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**ALTERNATIVE TO STATE RESPONSIBILITY FOR USE OF FORCE BY NON-STATE  
ACTORS IN AN ARMED CONFLICT**

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**DISSERTATION**

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**FIRST ADVISER: PROF. DR. ANNE VAN AAKEN**

**SECOND ADVISER: PROF. DR. STEFAN VOIGT**

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## LIST OF ABBREVIATIONS

• Alliance of Democratic Forces for the Liberation of Congo	ADFL
• Articles on Responsibility of States for Internationally Wrongful Acts, 2001	ARSIWA
• Articles on the Responsibility of International Organisations	ARIO
• Community Based Participatory Process	CBPP
• Democratic Self-Administration	DSA
• European Convention on Human Rights	ECHR
• European Union	EU
• Federal Republic of Yugoslavia	RFY
• Financial Action Task Force	FATF
• Free Syrian Army	FSA
• Food and Agriculture Organization	FAO
• International Committee of the Red Cross	ICRC
• International Court of Justice	ICJ
• International Covenant on Civil and Political Rights	ICCPR
• International Criminal Tribunal for the Former Yugoslavia	ICTY
• International Law Association	ILA
• International Law Commission	ILC
• Islamic State in Iraq and the Levant	ISIL
• Justice and Equality Movement	JEM
• Kurdistan Workers Party	PKK
• Liberation Tigers of Tamil Eelam	LTTE
• Monitoring and Reporting Mechanism	MRM
• Moro Islamic Liberation Front	MILF
• National Patriotic Front of Liberia	NPFL
• National Transitional Council	NTC
• Non-State Actor	NSA
• Office for the Coordination of Humanitarian Affairs	OCHA
• Organization for Security and Co-operation in Europe	OSCE
• Palestine Liberation Organization	PLO
• Palestinian National Authority	PNA
• People's Protection Units	YPG
• Permanent Court of International Justice	PCIJ



• Private Military Company	PMC
• Republic of Srpska	VRS
• Revolutionary United Front	RUF
• Syrian Democratic Forces	SDF
• Syrian Kurdish Democratic Union Party	PYD
• The European Court of Human Rights	ECtHR
• The North Atlantic Treaty Organization	NATO
• Turkish Republic of Northern Cyprus	TRNC
• Union of the Soviet Socialist Republics	USSR
• United Nations	UN
• United Nations Convention on the Law of the Sea, 1982	UNCLOS
• United Nations Human Rights Council	UNHRC
• United Nations Security Council	UNSC
• United Nations Development Programme	UNDP
• United States	US
• Uppsala Conflict Data Program	UCDP
• Vienna Convention on the Law of Treaties, 1969	VCLT
• World Food Programme	WFP
• World Health Organization	WHO

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4. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), (2005) ICJ Reports 168.
5. Barnett v. Chelsea & Kensington Hospital Management Committee, (1969) 1 QB 428.
6. Behrami v France, (2007) 45 EHRR SE 10.
7. Corfu Channel Case (Merits) (United Kingdom v. Albania), (1949) ICJ Reports 4.
8. Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) (13 March 2004).
9. East Timor (Portugal v. Australia) Judgment, (1995) ICJ Reports 90.
10. Hassan v. United Kingdom (ECHR, Grand Chamber, Application No. 29750/09, 16 September 2014).
11. International Status of South West Africa, Advisory Opinion, (1950) ICJ 128 (July 11).
12. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, (1980) ICJ Reports 73.
13. Iran v United States (Oil Platforms Case) (Merits), (2003) ICJ Reports 161.
14. Jaloud v. Netherlands (ECHR, Grand Chamber, Application No. 47708/08, 20 November 2014).
15. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004) ICJ Reports 136.
16. Loizidou v. Turkey (Preliminary Objections) (ECHR, Application No. 15318/89, 23 March 1995).
17. Military and Paramilitary Activities in and against Nicaragua v. United States of America (Merits), (1986) ICJ Reports 14.
18. Mustafic-Mujic v The Netherlands, Judgment, LJN: BR 5386 (5 July 2011).
19. North Sea Continental Shelf (Judgment) (1969) ICJ Rep 3.
20. Nuhanovic v The Netherlands, Appeal Judgment, LJN: BR 5388 (5 July 2011).
21. Prosecutor v Haradinaj, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008.
22. Prosecutor v Tadic, 2 October 1995, 105 ILR 419.
23. Prosecutor v Tadic, 7 May 1997, 112 ILR 1, 179.

24. Prosecutor v. Tadić, Judgment (Appeals Chamber), 15 July 1999, Case No. IT-94-1.
25. Prosecutor v. Sam Hinga Norman – Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), (2004) SCSL 7, 13 March 2004.
26. Pulp Mills on the River Uruguay (Argentina v. Uruguay), (2010) ICJ Reports 14.
27. Reparations for Injuries, Advisory Opinion, (1949) ICJ Reports 174.
28. Rigby v. Chief Constable of Northamptonshire, (1985) 1 WLR 1242.
29. Sadiq Shek Elmi v. Australia, CAT/C/22/D/120/1998, UN Committee Against Torture, (25 May 1999).
30. Catan and Others v. Moldova and Russia (ECHR, Grand Chamber, Application Nos. 43370/04, 8252/05, 18454/06, 19 October 2012) 42.
31. Tate & Lyle Industries Ltd. v. Greater London Council, (1983) 2 AC 509.
32. The Netherlands v Nuhanović, Supreme Court of the Netherlands, 12/03324 (6 September 2013).
33. US Diplomatic and Consular Staff in Teheran case (United States v. Iran), (1980) ICJ Reports 1.
34. Western Sahara, Advisory Opinion, (1975) ICJ Reports 12.

**PART I: INTRODUCTION**

## 1. INTRODUCTION

Under the existing international law regime, non-state actors are, by and large, incapable of being held directly responsible for acts and conducts which would otherwise constitute breaches of public international law. This is primarily because non-state actors are not recognized as subjects of international law and responsibility is channelized through the more classical framework of state responsibility based on attribution of the conduct of non-state actors to states.

Among other issues, the ongoing Ukraine war highlights the reality of state support of non-state actors in a rival state and raises the question of state responsibility for breach of international law by such armed non-state actors. The pro-Russian voices of discontent in Russian speaking Eastern Ukraine, fast transformed into organized, well-funded, well-armed pro-Russian separatist entities in Eastern Ukraine.<sup>1</sup> In March 2014, Russian Parliament authorized the use of force to protect Russian interests in Eastern Ukraine.<sup>2</sup> Russia deployed troops along its border in Ukraine and there were all indications that Russia was arming the separatists.<sup>3</sup>

The downing of the civil passenger aircraft MH 17 in July 2014 in Eastern Ukraine resulted in the death of all 298 passengers.<sup>4</sup> Preliminary investigations indicated towards a Russian SA 11 buk missile as the immediate reason for the crash.<sup>5</sup>

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<sup>1</sup> See Simon Shuster, 'Meet the pro-Russian separatists of Eastern Ukraine', *Time* (online), 23 April 2014 <<https://time.com/74405/exclusive-pro-russian-separatists-eastern-ukraine/>>, last accessed 10 October 2023.

<sup>2</sup> Ibid.

<sup>3</sup> See, eg, Heather Saul, 'Russian T-72 tank in eastern Ukraine 'shows Russia is supplying arms to rebels', says strategy experts', *The Independent* (online), 28 August 2014 <<https://www.independent.co.uk/news/world/europe/iiss-experts-say-russian-tank-in-eastern-ukraine-shows-russia-is-supplying-arms-to-rebels-9695852.html>>, last accessed 10 October 2023.

<sup>4</sup> See, eg, Oliver Laughland, Shaun Walker, Kate Hodal, Harriet Salem & Alec Luhn, 'Malaysia Airlines flight MH17 crash: world demands answers from Russia', *The Guardian* (online), 18 July 2014 <<https://www.theguardian.com/world/2014/jul/18/mh17-pressure-on-russia-as-world-demands-answers-over-planes-destruction>>, last accessed 10 October 2023.

<sup>5</sup> See, eg, David Alexander & Peter Apps, 'Malaysian airliner downing puts spotlight on Buk missile system', *Reuters* (online), 18 July 2014 <<https://www.reuters.com/article/ukraine-crisis-airplane-buk-idINKBN0FN04L20140718>>, last accessed 10 October 2023.

The Ukrainian government has repeatedly insinuated Russian hand in the downing of MH 17 while there is general consensus in the international investigative reports that shrapnel from missile shot from pro-Russian territory in eastern Ukraine is the cause for the crash.<sup>6</sup> In October 2015, a Dutch investigation into the downing of flight MH 17 concluded that Malaysian airline MH 17 was downed by a Russian buk missile from a territory in eastern Ukraine that is rebel controlled.<sup>7</sup> The report did not conclude on whether the rebels in eastern Ukraine were acting independently or upon instructions from Russia.<sup>8</sup> The entire scheme of events intensified the question of state responsibility for the particular act of downing of a civil aircraft.

There are certain limitations to the law of state responsibility under international law. In the situation of a breach of an international law by an armed non-state actor, state responsibility would only be invoked if the unlawful act of the armed non-state actor can be attributed to the state. The Nicaragua case<sup>9</sup> held that for the conduct of non-state actors to give rise to state responsibility, it would in principle have to be proved that the state had ‘effective control’ of the operations of the non-state actor in the course of which the violations of international law were committed.<sup>10</sup> Thus, there is an assumption of ‘control’ as the essential feature in the relationship between a state and a non-state actor in the present rule of attribution for state responsibility.

At present, international law lacks a framework for legal responsibility of armed non-state actors for violations of international law.<sup>11</sup> While there is wide agreement that

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<sup>6</sup> See, eg, Maya Rhodan, ‘Ukraine: MH17 downed by ‘massive explosive decompression’’, *Time* (online), 28 July 2014 <<https://time.com/3045423/mh17-ukraine-crash-explosive-decompression/>>, last accessed 10 October 2023.

<sup>7</sup> ‘MH17 Ukraine plane crash: What we know’, *BBC News* (online), 26 February 2020 <<https://www.bbc.com/news/world-europe-28357880>>, last accessed 8 October 2023.

<sup>8</sup> Anthony Deutsch, ‘Investigators identify Russian military unit in downing of flight MH17’, *Reuters* (online), 24 May 2018 <<https://www.reuters.com/article/us-ukraine-crisis-mh17/investigators-identify-russian-military-unit-in-downing-of-flight-mh17-idUSKCN1IP0TR>>, last accessed 8 October 2023.

<sup>9</sup> *Military and Paramilitary Activities in and against Nicaragua v. United States of America (Merits)*, [1986] ICJ Reports 14 (hereinafter ‘Nicaragua case’).

<sup>10</sup> See Nicaragua case, above n 9, [115].

<sup>11</sup> A significant Report that considered the responsibility of armed non-state actors is the ICRC Study on Customary International Humanitarian Law which noted that armed non-state actors are responsible for violations of international humanitarian law. However, these observations have not been developed under

armed non-state actors have obligations under international law, there is no clarity on the applicability of the secondary rules. This reflects an accountability gap in international law and a need to hold the armed non-state actors into account.

The ICRC Study on Customary International Humanitarian Law agrees that while armed non-state actors are responsible for the acts committed by persons forming part of such groups, there is no clarity on the consequence for breach of such responsibility.<sup>12</sup> The ICRC has affirmed in the Commentary to Common Article 3 that international law is unclear as to the responsibility of an armed non-state actor, as an entity in itself, for acts committed by members of the group.<sup>13</sup> Hence, there is a definite gap in international law with respect to the accountability of armed non-state actors under international law. Since the existing state responsibility regime is insufficient to address the issue of violations of international law by armed non-state actors, it is important to formulate an accountability regime for the acts of armed non-state actors in an armed conflict.

The common tools used so far have been international criminal law, mechanisms such as the Commission of Inquiry, naming and shaming and sanctions. Mechanisms such as the Commission of Inquiry hold armed non-state actors responsible for violations of international humanitarian law and international human rights law.<sup>14</sup> However, the Reports of the Commission of Inquiry are not clear on how to impose legal consequences on violations by armed non-state actors.<sup>15</sup> It may be concluded that by and large the Reports of Inquiry Commission focused on the individual criminal responsibility and failed to clarify the consequence for breach of

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international law. See JM Henckaerts & L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2009) Vol I: Rules, ICRC, 536.

<sup>12</sup> Ibid.

<sup>13</sup> ICRC, International Humanitarian Law Databases, 'Commentary of 2016 Article 3: Conflicts not of an international character', [892] <<https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>>, last accessed 8 October 2023.

<sup>14</sup> See for example, United Nations General Assembly, A/HRC/51/45, 17 August 2022, 18; United Nations General Assembly, A/HRC/52/69, 7 February 2023, 19-20.

<sup>15</sup> See for example, UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/S-17/2/Add.1 (23 November 2011) 21.



international law by the armed non-state actors.<sup>16</sup> International criminal law is not appropriate to tackle the problem because of its focus on individual members and not on armed non-state actor as a group. Although the Security Council Working Group on children and armed conflict<sup>17</sup> resorts to naming and shaming and subsequently, sanctions - they only confine themselves to violations pertaining to children's rights.<sup>18</sup>

Zegveld was amongst the first scholars to delve into the issue of accountability of armed non-state actors in detail. Apart from a lack of a judicial forum to bring claims against the armed non-state actors, there is a further challenge wherein there is a dissonance between the primary rules and the secondary rules of international law.<sup>19</sup> She stressed on procedural issues like the lack of appropriate forums which have the jurisdiction to institute proceedings against armed non-state actors and substantive issues relating to determining the conduct which can be attributed to armed groups as a whole.<sup>20</sup> Sassoli and Bellal also acknowledge the accountability gap that exists in international law presently where armed non-state actors have primary obligations under international law but the implementation of these primary rules are not clear.<sup>21</sup>

In light of the above, it is imperative to analyse the existing legal regime under international law regarding attribution of responsibility for the acts of armed non-state actors to states and critically assess the same. It is also essential to determine the legal

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<sup>16</sup> L Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002) 223. Also see for example, United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/S-17/2/Add.1, 23 November 2011, 21.

<sup>17</sup> See United Nations Security Council, Working Group on Children and Armed Conflict <[Working Group on Children and Armed Conflict | United Nations Security Council](#)>, last accessed 30 October 2023.

<sup>18</sup> Andrew Clapham, 'The Accountability of Armed Groups' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) 801.

<sup>19</sup> Zegveld, above n 16, 152-154.

<sup>20</sup> Ibid, 152 -154 and 157-163. Also see Laura Inigo Alvarez, *Towards a regime of responsibility of armed groups in international law* (Intersentia, 2020) Vol 90, 55.

<sup>21</sup> See M Sassòli, 'Taking armed groups seriously: Ways to improve their compliance with international humanitarian law' (2010) 1 *Journal of International Humanitarian Legal Studies* 5, 44. A Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in N Gal-Or, C Ryngaert & M Noortmann, 'Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings' (Brill Nijhoff, 2015) 309.

status of non-state actors in international law and discuss a framework for accountability of armed non-state actors. There are many non-state players in the international field today, but this thesis limits itself to the discussion of non-state actors in the context of armed groups involved in an armed conflict.

## **2. RESEARCH CONTRIBUTION**

This thesis uses descriptive statistics to highlight the growing importance of armed non-state actors in an armed conflict. This thesis criticizes the existing rule of attribution for state responsibility and challenges the assumption that an externally supporting state and an armed non-state actor interact as principal-agent. This thesis contributes to the existing literature with an original dataset (Annexure 'A') which empirically analyses the existing armed conflicts to ascertain the kind of relationship that armed non-state actors have formed with externally supporting states. My empirical analysis in Annexure 'A' presents an approach which is previously unconsidered, and the result based on this analysis shows that armed non-state actors and externally supporting states interact as 'partners' rather than as principal-agent. This finding is significant because the existing rule of attribution for state responsibility is based on the assumption of 'control' by states of armed non-state actors. This finding together with the original dataset (Annexure 'A') adds a nuanced, meaningful contribution to the existing literature on the rule of attribution for state responsibility.

Furthermore, this thesis also provides an alternative to the problems associated with the present rule of attribution for state responsibility by proposing direct accountability of armed non-state actors through consent based, standard setting which could be monitored by mechanisms such as Geneva Call/ICRC. This thesis applied rational choice and discussed mechanisms such as reputation, retaliation, reciprocity, and rewards to induce compliance of humanitarian law by armed non-state actors in an armed conflict. This thesis further elaborated on rewards as a compliance mechanism and argued that United Nations ('UN') should consider including and integrating armed non-state actors into the humanitarian process of the UN because such recognition of armed non-state actors by the UN would constitute a reward which could encourage further compliance by armed non-state actors.

### **3. DEFINITIONS**

#### **3.1 DEFINITION OF A NON-STATE ACTOR**

There is no universally accepted definition of non-state actors.<sup>22</sup> For the purpose of this thesis, non-state actors can be defined as “any organized armed group, distinct from and not operating under the control of, the state or states in which it carries out military operations, and which has primarily political, religious, and/or military objectives.”<sup>23</sup> This excludes paramilitaries that are under the “effective control of the state.”<sup>24</sup>

This thesis will focus on armed non-state actors that challenge the state to achieve its objectives.

#### **3.2 DEFINITION OF AN ARMED CONFLICT**

Armed conflicts are distinguished as international armed conflict and non-international armed conflict. The former occurs whenever there is resort to armed force between two or more states.<sup>25</sup> Non-international armed conflict occurs whenever there is a protracted armed confrontation occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a state.<sup>26</sup> The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.<sup>27</sup>

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<sup>22</sup> DCAF & Geneva Call, ‘Armed Non-State Actors: Current Trends & Future Challenges’ (Working Paper No 5, DCAF, 2015) 7.

<sup>23</sup> A Bellal, G Giacca and S Casey-Maslen, ‘International Law and Armed Non-State Actors in Afghanistan’ (2011) 93 *International Review of the Red Cross* 881, 48.

<sup>24</sup> In such a circumstance, the responsibility is attributed to the State.

<sup>25</sup> See Article 2 common to the four Geneva Conventions of 1949.

<sup>26</sup> See the Decision of the Appeals Chamber, *Prosecutor v Tadic*, 2 October 1995, 105 ILR 419, 488.

<sup>27</sup> See the Decision of the Trial Chamber, *Prosecutor v Tadic*, 7 May 1997, 112 ILR 1, 179 [562].

#### **4. RESEARCH QUESTIONS**

a) What is the present law on state responsibility for use of force by non-state actors? Does the extant rule of attribution for state responsibility for acts of non-state actors considers the ground realities/real nature of state engagement with non-state actors in an armed conflict?

b) What is the status of non-state actors under international law? Did international law succeed in regulating the growing importance of non-state actors in an armed conflict?

c) Could we argue for greater accountability of armed non-state actors for violations of international law in an armed conflict?

#### **5. HYPOTHESIS**

It is hypothesized that the assumption underlying the extant rule of attribution for state responsibility for acts of non-state actors is not reflective of the reality of state engagement with armed non-state actors. The assumption of predominance of ‘control’ as the defining characteristic in the relationship between a state and a non-state actor in the extant rule of attribution for state responsibility is inconsistent with ground reality where they function more as ‘partners’ rather than as ‘principal-agent’. It is also hypothesized that the existing rule of attribution for state responsibility did not have any affect in deterring states from providing external support to non-state actors in an armed conflict.

#### **6. METHODOLOGY**

This thesis uses descriptive statistics in Chapter 1 and empirical analysis in Chapter 4 to interpret the Uppsala Armed Conflict dataset in the context of state support of use of force by non-state actors in an armed conflict. From 1946 onwards, the

Uppsala Conflict Data Program ('UCDP')<sup>28</sup> at Uppsala University, Department of Peace, and Conflict Research, collected various information on armed conflicts. Thereafter, the UCDP embarked on the project to document and digitize armed conflicts since 1970s. The wide range of data provided in the Uppsala Armed Conflict dataset is widely used for its accuracy. UCDP contains varied datasets on armed conflicts among which is included the UCDP External Support Dataset.<sup>29</sup> This dataset contains detailed information on conflicts between 1975 and 2009 on the existence, type and provider of external support for all warring parties.

Descriptive statistics as a statistical tool depicts or summarizes data such that it is easily comprehensible.<sup>30</sup> Uppsala Armed Conflict database on external support to non-state actors provides of three cases (a) external support to non-state actors by a state (b) external support to non-state actors by another non-state actor (c) no external support to non-state actor in an armed conflict. I looked up all the dataset entries where a state and a non-state actor were involved in an armed conflict and the non-state actor either received external support from a state or another non-state actor or did not receive any external support at all. I used descriptive statistics to compare this data, which leads to some key findings on the role of non-state actors in externally supporting other non-state actors in an armed conflict. These findings have been discussed in chapter 1 of the thesis.

I also analysed the Uppsala Dataset on Armed Conflict to understand the political context surrounding state support of non-state actors in an armed conflict. This thesis seeks to make an empirical analysis on the existing armed conflicts to ascertain the kind of relationship that armed non-state actors have formed with externally supporting states. It is fundamental to ascertain the real relationship between the non-state actors and the externally supporting states to determine the appropriate legal framework for use of force by non-state actors.

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<sup>28</sup> Uppsala Conflict Data Program, UCDP Conflict Encyclopaedia <<https://ucdp.uu.se/>>, Uppsala University, last accessed 1 July 2020.

<sup>29</sup> Stina Högladh, Therése Pettersson and Lotta Themnér, (2011) 'External Support in Armed Conflict 1975–2009'. This dataset can be accessed at <<https://ucdp.uu.se/downloads/olddw.html>>, last accessed 1 November 2023.

<sup>30</sup> Roger E Kirk, *Statistics - An Introduction* (Thomson Wadsworth, 5<sup>th</sup> ed, 2008) 7.

Uppsala Armed Conflict database on external support to non-state actors provides details on support by an external state to a non-state actor engaged in an armed conflict. I looked up all the dataset entries where a state and a non-state actor were involved in an armed conflict and the non-state actor received external support from a state. I further analysed the background in which the externally supporting state and the non-state actor get involved to determine the nature of the relationship between the two.

I undertook the aforementioned assessment by creating my own armed conflict database named '**Externally Supporting State and NSA in an Armed Conflict**' (**attached as Annexure 'A'**) derived from Uppsala Armed Conflict dataset. Chapter 4 of the thesis discusses the same in details.

## **7. STRUCTURE OF THE THESIS**

This thesis discusses the above problem in five parts – Part I is the Introduction and Part II investigates the issue of external support by states to armed non-state actors involved in an armed conflict. Part II of the thesis comprises of Chapter 1 which discusses how external support is an important tool for armed non-state actors to sustain themselves in an armed conflict. This chapter explores the literature on the trend of external support to armed non-state actors, which suggests that non-state actors play an important role in supporting the causes of other non-state actors engaged in an armed conflict.

Part III of the thesis analyses the existing law of state responsibility in international law. This section of the thesis comprises of Chapters 2, 3 and 4.

Chapter 2 of the thesis shall study the case laws to analyse the extant legal regime on the rule of attribution for state responsibility under international law and critically assess the same. Chapter 3 delves into the theoretical background of agency and the law and economics literature on vicarious liability. The present rule of attribution of 'effective control' assumes agency. Furthermore, this chapter elaborates and distinguishes between the two concepts of 'conflict delegation' and 'conflict

intervention' to argue that the former is similar to a situation of agency and the latter is not.

Chapter 4 of the thesis attempts an empirical analysis on the existing armed conflicts to ascertain the kind of relationship that armed non-state actors have formed with externally supporting states with the goal of determining the real relationship on ground between the non-state actors and the externally supporting states. This chapter shall investigate the data provided in the Uppsala Armed Conflict dataset to make key findings on the nature of relationship between the externally supporting states and the non-state actors.

Part IV of the thesis discusses the status of non-state actors under international law. There are 3 chapters in Part IV – Chapters 5, 6 and 7.

Chapter 5 of the thesis shall discuss the present status of non-state actors in international law. Armed non-state actors have certain obligations under international law and enjoy limited international legal personality. This chapter also discusses the treatment and recognition of non-state actors in international law jurisprudence.

Chapter 6 shall discuss whether armed non-state actors could be bound by international law in the absence of their consent. It discusses the law and economics rational choice theory to understand why rational actors comply with a norm. Focusing on compliance as opposed to the binding nature of the norms is a more pragmatic approach in regulating the conduct of armed non-state actors.

Chapter 7 argues for accountability of armed non-state actors through consent based standard setting with supervisory mechanisms such as Geneva Call and ICRC. This chapter highlights how soft law instruments such as the Deeds of commitment exert persuasive power and affect the behaviour of armed non-state actors. Furthermore, this chapter discusses various mechanisms such as reputation, retaliation, reciprocity, and rewards to induce compliance of humanitarian laws by armed non-state actors.

Part V is the Conclusion. This is the final section of the thesis that ties together all the above chapters and concludes this dissertation.

**PART II: EXTERNAL SUPPORT BY STATES TO ARMED NON-STATE ACTORS**



**CHAPTER 1: EXTERNAL SUPPORT TO NON-STATE ACTORS IN AN ARMED CONFLICT –  
A STATISTICAL ANALYSIS**

**1. EXTERNAL SUPPORT TO NON-STATE ACTORS – AN INTRODUCTION**

External support is a significant factor which allows non-state actors to sustain themselves in a conflict.<sup>31</sup> External support helps expand their military strength in terms of funding, recruitment/training and also to procure arms and strategize factors for success.<sup>32</sup> For example, armed non-state actors like the Taliban have been in existence for decades because of continued external support.<sup>33</sup> The Taliban also succeeded in weakening the government in Afghanistan and taking control of certain parts of Afghanistan.<sup>34</sup>

During the cold war, external support to non-state actors was a common foreign policy - for example, United States ('US') supporting contras in Nicaragua and the Mujahidin in Afghanistan as a way to oppose communist regimes.<sup>35</sup> Similarly, Union of the Soviet Socialist Republics ('USSR') supported non-state actors in Vietnam, Angola, Greece, South Africa etc. to further the growth of communism.<sup>36</sup> State support to non-state actors continued after the end of the cold war – Russia supported the non-state actors in the former republics of USSR and US supported groups such as the Bosnian Muslims, the Kosovo Liberation Army, Iranian opposition movements etc.<sup>37</sup>

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<sup>31</sup> Idean Salehyan, Kristian Skrede Gleditsch and David E Cunningham, 'Explaining external support for insurgent groups' (2011) 65(4) *International Organization* 709-744.

<sup>32</sup> Idean Salehyan, 'The delegation of war to rebel organizations' (2010) 54(3) *The Journal of Conflict Resolution* 493-515.

<sup>33</sup> Daniel P Sullivan, 'Tinder, Spark, Oxygen, and Fuel: The Mysterious Rise of the Taliban' (2007) 44(1) *Journal of Peace Research* 93-108; Human Rights Watch, *Afghanistan: Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fueling the Civil War in Afghanistan*, Report 13(3), July 2001.

<sup>34</sup> Anthony Davis, 'How the Taliban became a Military Force' in William Maley (ed), *Fundamentalism Reborn? Afghanistan and the Taliban* (New York University Press, 1998) 43–70.

<sup>35</sup> William E Odom, *On Internal War: American and Soviet Approaches to Third world clients and insurgents* (Duke University Press, 1992) 72.

<sup>36</sup> Ibid.

<sup>37</sup> Daniel Byman et al, *Trends in outside support for insurgent movements* (RAND, 2001) 1-2.

External support is not just provided by states to these non-state actors but also by one non-state actor to another. In fact, studies have proved that non-state support to other non-state actors is far more reliable than state support because the latter may disappear or reduce following a change in the government and foreign policy.<sup>38</sup> Non-state actor support can come from diaspora, refugee groups, guerrilla group and even resourceful individuals.<sup>39</sup> For example, non-state actors like Al Qaida have extensively supported the Taliban in Afghanistan.<sup>40</sup> State support has proved vital to ensure longevity against a powerful state especially when a non-state actor is new and emerging, trying to establish foothold.<sup>41</sup> For example, the Liberation Tigers of Tamil Eelam ('LTTE') in Sri Lanka, received enormous support from the Indian Tamil diaspora from its inception in 1976 until 1987.<sup>42</sup> After the initial support, the LTTE continued to thrive in its latter years even though the external support reduced.<sup>43</sup>

Post-cold war, USSR and US are not the main supporters of non-state actors as Iran and Pakistan have emerged as significant state supporters in the post-cold war era.<sup>44</sup> Rwanda uses non-state actors as proxies in Congo and central Africa.<sup>45</sup> Support of non-state actors is seen as a means to weaken the rival state.<sup>46</sup> Rwanda and Uganda

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<sup>38</sup> Ibid, 2.

<sup>39</sup> Yossi Shain and Martin Sherman, 'Dynamics of disintegration: Diaspora, secession and the paradox of nation-states' (1998) 4(3) *Nations and Nationalism* 321-46.

<sup>40</sup> Seth G Jones, 'The rise of Afghanistan's insurgency: State failure and Jihad' (2008) 32(4) *International Security* 7-40.

<sup>41</sup> Idean Salehyan, 'No shelter here: Rebel sanctuaries and international conflict' (2008) 70(1) *The Journal of Politics* 54-66.

<sup>42</sup> Ahilan Kadirgamar, 'Classes, states and the politics of the Tamil diaspora' (2010) 45(31) *Economic and Political Weekly* 23-26.

<sup>43</sup> Kristian Stokke, 'Building the Tamil Eelam State: Emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka' (2006) 27(6) *Third World Quarterly* 1021-1040.

<sup>44</sup> Byman et al, above n 37, 2.

<sup>45</sup> Stein Sundstøl Eriksen, 'The Congo War and the Prospects for State Formation: Rwanda and Uganda Compared' (2005) 26(7) *Third World Quarterly* 1097-1113.

<sup>46</sup> Francois Ngolet, 'African and American Connivance in Congo-Zaire' (2000) 47(1) *Africa Today* 65-85; John F Clark, 'Explaining Ugandan Intervention in Congo: Evidence and Interpretations' (2001) 39(2) *The Journal of Modern African Studies* 261-287.

supported the rebels in Congo to destabilize and weaken the governmental regime in Congo.<sup>47</sup>

Both India and Pakistan have provided external support to non-state actors in each other's state as an act of inter-state rivalry.<sup>48</sup> Such measures to destabilize the rival state can be highly effective as the targeted state often ends up spending resources to tackle the rebel attack in its territory.<sup>49</sup> For example, the military/defence expenditure of Pakistan is disproportionately high for a developing country to ensure security against India in the on-going conflict.<sup>50</sup> Sometimes such rebel movements have a deep impact on the economy of a country if the rebel attacks are consistent. For example, in Israel, the tourism industry has suffered because of attacks from Palestinian guerrilla forces.<sup>51</sup>

A common goal for state support of non-state actors has been to overthrow governmental regimes. For example, Uganda and Rwanda supported Kabila to overthrow Mobutu<sup>52</sup>, US supported Iraqi opposition groups in Iraq to oust Saddam Hussein and the ruling Ba'ath party.<sup>53</sup> Sometimes states have supported non-state actors on ideological grounds such as Iran supporting other Islamic groups such as Lebanese Hezbollah,<sup>54</sup> Arab states supporting the Palestine Liberation Organization ('PLO') to

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<sup>47</sup> John F Clark, 'Explaining Ugandan Intervention in Congo: Evidence and Interpretations' (2001) 39(2) *The Journal of Modern African Studies* 261-287.

<sup>48</sup> Navine Murshid, 'India's Role in Bangladesh's War of Independence: Humanitarianism or Self-interest?' (2011) 46(52) *Economic and Political Weekly* 53-60; Also see 'Musharraf says militants trained against India', *The Express Tribune* (online), 6 October 2010 <[Musharraf says militants trained against India \(tribune.com.pk\)](http://tribune.com.pk)>, last accessed 8 October 2023.

<sup>49</sup> Salehyan, above n 32, 493-515; Zeev Maoz, 'Rivalry and state support of non-state armed groups (NAGs), 1946-2001' (2012) 56(4) *International Studies Quarterly* 720-734.

<sup>50</sup> Sangit Sarita Dwivedi, 'India as a dominant security concern to Pakistan (1947-1980)' (2008) 69(4) *The Indian Journal of Political Science* 889- 896.

<sup>51</sup> Byman et al, above n 37, 33.

<sup>52</sup> 'Explaining Ugandan Intervention in Congo: Evidence and Interpretations' (2001) 39(2) *The Journal of Modern African Studies* 261-287.

<sup>53</sup> Daniel Byman, 'Proceed with caution: US support for the Iraqi Opposition' (1999) *The Washington Quarterly* 23-37.

<sup>54</sup> Marc R DeVore, 'Exploring the Iran-Hezbollah Relationship: A Case Study of How State Sponsorship Affects Terrorist Group Decision-Making' (2012) 6(4-5) *Perspective on terrorism* 85-88.

intensify their Arab nationalist credentials.<sup>55</sup> Religion has also been a factor for some countries to support non-state actors such as Iran, which has backed causes relating to Shi'a groups in Iraq, Lebanon, Kuwait in the form of supporting Islamic militants.<sup>56</sup>

LTTE acquired significant control over parts of northeast Sri Lanka, operating a virtual state within a state until the Sri Lankan army uprooted the group in 1995.<sup>57</sup> Sri Lankan government struggled to suppress LTTE militarily.<sup>58</sup> LTTE received tremendous support of the Tamil diaspora across the world.<sup>59</sup> Similarly, the Kurdistan Workers' Party ('**PKK**') was an organization based in Iraq and Turkey which have fought against the oppression of Kurds in Turkey and Iraq since 1980s and succeeded in establishing an autonomous region in Iraq called the Kurdistan region which has its own constitution since 2005.<sup>60</sup>

Refugees often support non-state actors to overthrow the home government, which made them flee their country - for example, USSR invasion of Afghanistan in 1979 resulted in the mass exodus of Afghans who in turn supported anti-USSR movement in Afghanistan.<sup>61</sup> In fact, the Taliban was formed mostly of displaced Afghans – particularly those Afghans who migrated to Pakistan.<sup>62</sup> Refugees support armed non-state actors to restore the government of their choice in their home country.<sup>63</sup> Also, refugees may be convinced that military action is required to restore their desired

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<sup>55</sup> Rashid Hamid, 'What is the PLO?' (1975) 4(4) *Journal of Palestine Studies* 90-109.

<sup>56</sup> Byman et al, above n 37, 36.

<sup>57</sup> Kristian Stokke, 'Building the Tamil Eelam State: Emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka' (2006) 27(6) *Third World Quarterly* 1021-1040.

<sup>58</sup> Ibid.

<sup>59</sup> Ahilan Kadirgamar, 'Classes, states and the politics of the Tamil diaspora' (2010) 45(31) *Economic and Political Weekly* 23-26.

<sup>60</sup> 'Who are the Kurds', *BBC News* (online), 14 March 2016 <<https://wwwnews.live.bbc.co.uk/news/world-middle-east-29702440>>, last accessed 8 October 2023.

<sup>61</sup> Ahmed Rashid, 'The Taliban: Exporting Extremism' (1999) 78(6) *Foreign Affairs* 22-35; Jason Lyall, Graeme Blair and Kosuke Imai, 'Explaining Support for Combatants during Wartime: A Survey Experiment in Afghanistan' (2013) 107(4) *The American Political Science Review* 679-705.

<sup>62</sup> Ahmed Rashid, 'The Taliban: Exporting Extremism' (1999) 78(6) *Foreign Affairs* 22-35.

<sup>63</sup> Idean Salehyan and Kristian Skrede Gleditsch, 'Refugees and the Spread of Civil War' (2006) 60(2) *International Organization* 335-366.

government.<sup>64</sup> Similarly, PLO and HAMAS, which were formed to liberate Palestine, received substantial support from refugees.<sup>65</sup>

As mentioned earlier, non-state actors like revolutionary groups or religious groups or organizations are also major supporters of non-state actors. For example, revolutionary groups support other rebel or insurgent groups.<sup>66</sup> The Lebanese Hezbollah, for example, recruited and trained fighters from many Arab and Muslim groups.<sup>67</sup>

Religious leaders have also provided support for insurgents.<sup>68</sup> For example, the clerics in Tehran have provided support to Lebanese Hezbollah.<sup>69</sup> Islamic fighters in Bosnia, Algeria and Afghanistan have received support from religious organizations around the world.<sup>70</sup> Charles Taylor's National Patriotic Front of Liberia ('NPFL') was a rebel group, which supported another rebel group Revolutionary United Front ('RUF') fighting against the military government of Sierra Leone.<sup>71</sup>

This chapter shall use the Uppsala Armed Conflict Dataset on External Support to understand the reality of external support to non-state actors in an armed conflict. This chapter shall make statistical analysis on the reality of states supporting non-state actors externally and the situation of a non-state actor supporting another non-state actor externally.

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<sup>64</sup> Ibid.

<sup>65</sup> Helga Baumgarten, 'The Three Faces/Phases of Palestinian Nationalism, 1948–2005' (2005) 34(4) *Journal of Palestine Studies* 25-48.

<sup>66</sup> Seden Akcinaroglu, 'Rebel Interdependencies and Civil War Outcomes' (2012) 56(5) *The Journal of Conflict Resolution* 879-903.

<sup>67</sup> Julian Borger, 'Iran and Hezbollah 'have built 50,000-strong force to help Syrian regime'', *The Guardian* (online), 14 March 2013 <<https://www.theguardian.com/world/2013/mar/14/iran-hezbollah-force-syrian-regime>>, last accessed 8 October 2023.

<sup>68</sup> Byman et al, above n 37, 71.

<sup>69</sup> 'Iranian Clerics Meet Nasrallah, Affirm Support for Hezbollah', *Iran Front Page* (online), 7 June 2016 <<https://ifpnews.com/iranian-clerics-meet-nasrallah-affirm-support-for-hezbollah/>>, last accessed 8 October 2023.

<sup>70</sup> Byman et al, above n 37, 79.

<sup>71</sup> Yekutieli Gershoni, 'War without End and an End to a War: The Prolonged Wars in Liberia and Sierra Leone' (1997) 40(3) *African Studies Review* 55-76.

## **2. FORMS IN WHICH EXTERNAL SUPPORT IS PROVIDED BY STATES/NON-STATE ACTORS TO NON-STATE ACTORS INVOLVED IN AN ARMED CONFLICT**

### **2.1 SAFE HAVENS AND SANCTUARIES**

Safe havens or sanctuaries are grounds from which the non-state actors can operate, recruit, conduct training and plan strategies for attacks.<sup>72</sup> Such a sanctuary is essential for the survival of a non-state actor or it would be difficult to escape from the governmental forces.<sup>73</sup> Iraqi Shi'ites have used Iran as a sanctuary to receive training.<sup>74</sup> Kashmiri militants have resided in Pakistan and launched cross border attacks.<sup>75</sup> On some occasions, it has been found that the state government is ineffective in ousting the non-state actors from their territory and such non-state actors begin operating from the weak state's territory.<sup>76</sup> For example, Lebanon was unable to suppress the Palestinian armed groups that targeted Israel and hence, ended up hosting these armed non-state actors in its territory.<sup>77</sup> Right to transit in aid of non-state actors is also a significant factor to consider – Syria allowed Iran to send weapons to Hezbollah through its territory.<sup>78</sup>

### **2.2 FINANCIAL RESOURCES**

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<sup>72</sup> Idean Salehyan, 'No Shelter Here: Rebel Sanctuaries and International Conflict' (2008) 70(1) *The Journal of Politics* 54-66.

<sup>73</sup> Ibid.

<sup>74</sup> Will D Swearingen, 'Geopolitical Origins of the Iran-Iraq War' (1988) 78(4) *Geographical Review* 405-416.

<sup>75</sup> Rajen Harshe, 'Cross-Border Terrorism: Road-Block to Peace Initiatives' (2003) 38(35) *Economic and Political Weekly* 3621-3625.

<sup>76</sup> David P Fidler, 'A Theory of Open-Source Anarchy' (2008) 15(1) *Indiana Journal of Global Legal Studies* 259-284.

<sup>77</sup> Rami Siklawi, 'The Dynamics of Palestinian Political Endurance in Lebanon' (2010) 64(4) *Middle East Journal* 597-611; Adam Rothman, 'Beware the Weak State' (2007) 64(2) *The William and Mary Quarterly, Third Series* 271-274.

<sup>78</sup> Byman et al, above n 37, 86.

It is perhaps the most important contribution for the causes of non-state actors as it helps them procure arms, recruit militants, strategize plans of attack etc.<sup>79</sup> While only states can provide sanctuary and safe havens, diasporas and refugees or wealthy individuals can provide financial assistance.<sup>80</sup> Funds provided by the diaspora have been essential for the survival of LTTE in Sri Lanka.<sup>81</sup> The non-state actors use propaganda and publicity to raise funds from the refugees and diaspora.<sup>82</sup> Funds are also raised through illicit enterprises and organizations.<sup>83</sup>

### **2.3 POLITICAL SUPPORT AND PROPAGANDA**

Political support can translate to greater number of supports i.e. more people joining in the causes of non-state actors, for example, states often support a non-state actor, portraying their causes as worthy of public support through finance or otherwise.<sup>84</sup> PKK supporters have used the radio, newspapers to bolster the political cause of PKK.<sup>85</sup>

### **2.4 MILITARY SUPPORT AND TRAINING**

Direct assistance by the state in terms of supplying military support to non-state actors is uncommon but there have been some examples like the Taliban, which

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<sup>79</sup> Salehyan, above n 32, 493-515.

<sup>80</sup> Helen Lock, 'How ISIS became the wealthiest terror group in history', *Independent* (online), 15 September 2014 <<https://www.independent.co.uk/news/world/middle-east/how-isis-became-the-wealthiest-terror-group-in-history-9732750.html>>, last accessed 8 October 2023.

<sup>81</sup> Human Rights Watch, 'Funding the 'Final War': LTTE Intimidation and Extortion in the Tamil Diaspora', March 2006.

<sup>82</sup> Byman et al, above n 37, 90.

<sup>83</sup> Human Rights Watch, 'Funding the 'Final War': LTTE Intimidation and Extortion in the Tamil Diaspora', March 2006.

<sup>84</sup> Byman et al, above n 37, 88.

<sup>85</sup> Spyridon Plakoudas, *Insurgency and counter-insurgency in Turkey: The new PKK* (Springer International Publishing, 2018) 29-41.

received military support/training from Pakistan.<sup>86</sup> Congolese revolutionary Kabila received enormous support of Uganda and Rwanda.<sup>87</sup> Military training is extremely important to ensure success of a non-state actor in an insurgent movement.<sup>88</sup> Such armed groups require skilled, experienced fighters to teach the new recruits and also to upgrade specialized techniques to keep up with the rival state.<sup>89</sup> In the formative stage of a non-state actor, the importance of acquiring training is especially important.<sup>90</sup> For example, India has alleged Pakistan to be active in training armed groups in advanced techniques with the involvement of Pakistan's highest intelligence service ISI.<sup>91</sup> Hezbollah, has acted as Iran's surrogate and trained several insurgent groups who support Islamic religious causes.<sup>92</sup> Al Qaida imparted advanced training to Islamist militants, methods like counter-intelligence and urban guerrilla operations.<sup>93</sup>

## 2.5 WEAPONS AND MATERIAL

It is the most important tool in the hands of non-state actors. During the cold war, USSR and US supplied weapons and equipment to their proxies.<sup>94</sup> Many non-state

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<sup>86</sup> 'Pakistani agents 'funding and training Afghan Taliban'', *BBC News* (online), 13 June 2010 <<https://www.bbc.co.uk/news/10302946>>, last accessed 8 October 2023.

<sup>87</sup> 'Explaining Ugandan Intervention in Congo: Evidence and Interpretations' (2001) 39(2) *The Journal of Modern African Studies* 261-287.

<sup>88</sup> Salehyan, above n 32, 493-515.

<sup>89</sup> Idean Salehyan, Kristian Skrede Gleditsch and David E Cunningham, 'Explaining External Support for Insurgent Groups' (2011) 65(4) *International Organization* 709-744.

<sup>90</sup> Ibid.

<sup>91</sup> 'Musharraf says militants trained against India', *The Express Tribune* (online), 6 October 2010 <<https://tribune.com.pk/story/58792/musharraf-slams-the-west-for-ignoring-kashmir>>, last accessed 8 October 2023.

<sup>92</sup> David Daoud, 'Hezbollah fighters train Iraqi Shiite militants near Mosul', *Long War Journal* (online), 5 November 2016 <<https://www.longwarjournal.org/archives/2016/11/hezbollah-fighters-train-iraqi-shiite-militants-near-mosul.php>>, last accessed 8 October 2023.

<sup>93</sup> Anne Stenersen, *Al-Qaida in Afghanistan* (Cambridge University Press, 2017) 96-115.

<sup>94</sup> Alan Axelrod, *The real history of the cold war* (Sterling, 2009) 113.



actors have huge financial support and trade in international arms market as buyers.<sup>95</sup> There is also a parallel illicit international market for arms, which is worth 2-10 billion dollars a year, according to a 1998 estimate.<sup>96</sup> Thus, non-state actors can easily procure arms from the international market.

### **3. EXTERNAL SUPPORT TO NON-STATE ACTORS IN AN ARMED CONFLICT – A STATISTICAL ANALYSIS.**

Statistics implies use of data, functions of data, techniques for collecting, analysing, and interpreting data for decision-making and the science of applying such techniques.<sup>97</sup> Statistics is an important research tool for researchers as it helps them make sense of the data by generating novel ways of thinking about questions.<sup>98</sup> Thus, it can be a powerful tool for making decision at the time of uncertainty. Descriptive statistics as a statistical tool depicts or summarizes data such that it is easily comprehensible.<sup>99</sup>

From 1946 onwards, the Uppsala Conflict Data Program ('UCDP')<sup>100</sup> at Uppsala University, Department of Peace, and Conflict Research, collected various information on armed violence. Thereafter, the UCDP embarked on the project to document and digitize violent conflicts since 1970s. The wide range of data provided in the Uppsala Armed Conflict dataset is widely used for its accuracy. The UCDP contains varied datasets among which is included the UCDP External Support

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<sup>95</sup> Paul Levine, Ron Smith, Lucrezia Reichlin and Patrick Rey, 'The Arms Trade' (1997) 12(25) *Economic Policy*, 335-370.

<sup>96</sup> Byman et al, above n 37, 94.

<sup>97</sup> Roger E Kirk, *Statistics - An Introduction* (Thomson Wadsworth, 5<sup>th</sup> ed, 2008) 3.

<sup>98</sup> *Ibid*, 10.

<sup>99</sup> *Ibid*, 7.

<sup>100</sup> Uppsala Conflict Data Program, UCDP Conflict Encyclopaedia <<https://ucdp.uu.se/>>, Uppsala University, last accessed on 1 July 2020. The 2015 version of the UCDP Armed Conflict Dataset allowed creation of customised dataset using the online 'customised reports' tool. The present updated UCDP website does not allow creation of customised datasets – only complete datasets can be downloaded from the website.

Dataset.<sup>101</sup> This dataset contains detailed information on conflicts between 1975 and 2009 on the existence, type and provider of external support for all warring parties.

Limitation of the UCDP dataset is that the battle related deaths are not numerically accurate. Since the UCDP data on battle related deaths relies on publicly accessible sources, there are certain discrepancies as numerous incidents, and the resulting battle related deaths go unreported in the media. UCDP is a complex dataset and there are inherent limitations in relation to the exact accuracy of the collected data owing to the difficulty of obtaining data in situations of armed conflict. Nonetheless, the wide range of data provided in the Uppsala Armed Conflict dataset is highly useful for statistical analysis and widely recognised for the information provided on armed conflicts.

The Uppsala Armed Conflict database on external support in armed conflict provides details of these three cases (a) external support to non-state actors by a state (b) external support to non-state actors by another non-state actor (c) no external support to non-state actor in an armed conflict. I looked up all the dataset entries where a state and a non-state actor were involved in an armed conflict and the non-state actor either received external support from a state, or another non-state actor or did not receive any external support at all.

My primary motive was to analyse the battle related deaths in conflict where there was external support by a state to a non-state actor with that of the Total Battle Related Deaths (which includes conflicts with external support to non-state actors from states + another non-state actor + conflicts with no external support).

The analysis of the above was particularly important to compare with the Battle Related Deaths in Conflicts where there was external support by a non-state actor to another non-state actor with that of the Total Battle Related Deaths (includes conflicts with external support to non-state actors from states + another non-state actor + conflicts with no external support). Battle related deaths include both military and civilian casualties.

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<sup>101</sup> Stina Högladh, Therése Pettersson and Lotta Themnér, (2011) 'External Support in Armed Conflict 1975–2009'. This dataset can be accessed at <<https://ucdp.uu.se/downloads/olddw.html>>, last accessed 1 November 2023.

The rule of attribution for state responsibility for acts of non-state actors was clarified in 1986 in the Nicaragua case. The ICJ judgment in *Nicaragua v United States*<sup>102</sup> dealing with attribution of acts of non-state actors to states, applied the test of ‘effective control’. Thus, I looked up data on external support by states to non-state actors pre-1986 and post-1986 to determine whether the law on state responsibility succeeded in deterring states from supporting non-state actors externally.

Since the UCDP External Support dataset starts from 1975 and the Nicaragua decision was passed in 1986, this analysis considered data of 10 years for proper comparison i.e. ten years prior to 1986; and ten years post 1986.

### **3.1 HYPOTHESIS AND METHODOLOGY**

My hypothesis is that the existing rule of attribution (‘effective control’) for state responsibility did not have any affect in deterring states from externally supporting non-state actors in an armed conflict.

Please find the methodology and the statistical description below. To summarize the methodology:

1. I have selected entries from the Uppsala Armed Conflict database with non-state actors and states as the primary warring parties in a conflict.
2. I looked up the entries to identify whether the external support was given to non-state actors by a state, another non-state actor or there was no external support provided at all.
3. I further divided the entries in pre 1986 (1986 being the year when the attribution test of ‘effective control’ was laid down in the Nicaragua case) and post 1986 period based on the year of conflict. That is, when the year of conflict in the entries is between 1987 and 1997, the conflict is classified as a conflict in the ‘post’ period; while when the year of conflict is between 1976 and 1986, the conflict is classified as a conflict in the ‘pre’ period.

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<sup>102</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14.

4. I summarised the total battle-related deaths year wise for the ‘pre’ and ‘post’ period.

5. I further classified the total battle related deaths in a specific year into 3 categories – (a) battle related deaths in conflicts with external support by a state party (b) battle related deaths in conflicts with external support by a non-state party and (c) battle related deaths in conflicts with no external support.

6. I undertook an analysis of the total battle related deaths corresponding to the selected entries based on the nature of external support - i.e., external support by state, non-state actor, or whether there was no external support.

7. I compared the total battle related deaths attributable to external support by a state actor or external support by a non-state actor in a specific year in the aforementioned data with that of the total battle related deaths in that year.

**TABLE A:** PRE “EFFECTIVE CONTROL” TEST

PRE	(A) Battle Related Deaths (non- state actor providing external support)	(B) Battle Related Deaths (states providing external support)	(C) Battle related deaths (no external support)	(D) Total Battle Related Deaths (external support by non-state actors and states)	(E) Total Battle Related Deaths (including entries of no external support + entries of external support from non-state actors and states)
1976	11533	15325	30	26,858.00	26888

1977	22413	24771	4272	47,184.00	51456
1978	25794	36483	3105	62,277.00	65382
1979	52357	72159	4130	124,516.00	128646
1980	138484	41594	8442	180,078.00	188520
1981	170872	45893	2200	216,765.00	218965
1982	229997	86216	2250	316,213.00	318463
1983	283861	92857	213	376,718.00	376931
1984	340044	94958	11708	435,002.00	446710
1985	394026	98914	8422	492,940.00	501362
1986	467667	93340	21469	561,007.00	582476

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**TABLE B:** POST “EFFECTIVE CONTROL” TEST

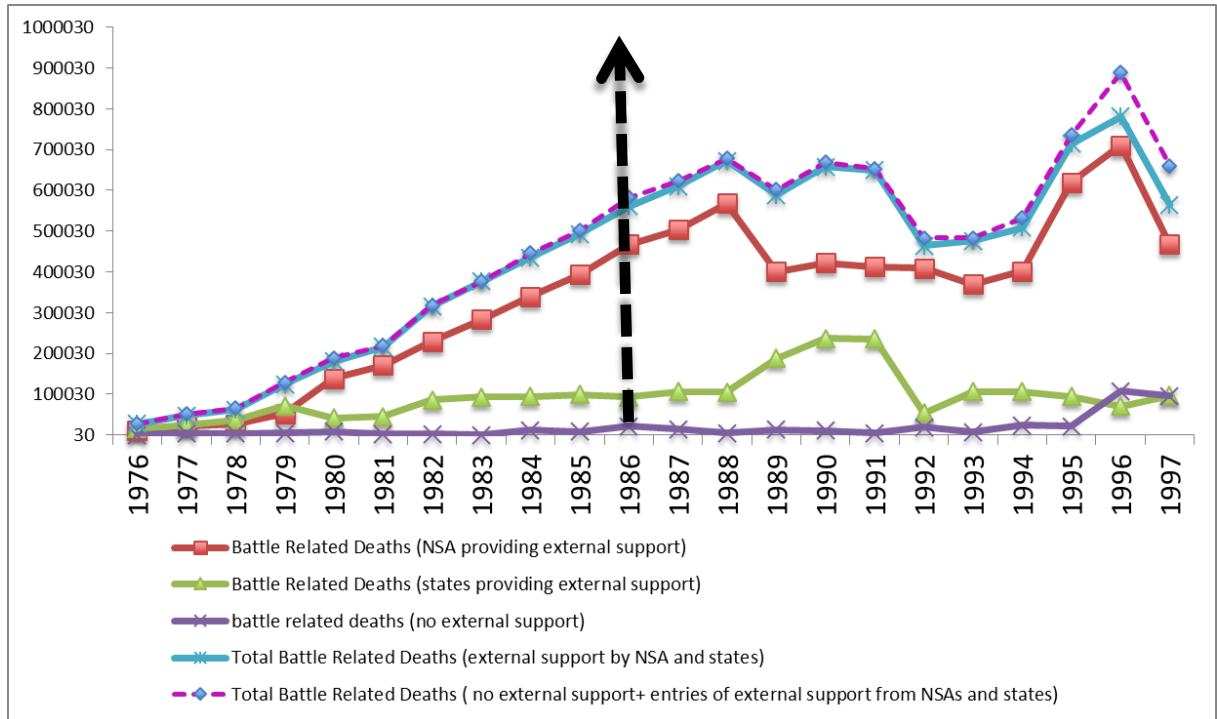
POST	(A) Battle Related Deaths (non-state actor providing external support)	(B) Battle Related Deaths (states providing external support)	(C) Battle related deaths (no external support)	(D) Total Battle Related Deaths (external support by non-state actors and states)	(E) Total Battle Related Deaths (including entries of no external support+ entries of external support from non-state actors and states)
1987	503417	106294	14022	609,711.00	623733
1988	567728	105297	4861	673,025.00	677886
1989	400803	188161	13181	588,964.00	602145

1990	422178	236233	10133	658,411.00	668544
1991	412939	236182	4185	649,121.00	653306
1992	409553	54304	19060	463,857.00	482917
1993	369608	106169	7382	475,777.00	483159
1994	402552	105961	24139	508,513.00	532652
1995	619526	94368	21940	713,894.00	735834
1996	710828	70444	107245	781,272.00	888517
1997	468007	96868	96000	564,875.00	660875

### 3.2 GRAPHICAL REPRESENTATION

Accordingly, the battle related deaths ('Y'- Axis) for each of the five categories were plotted against the period 1976 to 1997 ('X'- Axis). The aforementioned graph is

represented herein below with each category of battle related deaths represented by a different colour:



**FIG: 1.0: EXTERNAL SUPPORT TO NON-STATE ACTORS ('NSA')**

On analysing the aforementioned graphical representation of the data, the following becomes evident:

(i) The relative volume of battle related deaths in situation of non-state actors providing external support is by far the most and it heavily outweighs the battle related deaths in conflicts with states providing external support and where there is no external support (represented by the green and the purple line respectively), taking into consideration the entire period between 1976 to 1997.

(ii) However, on a closer analysis of the same data, it will be evident that for the period between 1976 to 1979, battle related deaths in conflicts with non-state actors providing external support and in conflicts with states providing external support



are almost analogous with battle related deaths in situation of states providing external support accounting for larger number of battle related deaths.<sup>103</sup>

(iii) A sharp divergence in the data pattern is observable from the year 1979 onwards wherein one can observe a steep increase in the number of battle related deaths with non-state actors providing external support as opposed to a relative decrease in the number of battle related deaths with states providing external support. The pattern continues up to the year 1988. In the period between 1979 to 1988, there is a steady increase in the number of battle related deaths with non-state actors providing external support whereas the number of battle related deaths with states providing external support remaining almost constant with minor variations. It appears that the period between 1979 to 1988, is indicative of a shift in the relative intensity of conflicts with non-state actors providing external support as opposed to states providing external support. This is partially attributable to proliferation of conflicts in the African continent with cross-border non-state actor co-operation. The proliferation of conflicts with cross-border non-state actor co-operation is a significant trend.

(iv) The abovementioned trend appears to continue right up to the year 1988, whereupon yet another change of trend can be observed from the graphical representation above. It is perhaps interesting to note that despite the year 1986 being significant in international law, laying down the parameters for imposition of state responsibility under international law for acts of non-state actors, no significant effect of such enumeration is noticeable from the graphical representation above. It may be concluded that the attribution test of 'effective control' was ineffective in deterring states from providing external support to non-state actors.

(v) It is evident that the incidence of non-state actor with another non-state actor co-operation has rendered the significance of conflicts with states providing external support to non-state actors relatively obscure in view of the vast divergence in number of battle related deaths in the respective conflicts.

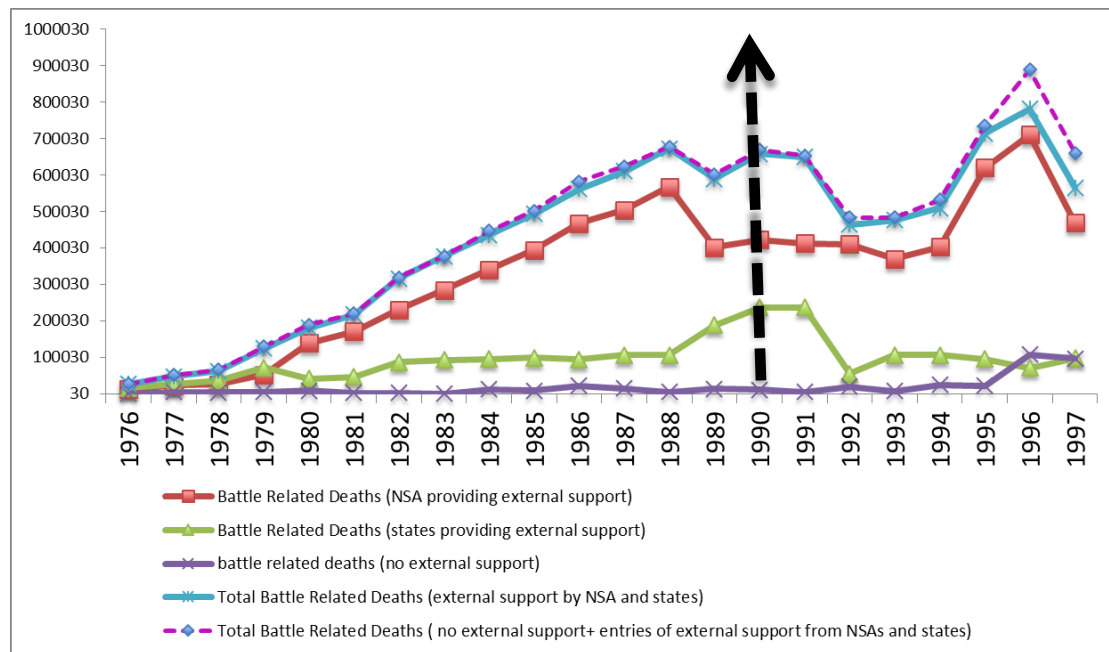
(vi) The data suggests there is no substitution effect between state and non-state support since there is no discernible change in the pattern of non-state actor

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<sup>103</sup> See Table A – compare columns (A) and (B) for the years 1976, 1977, 1978 and 1979.

external support to other non-state actors post 1986. Also, non-state actors have been actively supporting other non-state actors since 1978.

In Figure 2.0, my attempt is to analyse the trend of external support to non-state actors after the end of the cold war and whether there were any changes to the abovementioned results.



**Fig. 2.0:** External support to non-state actors after the end of the cold war

(i) Post 1989, the number of battle related deaths with non-state actors supporting non-state actors saw sharp decline and such decline was carried forward till the year 1994. As opposed to that, the number of battle related deaths with states providing external support saw a relative upsurge continuing till about 1991. It is evident that such a relative upsurge is attributable to the various Balkan conflicts in the relevant period.

(ii) While the trend of relative downturn in the number of battle related deaths with non-state actors providing external support continued during the period between 1989 to 1994, 1994 onwards the numbers again saw a steep increase lasting till about the year 1996.

(iii) It is amply evident from the graph above that the relative contribution in terms of the number of battle related deaths of conflicts with non-state actors providing external support to another non-state actor is significantly higher than that of the conflicts with states providing external support.

There is no change in our findings on the trend of external support to non-state actors in an armed conflict after the end of the cold war. This is perhaps indicative of a shift in stance in international law in relation to the relative importance of non-state actors as principal protagonists in an armed conflict.

#### **4. CONCLUSION**

As discussed extensively, external support allows non-state actors to sustain themselves in an armed conflict. The trend of external support to non-state actors assert that non-state actors play an important role in supporting the causes of other non-state actors engaged in a conflict.

Analysing the data provided in the Uppsala Armed Conflict dataset, there is a clear pattern wherein conflicts with non-state actors providing external support are observable as the predominant type of conflict contributing to the largest number of battle related deaths. Statistically, it is observed that the relative contribution in terms of the number of battle related deaths of conflicts with non-state actors providing external support to another non-state actor is significantly higher than that of the conflicts with states providing external support. This is an indication of a shift in stance in international law in relation to the relative importance of non-state actors as principal protagonists in an armed conflict.

The statistical analysis affirms that the existing rule of attribution ('effective control') for state responsibility has been unsuccessful in deterring states from externally supporting non-state actors in an armed conflict. The abovementioned result of my statistical analysis supports my hypothesis.

The statistical analysis in the chapter also evidences the dominant role of non-state actors as the primary externally supporting parties (to other non-state actors) in armed conflicts as opposed to states. This is indicative of a broad lacuna in the existing

international law framework, which mostly excludes armed non-state actors and continues to focus exclusively on states as the primary parties.

For a non-state actor to be bound by international law, it must have international legal personality. An entity has international legal personality, if it possesses rights as well as obligations within a legal system.<sup>104</sup> Although the ICJ makes it clear that international organizations may possess international legal personality, it does not clarify if it includes ‘non-state actors’ apart from international organizations.<sup>105</sup> In fact, in the present times, international law lacks a regulatory framework addressing the growing influence of non-state actors.

At present, armed non-state actors are not subjects of international law and state responsibility is invoked to attribute the wrongful acts of non-state actors to states. Thus, the question arises as to when the law of state responsibility gets invoked in international law for the wrongs committed by non-state actors. The next section of the thesis shall investigate the existing law to analyse the rule of attribution for state responsibility for acts of non-state actors.

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<sup>104</sup> James Crawford, *The creation of states in international law* (Clarendon Press, 2<sup>nd</sup> ed, 2006) 28.

<sup>105</sup> *Reparation for Injuries Suffered in the Service of the UN*, [1948] ICJ 121, 178.

