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INTERNATIONALISATION AND ATTRIBUTION

The *Tadic* analysis
in the *Genocide in Bosnia* case

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Abstract

The rules of attribution under the international law of State Responsibility have been undergoing substantial developments in the past few decades. The direction of these developments has contributed to an abandoning of its core objectives – those which strive to extend accountability beyond its traditional frontiers. This trend is discussed in this work by being associated with the contemporary string of jurisprudential debates on the questions of agency and control, most topically reflected by the ICJ in Genocide in Bosnia that has declared the ICTY's Tadic test for internationalisation of conflicts as insufficient to establish State responsibility. This assertion is hereby discussed and contextualized in light of the many facets of the law of State responsibility, and the problematic of the enforceability of international law due to its Westphalian structures. A leading question in this work is whether the present application of the rules of attribution is consistent with the objectives inbred by its foundational doctrines. It proceeds to observe whether the typology of the present applications of the rules, and the approaches espoused by international courts and tribunals are successful in addressing the growing ubiquity of extra-statal activities that challenges the utility and functionality of the present mechanisms of international humanitarian law. International legal sources and rules, primary and secondary, are fragmented and reclassified as they are applied to factual situations to which they seek to give adequate expression. It is this difference between will-based and justice-based understandingⁱ that challenges the legal legitimacy of the perceived restructuring of the law of State responsibility by the ICJ in Genocide in Bosnia. This judgment calls unremittingly for a review of the legal framework of the rules and confirms the need to harmonise its interpretative applications.

ⁱ Koskenniemi M. *From Apology to Utopia: the structure of international legal argument*. Cambridge: Cambridge University Press, 2005. 284

Internationalisation and Attribution:

The *Tadic* analysis in the *Genocide in Bosnia* caseⁱⁱ

Valentina Azarov

"The completeness of the rule of law - as distinguished from the completeness of individual branches of statutory or customary law - is an *a priori* assumption of every system of law, not a prescription of positive law. It is impossible, as a matter of *a priori* assumption, to conceive that it is the will of the law that its rule should break down as the result of the refusal to pronounce upon claims...There are no gaps in the legal system taken as a whole...The actual operation of the law in society is a process of gradual crystallization of the abstract legal rule, beginning with the constitution of the State, as the most fundamental and abstract body of rules, and ending with the concrete shaping of the individual legal relation by a judgment of a court..."

Lauterpacht H. *The Function of Law in the International Community*, 1933.
85, 102

ⁱⁱ I would like to thank Dr. Marco Roscini, for his thoughtful guidance and constructive directions.

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Abstract

The rules of attribution under the international law of State Responsibility have been undergoing substantial developments in the past few decades. The direction of these developments has contributed to an abandoning of its core objectives – those which strive to extend accountability beyond its traditional frontiers. This trend is discussed in this work by being associated with the contemporary string of jurisprudential debates on the questions of agency and control, most topically reflected by the ICJ in *Genocide in Bosnia* that has declared the ICTY's *Tadic* test for internationalisation of conflicts as insufficient to establish State responsibility. This assertion is hereby discussed and contextualized in light of the many facets of the law of State responsibility, and the problematic of the enforceability of international law due to its Westphalian structures. A leading question in this work is whether the present application of the rules of attribution is consistent with the objectives inbred by its foundational doctrines. It proceeds to observe whether the typology of the present applications of the rules, and the approaches espoused by international courts and tribunals are successful in addressing the growing ubiquity of extra-statal activities that challenges the utility and functionality of the present mechanisms of international humanitarian law. International legal sources and rules, primary and secondary, are fragmented and reclassified as they are applied to factual situations to which they seek to give adequate expression. It is this difference between *will-based* and *justice-based* understandingⁱ that challenges the legal legitimacy of the perceived restructuring of the law of State responsibility by the ICJ in *Genocide in Bosnia*. This judgment calls unremittingly for a review of the legal framework of the rules and confirms the need to harmonise its interpretative applications.

ⁱ Koskenniemi M. *From Apology to Utopia: the structure of international legal argument*. Cambridge: Cambridge University Press, 2005. 284

I. Introduction

Despite the progressing role of non-state actors in a notable number of fields of international law, particularly international humanitarian law and human rights, It is still unclear under what circumstances should international law impute to states the acts of such groups. The most problematic of the present rules of attribution, to be examined in this work, is the notion of “control and direction” enshrined in the draft codification of the ILC at Article 8 of the Draft Articles on State Responsibility for internationally wrongful acts.ⁱⁱ Draft Article 8 considers an individual’s acts as those of a state if the act possesses a public character, and it would hold a State responsible for an act of an individual even in the absence of any strict causal link between the two. It is on this particular notion that most of the controversial jurisprudence of international courts and tribunals is founded, and where the February, 2007 judgment of the ICJ in the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocideⁱⁱⁱ makes an attempt to resolve the ongoing debate originated predominantly by the interplay between *Tadic*^{iv} and *Nicaragua*^v. By doing so, however, it arguably further fragments the interpretative alternatives to which the rules are subjected, as well as refutes their determinability.

ⁱⁱ Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001); Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf/ (last visited March, 2008) (hereinafter *Draft Articles*)

ⁱⁱⁱ *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Reports 2007, (February 26) (hereinafter *Genocide in Bosnia*)

^{iv} *Prosecutor v Dusko Tadic*, Case No IT-94-1-A (ICTY 1999); Available at: <http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.pdf> (last visited Sept 14, 2007) (hereinafter *Tadic*)

^v *Military and paramilitary Activities (Nicaragua v United States)*, ICJ Reports 1986 (June 27), para. 115 (hereinafter *Nicaragua*); We will procure a thorough examination of this particular standard, and whether or not the two main tests, *Tadic* and *Nicaragua*, are not just manifestations of this standard that do not really conflict. This discourse is examined in detail by Leo Van Den Hole, “Towards a test of international character of an armed conflict: Nicaragua and Tadic.” *Syracuse Journal of International Law*, 269, 286-87, 2005

The international legal framework has made continuous efforts to reinforce the rules of attribution for the purpose of extending the frontiers of State accountability. Nonetheless, the current law is struggling with questions of application arising predominantly out of contemporary armed conflicts that no longer fit into the conventional frameworks designed by traditional doctrines of international humanitarian law. Many authors address the question of self-defence and the legitimate use of force against and by non-state actors as a neglected child of international law. The present author proposes that the existent rules of attribution are not only satisfactory but, if interpreted consistently with their original doctrinal notions, can reconcile and aid in the resolution of the problems created by either the United States' retaliation against Afghanistan, or Israel's retaliation against Lebanon, both examined below. In other words, if we refrain from making them up, or contorting them as we go along, we are likely to discover that Ago's original rules of attribution are apt to resolve the majority of our present-day dilemmas. State actors are to be held accountable in international law for the violation of their primary obligations. *A fortiori*, on a Lauterpacht-type^{vi} creative interpretation, contemporary notions of State sovereignty are apt and should be willing to extend their interpretative frontiers to include a growing array of international actors for whose activities the State is called to become liable by virtue of its territorial sovereignty.

This succinct examination of the rules of attribution will primarily observe the context of these rules' birth and growth, as well as the functional nature of the secondary-rules umbrella in the

^{vi} Lauterpacht interpreted the decisions of the Permanent Court of International Justice according to a "subjective school of thought in the sense that it gave priority to the intentions of the parties." He saw this as preferential for the precision of interpretation and application as well as for preventing the treaty from assuming a life of its own; see Spiermann O. *International legal argument in the Permanent Court of International Justice: The rise of the international judiciary*. Cambridge: Cambridge University Press, 2005. 100-101; For Lauterpacht, judicial legislation exists everywhere, although law finds no clear articulation for it and treats it by recourse to "the fiction that the enunciation of the new rule is no more than an application of an existing legal principle or an interpretation of an existing text." This fiction, however, like the controversy about whether judges create law or merely reveal nascent rules is "highly unreal"; Koskenniemi M. "Lauterpacht: The Victorian Tradition in International Law." *European Journal of International Law*, 215, 1997

international legal framework. It will then undertake to enforce the present understanding of the secondary rules of international law, following the ICJ's recent judgment, on the primary rules of international law and examine the varying degrees of its operability.

For this purpose, a three-limbed structure is proposed: Part II undertakes an examination of the doctrine of State responsibility and its fundamental pillars; Part III proceeds to approach the jurisprudential discourse by observing retrospectively the repercussions of the *Genocide in Bosnia* judgment on the dilemmas created by *Nicaragua* and *Tadic*. Within this section, we will treat two self-contained, but interdependent, issues: (i) the jurisprudential and institutional clash between *Tadic* and *Nicaragua*, and (ii) the perceived establishment of a new relationship between the rules of State responsibility and international humanitarian law – hierarchical formation or *lex specialis derogat legi generali*? Lastly, Part IV will attempt to re-evaluate the place the rules occupy by observing instances of practical legal application through a symbolic number of case studies under the doctrine of self-defence, to then embark on a discussion *de lege ferenda* in light of the present string of interpretative orientations.

II. The Rules of Attribution in the International Law of State Responsibility

Roberto Ago, the ILC's Special Rapporteur in the field, is the founding father of the doctrine of attribution in the framework of the law of State responsibility. One of the key concepts in Ago's system is that every internationally wrongful act of a state invokes its international responsibility,

and that there are secondary rules of responsibility of general application.^{vii} Ago's discourse on the law of State responsibility after the Second World War recognises that there is a real international community of states, which possesses some legal mechanisms to enforce the collective will.^{viii} The key premise for this was developed in the period between the two World Wars by Root, who confirmed that "international law violated with impunity must soon cease to exist and every state has a direct interest in preventing those violations which if permitted to continue would destroy the law."^{ix} Lauterpacht went further in view of justice and practice to denote that it would be illogical, to deny any form of responsibility of states on the basis that they are sovereign. It would thereby be completely arbitrary to say that individuals organized in the form of a state acquire a degree of immunity because it has chosen the attributes of sovereignty and dignity. He advocated that international law is not built upon natural law, it is rather the "sense of right", "the social solidarity", or "the engineering law" that is at hand to promote the ends of the international society.^x

By asserting the basis for the establishment of the international law of State responsibility, we are better able to evaluate the ongoing developments and decide whether they are drawing the law away from a forgotten idealism or merely offering content and substance to the principles conceptualized by this law's original founders. It is through this discourse that we can fathom not only (i) the intentions of the founders of this fundamental doctrine, but also (ii) attempt to conceptualize the reasons for the jurisprudential limitations of the rules enacted in light of contemporary threats posed to the existence of the State.

