Africa, specifically – Horn of Africa. Case-study of this region was inspired by the most recent Nobel Peace Prize award to the Ethiopian Prime Minister, instigating closer interest in this region and resulting in findings that Africa is unjustly missing from the narrative of proxy wars, as new data show. The Horn of Africa brings to light a new aspect of proxy wars that may assist in further research and understanding of the issue.

In Chapter VIII, the international human rights law is looked at to assess whether it can perhaps be a better or more flexible tool to address the legal gap created by the two control standards.

Finally, in Chapter IX, further considerations are presented – a summary of the analysis introduced in the above chapters and advancing it to assess whether the questions posed at the beginning have been answered and whether the solutions offered are sufficient to deal with the problem.

II. Proxy Wars

1. Definition

In order to understand the concept of proxy wars, the definition has to be deconstructed from broader terms.

Starting with what is *"war",* wars on drugs, poverty or illiteracy are all wars, but not from IHL perspective.[10] IHL operated the term "war" to describe a state of armed conflict carried on between nations, states, or parties[11] up until the adoption of four Geneva Conventions in 1949, where the term was intentionally replaced by *"armed conflict."*[12] Commentaries explain that the State parties were attempting to ensure that no one could claim inapplicability of the Geneva Conventions due to the absence of officially acknowledged war.[13]

Within wars, there are many subtypes, such as conventional, civil, asymmetric, informational, nuclear, etc., which can fit in the IHL definition of war. Hybrid wars constitute further interest for us.

"Hybrid war" concept was first proposed by Frank Hoffmann[14] more than a decade ago, but modern international law does not define the term. It is characterized by publicists as a new type of war that combines regular armed forces and irregular forces - insurgents, guerrillas, terrorists that may involve both state and non-state actors that are intended to achieve common political goals.[15] Academics note, that being labeled as "hybrid" does not change the nature of war, it only changes ways in which forces are involved in its conduct.[16] According to the others, the twentieth century is dominated by hybrid wars.[17]

Similar to hybrid wars, the term "proxy wars" remains in political and military dictionaries and does not have a legal definition and is used to describe a conflict instigated by opposing powers who do not fight against each other directly. Instead, they use third parties (*proxy force - author*) to do the fighting for them.[18] Hence, proxy forces are non-state actors that are used to enter into a confrontation between two states as a substitute for the regular armed forces of a state.

Interchangeably used synonyms to "proxy forces" are "special forces", "proxy agents", "surrogate militias", "state-sponsored terrorists", "satellite groups", "insurgents" and "auxiliaries".[19]

[10] Gary D. Solis. *The law of armed conflict : international humanitarian law in war.* Second edition ed. Cambridge University Press, 2016. Web. *EBSCOhost*, search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.4910374&site=eds-live&scope=site, p. 20.
[11] ICRC, War and international humanitarian law. Web. *https://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm.*
[12] Crawford, p. 33.
[13] Crawford, p. 30.
[14] Frank G.Hoffman, Conflict in the 21st Century: the Rise of Hybrid Wars, Potomac Institute for Policy Studies, December 2007. Web. 23 Apr 2020. <https://potomacinstitute.org/images/stories/publications/potomac_hybridwar_0108.pdf>.
[15] Mansur, P. (2012). *Hybrid Warfare in History*. In Murrey, W. and Mansur, P. *Hybrid Warfare: Fighting Complex Opponents from the Ancient Time to Present*. New York: Cambridge University Press, pp. 1-17.
[16] Shaw, p. 591.
[17] Murrey, W. (2012). What the Past Suggestes. In Murrey, W. and Mansur, P. *Hybrid Warfare: Fighting Complex Opponents from the Ancient Time to Present*. New York: Cambridge University Press, 289-307.
[18] Innes, Michael A. (ed.) *Making Sense of Proxy Wars: States, Surrogates & the Use of Force.* Washington, DC: Potomac Books, 2012.
[19] Vladimir Rauta. *Proxy agents, auxiliary forces, and sovereign defection: assessing the outcomes of using non-state actors in civil conflicts.* 16 Vol. Routledge, 2016. Web. *EBSCOhost*, doi:10.1080/14683857.2016.1148416, p.91.

The reason for operating this at first sight non-legal term lies in being able to most accurately describe the factual situation. Legal framing of the conflict, or conflict classification under IHL, is the next step dealt with in the following chapters. It would be incorrect to assume proxy wars as being a certain type of conflict from the outset (for example, NIAC) since they are usually very complex in nature, with many layers and overlaps.

Proxy wars present international law with new challenges due to the blending of non-state actors and states.[20]

The difficult part in dealing with proxy wars is being able to identify one, specifically, to distinguish between the State's using proxy forces to wage a war and simple State's involvement in the conflict, not amounting to de-facto participation as one of the warring parties.

According to the Stockholm International Peace Research Institute, which accumulated years of research on hybrid wars recently published in their 2016 Yearbook, at least two-thirds of all intrastate conflicts active since 1975 have experienced some type of external support from other states.[21] This support can range from direct participation of military personnel to indirect forms of aid, such as the provision of intelligence, logistic support, funding, sanctuary, or training. Military interventions in the internal conflicts have doubled since September 2001, and in recent years the trend has been for increased troops support.[22]

Proxy wars are often initially labeled as civil wars, which is logical since the purpose is to mask the State's participation by making an appearance of NIAC.[23] Contemporary armed conflicts illustrate the hypothesis that civil wars are rarely just a matter of internal affairs, exemplified by situations in Ukraine and Syria[24] and now it is a well-established fact that most conflicts experience external support.[25]

Employing the term "civil war" to describe the conflict in Ukraine is challenged by most, because of the nature of intervention by Russia, the scope of which after almost four years remains controversial.[26]

Not only Ukraine and Syria, but many contemporary armed conflicts are illustrative of broader international tensions and relations since warring parties receive extensive support from a number of outside states.[27] It is crucially important for everyone applying legal analysis to conflicts to be aware of this international dynamic, although it may seem irrelevant at first sight.

2. History

Proxy wars present international with new challenges due to the blending of non-state actors and states.[28]

[20] Gilder, p. 60.
[21] *SIPRI Yearbook : Armaments, Disarmament and International Security*. Oxford University Press, 2011. Web. P. 115.
[22] Ibid.
[23] Ibid.
[24] Niklas Karlen, Department of Peace and Conflict Research, Uppsala University, in SIPRI 2016, p. 117.
[25] Rosenau, J. N. (1964). International aspects of civil strife. Princeton, N.J., 1964, in SIPRI 2016, p 117; Harbom, L., & Wallensteen, P. (2005). Armed Conflict and Its International Dimensions, 1946-2004. Journal of Peace Research, (5), p. 629.
[26] SIPRI, p. 116.
[27] SIPRI 2016, p. 118.
[28] Gilder, p. 60.

"The use of proxy warriors is as old as warfare itself",[29] as suggested by Williams. As far back as in 1000 BC, the pagan Philistines used David, soon to become Israeli King, and his army of warriors to fight for them.[30] The Persians hired Xenophon and his Greek mercenaries, the Romans hired Attila and his Huns.[31] Jumping over many centuries, during the Cold War between the United States and the Soviet Union, American warriors fighting the war of ideas continued the ancient tradition and used Vietnamese Montagnards, Nicaraguan contras, and Afghan mujahidin to conduct a war against the evil empire of Communism.[32]

Proxy wars in the 20th century on are not limited to the cold war rivalry between the two superpowers and there is an abundancy of examples, as demonstrated below.

Spanish Civil War (1936-1939), for example, began as a civil war between the revolutionary pro-fascist Nationalists and the Republicans, the so-called supporters of the Spanish Republic. Germany and Italy are known to have aided the nationalist groups during the Spanish Civil War with air raids, equipment, and weapons.[33] Over time, it evolved into a proxy war when Nazi Germany and its allies began supporting the Nationalists, while the USSR, Mexico and various international volunteers supported the Republicans.[34]

On African continent, during the decolonization era (from the 1960s to the 1990s) one can find quite many examples of proxy wars, where the before-mentioned United States and the Soviet Union assisted rival anti-colonial factions in their struggle for dominance in the postcolonial era.[35]

During the 2011 Libyan Civil War, it is established that at least 18 states provided armed support. For instance, Qatar distributed weapons to the opposition movements in Libya as well as provided basic infantry training to Libyan rebels.[36] Only later the civil war was recognized as the proxy war between the UAE and Qatar, each trying to enhance their influence in the Gulf Arab area after the fall of the Qaddafi regime in 2011.[37]

3. Current proxy wars

In recent years the issue of proxy warfare has again been rising up the international agenda.[38] The biggest ongoing proxy wars are in Syria, Yemen, and Ukraine.

The consequences of such wars are not only dangerous but terrifying. In three below examples, rather than giving an account of each proxy war that can be easily found in public sources, the focus will be on three different aspects of the conflicts with the aim to give a

[29] For examples, see Chapter 3, Brian Glyn Williams author. *The Crimean Tatars : From Soviet Genocide to Putin's Conquest.* Oxford University Press, 2015. Web.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] John F. Coverdale. *Italian intervention in the Spanish Civil War.* Princeton U.P, 1975. Web.
[34] Spanish Civil War | Definition, Causes, Summary, & Facts, , Apr 20, 2020 <https://www.britannica.com/event/Spanish-Civil-War>.
[35] Seyom Brown. "Purposes and pitfalls of war by proxy: A systemic analysis." *Small Wars & Insurgencies* 27.2 (2016): 243-57. Web. Apr 20, 2020.
[36] David Roberts, "Behind Qatar's Intervention In Libya," -11-19T17:53:09-05:00 2013: Apr 20, 2020 <https://www.foreignaffairs.com/articles/libya/2011-09-28/behind-qatars-intervention-libya>.
[37] See, for example, Giorgio Cafiero, et al, "The UAE and Qatar Wage a Proxy War in Libya," HuffPost 2015-12-14 17:03:38 -0500 2015-12-14 17:03:38 -0500: Apr 20, 2020 <https://www.huffpost.com/entry/the-uae-and-qatar-wage-a-_b_8801602>. Frederic Wehrey, "Is Libya a proxy war?" Washington Post Oct 25, 2014: Apr 20, 2020 <https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/24/is-libya-a-proxy-war/>.
[38] Seyom Brown, at <http://dx.doi.org/10.1080/09592318.2015.1134047>.

broader and more comprehensive picture and emphasize the utter danger of proxy wars by highlighting different angles.

According to the UN Office for the Coordination of Humanitarian Affairs, the number of deaths resulting from the two-year-old Yemen conflict now exceeds 10,000, with around 40,000 wounded. Two-thirds of the population, some 18.8 million people are in urgent need of humanitarian and protection assistance, and 2 million are internally displaced. Currently, Yemen poses one of the world's most enormous food-security problems.[39] This illustrates how proxy wars threaten civilians and are a detriment to one of the basic principles of LOAC – the principle of humanity.

The example of Syria is rather a complicated one, and it does not serve a purpose to recount the overwhelming number of facts of the conflict. Instead, by showing an impact of the Syrian war on the EU Member State and the rest of the world community, the argument can be better supported.

Although Damascus lies over 3,000 kilometers away from Stockholm, the Syrian civil war arguably presents a more dangerous threat to Sweden than any other conflict since World War II.[40]

An estimated number of 250-300 Swedish citizens have traveled to Syria and Iraq in order to join al-Qaida-inspired organizations since the start of the fighting. Many have lost their lives and among those who survive there might be potential terrorists who will commit acts of terror upon their return.[41] Recent disturbing events in central Stockholm taking away several lives and leaving many injured and frightened, which occurred on the 7th of April, 2017 is characterized by the Swedish police as a terrorist attack, and the suspect is shown to have ties with the ISIS.[42]

During this ongoing humanitarian catastrophe, over 9 million people were forced from their homes. The Swedish government implemented a unique asylum policy, which resulted in a third of all EU-bound Syrian refugees ending up in Sweden. Due to the lack of legal possibility to make a proper trip to Sweden refugees-to-be turn for assistance to migrant smugglers.[43]

Human smuggling from Syria to Sweden is a dangerous process leading to a high percentage of deaths of fleeing people using such services. Moreover, it strengthens criminal organizations and contributes to drug smuggling and other offenses in Sweden.[44]

Syrian example also provides lessons for the Donbas conflict in Ukraine, the example of current proxy wars, which would be analyzed separately and in detail in Chapter VII. As far as this section is concerned, it poses an opportunity to draw some interesting comparisons between the two conflicts.

[39] "The Percolating Proxy War in Yemen." *Strategic Comments* 23.1 (2017): iv-vi. Web. Apr 20, 2020. <http://dx.doi.org/10.1080/13567888.2017.1291569>.
[40] Karl Lallerstedt, "Syrien och Sverige: En avlägsen konflikt med allvarliga konsekvenser på hemmaplan", Frivärld, Stockholm Free World Forum (in Swedish). Web. Apr 23, 2020 http://frivarld.se/wp-content/uploads/2014/12/4_rapport_lallerstedt.pdf. p. 1.
[41] Lallerstedt report, p. 14.
[42] Åklagarmyndigheten: "Anhållande hävt i terroristärende", press release of the Swedish Prosecution Authority (in Swedish), Web. Apr 20, 2020 <https://www.aklagare.se/nyheter-press/pressmeddelanden/2017/april/anhallande-havt-i-terroristarende/>.
[43] Lallerstedt report, p. 1.
[44] Lallerstedt report, p. 16.

Despite those apparent arguments, Russia has chosen to fight both and carry all associated costs. Fighting in both Syria and Ukraine illustrates very well that Moscow knows how to wage a war without being in the state of war, and knows how to train and equip proxies to fight till the end for its political ends.[45] Syrian case shows that Russia has taken its mission very seriously. By escalation, it demonstrated in Syria it can be inferred that it will only continue to further its agenda to the big disappointment and concern of Ukraine.

In the spring months of 2020, Coronavirus has torn through Iran, inciting calls from the international community, *inter alia*, that the United States lift heavy economic sanctions to help them fight the pandemic.[46] However, according to many analysts, even shattered by pandemic, Iran has failed to cease its support of terrorist organizations and proxy wars.[47]

And while the massive health crisis might prompt Iran to shift focus on what is happening in its own borders, researchers said that with much of the world distracted, they have instead stepped up its threatening conduct – offensives in Iraq, fighting in Yemen and the continued attacks against the last of the rebels' forces in Idlib in support of government forces in Syria.[48]

It has been shown that cease-fires are only temporary, promises are empty, and reading of international law is customized to a degree, where it goes beyond lawfare. Such a situation of a superpower having untied hands and avoiding impunity should be worrying not only to targeted states but also to the international community and especially the legal community.

4. Problem

The biggest problem with the proxy wars is that they generally happen in covert and invisible environments, where the actions and their attribution is hard to establish.[49] Comprehensive control devices are required, that would ensure adherence to IHL, human rights law, or other mechanisms, as well as thorough government oversight of proxy activities and ability to trace proxy forces' employees.[50]

Contemporary authors show that, for example, traditional categories of state sponsorship of terrorist activities, are outdated and fail to capture the fluid, sophisticated relationship between sovereign states and terrorists, insurgents, and other proxies.[51]

Indeed, proxies have evolved significantly in recent decades, and their relationships with states are now driven by a lot more contributing factors than just the traditional concept of sponsorship. These groups have their own religious and ideological platforms in addition to those of the employing States, and can also additionally depend on criminal activities, such as drug dealing to carry out their activities without being hundred percent dependent on State

[45] Ibid.
[46] *Iran Coronavirus: 82,211 Cases and 5,118 Deaths - Worldometer*., 2020. Web. Apr 20, 2020.https://www.worldometers.info/coronavirus/country/iran/>.
[47] Hollie McKay | Fox News, Coronavirus hasn't slowed Iran's terrorism and proxy wars, analysts say, published on 10 Apr, 2020, Apr 20, 2020 <https://www.foxnews.com/world/coronavirus-iran-terrorism-proxy-wars>, "Lifting core U.S. sanctions on Iran because of the coronavirus would be irresponsible and would not solve the fundamental problem: the regime's well-documented history of mismanagement and corruption," Jason Brodsky, Policy Director for United Against Nuclear Iran (UANI), told Fox News.
[48] Ibid.
[49] Innes, Michael A. *Making Sense of Proxy Wars : States, Surrogates & the Use of Force*; Foreword p. X.
[50] Foreword p. IX.
[51] Ibid.

support.[52] Present-day proxies serve a variety of masters, and they pursue a wide range of agendas.[53]

According to SIPRI,[54] proxy wars and external support, in general, are crucial variables to conflict dynamics, since they make the conflict deadlier, prolong the fighting and decrease chances for prompt peace negotiations.[55] Examples around the world illustrate that civilian targeting prevails in these types of conflicts, and there is a much higher risk of full-scale wars.[56]

An important thing to keep in mind regardless of all above-mentioned criticism of proxy wars is that even the aggressor States and perpetrators themselves agree with the fact that they are not acting in a rule-free space.[57] Counter-argument to the allegations that international law is useless in these kinds of situations lies in emphasizing that senior political leaders of the biggest actors on the international arena do tend to invoke international legal rules.[58]

For example, only in Ukraine-Russia conflict, such legal bases are invoked as the right to self-determination, intervention by invitation or consent, pre-emptive self-defense, right to offer humanitarian relief, etc.[59] These examples illustrate very well that international law continues to govern the conflicts.

The approach of condemning the "bad men" and assuming that it is the fault of the leaders, who lack the political will to comply with the rules of international law and act in a bad faith is futile from the international law perspective. Although this is often the case, playing the blame game does not do much in achieving the objectives of IHL, International Criminal Law, and the protection of human rights.

Keeping *nulla poena sina lege* principle in mind, from the International Criminal Law standpoint, the priority concern about the proxy wars is having a legal framework that corresponds to the present-day developments of armed conflict.

[52] Ibid.
[53] Foreword, p. X.
[54] SIPRI Yearbook 2016
[55] Aysegul Aydin and Patrick M. Regan. "Networks of third-party interveners and civil war duration." *European Journal of International Relations* 18.3 (2012): 573-97. Web. Apr 20, 2020. P. 575.
[56] Skrede Gleditsch Kristian, Idean Salehyan, and Kenneth Schultz. *Fighting at Home, Fighting Abroad: How Civil Wars Lead to International Disputes.* 52 Vol. Sage Publications, 2008. Web.
[57] Korhonen, p. 456.
[58] Korhonen, p. 456.
[59] Korhonen, p. 456.

III. International Legal Framework

1. International Humanitarian Law and International Criminal Law

Concerning the body of laws regulating the armed conflicts in general, and proxy wars in particular, "the subject is large and complicated."[60] Moreover, the applicable law is fragmented, since there are many regulations and treaties addressing different aspects of the conduct of armed conflict. One also cannot underestimate the role national criminal law plays in bringing offenders to justice.

Another difficulty is that ICL does not contain all necessary categories and definitions in itself, so they have to be borrowed from other fields of international law, especially IHL, and as will be shown later, the law of state responsibility.[61]

Given that ICL and IHL have developed significantly over the last 15 years, "in a piecemeal fashion",[62] and still under the construction stage by the adoption of new treaties and case law of national and international courts.[63]

Without concentrating too much on history, it is worth mentioning that as far back as teachings of Grotius[64] and Gentili[65] go restraint in warfare, and punishment of the individuals failing to practice restraint was upheld. Only before Nuremberg trials in 1946 was the notion of individual criminal responsibility crystalized in modern international law. Geneva Conventions of 1949, in their turn, codified all existing principles to date and stipulated, that some breaches are more serious than the others, creating the category of "grave breaches".[66] The underlying goal of the four Geneva Conventions is to guarantee, that all state parties, and not only the parties to a conflict have a duty to respect and ensure respect for the laws of war.[67]

With regard to the regulation of internal armed conflicts, rules on which are codified in Common Article 3, it was always a serious challenge. This stems from the different vectors of various States' interests and the unwillingness of some powers to have their hands tied. Thus,

[60] For a fuller discussion see the major study of state practice made by the ICRC, J.M. Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, vol. I Rules, (Cambridge University Press Cambridge, 2005). Henckaerts and DoswaldBeck responsibility for violations (Rule 149); the obligation to make full reparation (Rule 150); individual criminal responsibility (Rule 151); command responsibility (Rules 152– 153); the duty to disobey a manifestly unlawful order (Rule 154); criminal responsibility for superior orders (Rule 155); war crimes (Rule 156); universal jurisdiction over war crimes (Rule 157); national prosecution of war crimes (Rule 158); amnesties at the end of non-international armed conflicts (Rule 159); non-applicability of statutory limitations to war crimes (Rule 160); international co-operation in the investigation and prosecution of war crimes (Rule 161). See also A. Obote-Odora, The Judging of War Criminals: Individual Criminal Responsibility under International Law, (University of Stockholm, Stockholm, 1997), S. R. Ratner and J. S. Abrams, Accountability for Human Rights atrocities in international law: Beyond the Nuremberg Legacy, (Clarendon, Oxford 1997) and E. Van Sliedregt, Criminal Responsibility of Individuals for Violations of International Humanitarian Law (Cambridge University Press, Cambridge, 2003).

[61] Ibid.

[62] Iain Cameron "Individual Responsibility under National and International Law for the Conduct of Armed Conflict", in Bring, O., Engdahl, O., Wrange, P., & Jacobsson, M. (2008). Law at war : the law as it was and the law as it should be : liber amicorum Ove Bring. Leiden : Martinus Nijhoff, 2008, p. 40.

[63] Iain Cameron "Individual Responsibility under National and International Law for the Conduct of Armed Conflict", in Bring, O., Engdahl, O., Wrange, P., & Jacobsson, M. (2008). Law at war : the law as it was and the law as it should be : liber amicorum Ove Bring. Leiden : Martinus Nijhoff, 2008.

[64] See, for example, *De jure belli ac pacis (On the Law of War and Peace*) – Paris, 1625 (2nd ed. Amsterdam 1631) *The Rights of War and Peace*, ed. Richard Tuck (Liberty Fund, 2005), Web. 20 Apr, 2020 <https://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-3-vols>.

[65] See, for example, Alberico Gentile, John Carew Rolfe, and Coleman Phillipson. *De jure belli libri tres.* Oxford; London: Clarendon Press ; H. Milford, 1933. Web. Apr 20, 2020. <https://www.worldcat.org/title/de-jure-belli-libri-tres/oclc/489950714>.

[66] Cameron, p. 41.

[67] Cameron, p. 42.

no explicit provision was made for international responsibility, and supervisory mechanisms for compliance were deliberately made very weak.[68] Self-supervision of compliance, neutral "protecting powers" and the secondary role of ICRC as monitors of compliance do not provide secure enough system to ensure compliance. As will be shown later, it is especially disadvantageous when it comes to asymmetrical conflicts or proxy wars.

2. Other instruments

Two conventions are important when talking about the international framework – the Genocide Convention[69] and the Convention against Torture.[70] Former provides for individual responsibility for acts of genocide regardless of wartime or peacetime,[71] but it was not established as a "universal jurisdiction" crime.[72] Similarly to the Genocide Convention, the Torture Convention "blurs the lines between humanitarian and human rights law" by applying in both wartime and peacetime. As well as requires states to criminalize torture, in particular Articles 2, 3, and 4 of the Torture, impose obligations to implement sweeping measures to prevent torture committed by any actor under any circumstances, and to have domestic criminal sanctions to punish violations, no matter where the offense was committed.[73]

Another instrument is a "Terrorism Convention".[74] State-sponsored terrorism is not a recent phenomenon, however, states which render their support to terrorist groups often deny any involvement in funding terrorist activities, as they tend to provide such support clandestinely.[75] The prohibition of state-sponsored terrorism, while strongly enshrine in customary international law, is largely absent from the norms of the growing body of the terrorism-related conventions. These instruments consider the state as an instrument through which terrorism committed by non-state armed groups can be contained by imposing obligations upon states to criminalize terrorism offenses, to prevent the acts of terrorism, to cooperate in combatting terrorism, including the obligation to extradite or prosecute (*aut dedere aut judicare*).[76] In one of the below chapters in the case-study of Ukraine, example of Ukraine invoking the Terrorism Convention in its legal battle in the ICJ against Russia's proxy war.[77]

3. Shift in the nature of warfare

It is important to understand that the nature of warfare has changed significantly after the above described documents have codified existing rules.[78] The wars of national liberation and

[68] Cameron, p. 42.
[69] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.
[70] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
[71] Cameron, p. 42.
[72] Cameron, p. 42.
[73] Michael Newton. "War by Proxy: Legal and Moral Duties of Other Actors Derived from Government Affiliation." *Case Western Reserve Journal of International Law* 37.2 (2006): 249. Web. Apr 20, 2020. P 252.
Lawfare is defined as the misuse of the law and either undermine military operations and their legitimacy by using law, or achieving a planned military goals using legal means. Such accommodation of interests of limited circle of people within the legal framework is not about the legitimate defense of human rights, but in practice is rather about their abuses.
[74] UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, available at: https://www.refworld.org/docid/3dda0b867.html [accessed 19 April 2020]
[75] For a brief overview on state financed terrorism in international law, see Ilias Bantekas. "The International Law of Terrorist Financing." *American Journal of International Law* 97.2 (2003): 315-33. Web. Apr 20, 2020. Pp. 316–17.
[76] Kimberley N. Trapp. *State responsibility for international terrorism. [Elektronisk resurs] problems and prospects.* Oxford University Press, 2011. Web. P. 266.
[77] P. 52 of the present thesis.
[78] Cameron, p. 42.

colonial wars, as well as proxy wars of the Cold War period, have brought serious loopholes in legal regulation to light, which in its turn incited the international community to react. This resulted in the adoption of two new treaties supplementing the Geneva Conventions – Protocol I and Protocol II, dealing with international and non-international conflicts, respectively. Although the protective framework of IHL was substantially widened, the Protocol II, which is of main interest when it comes to proxy wars, does not explicitly provide for individual responsibility for abusing treaty obligations.[79]

As described above, hybrid war is a tricky combination of conventional and irregular (e.g., using proxy forces) warfare.[80] After the two Protocols, hybridization of warfare only advanced uncovering more and more legal loopholes, giving states a perfect possibility to abuse this lack of legislation and resort to lawfare.