**PART III: LAW OF STATE RESPONSIBILITY IN INTERNATIONAL LAW**

## **CHAPTER 2. THE EXTANT LEGAL REGIME: RULE OF ATTRIBUTION FOR STATE RESPONSIBILITY UNDER INTERNATIONAL LAW**

### **1. INTRODUCTION**

The question of state responsibility for acts of non-state actors has formed the crux of a number of international disputes in the past decades.<sup>106</sup> During the cold war, global geopolitics witnessed a growing trend where states resorted to covert modes of interference in the affairs of other states.<sup>107</sup> States resorted to indirect means to interfere in other states to gain political outcomes, a scenario very different from the classical approach of a state resorting to direct warfare to settle disputes.<sup>108</sup>

This change in scenario from classical warfare to state support of non-state actors in rival states for achieving defined political objectives, has evoked considerable interest amongst international scholars and jurists regarding the question of state responsibility. The importance of the rule of attribution for imposition of state responsibility for use of force by non-state actors has been highlighted in the incident regarding the downing of Flight MH17 in Eastern Ukraine. The question of attribution for wrongful acts by non-state actors in breach of international law to a state has long posed a difficult question in international law.<sup>109</sup> Although the issue was sought to be

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<sup>106</sup> See *Corfu Channel Case (Merits) (United Kingdom v. Albania)*, [1949] ICJ Reports 4; *Military and Paramilitary Activities in and against Nicaragua v. United States of America (Merits)*, [1986] ICJ Reports 1986; *Prosecutor v. Dusko Tadic*, Judgment of Appeals Chamber dated July 15, 1999 (Case no. IT-94-1-A); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Reports 43.

<sup>107</sup> See Michael J Findley, James A Piazza and Joseph K Young, 'Games Rivals Play: Terrorism in International Rivalries' (2012) 74(1) *The Journal of Politics* 235; Idean Salehyan, Kristian Skrede Gleditsch and David E Cunningham, 'Explaining External Support for Insurgent Groups' (2011) 65(4) *International Organization* 709; Idean Salehyan, 'Transnational Rebels: Neighbouring States as Sanctuary for Rebel Groups' (2007) 59(2) *World Politics* 217; Mark Kramer, 'Ideology and cold war' (1999) 25 *Review of International Studies* 539.

<sup>108</sup> *Ibid.*

<sup>109</sup> See generally, James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford, 8th ed, 2012) 539-565; James Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in M Evans (ed), *International Law* (Oxford, 2nd ed, 2006) 451-478; James Crawford, 'The ICJ and the Law of State Responsibility' in Christian J Tams & James Sloan (ed), *Development of International Law by the International Court of Justice* (Oxford University Press, 1st ed, 2013) 71-86; Yoram Dinstein, *War, aggression and self-defence* (Cambridge, 4th ed, 2005) 104-112. Christine Gray,

resolved in several instances since mid-eighties, the issue remains vexed and controversial.<sup>110</sup> An important reason for the difficulty in framing an appropriate rule of attribution is the fact that there are several political issues underpinning the question of attribution.<sup>111</sup>

Even though the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts<sup>112</sup> have not been turned into law making treaties as yet, they have been continually cited in case laws and have acquired increasing authority as international law on state responsibility.<sup>113</sup> The court has applied a number of those articles, Articles 4 and 8 in particular, as declaratory of general international law.<sup>114</sup> Article 4<sup>115</sup> provides that a state is responsible for the act of an organ or official of that state acting in that capacity. Article 8<sup>116</sup> provides that a state will be responsible if the individuals are in fact acting under its authority, i.e., on its instructions, or under its direction or control. The ICJ had the occasion to consider the

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*International Law and the Use of Force* (Oxford, 3rd ed, 2008) 114-166. Malcolm N Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 841-846.

<sup>110</sup> See, eg, Frederic Kirgis, Fred L Morrison, Patrick M Norton, Jules L Lobel, Yoram Dinstein and Daniel B Magraw, Jr., 'The Jurisprudence of the Court in the Nicaragua Decision', *Proceedings of the Annual Meeting* (1987) 81 *American Society of International Law*, 258-277; John Norton, 'Nicaragua and the Deterioration of World Order' (1987) 81(1) *American Journal of International Law* 151; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81(1) *American Journal of International Law* 101; BS Chimni, 'The International Court and the Maintenance of Peace and Security: The Nicaragua Decision and the United States Response' (1986) 35(4) *ICLQ* 960. Also see, an entire issue of the American Journal of International Law was dedicated to the assessment of the Nicaragua case: 'Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)' (1987) 81 *American Journal of International Law* 77 (including comments by Herbert W Briggs, Francis A Boyle, Gordon A Christenson, Anthony D'Amato, Richard Falk, Tom J Farer, Thomas M Franck, Michael J Glennon, Edward Gordon, John Lawrence Hargrove, Mark Weston Janis, Frederick L Kirgis, Jr., John Norton Moore, Fred L Morrison, W Michael Reisman and Fernando R Tesón).

<sup>111</sup> Ibid.

<sup>112</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), UN Doc. A/56/83, 3 August 2001.

<sup>113</sup> See James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford, 8th ed, 2012) 540. Also see generally Nicaragua case, above n 9.

<sup>114</sup> See, eg, Separate Opinion of Judge Roberto Ago in Nicaragua case, above n 9, 188-189 [15-16]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment [2007] ICJ Reports 43, 388, 398 [385]; *Tadic case*, July 15, 1999 (Case no. IT-94-1-A), [109-110].

<sup>115</sup> See Article 4 of ARSIWA.

<sup>116</sup> See Article 8 of ARSIWA.

degree of control, which must be exercised by a state in order for a conduct to be attributable to a state in several decisions, most notably, in the Nicaragua case.<sup>117</sup>

It is imperative to study the case laws to analyse the extant legal regime on the rule of attribution for state responsibility under international law.

## **2. AN ANALYSIS OF THE CASE LAWS ON THE RULE OF ATTRIBUTION UNDER THE EXISTING LAW OF STATE RESPONSIBILITY**

### **2.1 CORFU CHANNEL CASE**

The ICJ in 1949 addressed the question of state responsibility for the first time in the Corfu Channel case,<sup>118</sup> which was brought by the UK against Albania. The Court by 11 votes against 5, held that Albania is responsible for mine laying even though Albania did not have any mine laying capacity of its own.<sup>119</sup> Albania was held responsible because it must have known about the existence of the mines in its territory and failed in warning UK about the dangers even though Albania did not lay the mines itself.<sup>120</sup> The court did not discuss attribution of the wrongful act of non-state actors to Albania but instead, held that the grave omission by Albania to prevent the explosion involves the international responsibility of Albania.<sup>121</sup>

### **2.2 NICARAGUA CASE**

The classical exposition of the question of state responsibility for acts of non-state actors was perhaps most famously addressed in the opinion of the ICJ in the

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<sup>117</sup> Nicaragua case, above n 9.

<sup>118</sup> *Corfu Channel Case (Merits) (United Kingdom v. Albania)*, [1949] ICJ Reports 1949 4.

<sup>119</sup> *Ibid*, 22.

<sup>120</sup> *Ibid*, 22.

<sup>121</sup> *Ibid*, 23.



decision of the Nicaragua case.<sup>122</sup> The decision remains one of the foremost expositions of the question of state responsibility for internationally wrongful acts of non-state actors. In the context of ascertaining whether the US is liable for the acts of the contra rebels in breach of international humanitarian law, the court had the occasion to assess the necessary prerequisites for attribution of acts of non-state actors to a state. It is to be noted that this forms a distinct assessment than that of liability of the state for its own acts or omission in aiding, abetting and logistically and financially supporting non-state actors in their commission in violation of international humanitarian law.<sup>123</sup>

In its formulation of the test for attribution for acts of non-state actors, the court enumerated that the question of US's responsibility for humanitarian violations of contra-rebels was necessarily dependent upon an exposition of the inter-se relationship between the contra rebels and the US.<sup>124</sup> The court observed that the relationship between the two has to be one of dependence on one hand and that of control on the other, such that it is possible to equate the acts of contras to that of a *de facto* organ of the US government. In this context, the court observed the following:

*“What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.”*<sup>125</sup>

It is noteworthy that the aforementioned test for determination of contras as the *de facto* organ of US, rendering its acts attributable directly to the US, emphasizes the aspect of ‘dependence’ as the core element of assessment and it envisages ‘control’ as a secondary adjunct inherent in the degree of dependence between the parties. In this context, the court observed the following:

*“In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit*

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<sup>122</sup> Nicaragua case, above n 9.

<sup>123</sup> Ibid, [75].

<sup>124</sup> See Nicaragua case, above n 9.

<sup>125</sup> Ibid, [109].

*of their activities but is insufficient to demonstrate their complete dependence on United States aid. On the other hand it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence.*"<sup>126</sup>

However, the court subsequently went on an independent assessment to determine the degree of control US exercised on the operation by contra-rebels and whether the acts of contra-rebels could be made attributable to the US.

The court held that the evidence of US involvement in the form of financial and logistic support and training of the contras is insufficient to prove 'control' and 'dependence' of contras to a degree justifying attribution of their acts to the US. The court concluded that for the conduct of US to give rise to legal responsibility for acts of the contra-rebels, it needs to be established that US had 'effective control' of the particular military or paramilitary operations in course of which the alleged violations were committed as opposed to general overall control. The court held that:

*"All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. 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 State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."*<sup>127</sup>

It is fair to conclude that the ICJ in formulating a rule of attribution for imputing the acts of the contra-rebels to the US, compositely considered the factum of 'dependence' of non-state actors and the aspect of 'effective control', as opposed to

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<sup>126</sup> See Nicaragua case, above n 9, [110].

<sup>127</sup> See Nicaragua case, above n 9, [115].

‘general overall control’, to imply a relationship of *de facto* agency between the non-state actors and the state.<sup>128</sup>

### 2.3 BOSNIAN GENOCIDE CASE

Subsequently, the reassessment of the question of state responsibility for acts of non-state actors not being a *de jure* organ of the state as per the internal municipal law came up for assessment in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).<sup>129</sup> In the backdrop of assessing whether the acts of the military unit of Republic of Srpska (‘VRS’) is attributable to Federal Republic of Yugoslavia (‘RFY’) for its support and training of the Srpska forces, the court had the opportunity to reassess the question of attribution of the acts of non-state actors to a state.

In assessing the appropriate rule of attribution for state responsibility for acts of non-state actors, the Court distinguished the aspect of attribution flowing from designation of the non-state actors as *de facto* organ of the state and the aspect of attribution arising from the factum of effective control.<sup>130</sup> In its assessment of VRS, the court referred to the decision in Nicaragua case and emphasized the aspect of ‘dependence’ coined by the ICJ in the aforesaid decision as the relevant test for designating a non-state actor as a *de facto* organ of the state.

The Court interpreted the statement of the ICJ in Nicaragua case as meaning that to be equated as the state organ, the non-state actors must act in ‘complete dependence’ on the state, rendering them mere instrumentality of the state, making their acts attributable to the state. The court held the following:

*“According to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups*

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<sup>128</sup> See *ibid*, [109-115].

<sup>129</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, [2007] ICJ Reports 43 (‘Bosnian Genocide case’).

<sup>130</sup> *Ibid*, [392-93, 397, 400].

*or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.*

*However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as complete dependence.”<sup>131</sup>*

The court considered Article 4 of ARISWA as the statement of customary international law regarding attribution of acts of organs of state and fashioned the abovementioned test of complete dependence as the test for *de facto* instrumentality.<sup>132</sup>

Thereafter, the court went on to consider the question of attribution on the basis of the ‘direction’ and ‘control’ by a state of the acts of non-state actors.<sup>133</sup> The court’s approach in separately considering the test for designating non-state actors as *de facto* organs of the state based on the test of ‘complete dependence’, and the test of ‘direction’ and ‘control’ of the acts of non-state actors rendering such acts of non-state actors as acts of the state’s own organs are somewhat indistinguishable in scope and effect. However, the court went ahead and espoused that ‘effective control’ over the acts of non-state actors in respect of each operation in which impugned acts were committed by the non-state actors, as opposed to general control in respect of the overall conduct of the non-state actors, would render such acts of non-state actors directly attributable to the state.<sup>134</sup> The clear distinction drawn between the two elements of ‘dependence’ and ‘control’ and their effect on attribution is apparent in the courts formulation of the test of ‘effective control’ in the following words:

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<sup>131</sup> Ibid, [392-93].

<sup>132</sup> Ibid, [385, 393 and 414].

<sup>133</sup> Ibid, [397].

<sup>134</sup> Ibid, [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 persons or groups of persons having committed the violations.”<sup>135</sup>*

## **2.4 TADIC CASE**

The court in the Bosnian Genocide case<sup>136</sup> rejected the test of ‘overall control’ enumerated by the ICTY Appeals Chamber in the Tadic case,<sup>137</sup> wherein the Appeals Chamber stated that for attribution of acts of non-state actors, a general control of the overall operation of the non-state actors is sufficient to constitute a *de facto* agency rendering such acts attributable to the state.<sup>138</sup> In the case of Tadic, the court stated that:

*“In order to attribute the acts of a military or paramilitary group to a State, 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. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.”<sup>139</sup>*

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<sup>135</sup> Ibid, [400].

<sup>136</sup> Bosnian Genocide case, above n 129, [400].

<sup>137</sup> ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, 15 July 1999 (‘Tadic Case’).

<sup>138</sup> Ibid, [120, 131].

<sup>139</sup> Ibid, [131].

## **2.5 TEHRAN HOSTAGES CASE**

In the discussion on the case laws on state responsibility, it is also relevant to discuss the Tehran Hostages<sup>140</sup> case. The ICJ divided the facts of the case into two phases and held that in the first phase, Iran was not responsible for the acts of the individuals who seized the Embassy but Iran was responsible for subsequent developments because the government made public declarations that the premises of the Embassy and the hostages would remain as they were until the US government handed the Shah for trial.<sup>141</sup> The Court held that such a declaration by the Iranian government amounted to an approval by the State of the seizure of the Embassy and the militants responsible for the seizure had now become agents of the state for whose acts the state was internationally responsible.<sup>142</sup>

## **2.6 CASES UNDER ARTICLE 51 OF THE UN CHARTER**

Article 51 of the UN Charter recognizes self-defence as an inherent right in situations of ‘armed attack’ by one state against another state.<sup>143</sup> This is particularly tricky in situations necessitating self-defence against acts of non-state actors. The controversial issue pertaining to this Article has been whether a state can exercise self-defence against a non-state actor and whether use of force by a non-state actor constitutes an ‘armed attack’ under Article 51.

In the Wall Advisory opinion,<sup>144</sup> the Court opined that Article 51 recognized right of self-defence only in the case of an armed attack by one state against another

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<sup>140</sup> *US Diplomatic and Consular Staff in Teheran case (United States v. Iran)*, (1980) ICJ Reports 1.

<sup>141</sup> *Ibid*, [58 and 74].

<sup>142</sup> *Ibid*, [74].

<sup>143</sup> See Article 51 of the UN Charter.

<sup>144</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (‘The Wall Advisory opinion’), ICJ, Advisory Opinion of 9 July 2004.

state. In *Armed Activities (DRC v Uganda)*,<sup>145</sup> the court did not address the issue at all. In the *Oil Platforms* case,<sup>146</sup> the court did not answer whether a state could exercise self-defence against a non-state actor but emphasized that self-defence could be exercised by a state in keeping with the principle of necessity and proportionality.<sup>147</sup>

It would be appropriate to state that the legal position appears to be that stated in the *Nicaragua* case. A state cannot exercise Article 51 against the use of force by non-state actors unless they are under the ‘effective control’ of another state.

The result of this understanding of the scope of Article 51 incorporating the test of ‘effective control’ enumerated in the *Nicaragua* case is a presumed heightened risk of an illegality of any recourse to self-defence against the acts of non-state actors since the standard and degree of nexus between non-state actors and the state to render such relationship one of ‘effective control’ is particularly high.<sup>148</sup>

However, there is recognition of the threat posed by non-state actors and Judge Kooijmans in his separate opinion of *Armed Activities (DRC v Uganda)*<sup>149</sup> observed the following:<sup>150</sup>

*“Phenomenon which in present-day inter-national relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require.”*

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<sup>145</sup> *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), [2005] ICJ Reports 168.

<sup>146</sup> *Iran v United States (Oil Platforms Case) (Merits)*, [2003] ICJ Reports 161.

<sup>147</sup> *Ibid.*, [77].

<sup>148</sup> See generally, James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford, 8th ed, 2012) 771-72.

<sup>149</sup> *Armed Activities on the Territory of the Congo*, above n 145.

<sup>150</sup> *Ibid.* See separate opinion of Judge Kooijmans, 314.

It is also contextual to highlight that in September 2014, the UN Secretary-General expressed support for the campaign against the ‘Islamic State’ in Syria, noting that “the strikes took place in areas no longer under the control of that Government.”<sup>151</sup>

### 3. AN ANALYSIS OF THE ‘EFFECTIVE CONTROL’ TEST AND THE ‘OVERALL CONTROL’ TEST

The test of attribution of ‘effective control’ to establish state responsibility for acts of non-state actors to states is based on agency.<sup>152</sup> It assumes a principal-agent relationship between the state and the non-state actor. This approach, finding its resounding endorsement in the ICJ's decision in Nicaragua and Genocide case, is a longstanding legacy of the work of special *rapporteur* Roberto Ago on ARSIWA,<sup>153</sup> specifically Article 8 of the draft articles enumerating ‘direction and control’ as the nature of link necessary for attribution of acts of non-state actors to states.<sup>154</sup>

Perhaps not so surprisingly, the bench of ICJ deciding the Nicaragua case, including Roberto Ago, repeatedly emphasized the importance of draft Article 8 for expounding the rule of attribution applicable to the facts of Nicaragua.<sup>155</sup> The special emphasis on the need to establish evidence of specific state authorization and ‘control’

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<sup>151</sup>Secretary-General Ban Ki-moon, Remarks at the Climate Summit press conference (including comments on Syria), 23 September 2014 <<https://www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria>> last accessed 1 November 2023.

<sup>152</sup> See Nicaragua case, above n 9 and the Bosnian Genocide case, above n 129. (The principal discourse is one of establishment of *de facto* agency for attribution).

<sup>153</sup> See Introductory Note, the Articles on Responsibility of States for Internationally Wrongful Acts 2001, James Crawford: “By 1962, the idea that the ILC should shift its focus towards the ‘definition of the general rules governing the international responsibility of the State’ (R Ago) gained support. Professor Ago (Italy), as the second Special Rapporteur on the subject, submitted eight reports as well as a substantial addendum between the years 1969 and 1980. During that time, the ILC adopted 35 articles, which constitute the foundation of the Articles on the origin and fundamental features of state responsibility (the current Part One of the Articles on Responsibility of State for Internationally Wrongful Acts).” Also see James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 75-76.

<sup>154</sup> Article 8 of ARSIWA, commentary on Article 8 of ARSIWA, ILC Yearbook 2001/II (2), 47-8.

<sup>155</sup> See Separate Opinion of Judge Roberto Ago, Nicaragua case, above n 9, 188-189 [15-16]; Bosnian Genocide case, above n 129, [385, 388, 398]; Tadic case, above n 137, [109-110].



of a particular operation resulting in violation of international norms as a real test of attribution by Ago elucidates a preoccupation with designation of non-state actors as *de facto* agents of the state.<sup>156</sup>

The verdict of the majority in Nicaragua also placed a rather heavy evidentiary burden on the victim state's asserted attribution of wrongful acts of non-state actors by enumeration of a requirement of decisive evidence of 'effective control' for establishment of agency relationship.<sup>157</sup> This widely criticized test also renders adjudication of attribution highly illusory in view of the necessity of discharging the evidentiary burden, which it places on the victim.<sup>158</sup> There are practical difficulties of fact finding accompanying a clandestine involvement between a state and a non-state actor in perpetration of internationally wrongful acts.<sup>159</sup> It overlooks the practical realities often accompanying a claim for attribution of internationally wrongful acts to a state actor.

Although the decision of the Appeals Chamber in the case concerning Duško Tadic sought to depart from the established test of attribution for acts of non-state actors, the departure by Appeals Chamber in its enumeration of 'overall control' test is more of a distinction in degree of control necessary for attribution than a paradigmatic shift from the question of the nature of relationship between a state and a non-state actor for attribution of acts of non-state actor to such state.<sup>160</sup> The Appeals Chamber persisted with the *de facto* agency paradigm, though with a diluted notion of control rendering control by a specific instruction of a particular operation unnecessary.<sup>161</sup>

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<sup>156</sup> See *ibid.*

<sup>157</sup> See Nicaragua case, above n 9, [109-115].

<sup>158</sup> See generally, James Crawford, 'The ICJ & the Law of State Responsibility' in Christian J Tams & James Sloan (eds), *Development of International Law by the International Court of Justice* (Oxford University Press, 1st ed, 2013) 85; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 68-69, 71; also see Bosnian Genocide case, above n 129, [392-93].

<sup>159</sup> *Ibid.*

<sup>160</sup> The issue of *de facto* agency prominently and expressly formed part of the consideration of the Appeals Chamber. The endeavour of the Appeals Chamber was to fine-tune the 'degree of control' necessary to designate non-state actors as *de facto* agents of the state. See Tadic case, above n 137, [98].

<sup>161</sup> *Ibid.*

However, the dilution of degree of control necessary to establish the relationship of agency was circumscribed by a qualification of requirement of ‘compelling evidence’ to show genuine control.<sup>162</sup> As such, the optimism often associated with the Appeals Chamber’s enumeration of the ‘overall control’ test prescribed for the rule of attribution is perhaps somewhat misapprehended in view of the same evidentiary burden placed on the victim asserting state responsibility.<sup>163</sup>

The established test for attribution of acts of non-state actors for a finding of state responsibility overlooks the apparent reality on ground wherein states colluding or acting in collusion with a private non-state actor would make its best efforts in hiding such a collusion.<sup>164</sup> In fact, arguably, a strict agency-based enumeration of rule of attribution would incentivize such a state to be deeply cautious in hiding its relationship with non-state actors thereby rendering a finding on such responsibility somewhat implausible.<sup>165</sup>

It has been suggested by Cassese that the test of ‘effective control’ for attribution is a departure from the established position of law in as much as a state under international law should be responsible for all acts of an ‘authorised’ non-state instrumentality, irrespective of whether strict ‘effective control’ is exercised over the conduct of such a non-state actor.<sup>166</sup>

I think the criticism of the test of ‘effective control’ as not being representative of the existing position of law is perhaps circular in nature in as much as Antonio Cassese suggests blanket state responsibility for all acts of an ‘authorised’ non-state party without clarifying as to what such ‘authorisation’ supposedly entails. In other words, Cassese presumes a relationship of agency based on an ‘authorization’ and thereafter proposes blanket attribution for all acts of such an agent created by the act of

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<sup>162</sup> See Tadic case, above n 137, [138].

<sup>163</sup> While it may appear that the threshold is lower, the evidentiary burden is still high and the practical barriers to its application are quite stringent.

<sup>164</sup> Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 68-69, 71.

<sup>165</sup> Ibid.

<sup>166</sup> See Antonio Cassese, ‘The Nicaragua and Tadic tests revisited in the light of the ICJ judgment on Genocide in Bosnia’ (2007) 18(4) *The European Journal of International Law* 649, 655.

‘authorisation’. Thus, Cassese does little more than restating a test for *de facto* agency with a much lower threshold for attribution without elaborating on the basis for such a low threshold.

It is stated that such a test propounded by Cassese is a departure from the existing law of agency as the element of specific authorisation delineating the mandate of the agency and the attribution of acts strictly within such mandate to the principal are basic precepts of the law of agency. It can be argued that in proposing a blanket rule of attribution based on an ‘authorised’ agency without further elaborating on the rationale for attribution beyond the mandate of agency, lacks a principled basis for attribution and is a departure from the existing principles of the law of agency.<sup>167</sup>

Perhaps this curious proposition for the blanket relaxation of the rule of attribution is imputable to the fact that some doubt has been cast upon the test of ‘overall control’ fashioned in Tadic by the Appeals Chamber.<sup>168</sup> Such an endeavour towards generalizing the test of ‘overall control’ as the basis of *de facto* agency for attributing the acts of organised armed groups, to acts of all non-state actors is an over generalization of a test specifically crafted in relation to organised hierarchical armed militia wherein ‘direction and control’ of independent operations are deemed to be unnecessary for establishment of *de facto* agency.<sup>169</sup>

An issue with the agency paradigm is its inherent limitation arising out of an assumption of a relationship in the nature of principal and agent between a state and a non-state actor manifest in its prescription of *de facto* agency as the predominant exception to the rule of separate delict.<sup>170</sup>

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<sup>167</sup> An agent is personally liable for his conduct beyond the strict mandate of agency. See Eric Blackwood Wright, *The law of principal and agent* (HardPress Publishing, 2014) 54.

<sup>168</sup> See, eg, Davis B Tyner, ‘Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia’s Folly in Tadic’ (2006) 18 *Florida Journal of International Law* 843.

<sup>169</sup> The test of ‘overall control’ in Tadic was laid down specifically in the context of enumerating a rule of attribution for attributing the acts of organized armed militias and would be inappropriate to generalize the test. See Tadic case, above n 137, [131].

<sup>170</sup> See Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 156-57.

The emphasis on *de facto* agency trivializes the actual role of a non-state actor in the impugned internationally wrongful conduct, by adopting an artificial presumption of the non-state actors' role as that of a mere instrumentality.<sup>171</sup>

Such a relationship cannot, by an artificial construct, be rendered as that of a principal and an agent. Such a presumption about the relationship between a state and a non-state actor conducting an internationally wrongful act is devoid of any justification and should be re-assessed. The rule of attribution with a wider notion of the relationship between a state and a non-state actor is necessary to mould the facts arising in each independent circumstance for determination of state responsibility.<sup>172</sup> The artificial view of the relationship between a state and a non-state actor for perpetuating internationally wrongful acts as that of principal and agent is incapable of taking up the entire spectrum of the relationship into account.

There is also a requirement to focus on direct accountability of the armed non-state actors perpetrating internationally wrongful acts and the subsequent chapters of the thesis shall look into this question.

#### **4. SCHOLARLY CRITICISM OF THE EXTANT RULE OF ATTRIBUTION UNDER INTERNATIONAL LAW**

Scholars have criticized the existing rule of attribution on various grounds and their views are discussed below.

##### **4.1 CRITICISM OF THE INTERNATIONAL LAW ON SELF-DEFENCE**

The entire discourse of adequacy of the existing agency paradigm for attribution of acts of non-state actors to states, is also significantly called into question on the issue of legality of acts purporting to be acts in exercise of right to self-defence under Article

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<sup>171</sup> Ibid.

<sup>172</sup> The rule of attribution is not immutable and should be flexible enough to be applied to specific facts of a particular case. See Rudiger Wolfrum, 'State Responsibility for private actors: An old problem of renewed relevance' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005) 423-434.

51 of the UN Charter against acts of non-state actors.<sup>173</sup> As already stated, the interpretation of Article 51 as providing for right to self-defence only against acts of a state erects a significant theoretical hurdle for justification of acts purportedly in exercise of right of self-defence against acts of non-state actors by necessitating imputability of such acts of non-state actors to a state party.<sup>174</sup> While the agency paradigm still dominates the discourse of legality of exercise of right of self-defence under Article 51 against acts of non-state actors, voices supporting exercise of right to self-defence without a definitive reference of direct state responsibility on application of the rule of attribution enumerated in Nicaragua are finding acceptance.<sup>175</sup>

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<sup>173</sup> The principal strand of argument being that for proper invocation of right of self-defence under Article 51, the attack must be one in the nature of armed attack attributable to a State. See, eg, Helen Duffy, *The War on Terror and the Framework of International Law* (Cambridge University Press, 2005) 48-50, 52-55; Giuliana Ziccardi Capaldo, 'Providing a Right of Self-Defence Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict' (2007) 48 *Harvard International Law Journal* 101; Antonio Cassese, 'The International Community's 'Legal' Response to Terrorism' (1989) 38 *International & Comparative Law Quarterly* 589; ME O'Connell, 'Lawful Self Defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889. However, some scholars have opined against the 'conflation' of these two separate principles of state responsibility and the right of self-defence under Article 51 of the UN Charter. See Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Elgar, 2<sup>nd</sup> ed, 2020) 202.

<sup>174</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('The Wall Advisory Opinion'), ICJ, Advisory Opinion of 9 July 2004, [139]; Also see *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICJ Reports 168, [146-47]: "It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The 'armed attacks' to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present."

<sup>175</sup> See *ibid*, separate opinion of Judge Higgins, [33-34], and separate opinion of Judge Burgenthal, [6-7]; see, eg, Thomas Franck, 'Terrorism and the Right of Self-defence' (2001) 95 *American Journal of International Law* 839; SD Murphy, 'Self-defence and the Israeli Wall Opinion – An Ipse Dixit from the Court?' (2005) 99 *American Journal of International Law* 62; SD Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter' (2002) 43 *Harvard International Law Journal* 41; Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993; Christian J Tams, 'The Use of Force against Terrorists' (2009) 20 *European Journal of International Law* 359, 378 et. al; Christian J Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16 *European Journal of International Law* 963; Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Elgar, 2<sup>nd</sup> ed, 2020) 202-203; C Gray, *International Law and the Use of Force* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 31 – 33.

Scholars have argued for a right to self-defence by a state against use of force by a non-state actor. Professor Yoram Dinstein argues that “just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands or terrorists operating from within the Arcadian territory”.<sup>176</sup> The rationale is that the victim state should be allowed to take measures if the host state fails to prevent/regulate such non-state actors.<sup>177</sup>

Ruth Wedgwood has similarly asserted that if the host country fails to act against the non-state actors using the host state’s territory as a staging area for terrorist attacks, the victim state should be allowed to exercise self-defence against the instrumentalities of the armed attack.<sup>178</sup> She stressed however, that the victim state cannot target the ‘independent assets of the host countries.’<sup>179</sup>

However, many scholars are of the opinion that state practice is not consistent with the provisions in the UN Charter on the use of force and this has especially become evident since September 11, 2001. Christian Tams is of the opinion that the UN Charter does not provide a conclusive answer as to whether a state can use force against terrorists based in another state.<sup>180</sup> He is also of the opinion that the international community has recognized the right of states to use force against terrorists and that there has been a change in the law on the use of force in the last two decades.<sup>181</sup>

Kimberley Trapp is of the view that in the context of terrorism, ‘acquiescence is a basis for attributing non-state conduct to a State.’<sup>182</sup> She further elaborated that ‘state practice strongly suggests that the international community has recognized a right to use force in self-defence targeting non-state actors in foreign territory to the extent

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<sup>176</sup> Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge, 4th ed, 2005) 245.

<sup>177</sup> See generally, *ibid*, 244-251.

<sup>178</sup> Ruth Wedgwood, ‘Responding to Terrorism: The Strikes against Bin Laden’ (1999) 24 *Yale Journal of International Law* 559, 565-66.

<sup>179</sup> *Ibid*.

<sup>180</sup> Christian J Tams, ‘The Use of Force against terrorists’ (2009) 20(2) *The European Journal of International Law* 359.

<sup>181</sup> *Ibid*.

<sup>182</sup> Kimberley N Trapp, ‘Back to Basics: Necessity, proportionality, and the right to self-defence against non-state terrorist actors’ (2007) 56(1) *The International and Comparative Law Quarterly* 141,155.

that the foreign state cannot be relied on to prevent or suppress terrorist activities.’<sup>183</sup> She added that use of force must be necessary and proportionate in order to amount to a legitimate exercise of self-defence.<sup>184</sup>

There is a development of significant support for the view that direct attribution is perhaps unnecessary for exercise of right to self-defence under Article 51, most prominently in Security Council Resolutions 1368<sup>185</sup> and 1373<sup>186</sup>, invoking inherent right of self-defence and subsequent endorsement of actions of NATO without a strict reference to the rule of attribution fashioned by the ICJ.<sup>187</sup>

Attempts have also been made to explain the legality of such an exercise of right to self-defence by providing for diluted standard of attribution and sometimes novel mechanism for attribution, however, to limited success and often without adequate explanation for undermining the authorities in decided cases of the ICJ.<sup>188</sup> However, the legality of the aforementioned positions advocating recourse to right to self-defence without strict compliance of the rule of attribution in Article 8 of ARSIWA remains doubtful, especially in view of the decided authorities of ICJ.<sup>189</sup>

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<sup>183</sup> Ibid, 156.

<sup>184</sup> Ibid.

<sup>185</sup> See United Nations, S/RES/1368 (2001), 12 September 2001.

<sup>186</sup> See United Nations, S/RES/1373 (2001), 28 September 2001.

<sup>187</sup> Also see Preamble, United Nations, S/RES/1368 (2001), 12 September 2001. For an overview of assessment of state practice in this respect post 9/11, see Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Elgar, 2<sup>nd</sup> ed, 2020) 202-203; Daniel Bethlehem, ‘Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors’ (2012) 106 *American Journal of International Law* 769.

<sup>188</sup> See, eg, Giuliana Ziccardi Capaldo, ‘Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict’ (2007) 48 *Harvard International Law Journal* 101; G Travailo and J Altenburg, ‘State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force’ (2003) 4 *Chinese Journal of International Law* 97; Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1981) 370; PL Zanardi, ‘Indirect Military Aggression’ in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff, 1986) 155: interpreting Article 3(g) of General Assembly’s definition of Aggression, 1974 (suggesting ‘substantial involvement’ as the standard of nexus establishing attributability of acts of non-state actors).

<sup>189</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (‘The Wall Advisory Opinion’), ICJ, Advisory Opinion of 9 July 2004, [139]; Also see *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, [2005] ICJ Reports 168, [146-47]: ‘It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The ‘armed attacks’ to which reference was made came rather from the ADF. The

The issue of reassessment of the relevance of the *de facto* agency-based paradigm for formulation of the rule of attribution came into greater focus in the developments post the 9/11 attacks.

The agency paradigm is already riddled with questionable tolerance of state actions and actions by international organizations, purportedly in self-defence, in territories of sovereign states without attribution of a direct state responsibility under the extant regime.<sup>190</sup> The ultimate manifestation of this wide tolerance is the wide endorsement by the international community of the operation Enduring Freedom against the Taliban regime for their purported nexus with Al Qaida.<sup>191</sup>

It is to be noted that although the legality of operation Enduring Freedom has come under severe question by several jurists<sup>192</sup> and there is an apparent scepticism regarding its legality under the extant test of attribution in scholarly parlance, it has

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Court has found above [paragraphs 131-135] that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.” Also see Roberto Ago, ‘Fourth Report on State Responsibility’ (1972) 2 *Yearbook International Law Commission* 71, UN Doc. A/CN.4/264.

<sup>190</sup> See Preamble, United Nations, S/RES/1368 (2001), 12 September 2001; United Nations, S/RES/1373 (2001), 28 September 2001. For an overview of assessment of state practice in this respect post 9/11, see Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Elgar, 2<sup>nd</sup> ed, 2020) 202-203; Daniel Bethlehem, ‘Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors’ (2012) 106 *American Journal of International Law* 769.

<sup>191</sup> See especially, Preamble, United Nations, S/RES/1373 (2001), 28 September 2001: “*Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), *Reaffirming* the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts[.]” (It is submitted that the tenor of the resolution is clearly directed towards authorisation of acts purportedly in self-defence under Article 51 of the UN Charter without a necessity of finding of direct state responsibility on part of the host state(s)); see *The Legal Basis for the Invasion of Afghanistan*, Standard Note: SN/IA/5340, The House of Commons, UK Parliament.

<sup>192</sup> See Helen Duffy, ‘Responsibility of State for Acts of Terrorism’ in *The War on Terror and the Framework of International Law* (Cambridge University Press, 2005) 52-55; Antonio Cassese, ‘Terrorism is also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 *European Journal of International Law* 993; Gilbert Guillaume, ‘Terrorism and International Law’ (2004) 53(3) *International & Comparative Law Quarterly* 537, 546-47.



political endorsement and recognition from the international community.<sup>193</sup> This dichotomy casts an undeniable obligation on the jurists to explain the apparent discord between positive legality of the action of the US and the normative acceptance of the political justifiability of the attack. Multitude of scholars have sought to explain and justify this apparent discord by pointing out the various factors legitimizing the acts of US in acts of operation Enduring Freedom.<sup>194</sup> However, such justifications more often than not are inconsistent with the existing authorities on the question of the rule of attribution.<sup>195</sup> To a degree, it has been conceded in the existing scholarship that the justification and the wide recognition of the operation Enduring Freedom extends from extra-legal factors as opposed to strict legal assessment of the state operation.<sup>196</sup>

Interestingly, there have been overzealous calls for recognition of the state of affair of wide recognition of legitimacy of Operation Enduring Freedom in apparent conflict with the extant rule of attribution as an indication towards evolution of new rule of attribution.<sup>197</sup> It has been suggested that perhaps a more apt coinage of this recognition of legitimacy of Operation Enduring Freedom is to describe the same as

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<sup>193</sup> See, eg, Statement by NATO Secretary General, Lord Robertson, 8 October 2001, Press Release (2001) 138: “The permanent representatives made it clear that the military action that commenced on 7 October was taken in self-defense and directed at terrorists and those who harboured them. They stressed that every effort was being made to avoid civilian casualties, and that the action was in no way a strike against the people of Afghanistan, Islam or the Muslim world. The members of the Council were appreciative of the presentation made by the United States and the United Kingdom”; Press Statement on Terrorist Threats by Security Council President, 8 October 2001, UN Doc. AFG / SC-152/7167: “NATO Ambassadors this morning expressed their full support for the actions of the United States and the United Kingdom, which follow the appalling attacks perpetrated against the United States on 11 September 2001. They reiterated their readiness to provide assistance as required. Specifically, they remain fully committed to implement the eight measures agreed on 4 October at the request of the United States.”

<sup>194</sup> See, eg, AM Slaughter and W Burke White, ‘An International Constitutional Moment’ (2002) 43 *Harvard International Law Journal* 1; R Wolfrum and CE Phillip, ‘The Status of the Taliban: Their Obligations and Rights Under International Law’ (2002) 6 *Max Planck Yearbook of United Nations Law* 566; TM Franck, ‘Terrorism and Right to Self Defence’ (2001) 95 *American Journal of International Law* 839; see Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 220 et seq. for a general assessment of authorities in this regard.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> See Gilbert Guillaume, ‘Terrorism and International Law’ (2004) 53(3) *International and Comparative Law Quarterly* 537, 547. Guillaume suggested a polite rejection of the suggestion in view of ‘dubiousness’ of deriving instant custom from an ‘isolated precedent’ and lack of ‘clearer practice’ and ‘more constant *opinio juris*’.

evidencing the extant ‘normative expectation’ of the international community, that a *de novo* consideration of the legality of such an operation might be necessary.<sup>198</sup>

Casten Stahn is of the opinion that the ‘overall control’ test propounded by the Tribunal in the Tadic Case is sufficient to legally justify the Operation Enduring Freedom led by the US against the Taliban and that the ‘overall control’ test overturns the ‘effective control’ test laid down by the Nicaragua case.<sup>199</sup> However, it may be reiterated that the court in the Bosnian Genocide case rejected the test of ‘overall control’ enumerated by the ICTY Appeals Chamber in the Tadic case and upheld that the test of ‘effective control’ is applicable to render the acts of non-state actors directly attributable to the state.<sup>200</sup>

International Law Association Report on the use of force in 2018 recommended States to resolve in good faith the threat posed by armed non-state actors through mutual co-operation so they can avoid use of force in another state’s territory. It further recommended increased involvement and support of Security Council towards de-escalation of situations leading to such use of force.<sup>201</sup>

Even though the legal position as confirmed by the ICJ in the Case Concerning Armed Activities on the Territory of the Congo<sup>202</sup> remains that for proper invocation of right of self-defence under Article 51, the attack must be one in the nature of armed attack attributable to a state, the developments post 9/11 reflect a stark inadequacy and apparent discord between the theory underpinning the rule of attribution and the practical political realities evidenced in the inability of the extant legal regime to explain the wide recognition of the legality of war on terror.

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<sup>198</sup> Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 221; G Travailo and J Altenburg, ‘State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force’ (2003) 4 *Chinese Journal of International Law* 97.

<sup>199</sup> C Stahn, ‘Terrorist Acts as ‘Armed Attack’: The Right to Self-Defence, Art 51(1/2) of the UN Charter and International Terrorism’ (2003) 27(2) *Fletcher Forum of World Affairs* 35, 47.

<sup>200</sup> Bosnian Genocide case, above n 129, [400]. Also see James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 156.

<sup>201</sup> International Law Association, Final Report on Aggression and the Use of Force (Sydney Conference, 2018) 30.

<sup>202</sup> *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, [2005] ICJ Reports 168, [146-47].

## 4.2 CRITICISM OF THE RULE OF ATTRIBUTION OF ‘EFFECTIVE CONTROL’

Various scholars have criticized the rule of attribution adopted in the Nicaragua case as one of the apparent assumptions of the test of *de facto* agency i.e. dependence and effective control, as evidencing the principle of customary international law.<sup>203</sup> Scholars have further expressed their reservation about Article 8 of ARISWA as evidencing the extant customary international law regarding attribution of acts of non-state actors.<sup>204</sup>

It has been contended that the adoption of the rule of ‘effective control’ as the test for *de facto* agency for attribution is not based on any authority or precedent in international law.<sup>205</sup> As a logical corollary, there has also been dissatisfaction with Article 8 of the ILC Draft Articles, which was the basis of the test of attribution in Nicaragua, as itself not evidencing the true position of customary international law.<sup>206</sup>

In much contrast to the *de facto* agency for attribution, Caron argues that causation as an aspect of state responsibility is an undeveloped concept under

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<sup>203</sup> See, eg, Frederic Kirgis, Fred L Morrison, Patrick M Norton, Jules L Lobel, Yoram Dinstein and Daniel B Magraw, Jr., ‘The Jurisprudence of the Court in the Nicaragua Decision’ (1987) 81 *Proceedings of the Annual Meeting, American Society of International Law* 258-277; John Norton, ‘Nicaragua and the Deterioration of World Order’ (1987) 81(1) *American Journal of International Law* 151; Anthony D’Amato, ‘Trashing Customary International Law’ (1987) 81(1) *American Journal of International Law* 101; BS Chimni, ‘The International Court and the Maintenance of Peace and Security: The Nicaragua Decision and the United States Response’ (1986) 35(4) *International & Comparative Law Quarterly* 960. Also see an entire issue of the American Journal of International Law was dedicated to the assessment of the Nicaragua case: ‘Appraisals of the ICJ’s Decision: Nicaragua v. United States (Merits)’ (1987) 81 *American Journal of International Law* 77 (including comments by: Herbert W Briggs, Francis A Boyle, Gordon A Christenson, Anthony D’Amato, Richard Falk, Tom J Farer, Thomas M Franck, Michael J Glennon, Edward Gordon, John Lawrence Hargrove, Mark Weston Janis, Frederick L Kirgis, Jr., John Norton Moore, Fred L Morrison, W Michael Reisman and Fernando R Tesón). Also see Antonio Cassese, ‘The Nicaragua and Tadic tests revisited in the light of the ICJ judgment on Genocide in Bosnia’ (2007) 18(4) *The European Journal of International Law* 649.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

international law.<sup>207</sup> He points out that causation serves as a limit on the scope of state responsibility for attribution of acts to a state.<sup>208</sup>

Although causation is established in legal theory, the discussion on the application of causation to state responsibility is not so developed in the literature. Until September 11, the agency paradigm on state responsibility seems to be well accepted.<sup>209</sup> Tal Becker argues that the events of September 11, more clearly highlights the ‘normative expectations of states in approaching the question of responsibility for terrorism’. He further criticised the agency paradigm proposed in the decision in Nicaragua case and argued that the *de facto* agency based test propounded in Nicaragua case, Tehran Hostages and Tadic are inadequate given the reach and potential of terrorist actors in the present times where they rely on a state only minimally to fulfil their objectives.<sup>210</sup>

There have been calls for the recognition of an emergence of a new rule of state responsibility, substantially narrowing the threshold for attribution of acts of non-state actors to a state in direct departure from the existing *de facto* agency based tests espoused in Nicaragua and Tadic.<sup>211</sup> Notably, some of these scholars espousing the new rule have sought to emphasize on the element of ‘substantial involvement’ as the basis for attribution as opposed to agency paradigm.<sup>212</sup>

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<sup>207</sup> D Caron, ‘The Basis of Responsibility: Attribution and Other Trans-substantive Rules’ in RB Lillich and DB Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Ardsey: Transnational Publishers, 1998) 153.

<sup>208</sup> Ibid.

<sup>209</sup> Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 331.

<sup>210</sup> Ibid, 267.

<sup>211</sup> See eg, Giuliana Ziccardi Capaldo, ‘Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict’ (2007) 48 *Harvard International Law Journal* 101; G Travailo and J Altenburg, ‘State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force’ (2003) 4 *Chinese Journal of International Law* 97; I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1981) 370; PL Zanardi, ‘Indirect Military Aggression’ in Antonio Cassese (ed), *The Current Regulation of the Use of Force* (Martinus Nijhoff, 1986) 155: interpreting Article 3(g) of General Assembly’s definition of Aggression, 1974 (suggesting ‘substantial involvement’ as the standard of nexus establishing attributability of acts of non-state actors).

<sup>212</sup> See I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1981) 370; PL Zanardi, ‘Indirect Military Aggression’ in Antonio Cassese (ed), *The Current Regulation of the Use of Force* (Martinus Nijhoff, 1986) 155: interpreting Article 3(g) of General Assembly’s definition of

It is stated that the espousal of tests in the nature and/or analogous to that of ‘substantial involvement’ paradigm is a throwback to a causal criterion, so often forming the link for attribution of responsibility in both common law and civil law in private law sphere.<sup>213</sup> Causation is not well developed in the law of state responsibility in international law. There is complete lack of clarity owing to courts failing to provide clear causal reasoning in case laws.<sup>214</sup>

Kristen Boon agrees with the view that ‘control’ test is not fit for the future and there is a need to formulate an international legal framework for non-state actors.<sup>215</sup> The threat posed by non-state actors calls for a reconsideration of the extant rule of attribution, keeping in view the changed political realities.

## 5. JURISPRUDENCE ON ATTRIBUTION BY THE EUROPEAN COURT OF HUMAN RIGHTS

The ILC Articles on the Responsibility of States for Internationally Wrongful Acts lays down the general law of state responsibility and applies to the European Convention on Human Rights (‘ECHR’) unless subject to the *lex specialis* rule.<sup>216</sup>

*“The Court must take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law,*

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Aggression, 1974 (suggesting ‘substantial involvement’ as the standard of nexus establishing attributability of acts of non-state actors).

<sup>213</sup> See, eg, *Barnett v. Chelsea & Kensington Hospital Management Committee*, [1969] 1 QB 428; *Tate & Lyle Industries Ltd. v. Greater London Council*, [1983] 2 AC 509; *Rigby v. Chief Constable of Northamptonshire*, [1985] 1 WLR 1242; see generally, Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2004) 45.

<sup>214</sup> See Ilias Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’ (2015) 26 (2) *European Journal of International Law* 471–492.

<sup>215</sup> Kristen E Boon, ‘Are control tests fit for the future? The slippage problem in attribution doctrines’ (2014) 15(2) *Melbourne Journal of International Law* 48. She argues that it is required to develop primary rules in particular subject areas of international law so that the positive obligations of each of the non-state actors is well defined.

<sup>216</sup> James Crawford AC and Amelia Keene, ‘The structure of state responsibility under the European Convention on Human Rights’ in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) 178.

*although it must remain mindful of the Convention's special character as a human rights treaty.*'<sup>217</sup>

With respect to the European Court of Human Rights ('ECtHR') jurisprudence on attribution for state responsibility, two important developments would be discussed in this section. Firstly, the ECtHR has applied a different test of attribution ('ultimate authority and control') for state responsibility in peacekeeping operations. Secondly, the ECtHR has often conflated the two distinct concepts of attribution for state responsibility and state jurisdiction under Article 1 of the ECHR in its case laws. Such a conflation by the ECtHR is problematic because it leads to conceptual confusion.

### **5.1 ECtHR AND THE 'ULTIMATE AUTHORITY AND CONTROL' TEST – AN ANALYSIS OF THE BEHRAMI CASE AND THE AL JEDDA CASE**

The ECtHR in *Behrami v. France and Saramati v. France, Germany and Norway*,<sup>218</sup> dealt with a question involving abuse of human rights by states that were members of the United Nations and troop-contributing states for the United Nations and NATO operations after the Kosovo conflict in 1999. *Behrami* was a case involving the death of a child after he discovered several undetonated cluster bomb units, which had been dropped during the bombardment by NATO in 1999. The ECtHR while purporting to apply the 'effective control' standard resorted to a much lower threshold and test of 'ultimate authority and control'.<sup>219</sup> The main issue as highlighted by the court was, whether the UNSC retained the ultimate authority and control on UNMIK (which was the interim administration for Kosovo) and KFOR (security presence in Kosovo). The ECtHR ultimately held that Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.<sup>220</sup>

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<sup>217</sup> *Ibid*, [57].

<sup>218</sup> *Behrami v France*, (2007) 45 EHRR SE 10.

<sup>219</sup> *Ibid*, [133].

<sup>220</sup> *Ibid*, [149].

As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organization of universal jurisdiction fulfilling its imperative collective security objective.<sup>221</sup>

As a result, the court held that the proceedings were dismissed because the ECtHR did not have jurisdiction. The test of ‘ultimate authority and control’ was upheld by the ECtHR in the case of *Al-Jedda v. United Kingdom*.<sup>222</sup>

In *Al-Jedda v. United Kingdom*, Al Jedda, an Iraqi national obtained UK citizenship in 2000 and consequently lost his Iraqi citizenship. In 2004 when he travelled to Iraq from the UK, he was arrested by the US forces and handed over to the UK forces which detained him without a proper charge until 2007. His detention was challenged for being in violation of his rights under the ECHR. The ECtHR held UK responsible for the following reasons:<sup>223</sup>

*“the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force ... the applicant’s detention was not, therefore, attributable to the United Nations. [However] the internment took place within a detention facility in Basra City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout.”*<sup>224</sup>

It is interesting to observe that the court applied both tests of ‘effective control’ and ‘ultimate authority and control’ to argue that both the tests were not fulfilled in this case. It is also hard to explain the different outcomes in *Behrami* and *Al Jedda*, considering that the court was dealing with a similar situation of respondent states sending troops to the peacekeeping operations authorised by the Security Council. Scholars have argued that different backdrops of UN involvement may have played a

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<sup>221</sup> *Ibid*, [151].

<sup>222</sup> *Al-Jedda v United Kingdom*, (2011) 53 EHRR 23.

<sup>223</sup> *Ibid*, [84].

<sup>224</sup> *Ibid*, [84].

role in the difference in the decision in *Behrami and Al Jedda*.<sup>225</sup> What is even more noticeable is that the court upheld the test of ‘ultimate authority and control’ despite having an opportunity to over-rule that test since it does not have any basis in the law of state responsibility.<sup>226</sup>

## **5.2 ATTRIBUTION FOR STATE RESPONSIBILITY AND STATE JURISDICTION IN ECtHR JURISPRUDENCE**

The ECtHR, when deciding cases on the application of the ECHR extra territorially, faces the issue of determining the jurisdiction of the state under Article 1 of the ECHR and also assessing whether the acts of the agent or the organ is attributable to the state.

It has been argued that the ECtHR displays confusion in determining jurisdiction under Article 1 of the ECHR and attribution as a question of state responsibility.<sup>227</sup> These two form a different set of questions,<sup>228</sup> and the distinction between the two concepts shall be explained for greater clarity. State responsibility has already been discussed at length in this chapter, so an attempt is made to understand the concept of state jurisdiction under Article 1 of the ECHR.

The term ‘jurisdiction’ used in Article 1 of the ECHR refers to *de facto* control that a state exercises over a territory or over individuals.<sup>229</sup> There are two models of state jurisdiction: the spatial model and the personal model. In the spatial model,

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<sup>225</sup> See James Crawford AC and Amelia Keene, ‘The structure of state responsibility under the European Convention on Human Rights’ in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) 178.

<sup>226</sup> *Ibid.*

<sup>227</sup> Marco Milanovic, ‘Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court’ in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) 103.

<sup>228</sup> See *Catan and Others v. Moldova and Russia* (ECHR, Grand Chamber, Application Nos. 43370/04, 8252/05, 18454/06, 19 October 2012) 42 [115] where it stated that ‘the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a state’s responsibility for an internationally wrongful act under international law.’

<sup>229</sup> Marko Milanovic, *Extraterritorial application of human rights treaties* (Oxford University Press, 2011) 49.



jurisdiction is exercised by virtue of effective control by a state over a territory and in the personal model, jurisdiction is exercised by virtue of control over an individual.<sup>230</sup>

In *Al-Skeini v. United Kingdom*,<sup>231</sup> the court held that when the agents of a state exercise authority and control over an individual, the state has an obligation under Article 1 of the ECHR to secure rights to that individual under the ECHR.<sup>232</sup> The court also clarified that jurisdiction under Article 1 also applies when a state exercises effective control of an area outside their national territory.<sup>233</sup> The court pointed out that whether a state exercises effective control over an area outside its territory is a question of fact that needs to be determined.<sup>234</sup>

For example, in *Loizidou v Turkey*,<sup>235</sup> the ECtHR applied the spatial model of jurisdiction. In *Loizidou v Turkey*, the court held that the term ‘jurisdiction’ under Article 1 of the ECHR is applicable outside the territory of the contracting states.<sup>236</sup> The court held that Turkey exercised overall effective control over Northern Cyprus (as evidenced from the large number of Turkish troops in Northern Cyprus) and hence, Turkey was responsible for the acts of the Turkish Republic of Northern Cyprus (‘TRNC’).<sup>237</sup>

Thus, although ‘jurisdiction’ and ‘state responsibility’ are different concepts altogether, the test of ‘effective control’ is applied for attribution and the same test of (overall) effective control is applied by the ECtHR to the question of jurisdiction of a state over a territory.<sup>238</sup>

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<sup>230</sup> Marco Milanovic, ‘Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court’ in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) 97-98.

<sup>231</sup> *Al-Skeini and Others v the United Kingdom* (2011) 53 EHRR 18.

<sup>232</sup> *Ibid.*, [137].

<sup>233</sup> *Ibid.*, [138].

<sup>234</sup> *Ibid.*, [139].

<sup>235</sup> *Loizidou v. Turkey (Preliminary Objections)* (ECHR, Application No. 15318/89, 23 March 1995).

<sup>236</sup> *Ibid.*, [62-64].

<sup>237</sup> *Ibid.*

<sup>238</sup> Marko Milanovic, *Extraterritorial application of human rights treaties* (Oxford University Press, 2011) 102.

An example could also be given of *Hassan v UK*,<sup>239</sup> where the ECtHR applied the personal model of jurisdiction. In the case of *Hassan v UK*,<sup>240</sup> the applicant had impugned the detention of his brother by the British forces near Basra at the time of active hostilities between British forces and the military wing of the Baath party. The applicant's brother was subsequently released by the British forces upon the satisfaction that he did not pose any threat to the security of the region, but he disappeared soon after and was discovered dead with several bullets on his body and marks of torture.

The applicant applied to the Grand Chamber of ECHR, impugning the detention of his brother as being *inter alia* in violation of Article 5 of the ECHR. The challenge presumed triggering of the obligation of the UK as a state party to the ECHR for the action of its forces in detaining the applicant's brother in Iraq.

The question of applicability of ECHR to the facts of the aforementioned case hinged upon the interpretation of the word 'within their jurisdiction' in Article 1 of the ECHR. The Grand Chamber unanimously found that the obligations of UK as a state party to the ECHR to safeguard all rights enumerated in section 1 of the ECHR was triggered in the aforementioned case in so far as the British forces had authority and control over the individual in question which was found to be sufficient to constitute jurisdiction within the meaning of Article 1 of the ECHR.<sup>241</sup>

### **5.3 DISTINCTION BETWEEN ATTRIBUTION FOR STATE RESPONSIBILITY AND STATE JURISDICTION IN THE ECtHR JURISPRUDENCE: AN ANALYSIS**

In order to draw the conceptual distinction between attribution for state responsibility and state jurisdiction under Article 1 of the ECHR, it is essential to discuss the case of *Jaloud v Netherlands*.<sup>242</sup>

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<sup>239</sup> *Hassan v. United Kingdom* (ECHR, Grand Chamber, Application No. 29750/09, 16 September 2014).

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*, [104].

<sup>242</sup> *Jaloud v. Netherlands* (ECHR, Grand Chamber, Application No. 47708/08, 20 November 2014).

The Grand Chamber in *Jaloud v Netherlands*<sup>243</sup> found the Netherlands responsible for the breach of procedural obligations under Article 2 of the ECHR.<sup>244</sup> In this case, the applicant's son (Mr. Jaloud) was killed upon the passenger car being fired upon at a checkpoint in Iraq by a Dutch Lieutenant. Netherlands was held responsible for the conduct of the Dutch Lieutenant on the ground that it had complete control and supervision of its forces in Iraq and as such was responsible for their conduct.<sup>245</sup> The court further concluded that Netherlands exercised jurisdiction under Article 1 of the ECHR because the Dutch Lieutenant exercised control and authority over the passenger (Mr. Jaloud) in the car.

The court endorsed the view that “the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a state’s responsibility for an internationally wrongful act under general international law.”<sup>246</sup>

As discussed above, the test to establish state jurisdiction questions as to whether the state exercises the personal model, or the spatial model of jurisdiction is whether a state exercises effective control over a territory or control and authority over an individual. On the other hand, state responsibility pertains to the question whether the unlawful act or omission of a person or entity is attributable to the state such that the state is responsible under law for such unlawful act or omission.

The distinction between the two concepts can be explained by discussing the *Jaloud* case<sup>247</sup> in more details. In this case, the Netherlands argued that the conduct of its soldiers could not be attributed to Netherlands because the soldiers were under the command of an officer from the United Kingdom.<sup>248</sup> If the acts of the soldiers are not

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<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*, [152-153].

<sup>245</sup> *Ibid.*

<sup>246</sup> See *Catan and Others v Moldova and Russia* (ECHR, Grand Chamber, Application Nos. 43370/04, 8252/05, 18454/06, 19 October 2012) 42[115].

<sup>247</sup> *Jaloud v. Netherlands* (ECHR, Grand Chamber, Application No. 47708/08, 20 November 2014).

<sup>248</sup> *Ibid.*

attributable to the Netherlands at all, the question of jurisdiction of Netherlands for violation of an obligation under the ECHR does not arise.

However, the court responded to the Netherlands's assertion by finding that "the Court cannot find that the Netherlands troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State."<sup>249</sup>

After it was established that the conduct of the soldiers were attributable to Netherlands, the court established that the jurisdiction of Netherlands under Article 1 of the ECHR is triggered because the Dutch soldier exercised control and authority over the passenger (Mr. Jaloud) in the car who was killed by the soldier's firing (which was in violation of Article 2 of the ECHR since proper procedural safeguards were not followed before the firing).<sup>250</sup>

Marco Milanovic argues that the court should have drawn the distinction between the two concepts of attribution and state jurisdiction more clearly.<sup>251</sup> He further argues that the issue of attribution is relevant in every case and a pre-requisite to establishing jurisdiction under Article 1 of the ECHR.<sup>252</sup> In many cases, the court does not venture into the attribution query explicitly but the question of attribution is nonetheless resolved, since without attribution there can be no state responsibility for violation of an international obligation.<sup>253</sup>

He further distinguishes between the *jurisdiction establishing conduct* and the *violation establishing conduct*.<sup>254</sup> For example, in the Jaloud case, the jurisdiction

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<sup>249</sup> Ibid, [151].

<sup>250</sup> Ibid, [152].

<sup>251</sup> Marco Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) 103-104.

<sup>252</sup> Ibid, 105.

<sup>253</sup> Ibid, 106.

<sup>254</sup> See Marko Milanović, 'Jurisdiction, Attribution and Responsibility in Jaloud' (11 December 2014) EJIL:Talk! <<http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>>, last accessed 9 October 2023. Jurisdiction establishing conduct has been understood as the act or omission of an agent or organ (of the state), through which the state establishes control over a territory or over an individual. Violation establishing conduct is the act or omission, which constitutes a breach under the ECHR.

establishing conduct was the control and authority the Dutch soldier exercised over the passenger (Mr. Jaloud) in the car and the violation establishing conduct was the lack of procedural safeguards undertaken by the Dutch soldier before firing at Mr. Jaloud. Although in some cases of personal jurisdiction, the jurisdiction establishing conduct and the violation establishing conduct may be the same. For example, in the Hassan case both the jurisdiction establishing conduct and the violation establishing conduct was the illegal detention of the applicant's brother by the British forces in Iraq.

Gondek voiced a similar view that attribution and state jurisdiction are two distinct concepts and should not be confused.<sup>255</sup> He argues that the issue of attribution belongs to the secondary rules of state responsibility under international law and is separate from the question of whether an individual is within state jurisdiction under the ECHR.<sup>256</sup>

Crawford and Keene argue that there is a strong connection between state jurisdiction and the court's jurisdiction and attribution is the link between the "extraterritorial act and the state, needed to establish personal or spatial jurisdiction."<sup>257</sup> State jurisdiction is the first step to prove court's competence and hence, the court must inquire the state jurisdiction query first (which would include the attribution query), before proceeding to the merits of the case.<sup>258</sup> Crawford and Keene argue that to prove state jurisdiction (spatial or personal), it would be required to assess whether the act of the agent/organ can be attributed to the state.<sup>259</sup>

It can indeed be concluded that even though there is a connection between the two concepts of state jurisdiction and attribution for state responsibility (in terms of application of the ECHR extraterritorially), to the extent that attribution must be established before state jurisdiction under the ECHR can be invoked, the two concepts

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<sup>255</sup> M Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial application of Human Rights Treaties* (Intersentia, Antwerpen, 2009) 165-168.

<sup>256</sup> *Ibid*, 164.

<sup>257</sup> James Crawford AC and Amelia Keene, 'The structure of state responsibility under the European Convention on Human Rights' in Anne van Aaken/Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) 191.

<sup>258</sup> *Ibid*, 191-192.

<sup>259</sup> *Ibid*, 192.

remain distinct. The ECtHR could separate its finding on attribution for state responsibility (even if such inquiry is made to determine state jurisdiction) for greater conceptual clarity.<sup>260</sup>

## 6. CONCLUSION

This chapter criticized the existing rule of attribution of ‘effective control’ for state responsibility (for acts of non-state actors) as being too rigid and placing a very high burden of proof on the victim state that is nearly impossible to prove in practice. As a result, states are not held responsible for the conduct of non-state actors engaged in an armed conflict.

As already mentioned in this chapter, the rule of attribution of ‘effective control’ is based on the agency paradigm, which assumes that non-state actors function as agents of the state. The next chapter of the thesis shall explain the theoretical framework of agency, which forms the very foundation of the extant rule of attribution for state responsibility. Such a theoretical understanding of agency and its application to the rule of attribution for state responsibility is necessary because the subsequent chapters of the thesis seek to challenge this assumption of agency in the law of state responsibility as erroneous.

After discussing the theoretical underpinnings of the law of agency and its application to the law of state responsibility for acts of non-state actors in international law, subsequent chapters of the thesis shall investigate the reality of state support of non-state actors to determine whether such non-state actors really function as agents of the state.

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<sup>260</sup> Ibid, 196.

### **CHAPTER 3: THEORETICAL FOUNDATION OF THE EXISTING RULE OF ATTRIBUTION FOR STATE RESPONSIBILITY**

#### **1. INTRODUCTION**

As discussed in the previous chapter, the extant rule of attribution of ‘effective control’ for state responsibility is based on an assumption of a principal-agent relationship between the external state and the non-state actor.

The escalating threat posed by non-state actors has necessitated a reassessment of the present rule of attribution for state responsibility (with its assumption of agency) in international law. Such an assessment of the exact nature of the relationship between an externally supporting state and a non-state actor is necessary given the changing role of non-state actors in the present times, where they have defined political agenda and clear hierarchical structure.

It is important to understand the theoretical foundation of agency to assess the application of agency in situation of state engagement with a non-state actor in an armed conflict. It has already been highlighted that it is common for states to externally support non-state actors (through assistance such as providing weapons, funds, or training), which are engaged in an armed conflict in a rival state. Under the present international law framework, the externally supporting state is not responsible for the acts of non-state actors involved in an armed conflict in a rival state because the present attribution test of ‘effective control’ is very strict and assumes that the externally supporting state and the non-state actor function as a principal and agent. It is submitted that this presumption of agency is flawed. This chapter seeks to determine whether the externally supporting state engages in ‘conflict delegation’, which is ‘agency’, or does it engage in ‘conflict intervention’, which functions more as a ‘partnership’ between the externally supporting state and the non-state actor rather than an agency.