^{vii} This rule forms the cornerstone of the ILC's work on State Responsibility: Draft Articles on State Responsibility, General principles, Art 1, adopted in 1979 at its 25th session; see also Boelaert-Suominen S. "The ICTY Anno 1999: its place in the international legal system, mandate and most notable jurisprudence." *Polish Yearbook of International Law*, 96, 1999-2000

^{viii} Nolte G. "From Dionisio Anzilotti to Roberto Ago: The classical international law of State responsibility and the traditional primacy of a bilateral conception of inter-state relations." *European Journal of International Law*. Vol 13, No 5, 2002. 1084

^{ix} Root, "The Outlook for international law", 10 *American Journal of International Law*, 1, 1916

^x Nolte G. *supra* note 7, 1092

1. The origins of State responsibility and the doctrinal foundations of the rules of attribution

A historical uprooting of the development of the rules of attribution begins with the theory of complicity.^{xi} State responsibility, not derived from principles of collective or absolute responsibility, was first developed by Grotius,^{xii} who held in the seventeenth century that a state can be ‘complicit’ in the private act through two notions – those of *patientia* or *receptus*.^{xiii} Under the principle of *patientia*, the ruler or state know of the crime and fail to prevent it.^{xiv} Whilst under the principle of *receptus* crimes of refugees from justice are attributed to the sovereign.^{xv} He expressed his doctrine in the following manner: “...as we have said, to participate in a crime a person must not only have knowledge of it but also have the opportunity to prevent it...”^{xvi} Although a considerable number of Grotius’ followers opposed his liberal analysis of the responsibility frontiers, he was afforded much support despite moral conceptions of *natural liberty* and the *will of citizens* that coated his legal ideology. Grotius’ ideologies remain the fundamental grounds for State responsibility theories today. These notions outline both a moral and legal basis to the State’s obligation – the former stems from the overriding obligation of all

^{xi} Draft Article 16 covers the question of complicity where examples of such situations, according to the ILC, include “knowingly providing an essential facility or financing the activity in question.” In each case the State must be aware that it is aiding or assisting in the commission of an internationally wrongful act, it must facilitate the act in question, and the act must constitute a wrongful act if committed by the assisting State; see McCorquodale R, Simons P. “Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law.” 70 *Modern Law Review* 4, 611, 2007

^{xii} Grotius H. “De jure belli ac pacis [on the laws of war and peace].” 1646. 436 (Francis W. Kelsey trans., William S. Hein & Co. 1995)

^{xiii} Becker T. *Terrorism and the State*. Oxford: Hart Publishing, 2006. 14

^{xiv} “The commandment addressed by international law to the state consists of not permitting or tolerating that certain acts are carried out by individuals subject to their authority”; Anzilotti D. “La responsabilité internationale des états à raison des dommages soufferts par des étrangers.” 13 *Revue Générale de Droit International Public*, 14, 1906

^{xv} Hessbruegge J.A. “The Historical Development of the doctrines of attribution and due diligence in international law.” 36 *International law and Politics*, 283, 2004

^{xvi} Garcia Mora M.R. *International responsibility for hostile acts of private persons against foreign states*. The Hague: Martinus Nijhoff, 1962. 17

states to contribute to the maintenance of peace and order in the international community, and the latter proceeds from obligations resulting from the exercise of territorial sovereignty.^{xvii}

These notions were further elaborated by Vattel who confirmed the duty of each state not to permit its subjects to offend other nations. His interpretation of the purposefulness of the doctrine lies in the following argumentation: "...the sovereign should permit those under his rule to violate the precepts of natural law, which forbids such acts...[and] Nations should mutually respect one another and avoid any offence, injury or wrong; in other words, anything which might be hurtful to others."^{xviii} The only instance in which the State may be held liable is "if the nation or its ruler, approve and ratify the acts of its citizen, and may then be regarded by the injured party as the real author of the affront."^{xix} With regard to the law of war, Vattel wrote that if citizens of a captured town rebel to win back the town of their sovereign, "they may confidently presume, that the prince will approve of their courageous undertaking."^{xx} Therefore, citizens in the absence of their authorities may rise up and assume public functions the approval thereof in practice, being the actual absence or ignorance exercised on behalf of the State.^{xxi}

A considerable number of scholars followed Vattel and the complimentary approach underlining Borchard's theory, a more contemporary scholar of analogous academic eminence. Borchard rejected every assumption that international law does not impose any liability on states for wrongful acts of private individuals and had initiated the school of thought of 'absolute liability'

^{xvii} Ibid. 18

^{xviii} Ibid. 19

^{xix} Ibid. 20

^{xx} Ibid.

^{xxi} This notion is equally codified in Draft Article 9, that allows for the attribution of the acts of non-state actors to the State where there is an "absence or default of the official authorities." This is an incisive question particularly in relation to the events of the summer of 2006 between Israel and Lebanon and the theoretical misapplications of both international humanitarian law and the law of State responsibility to this particular conflict (see the discussion in Part IV, *infra*); This is equally an accurate description of Draft Article 11; see Townsend G. "State responsibility for acts of de facto agents." 14 *Arizona Journal of International and Comparative Law* 3, 1997. 636-637

prescribing the conditions under which responsibility legally arises.^{xxii} Endorsing these views, Kelsen elaborated upon them by stating that indirect liability, which results from the acts of private persons imputable to the State,^{xxiii} arises in situations where the State has clearly been negligent either in preventing the commission of the act or in punishing the guilty party *post factum*.^{xxiv}

The question of fault, and thereby also the issue of complicity, is a matter long-forgotten by the ILC. The ILC negated the harshness of fault-based responsibility perceiving it as a consequence the deviant state has to rebut evidentially in order to preclude the wrongfulness of its actions.^{xxv} Fault is, however, an inevitable question that has to be addressed both with regards to imputability and the determination of the consequences of a wrongful act.^{xxvi}

Brownlie equally supports this argumentation by noting that the State, as a legal entity, is not physically capable of conduct – it is obvious that all that can be imputed to a state is the act or omission of an individual or of a group of individuals.^{xxvii} The problematic aspect of ascertaining guilt and attributing conduct of an individual to the State is the mental, subjective element of the

^{xxii} The conditions purport to the establishment of implied complicity when a State fails to exercise due diligence in preventing a private person or group from carrying out an act against a foreign state, amounting to an act of delinquency; Garcia Mora M.R. *supra* note 15, 20

^{xxiii} It is assumed that he has meant that the acts and not the persons themselves are imputable. This is a dilemma that resonates in the discussion and the actual analysis of the notion of control. The problem was examined in *Genocide in Bosnia* indirectly as the judges reverted to *Nicaragua* by noting that the control needs to be over the acts and not merely over the group. In *Nicaragua* the United States trained, financed and armed the group but could not have been aware of the fact that they were going to undertake the particular actions that they did. It should have however been speculate (under Ago's notion of *pateintia*) that this was the case, as *Tadic* outlines, it should be irrelevant which villages, or at what precise time the attacks were going to occur as long as the establishment of the group itself and its enforcement as a whole was contributed to by the state, the latter needs to be held accountable.

^{xxiv} Garcia Mora M.R. *supra* note 15, 21

^{xxv} Gattini, A. "Smoking/No Smoking: some remarks on the current place of fault in the ILC articles on state responsibility." 10 *European Journal of International Law* 3, 1999. 397

^{xxvi} This uncertainty was best exemplified by Jagota, a former member of the ILC, in the following statement: "it is like when you entered a room and you know that somebody had just smoke a cigarette, you cannot see the smoker but you know he is there." Gattini responds to this comment by presenting us with a short treatise on the question of certainty and legal precision in the drafting of the articles. He notes that "not only is there still smoke lingering in the ILC meeting-room, but that the ILC, under the influence of its previous rapporteurs, Ago and Arangio-Ruiz, risks contracting a bad case of smoker's cough." The most difficult question to answer according to Gattini is "whether this was the last ILC cigarette?" taken from Gattini A. *supra* note 24, 398

^{xxvii} Brownlie, I. *System of the Law of Nations: State Responsibility. Part I*. Oxford: Clarendon Press, 1986. 37

crime.^{xxviii} He notes that many rules prescribe the *actus reus* without being very explicit about the ‘mental state’, or degree of advertence required from the state organs involved.^{xxix} In a great number of cases it is the relationship between the State and the parties concerned that constitutes the causal link for determining the State’s failure to discharge its duty of prevention. This is based on the fictitious assumption that by failing to exert the appropriate means of prevention, the State becomes a party to the private person’s act.^{xxx}

Ago, who pioneered the codification project of the Draft Articles fiercely advocated the State’s responsibility and imperative duty to legislate and take all necessary and appropriate positive measures to fulfil its obligations under international humanitarian law. He confirmed these assertions in his position as a judge of the ICJ in the *Nicaragua* judgment, “a rare exception to the rule that the conduct of persons or groups which are neither agents nor organs of the State, nor members of its apparatus even in the broadest acceptance of that term, may be held to be acts of the State.”^{xxxii} He additionally formulated, in his role as a Special Rapporteur for the ILC, “the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to...” and engaging the responsibility of the State at the international level.^{xxxii}

^{xxviii} In the recently decided *Neer case* (General Claims Commission, US and Mexico, Docket No 136, October 15, 1926), the Commission held that the standard of *due diligence* should amount to the standard of “wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”; see also Eaglton C. *The responsibility of states in International law*. New York: New York University Press, 1928. 83-86

^{xxix} Brownlie I. *supra* note 26, 38

^{xxx} Garcia Mora M.R. *supra* note 15, 16-17

^{xxxii} *Nicaragua*, *supra* note 4, para. 188

^{xxxii} Roberto Ago, Special Rapporteur, *Third Report on State Responsibility*, [1971] Y.B. ILC 199, 264, para. 1 (UN Doc. A/CN.4/246. 1-3)

An objective logic is found in Anzilotti's theory of 'strict liability', which is satisfied when there has been a violation of the rights of another State for international responsibility to ensue.^{xxxiii} International responsibility postulates from a higher set of ideals – primarily, from the State's obligation to protect each other's independence and well-being as a guarantee of good international relations. It is a theory according to which the responsibility of the State should not be made to depend upon subjective conceptions of fault, but rather simply upon the illicit nature of the act itself and the fact that a violation had been committed.^{xxxiv} In the words of Garcia Mora, having considered the "present day government's pervasive and complete control" over the movements and actions of persons, "peace and security may become illusory should the State be able to escape responsibility for private acts by merely pleading lack of knowledge of these acts or impossibility of fulfilling the duty of prevention."^{xxxv}

Despite the limitations of the present legal mechanisms, the ambit of the responsibility regime are unquestionably broader and more far-reaching than perceived in theory.^{xxxvi} The formulaic limitations of the legal framework restrict state participation, which is required in subjecting both state organs and non-state actors to stricter control for the purpose of combating impunity.^{xxxvii} In targeting this semantic inoperability, Gattini, amongst others, urges that clarity is brought to these

^{xxxiii} This can also be referred to as *a fortiori* reasoning. Since we have earlier asserted that one of the fundamental premises of the law of State responsibility is that any violation of international law invokes the responsibility of the State. The doctrine of strict liability goes a step in asserting that if there was a violation, upon this mere fact, it should be said that responsibility should follow – impunity is not an option and the legal author of the wrongful act should be punished.