Lawfare is defined as the misuse of the law and either undermine military operations and their legitimacy by using the law or achieving a planned military goal using legal means.[81] Such accommodation of interests of a limited circle of people within the legal framework is not about the legitimate defense of human rights, but in practice is rather about their abuses.[82]

Examples of lawfare are numerous – creating new forms of war, hybrid war, use of non-declared soldiers, the invention of the "little green men" as a military force and a tool for avoiding responsibility (both for aggression and rights of these soldiers and their families). Speculating and using the gaps of the international legislation in order to take advantage of one's dominant position, since it is not sanctioned or not clearly sanctioned yet.[83].

Commentators indicate that now is the momentum for establishing better protection of human rights in conflict areas, and it is up for the states and non-governmental organizations to cooperate in order to reduce the human suffering during proxy conflicts. It can be done through various means: improved contracting arrangements, or the involvement of international courts or arbiters, new forms of incentives, the creation of an accreditation scheme and so on. It is emphasized, that control over proxies may be the states' biggest "security challenge of the twenty-first century."[84]

However, the purpose of this chapter is not to problematize the concrete issue of proxy wars, but rather to show that available corpus of applicable instruments is not developing at the same pace as ever changing military and political situation in the world.

The main challenge lies in being able to determine the exact scope or concrete list of rules that shall be applicable to the parties to the conflict. Ukraine is one of the numerous examples where already existing international legal framework has achieved very little to secure fair and lasting peace and practical delivery of justice.[85] With this in mind, the next chapter of the thesis will focus more specifically on issues of international responsibility and problems associated with it.

[79] Cameron, p. 43.
[80] Cameron, p. 35.
[81] Cameron, p. 35.
[82] *Countering Hybrid Threats: Lessons Learned from Ukraine*. IOS Press Ebooks, 2016. Web. Apr 20, 2020. P. 35.
[83] *Countering Hybrid Threats: Lessons Learned from Ukraine,* p. 36.
[84] William C. Banks, foreword, p XI, in Wallace, et.al.
[85] Korhonen, p. 456.

IV. Establishing International Responsibility

The often-quoted words of Judge Huber in regard to the *Spanish Zone of Morocco Claims*[86]: "Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation."[87]

1. State responsibility

States are the principal carriers of international obligations, which results from the general legal personality of every State under international law.[88] State responsibility, consequently, is a central institution of international law.[89] Furthermore, just as the law of State treaties is applied by analogy to the treaties of other international legal entities or persons,[90] similarly, State responsibility provides the frame of reference for considering other forms of international responsibility, for instance, the responsibility of international organizations,[91] but excludes other forms of responsibility, such as individual, to be further discussed in the next section.

The actual scope of that state's international obligations defines what amounts to a breach of international law by a state, which is different for different states.[92] Even under general international law, which might be considered to be virtually uniform for every state, different states may be differently placed and have varying interests: coastal States and water-fishing States, capital importers and capital exporters, and so on.[93] They will also have a varying range of treaty and other commitments and, respectively, different responsibilities.[94] James Crawford claims that there is "no such thing as a uniform code of international law, reflecting the obligations of all States".[95]

Furthermore, the underlying concepts of State responsibility are of general character — attribution, breach, excuses, and consequences. Particular treaties, norms or agreements may change these underlying concepts to some extent, but they are presumed to apply unless otherwise excluded.[96] These basic notions of state responsibility, which give rise to specific state obligations, were studied by the International Law Commission (ILC) for almost half a century, and are now codified and advanced in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR), adopted on 10 August 2001,[97] the work on

86 *Spanish Zone of Morocco Claims* (Great Britain vs Spain) (1925)2 RIAA 615.
87 Ibid, 641.
88 State Responsibility, September 2006, Apr 20, 2020 <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093?prd=MPIL>. Para. 1. (hereinafter – "State Responsibility OUP").
89 Ibid.
90 See also *Vienna Convention on the Law of Treaties [1969]*.
91 International Organizations or Institutions, Responsibility and Liability, May 2011, Apr 20, 2020 <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e509?prd=MPIL>.
92 State Responsibility OUP, para. 2.
93 see Anglo-Norwegian Fisheries, U.K. v. Norway, Order, 1951 I.C.J. 117 (Jan. 18); Investments, International Protection, June 2013, Apr 20, 2020 <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1533?prd=MPIL>.
94 State Responsibility OUP, para. 2.
95 State Responsibility OUP, para. 2.
96 State Responsibility OUP, para. 3.
97 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html [accessed 19 April 2020].

the Articles continues to date,[98] with the growing body of international organizations, courts and tribunals invoking the ASR.[99]

Another important issue to note, in the Commentary to the ARS, the ILC duly points out that the Articles contain rules of state responsibility, which are the secondary and not the primary.[100] The meaning of this is that the ARS does not seek to regulate under which circumstances an internationally wrongful act is to be deemed to be committed by the state.[101] Instead, the ARS task is to define "the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."[102]

Throughout the next chapters of the thesis, the problem of state responsibility for proxy wars will be described and analyzed.

2. Individual criminal responsibility

State responsibility, discussed in the previous section, is concerned with civil, and not criminal liability.[103] The ILC's position was that previous attempts to establish responsibility for criminal acts were misconstrued.[104] In its turn, the ILC effectively reinforces the determination by the Nuremberg International Tribunal, which in 1946 stipulated that international crimes are "committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[105]

It does not entail that state responsibility excludes individual criminal responsibility and vice versa. This notion should not be misconstrued to be read that there is no state responsibility for international crimes. On the contrary, the author will argue that in proxy wars, both modes of responsibility – state and individual are equally important. However, it should be clearly distinguished, that state responsibility is civil, not criminal, and the purpose of its invoking is to provide reparation in its different forms rather than punishment.[106]

1) Identifying international crimes

This section presents a discussion on what international law has to say about the significance of conflict classification for the purpose of establishing the full scope of war crimes allegedly committed.

[98] See, for example, UN General Assembly, Sixth Committee (Legal) — 74th session Responsibility of States for internationally wrongful acts (Agenda item 75), Web. Apr 19, 2020.
[99] A/74/83, UNGA, Report of the Secretary-General: Compilation of decisions of international courts, tribunals and other bodies, 23 April 2019, Web. Apr 19, 2020. <https://undocs.org/en/A/74/83>.
[100] Wade Mansell and Karen Openshaw. *International law : a critical introduction.* Hart Publishing, 2013. Web. P. 93.
[101] Ibid.
[102] James Crawford. *State Responsibility. [Elektronisk resurs] the general part.* Cambridge University Press, 2013. Web. p.1.
[103] Mansell & Openshaw, p. 92.
[104] Ibid.
[105] Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947, page 223, in Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries 1950, para. 99. See also cited in *United States of America et al v Göring et al* [Judgment and Sentences of the International Military Tribunal] 221.
[106] Mansell & Openshaw, p. 92.

Nulla poena nullum crimen sine lege principle of customary international law, also known as the basic principle of legality, requires the crime to be defined in law prior to an individual may be held responsible for committing such a crime.[107]

The obligations of natural persons under international criminal law are defined by customary international law, enshrined in state practice and *opinio iuris*.[108] Such obligations may be derived from or find confirmation in treaties between states, a central example being the Statute of the International Criminal Court (ICC) or the Rome Statute.[109]

However, if we turn to Article 8 of the Rome Statute, it is by far more restrictive than the applicable rules of customary international law. ICC maintains the distinction between IAC and NIAC when it comes to listing war crimes submitted to its jurisdiction.[110]

It is important to distinguish between two levels of individual criminal responsibility - the creation of the legal norms and the enforcement of those norms establishing such responsibility.[111] Latter is a prerequisite to answering the research question of this thesis.

2) Classification of the conflict

As will be elaborated below in the case study of the situation in Ukraine, in order for the ICC Prosecutor to proceed with the Ukrainian case, she would have to make some difficult decisions with regard to the qualification of the conflict.[112] It was also mentioned that this determination is very important since it directly affects the choice of the range of war crimes charges.

It is crucial to leave the political implications of the situation behind and perform a legal assessment under IHL of the actions taken by the parties to the conflict in order to qualify the conflict correctly.[113]

i) War crimes

Traditionally war crimes were said to include solely the violations of regulations of IACs, that is, only between states, but not civil wars and other internal struggles.[114] After the Interlocutory Appeal judgment in the landmark *Tadić* case, it is now widely accepted that serious violations of the IHL body of regulations applicable to NIACs may also be considered as amounting to war crimes, in case if the regarded conduct is criminalized by international law.[115]

[107] Individual Criminal Responsibility, May 2009, Apr 20, 2020 <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1852?prd=MPIL>. Para. 3.
[108] Ibid.
[109] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 16 April 2020]
[110] Based on the nature of the armed conflict and the origin of norm that is violated, Article 8 distinguishes 4 categories of war crimes, namely two in IAC and two in NIAC. They are 1) grave breaches of the GCs, 2) other serious violations, 3) serious violations of Common Article 3, 4) other serious violations in NIAC, in *The Oxford Handbook of International Law in Armed Conflict*. Oxford University Press, 2014. Web. P. 746.
[111] State Responsibility OUP, para. 5.
[112] See Chapter VII-1.-5) of the present thesis.
[113] Robert Heinsch, Conflict Classification in Ukraine: The Return of the "Proxy War"?. 91 Vol. International Legal Studies 323, 2015, p. 324.
[114] *The Oxford Handbook of International Law in Armed Conflict.* P. 746 (hereinafter – "Oxford War Handbook").
[115] Oxford War Handbook, fn. 29.

It would be uninformed to disregard the fact that customary rules evolved to the extent that one can securely assume that in the matter of war crimes the traditional distinction has become no longer so crucial since illegal conduct that can amount to war crimes is almost the same in both kinds of armed conflict.[116]

Although the law of NIAC has evolved significantly over the past years, especially due to the ICTY tribunal legislating extensively on the armed conflicts of complex nature, there is a drawback to applying only the law of NIAC where regulations covering IAC could potentially be invoked.

Altogether, comparing the number of treaty rules applicable to IAC with the number of those covering NIAC, it is 600 versus less than 30.[117] This, in itself, poses a significant challenge, since the nature of contemporary conflicts makes it easier to classify them as NIACs.[118]

One of the deficiencies of the NIAC body of laws is that despite a large number of IHL violations are criminalized in both types of armed conflict,[119] there is a range of violations that are criminalized only in cases of IAC.[120]

Suggested by the Rome Statute list of war crimes in IAC is significantly longer than the one for NIAC. Some of the examples include IHL rules on prohibited methods of warfare, which Article 8 does not consider as crimes in NIAC. The rules regulating the conduct of hostilities, as well as humanitarian access and assistance, are more detailed in IAC. This lack of guidance can pose a challenge because the majority of contemporary conflicts, as was described above, are NIACs.[121]

ii) Crimes against humanity

Another example of why conflict classification is crucial is crimes against humanity. Although it is true that crimes against humanity can be found regardless of the territory, they are committed in, or the status of the conflict, but, for example, establishing the territory as occupied and thus triggering the IAC rules can mean that the acts otherwise classified as crimes against humanity would be classified as war crimes.[122] In its turn, war crimes can ensure better state accountability and at the same time spare of the need to comply with the contextual elements of crimes against humanity, such as widespread or systematic attack directed against civilian population.[123]

Taking into consideration the continuing discrepancy between IAC and NIAC set of IHL rules, specific conduct can amount to a war crime in the former, but not in the latter.[124] Classifying the proxy-wars type of situations as either NIAC or IAC has serious implications on international criminal law application in such situations.[125]

[116] Oxford War Handbook, p. 746.
[117] *International Humanitarian Law | International Justice Resource Center*.Web. Apr 20, 2020. <http://www.ijrcenter.org/international-humanitarian-law/>.
[118] Ibid.
[119] Tom Gal. *Unexplored Outcomes of Tadić.* 12 Vol. Oxford University Press / USA, 2014. Web. P. 76 fn. 104.
[120] Gal. P. 76 fn. 105.
[121] P. 19 of the present thesis.
[122] Gal. P. 76.
[123] Gal. P. 76.
[124] Oxford War Handbook, p. 746.
[125] Gal. P. 76.

To address this, one of the possible solutions is to look into customary international law, which contains a number of rules that have evolved to address IAC as well as NIAC situations,[126] this academic exercise is undertaken in Chapter VIII. In the next chapter, the author proceeds to outline the two conflicting standards of control and how they are established in international law.

[126] *International Humanitarian Law | International Justice Resource Center*.

V. Attribution: Reassessing control tests

1. The notion of control

An actor committing an internationally wrongful act shall bear responsibility for their wrongdoing. It is important to identify in what context a violation took place and what is the nature of the affiliation between an actor and a state which might potentially result in international state responsibility.[127]

This goes both for bringing a state to international responsibility under secondary rules of law on state responsibility[128] as well as for individual criminal responsibility, which largely depends on the classification of the conflict – international or non-international, which is discussed in detail below.

As elaborated above, proxy wars are a form of armed conflict and, hence, norms of international humanitarian law shall apply. However, IHL does not have a specific set of its own rules on determining whether an armed group is affiliated with a third state to the extent that it would trigger that state responsibility for waging a conflict.[129] For this reason, general rules of international law are to be referred to find suitable criteria for attributing private persons actions to a state.[130] More specifically, the Articles on State Responsibility, known to be a codification of customary international law norms, are a proper body of law in this context.

Article 8 of ARS stipulates, "*[t]he conducts 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."*[131]

Breaking it into elements,

- "instructions" describe cases where state recruits or instigates private actors operating outside of the state structure;[132]
- "directions" normally refer to circumstances where a state desires to achieve a concrete goal.[133]

In addition to "instruction" and "direction", ARS Article 8 makes reference to responsibility arising through the "control" of a private entity by a state.

While the term "instructions" leaves little room for uncertainty, the concept of "control" needs further consideration.[134]

[127] Shaw, Malcolm Nathan. *International Law*. Eighth edition., Cambridge University Press, 2017. EBSCOhost, search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5037632&site=eds-live&scope=site, p. 591.
[128] Mansell & Openshaw, p. 93.
[129] ICRC, Treaties, States parties, and Commentaries - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949 - 2 - Article 2: Application of the Convention - Commentary of 2016, para. 267 (hereinafter – "ICRC 2016 Commentary Art.2").
[130] ICRC 2016 Commentary Art. 2, para. 267.
[131] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[132] Kristen E. Boon. *Are control tests fit for the future? The slippage problem in attribution doctrines.* 15 Vol. , 2014. Web. P. 18.
[133] Boon, p. 18.
[134] Max Plank Encyclopaedia, Responsibility of States for Private Actors: the exact determination of the criteria of 'instructions' and "control" was at issue also in the *Short v. Islamic Republic of Iran,* AWD 312-11135-3 (July 14, 1987) (Chamber 3), in 82 AJIL 140.

Although "control" is an underlying element of Article 8,[135] it has not been elaborated by the ILC, what precisely the control means. Instead, it made a reference to the *Tadić* decision, indicating, 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"[136] and that it is necessary to evaluate "full factual circumstances and particular context".[137]

Assessing these issues in the setting of proxy wars constitutes a particular challenge due to the covert nature of the conflict. For this reason, it is ever more important to have an exact definition, elements, and algorithm of the control test elaborated in order to be able to provide legal regulation of uncertain situations.

Although there is no single definition of what was meant by ILC by "control", there indeed is a great deal of groundwork and work-in-progress put together by international courts, organizations and academics that provide us if not with desired answers than with valuable insight for further research.

It is, for instance, established that the support provided by the third state to the armed groups that do not belong to is equivalent to a form of control.[138] This control may be administered *in parallel to* or *instead of* the actual participation of armed forces of the third state in a conflict taking part in the territory of the state.[139] Developing this idea further, international tribunals have ruled that conflict becomes "internationalized" or international when a State intervenes in already happening internal armed conflict by exercising a particular level of control over armed formations fighting in that conflict.[140]

Despite the absence of a threshold,[141] the subordination relationship still can be established, for which it is necessary to show that the armed group is acting on behalf of the state.[142] This supports the generally accepted principle that "private entities can act on behalf of a state as an "extended arm."[143] An approach that would be both flexible and factually based is required.[144]

The concept of control is of most importance to category of conflicts: the attribution of acts of irregular forces, which act under a state's direction, control, or instructions. This category deals with individuals or groups who are not officially part of the state but who act under its authority (the principal inquiry of the *Nicaragua* decision).[145]

Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Order, 12 V 81, International Court of Justice (ICJ), 12 May 1981, and the *Nicaragua* case.

135 Boon, p. 18.

136 Boon, p. 97.

137 Boon, p. 98.

138 Max Plank Encyclopedia, Responsibility of States for Private Actors: the exact determination of the criteria of 'instructions' and "control" was at issue also in the *Short v. Islamic Republic of Iran,* AWD 312-11135-3 (July 14, 1987) (Chamber 3), in 82 AJIL 140;

139 ICRC 2016 Commentary Art. 2, para. 265.

140 ICRC 2016 Commentary Art. 2, paras. 265, 269.

141 ICRC 2016 Commentary Art. 2, para. 267 fn. 110.

142 ICRC 2016 Commentary Art. 2, para. 267.

143 Boon, p. 18.

144 Boon, pp. 18, 99.

145 Boon, p. 17.

Concluding, the notion of control is an essential element of the doctrine of attribution, defining the legal relationship between states, international organizations, and individuals[146] in theory, and between states and proxy forces in our case.

Below the author will undertake a thorough assessment of the two present conflicting approaches to defining control in legal terms.

[146] James Crawford and Jeremy Watkins, "International Responsibility" in Samantha Besson and John Tasioulas. *The philosophy of international law.* Oxford University Press, 2010. Web. Pp. 283, 288 ("States, lacking bodies of their own, must act through the agency of others").

2. Effective control

1) Definition

The ICJ has been "extremely clear that the standard of attribution under "direction and control" (Article 8 ASR) is one of "effective control".[147] Relevant passages of the 2007 Genocide case[148] are of particular importance as they are the most up-to-date source of law defining effective control (Annex I).

The test was initially produced in the *Nicaragua* case and later elaborated in the *Genocide* case. Below is the summary of the definition and criteria the ICJ sets out for effective control.

Nicaragua case dealt with the question of whether violations of International Humanitarian Law committed by private individuals (the "contras") during the Nicaraguan civil war could be attributed to the United States.[149] One of the central issues of the ICJ judgments was a legal assessment of the diversified types of support of a third State to armed groups and individuals.[150]

While the Court has denied the qualification of the contras as acting on behalf of the United States, there were, however, remaining unresolved issues of responsibility that required resolving.[151] The Court could still have found the United States accountable for separate acts over which it exercised control or had given instructions, or allocate responsibility for complicity or for inciting any such actions.[152]

The ICJ insisted: *"*even the general control by the respondent State over a force with a high degree of dependence on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of acts contrary to human rights and humanitarian law alleged [...] Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*".[153]*

In the Genocide case, the ICJ affirmed that the appropriate test is the test of "effective control", initially introduced in *Nicaragua*.[154]

147 Robert Kolb. *The international law of state responsibility : an introduction.* Edward Elgar Pubishing, 2017. Web. Downloaded from Elgar Online at 12/18/2018 05:43:29PM via Lund University <EBSCOhost, search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.6031883&site=eds-live&scope=site>.
148 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Merits, Judgment of 26 February 2007, ICJ Rep 2007, 43 [` Bosnia Genocide'], at 207-208, paras. 399-406.
149 Crawford p 147; Crawford, 'Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States)', (2006) MPEPIL; Crawford, (2012) 25 LJIL 471.
150 Max Plank Encyclopaedia, Responsibility of States for Private Actors.
151 Elena-Laura Álvarez Ortega. "The Attribution of International Responsibility to a State for Conduct of Private Individuals within the Territory of Another State (La Atribución De Responsabilidad Internacional a Un Estado Por La Conducta De Particulares En El Territorio De Otro Estado)." *InDret* (2015)Web. Apr 20, 2020. P. 10; see also Stefan A. G. Talmon. "The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities." *International and Comparative Law Quarterly* Vol. 58 (2009)Web. Apr 20, 2020. P. 502 - an assertion of the subsidiary character of the "effective control" test.
152 Ortega, p. 10. Nicaragua v USA, para. 114 – on the contrary, since it denies that these issues would arise in case the contras were equated with an organ of the United States).
153 *Nicaragua case,* para 115. Ortega, p. 10.
154 Genocide case, paras. 398-399.

Moreover, in this latter judgment, the Court emphasized the high evidentiary threshold of the effective control test:

> First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that state's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the state's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[155]

In other words, the test demands specific direction or instruction regarding the specific operation during which the allegedly wrongful act took place. Only such control by the state over non-state actors' actions, which was exercised "in respect of each operation in which the alleged violation occurred" would result in attribution.

This would have direct implications on handling the evidence in cases involving the need to prove effective control. It would require to produce documentary verification or records regarding existence and receipt of orders or instructions concerning operations.[156]

The authoritative body of the ICJ remains on the position that, as recalled above, attribution of actions of private actors to the state is an exception to the general rule of non-attribution, which calls for narrow interpretation. Non-state actors, which are merely supported or have their planning done by the state, cannot be considered acting on behalf of that state. It is not sufficient to show that the state has influence over the actions of non-state actors.[157]

The ICJ was insistent on the prevalence of "effective control" as the decisive test.[158]

2) Initial Critique

The effective control test "has not gone unchallenged."[159] This is a consequence of the parting, conceptualizing, and generalization of secondary norms of attribution, the precise content of which shall be determined without concern for the primary norms - applicable obligations of international law.[160] "A separation that has not evolved from international practice but has been introduced in the course of the work of the ILC".[161] The notorious test of "effective control" has been dividing courts, tribunals and academics for the last three decades. Ever since its introduction by the International Court of Justice in *Nicaragua*, the test has been widely discussed and debated.[162]

[155] Genocide case, para. 400
[156] Luca Schicho. *Attribution and State Entities: Diverging Approaches in Investment Arbitration.* 12 Vol. , 2013. Web. P. 288; Boon, p. 347.
[157] Responsibility of States for Private Actors, March 2011, Apr 20, 2020 <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092?prd=MPIL>. Para. 14. (Hereinafter – "Private Actors, Oxford").
[158] David Miklós Pusztai. *Causation in the law of State responsibility.* University of Cambridge, 2017. Web. P 21; Bosnia Genocide, paras. 403-407.
[159] Private Actors, Oxford, para. 15.
[160] Private Actors, Oxford, para. 15.
[161] Ibid.
[162] Pusztai, p. 18; see also *Military and Paramilitary Activities* in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment of 27 June 1986, ICJ Rep 1986, 14 [*'Nicaragua case'*], at 65-65, para. 115. For some of the academic reactions see in particular A de Hoogh 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 76, BYBIL 255 ['de Hoogh']; A Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007)

The limitations that effective control test poses are numerous, the paramount one being analyzed by in the next section, since it is directly related to the central problem of this thesis. In this section, the overview of the most common critical remarks addressed towards effective control test will be described, grouped into categories.

3) Further Critique

i) Limited but demanding

The effective control test, according to commentators,[163] while more limited in the scope of responsibility involved and more limited in the sense of evidence necessary (particular cases of control), remains a demanding test,[164] since a general degree of control or dependence of the group is not sufficient, but instead complaining state needs to provide evidence of control in relation to the exact acts under consideration[165] (in case of proxy wars - violations of human rights and humanitarian law) over which it desires to attribute responsibility to the perpetrator State.

ii) Not universal

Substantial objections against the strict effective control test have been raised by international tribunals in situations where State responsibility was not the main issue.[166] The ICTY, for instance, criticized in the Tadić case that the effective control test was "propounded by the International Court of Justice as an exclusive and all-embracing test",[167] although it was, in the opinion of the ICTY, inconsistent with the "logic of the law of State responsibility" as well as with judicial and state practice,[168] which leads to the next point.

iii) Inconsistent with the logic of State responsibility

The Appeals Chamber argued that the notion of an effective control test was contrary to the "logic" of the law of state responsibility by stipulating:[169]

> The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not

18 EJIL 649 [‘Cassese’]; S Talmon, ‘The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities’, (2009) University of Oxford Legal Research Paper Series, Paper No 16/2009 [Talmon].

163 See, for example, Álvarez Ortega.

164 Talmon considers that “while the burden of proof for the –effective control– test is lower than that for the “strict control” test, in practice it will be extremely difficult to establish”, in Talmon, p. 503.

165 Also “the object of control is no longer the secessionist entity but the activities or operations giving rise to the internationally wrongful act” in Talmon, p. 506.