This chapter shall discuss the theoretical foundation of the law of agency, which is the basis for the present rule of attribution for state responsibility in international law. After discussing the theoretical background of the law of agency, this chapter shall explain how a situation of ‘conflict delegation’ by an external state to a non-state actor is similar to an agency. Furthermore, this chapter shall discuss the distinction between

‘conflict delegation’ and ‘conflict intervention’ such that one can assess the real relationship between the externally supporting state and the non-state actor involved in an armed conflict.

## **2. LAW AND ECONOMICS BACKGROUND OF THE EXISTING RULE OF ATTRIBUTION FOR STATE RESPONSIBILITY: THE AGENCY PARADIGM**

The existing literature on law and economics analysis on the issue of attribution for state responsibility for acts of non-state actors is influenced by the analogous principle of vicarious liability under municipal law.<sup>261</sup> The analysis of state responsibility in the law and economics literature factors in the need for internalization of the externality in the form of the cost produced by the wrongs of a delegatee by passing it to the delegator through the concept of vicarious liability.<sup>262</sup>

However, the literature, in considering the rationale behind the principle of vicarious liability, emphasizes heavily on the ability of the delegator to ‘monitor’ the acts of the delegatee, since without such ability to ‘control’, there would not be sufficient incentive on the part of the employer to prevent the commission of wrongs by its employee.<sup>263</sup>

There is wide agreement that tortious liability (such as vicarious liability) is an essential tool in law to incentivize a particular form of behavior.<sup>264</sup> In a simple system of torts, the party undertaking a particular conduct has to take precaution so as to avoid the consequential harm and the costs thereof, which a victim stands to suffer.<sup>265</sup> On such protection being taken by the tortfeasor, the victim stands to benefit by the reduced probability of the harm.

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<sup>261</sup>Alan O Sykes & Eric Posner, *An Economic Analysis of State and Individual Responsibility under International Law* (John M Olin Program in Law and Economics, Working Paper No. 279, 2006) 6; Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Harvard University Press, 2013) 113.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Robert Cooter and Thomas Ulen, *Law & Economics* (Addison Wesley, 5<sup>th</sup> ed, 2008) 325.

<sup>265</sup> Ibid, 348-349.



Vicarious liability is beneficial if the employer can influence the employee to take adequate precaution and hence the employer must be able to monitor the employee. Law and economics view is that law imposes ‘vicarious liability’ only in a situation where the employer has an ability to ‘monitor’ the employee.<sup>266</sup> The wrong committed by the employee must be within the scope of the employment as the employer would be unable to monitor the acts of the employee occurring outside the scope of their employment.<sup>267</sup>

In its fundamental iteration, vicarious liability signifies the liability which a person may incur for damages caused by the consequences of acts of another person if there exists a certain relationship between the two, so as to justify passing on of such liability.<sup>268</sup> The common and the most popular instance of this particular kind of liability for acts of another related person is the liability of an employer for the wrongs of his servant.<sup>269</sup> It is important to point out that although tortious principle of vicarious liability has predominantly developed around this particular relationship of employer-employee or master-servant, it is by no means an exhaustive realm of the principle of vicarious liability. Vicarious liability in principle can also arise between principal and agent or partners inter se.<sup>270</sup>

The existing rule of attribution is framed on an assumption of ‘control’ being the main characteristic of an agency arising out of delegation of use of force by a state to a non-state actor in an armed conflict. This assumption of a principal-agent relationship is the rationale for imposition of state responsibility by the analogy of imposition of vicarious liability on the principal for the acts of an agent.<sup>271</sup>

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<sup>266</sup> Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Harvard University Press, 2013) 115.

<sup>267</sup> Ibid.

<sup>268</sup> See WVH Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 16<sup>th</sup> ed, 2002) 701.

<sup>269</sup> Ibid. Also see, *Mahmud v. BCCI*, [1998] AC 20.

<sup>270</sup> PS Atiyah, *Vicarious Liability in Law of Torts* (Butterworths, 1967) 99. Also see WVH Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 16<sup>th</sup> ed, 2002) [20.19].

<sup>271</sup> Posner & Sykes, above n 266, 115. However, distinction is made between a corporate and a state to the extent that states are not similar to corporates to the extent that a corporate’s main focus is on profits.

As discussed earlier, the present attribution test of ‘effective control’ indicates a preoccupation with the agency paradigm whereby attribution follows an establishment of the relationship of *de facto* agency between a state and a non-state actor. The test of attribution implicit in Articles 4 and 8 of ARSIWA can also be understood as being rooted in the concept of agency.<sup>272</sup>

Agency has been defined as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests or otherwise consents so to act.”<sup>273</sup>

Thus, an agency relationship differs from a contract to the extent that an agency involves three parties, namely, the principal, the agent and the third party.<sup>274</sup> The agent interacts with the third party when it is performing the task of the principal. The law of agency governs the interaction between the agent (on behalf of the principal) and the third party for the execution of the tasks of the principal.<sup>275</sup>

The law of agency attempts to protect third parties from harm by imposing the rule of vicarious liability, which makes the employer liable for the torts of the employee, which arises in the scope of the employment. In the absence of an agency law, a principal could potentially use an agent to avoid responsibility for the risky conducts undertaken by the principal.<sup>276</sup> Besides the principal would have no incentive to monitor the conduct of the agent in the absence of vicarious liability.

On the other hand, it may also be possible that the third party and the agent collude with each other to act against the interest of the principal. The overall aim of the law of agency is to deter such collusion by imposing fiduciary duties on the principal and the agent to act in good faith.<sup>277</sup>

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<sup>272</sup> Miles Jackson, *Complicity in International law* (Oxford University Press, 1<sup>st</sup> ed, 2015) 196.

<sup>273</sup> See *Restatement of the Law of Agency* (American Law Institute, 3<sup>rd</sup> ed, 2006) §1.01.

<sup>274</sup> George M Cohen, ‘Law and Economics of Agency and Partnership’ (5 July 2018) (Virginia Law and Economics Research Paper No. 2018-11) 400.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*, 405.

<sup>277</sup> *Ibid.*, 413.

With this theoretical background of the law of agency and the principle of vicarious liability, the next section of this chapter shall analyze the issue of external support by states to non-state actors for use of force against a rival state. The delegation of use of force to non-state actors against a rival state could be a strategic foreign policy tool employed by the states since a direct warfare is a much costlier affair.<sup>278</sup>

### **3. APPLICATION OF THE AGENCY PARADIGM TO SITUATIONS OF CONFLICT DELEGATION: AN ANALYSIS**

External state support of non-state actors for use of force against a rival state is an example of conflict delegation if the external state exercises control on the goals of the non-state actor and the objectives of the conflict.<sup>279</sup> Traditional agency models have been applied to understand the nature of engagement between the externally supporting state and the non-state actor. Conflict delegation mirrors an agency with some degree of control and influence of the external state (the principal) to shape the strategic objectives and goals of the non-state actor (the agent) involved in the conflict with the rival state (the third party).<sup>280</sup> The advantages and disadvantages of a conflict delegation have been enumerated below.

Firstly, delegation of a conflict by an external state to a non-state actor has the important advantage of a cost saving device, as direct warfare is an expensive affair.<sup>281</sup> A second benefit of delegation of conflict to non-state actors by external states is local expertise and skills which external states may lack, including endeavours like military intelligence about infrastructure, military and terrain.<sup>282</sup> This advantage is that non-state actors do not appear foreign to local population and hence have greater influence with the local population. Thirdly, a state may prefer delegating a conflict to non-state actors

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<sup>278</sup> See Salehyan, above n 32, 494-495. Idean Salehyan, Kristian Skrede, Gleditsch and David E Cunningham, 'Explaining External Support for Insurgent Groups' (2011) 65(4) *International Organization* 709, 713-714.

<sup>279</sup> See Salehyan, above n 32, 501.

<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*, 494.

<sup>282</sup> *Ibid.*, 504.

to maintain its reputation in the international community and avoid associated costs of harm to reputation, such as diplomatic isolation and economic sanctions.

The most important reason for conflict delegation has been cited as improving bargaining outcomes with their international opponents implying that conflict delegation on a rival state imposes costs on the rival state while simultaneously displaying the capabilities and reach of the external state delegating the conflict.<sup>283</sup> This strategy is used oftentimes to increase the bargaining position of the external state with the rival state (or the victim state) in peace settlements.

The disadvantage of delegation is agency loss, agency slack and adverse selection.<sup>284</sup> Agency loss would be a situation where the principal and the agent have different interests whereas the problem of adverse selection indicates a problem of information asymmetry between the principal and the agent with risk of inferior selection.<sup>285</sup> Conflict delegation holds the risk of the external state losing the foreign policy autonomy or the ability to control the conflict to their interest.<sup>286</sup> Lastly, agency slack would be the problem of an agent using its powers against the principal itself.<sup>287</sup>

For example, the Palestine Liberation Movement was created by the Arab League in 1964 but later under Yasser Arafat, the PLO assumed independence in the Israeli-Palestinian conflict.<sup>288</sup> Information asymmetry poses yet another problem in selection of competent agents with similar goals.<sup>289</sup> Agency slack may also occur if the agents use the resources provided by the external state for private consumption.

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<sup>283</sup> Ibid, 505.

<sup>284</sup> Mathew McCubbins and Thomas Schwartz, 'Congressional oversight overlooked: Police patrols versus fire alarms' (1984) 28(1) *American Journal of Political Science* 165.

<sup>285</sup> Paul A Pavlou, Huigang Liang and Yajiong Xue 'Understanding and Mitigating Uncertainty in Online Exchange Relationships: A Principal Agent Perspective' (2007) 31(1) *MIS Quarterly* 105, 109-110. Also see Salehyan, above n 32, 502.

<sup>286</sup> Salehyan, above n 32, 502.

<sup>287</sup> Mathew McCubbins and Thomas Schwartz, 'Congressional oversight overlooked: Police patrols versus fire alarms' (1984) 28(1) *American Journal of Political Science* 165.

<sup>288</sup> Ibid.

<sup>289</sup> Paul A Pavlou, Huigang Liang and Yajiong Xue, 'Understanding and Mitigating Uncertainty in Online Exchange Relationships: A Principal Agent Perspective' (2007) 31(1) *MIS Quarterly* 105, 110.

The cost associated with a direct conflict such as direct costs of resources and manpower together with the indirect costs of international sanction, costly intelligence and the associated governance costs have often been understood to be the primary rationale behind state's choosing to delegate the conflict strategy to non-state actors.<sup>290</sup> For democracies, there is an added audience cost<sup>291</sup> together with the costs relating to the death of soldiers.

It is important to distinguish conflict 'delegation' from a situation of conflict 'intervention' because in the latter scenario, an externally supporting state does not exercise the same degree of control on the objectives of the conflict as in situations of conflict delegation.

#### **4. DISTINCTION BETWEEN 'CONFLICT DELEGATION' AND 'CONFLICT INTERVENTION' BY EXTERNAL STATES**

While it is common for states to externally support non-state actors engaged in an armed conflict in a rival state, there is less clarity on the nature of the relationship between an externally supporting state and a non-state actor. Lack of clarity in these aspects often results in non-consideration of serious elements of the conflict dynamics between these two parties - the non-state actor and the external state.

It is submitted that the biggest problem in the present attribution rule is the characterization of the nature of engagement between the non-state actor and its externally supporting state. Such engagement between the external state and the non-state actor could range anywhere on the spectrum between a delegation of a foreign policy/political objective to ideological support to a domestic strife.<sup>292</sup> To that end, it is

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<sup>290</sup> Darren Filson and Suzanne Werner, 'A bargaining model of war and peace: Anticipating the onset, duration, and outcome of war' (2002) 46(4) *American Journal of Political Science* 819; R Harrison Wagner, 'Bargaining and war' (2000) 44(3) *American Journal of Political Science* 469; James D Fearon, 'Rationalist explanations for war' (1995) 49(3) *International Organization* 379.

<sup>291</sup> Philip BK Potter and Matthew A Baum, 'Democratic Peace, Domestic Audience Costs, and Political Communication' (2010) 27(4) *Political Communication* 453-470.

<sup>292</sup> Salehyan, above n 32.

relevant to recognize the distinction between the two forms of engagement i.e., ‘conflict delegation’ and ‘conflict intervention’ and separately analyse them.

Recognition of this distinction is essential for arriving at the appropriate legal framework for use of force by non-state actors in an armed conflict.

#### **4.1 UNDERSTANDING ‘CONFLICT INTERVENTION’**

It is important to emphasize the conceptual distinction between ‘conflict intervention’ as opposed to ‘conflict delegation’ to non-state actors.

The principal distinction that has been drawn between the two kinds of engagement i.e., ‘conflict delegation’ and ‘conflict intervention’ is the varying degree of the object and the varying degree of involvement that an external state (the principal) has in the two kinds of engagement. As already discussed above, in situations of a conflict delegation, the external state retains the control over the non-state actors and the goals and objectives of the conflict in the rival state. While in a situation of conflict intervention, the pre-dominant objective of the external state is to influence conflict outcomes, such participation seldom elevates to meaningful control and/or influence over the objectives of the non-state actor.<sup>293</sup> In conflict intervention, the externally supporting state is influenced by ethnic and/or ideological solidarity or to suppress a rival state.<sup>294</sup>

A situation where the externally supporting state is merely aiding and abetting a non-state actor in an ongoing home-grown conflict (for example an ongoing conflict rooted in domestic ethno-ideological grounds) may be seen as a conflict intervention.<sup>295</sup> In the situation of conflict intervention, the non-state actor might be less amenable to surrender organizational autonomy in lieu of material benefits and tangible

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<sup>293</sup> Ibid, 500.

<sup>294</sup> Michael Findley and Tze Kwang Teo, ‘Rethinking third-party interventions into civil wars: An actor-centric approach’ (2006) 68(4) *Journal of Conflict Resolution* 828, 835-836.

<sup>295</sup> Dylan Balch-Lindsay, Andrew J Enterline and Kyle A Joyce, ‘Third party intervention and the civil war process’ (2008) 45(3) *Journal of Peace Research* 345; Michael Findley and Tze Kwang Teo, ‘Rethinking third-party interventions into civil wars: An actor-centric approach’ (2006) 68(4) *Journal of Conflict Resolution* 828.

resources.<sup>296</sup> Furthermore, ideological autonomy defining the indigenous conflict might also render it undesirable for a non-state actor to trade agenda control in lieu of strategic and material assistance.<sup>297</sup>

The aforementioned factors render the classical agency model inappropriate for explaining conflict intervention by an external state to support a non-state actor, which is a primary party to an indigenous civil conflict.

The traditional understanding of the problems of agency slack arising out of the divergence of incentive of the principal (external state) and the agent (non-state actor) and the various tools for regulating the same might not be easily translatable to a situation of conflict intervention.<sup>298</sup> The traditional cost and benefit associated with conflict delegation from the perspective of both the principal and the agent, namely – agency slack and the reduction of costs associated with direct conflict from the perspective of the principal; and dilution of control and resource augmentation from the perspective of the agent, are not easily translatable to a situation of conflict intervention. Situations of conflict intervention do not closely mirror an agency in the first place and are more akin to ‘partnership’ with limited hierarchy of influence between the parties.<sup>299</sup>

To sum up the distinction between conflict delegation and conflict intervention, conflict delegation is similar to an agency where the externally supporting state (the principal) retains the control to shape the goals and objectives of the conflict but in a situation of conflict intervention, the states do not exercise much control over the non-state actors and the external state and the non-state actors function more as ‘partners’ rather than as principal and agent.

## **4.2 FACTORS DETERMINING THE EXISTENCE OF CONFLICT ‘INTERVENTION’ AS OPPOSED TO CONFLICT ‘DELEGATION’**

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<sup>296</sup> Salehyan, above n 32, 500-501.

<sup>297</sup> Ibid, 500-501.

<sup>298</sup> See Salehyan, above n 32, 502.

<sup>299</sup> Salehyan, above n 32. Also see Kristina Kausch, ‘State and Non-State Alliances in the Middle East’ (2017) 52(3) *Italian Journal of International Affairs* 36, 38.

While this distinction between conflict delegation and conflict intervention has been studied in recent literature, it remains uncertain as to how to clearly identify a situation of conflict delegation as opposed to conflict intervention. There is limited literature directly on this point. However, few benchmarks can be identified from the works of various scholars who focused on the features and/or benchmarks earmarking these two distinct kinds of engagement.<sup>300</sup>

The following can be proposed as an indicative benchmark for the existence of a conflict ‘intervention’:

**4.2.1 Existing Civil War** - External support to a non-state actor during the incidence of a civil war with deep indigenous/domestic roots is widely seen as indicative of a situation of conflict intervention in so far as the external state is often seeking to influence outcome in predominantly internal conflict owing to ethnic and/or ideological solidarity.<sup>301</sup>

**4.2.2 Organizational autonomy and objective by the non-state actor** - The retention of organizational autonomy and objective by the non-state actor in the face of external support is yet another indication of existence of conflict intervention. This is so because such organizational autonomy is indicative of the absence of the element of direct control by the external state over the non-state actor.<sup>302</sup>

**4.2.3 Transnational ethno-ideological alliance** - Transnational ethno-ideological alliance between the external state party and the non-state actor could also

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<sup>300</sup> Salehyan, above n 32.

<sup>301</sup> Michael Findley and Tze Kwang Teo, ‘Rethinking third-party interventions into civil wars: An actor-centric approach’ (2006) 68(4) *Journal of Conflict Resolution* 828, 835-836. Paul Collier and Anke Hoeffler, ‘Greed and grievance in civil war’ (2004) 56(4) *Oxford Economic Papers* 563; Patrick M Regan, ‘Third-party interventions and the duration of intrastate conflicts’ (2002) 46(1) *Journal of Conflict Resolution* 55.

<sup>302</sup> Salehyan, above n 32, 500-501.



indicate existence of a conflict intervention in so far as the parties are more amenable to partnerships as opposed to agencies in their engagement.<sup>303</sup>

**4.2.4 Non-state actors with regional influence** - Non-state actors with domestic connections and regional influence are increasingly playing the role of partners to external states and hence, are examples of conflict ‘intervention’ by external states.<sup>304</sup>

This can be sharply contrasted to a situation of conflict ‘delegation’ wherein the engagement is earmarked by the following characteristics:

(i) **Control of agenda** - The clear control of agenda by the external state party could indicate an incidence of conflict delegation. This is so because such agenda control is an aspect of the existence of direct control and supervision of the non-state actor by the external state party.<sup>305</sup>

(ii) **Non-existence of systematic conflict** - Non-existence of systematic conflict on ground at the point of involvement of the external state is yet another signature earmark of conflict delegation. The absence of clearly defined ethnic or ideological objective of the conflict could also be indicative of the situation of conflict delegation.<sup>306</sup>

As discussed above, in a conflict intervention, the pre-dominant objective of the external state is to influence conflict outcomes whereas in a conflict delegation the external state has much greater degree of control to shape the political objectives and goals of the non-state actor involved in the conflict. The above distinction between ‘conflict delegation’ and ‘conflict intervention’ is essential for understanding the

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<sup>303</sup> David R Davis and Will H Moore, ‘Ethnicity matters: Transnational ethnic alliances and foreign policy behaviour’ (1997) 41(1) *International Studies Quarterly* 171; Rupen Cetinyan, ‘Ethnic bargaining in the shadow of third-party intervention’ (2002) 56(3) *International Organization* 645.

<sup>304</sup> Kausch, above n 299, 38.

<sup>305</sup> Salehyan, above n 32, 501.

<sup>306</sup> See David R Davis and Will H Moore, ‘Ethnicity matters: Transnational ethnic alliances and foreign policy behaviour’ (1997) 41(1) *International Studies Quarterly* 171; Rupen Cetinyan, ‘Ethnic bargaining in the shadow of third-party intervention’ (2002) 56(3) *International Organization* 645.

realities of the ground relationship forged between the externally supporting state and the non-state actor involved in an armed conflict.

The insight into the relationship between the externally supporting state and the non-state actor is significant to determine the legal framework required to regulate the issue of use of force by non-state actors in an armed conflict. If the relationship between the externally supporting state and the non-state-actor is not in the nature of a principal and agent, the present rule of attribution of ‘effective control’ (with its assumption of agency) would be flawed and in need of reconsideration.

## 5. CONCLUSION

The rule of ‘effective control’ as the test for *de facto* agency for attribution of acts of non-state actors to states has been criticised in the previous chapter. The rule of ‘effective control’ places a heavy evidentiary burden for the establishment of agency relationship on the victim state (or the third party in an agency relationship), which claims attribution of wrongful acts of non-state actors to the externally supporting state.

This chapter distinguished the two concepts of ‘conflict delegation’ and ‘conflict intervention’ to argue that a situation of conflict intervention is not in the nature of an agency and more in the nature of a partnership. Furthermore, this chapter elaborated the factors that determine the existence of a conflict intervention by an external state by supporting the non-state actor against a rival state. Non-consideration of the ground relationship between an externally supporting state and the non-state actor involved in an armed conflict could result in the application of the wrong legal model to a particular incidence of external state support to a non-state actor. It is important to emphasize that the traditional model of agency between a principal and an agent, applied to the relationship of an externally supporting state and non-state actor might not be appropriate without proper classification of the particular incident as either ‘conflict delegation’ or ‘conflict intervention’.

In view of the importance of proper classification of a situation of external state support to non-state actor as either conflict intervention or conflict delegation, the next chapter shall endeavour to separately classify incidences of ‘conflict intervention’ and ‘conflict delegation’ in view of the above-mentioned factors determining the existence

of a ‘conflict intervention’.<sup>307</sup> This distinction is crucial because if an external state is involved in a ‘conflict intervention’, the external state and the non-state actor are likely to function as ‘partners’ and not as ‘principal’ and ‘agent’ – implying that the test of attribution of ‘effective control’ for state responsibility (with its assumption of agency) needs re-evaluation.

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<sup>307</sup> Factors determining the existence of a ‘conflict intervention’ are as follows: Incidence of a civil war with deep indigenous/domestic roots; retention of organizational autonomy and objective by the non-state actor; transnational ethno-ideological alliance between the external state and the non-state actor; and strong non-state actors with domestic connections and regional influence. See section 4 of this chapter. The next chapter of this thesis shall elaborate and explain these factors in greater details.

**CHAPTER 4: ALTERNATIVE TO THE EXISTING RULE OF ATTRIBUTION FOR USE  
OF FORCE BY NON-STATE ACTORS IN AN ARMED CONFLICT**

**1. INTRODUCTION**

Non-state actors are key participants in an armed conflict but what is not yet clear is the capacity in which non-state actors participate. This chapter shall attempt to understand the manner in which non-state actors participate in an armed conflict. Do non-state actors function as agents of an external state, merely executing the goals of another state on ground or do they operate independently striving to execute their own personal aims and agenda?

There is literature to suggest that non-state actors in armed conflicts mostly function independently and establish partnerships with external states with common goals in return for material gains such as obtainment of arms and training.<sup>308</sup>

The previous chapters discussed the existing rule of attribution of ‘effective control’ and criticized the same for being rooted in the concept of agency. Furthermore, the previous chapter distinguished between conflict delegation and conflict intervention to highlight how in a situation of conflict intervention, armed non-state actors often function as ‘partners’ with the externally supporting states rather than as principal and agent.

This chapter of the thesis shall make an empirical analysis of the existing armed conflicts to ascertain the kind of relationship that non-state actors have formed with externally supporting states. The existing rule of attribution of ‘effective control’ would be inappropriate if it can be established that the relationship between non-state actors and the externally supporting states is not that of a principal and an agent. If non-state actors are independent in their functioning and approach in an armed conflict, it is important to directly regulate their conduct under law.

Presently, non-state actors are not subjects of international law even though international humanitarian laws are applicable to them. Thus, there is a responsibility gap in international law at present where non-state actors cannot be held responsible

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<sup>308</sup> See Kausch, above n 299.

for their acts under international law and the rule of attribution for state responsibility places the threshold too high with the test of ‘effective control’. Furthermore, the test of attribution assumes an agency relationship between the external state and the non-state actors, which may not be correct.

This chapter shall criticize the existing rule of attribution and challenge the underlying assumption of agency in the present rule of attribution by looking into the real relationship between the externally supporting state and the non-state actor. Furthermore, this chapter shall suggest an alternative to the existing rule of attribution to address the issue of use of force by non-state actors in an armed conflict.

## **2. FACTORS DETERMINING THE EXISTENCE OF A CONFLICT INTERVENTION**

As discussed in the previous chapter, in a conflict intervention, the predominant objective of the external state is to influence conflict outcomes whereas in a conflict delegation the external state has much greater degree of control to shape the political objectives and goals of the non-state actor involved in the conflict.<sup>309</sup>

Literature indicates that the factors determining the existence of a ‘conflict intervention’ are as follows<sup>310</sup>: incidence of a civil war with deep indigenous/domestic roots; retention of organizational autonomy and objective by the non-state actor; transnational ethno-ideological alliance between the external state and the non-state actor; and strong non-state actors with domestic connections and regional influence.

On the other hand, the factors indicating the existence of a ‘conflict delegation’ are as follows<sup>311</sup>: clear control of agenda by the external state; and non-existence of a systematic conflict on ground at the point of the involvement of the external state.

It has already been discussed that while conflict delegation is more in the nature of an agency, a situation of conflict intervention does not resemble an agency but a partnership between the external state and the non-state actor. The next section shall

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<sup>309</sup> Salehyan, above n 32, 501.

<sup>310</sup> See Chapter 3 of the thesis.

<sup>311</sup> Ibid.

discuss the four factors of conflict intervention in details with case examples to clarify the existence of a conflict intervention.

## 2.1 INCIDENCE OF A CIVIL WAR

Civil war has been defined as a politically organized, large-scale, sustained, physically violent conflict that occurs within a country principally among large/numerically important groups of its inhabitants or citizens over the monopoly of physical force within the country.<sup>312</sup>

Literature establishes that the involvement of third-party states in an ongoing civil war is always strategic.<sup>313</sup> External states strategically involve themselves in an ongoing civil war in a rival state with the intentions to exhaust the resources of the rival state. Attempts to understand how third-party interventions affect wars and its implications on framing policies conclude that the demands of a separatist state in a civil war leads to an extension of the duration of a civil war.<sup>314</sup>

Literature on intervention establishes that civil wars are caused by domestic issues such as poverty, political instability, inequality, and ethnic conflicts.<sup>315</sup> External states intervene in a civil war to protect or promote their own interests. For example, an external state could attempt to aid the non-state actor to destabilise the rival state.<sup>316</sup>

External support to a non-state actor increases the chances of the non-state actor to emerge victorious in the civil war against the government, while also simultaneously being able to portray to the local population as a serious opposition to the

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<sup>312</sup> Mark Gersovitz, 'What Is a Civil War? A Critical Review of Its Definition and (Econometric) Consequences' (2013) 28(2) *World Bank Research Observer* 159; Also see JD Fearon, 'Iraq's Civil War' (2007) 86(2) *Foreign Affairs* 2.

<sup>313</sup> Dylan Balch-Lindsay, Andrew J Enterline and Kyle A Joyce, 'Third party intervention and the civil war process' (2008) 45(3) *Journal of Peace Research* 345.

<sup>314</sup> *Ibid.*, 352.

<sup>315</sup> James D Fearon and David D Laitin, 'Ethnicity, insurgency, and civil war' (2003) 97 *American Political Science Review* 75. Paul Collier and Anke Hoeffler, 'Greed and grievance in civil war' (2004) 56(4) *Oxford Economic Papers* 563.

<sup>316</sup> Michael Findley and Tze Kwang Teo, 'Rethinking third-party interventions into civil wars: An actor-centric approach' (2006) 68(4) *Journal of Conflict Resolution* 828, 831.

government.<sup>317</sup> Meanwhile, the government must bear the extra cost of stifling the opposition.

In a civil war caused by domestic issues, external states strategically involve themselves to influence conflict outcomes and typically engage in a conflict intervention rather than a conflict delegation.

This finding is fundamental, and it could be enlightening to analyse the number of situations in which external states have supported non-state actors engaged in an on-going civil war. The larger point being that if external states strategically involve themselves in an on-going civil war in a rival state with intentions to exhaust the resources of their rival state, they would not be in a position to ‘effectively control’ such non-state actors. The Afghanistan conflict is a good example of ‘conflict intervention’ by United States in a civil war.

USSR invaded Afghanistan on December 24, 1979.<sup>318</sup> Subsequently, USSR forces installed Babrak Kamal as a new USSR backed leader in Afghanistan. However, the USSR installed government had no control over provinces outside the cities, as a result of which there was no unified leadership in Afghanistan.<sup>319</sup> Nonetheless, USSR was doling out massive economic aid to Afghanistan. The war in Afghanistan and the arms race with the US were the primary reasons why the USSR spent excessively on the military.

USSR presence in the Afghan soil resulted in the popular support for the local non-state actor, the Mujahidin.<sup>320</sup> The Soviet led Afghan government could not overpower the Mujahidin forces. The factions opposing USSR government in Afghanistan were united by common factors like Islam and the nationalist ideology.<sup>321</sup>

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<sup>317</sup> Dylan Balch-Lindsay, Andrew J Enterline and Kyle A Joyce, ‘Third party intervention and the civil war process’ (2008) 45(3) *Journal of Peace Research* 345, 349.

<sup>318</sup> ‘Timeline: Soviet war in Afghanistan’, *BBC News* (online), 17 February 2009 <[http://news.bbc.co.uk/2/hi/south\\_asia/7883532.stm](http://news.bbc.co.uk/2/hi/south_asia/7883532.stm)>, last accessed 11 October 2023.

<sup>319</sup> Joseph J Collins, *Understanding War in Afghanistan* (National Defense University Press, 2011) 22.

<sup>320</sup> Alan Taylor, ‘The Soviet War in Afghanistan, 1979 – 1989’, *The Atlantic* (online), 4 August 2014 <<https://www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786/>>, last accessed 11 October 2023.

<sup>321</sup> *Ibid.*

The conflict in Afghanistan was widely considered to be an extension of the cold war politics. US shipped Stinger missiles to the Mujahidin, which were considered the most effective in the world.<sup>322</sup> When the Reagan administration came to power in 1981, the assistance to the Mujahidin by the US, Pakistan, China and Saudi Arabia increased.<sup>323</sup> More distinctively, Osama bin Laden established training sites in Pakistan to facilitate Muslim participation in the fight against the USSR.<sup>324</sup> In April 1985, President Reagan signed a National Security Directive, which stated that it was US's policy to drive USSR away from Afghanistan - as a result of which the aid to Afghanistan increased.<sup>325</sup>

There was improvement in the resistance movement in Afghanistan and the rebels had better weapons. There was a marked improvement in how the rebels performed in the resistance movement in Afghanistan against the pro-USSR government.<sup>326</sup>

Soviets started to withdraw from Afghanistan, which was complete by 1989.<sup>327</sup> After Soviet withdrawal, there was a civil war in Afghanistan between the existing Najibullah regime, the Mujahidin groups and the upcoming Taliban.<sup>328</sup> Even after the

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<sup>322</sup> Collins, above n 319, 39. Also see Robert Pear, 'Arming Afghan Guerrillas: A Huge Effort Led by U.S.', *The New York Times* (online), 18 April 1988 <<https://www.nytimes.com/1988/04/18/world/arming-afghan-guerrillas-a-huge-effort-led-by-us.html>>, last accessed 11 October 2023.

<sup>323</sup> Archie Brown, 'Reform, Coup and Collapse: The End of the Soviet State', *BBC News* (online), 17 February 2011 <[http://www.bbc.co.uk/history/worldwars/coldwar/soviet\\_end\\_01.shtml](http://www.bbc.co.uk/history/worldwars/coldwar/soviet_end_01.shtml)>, last accessed 11 October 2023.

<sup>324</sup> Louis Dupree, 'Afghanistan in 1982: Still no Solution' (February 1983) 23(2) *Asian Survey, A Survey of Asia in 1982: Part II* 133.

<sup>325</sup> Alan J Kuperman, 'The Stinger Missile and U.S. Intervention in Afghanistan' (1999) 114(2) *Political Science Quarterly* 219. Also see Leslie H Gelb, '85 Reagan ruling on Afghans cited' *The New York Times*, 19 June 1986 <<https://www.nytimes.com/1986/06/19/world/85-reagan-ruling-on-afghans-cited.html>>, last accessed 11 October 2023.

<sup>326</sup> Gelb, above n 325.

<sup>327</sup> 'Soviet troops pull out of Afghanistan', *BBC* (online), 15 February 1989 <[http://news.bbc.co.uk/onthisday/hi/dates/stories/february/15/newsid\\_4160000/4160827.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/february/15/newsid_4160000/4160827.stm)>, last accessed 11 October 2023.

<sup>328</sup> *Ibid.*



Soviet troops left Afghanistan, US continued to send funds to the guerrillas to ensure the Soviet influence would not return.<sup>329</sup> US considered Soviet withdrawal from Afghanistan as a victory and rebuilding Afghanistan was not much of a concern to the US.<sup>330</sup>

After the USSR left Afghanistan, there was a lack of unity amongst the various ethnic factions in Mujahidin and there was an ongoing civil conflict to expand their area of power. Rabbani was installed as the President in 1992. However, the state of civil war continued and there were several warlords in control of the Afghan provinces.<sup>331</sup> The Taliban captured Kandahar in 1994 with the intention to transform Afghanistan into an Islamic state.<sup>332</sup>

The Taliban was a hardliner in approach and severely curtailed the freedom of expression in Afghanistan. The Taliban mostly received training in the madrasas in Pakistan and received backing from the Pakistani army.<sup>333</sup> Saudi Arabia wanted to exploit the situation in Afghanistan to strengthen its Islamic credentials in the region.<sup>334</sup> It has been alleged that Saudi Arabia was the top source of funding for Al-Qaida, which supported the Taliban.<sup>335</sup>

The influence of the Taliban was growing in Afghanistan as they continued to fight the other warlords.<sup>336</sup> The Taliban had emerged as the new power in the civil war in Afghanistan as they took control of three provinces and Kabul itself.<sup>337</sup> September

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<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

<sup>331</sup> Andrew Hartman, ‘The Red Template’: US Policy in Soviet-Occupied Afghanistan’ (2002) 23(3) *Third World Quarterly* 467.

<sup>332</sup> Rakhahari Chatterji, ‘Afghanistan under Taliban 2.0: Revisiting its humanitarian crisis’, *Observer Research Foundation* (online), 15 June 2022 <<https://www.orfonline.org/expert-speak/afghanistan-under-taliban-2-0/>> last accessed 11 October 2023.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Ralph H Magnus, ‘Afghanistan in 1996: Year of the Taliban’ 1997 37(2) *Asian Survey, A Survey of Asia in 1996: Part II* 111.

9/11 terrorist attacks in the United States, brought attention towards Afghanistan and the terrorist outfit Al-Qaeda, which allegedly trained the hijackers in Afghanistan.<sup>338</sup> After the 9/11 terrorist attack in the United States, Afghanistan was attacked by the United States, the United Kingdom, and the NATO. The different factions in Afghanistan agreed to have a constitution, thus, paving the way for an election in Afghanistan.<sup>339</sup> Hamid Karzai was elected as the President in the first democratic Afghan elections.<sup>340</sup> Karzai failed to provide strong governance and survived several assassination attempts.<sup>341</sup>

The Taliban resurfaced and resorted to violence again in 2005.<sup>342</sup> Their means of warfare included suicide bombings, which caused heavy casualties in Afghanistan. 2005 was marked by the reprisal of the Taliban. Afghanistan was prone to several suicide attacks in that period. The Taliban's resurgence was a result of growing anti-US and anti-west sentiments in Afghanistan because of slow pace of reconstruction in Afghanistan and the alleged human rights abuses at the US's detention facilities.<sup>343</sup> There was growing resentment against the US in Afghanistan and US vowed to take lesser interest in the situation in Afghanistan. There were several civilian casualties caused by the US and Afghan bombings and in May 2006, there were violent anti-American riots in Kabul after several civilians died because of a US military vehicle crash.<sup>344</sup>

In 2007, some of the top Taliban leaders were captured in Pakistan and in the US.<sup>345</sup> United States targeted the Taliban leaders hiding in Pakistan by firing missiles

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<sup>338</sup>See 'Afghanistan: 2001-2008', *The Guardian* (online), 8 April 2008 <<https://www.theguardian.com/world/2008/apr/08/afghanistantimeline.afghanistan>>, last accessed 11 October 2023.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup>Griff Witte, 'Afghanistan War 2001-2014', Encyclopaedia Britannica <<https://www.britannica.com/event/Afghanistan-War>>, last accessed 11 October 2023.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

from drones. United States urged Pakistan to co-operate in capturing the Taliban leaders and there were threats of further drone attacks if Pakistan failed. In June 2011, US announced it would withdraw all its troops by the end of 2014, but US troops were present in Afghanistan until August 2021.<sup>346</sup>

In 2021, US President Joe Biden resolved to withdraw all US troops from Afghanistan.<sup>347</sup> In August 2021, the government of Islamic Republic of Afghanistan collapsed leading to the Taliban rising to power in Afghanistan.<sup>348</sup> By August 2021, US forces finally withdrew from Afghanistan marking the end of the US war with Afghanistan.

When the US funded the Mujahidin in the 1980s, during the Soviet occupied Afghanistan and during the civil war in Afghanistan (1989 - 1992), it was a 'conflict intervention'. As discussed above, US intervention in Afghanistan in 1980s by supporting the Mujahidin during the Soviet occupation and during the civil war was strategic as it wanted to challenge the Soviet influence in Afghanistan. The US was not in a position to 'effectively control' the Mujahidin as they were well organized and enjoyed wide support locally. Moreover, as discussed above, the civil war in Afghanistan was caused by domestic factors, mainly by the lack of unity amongst the various ethnic factions. After 9/11, when the US attacked Afghanistan in 2001 - it was in self-defence in response to the 9/11 terrorist attack.<sup>349</sup>

## **2.2 RETENTION OF ORGANIZATIONAL AUTONOMY AND OBJECTIVE BY THE NON-STATE ACTOR**

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<sup>346</sup> Ibid.

<sup>347</sup> Missy Ryan and Karen DeYoung, 'Biden will withdraw all U.S. forces from Afghanistan by Sept. 11, 2021', *The Washington Post* (online), 13 April 2021 <[https://www.washingtonpost.com/national-security/biden-us-troop-withdrawal-afghanistan/2021/04/13/918c3cae-9beb-11eb-8a83-3bc1fa69c2e8\\_story.html](https://www.washingtonpost.com/national-security/biden-us-troop-withdrawal-afghanistan/2021/04/13/918c3cae-9beb-11eb-8a83-3bc1fa69c2e8_story.html)>, last accessed 11 October 2023.

<sup>348</sup> Yaroslav Trofimov, 'Afghanistan Government Collapses as Taliban Take Kabul', *The Wall Street Journal* (online), 15 August 2021 <<https://www.wsj.com/articles/afghanistans-taliban-seize-jalalabad-as-panic-grips-kabul-11629005282>>, last accessed 11 October 2023.

<sup>349</sup> See UNSC Resolution 1368, 12 September 2001 and UNSC Resolution 1373, 28 September 2001.

When an external state ‘delegates’ a conflict to a non-state actor in a rival state, the external state controls the objective and the agenda, influencing the aim, strategies, and tactics of the non-state actor.<sup>350</sup> When external states ‘intervene’ in an existing conflict to influence the outcome of the conflict, the non-state actors retain their organizational autonomy and objective.<sup>351</sup>

Given that the primary condition of conflict delegation is control of non-state actors by the external state to establish a principal and agent relationship, retention of organisational autonomy and objective by the non-state actor is indicative of a conflict intervention where the external state seeks to influence the conflict outcome and protect its own interest. For example, LTTE in Sri Lanka was one of the biggest and most well organized armed non-state actors.

The LTTE was founded under the leadership of Prabhakaran in 1976 with the objective to secure a separate state for the Tamilian population in Sri Lanka or the independence of Tamil Eelam in northeast Sri Lanka. The LTTE and the Sri Lankan government were involved in a civil war from 1983 to 2009 until the Sri Lankan Armed Forces finally defeated the LTTE.<sup>352</sup>

The LTTE is recognized as one of the most organized and sophisticated armed non-state actor group which retained territorial control over parts of north-east Sri Lanka, running its own affairs as a ‘State’ within Sri Lanka in the Jaffna Peninsula until they were dislodged by the Sri Lankan Armed Forces in 1995.<sup>353</sup>

The LTTE maintained a strong hierarchical order and had two wings – political and military, both of which were controlled by the Central Governing Committee headed by Prabhakaran who made all the key decisions, after consultation with the Central Governing Committee.<sup>354</sup> The Central Governing Committee was entrusted

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<sup>350</sup> Salehyan, above n 32.

<sup>351</sup> Ibid, 501.

<sup>352</sup> See Joanne Richards, ‘An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)’ (CCDP Working Paper no. 10, The Centre on Conflict, Development and Peacebuilding, The Graduate Institute, Geneva).

<sup>353</sup> Byman et al, above n 37, 42.

<sup>354</sup> ‘The history of the Tamil Tigers’, *Al Jazeera* (online), 28 April 2009 <<https://www.aljazeera.com/focus/2008/11/2008112019115851343.html>>, last accessed 11 October 2023.

with the task of devising militaristic strategies as well as administrative related activities for the governance of the LTTE held territories.<sup>355</sup>

The political wing of the LTTE was entrusted with the tasks of civil administration and oversaw its territory through the judicial system, law enforcement instruments such as the police force, bureaucratic offices, and broadcasting stations.<sup>356</sup> The political wing also had an international secretariat, which operated the global LTTE network and the foreign relations cell. It is believed that the LTTE had branches in 54 countries with front organizations in India, Australia, UK, Canada, Malaysia etc. In 1984, LTTE opened its first overseas office in London.<sup>357</sup> The LTTE targeted to receive support from both the host government and the Tamil diaspora towards their cause.

The LTTE military ranks and grades followed the hierarchical structure of the Sri Lankan army.<sup>358</sup> These included two grades of ranks, commissioned and non-commissioned officers. Area commanders took key military decisions and other tactical decisions pertaining to their area.<sup>359</sup> The LTTE military was extremely advanced and killed two political figures, namely, Indian Prime minister Rajiv Gandhi in 1991 and the Sri Lankan President Ranasinghe Premadasa in 1993.<sup>360</sup>

There were several other wings in the LTTE which included the Sea Tigers, women's military wing; the Black Tigers Unit, which were responsible for conducting suicide attack and the members were carefully selected by Prabhakaran himself.<sup>361</sup> There was also an arms procurement department and secretive intelligence group.

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<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Edward A Gargan, 'Suicide Bomber Kills President of Sri Lanka', *The New York Times* (online), 2 May 1993 <<https://www.nytimes.com/1993/05/02/world/suicide-bomber-kills-president-of-sri-lanka.html>> last accessed 11 October 2023.

<sup>361</sup> 'The history of the Tamil Tigers', *Al Jazeera* (online), 28 April 2009 <<https://www.aljazeera.com/focus/2008/11/2008112019115851343.html>>, last accessed 11 October 2023.

The LTTE also had a dedicated team headed by Anton Balasingham and Sivagnam Gopalathinam, which promoted the cause of LTTE by publicity and propaganda.<sup>362</sup> Their publicity strategy included media outlets, pressure groups, charities, and NGOs. The LTTE was active on internet using electronic platforms to disseminate its propaganda.<sup>363</sup> Sri Lankan government succeeded in defeating the LTTE militarily in May 2009, killing their main leader Prabhakaran.<sup>364</sup>

LTTE was undoubtedly one of the biggest and most well-organized non-state actors, which retained its organizational autonomy and political objective despite the support it received from external states towards its cause.

### **2.3 TRANSNATIONAL ETHNO-IDEOLOGICAL ALLIANCE**

The literature on transnational ethno-ideological alliance also indicates an interventionist approach. Research shows that ethnic conflicts attract external intervention from third states.<sup>365</sup> Ethnic groups show solidarity with their ethnic brethren and come to support similar ethnic groups in a conflict owing to similar interests and a shared identity.<sup>366</sup>

It has been argued that ethnic support is a common pretext to make an intervention even though the reasons for intervention may be relating to geopolitical

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<sup>362</sup> Byman et al, above n 37, 42 - 44.

<sup>363</sup> Ibid.

<sup>364</sup> Sri Lanka's Tamil Tigers 'defeated', *Al Jazeera* (online), 17 May 2009 <<https://www.aljazeera.com/news/asia/2009/05/2009516125146283478.html>>, last accessed 11 October 2023.

<sup>365</sup> Michael Findley and Tze Kwang Teo, 'Rethinking third-party interventions into civil wars: An actor-centric approach' (2006) 68(4) *Journal of Conflict Resolution* 828, 832.

<sup>366</sup> Stephen Saideman, 'Explaining the International Relations of Secessionist Conflicts: Vulnerability v. Ethnic ties' (1997) 51(4) *International Organization* 721-753. Rupen Cetinyan, 'Ethnic bargaining in the shadow of third-party intervention' (2002) 56(3) *International Organization* 645. David R Davis and Will H Moore, 'Ethnicity matters: Transnational ethnic alliances and foreign policy behavior' (1997) 41(1) *International Studies Quarterly* 171. Also see Salehyan, above n 32, 501.

influence.<sup>367</sup> For example, Russia has used ethnic alliance as an excuse in Ukraine and Tajikistan to maintain regional influence.<sup>368</sup>

It is also observed that oftentimes governments feel pressure from their nationals to support co-ethnics in foreign states when co-ethnics are oppressed or discriminated against by the government.<sup>369</sup>

In the context of ethno-ideological alliance, it is relevant to highlight the recent Ukrainian war. Among other issues, the Ukrainian war is a good example of an ethno-ideological conflict where an external state (Russia) intervened. Ethnic support of the oppressed separatists in eastern Ukraine was a pretext used by Russia to make a 'conflict intervention' in Ukraine, even though the motives for intervention may be relating to geopolitical reasons.

## **2.4 NON-STATE ACTORS WITH DOMESTIC CONNECTIONS AND REGIONAL INFLUENCE**

Kristina Kausch studied the role of non-state actors in the middle east conflict and argued that proxy wars are empowering non-state actors as major states like Russia, US and Iran are collaborating with local non-state actors.<sup>370</sup> Such non-state actors are thus, key players in shaping the middle eastern power struggles. She argues that non-state actors like Hezbollah and IS combine features of both the states and the non-state actors.<sup>371</sup>

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<sup>367</sup> Patrick M Regan, 'Choosing to Intervene: Outside Interventions in Internal Conflicts' (1998) 60(3) *The Journal of Politics* 754-779. Michael Findley and Tze Kwang Teo, 'Rethinking third-party interventions into civil wars: An actor-centric approach' (2006) 68(4) *Journal of Conflict Resolution* 828.

<sup>368</sup> Karina Fayzullina, 'Does Tajikistan matter? Political trends in modern Tajikistan', *Al Jazeera* (online), 20 June 2013 < <https://studies.aljazeera.net/en/reports/2013/06/201362082342345467.html>>, last accessed 11 October 2023. Also see Jonathan Marcus, 'Russian parliament approves troop deployment in Ukraine', *BBC News* (online), 1 March 2014 < <https://www.bbc.com/news/world-europe-26400035>>, last accessed 11 October 2023.

<sup>369</sup> Byman et al, above n 37, 36-37.

<sup>370</sup> Kausch, above n 299, 36-47.

<sup>371</sup> *Ibid*, 37.

Weak states with poor governance can be breeding grounds for non-state actors to flourish. Kausch has argued that often, external states don't resort to direct intervention to intervene in weak states but prefer to become partners with the local non-state actors who have the requisite domestic connection but lack monetary resources to move ahead with their political agenda.<sup>372</sup> She argues that such circumstances give rise to a 'mutually beneficial partnership'.<sup>373</sup>

She also highlights that the degree of autonomy of non-state actors is never uniform and varies over a period of time.<sup>374</sup> She cited an example of the PLO. In 1964, the Arab League created the Palestine Liberation Movement and oversaw PLO's organization. However, later under Yasser Arafat, the PLO assumed independence in the Israeli-Palestinian conflict.

Furthermore, her conclusion has been that the relationship between the states and the non-state actors has been as varied as the kinds of non-state actors. She is of the view that the role of non-state actors as challengers has been well analysed but the role of non-state actors as 'partners' to a third state has not been sufficiently explored. She holds that non-state actors with regional influence are increasingly playing the role of partners to third states with regional ambitions.<sup>375</sup>

Strong non-state actors, which can sufficiently challenge the authority of their home state, prove to be valuable strategic partners to third states. As such, Kristina Kausch concludes that non-state actors are increasingly 'shaping the battle' between regional powers.<sup>376</sup> She gives some distinct examples such as Iran and Hezbollah. It is relevant to mention that there have been consistent claims of Iran's alleged aid to Hezbollah in its operations against Israel.<sup>377</sup> US support of Kurds in Syria and Iraq will

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<sup>372</sup> Ibid, 37- 38.

<sup>373</sup> Ibid, 38.

<sup>374</sup> Ibid.

<sup>375</sup> Ibid, 37-38.

<sup>376</sup> Ibid.

<sup>377</sup> See, e.g., Zeev Schiff, 'Israel's war with Iran' (2006) 85(6) *Foreign Affairs* 23. Also see Abbas William Samii, 'A stable structure on shifting sands: Assessing the Hizbullah-Iran-Syria Relationship' (2008) 62(1) *Middle East Journal* 32.



be discussed in detail below to illustrate how non-state actors can be strategic partners to external states.

Kurds make up the fourth largest ethnic group in the Middle East although they are still fighting for a separate state. They are presently a minority group in Iraq, Turkey, Syria, Armenia and Iran, fighting for a separate state called ‘Kurdistan’.<sup>378</sup> In 2013, Islamic State (‘IS’) launched an attack on the Kurdish population in Northern Syria and continued the same until mid-2014.<sup>379</sup> People’s Protection Units (‘YPG’) - the armed wing of the Syrian Kurdish Democratic Union Party (‘PYD’) fought against the IS in Syria.<sup>380</sup> IS also attacked the Kurdish population in Iraq in 2014. The autonomous government of Kurdistan region in Iraq got involved and sent its Peshmerga forces to fight against the Islamic Republic.<sup>381</sup> US led coalition launched strikes in northern Iraq and aided in the form of military advisors to support the Peshmerga.<sup>382</sup> The YPG and the Kurdistan Workers’ Party (‘PKK’) that fought for autonomy of the Kurds in Turkey for decades, also supported their cause.<sup>383</sup>

In September 2014, IS attacked the northern Syrian Kurdish town of Kobane which the Kurdish forces succeeded to quash in January 2015.<sup>384</sup> Kurds fought under the banner of the Syrian Democratic Forces (‘SDF’) and consistently received US support against its fight with the IS. In 2017, SDF captured the *de facto* IS capital city

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<sup>378</sup> ‘Who are the Kurds?’, *BBC News* (online), 15 October 2019 <<https://www.bbc.com/news/world-middle-east-29702440>>, last accessed 11 October 2023.

<sup>379</sup> Ibid.

<sup>380</sup> Karim Traboulsi, ‘Who and what are the Kurds fighting for?’, *The New Arab* (online), 3 December 2015 <<https://www.alaraby.co.uk/english/politics/2015/12/3/who-and-what-are-the-kurds-fighting-for>>, last accessed 11 October 2023.

<sup>381</sup> Dexter Filkins, ‘The Fight of Their Lives’, *The New Yorker* (online), 22 September 2014 <<https://www.newyorker.com/magazine/2014/09/29/fight-lives>>, last accessed 11 October 2023.

<sup>382</sup> Loveday Morris, ‘Kurdish forces, backed by U.S. airstrikes, launch offensive in Iraq’, *The Washington Post* (online), 13 November 2015 <[https://www.washingtonpost.com/world/kurdish-forces-backed-by-us-led-coalition-launch-offensive-in-iraq/2015/11/12/c151fd80-8908-11e5-be39-0034bb576eee\\_story.html](https://www.washingtonpost.com/world/kurdish-forces-backed-by-us-led-coalition-launch-offensive-in-iraq/2015/11/12/c151fd80-8908-11e5-be39-0034bb576eee_story.html)>, last accessed 11 October 2023.

<sup>383</sup> ‘Who are Kurdistan Workers’ Party (PKK) rebels?’, *BBC News* (online), 4 November 2016 <<https://www.bbc.com/news/world-europe-20971100>>, last accessed 11 October 2023.

<sup>384</sup> Karim Traboulsi, ‘Who and what are the Kurds fighting for?’, *The New Arab* (online), 3 December 2015 <<https://www.alaraby.co.uk/english/politics/2015/12/3/who-and-what-are-the-kurds-fighting-for>>, last accessed 11 October 2023.

of Raqqa making them an important player in the Syrian struggle.<sup>385</sup> The rising influence of the US supported Kurds meant that they were a threat to the Assad government, which wants to take back control of the whole of Syria.

Syrian conflict took yet another turn when Assad aided Syrian Kurds with logistics and humanitarian support in the Kurdish fight against Turkey.<sup>386</sup> Turkey escalated the conflict by launching Operation Peace Spring against the Kurds in northern Syria in October 2019, leading the US to withdraw its troops from northern Syria.<sup>387</sup> The US imposed sanctions on Turkey while the Syrian Kurds strengthened its alliance with the Assad government to fight Turkey.<sup>388</sup> In 2020-2021, Turkey launched air and land campaign in Iraqi Kurdistan to attack the PKK which created further rift between US and Turkey because of USA's continued support of PKK.<sup>389</sup> In November 2022, Turkey launched Operation Claw-Sword to target PKK and its allied non-state actors and also condemned US's support of such armed non-state actors.<sup>390</sup>

The above is an example where strong non-state actors such as Kurds with substantial regional influence, prove to be valuable strategic 'partners' to external states such as the US. As such, external states such as US have formed 'mutually beneficial partnership' with local non-state actors like the Kurds with domestic connections.

In each of the 4 case examples discussed above: the Afghanistan conflict, the LTTE in Sri Lanka, the Ukraine conflict, and the Kurds in Syria/Iraq – the non-state

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<sup>385</sup> 'Syria conflict: Kurds launch campaign north of IS-held Raqqa', *BBC News* (online), 25 May 2016 <<https://www.bbc.com/news/world-middle-east-36371226>>, last accessed 11 October 2023.

<sup>386</sup> Laila Bassam and Tom Perry, 'Friend or foe? Assad quietly aids Syrian Kurds against Turkey', *Reuters* (online), 11 February 2018 <<https://www.reuters.com/article/us-mideast-crisis-syria-turkey-kurds-idUSKBN1FV078>>, last accessed 11 October 2023.

<sup>387</sup> Umut Uras, 'Turkey's Operation Peace Spring in northern Syria: One month on', *Al Jazeera*, 8 November 2019 <<https://www.aljazeera.com/news/2019/11/8/turkeys-operation-peace-spring-in-northern-syria-one-month-on>>, last accessed 11 October 2023.

<sup>388</sup> Ibid.

<sup>389</sup> 'Turkish forces attack PKK targets in northern Iraq', *Al Jazeera* (online), 25 April 2021 <<https://www.aljazeera.com/news/2021/4/25/turkish-forces-hit-pkk-in-northern-iraq>>, last accessed 11 October 2023.

<sup>390</sup> Halil Karaveli, 'Turkey's Problem Isn't Sweden. It's the United States', *Foreign Policy* (online), 25 January 2023 <<https://foreignpolicy.com/2023/01/25/turkey-erdogan-nato-sweden-pkk-pyd-ypg/>>, last accessed 11 October 2023. Also see, 'Turkey Kurdish strikes: Operation Claw-Sword targets militant bases', *BBC News* (online), 20 November 2022 <[Turkey Kurdish strikes: Operation Claw-Sword targets militant bases - BBC News](https://www.bbc.com/news/world-middle-east-61888888)>, last accessed 11 October 2023.

actors had defined political agenda and organisational autonomy. In fact, as demonstrated by Kristina Kausch in her research, the external states and the armed non-state actors functioned more as ‘partners’ than as ‘principal’ and ‘agent’.

### **3. UPPSALA ARMED CONFLICT DATASET ANALYSIS TO CLASSIFY ARMED CONFLICTS AS ‘CONFLICT DELEGATION’ OR ‘CONFLICT INTERVENTION’**

From 1946 onwards, the Uppsala Conflict Data Program (‘UCDP’)<sup>391</sup> at Uppsala University, Department of Peace and Conflict Research, collected various information on armed conflict and organized violence. The wide range of data provided in the Uppsala Armed Conflict dataset is widely used for its accuracy. UCDP contains varied datasets on armed conflicts among which is included the UCDP External Support Dataset.<sup>392</sup> This dataset contains detailed information on conflicts between 1975 and 2009 on the existence, type, and provider of external support for all warring parties.

UCDP External Support Dataset provides of details of support received by the non-state actor by an external state. For the purpose of this chapter, I have focused on examining the nature and character and/or context of the engagement between the externally supporting state and the non-state actor, which is the recipient of such external support.

I looked up all the dataset entries where a state and a non-state actor were involved in an armed conflict and the non-state actor received external support from a state. I further analysed the background in which the externally supporting state and the non-state actor get involved to determine the nature of the relationship between the two. The primary objective of such analysis was to test the presumption of ‘agency’ in the existing rule of attribution – the test of ‘effective control’ and analyse whether it is

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<sup>391</sup> Uppsala Conflict Data Program, UCDP Conflict Encyclopaedia <<https://ucdp.uu.se/>>, Uppsala University, last accessed 1 July 2020.

<sup>392</sup> Stina Högladh, Therése Pettersson & Lotta Themnér, (2011) ‘External Support in Armed Conflict 1975–2009’. This dataset can be accessed at <<https://ucdp.uu.se/downloads/olddw.html>>, last accessed 1 November 2023.

consistent with the ground reality of the engagement between the externally supporting state and the non-state actor.

I undertook the aforementioned assessment by first of all, creating my own armed conflict database namely, the ‘**Externally Supporting State and NSA in an Armed Conflict**’ dataset (attached as **Annexure ‘A’**) derived from the Uppsala Armed Conflict dataset. In this connection, a copy of the ‘Externally Supporting State and NSA in an Armed Conflict’ dataset is annexed hereto and marked as **Annexure ‘A’**.

Please note that there are three parties to the armed conflicts enumerated in Annexure ‘A’ - the non-state actor, the victim state, or the home state (which is involved in the armed conflict with the non-state actor) and the externally supporting state or the third state (which indirectly gets involved in the conflict by supporting the non-state actor). The endeavour is to establish the relationship between the externally supporting state and the non-state actor to determine whether the externally supporting state is participating in ‘conflict delegation’ or ‘conflict intervention’.

In the ‘Externally Supporting State and NSA in Armed Conflict’ dataset (attached as Annexure ‘A’), I undertook the task of preparing an exhaustive database<sup>393</sup> of every conflict involving a belligerent non-state actor, externally supported by a state, to assess the true nature and context of such association. In this endeavour, I considered the following as recognized and established indicators of existence of a ‘conflict intervention’: incidence of a civil war; transnational ethno-ideological alliance; retention of organizational autonomy and objective by the non-state actors; non-state actors with domestic connections and regional influence.<sup>394</sup>

My result is tabulated as under:

Total Number of Armed conflicts with external	Total Number of Armed conflicts where Non-state actors were	Total Number of Armed conflicts with domestic connection	Total Number of Armed conflicts with	Total Number of Armed conflicts with	Total Number of Armed conflicts classified as
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<sup>393</sup> The facts in the database have been researched from internal press and Human Rights Watch, amongst others. The facts and figures have also been crosschecked and corroborated with the Uppsala Armed Conflict Dataset for consistency.

<sup>394</sup> See above, section 2 of this chapter.

support by States to Non-state actors	organized with political objective	and regional influence of Non-state actors	existence of civil war	existence of ethnic strife	Conflict Intervention
72	68	51	39	43	72

My conclusion from my analysis in Annexure ‘A’ is that an externally supporting state is trying to exploit a situation of a civil war or ethnic conflict in the victim/home state by providing external support to armed non-state actors. My result of an exhaustive analysis of the data presented in the table in Annexure ‘A’ shows that there is an overwhelming preponderance of a situation of a civil war or ethnic conflict in the victim/home state where the external state exploits the unstable situation by providing external support to the armed non-state actors. Also, there is a strong indication of an existence of non-state actors with organized structure, hierarchy and leadership structure espousing ideological goals in the aforementioned conflicts. Such ideological goals and objectives of the non-state actors involved in an armed conflict leads to their popular acceptance or strong domestic support in the victim state/home state.

Given the political objective and the leadership structure of the non-state actors enumerated in Annexure ‘A’, the assumption of agency between the externally supporting state and the non-state actor, seems to be erroneous and ill-conceived. In light of the above analysis, it is important to re-consider the existing rule of attribution with its inherent assumption of agency as being the correct explanation of the nature of engagement between the external state and the armed non-state actor.

Kristina Kausch is of similar view that external states use alliances with non-state actors to gather regional influence and destabilize rival states.<sup>395</sup> Hence, non-state actors must be viewed as both challengers to the victim state/home state and also as potential partners to external states. This finding, she argues, leads to the conclusion

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<sup>395</sup> Kristina Kausch, above n 299, 36-47.

that the international community must adopt formal policies both legally and diplomatically to effectively consider the importance of non-state actors.<sup>396</sup>

#### **4. ALTERNATIVE TO THE EXISTING RULE OF ATTRIBUTION FOR STATE RESPONSIBILITY FOR USE OF FORCE BY NON-STATE ACTORS**

It has been suggested that the duty to prevent violations of international law by states can be considered as an alternative to the existing rule of attribution in international law. It has also been argued that complicity can be considered as a standard to attribute the conduct of non-state actors to states. This section shall analyze these suggestions and assess the efficacy of importing the concept of direct responsibility for omissions in preventing a breach of international law within the ambit of the secondary rule of attribution as a possible solution.

The other alternative to the existing rule of attribution would be to hold armed non-state actors accountable for their internationally wrongful acts. The subsequent chapters of this thesis shall explore the issue of direct accountability of armed non-state actors in an armed conflict.

##### **4.1 DUTY TO PREVENT AND DUE DILIGENCE**

Kristen Boon argues that the duty to prevent has acquired prominence due to the stringent ‘effective control’ test and views this duty as relevant to fill in the accountability gap in the existing attribution test for state responsibility.<sup>397</sup> There are several examples where the duty to prevent has been illustrated in treaties and Security Council resolutions.<sup>398</sup>

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<sup>396</sup> Ibid.

<sup>397</sup> Boon, above n 215, 39.

<sup>398</sup> Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Article 2(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85; Article 15 of the International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256. Also see Boon, above n 215, 36.

With respect to terrorism, there has been a tendency to focus on the primary duty to prevent terrorism. Security Council Resolution 1373<sup>399</sup> of 28 September 2001, requires all states to comply with the International Convention for the Suppression of the financing of terrorism, regardless of whether they are parties to the Convention.<sup>400</sup> Crawford also argues that it is prudent to expand the primary norms of states to prevent terrorism and prohibit support of such acts rather than focus on lowering the ‘effective control’ threshold.<sup>401</sup>

It is also relevant to discuss international environmental law where the duty to prevent is imposed on states. The principle of due diligence is applicable to the obligation to prevent. Under international environmental law, states must ensure that activities undertaken under their jurisdiction does not result in damage to the environment of other states.<sup>402</sup> Environmental treaties emphasize on preventing harm which implies that states have a duty of due diligence. Due diligence is connected to the degree of effectiveness of the states’ control over the territory, degree of predictability of harm and the interest to be protected.<sup>403</sup> The duty of due diligence is also consistent with the precautionary principle laid down in Principle 15 of the Rio Declaration.<sup>404</sup>

The Court in *Pulp Mills*<sup>405</sup> held that the principle of prevention, as a customary rule, has its origin in the due diligence rule that is required of a state in its territory.<sup>406</sup> The Court upheld the position in *Corfu Channel*,<sup>407</sup> that every state is obligated to not

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<sup>399</sup> United Nations, S/RES/1373, 28 September 2001.

<sup>400</sup> United Nations, S/RES/1373, 28 September 2001, [1a].

<sup>401</sup> James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 161.

<sup>402</sup> Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, 38.