^{xxxiv} Garcia Mora M.R. *supra* note 15, 26-27

^{xxxv} *Ibid.* 17

^{xxxvi} As Tomuschat notes, the ILC's work on treaties "almost ideally combined aspects of legal theory with the needs of legal policy," but it remains that the "academism" of the work on state responsibility presents "an entirely different picture"; Tomuschat C. "ILC-International law Commission" in Wolfrum R. Philip C. *UN: Law, policies and practice*, 1995. 705-708 ; see also Caron's discussion on the difficulty of applying abstractions in Caron D. "Symposium, the ILC's articles on State responsibility: The paradoxical relationship between form and authority." *American Journal of International Law*, 2002. 870-872

^{xxxvii} For a discussion of the disappointing and confusing nature of the decisions undertaken by the international courts and state practice in this field see Christenson's analysis. He particularly criticises the courts for failing to establish a clear distinction between direct and indirect attribution and opting for a blurred evidential threshold for the establishment of control and authorisation with regards to the non-state group under Draft Article 8. He uses the example of the Court's "sloppy" reasoning in its *Nicaragua* conclusion that the US was not responsible for the *contras* actions, failing to distinguish between the two situations Draft Article 8 prescribes – the first is where the State "instructs" and the second is where the State "prompts" the private persons; Christenson G.A. "Attributing conduct to the state: is anything new?" 84 *American Society of International Law Proceedings* 51, 1990. 51-59

rules in order to reconcile the current definitional difficulties and contribute to the logical traits of the development of international law towards individualisation – a more remarkable achievement for an order that is too often drawn to primitiveness.^{xxxviii} Despite the widespread citation of the articles by foreign ministries, lawyers and international courts, Boyle and Chinkin have recently confirmed that “in significant respects it was far from clear what those rules were, still less what they should be.”^{xxxix}

This brief genealogical account is a ground for comparing the initial state of the rules with their interpretation and implementation to present day situations that the following sections will pursue. It equally permits to discern and define an idea that validates the thesis of this work – the nativity of the rules of attribution, with particular emphasis on Draft Article 8, not only allows for but actively stimulates the affiliation of armed groups with the State. Concurrently, the crystallisation of the law through such instances of practice attest to the need to discern a typology of interpretations for the purpose of securing a more consistent and comprehensive legal framework. It is on this premise that the rest of this work observes the application and instrumentalisation of this classic doctrine of public international law, both self-exclusively and in interaction with other principles and doctrines.

2. The principles of Draft Article 8 developed by the case law of international tribunals

A jurisprudential survey shows that it is difficult to clearly discern a set of criteria assessing the degree of involvement that states would have to exert in order to pass the benchmark for

^{xxxviii} Gattini A. *supra* note 24, 398

^{xxxix} They concede, however, that the Commission did not failed to rise to the challenge of constructing a “skilfully drafted” instrument in treaty language which is “lean and polished”, even though some would have preferred it to go further; Boyle A. Chinkin C. *The Making of International Law*. Oxford: Oxford University Press, 2007. 184

attribution that applies the “control and direction” terminology of Draft Article 8.^{xl} In fact, the most important pronouncements of international courts and tribunals in relation to the topic of State responsibility have been made without any reference to the Draft Articles. Due to the discretionary nature of the reasoning found in the case law, which does not abide by any unique set of criteria, it is arguable that this is the law’s current status quo, or the only operable state of the ever-changing international legal order. It is hereby examined further why it is that whilst we are presented with an apparently confident codification on behalf of the ILC, the case law, correspondingly, is struggling with the task of providing a workable approach to the determination of the factual threshold required for the operation of this phraseology, for instance, that of “acting on the instructions of, or under the direction or control of,” that is deduced from the scope of this Draft Article.^{xli}

In his commentary on the Draft Articles, which reflects a comprehensive survey of international customary law in this field, Crawford gives special regard to state-owned and controlled enterprises and corporations. There would equally be sufficient precedent for attribution where the State was using its ownership interest in order to achieve a particular result.^{xlii} The examination of each situation on an *ad hoc* basis needs to rely on three criteria: (i) the instructions given, or direction or control exercised,^{xliii} (ii) the specific conduct complained of,

^{xl} Whether it is the amount of tolerance, through an examination of the duration and intensity, or the amount of voluntary support and/or endorsement of the actions (see discussion *supra*).

^{xli} This is a codification process that lasted over 40 years. In particular Draft Article 8, where the ILC clearly outlines, despite the ambiguity of the terms employed, that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”; Crawford J. *The International Law Commission’s Articles on State Responsibility: Introduction, text and commentaries*. Cambridge: Cambridge University Press, 2002. 110

^{xlii} *Foremost Telecom, Inc. v Islamic Republic of Iran* (1986) 10 Iran-U.S.C.T.R. 228; *American Bell International Inc. v. Islamic Republic of Iran* (1986) 12 Iran-U.S.C.T.R. 170; see also Crawford J. *supra* 40, 113

^{xliii} The concepts of express authorisation or ratification by a state have arguably contributed to one of the most problematic definitional dilemmas of this century. The uncertainty as to the positions of their thresholds is both evidential and conceptual.

and (iii) the causal link^{xliv} between the instructions or control and the conduct that amounted to an internationally wrongful act.^{xlv}

Duties flowing from the doctrine of territorial sovereignty are encountered in the judgment of the ICJ in *Corfu Channel*.^{xlvi} The Court concluded that the laying of the minefield could not have been accomplished without the knowledge of the Albanian government and referred to every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states. The Court consequently asserts that exclusive control alleviated the restrictiveness of methods of proof.^{xlvii} The *Hostages* case^{xlviii} analogously held that not only was the Iranian government responsible for having violated their obligations under the Consular and Diplomatic relations Convention, but they equally failed to bring the situation to a quick conclusion.^{xlix} Failure to fulfil a duty to control an inflamed mob should constitute direct conduct.¹ This was seen as a correct and straightforward application of Ago's interpretation.

However, an attempt to construct a typological classification of the jurisprudence confirms that there is an indiscernible number of doctrinal interpretations found in the case law. The following

^{xliv} Caron interestingly observes that there is little discussion of the principles of causation in the modern efforts to restate the law of State responsibility. As a consequence, causation as an aspect of State responsibility is a very undeveloped area of law. The relationship between the two is clear, causation serves as a limit on the scope of State responsibility. What remains unclear and problematic is whether the reverse is the same – do the rules of attribution limit State responsibility to less than “the proximate and natural consequences of a state's acts?” Tribunals only feel comfortable with finding responsibility as an immediate and direct result of an attributable act, rather than as a foreseeable consequence. It is inherent in certain violations that the acts effectuating it will be general, unspecific and indirect. What is then the benchmark for a particular cause bringing about a particular effect?; Caron D. “Acts of private persons and the relationship between attribution and causation.” 84 *American Society of International Law Proceedings* 51, 1990. 67-71

^{xlv} For instance, that of the non-respect of Article 1 Common to the Geneva Conventions and extra-territorial human rights law obligations; Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950

^{xlvi} This case also provides an instructive example of the fact that there is no liability without fault; ICJ Reports, 1949; see also Brownlie I. *supra* note 28, 43

^{xlvii} “By reason of such exclusive control, the other [victim] State...is often unable to furnish direct proof of facts giving rise to responsibility...such a state should be allowed a more liberal recourse to inferences of fact and circumstantial evidence”; Ibid. 182

^{xlviii} *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, United States Diplomatic and Consular Staff in Tehran, ICJ Reports 45, 1981 (May 12) (hereinafter *Hostages*)

^{xlix} Caron notes that the question of causation cannot be ignored. Judge Brower of the ICJ similarly held that there was a cause and effect relationship between these successive statements by the leader of the ultimately successful Islamic revolution and events that befell Americans in that country since 1978; Caron D. *supra* note 43, 70.

¹ Christenson G.A. *supra* note 36, 54-56

cases are the classically discussed jurisprudential collection that attempts to define the notion of active and direct, rather than passive and indirect, *control* under Draft Article 8.

The first amongst these is the *Military and Paramilitary Activities*^{li} case where the degree of control by the United States government of the paramilitary group was seen as insufficient to conclude for a Draft Article 8 attribution.^{lii} Despite overwhelming evidence, the United States evaded responsibility due to the restrictive application of the “effective control” test.^{liii} The judges agreed that the general evidence presented was indeed sufficient to establish control, however, they insisted that to justify attribution specific evidence of the State’s authorisation of the wrongful conduct is required.^{liv} In the analysis of the facts, the ICJ uses the following argumentation: “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.”^{lv}

It merits to add that not only did the US directly support the *contras*, but their actions went as far as providing the group with “the CIA manual on psychological guerrilla warfare encouraging the commission of unlawful acts.”^{lvi} This, according to the Court, “did not show sufficient control and authorisation of the non-state group.”^{lvii} The essential problem was that the US did not charge the *contras* to do any specific acts for which it specified the location and timing. This case

^{li} Here the question was whether the conduct of the *contras* was attributable to the United States. The Court analyzed the case in terms of the notion of “control” and concluded that there was no clear evidence that the US had exercised such a degree of control in all fields as to say that the *contras* acted on its behalf. More over, the Court concluded that the test should examine whether the State had effective control of the military or parliamentary activities in the course of which the alleged violations were committed. *Nicaragua*, *supra* note 4, para. 14

^{lii} Becker T. *supra* note 12, 68

^{liii} *Ibid.*

^{liv} Ironically, neither the concept of “general evidence” nor “specific evidence” were defined by the Chamber. It has been concluded from the general prose in the judgment is that the threshold for the internationalisation of a conflict was utterly low so that no state could evade responsibility for its involvement in a conflict, particularly on the territory of another state; *Ibid.*

^{lv} *Tadic*, *supra* note 3, para. 109

^{lvi} *Nicaragua*, *supra* note 4, para. 14

^{lvii} Christenson G. "The Doctrine of Attribution in State Responsibility." in *International Law of State Responsibility for Injuries to Aliens* (Lillich ed), Charlottesville: Virginia University Press, 1983. 330-336

confirms the stringent nature of a relationship of agency.^{lviii} It is objectively questionable whether the requirement to know *exactly* the whereabouts of the group and its acts are not an excessive prerequisite for establishing responsibility. The requirement to prove the existence of such a bond makes a majority of instances of attribution virtually impossible to substantiate in law.