166 Private Actors, Oxford, para. 15.

167 *Prosecutor v. Dusko Tadić (Sentencing Judgement)*, IT-94-1-Tbis-R117, International Criminal Tribunal for the former Yugoslavia (ICTY), 11 November 1999, para. 116

168 ibid para. 124

169 Ibid., 108–11. It was also to argue that the test of effective control was at odds with state and judicial practice relying on its reading of cases such as Tehran Hostages, ICJ Rep. 1980 p. 3; Yeager v. Iran, (1987) 17 Iran–US CTR 92; Loizidou v. Turkey, (1996) 108 ILR 443; and Jorgic v. Germany, 26 September 1997, 2 StE 8/96, unpublished typescript provided to the ICTY (on appeal: (2000) 135 ILR 152): Tadić´, Appeal against Conviction, (1999) 124 ILR 61, 111–21. Further: Milanovic (2006), pp. 585–7; cf. Cassese (2007), p. 658 n.17. In Crawford (The General Part. Chapter 5), Downloaded from https://www.cambridge.org/core. Lund University Libraries, on 15 Dec 2018 at 14:34:56, <https://doi.org/10.1017/CBO9781139033060.008>.

engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the state exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case.[170]

iv) At disagreement with judicial and state practice

In *Nicaragua* case, the ICJ introduced the effective control test without explanation or elaboration of the grounds on which it was based.[171] No reference was made by the Court either to state practice or to other sources of international law. This is in keeping with a regrettable recent tendency of the Court not to corroborate its pronouncements on international customary rules (other than those traditional rules that are upheld mainly in case law and the legal literature) with a showing, if only concise, of the relevant practice and *opinio juris*.[172]

If the ICJ had conducted a close examination of such practice, it would have concluded that it indeed supported the "effective control" test but solely with regard to instances where single private individuals act on behalf of a state.[173]

The reasons that driven the ICJ to require this high threshold for attributing serious violations of international humanitarian law by the contras to the U.S. government are evident, according to Antonio Cassese, and are relying on practical wisdom and judicial restraint.[174]

The Court found U.S. agents' actions of arming, training, supplying of the Nicaraguan contras attributable to the U.S, but hesitated to do the same with grave breaches of international humanitarian law and violent crimes over the civilian population.

v) Unreachable evidentiary threshold

One of the numerous limitations of the "effective control" test is that it imposes on the damaged state quite unrealistic obligation to provide evidence of specific instructions or directions of the de facto intervening state relating to the armed conflict.[175] Some publicists have articulated concern that "the traditional "effective control" test […] seems insufficient to address the threats posed by global criminals and the states that harbor them".[176] The 9/11 events have significantly undermined the position of supporters of strict approach, and the

[170] Ibid., pp. 108–9. This position was based on Ago's version of Draft Art. 8 as adopted on first reading, which concerned a private actor acting in fact on behalf of a state without further elaboration. The Appeals Chamber's reliance on Draft Art. 8 in this context is misplaced, given that under Ago's original conception, it was intended to apply in circumstances of actual instruction only: Nicaragua, ICJ Rep. 1986 p. 14, 188–9 (Judge Ago). Also Draft Articles Commentary, Art. 8, para. 8; Crawford, First Report, 43., in Crawford (The General Part. Chapter 5), p. 152.
[171] Antonio Cassese. *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia.* 18 Vol. , 2007. Web. P. 653.
[172] Ibid, p 654.
[173] Practice and case law on this matter are correctly set out in Tadić, supra note 3, at paras. 133 – 136, in Cassese, p. 654.
[174] See discussion in Cassese, p. 654.
[175] René Värk, State Responsibility for Private Armed Groups in the Context of Terrorism, Juridica International, XI, 2006. Web. Apr. 23, 2020. <https://www.juridicainternational.eu/?id=12655>. pp. 184-193.
[176] Anne-Marie Slaughter and William Burke-White. *An International Constitutional Moment.* 43 Vol. , 2002. Web. P. 20.

international community is more lenient towards lower threshold and more liberal approach.[177]

As Cassese remarks,

> applying … the "effective control" … If one instead relies upon the "overall control" test, it suffices to demonstrate that certain terrorist units or groups are not only armed or financed (or also equipped and trained) by a specific state or benefit from its strong support, but also that such [a] state generally speaking organizes or coordinates or at any rate takes a hand in coordinating or planning its terrorist actions (not necessarily each individual terrorist operation). It would then be relatively easy to infer from these links that the state at issue bears responsibility for those terrorist activities. In short, on the strength of the "overall control" test, it would be less difficult to attribute those actions to the state in question.[178]

vi) Not portable

As such, the foundations advanced by the ICJ have envisioned to concern the determination of effective control in the context of a military operation subject to circumstances governed by the international humanitarian law.[179] This approach intended that the portability of the effective control test has been challenging, or not possible, from the start because it is tied to violations of the law of war.[180]

In conclusion, the "effective control" test proponed in *Nicaragua* case has been firmly designated as the only possible test for attributing responsibility of non-state actors to the state. This test, however, is not immune against critique and debate around whether it stands the test of time. The definition of armed conflict put forth in *Tadić* case is perceived as a legally correct statement of the law, which instructs other courts to simply cite the case rather than engage in further development of a legal definition.[181] Similarly, in the Nicaragua case the ICJ test is interpreted as the set and not subject to interpretation. This approach risks overlooking the evolving nature of relationship between non-state actors and a state, distancing law from reality, which will be argued further in this thesis. In below section the "overall control" standard of the ICTY is analyzed in a similar manner.

177 Värk, p. 192.
178 Cassese (2007), 666, in Crawford, p 157.
179 Kristen E. Boon. *Are control tests fit for the future? The slippage problem in attribution doctrines.* 15 Vol. , 2014. Web. P. 19.
180 Boon, p. 19.
181 Letizia Lo Giacco, *Citing Matters : An Analysis of the Use of Judicial Decisions in International Criminal Law Adjudication through the Lens of Law-Making.* Faculty of Law, Lund University, 2019. EBSCOhost, search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5344628&site=eds-live&scope=site, p. 189.

3. Overall Control

In the Tadić case, the ICTY looked into the criminal responsibility of Dusko Tadić for crimes committed by the Bosnian-Serb army (VRS) of Republika Srpska, an unrecognized Bosnian breakaway region—in Bosnia-Herzegovina.[182] In order to decide on the individual criminal responsibility of Dusko Tadić, the initial step for the Tribunal was to classify the armed conflict and then determine the applicable law. For this purpose, the factual and legal connection had to be established between the actions of the VRS and the third State.[183]

It is worth noting that the ICTY is an international criminal tribunal that has jurisdiction limited to individuals, and would not regularly be considered competent to judge on questions of state responsibility.[184] In the case of *Tadić*, the ICTY has dealt with this issue by considering state responsibility as a preliminary question in order to move forward and deal with matters inherently within its jurisdiction, more precisely the difference between an international and non-international armed conflict.[185]

1) Definition

When deciding on the level of control necessary for attributing armed group conduct to the state, the ICTY established:

> it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.[186]

Thus, the overall control test put forward lowers the threshold of control necessary for attributing responsibility to the state. This is possible not by overlooking the requirement of giving specific instructions or control over the specific operation, but rather by decreasing of the threshold by the overall control, by stating that it must go beyond financial and military assistance or training and include the coordination or help in the planning of its military activity.[187] These requirements are lesser than the *strict control test* applied by ICJ to link a group with a State organ. In essence, the relation of complete dependence is required by ICJ, meaning that the state must have complete control over the armed group, that potential for control must have been used and have extended to all fields of its activity.[188]

The requisite level of control, according to ICTY, is established when a state *"has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operations support to that group"*.[189]

Therefore, in contrast to effective control, which becomes apparent on the tactical level by achieving specific military objectives, overall control, in its turn, requires a more general, less-intrusive, level of direction and planning, done at the strategic and operational level of military operations.[190]

[182] R. Jorritsma. *Where general international law meets international humanitarian law: Attribution of conduct and the classification of armed conflicts.* 23 Vol. Oxford University Press, 2018. Web. P. 409.
[183] Jorritsma, p. 409.
[184] Crawford (General Part, Chapter 5), p.150.
[185] Crawford (General Part, Chapter 5), p.150.
[186] *Tadić case* (para 131).
[187] Ortega, p. 24.
[188] Ortega, p. 25.
[189] Tadić, Appeal against Conviction, (1999) 124 ILR 61, 119.
[190] Jorritsma, p. 410; Western military doctrine traditionally distinguishes three levels of military operations and planning, from general to specific: strategic, operational, and tactical.

After an overall control has been established, the conduct of the armed group or its members may be regarded as the conduct of de facto State organs, whether or not the overseeing state has issued any specific instruction regarding the execution of each of those acts.[191]

Overall control:

Having a role in:	- Organizing - Coordinating - Planning - Supervising	⟶ military actions or operations

Organized group

To have a more nuanced understanding of the meaning of the *Tadić* case ruling for the present thesis, one crucial remark has to be made with respect to the nature of the non-state actor, whose conduct we are attempting to attribute to the state.

The Appeals Chamber distinguished the level of state control required with regard to an individual or non-organized group as opposed to an "organized and hierarchically structured group"[192] and proposed distinct tests for state responsibility.[193]

The judgement proclaimed that it would depend on the facts what levels of control are to be applied to equate private individuals or groups with *de facto* State organs:

> Where the question at issue is whether a single private individual or a group that is not militarily organized has acted as a de facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by the state [...] By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the state, or its direction of each individual operation.*[194]*

The reasoning behind this conclusion that less stringent standard is to be applied to organized groups is that "a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group".[195]

The strategic level denotes in a broad way national or coalition objectives, the operational level is concerned with the general planning of campaigns and major operations, and at the tactical level forces are deployed to gain specific military objectives in order to achieve operational and strategic success. See eg NATO, Allied Joint Doctrine (Allied Joint Publication (AJP)-01(D) December 2010) paras 114–16.

[191] Tadić Appeal Judgment paras 130–45).

[192] Crawford (General Part, Chapter 5), p.152.

[193] Boon, p. 9.

[194] *Tadić case,* para 137.

[195] Tadić, Appeal against Conviction, (1999) 124 ILR 61, 109. Also ibid., 116–18.

2) Critique

Two separate tests for state responsibility for individuals and non-organized groups on the one hand and organized and hierarchical groups on the other propounded by the Appeals Chamber raise additional questions.[196]

The ICJ stated that, in any event, the overall control test was unsuitable for application in a state responsibility context on the basis that the responsibility so produced was overly broad.

The Court noted that the "overall control" test introduced in the *Tadić Appeal Judgment* had the "major drawback of broadening the scope of State responsibility well below the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct; that is to say the conduct of persons acting, on whatever basis, on its behalf. The "overall control" test … stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility."[197]

[196] Crawford (General Part, Chapter 5), p.152.

[197] *Genocide case*, para. 406. See full text in Annex I. Ibid. Cf. ibid., 257 (Judge Al-Khasawneh), arguing that 'different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution'.

4. Bosnian Genocide: solution or further fragmentation

The author argues that by pronouncing the judgment in the *Genocide* case and dividing the spheres of application for effective control and overall control tests, the ICJ has not resolved the conflict. Moreover, by resorting to the limited interpretation of the nature of both tests, it has artificially created a new problem for international law, which seems to only escalate with time.

The case before the ICJ was caused by the same conflict as *Tadić*[198] - the question was whether the FRY (and, later, Serbia) was responsible for acts of Genocide committed by Bosnian Serb militias during the Bosnian War.

1) Dichotomy

This judgment was delivered after the ARS had been adopted, commentaries to which paid due attention to the decisions of *Nicaragua* and *Tadić* and the two conflicting tests, but did not itself offer a position on the matter leaving the issue unresolved.

In the *Genocide* case, a more productive attempt to revisit these cases was undertaken, with the Court reinforcing *Nicaragua* and dismissing the criticism of that decision by the ICTY in *Tadić*.[199]

The position of the ICJ is as follows:

> Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favor of that test is unpersuasive.[200]

The Court has moved directly to assess the overall control test, acknowledging that the test is indeed appropriate for determining whether an armed conflict should be classified as national or international.[201] Nevertheless, the overall control test was unsuitable for application in a state responsibility context on the basis that the responsibility so produced was overly broad.[202]

The Court recalled the general rule of state responsibility 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".[203] Grounding its decision on this proposition, it subsequently found that the atrocities

198 Generally: William A. Schabas. "Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)." *Oxford Public International Law.* December 2008. Web. Apr 23, 2020<https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1245?prd=MPIL>.

199 For criticism: Cassese (2007).

200 *Genocide case*, para 404.

201 *Genocide case*, p. 210.

202 Cassesse, p. 654.

203 *Genocide case*, para. 406.

at Srebrenica were not perpetrated by the Federal Republic of Yugoslavia ("FRY") organs, under instructions or direction of organs of the FRY or in operations where the state exercised effective control.[204]

Moving further, the Court "on the basis of its settled jurisprudence" has applied Article 8 of ARS to the FRY[205] turning to the effective control test in *Nicaragua* resulting in arriving at the conclusion that a finding of FRY instruction, direction, or effective control with respect to acts of genocide in Bosnia committed by non-state actors is not corroborated by sufficient evidence.[206]

The ICJ has subsequently reaffirmed the *Nicaragua* case test in finding that acts of the Republika Srpska, VRS, and paramilitary militia involved in the massacres at Srebrenica were not attributable to the FRY, on grounds that in July 1995, neither the Republika Srpska nor the VRS could be regarded as tools via which the FRY was acting. While the military, political, and organizational relations between the federal authorities in Serbia and the authorities in the Republika Srpska certainly remained powerful, they were not sufficient to be likened with the organs of the FRY. Nor could it be said, in the specific circumstances surrounding the events at Srebrenica, that the perpetrators of genocide were acting on the FRY's instructions, or under its direction or control.[207]

This differentiation approach and imposing different rules with regard to attribution for State responsibility on one hand and classification of conflict on the other has made it possible for the ICJ to rule out the overall control test applicability for State responsibility, while not rejecting the applicability of this test to determine the existence of an IAC.[208]

2) Fragmentation

Made particularly apparent in the *Genocide* case, the jurisprudence of the ICJ and international criminal tribunals and even ECtHR (although the latter is not covered in the present thesis) reveals different judicial approaches towards the relationship between IHL, the law of state responsibility and the conflict classification. The case law on this topic has been named as "the most cited example of the "fragmentation of international law".[209]

According to the prognosis of international law publicists, the fragmentation is likely to continue.[210]

[204] Boon, p. 10; Genocide case, paras 394, 397, 413–15.
[205] *Genocide case*, p. 210.
[206] *Genocide case*, p. 214.
[207] Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro] ICJ [26 February 2007], paras 394, 397, 413–15; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro), December 2008, Apr 20, 2020 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1245>.
[208] The ICJ's approach of functional differentiation is reminiscent of some early cases decided by the ICTY. In these cases, the Trial Chamber refused to classify an armed conflict by resorting to the Nicaragua-test of State responsibility because of the belief that the determination of State responsibility is by its very nature different from the determination of individual criminal responsibility: see Prosecutor v Rajic´ (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61, Trial Chamber (13 September 1996) [25], [32], [37], [42] (because of Rajic´' guilty plea, this issue was not addressed in the subsequent proceedings); Prosecutor v Delalic´ et al (Judgment) IT-96-21-T, Trial Chamber (16 November 1998) [230]–[231] and fn 262 (overturned on appeal, see Delalic´ (Appeal) (n 21)).
[209] December art p 405; Judge R Higgins, Speech at the Meeting of Legal Advisers of the Ministries of Foreign Affairs (29 October 2007).5 https://www.icj-cij.org/files/press-releases/7/14097.pdf.
[210] "Fragmentation" In *Oxford Bibliographies* in International Law. 18 Apr. 2020. <https://www-oxfordbibliographies-com.ludwig.lub.lu.se/view/document/obo-9780199796953/obo-9780199796953-0113.xml >.; *Regime Interaction in International Law : Facing Fragmentation*. Cambridge University Press, 2012. Web. Ortega, p. 36; A. V. Plotnikov. *Jurisdictional conflict and dialogue of international courts in the course of fragmentation of international law.* 84 Vol. State Educational Entity of High Professional Education (Urals' State Law Academy), 2012. Web. P. 108–117. For the opposing

The difference in *Nicaragua* and *Tadić* legal rules is best described as a divergence between the ICJ and ICTY. The scholars note*,* on the one hand, that the phenomenon of fragmentation of international law, is the result of lack of coordination and practical development of regimes in international law, resulting in different systems having developed from a focus on "problem-solving" within the scope of a specific regime.[211]
Functional necessity, hence, weakens the coordinated development of international law regimes.[212]

Proliferation, in its turn, refers to the uncoordinated increase in the number of judicial bodies, with the diversification of international law causing the establishment of many and diverse judicial bodies, not only for specific areas but also regional courts. The "overall control" test, advanced by the ICTY, is not in conformity with the previous "effective control" test applied by the ICJ. To address this discrepancy, the proliferation of the international justice embodied in ICJ and ICTY furthers fragmentation in the interpretation of norms and principles of international law.

However, the outstanding question remains whether we should aim for convergence or we should simply accept and welcome fragmentation as a natural step for the development of the law and the enhancement of human rights standards.[213]

view, see Martti Koskenniemi and Pä Leino. *Fragmentation of International Law? Postmodern Anxieties.* 15 Vol. , 2002. Web. Pp. 553–579. EBSCOhost, doi:10.1017/S0922156502000262. Accessed 18 Apr. 2020.
[211] Benedict Kingsbury and Lorenzo Casini. *Global Administrative Law Dimensions of International Organizations Law.* 6 Vol. , 2009. Web. ." International Organizations Law Review, vol. 6, no. 2, Sept. 2009, pp. 319–358.
[212] Kingsbury, pp. 319–358.
[213] Elena Abrusci. *The European Court of Human Rights and Its Contribution to Judicial Fragmentation in International Human Rights Law.* 113 Vol. , 2019. Web. P. 95.

VI. What Exactly is Missing: Deconstructing the Gap

This chapter will be devoted to an analysis of how two coexisting control tests complicate matters in bringing state waging a proxy war to international responsibility. Firstly, in continuation of the section elaborated above in this thesis, on the critique of the effective control test, the author will discuss how *Genocide* ruling is inconsistent with the logic of State responsibility law. Second, the author will turn to policy considerations in allocation responsibility for proxy wars. Third, the IHL, as will be argued, is the protective and logical body of law, and, finally, the gradual shift from the stricter standard of effective control will be pointed out.

To begin with, both *Nicaragua* and *Tadić* are relevant since they describe modern conflicts in different but complementing aspects. For instance, Appeal Chamber in *Tadić* case for the first time acknowledged that certain armed conflicts, which are normally perceived as internal, have an international dimension when a state controls non-state armed group. This serves to single out wars by proxy as a sub-type of international conflicts.[214] However, below it will be shown how *Genocide* interpretation of these tests has revealed and created a legal gap in state responsibility resulting in a grey area, a very favorable environment for waging proxy wars. The key question is: how far apart are the *Tadić* overall control test and *Nicaragua's* effective control test?

1. Two equal parties to conduct a war

In the author's opinion, the quote from the 1969 decision in *Omar Mahmud Kassem and Other* case by Israeli Military Court best summarizes the essence of responsibility of parties to an international armed conflict:

> [In IACs] a "command relationship" should exist between such government and the fighting forces, with the result that a *continuing responsibility* exists of the government and the commanders of its army for those who fight in its name and on its behalf. … It is the implementation of the rules of war that confers both rights and duties, and consequently *an opposite party must exist to bear responsibility* for the acts of its forces, regular and irregular. We agree that the Convention applies to military forces (in the wide sense of the term) which, *as regards responsibility under International Law*, belong to a State engaged in armed conflict with another State, but it excludes those forces – even regular armed units – which do not yield to the authority of the state and its organs of government. … [In view] of the experience of two World Wars, the nations of the world found it necessary to add the *fundamental requirement of the total responsibility of Governments for the operations of irregular corps* and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war… .[215]

The rationale in the quoted part of the decision is ever more actual today, and current commentators highlight that both parties to an international conflict shall have an equal scope of rights and obligations.[216] It is, of course, the desirable ideal scenario that can only be achieved when both parties engage in IACs on terms of equals.[217] If the law of international

[214] Gal, p. 1.
[215] *Military Prosecutor v. Omar Mahmud Kassem and Others*, Israel Military Court sitting in Ramallah, 13 April 1969) Law and Courts in the Israel held Areas (Jerusalem, 1970), 17ff (emphasis added), Web. Apr, 23, 2020. <https://casebook.icrc.org/case-study/israel-military-prosecutor-v-kassem-and-others>.
[216] Jorritsma, p. 421.
[217] See e.g. Tadić (Appeal) (n 10) [94]: 'States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and,

armed conflict applies to an organized armed group (as result of classification the conflict as NIAC), this should result that same body of law applies to both the territorial state opposing armed group and the state controlling it.[218]

"It is simply inconceivable" that a territorial State would apply the law of war with regard to armed groups acting as proxies for a third state, with no possibility to hold this state responsible for its agents' conduct.[219]

2. State responsibility rules

By defining proxy wars situations as IAC, the Appeals Chamber in *Tadić* provided for the possibility for provisions, which normally apply to states only during inter-state armed conflicts, to apply to non-state actors acting as proxies as well.[220]

Consequences of this, when read in conjunction with *Genocide* ruling requiring "effective control" for attribution to a state of responsibility for violations of norms of international law are quite problem-generating in situations where a conflict is fought through proxies.[221]

As mentioned above, this allows a third State to control an armed group to the extent of legally waging a war (with all resulting belligerent rights and obligations) but without being responsible with regard to the territorial state (and its inhabitants) for the specific actions of the proxy force through which the state acts.[222]

In *Genocide* case, the ICJ did not envisage a problem in this scenario, emphasizing that the degree of a State's involvement required by IHL for an armed conflict to become international "can very well, and without logical inconsistency" still can be less than necessary to invoke that state's responsibility for specific acts committed during such conflict.[223]

According to Cassese, the effective control test is inconsistent with a basic rule of State responsibility establishing that a State may not evade its responsibility by acting indirectly (through the use of auxiliaries - groups or individuals) rather than through its organs.[224] On the one hand, states are not prohibited from acting through proxies.[225] On the other hand, however, they are not allowed to legally detach from the unlawful conduct when these individuals violate international law.[226]

by the same token, a relationship of dependence and allegiance of these irregulars vis-a-vis that Party to the conflict. These then may be regarded as the ingredients of the term "belonging to a Party to the conflict". See also R Jorritsma, "Emerging Voices Symposium: The Role of Attribution Rules under the Law of State Responsibility in Classifying Situations of Armed Conflict", International Commission of Jurists, Opinio Juris blog, 17 August 2015, Web. Apr 23, 2020. <http://opiniojuris.org/2015/08/17/emerging-voices-the-role-of-attribution-rules-under-the-law-of-state-responsibility-in-classifying-situations-of-armed-conflict/>.

[218] Jorritsma, p. 421.

[219] Jorritsma, p. 421.

[220] Gal, p. 63.

[221] Gal, p. 77.

[222] Jorritsma, p. 4; M Milanovic, "The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts'" in *The 1949 Geneva Conventions : A Commentary*. Oxford University Press, 2015. Web. P. 37 para 34;

[223] Jorritsma, p. 411; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43 [405].

[224] Cassese, p. 654.

[225] Cassese, p. 656. C. A. Pfaff. *Proxy War Ethics.* 9 Vol. University of the Pacific, McGeorge School of Law, 2017. Web.

[226] Cassese, p. 656., *Tadić* para. 117.

The rule of state responsibility stipulates that whenever persons lawfully acting on behalf of a state exceed their authority or contravene state instructions, the state is nonetheless liable for such actions.[227]

The Spanish government has stated on this matter, that

> if this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.[228]

To move from a purely theoretical domain to practical applicability, let us consider the assessment of VRS conduct in Bosnia-Herzegovina conflict from the attributability standpoint as carried out by ICJ and ICTY. ICTY assumed from the outset that the VRS was acting on behalf of Serbia, thus turning the conflict into international bringing individuals to responsibility for conduct violating laws of war. Quite the contrary, the ICJ took a position that the VRS was neither completely dependent on Serbia nor acting on behalf of Serbia due to the absence of the latter's "effective control" nor was the VRS.[229] Therefore, in practice, by separating classification and the attribution of violations, the ICJ opened a Pandora's box of possibilities for a third state to employ non-state armed groups as its proxy for fighting an international conflict, without being officially responsible for the proxy's violations of the law.[230]

The adverse effects of conflict do not end when the shootings have ceased. In the aftermath of the conflict, violations should be addressed at the individual level, but should also necessarily be addressed at the state level. If we adopt the separation between effective and overall control suggested in the *Genocide* case, dealing with consequences of proxy conflicts the latter might not be achieved.

In absence of legal rules establishing the responsibility of a state for the compliance of the group controlled by it with international law concerning violations committed by such group, the members of the armed group bear only individual criminal responsibility.[231]

The third state exercising "overall control" over the non-state armed group, will not bear responsibility for violations committed by its proxy, the non-state armed group. Indeed, at the national level, individuals could pursue reparations and compensation from the non-state armed group, especially if the group has an established political branch or known bank accounts and assets that can be seized.[232] However, at the international level, it is unlikely that this non-state armed group could be held responsible, by itself as an entity, for the violations committed by its members since an international instrument providing for an adequate framework is yet to be created.[233]

227 Cassese, p. 654.
228 Statement by the Spanish Government, reported by the ILC Commentary to Art. 7 of the ILC Arts, at para. 3. See James Crawford. *The International Law Commission's articles on State responsibility : introduction, text and commentaries.* Cambridge University Press, 2002. Web. P. 106.
229 Genocide case, supra note 6.
230 Gal, p. 63.
231 Gal, p 77; For a full presentation of the accountability gap of non-state armed groups, see Liesbeth Zegveld. *Accountability of armed opposition groups in international law.* Cambridge University Press, 2002. Web. P. 60.
232 The Alien Tort Statute (28 USC x1350) and its application in Mehinovic. v.Vuckovic.,198 F. Supp.2d 1322 (Ga. 2002) and The Estates of Yaron Ungar and Efrat Ungar and others v. The Palestinian Authority and others, USDistrict Court for the District of Rhode Island,228 F.Supp.2d 40 (2002).
233 The ILC Draft Articles on Responsibility of International Organizations (2011) do not refer to non-state armed groups.