<sup>403</sup> See Duncan French and Tim Stephens, *ILA Study Group on Due Diligence in international law* (International Law Association, First Report, 7 March 2014) 16. Also see Boon, above n 215, 38.

<sup>404</sup> See Principle 15 of the Rio Declaration on Environment and Development 1992.

<sup>405</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 ICJ Reports 14.

<sup>406</sup> *Ibid*, 55.

<sup>407</sup> *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, 1949 ICJ Reports 4.

allow use of its territory for acts contrary to the rights of other states.<sup>408</sup> Furthermore, the Court upheld the position in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*<sup>409</sup> that this obligation is now part of the corpus of international law relating to the environment.<sup>410</sup>

However, the principle of due diligence does not require the state to produce specific results so long as the state makes an effort to prevent violations.<sup>411</sup> Furthermore, where there is no clear duty to prevent or to conduct due diligence, it is not a viable alternative and may not yield much result.<sup>412</sup>

It is suggested that states could also be held responsible for the acts of non-state actors by building in the responsibility for omission into the ‘effective control’ test. An international responsibility may also arise by an act of omission. When there is a legal obligation to act and the same is breached, responsibility may occur due to an omission.<sup>413</sup>

This is the approach adopted by the Dutch Court of Appeals in the twin decisions of *Mustafic-Mujic v The Netherlands*<sup>414</sup> and *Nuhanovic v The Netherlands* (‘*Nuhanovic case*’).<sup>415</sup> Both decisions pertained to similar fact situations relating to the deaths of Bosnian civilians in the Srebrenica genocide. Since these decisions are similar in all accounts, I shall discuss the *Nuhanovic case* in detail.

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<sup>408</sup> *Ibid*, 22.

<sup>409</sup> ICJ Reports 1996 (1), 242.

<sup>410</sup> *Ibid*, [29].

<sup>411</sup> Pisillo-Mazzeschi, ‘The Due Diligence and the Nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, 48.

<sup>412</sup> There is no general duty of due diligence. When an external state supports an armed non-state actor, it is a breach of a duty to abstain which does not involve the rule of due diligence. See *ibid*, 34 and 46.

<sup>413</sup> In the *Bosnian Genocide case*, ICJ considered the duty to prevent genocide under Article 1 of the Genocide Convention as an obligation of conduct and concluded that the obligation under the Genocide Convention would be breached if the state failed to conduct due diligence in fulfilling the duty of prevention and the actual occurrence of genocide. See *Bosnian Genocide case*, above n 129. Also see James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 230-231.

<sup>414</sup> *Mustafic-Mujic v The Netherlands, Judgment*, LJN: BR 5386 (5 July 2011).

<sup>415</sup> *Nuhanovic v The Netherlands, Appeal Judgment*, LJN: BR 5388 (5 July 2011).



Although derived from the primary rules - the duty to prevent has been read into the secondary rules in the Nuhanovic case where the Netherlands Court of Appeal attributed responsibility on Netherlands for their failure to prevent the removal of the claimants' family members from the Dutchbat complex in Srebrenica, resulting in their death in the hands of the Bosnian Serbs.<sup>416</sup> The Netherlands Court of Appeal ruled that the test of 'effective control' is applicable for attribution and in assessing whether the 'effective control' criteria is met, it is of relevance to check whether the state or the UN gave specific instructions to commit the wrongful act or in the absence of such specific instruction, if the UN or the state was in a position to prevent the wrongful conduct in question.<sup>417</sup> The Court of Appeal's interpretation of the 'effective control' test was upheld by the Supreme Court of Netherlands in Nuhanovic.<sup>418</sup>

Although this interpretation of the 'effective control' in terms of the ability to prevent a wrongful act is different from the ILC's framework of 'effective control', scholars like Nollkaemper argue that although the interpretation of 'effective control' differs in the Nuhanovic case, it is not incorrect.<sup>419</sup> This has far reaching consequence in so far as it significantly broadens the meaning and purport of 'effective control' test as adopted in the Nicaragua decision and introduces omission on the part of the state to prevent an act, prevention of which was within their ability as being sufficient for constituting 'effective control' and therefore justifying attribution for the wrongful act.

However, application of this approach adopted in Nuhanovic has to be circumscribed with the understanding that the test was laid down in Nuhanovic in the context of actions of peacekeeping troops contributed by the state to UN peacekeeping efforts wherein the state at all times had a jural relationship with the troops.<sup>420</sup> This is

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<sup>416</sup> Ibid, [5.20].

<sup>417</sup> Ibid, [5.8 and 5.9].

<sup>418</sup> *The Netherlands v Nuhanović*, Supreme Court of the Netherlands, 12/03324 (6 September 2013), [3.12.3].

<sup>419</sup> See Andre Nollkaemper, *Dual attribution: Liability of the Netherlands for removal of individuals from the compound of Dutchbat* (8 July 2011) Shares Blog <<http://www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat/>>, last accessed 11 October 2023.

<sup>420</sup> Tom Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61(3) *The International and Comparative Law Quarterly* 713, 723-724.

starkly different from the situation in Nicaragua where the contra rebels had no obvious jural relationship with the US. This difference is significant, since in the absence of an obvious jural relationship, the concept of ability to prevent might be difficult to prove. It may also be difficult to address the issue of a lack of primary norms by reading primary rules into the secondary rules of attribution.<sup>421</sup>

Despite such difficulty in extrapolating this approach to wrongful acts of non-state actors, this is a potential solution, which can be adopted when the facts permit finding of an ability to prevent by the states.

## **4.2 COMPLICITY**

It is important to emphasize that the law of state responsibility in international law is based on agency and not complicity. A complicit relationship between a state and a non-state actor is not enough basis for attribution. It is arguable that in the absence of any legal regime designating the acts of non-state actors as being illegal, there cannot be a secondary rule of complicity whereby a state can be held responsible for such an act.<sup>422</sup>

However, it has been argued by Vladyslav Lanovoy and Kanehara to consider complicity as an alternative to the existing rule of attribution in international law for state responsibility.<sup>423</sup> Lanovoy criticizes the existing rule of attribution, which is based on the agency standard and argues for complicity as a standard to attribute the conduct of non-state actors to states. The basis of his argument is that the nature of collaboration that takes place between an externally supporting state and a non-state actor, amounts to complicity on the part of the supporting state in an internationally wrongful act.<sup>424</sup>

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<sup>421</sup> This distinction between primary and secondary rules in international law for state responsibility has been criticized by some scholars as unnecessary and artificial. See André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359.

<sup>422</sup> Jackson, above n 272, 126-127.

<sup>423</sup> Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) *The European Journal of International Law* 563, 566.

<sup>424</sup> Under Article 16 of ARSIWA, complicity is recognized as a form of responsibility in the inter-state context but not as a ground for attribution of conduct of non-state actors to states. Article 16 of ARSIWA is in the nature of a primary rule rather than a secondary rule determining attribution of conduct of non-

On similar lines, Atsuko Kanehara advocates for introducing the concept of complicity in the law of state responsibility to address the present realities of state and non-state actor relationship.<sup>425</sup> She argues that in the changing international landscape strict positivist notions of states being the exclusive subjects of international law and the idea that the only means to regulate the acts of non-state actors would be through attribution of their acts to states is outdated and requires an overhaul.<sup>426</sup> She proposes framing an integrative theory of state responsibility for acts of non-state actors where the complicity of the state in the acts of non-state actors would form a significant consideration in framing a rule of attribution.<sup>427</sup>

This concept of complicity for attribution implies that the non-state actor is more than a mere private grouping, independent and pursuing its own goal but the state is nonetheless responsible for supporting the non-state actor, if the supporting state had knowledge of the wrongful act by the non-state actor and yet it provided the support.<sup>428</sup>

Thus, they propose a new complicity test to attribute the acts of non-state actors to states. It appears that complicity relies on causality to the extent it aims to understand the causal link between the externally supporting state and the conduct of the non-state actor.<sup>429</sup> If the causal link is established the externally supporting state would bear state responsibility for the wrongful conduct of non-state actors.

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state actors to states. Also see Ilias Plakokefalos, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy' (2017) 28(2) *The European Journal of International Law* 587, 590.

<sup>425</sup> Atsuko Kanehara, 'Reassessment of the Acts of the State in the Law of State Responsibility – A Proposal of an Integrative Theoretical Framework of the Law of State Responsibility to Effectively Cope with the Internationally Harmful Acts of Non-state Actors' (2019) 399 *Collected Courses of the Hague Academy of International Law*, 243.

<sup>426</sup> *Ibid*, 247.

<sup>427</sup> *Ibid*, 244.

<sup>428</sup> Lanovoy, above n 423, 581-582.

<sup>429</sup> See *ibid*, 584.

In this context, it may be highlighted that causation is not well developed in the law of state responsibility in international law. There is complete lack of clarity owing to courts failing to provide clear causal reasoning in case laws.<sup>430</sup>

Ilias Plakokefalos criticises this approach and calls for primary obligations of either the state or the non-state actor in international law because rules of attribution for state responsibility is a secondary rule and not designed to solve problems emerging due to the lack of primary rules.<sup>431</sup> Miles Jackson is of the view that complicity as a rule of attribution of conduct may disturb the clarity of the existing secondary rules of attribution.<sup>432</sup>

There is a concern that complicity as a rule of attribution of conduct is radical without any foundation in the existing state practice or literature. Given the discussion in this chapter on the prominence of armed non-state actors in armed conflicts where they increasingly function as ‘partners’ rather than as ‘agents’ to external states, it is important to regulate them directly under international law.

There is an urgent need to develop a legal framework designed to regulate non-state actors to overcome the shortcomings of the present control-based test of attribution for state responsibility. Considering the reasons stated in this chapter, it is more prudent to impose accountability on different actors directly, so they fulfil positive obligations rather than attribute responsibility to limited subjects of international law.<sup>433</sup> As this chapter demonstrates, the non-state actors are functioning independently with their own power structures; hence, it is significant to regulate them directly under international law.

## 5. CONCLUSION

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<sup>430</sup> See Ilias Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’ (2015) 26 (2) *European Journal of International Law*, 471–492.

<sup>431</sup> Ilias Plakokefalos, ‘The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy’ (2017) 28(2) *The European Journal of International Law* 587, 588.

<sup>432</sup> Jackson, above n 272, 197.

<sup>433</sup> Boon, above n 215, 48. Also see Jan Arno Hessbregge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2004) 36 *New York University Journal of International Law and Politics* 265, 306.

The law of state responsibility with the existing rule of attribution (test of ‘effective control’) is founded on the principle of agency. This chapter analysed the *de facto* agency presumption of the present rule of attribution by looking into the real relationship between the externally supporting state and the non-state actor.

This chapter attempted to discern the actual relationship or interaction or power structure on ground between the relevant players namely the externally supporting states and the non-state actors. As established above with the help of Annexure ‘A’, these relationships are not in the nature of agency in the first place so there is little sense in applying an agency test of ‘effective control’ to establish attribution. As discussed in this chapter, externally supporting states and non-state actors often function as ‘partners’ rather than as ‘principal’ and ‘agent’.

Although the ‘effective control’ test is the present rule of attribution, it appears that there are counter currents in the international law jurisprudence moving away from ‘effective control’ test as the paradigm for attribution. These counter currents can be broadly classified into few emergent trends in the international law jurisprudence as is evident in various sub discourses of international law. The trends can be broadly classified as follows:

Firstly, in certain specialized areas of international law such as international trade law, the threshold for attribution seems to be progressively diluted in the emerging jurisprudence in the field.<sup>434</sup>

Secondly, there appears to be a shift of focus on imposition of direct responsibility for omissions on the part of recognized subjects of international law as opposed to seeking to attribute acts and conducts of non-recognized subjects of international law to the recognized subjects.<sup>435</sup>

Thirdly, there is also significant growth on the discourse of multi-pronged imposition of responsibility on various entities irrespective of their acceptability as

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<sup>434</sup> In *United States - Countervailing Duty Measures on Certain Products from China*, Report of the Appellate Body, the WTO Appellate Body proposed the test of ‘meaningful control’, which is less strict than the ‘effective control’ test. (*United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body, WTO Doc WT/DS379/AB/R, AB-2010-3, 2 March 2011), 123 [318].

<sup>435</sup> Boon, above n 215, 44. See the discussion on the Nuhanovic case in section 4.1 of this chapter.

subjects of international law.<sup>436</sup> It is suggested that the future of international law would be a framework, which fills the gap in legal responsibility with respect to non-state actors.

From an assessment of the suggested alternatives to the extant rule of attribution, it becomes evident that direct regulation of non-state actors is a prudent option. The next chapter of this thesis shall investigate the existing status of non-state actors to analyse the potential legal issues surrounding direct regulation of armed non-state actors in international law.

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<sup>436</sup> Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 449–52.

**PART IV: STATUS OF NON-STATE ACTORS IN INTERNATIONAL LAW**

## **CHAPTER 5: EXISTING LEGAL STATUS OF NON-STATE ACTORS UNDER INTERNATIONAL LAW**

### **1. INTRODUCTION**

There are several categories of non-state actors like the international organizations, financial institutions and corporations, NGOs, armed groups etc. Each of these non-state actors is influential in the present times. Multinational corporations and financial institutions have been heavily influential for the past many decades; NGOs acting in public interest have been significant in the fields of environment and human rights;<sup>437</sup> armed non-state actors are a strong political force in armed conflicts.<sup>438</sup> The common factor between these entities would be that a) they are not identified or within the control of any state b) they do not have an international legal personality.<sup>439</sup>

Non-state actors are groups or individuals who are not acting on behalf of a state.<sup>440</sup> It is immaterial whether the non-state actor is receiving some form of support from the state, so long as its conduct is not attributable to a state, it would be independent from the state and considered a non-state actor under international law.<sup>441</sup> The non-state actor can be based within the state or extra-territorially.

In the present times, the influence of the non-state actor has significantly increased. Firstly, the number of non-state actors has increased significantly. Secondly, the non-state actors are expressing their views in a more formal manner by participating in international negotiations and in important institutions such as the UN, international courts, and tribunals. Such a growing influence of non-state actors makes it possible to

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<sup>437</sup> Elizabeth Burlison, 'Non-State Actor Access and Influence in International Legal and Policy Negotiations' (2010) 104 Proceedings of the Annual Meeting, *American Society of International Law* 325-328.

<sup>438</sup> Claudia Hofmann and Ulrich Schneckener, 'Engaging non-state armed actors in state and peace-building: Options and strategies' (2011) 93(883) *International Review of the Red Cross* 603.

<sup>439</sup> Anne-Marie Slaughter, 'Plenary Theme Panel: The challenge of non-state actors' (1998) 92 Proceedings of the Annual Meeting, *American Society of International Law* 20-36.

<sup>440</sup> Noam Lubell, *Extraterritorial use of force against non-state actors* (Oxford University Press, 2010) 14-15.

<sup>441</sup> *Ibid.*



argue for a case of non-state actors being granted a legal personality in international law such that their acts can be regulated to ensure better international governance. International system has undergone several transitions in the past few decades and the rise of non-state actors warrants a review of the ‘state-centric’ approach of international law.<sup>442</sup>

The previous chapter ascertained the prominent role played by the armed non-state actors in an armed conflict. This chapter will discuss the existing status of non-state actors in international law. Since my thesis is focused on armed non-state actors involved in an armed conflict, I seek to discuss the status of armed non-state actors under international humanitarian law, human rights law and international criminal law. It is relevant to analyse if the growing importance of armed non-state actors is reflected under the present international law. International law needs to be updated to regulate the acts of armed non-state actors, in view of the potential disruptive role they play in the global geo-politics today.

## **2. A BRIEF BACKGROUND OF THE LEGAL STATUS OF NON-STATE ACTORS UNDER INTERNATIONAL LAW**

A subject of international law is any actor in the international system upon which specific rights and obligations are conferred under international law.<sup>443</sup> Traditionally, sovereign states have been the subject of classical international law. From the 17<sup>th</sup> century onwards, international law developed as a framework of international relations, and expressing the rights and claims of states, without the existence of any

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<sup>442</sup> Anne-Marie Slaughter, ‘Plenary Theme Panel: The challenge of non-state actors’ (1998) 92 Proceedings of the Annual Meeting, *American Society of International Law* 20-36.

<sup>443</sup> James Crawford (ed), *Brownlie’s Principles of Public International Law* (Oxford, 8th ed, 2012) 3-19; Stephan C Neff, ‘A short history of International law’ in M Evans (ed), *International Law* (Oxford, 2nd ed, 2006) 29-52.

supra-national institutions.<sup>444</sup> The mechanism for dispute resolution was mainly through diplomatic means but if diplomacy failed, states resorted to war.<sup>445</sup>

The rise of the modern sovereign state and its recognition in the Peace of Westphalia, 1648 brought into existence the modern international system as there was a growing need for the formation of legal rules among the new entities called states.<sup>446</sup> Theoretical developments emphasized the concept of ‘sovereignty’ as the key organizing idea.<sup>447</sup>

Even in the present times, the main subject in international law are states.<sup>448</sup> However, since 1945 the standing of individuals under international law has greatly improved and individuals can bring petitions or applications before the international courts.<sup>449</sup>

The devastating consequences of the Second World War led to the formation of the UN Charter resulting in the change of the status of the individual.<sup>450</sup> Gross violation of human rights was recognized and called for UN action based on the UN Charter. There was focus on the development of human rights and wide recognition of individual criminal responsibility.<sup>451</sup>

A breakthrough judgment on the question of whether entities besides states could be subjects of international law is the Reparations Case. In *Reparations for Injuries Opinion*<sup>452</sup>, the ICJ ruled that non-state actors could have international

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<sup>444</sup> Malcolm N Shaw, *International Law* (Cambridge, 7th ed, 2014) 14-25.

<sup>445</sup> James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford, 8th ed, 2012) 718-733.

<sup>446</sup> Ibid, 3-19; Stephan C Neff, ‘A short history of International law’ in M Evans (ed), *International Law* (Oxford, 2nd ed, 2006) 29-52.

<sup>447</sup> James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford, 8th ed, 2012) 12.

<sup>448</sup> Ibid, 3-19; Stephan C Neff, ‘A short history of International law’ in M Evans (ed), *International Law* (Oxford, 2nd ed, 2006) 29-52.

<sup>449</sup> Malcolm N Shaw, *International Law* (Cambridge, 7th ed, 2014) 232.

<sup>450</sup> Robert McCorquodale, ‘The Individual and the International legal system’ in M Evans (ed), *International Law* (Oxford, 2nd ed, 2006) 312-319.

<sup>451</sup> Malcolm N Shaw, *International Law* (Cambridge, 7th ed, 2014) 232-235.

<sup>452</sup> *Reparations for Injuries, Advisory Opinion*, [1949] ICJ Reports 174.

personality and be a subject of the international legal system, although they may have different legal capacity than a state.

The ICJ again echoed similar sentiments in the Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt,<sup>453</sup>

*“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”*<sup>454</sup>

It is now well recognised that there can be subjects of international law that are not states. The Reparations case clarifies that the international system is continuously developing and thus, it is possible for other entities to have a legal personality under international law.<sup>455</sup>

## **2.1 STATUS OF NON-STATE ACTORS IN INTERNATIONAL HUMANITARIAN LAW**

Even though the status of armed non-state actors under public international law is ambiguous, a few branches of the public international law marginally acknowledge non-state actors as a subject matter and seek to govern their conduct. The least controversial example of recognition of non-state actors as a subject of public international law is perhaps found in specific obligations cast upon non-state actors under the international humanitarian law.<sup>456</sup>

For hundreds of years armed non-state actors had certain rights and obligations under the laws of war.<sup>457</sup> Since the mid-20<sup>th</sup> century, armed non-state actors or

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<sup>453</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, [1980] ICJ Reports 73.

<sup>454</sup> *Ibid.*, 89-90 [37].

<sup>455</sup> The ICJ's treatment and recognition of non-state actors in the international legal jurisprudence has been discussed at length in section 5 of this chapter.

<sup>456</sup> Cedric Ryngaert, 'Non-state actors in international humanitarian law' in Jean d'Aspremont (ed), *Participants in the international legal system* (Routledge, 2011) 284-295.

<sup>457</sup> Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 106. Noelle Higgins, 'The Regulation of

insurgents have certain rights and obligations under the international humanitarian law.<sup>458</sup> International humanitarian law are a body of rules under international law that governs the conduct of parties to an armed conflict - international or non-international in character.<sup>459</sup>

International humanitarian laws are framed to protect and prevent civilians and/or excessive damage to property during a conflict by prohibiting certain means/methods of warfare.<sup>460</sup> There are two conditions for international humanitarian law to apply to an armed non-state actor:

(i) Existence of an armed conflict as defined by international humanitarian law.<sup>461</sup>

(ii) The group must possess a sufficiently developed structure.<sup>462</sup>

The existence of an armed conflict is a matter of fact and is not dependent upon the subjective opinions of the states.<sup>463</sup> An armed conflict could be international in character or non-international.<sup>464</sup> An international armed conflict is defined in Article

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Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements' (2009) 17(1) *Human Rights Brief* 12.

<sup>458</sup> Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 106.

<sup>459</sup> Cedric Ryngaert, 'Non-state actors in international humanitarian law' in Jean d'Aspremont (ed), *Participants in the international legal system* (Routledge, 2011) 284-295.

<sup>460</sup> *Ibid.*

<sup>461</sup> See Article 2 common to the four Geneva Conventions of 1949 for an understanding of the existence of an armed conflict. Common Article 3 applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.' Also see *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1, [67].

<sup>462</sup> Common Article 3 does not provide for the degree of organization the armed non-state actor must have for the provision to apply to them. The ICTY in *Prosecutor v Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, 32-33 [60], lays down the degree of organization required of an armed non-state actor for applicability of Common Article 3.

<sup>463</sup> S Vit , 'Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 873, 69-94. Annyssa Bellal & Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3(1) *Goettingen Journal of International Law* 175-197.

<sup>464</sup> See Article 2 common to the four Geneva Conventions of 1949 and Article 3 Common to the four 1949 Geneva Conventions and 1977 Additional Protocol II to the Geneva Conventions.

2 common to the four Geneva Conventions of 1949.<sup>465</sup> Non-international armed conflicts are governed under Article 3, Common to the Geneva Conventions and Additional Protocol II to the Geneva Conventions. Common Article 3 says that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, a certain number of minimum provisions.<sup>466</sup>

It has now been recognized in several judicial decisions that Common Article 3 to the four 1949 Geneva Conventions applies to non-state actors.<sup>467</sup> In this connection, it is important to review the articulation of ICJ's understanding of the purport and scope of Common Article 3 in the Nicaragua case.<sup>468</sup>

In the Nicaragua case, the ICJ ruled that the Common Article 3 of the Geneva Convention was applicable to the rebel group (contras, the armed non-state actors) in Nicaragua, which was engaged in a non-international armed conflict against the government of Nicaragua.<sup>469</sup> Thus, case laws have clarified that armed non-state actors are governed under international humanitarian law.

Furthermore, in *Prosecutor v. Sam Hinga Norman*,<sup>470</sup> the Special Court for Sierra Leone held that all parties to an armed conflict including the states and a non-state actor are bound by international humanitarian law although only states are parties to the international treaties.<sup>471</sup>

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<sup>465</sup> Article 2 common to the four Geneva Conventions of 1949 states that the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

<sup>466</sup> See Article 3 Common to the four 1949 Geneva Conventions.

<sup>467</sup> The ICJ in the Nicaragua case confirmed that the contras, the non-state armed group fighting the government in Nicaragua were bound by the common article 3. See Nicaragua case, above n 9, [219].

<sup>468</sup> See Nicaragua case, above n 9.

<sup>469</sup> See Nicaragua case, above n 9, [219].

<sup>470</sup> *Prosecutor v. Sam Hinga Norman – Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)*, [2004] SCSL 7, 13 March 2004, [22].

<sup>471</sup> *Ibid*, [22].

In *Prosecutor v. Tadić*, Judgment (Appeals Chamber),<sup>472</sup> the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) declared that the Common Article 3 of the Geneva Conventions is part of the customary international law.<sup>473</sup>

According to Additional Protocol II, Article 1, paragraph 2, both Common Article 3 and Additional Protocol II do not apply in situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>474</sup>

*Prosecutor v. Tadić*<sup>475</sup> observed that for an international armed conflict to trigger, there needs to be “a resort to armed force between States.”<sup>476</sup> However, for the application of the Common Article 3 and Additional Protocol II, one needs to prove the existence of “protracted armed violence” between the parties.<sup>477</sup> Furthermore, “protracted” has been defined as a certain intensity of combat rather than a specified duration.<sup>478</sup>

In the case of *Prosecutor v. Haradinaj*,<sup>479</sup> the ICTY determined the degree of organization that an armed non-state actor must possess for the Common Article 3 to apply to them. The case law laid down the following:

*“As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including*

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<sup>472</sup> *Prosecutor v. Tadić*, Judgment (Appeals Chamber), 15 July 1999, Case No. IT-94-1.

<sup>473</sup> *Ibid.*, [98].

<sup>474</sup> See Additional Protocol II, Article 1, paragraph 2.

<sup>475</sup> *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1.

<sup>476</sup> *Ibid.*, [70].

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

<sup>479</sup> *Prosecutor v. Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008.

*troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.*"<sup>480</sup>

Hence, even under international humanitarian law recognition of non-state actors as a subject matter under the norms of the international humanitarian law are contingent upon such non-state actors meeting certain basic threshold of organizational structure. Article 1, paragraph 4 of Additional Protocol I of the 1977 Geneva Convention specifically recognizes application of the Convention to armed conflicts between parties other than two high contracting parties.<sup>481</sup> This is perhaps the first recognition of parties other than high contracting parties as subject matters of international humanitarian law.

However, the application of Additional Protocol I to non-state actors is not free from controversy. This is mostly because the application of Additional Protocol I is restricted to international armed conflicts and the intrinsic issues of characterization of international armed conflicts and its incompatibility with the notion of a conflict involving a non-state actor as a primary belligerent party.

Thus, it may be concluded that armed non-state actors are bound by international humanitarian law applicable in a non-international armed conflict, which include the Common Article 3 of the 1949 Geneva Conventions, the 1977 Additional Protocol II to the Geneva Conventions, Article 19 of the Hague Convention on Cultural Property, and customary rules of international humanitarian law.<sup>482</sup>

## **2.2 STATUS OF NON-STATE ACTORS UNDER INTERNATIONAL HUMAN RIGHTS LAW**

When it comes to the applicability of human rights law, some scholars believe that since human rights is applicable to states, they should not bind private actors or

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<sup>480</sup> ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, [60].

<sup>481</sup> Article 1, paragraph 4 of the 1977 Additional Protocol I to the Geneva Conventions.

<sup>482</sup> Veronika Bilkova, 'Establishing direct responsibility of armed opposition groups for violations of international humanitarian law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds) *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 263.

non-state actors under the purview of states.<sup>483</sup> However, scholars have recognized the need for a greater engagement with non-state actors as a solution to influence their behaviour.<sup>484</sup>

Although there has been a growth of individual rights under human rights, it remains state centric. For example, states have the power to consent to enter into treaties, even the power to make reservations on certain sections of the treaties.<sup>485</sup> Non-state actors are not subjects of international law and incapable of consenting to enter into treaties.<sup>486</sup>

State centrism of human rights is evident in many articles such as Article 2(1) of the International Covenant on Civil and Political Rights ('**ICCPR**'), which mandates State parties to "*respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.*"<sup>487</sup>

With respect to human rights obligations for the acts of armed non-state actors, a state would be responsible under international law only "upon the State's own failure to act, the act of armed opposition groups merely constituting the objective condition which gives rise to a breach on the part of the State."<sup>488</sup> Thus, at present, the application of international human rights obligations to non-state actors is through the domestic law as states uphold the responsibility to protect the principles of human rights.

Scholars like Andrew Clapham have argued that non-state actors can be held accountable under human rights law. Clapham argues that international law places

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<sup>483</sup> Annyssa Bellal & Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3(1) *Goettingen Journal of International Law* 175-197.

<sup>484</sup> N Rodley, 'Can Armed Opposition Groups Violate Human Rights' in KE Mahoney & P Mahoney (eds), *Human Rights in the Twenty-First Century* (Springer Netherlands, 1993) 300.

<sup>485</sup> Vienna Convention on the Law of Treaties, 1969, Articles 2 and 3 (hereinafter '**VCLT**').

<sup>486</sup> According to Article 35 of the VCLT, treaties cannot create obligations on third parties unless they consent to such obligations.

<sup>487</sup> International Covenant on Civil and Political Rights, 1966, Article 2(1). Also see, Jean d'Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 271.

<sup>488</sup> Zegveld, above n 16, 182. Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 3.



duties on individuals under the international criminal law.<sup>489</sup> Thus, there is nothing against the structure of international law that prevents non-state actors from fulfilling obligations under international law.<sup>490</sup> He suggests that the international legal personality of non-state actors might be gauged based on their capacity to fulfill obligations. Rosalyn Higgins agrees with this view and further elaborates that a ‘subject’ of international law should be examined based on its capacity to enjoy rights and fulfill obligations.<sup>491</sup>

Armed groups have been held accountable under human rights law. There are several instances where Commissions of Inquiry and Special Rapporteurs have held armed groups accountable for their actions.<sup>492</sup> In fact, the UN Office of the High Commissioner of Human Rights has recognized that the armed groups “exercising some degree of control” over a territory or population must observe human rights standards.<sup>493</sup>

The emerging UN practice appears to be that when an armed non-state actor *de facto* controls a territory, it has human rights obligations similar to that of a state.<sup>494</sup> Furthermore, even if an armed non-state actor does not *de facto* control a territory, but only controls certain areas in the territory, it needs to observe human rights obligations.<sup>495</sup> Lastly, even if an armed non-state actor does not control any territory,

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<sup>489</sup> Andrew Clapham, *Human Rights obligations of non-state actors* (Oxford University Press, 2009) 30.

<sup>490</sup> Ibid.

<sup>491</sup> Rosalyn Higgins, *Problems and process, international law and how we use it* (Clarendon Press, 1994) 49.

<sup>492</sup> See for example, United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/17/44, 12 January 2012, 70.

<sup>493</sup> United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict* (2011) 25. Also see Katherine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 4.

<sup>494</sup> Also see, Annyssa Bellal, ‘Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution’ in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (ed), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 308.

<sup>495</sup> Ibid.

such non-state actors must respect the peremptory norms or *jus cogens* obligations under international law.<sup>496</sup>

Although there is disagreement on whether armed groups need to consent to international norms before they could be bound by them – it is a common practice now for Commissions of Inquiry and Special Rapporteurs to hold armed groups accountable for their actions. UN OHCHR has stated that armed groups are accountable where they exercise “some control over a given territory and population.”<sup>497</sup> It is noteworthy to mention that Convention on the Elimination of discrimination against women in 2013 was the first human rights treaty to recognize that armed groups with an identifiable political structure and exercising significant control over territory or population have an obligation to fulfill international human rights law.<sup>498</sup>

### **2.3 STATUS OF NON-STATE ACTORS UNDER INTERNATIONAL CRIMINAL LAW**

Although international criminal law recognizes individual responsibility, much of the institutional law framework has been developed through state consent and practically, remains bound by state interests.<sup>499</sup> Non-state actors are considered incapable to consent to treaties and are not parties to the Rome Statute.<sup>500</sup> It is also important to remember that international criminal law is an *ex post facto* redress to

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<sup>496</sup> Ibid, 308-309.

<sup>497</sup> OHCHR, *International Protection of Human Rights in Armed Conflict* (UN Human Rights, 2011) 25.

<sup>498</sup> See UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations’ (18 October 2013), UN Doc CEDAW/C/GC/30, [16]. Also see Katherine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 15.

<sup>499</sup> Cedric Ryngaert, ‘Non-state actors in international humanitarian law’ in Jean d’Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 296-297.

<sup>500</sup> According to Article 35 of the VCLT, treaties cannot create obligations on third parties unless they consent to such obligations.

victims against certain heinous breaches of international law.<sup>501</sup> International criminal law imposes individual criminal responsibility but does not have any regulatory framework for the conduct of non-state actors as a group.

Though the judges of the international criminal court are appointed by the states, they have shown independence in their judgments.<sup>502</sup> To cite an example, the International Criminal Tribunal for the Former Yugoslavia in the Tadić<sup>503</sup> decision held that an armed conflict exists whenever there is a resort to armed force between states or protracted violence between governmental authorities and organized armed groups, or between such groups within a state.<sup>504</sup>

This definition is a welcome change from the present scenario where states have the authority to declare whether a non-international armed conflict exists. However, international institutions need to maintain good relations with the states and their disapproval implies that internal conflicts remain subject to state recognition.<sup>505</sup>

It may also be argued that international criminal law is not sufficient to address accountability issues of armed non-state actors. International criminal law is envisaged as a redress mechanism whereas the emphasis of international law should be placed on the prevention of wrongful acts by armed non-state actors.<sup>506</sup> International Criminal Court has not been very effective and very few convictions have been made so far.<sup>507</sup>

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<sup>501</sup> Cedric Ryngaert, 'Non-state actors in international humanitarian law' in Jean d'Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 297.

<sup>502</sup> According to Article 36 of the Rome Statute, the International Criminal Court (ICC) is composed of 18 judges, who are elected for terms of office of nine years by the assembly of states, parties to the Rome Statute.

<sup>503</sup> *Prosecutor v. Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-93-1-AR72 (2 October 1995).

<sup>504</sup> *Ibid*, [70].

<sup>505</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 198; Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 3.

<sup>506</sup> Cassandra Steer, 'Non-state actors in international criminal law' in Jean d'Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 297.

<sup>507</sup> Moses Retselisitsoe Phooko, 'How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court' (2011) 1(1) *Notre Dame Journal of International & Comparative law*, Article 6.

Most international wrongs that affect the civilians in an armed conflict may not fulfil the criteria of international criminality. International criminal law is insufficient for remedying everyday injustices, and it would be appropriate to delve elsewhere (for instance, under international humanitarian law) for regulation of armed non-state actors under international law.<sup>508</sup>

#### **2.4 STATUS OF NON-STATE ACTORS AND THE INTERNATIONAL LAW ASSOCIATION**

International Law Association (‘**ILA**’) mentioned the growing relevance of non-state actors under international law while accepting the ‘Proposal to establish an ILA Committee for the study of the rights and obligations of non-state actors under international law’.<sup>509</sup> In the ILA Hague Conference on non-state actors in 2010, the first Report of the ILA Committee on non-state actors was submitted.<sup>510</sup> This Report discussed the challenge of non-state actors in terms of listing the relevant legal issues. The Report discusses the rights and obligations of non-state actors, their legal status and monitoring compliance. In its Report, the ILA Committee looks at non-state actors that are involved in functions in the international platform that have real or potential outcome on international law.<sup>511</sup>

The Report observed the tendency of states to impose obligations on non-state actors but not grant many rights to them under international law. It cited examples such as states power in determination of the status of armed non-state actors involved in an armed conflict – states could either treat them as insurgents or declare them as

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<sup>508</sup> Ibid.

<sup>509</sup> Math Noortmann, ‘International Law Association and Non-state actors’ in Jean d’Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 241.

<sup>510</sup> International Law Association, ‘Non-state actors in international law: Aims, approach and scope of project and legal issues’ (The Hague Conference, Non-State Actors, First Report of the Committee, 2010).

<sup>511</sup> Ibid.

belligerents.<sup>512</sup> States often refrain from increasing the status of the rebels by admitting a non-international armed conflict. Furthermore, in a non-international armed conflict, although the armed non-state actors are bound by the humanitarian laws, they are denied the right to prisoner of war status.<sup>513</sup>

The Report further observed that non-state actors must be bestowed with legal status, so they become formal subjects of international law. They also emphasized the need to grant them participatory rights in international law. The Report concluded that recognizing non-state actors as subjects of international law would grant legitimacy to international law process and ensure greater compliance with international law.<sup>514</sup>

However, the Hague Report failed to present a policy-oriented discussion on the issue of the status of armed non-state actors. It emphasized and elaborated on the need to make non-state actors a subject of international law but did not come up with any practical theories or policies to execute this suggestion.<sup>515</sup>

It was also suggested by the Non-State Actors Committee of the International Law Association to draft articles for international responsibility of non-state actors, much like the International Law Commission's Articles on the Responsibility of States and International Organizations for Internationally Wrongful Acts.<sup>516</sup> However, this suggestion was not accepted owing to few primary obligations of non-state actors, no relevant practice on responsibility and the heterogeneous nature of the non-state actors.<sup>517</sup>

The Second Report on non-state actors by ILA focused on the law-making capacity of non-state actors and concluded that non-state actors are not law-making agencies. It concluded that the treaties signed between armed non state actors and state

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<sup>512</sup> Ibid, 22.

<sup>513</sup> Ibid, 22.

<sup>514</sup> Ibid, 23-24.

<sup>515</sup> Math Noortmann, 'International Law Association and Non-state actors' in Jean d'Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 242.

<sup>516</sup> Cedric Ryngaert, 'Non-state actors: Carving out a space in a state-centred international legal system' (2016) 63(2) *Netherlands International Law Review* 183, 192.

<sup>517</sup> Ibid.

parties are binding but more in the nature of hybrid treaties where a recognized subject of international law (states) forms an agreement with an unrecognized subject (non-state actors).<sup>518</sup> Furthermore, the Report considered the Unilateral Declarations signed by armed non-state actors with ICRC and Geneva call to comply with humanitarian norms as binding due to their widespread use in armed conflicts.<sup>519</sup> Lastly, the Report concluded that although the settled position in international law is that the practices of armed non state actors are irrelevant to determine the existence of customary norms – the practice of armed non state actors could be relevant to assess norms that govern the conduct of armed non-state actors.<sup>520</sup> In the Final Report of ILA on non-state actors, it was noted that while non-state actors have certain rights and obligations under international law, it was unclear whether the breach of such legal obligations resulted in international responsibility.<sup>521</sup>

## **2.5 CRITICAL ANALYSIS OF THE PRESENT LEGAL STATUS OF ARMED NON-STATE ACTORS**

The diverse array of organizational structure of armed non-state actors presents a hurdle in the way of proper recognition and regulation of armed non-state actors under public international law.<sup>522</sup> The multitude of forms and structure of non-state actors renders it difficult to suitably define them as subjects of public international law. The law relating to legal personality under public international law is intrinsically

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<sup>518</sup> International Law Association, ‘Non-State Actors in International Law of the International Law Association (ILA): Lawmaking and Participation Rights’ (Sofia Conference, 2012) 4.

<sup>519</sup> Ibid, 5. Also see, Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ (2011) 37 *Yale Journal of International Law* 107, 141-143.

<sup>520</sup> International Law Association, ‘Non-State Actors in International Law of the International Law Association (ILA): Lawmaking and Participation Rights’ (Sofia Conference, 2012) 6.

<sup>521</sup> International Law Association, ‘Final Report of the Committee on Non-State Actors of the International Law Association’ (Johannesburg Conference, 2016) 15.

<sup>522</sup> M Cherif Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98(3) *Journal of Criminal Law and Criminology* 711.

intertwined with the concept of *de minimis* organizational hierarchy.<sup>523</sup> The lack of uniform and homogenous organizational hierarchy presents a definitional issue going to the very root of recognition and regulation of armed non-state actors as subjects of international law.

Apart from the organizational heterogeneity of the armed non-state actor, the functional multiplicity of an armed non-state group presents yet another issue in suitably defining non-state armed group as subjects of international law. This is manifest most often in non-state armed group performing the dual functions of political opposition/activism against the ruling government.<sup>524</sup> Such duality in functional identity presents yet another divergence problem in suitably defining non-state armed group as subjects of international law.

Yet another associated problem with enforcement of international humanitarian law in relation to armed non-state actors is the problem of characterization of conflict to which the norms of international humanitarian law would apply. The characterization of a conflict as either an international armed conflict or a non-international armed conflict has significant ramification on the scope and applicability of norms of international humanitarian law, either under the Geneva Convention or as part of customary international law.<sup>525</sup>

The consequence of a breach of an international humanitarian law provision, either under the Geneva Convention or as part of customary international law are vastly different and the obligations imposed by humanitarian law on the state subject are entirely dependent upon the nature of the conflict.<sup>526</sup> Whereas in the situation of an

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<sup>523</sup> ICTY, *Prosecutor v Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, [60]. Common Article 3 does not provide for the degree of organization the armed non-state actors must have for the provision to apply to them. The ICTY's case law clarifies the degree of organization required from the group.

<sup>524</sup> M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711.

<sup>525</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 1-4.

<sup>526</sup> In international conflicts, serious violations of established norms attract criminal responsibility and are characterized as 'grave breaches' of the Geneva Convention and as 'war crimes' when such violations are of customary international humanitarian law. Upon occurrence of such violations, the states are obligated to either prosecute or extradite. However, such obligation to prosecute or extradite do not apply in the same manner in the context of non-international armed conflict. In purely internal conflicts, none of the above applies, as only domestic law is deemed applicable. See M Cherif Bassiouni, 'The New

international armed conflict of a conduct amounting to grave breaches of the Geneva Convention and/or violations of customary humanitarian law are well defined imposing the state subject an obligation to criminalize/prosecute/punish and/or extradite the responsible parties, the same standards of obligations do not apply to a non-international armed conflict.<sup>527</sup> It is also pertinent to note that purely internal conflicts are beyond the scope of humanitarian law either under the Geneva Conventions or as part of customary international law.<sup>528</sup>

The differential treatment of violations of similar nature in the scenario of internal conflict and non-international armed conflict also has significant bearing in the recognition of legal personality of armed non-state actors as a subject of international humanitarian law.<sup>529</sup> This disparity in legal treatment of armed non-state actors in these two aforementioned scenarios have invited significant discussion on the need to redefine the reach of international humanitarian law in relation to armed non-state actors.<sup>530</sup>

Another important issue to be re-examined is the extent to which Common Article 3 is binding upon the states. Common Article 3 can only be applied when a state determines that a conflict is a state of belligerency.<sup>531</sup> This disproportionate power on states to decide whether there is a state of belligerency or not leads to an unfortunate circumstance where the armed non-state actors who are involved in these conflicts do not follow the obligations of humane treatment, which are much required in these

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Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711.

<sup>527</sup> Ibid.

<sup>528</sup> See Additional Protocol II, Article 1, paragraph 2.

<sup>529</sup> In conflicts of a non-international character, only Common Article 3 of Geneva Conventions and Protocol II is applicable to non-state actors. Such persons do not obtain the prisoner of war status. These laws are not applicable in purely internal conflicts. The limitation in applicability of international humanitarian law to internal conflicts has resulted in an otherwise competent subject satisfying the definition of a 'combatant' under the Geneva Convention, an unregulated subject of international law.

<sup>530</sup> See M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711. Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554.

<sup>531</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 9-10.



situations on the basis of reciprocity.<sup>532</sup> Scholars argue that regardless of the declarations made by the states, the obligations of such humane treatment should be made binding upon the states.<sup>533</sup>

Armed non-state actors do not have any incentive for compliance of international humanitarian law if the states do not reciprocate and continue to treat them as common criminals under the domestic law.<sup>534</sup> As discussed earlier, internal or domestic conflicts are not covered under the purview of international humanitarian law and there is enormous difference in the manner in which international humanitarian law regulates international armed conflicts, non-international armed conflicts and conflicts of an internal nature.<sup>535</sup> The power that states have to decide whether a conflict is non-international armed conflict or a domestic conflict has an adverse impact on the compliance of international humanitarian law by both states and non-state actors.

Furthermore, while the existence of International Humanitarian Fact-Finding Commission<sup>536</sup> is a positive development, it has only investigated one conflict so far. In 2017, the Commission investigated Ukraine regarding the explosion of an Organization for Security and Cooperation in Europe's vehicle.<sup>537</sup> The reason for no investigation by the Commission has been the poor willingness of states to involve the Commission to investigate potential violations of international humanitarian law.<sup>538</sup>

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<sup>532</sup> Ibid, 14-16.

<sup>533</sup> M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711. Annysa Bellal and Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3(1) *Goettingen Journal of International Law*, 175-197.

<sup>534</sup> See M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711.

<sup>535</sup> Armed non-state actors engaged in a domestic conflict are not viewed as lawful combatants and hence, do not receive the same protection as 'combatants' in conflict of an international character.

<sup>536</sup> International Humanitarian Fact-Finding Commission was established under Article 90 of Additional Protocol II to the Geneva Convention with the aim to investigate the facts behind allegations of violations of international humanitarian law. See International Humanitarian Fact-Finding Commission, <<https://www.ihffc.org/index.asp?Language=EN&page=home>>, last accessed 30 October 2023.

<sup>537</sup> Cristina Azzarello & Matthieu Niederhauser, 'The Independent Humanitarian Fact-Finding Commission: Has the "Sleeping Beauty" Awoken?' (9 January 2018) <<http://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/>>, last accessed 30 October 2023.

<sup>538</sup> Ibid.

The Commission remains one of the few mechanisms to investigate into humanitarian issues, although it needs to find ways to protect humanitarian laws despite the lack of political will of the states.

### **3. INTERNATIONAL HUMAN RIGHTS LAW BINDING ON NON-STATE ACTORS THAT CONTROL TERRITORY**

There is an emerging practice wherein UN accountability mechanisms attribute responsibility on non-state actors to uphold international human rights law when they control territory.

#### **3.1 THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS**

The Office of the High Commissioner for Human Rights was set up by the UN General Assembly in 1993 to protect and promote the human rights guaranteed under international law.<sup>539</sup> The Office of the High Commissioner for Human Rights has stated that non-state actors exercising state like control over a particular territory are obligated to follow international human rights law to the extent their acts affect rights of the individuals under their control in the territory.<sup>540</sup>

In the Report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolution 7/1, the High Commissioner held that since Hamas exercises government-like functions and control over the territory in Gaza, they are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.<sup>541</sup>

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<sup>539</sup> See United Nations Human Rights Office of the High Commissioner, 'Brief History' <<https://www.ohchr.org/EN/AboutUs/Pages/BriefHistory.aspx>>, last accessed 30 October 2023.

<sup>540</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/8/17, 6 June 2008, 6-7 [9]; A/HRC/12/37, 19 August 2009, 4-5 [7]; A/HRC/16/71, 3 March 2011, 3[4]; A/HRC/19/20, 13 December 2011, 3[5]; A/HRC/22/35, 6 March 2013, 4[5].

<sup>541</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/7/78, 6 March 2008, 8.

The United Nations Human Rights Council (under the resolution 28/30 adopted in 2015) requested the United Nations High Commissioner for Human Rights to investigate the violations of human rights law in Libya since 2014.<sup>542</sup> In the 2016 investigation finding Report<sup>543</sup> by the Office of the United Nations High Commissioner for Human Rights on Libya, the High Commissioner held that non-state actors who exercise government-like functions and control over a territory are obliged to respect human rights norms and humanitarian law when their conduct affects the human rights of the individuals under their control.<sup>544</sup> Furthermore, customary international law will be applicable to non-state groups that are party to an armed conflict.<sup>545</sup> The High Commissioner also clarified that the scope of international criminal law would extend to all individuals.<sup>546</sup>

In April 2023, the Independent Fact-Finding Mission on Libya urged the Office of the High Commissioner for Human Rights to put in place a mechanism to monitor and report the violations of human rights in Libya to encourage greater accountability.<sup>547</sup>

Based on the above, one may conclude that according to the emerging UN practice, when an armed non-state actor *de facto* controls a territory, it has human rights obligations similar to that of a state.<sup>548</sup> However, there is a need to specify these human rights and educate non-state actors on human rights law so that they can protect them.

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<sup>542</sup> United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/31/47, 15 February 2016, 3[1].

<sup>543</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/31/CRP.3, 23 February 2016.

<sup>544</sup> *Ibid.*, 10[29].

<sup>545</sup> *Ibid.*

<sup>546</sup> *Ibid.*

<sup>547</sup> United Nations Human Rights Office of the High Commissioner, 'Human Rights Council hears that there are reasonable grounds to believe that crimes against humanity have been committed against Libyans and migrants throughout Libya since 2016 and that new mechanisms are needed' (3 April 2023) <<https://www.ohchr.org/en/news/2023/04/human-rights-council-hears-there-are-reasonable-grounds-believe-crimes-against>>, last accessed 30 October 2023.

<sup>548</sup> Also see Annyssa Bellal, 'Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 308.

It is significant that armed non-state actors are aware of human rights which are applicable to them under international law.

### **3.2 THE PANEL OF EXPERTS ON THE SUDAN**

The Panel of Experts on the Sudan was established by the Security Council by resolution 1591 in 2005.<sup>549</sup> The Panel of Special Procedures Experts on the Sudan in their 2007 Report<sup>550</sup> to the Security Council explicitly mentioned in its Report that even though the Government of Sudan bears the primary responsibility to guarantee human rights of its citizens, armed non-state actors also have the responsibility to respect human rights in areas under their control.<sup>551</sup>

The Panel of Experts further held that the members of the SLA/MM armed groups have consistently committed grave violations of human rights in areas where the armed group has a presence in Darfur.<sup>552</sup> These violations have included violations of the right to life and subjecting persons to cruel and inhuman treatment.<sup>553</sup> Armed groups associated with tribes in Darfur such as Tarjum, Aballa, Habbaniya and Fallata are also guilty of serious violations of human rights such as the right to life towards other armed non-state groups in Southern Darfur.<sup>554</sup>

The Panel recorded the pattern of violations of human rights in Darfur since 2003 and took a position that all parties to the conflict in Darfur have a responsibility to protect human rights, although the Government of Sudan has a greater responsibility under the human rights treaties.<sup>555</sup>

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<sup>549</sup> Security Council Committee established pursuant to Resolution 1591 (2005) concerning the Sudan, <[https://www.un.org/sc/suborg/en/sanctions/1591/panel-of\\_experts/work\\_mandate](https://www.un.org/sc/suborg/en/sanctions/1591/panel-of_experts/work_mandate)>, last accessed 30 October 2023.

<sup>550</sup> See Security Council Report, S/2007/584, 3 October 2007.

<sup>551</sup> Ibid, 86 [325].

<sup>552</sup> Ibid, 87 [330].

<sup>553</sup> Ibid, 87 [330].

<sup>554</sup> Ibid, 87 [331].

<sup>555</sup> Ibid, 86 [325].

In the Final Report of the Panel of Experts on Sudan in 2020, the Panel of Experts observed there were serious violations of human rights due to fights between the government and SLA/AW armed groups in Jebel Marra in Darfur.<sup>556</sup> The Report further directed that targeting of civilians by such armed groups is a violation of international humanitarian law and the government of Sudan must hold such armed non-state actors accountable for their violations of human rights and international humanitarian law.<sup>557</sup>

Thus, it is observed that the emerging UN practice is that even if an armed non-state actor does not *de facto* control a territory, but only controls certain areas in the territory, it needs to observe human rights and international humanitarian law obligations.<sup>558</sup> Again, there is a need to educate and disseminate the knowledge of such human rights to the armed non-state actors so they can observe them. Lack of awareness as to which human rights need to be observed by armed non-state actors is often the key reason why armed non-state actors do not have regard for human rights.

### **3.3 THE INTERNATIONAL COMMISSION OF INQUIRY ON LIBYA AND SYRIA**

The Human Rights Council established the International Commission of Inquiry on Libya by resolution S-15/1 in February 2011 to inquire into the civil repression in Libya following the protests against the Gaddafi regime. The Commission received the mandate to identify the ones violating international law and make recommendations such that the offenders could be held accountable.

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<sup>556</sup> United Nations Security Council, S/2020/36, Final Report of the Panel of Experts on the Sudan, 14 January 2020, 28.

<sup>557</sup> Ibid, 28, 44.

<sup>558</sup> Also see Annyssa Bellal, 'Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 308.

The National Transitional Council had declared itself to be the government of Libya.<sup>559</sup> In the Report<sup>560</sup> of the International Commission of Inquiry to investigate all alleged violations of international law in the Libyan Arab Jamahiriya, it was reported that since the National Transitional Council has been exercising *de facto* control over the territory, it was obligated to respect the human rights in the territory under their control. The Report held the *de facto* regime of National Transitional Council responsible for the human rights and humanitarian violations committed in the territory under the control of National Transitional Council.<sup>561</sup>

In the 2014<sup>562</sup> Report, the Commission examined allegations of human rights violations committed by the Gaddafi Government and the Thuwar. The Commission concluded that they were guilty of serious violations of human rights law such as unlawful killing, torture, enforced disappearance and indiscriminate attacks.<sup>563</sup> The Commission further noted that the Thuwar have not been held accountable for their crimes. The Commission directed that the interim government of Libya must investigate on the violations highlighted in the Report and prosecute the perpetrators of such crimes.<sup>564</sup>

Thus, the Commission observed that armed non-state actors must respect the fundamental human rights of persons in areas where such actors exercise *de facto* control even though such non-state actors are not parties to the international human rights treaties.<sup>565</sup>

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<sup>559</sup> See ‘National Transitional Council – Libya’, <<http://ntclibya.org/>>, last accessed 30 October 2023.

<sup>560</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/17/44, 12 January 2012.

<sup>561</sup> *Ibid.*, 70.

<sup>562</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/19/68, 28 January 2014.

<sup>563</sup> *Ibid.*, 21[120].

<sup>564</sup> *Ibid.*, 22[127].

<sup>565</sup> Annyssa Bellal, ‘Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution’ in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 308-309. Also see A/HRC/19/68, 8 March 2012.

A similar Commission was set up in Syria as well. The Independent International Commission of Inquiry on the Syrian Arab Republic was established in 2011 through resolution S 17/1 by the Human Rights Council to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic. In the First Report<sup>566</sup> by the Commission in 2011 and the Second Report<sup>567</sup> in 2012 (which covers the period until February 15, 2012), the Commission did not apply international humanitarian law because the conflict was not adjudged as an armed conflict.<sup>568</sup>

The First Report emphasized the individual criminal responsibility of the members of the armed group but did not focus on the responsibility of the armed non-state actors for the violations of human rights in Syria.<sup>569</sup> The Second Report emphasized armed non-state actors to respect and act in accordance with human rights law.<sup>570</sup> It further clarified that human rights obligations constituting peremptory international law (*jus cogens*) bind states, individuals and non-state collective entities, including armed groups.<sup>571</sup>

The Third Report<sup>572</sup> was submitted through resolution 19/22 which extended the mandate of the International Commission of Inquiry on Syria established by the earlier resolution S-17/1. The Report held that armed non-state actors must observe and abide by the international humanitarian law even though they are not parties to the Geneva Convention.<sup>573</sup> The Report clarified that serious violations of humanitarian law

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<sup>566</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/S-17/2/Add.1, 23 November 2011.

<sup>567</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/19/69, 22 February 2012.

<sup>568</sup> Ibid, 6.

<sup>569</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/S-17/2/Add.1, 23 November 2011, 21.

<sup>570</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/19/69, [106].

<sup>571</sup> Ibid.

<sup>572</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/21/50, 16 August 2012.

<sup>573</sup> Ibid, 22[134].

are prosecutable as war crimes.<sup>574</sup> The Report further held that the non-state groups at a minimum must observe human rights obligations constituting peremptory international law (*jus cogens*).<sup>575</sup>

There were several Reports released between 2013 to 2023, which reiterated the earlier recommendations which mainly mentioned that all parties to the conflict are obliged to respect international human rights and international humanitarian law.<sup>576</sup>

It may be concluded from the Inquiry Commission Reports that the emerging UN practice is that even if an armed non-state actor does not control any territory, such non-state actors must respect the peremptory norms or *jus cogens* obligations under international law.<sup>577</sup>

### **3.4 CHILDREN AND ARMED CONFLICT**

The Special Representative of the Secretary-General for Children and Armed Conflict was established by the General Assembly by Resolution 51/77<sup>578</sup> to protect children affected by armed conflict. Consequently, the Special Representative collects information about the status of children affected by war and reports to the General Assembly and the Human Rights Council every year.<sup>579</sup>

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<sup>574</sup> Ibid.

<sup>575</sup> Ibid.

<sup>576</sup> See for example, United Nations General Assembly, A/HRC/51/45, 17 August 2022, 18; United Nations General Assembly, A/HRC/52/69, 7 February 2023, 19-20.

<sup>577</sup> Annyssa Bellal, 'Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 308-309.

<sup>578</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, A/RES/51/77, 20 February 1997.

<sup>579</sup> Permanent Missions, Special Representative of the Secretary-General for Children and Armed Conflict <<https://www.un.int/pm/special-representative-secretary-general-children-and-armed-conflict-srsgcaac>>, last accessed 30 October 2023. A Memorandum of Understanding was signed in March 2019 between the Special Representative of the Secretary-General for Children and Armed Conflict and the Force Commander of the Coalition to Support Legitimacy in Yemen. The Memorandum of Understanding aims to undertake protective measures for children in Yemen. The Special Representative re-emphasized the obligation of all parties to the armed conflict to protect both the civilians and especially the children. See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *MoU to Strengthen the Protection of Children Affected by Armed Conflict in Yemen*



Furthermore, Resolution 1612 (2005) gave birth to the Security Council Working Group, which has been entrusted with the responsibility to report on the violations against children in an armed conflict. Armed non-state actors which violate the rights of children in an armed conflict would be listed in an annex to the report of the Secretary-General on children and armed conflict which can then have serious consequences for such armed non-state actors such as travel ban and arms embargo.<sup>580</sup> The annex also mentions and lists armed non-state actors, which recruit or use child soldiers in any manner in an armed conflict.<sup>581</sup>

One of the key responsibilities of the Security Council Working Group is to review reports of the Monitoring and Reporting mechanism concerning armed non-state actors listed in the annexes to the Secretary-General's Report.<sup>582</sup>

The Monitoring and Reporting mechanism ('MRM') has been established to monitor compliance on humanitarian laws governing children and armed conflict. The MRM is entrusted with the responsibility to gather information on six grave violations committed against children in an armed conflict which include killing and maiming of children, recruitment and use of children by armed non-state actors, sexual violence against children, attacks against school or hospitals, abduction of children and denial of humanitarian access to children.<sup>583</sup> The information gathered by the MRM is reported to the UN including the Annual Report of the Secretary-General on children and armed conflict and country-specific reports of the Secretary-General on children and armed conflict.<sup>584</sup>

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*Signed with the Coalition to Support Legitimacy in Yemen* (25 March 2019) <<https://childrenandarmedconflict.un.org/mou-to-strengthen-the-protection-of-children-affected-by-armed-conflict-in-yemen-signed-with-the-coalition-to-support-legitimacy-in-yemen/>>, last accessed 30 October 2023.

<sup>580</sup> See United Nations Security Council, Working Group on Children and Armed Conflict <[Working Group on Children and Armed Conflict | United Nations Security Council](#)>, last accessed 30 October 2023.

<sup>581</sup> Ibid.

<sup>582</sup> Ibid.

<sup>583</sup> See United Nations Security Council, S/RES/1612 (2005), 26 July 2005.

<sup>584</sup> Ibid.

The MRM requires armed non-state actors to undertake Action Plans wherein they commit to stop recruiting child soldiers in an armed conflict and release the already recruited child soldiers.<sup>585</sup> The MRM has been criticized for not having clarity on the basis on which responsibility is attributed to armed non-state actors in the Reports.<sup>586</sup>

For example, in the July 2013 Report<sup>587</sup> of the Secretary General on children and armed conflict in the Philippines, which was submitted to the Security Council Working Group, the focus was on the armed non-state actors Abu Sayyaf Group, the Bangsamoro Islamic Freedom Fighters, the Moro Islamic Liberation Front and the New People's Army. However, the Report did not clarify how violations of laws were attributed to the armed non-state actors.<sup>588</sup>

The 2017 Report<sup>589</sup> on grave violations against children in Philippines also failed to impose any direct responsibility on armed non-state actors under international law. In fact, it can be said that the Report does not propose to formulate direct responsibility on non-state actors. It is possible to construe this Report as merely calling upon the state of Philippines to ensure prevention of violation of international law on its territory by breaches such as recruitment of child soldiers by non-state actors involved in the conflict.<sup>590</sup>

In the 2022 Report of the Secretary-General on Children and armed conflict in the Democratic Republic of the Congo, the Secretary-General condemned the grave violations against children and directed all the parties to the conflict to respect human rights and international humanitarian law.<sup>591</sup> It especially urged the Government of

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<sup>585</sup> Ibid, [8].

<sup>586</sup> Annyssa Bellal, 'Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 322.

<sup>587</sup> See United Nations Security Council, S/2013/419, 12 July 2013.

<sup>588</sup> Ibid.

<sup>589</sup> See United Nations Security Council, S/2017/294, 5 April 2017.

<sup>590</sup> This is in reference to the use of the term "all parties" to respect their obligations under international law. See United Nations Security Council, S/2017/294, 5 April 2017, 16-17 [73].

<sup>591</sup> United Nations Security Council, Report of the Secretary-General, Children and Armed Conflict in the Democratic Republic of the Congo, S/2022/745, 10 October 2022, 14.

Congo to hold perpetrators of the grave violations accountable. The Secretary-General further applauded the armed groups for signing the Unilateral Declarations to release children from their group and cease recruitment of children – however, the Secretary General maintained that there are still many incidents of recruitment of children and commanders of armed groups must cease such recruitment with immediate effect.<sup>592</sup> It further urged that the groups which are mentioned in the annexes<sup>593</sup> to the report on the children and armed conflict, work with United Nations and sign commitments to stop grave violations against children.<sup>594</sup>

Clapham notes that the above mechanism uses ‘naming and shaming’ to ensure that the armed non-state actors submit an Action Plan to the Security Council.<sup>595</sup> Even though the MRM’s success in terms of recruitment of child soldiers by armed non-state actors in an armed conflict has been recognized, there is a need to broaden their goals and also ensure better accessibility with armed non-state actors.<sup>596</sup> Armed non-state actors have reservations on the transparency and accessibility of the MRM’s mechanism and efforts must be made to improve the mechanism to enable greater compliance of humanitarian laws by armed non-state actors.<sup>597</sup>

It may be concluded that compliance monitoring mechanisms such as the MRM must have more power in terms of imposing sanctions in case of non-compliance in order to be more effective. It is equally important to ensure the independence of MRM so it can retain both its objectivity and transparency. Lastly, it is important to educate armed non-state actors on humanitarian laws for greater clarity on such laws.

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<sup>592</sup> Ibid, 14-15.

<sup>593</sup> United Nations Security Council, A/76/871-S/2022/493, 23 June 2022.

<sup>594</sup> United Nations Security Council, Report of the Secretary-General, Children and Armed Conflict in the Democratic Republic of the Congo, S/2022/745, 10 October 2022, 14-15.

<sup>595</sup> Andrew Clapham, ‘The Accountability of Armed Groups’ in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) 801.

<sup>596</sup> Cedric Ryngaert, Anneleen Van de Meulebroucke, ‘Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms’ (2011) 16 *Journal of Conflict & Security Law* 443, 472.

<sup>597</sup> Ibid.

#### 4. INTERNATIONAL HUMAN RIGHTS LAW BINDING ON NON-STATE ACTORS THAT CONTROL TERRITORY: AN ANALYSIS

From the above Reports, it emerges that the scope of direct responsibility of armed non-state actors in terms of their human rights obligations depends upon the control they exercise over a territory. In situations where an armed non-state actor *de facto* controls a territory, their scope of human rights obligations would be similar to that of a state. In situations, where the armed non-state actor does not exercise *de facto* state like control over a territory but nonetheless possesses control over a territory, the non-state actor is bound by some human rights obligations. Lastly, when an armed non-state actor does not exercise any control over a territory it is still bound by *jus cogens* norms or peremptory norms of international law.

It is of importance to clarify that the above is the emerging practice in UN and not stabilized as international law. To establish greater certainty around the responsibility of non-state actors under international law is the need of the hour.

This emerging trend has been upheld by the UN Committee against torture in *Sadiq Shek Elmi v Australia*.<sup>598</sup> In this case it was held that the armed non-state actors in control of some parts of the territory in the state of Somalia and exercising power like *de facto* states were responsible for the violation of Convention against Torture.<sup>599</sup>

The Committee in the Elmi case held that:

*“The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of*

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<sup>598</sup> *Sadiq Shek Elmi v Australia*, Communication No. 120/1998, UN Doc CAT/C/22/D/120/1998 (1999).