In *Kordic*^{lix} the Appeal Chambers found, beyond reasonable doubt, that the conflict was international in character. In determining the internationalisation the Chamber focused on two questions: (i) was there evidence relating to whether a state provided “financial and training assistance, military equipment and operational support”? and (ii) did that State “participate in the organization, coordination or planning of [the] military operations”?^{lx} There appears to be no detectable logical difference between this two-limb test for attribution and the one applied in *Nicaragua*.

An appeasement came with the Appeals Chamber of the ICTY judgment in *Tadic*, which upheld that the degree of control may vary according to the factual circumstances of each case.^{lxi} Thereby, the Court lowered the threshold required for attribution arguably reverting to the operative approach envisaged by the drafters of Draft Article 8.^{lxii} Upon an examination of the facts, the Chamber concluded that the relevant test was that of “overall control”.^{lxiii} Contending

^{lviii} Ibid. 69

^{lix} *Prosecutor v Kordic and Cerkez*, Case No. IT-95-14/2-A, ICTY Reports 2004 (December 17) (hereinafter *Kordic*)

^{lx} One can be safe to assume, according to linear logic, that “military operations” in a general sense does not oblige the state to have been aware of the particular, specific operations for which it may be held to account; *Kordic*, *supra* note 58, para. 361

^{lxi} *Tadic* arguably complicated matters by initiating a discussion of the links between international humanitarian law, particularly the internationalisation of conflicts, and State responsibility. This is due to the existence of a vibrant academic debate on the implications of internationalisation on the laws of war and on the secondary rules respectively.

^{lxii} Becker T. *supra* note 12, 69; contrasted with Tyner D.B. (*infra* note 93, 877) who criticises the ILC for opening on first reading the door to a lower standard for State responsibility than that adopted by *Nicaragua*. Though the commentary on the Draft Articles does address the Appellate Chambers’ fault for addressing a question that was not directly before it, the drafters failed to go forward and outline the relevant distinction between the two cases and were instead content to adopt a limited view of the problem.

^{lxiii} The FRY was paying the salaries of the VRS, *Tadic*’s military unit, and the VRS “was formally under the command of Belgrade...[and] operate[d] as an integrated and instrumental part of the Serbian war effort; presented by Judge McDonald in her dissenting opinion, available at: <<http://www.un.org/icty/970507op.htm>>

that evidence of specific instructions is unnecessary, it asserted that such compelling evidence is only required in cases of internal turmoil where it is overwhelmingly difficult to assess whether the State's involvement has passed the required evidential threshold.^{lxiv}

Nicaragua appears to be equally unhelpful in delimiting the scope and content of the “effective control” test. Although the Court found that US assistance was “crucial” to the *contras*' efforts,^{lxv} it held that the group continued their activities despite the fact that Congress no longer authorised US military aid after October 1984, and therefore assistance from the US was “insufficient to demonstrate their *complete* dependence on [the] US.”^{lxvi}

A problematic is also detected with the criterion of agency used in both *Tadic* and *Nicaragua*. This concept appears to openly neglect the reality where states invariably hide their connections to private actors and where straightforward situations do not exist.^{lxvii} Overall codification of the law of State responsibility envisages a single regime for all wrongful acts, irrespective of the source of the obligation.^{lxviii} This very anomaly brings us to the following question: has jurisprudential practice proceeded to restructure the law of State responsibility by fragmenting its application to different obligations contrary to the very premise of its doctrinal foundations?

^{lxiv} The core of the issue concerning the extent of the control process carried out either formally or practically by the party over the operation units is primarily relevant to the question whether or not imputability of a given act to that party exists at all, or is merely an act of private persons; Kamenov T. “The origin of State and entity responsibility for violations of international humanitarian law in armed conflicts” in F. Kalshoven and Y. Sandoz (eds), *Implementation of International Humanitarian Law*. Dordrecht: Martinus Nijhoff Publishers, 1989. 177; see also Becker T. *supra* note 12, 70

^{lxv} *Tadic*, *supra* note 3, para. 110

^{lxvi} *Ibid.* (emphasis added)

^{lxvii} These developments reflect Koskeniemi's submission, “[m]ethod, as pursued by doctrine, is in constant movement away from doctrine itself to something beyond it – a solid epistemological foundation”; Koskeniemi M. *supra* note 5, 251

^{lxviii} At the time of codification this option appeared more attractive for a number of reasons; Arsanjani M.H. “The codification of the law of State responsibility.” 83 *American Society of International Law Proceedings* 225, 1989. 225-228

III. The paradox in *Genocide in Bosnia*: what logic requires^{lxix}?

The judgment of the ICJ in the *Genocide in Bosnia* case published on February 26, 2007 has provoked an evolution based on the paradox that is found in its conclusion on the question of attribution. Having concluded that genocide was committed in Srebrenica, the Court then considered the ways that responsibility for genocide could be attributed to Serbia.^{lxx} The ICJ held that neither could the VRS be considered *de facto* organs because they were not under such strict control of the State, nor were the acts committed by persons who acted on the instructions of the FRY or under its direct control.^{lxxi}

In paragraphs 403 to 405 of the judgment, the Court persists with a very creative interpretative methodology to conclude that the “overall control” test is “unpersuasive” and that the “degree and nature” of a state’s involvement in a conflict in order for the laws of war applicable to international armed conflicts to apply is different than the “degree and nature” of involvement required “to give rise to the State’s responsibility for a specific act committed in the course of the conflict.”^{lxxii} The paradox lies in the possibility that the State could be a party to the conflict for the purpose of applying the rules applicable to international armed conflicts, but not a party to the conflict for the purpose of being held accountable for the violations of these rules.

^{lxix} *Genocide in Bosnia*, *supra* note 2, para. 405

^{lxx} The Court then examined the question of responsibility for conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide in respect of Srebrenica; see Morgan-Foster J. Savoie P.O. “World Court finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide.” 11 *ASIL Insight* 9, 2007. Available at: <<http://www.asil.org/insights/2007/03/insights070403.html>> (accessed December 27, 2007)

^{lxxi} Where it is notable that the Court rejected the “overall control” test of the ICTY in the *Tadic* case, reaffirming the “effective control” test in the ICJ’s *Nicaragua* case; *Genocide in Bosnia*, *supra* note 2, para. 396-415; for further comments on this case see Sivakumaran S. “Application of the Convention on the Prevention and Punishment of the Crime of Genocide” (Bosnia and Herzegovina v Serbia and Montenegro) (Case comment). 56 *International and Comparative Law Quarterly* 3, 2007. 695-708

^{lxxii} *Genocide in Bosnia*, *supra* note 2, para. 403

More critical than its implications on the test for attribution are the consequences such an approach could have on the appreciation of the relationship between the primary rules of international humanitarian law, and the secondary rules of State responsibility.^{lxxiii} By using the word “differ” it is objectively ascertainable that the Court did not intend to create a hierarchy between the two overlapping fields. It is simply unclear what the Court had intended to impart by endorsing such “semantic open-endedness or ambiguity of international legal words.”^{lxxiv} The dilemma that concurrently arises, and shall be examined in the case studies below, is that it is equally unfavourable to choose a strict application of a set of uniform rules of attribution, as it is to opt for a fragmented, unworkable normative framework for determining State responsibility.

In order to structure our discussion, we will undertake the issues as follows: part (a) will discuss the *Tadic* fall-out in the *Genocide in Bosnia* judgment by observing the original *Tadic-Nicaragua* clash which *Genocide in Bosnia* aspired to resolve – namely, the jurisdictional inconsistencies between the ICJ and ICTY, as well as the rationales for the conclusions reached in each case; and part (b) will conduct an analysis of a newly devised relationship between international humanitarian law and the law of State responsibility in light of the theoretical understanding of the interface between primary and secondary rules of international law.

1. The *Tadic-Nicaragua* clash

Despite the apparent logical similarities between the rationale’s of these two judgments, in its discussion of the appropriate test to be used for attribution, the ICJ in *Genocide in Bosnia* insisted

^{lxxiii} For definitions of “primary” and “secondary” rules and the relation between the two see *infra* Section III(b)(i)

^{lxxiv} Koskenniemi M. *supra* note 5, 585

that the *Tadic* test was inapplicable and therefore does not fit into the jurisprudential package on State responsibility. On a crude appreciation of the *ratio decidendi*, it appears that this is the reason why the Court reverted to the *Nicaragua* test instead. In paragraph 403 of the *Genocide in Bosnia* judgment the Court holds that the ICTY in *Tadic*,

“was not called upon, nor is it generally called upon, to rule on questions of State Responsibility, since its jurisdiction is criminal and extends over persons only...[therefore] the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.”^{lxxv}

This conclusion was reached on the basis of two reasons that our discussion will address in turn: (i) it was not within the jurisdiction of the ICTY to comment on this area of law which applies to states and not to individuals; and (ii) the test for the classification of a conflict as international requires a different “degree and nature” of State involvement than that required for the invocation of State responsibility. Both argumentative assertions produce a considerable number of concerns that the following sections aspire to address in contextualising the issues with their relevant theoretical notions.

a. The limited jurisdiction of the ICTY

The ICJ in *Genocide in Bosnia* faulted the ICTY for addressing an issue “which was not indispensable for the exercise of its jurisdiction...since its jurisdiction is personal and extends

^{lxxv} *Genocide*, see note 2, para. 403

over persons only.^{lxxvi} A question to be undertaken at brief, but without which this work would not be complete, is whether the ICTY was authorised to address issues of State responsibility and was the consideration authoritative. Consequently, if it was authoritative, even if *ultra vires*, it is asked whether the ICJ has, or should be expected to have, a duty or judicious requirement to consider relevant precedent in order to minimise the fragmentation of international jurisdictions.^{lxxvii}

Cannizzaro examined the judgment from this particular angle of the argumentation. He commences by affirming that the ICJ, the only existing international court of universal jurisdiction, should take note of the case law of specialised courts when settling disputes touching upon subject matters that come within their ambit.^{lxxviii} This reinforces the stance that decisions of the ICTY have a certain degree of authoritative thrust and, far from being considered for their procedural force, need to be considered for their normative convictions.^{lxxix}

Cannizzaro proposes the “normative approach” in order to reconcile the current proliferation of international tribunals and the operational difficulties that this plurality creates. He details the manner in which the ICTY entered the international legal order and explores its founders’ intentions. The ICJ holds that the FRY must be regarded as having accepted the jurisdiction of the ICTY.^{lxxx} Furthermore, in the same light, Article 29 of the Tribunal’s Statute^{lxxxi} - the

^{lxxvi} Ibid.