3. Policy considerations

In major work of Robert Kolb on state responsibility, in context of proxy wars, he arrives at a conclusion, that "the ICJ test is dubious from the point of view of policy considerations: States will easily be able to evade their responsibility when they support dangerous armed bands and terrorists, since the proof of "effective control" will in most cases be impossible or too exacting".[234]

Cassese points out that separation of attribution of contras to the state and holding the state responsible for training, equipping under art 2(4) of the UN Charter, encourages proxy wars by disconnecting proxies from the principal state and missing on the nature of the proxy wars.[235]

As described in the above chapter, in the case of Nicaragua, the ICJ set the control threshold very high for the very policy considerations - practical wisdom and judicial restraint.[236] The effective control standard, however, stayed around after the case of Nicaraguan contras in the 1980s. The author argues that political contemplations in one case now block the aptitude of international law from being the regulator in achieving just legal order.

The difficulty with the standard of effective control is not only that it sets the threshold very high, as outlined in the previous chapter. It also establishes perverse incentives that encourage states to employ proxies while discouraging them from moderating proxy behavior, since any attempt at moderation could fit the criteria for effective control and trigger responsibility.[237] Arguably, had the FRY just provided support and not direction, the FRY leadership may not have been found accountable for VRS atrocities.

Once again, a useful referral could be made to the Israeli High Court of Justice decision. Although it is a domestic court, it has extensively dealt with protracted situations involving non-state armed groups, dealing specifically with the situation in the Gaza Strip. Different international bodies have considered the Gaza Strip to be occupied by Israel regardless of the official disengagement of its forces in 2005,[238] the paramount reason is that Israel possessed the capacity (and has demonstrated such capacity) to deploy troops into the Gaza Strip at any given moment and was factually controlling the air and the sea of the area.[239]

The author claims that it is for policy considerations that international organs have reached this conclusion. Thus, this case is an excellent example of how it is crucial to refrain from applying international law in isolation from the policy situation. This is particularly relevant for international conflicts of a complex nature.

To reiterate, situations when a state does not assume responsibility for the actions of its proxies, resulting in the civilian population being not protected, create further incentives for states not to use their agents and to continue to rely on "puppets". The knowledge that neither their proxies (apart for the possibility of individual criminal liability) nor their "master

[234] Robert Kolb. *The international law of state responsibility : an introduction.* Edward Elgar Pubishing, 2017. Web. P.106.
[235] See, in general, Cassese.
[236] P. 34 of the present thesis.
[237] Pfaff, p. 344.
[238] Gal, p. 71. See, inter alia, UN General Assembly, UN Doc. A/HRC/15/21, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, 27 September 2010. Web. Apr 23, 2020. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.PDF>.
[239] Gal, p. 71.

state" (playing safe and not crossing the threshold of control) will be brought to international responsibility.[240]

4. Protective framework of IHL

Introduced by the ICJ *Genocide* case double control standard weakens the protective framework of IHL. One of the key obligations, recognized as *erga omnes*,[241] establishes that all Parties to the Geneva Conventions have an obligation to respect and ensure respect for the Conventions.[242] Given that it is an obligation "towards everyone", and not, for instance, to the enemy state, against which the war is waged, it is thus reasonable to expect a state, using a proxy, to ensure the respect of IHL norms.[243]

Paying due regard to the protective framework of IHL in the present case serves to show how the responsibility gap is detrimental to waging a just war with respect for human rights and humanitarian principles.

As early as during World War II, it had become apparent that some States attempted to avoid their international obligations by carrying out their policies through an auxiliary. It was necessary to ensure full responsibility of States for the acts of the forces through which it acts is required by the framework of IHL applicable to IACs, which is premised on avoiding a protection and responsibility gap in relation to those who are affected by the consequences of warfare. There is a range of IHL norms that crystalized with a view of preventing such a responsibility gap and protecting those who suffer war consequences by ensuring full accountability and responsibility in situations of interstate conflicts, even if those States employ entities other than their regular armed forces.[244]

5. Departure from stricter standards

According to the Report on the Fragmentation of International Law, *Tadić* decision does not position overall control as an exception to the general rule of effective control, but rather "it seeks to replace that standard altogether".[245]

While this might seem somewhat radical giving reluctance of some of the most authoritative commentators of international law, in this section, the author aims to illustrate how slowly but firmly the departure from stricter standard of effective control takes place and why it is logical.

The huge work of the utmost significance to the changing nature of modern conflicts and proxy wars, in particular, has been carried out by the ICRC by delivering the updated version of the Commentary to Geneva Conventions I and II. Academics and practitioners from different jurisdictions have been reviewing past and recent armed conflicts to put together what is the current understanding of the law.

[240] Gal, p. 78.
[241] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004), 136.
[242] Common Art. 1 GCs.
[243] P Gal, p. 63.
[244] Jorritsma, p. 420.
[245] Jorritsma, p. 421; Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission (Finalized by M Koskenniemi), UN Doc A/CN.4/L.682 (13 April 2006) 32 para 50. In the same vein, see Judge G Guillaume, Speech to the Sixth Committee of the General Assembly (27 October 2000). https://www.icj-cij.org/files/press-releases/1/3001.pdf, who warns that the overall control test in *Tadić* (Appeal) presents 'a serious risk: namely the loss of the overall perspective' and that it endangers the unity of international law.

IHL is not a self-contained legal regime, but instead it interacts with other regimes of international law in an often complementary way. Law of state responsibility and the law of treaties have both seen a lot of change since their "golden age," and those developments are also reflected in the new Commentary.[246]Interestingly to note, human rights are more often referred to than in the previous version, especially when dealing with shared concepts.

Article 1 common of Geneva Conventions proclaiming "respect and ensure respect" is at the heart of approach to modern conflicts, especially with the fact that it is now applicable in NIACs, which reflects the fundamental nature of common Article 3.

Now the closer look will be taken at how ICRC tackled issues of classification of conflict and degree of control required to attribute conduct of non-state armed group to a state. While paying due regard to the diverging views on the level of control required for the purposes of attribution under the State responsibility law and for the purposes of classification of conflicts as international or non-international, the ICRC in the Commentary vouches for the overall control test is appropriate because it is better suited to address the most legally problematic aspects of proxy wars:

> In order to classify a situation under humanitarian law when there is a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third state, including for the purpose of attribution. It implies that the armed group may be subordinate to the state even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the de facto entity or non-State armed group as a whole, and thus allows for the attribution of several actions to the third state. Relying on the effective control test, on the other hand, might require reclassifying the conflict with every operation, which would be unworkable. Furthermore, the test that is used must avoid a situation where some acts are governed by the law of international armed conflict but cannot be attributed to a State.[247]

This also appears to be the position of some countries, who, when commenting on ARS, noted that they welcomed that, for the purposes of State responsibility, the words "direction or control" allow for the application of both a strict standard of "effective control," as used [in *Nicaragua*], and a more flexible standard as applied in *Tadić*.[248]

In summary, in this thesis, the author does not advocate for giving up on effective control standard but brings to attention an undeniably evident pattern in the practice of some international courts and tribunals that gracefully depart from the strict approach of the ICJ. By showing that the effective control test is too stiff to swiftly adapt to the quickly changing nature of international warfare, these cases are an important driving force to initiate reconsideration of State responsibility on a larger scale.[249]

[246] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. Commentary of 2017, Article 2: Application of The Convention. Web. Apr 23, 2020. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1A35EE65211A18AEC12581150044243A>, p. 555.
[247] Ibid, para 293.
[248] Jorritsma, p. 430.
[249] Pusztai, p. 17.

The effective control test had very questionable grounds in court practice before *Nicaragua* case[250] and the most recent reconsideration of the test seems more in line with the earlier cases, *opinio juris,* and contemporary armed conflicts.

[250] Pusztai, p. 19.

VII. Case-Studies

This chapter presents three case studies, which all allow to look at legal consequences of proxy wars from different angles. First is the authors country of origin, Ukraine, which over the past years evolved to be a classic textbook example of proxy wars. Its unique feature is that while being fought at the easternmost border of the Europe, it nevertheless presents a security threat to entire European continent and to a large extent is shaping the European politics in the last years. War in Syria moves the reader to another region of the world – Middle East. It was chosen not only for the number of references to it as a "proxy war", which is also true, but for the scope of the war, number of parties involved and the unprecedented humanitarian consequences, causing crises in regions thousand miles away. There are apparent reasons why it is named as the biggest human disaster since the World War II. Finally, least obvious continent known for its everlasting civil wars and domestic strives – Africa, specifically – Horn of Africa. Case-study of this region was inspired by the most recent Nobel Peace Prize award to the Eritrean Prime Minister, developing closer interest in this region and resulting in findings that Africa is unjustly missing from the narrative of proxy wars, as new data show. Horn of Africa brings to light a new aspect of proxy wars that may assist in further research and understanding of the issue.

1. Ukraine: jeopardized security on the European continent

Russia's use of proxies in eastern Ukraine is a high-profile illustration of the main object of discussion in action.[251]

Russia has long been one of the leaders of proxy warfare. British military historian John Keegan points that the Romanov dynasty, ruling Russia from the seventeenth century until the 1917 Revolution, repeatedly contracted the Cossacks to serve as its proxy and to amplify its military power.[252] Similarly, Russia bestrides modern proxy hotspots by engaging with eager local nationals, mercenaries, and those easy to negotiate foreign nationals. Different structures of Russian proxies can be found all over Eastern Europe and the Caucasus region.[253] Still, two conflicts in Ukraine and Syria present the most interesting and relevant examples of waging of a proxy war without responsibility by Russia.[254]

1) National context

Ukraine became an independent state after the break of the Soviet Union in 1991. The "Orange Revolution" in 2004 and the "Euromaidan Revolution" in 2014 were the two turning points in Ukraine's contemporary history, both leading to changes of government and a swift political turn towards the EU. Result of both mass protests was the removal from Presidential post of the same person Viktor Yanukovich. In 2014, the agreement on the settlement of the political crisis in Ukraine[255] signed by the opposition, the government, a number of EU countries with the participation of Russia, resulted in the removal of Yanukovich, triggered by the Maidan Square shootings and killings of over a hundred protesters and 13 members of

[251] C. Fox Amos. *Conflict and the Need for a Theory of Proxy Warfare.* 12 Vol. University of South Florida Board of Trustees, 2019. Web. P. 44.
[252] Keegan, John. A History of Warfare . Penguin Random House, 1993. Print. Pp. 7-11.
[253] Russian proxies are operating in Ukraine, Crimea, and Transnistria in Eastern Europe. In the Southern Caucasus Region Russian, proxies are working in Georgia's breakaway regions on South Ossetia and Abkhazia
[254] Conflict and the Need for a Theory of Proxy Warfare, pp. 49-50.
[255] Agreement of the opposition with President Yanukovich (Ukr.- Угода опозиції з Януковичем (ПОВНИЙ ТЕКСТ) - новини Еспресо TV | Україна, , Apr 21, 2020 <https://espreso.tv/article/2014/02/21/uhoda_opozyciyi_z_yanukovychem_povnyy_tekst>.

the police, which remain uninvestigated to date.[256] The clashes of "pro-federalists," those who foresaw a greater autonomy, including affiliation with the Russian Federation, and "unists" resulted in battles and the taking over of governmental buildings across Ukraine.[257] A milestone violent event took place on 2 May 2014 in Odesa, where 48 people died as a result of being blocked in a building that was set on fire.[258]

The declaration of independence of Donetsk and Luhansk "peoples' republics" from Ukraine in spring 2014 was followed by an "anti-terrorist" operation.[259] Over the next months, a full-fledged conflict exploded in attempts to take control over the self-proclaimed republic of Donetsk and Luhansk.[260] Various attacks by such groups, including on including judges, lawyers, activists,[261] were accompanied by broad impunity for attacks on civilians both in the zone of active fighting and having effect of other parts of Ukraine.[262] Ukraine notified the Council of Europe and UN authorities of the suspension of the application of the European Convention of Human Rights and the International Covenant on Civil and Political Rights in the Donbas areas not controlled by the government.[263]

In recent years the deteriorating climate of lack of respect for human rights has become troubling, with a large number of attacks reported against a variety of groups and individuals, the most frequent targets reportedly being civil society activists[264], journalists, business persons, representatives of minority groups[265] and human rights defenders.[266] Attacks include physical violence or other forms of intimidation by both individuals and groups.[267] An larming level of violence is constantly reported by international human rights bodies,[268] international

[256] *Report of the International Advisory Panel on its review of the Maidan Investigations*, 31 March 2015. Web. Apr 21, 2020. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f038b>.
[257] *Report of the International Advisory Panel on its Review of the Investigations into the Events in Odesa on 2 May 2014*, 4 November 2015. Web. Apr 21, 2020. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048610f>.
[258] Ibid.
[259] Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the human rights situation in Ukraine 15 May 2014, para. 95. Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf>.
[260] See, for example, OSCE Special Monitoring Mission to Ukraine, Thematic Report, *Findings on Formerly State-Financed Institutions in the Donetsk and Luhansk Regions,* 30 March 2015, para. 2.1. Web. Apr 21, 2020. <https://www.osce.org/ukraine-smm/148326?download=true>.
[261] See also OHCHR, Report on the human rights situation in Ukraine, 16 May 2018 to 15 August 2018, para 9: "OHCHR is further concerned by attacks on, and intimidation of, defence lawyers by members of extreme right-wing groups, and continuing interference with the independence of judges". Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/ReportUkraineMay-August2018_EN.pdf>; OHCHR, Report on the human rights situation in Ukraine, 16 August 2018 to 15 November 2018, UN. Doc. A/HRC/37/CRP.1, para 11: "OHCHR also continued documenting cases of increasingly violent attacks against journalists and media professionals, civil society activists, affiliates of political parties and defence lawyers in conflict-related cases perpetrated by members of extreme right-wing groups, narrowing democratic and civic space in Ukraine." Web. Apr 21, 2020.
[262] OHCHR, Report on the human rights situation in Ukraine 16 February to 15 May 2018, para. 7. Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf>.
[263] Decree of the Verkhovna Rada on Derogations of Ukraine from Certain Obligations Outlined by the International Covenant on Civil and Political Rights and the Convention on Human Rights and Fundamental Freedoms No. 462-VIII, 21 May 2015. Web. Apr 21, 2020. <https://zakon.rada.gov.ua/laws/main/462-19?lang=en>.
[264] The main types of targets of violence are reportedly anti-corruption activists; environmental protection activists; LGBTI and feminists.
[265] For example, Roma camps and LGBTI community.
[266] The recent statement of the OHCHCR, the United Nations Monitoring Mission to Ukraine (SMM), 1 November 2019, Web. Apr 21, 2020. <http://www.un.org.ua/en/information-centre/news/4776-ukraine-justice-pending-for-killings-of-journalists-and-activists>.
[267] E.g. Amnesty International Ukraine: *Human rights under pressure, their advocates under attack*, AI Index: EUR 50/9827/2019, 8 February 2019. Web. Apr 21, 2020. <https://www.amnesty.org/download/Documents/EUR5098272019ENGLISH.pdf>
[268] Committee on the Elimination of Racial Discrimination, Concluding observations on the twenty-second and twenty-third periodic reports of Ukraine, UN. Doc. CERD/C/UKR/22-23 (2016), para. 15. Web. Apr 21, 2020. <https://undocs.org/en/CERD/C/UKR/CO/22-23>.

organizations[269] and civil society in Ukraine.[270] Reportedly only due to great public attention and activism that some politically sensitive or high-profile cases of attacks end up in court.[271]

The armed conflict in East Ukraine is a factor adding to the lack of prosecutions for such attacks,[272] where thousands of crimes are not investigated,[273] resulting in a general increase in the level of tolerance to violence, radicalization of some parts of society and increase of xenophobia.[274] The situation is exacerbated by impunity for the commission of related crimes.

The annexation of Crimea and the armed conflict in Donbas enabled by Russia brought to light an urgent need for radical improvements of Ukrainian military capability. Tellingly, neither reform supporters nor opponents deny the real possibility of unrolling of a further major military conflict with Russia.[275]

2) Security threat in the EU

Europe offers one of the best present-day examples of proxy wars, personified in the relationship between Russia and the rebels in Ukraine's Donbas region. The existence of the pro-Russian separatists, the financial support of their forces, and their pseudo-political status are all Russian groundworks.[276]

Russia's aggression against Ukraine has forced the major reassessment of European security since the end of the Cold War. In the Nordic region, this has caused preparations for great power armed conflict in this part of Europe after a long-standing period of strategic neglect. All of the Nordic states, but to the greatest extent, Finland, Sweden, and Norway, have developed and are implementing so-called total defense policies.[277]

The security situation in Europe has significantly deteriorated since Russia's annexation of Crimea and proxy war in Eastern Ukraine in 2014. As NATO and partner states in Europe are facing a threat from a belligerent Russian Federation, they have swiftly returned territorial defense on the agenda.[278]

[269] OSCE Office for Democratic Institutions and Human Rights Hate Crimes Reporting, Ukraine. Web. Apr 21, 2020. <http://hatecrime.osce.org/ukraine>.
[270] LGBT Human Rights Nash Mir Centre, *Report on Hate Crimes and Incidents in Ukraine,* 2015-2018. Web. Apr 21, 2020. <https://gay.org.ua/publications/hatecrime2018-e.pdf>; see also ECRI Report on Ukraine (fifth monitoring cycle), CRI(2017)38, 20 June 2017. Web. Apr 21, 2020. <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8>.
[271] For example, in case of Kateryna Handziuk, an anti-corruption activist who died in February 2019 from acid burns received during an attack, there have been numerous attempts on the side of authorities to stall the investigation, but activists persistently draw attention to the case. See: OSCE SMM, *Daily Report* 263/2019, 6 November 2019. Web. Apr 21, 2020. <https://www.osce.org/special-monitoring-mission-to-ukraine/438233>. Golos Ukrainy (Voice of Ukraine, Parliamentary newspaper), 4 November 2019. Web. Apr 21, 2020. <http://www.golos.com.ua/article/323614>.
[272] See account of events in the OHCHR, Report Accountability for killings in Ukraine from January 2014 to May 2016, Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>.
[273] There is no significant progress with the investigation of Maidan and Odessa events, OHCHR, Report on the human rights situation in Ukraine 16 February to 15 May 2016, para. 9. Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf>.
[274] OHCHR, Report on the human rights situation in Ukraine 16 August to November 2018, para 114. Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/24thReportUkraineAugust_November2018_EN.pdf>.
[275] Tor Bukkvoll and Volodymyr Solovian. *The threat of war and domestic restraints to defence reform- how fear of major military conflict changed and did not change the Ukrainian military 2014-2019.* 20 Vol. , 2020. Web. <DOI: 10.1080/14702436.2019.1704176>.
[276] Conflict and the Need for a Theory of Proxy Warfare, p. 63.
[277] James Kenneth Wither. *Back to the future? Nordic total defence concepts.* 20 Vol. , 2020. Web. <EBSCOhost, doi:10.1080/14702436.2020.1718498>. P. 61.
[278] Ibid.

It is reported, in particular, that "[i]n the Nordic region, Russia has conducted unannounced snap exercises, deployed new weapon systems, simulated air attacks and mounted disinformation campaigns to try to undermine governance and societal cohesion."

Following the Russian-provoked conflicts in Ukraine and Georgia over the past two decades[279], the number of states has faced the legal-political challenge – to maintain position in the international arena as well as fulfill a legal obligation before their citizens or other states.[280] It has been concluded that Georgia, Ukraine and Russia "speak" international law in international politics differently, arguing that political preferences are instilled into legal arguments causing these states in the post-Soviet region to use the language of international law differently.[281]

Ukraine decided to invoke legal remedies to deal with and to address the proxy war and its consequences. These legal avenues include, for example, legislative, executive and judicial organs of international organizations, such as the United Nations Security Council (UNSC), the International Court of Justice (ICJ) or the European Court for Human Rights (ECtHR). Using international law as a weapon, Ukraine fights "legal battles" in courtrooms and on paper, confronting Russia as sovereign equals,[282] independently of their *de facto* political and military power.[283] This "lawfare" waged against Russia by Ukraine appears as the continuation of politics and warfare by means of international law. Warring states often resort to "warfare," relying on international law as a universal, impartial regulator of power politics and military actions.[284]

On 16 January 2017, Ukraine submitted an application to the ICJ against Russia, the development most observers had anticipated.[285] Ukraine alleged that the Russian Federation's support of what Ukraine considers terrorist activities in the eastern regions of Ukraine violated the International Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention).[286] Additionally, drawing parallels with Georgia's case against Russia, Ukraine accused Russia of violations against CERD, addressing, in particular, the situation of Crimean Tartars after the annexation of Crimea in March 2014.[287]

It appears rather odd that Ukraine's lawsuit invoked the Terrorism Financing Convention as a legal basis in the case of Ukraine *v.* Russia.[288] After all, in the domestic framework and on the international scene, Ukraine appears to regard Russia's acts of aggression and unlawful use of force in effectively annexing Crimea in 2014 and waging a proxy war in the eastern regions

279 For example, the Russo-Georgian War, the annexation of Crimea and the armed conflict in East Ukraine.
280 Cindy Wittke. *The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia 'Speak' International Law in International Politics Differently?*. 72 Vol. , 2020. Web. <DOI: 10.1080/09668136.2020.1732303>. P. 180.
281 Wittke, p. 180.
282 According to the universal legal principle of sovereign equality of states enshrined in the *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. Web. Apr 21, 2020. <https://www.refworld.org/docid/3ae6b3930.html>.
283 Wittke, p. 182.
284 Against the outlined background, it is crucial to underline that the newly independent states that emerged from the collapse of the Soviet Union have faced complex challenges in formulating their own, sovereign approaches to and politics of international law in regional and international politics, as well as in dealing with legacies of the Soviet theory and practice of international law, as describet in Mälksoo, L. Russian Approaches to International Law, 2015: Oxford, Oxford University Press, in Wittke, p. 182.
285 application instituting proceedings filed in the Registry of the Court on 16 January 2017: Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation).
286 International Convention for the Suppression of the Financing of Terrorism. New York, 9 December 1999..
287 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, p. 195. Web. Apr 21, 2020. <https://www.refworld.org/docid/3ae6b3940.html>.
288 Ibid, for the timeline of the case see: Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation). Web. Apr 21, 2020. <https://www.icj-cij.org/en/case/166>.

of Ukraine as the major issues. Ukraine, similarly to Georgia some years prior, selected these unusual legal bases for its claims in Ukraine *v.* Russia having regard that the ICJ's exercises its jurisdiction based on the principle of sovereign states' consent.[289] Ukraine relied upon international treaties providing for the possibility of compulsory dispute settlement by the ICJ, should direct negotiations between treaty parties fail to lead to a settlement of disputes concerning the treaties' interpretation and implementation. Both the Terrorism Financing Convention and the CERD include such provisions and have been ratified by Ukraine and Russia. Without reliance on these international treaties, Russia, which does not recognize the ICJ's compulsory jurisdiction, would have probably refused the ICJ's jurisdiction.[290]

3) Minsk Agreements

Bringing peace, security, and stability to the destroyed by war region of Donbas has proven to be a near-impossible task. Since the outbreak of armed hostilities between Russia-backed separatist forces and Ukrainian government forces in Eastern Ukraine in the spring of 2014, numerous efforts have been made to establish a viable and lasting ceasefire to protect the civilian population.[291]

The first agreement of September 2014 is known as "Minsk Protocols", contained 12 measures to achieve a ceasefire.[292] After a short period of deintensification, in January 2015, the separatist forces of the self-proclaimed "People's Republics" of Donetsk and Luhansk (hereinafter DNR and LNR) embarked on a new offensive to return territory lost to Ukrainian government forces in the summer of 2014. This resulted in severe clashes along the frontline, and the number of civilian and military casualties surged.[293]

More than five years after the signing of the second Minsk agreement in 2015 (known as "Minsk II"), it can be noted that none of the 13 measures listed in the agreement has been fully implemented.[294]

Data collected by the OSCE Special Monitoring Mission to Ukraine (SMM) indicate that there have been more than one million ceasefire violations in Donbas since February 2015.[295]

4) Classification of Donbas conflict

Let us now turn to the classification of the Donbas conflict. Is it internal or international, civil war, or a foreign invasion? Or is it a mix of both? It should be emphasized here that the "civil war" classification does not necessarily exclude the "invasion". In the research literature on

289 United Nations, *Statute of the International Court of Justice*, 18 April 1946, article 36. Web. Apr 21, 2020. <https://www.refworld.org/docid/3deb4b9c0.html>.
290 In the following eight cases, the ICJ found that it could not allow an application in which it was acknowledged that the opposing party did not accept its jurisdiction: *Treatment in Hungary of Aircraft and Crew of the United States of America (United States of America* v. *Hungary) (United States of America* v. *USSR); Aerial Incident of 10 March 1953 (United States of America* v. *Czechoslovakia); Antarctica (United Kingdom* v. *Argentina) (United Kingdom* v. *Chile); Aerial Incident of 7 October 1952 (United States of America* v. *USSR); Aerial Incident of 4 September 1954 (United States of America* v. *USSR);* and *Aerial Incident of 7 November 1954 (United States of America* v. *USSR)* in
291 Kristian Åtland. *Destined for deadlock? Russia, Ukraine, and the unfulfilled Minsk agreements.* 36 Vol. , 2020. Web. <DOI: 10.1080/1060586X.2020.1720443>, p. 122.
292 Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of the Russian Federation, V. Putin. Web. Apr 21, 2020. <https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_140905_MinskCeasfire_en.pdf>.
293 Åtland, p. 122.
294 Åtland, p. 122.
295 OSCE SMM (OSCE Special Monitoring Mission to Ukraine). 2020. "2019 Trends and Observations." January 27, 2020. Web. Apr 21, 2020. <https://www.osce.org/special-monitoring-mission-to-ukraine/444745>.

other conflicts in the post-Soviet space (e.g., Abkhazia, South Ossetia, Transnistria, and Nagorno-Karabakh), one will find many examples of the interplay between internal and external dynamics.[296]

If a conclusion is reached that armed conflict in Eastern Ukraine is both a (Ukrainian) civil war and a (Russian) invasion, important consideration to make is which one of these two dimensions is the primary and whether the character of the conflict has changed overtime.