<sup>599</sup> *Ibid.*

*the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in Article 1.*'<sup>600</sup>

This finding by the Committee is an exception because the non-state actor (Hawiye clan) was exercising quasi-governmental authority in Somalia at a time when Somalia was a failed state.<sup>601</sup>

While there is an emerging practice in the UN that human rights law is applicable to armed non-state actors when they control territory, there is no clarity on how this can be explained from the legal perspective.<sup>602</sup> The principle of effectiveness is helpful to understand why armed non-state actors are bound by human rights law, when they exercise control over a territory. The principle of effectiveness focuses on the efficacy of the law.<sup>603</sup> The extended jurisdiction theory is also helpful to explain why non-state actors are bound by the human rights law when they control territory. As a result of the state's signing the Geneva Convention and other human rights treaties every entity in the territory of the state is bound by those principals.<sup>604</sup> Non-state actors acquire their rights and obligations through the state on whose territory they operate.<sup>605</sup>

The Reports from UN accountability mechanisms have been criticized for not clarifying how the violations of international law have been linked to the armed non-state actors. Such clarity is required to ensure that the rule of law is upheld by the UN mechanisms.<sup>606</sup> The Reports from the Commission of Inquiry avoid the difficult question as to the basis on which the human rights law is made binding on armed non-state actors exercising control over a territory. Furthermore, the Reports do not pay

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<sup>600</sup> Ibid, [6.5].

<sup>601</sup> Katharine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 220.

<sup>602</sup> Ibid, 15.

<sup>603</sup> Ibid, 200.

<sup>604</sup> Ibid, 202.

<sup>605</sup> See Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 37.

<sup>606</sup> Ibid, 322.

enough attention to whether the armed non-state actors exercise control over the territory in actuality.<sup>607</sup>

It may be fair to conclude that in the absence of clarity on how armed non state actors are bound by international human rights law, the legitimacy of the emerging practice of UN (to apply human rights law on non-state actors exercising control over a territory) remains uncertain.<sup>608</sup>

While the Reports from UN accountability mechanisms have held armed non-state actors accountable for violations of international humanitarian and human rights law, the recommendations of these Reports have focused on individual criminal responsibility of the perpetrators. Thus, there is no clarity on the legal ramification for violations of international humanitarian law and human rights law by armed non-state actors as a collective entity.<sup>609</sup>

## **5. TREATMENT AND RECOGNITION OF NON-STATE ACTORS IN INTERNATIONAL LAW JURISPRUDENCE**

A practical and useful way of testing the efficacy of the various theories relating to legal personalities of non-state actors under international law would be to observe as to how the international law jurisprudence developed by ICJ, which is also recognized as a source of international law under the ICJ Charter, has approached the subject of independent legal personalities of non-state actors, and what theoretical basis have they adopted in doing so.

This is of some practical significance since the jurisprudence developed by ICJ has wide state participation, and often, the decisions rendered, though not binding as precedent between other state parties, have been viewed as the most persuasive authority as to the existing position and interpretation of the law. The continuity of the

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<sup>607</sup> Katharine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 356.

<sup>608</sup> *Ibid*, 360.

<sup>609</sup> Veronika Bilkova, 'Establishing direct responsibility of armed opposition groups for violations of international humanitarian law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds) *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 263.

body of jurisprudence right from PCIJ era to the present ICJ framework also provides a unique opportunity to observe the evolution of law itself. Accordingly, ICJ decisions on the issue can provide a unique vantage point for the development and evolution of the status of non-state actors under international law.

## **5.1 JUDICIAL DEVELOPMENTS**

In this section, I seek to briefly revisit the various instances where the issue of rights and obligations of non-state actors have come up for consideration in international law. From a brief overview of these instances, I shall endeavour to assess whether there has been a consistent theoretical basis for inclusion of non-state actors as subjects of international law in the present international law jurisprudence.

The principle focus shall be on the ICJ's treatment of non-state actors as subjects of international law or otherwise in the decisions and/or advisory opinion since the advisory opinion rendered in Reparations for Injuries suffered in service of the United Nations (advisory opinion).<sup>610</sup> The principle endeavour shall be to assess the development since the Reparations case to ascertain the approach of both the ICJ and other international authorities in either recognizing non-state actors as subjects of international law or otherwise.

As will be discussed, in greater details, the issue of consideration of non-state actors as subjects of international law for the purpose of ascribing rights and obligations on them has been far from consistent and uniform. The approach of ICJ on the present issue has been fragmented at best and *ex facie* inconsistent at worst. However, certain common themes are identifiable in the ICJ's consideration of the issue relating to the treatment of non-state actors as subjects of international law.

I shall endeavour to expound and expand on these common themes to ascertain as to whether a consistent, underlined, theoretical basis can be fashioned for treatment of non-state actors as subjects of international law. The overarching objective in the analysis is to assess the legality of direct attribution of rights and responsibilities on non-state actors as subjects of international law.

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<sup>610</sup> *Reparation for Injuries Suffered in the Service of the UN*, [1948] ICJ 121.

To undertake the analysis, I shall seek to thematically segregate judicial consideration of the question by the ICJ. This thematic segregation shall be based on the broad theoretical approach adopted by the ICJ in considering the question, and once this thematic consideration has been achieved, I shall seek to establish overlapping themes across the decisions towards unified legal theory. I argue that the ICJ's approach can be broadly uniformly designated as a pragmatic, purposive approach towards designation of international legal personality on non-state entities. However, the theoretical basis for such approach has been less than fundamental and often disjoint. Nonetheless, the language of rights of individual stakeholders and obligation *erga omnes* can be identified as a strong theoretical framework under which ICJ can impose responsibility on non-state entities under international law.

## **5.2 THE APPROACH OF ICJ IN THE REPARATIONS CASE – THE DOCTRINE OF IMPLIED CHARACTER**

The question of a non-state entity as a subject of international law came up for consideration before the ICJ in the Reparations case<sup>611</sup> wherein ICJ was confronted with the question as to whether the UN is a subject of international law and as such, has the requisite personality to initiate a proceeding before the ICJ claiming reparations on account of death of its officials.

The formal question framed for the ICJ's opinion is as follows:

*"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?"*<sup>612</sup>

The question involved related to the UN's capacity to bring an international claim before the ICJ. In answering the question, the ICJ delved into an analysis of the

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<sup>611</sup> Ibid.

<sup>612</sup> Ibid, 176-177.



character of the entity to assess as to whether the entity was of a nature invested with the capacity to bring an international claim. The court understood the aforementioned assessment to amount to an assessment as to whether the entity in question has ‘international personality’. The importance of ascribing international personality is implicit in the following observations of the ICJ:

*“But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.”*<sup>613</sup>

The ICJ emphasized that designation of nature and character of a non-state entity depends heavily on the needs of the community and the requirements of international life. So, the question of attributing international legal personality to non-state subjects should be seen through the lens of the object and purpose and functions such non-state entity performs. The court held the following:

*“To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.*

*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities, which are not States. This development culminated in the establishment in June 1945 of an international organization whose*

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<sup>613</sup> Ibid, 178.

*purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.”*<sup>614</sup>

In answering the question, the court considered the nature and character of the United Nations in view of the provisions of the UN Charter. Finally, in view of the legal capacity and privileges and immunities invested in the United Nations, and in view of the international functions performed by it, the ICJ concluded that the UN is vested with international legal personality in the following words:

*“In the opinion of the court the organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the court has come to the conclusion that the organization is an international person.”*<sup>615</sup>

In fact, the ICJ clearly defined its approach of designating international personality to UN as one formulated in view of the purposes and functions specified or implied in the constituent documents of the organization and/or developed in practice. The aforementioned enumeration of its own approach is clearly indicative of a purposive approach towards designation of international legal personality on a non-state entity keeping in view the broader role of such entity and the requirements of the international community. It is a definitive departure from the positivist state centric approach towards attribution of international legal personality. This would be evident from the following observations of the ICJ in the aforementioned opinion:

*“Whereas a State possesses the totality of international rights and duties recognized by international law, the rights, and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in*

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<sup>614</sup> Ibid.

<sup>615</sup> Ibid, 178-179.

*its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.*"<sup>616</sup>

Affirming the views of the majority in relation to ascription of international legal personality to UN but on a slightly different basis, Judge Hackworth in his dissenting opinion enumerated the doctrine of implied powers for ascribing international legal personality upon a non-state entity. Upon a perusal of the legal capacity and powers of the UN under articles 104 and 105 together with the provisions of the Convention on Privileges and Immunities adopted by the General Assembly on February 13, 1946 recognizing juridical personality of the UN, Judge Hackworth, came to the conclusion that the specified powers and the international practice incontrovertibly implies that the UN has requisite personality to safeguard its own interest and assert claims on its own behalf.

*"It stands to reason that, if the Organization is to make contracts, to acquire and dispose of property, to institute legal proceedings, and to claim the benefits of the privileges and immunities to which it is entitled, it must be able to carry on negotiations with governments as well as with private parties. It must therefore be able to assert claims in its own behalf. No other conclusion consistent with the specified powers and with the inherent right of self-preservation could possibly be drawn. The Organization must have and does have ample authority to take needful steps for its protection against wrongful acts for which Member States are responsible. Any damage suffered by the Organization by reason of wrongful acts committed against an agent, while in the performance of his duties, would likewise be within its competence. This is a proper application of the doctrine of implied powers.*"<sup>617</sup>

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<sup>616</sup> Ibid, 180.

<sup>617</sup> Ibid. See dissenting opinion of Judge Hackworth, 196 [197].

### **5.3 THE PROBLEM OF GENERALIZING THE FINDINGS IN THE REPARATIONS**

#### **CASE: THE WAY FORWARD**

While the ICJ was categorical and definitive in its finding that the UN has the requisite international legal personality to assert legal claims, such finding was limited to the specific status of UN and its powers, functions, and immunities under international law. Such finding was in no way a general finding relating to the status of a non-state entity and/or its international legal personality. Confounded with the limitations of the findings in the Reparations case, the ICJ was compelled to reconsider the question of possession of international legal personality of non-state entity in the subsequent proceedings before it.

The issue of international legal personality of non-state actors and/or entities came up for consideration before the ICJ again in the Western Sahara (Advisory opinion)<sup>618</sup> in the context of the right of self-determination. The ICJ opined in the aforementioned decision recognizing the right of self-determination under international law and enumerating the requirement of free and genuine expression of the will of the people as the necessary pre-condition for existence of such rights.<sup>619</sup>

However, in its recognition of the right of self-determination of people, the ICJ implicitly acknowledged individuals as subjects of international law possessing specific rights. This would also necessarily imply that individuals also in certain circumstances possess requisite legal personality under international law. It is noteworthy that the aforementioned opinion of the ICJ has been criticized as not enumerating sufficient basis and/or rationale for ascribing international legal personality on individuals.<sup>620</sup> It is fair to state that there existed a fundamental logical void in the ICJ's opinion in so far as ascription of legal personality on individuals is concerned.

The ICJ sought to plug this gap by providing a theoretical basis for ascription of international legal personality on individuals in its decision in East Timor (Portugal

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<sup>618</sup> *Western Sahara, Advisory Opinion*, [1975] ICJ Reports 12.

<sup>619</sup> *Ibid*, 32.

<sup>620</sup> Fergus Green, 'Fragmentation in two dimensions: The ICJ's flawed approach to non-state actors and international legal personality' (2008) 9 *Melbourne Journal of International Law* 47.

v Australia).<sup>621</sup> The fundamental basis for recognition of people's right to self-determination under international law was that the right to self-determination is a right *erga omnes* and is one of the essential principles of contemporary international law.<sup>622</sup>

In providing a principled basis for ascription of international legal personality on individuals, Judge Weeramantry in his dissenting opinion provided the following principles justifying the recognition of right to self-determination of people under international law.<sup>623</sup> Judge Weeramantry's formulation of the rationale for ascription of international legal personality on individuals seeks to balance the traditional state centric approach to the understanding of the subject of international law with the emerging trend of expanding the notion of subjects governed by international law.

Judge Weeramantry ingeniously provided that if obligation *erga omnes* are obligations which every state has an interest in fulfilling and in so far as right to self-determination as a right *erga omnes*, every state has a corresponding duty to recognize and enforce the same. Accordingly, the right of self-determination automatically is a recognition/acknowledgment of the corresponding duty of a state to safeguard right of self-determination of its people. In one swoop, Judge Weeramantry has recast the language of right of the people to a corresponding understanding of duty on the state. It appears that the dissenting opinion of Judge Weeramantry in effect smudges the controversy of ascription of specific international legal personality on individuals by recasting the same into a language of duty of states under international law.

It is pertinent to note that while the ICJ did recognize the right of self-determination of the people of East Timor and the *erga omnes* character thereof, in the facts of the aforementioned case, the court nonetheless refused to exercise jurisdiction over the dispute referred to it on account of the fact that such adjudication would affect the rights of Indonesia despite Indonesia not having consented to its jurisdiction and accordingly against the settled principles of international law pertaining to ICJ's jurisdiction. The court however did observe that such jurisdictional challenge apart, the ICJ is not incompetent to adjudicate upon a dispute affecting the rights of a third state.

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<sup>621</sup> *East Timor (Portugal v. Australia) Judgment*, [1995] ICJ Reports 90.

<sup>622</sup> *Ibid*, 102.

<sup>623</sup> *Ibid*, 204, 205, 208 and 209 of the dissenting opinion of Judge Weeramantry.

This judgment, however, is embroiled in controversy. However, it is an inescapable conclusion that ICJ in rendering the judgment recognized the status of the people of East Timor as subjects of international law.

It is arguable that in so far as the court expressed an observation pertaining to the right of self-determination of “people of East Timor under international law”, it amounts to a tacit endorsement of recognition of the status of individual non-state parties under international law.<sup>624</sup>

In contrast, the separate opinion of Judge Weeramantry in the same decision clarifies the theoretical basis for recognition of rights of individuals and consequently, the status of individuals under international law. By recognition of the right of self-determination as an obligation *erga omnes*, the ICJ effectively diluted the necessity of impleadment of Indonesia as a necessary party to the proceeding. Such a finding would suggest that Judge Weeramantry envisaged direct ascription of status to the people of East Timor as subjects of international law whose rights stood to be curtailed by the act of Australia entering the 1989 treaty without necessitating the *via media* of Indonesia as a state party. This is corroborated by Judge Weeramantry’s explicit recognition of the requirement to dilute the strict state centric approach under international law by reference to the rising importance of multilateral nature of modern international organisations under international law. In so observing, Judge Weeramantry clearly recognizes the emergence of non-state instrumentalities under international law.<sup>625</sup>

In fact, a perusal of the advisory opinion of the ICJ in the Western Sahara (Advisory Opinion)<sup>626</sup> would also show that presence of the Mauritanian settlement was taken into consideration in adjudicating the status of Rio de Oreo and Saiket L Hamra in Western Sahara as *terra nullius*. In arriving at an opinion as to the nature of the aforementioned territories, rights of the Mauritanian settlers were taken

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<sup>624</sup> Ibid, [29, 34].

<sup>625</sup> Ibid, 170,173 and 174 of the dissenting opinion of Judge Weeramantry.

<sup>626</sup> See *Western Sahara, Advisory Opinion*, [1975] ICJ Reports 12, [38, 50, 59 and 82-97]. This illustrates the recognition by ICJ of the rights and interests of the unofficial Sherifian state and the Mauritania settlement entity locally known as Bilad Shinguitti in determining the character of the Western Sahara territory.

into account, thereby clearly recognizing rights of non-state actors under international law.

The above approach on the part of the ICJ in rendering the opinion would clearly imply the following: (a) in rendering the opinion, the ICJ considered the rights of the Mauritanian settlers as subject matter of the international law; and (b) ICJ did not consider the rights of the state parties as the exclusive subject matter of international law. It is clear from the above that there is a clear emerging pattern of recognition of subjects other than state parties as subjects of international law.

Even in the advisory opinion issued by the ICJ in the Legal Consequences of the Construction of a Wall,<sup>627</sup> the ICJ recognized the right of the people of Palestine and their right of self-determination and sovereignty over the disputed territorial expanse in the Israel occupied Palestine, the settlements thereof.<sup>628</sup> This is entirely consistent with the language of rights of individuals recognized in both the decisions of Western Sahara and East Timor.

There appears to be an emerging trend of recognition of rights of individuals or of independent groups, and consequently such non-state actors as subjects of international law. There is also a clear pattern of individuals and non-state entities being recognized as *de facto* subjects of international law.

From the above cases, it becomes evident that there is a shift from state centric approach of designation of subjects of international law to a wider notion of subjects of international law, inclusive, inter alia, of individuals and non-state entities. Taking a pragmatic and solution-based approach on the issue of subjects of international law has become necessary considering the emergence of various non-state entities interacting with the states.

## **6. STATUS OF NON-STATE ACTORS UNDER INTERNATIONAL LAW – A CRITICAL ANALYSIS**

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<sup>627</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Reports 136.

<sup>628</sup> *Ibid*, [45].

As discussed above, much of international law revolves only around the states – territory, sovereignty, state consent, etc. Even under human rights, the diligence obligation rests on the states to safeguard its population from private actors.<sup>629</sup> The interpretation of ARSIWA by the ICJ<sup>630</sup> resulted in restrictive thresholds, which must be met to attribute conduct of armed non-state actors to states.<sup>631</sup> Such thresholds are very restrictive and in practice, ensure that states would never be responsible for the acts of armed non-state actors.<sup>632</sup> Although the ICJ makes it clear that international organizations may possess international legal personality, it does not clarify if it includes ‘non-state actors’ apart from international organizations.<sup>633</sup> In fact, in the present times, international law lacks a regulatory framework addressing the growing influence of non-state actors.

International humanitarian law has been heavily focused on states and ignored non-state actors to an extent, even though they are parties to an armed conflict in recent years. As has been discussed earlier, the states play a central role in determining when a non-international armed conflict exists in order to apply humanitarian laws in a crisis situation.<sup>634</sup> Statistically, there has been no such occasion since 1949 where states have recognized the existence of an armed conflict because then the non-state actors have direct rights and duties under international law and cannot be tried under the domestic laws of the state.<sup>635</sup> Thus, humanitarian concerns take a backseat before state interests as the present humanitarian law continues to be state centric.

This is further compounded by the fact that non-state actors are not a subject of international law and hence, not capable of consenting to the provisions of Geneva

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<sup>629</sup> Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 3.

<sup>630</sup> Nicaragua case, above n 9.

<sup>631</sup> Ibid, [115].

<sup>632</sup> Boon, above n 215.

<sup>633</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 66.

<sup>634</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 14-15.

<sup>635</sup> Ibid, 19.



Convention which are essentially multilateral treaties designed by state consent.<sup>636</sup> It is important to focus on the shortcomings of the present humanitarian law as it has a large role to play in the mitigation of humanitarian crisis in an armed conflict where one of the parties is an armed non-state actor.

Armed non-state actors do not become the subjects of international law just because their acts are governed under international humanitarian law. The international community does not grant legitimacy based on accountability mechanisms.<sup>637</sup>

The ILA Reports note that states remain the original subjects of international law and even though international organizations have international legal personality, non-state actors will have even more limited international legal personality.<sup>638</sup> Since states have the power to decide the extent to which rights and obligations will be granted on non-state actors, they have granted very few such rights and obligations on non-state actors. The ILA Report argued that when states decide the rights and obligations of non-state actors, the legal status of non-state actors is unpredictable and inconsistent, which further reduces the legitimacy and compliance of such rights and obligations.<sup>639</sup> However, the ILA Report warns that democratic participation may result in the more powerful non-state actors overpowering the minority non-state actor views.<sup>640</sup>

Nonetheless, the ILA Report suggests that states formalizing the status of a few non-state actors would be in the best interest of the international community.<sup>641</sup> It concluded that the legal status of the diverse non-state actors must be clarified, and their participation must be encouraged to ensure greater legitimacy and compliance of international norms.

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<sup>636</sup> Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 4.

<sup>637</sup> M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711, 738.

<sup>638</sup> International Law Association, 'Non-state actors in international law: Aims, approach and scope of project and legal issues' (The Hague Conference, Non-State Actors, First Report of the Committee, 2010).

<sup>639</sup> *Ibid.*

<sup>640</sup> *Ibid.*

<sup>641</sup> *Ibid.*

In the Reparations case, the ICJ adopted a purposive and functional perspective of the issue of legal personality under international law. Ryngaert supported the view in Reparations opinion and held that armed non-state actors should have international rights and obligations so long as the non-state actors respond to certain functional needs of the international community.<sup>642</sup> Some other scholars have argued that the judgment in Reparations was a failed opportunity, as it did not elaborate on the rights and obligations of non-state actors apart from international organizations.<sup>643</sup> International organizations have legal personality as they function as a group of states acting in public interest, but the status of other non-state actors has not been clarified in the Reparations Judgment. Noemi Gal-Or is of the opinion that the Reparations Judgment did not clearly clarify as to when a non-state actor possesses international legal personality.<sup>644</sup> She further argues that the ascertainment of legal personality of non-state actors seems subjective.<sup>645</sup>

James Crawford defines legal personality as the ‘capacity to be the bearer of rights and duties under international law’.<sup>646</sup> The traditional doctrine where only states can be the subjects of international law has been created by states themselves. Rosalyn Higgins argues that this understanding of international law is an artificial construct and can be changed.<sup>647</sup> She also argues that this construct of ‘subjects’ and ‘objects’ of international law has no functional purpose.

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<sup>642</sup> *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, [1949] ICJ Reports 174, 187. Also see Cedric Ryngaert, ‘Non-State Actors in International Law: A Rejoinder to Professor Thirlway’ (2017) 64(1) *Netherlands International Law Review*, 155-162.

<sup>643</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 61. Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010) 9. Also see Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 2.

<sup>644</sup> Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 371- 373.

<sup>645</sup> *Ibid*, 371.

<sup>646</sup> James Crawford, *The creation of states in international law* (Clarendon Press, 2<sup>nd</sup> ed, 2006) 28.

<sup>647</sup> R Higgins, *Problems and Process, International Law and How we use it* (Clarendon Press, 1994) 49.

Hersch Lauterpacht is a proponent of the individualistic conception of international legal personality.<sup>648</sup> Portmann also explains the individualistic approach to international legal personality as the idea that the individual has an international legal personality, which is autonomous to the will of the states.<sup>649</sup> Lauterpacht believes that individuals are the ultimate or the final unit of international law.<sup>650</sup> In a similar vein, under Kelsen's Pure Theory of Law, individuals and other non-state actors can be directly bound by international law.<sup>651</sup>

Similarly, Lauterpacht refers to the armed groups' exercise of rights and obligations under international law. Lauterpacht argues that there are many ways to acquire international legal personality under international law and that non-state actors could acquire international legal personality through participation on the international plane.<sup>652</sup> According to Murray, international legal persons are independent actors who possess direct rights or obligations under international law.<sup>653</sup> There are three factors which need to be fulfilled for international legal personality: (a) the entity should be in existence in an independent manner (b) have direct international rights or obligations (c) be in possession of such rights and obligations. Murray argues that only when these three conditions are fulfilled, an entity has international legal personality and is bound by international law.<sup>654</sup>

It is suggested that armed non-state actors have limited international legal personality because they have obligations under international humanitarian law.<sup>655</sup>

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<sup>648</sup> H Lauterpacht, *International law and human rights* (Stevens & Sons, 1950) 69.

<sup>649</sup> R Portmann, *Legal Personality in international law* (Cambridge University Press, 2010) 126.

<sup>650</sup> H Lauterpacht, *International law and human rights* (Stevens & Sons, 1950) 69. Also see Katherine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 80.

<sup>651</sup> H Kelsen, *Pure Theory of Law* (University of California Press, 1967) 173. Under Pure theory, law is only concerned with the legal rights and obligations of a natural person. Different entities may have varying degree of rights and duties so states cannot be considered the exclusive actor under international law that are bound by rights and duties.

<sup>652</sup> H Lauterpacht, *International law and human rights* (Stevens & Sons, 1950) 12-13.

<sup>653</sup> Daragh Murray, *Human Rights obligations of non-state armed groups* (Hart Publishing, 2016) 23-24.

<sup>654</sup> *Ibid*, 50.

<sup>655</sup> Also see Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 103-104.

However, states are the sole lawmakers under the international legal system.<sup>656</sup> Sassoli also supports the view that international humanitarian law confers the necessary international legal personality on the parties to an armed conflict, which is a prerequisite to impose rights and obligations foreseen by international humanitarian law.<sup>657</sup> Zegveld is also in agreement that armed non-state actors have limited legal personality under Common Article 3 and Additional Protocol II.<sup>658</sup>

Although there has been a dilution of the state centric model of international law in the Reparations case, which adopted a purposive and a functional perspective of the issue of legal personality of non-state actors, the dominance of armed non-state actors remains unaddressed in the international legal system. There is a gap in the present law with respect to armed non-state actors' accountability. There is a complete lack of clarity on the legal consequences of armed non-state actors if they violate international humanitarian law. There are no secondary rules applicable to armed non-state actors for the violations of their primary rules under the international humanitarian law.<sup>659</sup> In the absence of any legal consequence to the violation of international humanitarian law by the armed non-state actors, there remains an accountability gap between the present law and the key role that armed non-state actors play in an armed conflict.<sup>660</sup>

Furthermore, there are no judicial forums internationally, which can adjudicate complaints against the armed non-state actors for the violations of their primary rules under international humanitarian law.<sup>661</sup> Zegveld also highlights that there exists a gap

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<sup>656</sup> Jorg Kammerhofer, 'Non-state actors from the perspective of the pure theory of law' in Jean d'Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 54-64.

<sup>657</sup> M Sassoli, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (2010) 1(1) *Journal of International Humanitarian Legal Studies* 5, 46-47.

<sup>658</sup> Zegveld, above n 16, 57.

<sup>659</sup> Veronika Bilkova, 'Establishing direct responsibility of armed opposition groups for violations of international humanitarian law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds) *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 264.

<sup>660</sup> See generally, *ibid*, 278.

<sup>661</sup> *Ibid*, 282. Also see Zegveld, above n 16, 162.

at present with respect to the enforcement of international humanitarian law against the armed non-state actors.<sup>662</sup>

## 7. CONCLUSION

From a positivist law perspective, non-state actors are not subjects of international law. Although armed non-state actors have limited legal personality because they have obligations under international humanitarian law, non-state actors are not subjects of international law, which remains state centric till date.

As observed by Jean d'Aspremont, international legal personality acquired by non-state actors in the recent times is not the result of direct conferral of international legal personality on non-state actors but an indirect consequence arising from their rights and duties.<sup>663</sup> The rights and duties that the non-state actors wield is the result of state centric process of law making and thus, even though they may have an international legal personality, the status of their formal law making in international legal system is questionable.<sup>664</sup> On application of a positivist perspective, non-state actors fall short of qualifying as formal lawmakers.<sup>665</sup>

It is also debatable whether the human rights treaties are applicable to armed non-state actors.<sup>666</sup> Since majority of human rights treaties are applicable to states, the recent practice of UN wherein they hold armed non-state actors responsible for violations of international human rights law (if they exercise *de facto* control over territory) is not a settled position under international law. As discussed above, the emerging UN practice fails to clarify the basis on which the armed non-state actors are

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<sup>662</sup> Zegveld, above n 16,162.

<sup>663</sup> Jean d'Aspremont, 'Non-state actors from the perspective of legal positivism' in Jean d'Aspremont (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 25.

<sup>664</sup> Ibid, 26.

<sup>665</sup> Jean d'Aspremont, 'International law-making by non-state actors: Changing the model or putting the phenomenon into perspective?' in Math Noortmann and Cedric Ryngaert (eds), *Non-state actor dynamics in international law* (Ashgate, 2010) 187.

<sup>666</sup> ICRC Report, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2019) 101(911) *International Review of the Red Cross* 869, 924.

bound by human rights. It has been further argued that armed non-state actors may not have the necessary capacity to comply with the human rights obligations.<sup>667</sup>

Nonetheless there is a need to enter into a dialogue with armed non-state actors with respect to such issues of protecting rights of civilians in situations where such armed non-state actors control territory. Humanitarian organizations such as the ICRC and the Geneva Call are already involved on ground with such armed non-state actors to enhance compliance/respect of international humanitarian law and they may broaden their scope to include international human rights issues.<sup>668</sup>

The rise of non-state actors in the present globalized world challenges the dominance of states in world affairs. There is a need to address this change in international law, which remains state centric in its approach. International law is probably the most suited to meet the needs of globalization with multiple actors participating in the global geo-politics with varied interests. As some scholars like Noortman have observed, international law must be restructured to meet the challenges of a much more variable international system.<sup>669</sup> Any legal system must be restructured and equipped to accommodate the ever-changing global interest.

The ICJ in several cases including the Reparations case<sup>670</sup> and the Legal Consequences of the Construction of the Wall<sup>671</sup> has repeatedly emphasized on the functional and purposive approach to the question of duties and responsibilities of non-state actors under international law. It is stated that this question does not have a uniform answer. The answer to the present question often depends on the exact role or duty that the non-state actors are discharging. Some support of this approach can always be found in the decision of the ICJ in the Reparations case where the court ascribed legal personality on non-state actors, specifically the UN and international

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<sup>667</sup> Ibid.

<sup>668</sup> Ibid.

<sup>669</sup> Math Noortmann and Cedric Ryngaert, 'Non-state actors: International law's problematic case' in Math Noortmann and Cedric Ryngaert (eds), *Non-state actor dynamics in international law* (Ashgate, 2010) 1-8.

<sup>670</sup> *Reparations for Injuries, Advisory Opinion*, [1949] ICJ Reports, 174.

<sup>671</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Reports 136, [104 -113].

organizations in the specific case, in view of the duty and the functions it discharges in the international context. The same purposive approach can be adopted to assess if in a particular context and in a particular circumstance, a non-state actor should have legal personality under international law.

The need to include non-state actors under the international legal framework follows from the growing understanding that they are far too significant now to be ignored. The next chapter of the thesis shall assess the theoretical and the legal basis for the application of international law to armed non-state actors.

## **CHAPTER 6: BINDING ARMED NON-STATE ACTORS TO INTERNATIONAL LAW IN THE ABSENCE OF THEIR ‘CONSENT’: LAW AND ECONOMICS APPROACH**

### **1. INTRODUCTION**

As discussed in the previous chapter, effective regulation of the activities of non-state actors under international law is increasingly becoming a necessity, which no longer can be deferred or turned away from. This leap of non-state actors from the fringes of international politics to its centrefold has necessitated reconsideration of the position and status of non-state actors under international law. There is a recurring argument in international law that our globalized times demand for greater accountability of non-state actors.

Several scholars have investigated the issue of whether armed non-state actors can be held accountable under international law directly, and the idea has been gaining traction for a while now. However, the exercise is far from a simple one since the issue is fraught with several legal impediments under the existing international law.

This chapter focuses on the issues surrounding direct responsibility of armed non-state actors in an armed conflict for violations of international law. It was highlighted in the previous chapter that international humanitarian law imposes certain duties and obligations on armed non-state actors in an armed conflict.

An example would be the Common Article 3 of the Geneva Convention wherein Common Article 3 explicitly provides for imposition of certain duties and obligations directly on the non-state actors. Common Article 3 also expressly provides that the application of international humanitarian law to non-state actors shall not amount to a change in the legal status of non-state actors under international law.<sup>672</sup> The justification of such application of norms of international humanitarian law without recognition of non-state actors as subjects of international law remains vague and elusive.

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<sup>672</sup> See Article 3 Common to the four 1949 Geneva Conventions.



Although international humanitarian law is binding on armed non-state actors,<sup>673</sup> there is confusion with respect to the legal basis on which armed non-state actors are bound by international humanitarian law. It has been argued that it is important to understand the legal basis behind attribution of rights and obligations to armed non-state actors through an international treaty because it has repercussions for the future regulation of armed non-state actors by treaty law.<sup>674</sup>

According to the state centric perspective, international law is a result of the will of the sovereign states where state consent is the basis of international rights and obligations. International law also derives legitimacy from state participation in law making and compliance. Thus, according to the positivists, state consent is the basis of the binding nature of international law in a decentralized legal system.<sup>675</sup>

Scholars like James Crawford and Portmann are also of the opinion that international law does not create states - in fact, states recognize international law and give it legitimacy.<sup>676</sup> Portmann concluded that states were the highest social institution and international law was a result of the 'will of the states.'<sup>677</sup>

Given the state centric nature of international law, it is critical to discuss the position of non-state actors. Could non-state actors be bound by international law, given the fact that they neither consented to be bound by international law provisions nor participated in the law making? The next section of this chapter will explore this question.

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<sup>673</sup> See Nicaragua case, above n 9, [218]. Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101.

<sup>674</sup> Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 102.

<sup>675</sup> The emergence of international law by way of the Westphalian Peace treaties in 1648 was essentially state-centric international legal system. Such formulation of an international law was positivist and state centric. Carl Bergbohm further developed the idea that international law was completely governed by the 'will of the states.' Such will of the state could be explicit in the form of multilateral treaties or implicit in the form of formulation of customary law through state practice and *opinio juris*. States were regarded as the only parties in international agreements and consequently, the only subjects of international law. This sentiment was endorsed by the PCIJ in the *Lotus opinion (S.S. Lotus) (France v Turkey)* [1927] PCIJ (ser A) No 10 (September 7), [44]. Also see Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 2.

<sup>676</sup> James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 12.

<sup>677</sup> Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010) 61.

## 2. APPLICABILITY OF INTERNATIONAL LAW TO ARMED NON-STATE ACTORS IN THE ABSENCE OF THEIR CONSENT

A fundamental question that arises for consideration is the theoretical basis for the application of international treaties and instruments to non-state actors given the fact that non-state actors are not consenting parties to the international law-making process, which in turn renders them incapable of being treated as subjects of international law. If non-state actors are not subjects of international law, they are incapable of consenting to a treaty. Application of international humanitarian law to armed non-state actors raises the question as to how the provisions of the Geneva Conventions come to bind armed non-state actors if they never consented to be bound by them (as only states can consent to treaties).<sup>678</sup>

Common Article 3 of the Geneva Convention aims to be binding on all the parties engaged in a non-international armed conflict and protects all parties to a non-international armed conflict.<sup>679</sup> There is significant debate among scholars as to why armed non-state actors are bound by Common Article 3 even if they did not expressly consent to its provisions.

The next section of this chapter shall look into the views of several academics and scholars to answer the above question. It can *prima facie* be argued that under the system of 'monism' where international law automatically becomes part of the domestic law of the state, non-state actors are bound by Common Article 3 of the Geneva Convention because it is part of the domestic law of the consenting state.<sup>680</sup> However, it can be argued that under dualism where a state needs to adopt the international law into the national law by specific domestic procedures, international law does not automatically become a part of the domestic law.<sup>681</sup> The corresponding

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<sup>678</sup> Andrea Bianchi (ed), *Non-state actors and international law* (Ashgate, 2009) 43-51.

<sup>679</sup> See Article 3 Common to the four 1949 Geneva Conventions.

<sup>680</sup> JG Starke, 'Monism and dualism in the theory of international law' (1936) 17 *British Yearbook of International Law* 66.

<sup>681</sup> Dinah L Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 1<sup>st</sup> ed, 2011) 11-13.

obligation, even upon adoption of the relevant norm under international law into the municipal law, would be an obligation under the municipal law as opposed to a direct obligation under international law.

Several scholars<sup>682</sup> have investigated the question of why non-state actors are bound by treaties that they did not formally consent to in the first place and the next section shall discuss this in detail.

It is pertinent to note that the ability to consent to be governed by the provisions of a treaty instrument itself is dependent on the legal status and personality of the non-state actor. Even though scholars principally agree on the idea that there must be some sort of regulation on the acts of non-state actors, they have not been able to agree on the theoretical basis.

### **3. DIFFERENT THEORIES EXPLAINING THE BINDING NATURE OF INTERNATIONAL LAW ON ARMED NON-STATE ACTORS**

This section shall discuss several theories which attempt to explain how armed non state actors are bound by international law in the absence of their consent.

#### **3.1 ARMED NON-STATE ACTORS BOUND BY CUSTOMARY INTERNATIONAL LAW**

It has been argued by various scholars that armed non-state actors are bound by international law on the basis of customary law.<sup>683</sup> The customary law theory holds that armed non-state actors are bound by international humanitarian law through customary law, regardless of their consent to be bound by such law.<sup>684</sup> This argument proceeds on

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<sup>682</sup> See Olivier Bangerter, 'Reasons why Armed Groups choose to respect International Humanitarian Law or not' (2011) 882(93) *International Review of the Red Cross* 353. S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *The International and Comparative Law Quarterly* 369, 372. Also see Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 105.

<sup>683</sup> Ibid.

<sup>684</sup> A Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30(2) *The International and Comparative Law Quarterly* 416, 430. S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *The International and Comparative Law Quarterly*

the premise that customary norms of international law are binding on all subjects of international law irrespective of their direct participation in the formation of the customary norm. This is founded on the view that customary norms are an independent source of international law and as such is not dependent upon consent and adherence of each individual state.

The Appeals Chamber of the Special Court for Sierra Leone in the *Decision on Challenge to Jurisdiction: Lome´ Accord Amnesty*<sup>685</sup> held that armed non-state actors are bound by Common Article 3 of the Geneva Convention through customary law.<sup>686</sup>

Customary international law has two elements comprising of state practice and *opinio juris*. Thus, there is an argument that only states are bound by customary international law.<sup>687</sup> However, it has already been discussed extensively in the previous chapter that non-state actors can have international legal personality. Accordingly, Murray argues that customary international law is applicable to entities that possess international legal personality such as the armed non-state actors. He cites *North Sea Continental Shelf*<sup>688</sup> case where the ICJ held that the customary law must have an equal force for all members of the international community.<sup>689</sup>

There is some concern that armed non-state actors were not involved in the creation of the customs and thus may not be bound by it. The ICJ in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)*<sup>690</sup>

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369, 372. Also see Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 105.

<sup>685</sup> *Decision on Challenge to Jurisdiction: Lome´ Accord Amnesty*, Appeals Chamber, SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) (13 March 2004).

<sup>686</sup> *Ibid*, [47].

<sup>687</sup> Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 105.

<sup>688</sup> *North Sea Continental Shelf (Judgment)* [1969] ICJ Rep 3.

<sup>689</sup> *Ibid*, [63].

<sup>690</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, [1980] ICJ Reports 73.

held that non-state actors are bound by customary international law without clarifying the role of non-state actors in the establishment of such laws.<sup>691</sup>

However, it is interesting to note that in the *Tadic Appeal* case,<sup>692</sup> the ICTY observed that the practice of the insurgents was ‘instrumental in bringing about the formation of the customary rules’.<sup>693</sup> Sassoli supports this view and holds that customary international humanitarian law of non-international armed conflict is derived from both states and armed non-state actors’ practice and *opinio juris*.<sup>694</sup> Sassoli argues that armed non-state actors were involved in the creation of customary international humanitarian law of non-international armed conflict as customary law is based on the behavior of the subjects of a rule, taking account their acts and omission.<sup>695</sup> As such, it could be argued that only such customary norms of international law, which is backed by practice of non-state actors would be binding on non-state actors.

In contrast, Fortin argues that armed non-state actors can be bound by the customary international law without their consent on the basis of state practice and *opinio juris*.<sup>696</sup> According to Fortin, armed non-state actors are not the only actors that

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<sup>691</sup> Ibid, [37].

<sup>692</sup> *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-93-1-AR72 (2 October 1995), [108].

<sup>693</sup> Ibid. However, scholars have criticized this proposition by the argument that *opinio juris* is also a requirement to establish customary law under international law besides state practice. See Theodor Meron, ‘Is International Law moving towards criminalisation?’ (1998) 9 *European Journal of International Law* 18, 28. In this context, Anthea Roberts has observed that traditionally, state practice played the most important role in the formation of a custom but the modern customs emphasize much more on the *opinio juris*. See Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A reconciliation’ (2001) 95 *American Journal of International Law* 757, 788.

<sup>694</sup> Annysa Bellal and Ezequiel Heffes, ‘Yes, I do’: Binding armed non-state actors to IHL and Human Rights norms through their consent’ (2018) 12(1) *Human Rights & International Legal Discourse* 120, 125.

<sup>695</sup> However, the ICRC Study on Customary International Humanitarian Law concluded that the practice of armed groups does not constitute state practice. The legal significance of the practice of armed non-state actors is unclear. Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law Volume 1: Rules* (Cambridge University Press, 2009) xlii. Also see Daragh Murray, ‘How International Humanitarian Law Treaties Bind Non-State Armed Groups’ (2015) 20(1) *Journal of Conflict & Security Law* 101, 108.

<sup>696</sup> See United Nations, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General’ (25 January 2005) 51 [172]. Also see Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017) 331.

are bound by customary international law without their consent since specific, individual states do not explicitly consent to be bound by customary international law either.<sup>697</sup> She gives example of new states that are bound by the customary international law despite not giving their consent.<sup>698</sup>

In similar vein, the International Commission of Inquiry on Darfur held that the SLM/A and the JEM possess international legal personality and are bound by customary international law.<sup>699</sup> There is wide consensus that customary international law is applicable to all entities under international law and since, armed non-state actors possess limited international legal personality, they are bound by customary international law.<sup>700</sup>

However, the above argument has been criticized to be circular in logic where armed non-state actors are bound by customary international law because they are subjects of international law, and they are subjects of international law because they are bound by the common Article 3.<sup>701</sup> One is back to the initial question as to which theory justifies the initial application of common article 3 to armed non-state actors. Conclusively, customary law does not convincingly explain how armed non-state actors are bound by international humanitarian law in the absence of their consent.

### **3.2 DOCTRINE OF LEGISLATIVE JURISDICTION**

The theory of legislative jurisdiction posits that all entities in the territory of the state are bound by the legislations made by the state.<sup>702</sup> Sivakumaran advocates the

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<sup>697</sup> Ibid.

<sup>698</sup> Ibid, 383.

<sup>699</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005, Geneva) 51[172].

<sup>700</sup> Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 109. S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *The International and Comparative Law Quarterly* 369, 373.

<sup>701</sup> JK Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, 456.

<sup>702</sup> A Cassese, *International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 49.

view that armed non-state actors are bound by the conventions and treaties even though they did not consent or sign them by virtue of the doctrine of legislative jurisdiction.<sup>703</sup> This, of course, assumes that such conventions and treaties ratified by the state automatically becomes part of the domestic law, which might not always hold true. The doctrine of legislative jurisdiction upholds the idea that state has the authority to legislate for its nationals, which includes the authority to ratify treaties that would be binding on each of its citizens.<sup>704</sup> In extension of the doctrine of legislative jurisdiction, armed non-state actors are bound by treaties even if they did not formally consent to them.<sup>705</sup>

Legislative jurisdiction theory enjoys wide support from scholars as an explanation as to why the armed non-state actors are bound by international law.<sup>706</sup> Murray argues in favour of legislative jurisdiction and asserts that the textual reading of Common Article 3 would signify the application of legislative jurisdiction.<sup>707</sup>

Jann K. Kleffner is of the opinion that the doctrine of legislative jurisdiction should not be interpreted narrowly as states are sovereign and have the jurisdiction to accept international rights and obligations on behalf of their citizens.<sup>708</sup> However, direct application of treaty provisions on individuals, irrespective of the semantics, would not be dependent upon the doctrine of legislative jurisdiction and is a question of construction of the obligations enumerated under the terms of the treaty.

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<sup>703</sup>Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369.

<sup>704</sup> *Ibid*, 381.

<sup>705</sup> *Ibid*, 369.

<sup>706</sup> A Cassese, *International Law* (OUP, 2<sup>nd</sup> ed, 2005) 49. I Brownlie, *Principles of Public International Law* (OUP, 7<sup>th</sup> ed, 2008) 299. JK Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, 445. Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369, 381. Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 130.

<sup>707</sup> Murray refers to the text of Article 3, which holds that, "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 123.

<sup>708</sup> JK Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, 448.

Cassese also supports the view that in most states, treaties and conventions become part of the domestic law of the state and are subject to the judicial law of the domestic system.<sup>709</sup> Common Article 3 and the Protocol would be binding on armed non-state actors by virtue of a state's ratification and the treaty being incorporated into the domestic law of the state.<sup>710</sup> However, international humanitarian law will not apply if a non-state actor was not under state jurisdiction and in control of a state or territory since the armed non-state actor would have the power to declare international law as non-binding.<sup>711</sup>

Critics of legislative jurisdiction point out that there is no uniformity in the way treaties are executed in states.<sup>712</sup> There are different forms – monism and dualism, which determines the relationship between domestic and international law in a state. Since under the system of dualism, a treaty is not automatically incorporated in domestic law after it has been ratified, a state has to legislate the treaty into the domestic laws of the state in order to incorporate a treaty.<sup>713</sup> The argument against legislative jurisdiction is that, in dualist systems a state does not bind its citizens simply by ratifying a treaty and may dilute the essence or substance in the process of legislating the provisions of the treaty into domestic law.<sup>714</sup>

Despite the criticisms, the theory of legislative jurisdiction has widespread acceptance because a state has the competence to legislate on behalf of its nationals.

### **3.3 DISCURSIVE DEMOCRACY THEORY**

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<sup>709</sup> Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *International and Comparative Law Quarterly* 416, 429.

<sup>710</sup> Ibid.

<sup>711</sup> Ibid, 430.

<sup>712</sup> JK Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, 446.

<sup>713</sup> Ibid, 447.

<sup>714</sup> Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369, 384.



Discursive democracy theory aims to improve the collective decision making by being more inclusive. Democratic legitimacy is to be found in authentic deliberation among those affected by a collective decision and hence, must have the opportunity to participate in that decision.<sup>715</sup>

Discursive democracy has been hailed as inclusive of all the actors in the international platform. Habermas has discussed how discursive democracy can legitimize non-state actors in international law by envisaging a situation where ‘discourse’ means a situation where all the actors can participate equally without any eternal bias and coercion.<sup>716</sup> Since the actors directly participate in formulating the law, it is called ‘rational self-legislation’.<sup>717</sup>

Discursive democracy prescribes that if actors did not get a chance to participate in law making, they cannot be governed by it. It even prescribes that such a law lacks legitimacy. According to some authors, international law is binding on non-state actors only if they have consented to such laws and non-state actors are considered as subjects of international law.<sup>718</sup> Such participation of all the actors in law making process is also important to ensure procedural legitimacy. Ryngaert supports Habermas’s discursive democracy theory and argues that without the participation of the actors in the creation of law, the law would lack legitimacy.<sup>719</sup> He further stresses the need to include non-state actors in law making such that there is a genuine ‘international community’.<sup>720</sup> He also observes that the participation right of non-state actor must not be *ad hoc* to ensure the effectiveness and legitimacy of international law.<sup>721</sup>

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<sup>715</sup> John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford Press, 2002) 8-12.

<sup>716</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action* (MIT Press, 1990) 65.

<sup>717</sup> *Ibid*, 120.

<sup>718</sup> Cedric Ryngaert, ‘Imposing International duties on Non-State Actors and the legitimacy of International law’ (Working Paper presented at the seminar of the FWO research community on Non-State Actors in International Law, Leuven, 26-28 March 2009) 1-3.

<sup>719</sup> *Ibid*, 5,16.

<sup>720</sup> *Ibid*, 12-17.

<sup>721</sup> *Ibid*, 17.

Scholars like Kleffner have argued that if non-state actors are participants in the law-making process, their engagement will have a better chance of ensuring compliance of international law by all the actors.<sup>722</sup> It has been argued that consent and participation ensures a more binding quality to a treaty, resulting in better compliance.<sup>723</sup>

There are several examples of non-state actors participating in the development of international law. Non-state actors such as the ICRC have been influential in the growth of international law. ICRC has also been granted an observer status at the UN General Assembly.<sup>724</sup> NGOs can provide submissions to the International Committee on Economic and Social Rights and Committee on the Elimination of Discrimination against Women. They can also provide Reports and other state specific information to the working group of the Committee on the Elimination of Discrimination against Women or make oral interventions when the Committee is considering a state.<sup>725</sup> ICJ allows NATO to submit amicus briefs.<sup>726</sup>

Non-state actors have been contributing and participating to some extent, for instance under Article 6 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), the state has been obligated to:

*establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in*

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<sup>722</sup> JK Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, 444.

<sup>723</sup> Ibid.

<sup>724</sup> UNGA Res 45/6, 'Observer status for the International Committee of the Red Cross' (16 October 1990). Christian Koenig, 'Observer Status for the International Committee of the Red Cross at the United Nations: A Legal Viewpoint' (1991) 31 *International Review of the Red Cross* 37.

<sup>725</sup> International Justice Resource Center, *Committee on the Elimination of discrimination against Women* <<https://ijrcenter.org/un-treaty-bodies/committee-on-the-elimination-of-discrimination-against-women/>>, last accessed 1 November 2023.

<sup>726</sup> *International Status of South West Africa, Advisory Opinion*, [1950] ICJ 128 (July 11); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Reports 136; Gleider Hernández, 'Non-State Actors from the Perspective of the International Court of Justice' in Jean d'Aspremont (ed), *Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 141–63; Also see, Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 4.

*elective institutions and administrative and other bodies responsible for policies and programmes which concern them;*<sup>727</sup>

There is a greater need for direct participation of non-state actors in international law. Principal criticism of this theory is from scholars like Chappel who argue that non-state actors are a heterogeneous group with different interests and would be difficult to effectively bracket them as a collective organization.<sup>728</sup> Ryngaert agrees that it is a challenge to formulate and implement rules for non-state actors' participation.<sup>729</sup> The central issue is how to implement non-state actors' participation considering the heterogeneous nature of the group.

As observed, in the discursive democratic method of participation, non-state actors could participate in institutions in a democratic manner with equal participation.<sup>730</sup> However, in practice such democratic processes are a result of state centric approach as mostly sovereign states have participated in international law making so far. In this regard, Haberman's proposal is idealistic and difficult to achieve in reality.<sup>731</sup>

### **3.4 THE CONCEPT OF STATE SUCCESSION**

Another proposed reason for the application of international treaties and law on armed non-state actors is the ILC's Articles on State Responsibility which provides in Article 10<sup>732</sup> the following:

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<sup>727</sup> Article 6 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

<sup>728</sup> Zsuzsanna Chappell, *Deliberative Democracy: A Critical Introduction* (Palgrave Macmillan, 2012) 38.

<sup>729</sup> Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Cedric Ryngaert and Math Noortmann (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate, 2010) 81.

<sup>730</sup> Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 4.

<sup>731</sup> *Ibid.*

<sup>732</sup> Article 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

*The conduct of an insurrectional movement, which becomes the new Government of a State, shall be considered an act of that State under international law.*

Thus, the argument is that if a non-state actor purports to represent the state it should be bound by the applicable laws especially in light of the fact that the armed non-state actor would be bound by international law if it succeeded in a change of the political regime.<sup>733</sup> Murray further illustrates Article 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts as an example wherein international obligations is imposed on armed groups regardless of their consent.<sup>734</sup>

When a non-state actor becomes a state, it incurs responsibility under international law for the wrongful acts committed by such non-state actor. In actuality, the responsibility under the abovementioned Article 10 accrues at the time of the perpetration of the wrongful act in question. As such the responsibility in question accrues at the time of the conduct and the cause of action is not the event of state succession but the time when the internationally wrongful act or omission has occurred.

This is essentially an extension of the state centric theory of international law in so far as what is seen to be material is succession to statehood by a non-state actor, thereby confirming its legal status to be held responsible under international law. However, whether the armed non-state actor is bound by international humanitarian law cannot depend upon whether the armed non-state actor wins the non-international armed conflict. This rationale fails to explain how armed non-state actors which lose against the state government and fail to establish a new government are bound by international humanitarian law.

Another justification for Article 10 is that armed non-state actors are bound because they exercise control over certain parts of the territory of a state and function as the *de facto* government in the territory they control.<sup>735</sup> The argument being that armed non-state actors which exercise *de facto* control and authority over certain territory of the state must uphold international humanitarian law obligations similar to

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<sup>733</sup> Ibid. Also see Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101, 118-120.

<sup>734</sup> Ibid, 119.

<sup>735</sup> Katherine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 199-200.

the state government.<sup>736</sup> However, there is no established link between Article 10 and the *de facto* control of territory by the armed non-state actor.<sup>737</sup>

### 3.5 INDIVIDUAL CRIMINAL RESPONSIBILITY

As a possible model of legal framework for armed non-state actors, it has been suggested that individual criminal responsibility could be extended to armed non-state actors.<sup>738</sup> Scholars like Ryngaert have criticized the suggestion that individual criminal responsibility could be extended to groups of individual's forming/constituting a non-state armed group.<sup>739</sup> According to him, it would be a stretch to say that armed non-state actors can be prosecuted under international criminal law because it allows for individual criminal responsibility.<sup>740</sup>

There is some merit to the argument that armed non-state actors cannot be clubbed as 'groups of individuals' under law. In fact, armed non-state actors have certain distinct characteristics just like states. There are examples of armed non-state actors refusing to comply with the humanitarian law and declaring them as non-binding.<sup>741</sup> To cite an example, Front de Libération National of Algeria declared the Geneva Convention non-binding to itself.<sup>742</sup> The Vietnamese group of NLM also

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<sup>736</sup> Ibid.

<sup>737</sup>United Nations, (1972) II *Yearbook of the International Law Commission* 145, UN Doc A/CN.4/SER.A/1972/Add.1.

<sup>738</sup> Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 3.

<sup>739</sup> Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed), *Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 286–7.

<sup>740</sup> Ibid.

<sup>741</sup> Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 4.

<sup>742</sup> Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) *Yale Journal of International Law* 108, 140.

refused to apply the Common Article 3 on the ground that the international treaties should not be binding to the group as it did not participate in its formation.<sup>743</sup>

Although individual criminal responsibility punishes individual perpetrators of international crime, international criminal courts do not have jurisdiction over ‘groups of individuals’ such as armed non-state groups. There is a growing debate in international law that individual prosecution is not enough and it is important to hold a group itself responsible for the violations committed by armed non-state actors.<sup>744</sup> It is argued that punishing a group would be more effective in ensuring the victim is compensated in situations where the group has greater assets than the individual perpetrator of crime.<sup>745</sup> Also, victims would have recourse to the armed group if the individual member or perpetrator of crime of the group is dead.<sup>746</sup>

It is non-state actors as an entity as opposed to individual members who have the key decision-making authority so it is doubtful to what extent the action and conduct of non-state actors would be deterred by the threat of individual criminal responsibility.<sup>747</sup>

### **3.6 AN ANALYSIS OF THE ABOVEMENTIONED THEORIES EXPLAINING THE BINDING NATURE OF INTERNATIONAL LAW ON NON-STATE ACTORS**

From the theoretical overview above, it can be concluded that the theories do not convincingly explain how armed non-state actors are bound by international humanitarian law in the absence of their consent.

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<sup>743</sup> ICRC, ‘External Activities: Vietnam’ (1965) 5 *International Review of Red Cross* 634, 636. Also see Lee J McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017) Chapter 4.

<sup>744</sup> Annyssa Bellal, ‘Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution’ in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 305.

<sup>745</sup> *Ibid.*, 306-307.

<sup>746</sup> *Ibid.*

<sup>747</sup> Jan Arno Hessbrügge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2004) 36 *New York University Journal of International Law and Politics* 265, 306.

In so far as the theory of legislative jurisdiction is concerned, the opinion appears to be that the ratification by a state of an international treaty would necessarily bind all subjects of the relevant state, including inter alia an armed non-state actor challenging the state. This is premised upon an understanding that upon ratification, the provisions of the treaty directly become binding on the individual subjects of the state. This overlooks the dual issue of dichotomy of obligations under municipal law vis-à-vis that of international law and the issue of inconsistency of state practice regarding enforcement of treaty obligations. While some states have adopted a monistic system of law wherein upon ratification the treaty automatically becomes binding in the subject state, the other states follow a dualist approach wherein for a treaty obligation to be enforceable in the state, the state must enact the treaty obligation by way of a municipal legislation. This gives rise to the connected issue of whether the question of breach of a treaty obligation (ratified by the parent state) by the armed opposition group is a question of breach of municipal obligation as opposed to an issue of international law.

These associated problems with the theoretical framework of the binding nature of international norms (and more specifically, international humanitarian law) on armed non-state actors, has resulted in shifting of the focus to compliance as opposed to the binding nature of the norms themselves. This has resulted in greater emphasis upon the rationale of recognition of measures of compliance such as unilateral declarations on the part of the armed non-state actors to be bound by the international humanitarian law instead of a discourse on the binding nature of the norms themselves.

Even if one agrees that the armed non-state actors are bound by customary international law, customary law does not explain how armed non-state actors are bound by Additional Protocol II.<sup>748</sup> Moir argues that it is more relevant to observe whether the armed non-state actors comply with the Additional Protocol II in reality.<sup>749</sup>

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<sup>748</sup> All the provisions of Additional Protocol II do not have customary law status. See Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369, 372.

<sup>749</sup> L Moir, *The Law of Internal Armed Conflicts* (Cambridge University Press, 2002) 53-54. One must observe the Unilateral Declarations and the Codes of Conduct to decipher the extent to which the armed non-state actors accept the Additional Protocol II in practice. Annysa Bellal and Ezequiel Heffes, 'Yes, I do': Binding armed non-state actors to IHL and Human Rights norms through their consent' (2018) 12(1) *Human Rights & International Legal Discourse* 120, 125.

Similarly, Sivakumaran observes that Additional Protocol II has received a lot of acceptance by the armed non-state actors.<sup>750</sup>

Given the limitations of the theoretical frameworks explaining how armed non-state actors are bound by international humanitarian law in the absence of their consent, it is important to take a pragmatic approach. Murray also agrees that the question of consent of armed non-state actors to be bound by international humanitarian law is exaggerated.<sup>751</sup> In reality, few armed non-state actors have expressed their disapproval to apply humanitarian standards because they did not consent to these laws in the first place.<sup>752</sup> According to Bangerter, armed non-state actors refusing to comply with international humanitarian law is an exception and not the norm.<sup>753</sup>

Although armed non-state actors are bound by international law, the question that needs to be answered is whether the armed non-state actors perceive international law to be binding upon them? Unless armed non-state actors perceive international humanitarian law to be binding on them, they may not comply with the law. Similar concerns have been echoed by scholars that the lack of participation by armed non-state actors in law making will influence the compliance of the law because they are likely to have less ‘ownership’ of the laws in the absence of their participation in the process of law making.<sup>754</sup>

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<sup>750</sup> Sandesh Sivakumaran, ‘Binding Armed Opposition Groups’ (2006) 55 *International and Comparative Law Quarterly* 369, 388.

<sup>751</sup> Daragh Murray, ‘How International Humanitarian Law Treaties Bind Non-State Armed Groups’ (2015) 20(1) *Journal of Conflict & Security Law* 101, 131.

<sup>752</sup> See Human Rights Watch, *War Without Quarter: Colombia and International Humanitarian Law, Chapter II* (1998) <[www.hrw.org/legacy/reports/reports98/colombia/4](http://www.hrw.org/legacy/reports/reports98/colombia/4)>, last accessed 1 November 2023. In Colombia, armed non-state actors refused to comply with Additional Protocol II because they did not consent to them. Another example of the National Liberation Front of South Vietnam could be cited. National Liberation Front refused to apply treaties to which they did not consent. See DP Forsythe, ‘Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts’ (1978) 72 *American Journal of International Law* 272, 292. Also see Daragh Murray, ‘How International Humanitarian Law Treaties Bind Non-State Armed Groups’ (2015) 20(1) *Journal of Conflict & Security Law* 101, 128.

<sup>753</sup> Olivier Bangerter, ‘Reasons why Armed Groups choose to respect International Humanitarian Law or not’ (2011) 882(93) *International Review of the Red Cross* 353, 360.

<sup>754</sup> Annyssa Bellal and S Casey-Maslen, ‘Enhancing respect for international law by armed non-state actors’ (2011) 3(1) *Göttingen Journal of International Law* 175. Annyssa Bellal, ‘Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution’ in



This necessitates a law and economics approach to understand the connection between the binding nature of the law and its effect on compliance. Guzman tries to ascertain if international law affects the behavior of states.<sup>755</sup> When law succeeds in changing state behavior, it is deemed effective. Guzman measures the effectiveness of a law to the extent it results in marginal increase in compliance.<sup>756</sup> However, Guzman observes that while it is possible to observe compliance, it is difficult to evaluate whether law has been effective in changing the behavior of states.<sup>757</sup>

The precise appeal of crafting a discourse which can postulate the various factors enabling analysis of likelihood of compliance of international legal norms resulted in adoption of cross disciplinarian tools and/or approaches which were prevalent in other social sciences, such as the subject of International Relations. In so far as International Relations, as a subject area, focuses on the dynamics of state behavior, tools, and approaches of analysis existing in International Relations were also envisaged to be useful in understanding the issue of compliance of international legal norms by states, and by extension, other stakeholders of international law.

#### 4. RATIONAL CHOICE THEORY – LAW AND ECONOMICS APPROACH

One of the longstanding conundrums that has engaged international legal scholars since its nascent years is the problem of a suitable explanation for the impact of international law on state conduct despite its seemingly soft binding nature. This paradox is underlined by the general acceptance and acknowledgment of the limited coercive means of enforcement available under the international legal framework for

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Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015) 315.

<sup>755</sup> The maxim that, ‘treaties are to be obeyed’ fails to demonstrate how states behave in reality by simply assuming compliance from the states without offering any reason or explanation. See Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90(6) *California Law Review* 1823, 1834.

<sup>756</sup> While Guzman acknowledges that consent plays a role in the creation of an obligation, consent does not explain why states comply with an obligation. See Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 34-36.

<sup>757</sup> *Ibid.*

the breach of an international norm. This is particularly so since international law at its nascent stage was significantly accord and treaty driven.

At this stage, it is important to clarify that for our purpose, the term ‘legal obligation’ is being used to convey an *ex ante* obligation under international law, without any reference to the ability to enforce such obligation. The problem can thus be boiled down to the question as to how these ‘legal obligations’ which are not necessarily enforceable in the positivist sense of the term, have successfully shaped state behavior despite not carrying the threat of coercive enforcement.

An important goal of law and economics approach to international law as a discourse has been to explain the influence exerted by international legal obligations on state behavior.

A logical corollary of this inquiry is to understand the role of consent on this influence of international legal obligations, since in so far as states are concerned, there was no controversy whatsoever that international legal norms give rise to binding (although not necessarily enforceable) obligations on states on the basis that the states have consented to such legal framework. One of the key approaches towards explaining this influence of international legal obligations on state behavior and the consequent compliance has been the rational choice approach to international law.<sup>758</sup>

Law and economics scholars such as Goldsmith and Posner criticize the relevance of consent as the basis to bind international law and argue that consent is ‘neither a necessary, nor a sufficient basis’ to create international legal obligations.<sup>759</sup> They argue that international law is reflective of the interests of states and is not a representation of a just legal framework. Hence, a state may comply with international law if the state deems it right to comply in its own judgment.<sup>760</sup>

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<sup>758</sup> Modern analysis of compliance of international law emerged from Henkin who famously observed, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”. Although Henkin did not propagate a theoretical framework of compliance, he observed several factors (such as reputation, reciprocity, domestic politics and morality) that lead to the compliance of international law. See Louis Henkin, *How Nations Behave* (Columbia University Press, 2<sup>nd</sup> ed, 1979) 47. Also see Ingrid Wuerth, ‘Compliance’ in Jean D’Aspremont and Sahib Singh, *Concepts for international law* (Edward Elgar Publishing, 2019) 118.

<sup>759</sup> Eric Posner and Jack L Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) 160.

<sup>760</sup> *Ibid*, 166. They further state that international law is not law but a special kind of politics. See *ibid*, 169. Their views stated in their book (‘The Limits of International Law’) received criticism. See for

Guzman agrees with the view that consent alone is an insufficient incentive for states to comply with their obligations.<sup>761</sup> He argues that proponents of the consent theory do not look into the incentives behind a state to comply with the law. In fact, the supporters of the consent theory straightforwardly apply the maxim, ‘treaties are to be obeyed’.<sup>762</sup> Guzman criticized the notion of ‘states must obey the law’ on the grounds that it does not offer a clear understanding of why states comply with international law in reality.<sup>763</sup>

Guzman further contends that past consent to a legal rule is inadequate to guarantee compliance of the legal rule in the future. Critics of the consent-based theory assert that past consent fails to explain why international law is binding.<sup>764</sup> Critics argue that nothing prevents the states from revoking their consent.<sup>765</sup> According to Guzman, the actual issue with consent-based view is that it lacks an explanation on compliance.<sup>766</sup>

As a more modern discourse, law and economics rational choice theory is concerned with explaining and analyzing factors which result in compliance of the norms of international law and considers the issue of the binding nature of international law as less relevant. Although the perception of the binding legal obligation is considered an important factor for compliance, from a strict pragmatic perspective, this approach of focusing on ‘compliance’ as opposed to a discourse on binding nature appears to be more attractive.