^{lxxvii} This is presented with a conscious reverence of the formal position that there is no doctrine of precedent in international law and that international judicial decisions are binding only on the parties to the particular case. Nevertheless, judicial decisions have law-making effect. As the principal judicial organ of the UN, the Court behaves as though its decisions have precedential value; Boyle A. Chinkin C. *supra* note 38, 293

^{lxxviii} Cannizzaro E. “Interconnecting international jurisdictions: A contribution from the Genocide decision of the ICJ.” *European Journal of Legal Studies*, April, 2007. Available at: <<http://www.ejls.eu/>> (visited September 14, 2007)

^{lxxix} The decisions of the Tribunal constitute rules of law affecting the legal positions of the individuals tried by the Tribunal, but also of the states bound by the Security Council Resolution that established it, Resolution 827(1993) and the Statute of the Tribunal, which requires these states to recognize its decisions and give them effect within their municipal orders; Ibid. 10

^{lxxx} This is equally mentioned in paragraph 445, where the ICJ had concluded that the Tribunal constitutes an “international penal tribunal” within the meaning of Article VI of the Genocide Convention, i.e. a Tribunal having jurisdiction for individual conduct in breach of the obligation contained in the same convention which bestows jurisdiction upon the ICJ for State conduct; *Genocide in Bosnia*, *supra* note 2, para. 445-447

obligation to cooperate – was interpreted in considerably broad terms by national laws to recognise judgments in the internal legal order.^{lxxxii} The insecurity created by the tendency of specialised courts to settle disputes under their respective constitutive treaties only, and thus to render awards which are structurally incomplete, endangers the unity of international law.^{lxxxiii} In order to limit the fragmentation of international law, the “normative approach” is a compromise between the ICJ’s complete resentment to the ICTY’s discussion of the law of State responsibility and its choice to ignore it altogether. The limitations on the jurisdiction of international judicial bodies should not, by itself, entail a corresponding limitation on the law applicable to the settlement of the dispute.^{lxxxiv}

The importance of the ICTY as an international institution for dispute resolution is incontestable. Meron observes that the ICTY has produced more precedent than all previous domestic and international war crimes jurisdictions combined.^{lxxxv} Despite this, it is apprehended that the parameters of the relationship between the ICTY and other international institutions have not been defined.^{lxxxvi} Although the overlap between the ICJ and the ICTY is inevitable, it begs the following pivotal question: to what extent is the ICJ to abide by a finding of the ICTY that genocide took place in Bosnia?

^{lxxxii} Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704.

^{lxxxiii} The example that Cannizzaro uses the Austrian example of Article 26 of the Austrian Federal Law on Cooperation with the International Tribunals, which reads: “...a final judgment of the ICTY shall constitute full proof of that which was declared in the said final judgment on the basis of evidence. Proof of the incorrectness of declarations is admissible”; see the discussion by Cannizzaro E. *supra* note 77, 9

^{lxxxiii} *Ibid.* 17

^{lxxxiv} Cannizzaro equally mentions this question in Cannizzaro E, Bonafé B. “Fragmenting international law through compromissory clauses?” *European Journal of International Law*, 2005. 481

^{lxxxv} Conference program: “The ICTY at ten,” at the New England School of Law in Boston, Mass. (Nov. 9 2002) in Drumbl M.A. “Looking Up, Down and Across: The ICTY’s Place in the International Legal Order” . 47 *New England Law Review* 4, 2003. 1039

^{lxxxvi} This can be compared to the conceptual insufficiencies found in the interplay between Individual responsibility and State responsibility. The non-concurrence of the true has resulted in a number of appalling and incommensurable inconsistencies in the application of international law and the invocation of Individual responsibility, on the one hand, but not State responsibility, on the other, for the same crime; *Ibid.* 1048; Nolkaemper says that since there is no differentiation between ordinary and aggravated State responsibility, having abandoned the notion of a “State crime”, the current position of the ILC Articles is that all acts are attributable to the State. The matter then is not so much a problem of attribution as of consequences of serious breaches of international law; Nolkaemper A. “Concurrence between individual responsibility and state responsibility in international law”. 52 *International & Comparative Law Quarterly* 3, 2003. 616-640.

The 2002 *Democratic Republic of Congo v. Belgium*^{lxxxvii} majority opinion indicates that the ICJ is mindful of the contributions to international law made by its Statute and case law. Perhaps more importantly, these institutions all strive to provide justice for the same victims and therefore guidelines should recognise that the work of each institution is part of a broader process of international legal “becoming”. The idea of complementarity that guides the relationship between international and national courts should also be transposed to the interface between international and regional, specialised dispute resolution bodies.^{lxxxviii} The ILC is of the opinion that the legal issues and the factual situation brought to light in the *Tadic* case differ from those the ICJ had faced in the *Nicaragua* case^{lxxxix} - the ICTY’s mandate was to address issues of individual criminal responsibility, not State responsibility.^{xc}

In guise of a conclusion on this particular point, the present author supports the following argumentation that was presented by Sassòli in challenging the ILC’s position.^{xcii} The ILC, who writes that the application in the *Tadic* case concerned not responsibility but the applicable rules of international humanitarian law, is correct. But, it neglects the fact that the preliminary underlying issue in both cases was the same – before individual responsibility can be established in a given case, the rules according to which an individual should have acted must be clarified.^{xcii}

What had become unclear, and is examined in detail in the following section, was whether attribution is not a test commonly used in judging whether a foreign intervention leads to the

^{lxxxvii} Case concerning the arrest warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), 2002 ICJ (Feb 14), at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgement/icobe_judgement_20020214.pdf (last visited Sept 22, 2007)

^{lxxxviii} Drumbl M.A. *supra* note 84, 1057

^{lxxxix} *Nicaragua* did not deal with the internationalisation of the conflict between Nicaragua and the United States. What was at stake was whether the group that the US supported had been sufficiently dependent on that support in order to conclude that it acted on behalf of the US and therefore that the violations of international humanitarian law were in fact attributable to the US government itself.

^{xc} “The question of the Contras’ liability for their actions and the question of whether the United States was liable for the conduct of the contras were, in the eyes of the ICJ, distinct and separate questions that likely would require different analyses”; *Nicaragua, supra* note 4, para. 116

^{xcii} Sassòli M. “State responsibility for violations of international humanitarian law.” 84 *International Review of the Red Cross* 846, June 2002. 408

^{xcii} IHL governing international armed conflicts could apply to acts, which Mr. Tadic committed against Bosnian Muslims in the course of a conflict with the Bosnian government only if those acts could be legally considered as acts of another State, namely the Federal Republic of Yugoslavia; *Ibid.* 408

internationalisation of a conflict.^{xciii} In other words, do we need to impute a group's actions to the State or merely to conclude for a reduced level of involvement in order to internationalise a conflict?^{xciv} and forthwith, does a lower and much wider threshold for the internationalisation test not necessarily lead to inconsistencies in the unicity of the law of State responsibility?^{xcv}

b. Untangling Tadic and Nicaragua

The question at issue in *Tadic* was whether the Bosnian Serb Forces were *de facto* organs or agents of Belgrade. The *Tadic* test for internationalisation rejected what the ICJ had 'authoritatively' suggested in *Nicaragua* to be the legal test for the degree of control,^{xcvi} and used two alternatives to conclude in favour of internationalisation, namely: "(i) if another State intervenes in that conflict through its troops, or (ii) if some of the participants in the internal conflict act on behalf of that other State."^{xcvii} It applied the test of "overall control", which requires that a state have "a role in *organizing, coordinating or planning the military actions of the military group, in addition to financing, training or equipping or providing operational support for that group.*"^{xcviii} This resonates the abovementioned test applied by *Kordic*.

^{xciii} Boyle and Chinkin would argue that this is an example of the "systemic impact" of "specialist sectoral courts delivering judgments on a regular basis." Such fragmentation, they confirm, "will undermine the coherence of international law in...that specialist regimes will diverge from their international law roots and expounds specialist rules of limited application"; Boyle A. Chinkin B. *supra* note 38, 263

^{xciv} To confirm this discrepancy the Chamber in *Tadic* went even further in challenging the logic of state responsibility adopted by *Nicaragua*, which went against judicial and state practice. It points out that "any state responsible for acts in breach of international law performed: (i) by individuals having the formal status of organs of the state, or (ii) by individuals who make up organized groups subject to the state's control. International law does that *regardless of whether or not the state has issued specific instructions to those individuals*" (accent added); see Tyner D.B. "Internationalisation of war crimes prosecutions: correcting the international criminal tribunal for the former Yugoslavia's folly in *Tadic*." 18 *Florida Journal of International Law*, 2006. 858

^{xcv} Tyner notes that the Tribunal in *Tadic* was aware of the inconsistency but believed that the threshold set in *Nicaragua* was too high and virtually inoperable in light of the present-day reality: "The appeals chamber then cited several examples from the Mexico-US Claims Tribunal, the Iran-US Claims Tribunal, and the European Court of Human Rights, in support of its position that the ICJ set too high a standard of attribution in *Nicaragua*"; *Ibid*.

^{xcvi} *Tadic, supra* note 5, para. 99

^{xcvii} Stewart J.G. "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict." 85 *International Review of the Red Cross* 850, 2003. 323

^{xcviii} *Tadic, supra* note 2, para. 137 (emphasis added); see also the example of *Blaskic*, 3 March 2000, Case No IT-95-14.PARA.112, 114, 116, which refers to control by the foreign State over appointments and promotions within the rebel military, and ability to replace those who were not in agreement with the goals of the foreign state as evidencing "overall control"; see also the discussion in Babiker M.A. "Internationalisation of the international armed conflict in the Sudan through regional involvement: qualifying the character of the armed conflict from a humanitarian law perspective." *Third International Conference of the SSA, and SSUK*, Washington DC, July 31-August 2, 2003. 7

There appears to be a discrepancy between the *Nicaragua*'s reasoning and the statements made in the Court's final conclusions. Although the ICJ stated that the US was responsible for the violation of a number of obligations vis-à-vis Nicaragua – such as the use of force and resort to unlawful intervention – it concluded that the test for attribution, that of “effective control”, had not been satisfied. Although it would be unreasonable to hold the United States responsible for specific intent war crimes that it did not even know were occurring, it is factually feasible, absent clear evidence to the contrary, to assert that the United States knew or should have known about the atrocities the *contras* are likely to commit.^{xcix}

The Court's conclusion in *Tadic* contradicts this observation of the two tests. This means either that *Tadic* has established a considerably low threshold test for the internationalisation of conflicts that the Court in *Nicaragua* did not uphold, or that such a low threshold is unsuitable for the attribution of a group's actions to the State. We are reminded that the *Tadic* judgment recognised that the factual situation exceeded the evidential requirements for the purpose of internationalisation.^c Does such a conclusion imply a fragmentation of the secondary rules?