The official position of Russia is that the conflict in Ukraine is, and has always been, an internal conflict between the government in Kyiv and the self-proclaimed republics of DNR and LNR, which did not recognize the country's post-Maidan central authorities. This leadership allegedly assumed power as the result of a "coup."[297] Representatives of the Russian defense sector highlight that the conflict in eastern Ukraine was *"a civil war between the nationalist power, which led the country as a result of a coup, and Donbas militias, which refuse to live in a country which denies them of their right to speak their language."*[298]

Given such an interpretation, Russia is not a party to the conflict, and, as proclaimed by Vladimir Putin in a July 2018 meeting with a Ukrainian politician and Trilateral Contact Group member Viktor Medvedchuk, "*the conflict can only be resolved through contacts between Kyiv and representatives of DNR and LNR."*[299]

Ukrainian leadership, on the other hand, have on numerous occasions, rejected the Russian attempts to frame the Donbas conflict as an internal conflict, claiming Russia's central and undeniable political and military role in it. For instance, at the 2016 Munich Security Conference, President Petro Poroshenko confronted Moscow's "civil war" rhetoric. "Mr. Putin," he said, "there is no civil war in Ukraine – that's your aggression."[300]

These highly contradictory views of the nature and root causes of the Donbas conflict are also found in recent scholarly debates.[301] It is argued that while separatist groups in Donbas and their Russian backers planned to destabilize larger parts of Ukraine or launch a nationwide civil war, they clearly failed to achieve this objective.[302] The domestic participation in the Donbas insurgency have been well documented,[303]but this should not lead to overlooking or underestimating Russia's role in the conflict. The scholarship notes that "[t]he transnational character of the Donbas insurgency is not a secondary issue but a fundamental matter."[304] From the onset of the conflict, East Ukraine was heavily penetrated by Russian allies, agents,

[296] Åtland, p. 126.
[297] Åtland, p. 127.
[298] Russian defense commentator Viktor Litovkin's, in Nezavisimoe Voennoe Obozrenie, 10 July 2015, cited in Tsyganok, A. 2017. Donbass: Nezakonchennaya Voyna. Grazhdanskaya Voyna Na Ukraine (2014–2016): Russkiy Vzglyad [Donbass: The Unfinished War. Civil War in Ukraine (2014–2016): A Russian View]. Moscow: AIRO-XXI, pp. 510-511. In Åtland, p. 127.
[299] Medvedchuk met with Putin 3 days prior Parliamentary Elections (Ukr. "Медведчук зустрівся з Путіним за три дні до виборів у Раду").18 July 2018. Web. Apr 21, 2020. <https://p.dw.com/p/3MGk3?maca=uk-EMail-sharing>; Rossiya 24, 18 July 2018.
[300] Newsader, 14 February 2016
[301] Three interesting PONARS papers, all published in February 2019 may shed light on the interpretation fault lines, see Brik, T. 2019. "Ukraine's 'Type 4' Conflict: Why Is It Important to Study Terminology before Changing It?" PONARS Eurasia Policy Memo, no. 575; Driscoll, J. 2019. "Ukraine's Civil War: Would Accepting This Terminology Help Resolve the Conflict?" PONARS Eurasia Policy Memo, no. 572; Gomza, I. 2019. Quenching Fire with Gasoline." PONARS Eurasia Policy Memo, no. 576.
[302] Gomza, I. 2019. "Quenching Fire with Gasoline." PONARS Eurasia Policy Memo, no. 576., p 2, in Åtland, p.128.
[303] Kudelia, S. 2014. "Domestic Sources of the Donbas Insurgency." PONARS Eurasia Policy Memo, no. 351. See also Malyarenko, T., and S. Wolff. The Dynamics of Emerging De-Facto States: Eastern Ukraine in the Post-Soviet Space. 2019. London: Routledge, pp. 30-43.
[304] Gomza, I. Quenching Fire with Gasoline. 2019. PONARS Eurasia Policy Memo, no. 576, p. 2.

and operatives, who were either supporting or directly controlling the rebels.[305] The accessible Russian-Ukrainian border became a frequently used crossing point for Russian arms supplies, Russian insurgents, and the regular Russian army.[306]

In summer 2014, there was a noticeable surge in Russia's military involvement in the conflict. Supported by Russian regular troops and arms, the separatists were able to fortify and spread their territorial control, and in the fierce battle of Ilovaisk[307] some 1,000 Ukrainian soldiers were murdered by Russian or Russian-backed forces.[308] Similarly, in February 2015, Ukrainian troops were forced to withdraw from the city of Debaltseve, located northeast of Donetsk, after a concerted Russian offensive to retake the city.[309] The facts tell that by the spring of 2015, at least 11,000 Russian troops were operating in Donbas, right after the Minsk II agreement was concluded.[310] The presence of significant numbers of Russian troops and arms on Ukrainian sovereign territory has since then been a more or less permanent feature of the conflict.[311]

Therefore, the interstate characteristic of the conflict in East Ukraine should be one of its defining features. If not for Russia's financial, organizational, and military support, it is quite dubious that the Donbas armed groups would have been in a position to maintain fighting over time and conduct complex operations on retaining control over large parts of Ukraine's territory.[312] This has also been acknowledged by current and former separatist leaders.[313] Moreover, recent reports illustrate that Russian generals are at the top of its proxy army.[314] In April 2020 further proof of weapon supply to armed groups from Russia - Long Range Land Attack Projectile - was documented and will be submitted to the ICJ and ICC as a piece of evidence.[315]

Numerous interviews and memoir entries of the LNR and DNR commanders or Russian servicemen present a picture of Russia's role in the unleashing and continuing of the war in Donbas.[316]

[305] Åtland, p. 128.
[306] Ibid.
[307] OHCHR, Report on the human rights situation in Ukraine 7 August–2 September 2014.
[308] Kyiv Post, 16 October 2014
[309] BBC Europe, Ukraine troops retreat from key town of Debaltseve, 18 February 2015 <https://www.bbc.com/news/world-europe-31519000>.
[310] Sutyagin, I. 2015. "Russian Forces in Ukraine." RUSI Briefing Paper, March 2015. https://rusi.org/sites/default/files/201503_bp_russian_forces_in_ukraine.pdf
[311] Åtland, p. 128.
[312] Ibid.
[313] One of them, Alexander Borodai, who held top positions in the DNR administration prior to the downing of Malaysian airliner MH17 on 17 July 2014, said the following in a recent interview (cited in Coynash 2019):
"I want to say that we are rather beholden to the President of the Russian Federation, Vladimir Putin. By "we" I mean the volunteers who arrived in 2014. We owe him that smallest of things – our lives. Everybody who arrived in the first half of 2014 remembers what the situation was like in the second half of July 2014. If not for his policy, if not for his decisions and actions, we would not be here. In the same way as that there would be no Russian Donbas, and no Donetsk and Luhansk People's Republics.", in Coynash, H. 2019. "Former Donbas Militant Leader Admits 'Republics' Exist because of Putin and Russia." Kharkiv Human Rights Protection Group, August 19. Web. Apr 21, 2020. <http://khpg.org/en/index.php?id=1565889311>.
[314] "'Fog' of Ukraine's War: Russian's Death in Syria Sheds Light on Secret Mission." Reuters -01-29 2018, : Apr 21, 2020 <https://www.reuters.com/article/us-russia-ukraine-syria-insight-idUSKBN1FI12I>.
[315] United Forces Operation Claimed the New Evidence of Russia's Participation in War in Donbas (Ukr. -В ООС заявили про нові факти участі Росії у війні на Донбасі, 17 April 2020, Apr 21, 2020 <https://www.pravda.com.ua/news/2020/04/17/7248421/>.
[316] Similarly, Alexander Zhuchkovsky, a close affiliate of Igor Girkin ("Strelkov"), who arrived in Slovyansk in April 2014, In his recent memoirs, he writes: "Russia . . . had to bring in forces, albeit unofficially. Had Moscow done that at the end of June or beginning of July, Slavyansk would still be under a Russian flag …Without Russian support, the militants would not have held out until the autumn. The long-awaited help arrived only in the middle of August", in Zhuchkovsky, A. G. 2018. 85 Days of Slavyansk (Rus. - 85 Dnei Slavyanska). Moscow: Chernaya sotnya, p. 260, cited in Åtland, p. 128.

Hence, three to the conflict in Eastern Ukraine are easily discernable: Russia, Ukraine, and the Donbas separatists, the latter presently represented by the LNR and DNR leaders. Despite vast evidence, Russia continues to deny its military engagement in the Ukrainian conflict.[317] The Minsk agreements include no mention to Russia as a party to the conflict and do not contain any specific obligations on de-facto belligerent state implementation goes.[318] Statement at the UN of Russia's UN Ambassador Vasiliy Nebenzya responding to questions on Russian commitment to fulfill Minsk agreements:

> "Every time, I urge you: read the document thoroughly. Don't keep repeating the memorized phrase that "Russia needs to fulfill the Minsk accords." Russia is not mentioned in them. We have talked about this so many times. It's absurd: Kyiv is sabotaging "Minsk," and tries to blame Moscow."[319]

While the Ukrainian government vouches for the peaceful reintegration of "de-occupation" of Eastern Ukraine, over which it has it has lost control.[320] Russia's main goal appears to be to maintain the conflict simmering with a view of obtaining "systemic, legitimized leverage over Kyiv through its de facto control of the Donbas."[321]

It is important to note, that the qualification of the conflict under national legislation does not influence the qualification under international law, in particular IHL.[322] The same applies to the legal definitions the state chooses to use. For instance, in Ukrainian legislation, the conflict in Donbas was defined as "anti-terrorist operation" (ATO),[323] and the proxy forces were called "terrorists", which first does not correspond with the international legal framework, and second, did not reflect the actual circumstances and complicated matters with the application of domestic law. In 2018 Ukraine changed its policy towards the conflict in East Ukraine and changed ATO format to "Joint Forces Operation on ensuring the national security and defense, rebuffing and deterring Russia's armed aggression in the territory of Donetsk and Luhansk regions of Ukraine".[324]

When it comes to the DNR and LNR leadership, it is important to discuss whether they should be seen as autonomous players in their own right or simply as Russian marionettes whose existence was and is dependent upon Russia's will and material support.

There is overwhelming evidence to suggest that the latter is the case.[325] In Minsk, separatist leaders[326] were interested in maximizing the political autonomy of the territories they

317 Ibid.
318 Åtland, p. 129.
319 Nezavisimaya Gazeta, #031 (7507) from 14 February 2019.
320 Åtland, p. 129.
321 Sushko, O. 2017. "Is There a Way Out of the Minsk Agreement Deadlock?" PONARS Eurasia Policy Memo, no. 474, p 2.
322 Ukrainian Helsinki Human Rights Union, webinar on 16 April 2020. Web. Apr 21, 2020. <https://helsinki.org.ua/articles/vidbulasia-onlayn-lektsiia-postiynoho-predstavnyka-prezydenta-ukrainy-v-avtonomniy-respublitsi-krym-antona-korynevycha/>.
323 Footnote 256.
324 Permanent Mission of Ukraine to the Intrnational Organizations in Vienna "Statement on "Russia's ongoing aggression against Ukraine and illegal occupation of Crimea". 3 May 2018. Web. Apr 21, 2020. <https://www.osce.org/permanent-council/380512?download=true>; on 18 January 2018 the Parliament of Ukraine adopted a law № 2268-VIII commonly known as the law "on de-occupation of Donbas". Web. Apr 21, 2020. <https://zakon.rada.gov.ua/laws/show/2268-19#n24>.
325 See above; see also - To the extent that DNR/LNR leaders held independent views about the specific terms and terminology of the Minsk accords, these appear to have been quickly realigned with Moscow's views, in Åtland, p. 129.
326 Alexander Zakharchenko (DNR) and Igor Plotnitskiy (LNR) were interested in maximizing the political autonomy of the territories they controlled. One of the many contentious issues discussed during the negotiations was the terms under which elections would be held in the areas controlled by the Russian/separatist forces. On this point, the side of the Ukrainian government prevailed, as article four of the Minsk II agreement made clear that elections in these areas were to be held "in accordance with Ukrainian legislation." This was a hard-to-swallow concession for the DNR and LNR representatives, who long refused to sign the final version of the document (International Crisis Group 2015, 3–4).

controlled. The Donbas conflict is undoubtedly a "blended conflict"[327]and it is taking place in a region where Russian interests and Russian power are pervading. The Russian government is consistently trying to frame the war as an intrastate conflict, whereas Ukraine is unfailingly perceiving it as international armed conflict and, progressively, as an occupation by another state.[328] In April 2020, the Ukrainian government has launched a website, dedicated to the current proceedings concerning Crimea and Donbas in international courts and tribunals.[329]

The complex nature of the conflict, and the parties' widely divergent views of what a peace settlement should look like, are in many ways, reflected in the terms, conditions, and wording of the Minsk II agreement.

In April 2020, OHCHR issued a statement condemning the increase in civilian casualties in the conflict zone in Eastern Ukraine, especially those caused by the shelling and fire, which in March 2020 were equal to the total number of casualties over preceding five months.[330] Office of the UN High Commissioner for Human Rights continues to closely monitor the conflict[331] and the end to it is not visible.

Ukraine often is used to illustrate the phenomena of the parallel armed conflicts[332] – IAC and NIAC. Currently, the Russian occupation of the Crimea, which is not analyzed in the present work, is defined as an international armed conflict[333] and a non-international armed conflict in the Donbas regions.[334] The complexity and inextricable links between the parties of conflict led to some scholars proposing to separate the occupation and civil war and treat them as different conflicts as the only feasible way to establish the rights, duties, and responsibilities of the participants and protect human rights.[335] "This theoretical pulling apart of the conflicts thus allows for the application of the law despite the confusing amalgamation of state and

[327] Tettiana Malyarenko, Stefan Wolff. The Dynamics of Emerging De-Facto States: Eastern Ukraine in the Post-Soviet Space. 2019. London: Routledge, p. 3.
[328] On 18 January 2018 the Parliament of Ukraine adopted a law № 2268-VIII commonly known as the law "on de-occupation of Donbas" (Закон Україні "Про особливості державної політики із забезпечення державного суверенітету України над тимчасово окупованими територіями в Донецькій та Луганській областях"), where the Preamble states that Russia is committing a crime of aggression, and in following articles the Russian Federation is defined as an aggressor state, committing armed aggression and an occupying state, relying on international law (e.g. Article 5 paras 3 and 4, Article and 8). Web. Apr 21, 2020. <https://zakon.rada.gov.ua/laws/show/2268-19#n24>.
[329] "Lawfare". Web. Apr 21, 2020. <https://lawfare.gov.ua/>.
[330] Statement by Ms Matilda Bogner Head of the UN Human Rights Monitoring Mission in Ukraine of 9 April 2020. Web. Apr 21, 2020. <http://www.un.org.ua/en/information-centre/news/4873-on-the-increase-in-civilian-casualties-in-the-conflict-zone-of-eastern-ukraine-statement-by-ms-matilda-bogner-head-of-the-un-human-rights-monitoring-mission-in-ukraine?fbclid=IwAR2z79E1XRlSKADxe63Rvv66aj6IITs2A1raNPzYC4HpXzR3xziKw_UJ6UU>.
[331] OHCHR, Conflict-related civilian casualties in Ukraine, March 2020. Web. Apr 21, 2020. <http://www.un.org.ua/en/information-centre/news/4871-conflict-related-civilian-casualties-in-ukraine-march-2020#a1>.
[332] See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 219 (June 27) (finding that both an international and non-international conflict were simultaneously taking place in Nicaragua). See also James Summers, Introduction to Caroline Harvey et al. eds. Contemporary Challenges to the Law of War: Essays in Honour of Professor Peter Rowe, 2014. Cambridge: Cambridge University Press. (noting that a simultaneous international and non-international armed conflict was found to exist in Nicaragua as there were "hostilities between the Nicaraguan government and the Contra rebels within the country and external intervention by the USA."). The International Criminal Court (ICC) came to a similar conclusion in the Uganda case. See *Prosecutor v. Dyilo,* Case No. ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, TT 563-67 (Mar. 14, 2012). Web. Apr 21, 2020. <https://www.icc-cpi.int/CourtRecords/>.
[333] See Geneva Convention II, supra note 156, art. 2.
[334] Shane R. Reeves & David Wallace, The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict, 91 INT'L L. STUD. 361, p. 383. Web. Apr 21, 2020. <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1321&context=il>, "The occupation of Crimea and the non-international armed conflict in eastern Ukraine, though inextricably linked, remain best viewed as parallel international and non-international armed conflicts."
[335] David Wallace, Amy McCarthy, and Shane R. Reeves. *Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict.* 25 Vol. , 2017. Web. P. 583.

non-state actors involved in the fighting".[336] The author, however, does not agree with this suggestion, since this artificial separation does not in any way assist in filling the accountability gap.

5) Case in the ICC

The Ukrainian situation has been under preliminary examination since 25 April 2014.[337] On 6 December 2019, the International Criminal Court (ICC) for the sixth year in a row issues its preliminary findings that "that the information available provides a reasonable basis to believe that, in the period from 30 April 2014 onwards" a number of war crimes have been committed in East Ukraine.[338] The OCP proceeds to note the following:

> The intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine had reached a level that would trigger the application of the law of armed conflict and that the armed groups operating in eastern Ukraine, including the LPR and DPR, were sufficiently organized to qualify as parties to a non-international armed conflict. The Office also assessed that direct military engagement between the respective armed forces of the Russian Federation and Ukraine, indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.[339]

On the release of the first ICC report, including the issue of Ukraine conflict in 2016, Russia announced its withdrawal from the ICC because it "failed to meet the expectations to become a truly independent, authoritative international tribunal."[340]

The ICC report disproves the Russian narrative of the Ukrainian conflict, which paints Russia as an innocent bystander. Following the ICC report and Russia's enraged withdrawal from the international tribunal, there should be no further reference to "civil war," "separatists," or "insurgents." Instead, the conflict that has claimed over 11,000 lives is an "international armed conflict between Russia and Ukraine."[341] There is also an opinion that was deeming Russia a party to the conflict should result in depriving Russia of a "peacemaker" seat in negotiations in Minsk.[342] The ICC report is especially inconvenient for the Kremlin as it tries to promote its parallel-reality version of the Ukraine conflict to the international community.

In the Donbas region of Ukraine, Russian proxies have been fighting since the spring of 2014. The proxies embody as Russian-aligned Ukrainian separatists, secured their presence and activity in eastern Ukraine, and with Russia's support have managed to retain quasi-independence from the government in Kyiv. While direct Russian military involvement in the conflict is manifest, up to date, no one bore international or criminal responsibility for killing

[336] See Solis, supra note 163, at 149 (discussing the significant practical and policy consequences flowing from battlefield determinations). In Wallace et al., p. 583.
[337] For the timeline, see International Criminal Court, Preliminary examination. Ukraine. Web. Apr 21, 2020. <https://www.icc-cpi.int/ukraine>.
[338] International Criminal Court, Report on Preliminary Examination Activities 2019, paras 279-280. Web. Apr 21, 2020. <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.
[339] International Criminal Court, Report on Preliminary Examination Activities 2019, para 266. Web. Apr 21, 2020. <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.
[340] "Russia quits International Criminal Court, Philippines may follow", CNN, 17 November 2016. Web. Apr 21, 2020. <https://edition.cnn.com/2016/11/16/world/russia-quits-international-criminal-court/index.html>.
[341] Gregory, Paul Roderick. "International Criminal Court: Russia's Invasion Of Ukraine Is A 'Crime,' Not A Civil War." *Forbes.* Nov 20, 2016. Web. Apr 21, 2020 <https://www.forbes.com/sites/paulroderickgregory/2016/11/20/international-criminal-court-russias-invasion-of-ukraine-is-a-crime-not-a-civil-war/>.
[342] Ibid.

over 13,000 Ukrainians in Eastern Ukraine and wounding an additional 31,000 by Russian forces, proxies as well as its own military, the total number of casualties around 44,000.[343]

[343] Report on the Human Rights Situation in Ukraine, November 16, 2019 to February 15, 2020 (New York: Office of the United Nations High Commissioner for Human Rights, 2020, para 31. Web. Apr 21, 2020. <https://www.ohchr.org/Documents/Countries/UA/29thReportUkraine_EN.pdf>.

2. Syria: the biggest human disaster

> "Humanity has been undergoing a trial of fire and blood in Syria since 2011. What is happening? Over time, this conflict has exhibited all possible guises of war: civil war, proxy war, siege warfare, cyber-warfare and war against terror. All forms of past and present warfare seem to converge in this one conflict."[344]

This quote by the International Review of the Red Cross' Editor-in-Chief Vincent Bernard serves as a very good introduction and, at the same time, showcasing the complexity and importance of this war.

A case study of Syria was chosen due to the scope of the destruction and human rights atrocities and the significance of this conflict as a new paradigm of war.

1) Overview

The war in Syria has lasted for over nine years and resulted in a massive loss of life and total destruction. Almost all peace efforts undertaken to date were hindered from the beginning, and there is growing disbelief that the conflict will reach a settlement in the near future. This disturbance has provoked a demand in the international community as well as among states and non-governmental organizations for specific and tangible that can contribute to greater protection of human rights and obedience of international law principles.[345]

While political negotiations delivered no results, with IHL repeatedly disregarded and assistance by international humanitarian organizations mainly restricted, the crisis in Syria has led to fatigue and frustration across the international community. The loss of human life in this war is extensively considered to be unprecedented among civil wars[346] and a danger to international peace and security.[347] Nevertheless, the parties to the conflict have continuously ignored the binding UN Security Council decisions demanding respect for international law.[348] While so scarce opportunities for peace appear to exist currently, any concrete and practical developments or measures that could alleviate the human cost and ensure compliance with international law in Syria are desperately needed.[349]

Whereas there is no common agreement on the death toll numbers, a New York Times piece issued in April 2018 puts the most widely accepted death count at 470,000.[350] By April 2020,

[344] Vincent Bernard. *Editorial: Conflict in Syria: Finding hope amid the ruins.* 99 Vol. , 2019. Web. <doi:10.1017/S181638311800032>, p. 865.
[345] Polina Levina Mahnad. *Protecting cultural property in Syria: New opportunities for States to enhance compliance with international law?*. 99 Vol. , 2019. Web. <doi:10.1017/S181638311800032>, p. 1037
[346] Max Fischer, Syria's Paradox: Why the War Only Ever Seems to Get Worse, New York Times, 26 August 2016, in Majnad, p. 1037.
[347] Syria's brutal war threatens international peace and security, says UN rights panel, -08-27 2014, Apr 21, 2020 <https://news.un.org/en/story/2014/08/476012-syrias-brutal-war-threatens-international-peace-and-security-says-un-rights>.
[348] UNSC Res. 2139, 22 February 2014, para. 6, demanding that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners across conflict lines and across borders; UNSC Res. 2268, 26 February 2016, para. 1, endorsing a cessation of hostilities agreement aimed at ending five years of conflict; UNSC Res. 2401, 24 February 2018, para. 1, demanding the cessation of hostilities without delay by all parties for a durable humanitarian pause for at least thirty consecutive days throughout Syria.
[349] Mahnad, p. 1037.
[350] Megan Specia, "How Syria's Death Toll Is Lost in the Fog of War", The New York Times, 13 April 2018, Web. Apr 21, 2020. <www.nytimes.com/2018/04/13/world/middleeast/syria-death-toll.html>. The Syrian Observatory for Human Rights, based in the UK, reports a figure of 511,000 people killed between March 2011 and March 2018; see Angus McDowall, "Syrian Observatory Says War Has Killed More Than Half a Million', Reuters, 12 March 2018. Web. Apr 21, 2020. <www.reuters.com/article/us-mideastcrisis-syria/syrian-observatory-says-war-has-killed-more-than-half-a-million-idUSKCN1GO13M>.Other sources provide smaller figures; see, for example: "Monthly Statistical Report on Casualties in

the number of dead is reported to be as high as 590,000, and an additional 2 million civilians severely injured or handicapped.[351]

UNICEF reports that is spring 2018, nearly 30,000 people were wounded every month, 1.5 million permanently handicapped, 6.5 million were starving, and 70% of the population was living in extreme poverty. 1.75 million children were deprived of schooling, with one out of every three schools used for the war purposes.[352]

The repercussions of the war in Syria are being felt well outside the state's borders. This is most evident in the destiny of the 12-13 million Syrians who have had to flee the country. 5,5 million refugees are registered, are reported by UNHCR.[353] UN Inquiry Commission in the spring 2020 report "unprecedented levels of displacement and dire conditions for civilians."[354] Their fate now rests with their host countries, who themselves are deeply divided in their view of how to handle a mass influx of asylum seekers and what protection they are entitled to or what the state is ready to offer. The latter caused a refugee crisis striking the European continent in 2015.[355] Some predict the recurrent of the refugee crisis in 2020.[356] Apart from the international community divisions that the Syrian war has exposed, the engagement of both regional and great powers in support of either party to the conflict has turned the Syrian people into hostages of conflicting interests with which they have little to do.[357] The turmoil in Syria has gave rise to violent activities by various local and transnational armed groups acting both within the state's borders and in different places of the world, where separate individuals or terrorist groups are attacking in their name.[358]

The most recent report of the UN Commission of Inquiry on Syria concluded that after nine years of war, Syrian women, children, and men continue to face unprecedented levels of suffering and pain.[359] Belligerent parties continue to neglect international law and humanitarian principles and refuse protection to vulnerable civilians, including unhindered humanitarian assistance.[360]

2) Parties to the conflict

With such complex picture as exists in Syria at present, classifying the conflict is not a purely academic exercise, but rather a prerequisite to establishing the legal duties of parties engaged

Syria – March 2018", Violations Documentation Center in Syria, 2018. Web. Apr 21, 2020. <http://vdc-sy.net/wpcontent/uploads/2018/04/Monthly_Stat_Rep_Mar18_EN.pdf>.