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example, Anne van Aaken, ‘To Do Away with International Law? Some Limits to ‘The Limits of International Law’’ (2006) 17(1) *The European Journal of International Law* 289.

<sup>761</sup> Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90(6) *California Law Review* 1823, 1834.

<sup>762</sup> See Abram Chayes and Antonia Handler Chayes, ‘On Compliance, International Organization’ (1993) 47(2) *International Organization* 175, 185. Also see Arnold Duncan McNair, ‘The Law of Treaties’ (Oxford: Clarendon Press, 1961) 493-505. JL Brierly, *The Law of Nations: An Introduction to the international law of peace* (Oxford University Press, 6th ed, 1963) 51-54.

<sup>763</sup> Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90(6) *California Law Review* 1823, 1833-1834.

<sup>764</sup> Ibid.

<sup>765</sup> Ibid.

<sup>766</sup> Ibid, 1834.

#### 4.1. UNDERSTANDING RATIONAL CHOICE THEORY

Rational choice theory has been applied to international law to understand how actors and international institutions behave.<sup>767</sup> In rational choice theory, individuals are assumed to make rational decisions and work towards utility maximization.<sup>768</sup> The rationalist law and economics approach seeks to apply the same model to states upon the assumption that states are rational, self-interested, unitary entities,<sup>769</sup> and thereby makes an incentive driven analysis possible.<sup>770</sup> However, there is some concern in applying rational choice model to collective actors such as the states because states do not have clear goals and preferences.<sup>771</sup> Furthermore, Abbott and Snidal recognize that although the concept of states as unitary actor is a fiction, and even though state preference is unstable, when states execute international agreements, they represent the aggregate of their domestic actor's interests.<sup>772</sup>

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<sup>767</sup> Alexander Thompson, 'Applying Rational Choice Theory to International Law: The promise and pitfalls' (2002) 31(S1) *The Journal of Legal Studies* S285, S285-S286.

<sup>768</sup> Ibid S286-S287. Also see Eric Posner and Jack L Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) 6.

<sup>769</sup> While the decision-making process of 'states' involve complex interaction between the electorates, political leadership, and other intermediaries in the decision-making process (the 'billiard ball' state or the 'Lego World' approach), for the sake of parsimony and simplicity, a 'state' has been considered to be a single unit of analysis in rationalist scholarship. The success of the model lies in its predictive ability. See Anne van Aaken, 'Rationalist and Behavioralist Approaches to International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022) 261-281.

<sup>770</sup> See for example, Anne van Aaken, 'Rationalist and Behavioralist Approaches to International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022) 261. Also see Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 16-17.

<sup>771</sup> Alexander Thompson, 'Applying Rational Choice Theory to International Law: The promise and pitfalls' (2002) 31(S1) *The Journal of Legal Studies* S285, S292. Also see Eric Posner and Jack L Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) 7.

<sup>772</sup> Kenneth W Abbott & Duncan Snidal, 'Values and Interests: International Legalization in the Fight against Corruption' (2002) 31(1) *The Journal of Legal Studies* S141, S155. Also see Eric Posner and Jack L Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) 7. Institutional policy choices are reflective of the 'state's interest'.

The rational choice theory seeks to explain state behavior within the ambit of reputation, reciprocity and retaliation.<sup>773</sup> It is imperative to understand that in seeking to define state behavior within the triad of reputation, reciprocity and retaliation, rational choice theory is resorting to adoption of a standardized definition of state objective and/or value.<sup>774</sup>

State behavior is more readily explainable in terms of strategic games engaged in by states with other states. When a state disregards an obligation, its credibility with respect to future promises is lessened and there is a loss of reputation.<sup>775</sup> This loss of reputation reduces the credibility of the state with respect to future promises. Prospectively, other states will have a fear that the non-complying state will violate the obligations in an agreement for short-term gains.<sup>776</sup> Thus, the reputational harm makes it difficult for the non-complying state to negotiate agreements in the future, which implies potential losses in the future.

Thus, Guzman demonstrates how there are costs to breaching international law, which creates a “compliance pull” where it is in the interest of a state to comply with legal obligations.<sup>777</sup>

Apart from reputational harm, states may also face reciprocity.<sup>778</sup> Reciprocity implies reciprocal non-compliance from the other states if one state chooses to non-comply. Guzman argues that often states comply because there is a threat of reciprocal non-compliance from the other party to the agreement which would lead to a situation

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<sup>773</sup> For the import of ‘reputation’ and ‘retaliation’ in explaining ‘compliance’, see Eric Posner and Jack L Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) 100-102. Also see Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 32-34.

<sup>774</sup> Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 20.

<sup>775</sup> *Ibid*, 50-51.

<sup>776</sup> *Ibid*, 51.

<sup>777</sup> *Ibid*, 54. However, Brewster argues that perception is a big component to reputation so different governmental regimes of a state may create different expectations of compliance. See Rachel Brewster, ‘Reputation in International Relations and international law theory’ in JL Dunoff and MA Pollack (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 535.

<sup>778</sup> Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 55.

where both parties are worse off.<sup>779</sup> Thus, mutual compliance is implemented through a credible threat of non-performance of an agreement or legal obligation.

Guzman gives a caveat that reciprocity, as a threat, will only be applicable if the threat is genuine or credible.<sup>780</sup> Also, for reciprocity to induce compliance, it is vital that the threat of reciprocal non-performance should be of some consequence to a potential violator.<sup>781</sup>

A state may retaliate in terms of economic sanctions or alike against the non-complying state.<sup>782</sup> A state may retaliate against a non-complying state to communicate to the violating state and others that it can react when their legal rights are not respected. A retaliating state will increase its reputation by pursuing a violating state and setting an example for the future that it will take actions when their legal position is compromised.<sup>783</sup>

Such retaliatory measures are a strong compliance-inducing tool. Retaliation is also helpful to coerce the violating state back into performance of its legal obligation.<sup>784</sup> However, such retaliatory measures are costly, and a state may resort to retaliation only to force the violating state back into compliance or to establish a reputation that it will punish violations of legal obligations.<sup>785</sup>

Although it has been contended that the value of reputation is limited, it is nonetheless an important factor explaining compliance with international law by states. The role of reputation is limited for states because if the pay-off is huge, states may disregard

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<sup>779</sup> Ibid.

<sup>780</sup> Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 57-58.

<sup>781</sup> Ibid.

<sup>782</sup> Ibid, 60.

<sup>783</sup> Ibid, 59-60.

<sup>784</sup> Ibid, 60.

<sup>785</sup> Ibid.

reputational concerns.<sup>786</sup> There is also a possibility that some states may not be keen on maintaining a good reputation.<sup>787</sup>

#### **4.2. APPLYING RATIONAL CHOICE THEORY TO ARMED NON-STATE ACTORS**

On application of the rational choice theory, one may conclude that consent is not sufficient for predicting compliance of a norm. This would suggest that any rational actor would comply with a particular norm of international law only if factors such as reputation, reciprocity and retaliation favor compliance.<sup>788</sup> It is assumed that armed non-state actors much like states are rational actors wanting to maximize their preferences. As such, law and economics theory in its application is indifferent to whether the entity in question is a non-state actor or a state.

However, it is stated that consent is still important as unless armed non-state actors perceive international norms as binding, they may not comply with it. Consent implies commitment and clarity from armed non-state actors to honour an obligation and a failure to abide by such obligations would have a reputational cost.<sup>789</sup> In the absence of consent from armed non-state actors, their commitment to international norms is uncertain and hence, the stake on their reputation is low.<sup>790</sup> Also, it may be noted that while consent demonstrates that the armed non-state actors perceive the

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<sup>786</sup> Ibid, 124-125. Also see Eric Posner and Jack L Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) 102-104. The author cautions against the tendency of over stating reputational concerns in decision-making.

<sup>787</sup> Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 124-125.

<sup>788</sup> See Alan O' Sykes and Andrew Guzman, 'Economics of International Law' in Francesco Parisi (ed) *The Oxford Handbook of law and economics: Volume 3: Public Law and legal institutions* (Oxford University Press, 2017) 439, 444.

<sup>789</sup> Andrew T Guzman, 'A Compliance-Based theory of international law' (2002) 90(6) *California Law Review* 1823, 1876 -1877.

<sup>790</sup> Ibid, 1877.

norms as binding, it does not guarantee compliance. If an actor has compelling incentives to violate the law, it may do so despite the prior consent.<sup>791</sup>

Bangerter supports the view that the first step to ensure the compliance of international humanitarian law would be to understand the factors that lead armed non-state actors to comply.<sup>792</sup> Bangerter asserts that self-image is a relevant factor for armed non-state actors when weighing in their decision to respect the international humanitarian law.<sup>793</sup> Self-image and reputation plays a key role in respecting international humanitarian law because as Bangerter observes, “most armed groups see their aim – the reason why they are fighting – as beneficial for their country, their ethnic group, and/or the population in general.”<sup>794</sup> Another factor that plays a role in determining whether to respect the international humanitarian law is military advantage.<sup>795</sup>

Similarly, Michel Venthey is of the view that the factors determining the respect for international humanitarian law by armed non-state actors are public opinion, reciprocity, military efficacy, concerns of economy, peace and ethics.<sup>796</sup> Mack highlights factors such as reputation and reciprocal respect along with other factors such as military efficacy, long term interests, economy, and risk of prosecution.<sup>797</sup>

In this context, it may be highlighted that in case of armed non-state actors, the unitary actor assumption might be inadequate. The unitary actor assumption is inadequate because armed non-state actors have to take into account the preferences of other actors such as the civilians to calibrate and shape its preferences and objectives.

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<sup>791</sup> Ibid, 1846.

<sup>792</sup> Olivier Bangerter, ‘Reasons why Armed Groups choose to respect International Humanitarian Law or not’ (2011) 882(93) *International Review of the Red Cross* 353, 357.

<sup>793</sup> Ibid, 358.

<sup>794</sup> Ibid.

<sup>795</sup> Ibid, 366.

<sup>796</sup> Michel Veuthey, *Guérilla et droit humanitaire* (ICRC, 2<sup>nd</sup> ed, 1983) 339, 373. Also see Olivier Bangerter, ‘Reasons why Armed Groups choose to respect International Humanitarian Law or not’ (2011) 882(93) *International Review of the Red Cross* 353, 357.

<sup>797</sup> Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts* (ICRC, 2008) 30–31.



Putnam's two-level game could be useful to understand the behavior of armed non-state actors.<sup>798</sup> According to Robert Putnam, there exists a two-level game when an actor is involved in negotiations at the international level as it deals with both domestic and international pressures simultaneously and both these concerns must be dealt with during the international negotiation stage.<sup>799</sup>

Domestic pressures have a significant impact on the preferences being made in the international stage.<sup>800</sup> States seek to appease domestic pressures while managing their commitments in the international stage.<sup>801</sup> The leaders negotiating at the international stage have to keep the concerns of domestic level in mind because international negotiations have to ultimately receive approval from the domestic level.<sup>802</sup> Thus, the domestic and international levels<sup>803</sup> have a strong link and one needs to understand the domestic realities to better appreciate the constraints of an actor at the international plane.<sup>804</sup> The negotiating leader at the international level can only conclude a policy when the win-sets of all the concerned parties (at both the domestic level and the international level) overlap.<sup>805</sup>

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<sup>798</sup> Robert D Putnam, 'Diplomacy, and domestic politics: The logic of two-level games' (1988) 42(3) *International Organization* 427-460.

<sup>799</sup> *Ibid.*, 434.

<sup>800</sup> *Ibid.*, 427. Also see Robert Pahre and Paul A Papayoanou, 'Using Game Theory to Link Domestic and International Politics' (1997) 41(1) *The Journal of Conflict Resolution* 4-5.

<sup>801</sup> Robert D Putnam, 'Diplomacy, and domestic politics: The logic of two-level games' (1988) 42(3) *International Organization* 433, 436.

<sup>802</sup> *Ibid.*

<sup>803</sup> Several stakeholders from the domestic level such as the NGOs, bureaucracy, academic thinkers, and the citizens are involved in the formulation of a nation's foreign policy. In the international level, actors such as the corporations, scholars, international committees etc try to influence a state's foreign policy considerations. See Eugénia da Conceição-Heldt, Eugénia and Patrick A Mello, *Two-Level Games in Foreign Policy Analysis* (Oxford Encyclopedia of Foreign Policy Analysis, Oxford University Press, 2018) 774-776.

<sup>804</sup> Bruce Bueno de Mesquita, 'Domestic Politics and International Relations' (2002) 46(1) *International Studies Quarterly* 6.

<sup>805</sup> The win-set is determined by factors such as how the state negotiates at the international level, interaction between different institutions at the domestic level and possible coalitions of preferences. See Robert D Putnam, 'Diplomacy, and domestic politics: The logic of two-level games' (1988) 42(3) *International Organization* 440-441. Apart from political institutions at the domestic level, the preferences of the voters is a considerable limitation on states at the international negotiation level. Also

Given that negotiations at the international stage often deal with conflicting interests in the domestic and international levels, a win-set is reflective of the shared preferences of all the concerned parties and harmonious to the interests of the domestic level.<sup>806</sup> Leaders give great emphasis to the domestic environment in their decisions on policy making at international level.<sup>807</sup>

The abovementioned two-level game illustrates that the interests of both the parties – the domestic and the international, must be managed simultaneously. Thus, the idea of a unitary actor does not appropriately capture the reality of the decision-making process of armed non-state actors.<sup>808</sup> Given that armed non-state actors want to get the support of the civilian population, they would adhere to international humanitarian law at least to the extent it protects the rights of the civilians. Considerations such as military advantage are compromised to accommodate the preference of domestic actors such as the civilians which require that humanitarian laws protecting the civilians are respected by armed non-state actors.

ICRC in its recent Report on ‘International humanitarian law and the challenges of contemporary armed conflicts’ claims that the reality of armed conflicts is that international humanitarian law is respected by both the states and the non-state actors.<sup>809</sup> According to ICRC, the Codes of Conduct and the Deeds of Commitment are evidence of the acceptance of such humanitarian law by the armed non-state actors.<sup>810</sup>

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see Eugénia da Conceição-Heldt, Eugénia and Patrick A Mello, *Two-Level Games in Foreign Policy Analysis* (Oxford Encyclopedia of Foreign Policy Analysis, Oxford University Press, 2018) 774-776.

<sup>806</sup> Robert D Putnam, ‘Diplomacy, and domestic politics: The logic of two-level games’ (1988) 42(3) *International Organization* 435-437.

<sup>807</sup> Ibid, 427. Also see Natalie Zufle, ‘Putnam Two Level games’ (Seminar Paper, GRIN, 2013) 3.

<sup>808</sup> Chris Alden, ‘Critiques of the Rational Actor Model and Foreign Policy Decision Making’ in Cameron G Thies (ed), *The Oxford Encyclopedia of Foreign Policy Analysis* (Oxford University Press, 2018) 474.

<sup>809</sup> ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2019) 101(911) *International Review of the Red Cross* 869.

<sup>810</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law Volume 1: Rules* (Cambridge University Press, 2009) xlii.

ICRC provides several examples of compliance of international humanitarian law to change the narrative that international humanitarian law is constantly violated.<sup>811</sup>

ICRC asserts that in reality, parties to an armed conflict, consider it in their interest to respect international humanitarian law.<sup>812</sup> ICRC provides examples of non-state actors complying with international humanitarian law which includes examples such as Mouvement des Nigériens pour la Justice (armed non-state actor) in Nigeria which allowed access to ICRC to give medical relief to captured soldiers of the Forces Armées du Niger in conflict between 2007-2009.<sup>813</sup> In fact, Mouvement des Nigériens successfully released the captured soldiers.

It also gives several examples of states complying with international humanitarian law among which is included the example of Chad which signed an Action Plan in 2011 with the United Nations to prohibit the use of child soldiers.<sup>814</sup> Chad succeeded in fulfilling its Action Plan and was consequently delisted from the UN Secretary General's Report on Children and Armed Conflict in 2014.<sup>815</sup>

Respecting international humanitarian law also helps the public relations of armed non-state actors and portrays the armed non-state actors in a more positive light.<sup>816</sup> It may also be noted that such armed non-state actors require support of the public - as without such support, they are vulnerable to state's attack (which is usually stronger militarily).<sup>817</sup> Lack of awareness of international humanitarian law can be a

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<sup>811</sup> ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2019) 101(911) *International Review of the Red Cross* 869, 947. Also see ICRC, 'IHL in Action: Respect for the Law on the Battlefield' <<https://ihl-in-action.icrc.org/>>, last accessed 1 November 2023.

<sup>812</sup> Ibid.

<sup>813</sup> ICRC, 'IHL in Action: Respect for the law on the Battlefield', *Niger, Treatment and Release of Detainees* <<https://ihl-in-action.icrc.org/case-study/niger-treatment-and-release-detainees>>, last accessed 1 November 2023.

<sup>814</sup> ICRC, 'IHL in Action: Respect for the law on the Battlefield', *Chad, Prohibiting the Use of Child Soldiers* <<https://ihl-in-action.icrc.org/case-study/niger-treatment-and-release-detainees>>, last accessed 1 November 2023.

<sup>815</sup> Ibid.

<sup>816</sup> Olivier Bangerter, 'Reasons why Armed Groups choose to respect International Humanitarian Law or not' (2011) 882(93) *International Review of the Red Cross* 353, 360.

<sup>817</sup> Ibid, 362.

contributing factor as to why armed non-state actors do not comply with international humanitarian law.

Looked at from the above perspective, an important strategy for ensuring compliance by armed non-state actors of particular norms of international law would be to try and define soft accountability regimes based on consensual/voluntary undertaking by armed non-state actors to comply with specific international law norms in view of the benefits accruing out of such compliance. An example of such an endeavor of defining a soft accountability regime is the Geneva Call. Accountability mechanisms such as the Geneva Call and the ICRC are important for their information dissemination role as it promotes awareness of international humanitarian law among armed non-state actors. These accountability mechanisms will be discussed at length in the next chapter of this thesis.

## 5. CONCLUSION

The state centric model of international law as being the product of consent amongst sovereign states has become inadequate to account for the role of non-state actors in international law. This necessitated a functional, pragmatic, and purposive approach towards the question of whether armed non-state actors are bound by international law in the absence of their consent.

As discussed in this chapter, there is a conspicuous absence of a definitive theoretical justification for international legal norms to be binding on armed non-state actors. The problem of non-participation and absence of consent has rendered the discourse of binding nature of international legal norms in the context of non-state actors problematic. In the face of such theoretical uncertainty, focusing on the utilitarian perspective of compliance as opposed to jurisprudential discourse on binding nature of international legal norms on non-state actors has been suggested as a more effective and pragmatic approach in regulating the conduct of armed non-state actors.

This is particularly relevant in so far as the empirical experience suggests that armed non-state actors have not denounced international humanitarian law.<sup>818</sup> This has

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<sup>818</sup> Ibid, 360.

rendered the jurisprudential issue together with the theoretical justification for the binding nature of international law on non-state actors largely academic.

This has resulted in the shift of discourse from theoretical inquiry into the binding nature of obligations of non-state actors under international law to a question of compliance. A powerful tool in analyzing and predicting compliance has been the law and economics approach espousing the rational choice theory which assumes non-state actors to be rational actors seeking to maximize their preferences, much like states.

As such, rational choice theory in its application to international law is not limited to any specific subject and proceeds solely on the analysis of likelihood of compliance of a norm based on the incentives (such as reputation, reciprocity, and retaliation) to the subject for such compliance. In this context, it is highlighted that consent is important but not sufficient to influence compliance of a norm.<sup>819</sup>

Thus, it is suggested that armed non-state actors adopt a consent-based, voluntary accountability mechanism which considers the relevant incentives of the armed non-state actors. An example of such soft accountability measures achieving substantial success in enhancing the likelihood of compliance of international legal norms by armed non-state actors can be seen in Geneva Call. These accountability mechanisms (such as the Geneva Call and the ICRC) would be discussed at length in the next chapter of this thesis.

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<sup>819</sup> In the absence of any consent at all, the armed non-state actors may not perceive international law as law and may not comply with it.

**CHAPTER 7: ACCOUNTABILITY OF ARMED NON-STATE ACTORS FOR COMPLIANCE OF INTERNATIONAL HUMANITARIAN LAW**

**1. INTRODUCTION**

It has been discussed in the earlier chapters how the present state responsibility mechanism places the threshold too high, and states would never be held responsible for violations of humanitarian law committed by armed non-state actors.

This chapter focuses on armed non-state actors involved in an armed conflict and investigates the existing mechanisms (such as the Geneva Call) which work with armed non-state actors directly to ensure a more humanitarian approach in an armed conflict. This chapter argues for accountability of armed non-state actors through consent based standard setting and compliance monitoring through existing mechanisms such as the Geneva Call and the ICRC.

Consent is not the basis for compliance of an obligation. However, this chapter argues for consent based, standard setting because consent implies commitment and clarity from armed non-state actors to honour an obligation and a failure to abide by such obligations would have a reputational cost.<sup>820</sup> In the absence of consent from armed non-state actors, their commitment to international norms is uncertain and hence, the stake on their reputation is low.<sup>821</sup> Also, it may be noted that while consent demonstrates that the armed non-state actors perceive the norms as binding, it does not guarantee compliance. If an actor has compelling incentive to violate the law, it may do so despite the prior consent.<sup>822</sup> Thus, consent is important but not sufficient for compliance of a norm.

First and foremost, there is a need to distinguish between the seemingly interconnected concepts under international law of responsibility and accountability.

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<sup>820</sup> Andrew T Guzman, 'A Compliance-Based theory of international law' (2002) 90(6) *California Law Review* 1823, 1876 -1877.

<sup>821</sup> *Ibid*, 1877.

<sup>822</sup> *Ibid*, 1846.

Legal responsibility refers to the obligation of a state to compensate for an internationally wrongful act by *restitutio in integrum* or where such reversion to such status quo ante is not possible, by reparation either by payment of money or by other means such as public apology.<sup>823</sup>

The concept of ‘accountability’ on the other hand is wider than ‘responsibility’. When a subject of international law is held responsible for a wrongful act, it has a duty to provide reparation to the victim whereas if an actor is held accountable for a wrongful act, it may not necessarily incur any responsibility.<sup>824</sup> When an entity is held accountable, they have a duty to explain the allegations made against it.<sup>825</sup> The concept of ‘accountability’ has a procedural element.

Nollkaemper and Curtin describe the notion of accountability as “a process in which an actor explains conduct and gives information to others, in which a judgment or assessment of that conduct is rendered on the basis of prior established rules or principals and in which it may be possible for some form of sanction (formal or informal) to be imposed on the actor.”<sup>826</sup>

In the context of armed non-state actors, the responsibility for a wrongful breach of the norms of international law is not straightforward and free from controversy, so the language of ‘accountability’ would be used as opposed to the language of ‘responsibility’ due to the wider connotation of the former term.

This chapter shall argue that consent-based standard setting could be a potential solution for holding armed non-state actors accountable under international law. It shall further examine monitoring mechanisms such as Geneva call and ICRC for accountability of armed non-state actors through standard setting. Lastly, this chapter shall discuss different mechanisms used by Geneva Call and ICRC to induce compliance of humanitarian law by armed non-state actors.

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<sup>823</sup> Frans von der Dunk, ‘Liability versus responsibility in space law: Misconception or misconception?’ (1999) *Proceedings of the Thirty-Fourth Colloquium on the Law of Outer Space* 364.

<sup>824</sup> Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017) 5.

<sup>825</sup> *Ibid.*

<sup>826</sup> D Curtin and A Nollkaemper, ‘Conceptualizing accountability in International and European Law’ (2005) 36 *Netherlands Yearbook of International Law* 3, 8.

## 2. ACCOUNTABILITY OF ARMED NON-STATE ACTORS THROUGH STANDARD SETTING

In the absence of a definitive basis for stipulating primary obligations on non-state actors, it is difficult to impose a regime of international responsibility in relation to the non-state actors.<sup>827</sup> Faced with such difficulty, scholars have proposed accountability through consent based standard setting as an alternative to responsibility in the case of non-state actors.<sup>828</sup> Given the constraints of the responsibility discourse, it has been argued that there is a need to formulate creative solutions outside the domain of international responsibility. Since international responsibility was framed keeping states in mind, international legal responsibility may not be the appropriate mechanism

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<sup>827</sup> Ibid, 54 and 61.

<sup>828</sup> See Jean d'Aspremont et al., 'Sharing responsibility between non-state actors and states in international law: Introduction' (2015) 62(1) *Netherlands International Law Review* 49, 60. This article specifically addresses the issue of shared responsibility where multiple actors are involved in an armed conflict and the harmful outcomes produced by these actors cannot be attributed to a single actor. This article uses shared responsibility in the context of duties and obligations multiple actors (in case of armed non-state actors involved in an armed conflict) voluntarily undertake to prevent violations. Standard setting implies undertaking voluntary commitments from both non-state actors and states. After these commitments are undertaken through deeds of commitment or unilateral declarations, such non-state actors are then monitored by supervisory mechanisms. This clarification is necessary, and caution must be exercised in understanding the terminology of 'shared responsibility' in relation to the context of non-state actors, since such terminology necessarily refers to the concept of 'shared accountability', as opposed to responsibility. Also see Veronika Bilkova, 'Armed opposition groups and shared responsibility' (2015) 62(1) *Netherlands International Law Review* 69. Bilkova argues that although standard setting is not a functional equivalent to the shared responsibility regime, they serve similar function in so far as it ensures that the multiple actors responsible for producing the harmful outcomes are accountable for their actions. Bilkova agrees with the suggestion to have *ex ante* arrangements with mechanisms that set standards and take into account the role of multiple actors in producing harmful outcomes. Thus, responsibility is 'shared' amongst all the actors since states and armed non-state actors have committed to uphold certain standards. Standard setting has been applied to regulate private military companies ('PMCs'). PMCs are regulated through the Montreux Document of 2008 and the International Code of Conduct of 2010. See S MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring Through Self-Regulation-Plus' (2015) 62(1) *Netherlands International Law Review* 119. The existing international legal framework does not specify clear laws which would apply to armed non-state actors in situations of shared responsibility and the discussion on shared responsibility is outside the scope of this thesis. In the present chapter, the aforementioned articles have been referred to and relied upon to illustrate the concept of voluntary, consent based standard setting and supervisory mechanisms for monitoring compliance, devoid of the context of shared responsibility amongst multiple parties.



to ensure compliance of international law by non-state actors. In view of this, adoption of an accountability approach has been mooted as a potential solution to the problem.<sup>829</sup>

It has been suggested that a regulatory mechanism where standards are adopted through discussion and mutual agreement with non-state actors, compliance of which is supervised by a formal monitoring mechanism might provide a more robust framework for ensuring compliance of international norms by non-state actors.<sup>830</sup> Involvement of armed non-state actors in developing the standards, which may not necessarily be legally binding, has also been proposed towards setting up an accountability regime in relation to such non-state actors. Such accountability could be by way of monitoring and reports on compliance of agreed standards without necessarily rendering the obligation to act in compliance of the set standards a legal obligation.<sup>831</sup>

It is this non legally binding character of the obligation to act in consonance with the standards that distinguishes this concept of accountability from that of the concept of wrong based ‘responsibility’ under international law, *stricto sensu* which connotes a binding legal obligation in the formal sense.<sup>832</sup>

Anne Peters clarifies that the concept of ‘standard setting’ is much broader in ambit than mere prescription of norms.<sup>833</sup> ‘Standards’ could be defined as ‘soft law’ that came into existence *de hors* the state through non-state actors.<sup>834</sup> Harm Schepel also argues that standards are not strictly legal norms and fall somewhere in between legal and social norms.<sup>835</sup> These standards created by non-state actors perform certain distinct functions. They perform pre-law function and are often viewed as pre-cursors

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<sup>829</sup> See Jean d’Aspremont et al., ‘Sharing responsibility between non-state actors and states in international law: Introduction’ (2015) 62(1) *Netherlands International Law Review* 49, 51-52.

<sup>830</sup> *Ibid*, 60.

<sup>831</sup> *Ibid*, 61.

<sup>832</sup> *Ibid*, 51.

<sup>833</sup> Anne Peters, Lucy Koechlin and Gretta Finner Zinkernagel, ‘Non-state actors as standard setters: Framing the issue in an interdisciplinary fashion’ in Anne Peters et al (eds) *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 11.

<sup>834</sup> *Ibid*, 16.

<sup>835</sup> *Ibid*, 11.

to future international law.<sup>836</sup> It has been viewed as norm formation through the ‘bottom up’ approach rather than the ‘top down’ approach of legislations.<sup>837</sup>

Standard setting is a step in the right direction as the emphasis is on prevention by putting in place an *ex ante* regime of agreed standards.<sup>838</sup> This pragmatic approach can be equated with soft law. Soft law focuses on the functionality of law rather than the binding nature of the law.<sup>839</sup> Several scholars recognize the significance of soft law and the affect it can have on how actors behave to enable greater co-operation.<sup>840</sup>

Meyer argues that the uniqueness of soft law is that its flexibility allows rules to evolve with the change in circumstances and that it is the best alternative to hard law.<sup>841</sup> Meyer suggests soft law is better suited in situations where a flexible approach is required so that it leads to a positive effect on cooperation with the passage of time.<sup>842</sup> There are several factors that determine whether a state shall comply with laws and the binding quality of law is only one such variable.<sup>843</sup>

Institutional thinkers view soft law as flexible in terms of ease to negotiate but the downside is that soft law may be easier to violate as compared to hard law.<sup>844</sup> Constructivist thinkers believe that soft law is a result of socialization and can be

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<sup>836</sup> Ibid, 500.

<sup>837</sup> Ibid, 500.

<sup>838</sup> Despite the many benefits, the limitation of standard setting could be that armed non-state actors may not comply with the set standards or may even refuse to voluntarily undertake the set standards. See Veronika Bilkova, ‘Armed Opposition Groups and shared responsibility’ (2015) 62(1) *Netherlands International Law Review* 69, 87.

<sup>839</sup> Andrew T Guzman and Timothy Meyer, ‘Soft Law’ in Eugene Kontorovich and Francesco Parisi (eds) *Economic Analysis of International Law* (Edward Elgar Publishing, 2016) 127-128.

<sup>840</sup> Gunther F Handl, W Michael Reisman, Bruno Simma, Pierre Marie Dupuy and Christine Chinkin, ‘A hard look at soft law’ (1988) 82 *American Society of International Law*, 371-395. Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100(2) *The American Journal of International Law* 291, 321.

<sup>841</sup> Timothy Meyer, ‘Soft Law as Delegation’ (2008) 32(3) *Fordham International Law Journal* 888, 890, 898.

<sup>842</sup> Ibid, 937.

<sup>843</sup> Andrew T Guzman and Timothy Meyer, ‘Soft Law’ in Eugene Kontorovich and Francesco Parisi (eds) *Economic Analysis of International Law* (Edward Elgar Publishing, 2016) 130.

<sup>844</sup> Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421, 421-422. Stephen Daly, ‘The Rule of (Soft) Law’ (2021) 32(1) *King’s Law Journal* 3, 4-6.

influenced by processes such as persuasion, norm diffusion etc.<sup>845</sup> Given that soft law can be shaped by social influence, it can produce desirable results and create positive impact on international community. Thus, one may conclude that soft laws are either a precursor to hard law or a supplement to hard law and hold significant persuasive value.<sup>846</sup>

Soft law has also received its fair share of criticism as being unclear, indeterminate and not reflective of law at all.<sup>847</sup> In general, soft law has been relegated as secondary to hard law.<sup>848</sup> Although soft law has sometimes been criticized as confusing the clarity as to what is legally binding and what is not,<sup>849</sup> one may agree that soft law can be viewed as a social norm which is reflective of the normative preference of the international community as a whole.<sup>850</sup>

It is worthwhile to explore how soft law shapes the behavior of armed non-state actors and creates a compliance pull and section 5 of this chapter shall analyze the same in detail. Before we investigate the mechanisms of compliance by armed non-state actors, we will look into the supervisory mechanisms like Geneva Call and ICRC to understand how armed non-state actors are held accountable through standard setting.

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<sup>845</sup> James D Fearon and Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (SAGE Publications, 2002) 52-53. Also see Andrew T Guzman and Timothy Meyer, 'Soft Law' in Eugene Kontorovich and Francesco Parisi (eds) *Economic Analysis of International Law* (Edward Elgar Publishing, 2016) 123.

<sup>846</sup> Dinah L Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 10.

<sup>847</sup> Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 172. Also see Andrew T Guzman and Timothy Meyer, 'Soft Law' in Eugene Kontorovich and Francesco Parisi (eds) *Economic Analysis of International Law* (Edward Elgar Publishing, 2016) 123.

<sup>848</sup> Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 174. Anthony D'Amato, 'International Soft Law, Hard Law, and Coherence' (2018) Northwestern Public Law Research Paper No. 08-01 at <<http://ssrn.com/abstract=1103915>>, last accessed 30 November 2023.

<sup>849</sup> CM Chinkin, 'The challenge of soft law: Development and change in international law' (1989) 38(4) *The International and Comparative Law Quarterly* 850, 851.

<sup>850</sup> Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 175.

### 3. SUPERVISORY MECHANISMS FOR ACCOUNTABILITY OF ARMED NON-STATE ACTORS THROUGH STANDARD SETTING

It is interesting to mention the pioneering work of the NGO Geneva Call, which focuses on armed non-state actors. Geneva Call seeks to ensure respect of humanitarian law by armed non-state actors by encouraging them to sign unilateral agreements called ‘Deeds of Commitment’ where armed non-state actors sign certain commitments to respect humanitarian law.<sup>851</sup> Once a commitment has been signed by an armed non-state actor, Geneva Call oversees the practical implementation.<sup>852</sup> Armed non-state actors who comply with humanitarian law realize they have much to gain by compliance of the same. Since Geneva Call is the most recognised supervisory mechanism monitoring compliance by armed non-state actors, the details and particulars of Geneva Call is discussed below.

#### 3.1 GENEVA CALL

Geneva Call is a humanitarian organisation, which aims to encourage armed non-state actors to comply with international humanitarian law. By 2021, Geneva Call was working with 171 armed non-state actors in 27 countries to increase respect for humanitarian norms.<sup>853</sup> Geneva Call has devised an instrument called the Deed of Commitment<sup>854</sup> whereby armed non-state actors can specifically choose to comply with certain humanitarian norms. The Deed of Commitment is modelled on the existing

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<sup>851</sup> Pascal Bongard and Jonathan Somer, ‘Monitoring armed non-state actor compliance with humanitarian norms: A look at international mechanisms and the Geneva Call Deed of Commitment’ (2011) 93(883) *International Review of the Red Cross* 673, 684-688.

<sup>852</sup> Ibid.

<sup>853</sup> Geneva Call (Annual Report, 2021) 5.

<sup>854</sup> It appears that an instrument such as the ‘Deed of Commitment’ have their theoretical basis in the understanding that promises underlying the commitment are likely to be performed even in the absence of enforcement mechanisms, as observed in several empirical studies. ‘Promises’ are shown to be likely to be complied with even in the absence of enforcement mechanisms due to ‘expectations per se effect’, ‘promising per se effect’ and ‘interaction effect.’ See Dorothee Mischkowski, Rebecca Stone and Alexander Stremitzer, ‘Promises, Expectations, and Social Cooperation’ (2019) 62(4) *Journal of Law and Economics* 687.

humanitarian norms and the relevant human rights norms such that after an armed non-state actor formally signs the Deed, it can be held accountable by Geneva Call.<sup>855</sup>

Geneva Call has developed several Deeds: (a) Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Co-operation in Mine Action in 2000 (b) Deed of Commitment for the Protection of Children from the effects of Armed Conflict in 2010 (c) Deed of Commitment for the Prohibition of Sexual Violence in situations of Armed Conflict and towards the Elimination of Gender Discrimination in 2012 (d) Deed of Commitment for the Protection of Health Care in Armed Conflict in 2018. These Deeds of Commitment are reflective of international legal framework.

Geneva Call keeps a record pertaining to the armed non-state actors which have signed the Deed of Commitment while simultaneously also monitoring the execution of the commitments.<sup>856</sup> Geneva Call relies on field investigation through third party sources and its own observation.<sup>857</sup> While Geneva Call encourages self-monitoring and reporting, it also uses external monitoring.<sup>858</sup>

Geneva Call supervises the implementation of the Deed of Commitment by requiring the armed non-state actors to report on the compliance of their commitments which must provide details of violations, if any.<sup>859</sup> These reports are made compulsory by Geneva Call to enable them to track progress by armed non-state actors and identify areas which need support. Armed non-state actors have been willing to co-operate in monitoring mechanisms – submitting reports and information to Geneva Call.<sup>860</sup> Geneva Call studies the report and is free to seek additional information and make

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<sup>855</sup> Geneva Call (Annual Report, 2021) 5.

<sup>856</sup> See Geneva Call <<https://www.genevacall.org/where-we-work/>>, last accessed 30 November 2023.

<sup>857</sup> Pascal Bongard and Jonathan Somer, 'Monitoring armed non-state actor compliance with humanitarian norms: A look at international mechanisms and the Geneva Call Deed of Commitment' (2011) 883(93) *International Review of the Red Cross* 673, 702.

<sup>858</sup> *Ibid*, 705.

<sup>859</sup> *Ibid*, 690.

<sup>860</sup> *Ibid*.

suitable suggestions if required.<sup>861</sup> Reports by armed non-state actors are not made public.

Geneva Call's Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action is particularly important. Fifty-four non-state actors have signed the Deed since its launch in 2000 and the Deed received wide compliance by the armed non-state actors.<sup>862</sup> In case of violation, Geneva Call relies on monitoring efforts such as publishing reports and following up with the violators.<sup>863</sup> The effectuation mechanism used by Geneva Call is primarily reputational with focus on capacity building and dissemination of information on the existing humanitarian law norms.

For example, there were allegations that armed non-state actors Moro Islamic Liberation Front ('MILF') in Philippines was not honouring its Deed of Commitment on Anti-Personnel ban.<sup>864</sup> Geneva Call inquired into the allegations and worked with MILF to ensure they were fulfilling all the obligations under Anti-Personnel mine ban. It recommended MILF amend its internal code of conduct to reflect the clause on anti-personnel mine ban and spread greater awareness on this subject.<sup>865</sup> The MILF agreed to these suggestions by Geneva Call.

It is also worth mentioning that the feature of self-reporting in Geneva Call requires the armed non-state actors to reflect on the international humanitarian law issues, discuss the difficulties they face and address the non-compliance of international

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<sup>861</sup> Reports available under the section of 'Resources' on Geneva Call <<http://www.genevacall.org>>, last accessed 30 November 2023.

<sup>862</sup> Geneva Call (Annual Report, 2020) 15. Also see Kristian Skrede Gleditsch, Simon Hug, Livia Isabella Schubiger and Julian Wucherpfennig, 'International Conventions and Nonstate Actors' (2018) 62(2) *The Journal of Conflict Resolution* 346, 366.

<sup>863</sup> Ulrich Schneckener, Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 102.

<sup>864</sup> ICBL, *Landmine Monitor Report 2008: Toward a Mine-free World* (Mine Action Canada, 2008) 587.

<sup>865</sup> Pascal Bongard and Jonathan Somer, 'Monitoring armed non-state actor compliance with humanitarian norms: A look at international mechanisms and the Geneva Call Deed of Commitment' (2011) 883(93) *International Review of the Red Cross* 701.

humanitarian law, if any.<sup>866</sup> Self-reporting has the unique opportunity to provide the armed non-state actor with the opportunity to take accountability for their commitment.<sup>867</sup>

The recent experience has shown that Geneva Call has achieved promising results in its endeavor to induce compliance of international humanitarian law by armed non-state actors through its focus on capacity building, education and training through workshops and awareness building exercises.<sup>868</sup> In 2022, Geneva Call undertook an ambitious assignment of engaging with members of self-defense armed groups in Burkina Faso whereby such members were trained on various aspects of international humanitarian law norms with special emphasis on protection of children in armed conflict.<sup>869</sup> The exercise led to the signing of 3 Unilateral Declarations on the education and protection of children by three armed groups operating in the east, north and Boucle du Mouhoun areas.<sup>870</sup>

Additionally, Geneva Call also organized training sessions for frontline combatants in Ukraine in 2022.<sup>871</sup> This also resulted in several of the frontline armed non-state actors making formal commitments in the form of Unilateral Declaration ensuring unimpeded humanitarian access such as the one signed by the Georgian National Legion in June 2022.<sup>872</sup> Another aspect of the success of Geneva Call in achieving enhanced commitment to compliance was its adoption of a broader terminology for its target group. In 2022, Geneva Call moved away from established terminology of armed non-state actors to the more nuanced terminology of armed groups and *de facto* authorities, based on its in-depth field research and consultations.<sup>873</sup>

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<sup>866</sup> Sandesh Sivakumaran, 'Implementing Humanitarian Norms through Non-State Armed Groups' in Heike Krieger (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015) 125-146.

<sup>867</sup> Ibid.

<sup>868</sup> Geneva Call (Annual Report, 2021) 15.

<sup>869</sup> Geneva Call (Annual Report, 2022) 16.

<sup>870</sup> Ibid.

<sup>871</sup> Geneva Call (Annual Report, 2022) 22.

<sup>872</sup> Ibid.

<sup>873</sup> Ibid, 3.

This shift is important since the ground experience revealed significant number of armed groups designate themselves as part of the state but also continue to operate outside the command structure of the state.<sup>874</sup> The widening of the terminology from armed non-state actors to armed groups and *de facto* authorities results in broader engagement with groups with diverse structures.

The recent experience has also shown that while the decision of armed non-state actors to formally commit to compliance of international humanitarian law has largely been independent of ratification by the state party, there has been a positive influence on states to adopt the humanitarian norms when the opposing armed group has committed to comply.<sup>875</sup> It has resulted in state parties feeling social pressure to ratify conventions espousing international humanitarian law norms after non-state actors formally committed to adhere to these norms. An example of this was the SPLM/A signing the Deed of Commitment for adherence to a total ban on anti-personnel mines in 2001 resulting in Sudan ratifying the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their destruction two years later.<sup>876</sup> A similar example was KDP signing the Deed of Commitment for adherence to Ottawa Convention resulting in the Iraqi government following suit.<sup>877</sup>

These examples clearly evidence armed non-state actors independently committing to adherence of international humanitarian law norms before state's ratification to adhere to Ottawa Convention. This engagement between armed non-state actors and Geneva Call should be emphasized because it encourages all the parties to the armed conflict to observe humanitarian law. Thus, it may be concluded that Geneva Call has seized an opportunity to make armed non-state actors an active participant in protecting civilian rights and humanitarian values in an armed conflict.

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<sup>874</sup> Ibid, 8.

<sup>875</sup> Geneva Call (Annual Report, 2022) 22

<sup>876</sup> Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Marcos D Kotlik & Manuel J Ventura (eds) *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Springer, 2020) 438. Also see M Barber, 'Preface' in Geneva Call, *Armed Non-State Actors and Landmines: Volume I* (2005) 1.

<sup>877</sup> See Geneva Call (Annual Report, 2008) 17.



### 3.2 ICRC

ICRC is committed towards implementing and enforcing the humanitarian law in armed conflicts across the world. According to ICRC, it is important to engage the armed non-state actors when presenting the humanitarian law by strategically adapting the law to the relevant context.<sup>878</sup> Such engagement leads to a positive acceptance of the humanitarian law, which results in greater respect for such laws by armed non-state actors.<sup>879</sup> ICRC discourages ‘academic’ presentation of the law and follows a more operational or practical approach when discussing the law.<sup>880</sup>

To be persuasive, it is important to confine the discussion to the specific situation at hand. Thus, it is important to be mindful of the motives of the armed non-state actors and their level of competence. ICRC repeatedly stresses the need to engage with each of the parties to the conflict. Most recently in 2020, ICRC acted as a mediator for release of around 1000 detainees belonging to the Ansarullah Movement from Yemeni authorities.<sup>881</sup> Similarly, the ICRC has also mediated for release of civilians or members of armed forces held by armed non-state actors, such as the release of around 1800 detainees held by armed non-state actors in Columbia.<sup>882</sup>

ICRC emphasizes on the long-term relationship building to access better information on the real challenges on ground in an armed conflict such that appropriate norms can be formulated accordingly. Such a gesture would also lead to the non-state actor’s participation in law building, which in turn would lead to greater ownership of the laws and motivation towards compliance.

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<sup>878</sup> ICRC, ‘Increasing respect for International Humanitarian Law in Non-international Armed Conflicts’ (Geneva, February 2008) 11-13.

<sup>879</sup> Ibid.

<sup>880</sup> Ibid, 13.

<sup>881</sup> International Review of the Red Cross, ‘ICRC Engagement with Non-State Armed Groups: Why, How, For what purpose, and other Salient Issues’ (2020) 102(915) *International Review of the Red Cross* 1087, 1091.

<sup>882</sup> Ibid.

ICRC has used bilateral dialogues as an instrument to encourage parties in an armed conflict to execute their commitments to comply with humanitarian law.<sup>883</sup> In such confidential dialogues with the parties, ICRC steps in to monitor and remind the parties of its various commitments and also engages in training activities such as teaching the existing law, promoting awareness of humanitarian issues and holding discussions to ensure greater understanding of the law.<sup>884</sup> ICRC specifically targets non-state groups such as armed/security forces, armed non-state actors, police etc. whose behaviour has an impact on the victims of an armed conflict.<sup>885</sup> Thus, ICRC's main focus is to educate such groups on humanitarian law to improve conditions of victims and other civilians in an armed conflict.

In the 2005 Study of the Customary Humanitarian Law initiated by the ICRC at the request of the International Conference of the Red Cross and Red Crescent, one of the findings of the Report was that the violations of international humanitarian law takes place due to lack of respect for the rules along with the lack of awareness of these rules by the parties to the conflict and the general public.<sup>886</sup> The Report observed that the humanitarian laws per se are adequately in place.<sup>887</sup>

According to ICRC in July 2022, 175 million people lived in territory which was under the control of armed groups, out of which 64 million lived in territory which was in complete control of armed groups as opposed to 111 million living under territory fluidly controlled by armed groups.<sup>888</sup> Given these statistics, it may be concluded that the efforts placed by ICRC on dissemination of humanitarian law to armed non-state actors is an important factor in ultimately ensuring its success.

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<sup>883</sup> Ibid, 27.

<sup>884</sup> Ibid.

<sup>885</sup> Ibid, 15.

<sup>886</sup> Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87(857) *International Review of the Red Cross*, 176.

<sup>887</sup> Ibid.

<sup>888</sup> Matthew Bamber-Zryd, 'ICRC engagement with armed groups in 2022' (12 January 2023) <<https://blogs.icrc.org/law-and-policy/2023/01/12/icrc-engagement-armed-groups-2022/>> last accessed 30 November 2023.

## 4. INSTRUMENTS

The following are the instruments, which non-state actors can voluntarily elect to apply to their conduct in situation of an armed conflict:

### 4.1 UNILATERAL DECLARATIONS

These are commitments signed by an armed non-state actor to abide by the obligations laid down under Geneva Conventions and Additional Protocols.<sup>889</sup> As discussed earlier, this compliance is monitored by the NGO, Geneva Call. Supervisory mechanisms like Geneva Call follow up on the Deeds of Commitment and other commitments signed by the armed non-state actors. They also regularly monitor measures undertaken to implement their commitments in a regular time frame. Geneva Call also engages other stakeholders such as the UN agencies, government, and local organizations to gather greater overall support for implementation of humanitarian standards. Geneva Call shares reports with leaders of armed non-state actors to take appropriate remedies to check their violations.<sup>890</sup> After these dialogue-based avenues have been exhausted, Geneva Call considers publicly reporting the violations of armed non-state actors.<sup>891</sup>

### 4.2 CODES OF CONDUCT

Armed non-state actors also draw up Codes of Conduct such as the Code of Conduct signed by the Taliban in 2009.<sup>892</sup> Codes of Conduct could be understood as an

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<sup>889</sup> Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1) *The European Journal of International Law* 219, 261.

<sup>890</sup> See Geneva Call < <https://www.genevacall.org/how-we-work/> > last accessed 30 November 2023.

<sup>891</sup> Ibid.

<sup>892</sup> Cedric Ryngaert and Anneleen Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 (3) *Journal of Conflict and Security Law* 443, 452.

internal document adopted by the armed non-state actors to govern their conduct.<sup>893</sup> It is imperative that such Code of Conduct is widely circulated among the members of the group and the leaders of the armed group oversee the enforcement of the Code and if required through internal punishment.<sup>894</sup> Taliban's Code of Conduct took the obligations to minimize civilian casualties, ban torture and avoid suicide attacks.<sup>895</sup> Even though this Code of Conduct was criticized for trying to appease Afghan population rather than enforce international humanitarian law, it is an example of an armed non-state actor complying with humanitarian law.

Another example of a Code of Conduct would be the one adopted by the Free Syrian Army ('FSA') in May 2014, entitled 'The Pledge of the Syrian Revolutionaries from the Battlefields' which accepted that the acts of FSA in an armed conflict have certain responsibilities.<sup>896</sup> Nepal's CPN-Maoists also had an effective Code of Conduct which incorporated strategies to get the support of the civilian population by ensuring proper training and education of the members of the armed group.<sup>897</sup>

### **4.3 BILATERAL AGREEMENTS**

Bilateral agreements are drawn between the armed non-state actors and the state against which the armed non-state actor is in conflict or even between the armed non-state actors and the UN entities (mostly relating to humanitarian assistance).<sup>898</sup> Example of such an agreement would be the agreements during the civil war in Afghanistan in

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<sup>893</sup> Veronika Bilkova, 'Armed Opposition Groups and Shared Responsibility' (2015) 62(1) *Netherlands International Law Review* 69, 86.

<sup>894</sup> Ben Saul, 'Improving Respect for International Humanitarian Law by Non-state Armed Groups' in *Humanitarian Engagement with Non-state Armed Groups* (Chatham House, 2016) 45.

<sup>895</sup> Cedric Ryngaert and Anneleen Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16(3) *Journal of Conflict and Security Law* 443, 452.

<sup>896</sup> See also Veronika Bilkova, 'Armed Opposition Groups and Shared Responsibility' (2015) 62(1) *Netherlands International Law Review* 69, 86.

<sup>897</sup> Ben Saul, 'Improving Respect for International Humanitarian Law by Non-state Armed Groups' in *Humanitarian Engagement with Non-state Armed Groups* (Chatham House, 2016) 45.

<sup>898</sup> Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1) *The European Journal of International Law* 219, 261.

1982 between the Mujahideen and the Afghan army and also between the Mujahideen and the ICRC.<sup>899</sup> The Mujahideens agreed to the obligations laid down under common article 3 of the Geneva Convention and the humanitarian law on prisoners of war.<sup>900</sup> Even during the conflict in Yugoslavia, special agreements were entered into between various armed non-state actors and the ICRC wherein the armed non-state actors agreed to comply with the common article 3 of the Geneva Convention.<sup>901</sup>

Bilateral agreements are enforced by the ICRC through dialogue, repeated reminders to the party of its obligations, compliance monitoring, regular reporting and training and capacity building.<sup>902</sup>

## **5. GENEVA CALL AND THE ICRC: DIFFERENT MECHANISMS TO INDUCE COMPLIANCE OF HUMANITARIAN LAW BY ARMED NON-STATE ACTORS**

Compliance has been defined as “behavioral conformity with existing norms and regulations.”<sup>903</sup> Rational choice theory explains that self-interest is a major factor for compliance. In the 2007 Report on International Humanitarian Law and the ‘Challenges of Contemporary Armed Conflicts’, the ICRC observed that, to induce compliance, one ought to address the unique characteristics of the conflict and “to understand a party’s motivations and interests in order to explain why it is in the party’s interest to comply with the law.”<sup>904</sup> Traditional incentives such as reciprocity,

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<sup>899</sup> Cedric Ryngaert and Anneleen Van de Meulebroucke, ‘Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms’ (2011) 16(3) *Journal of Conflict and Security Law* 443, 452.

<sup>900</sup> See Felix Ermacora, ‘Report on the situation of human rights in Afghanistan by Special Rapporteur’, UN DOC E/CN.4/1985/21, February 1985, 29-29 [104].

<sup>901</sup> Cedric Ryngaert and Anneleen Van de Meulebroucke, ‘Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms’ (2011) 16(3) *Journal of Conflict and Security Law* 443, 452.

<sup>902</sup> Michelle Mack, ‘Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts’ (ICRC, 2008) 14.

<sup>903</sup> Hyeran Jo, ‘Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?’ (2016) 19 *Yearbook of International Humanitarian Law* 63, 65.

<sup>904</sup> ICRC, ‘International humanitarian law and the challenges of contemporary armed conflicts’ (2007) 89(867) *International Review of the Red Cross* 719, 746.

reputation and retaliation are important for compliance with the law. Apart from reputational factors, rewards can also be a strong motivating factor for compliance and this section shall discuss the same in detail. Lastly, soft laws also have huge persuasive value and will be discussed in this section to illustrate their impact on compliance by armed non-state actors.

### **5.1. FACTORS INFLUENCING COMPLIANCE: REPUTATION, RECIPROCITY AND RETALIATION**

Law and economics literature has mostly focused on reputation, reciprocity, and retaliation to explain compliance with international legal obligations.<sup>905</sup> Reputation is acquired based on an actor's past conduct, and it helps predict the future conduct of the actor.<sup>906</sup> Every time an actor complies with legal obligations, it demonstrates the willingness to fulfil its legal commitments. Based on the compliance record of the actor, it develops either a good reputation or a bad reputation. A good reputation enhances the future credibility of the actor and enables them to receive co-operative benefits whereas bad reputation leads to poor co-operative arrangements in the future.<sup>907</sup> Reputation is a compelling compliance mechanism when there is a lack of coercive enforcement.

Reciprocity relies on mutual co-operation between the parties - violation from one party leads to withdrawal of co-operation from the other.<sup>908</sup> Thus, for reciprocity to encourage compliance, the threat of reciprocal violation must be of relevance to the violating party.<sup>909</sup> With respect to compliance of international humanitarian law, reciprocal non-compliance is undesirable and hence, the focus must be on reciprocal compliance. Sometimes a violation may lead to retaliation if the retaliating party considers the payoff as greater than the cost of retaliation. Retaliatory action signals

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<sup>905</sup> Alan O' Sykes and Andrew Guzman, 'Economics of International Law' in Francesco Parisi (ed) *The Oxford Handbook of law and economics: Volume 3: Public Law and legal institutions* (Oxford University Press, 2017) 439, 444.

<sup>906</sup> Andrew T Guzman, *How International Law Works* (Oxford University Press, 2008) 47.

<sup>907</sup> Ibid.

<sup>908</sup> Ibid, 54.

<sup>909</sup> Ibid, 57.

strength to the violating party and conveys that the party willing to retaliate takes a violation seriously and is willing to punish the violator.<sup>910</sup>

Geneva Call and ICRC encourage compliance of international humanitarian law by armed non-state actors by dissemination of awareness about international humanitarian law and the benefits of compliance by highlighting the effect of compliance on the image and perception of the non-state actors in the international community.<sup>911</sup>

Geneva Call specifically studies each armed conflict so it can convince armed non-state actors to comply with the international humanitarian law. Geneva Call primarily highlights the reputational benefits compliance can bestow on armed non-state actors along with the reciprocal benefits such as their detainees receiving the reciprocal good treatment.<sup>912</sup>

Geneva Call envisages a policy of publishing the instances of violations of international humanitarian law by the armed non-state actors. This serves as a deterrent to the reputation and public image of armed non-state actors in the international community, which in turn results in the non-state actors being both politically and materially disinclined from undertaking such breach of international humanitarian law.

ICRC explains armed non-state actors why it is in their best interest to respect international humanitarian law.<sup>913</sup> They argue that if an armed non-state actor enjoys the reputation for treating prisoners of war in accordance with the established international humanitarian law standards, they may have people surrendering easily.<sup>914</sup> While reciprocity in terms of application of international humanitarian law may not be

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<sup>910</sup> Ibid, 58.

<sup>911</sup> Ulrich Schneckener and Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 79-111.

<sup>912</sup> Claudia Hofmann and Ulrich Schneckener, 'Engaging non-state armed actors in state and peacebuilding: Options and strategies' (2011) 93(883) *International Review of the Red Cross* 1, 16. Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press, 2020) 427- 451.

<sup>913</sup> Ulrich Schneckener and Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 79-111.

<sup>914</sup> Ibid.

guaranteed, there is high likelihood that the other party will treat the prisoners of war well if their own prisoners of war are being treated humanely.<sup>915</sup> Reciprocal expectations matter in a non-international armed conflict. Former members of an armed non-state actor in Chad revealed that they were instructed not to harm the civilians because they were afraid of reciprocal retaliation/harm by their family members.<sup>916</sup>

Reciprocity is a strong factor as to why states co-operate. As discussed earlier, when parties have an incentive to non-comply with their obligation, fear of reciprocal non-compliance from the other party can encourage co-operation.<sup>917</sup> The UN Secretary General stressed the need to emphasize on reciprocity in treatment as an incentive for armed non-state actors to comply with international humanitarian law.<sup>918</sup>

In situations where armed non-state actors do not comply with international humanitarian law concerning civilians, compliance invariably improves if there is any threat of retaliation. This threat of retaliation can come either from the civilian themselves, the illegality of their retaliation notwithstanding; or from the soldiers of the opposing side.<sup>919</sup> Fear of retaliation induces an overall culture of compliance.<sup>920</sup> Retaliation as a mechanism is costly for both the parties and rationally must be employed in scenarios where it can result in future compliance by the violating party.<sup>921</sup> Retaliation deters continued non-compliance by the armed non-state actors.

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<sup>915</sup> Ibid.

<sup>916</sup> Olivier Bangerter, 'Comment – Persuading armed groups to better respect international humanitarian law' in Heike Krieger (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015) 112-124.

<sup>917</sup> Jana von Stein, 'The engines of compliance' in JL Dunoff and MA Pollack (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 480. Also see Andrew T Guzman, *How international law works: A rational choice theory* (Oxford University Press, 2008) 55-58.

<sup>918</sup> UN Secretary General, 'Report of the Secretary-General on the protection of civilians in armed conflict', UN Doc S/2012/376, 22 May 2012, 10 [41].

<sup>919</sup> Heike Krieger, 'Conclusion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 521-523.

<sup>920</sup> Alexander Thompson, 'Coercive enforcement of international law' in JL Dunoff and MA Pollack (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 502. Also see Louis Henkin, *International law: Politics and values* (Martinus Nijhoff, 1995) 50.

<sup>921</sup> Anne van Aaken and Betül Simsek, 'Rewarding in international law' (2021) 115(2) *American Journal of International Law* 195, 201.



ICRC also highlights how post-conflict reconciliation is easier when armed non-state actors observe international humanitarian law.<sup>922</sup> ICRC emphasizes how violations of international humanitarian law has a long-term effect of damaging an actor's reputation, or loss of support by the local population.<sup>923</sup> ICRC has also observed that armed non-state actors often comply with humanitarian laws because attacks against the civilian population disrupt activities like supply of weapons etc.<sup>924</sup> Observing international humanitarian law may preserve resources and is hence, a better strategy in the long run.<sup>925</sup>

Geneva Call and ICRC have strong ties with the local population as well and use their network to create social pressure on the armed non-state actors.<sup>926</sup> Geneva Call seeks to develop a relationship of trust with the armed non-state actors thereby making the non-state actors an integral participant in the process of enforcement of international humanitarian law.<sup>927</sup>

Sivakumaran argues that armed non-state actors consider international humanitarian law as binding to avoid being identified as a terrorist organization and to have greater legitimacy in international community.<sup>928</sup> The more an armed non-state actor complies with international humanitarian law, the more legitimacy it gains. He elaborates how lack of legitimacy has adverse consequence such as lack of support for the armed non-state actor from their followers and problems such as frozen funds from abroad.<sup>929</sup> He cites an example of LTTE, which suffered losses to the tune of \$45-50

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<sup>922</sup> Ulrich Schneckener, Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 79-111.

<sup>923</sup> Ibid.

<sup>924</sup> ICRC, *The roots of restraint in war* (2018) 19 at <<https://www.icrc.org/en/publication/roots-restraint-war>>, last accessed 30 November 2023.

<sup>925</sup> Ibid.

<sup>926</sup> Ulrich Schneckener and Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 79-111.

<sup>927</sup> Ibid.

<sup>928</sup> Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369, 386.

<sup>929</sup> Ibid, 387.

million on account of being declared a terrorist outfit under the UK Terrorism Act, 2001.<sup>930</sup> He further demonstrates how acquiring legitimacy as a group has advantages such as acquiring greater support from the local population and international community.<sup>931</sup> Wide support to the armed non-state actor in turn puts pressure upon the relevant government to enter into a dialogue with the armed non-state actor.

It has been suggested that compliance is driven by recognition of the various benefits that accrue from the legitimacy that arises from compliance of international norms, for example, such legitimacy could result in better mobilization of funds and logistical support which are cut off upon being designated as an illegitimate or terrorist outfit.<sup>932</sup>

Upon being designated a rogue terrorist outfit, not only can popular support for the cause espoused by the outfit diminish, it can also render the logistics of tactical resources such as funds enormously more difficult. As already stated hereinabove, due to designation of LTTE as a terrorist outfit, it is estimated that LTTE lost out on funding to the tune of USD 45-50 million.

Another instance of reputation materially affecting a non-state actor would be the example of UNSC Resolution 1173 of 1998 sanctioning trade in Angolan diamonds from UNITA (the National Union for the Total Independence of Angola, an armed non-state actor) controlled mines.<sup>933</sup> The thriving trade in Angolan diamonds by UNITA (an armed non-state actor founded in 1966 as a rebel armed independence movement), sourced from territories controlled by it by employing slave and child labour, was the principal source of financing its operational costs.<sup>934</sup> Although UNITA continued to trade in Angolan diamonds in illegal black market subsequent to imposition of the sanction, it is estimated that the sanction reduced active trade in Angolan conflict

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<sup>930</sup> Ibid.

<sup>931</sup> Ibid.

<sup>932</sup> Ibid, 386.

<sup>933</sup> UNSC S/RES/1173 (1998), 12 June 1998, 3[12].

<sup>934</sup> See Jake H Sherman, 'Profit vs. Peace: The Clandestine Diamond Economy of Angola' (2000) 53(2) *Journal of International Affairs* 699, 702.

diamonds substantially, bringing to grinding halt a large proportion of the revenue stream of UNITA.<sup>935</sup>

Similarly, the issue of unethical sourcing of diamonds by employing child labour and bonded labour, and trade in such diamonds by armed non-state actors to fund their military objectives resulted in the enactment of the Kimberley Process Certification Scheme in 2003.<sup>936</sup> The Kimberley Certification Process seeks to certify ethically produced diamonds at the time of export, thus preventing trade in unethically sourced conflict diamonds by its 82 member states. Statistically, the Kimberley Process has been helpful to reduce trade in conflict diamonds, which has fallen to less than 1% in the international market compared to the 1990s where the figure stood as high as 15%.<sup>937</sup>

ICRC especially uses argument of economic self-interest to induce armed non-state actors to comply with international humanitarian law such as how compliance may lead to greater foreign support.<sup>938</sup> The example of diamond trade by armed non-state actors corroborates such emphasis on economic self-interest as a persuasive means to induce compliance.

However, it is worth mentioning that reputation will create a compliance pull in armed non-state actors only if they value support of the local population. Armed non-state actors pursuing long-term political objectives are likely to care about their reputation. If the armed non-state actor aims to replace the existing government, reputation of the armed non-state actor is essential – both nationally and internationally.<sup>939</sup> Armed non-state actors with political ambition are more sensitive to

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<sup>935</sup> Ibid, 714.

<sup>936</sup> See Kimberley Process, ‘Working groups and committees’ <<https://www.kimberleyprocess.com/en/working-groups-and-committees>>, last accessed 30 November 2023.

<sup>937</sup> European Commission, ‘Kimberley Process – United to fight blood diamonds!’, MEMO/07/236, 11 June 2007.

<sup>938</sup> Heike Krieger, ‘Conclusion’ in Heike Krieger (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015) 504-551.