US-Nicaragua relations were doubtlessly governed by the rules of international armed conflicts, an overt conclusion that can be reached in the absence of a discussion of attribution. Despite this, the nexus between attribution and the character of the conflict, as we experience in *Tadic*, was never discussed in *Nicaragua*. Although no one could question the international nature of a

^{xcix} Tyner D.B. *supra* note 93, 874

^c Judge Shahabuddeen reiterated the attribution test as established by *Tadic* in his judgment in *Prosecutor v Blaskic*, (IT-95-14, Judgment, 3 March 2000) simplifying the three-pronged *Tadic* formulation, said that the degree of control required to internationalize an armed conflict is simply that which “is effective in any set of circumstances to enable the impugned state to use force against the other state through the intermediary of the foreign military entity concerned.” The question is whether the insurgent's actions amount to “a resort to armed force between States” in which case the State in cahoots with the group could be held responsible both for the illicit use of force, *jus ad bellum*, and the *jus in bello* violations committed by the group; see Stewart J.G. *supra* note 96, 326

conflict where practically all the fighting is done by a foreign state, it is asked whether the State party to the international conflict would not, *a fortiori*, be responsible for the violations committed by the group fighting on its behalf?^{ci} In other words, is a conclusion in favour of the violations being *procured on the State's behalf* not merely a different way of asserting internationalisation?

The majority view argues that the standards advanced by the different courts irreconcilably conflict – this view also adheres to the ICTY's standard arguing that the ICJ's standard is too high.^{cii} The nature of the problematic in this decision varies from one author to another, some consensus is formed over the *Tadic* appeal judgment overruling the Trial Chamber's support for the strict "effective control" test, espoused in *Nicaragua*, and holding the ICJ's reasoning to be "unconvincing...based on the very logic of the entire system of international law of State responsibility."^{ciii}

According to Meron, the problem with the Appellate Chamber's approach lay not in the interpretation of *Nicaragua*, but in applying *Nicaragua* to *Tadic* in the first place.^{civ} He believes that the *Nicaragua* test addresses only the question of State responsibility and therefore conceptually cannot determine whether a conflict is international or internal.^{cv} Following Meron in asserting that internationalisation is different and separate from attribution, we accept a

^{ci} Although it is arguable that the group maintained its independence from the intervening power and does not satisfy the *Nicaragua* test, this is only feasible in theory. The decisive question is whether it is operational in practice; Meron T. *supra* note 106, 241

^{cii} For a doctrine that supports the *Tadic* position and negates that of the "effective control test" see Drumbl M.A. *supra* note 84, 1050; see also Stahn C. "International law under fire, terrorist acts as 'armed attack': the right to self-defence, Article 51 of the UN Charter, and international terrorism." 27 *Fletcher World Affairs* 35, 2003. 47

^{ciii} *Tadic*, *supra* note 5, para. 116; see also Stewart J.G. *supra* note 96, 324

^{civ} As the application of the *Nicaragua* test to the problem in *Tadic* "produces artificial incongruous conclusions"; Meron T. "Classification of armed conflict in the Former Yugoslavia: Nicaragua's fallout." 92 *American Journal of International Law* 2, April 1998. 236-242

^{cv} Other scholars that share Meron's opinions include Verhoeven, who accentuates the fact that *Nicaragua* merely handles the issues of State responsibility for violations of international humanitarian law committed by an armed group and hence does not address the issue of the nature of the armed conflict. Whilst *Tadic*, according to him, used the detour of State responsibility to come to the conclusion that the laws and customs regulating an international armed conflict were those applicable to sentence the accused; Verhoeven S. "International and non-international armed conflicts." in J. (Wouters and Verhoeven (eds.)), *Armed Conflicts and the Law*, 2007. 17

dismemberment of the inherent structures of international law. A corollary question that goes beyond the ambits of this work is whether Draft Article 55 on *lex specialis*, which is equally relevant and applicable, would support such a conclusion in this particular case?^{cvi} Boyle and Chinkin strongly oppose Meron's understanding of this instance of judicial activism. They hold that the ICTY considered factors which made the *Nicaragua* test "unpersuasive", including what it saw as inconsistency with State and judicial practice, and concluded by setting out its own test, and therefore "did not depart lightly from its sense of responsibility for judicial reasoning in development of the law."^{cvi}

The test applied by the ICJ in *Nicaragua* was unconvincing even for the purpose of attribution. It was, on its face, contrary to the logic of the law of State responsibility and at variance with common State practice.^{cvi} It is arguable that the Appellate Chamber in *Tadic* had merely corrected *Nicaragua's* faults by clarifying that a state's "overall control" of an armed group is sufficient to render that State responsible for the acts of the group.^{cix} Since the ICTY had arguably no right to depart, or even elaborate upon established precedent, the question is whether we are prepared to protect the accredited supremacy of the ICJ's jurisprudence, and whether it is at all necessary in this particular case.^{cx}

^{cvi} "[The Draft Articles] do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

^{cvi} Boyle A. Chinkin C. *supra* note 38, 294-297

^{cvi} A different camp says that *Nicaragua* was boldly ignored, however, it is notable that the judgment was indeed mentioned in the *Rajic* judgment (*Prosecutor v Ivica Rajic*, Case No. It-95-12-S, ICTY Reports 2006 (May 8)) when the prosecution was asked to present a brief on the attribution standard. Here the trial chamber did acknowledge the difference in context between the cases and nonetheless went on to assert that the Croatian community in Bosnia-Herzegovina (HVO) forces could be considered agents of Croatia. For this purpose, the Chamber found that specific operational control was not necessary and that general political and military control was sufficient. Perhaps it is by this influence that *Tadic* made the test in *Nicaragua* the gravamen of the decision; discussed by Meron T. *supra* note 103, 240

^{cix} Sassoli M. Olson L.M. "Prosecutor v. Tadic (Judgment). Case No. IT-94-a-A. 38 ILM 1518 (1999)." *The American Journal of International Law*, Vol 94, No 3, 2000. 572

^{cx} Clearly, a plethora of international courts raises the spectre of competing jurisdictions and legal orders resulting in conflicting decisions that undermine the authority of the law (and in particular that of the ICJ), encourage forum shopping and create uncertainty; Boyle A. Chinkin C. *supra* note 38, 265; see also Shany Y. *The Competing jurisdictions of international courts and tribunals*, Oxford: Oxford University Press, 2003

It is suggested that as a consequence of the *Nicaragua-Tadic* clash we presently have a two-limb test. According to Verhoeven, a combination of material and financial aid could establish “overall control” of a group.^{cxii} This does not mean, however, that the State becomes responsible for the conduct itself, as it can only be accountable for the actual support that it had provided. This is seen in the *Nicaragua* standard of heightened involvement, which determines whether the State is responsible for the *jus in bello* violations procured by the group. An objective reading of *Genocide in Bosnia*^{cxiii} supports that invoking State responsibility requires a higher evidential threshold than that for internationalisation. As a result, it can be said that international courts have differentiated between two separate fields of attribution – that of the group to the State, thereby the internationalisation of a conflict, and that of the group’s actions to the State, thereby the invocation of State responsibility.^{cxiii}

2. A new relationship between International Humanitarian law and the law of State responsibility?

The following sections examine the interface between international humanitarian law and the secondary rules. This relationship is evidently still developing into an operative and balanced form – where internationalised conflicts do not allow states to evade responsibility for groups they have either harboured or supported. A similar problematic is created by the possibility of

^{cxii} This is a problem that exists with Verhoeven’s explanation of the notion of “control”. Although he initially mentions that “a rebel group is not attributable to the state intervening in the conflict unless it can be demonstrated that this state has effective control over the *rebel group*”, at a later stage, instead of saying control over the “rebel group” he says “control over the *conduct of the members* of the armed group.” What is it then, control over the “group” or over “the conduct” and specific actions?; Verhoeven S. *supra* note 104

^{cxiii} Spinedi M. “On the Non-attribution of the Bosnian Serbs’ conduct to Serbia”. *Journal of International Criminal Justice*, 2007. 831

^{cxiii} Bohlander also discusses the standard in *Tadic* in light of the action/group dilemma. He tries to resolve this confusion by pointing out that the heightened degree of the *Nicaragua* test consisted in the following: “[*Nicaragua*] required that a party not only be in effective control of a military or paramilitary group, but that the control be exercised with respect to the specific operation in the course of which breaches may have been committed...[and] it was necessary to prove that the United States had specifically directed or enforced their perpetration”; see Bohlander M. “*Prosecutor v Dusko Tadic*: Waiting to exhale.” (case comment) *Criminal Law Forum*, Vol 11, 2000. 217-248

recognising a *lex specialis* in the field of international humanitarian law.^{cxiv} Such a conclusion, it is suggested in using the ICJ's parlance, would not stand "without logical inconsistency."^{cxv}

We have observed that the *Tadic-Nicaragua* clash can lead to two alternate situations, these will be discussed in turn: (i) the restructuring of the framework of secondary rules and acceptance of a graduated normativity^{cxvi} approach to the different primary obligations, or (ii) the discovery of a middle-ground between the varied thresholds in reverting to the unicity of the secondary rules of international law. What is of particular interest is whether the humanitarian *lex specialis derogat*, the *legi generali* of the law of State responsibility. A leading question is whether the application of the *Tadic* criteria by the ICJ in *Genocide in Bosnia* changes the nature of the legal relationship between the Geneva Conventions and the Draft Articles?