[351] The Syrian Observatory for Human Rights, 14 March 2020. Web. Apr 21, 2020. <http://www.syriahr.com/en/?p=157193>.

[352] UNICEF numbers (gathered with WHO and Handicap International) as of March 2018. Web. Apr 21, 2020. <www.unicef.org/mena/stories/seven-years-war-syria-numbers>.

[353] UNHCR, Situations, Syria Regional Refugee Response. Web. Apr 21, 2020. <https://data2.unhcr.org/en/situations/syria>.

[354] UN OHCHR, UN Commission of Inquiry on Syria: Unprecedented levels of displacement and dire conditions for civilians in the Syrian Arab Republic. 2 March 2020. Web. Apr 21, 2020. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25638&LangID=E>.

[355] "EU Migration: Crisis in Seven Charts." BBC News -03-04 2016, : Apr 22, 2020 <https://www.bbc.com/news/world-europe-34131911>.

[356] "Europe Hopes Brutality at the Border Will Keep Refugees Away." The Economist Mar 12, 2020: Apr 21, 2020 <https://www.economist.com/europe/2020/03/12/europe-hopes-brutality-at-the-border-will-keep-refugees-away>.; "2020 Could See A Renewed Refugee Crisis In Europe", Forbes, Dec 31, 2019. Web. Apr 21, 2020. <https://www.forbes.com/sites/alasdairlane/2020/12/31/2020-could-see-renewed-refugee-crisis-in-europe/#441406805b0a>.

[357] Bernard, p. 865.

[358] Bernard, p. 866.

[359] UN Commission of Inquiry on Syria: Unprecedented levels of displacement and dire conditions for civilians in the Syrian Arab Republic, 2 March 2020. Web. Apr 22, 2020. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25638&LangID=E>.

[360] Ibid.

in the hostilities. By distinctly identifying these obligations, conflict participants become formally bound by the deep-rooted humanitarian principles and rules of international law, as well as become responsible for any grave violations of human rights or committing of international crimes.

Classifying the Syrian war is thus a required first step towards decreasing the inhumaneness of the conflict and upholding those participants who disregard their legal obligations liable, thus striving to promote humanity and accountability.[361]
The warfare in Syria has developed into a disordered clash between a variety of state and non-state armed groups. This perplexing background makes classifying the conflict exceptionally challenging.[362] It is hence essential to recognize the main participants in the hostilities to correct the conflict properly.[363]

a. Free Syrian Army (FSA)

It was formed in 2011 by the absconding Syrian army officers,[364] and later grew into an umbrella organization which is comprised of numerous Syrian rebellious groups, subjugated to leading insurgent rebel group Supreme Military Council.[365] The United States and other nations have been for several years, training them and supported them with money and weapons.[366] The FSA has faced severe accusations of war crimes, in particular, Human Rights Watch has alleged that FSA has been using child soldiers,[367] kidnapping civilians,[368] as well as directing indiscriminate shelling of densely inhabited areas.[369]

b. Islamic Front

Seven Islamist rebel groups in 2013 joined forces to become the Islamic Front. Evidence of foreign state funding for this group is limited, and the group almost certainly depends largely on private support.[370]

c. Hay' at Tahrir al-Sham (formerly Jabhat al-Nusra) has roots in Al Qaeda in Iraq (AQI)

d. ISIS

The Islamic State (formerly AQI), also known as the Islamic State in Iraq and Syria (ISIS or ISIL), is an armed Islamic organization mainly located in Syria and Iraq. It has a highly

361 Wallace et al., p. 557.
362 See generally *Prosecutor v. Tadić,* Case No. IT-94-1-A, Appeals Judgment (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999) (highlighting the difficulty of prosecuting individuals when an internal and international armed conflict are taking place simultaneously).
363 Wallace et al., p. 557.
364 Christopher Phillips, After the Arab Spring: Power Shift in the Middle East?: Syria's Bloody Arab Spring, London School of Economics and Political Science. 37, 38 (2012). p. 40. In Wallace et al., p. 559.
365 A New Free Syrian Army Leadership, Apr 4, 2014, Apr 21, 2020 <https://carnegie-mec.org/diwan/55245>., in Wallace et al., p. 562.
366 Julian Borger & Nick Hopkins, West Training Syrian Rebels in Jordan, the Guardian, Mar. 8, 2013, <http://www.theguardian.com/world/2013/mar/08/west-training-syrian-rebels-jordan>, in Wallace et al., p. 563.
367 Syria: Armed Groups Send Children into Battle, -06-22 2014, Apr 21, 2020 <https://www.hrw.org/news/2014/06/22/syria-armed-groups-send-children-battle>.
368 Syria: Armed Opposition Groups Committing Abuses, -03-20 2012, Apr 21, 2020 <https://www.hrw.org/news/2012/03/20/syria-armed-opposition-groups-committing-abuses>. In Wallace et al., p. 564.
369 "He Didn't Have to Die" | Indiscriminate Attacks by Opposition Groups in Syria, -03-22 2015, Apr 21, 2020 <https://www.hrw.org/report/2015/03/22/he-didnt-have-die/indiscriminate-attacks-opposition-groups-syria>.
370 Aron Lund, The Politics of the Islamic Front, Part 1: Structure and Support, Carnegie Endowment for International Peace, Jan. 14, 2014. Web. Apr 21, 2020. <http://carnegieendowment.org/syriaincrisis/?fa=54183>. In Wallace et al., p. 565.

organized command structure and gathers sufficient income from its subjugated areas, making it one of the richest terror organizations.[371] ISIS has been engaged in many violent confrontations with different rebel Syrian groups, Kurdish units, the Syrian army, and Hezbollah. It is a violent extremist group, committed intentional killings of thousands of civilians, including public decapitations of prisoners.[372]

e. Kurdish Popular Protection Units

Not tied with any party to the conflict, the Kurdish people are the largest stateless nation, with their population spread out in Turkey, Iraq, Iran, and Syria.[373]

f. Syrian Armed and National Defense Forces (NDF)

Government's conventional armed forces constituted over 250,000 before 2011, but have diminished to 125,000 after almost six years of fighting,[374] due to casualties and desertions.[375] Unconventional forces and paramilitaries amount to 125,000.[376] The Syrian army is accused of committing numerous war crimes, including arbitrary deprivations of liberty, torture and indiscriminate killing.[377] Additionally, the Syrian Armed Forces have depleted chemical weapons and barrel bombs against insurgent groups and civilians throughout the conflict, causing the international community to be outraged by tactics."[378]

g. Allies of Syria: Russia, Iran, & Hezbollah

The Syrian government receives substantial support from Russia in the form of arms, reinforced vans, telecommunications and surveillance equipment, drones, guided missiles, as well as in-country military advisors.[379] Iran's contribution is also substantial, with state allegedly having sent billions in financial aid,[380] arms, technology[381] and its own Revolutionary Guard to fight side by side with the governmental military.[382] Hezbollah is a longtime supporter of the presidential party has sent thousands of combatants to boost the Syrian army.[383]

[371] How ISIS Works, New York Times, Sep. 16, 2014. Web. Apr 21, 2020. <http://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html>.
[372] Muhammad Al-'Ubaydi Et Al., Combating Terrorism Ctr. at West Point, The Group that Calls Itself a State: Understanding the Evolution and Challenges of the Islamic State 18, 2014, p. 87, in Wallace et al., p. 567.
[373] Michael M. Gunter. *The Kurds in Syria: The Forgotten People Kerim Yildiz.* 60 Vol. Middle East Institute, 2006. Web.
[374] Anne Barnard et. al., An Eroding Syrian Army Points to Strain, New York Times, Apr. 28, 2015. Web. Apr 21, 2020. <https://www.nytimes.com/2015/04/29/world/middleeast/an-erodingsyrian-army-points-to-strain.html>.
[375] Ibid; for the recent numbers see Syria Military Strength (2020). Web. Apr 21, 2020. <https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=syria>.
[376] Ibid.
[377] World Report 2020: Events in Syria in 2019, -12-13 2019, Apr 22, 2020 <https://www.hrw.org/world-report/2020/country-chapters/syria>.
[378] Anne Barnard et. al., An Eroding Syrian Army Points to Strain, New York Times, Apr. 28, 2015. Web. Apr 21, 2020. <https://www.nytimes.com/2015/04/29/world/middleeast/an-erodingsyrian-army-points-to-strain.html>.
[379] "Exclusive: Russia Steps Up Military Lifeline to Syria's Assad - Sources." Reuters -01-17 2014, : Apr 21, 2020 <https://www.reuters.com/article/us-syria-russia-arms-idUSBREA0G0MN20140117>.
[380] "Syria Central Banker Says Iran Weighs $1 Billion Credit Line." Bloomberg.com -05-05 2015, : Apr 21, 2020 <https://www.bloomberg.com/news/articles/2015-05-05/syria-central-banker-says-iran-weighs-1-billion-credit-line>.
[381] Treasury Designates Iranian Ministry of Intelligence and Security for Human Rights Abuses and Support for Terrorism, U.S. Department of Treasury, Feb. 16, 2012. Web. Apr 21, 2020. <http://www.treasury.gov/presscenter/press-releases/Pages/tgl424.aspx>.
[382] Karl Vick. *Nobody here but us Syrians: Why Iran persists in denying it has troops in the civil war.*, 2014. Web. Apr 21, 2020.
[383] Nicholas Blanford, "Why Iran is standing by its weakened, and expensive, ally Syria," Christian Science Monitor April 27, 2015: Apr 21, 2020 <https://www.csmonitor.com/World/Middle-East/2015/0427/Why-Iran-is-standing-by-its-weakened-and-expensive-ally-Syria>.

h. The U.S. and other International Actors

The United States, as briefly mentioned above, has been providing Syrian insurgent groups since the start of the conflict. Jordan, France, and the U.K. have amalgamated with the U.S. to create training capacities for non-Islamist insurgents in Jordan.[384] The U.S. and its associates, including Australia, U.K, France, Saudi Arabia, Bahrain, Jordan, and the U.A.E., have been carrying out airstrikes against ISIS in Syria in 2014, targeting personnel, equipment and buildings.[385] Turkey has also had a fundamental role in the Syrian conflict, having been involved in numerous border engagements with Kurdish forces and ISIS.[386] Last but not least, Israel has conducted airstrikes in Syria since the start of the conflict.[387]

The extensive variety of non-state and state actors engaged in Syria listed above makes classifying the conflict under the conventional normative framework distinctively difficult.[388] It is even more so when attempting to prove enduring intra-state violence between Syria's army and an array of non-state armed groups, together with the hostilities between opposing non-state armed groups, has crossed the threshold to be regarded as internationalized armed conflict in the absence of clear guidance how to do so. Moreover, the variety of state actors involved in Syria makes the violence increasingly internationalized and thus leaning towards an international armed conflict.[389]

3) Masters of clandestinity

Due to the continuous nature of the hostilities combined with the level of organization of certain armed groups, it is evident that a non-international armed conflict currently exists in Syria.[390] This assessment is corroborated by both a report by the United Nations Human Rights Council (UNCHR), stating "the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict."[391] and findings of the ICRC.[392] In reality,

[384] Isis news: British soldiers in Jordan and Turkey training rebels to fight Islamic State and Bashar al-Assad, -05-19 2015, Apr 21, 2020 <https://www.ibtimes.co.uk/isis-news-british-soldiers-jordan-turkey-training-rebels-fight-islamic-state-bashar-al-assad-1502017>.

[385] 7 countries have entered the fight against ISIS, Jan 20, 2016, Apr 21, 2020 <https://www.businessinsider.com/7-countries-have-entered-the-fight-against-isis-2016-1>. As of January 2016, the coalition has conducted over 6,000 airstrikes in Syria, the majority of which were carried out by the U.S.); Operation Inherent Resolve: Targeted Operations Against ISIS Terrorists, U.S. Department of Defence, Feb. 16, 2012. Web. Apr 21, 2020. <http://www.defense.gov/News/SpecialReports/0814_Inherent-Resolve>.

[386] Tim Arango, Turkey Confirms Strikes Against Kurdish Militias in Syria, New York Times, Oct. 27, 2015. Web. Apr 21, 2020. <https://www.nytimes.com/2015/10/28/world/europe/turkey-syria-kurdish-militias.html>.

[387] Isabel Kershner, Israel Will Never Give Golan Heights to Syria, Netanyahu Vows, New York Times, Apr. 17, 2016. Web. Apr 21, 2020. <https://www.nytimes.com/2016/04/18/world/middleeast/israel-will-never-give-golan-heights-to-syria-netanyahu-vows.html>. Prime Minister Netanyahu stated that "Israel had carried out 'dozens' of [air]strikes across the Syrian [border] ... to prevent Hezbollah from obtaining advanced weapons".

[388] See generally *Tadić (Appeal Judgement*), highlighting the difficulty of prosecuting individuals when an internal and international armed conflict are taking place simultaneously). However, the law of armed conflict is not an overly complicated body of law. It encapsulates certain straightforward, but critically important principles for regulating warfare such as the fundamental prohibition on attacking noncombatants; the essential obligation of combatants to attack only by lawful means and methods; the overarching requirement to treat individuals in captivity humanely; and the meta-principle compelling the protection of the victims of war such as prisoners of war, the wounded and sick and civilians, in Wallace et al., p. 570. See, e.g., Marco Sassòli, et al. *How does law protect in war? : cases, documents and teaching materials on contemporary practice in international humanitarian law.* 3., expanded and upd. ed. ed. ICRC, 2011. Web.

[389] Wallace et al., p. 574.

[390] Wallace et al., p. 589.

[391] U.N. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Twenty First Session, para. 12, U.N. Doc. A/HRC/21/50, Aug. 16, 2012. Web. Apr 21, 2020. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/160/66/PDF/G1216066.pdf?OpenElement>. The report specifically cited "the increased organizational capabilities of the FSA."

[392] See Stephanie Nebehay, Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes, Reuters, July 14, 2012, Web. Apr 21, 2020. <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86DO9H20120714> (categorizing the conflict in Syria as a non-intenational armed conflict).

there are multiple non-international armed conflicts singe hostilities are no longer exclusively between the Syrian government and anti-government groups, but also involves protracted violence between various organized non-state armed actors.[393]

Concerning classifying Syrian was as an international armed conflict, international powers engaged in Syria, including the United States, Russia, Turkey, Saudi Arabia, Israel, Iran, have largely avoided open confrontation.[394] There are a few outstanding exceptions, for instance, Israel and Syria remain in an international armed conflict that began in 1967 and has resulted in the continual belligerent occupation of the Golan Heights for the last over forty years.[395] Israel has silently conducted strikes against both the Syrian regime and non-state armed groups from the outset of the present Syrian conflict.[396]

The majority of states involved have made deliberate efforts to avoid state-on-state confrontations. Instead, they are rather interested in influencing the conflict by providing support to either the Syrian government or non-state actors.[397]

Russia and Iran are the most dedicated supporters of the Syrian state,[398] but their backing to a state actor fighting non-state armed groups does not change the characterization of the conflict.[399] In contrast, a number of other states openly supporting non-state armed groups.[400] This assistance has included providing weapons, military training, financial support, and even airstrikes.[401] It is important to remember that mere providing assistance is not sufficient to "internationalize" otherwise internal armed conflict; a state must have "overall control" of the rebel group.[402] State practice illustrates that the overall control threshold is high, and the evidence in support of such control must be compelling.[403] Nonetheless, there is no evidence that any state is directing or planning the military operations non-state armed groups in Syria, who seem to be independent actors. Academics claim that since no country is presently exercising a sufficiently high degree of control over armed groups, the war in Syrian has not yet been "internationalized" through rebel groups.[404]

A separate example is instructive to consider in a proxy war context, in particular, the Turkish-Syrian border, which has been a battlefield for many airstrikes - between Syria and Turkey in

393 Again, hostilities between rival non-state armed groups within a state may also amount to a non-international armed conflict. See *Tadić (Appeal Judgment),* para 70. See also Terry D. Gill, Classifying the Conflict in Syria, 92 INT'L L. STUD. 353, 363-64 (2016) (noting that "a minimum degree of organization [is] sufficient"), pp. 374-76 (stating there exists three non-international armed conflicts in Syria).
394 Wallace et al., p. 591.
395 What Now for the Golan Heights?, -01-27 2016, Apr 21, 2020 <https://www.lawfareblog.com/what-now-golan-heights>.
396 See, e.g., Adam Chandler, Report: Israel Strikes Target in Syria...Again, The Atlantic, Nov. 11, 2015. Web. Apr 21, 2020. <http://www.theatlantic.com/international/archive/2015/11/report-israel-strikes-target-in-syria/415446/>.
397 Wallace et al., p. 592.
398 See supra notes 119-128 and accompanying text in Wallace et al.
399 Wallace et al., p. 592.
400 Wallace et al., p. 592. See supra notes 62-95 and accompanying text.
401 "Syria Crisis: Where Key Countries Stand." BBC World -10-30 2015, : Apr 21, 2020 <https://www.bbc.com/news/world-middle-east-23849587>.
402 *Tadić (Appeal Judgement),* paras. 131, 137.
403 Wallace et al., p. 292; Yoram Dinstein. *Concluding Remarks on Non-International Armed Conflicts.* 88 Vol. , 2012a. Web. P. 411, noting that rebel group must be considered the de facto organs of the intervening state. It is worth repeating that states can provide assistance in the form of provisions, weapons, and other logistical support without crossing this threshold. See generally Yoram Dinstein. *War, aggression and self-defence.* 5. ed. ed. Cambridge Univ. Press, 2012b. Web. discussing the ambiguity of the "overall control" test), pp. 221-24.
404 Wallace et al., p. 593.

2012,[405] and between Turkey and Russia in 2015.[406] While many of these engagements meet the requisite criteria to trigger an international armed conflict, the involved states have avoided escalating violence and, in the situation of Turkey and Russia, have gone so far as to give an apology for the incident.[407]

4) Developments of 2019

Especially most recent events of 2019, as well as developments on the Turkish-Syrian border at the end of the mentioned year, brings the problem of proxy wars to light, to be considered in greater detail.

The United States has continuously conducted airstrikes against ISIS in northeast Syria, as part of the coalition, and provided monetary and logistical support to the Syrian Democratic Forces. On 6 October 2019, President Trump unexpectedly declared the withdrawal of US troops from Syria, giving the way for Turkey's military offecsive against the Kurds.[408] He also informed the world that Turkey would shortly be commencing operation in the north of the Syrian Arab Republic, enacted on nine by President Erdogan who announced the launch of Operation Peace Spring by the Turkish Armed Forces, together with the Syrian National Army,[409] Turkish powers, reinforced by the Syrian National Army, began attacking Kurdish people.[410]

On 22 October, Turkish President and Russian President signed a memorandum to expel the mostly Kurdish Syrian Democratic Forces (SDF) from northern Syria,[411] which enabled Russian military police and Syrian border guards to enter Turkish-Syrian border areas and facilitate the removal of elements of the Kurdish People's Protection Units.[412]

Historically, Turkey and Russia have been on opposite sides of the Syrian war: Moscow backs Syrian president Assad and Turkey has supported the anti-regime opposition.[413] And here, Turkey's and Russia's interests aligned.[414]

Turkey caused Russia's reappearance in the conflict, long a NATO member and Western ally, realigned its political vectors more towards Russia.[415] Russia is named by many as the "only

[405] See Stack, Liam Stack, Turkey Vows Action After Downing of Jet by Syria, New York Times, Jun. 23, 2012. Web. Apr 21, 2020. <http://www.nytimes.com/2012/06/24/world/middleeast/turkey-promisesretaliation-in-response-to-downing-of-military-jet-by-syria.html>, in Wallace et al., p. 572.
[406] See Nissenbaum et al., Turkey Shoots Down Russian Military Jet, Wall Street Journal, Web. Apr 22, 2020. <http://www.wsj.com/articles/turkey-shoots-down-jet-near-syria-border-1448356509>, in Wallace et al., p. 573.
[407] See Syria Crisis: Where Key Countries Stand.
[408] World Report 2020: Syria.
[409] On 4 October representatives of various Syrian armed opposition groups announced their formal unification under the umbrella of the Syrian National Army. See A/HRC/42/51, para. 16.
[410] UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A_HRC_43_57_AEV, 2 March 2020. Web. Apr 21, 2020. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_43_57_AEV.docx>, para 12
[411] Reese Erlich. Russia Is the Only Winner in Syria., 2019. Web. Apr 21, 2020. <https://foreignpolicy.com/2019/10/30/russia-is-the-only-winner-in-syria/>.
[412] The memorandum laid out that, starting 23 October 2019, Russian military police and Syrian border guards would enter the Syrian side of the Turkish-Syrian border, outside the area of Operation Peace Spring, to facilitate the removal of elements of the Kurdish People's Protection Units and their weapons.
[413] However, they've been working together in the Astana process — basically a peace process between Russia, Iran (allies of the Syrian government), and Turkey to end the war.
[414] Turkey wanted to secure this buffer zone and evict the Kurds. Russia wants to consolidate the territorial gains for Assad in the region and prove that it's the powerbroker in the region. So after hours of talks on Tuesday, Erdoğan and Putin emerged with a deal that would secure a 20-mile buffer zone into northern Syria near the Turkish border, in What really happened in Syria over the past 24 hours, explained, -10-23 2019, Apr 21, 2020 <https://www.vox.com/world/2019/10/23/20928618/syria-news-trump-putin-erdogan-kurds>.
[415] Russia Is the Only Winner in Syria.

winner in Syria."[416] Interestingly, the Russian army boasted of its critical role. "When the Russian flag appears, combat stops—neither Turks nor Kurds want to harm us, so fighting stops thanks to our work," a Russian officer told the news agency.[417]

Similarly, Trump declared victory and made clear that Syria is no longer America's problem: "[l]et someone else fights over this long bloodstained sand."[418] On 20 December 2019, President Trump signed into law the Senate Bill "Caesar Syria Civilian Protection Act," establishing sanctions against the Syrian government and any other actors that are "responsible for or complicit in human rights abuses committed against citizens of Syria or their family members."[419]

Despite the announcement by the Russian Federation of the complete withdrawal of the Kurdish People's Protection Units, clashes between Turkish forces and Kurdish groups, as well as the Syrian army and Turkish-backed forces, continued.[420]

The Syrian-Russian forces launched hundreds of attacks every day in 2019, widely spread out, including self-made "barrel bombs" - against schools, private houses, hospitals, destroying entire towns in the area and killing civilians and children.[421]

Moreover, the Syrian-Russian joint forces killed 20 civilians in one strike on a displacement compound situated in Idlib, Hass. This action was unlawful and constituted a war crime.[422] Syrian-Russian alliance also destroyed or rendered inoperable over 50 health facilities only in northwest Syria in 2019.[423]

With regard to the military offensive and aerial campaign in northeast Syria in 2019, the UN Commission of Inquiry on Syria noted:" [t]he last thing Syrians need now is a new wave of violence."[424] As of spring 2020, this branch of conflict was still escalating, Germany threatening to impose sanctions on Russia like it did in the Ukrainian conflict.[425]

Events in Syria of 2019 reiterated the conclusion that human rights violations and atrocities inherent to the conflict in Syria "continued to be the rule, not the exception".[426]

In his address to the Human Rights Council, Chair of the UN Commission highlighted:

> Now, in its ninth year, the armed conflict in Syria has been a study in crisis and missed opportunities. As parties to this conflict have repeatedly pursued military objectives, whatever the cost, civilian lives have been callously abused and lost. Meanwhile, civilians have suffered indiscriminate bombing, shelling, detention, torture, and death. […] In areas

[416] Ibid.
[417] Ibid.
[418] What really happened in Syria over the past 24 hours, explained.
[419] UN Inquiry Report, para. 15.
[420] UN Inquiry Report, 2 March 2020, para. 14.
[421] World Report 2020: Syria.
[422] World Report 2020: Syria.
[423] Russia and Syria targeted hospitals using coordinates these facilities had shared with Russia through a United Nations deconfliction mechanism, according to Physicians for Human Rights and other humanitarian groups. On August 1, the United Nations announced that UN Secretary-General Antonio Guterres would launch an investigation into hospital attacks in Syria, in World Report 2020: Syria.
[424] UN Commission of Inquiry on Syria: A new wave of violence is the last thing Syrians need, Geneva, 10 October 2019. Web. Apr 21, 2020. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25123&LangID=E>.
[425] "German Minister Moots Sanctions on Russia Over Syria." Reuters -03-04 2020, : Apr 21, 2020 <https://www.reuters.com/article/us-syria-security-russia-germany-idUSKBN20R131>.
[426] World Report 2020: Syria.