<sup>939</sup> Ibid.

reputation. Armed non-state actors with a developed military are more likely to have political ambitions due to their high military strength to fight the state government.<sup>940</sup>

ICRC and Geneva Call work on the assumption that the armed non-state actor cares about its reputation.<sup>941</sup> It is unanimously agreed that reputation is a powerful motive for armed non-state actors to comply with international humanitarian law. However, apart from damage to reputation, there is little consequence for breach of standards by armed non-state actors.

## **5.2. REWARDING AND OUTCASTING**

One of the central issues with international legal framework is that there is no centralized international mechanism to enforce compliance of international law. The existing academic discourse on compliance theory is occupied with negative incentives and there is very little discussion on ‘rewarding’ as a mechanism for compliance of international law.<sup>942</sup>

Rewards in the context of a compliance mechanism has been defined as an improvement on the subject’s “value position relative to a baseline of expectations.”<sup>943</sup> As such in order to define and appreciate the concept of reward it is imperative that one first defines the baseline expectation of the subject. For example, a subject expecting a payment of 10\$ upon receipt of 5\$ might not construe the same as reward. This is so since the baseline expectation of the subject was to receive 10\$ and the payout in the above example did not constitute an improvement over such baseline expectation.<sup>944</sup> As such, as it can be seen from the above example, rewards itself is a relative concept and is linked to the baseline expectation of a subject in each circumstance.

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<sup>940</sup> Ibid, 528.

<sup>941</sup> Ibid.

<sup>942</sup> Anne van Aaken and Betül Simsek, ‘Rewarding in international law’ (2021) 115(2) *American Journal of International Law* 195, 196.

<sup>943</sup> Ibid, 196.

<sup>944</sup> Ibid, 203. David A Baldwin, ‘The Power of Positive Sanctions’ (1971) 24(1) *World Politics* 19, 23.

The theoretical underpinning for usage of reward as a tool for inducing compliance of international norms is that if the benefit that a subject derives from a reward outweighs the benefit it derives from non-compliance of a norm, such rational actor would be induced to comply in view of the reward.<sup>945</sup>

Since a rational choice framework operates upon a cost benefit analysis, if instead of rewards, a penalty offsets the benefit that a subject derives from non-compliance of a norm, then that would also be an equally effective outcome.<sup>946</sup> Therefore, a simplistic cost benefit explanation does not sufficiently address as to why rewards should be chosen over penalties as a preferred tool for inducing compliance. Rational choice theory suggests that a rational enforcer will opt for the less costly tool of compliance.<sup>947</sup> There is cost attached to both rewards and penalties but there are many reasons for choosing rewards as a preferred means for inducing compliance.

The usage of reward as a tool for compliance results in a pareto efficient outcome and as such is likely to induce greater compliance.<sup>948</sup> It has also been suggested that employing reward as a tool for inducing compliance enhances the long-term reputation of the enforcer which can induce greater co-operation between the parties as opposed to deploying penalties.<sup>949</sup>

In contrast to the rational choice approach, another perspective from which the reward versus penalty debate can be looked at is the behavioral approach. The field of behavioral psychology suggests that the two tools (reward and penalty) have a very different behavioral perception and response. Rewards or penalties carries different potential response from the target subject. Threats trigger a fight or flight response by triggering negative emotions such as fear which results in reduction of rational decision making and likelihood of knee-jerk, fear driven overtures.<sup>950</sup> It enhances the biases in

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<sup>945</sup> Ibid, 197.

<sup>946</sup> Ibid, 218.

<sup>947</sup> Ibid.

<sup>948</sup> Ibid, 197. Penalties operate on the fundamental principal of making the non-compliant subject worse off, whereas rewards on general operate on the fundamental objective of rendering one subject better off and no-one worse off.

<sup>949</sup> Ibid, 225.

<sup>950</sup> Ibid, 231.

the target subject thereby resulting in enhancement of possibility of an irrational outcome.<sup>951</sup> As such, employing threats and/or penalties might also carry strong negative reciprocity from the target subject resulting in further escalation of the conflict and increasing non-compliant behavior.<sup>952</sup>

As opposed to the above, employing rewards do not carry any of the above negatives and increases co-operation between the parties to arrive at a mutually beneficial outcome. It has been argued that rewards de-escalate existing conflicts, promote mutual trust and could be a better tool for fostering compliance.<sup>953</sup>

Presently, Geneva Call and ICRC use both the tools (rewards and penalties) to induce compliance of international humanitarian law by armed non-state actors. Geneva Call publishes both the violations and the instances of compliance of international humanitarian law by armed non-state actors.<sup>954</sup> Reporting instances of compliance is useful because armed non-state actors look for greater legitimacy in the eyes of the local population and international community, and conversely, publicity of instances of violations adversely affect the image and reputation of the non-state actor.<sup>955</sup>

Article 7 of the Deed of Commitment banning anti-personnel mines gives Geneva Call the option to publish both instances of compliance and violations by armed non-state actors.<sup>956</sup> In 2019, Geneva Call acknowledged the destruction of 2,485

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<sup>951</sup> Ibid.

<sup>952</sup> Ibid, 232.

<sup>953</sup> Ibid, 235. Prospect theory suggests that people are loss averse and place more value on potential loss than the prospect of a potential gain. Penalty results in a loss of status quo and thus, the subject places a higher value to winning the conflict and is generally less likely to concede. In contrast, reward increases the co-operation between the parties leading to de-escalation of hostilities.

<sup>954</sup> See Article 7 of the Deed of Commitment Banning Anti-Personnel Mines.

<sup>955</sup> It may be illustrated that in 2018, Geneva Call announced the success of an armed non-state actor (Polisario Front) in Western Sahara in fulfilling its obligations under the Deed of Commitment, which required them to abstain from using anti-personnel mines. See Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press, 2020) 427- 451.

<sup>956</sup> See Article 7 of the Deed of Commitment Banning Anti-Personnel Mines. Also see Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press, 2020) 427- 451.

stockpiled anti-personnel mines in Western Sahara by Polisario Front to honour the Deed of Commitment to ban anti-personnel mines signed in 2005.<sup>957</sup> Since Polisario Front signed the Deed of Commitment in 2005, the total number on anti-personnel mines destroyed by the armed non-state actors are 20,493.<sup>958</sup>

Geneva Call has also highlighted cases of violations such as the violation by Kurdish People's Protection Units; Women's Protection Units; and Democratic Self-Administration in Rojava ('YPG/YPJ/DSA') in Syria.<sup>959</sup> In 2018, Geneva Call noted that the YPG/YPJ/DSA signed the Deed for the Protection of Children in 2014, and yet it violated some of its commitments.<sup>960</sup> Simultaneously, in the same newsletter, Geneva Call applauded the measures taken by YPG/YPJ/DSA to address the said violations which included increasing the minimum age of voluntary members and 'non-combatant' category to 17.<sup>961</sup>

ICRC has launched 'IHL in Action: Respect for the Law on the Battlefield' database to document compliance with international humanitarian law in armed conflicts.<sup>962</sup> ICRC intends to focus on positive reciprocity of international humanitarian law norms to further improve the compliance of such norms. This project aims to highlight positive case situations of compliance so there is focus on instances of compliance rather than focus on violations.<sup>963</sup> ICRC believes such an initiative can encourage more widespread compliance with international humanitarian law.

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<sup>957</sup> Geneva Call, 'Final destruction of 2,485 stockpiled anti-personnel mines in Western Sahara' (22 January 2019) available at <<https://genevacall.org/news/final-destruction-of-2485-stockpiled-anti-personnel-mines-in-western-sahara/>>, last accessed 30 November 2023.

<sup>958</sup> Ibid.

<sup>959</sup> Geneva Call, 'Syria: New measures taken by the Kurdish People's Protection Units to stop recruiting children under 18' (22 June 2018) available at <<https://www.genevacall.org/news/syria-new-measures-taken-by-the-kurdish-peoples-protection-units-to-stop-using-children-under-18/>>, last accessed 30 November 2023.

<sup>960</sup> Ibid.

<sup>961</sup> Ibid.

<sup>962</sup> "IHL in Action: Respect for the Law on the Battlefield" project by ICRC documents case studies of compliance with international humanitarian law in armed conflicts. See ICRC, 'IHL in Action: Respect for the Law on the Battlefield' <<https://ihl-in-action.icrc.org/>>, last accessed 30 November 2023.

<sup>963</sup> Ibid.

Evolutionary psychology also corroborates the finding that human beings strategize their behaviour by taking social cues from how others around them are behaving.<sup>964</sup>

Several positive examples have been cited such as the armed non-state actor Libyan National Transitional Council ('**NTC**') disseminating information on international humanitarian law norms to all rebel groups in 2011<sup>965</sup> and Sudanese armed group Justice and Equality Movement ('**JEM**') releasing prisoners of war in 2017.<sup>966</sup>

Such reports on compliance with international humanitarian law provides a reputational reward to armed non-state actors and helps them gain moral legitimacy in the eyes of the civilian population.<sup>967</sup> Armed non-state actors with political ambitions seek legitimacy when they are mature in their life cycle.<sup>968</sup> Secessionist groups are sensitive to reputation and seek international recognition because their principal aim is to form a separate state. Examples of such armed non-state actors are SPLM/A in South Sudan and Polisario Front in Western Sahara.<sup>969</sup>

In contrast, the UN has focused more on outcasting armed non state actors as opposed to providing them with rewards. Armed non-state actors who commit grave violations against children are listed in the Secretary General's Annual Report on children and armed conflict.<sup>970</sup> Security Council further asks such listed armed non-

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<sup>964</sup> Ezequiel Morsella, 'The Mechanisms of Human Action: Introduction and Background' in Ezequiel Morsella, John A Bargh and Peter M Gollwitzer (eds), *Oxford Handbook of Human Action* (Oxford University Press, 2008) 20. Also see Richard Dawkin, *The Selfish Gene* (Oxford University Press, 2016) 249, 251.

<sup>965</sup> IHL in Action, 'Libya, IHL Dissemination amongst Non-State Armed Groups' <<https://ihl-in-action.icrc.org/case-study/libya-ihl-dissemination-amongst-non-state-armed-groups>>, last accessed 30 November 2023.

<sup>966</sup> 'Welcome the partial release of JEM POWs', *Sudan Tribune* (online), 29 July 2023 <<https://sudantribune.com/article60131/>>, last accessed 30 November 2023.

<sup>967</sup> Ulrich Schneckener, Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 97.

<sup>968</sup> Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press, 2015) 222.

<sup>969</sup> Margarita Konaev, Tanisha Fazal, 'Can International Humanitarian Law Restrain Armed Groups? Lessons from NGO Work on Anti-Personnel Landmines', *Lawfare* (30 September 2018) available at <<https://www.lawfaremedia.org/article/can-international-humanitarian-law-restrain-armed-groups-lessons-ngo-work-anti-personnel-landmines/>>, last accessed 30 November 2023.

<sup>970</sup> United Nations, Office of the Special Representative of the Secretary General for Children and Armed Conflict <<https://childrenandarmedconflict.un.org/six-grave-violations/>>, last accessed 30 November



state actors to sign an Action Plan to address the violations and commit to not recruiting children in armed forces.<sup>971</sup> Sudanese armed group JEM signed an Action Plan with UN in 2012 to stop recruiting child soldiers and protect children in armed conflict.<sup>972</sup>

UN also has the discretion to delist such armed non-state actors if it complies with the Action Plan to the satisfaction of the UN. For example, MILF signed an Action Plan in 2010 with UN in Philippines wherein MILF undertook to not recruit children and to protect children's rights.<sup>973</sup> Subsequently, MILF was delisted from the annexes of the Secretary General Annual Report on Children and Armed Conflict because it complied with the Action Plan.<sup>974</sup> Delisting armed non-state actors from the annexes of the Secretary General Annual Report could be construed as a reward if such outcasting became the baseline expectation of the armed non-state actor.

Similarly, the Financial Action Task Force ('FATF') Standards stipulated Recommendation 6 as a counter-measure to thwart terrorist financing regime.<sup>975</sup> The said Recommendation 6 requires each member state to promulgate targeted financial sanctions, freezing funds and their assets likely to be used for the purposes and benefits of an entity designated by UNSC under Chapter VII of the UN Charter as a terrorist entity or under Security Council Resolution 1373 of 2001.<sup>976</sup> For example, the FATF

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2023. Such grave violations include killing or recruiting or abducting children or sexual violence against children in an armed conflict.

<sup>971</sup> Ibid.

<sup>972</sup> Justice and Equality Movement Sudan, *Action Plan – Operational Mechanism to prevent and end recruitment and use of child soldiers* (26 September 2012) available at <<https://sudanjem.com/>>, last accessed 30 November 2023.

<sup>973</sup> United Nations, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *MILF signs an Action Plan to prevent recruitment and reintegrate children into civilian life* (31 July 2009) available at <<https://childrenandarmedconflict.un.org/31jul09/>>, last accessed 30 November 2023.

<sup>974</sup> United Nations, Office of the Special Representative of the Secretary General for Children and Armed Conflict, available at <<https://childrenandarmedconflict.un.org/2017/12/philippines-un-officials-congratulate-milf-completion-disengagement-children-ranks/>>, last accessed 30 November 2023.

<sup>975</sup> FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2012-2023)* available at <[www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html)>, last accessed 30 November 2023.

<sup>976</sup> See Recommendation 6 of FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2012-2023)* available at <[www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html)>, last accessed 30 November 2023.

Report in February 2015 on Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (**ISIL**) attempted to understand the funding process of ISIL to break their sources of funds.<sup>977</sup>

It is pertinent to note that the FATF Recommendations also provides for a mechanism whereby member states are required to put in place a mechanism for submission of delisting request to the UN Security Council upon review by the member state that the relevant entity no longer meets the criteria for designation of financial sanctions under the FATF regime.<sup>978</sup> UN Security Council Resolution 1730 of 2006 specifically stipulates a transparent mechanism enabling entities to make such de-listing requests to the UN Security Council.<sup>979</sup>

Apart from acknowledgement of compliance by organisations such as the Geneva Call and ICRC, which provides a degree of reputational reward for their compliance, it is suggested that additional rewards be bestowed on armed non-state actors by UN to incentivise further compliance of international humanitarian law. Reward as a tool for achieving compliance is underutilized at present and it is asserted that UN bestowing tangible rewards to armed non-state actors would further induce compliance of international humanitarian law in armed conflicts. One way this can potentially be achieved is to include armed non-state actors as stakeholders in the humanitarian process in conflict zones.

International community depends upon the UN for co-ordination of humanitarian relief in situations of an armed conflict. This is carried into effect by various UN entities/agencies such as the United Nations Development Programme

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<sup>977</sup> FATF, 'Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)' (2015) 40 available at [www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html](http://www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html), last accessed 30 November 2023.

<sup>978</sup> See Recommendation 6[7] of FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2012-2023) available at [www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html), last accessed 30 November 2023.

<sup>979</sup> See UNSC Resolution 1730, 19 December 2006. Also see UNSC Resolution 1267, 15 October 1999 and UNSC Resolution 1373, 28 September 2001 for de-listing procedures. For example, in January 2010, UN delisted senior members of Taliban from UN's sanction list. The delisted Taliban members would not be subject to freezing of assets or travel ban under UN Security Council Resolution 1267 of 1999. United Nations, 'Security Council removes five men from UN's Taliban sanctions list' (27 January 2010) available at <https://news.un.org/en/story/2010/01/327762>, last accessed 30 November 2023. Also see UNSC Resolution 1267, 15 October 1999.

(‘UNDP’), World Food Programme (‘WFP’), Food and Agriculture Organization (‘FAO’) and World Health Organization (‘WHO’) with the Office for the Coordination of Humanitarian affairs (‘OCHA’)<sup>980</sup> of the UN Secretariat co-ordinating and officiating the suitable response from the relevant agencies.

UN has recognized the requirement of engagement with armed non-state actors for achieving its humanitarian objectives. To provide some clarity towards the framework for engagement with armed non-state actors, the UN has published its ‘Guidelines on Humanitarian Negotiations with Armed Groups’<sup>981</sup> (‘Guidelines’) and ‘Humanitarian Negotiations with Armed Groups: A Manual for Practitioners’<sup>982</sup> (‘Manual’) laying down the ground rules for engagement with armed non-state actors so as to secure their cooperation in achieving the object of enhancing humanitarian action in conflict zones.<sup>983</sup>

It shall be evident from the perusal of the Guidelines that it considers involvement of armed non-state actors vital for securing enhanced humanitarian action in conflict zones and for building ‘trust and confidence’ with armed non-state actors so as to ensure greater success in humanitarian efforts.<sup>984</sup>

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<sup>980</sup> OCHA Mandate stems from the General Assembly Resolution 46/182 of 19 December 1991 which states that: “The leadership role of the Secretary-General is critical and must be strengthened to ensure better preparation for, as well as rapid and coherent response to, natural disasters and other emergencies. This should be achieved through coordinated support for prevention and preparedness measures and the optimal utilization of, *inter alia*, an inter-agency standing committee, consolidated appeals, a central emergency revolving fund and a register of stand-by capacities.”

<sup>981</sup> Gerard Mc Hugh and Manuel Bessler, *Guidelines on Humanitarian Negotiations with Armed Groups* (United Nations, January 2006).

<sup>982</sup> *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (United Nations, 2006).

<sup>983</sup> See Gerard Mc Hugh and Manuel Bessler, *Guidelines on Humanitarian Negotiations with Armed Groups* (United Nations, January 2006) 2.

<sup>984</sup> See *ibid*, 1,2. Also see *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (United Nations, 2006) 8,9. These Reports have highlighted the importance of negotiations with parties to a conflict to ensure access to and protection of vulnerable groups. Reports of the Secretary General on the Protection of Civilians in Armed Conflict were published in 1999 (UN document reference S/1999/957), 2001 (S/2001/331), 2002 (S/2002/1300), 2004 (S/2004/431), and 2005 (S/2005/740). For UN humanitarian agencies, the UN General Assembly has also recognized the need to enter into negotiations with all the parties to a conflict to facilitate humanitarian action. See UN General Assembly Resolution 46/182, 19 December 1991, [35(d)]. In particular, the 2001 Report of the Secretary-General on the Protection of Civilians in Armed Conflict identified the need for a structured, consistent approach to humanitarian negotiations with armed groups. In the 2001 Report, the UN Secretary-General stated that he had requested the Inter-Agency Standing Committee (IASC) to: “... develop a manual for access negotiations and strategies, including benchmarks for the engagement and disengagement of aid agencies, demands of conditionality, clearance procedures, needs assessments, and other principles

UN recognizes the necessity of integration and participation of armed non-state actors as an important stakeholder in the humanitarian process for its success.<sup>985</sup> However, the Guidelines and Manual are merely a set of guidelines for humanitarian practitioners intended as “advice and guidance”<sup>986</sup>, and as such, UN stops short of any institutional commitment towards such process.

This is also evident from the experience and record of the various UN organizations/entities involved in the frontline of humanitarian process. For example, WFP is the key instrumentality of UN in delivering humanitarian aid in the form of food in circumstances of emergency. It is the body responsible for providing food and funds for feeding civilians in situations of food shortage and/or famine in affected areas. It is widely recognized that conflict is the singular largest cause for hunger and food shortage in present scenario.<sup>987</sup>

While violent conflict and climate change have emerged as the top causes of humanitarian need, it is estimated that 80% of humanitarian needs are directly attributed to violent conflict.<sup>988</sup> It is also posited that hunger and food shortage deepens and escalates conflict.<sup>989</sup> As such, WFP and its efforts towards mitigating situations of

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outlined in the present report [Protection of Civilians in Armed Conflict].” United Nations Security Council, ‘Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict’, UN Doc. S/2001/331 (United Nations, 30 March 2001), [26]. In response to the request of the Secretary-General, the IASC set up an Informal Working Group consisting of OCHA, OHCHR, UNHCR, UNICEF, UNDP, WHO and WFP to oversee the development of a Manual on humanitarian negotiations and initial research and consultations began in 2002. This Manual builds on that prior research and process of consultation and on field experiences of UN agencies and non-governmental organizations to provide a practical tool for humanitarian development and human rights workers to guide and enhance their negotiations with armed non-state actors. It is envisaged that more consistent and effective negotiations will assist in securing agreed outcomes that improve humanitarian conditions of those in need.

<sup>985</sup> *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (United Nations, 2006) 5,6

<sup>986</sup> Gerard Mc Hugh and Manuel Bessler, *Guidelines on Humanitarian Negotiations with Armed Groups* (United Nations, January 2006) 1.

<sup>987</sup> ‘Hunger, Conflict and Improving the Prospects for Peace’ (World Food Programme, October 2020) 1.

<sup>988</sup> See Caroline Delgado, Suyoun Jang, Gary Milante and Dan Smith, ‘The World Food Programme’s Contribution to Improving the Prospects for Peace (Preliminary Report)’ (SIPRI and World Food Programme, June 2019) 1.

<sup>989</sup> ‘Hunger, Conflict and Improving the Prospects for Peace’ (World Food Programme, October 2020) 1.

famine/food shortage in conflict ridden areas is widely recognized as one of the key drivers for the peace process.<sup>990</sup>

However, it is also acknowledged that its role and process of aiding humanitarian needs has definite scope for improvement.<sup>991</sup> One of the key criticisms of work of WFP in conflict zones is that the programme and projects of WFP does not consider the context of conflict and are not “conflict sensitive”.<sup>992</sup> This often results in marginal negative effects towards exacerbation of conflicts in certain situations.

One of the key suggested approaches to mitigate such unintended negative outcomes in its effort towards humanitarian process is to employ a “community based participatory process” (‘CBPP’).<sup>993</sup> CBPP envisages participation of representative group from all key stakeholders of the programme and the beneficiaries thereof. This is premised on the assumption that the stakeholders or the intended beneficiary community of the programme are best placed to identify the key requirements as well as the contextualized local knowledge about the humanitarian needs of the community and how to meet them.<sup>994</sup> In conflict situations, building such collaborative and participative process for humanitarian cause is understood to be even more imperative due to the lack of social cohesion and trust amongst the various stakeholders in a conflict zone.<sup>995</sup>

An analysis of the CBPP approach in conflict zones would suggest that armed non-state actors are a key stakeholder in the peace process and their participation in the peace process is key in achieving the desired positive outcomes while avoiding the unintended negative outcomes. It is further submitted that the CBPP principle is consistent with inclusion of armed non-state actors as a key participant in the peace process being implemented by the relevant UN organization.

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<sup>990</sup> See Caroline Delgado, Suyoun Jang, Gary Milante and Dan Smith, ‘The World Food Programme’s Contribution to Improving the Prospects for Peace (Preliminary Report)’ (SIPRI and World Food Programme, June 2019) 13.

<sup>991</sup> Ibid, 24-29.

<sup>992</sup> Ibid, 2.

<sup>993</sup> Ibid, 13.

<sup>994</sup> Ibid, 12-13.

<sup>995</sup> Ibid, 14.

Furthermore, it is acknowledged that incorporating ‘conflict sensitivity’ and ‘conflict analyses’ are integral to the successful implementation of the humanitarian process in a conflict zone.<sup>996</sup> This further highlights the importance of integration of armed non-state actors in the humanitarian process as they are best placed to provide a context and understanding regarding the scope and ambit of the ongoing conflict. However, despite the obvious necessity for their inclusion, and despite the CBPP implying such inclusion as a necessity for achieving the desired humanitarian object, there is no explicit suggestion for inclusion of armed non-state actors in the humanitarian process implemented by the UN organizations.<sup>997</sup>

Such engagement with armed non-state actors has also been espoused by UN itself in the past for the purpose of promoting humanitarian causes.<sup>998</sup> The lack of any general mandate for inclusion of armed non-state actors as part of the humanitarian process has also been criticized as a major roadblock towards meaningful engagement with armed non-state actors in the interest of efficient humanitarian engagement.<sup>999</sup> The need for such general mandate is also highlighted by various advocacy groups.<sup>1000</sup>

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<sup>996</sup> Ibid, 16, 23.

<sup>997</sup> See for eg, Ashley Jackson, ‘Talking to the other side: Humanitarian engagement with armed non-state actors’ (HPG Policy Brief 47, June 2012) 1. Also see Jeffrey Feltman, ‘UN engagement with nonstate armed groups for the sake of peace: Driving without a roadmap’, *Brookings* (15 January 2021) <<https://www.brookings.edu/articles/un-engagement-with-nonstate-armed-groups-for-the-sake-of-peace-driving-without-a-roadmap/>> last accessed 30 November 2023.

<sup>998</sup> See for eg, UN Security Council Resolution 1888 of 30 September 2005, S/RES/1888 (2009), 4[4] which states the following: “Requests that the United Nations Secretary-General appoint a Special Representative to provide coherent and strategic leadership, to work effectively to strengthen existing United Nations coordination mechanisms, and to engage in advocacy efforts, inter alia with governments, including military and judicial representatives, as well as with all parties to armed conflict and civil society, in order to address, at both headquarters and country level, sexual violence in armed conflict, while promoting cooperation and coordination of efforts among all relevant stakeholders..” Also see UN Security Council Resolution 1612 of 26 July 2005, S/RES/1612 (2005), 4.

<sup>999</sup> See Jeffrey Feltman, ‘UN engagement with nonstate armed groups for the sake of peace: Driving without a roadmap’, *Brookings* (15 January 2021) <<https://www.brookings.edu/articles/un-engagement-with-nonstate-armed-groups-for-the-sake-of-peace-driving-without-a-roadmap/>> last accessed 30 November 2023.

<sup>1000</sup> See Andrew MacLeod, ‘Engaging Non-state Armed Groups for Humanitarian Purposes: Experience, Constraints and Ways Forward’ in *Humanitarian Engagement with Non-state Armed Groups* (Chatham House, 2016) 19-20. Also see Jeffrey Feltman, ‘UN engagement with nonstate armed groups for the sake of peace: Driving without a roadmap’, *Brookings* (15 January 2021) <<https://www.brookings.edu/articles/un-engagement-with-nonstate-armed-groups-for-the-sake-of-peace-driving-without-a-roadmap/>> last accessed 30 November 2023.

Considering the above, it is submitted that participation/integration of armed non-state actors in the humanitarian process by UN organizations can provide a powerful reward and incentive for the armed non-state actors to comply with humanitarian law norms. This is because such institutional engagement with armed non-state actors by UN in humanitarian process is bound to provide such armed non-state actors broader recognition and positive reputation which can be an example of employing tangible rewards for inducing greater compliance with international humanitarian law.<sup>1001</sup>

### **5.3. PERSUASIVE POWER OF SOFT LAW**

Soft law instruments such as non-binding and voluntary standards such as Deeds of Commitment signed by the armed non-state actors have an extreme persuasive value. Soft law has persuasive power to influence the behavior of the parties.<sup>1002</sup> The non-binding nature of soft law may pose a problem with enforcement, but they nonetheless carry an expectation of compliance by the parties.<sup>1003</sup> Thus, it is worthwhile to explore rational choice theory and behavioral explanations to understand how soft law shapes the behavior of armed non-state actors.

Firstly, the mere fact that soft law is in existence has a compliance pull.<sup>1004</sup> The mere existence of such a substantive body of normative framework would be persuasive enough to foster further compliance by reason of ‘status quo’ bias prevalent in a

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<sup>1001</sup> Andrew MacLeod, ‘Engaging Non-state Armed Groups for Humanitarian Purposes: Experience, Constraints and Ways Forward’ in *Humanitarian Engagement with Non-state Armed Groups* (Chatham House, 2016) 20.

<sup>1002</sup> Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 1<sup>st</sup> ed, 2003) 2.

<sup>1003</sup> Dinah L Shelton, ‘Soft Law’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge Press, 1<sup>st</sup> ed, 2008) 68-78.

<sup>1004</sup> Tomer Broude and Yahli Shereshevsky, ‘Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses’ in Harlan Grant Cohen and Timothy Meyer (eds) *International Law as Behavior* (Cambridge University Press, 1<sup>st</sup> ed, 2021) 113.

group.<sup>1005</sup> The status quo bias would induce compliance of an acknowledged body of normative framework even though it might fall short of being strictly prescriptive in nature.<sup>1006</sup>

A normative framework providing a particular standard of conduct on a particular subject matter can influence the behavior of the actors by providing an anchor or reference point to its subjects regarding that specific standard of conduct.<sup>1007</sup> The relevance of soft law as a framework providing a reference point cannot be undermined. For example, although the ILC's Draft Articles on the Responsibility of International Organizations<sup>1008</sup> is not binding, it has become the reference point or the benchmark to be followed.<sup>1009</sup>

Secondly, a related theory regarding the efficacy of soft law in inducing compliance where hard law has ostensibly failed to produce the desired outcome would be the reputational cascade created by a normative body of standards in respect of a particular subject matter.<sup>1010</sup> This of course assumes the substantive efficacy of such standards contained in the normative framework is recognized and acknowledged by the key subjects of international law, be it institutional or individual.<sup>1011</sup>

Recognition and acknowledgement of standards by international institutions such as tribunals, courts, specific judges, or recognition by world leaders could validate the credentials of such standards and render them valuable basis on which further hard

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<sup>1005</sup> William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1998) 1(1) *Journal of Risk and Uncertainty* 7, 8. Also see Ilana Ritov and Jonathan Baron, 'Status-Quo and Omission Biases' (1992) 5(1) *Journal of Risk and Uncertainty* 49, 49-61.

<sup>1006</sup> Tomer Broude and Yahli Shereshevsky, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses' in Harlan Grant Cohen and Timothy Meyer (eds) *International Law as Behavior* (Cambridge University Press, 1<sup>st</sup> ed, 2021) 106.

<sup>1007</sup> *Ibid*, 117-118.

<sup>1008</sup> Available at International Law Commission, 63rd session, A/CN.4/L.778.

<sup>1009</sup> See *The Netherlands v Nuhanović*, Supreme Court of the Netherlands, 12/03324 (6 September 2013) 16, 17.

<sup>1010</sup> Tomer Broude and Yahli Shereshevsky, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses' in Harlan Grant Cohen and Timothy Meyer (eds) *International Law as Behavior* (Cambridge University Press, 1<sup>st</sup> ed, 2021) 116.

<sup>1011</sup> Timur Kuran and Cass R Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51(4) *Stanford Law Review* 683, 721-722.



law can be framed upon.<sup>1012</sup> Such validation of standards would also create an informational and reputational cascade inducing any subject to comply with such standard to garner reputational benefits.<sup>1013</sup>

This aspect of social influence fosters compliance by creating external pressure.<sup>1014</sup> The basic understanding being if more actors hold a particular reference position, the cost of dissent from such reference position would become progressively higher, thus encouraging wider compliance.<sup>1015</sup>

Lastly, adoption of soft law can also have inherent efficacy in solving simple co-ordination problem in a scenario where the actors are in agreement on the substantive outcome they want to achieve, but there is a transaction cost in achieving that outcome.<sup>1016</sup> The mere existence of a soft law framework in relation to a particular subject matter would eliminate all transaction cost by removing the need for *a priori* negotiation at each instance.<sup>1017</sup> An example could be the International Standard for Business Aircraft Operations (IS-BAO) for aircraft operations so there is clarity in safety protocols to be observed by all the participants.<sup>1018</sup>

However, one aspect that must be considered while assessing the relevance and efficacy of soft law is that the potential efficacy of a particular norm/standard might depend upon the kind of actor on whom it is applied. Accordingly, it is relevant to

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<sup>1012</sup> John D DeLamater, Daniel J Myers, Jessica L Collett, *Social Psychology* (Routledge, 8<sup>th</sup> ed, 2018) 336. Also see Tomer Broude and Yahli Shereshevsky, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses' in Harlan Grant Cohen and Timothy Meyer (eds) *International Law as Behavior* (Cambridge University Press, 1<sup>st</sup> ed, 2021) 114-115.

<sup>1013</sup> Eric A Posner, Cass R Sunstein, 'The Law of Other States' (2006) 59(1) *Stanford Law Review* 131, 161.

<sup>1014</sup> Timur Kuran and Cass R Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51(4) *Stanford Law Review* 683, 729.

<sup>1015</sup> BH Druzin, 'Why Does Soft Law Have Any Power Anyway?' (2016) 7(2) *Asian Journal of International Law* 361, 362. Druzin is of the view that network effect contributes to the adoption of soft law as desirable amongst all the actors.

<sup>1016</sup> Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 176-177.

<sup>1017</sup> *Ibid.*

<sup>1018</sup> *Ibid.*

consider the potential target group on whom the proposed soft law is sought to be applied and frame the standard of conduct accordingly.

In the case of armed non-state actors, soft law could be of persuasive value in interpreting and adapting the hard law rules.<sup>1019</sup> This is especially important because armed non-state actors did not consent to the hard laws. It has also been argued by scholars such as Hyeran Jo that one of the reasons why armed non-state actors do not comply with international humanitarian law is due to their lack of participation in international law making.<sup>1020</sup> Legitimacy is a consideration for compliance with soft law because soft law is not enforceable.<sup>1021</sup> Armed non-state actors did not participate in the creation of international norms and some norms such as their lack of prisoner of war status goes against their interest. Thus, norm diffusion and participation enhance the legitimacy of humanitarian law norms which in turn increases the prospect of its compliance.<sup>1022</sup>

Lack of awareness of international humanitarian law is a major factor as to why armed non-state actors do not comply with such law. The lack of awareness about humanitarian law and the ramifications of non-compliance would result in the non-state actors failing to recognize the benefits of compliance with humanitarian law. Hence, the role of information dissemination is paramount. Geneva Call and ICRC enter into a dialogue with the armed non-state actors where it is conveyed how respecting international humanitarian law is in their self-interest. Geneva Call and ICRC disseminate knowledge and awareness on the international humanitarian law norms, which in turn incentivizes the armed non-state actors to respect these laws. The element

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<sup>1019</sup> Tomer Broude and Yahli Shereshevsky, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses' in Harlan Grant Cohen and Timothy Meyer (eds) *International Law as Behavior* (Cambridge University Press, 1<sup>st</sup> ed, 2021) 104.

<sup>1020</sup> Hyeran Jo, 'Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?' (2016) 19 *Yearbook of International Humanitarian Law* 63, 69-70.

<sup>1021</sup> Anne Peters, Till Forster and Lucy Koechlin. 'Towards non-state actors as effective, legitimate, and accountable standard setters' in Anne Peters et al (eds) *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 510.

<sup>1022</sup> Heike Krieger, 'Introduction' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 79-111.

of self-interest is employed as a tool of persuasion to get the non-state actors to consent and sign the unilateral declarations and/or codes of conduct.

Geneva Call and ICRC also rely on creating sufficient social pressure. They work to increase the awareness of international humanitarian law in the overall community so there is sufficient pressure on armed non-state actors to comply. Violations by armed non-state actors are reported to condemn them and impose negative reputation such as sanctions or disruption of cooperation from civilian and international community.<sup>1023</sup>

Geneva Call and ICRC persuade through dialogue along with monitoring and capacity building. In the experience of Geneva Call and ICRC, the approaches of persuasion through mediation and norm diffusion work because armed non-state actors lay a lot of emphasis on their value system.<sup>1024</sup> Armed non-state actors place importance on values because it is important for their public image, reputation, moral authority and legitimacy.<sup>1025</sup> Depending on the armed non-state actor, ICRC uses different approaches to influence them to comply with humanitarian law - with some religious groups they resort to traditional religious arguments that support compliance with humanitarian law.<sup>1026</sup>

Armed non-state actors sign the Deeds of Commitment for reasons such as acquiring political recognition, establishing themselves as senior players to the local population and the international community at large and to possess international

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<sup>1023</sup> Ulrich Schneckener and Claudia Hofmann, 'The power of persuasion' in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 93.

<sup>1024</sup> Ibid.

<sup>1025</sup> Claudia Hofmann and Ulrich Schneckener, 'Engaging non-state armed actors in state and peace-building: Options and strategies' (2011) 93(883) *International Review of the Red Cross* 613.

<sup>1026</sup> ICRC Report, *International Humanitarian Law and the Challenges of contemporary Armed Conflicts - Recommitting to Protection in Armed Conflict on the 70th Anniversary of The Geneva Conventions* (ICRC, 2019) 50.

reputation.<sup>1027</sup> Armed non-state actors are more likely to comply with international humanitarian law when they are ‘status conscious’ and ‘independence seeking’.<sup>1028</sup>

Norm diffusion and acceptance of unilateral declarations by armed non-state actors opens the scope for internalization of such norms by armed non-state actors. However, persuasion and norm diffusion are not a helpful strategy with armed groups that lack political ambitions and are loose, unorganised with poor military discipline.<sup>1029</sup>

The constructivist arguments mentioned above have met with criticism that there is no theoretical basis explaining how such internalized norms leads to compliance.<sup>1030</sup> Constructivists fail to provide a model to predict when an actor would comply with a norm and when they may disregard it. It is important that a theory of compliance explains both situations convincingly – situations where a norm is respected by an actor and situations where a norm is ignored.<sup>1031</sup>

Although the constructivist arguments have been mentioned to give an overview of the theories explaining compliance, the central argument of this chapter is to explain compliance of standards based on rational choice approach and factors such as reputation, reciprocity, retaliation and rewards.

## 6. CONCLUSION

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<sup>1027</sup> Ulrich Schneekener and Claudia Hofmann, ‘The power of persuasion’ in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 79, 102. Ezequiel Heffes, ‘Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs’ in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press, 2020) 427- 451.

<sup>1028</sup> Katharine Fortin and Ezequiel Heffes (eds), *Armed Groups and International Law: In the Shadowland of Legality and Illegality* (Edward Elgar, 2023) 128.

<sup>1029</sup> Ulrich Schneekener and Claudia Hofmann, ‘The power of persuasion’ in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 110.

<sup>1030</sup> Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90(6) *California Law Review* 1823, 1836. Also see Brunnée J and Toope SJ, ‘Constructivism and international law’ in Dunoff JL and Pollack MA (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 135.

<sup>1031</sup> Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90(6) *California Law Review* 1823, 1840.

This chapter argued for accountability of armed non state actors through consent based standard setting. Standard setting is not equivalent to ‘law’ like the state responsibility regime in international law but given the limitations of state responsibility that it does not provide a remedy for breaches of international law by armed non-state actors, the approach of standard setting could be complementary for incentivizing compliance of international law by armed non-state actors.<sup>1032</sup>

Consent based, standard setting encourages armed non-state actors to take ownership of the norms and commitments in voluntary instruments such as the Deed of Commitment.<sup>1033</sup> While standards are not strictly law and fall in the arena of ‘soft law’, they perform normative functions.<sup>1034</sup> Such standards always shape societal attitudes and give a normative guidance to all the actors, and as such can foster greater incentive towards compliance of such norms/ standards.<sup>1035</sup>

Since UN is state empowered, independent organizations like Geneva Call and ICRC enjoy greater acceptance and persuasive value when engaging with armed non-state actors as they are viewed as more neutral.<sup>1036</sup> The approach of Geneva Call towards achieving compliance of these standards is to incentivise rational choice on the part of the armed non-state actors through systematic engagement about the reputational/reciprocal benefits of adoption of such law into their codes of conduct. Geneva Call and ICRC use mechanisms such as reputation, rewards, and persuasion to induce compliance of humanitarian law by armed non-state actors.

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<sup>1032</sup> Jutta Brunnee, ‘International legal accountability through the lens of the law of state responsibility’ (2005) XXXVI (3) *Netherlands Yearbook of International Law* 3, 35-36.

<sup>1033</sup> Katharine Fortin and Ezequiel Heffes (eds), *Armed Groups and International Law: In the Shadowland of Legality and Illegality* (Edward Elgar, 2023) 4.

<sup>1034</sup> Anne Peters, Till Forster and Lucy Koechlin. ‘Towards non-state actors as effective, legitimate, and accountable standard setters’ in Anne Peters et al (eds) *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 500.

<sup>1035</sup> *Ibid.*

<sup>1036</sup> Heike Krieger, ‘Conclusion’ in Heike Krieger (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015) 504-551.

Armed non-state actors who are organized with political goals are concerned with their reputation.<sup>1037</sup> It is especially important when the armed non-state actors seek support of the civil population to gain politically.<sup>1038</sup> Being compliant with the international humanitarian law norms improves the image of the armed non-state actors and increases their legitimacy in the eyes of the local population.

Following international humanitarian law norms is also helpful to preserve the existing infrastructure and compliance of such norms is pragmatic from the point of preserving resources.<sup>1039</sup> Armed non-state actors sign the Deed with Geneva Call for several factors ranging from reputational benefits to improving the stability and civil life of the area under their control.<sup>1040</sup>

It has also been discussed how soft law has persuasive value. Soft law can be persuasive in inducing compliance by reason of ‘status quo’ bias and by providing a reference point to individuals/groups regarding the prevailing standard of conduct. Soft laws provide a readily available body of norms associated with greater legitimacy and hence, creates compliance pull.

Similarly, rewards are also effective to induce compliance and both Geneva Call and ICRC use reputational rewards to incentivize armed non-state actors. However, such rewards are not employed by the UN to acknowledge or recognize the compliance of humanitarian law by armed non-state actors.

Accordingly, it is submitted that inclusion and integration of the armed non-state actors into the humanitarian process of the UN and its implementing organizations such as WFP, WHO and UNHRC would constitute a much greater reward for the armed non-state actors. Engagement of armed non-state actors in the humanitarian aid process by the UN would result in greater incentive for compliance of international humanitarian law because such inclusion by the UN provides armed non-state actors

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<sup>1037</sup> Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts* (ICRC, 2008) 31.

<sup>1038</sup> *Ibid.*

<sup>1039</sup> Ulrich Schneckener, Claudia Hofmann, ‘The power of persuasion’ in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 97.

<sup>1040</sup> Ulrich Schneckener, Claudia Hofmann, ‘The power of persuasion’ in Heike Krieger (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015) 101.

recognition in the international community. The existing framework under UN already envisages such participation by armed non-state actors in the humanitarian process but presently, there is no official commitment from the UN due to the apprehension of objection by the state parties.<sup>1041</sup> However, the benefits of armed non-state actors' participation in the UN humanitarian process outweighs such political concerns and provides considerable reward to armed non-state actors for further compliance with international humanitarian law.

The ultimate goal of international humanitarian law is compliance by all the actors involved in an armed conflict so effort must be made to ensure that armed non-state actors comply with standards that promote international humanitarian law. When armed non-state actors are accountable, the interests of all the actors are protected. There is no real alternative besides engaging with armed non-state actors directly.<sup>1042</sup>

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<sup>1041</sup> See Jeffrey Feltman, 'UN engagement with nonstate armed groups for the sake of peace: Driving without a roadmap', *Brookings* (15 January 2021) <<https://www.brookings.edu/articles/un-engagement-with-nonstate-armed-groups-for-the-sake-of-peace-driving-without-a-roadmap/>> last accessed 30 November 2023.

<sup>1042</sup> See also Heike Krieger, 'Conclusion' in Heike Krieger (ed) *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015) 504-551.

**PART V: CONCLUSION**



## CONCLUSION

This dissertation has highlighted the requirement for an accountability framework for armed non-state actors for their violations of international law in an armed conflict. Under the present state centric framework of international law, armed non-state actors are not held responsible for violations of international law directly. At present, armed non-state actors are not recognized as subjects of international law and responsibility for violations of international law by armed non-state actors is invoked through the route of attribution to states. The existing rule of attribution for state responsibility for acts of armed non-state actors remains a contentious issue under international law. The issue has assumed greater prominence in modern armed conflicts where armed non-state actors occupy a significant role.

The first research question that this dissertation examined was whether the existing rule of attribution for state responsibility considered the reality of the relationship between an armed non-state actor and their externally supporting state in an armed conflict.

Chapters 2, 3 and 4 of this dissertation answered this question in great detail. Law of state responsibility determines when a state will be held responsible for the violation of an international obligation.<sup>1043</sup> To impose state responsibility on a state under international law, there should be an unlawful act or omission and that unlawful act or omission must be ‘attributable’ to the state. The present test of attribution for state responsibility for use of force by non-state actors in international law – the ‘effective control’ test assumes a relationship of agency where the external state exercises control over the non-state actor. Agency paradigm has an inherent limitation of assuming a relationship of principal and agent between a state and a non-state actor.

On the basis of an empirical analysis of data provided in the Uppsala Armed Conflict dataset (‘Annexure ‘A’), I classified the armed conflicts into two distinct categories of ‘conflict delegation’ and ‘conflict intervention’. While a situation of ‘conflict intervention’ is more in the nature of a ‘partnership’ between the externally supporting state and the non-state actor, a situation of ‘conflict delegation’ reflects

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<sup>1043</sup> Martin Dixon, *Textbook on International Law* (Oxford University Press, 5th ed, 2005) 227.

greater control of the non-state actor by the external state. My finding suggests that most armed conflicts are of the nature of conflict intervention where externally supporting states do not exert excessive control over the armed non-state actors. Thus, it is inaccurate to apply an agency-based test of 'effective control' to establish attribution when the external state and the armed non state actors' function more as 'partners' rather than as 'principal-agent'. This finding which is based on an analysis of the existing armed conflicts outlined in Annexure 'A' is an important academic contribution by this research study.

My hypothesis was that the assumption of 'control' as the defining characteristic in the relationship between a state and a non-state actor in the extant rule of attribution for state responsibility is incorrect and inconsistent with reality. My conclusion in Chapter 4 that the external state and the armed non-state actor, indeed, function as 'partners' rather than as 'principal-agent' in an armed conflict does support my hypothesis. Furthermore, my statistical analysis in Chapter 1 supports my hypothesis that the existing rule of attribution for state responsibility did not have any affect in deterring states from providing external support to non-state actors in an armed conflict.

The second research question of this dissertation inquired the status of armed non-state actors under international law.

It has been established how armed non-state actors have limited legal personality in international law as they have certain obligations under international law when they are a part of a non-international armed conflict. Chapter 5 of this dissertation discussed the existing status of non-state actors in international law. It has been discussed how armed non-state actors have certain obligations under international humanitarian law such as under Common Article 3 of the Geneva Convention, Additional Protocol II and customary international law.<sup>1044</sup> There is also an emerging practice in the UN that human rights law is applicable to armed non-state actors when

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<sup>1044</sup> Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369, 375 and 388.

they control territory.<sup>1045</sup> However, non-state actors are not subjects of international law, which remains state centric till date.

The Reports of the UN Commissions of Inquiry have clarified that armed non-state actors have primary obligations under international law but there is no clarity on the secondary rules applicable to armed non-state actors.<sup>1046</sup> Armed non-state actors have certain obligations under international law but there is no clarity on the consequences of such violations.<sup>1047</sup> This reflects an accountability gap in international law and a need to hold the armed non-state actors into account.

The third research query of this dissertation was whether armed non-state actors could be made accountable for their violations of international law in an armed conflict.

This dissertation attempted to provide a solution to this ‘accountability gap’. Given the lack of clarity for holding armed non-state actors responsible under international law, and in the absence of a satisfactory legal framework, this thesis proposed an accountability framework. This dissertation focused on ‘accountability’ of armed non-state actors through consent based, standard setting as opposed to a responsibility regime. The notion of accountability is broader than the concept of responsibility.<sup>1048</sup>

This dissertation attempted to analyse the potential legal issues surrounding application of international law to armed non-state actors in Chapter 6. This chapter discussed various theoretical justifications (such as the doctrine of legislative jurisdiction) for binding armed non-state actors to international law and further discussed their shortcomings. In the absence of any definitive theoretical basis for binding armed non-state actors under international law, focusing on the utilitarian perspective of compliance has been found to be more pragmatic. Law and economics rational choice theory was considered as a useful framework to understand how rational

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<sup>1045</sup> Katharine Fortin, *The accountability of armed groups under human rights law* (Oxford University Press, 2017) 15.

<sup>1046</sup> See for example, United Nations, Human Rights Council, A/HRC/17/44, 12 January 2012, 70.

<sup>1047</sup> JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) Vol I: Rules, 536.

<sup>1048</sup> Zegveld, above n 16, 5.

actors comply with an international norm due to factors such as reputation, reciprocity, retaliation, and rewards.<sup>1049</sup>

Thus, chapter 7 of this dissertation suggested accountability of armed non-state actors through consent-based, standard setting mechanisms such as the Geneva Call and ICRC. While standards are not strictly law and fall in the arena of ‘soft law’, they have significant persuasive value.<sup>1050</sup> Law and economics rational choice theory gives us key insights as to why rational actors comply with a norm in a de-centralized legal system. Chapter 7 highlights how armed non-state actors are image conscious and comply with humanitarian law if it accrues reputational and other benefits to them.

This chapter further discussed the success of supervisory mechanisms such as the Geneva Call and ICRC – these organizations use tools such as reputation, reciprocity, and rewards to persuade armed non-state actors to comply with humanitarian norms. These organizations disseminate awareness on humanitarian law to armed non-state actors and highlight how compliance can enhance their reputation/legitimacy and attract support from external sources.<sup>1051</sup> The importance of reputational concern has been acknowledged by the UN Secretary-General who observed that ‘need for popular support and the group’s self-image and self-interest’ are significant factors for compliance.<sup>1052</sup>

Similarly, reward is also a useful mechanism to induce compliance of humanitarian law by armed non-state actors and both Geneva Call and ICRC use reputational rewards to incentivize armed non-state actors. However, such rewards are not employed by the UN to acknowledge or recognize the compliance of humanitarian law by armed non-state actors. Thus, it is suggested that the inclusion and integration

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<sup>1049</sup> See Anne van Aaken and Betül Simsek, ‘Rewarding in international law’ (2021) 115(2) *American Journal of International Law* 195, 203. Also see Andrew T Guzman, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008) 55-60.

<sup>1050</sup> Anne Peters, Till Forster and Lucy Koechlin, ‘Towards non-state actors as effective, legitimate, and accountable standard setters’ in Anne Peters et al (eds) *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 500.

<sup>1051</sup> H Jo and K Bryant, ‘Taming of the Warlords: Commitment and compliance by armed opposition groups in civil wars’ in T Risse, S Ropp and K Sikkink (eds), *The persistent power of human rights: From commitment to compliance* (Cambridge University Press, 2013) 242.

<sup>1052</sup> Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2012/376, 22 May 2012, [42].

of armed non-state actors into the UN's humanitarian process would serve as a more significant reward for them. By engaging armed non-state actors in the humanitarian aid process, the UN provides them with recognition within the international community and further incentive to comply with international humanitarian law.

Future research could discuss the issue of shared responsibility where multiple actors are involved in an armed conflict and the harmful outcomes produced by these actors cannot be attributed to a single actor.<sup>1053</sup> This dissertation proposes the need for further research into shared responsibility in contemporary armed conflicts involving multiple actors.

In conclusion, this dissertation advocated for accountability of armed non-state actors through consent based, standard setting monitored by mechanisms such as the Geneva Call and ICRC which recognize them as rational actors acting in furtherance of their self-interest and utilize incentives such as reputation and rewards to encourage their compliance with international humanitarian law.

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<sup>1053</sup> See Jean d'Aspremont et al., 'Sharing responsibility between non-state actors and states in international law: Introduction' (2015) 62(1) *Netherlands International Law Review* 49. Also see Laura Inigo Alvarez, *Towards a regime of responsibility of armed groups in international law* (Intersentia, 2020) 218.

**ANNEXURE 'A'**

**EXTERNALLY SUPPORTING STATE AND NSA IN AN ARMED CONFLICT DATASET**

Sr. No.	Armed Conflict	Externally Supporting State	Non-state parties	Established Organizational Structure and Stated Organizational Objective	Domestic connection/regional influence of Non-state actors	Existence of a situation of Civil War or Ethnic Strife		Conflict Delegation or Conflict Intervention
						Civil War	Ethnic Strife	
1.	Soviet-Afghan War (1979-1988)	US; Pakistan	Shia and Sunni Mujahideens	Yes; Unified Islamic Front against secular DRA government backed by Soviet Union.	Yes; Wide support amongst North Western Afghanistan; Tajiks and Pashtuns specifically.	Yes;	No;	Intervention
2.	Algerian Civil War (1991 – to 2002)	Morocco	Islamic Salvation Front (FIS) Armed Islamic Group (GIA)	Yes; Ideological opposition to FLN's secular rule as un-Islamic and hence without legitimacy.	Yes; FIS was the victorious party in the 1990 local elections with 54% of vote.	Yes;	No;	Intervention
3.	Angolan Civil War (1975-2002)	United States of America	National Union for Total Independence	Yes; One of the two prominent political parties involved	Yes; Large rural base.	Yes;	Yes; Ethnic strife between Ovimbundu	Intervention

Sr. No.	Armed Conflict	Externally Supporting State	Non-state parties	Established Organizational Structure and Stated Organizational Objective	Domestic connection/regional influence of Non-state actors	Existence of a situation of Civil War or Ethnic Strife		Conflict Delegation or Conflict Intervention
						Civil War	Ethnic Strife	
			of Angola (UNITA)	in the Angolan Freedom Struggle. Founded largely on Ovimbundu bases out of rural Angola as opposed to largely urban Ambundu People's Movement for the Liberation of Angola (MPLA)			du and Ambundu ethnicities.	
4.	Rwandan Civil War (1990-1994)	Uganda	Rwandan Patriotic Front (RPF)	Yes; Establishing Tutsi government in Rwanda overthrowing the Hutu government.	Yes; Wide support amongst ethnic Rwandan Tutsis in exile.	Yes;	Yes; Ethnic strife between Hutus and Tutsis.	Intervention
5.	Congo War (1996-1997)	Rwanda; Angola; Uganda	Alliance of Democratic Forces for the	Yes; A loose short-lived coalition between dissidents of	Yes; Wide support predominantly amongst	Yes;	Yes;	Intervention

Sr. No.	Armed Conflict	Externally Supporting State	Non-state parties	Established Organizational Structure and Stated Organizational Objective	Domestic connection/regional influence of Non-state actors	Existence of a situation of Civil War or Ethnic Strife		Conflict Delegation or Conflict Intervention
						Civil War	Ethnic Strife	
			Liberation of Congo (AFDL)	Mobutu Sese Seko's regime in Zaire brought into existence at the wake of Banyamulenge Rebellion.	Tutsi immigrants of Zaire.			
6.	Second Congo War (1999-2003)	Rwanda; Uganda	Rally for Congolese Democracy (RCD), Movement for the Liberation of Congo (MLC)	Yes; Disenchantment with Kabila's alienation of Rwandan support post first war and increasingly anti-Tutsi stance led to creation of Tutsi rebel militia supporting eastern Congolese provinces.	Yes; Wide Tutsi support in the entire region.	Yes;	Yes;	Intervention
7.	Hutu Insurgency in Rwanda (1999-2003)	Democratic Republic of Congo	Democratic Forces for the Liberation	Yes; Opposition to Tutsi led RPF government in Rwanda.	No;	No;	Yes; Hutu-Tutsi	Intervention



Sr. No.	Armed Conflict	Externally Supporting State	Non-state parties	Established Organizational Structure and Stated Organizational Objective	Domestic connection/regional influence of Non-state actors	Existence of a situation of Civil War or Ethnic Strife		Conflict Delegation or Conflict Intervention
						Civil War	Ethnic Strife	
			on of Rwanda (FDLR)				ethnic strife.	
8.	The Dirty War (1979)	Chile; Uruguay	Montoneros	Yes;  A left extremist collective formed in response to state terrorism against the leftists.  More of a defence unit than a political opposition.	No;	No;	No;	Intervention
9.	Nagorno-Karabakh War (Armenia-Azerbaijan) (1988-1994)	Turkey	Hezb-e-Islami Chechen	No;  No presence in Azerbaijan or NKR. Hired mercenaries from Afghanistan.	No;	No;	Yes;  Secessionist movement by ethnic Armenians in NKR	Intervention

Sr. No.	Armed Conflict	Externally Supporting State	Non-state parties	Established Organizational Structure and Stated Organizational Objective	Domestic connection/regional influence of Non-state actors	Existence of a situation of Civil War or Ethnic Strife		Conflict Delegation or Conflict Intervention
						Civil War	Ethnic Strife	
							from Azerbaijan	
10.	Bangladesh-Parbatya Chattagram Jana Samhati Samiti (1976-1997)	India	Shanti Bahini	Yes; Autonomy for the indigenous hill tribes of Chittagong.	Yes; Full scale support from the indigenous hill tribes.	No;	Yes; Ethnic clash between the indigenous hill tribes and the Bengalis.	Intervention
11.	Bosnia Herzegovina-Republic of SRPSKA (1992-95)	Serbia	Army of Republic of SRPSKA	Yes;	Yes;	Yes;	Yes;	Intervention
12.	Burundian Civil War (1993-2005)	Rwanda	National Council for the Defence of Democracy-	Yes; Hutu representation in the Hutu	Yes; FDD is the ruling party of Burundi. Represents	Yes;	Yes; Ethnic strife between Hutus	Intervention

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						Civil War	Ethnic Strife	
			Forces for the Defense of Democracy (CNDD-FDD)	majority Burundi.	majority Hutu interest.		and Tutsis.	
13.	Cambodia n-Vietnamese War (1977-1994)	China	FUNCI PEC KPNLF	Yes;  Cambodian royalist party with the deposed monarch as the leader of the party to claim back governance of the country from Vietnamese occupants.	Yes;  Third largest political party in Cambodia.	No;	No;	Intervention
14.	Central African Republic Coup d'état (2003)	Chad	Forces of Francois Bozize	Yes;  Francois Bozize organized a coup against the widely unpopular corrupt rule of Patasse.	No;  Wide unpopularity of the Patasse rule in CAR and failed	No;	No;	Intervention

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						Civil War	Ethnic Strife	
					coup attempts against Patasse government, but Bozize was in exile in Chad prior to the coup.			
15.	Central African Republic Bush War (2004-2007)	Sudan; Chad	Union of Democratic Forces for Unity (UFDR)	Yes;  An alliance of disgruntled ex liberateurs, Gula ethnic minorities complaining of marginalisation and discrimination in the northeast CAR and general Muslim populace of the northeast CAR alleging discrimination and violation of civil rights.	Yes;  UFDR demanded political representation and end to inter ethnic discrimination. Post amnesty, UFDR became a prominent political party	Yes;	Yes;  Marginalisation and discrimination against ethnic Muslim population, especially Gulas, gave rise to the movement in north-east CAR. Incidents concerning	Intervention

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						Civil War	Ethnic Strife	
					in the north-east CAR.		Sudanese nomads encroaching Gula territory, Chadian rebel forces encroaching Gula villages and the government treatment thereof, were prominent causes.	
16.	The First Chadian Civil War (1965-1979)	Libya	The National Liberation Front of Chad (FROLI NAT)	Yes; Ending ethno-regional marginalisation of the Arab Muslim North Chad by the non-Muslim Southern Chad Government.	Yes; Wide support in North Chad.	Yes;	Yes; Inter-ethnic strife between Muslim North Chad and non-	Intervention

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						Civil War	Ethnic Strife	
							Muslim south.	
17.	The Second Chadian Civil War (1979-1986)	Sudan; Egypt	Armed Forces of the North (FAN)	Yes; More Arab Muslim north Chad representation in Government, anti Libyan Annexation pogrom supported by GUNT.	Yes; Offshoot of the FROLINAT, widely popular in north Chad.	Yes;	Yes; Suspicion and fear of enhanced Libyan Awlad Suleyma n tribe influence over the movement of indigenous Arab Muslims of north Chad.	Intervention
18.	Chadian Coup d'état (1990)	Sudan; Libya	Patriotic Salvation Movement (MPS)	Yes; Ending the political subjugation of ethnic groups at the hands of dictator Habré.	Yes; Wide support amongst various ethnic groups in Chad, including Zaghawa, Hadjerai, Chadian Arab	No;	Yes; Subjugation of various ethnic groups of Chad	Intervention

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						Civil War	Ethnic Strife	
					and <i>Sara</i> ethnicities, excluding Goranes, Hissène Habré's own ethnic community.		excepting Gorane, dictator Habré's ethnic group, at Habré's brutal rule.	
19.	Chadian Civil War (2005-2010)	Sudan	United Front for Democratic Change (FUC), Union of Forces for Democracy and Development (UFDD), Rally of Democratic	No;	No;	Yes;	No;	Intervention

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						Civil War	Ethnic Strife	
			Forces (RFC)					
20.	Columbian Conflict (1975-2009)	Cuba; Erstwhile Soviet Union; Venezuela	Revolutionary Armed Forces of Colombia—People's Army (FARC), National Liberation Army (ELN), Popular Liberation Army (EPL)	Yes; Leftist rebellion against wide social inequality between Spanish rich and Colombian poor, for social justice through communism.	No;	No;	No;	Intervention
21.	The First Ivorian Civil War (2002-2007)	Burkina Faso; Liberia	Forces Nouvelles de Cote d'Ivoire	Yes; Claim for civil and political rights of the Muslim northerners, majorly	Yes; Wide support in Muslim North Cote d'Ivoire. Alassane Ouattara, the	Yes;	Yes; Principally an ethnic strife between Burkinab	Intervention



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						Civil War	Ethnic Strife	
			(New Forces/FN)	consisting of immigrant workers of Mali and Burkinabe descent, who have been denied citizenship and consequently, adult franchise.	presidential candidate from the north, whose participation in the presidential election was stalled by hastily passing a law redefining eligibility criteria for presidential election requiring parentage of Ivorian descent, would eventually win the post war elections, resulting in the Second Ivorian Civil War.		and other immigrant population in North Cote d'Ivoire from neighbouring poorer states of Mali and Burkina Faso.	
22.	The Second Ivorian Civil War (2010-2011)	France	Republican Forces of Cote d'Ivoire (RFCI)	Yes;  Abdication of Laurent Gbagbo and instating Alassane	Yes;	Yes;	Yes;  <i>See above: First</i>	Intervention

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						Civil War	Ethnic Strife	
			(FN renamed)	Ouattara, the popularly elected presidential candidate as the president.	<i>See above: First Ivorian Civil War.</i>		<i>Ivorian Civil War.</i>	
23.	The Croatian War of Independence (1991-1995)	Socialist Federal Republic of Yugoslavia (SFRY)	Yugoslav People's Army (JNA), the Military of Serbian Krajina	Yes; Political annexation of ethnic Croat territory for unification into a unified Serbian state.	Yes; Wide support amongst Serbians.	Yes;	Yes; Croat-Serbian ethnic strife.	Intervention
24.	Djiboutian Civil War (1991-1994)	Eritrea	Front for the Restoration of Unity and Democracy (FRUD)	Yes; Afar representation in Issa dominated government.	Yes; Support amongst Afar population.	Yes;	Yes; Issa-Afar ethnic strife.	Intervention

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						Civil War	Ethnic Strife	
25.	Salvadorian Civil War (1979-1992)	Soviet Union; Cuba; Nicaragua	Farabundo Martí National Liberation Front (FMLN)	Yes; Leftist struggle against repression of the Salvadorian peasants at the hands of Military Government and widespread corruption resulting in wide socio-economic gulf between the rich and poor.	Yes; Civilian support from the masses.	Yes;	No;	Intervention
26.	Abkhaz-Georgian Conflict (1989-1993)	Russia	Abkhazian Forces	Yes; Secession and independence of Abkhazia from Georgia.	Yes; Support amongst ethnic Abkhazians.	Yes;	Yes; Abkhazian-Georgian ethnic strife. Ethnic cleansing a proclaimed goal of Abkhaz struggle.	Intervention

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						Civil War	Ethnic Strife	
27.	Guinea Rebellion (2000-2001)	Liberia	Rally of the Democratic Forces of Guinea (RDFG)	Yes; Ending Soussou ethnic domination at the behest of Lansana Conte, president of Guinea, in the Government.	No;	No;	No;	Intervention
28.	Kashmiri Insurgency (1989-present)	Pakistan	Harkat-ul-Jihad al-Islami, Lashkar-e-Taiba, Jaish-e-Mohammed, Hizbul Mujahideen, Harkat-ul-Mujahi	Yes; While JKLF's stated political position is of a challenge to the legitimacy of Indian rule over Kashmir, various Mujahideen elements have sought to hijack the movement by inciting communal and ideological	No;	No;	No;	Intervention

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						Civil War	Ethnic Strife	
			deen, Al-Badr, Jammu Kashmir Liberation Front (JKLF)	hatred of majority Muslim population of Kashmir against Hindus.				
29.	Assam Separatist Movement in India (1979-2005)	Bangladesh; Myanmar	United Liberation Front of Assam (ULFA), Adivasi National Liberation Army (ANLA), Karbi Longri N.C. Hills Liberation Front (KLNLF), the Nati	Yes; Establishment of sovereign Assam through armed struggle.	Yes; Wide sympathy for the causes professed, but limited active political support.	No;	No;	Intervention