Having set apart the *Tadic* test from the Court's traditional jurisprudence on the rules of attribution, the ICJ has opened a new chapter in the application of general secondary rules. If the Court had indeed meant that *Nicaragua* is not adhered to at the expense of *Tadic*, it is seen to advocate the formation of a hierarchical relationship between *jus ad bellum*, and the Draft Articles on State Responsibility, which are thereby said to govern *jus in bello* violations exclusively. Such an outcome would lend to considerable criticism. The following section

^{cxiv} The concept of a *lex specialis* for international humanitarian law was argued successfully in the field of international human rights. The question that remains in the relationship between IHL and human rights is whether there is, and in which situations, room for complementarity. This question is discussed in detail by Krieger. But this issue is also transposable to the understanding of the relationship between IHL and the law of State responsibility, the latter being like human rights, an umbrella that enfolds humanitarian law. If we perceive this relationship in an analogous manner we should ensure that the law of State responsibility and its principles are used to interpret humanitarian law; Krieger H. "A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary study." 11 *Journal of Conflict and Security Law* 2, 2006. 265-291

^{cxv} The Court used this phraseology to accentuate the inconsistency that would be created if *Tadic* were accepted to overrule the judgment in *Nicaragua*; see also *Genocide in Bosnia*, *supra* note 2, para. 405

^{cxvi} A concept discussed at length by Weil as one of the major vices of international law. According to him, international law would no longer be capable of fulfilling its function – the ordering of international relations in a heterogeneous, pluralist world – were the existence of rights or obligations to be determined through the importation of material criteria into the law via its normative differentiations. That would be to give uncertain weight to such rights and obligations and to abandon a neutral evaluation to be effected through the application of formal legal criteria. As law is given the general task of influencing human behaviour, legal theories must be judged according to how effectively they fulfil this task. In this context, limited effectiveness of a legal theory implies limited normativity; P. Weil, "Towards Relative Normativity in International Law?" 77 *American Journal of International Law* 3, 1983. 413-442

explores the law-making approach chosen by the ICJ and the striking implications that it is expected to produce. As a foundation ground, we will commence by conceptualising the interface and outlining the inherent links between the Draft Articles and international humanitarian law.

Genocide in Bosnia raises a number of interesting questions with regards to the scope and content of the law of State responsibility and its place in the international legal framework. This brings us back to the pivotal questions of this work: (i) what is the present configuration of secondary-primary rules in international law? and (ii) can paragraph 405^{cxvii} of the *Genocide in Bosnia* judgment be viably interpreted without a restructuring of the relationship between the two sets of rules?

a. *The secondary-primary rule relationship*

In preparing its draft the ILC undertook to define other rules, which in contradistinction to the primary rules may be described as “secondary”, inasmuch as they were aimed at determining the legal consequences of failure to fulfil obligations established by the “primary” rules. Only these “secondary” rules fall within the actual sphere of responsibility for internationally wrongful acts. It remains, however, one thing to state a rule and the content of the obligation it imposes, and another to determine whether that obligation has been breached and what the consequences of the breach must be. Only the second aspect comes within the operational sphere of the international responsibility.^{cxviii}

^{cxvii} “[T]he degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterised as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict”; see *Genocide in Bosnia*, *supra* note 2, para. 405

^{cxviii} This general explanation of the place of secondary rules in international law, and their crucial role as enforcers and determinants of consequences and guilt is presented by the ILC as excerpts from its book *The Work of the International Law Commission*, 4th Ed. (2004) UN publications. Available at: <http://untreaty.un.org/ilc/summaries/9_6.htm> (last visited October 21, 2007)

The codification of the so-called secondary rules of international law applies to violations of all primary rules, except those “governed by special rules of international law.”^{cxix} In examining State responsibility, it is important to determine for which rules laid down in the Draft Articles international humanitarian law foresees a *lex specialis*. Despite this reservation, it is admitted that to leave international humanitarian law as a branch implemented only by its own mechanisms, would be to classify it as one of a less compulsory character, typified by large gaps.^{cxx} In order to acknowledge the existence of inherent links between the international humanitarian law rules on conflict-classification and, on the other hand, the rules of attribution of the law of State responsibility it merits to observe some of the commonly referenced examples from this inherent relationship. This will equally help support a conclusion as to whether international humanitarian law is indeed a self-contained system.

The first example is the *levée en masse* institution. The provisions make it clear that the State is responsible for the conduct of civilians that take up arms in its absence.^{cxxi} The corollary provision in the law of State responsibility, which owes its origins to the law of war, is Draft Article 9 on “conduct carried out in the absence or default of the official authorities.” A comparable example is drawn by Draft Article 5, which pertains to “conduct in the exercise of governmental authority.”^{cxxii} The same is seen with Draft Article 10 on “conduct of an

^{cxix} Draft Article 55

^{cxx} Sassòli M. *supra* note 97, 404

^{cxxi} The rules that civilians spontaneously taking up arms on the approach of the enemy and in the absence of regular forces have combatant status and a right to participate directly in hostilities; Article 4(A)(6) of Convention III (Geneva Convention relative to the treatment of prisoners of war, 12 August 1949, 75 UNTS 135-285) (hereinafter Convention III) and Article 2 of the 1907 Hague Regulations (Convention with Respect to the Laws and Customs of War on Land (Hague, II) (29 July 1899), entered into force September 4, 1900) (hereinafter 1907 Hague Regulations)

^{cxxii} Under this provision a State is responsible for private entities (i.e. privatized or deregulated companies in the field of defence, security and prisons) or individuals “empowered by the law of that State too exercise elements of governmental authority.” As a commentary, the ILC mentions private security firms contracted to act as prison guards...or to whom airlines may have delegated certain powers in relation to immigration control; United Nations, International Law Commission, *Report on the Work of its Fifth-Third Session*, Article 5(2) (23 April-1 June and 2 July-10 August 2001) General Assembly, Official Records, Supplement No 1 (A/56/10), available at: <<http://www.un.org/law/ilc/reports/2001/2001report.htm>>.

insurrectional movement or other movement”. The conduct is attributable to the State if the group becomes its new government, or the new State that the group establishes.^{cxxiii} The ILC notes that to define the types of groups encompassed by the term “insurrectional movement” regard should be had to the threshold for the application of Protocol II additional to the Geneva Conventions.^{cxxiv}

All three examples come to challenge the inherently questionable nature of the ICJ’s submissions in favour of a *lex specialis* for the secondary rules of international humanitarian law. The general premise presented by Sassòli in this regard can be appreciated as defensible. He acknowledges that the ILC has continuously referred to international humanitarian law as an exception to the Draft Articles. However, despite the recent progress towards the individualisation of public international, consequences of violations of international humanitarian law at the inter-state level remain crucial for ensuring respect for war crimes as long as the international community has not achieved “the form of an institutionalized world State in which the corporate veil – and concomitant responsibility – of the State no longer matters.”^{cxxv}

In the harsh reality of many present-day conflicts states continue to play a major role, particularly if they are not allowed to hide behind the smokescreen labels of “globalization”, “failed states” or “uncontrolled elements”.^{cxxvi} They are responsible under the general rules of attribution much more often than they could wish. Sassòli argues that “harmonizing international humanitarian law

^{cxxiii} An insurrectional group is defined by the provisions of Protocol II, which act as a guide to the application of this Draft Article; p. 116 (para 9 on Article 10) and Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international armed conflicts, of 8 June 1977, 1125 UNTS 609-699. As cited in Sassòli M. *supra* 106. 410

^{cxxiv} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

^{cxxv} Sassòli M. *supra* note 90, 403

^{cxxvi} *Ibid.* 404

with secondary concepts common to international law as a whole is a way of perfecting it.^{cxvii}

This equally aids in the reconciliation of the inconsistencies that exist between different fields of international law, e.g. the law of treaties, and the law of State responsibility.^{cxviii}

If we neglect these instances, it is argued that we reject the fundamental premise of the secondary rules and negate considerably the operability of the enforceability mechanisms of the current international legal order. For this reason, it should be asked whether the ICJ's semantic open-endedness and the ambiguity of its construction was consciously chosen in order to challenge the binary structure of primary and secondary rules, or was it merely attempting to remodel its form?

b. Understanding “involvement”: an examination of the Court’s logic

It is clear from a reading of the law that the rules applicable to determine whether a certain conflict is of an international or an internal character are the same whether the tribunal is called upon to decide on the criminal responsibility of an individual or the international responsibility of a state. However, according to the ICJ in paragraph 405^{cxix} of *Genocide in Bosnia* the attribution of conduct to the State, through the State's level of “involvement”, is based on criteria determined by international law and not on the recognition of a link of factual causality.^{cxix}

^{cxvii} Kamenov believes that in order to enhance the effectiveness of the application of international humanitarian law it is necessary to advance it through steps of normative perfection. This perfect is possible in three ways: development of general principles, formulation of detailed provisions, and finally, a precise harmonization with other institutions or concepts common to international law as a whole. This should be done by harnessing the institution of responsibility in enhancing the effectiveness of international humanitarian law that has been left beyond the scope of the general postulates of the ILC Draft Articles; Kamenov T. *supra* note 63, 170

^{cxviii} Such instances of progressive harmonisation of cross-disciplinary intersections are equally reflected in other examples. The case of derived responsibility, for instance, covered by Draft Article 18, allows to hold the State, that exercised the threat of force to coerce another state to commit an unlawful act, accountable for the violation of Article 2(4) UN Charter towards the coerced State and towards the victim of the coerced State; Roscini M. “Threats of armed force and contemporary international law.” *Netherlands International Law Review*, 2007. 263-266, 276-277

^{cxix} For the content of this paragraph, *supra* note 116

^{cxix} Spinedi makes a number of analogous observations in regard of the ICJ's dicta; Spinedi M. *supra* note 111, 831

Are there indeed two different tests, one for the internationalisation of a conflict and one for the invocation of the State's responsibility? In both cases one has to establish a link between the conduct of a group and the State, but it is the intensity of that link that becomes decisive. If the behaviour of a group of persons meets the conditions necessary for it to be attributed to the State as an act thereof, indisputably by corollary logic, this same behaviour should be regarded as an act of the State for the purpose of internationalising the conflict.^{cxvxi} These uncertainties limit a coherent comprehension of what the Court had meant by its statement in paragraph 405.^{cxvxi} Does this dicta imply that the criteria for attribution under Chapter II of the Draft Articles can be subject simultaneously to various interpretations?

Already in *Nicaragua*, Judge Shahabuddeen^{cxvxi} admitted that a less stringent set of criteria should be employed to attribute to the State the activities of an armed group when the issue at stake is whether there had been use of force by one state against another, and consequently an international armed conflict materialised. It has been argued that the illicit use of force attributed to the United States was the conduct of its official organs who trained and armed the *contras*, not that of the *contras* themselves. Although the obligation not to use force against another State was attributed successfully, other violations committed by the *contras* were not. An appreciation of this dictum depends on whether the breach of the obligation by the United States not to use force against Nicaragua was realised through the acts of the armed group or through the acts of the

^{cxvxi} Ibid.