> beyond Government control, the flagrant absence of the rule of law and the fragile security situation have fostered an environment conducive to impunity for human rights violations.
>
> […] The lack of a political process and progress towards peace is aggravating civilian suffering. While political efforts falter, all parties to the conflict must abide by the humanitarian imperative to protect civilians in their conduct of hostilities.[427]

The ruthless violence in Syria endures with a level of cruelty and bloodshed that seems to know no rational limits.[428] While resorting to the attributability tests in the Syrian war will not drastically change what is happening, it is only legal clarity that can make it possible to eventually protect the victims of the conflict and bring to responsibility those committing war crimes.

Although this may be not exactly helpful to those who are currently enduring the Syrian crisis, it is a crucial first step in ensuring that the war does not turn into unregulated savagery.

[427] Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, 42nd Session of the UN Human Rights Council, Geneva, 17 September 2019. Web. Apr 21, 2020. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25004&LangID=E>.
[428] Wallace et al., p. 594.

3. Horn of Africa: underestimated threat

While selecting Horn of Africa to illustrate proxy warfare is not an obvious choice, in this section the author demonstrate how recent research points out that African conflicts are under researched and misrepresented as civil wars, while in reality they are increasingly clandestine proxy wars. Further, it will be discussed that locking more closely into African conflicts is necessary, first to understand the global patterns, and second, since there are no signs that conflicts in the Horn of Africa will decrease in the near future.

1) Nobel Peace Prize

At the end of last year, Ethiopian Prime Minister Abiy Ahmed was presented the Nobel Peace Prize for the courageous efforts he undertook last year to negotiate peace with Eritrea.[429]

Between 1998 and 2000, the neighboring countries fiercely fought at the border. It was resembling World War I-style warfare. Approximately 80,000 young men and women died, almost all of the soldiers who disappeared in mass infantry attacks.[430]

Ethiopia gradually gained dominance, launching a considerable ground offensive in the spring of 2000 that cut through the defending Eritrean militia and threatened to seize the capital, Asmara. However, the Ethiopians agreed to the terms of an armistice, signed in Algiers shortly after the offensive. Nonetheless, the provisions of the peace deal were never complied with. Remarkably, when an international boundary commission awarded to Eritrea a little but symbolically crucial land plot Badme, where the war had commenced, Ethiopia refused to hand it over.[431]

For almost 20 years, the two nations were in a cold war, with their militaries mobilized in power along their shared border. People were divided, trade stooped, and huge numbers of Eritrean youth served indefinite mandatory military service on the front line. In the meantime, the two governments did everything possible to weaken each other by reinforcing each other's opposition, including rebellious groups that permeated across the border. In 2009, Eritrea's backing of anti-Ethiopian jihadi units in Somalia came to the attention of the UN Security Council, which imposed sanctions on Eritrea.[432]

Eritrean-Ethiopian war, considering the traditional belief is that African states often go to war, but not with each other is the striking exception that proves the rule. African armed conflicts are traditionally seen instead as internal or civil wars.[433]

2) Historic overview

During the years of decolonization and the early post-colonial state (1960–1975) academics point to a steady escalation of transnational conflict dyads, which overwhelmingly signifies external support for conflict parties fighting a "civil war".[434] In its majority, it was African support to liberation movements in the Portuguese colonies, and the counterpart

[429] The Nobel Peace Prize 2019, Apr 21, 2020 <https://www.nobelprize.org/prizes/peace/2019/abiy/facts/>.
[430] Vladimir Rauta. A theory of distributional violence : an analysis of proxy wars in Africa, 1945-2011. University of Nottingham, 2017. Web. P. 242 (hereinafter – Rauta, Africa).
[431] Terrence Lyons. The Ethiopia-Eritrea Conflict and the Search for Peace in the Horn of Africa. 36 Vol. , 2009. Web. Pp. 167-180.
[432] Ibid.
[433] Alex de Waal. Africa's 'Civil Wars' Are Regional Nightmares. 2019. Web. Apr 21, 2020.
[434] Rauta, Africa, pp. 131-132.

destabilization activities of the Apartheid state and its regional allies.[435] Cold War antagonisms were another aspect – during Congo crisis, nearly all the interferences were from outside of African continent.[436] On the contrary, the Horn of Africa presented a different pattern, where the regional states intervened directly and by proxy in one another's affairs, adding to external engagement.[437] The great majority of independent states experienced a civil war or a coup during this time period.[438]

During the subsequent 15 years (1976-90), transnational conflict endured, but patterns changed.[439] While the liberation wars in southern Africa gradually came to an end, rivalries among independent African states arose or became more evident.[440] There were a few of conventional interstate wars, particularly Ethiopia–Somalia, Chad–Libya and Uganda–Tanzania.[441] There wars were characterized not only by the Cold War principles, but also by mutual destabilization and chases of regional hegemony.[442]

This pattern was specifically prominent in north-east Africa, where the fall of the Somali and Ethiopian military governments in 1991 made it "year zero" for the Horn of Africa.[443] For a brief moment, international conflicts dropped, only to return soon with a revenge, initiated by the Sudanese government' s overreach in exporting Islamism.[444] The pattern that arose was conflict between the major states (Eritrea, Ethiopia, Sudan and Uganda), which mutually intervened in each other's domestic affairs, with direct military involvement (clandestine and sometimes open) and extensive support to national armed groups.[445]

During 1994-98, the three major of Eritrea, Ethiopia and Uganda coordinated their concealed efforts against Sudan, which included both sending their own army to support the SPLA and other rebels in response to Sudanese support for jihadist groups in Eritrea and Ethiopia and the Lord's Resistance Army in Uganda.[446] In 1998, the eruption of war between Eritrea and Ethiopia changed this alignment, and the two warring states withdrew their backing of Sudanese rebels, and redirected towards sponsoring their proxies in Somalia.[447] Although these conflicts are documented, the regional rivalries that reinforce them are not devoted sufficient analysis.[448]

3) Civil wars or interstate wars

Analysis of security threats on the African continent is primarily concentrated on fragile and failing states, ethnic conflicts, violent extremism, and war over natural resources. African

[435] Ibid.
[436] Gé Prunier. Africa's world war : Congo, the Rwandan genocide, and the making of a continental catastrophe. [Elektronisk resurs]. Oxford University Press. Web.
[437] Henderson, Errol (2015) African Realism?: International Relations Theory and Africa's Wars in the Postcolonial Era, Rowman & Littlefield Publishers, Incorporated, in Cullen Hendrix. African Realism? International Relations Theory and Africa's Wars in the Postcolonial Era. 54 Vol. , 2016. Web.
[438] Noel Twagiramungu, et al. Re-describing transnational conflict in Africa. 57 Vol. , 2019. Web. P. 384.
[439] Re-describing transnational conflict in Africa, p. 384.
[440] Ibid.
[441] Ibid.
[442] Re-describing transnational conflict in Africa, p. 385.
[443] Christopher Clapham, The Horn of Africa: state formation and decay. 2017. Oxford: Oxford University Press, p. 60.
[444] Ibid, p. 63.
[445] Ibid.
[446] Gérard Prunier. Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-99). 103 Vol. Oxford University Press, 2004. Web. P. 374.
[447] Ibid.
[448] Clapham, C. 2017. The Horn of Africa: state formation and decay. Oxford: Oxford University Press, p 60; Bereketeab, R. (ed.) 2013 The Horn of Africa: intra-state and inter-state conflicts and security. London: Pluto. In Re-describing transnational conflict in Africa, p. 386.

states are perceived as too weak to exercise power even within borders, not in a neighboring country.[449]

It is true that after African countries got independence in the middle of the twentieth century, in particular, since the Organization of African Unity was created, and the "Cairo Resolution" was adopted,[450] there have been less border conflicts and only two successful secessions (Eritrea and South Sudan). Also, there were only a couple of regime change conquests—such as when Tanzania removed Uganda's military leader Idi Amin in 1979, and Libya's invasion of Chad during Muammar al-Qaddafi.

Nonetheless, closer scrutiny suggests that this regular story misses an important element: interstate conflict. In Africa, this seldom takes the form of conventional conflicts over boundaries or aggressions to instate a new regime. On the contrary, armed opposition takes different, camouflaged forms: clandestine wars and a proxy war between states is prevailing. If one dives deeper into the examination of any civil war – there will most definitely be a foreign sponsor. Governments' toleration of armed groups from other countries is quietly and unconvincingly justified by the inability to control the border and weak security state. What is really the case, engagement in a was with a neighboring country is ordered or approved at the highest level and covertly yet systematically implemented by military or intelligence services.

To analyze an example of the Ethiopia-Sudan border war, internal conflicts on either side did not naturally spill across the border. It was, in reality, the two governments with great persistence and over a long period of time clandestinely fighting another. over the 1980s and 1990s, Ethiopia and Sudan each supported insurgents in the neighboring state with training camps, guns, and planning, via decisions made right at the highest echelons. Each state also deployed own military covertly in the other's territory, as, for instance, Ethiopian generals commanded operations for the Sudan People's Liberation Army (SPLA). Occasionally the rebels were even enlisted as counterinsurgents in the state they were de facto fighting with. The SPLA was fighting against Oromo rebels in Ethiopia in the 1980s, while the Eritrean People's Liberation Front resisted an SPLA offensive in Sudan's Blue Nile province in 1990.

Civil war definition

If classic definition of a civil war is applied – a war that is fought solely between a sovereign government and armed non-state actor within a country[451]– there are much fewer cases of civil war in Africa than normally assumed.[452]

The norm in question is that the use of force to settle is strictly prohibited under international law, particularly in Africa it is reinforced by the prohibition on changing inherited colonial territorial boundaries. It means that whenever one African state would choose to resort to force to settle disputes with another state, it will do so covertly.[453] Therefore, any research

[449] Ibid.
[450] The principle of the inviolability of inherited colonial boundaries i.e. the principle of respect of borders existing on achievement of independence, adopted by the Organization of African Unity in its Resolution AHG/Res. 16 (I) in 1964 at the first session of the Conference of African Heads of State and Government held in Cairo, Egypt, was later enshrined as Article 4 (b) in the Constitutive Act of the African Union. Web. Apr 21, 2020. <https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf>.
[451] Nicholas Sambanis. What Is Civil War? Conceptual and Empirical Complexities of an Operational Definition. 48 Vol. Sage Publications, 2004. Web. Pp. 814-58.
[452] Re-describing transnational conflict in Africa, p. 387.
[453] Laia Balcells and Patricia Justino. Bridging Micro and Macro Approaches on Civil Wars and Political Violence: Issues, Challenges, and the Way Forward. 58 Vol. SAGE Publications, 2014. Web. Pp. 1343-1359.

method that relies on contemporary public sources, such as major international news outlets or international organizations or NGO reports, will bypass clandestine military actions.[454]

Additional research can further document and systematize the dynamics of armed conflicts in post-colonial Africa. Especially, in the context of wider support for proxy interventions and assist in answering the questions of when support to domestic armed groups escalates to the point of intervention.[455]

4) "Mandated" violence

Over the past 15 years, as the African Union, together with the United Nations, have managed to establish a security and peace framework for Africa. Yet, these mechanisms of clandestine internationalized and international wars have not perished. Instead, "power hierarchies have been legitimized, and peace operations have become part of dominant states' repertoire of power projection."[456]

All over Africa, old patterns of cross-border fighting are now copied, as some argue, disguised as peacekeeping, endorsed by the United Nations, the African Union, and the continent's regional organizations.[457]

It is better for such cross-border military actions to be internationally mandated, which also means monitored, which does not legitimize them or render them innocent. Similar to every part of the world, peace and security in Africa are weighed down under strains of legal prohibition of aggression and war, together with related crimes, and the big politics rules and power struggle. While the regulations of the African Union and United Nations principles are weakened, the peace on the continent is jeopardized by the increasing threat of interstate war. Such armed conflicts are probable to keep on the established patterns of mixing covert intrusion and upkeep to proxies, while unconcealed wars cannot be excluded and are, moreover, likely. The international community should be knowledgeable of this growing threat of international conflict, eventually bringing into picture international conflicts instead of much accustomed to "civil wars."[458]

5) New research

Current conflict databases on Africa have methodically under-represented the extent of not only the inter-state support to warring parties in internal armed conflicts, but also the number of incidents of clandestine cross-border intervention and instances of resorting to armed force to intimidate a neighboring state.[459]

The academics' common opinion is that post-colonial Africa has undergone numerous civil wars, but very few interstate armed conflicts,[460] which implies that Africa is different from other continents.[461]

[454] Re-describing transnational conflict in Africa, p. 388.
[455] Re-describing transnational conflict in Africa, p. 388.
[456] Africa's Civil Wars Are Not Domestic Issues, p. 4.
[457] 3 Africa's Civil Wars Are Not Domestic Issues, p. 4.
[458] Africa's Civil Wars Are Not Domestic Issues, p. 4.
[459] Re-describing transnational conflict in Africa, p. 378.
[460] See Touval, S. The Boundary Politics of Independent Africa. 1972. Cambridge, MA: Harvard University Press; Herbst, J. 1989. 'The creation and maintenance of national boundaries in Africa', International Organization 43, p. 673; Ali, T. & R. Matthews. 1999. Civil Wars in Africa: roots and resolution. Montreal: McGill-Queen's University Press. In Re-describing transnational conflict in Africa, p. 378.
[461] Re-describing transnational conflict in Africa, p. 378.

Transnationality is stated to be a main feature of armed conflicts in Africa, including clandestine military action and material support to domestic belligerents. Thus, most of the so-called "civil wars" in Africa are more fittingly described as internationalized rather than internal conflicts. Additionally, the prevailing definitions of "interstate conflict" and "civil war" are too narrow to apprehend the peculiar features of Africa' s wars.[462]

A large number of incidents are missing because they are concealed and reportedly only recounted in later histories or memoirs. This is very usual, especially for cross-border support to armed groups.[463] In some cases, information on covert direct military operations is missing from databases, as was the case with the 1989-1990 armed confrontations on the Sudan–Ethiopia border.[464]

In recent research on armed conflicts in Africa, it was found that only 30 percent of African conflicts since 1960 was "internal" and the rest was a combination of "internationalized" and "interstate," with as much as 70 percent being in reality internationalized in one way or another.

These fresh insights do not undermine standard algorithms about how African conflicts originate or escalate, but they provide a further layer of explanations. They paint a more comprehensive picture reciprocal destabilization in the Horn of Africa, while Ethiopia was attempting to secure itself a position of dominance in the region and destabilized governments in Somalia and Sudan, but also some others, and they fought back.[465]

Another set of problems lies in identifying parties. The traditional distinction between "state" and "non-state" actors is increasingly problematic in the contexts of protracted wars with multiple parties, in which the internationally recognized government may be no more powerful or durable than so-called insurgents.[466]

6) Accountability gap

It is not disputable that the Horn of Africa is a zone of turmoil".[467] As de Waal remarked, this is certainly the case with contemporary Horn of Africa:

> For the student of war, the Horn of Africa offers a cornucopia of violence and destruction. It has interstate wars and civil wars; conventional wars fought in trenches with air-to-air combat overhead and irregular wars fought by jihadists and followers of a messianic cult;

[462] Re-describing transnational conflict in Africa, p. 379.
[463] Re-describing transnational conflict in Africa, p. 381.
[464] Re-describing transnational conflict in Africa, p. 382; de Waal, A. 2004. 'The Politics of Destabilisation in the Horn, 1989–2001', in A. de Waal, ed. Islamism and its Enemies in the Horn of Africa. London: Hurst, pp. 206-207. From 1994-98, Ethiopian and Ugandan military officers were also present inside Sudan, not only supporting but sometimes commanding SPLA operations. Another covert operation absent from the UCDP data occurred on 9 December 1982 when the South Africa Defence Forces launched a raid against the homes of ANC members in the capital of Lesotho, Maseru, killing. Lesotho took its case to the UN Security Council, but it was not covered by the newspapers of record.
[465] Other example include 1) pan-African cooperation to support anti-colonial insurgencies in southern Africa; 2) Libya's invasion of Chad and sponsorship of rebels across the Sahel and West Africa to try to establish Muammar al-Qaddafi as the big man of Africa; 3) rivalries between Nigeria, Ivory Coast, and Burkina Faso fought out in Liberia and Sierra Leone; 4) how interstate armed rivalries and proxy wars in the African Great Lakes, the Nile Valley, and Angola paved the way for Africa's "great war" in the Democratic Republic of Congo (DRC), in Africa's Civil Wars Are Not Domestic Issues, p. 3
[466] Re-describing transnational conflict in Africa, p. 382
[467] Geller, Daniel S. and David J. Singer, Nations at War: A Scientific Study of International Conflict, 1998Cambridge: Cambridge University Press, p. 24, in Rauta, Africa, p. 168.

> international military interventions and maritime piracy; genocidal massacres and non-violence popular uprisings. It had had three major territorial wars and three secessions.[468]

Observing a conflict that could be portrayed as a mere case of national liberation struggle, the cause of modern-day acts of violence in the Horn of Africa is fighting of wars. The Eritrea vs Ethiopia proxy war is instructive example of how non-state actors are able to engage in fighting involving committing acts of violence and international crimes, but no de-facto warring state bears accountability.[469]

To better illustrate the problemacy of such accountability gap, example of how Ethiopia being the regional hegemon exhibits it accountability. This is especially useful if one tries to invoke human rights framework as bases of accountability, to which the next chapter is devoted.

For instance, each state is supposed to submit state periodic report to the Human Rights Committee with a frequency of every 4 years.[470] Ethiopia submitted its first report on 2009 with the delay of 15 years, ad its second report in 2019 with the delay of 5 years.[471] While country admits the commission of numerous atrocities by state actors within its own borders and assures that criminal investigations are being conducted against senior members of armed groups, police and military,[472] the Human Rights Committee, in its turn, pointed to the lack of cases where perpetrators of serious crimes have been prosecuted and to the unwillingness of Ethiopian authorities to have an independent investigation on the situation.[473]

> The Committee notes with concern numerous reports suggesting that torture and cruel, inhuman or degrading treatments are widespread in the State party and used against detainees by the police, prison officers and military, especially with regard to alleged members of armed insurgent groups active in certain regions of Ethiopia (the Somali

[468] Alex De Waal, The Real Politics of the Horn of Africa: Money, War the Business of Power, 2015, London: Polity, p. 37, in Rauta, Africa, p. 168.
[469] Rauta, Africa, p. 216.
[470] UN OHCHR, Human Rights Committee, Monitoring civil and political rights. Web. Apr 21, 2020. <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.
[471] UN OHCHR, Human Rights Bodies, Country Specific Information, Ethiopia. Web. Apr 21, 2020. <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ETH&Lang=EN>.
[472] UN, Human Rights Committee, Second periodic report submitted by Ethiopia under article 40 of the Covenant, due in 2014* CCPR/C/ETH/2, Distr.:Gener 30 January2020. Web. Apr 21, 2020. < https://undocs.org/CCPR/C/ETH/2>. paras 53-54:
53. Recent political reforms reinvigorated commitment towards respect for human rights. This begins with the public admittance by the Country's Prime Minister of the commission of numerous atrocities by state actors and the sincere apology he extended to victims and their families. Following this, criminal investigations were commenced against senior leadership and members of the NISS, the National Defense Forces, police and prison 11 officials suspected of extrajudicial killings, enforced disappearances, torture and arbitrary detention.
54. A number of disturbances occurred across the country in the reporting period which led to the loss of life. Accountability for extra-judicial killings committed during these disturbances in particular and over the past two dozen years in general is one of the key priorities of the criminal investigations being carried out against members of the security forces. For example, six members of the National Defense Force are currently on trial for killing 9 and wounding 6 civilians in Moyale town. In addition to the criminal prosecutions, the Ministry of Defense has also established a committee to identify family members of victims of the extra judicial killing and wounding for the purpose of compensation.
[473] UN, Human Rights Committee, *Concluding Observations of the Human Rights Committee : Ethiopia*, 19 August 2011, CCPR/C/ETH/CO/1. Web. Mar 29, 2020. <https://www.refworld.org/docid/4fb2488d2.html>.
16. The Committee notes with concern the numerous reports received about serious human rights violations committed in the Somali Regional State of Ethiopia1 by members of the police and the army, including murder, rape, enforced disappearance, arbitrary detention, torture, destruction of property, forced displacement and attacks on the civilian population, as well as the recent reports of apprehension of foreign journalists in the region. The Committee is also concerned at the lack of cases in which perpetrators of serious crimes have been prosecuted and punished and by the refusal of the State party to have an independent inquiry on the situation (arts. 2, 3, 4, 6, 7 and 12). The State party should put a stop to such violations and ensure that all allegations of such violations are effectively investigated, that the alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that the victims have access to effective remedies, including adequate reparation.

Regional State and the Oromia Regional State of Ethiopia). Moreover, perpetrators reportedly very often go unpunished.[474]

In summary, there is a small but increasing literature on proxy warfare,[475] but not much of a systematic research on this phenomenon in Africa. The works assume that state actors are senior partners to non-state actors, but example of armed conflicts in the Horn of Africa outlined above indicates that they cannot be taken for granted.[476] The model of armed conflict disguised as civil war spreads across the African continent and is not limited only to the Horn of Africa. Proxy wars are common, along with the threat and sporadic use of force between states,[477] and this calls for a conclusion that in absence of clearly defined standards of attribution under international law, there is presently nothing to antithesize this law-avoiding conduct unless the international law-makers step up their efforts to make law more apt and practical instrument than it currently is with regard to proxy wars.

[474] UN Human Rights Committee (HRC), *Concluding Observations of the Human Rights Committee : Ethiopia*, 19 August 2011, CCPR/C/ETH/CO/1, Web. Apr. 22, 2020. <https://www.refworld.org/docid/4fb2488d2.html>, para 17; see also in recommendations: The State party should (a) guarantee that all allegations of torture or cruel, inhuman or degrading treatment are effectively investigated, and that the alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that the victims have access to effective remedies and adequate reparation; (b) improve the training of State agents in this regard, in order to ensure that all persons who are arrested or held in custody are treated with respect; and (c) in its next report, provide disaggregated data on all allegations of torture.
[475] See, for example, Hughes, G. 2012. My Enemy's Enemy: Proxy Warfare in International Politics. Brighton: Sussex Academic Press; and Mumford, A. 2013. Proxy Warfare. Cambridge: Polity Press, in Rauta, Africa, pp. 17, 43.
[476] Ibid.
[477] Re-describing transnational conflict in Africa, p. 382.

VIII. Human Rights Role

Judging from the examples of conflicts analyzed in the previous chapter and a wide array of other examples introduced at the beginning of this paper,[478] the modern international humanitarian law is challenged in ways that put to the test its salience. In other words, its continued ability to serve its purpose and be the primary legal framework of the legal protection of persons in situations of armed conflict.[479]

The modern era conflicts involving non-state actors (non-international armed conflicts) exceed in numbers wars between states as the primary source of armed conflict in the world,[480] a mode of conflict IHL's Geneva Conventions regulation is only limited to provisions of Common Article 3, a matter discussed in detail in previous chapters.
On the other hand, the coming and expansion of International Human Rights Law (IHRL) in the years following the adoption of the Geneva Conventions, it is argued, may be capable of filling the lacunae IHL creates in such conflicts in many respects.[481]

Moreover, the post-Geneva development of IHRL also puts into question the fiercely defended argument that IHL should be interpreted to apply as broadly as possible.[482] Notably, it challenges the argument that the application of IHL is best-suited and will unfailingly advance the protection of humanitarian interests.[483] The increasing number of academics researching conflict and security issues point out that core IHL assertion that peace is the normal state of international affairs is no longer valid concerning modern armed conflicts.[484]The same can be said about the war and body of law regulating it as an extraordinary and distinct condition.[485] Today's war is a "phenomenon that transcends IHL's fundamental conception of war as happening between discernable combatants and civilians in a defined battlespace.[486]

In this chapter, the author attempts to analyze what protection does IHRL offer to the war victims, how it is comparable to the IHL legal framework, and it could be feasible to advance the argument of placing IHRL before IHL when it comes to proxy wars.