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						Civil War	Ethnic Strife	
			onal Democratic Front of Bodoland (NDFB)					
30.	Tripuri Nationalist Movement in India (1989-2004)	Bangladesh	National Liberation Front of Tripura (NLFT)	Yes; Establishment of independent Tripura.	Yes; Limited support amongst indigenous tribal population.	No;	No;	Intervention
31.	Naga Nationalist Movement in India (1980-2000)	China; Pakistan; Bangladesh; Myanmar	Nationalist Socialist Council of Nagaland (NSCN)	Yes; Establishment of sovereign Nagaland.	Yes; Very limited popular support.	No;	Yes; Nationalist movement on ethnic lines.	Intervention
32.	Khalistan Movement in India	Pakistan	Babbar Khalsa, Khalist	Yes;	Yes;	No;	Yes;	Intervention

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						Civil War	Ethnic Strife	
	(1986-1993)		an Commando Force (KCF), Bhindranwala Tiger Force of Khalistan (BTFK), Khalistan Zindabad Force (KZF), Khalistan Liberation Force (KLF)	Establishment of the Sikh homeland of Khalistan.	Widespread support amongst the Sikh diaspora.		Militant nationalist movement on the religious identity.	
33.	Maoist-Naxalite Movement in India (1980-2000)	Pakistan; China	People's War Group (PWG)	Yes; Socio economic rights of the indigenous tribes of Chotanagpur Plateau region.	Yes; Widespread support amongst indigenous rural tribal population of	No;	No;	Intervention

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						Civil War	Ethnic Strife	
					Chotanagpur Plateau region.			
34.	Iranian Leftist Rebellion (1988-2001)	Iraq	Mojahe din-e-Khalq (MEK)	Yes; Overthrowing Islamic Republic of Iran.	No;	No;	No; Political opposition to Islamic Republic. Anti-Islamist movement.	Intervention
35.	Iraqi-Kurdish Conflict (1989-1996)	Syria; Iran	Patriotic Union of Kurdistan (PUK), Kurdistan Democratic	Yes; Establishment of Kurdish homeland of Kurdistan.	Yes; Wide support amongst Kurdish population.	Yes;	Yes; Iraqi Arab-Kurdish ethnic strife.	Intervention



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						Civil War	Ethnic Strife	
			Party (KDP)					
36.	Iran-Iraq War (1980-1988)	Iran	Supreme Council for Islamic Revolution in Iraq (SCIRI)	Yes; Adequate Shia representation in Iraqi government.	Yes; Support amongst the Shia community in Iraq.  Post war, it became a major political party.	No;	Yes; Shia-Sunni sectarian strife.	Intervention
37.	Israeli-Palestinian Conflict (1986-2009)	Iran; Syria  Arab League	Fatah, Hamas, Hezbollah, Popular Front for the Liberation of Palestine (PFLP), Islamic Jihad Movement in Palestine	Yes; Palestinian liberation, establishment of the state of Palestine.  Yes; Palestinian liberation, establishment of the state of Palestine.	Yes; Wide support amongst Palestinians.  Yes; Wide support amongst Palestinians.	Yes;	Yes; Arab-Israeli ethnic strife.	Intervention

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						Civil War	Ethnic Strife	
			e (PIJ), Palestine Liberation Organization (PLO)					
38.	Israeli-Palestinian Conflict (1986-2009)	Syria	Hezbollah, Rejectionist Front, PIJ, Hamas	Yes; Palestinian liberation, establishment of the state of Palestine.	No;	Yes;	Yes; Arab-Israeli ethnic strife.	Intervention
39.	The First Liberian Civil War (1989-1996)	Ivory Coast; Burkina Faso; Guinea	National Patriotic Front of Liberia (NPFL), Independent National Patriotic Front of	Yes; Overthrowing Samuel Doe's Krahn dominated government. Establishing a government with Gio and Mano	Yes; Wide support base in Gio and Mano dominated Nimba provinces.	Yes;	Yes; Krahn-Gio Mano ethnic strife.	Intervention

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						Civil War	Ethnic Strife	
			Liberia (INPFL)	tribal representation.				
40.	The Second Liberian Civil War (1999-2003)	Guinea	Liberians United for Reconciliation and Democracy (LURD)	Yes; Challenging the legitimacy of and overthrowing Charles Taylor's government. Organized mainly by Doe's followers and ex-Armed Forces of Liberia personnel.	Yes; Support amongst Krahn and Mandinka ethnicities.	Yes;	Yes; Krahn Mandinka - Gio Mano ethnic strife.	Intervention
41.	Tuareg Rebellion (1990-1995)	Libya	Popular Movement for the Liberation of Azawad (MPLA)	Yes; Socio-economic integration of the Tuareg tribe in Mali and Niger.	Yes; Wide support amongst Tuaregs.	Yes;	Yes; Socio-economic marginalisation of the Tuaregs by the	Intervention

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						Civil War	Ethnic Strife	
							Sahel government.	
42.	Western Sahara War (1975-1991)	Libya; Algeria	Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (POLISARIO)	Yes; Establishing independent state for the Sahrawi indigenous people in Western Sahara.	Yes; Wide support amongst Sahrawis.	Yes;	Yes; Moroccan Arab-Sahrawi strife. Sahrawi struggle against what is perceived as forced usurpation and settlement of Moroccans in West Sahara post Spanish withdrawal from West Sahara.	Intervention

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						Civil War	Ethnic Strife	
43.	Mozambican Civil War (1977-1992)	South Africa; Rhodesia	Mozambique Resistance Movement (RENAMO)	No; Styled as an anti communist outfit fighting against FRELIMO's socialist one party state, it was really an organization brought into existence, trained and curated by Central Intelligence Organization of Rhodesia as a means to stop FRELIMO support of Zimbabwe African National Union challenging the white minority rule in Rhodesia.	No;	Yes;	No;	Intervention
44.	Karen Insurgency in Myanmar (1989-2005)	India	Karen National Union (KNU), Karen National	Yes; Self-determination of	Yes; Wide support amongst	No;	Yes; Karen-Burmese ethnic strife.	Intervention

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			l Liberation Army (KNLA)	Karen people of Burma.	Karen people of Burma.		Marginalisation and oppression of Karen people at the hands of the majority Burmese government.	
45.	Shan Insurgency in Myanmar (2000)	Thailand	Shan State Army (South)	Yes; Self-determination of Shan people of Burma.	Yes; Wide support amongst Shan people of Burma.	No;	Yes; Shan-Burmese ethnic strife. Marginalisation and oppression of Shan people at the hands of the	Intervention

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						Civil War	Ethnic Strife	
							majority Burmese government.	
46.	South Philippines Insurgency (1986-1988)	Iran; Libya	Moro National Liberation Front (MNLF)	Yes; Independence of Bangsamoro land for Moro and/or Mindano people.	Yes; Wide support amongst Muslim Moro and Mindano people.	No;	Yes; Moro-Filipino ethnic strife.	Intervention
47.	Casmance Conflict in Senegal (1982-2014)	Guinea-Bissau; Libya; Iraq	Movement of Democratic Forces of Casamance (MDFC)	Yes; The ethnically distinct Jola people's movement for independent Casmance.	Yes; Wide support amongst Jola people.	No;	Yes; Jola-Senegalese ethnic strife.	Intervention
48.	Sierra Leone Civil War (1991-2002)	Libya; Liberia; Burkina Faso	Revolutionary United Front (RUF)	No; Political atheists, with no stated political objective other than to	No; There was some initial support for the group by reason of general	Yes;	No;	Intervention

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						Civil War	Ethnic Strife	
				overthrow government.	disenchantment with the corrupt Sierra Leone Government, which however soon vanished.			
49.	Nicaragua Conflict (1986-1990)	US	Contras	Yes; Contras sought to overthrow Nicaragua's left-wing Sandinista government.	Yes; Support from ethnic minority groups.	Yes;	No;	Intervention
50.	South African Conflict (1986-1988)	Cuba; Angola; Zimbabwe; OAU Liberation Committee	South West African People's Organisation (SWAPO)	Yes; SWAPO represented Namibians and fought for Namibia's independence.	Yes; Namibian people supported SWAPO as a nationalist organization.	No;	No;	Intervention



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						Civil War	Ethnic Strife	
51.	Sri Lankan Conflict (1986-1991)	India	Liberation Tigers of Tamil Eelam (LTTE)	Yes; Separate Tamil state in Sri Lanka.	Yes; Support from Tamilians in Sri Lanka.	Yes;	Yes; Strife between Sinhalese and the Tamils.	Intervention
52.	Second Sudanese Civil War (2003-2009)	Chad; Libya; Eritria	Justice and Equality Movement (JEM)	Yes; Creation of a new country-United Regions of Sudan with greater regional autonomy.	No; Some support from the Kobe Zaghawa group in North-eastern Darfur.	Yes;	Yes; Ethnic strife between Dinka and other ethnic groups among the Equatorians (Karo, Bari etc.).	Intervention

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						Civil War	Ethnic Strife	
53.	Second Sudanese Civil War (2004-2008)	Uganda; Eritria; Ethiopia	Sudan People's Liberation Movement (SPLM/A)	Yes; Restructuring of power in the centre and decentralization of power in the regions - separating religion from the state.	Yes; SPLM/A had wide support in South Sudan.	Yes;	Yes; Ethnic strife between Dinka and other ethnic groups among the Equatorians (Karo, Bari etc.).	Intervention
54.	Turkey-PKK conflict	Iran; Syria; Kurdish Diaspora	Kurdistan Worker's Party	Yes; Separate state of Kurdistan.	Yes; Support of Kurdish minorities in Turkey and	No;	Yes; Ethnic tension between Turks	Intervention

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						Civil War	Ethnic Strife	
	(1987-1999)		(PKK)		Kurdish diaspora.		and Kurds.	
55.	Ugandan Conflict  (1994-2001)	Sudan	Lord's Resistance Army (LRA)	Yes;  Overthrow the President of Uganda and establish a state based on the interpretation of the Ten Commandments	No;  Even though Northern Uganda is unhappy with the government there is minimal support for LRA.	No;	No;	Intervention
56.	Ethiopian Conflict  (2000-2008)	Eritrea	Ogaden National Liberation Front (ONLF)	Yes;  Self-determination for Somalis. Autonomy for Somali region in Ethiopia.	Yes;  Support from the ethnic Somalis residing in Ethiopia.	No;	No;	Intervention

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						Civil War	Ethnic Strife	
57.	Eritrean Conflict (1997-2003)	Ethiopia; Sudan	Eritrean Islamic Jihad Movement (EIJM)	Yes; Overthrow the existing regime and govern by Islamic, Sharia law.	No;	No;	No;	Intervention
58.	Philippines – CPP conflict (1989-1991)	Vietnam; North Korea (Alleged)	Communist Party of the Philippines (CPP)	Yes; Marxist-Maoist Ideology.	No;	No;	No; Although there has been disturbance in Southern Philippines and demand for a separate Islamist state.	Intervention
59.	Russia - Chechnya	Georgia	Chechen Republic	Yes;	Yes;	No;	Yes;	Intervention

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						Civil War	Ethnic Strife	
	(2002)		Support of Ichkeria	Independence of Chechnya from Russia.	Support of Chechen population.		Chechen-Russian conflict.	
60.	Somali civil war (2009 to present)	Eritrea	Al-Shabaa	Yes; Make Somalia a fundamentalist Islamic state.	Yes; Popular support because of strong governance and lack of any strong alternative government.	Yes;	No;	Intervention
61.	Somali civil war (1986-1988)	Ethiopia	Somali National Movement (SNM)	Yes; To overthrow the existing regime in Somalia.	Yes; Support from the Isaaq clan.	Yes;	No;	Intervention

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						Civil War	Ethnic Strife	
62.	Tunisian Conflict (1980)	Libya	Résiste Armée Tunisienne	Yes; Armed insurgency against the existing government.	No;	No;	No;	Intervention
63.	United Kingdom-IRA conflict (1986-91)	Libya; NORAID; Americans of Irish descent	The Irish Republican Army (IRA)	Yes; Independence of Ireland.	Yes; Support from the minorities initially but less so after the bombing attack in 1987.	Yes; In Northern Ireland	Yes; Between Protestants/unionists and Catholic/nationalists minority	Intervention
64.	Yugoslavia and Kosovo conflict (1998-99)	Albania; Albanian diaspora	Kosovo Liberation Army	Yes; Independence of Kosovo.	Yes; Support from ethnic Albanians.	Yes;	Yes; Between Serbs and Kosovar	Intervention

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						Civil War	Ethnic Strife	
							Albanians.	
65.	Tajikistan civil war (1992-96)	Afghanistan	The United Tajik Opposition (UTO)	Yes; Islamic led UTO was against the pro-communist government.	Yes; Support from opposition groups (to the pro-communist regime) such as the democratic and Islamist groups.	Yes;	Yes; Kulyabis against ethnic groups such as Pamiris and Garmis.	Intervention
66.	Uzbekistan – IMU conflict (1999-2000)	Afghanistan	The Islamic Movement of Uzbekistan (IMU)	Yes; Establish an Islamic state in Uzbekistan.	No;	No;	No;	Intervention

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						Civil War	Ethnic Strife	
67.	Uganda – WNBF conflict (1996)	Sudan	The West Nile Bank Front (WNBF)	Yes; WNBF wanted to destabilize Northern Uganda.	No;	No;	No;	Intervention
68.	Pakistan – Balochistan conflict (2008)	Afghanistan (alleged) India (alleged)	Baloch Republican Army (BRA)	Yes; Separation of Balochistan from Pakistan.	No;	No;	No;	Intervention
69.	Ethiopian Conflict (1987)	Sudan (alleged)	Eritrean People's Liberation Front (EPLF)	Yes; Fought for the Independence of Eritria from Ethiopia.	Yes; After Eritria's independence in 1991, EPLF named itself the People's Front for Democracy and Justice, which	Yes;	No;	Intervention



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						Civil War	Ethnic Strife	
					became the ruling political party in independent Eritria.			
70.	Trinidad and Tobago conflict (1990)	Libya	Jamaat al-Muslim een	Yes; Militant Islamic rule for the liberation of the Afro population.	No;	No;	Yes; Between Indo-Trinidadian and Tobagonian and the minority Afro-Trinidadian and Tobagonian.	Intervention
71.	Papua New Guinea – Bougainvi	Solomon Islands (alleged)	Bougainville Revolut	Yes; Independence of Bougainville	Yes;	Yes;	Yes;	Intervention

Sr. No.	Armed Conflict	Externally Supporting State	Non-state parties	Established Organizational Structure and Stated Organizational Objective	Domestic connection/regional influence of Non-state actors	Existence of a situation of Civil War or Ethnic Strife		Conflict Delegation or Conflict Intervention
						Civil War	Ethnic Strife	
	Ile conflict (1996)		ionary Army (BRA)	from Papua New Guinea.	Popular support from Bougainvilleans.		Ethnic conflict between Papuans and Bougainvilleans.	
72.	Lebanese Civil War (1975-1990)	Iraq	Lebanese Army (Aoun Fraktion), Lebanese Forces.	Yes; End of Syrian intervention in Lebanon. Pro-west, anti Islamic political elite of the pre war Lebanon, acting against growing radical Palestinian and Arab influences in Lebanon.	Yes; Wide support amongst Maronite Christian community in Lebanon.	Yes;	Yes; Shia Arab-Maronite Christian ethnic strife.	Intervention

## **BIBLIOGRAPHY**

- Abbott KW & Snidal D, 'Values and Interests: International Legalization in the Fight against Corruption' (2002) 31(1) *The Journal of Legal Studies* S141-S177
- Abbott KW and Snidal D, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization* 421-422
- Ago R, 'Fourth Report on State Responsibility' (1972) 2 *Yearbook International Law Commission* 71, UN Doc. A/CN.4/264
- Ahmad M, 'Suspected US missile strike kills 6 in Pakistan', *The Guardian*, October 2008
- Ahmad N, 'The Palestine Liberation Organization', 28 (4) *Pakistan Horizon, The Middle East* (1975) 81-115
- Akcinaroglu S, 'Rebel Interdependencies and Civil War Outcomes' (2012) 56(5) *The Journal of Conflict Resolution* 879-903
- Alexander D & Apps P, 'Malaysian airliner downing puts spotlight on Buk missile system', *Reuters*, July 18, 2014
- Alexandrova O, 'Ukraine and Western Europe' (1996) 20 *Harvard Ukrainian Studies* 145-170
- Alvarez LI, *Towards a regime of responsibility of armed groups in international law* (Intersentia, 2020) vol 90.
- Anthony D, 'How the Taliban Became a Military Force', in Maley W (ed), *Fundamentalism Reborn? Afghanistan and the Taliban* (New York University Press, 1998) 43-70
- Atiyah PS, *Vicarious Liability in Law of Torts* (Butterworths, 1967)
- Axelrod A, *The real history of the cold war* (Sterling, 2009)
- Azzarello C and Niederhauser M, 'The Independent Humanitarian Fact-Finding Commission: Has the "Sleeping Beauty" Awoken?' (9 January 2018) <http://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/> accessed 30 October 2023

- Baldwin DA, 'The Power of Positive Sanctions' (1971) 24(1) *World Politics* 19-23
- Bangerter O, 'Comment – persuading armed groups to better respect international humanitarian law' in Heike Krieger (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015) 112-124
- Bangerter O, 'Reasons why Armed Groups choose to respect International Humanitarian Law or not' (2011) 882(93) *International Review of the Red Cross* 353-384
- Barber M, 'Preface' in Geneva Call, *Armed Non-State Actors and Landmines: Volume I* (2005)
- Bassam L and Perry T, 'Friend or foe? Assad quietly aids Syrian Kurds against Turkey', *Reuters*, 11 February 2018
- Bassiouni MC, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98(3) *Journal of Criminal Law and Criminology* 711-810
- Baumgarten H, 'The Three Faces/Phases of Palestinian Nationalism, 1948–2005' (2005) 34(4) *Journal of Palestine Studies*, 25-48
- Becker T, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, 2006) 68-69
- Bellal A & Maslen AC, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3(1) *Goettingen Journal of International Law* 175-197
- Bellal A and Heffes E, 'Yes, I do': Binding armed non-state actors to IHL and Human Rights norms through their consent' (2018) 12(1) *Human Rights & International Legal Discourse* 120-125
- Bellal A, 'Establishing the direct responsibility of non-state armed groups for violations of international norms: Issues of attribution' in Gal-Or N, Ryngaert C and Noortmann M (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015)

- Bellal A, Giacca G and Casey-Maslen S, 'International Law and Armed Non-State Actors in Afghanistan' [2011] 93(881) *International Review of the Red Cross* 47-79
- Bethlehem D, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors' (2012) 106 *American Journal of International Law* 770-777
- Bianchi A (ed), *Non-state actors and international law* (Ashgate, 2009) 43-51
- Bilkova V, 'Armed Opposition Groups and shared responsibility' (2015) 62(1) *Netherlands International Law Review* 69-89
- Bilkova V, 'Establishing direct responsibility of armed opposition groups for violations of international humanitarian law?' in Gal-Or N, Ryngaert C and Noortmann M (eds) *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015)
- Bongard P and Somer J, 'Monitoring armed non-state actor compliance with humanitarian norms: A look at international mechanisms and the Geneva Call Deed of Commitment' (2011) 93(883) *International Review of the Red Cross* 673-706
- Bongard P, 'Engaging armed non-state actors on humanitarian norms: Reflections on Geneva Call's experience in Humanitarian Exchange' (2013) 58 *Humanitarian Practice Network* 9-11
- Boon KE, 'Are control tests fit for the future? The slippage problem in attribution doctrines' (2014) 15(2) *Melbourne Journal of International Law* 329-377
- Brewster R, 'Reputation in International Relations and international law theory' in Dunoff JL and Pollack MA (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012)
- Brierly JL, *The Law of Nations: An Introduction to the international law of peace* (Oxford University Press, 6th ed, 1963)
- Broude T and Shereshevsky Y, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses' in Cohen HG and Meyer T (eds) *International Law as Behavior* (Cambridge University Press, 1<sup>st</sup> ed, 2021)

- Brown A, 'Reform, Coup and Collapse: The End of the Soviet State', *BBC News* (online), 17 February 2011 <[http://www.bbc.co.uk/history/worldwars/coldwar/soviet\\_end\\_01.shtml](http://www.bbc.co.uk/history/worldwars/coldwar/soviet_end_01.shtml)> accessed 11 October 2023
- Brownlie I, *International Law and the Use of Force by States* (Clarendon Press, 1981) 370
- Brownlie I, *Principles of Public International Law* (OUP, 7<sup>th</sup> ed, 2008)
- Brunnee J, 'International legal accountability through the lens of the law of state responsibility' (2005) XXXVI (3) *Netherlands Yearbook of International Law* 21-56
- Burleson E, 'Non-State Actor Access and Influence in International Legal and Policy Negotiations' (2010) 104 *Proceedings of the Annual Meeting, American Society of International Law* 325-328
- Burrows A, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed)
- Byman D et al, *Trends in outside support for insurgent movements* (RAND, 2001)
- Capaldo GZ, 'Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hizbollah Conflict,' (2007) 48 *Harvard International Law Journal* 101-112
- Caron D, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in RB Lillich and DB Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Ardsey: Transnational Publishers, 1998)
- Cassese A, 'Terrorism Is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993-1001
- Cassese A, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *International & Comparative Law Quarterly* 589-608
- Cassese A, 'The Nicaragua and Tadic tests revisited in the light of the ICJ judgment on Genocide in Bosnia' (2007) 18(4) *The European Journal of International Law* 649-668

- Cassese A, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30(2) *The International and Comparative Law Quarterly* 416-439
- Cassese A, *International Law* (OUP, 2<sup>nd</sup> ed, 2005)
- Cetinyan R, 'Ethnic bargaining in the shadow of third-party intervention' (2002) 56(3) *International Organization* 645-677
- Chappell Z, *Deliberative Democracy: A Critical Introduction* (Palgrave Macmillan, 2012)
- Chayes A and Chayes AH, 'On Compliance' (1993) 47(2) *International Organization* 175-205
- Chimni BS, 'The International Court and the Maintenance of Peace and Security: The Nicaragua Decision and the United States Response' (1986) 35(4) *International & Comparative Law Quarterly* 960-970
- Chinkin CM, 'The challenge of soft law: Development and change in international law' (1989) 38(4) *The International and Comparative Law Quarterly* 850-866
- Clapham A, 'The Accountability of Armed Groups' in Clapham A and Gaeta P (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014)
- Clapham A, *Human Rights Obligations of Non-State Actors* (OUP, 2006)
- Clark JF, 'Explaining Ugandan Intervention in Congo: Evidence and Interpretations' (2001) 39(2) *The Journal of Modern African Studies* 261-287
- Cohen GM, 'Law and Economics of Agency and Partnership' (5 July 2018) (Virginia Law and Economics Research Paper No. 2018-11)
- Collier P and Hoeffler A, 'Greed and grievance in civil war' (2004) 56(4) *Oxford Economic Papers* 563-595
- Collins JJ, *Understanding War in Afghanistan* (National Defense University Press, 2011)

- Conceição-Heldt E, Mello PA, *Two-Level Games in Foreign Policy Analysis* (Oxford Encyclopedia of Foreign Policy Analysis, Oxford University Press, 2018) 774-776
- Conrad J, 'Interstate rivalry and terrorism: An Un-probed link' (2011) 55(4) *The Journal of Conflict Resolution* 529-555
- Cooter R and Ulen T, *Law & Economics* (Addison Wesley, 5<sup>th</sup> ed, 2008)
- Crawford J (ed), *Brownlie's Principles of Public International Law* (Oxford, 8th ed, 2012)
- Crawford J and Keene A, 'The structure of State responsibility under the European Convention on Human Rights' in van Aaken A/Motoc I (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018)
- Crawford J and Olleson S, 'The Nature and Forms of International Responsibility' in Evans M (ed), *International Law* (Oxford, 2nd ed, 2006)
- Crawford J, *State Responsibility: The General Part* (Cambridge University Press, 2013)
- Crawford J, *The creation of states in international law* (Clarendon Press, 2<sup>nd</sup> ed, 2006)
- Crawford J, 'The ICJ & the Law of State Responsibility' in Tams CJ & Sloan J (ed), *Development of International Law by the International Court of Justice* (Oxford University Press, 1st ed, 2013)
- Curtin D and Nollkaemper A, 'Conceptualizing accountability in International and European Law' (2005) 36 *Netherlands Yearbook of International Law* 3-20
- D'Aspremont J et al., 'Sharing responsibility between non-state actors and states in international law: Introduction' (2015) 62(1) *Netherlands International Law Review* 49-67
- D'Amato A, 'International Soft Law, Hard Law, and Coherence' (2018) Northwestern Public Law Research Paper No. 08-01 <<http://ssrn.com/abstract=1103915>> accessed 30 November 2023



- D'Aspremont J (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011)
- D'Aspremont J, 'International law-making by non-state actors: changing the model or putting the phenomenon into perspective?' in Noortmann M and Ryngaert C (eds), *Non-state actor dynamics in international law* (Ashgate, 2010)
- Daly S, 'The Rule of (Soft) Law' (2021) 32(1) *King's Law Journal* 3-13
- D'Amato A, 'Trashing Customary International Law' (1987) 81(1) *American Journal of International Law* 101-105
- Dannenbaum T, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61(3) *The International and Comparative Law Quarterly* 713-728
- Daoud D, 'Hezbollah fighters train Iraqi Shiite militants near Mosul' *Long War Journal*, 5 November 2016
- Davis DR and Moore WH, 'Ethnicity matters: Transnational ethnic alliances and foreign policy behaviour' (1997) 41(1) *International Studies Quarterly* 171-184
- DCAF & Geneva Call, 'Armed Non-State Actors: Current Trends & Future Challenges' (Working Paper No 5, DCAF, 2015)
- Dejevsky M, 'Ukraine, Russia and the EU: Does it have to be about brinkmanship?' *The Guardian*, November 20, 2013
- DeLamater JD, Myers DJ, Collett JL, *Social Psychology* (Routledge, 8<sup>th</sup> ed, 2018)
- Delgado C, Jang S, Milante G and Smith D, 'The World Food Programme's Contribution to Improving the Prospects for Peace (Preliminary Report)' (SIPRI and World Food Programme, June 2019)
- Deutsch A, 'Investigators identify Russian military unit in downing of flight MH17', 24 May 2018, *Reuters* <<https://www.reuters.com/article/us-ukraine-crisis-mh17/investigators-identify-russian-military-unit-in-downing-of-flight-mh17-idUSKCN1IP0TR>> accessed 8 October 2023

- Dinstein Y, *War, Aggression and Self-Defence* (Cambridge, 4th ed, 2005)
- Dryzek JS, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford Press, 2002)
- Dupree L, 'Afghanistan in 1982: Still no Solution' (February 1983) 23(2) *Asian Survey, A Survey of Asia in 1982: Part II* 133
- Dwivedi SS, 'India as a dominant security concern to Pakistan (1947-1980)' (2008) 69(4) *The Indian Journal of Political Science* 889-896
- Eriksen SS, 'The Congo War and the Prospects for State Formation: Rwanda and Uganda Compared' (2005) 26(7) *Third World Quarterly* 1097-1113
- Ermacora F, 'Report on the situation of human rights in Afghanistan by Special Rapporteur', UN DOC E/CN.4/1985/21, February 1985
- FATF, 'Financing of the terrorist organization Islamic State in Iraq and the Levant (ISIL)' (2015) 40 available at <[www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html](http://www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html)> accessed 30 November 2023
- FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2012-2023)' available at <[www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html)> accessed 30 November 2023
- Fayzullina K, 'Does Tajikistan matter? Political trends in modern Tajikistan', *Al Jazeera*, 20 June 2013
- Fearon JD and Laitin DD, 'Ethnicity, insurgency, and civil war' (2003) 97 *American Political Science Review* 75-90
- Fearon JD and Wendt A, 'Rationalism v. Constructivism: A Skeptical View' in Carlsnaes W, Risse T and Simmons BA (eds), *Handbook of International Relations* (SAGE Publications, 2002)
- Fearon JD, 'Iraq's Civil War' (2007) 86(2) *Foreign Affairs* 2-15
- Fearon JD, 'Rationalist explanations for war' (1995) 49(3) *International Organization* 379-414
- Feltman J, 'UN engagement with nonstate armed groups for the sake of peace: Driving without a roadmap', *Brookings* (15 January 2021)

<<https://www.brookings.edu/articles/un-engagement-with-nonstate-armed-groups-for-the-sake-of-peace-driving-without-a-roadmap/>> accessed 30 November 2023

- Fidler DP, 'A Theory of Open-Source Anarchy' (2008) 15(1) *Indiana Journal of Global Legal Studies*, 259-284
- Filkins D, 'The Fight of Their Lives', *The New Yorker* (online), 29 September 2014 <<https://www.newyorker.com/magazine/2014/09/29/fight-lives>> accessed 11 October 2023
- Filson D and Werner S, 'A bargaining model of war and peace: Anticipating the onset, duration, and outcome of war' (2002) 46(4) *American Journal of Political Science* 819-837
- Findley M and Kwang T, 'Rethinking third-party interventions into civil wars: An actor-centric approach' (2006) 68(4) *Journal of Conflict Resolution* 828-837
- Findley MJ, Piazza JA and Young JK, 'Games Rivals Play: Terrorism in International Rivalries,' (2012) 74(1) *The Journal of Politics* 235-248
- Forsythe DP, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 *American Journal of International Law* 272-295
- Fortin K and Heffes E (eds), *Armed Groups and International Law: In the Shadowland of Legality and Illegality* (Edward Elgar, 2023)
- Fortin K, *The accountability of armed groups under human rights law* (Oxford University Press, 2017)
- Franck TM, *Fairness in International Law and Institutions* (Oxford University Press, 1998)
- French D and Stephens T, *ILA Study Group on Due Diligence in international law* (International Law Association, First Report, 7 March 2014)
- Gal-Or N, Ryngaert C and Noortmann M (eds), *Responsibilities of the non-state actor in armed conflict and the market place* (Brill Nijhoff, 2015)
- Gargan EA, 'Suicide Bomber Kills President of Sri Lanka', *The New York Times*, 2 May 1993
- Geeraerts G, 'Analyzing Non-State Actors in World Politics' (1995) 1(4) *Pole Paper Series*

- Gelb LH, '85 Reagan ruling on Afghans cited', *The New York Times*, 19 June 1986
- Geneva Call, 'Final destruction of 2,485 stockpiled anti-personnel mines in Western Sahara' (22 January 2019) available at <<https://genevacall.org/news/final-destruction-of-2485-stockpiled-anti-personnel-mines-in-western-sahara/>> accessed 30 November 2023
- Geneva Call, 'Syria: New measures taken by the Kurdish People's Protection Units to stop recruiting children under 18' (22 June 2018) available at <<https://www.genevacall.org/news/syria-new-measures-taken-by-the-kurdish-peoples-protection-units-to-stop-using-children-under-18/>> accessed 30 November 2023
- Geneva Call, Annual Reports, <<https://genevacall.org/resources/documents/>> accessed 30 November 2023
- Gershoni Y, 'War without End and an End to a War: The Prolonged Wars in Liberia and Sierra Leone' (1997) 40(3) *African Studies Review* 55-76
- Gersovitz M, 'What Is a Civil War? A Critical Review of Its Definition and (Econometric) Consequences' (2013) 28(2) *World Bank Research Observer* 159-190
- Gleditsch KS, Hug S, Schubiger LI and Wucherpfennig J, 'International Conventions and Nonstate Actors' (2018) 62(2) *The Journal of Conflict Resolution* 346-380
- Gondek M, *The Reach of Human Rights in a Globalising World: Extraterritorial application of Human Rights Treaties* (Intersentia, Antwerpen, 2009)
- Gray C, *International Law and the Use of Force* (Oxford, 3rd ed, 2008)
- Green F, 'Fragmentation in two dimensions: The ICJ's flawed approach to non-state actors and international legal personality' (2008) 9 *Melbourne Journal of International Law* 47-77
- Gregory PR, 'International Criminal Court: Russia's Invasion of Ukraine Is A 'Crime', Not A Civil War', *Forbes*, 20 November 2016
- Guillaume G, 'Terrorism and International Law' (2004) 53(3) *International & Comparative Law Quarterly* 537-548

- Guzman A and Meyer T, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171-225
- Guzman A and Meyer T, 'Soft Law' in Kontorovich E and Parisi F (eds) *Economic Analysis of International Law* (Edward Elgar Publishing, 2016)
- Guzman AT, 'A Compliance-Based Theory of International Law' (2002) 90(6) *California Law Review* 1823-1887
- Guzman AT, *How international law works, A Rational Choice Theory* (Oxford University Press, 2008)
- Habermas J, *Between Facts and Norms* (MIT Press, 1996)
- Habermas J, *Moral Consciousness and Communicative Action* (MIT Press, 1990)
- Handl GF, Reisman WM, Simma B, Dupuy PM and Chinkin C, 'A hard look at soft law' (1988) 82 *American Society of International Law* 371-395
- Harshe R, 'Cross-Border Terrorism: Road-Block to Peace Initiatives' (2003) 38(35) *Economic and Political Weekly* 3621-3625
- Hartman A, 'The Red Template': US Policy in Soviet-Occupied Afghanistan' (2002) 23(3) *Third World Quarterly* 467-489
- Heffes E, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Kotlik MD & Ventura MJ (eds) *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Springer, 2020)
- Henckaerts JM, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87(857) *International Review of the Red Cross* 176-212
- Henkin L, *How Nations Behave* (Columbia University Press, 2<sup>nd</sup> ed, 1979)
- Henkin L, *International law: Politics and values* (Martinus Nijhoff, 1995)
- Herbst J, 'Assessing and Addressing Russian Revanchism' (2016) 6(2) *PRISM* 164-181

- Hernández G, ‘Non-State Actors from the Perspective of the International Court of Justice’ in D’Aspremont J (ed), *Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 141–63
- Herszenhorn DM, ‘Crimea votes to secede from Ukraine as Russian troops keep watch’, *New York Times*, 16 March 2014
- Hessbreugge JA, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2004) 36 *New York University Journal of International Law and Politics* 265-306
- Higgins N, ‘The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements’ (2009) 17(1) *Human Rights Brief* 12-18
- Higgins R, *Problems and process, international law and how we use it* (Clarendon Press, 1994)
- Hofmann C and Schneckener U, ‘Engaging non-state armed actors in state and peace-building: Options and strategies’ (2011) 93(883) *International Review of the Red Cross* 603-621
- Högladh S, Pettersson T and Themnér L, (2011) ‘External Support in Armed Conflict 1975–2009’. This dataset can be accessed at <<https://ucdp.uu.se/downloads/olddw.html>> accessed 1 November 2023
- Human Rights Watch, ‘Funding the “Final War”. LTTE Intimidation and Extortion in the Tamil Diaspora’, March 2006
- Human Rights Watch, *War Without Quarter: Colombia and International Humanitarian Law, Chapter II* (1998) <[5www.hrw.org/legacy/reports/reports98/colombia/4](http://www.hrw.org/legacy/reports/reports98/colombia/4)> accessed 1 November 2023
- Hyeran J, *Compliant Rebels. Rebel Groups and International Law in World Politics* (Cambridge University Press, 2015)
- ICBL, *Landmine Monitor Report 2008: Toward a Mine-free World* (Mine Action Canada, 2008)
- ICRC Report, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (2019) 101(911) *International Review of the Red Cross* 869-924

- ICRC Report, *International Humanitarian Law and the Challenges of contemporary Armed Conflicts - Recommitting to Protection in Armed Conflict on the 70th Anniversary of The Geneva Conventions* (ICRC, 2019)
- ICRC, 'ICRC Engagement with Non-State Armed Groups: Why, how, for what purpose, and other salient issues' (2020) 102(915) *International Review of the Red Cross* 1087-1091
- ICRC, 'IHL in Action: Respect for the Law on the Battlefield' <<https://ihl-in-action.icrc.org/>> accessed 1 November 2023
- ICRC, 'Increasing respect for International Humanitarian Law in Non-international Armed Conflicts' (Geneva, February 2008) 11-13
- ICRC, *The roots of restraint in war* (2018) 19 <<https://www.icrc.org/en/publication/roots-restraint-war>> accessed 1 November 2023
- International Justice Resource Center, *Committee on the Elimination of discrimination against Women* <<https://ijrcenter.org/un-treaty-bodies/committee-on-the-elimination-of-discrimination-against-women/>> accessed 1 November 2023
- International Law Association, 'Final Report of the Committee on Non-State Actors of the International Law Association' (Johannesburg Conference, 2016)
- International Law Association, 'Non-state actors in international law: Aims, approach and scope of project and legal issues' (The Hague Conference, Non-State Actors, First Report of the Committee, 2010)
- International Law Association, 'Non-State Actors in International Law of the International Law Association (ILA): Lawmaking and Participation Rights' (Sofia Conference, 2012)
- Jackson A, 'Talking to the other side: Humanitarian engagement with armed non-state actors' (HPG Policy Brief 47, June 2012)
- Jackson M, *Complicity in International law* (Oxford University Press, 1<sup>st</sup> ed, 2015)
- Jo H and Bryant K, 'Taming of the Warlords: Commitment and compliance by armed opposition groups in civil wars' in Risse T, Ropp S and Sikkink K (eds), *The persistent power of human rights: From commitment to compliance* (Cambridge University Press, 2013)

- Jo H, 'Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?' (2016) 19 *Yearbook of International Humanitarian Law* 63-88
- Jones SG, 'The rise of Afghanistan's insurgency: State failure and Jihad' (2008) 32(4) *International Security* 7-40
- Justice and Equality Movement Sudan, *Action Plan – Operational Mechanism to prevent and end recruitment and use of child soldiers* (26 September 2012) available at <<https://sudanjem.com/>> accessed 1 November 2023
- Kadirgamar A, 'Classes, states and the politics of the Tamil diaspora' (2010) 45(31) *Economic and Political Weekly* 23-26
- Kammerhofer J, 'Non-state actors from the perspective of the pure theory of law' in d'Aspremont J (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011) 54-64
- Karatnycky A, 'Ukraine's Orange Revolution' (2005) 84 (2) *Foreign Affairs* 35-52
- Kausch K, 'State and Non-State Alliances in the Middle East' (2017) 52(3) *Italian Journal of International Affairs* 36-45
- Kelsen H, *Pure Theory of Law* (University of California Press, 1967)
- Khaitan B, 'Alternative to the Existing Rule of Attribution for Use of Force by Non-State Actors in an Armed Conflict' (2021) 26(1) *Journal of Conflict and Security Law* 41-78
- Kirgis F, Morrison FL, Norton PM, Lobel JL, Dinstein Y and Magraw DB, Jr., 'The Jurisprudence of the Court in the Nicaragua Decision', *Proceedings of the Annual Meeting*, (1987) 81 *American Society of International Law*, 258-277
- Kirk RE, *Statistics - An Introduction* (Thomson Wadsworth, 5<sup>th</sup> ed, 2008)
- Kleffner JK, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443-461



- Koenig C, 'Observer Status for the International Committee of the Red Cross at the United Nations: A Legal Viewpoint' (1991) 31 *International Review of the Red Cross* 37-48
- Konaev M, Fazal T, 'Can International Humanitarian Law Restrain Armed Groups? Lessons from NGO Work on Anti-Personnel Landmines', *Lawfare* (30 September 2018) available at <<https://www.lawfaremedia.org/article/can-international-humanitarian-law-restrain-armed-groups-lessons-ngo-work-anti-personnel-landmines>> accessed 30 November 2023
- Kramer M, 'Ideology and cold war' (1999) 25 *Review of International Studies* 539-576
- Krieger H, 'Conclusion' in Krieger H (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015)
- Kuperman AJ, 'The Stinger Missile and U.S. Intervention in Afghanistan' (1999) 114(2) *Political Science Quarterly* 219-263
- Kuran T and Sunstein CR, 'Availability Cascades and Risk Regulation' (1999) 51(4) *Stanford Law Review* 683-768
- Lanovoy V, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) *The European Journal of International Law* 563-585
- Laughland O et al, 'Malaysia Airlines flight MH17 crash: world demands answers from Russia', *The Guardian*, 18 July 2014
- Lauterpacht H, *International law and human rights* (Stevens & Sons, 1950)
- Levine P, Smith R, Reichlin L and Rey P, 'The Arms Trade' (1997) 12(25) *Wiley, Economic Policy* 335-370
- Lindsay DB, Enterline AJ and Joyce KA, 'Third party intervention and the civil war process' (2008) 45(3) *Journal of Peace Research* 345-363
- Lock H, 'How ISIS became the wealthiest terror group in history', *Independent*, 15 September 2014
- Logiurato B, 'The Crisis in Ukraine Might Be On The Verge Of Getting A Whole Lot Worse', *Business Insider*, 18 July 2014

- Lubell N, *Extraterritorial use of force against non-state actors* (OUP, 2010)
- Lyall J, Blair G and Imai K, 'Explaining Support for Combatants during Wartime: A Survey Experiment in Afghanistan' (2013) 107(4) *The American Political Science Review* 679-705
- Mack M, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts* (ICRC, 2008)
- MacLeod A, 'Engaging Non-state Armed Groups for Humanitarian Purposes: Experience, Constraints and Ways Forward' in *Humanitarian Engagement with Non-state Armed Groups* (Chatham House, 2016)
- MacLeod S, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring Through Self-Regulation-‘Plus’' (2015) 62(1) *Netherlands International Law Review* 119-140
- Magnus RH, 'Afghanistan in 1996: Year of the Taliban' (February 1997) 37(2) *Asian Survey, A Survey of Asia in 1996: Part II*
- Maoz Z, 'Rivalry and state support of non-state armed groups (NAGs), 1946-2001' (2012) 56(4) *International Studies Quarterly* 720-734
- Marcus J, 'Russian parliament approves troop deployment in Ukraine', *BBC News*, 1 March 2014
- Mazzeschi RP, 'The Due Diligence Rule and the nature of the International Responsibility of States' (1992) 35 *German yearbook of International Law* 9-51
- Mc Hugh G and Bessler M, *Guidelines on Humanitarian Negotiations with Armed Groups* (United Nations, January 2006)
- McConnell LJ, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2017)
- McCorquodale R, 'The individual and the international legal system' in Evans M (ed), *International Law* (Oxford, 2nd ed, 2006)
- McCubbins M and Schwartz T, 'Congressional oversight overlooked: Police patrols versus fire alarms' (1984) 28(1) *American Journal of Political Science* 165-179

- McNair AD, 'The Law of Treaties' (Oxford: Clarendon Press, 1961)
- Meron T, 'Is International Law moving towards criminalisation?' (1998) 9 *European Journal of International Law* 18-31
- Mesquita BB, 'Domestic Politics and International Relations' (2002) 46(1) *International Studies Quarterly* 1-9
- Meyer T, 'Soft Law as Delegation' (2008) 32(3) *Fordham International Law Journal* 888-942
- Milanovic M, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Aaken A/Motoc I (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018)
- Milanović M, 'Jurisdiction, Attribution and Responsibility in Jaloud' (11 December 2014) EJIL:Talk! <<http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>> accessed 9 October 2023
- Milanovic M, *Extraterritorial application of human rights treaties* (Oxford University Press, 2011)
- Mischkowski D, Stone R and Stremitzer A, 'Promises, Expectations, and Social Cooperation' (2019) 62(4) *Journal of Law and Economics* 687-712
- Mohammed A, 'U.S. intensifies sanctions on Russia over Ukraine', *Reuters*, September 12, 2014
- Moir L, *The Law of Internal Armed Conflicts* (Cambridge University Press, 2002)
- Morris L, 'Kurdish forces, backed by U.S. airstrikes, launch offensive in Iraq', *The Washington Post*, 13 November 2015
- Mulford JP, 'Non-State Actors in the Russo-Ukrainian War' (2016) 15(2) *Connections: The Quarterly Journal* 89-107
- Murphy SD, 'Self-defense and the Israeli Wall Opinion – An Ipse Dixit from the Court?' (2005) 99 *American Journal of International Law* 62-76
- Murphy SD, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter' (2002) 43 *Harvard International Law Journal* 41-51
- Murray D, 'How International Humanitarian Law Treaties Bind Non-

State Armed Groups' (2015) 20(1) *Journal of Conflict & Security Law* 101-131

- Murray D, *Human Rights obligations of non-state armed groups* (Hart Publishing, 2016)
- Murshid N, 'India's Role in Bangladesh's War of Independence: Humanitarianism or Self-interest?' (2011) 46(52) *Economic and Political Weekly* 53-60
- Ngolet F, 'African and American Connivance in Congo-Zaire' (2000) 47(1) *Africa Today* 65-85
- Nollkaemper A and Jacobs D, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359-436
- Nollkaemper A, *Du attribution: Liability of the Netherlands for removal of individuals from the compound of Dutchbat* (8 July 2011) Shares Blog <<http://www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat/>> accessed 11 October 2023
- Noortmann M and Ryngaert C, 'Non-state actors: International law's problematic case' in Noortmann M and Ryngaert C (eds), *Non-state actor dynamics in international law* (Ashgate, 2010)
- Noortmann M, 'International Law Association and Non-state actors' in d'Aspremont J (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011)
- Norton J, 'Nicaragua and the Detoriation of World Order' (1987) 81(1) *American Journal of International Law* 151-159
- O'Loughlin J, Witmer FDW and Linke AM, 'The Afghanistan-Pakistan Wars, 2008–2009: Micro-geographies, Conflict Diffusion, and Clusters of Violence' (2010) 51(4) *Eurasian Geography and Economics* 437-471
- O'Connell ME, 'Lawful Self Defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889-908
- Odom WE, *On Internal War: American and Soviet Approaches to Third world clients and insurgents* (Duke University Press, 1992)

- Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *MoU to Strengthen the Protection of Children Affected by Armed Conflict in Yemen Signed with the Coalition to Support Legitimacy in Yemen* (25 March 2019) <<https://childrenandarmedconflict.un.org/mou-to-strengthen-the-protection-of-children-affected-by-armed-conflict-in-yemen-signed-with-the-coalition-to-support-legitimacy-in-yemen/>> accessed 30 October 2023
- OHCHR, *International Protection of Human Rights in Armed Conflict* (UN Human Rights, 2011)
- Pahre R and Papayoanou PA, ‘Using Game Theory to Link Domestic and International Politics’ (1997) 41(1) *The Journal of Conflict Resolution* 4-11
- Pavlou PA, Liang H and Xue Y, ‘Understanding and Mitigating Uncertainty in Online Exchange Relationships: A Principal Agent Perspective’ (2007) 31(1) *MIS Quarterly* 105-136
- Pear R, ‘Arming Afghan Guerrillas: A Huge Effort Led by U.S.’, *The New York Times*, 18 April 1988
- Permanent Missions, *Special Representative of the Secretary-General for Children and Armed Conflict* <<https://www.un.int/pm/special-representative-secretary-general-children-and-armed-conflict-srsgcaac>> accessed 30 October 2023
- Peters A et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009)
- Pisillo-Mazzeschi R, ‘The Due Diligence Rule and the nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9-51
- Plakokefalos I ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’ (2015) 26 (2) *European Journal of International Law* 471–492
- Plakokefalos I, ‘The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy’ (2017) 28(2) *The European Journal of International Law* 563-585
- Portmann R, *Legal Personality in international law* (Cambridge University Press, 2010)

- Posner E and Goldsmith JL, *The Limits of International Law* (Oxford University Press, 2005)
- Posner EA & Sykes AO, *Economic Foundations of International Law* (Harvard University Press, 2013)
- Posner EA, Sunstein CR, 'The Law of Other States' (2006) 59(1) *Stanford Law Review* 131-179
- Potter PBK and Baum MA, 'Democratic Peace, Domestic Audience Costs, and Political Communication' (2010) 27(4) *Political Communication* 453-470
- Prunier G, 'Rebel movements and proxy warfare: Uganda, Sudan and the Congo (1986-1999)' (2004) 103(412) *African Affairs* 359-383
- Putnam RD, 'Diplomacy, and domestic politics: The logic of two-level games' (1988) 42(3) *International Organization* 427-460
- Rashid A, 'The Taliban: Exporting Extremism' (1999) 78(6) *Foreign Affairs* 22-35
- Ratner SR, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443-545
- Regan PM, 'Choosing to Intervene: Outside Interventions in Internal Conflicts' (1998) 60(3) *The Journal of Politics* 754-779
- Regan PM, 'Third-party interventions and the duration of intrastate conflicts' (2002) 46(1) *Journal of Conflict Resolution* 55-73
- Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005, Geneva)
- Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2012/376, 22 May 2012
- Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2009/277, 29 May 2009
- Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2017/414, 10 May 2017
- Rhodan M, 'Ukraine: MH17 downed by "massive explosive decompression"', *Time*, 28 July 2014

- Richards J, 'An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)' (CCDP Working Paper, The Centre on Conflict, Development and Peacebuilding, The Graduate Institute, Geneva)
- Ritov I and Baron J, 'Status-Quo and Omission Biases' (1992) 5(1) *Journal of Risk and Uncertainty* 49-61
- Roberts A and Sivakumaran S, 'Lawmaking by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) *Yale Journal of International Law* 108-152
- Roberts AE, 'Traditional and Modern Approaches to Customary International Law: A reconciliation' (2001) 95 *American Journal of International Law* 757-791
- Rodenhäuser T, 'Armed Groups, rebel coalitions, and transnational groups: The degree of organization required from non-state armed groups to become party to a non-international armed conflict' (2016) 19 *Yearbook of International Humanitarian Law* 3-35
- Rodley N, 'Can Armed Opposition Groups Violate Human Rights' in Mahoney KE & Mahoney P (eds), *Human Rights in the Twenty-First Century* (Springer Netherlands, 1993)
- Rogers WVH, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 16<sup>th</sup> ed, 2002)
- Rosenberg S, 'Ukraine crisis: Protesters declare Donetsk 'republic'', *BBC News*, 7 April 2014
- Rothman A, 'Beware the Weak State' (2007) 64(2) *The William and Mary Quarterly, Third Series*, 271-274
- Ryngaert C and Meulebroucke AVD, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 (3) *Journal of Conflict and Security Law* 443-472
- Ryngaert C, 'Imposing International duties on Non-State Actors and the legitimacy of International law' (Working paper presented at the seminar of the FWO research community on Non- State Actors in International Law, Leuven, 26-28 March 2009)

- Ryngaert C, 'Non-state actors in international humanitarian law' in D'Aspremont J (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011)
- Ryngaert C, 'Non-State Actors in International Law: A Rejoinder to Professor Thirlway' (2017) 64(1) *Netherlands International Law Review*, 155-162
- Ryngaert C, 'Non-state actors: Carving out a space in a state-centred international legal system' (2016) 63(2) *Netherlands International Law Review* 183-195
- Saideman S, 'Explaining the International Relations of Secessionist Conflicts: Vulnerability v. Ethnic ties' (1997) 51(4) *International Organization* 721-753
- Salehyan I, 'No shelter here: rebel sanctuaries and international conflict' (2008) 70(1) *The Journal of Politics* 54-66
- Salehyan I, 'The Delegation of War to Rebel Organizations' 54 (3) *Journal of Conflict Resolution* (2010) 493-515
- Salehyan I, Gleditsch KS and Cunningham DE, 'Explaining external support for insurgent groups' (2011) 65(4) *International Organization* 709-744
- Salehyan I, 'Transnational Rebels: Neighbouring States as Sanctuary for Rebel Groups' (2007) 59(2) *World Politics* 217-242
- Samii AW, 'A stable structure on shifting sands: Assessing the Hizbullah-Iran-Syria Relationship' 62 (1) *Middle East Journal* (2008) 32-53
- Samuelson W and Zeckhauser R, 'Status Quo Bias in Decision Making' (1998) 1(1) *Journal of Risk and Uncertainty* 7-59
- Sassoli M, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (2010) 1(1) *Journal of International Humanitarian Legal Studies* 5-51
- Saul B (ed), *Research Handbook on International Law and Terrorism* (Elgar, 2<sup>nd</sup> ed, 2020)
- Saul B, 'Improving Respect for International Humanitarian Law by Non-state Armed Groups' in *Humanitarian Engagement with Non-state Armed Groups* (Chatham House, 2016)



- Saul H, 'Russian T-72 tank in eastern Ukraine "shows Russia is supplying arms to rebels", says strategy experts', *The Independent*, 3 October 2014
- Schiff Z, 'Israel's war with Iran' 85 (6) *Foreign Affairs* (2006) 23-31
- Schmidt U and Zank H, 'What is Loss Aversion?' (2005) 30(2) *Journal of Risk and Uncertainty* 157-167
- Schneckener U and Hofmann C, 'The power of persuasion' in Krieger H (ed) *Inducing compliance with International Humanitarian Law* (Cambridge University Press, 2015)
- Security Council Report, S/2007/584, 3 October 2007
- Security Council Working Group on Children in armed conflict, <<https://www.un.org/sc/suborg/en/subsidiary/wgcaac>> accessed 30 October 2023
- See Geneva Call < <https://www.genevacall.org/how-we-work/>> accessed 30 November 2023
- Shain Y and Sherman M, 'Dynamics of disintegration: diaspora, secession and the paradox of nation-states' (1998) 4(3) *Nations and Nationalism*, 321-346
- Shaw MN, *International Law* (Cambridge, 7th ed, 2014)
- Shelton D, 'Normative Hierarchy in International Law' (2006) 100(2) *The American Journal of International Law* 291-323
- Shelton DL (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000)
- Shelton DL, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 1<sup>st</sup> ed, 2011)
- Shemesh M, 'The founding of the PLO 1964' (1984) 20(4) *Middle Eastern Studies* 105-141
- Sherman JH, 'Profit vs. Peace: The Clandestine Diamond Economy of Angola' (2000) 53(2) *Journal of International Affairs* 699-719
- Shlaim A, 'The Oslo Accord' (1994) 23(3) *Journal of Palestine Studies*, 24-40
- Shuster S, 'Meet the pro-Russian separatists of Eastern Ukraine', *Time*, 23 April 2014

- Siklawi R, 'The Dynamics of Palestinian Political Endurance in Lebanon' (2010) 64(4) *Middle East Journal* 597-611
- Sivakumaran S, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369-394
- Sivakumaran S, 'Implementing humanitarian norms through non-State armed groups' in Krieger H (ed), *Inducing compliance with international humanitarian law* (Cambridge University Press, 2015)
- Sivakumaran S, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1) *The European Journal of International Law* 219-264
- Sivakumaran S, *The Law of Non-International Armed Conflict* (OUP, 2012)
- Slaughter AM and White WB, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1-21
- Slaughter AM, 'Plenary Theme Panel: The challenge of non-state actors' (1998) 92 Proceedings of the Annual Meeting, *American Society of International Law* 20-36
- Sokol-Hessner P and Rutledge R, 'The Psychological and Neural Basis of Loss Aversion' (2019) 28(1) *Current Directions in Psychological Science* 20-27
- Stahn C, 'Terrorist Acts as "Armed Attack": The Right to Self-Defence, Art 51(1/2) of the UN Charter and International Terrorism' (2003) 27 *Fletcher Forum of World Affairs* 35-54
- Steer C, 'Non-state actors in international criminal law' in d'Aspremont J (ed), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (Routledge, 2011)
- Stein JV, 'The engines of compliance' in Dunoff JL and Pollack MA (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012)
- Stokke K, 'Building the Tamil Eelam State: Emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka' (2006) 27(6) *Third World Quarterly* 1021-1040

- Sullivan DP, 'Tinder, Spark, Oxygen, and Fuel: The Mysterious Rise of the Taliban' (2007) 44(1) *Journal of Peace Research* 93-108
- Swearingen WD, 'Geopolitical Origins of the Iran-Iraq War' (1988) 78(4) *Geographical Review* 405-416
- Sykes AO and Posner EA, *An Economic Analysis of State and Individual Responsibility under International Law* (Olin, JM Program in Law and Economics Working Paper No. 279, 2006)
- Sykes AO and Guzman A, 'Economics of International Law' in Parisi F (ed) *The Oxford Handbook of law and economics: Volume 3: Public Law and legal institutions* (Oxford University Press, 2017)
- Tams CJ, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16 *European Journal of International Law* 963-978
- Taylor A, 'The Soviet War in Afghanistan, 1979 – 1989', *The Atlantic* (online), August 2014 <<https://www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786/>> accessed 11 October 2023
- The Office of the Prosecutor, *International Criminal Court, Report on Preliminary Examination Activities 2016* (14 November 2016)
- Thompson A, 'Applying Rational Choice Theory to International Law: The promise and pitfalls' (2002) 31(S1) *The Journal of Legal Studies* S285-S306
- Thompson A, 'Coercive enforcement of international law' in Dunoff JL and Pollack MA (ed) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012)
- Traboulsi K, 'Who and what are the Kurds fighting for?', *The New Arab* (online), 3 December 2015 <<https://www.alaraby.co.uk/english/politics/2015/12/3/who-and-what-are-the-kurds-fighting-for>> accessed 11 October 2023
- Trapp KN, 'Back to Basics: necessity, proportionality, and the right to self-defence against non-state terrorist actors' (2007) 56(1) *The International and Comparative Law Quarterly* 141-155

- UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations’ (18 October 2013)

- UN Doc A/HRC/RES/45/6, 12 October 2020
- UN Doc A/HRC/12/48, 25 September 2009
- UN Doc A/HRC/17/44, 12 January 2012
- UN Doc A/HRC/19/68, 28 January 2014
- UN Doc A/HRC/19/68, 8 March 2012
- UN Doc A/HRC/19/69, 22 February 2012
- UN Doc A/HRC/21/50, 16 August 2012
- UN Doc A/HRC/21/50, 16 August 2012
- UN Doc A/HRC/22/59, 5 February 2013
- UN Doc A/HRC/23/58, 17 April 2013
- UN Doc A/HRC/24/46, 16 August 2013
- UN Doc A/HRC/25/65, 12 February 2014
- UN Doc A/HRC/27/60, 13 August 2014
- UN Doc A/HRC/28/69, 5 February 2015
- UN Doc A/HRC/30/48, 13 August 2015
- UN Doc A/HRC/31/68, 11 February 2016
- UN Doc A/HRC/32/CRP.2, 15 June 2016
- UN Doc A/HRC/33/55, 11 August 2016
- UN Doc A/HRC/34/64, 2 February 2017
- UN Doc A/HRC/36/55, 8 August 2017
- UN Doc A/HRC/37/72, 1 February 2018
- UN Doc A/HRC/39/65, 9 August 2018
- UN Doc A/HRC/S-17/2/Add.1, 23 November 2011
- UN Doc A/HRC/S-17/2/Add.1, 23 November 2011
- UN Doc A/HRC/S-17/2/Add.1, 23 November 2011
- UN Doc A/HRC/S-9/L.1, 12 January 2009
- UN Doc A/RES/51/77, 20 February 1997
- UN Doc CAT/C/22/D/120/1998 (1999)

- UN Doc CEDAW/C/GC/30
- UN Doc S/2001/331, 30 March 2001
- UN Doc S/2012/376, 22 May 2012
- UN General Assembly Resolution 46/182, 19 December 1991
- UN Security Council Resolution 1612, 26 July 2005
- UN Security Council Resolution 1888, 30 September 2005
- UNGA, A/HRC/51/45, 17 August 2022
- UNGA, A/HRC/52/69, 7 February 2023
- UNGA, A/RES/45/6, 16 October 1990
- United Nations Human Rights Office of the High Commissioner, 'Brief History' <<https://www.ohchr.org/EN/AboutUs/Pages/BriefHistory.aspx>> accessed 30 October 2023
- United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict* (2011)
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/8/17, 6 June 2008
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/7/78, 6 March 2008
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/31/47, 15 February 2016
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/31/CRP.3, 23 February 2016
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/17/44, 12 January 2012
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/19/68, 28 January 2014
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/S-17/2/Add.1, 23 November 2011
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/19/69, 22 February 2012

- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/19/69
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/HRC/21/50, 16 August 2012
- United Nations Human Rights, Office of the High Commissioner for Human Rights, A/RES/51/77, 20 February 1997
- United Nations Security Council, A/76/871-S/2022/493, 23 June 2022
- United Nations Security Council, S/2013/419, 12 July 2013
- United Nations Security Council, S/2017/294, 5 April 2017
- United Nations Security Council, S/2020/36, 14 January 2020
- United Nations Security Council, S/2022/745, 10 October 2022
- United Nations Security Council, S/RES/1612 (2005), 26 July 2005
- United Nations Security Council, Working Group on Children and Armed Conflict <[Working Group on Children and Armed Conflict | United Nations Security Council](#)> accessed 30 October 2023
- United Nations, ‘Security Council removes five men from UN’s Taliban sanctions list’ (27 January 2010) available at <<https://news.un.org/en/story/2010/01/327762>> accessed 30 November 2023
- United Nations, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*, 2006
- United Nations, Office of the Special Representative of the Secretary General for children and armed conflict <<https://childrenandarmedconflict.un.org/six-grave-violations/>> accessed 30 November 2023
- United Nations, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *MILF signs an Action Plan to prevent recruitment and reintegrate children into civilian life* (31 July 2009) available at <<https://childrenandarmedconflict.un.org/31jul09/>> accessed 30 November 2023
- United Nations, Office of the Special Representative of the Secretary General for Children and Armed Conflict, available at <<https://childrenandarmedconflict.un.org/2017/12/philippines-un-officials->

[congratulate-milf-completion-disengagement-children-ranks/>](#) accessed 30 November 2023

- United Nations, S/RES/1368 (2001), 12 September 2001
- United Nations, S/RES/1373 (2001), 28 September 2001
- Uras U, 'Turkey's Operation Peace Spring in northern Syria: One month on', *Al Jazeera*, 8 November 2019
- van Aaken A and Simsek B, 'Rewarding in international law' (2021) 115(2) *American Journal of International Law* 195-241
- van Aaken A, 'Rationalist and Behavioralist Approaches to International Law' in Dunoff JL and Pollack MA (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022)
- van Aaken A, 'To Do Away with International Law? Some Limits to 'The Limits of International Law'' (2006) 17(1) *The European Journal of International Law* 289-308
- Veuthey V, *Guérilla et droit humanitaire* (ICRC, 2<sup>nd</sup> ed, 1983)
- Vité S, 'Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations' (2009) 91(873) *International Review of the Red Cross* 69-94
- Wagner RH, 'Bargaining and war' (2000) 44(3) *American Journal of Political Science* 469-484
- Walker S, 'MH17 downed by Russian military missile system, say investigators', 24 May 2018, *The Guardian*
- Weaver M, 'EU imposes further Russia sanctions', *The Guardian*, 12 September 2014
- Wedgwood R, 'Responding to Terrorism: The Strikes against Bin Laden', (1999) 24 *Yale Journal of International Law* 559- 566
- West J and Whitaker R, 'Suicide bomber murders president of Sri Lanka', *Independent*, 2 May 1993
- Wolfrum R and Phillip CE, 'The Status of the Taliban: Their Obligations and Rights Under International Law' (2002) 6 *Max Planck Yearbook of United Nations Law* 559-601

- Wolfrum R, 'State Responsibility for private actors: An old problem of renewed relevance' in Ragazzi M (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005)
- World Food Programme, 'Hunger, Conflict and Improving the Prospects for Peace' (October 2020)
- Wright EB, *The law of principal and agent* (HardPress Publishing, 2014)
- Wuerth I, 'Compliance' in D'Aspremont J and Singh S, *Concepts for international law* (Edward Elgar Publishing, 2019)
- Zagorulko I, 'Pro-Russian groups tightens grip on Eastern Ukraine', *Fox News*, 22 April 2014
- Zanardi PL, 'Indirect Military Aggression' in Cassese A (ed), *The Current Regulation of the Use of Force* (Martinus Nijhoff, 1986)
- Zegveld L, 'Accountability of Armed Opposition Groups in International Law' (CUP, 2002)
- Zhdannikov D, 'Russia becomes Iraq Kurds' top funder, quiet about independence vote', *Reuters*, 30 September 2017
- Zufle N, 'Putnam Two Level games' (Seminar Paper, GRIN, 2013)