There is also a group of critics that question the necessity to put labels on the armed conflict categories, such as type of conflict or type of control exercised.[487] In their opinion, the proxy war is interfering with or relays focus from the considerations of real importance in conducting of the armed conflict.[488] They argue that the vital current controversies over humanitarian conduct, e.g., lethal targeting, whether carried out by an individual or poorly organized group that managed to operate outside the control of legal authorities (Ukrainian case), deal with circumstances where the application of either IHL or IHRL ultimately leads to the same outcome. It is said that context-dependent analysis is better suited for either humanitarian

478 See Chapter II section 3. Of present thesis for examples of proxy wars.
479 Deborah Pearlstein. Armed Conflict at the Threshold?. 58 Vol. Virginia Journal of International Law, 2019. Web. P. 371
480 See Oona A. Hathaway & Scott J. Shapiro, The Internationalists: How A Radical Plan To Outlaw War Remade The World (2017) (arguing that the decreasing frequency in international armed conflicts and corresponding rise in non-international armed conflicts is in part a result of the dramatic success of the formal legal prohibition of aggressive war), in Deborah, p. 371.
481 Armed Conflict at the Threshold? Part IV.
482 Armed Conflict at the Threshold? P. 371.
483 See, e.g., ICRC, Commentary On The First Geneva Convention: Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field Paras 492-95 (2d Ed. 2016) (hereinafter - 2016 ICRC Commentary).
484 Stephen C. Neff, War And The Law Of Nations: A General History 279-8, 2005, tracing this notion from its roots in just war theory to its codification in post-World War II UN Charter rules, in Armed Conflict at the Threshold?, p. 371.
485 Ibid.
486 See, e.g., Deborah Pearlstein. How Everything Became War and the Military Became Everything. 111 Vol. , 2017. Web.
487 Armed Conflict at the Threshold? p. 373.
488 Armed Conflict at the Threshold? p. 373.

or human rights law.[489] Moreover, both international actors and scholars should rather debate what those contexts are and how to shift their substantive effect instead of conducting a meta-analysis of the existence of "armed conflict", or "effective control".[490]

1. Customary human rights

Central works illustrate evidence that customary international law provides the strongest theoretical basis for the accountability of armed groups under human rights law.[491]

The starting point to the discussion in this section is that human rights treaties are not generally binding on armed groups, and the burden lies on customary international law to explain how does human rights law regulate the conduct of armed groups.[492] The UN accountability mechanisms have repeatedly highlighted that customary international law, in contrast to treaty law, serves as the source of human rights framework regulating armed groups during the conflict.[493]
Recently, UN Special rapporteurs[494] and OHCHR have stipulated about armed groups 'violating' human rights, together with states. For instance, in her statement on Mali in 2012, the High Commissioner for Human Rights Navi Pillay noted: "[a]ccording to credible reports that my office has received, the various armed groups currently occupying northern Mali have been committing serious human rights violations and possibly war crimes."[495] She elaborated as follows:

> these include cruel punishments, such as amputations, the stoning to death of an unmarried couple, summary executions, recruitment of child soldiers, as well as violations of women's rights, children's rights, freedom of expression, the rights to food, health, education, to freedom of religion and belief and cultural rights".[496]

Furthermore, there is a great count of examples of OHCHR referring to 'human rights violations' by armed groups.[497] This well demonstrates that the quoted Mali statement is not a separate incident, and there are strong indications that the OHCHR considers armed groups controlling territory to be responsible under the international human rights law as a matter of policy.[498]

[489] Armed Conflict at the Threshold? p. 373.
[490] Armed Conflict at the Threshold? p. 373.
[491] Katharine Fortin. The accountability of armed groups under human rights law. First edition. ed. Oxford University Press, 2017. Web. Chapter 11: Armed Groups and Customary International Human Rights Law, p. 323.
[492] Fortin, p. 323.
[493] UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 'Mission to Sri Lanka' (27 March 2006) UN Doc E/ CN.4/ 2006/ 53/ Add.5, [25] (hereafter Sri Lanka Report 27 March 2006), which states: 'The Government [of Sri Lanka] has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights (ICCPR). As a non- State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.' This report has been cited by numerous other accountability mechanisms, see fn 64 in The Accountability of Armed Groups under Human Rights Law.
[494] Fortin, p. 335.
[495] 'Top UN official condemns amputations, human rights violations in northern Mali', *UN News Centre*, 17 September 2012. Web. Apr 21, 2020. <https://news.un.org/en/story/2012/09/419792>, where Navi Pillay repeated that the area of Northern Mali had seen 'several serious human rights violations and possibly war crimes'. >; OHCHR, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Northern Mali - Note by the secretariat. A/HRC/21/64, Sep 13, 2012. Web. Apr 21, 2020. <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/21/64>.
[496] OHCHR, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Northern Mali - Note by the secretariat. A/HRC/21/64, Sep 13, 2012. Web. Apr 21, 2020. <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/21/64>.
[497] See, for example, Statement by United Nations Assistant Secretary-General for Human Rights, Ivan Šimonović, Islamists use fear, drug money to maintain control of northern Mali, *UN News*, 10 October 2012. Web. Apr 21, 2020. < https://news.un.org/en/story/2012/10/423252>.
[498] Fortin, p. 356.

The argument can be made that there is reasonable legal precedent for the present widespread practice of bringing armed groups to accountability under human rights law, in those settings where they have sufficient control over the territory.[499] Similarly, in the in-depth academic research into the topic offers inference that obligations binding upon armed groups can be found to exist in customary international law, supported by sufficient State practice and *opinio juris*.[500]

Scholars note, however, that the reports listed above cite each other as legal precedent and leave the difficult questions such as "when" and "how" unsolved and not analyzed to a sufficient extent.[501] They point out that while carefully considering these reports calls for the conclusion that the phrase "it is now increasingly accepted that non-state groups exercising de facto control over a part of a State's territory must respect fundamental human rights of persons in that territory" is simply exploited as a formula phrase that then gives a "license" to invoke human rights law as applicable to the armed group in question.[502] There is virtually no specific inquiry of whether the armed group in question meets the criteria contained in the said formula phrase.

It is generally disregarded whether the armed group possesses a level of the organization allowing it to be considered as an autonomous legal entity under international human rights law. Moreover, another important factor is also commonly often overlooked, namely that the armed group in question has control over the territory.[503] It is even more so, if one is more meticulous, with the degree of that control, temporarily and geographically.[504] Attention is also rarely paid to the requirement that the armed group in question exercises the functions of government in the area concerned.[505]

Yet, these explanations do not justify the responsibility in carefully examining the issue from a legal perspective. It is argued, in reality, that the lack of review of the above factors is causing a significant injustice to the development of international law.[506]

Nevertheless, while these studies endorse the idea that armed groups are bound by customary international human rights law when they occupy land and execute governmental functions, they contribute little to a greater understanding or advancement of this concept at present. The lack of review of these points also means that they do not contribute to a sense of what armed groups are doing on the ground in terms of supporting very little attention to the extent of legal responsibilities that would be binding upon an armed group controlling territory.[507]

Consequently, unlike the jurisprudence of the ICTY and the ICC (which clarifies the legal basis for applying international humanitarian law to armed groups), these documents and studies do not help to explain the legal rationale for applying human rights law to armed groups and only contribute a small amount to clarifying its criteria.[508]

499 Fortin, p. 343.
500 Fortin, p. 343.
501 Fortin, p. 343.
502 Ibid.
503 Minimal attention to this is given in the Sri Lanka Report 27 March 2006 (n 1), in Fortin, p. 344.
504 Ibid.
505 Minimal attention to this is given in UN Security Council, 'Mid- Term Report of the United Nations Joint Human Rights Office on Human Rights Violations Committed by the M23 in North Kivu Province (April 2012– November 2013)' (19 July 2013) UN Doc S/ 2013/ 433. Minimal attention to this is also given in Sri Lanka Report 27 March 2006 (n 1) [23] in Fortin, p. 344.
506 Fortin, p. 344.
507 Fortin, p. 345.
508 Fortin, p. 345.

1) *Jus cogens*

In this discussion, it is also essential to see to practice indicating *jus cogens* norms as a source of obligations for armed groups under human rights law.

For situations where an armed group has no control over the territory, the fact that armed groups are bound by human rights law is justified concerning them being peremptory norms.[509] For instance, this is the argument that was used in the early reports from the Syria Commission on Inquiry, which have held that "human rights obligations constituting peremptory international law (ius cogens) bind States, individuals and non-state collective entities. Acts violating jus cogens— for instance, torture or enforced disappearances — can never be justified".[510]
Critically, the Commission on Inquiry made those findings concerning a time when international humanitarian law did not yet apply.[511]
A similar approach was also employed in the Human Rights Report of the UN Mission in the Republic of South Sudan, where it was stated that:

> The most basic human rights obligations, in particular, those emanating from peremptory international law (ius cogens), bind both the state and armed opposition groups in times of peace and during armed conflict. In particular, international human rights law requires states, armed groups, and others to respect the prohibitions of extrajudicial killing, maiming, torture, cruel inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict-related sexual violence, sexual and other forms of slavery, the recruitment and use of children in hostilities, arbitrary detention as well as of any violations that amount to war crimes, crimes against humanity, or genocide.[512]

Yet it is argued in that invoking *jus cogens* norms in situations as described above is problematic.[513] Respectively, accountability mechanisms should be cautious about holding armed groups bound to *jus cogens* norms per se.[514]

2) *Universal Declaration of Human Rights*

To make the discussion of human rights applicability in proxy wars more comprehensive, the "parent document, the primary inspiration, for most rights instruments in the world today"[515] should be briefly discussed.

[509] Article 53 of the Vienna Convention on the Law of Treaties defines peremptory norms as: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In her study on *jus cogens* norms Dinah Shelton notes that neither the International Law Commission nor the Vienna Conference on the Law of Treaties developed an accepted list of peremptory norms, but made reference to 'genocide, slave trading and use of force other than in self-defense in commentaries and discussion. D. Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) American Journal of International Law 292, 302., in ICL, fn. 95. The Human Rights Committee has identified a longer list of norms with *jus cogens* status in UN Human Rights Committee, General Comment 29 (States of Emergency: Article 4), 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11, paras. 11– 15. Web. Apr 21, 2020. <https://www.refworld.org/docid/453883fd1f.html>.
[510] UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc A/HRC/19/69, para. 122. Web. Apr 21, 2020. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/106/13/PDF/G1210613.pdf?OpenElement>.
[511] Syria Report 22 February 2012, n. 96.
[512] UNMISS, 'Conflict in South Sudan: A Human Rights Report, United Nations Mission in the Republic of South Sudan, 8 May 2014. Web. Apr 21, 2020. <https://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf>, in Fortin, p. 346.
[513] Fortin, p. 346.
[514] Fortin, p. 349.
[515] M. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, 2002,* Random House, New York, p.16, in Fortin, p. 350

The Preamble to the document famously designates "every individual' and 'every organ of society", instead of Member States, as entities responsible for promoting the rights and freedoms enshrined in UDHR as well as and securing their universal and effective recognition, and observance.[516]

During preparatory works and the adoption of UDHR, there was a common understanding that it was to be a non-binding document.[517] Nevertheless, in the years following its drafting, there has been a discussion that it has gained a binding character,[518] it was mostly based on its being extensively cited as the source of legal obligations by domestic courts, and incorporated explicitly in national constitutions.[519] In summary, it largely remains a minority view that UDHR has achieved customary international law status in its entirety.[520] The common agreement among scholars exploring this topic is that only some of the UDHR's provisions have a binding character.[521]

The aforementioned provokes a logical question similar to those posed to jus cogens norms – how and when are those peremptory norms would instruct conduct and call for responsibility of armed groups in proxy wars and what is the outstanding problem.

Both in wartime and peacetime, international human rights law forbids genocide regardless of who the perpetrator is, and while the formal definition of torture requires the perpetrator to be a state official or anyone acting in official capacity, many non-state armed groups do operate in such a capacity.[522]

2. Why it cannot suffice

There are several arguments in this regard. Namely, in places where the rule of law, domestic law, and human rights adherence are lacking, to ensure basic protection, it is important that IHL is triggered sooner rather than later.
There is a visible tendency that proxy wars are oftentimes taking place on the territories of states that are either historically vulnerable or are lacking in strength to resist their being exploited.[523] This especially concerns regions of the world or states, where human rights are insufficiently protected under other bodies of law (where, for instance, national laws or IHRL are undeveloped or unobserved, or the rule of law is lacking leaving criminal justice systems dysfunctional), it is crucial to ensure that IHL's basic constraining legal guidance is triggered sooner rather than later[524] in order to augment compliance with laws of war to ensure humanitarian protection.[525]

Underdeveloped or primitive domestic law or lack of resorting to international law protecting ordinary peacetime human rights cannot result in protecting human rights during the armed

[516] Fortin, p. 351.
[517] Fortin, p. 352.
[518] Fortin, p. 352.
[519] Ibid. Also Schabas. The Universal Declaration of Human Rights: The Travaux Préparatoires. [Elektronisk resurs]. Cambridge University Press, 2013. Web.
[520] Fortin, p. 353.
[521] Fortin, p. 353.
[522] Chandra Lekha Sriram, Johanna Herman, and Olga Martin-Ortega. War, conflict and human rights : theory and practice. Third edition. ed. Routledge, 2018. Web. Chapter 5: Nonstate actors and international humanitarian and international human rights law, p. 71 (hereinafter – Martin-Ortega et.al.)
[523] Ibid.
[524] See, e.g., Laurie R. Blank and Geoffrey S. Corn. Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition. 46 Vol. Vanderbilt Journal of Transnational Law, 2013. Web.
[525] Armed Conflict at the Threshold? p. 373.

conflict.[526] While in some parts of the world domestic constitutions are developed and the body of IHRL well incorporated the perception of IHL role as a tool of humanitarian protection might be shifting, in other parts of the world legal protection is lacking so much and existing gaps make IHL basic rules a whole lot more important for the protection of individual rights.[527]

At present, there is a mechanism offered by the International Criminal Court, which proffers at least the prospect of formal accountability for war crimes, inability, refusal or reluctance to recognize the existence of armed conflict during its onset in early days may effectively grant immunity to those acts of violence that being committed on any other stage of the conflict would be manifestly prosecutable.[528] The underlying rule stipulates that war crimes are conditioned to be said to exist only when an "armed conflict" exists.[529]

Therefore, in those not so rare situations when states are not otherwise inclined to comply with essential human rights, the high thresholds and overly stringent standards of what constitutes an armed conflict or when accountability is triggered – "risks leaving individuals without either front-end legal protection or back-end justice".[530]
Maximizing the chance that law will ensure state compliance with humanitarian protections hence is dependent on widening the set of circumstances that allow to legally recognizes the existence of an armed conflict.

The second big argument on why human rights law is not the safe replacement for the IHL stems from the analysis of state practice, more precisely, from how likely are states willing to adhere to IHL as compared to IHRL.
There is a valid concern that, lacking in formal enforcement mechanisms, international law cannot serve as an effective tool "to constrain the behavior of sovereign states not otherwise inclined to behavioral constraint".[531]

The post-War scholarship illustrated that formal enforcement mechanisms constitute mere a portion of reasons behind why states or individuals might comply with the law or not.[532] It is nowadays demonstrated that states have an array of interests that instruct their conduct regarding compliance or non-compliance with provisions of law, including, *inter alia*, interests in reciprocal treatment and reputation.[533]

There is a convincing argument that invoking IHL rules as early as possible in this setting would make it more difficult for those states commonly believed to be repressive to bypass the application of any human rights' protective frameworks in an internal conflict.[534] Furthermore, states are more likely to conform to, for example, the IHL rules of proportionality to minimize human loss than to parallel rules in the ICCPR, customary international law, or national legal regimes (which all are or should be prohibiting the arbitrary taking of life).[535] The hypothesis goes that states otherwise disinclined to human rights protection or having

526 Armed Conflict at the Threshold? p. 385.
527 Armed Conflict at the Threshold? p. 385.
528 See Triggers and Thresholds of Non-International Armed Conflict, -09-29 2016, Apr 22, 2020 <https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/>.
529 See, e.g., Rome Statute of the International Criminal Court, supra note 60.
530 Armed Conflict at the Threshold? p. 385.
531 See generally Hans Morgenthau, Politics Among Nations: The Struggle For Power And Peace, 1948, noting that in the decentralized international system, in the relatively rare instances when law is violated, the availability of sanctions could depend solely on the "vicissitudes of the distribution of power between the violator of the law and the victim of the violation"). In Armed Conflict at the Threshold? fn 86.
532 Armed Conflict at the Threshold? p. 392.
533 For a useful summary of key post-war insights, see Beth A. Simmons, Mobilizing For Human Rights: Int'l Law In Domestic Politics, 2009, 116-18, 121-25. In Armed Conflict at the Threshold? fn 91.
534 See Blank & Corn, supra note 64, pp. 695-696. In Armed Conflict at the Threshold? fn 92.
535 Armed Conflict at the Threshold? p. 392.

deficient domestic legal system are more disposed to comply with the IHL body of law (to which all states are party) than to customary international law the IHRL treaty regime (which does not have in keeping universal adherence). While logical assumption would be that states not into human rights protection in peacetime are unlikely to do so on the brink of war, the facts are that 19 states (including Singapore, Saudi Arabia, and Myanmar) have accepted treaty obligations not to engage in disproportionate targeting in "armed conflict,"[536] but did not accept mirror ICCPR obligations to protect the right to life, which suggests that states themselves may perceive some difference in the value or relevance of these obligations.[537]

Although, most commonly nowadays discussed states in the context of the armed conflict have all ratified ICCPR (including Afghanistan, Iraq, Russia, and Syria),[538] still, arguments are that there exist certain incentives for those states to rather adhere to their IHL obligations than to any corresponding ones under the ICCPR.[539] States formally involved in international armed conflict are likely concerned with reciprocity, reputation, and similar in their conduct of hostilities in that conflict.[540] Respectively, reciprocity concerns do not drive states engaged in a purely internal armed conflict, since no state on the other side is obliged by treaty regimes.[541]

3. Back to square one – control tests

This section emphasizes the existing gap elaborated in previous chapters and furthers the argument that this gap between law and practice is even larger regarding the human rights obligations and accountability for human rights violations of non-state armed groups outside IHL or state accountability frameworks. International human rights treaties imposing obligations upon states regarding their behavior during the armed conflict have a significant limitation – they apply to states that are party to those conventions.[542] Even in situations where certain legal rules evolved into customary international law, they remain to be aimed at governing state activities in armed conflict.[543]

The red lines for warring states that are party to international human rights treaties have limited application to armed groups, stemming from the fact that international legal obligations can be acceded to only by states.[544]

Holding armed groups accountable for grave violations committed by non-state armed groups is increasingly important, paying due regard to the prevalence of proxy wars in recent decades. The matter is complicated by the spillover effects of the activities of such proxy, or rebel groups, or, *inter alia*, cross-border terrorism.[545] The unfortunate outcome is that key

[536] ICRC, States Parties to the Convention (III) relative to the Treatment of Prisoners of War. Geneva, https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375.

[537] None of these states is a party to the International Covenant on Civil and Political Rights (ICCPR). See U.N. Human Rights Office of the High Commissioner, Status of Ratification Interactive Dashboard. Web. Apr 21, 2020. <http://indicators.ohchr.org/>.

[538] Ibid.

[539] Armed Conflict at the Threshold? p. 393.

[540] James D. Morrow. When Do States Follow the Laws of War?. 101 Vol. Cambridge University Press, 2007. Web.

[541] Likewise, to the extent a NIAC-involved state is worried about the reputational or strategic effects of non-compliance with a particular rule, the impact on reputation seems likely to be the same whether the state is complying (or failing to comply) with IHL proportionality obligations, or IHRL proportionality-equivalent obligations. If a state is killing large numbers of civilians, in violation of any law, the effect on its reputation among states is unlikely to be good. In Armed Conflict at the Threshold? p. 392.

[542] Martin-Ortega et.al., p. 71.

[543] Martin-Ortega et.al., p. 71.

[544] Martin-Ortega et.al., p. 71.

[545] Martin-Ortega et.al., p. 72.

players in contemporary domestic and international security remain relatively unregulated and unaddressed by neither international human rights or, as shown above, by humanitarian law.[546]

In previous chapters, it has been elaborated that while the provisions of Common Article 3 and Additional Protocol II apply to circumstances of non-international armed conflict, they do not encompass include and regulate armed groups as well as states. Further, the same cannot be unequivocally said about human rights obligations.

By default, in human rights treaties states are the ones that accede to obligations to protect certain rights or refrain from their violation. Treaties are driven by state consent and describe the relationship between the state and its citizens.[547] In sum, at least traditionally, armed groups do not have specific obligations under human rights agreements, such as the ICCPR, the CRC, CEDAW, and others.[548]

ICC

Jurisdiction of the ICC extends only to natural persons, and it can only establish individual criminal responsibility. It is not provided to punish groups as such, regardless of them being armed groups, corporations, or anything beyond a natural person, an individual.[549]

Crime of torture

The provisions of the Torture Convention serve as an excellent example of why applying provisions of human rights law, even peremptory norms, to non-state actors is highly problematic. The first challenge is that groups themselves are not subject to the Convention's provisions. The second and more sophisticated challenge is that for a crime committed to be qualified as torture, an element of state action must be present. Historically, this has been the understanding of the Torture Convention. Torture is defined in Article 1 as suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." This language is understood to require state action, but has more recently there are interpretations, which allow include the acts of those who exercise effective control over a territory,[550] but they remain a minority.

Crimes against humanity and non-state armed groups

Although IHL's distinctions specifically affect the application to non-state armed groups, the definition of crimes against humanity enshrined in the Rome Statute also presents possible challenges in addressing crimes allegedly committed by members of armed groups. This stems from the fact of Article 7(2) defining crimes against humanity as follows:

> "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[551]

[546] Martin-Ortega et.al., p. 72. However, many practitioners and advocates have increasingly proposed applying human rights treaties to armed groups, supported, in part, by former UN Secretary-General Kofi Annan. In Martin-Ortega et.al., p. 73.
[547] Martin-Ortega et.al., p. 73.
[548] Martin-Ortega et.al., p. 73.
[549] Martin-Ortega et.al., p. 72.
[550] Martin-Ortega et.al., p. 73.
[551] *Rome Statute*, art. 7(2).

The policy requirement claimed to be absent in customary law understandings of crimes against humanity seems to restrict the range of crimes that may fall within ICC, in contrast to domestic jurisdictions. Such opinion was often voiced by the late ICC Judge Kaul, who on several occasions dissented to decisions in the Kenya situation, arguing that while serious crimes appeared to have been committed, they could not constitute crimes against humanity in the situation of lack of evidence of an organizational plan or policy. Such evidence is a lot less likely to be easily recorded and presented in cases when crimes are committed by armed groups, which may have organizational structures which are more difficult to observe or record,[552] which is the case with proxy wars.

In summary, it is significant to note that the practice from UN accountability bodies indicates the similar emergence of two different thresholds at which customary international human rights law will apply to armed groups. The lower threshold is based on the armed group being bound by *jus cogens* customary norms represented, for instance, in Article 7 of the Rome Statute. The second higher threshold relies on the idea that the armed group has effective control over the territory. However, there is insufficient analysis at the moment on whether these emerging thresholds have been met by armed groups in current conflicts, including proxy wars.[553] Thus, practical opportunities of applying IHRL to close the accountability gap created in international jurisprudence is at the development stage and cannot currently offer tangible solutions.

[552] Martin-Ortega et.al., p. 77.
[553] Fortin, p. 355.

IX. Further Considerations

Crawford: "control test is a settled question".[554]
Cassese: "I submit that it may prove useful to revisit Nicaragua and Tadić".[555]

The present thesis aimed at answering the question - is international law actually apt to deal with profound modern conflict potentials and dynamics and their effect on international level?[556]

The short answer would be unfortunately "no". Following the thorough analysis of international legal norms as they exist at present and comparing them with challenges and demands modern proxy conflicts present leaves the international community without regulatory mechanism to apply to proxy wars.

Two conflicting standards of control arouse from different legal regimes, where each has developed from a focus on "problem-solving" within this particular regime.[557] However, this targeted problem-solving resulted in some bigger questions left unanswered and to date no international judicial body or authority dares to answer.

IHL, as a special regime in this regard, shall not be built on formalistic postulates. On the contrary, it's a realistic body of law based on the notion of effectiveness and inspired by the purpose of preventing departure from the standards to the maximum possible extent.[558]
Yet, it proves to be ineffective in prevailing nowadays situations when international actors disregard rules. Furthermore, looking broader, the general international law is unwilling or unable to identify and name those actors that disregard rules and such tacit agreement to continue avoiding the elephant in the room prevails.

Cassese points out that separation of attribution of proxies to the state and holding the state responsible for training, equipping under art 2(4) of the UN Charter, encourages proxy wars by disconnecting proxies from the principal state and missing on the nature of the proxy wars. In *Genocide* case, the ICJ legitimizes the double control standard, which in its turn is weakening the protective framework of IHL as well as international law.

The conflict in Ukraine is the prime example of why in certain situations the "effective control" standard is not an appropriate standard to determine whether the conduct of an organized armed group should be attributed to a state, and thus transform a non-international armed conflict into an international armed conflict and enable the use of international law in the most optimal way. Its practically unreachable threshold incapacitates international law to regulate the situation and deprives people of humanitarian protection.

554 Crawford, *State Responsibility: The General Part*, p. 156:
"So far as the law of state responsibility is concerned, this determination [the ICJ's Bosnian 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".
555 Cassese, p. 651.
556 Wittke, p. 181.
557 Benedict Kingsbury and Lorenzo Casini. *Global Administrative Law Dimensions of International Organizations Law.* 6 Vol. , 2009. Web. International Organizations Law Review, vol. 6, no. 2, Sept. 2009, pp. 319–358.
558 *Prosecutor v. Dusko Tadić aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, available at: https://www.refworld.org/cases,ICTY,4027812b4.html [accessed 23 April 2020], para 96.

Martti Koskenniemi has spoken against softening tendencies seeing it as the reduction of international law to international relations or, even further, "the imposition of a managerialist mindset that would reduce international law to rules of thumb, replacing it with a combination of expert rule and perpetual negotiations based on equity".[559] It is necessary to put these concerns about law's softening in perspective with a view of ensuring quality, pragmatism, and ability to respond to current challenges, developing at the same pace as situations that require legal regulation.

[559] Martti Koskenniemi, International Law: Between Fragmentation and Constitutionalism, pt. 10, 2006, in Korhonen, p. 474.

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Annex I

Excerpt from the *Genocide* case

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986,* p. 64, para. 115); this led to the following significant conclusion:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the per- sons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has 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. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been

committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the Military and Paramilitary Activities Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the "overall control" exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general inter- national law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the Tadic´ Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.