^{cxvxi} Spinedi notes with regards to this dilemma that although the tests here cannot be conceptually of a different threshold and different criteria it must be remembered that this kind of differentiation is not impossible and does exist with regards to the level of authority that a particular group may have from its attribution to a state. The rules establishing when a statement or declaration is to be attributed to a state as an expression of its consent to be bound by a treaty are partly different from those concerning attribution of wrongful acts to a state; Spinedi M. *supra* note 111, 833

^{cxvxi} "This question is not a generalised one as to whether an armed conflict has become "internationalised" in any broad sense of the term; nor is it to be determined by reference to criteria of unmanageable plasticity... But whether or not there is such a conflict turns, ex hypotheses, on whether one state is using force against the other. A demonstrable link test has to result in showing whether or not force was being used by a state"; *Nicaragua* (Separate Opinion of Judge Shahabuddeen), *supra* note 4, para. 25-27

official organs of the State.^{cxxxiv} Despite this discourse, no distinction as such is mentioned in the Draft Articles, which according to the ICJ^{cxxxv} reflects the rules of general international law.

Although a discussion of the distinction between rules of international law applicable to individuals and those applicable to states is not part of this work, the unity and transparency of the law are the fundamental premise of the secondary rules. There is both practical and theoretical significance to the concurrence between individual and State responsibility in international law.^{cxxxvi} The two are inseparable for the purpose of integrating the individual into the international legal order and negating the conservative Westphalian structure of inter-state relations.

The only discernible “logical inconsistency”^{cxxxvii} or misapplication deduced from the ICJ’s rationale is in the attempt to dichotomise two innately interrelated notions. The use of the non-technical terms “involvement” and “degree and nature” in this rationalisation is therefore most probably deliberate. This creates significant room for ambiguity and further interpretation and, as a result, preserves, what Boyle and Chinkin have called, a “backward-looking endeavour which failed to address the expanding scope of contemporary international law or the emergence of non-state entities as significant actors.”^{cxxxviii}

^{cxxxiv} Spinedi makes a similar contemplation in her work (*supra* note 111, 836); If there is a breach of the obligation not to use force by the organs of the State, which arm and equip an insurrectional group and help it organise military actions, the State would not be regarded as directly participating in the conflict, but it could nonetheless be considered as a party to the conflict.

^{cxxxv} *Genocide in Bosnia*, *supra* note 2, para. 385, 398

^{cxxxvi} For instance, the obligation to prosecute individuals suspected of international crimes, which can directly link the obligations and responsibilities of the State and those of the individual; see Nollekaemper A. “Concurrence between individual responsibility and state responsibility in international law”. 52 *International & Comparative Law Quarterly* 3, 2003. 616-640 (discusses the distinct problems pertaining to the influence of individual responsibility on state responsibility); see also Spinedi M. “State responsibility v. Individual responsibility for international crimes: Tertium non datur?” 13 *European Journal of International Law* 4. 895-899 (discusses whether international crimes committed by persons with the status of state officials are to be regarded as ‘acts done in a private capacity’ and answers this in the negative as that would inevitably promote state impunity on the international level)

^{cxxxvii} *Genocide in Bosnia*, *supra* note 2, para. 122

^{cxxxviii} Boyle A. Chinkin C. *supra* note 38, 185

I respectfully submit that the Court's argument leads itself to a few major objections and therefore cannot agree with the view that the characterisation of the conflict in Bosnia and Herzegovina, between this State and VRS, as an international armed conflict is a fact entirely separate from and independent of the question whether the FRY could be held responsible for the acts of the VRS. The issue is exactly the same. This hierarchy, or graduated standard of attribution, is further complicated by the current typology emerging from instances of State practice under the doctrine of self-defence. An examination of this practice affirms the status of states as international sovereigns negotiating political solutions,^{cxxxix} and not subjects bound by a set of adopted solutions.^{cxl} The following examination will attempt to classify these patterns of application of the rules of attribution and examine the operability of the rules of attribution in the context of contemporary armed conflicts.

IV. The rules of attribution in contemporary armed conflicts: Case studies under the doctrine of self-defence

The dangers and artificiality of the attribution test are validated by an examination of the present-day armed conflict,^{cxli} where the fighting is procured by an armed group supported by a foreign state.^{cxlii} More often, the rebels maintain their relative independence, and therefore do not satisfy the high evidential threshold of the *Nicaragua* "effective control" test. This implies that these

^{cxxxix} This gives way to Bentham's conception of the international law of cooperation as being law, or perhaps relational rights and obligations between states as opposed to law above states. This Lauterpacht-type preference to the intention of the parties favours precision of interpretation and application and prevents the treaty from assuming a life of its own; Spiermann O. *supra* note 5, 100-102

^{cxl} Amerasinghe C.F. "Interpretation of texts in open international organizations." *British Yearbook of International Law*, 1994. 264; see also Spiermann O. *supra* note 5, 104

^{cxli} An armed conflict may be deemed to be of an international character or to be international at one level and non-international at another or it may transform itself from the one to the other or into internal disorder. It may even involve non-state actors operating across national borders; see Watkin K. "Controlling the use of force: A role for human rights norms in contemporary armed conflict." *American Journal of International Law*, 2004. 3-9; see also Rowe P. *The impact of human rights law on armed forces*. Cambridge: Cambridge University Press, 2006. 163-164

^{cxlii} This type of conflict has established a controversial discussion around the question of internationalisation amongst academic and governments; see Meron T. *supra* note 103, 240-241

types of conflicts remain lost in the lacuna of non-attribution despite the fact that State involvement directly contributes to military intervention.^{cxliii}

This work would not be convincing without a brief attempt, to comprehend the secondary rules in their present-day application to the prohibition on the use of force under the doctrine of self-defence, predominantly in cases where the State commits an omissive act. For this purpose, we will examine a selected number of case studies that can be classified as follows: (a) the ‘harbour and support’ cases of Al-Qaida in Afghanistan and the Uganda Popular Defence Force (UPDF); and (b) the failed-state scenarios of Hezbollah in Lebanon in 2006 and the ongoing armed exchanges between the Hamas, situated territorially in Gaza, and the Israeli Defence Forces (IDF).

1. Harboursing and supporting: Afghanistan and Uganda

Preceding the *Genocide in Bosnia* judgment, a considerable number of academics argued that the *Tadic* standard of “overall control” had been further lowered when the UN Security Council acquiesced in US self-defence against Afghanistan^{cxliv} in reaction to the terrorist attacks of September 11 2001 committed by the non-State Al-Qaida group harboured by the Taliban,^{cxlv} the

^{cxliii} Ibid. 239-241

^{cxliv} The right to self-defence is a right to use force to avert an attack. In opposition to this work’s or the ICJ’s position, the Chatham House principles argue that the source of the attack whether a state or a non-state actor is irrelevant to the exercise of the right. There is nothing in the text of Article 51 to demand, or even to suggest, such a limitation. Therefore, the action in 2001 was against Al-Qaida and not against the Taliban. It was necessary to attack certain elements of the Taliban, in order to pre-empt attacks from Al Qaida. Therefore, if Article 51 is available to avert large-scale terrorist attacks such as those of September 11, then it can safely be concluded that there is a right to use self-defence against non-state actors. The present author contends that this is in bold contradiction with the doctrine of non-intervention based on the principle of territorial sovereignty. One cannot be indifferent to the source of the attack as it is always a state that harbours the group, even if it may be by omission rather than commissively; see Wilmhurst E. “The Chatham House principles of international law on the use of force in self-defense.” 55 *International & Comparative Law Quarterly* 4, 2006. 963-972

^{cxlv} For a more detailed discussion of this quandary in international law see Condorelli L. “Les attentats du 11 septembre et leurs suites: Où va le droit international?” 105 *Revue générale du droit international public*, 2001. 838-839

then *de facto* government of Afghanistan.^{cxlvi} UN Security Council Resolution 1368 and 1373 in 2001^{cxlvii} concluded in favour of attribution on the premise that Afghanistan harboured and supported the group,^{cxlviii} and independently of whether the State had “overall control” over the group.^{cxlix}

Aspects of this response strongly suggest that the threshold for attribution has been lowered substantially – irrespective of whether the State exercised “effective” or “overall” control. It remains to be seen whether this indicates a development of the secondary rule, applicable to all primary rules, and would apply to all states in similar future cases. At this stage it is difficult to know whether this is indeed a variation or an adjustment of the standard.

Following the attacks, it seemed that the ICTY’s attenuated approach was more attractive to many states in light of the national security threats posed by non-state terrorist actors. A possible contemplation is whether special rules of attribution apply with regards to the use of force, as we note in the discussion on the dilemmas in *Nicaragua*. The 2005 case of *Uganda v DRC*^{cl} reverts to a similar rationale used by the US with relation to Afghanistan.^{cli} The Court concluded that

^{cxlvi} Sassòli M. *supra* note 90, 409

^{cxlvii} The Security Council determined that the attacks constituted a threat to international peace and security triggering its Chapter VII powers and recognized the right of the US to self-defence. Because the Charter requires in Article 51 an “armed attack” as the factual predicate for the lawful exercise of self-defence, the Security Council’s invocation of Article 51 necessarily implies that it classified the September 11 attacks as such; Security Council Resolution No 1373, UN Doc No S/RES/1373 (2001) and 1368, UN Doc No S/RES/1368 (2001); see also Jinks D. “State responsibility for acts of private armed groups”. 4 *Chicago Journal of International Law* 84, 2003: 85

^{cxlviii} The characterisation of the September 11 attacks as an “armed attack” procured by Afghanistan permitted the United States to retaliate, under the notion of self-defence of Article 51 of the UN Charter because the Taliban regime allowed parts of Afghanistan to be used by this organization as a base of operation and refused to change its policy (see Resolution 1378 (UN Doc No S/RES/1378)). The Council additionally condemned the Taliban regime for providing a safe haven for Al-Qaida. In short it was made clear that the United States in its antiterrorism campaign, and a notable group of supportive academics like Jinks, would equate terrorists with those that support or harbour them; see also the UN Security Council, *Letter Dated 7 October 2001 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc No S/2001/946 (2001)

^{cxlix} Arguably, this is a different situation, one where the wrongful act was not commissive but omissive. Nevertheless, this work argues that on the basis of the traditional application of the right to self-defence under Article 51 and Article 3 of General Assembly Resolution 3314, the “armed attack” has always been defined as an attack by a State. In order to invoke self-defence a State must, *ratione personae*, attribute the group to the attacking State in order to show that there was an armed attack by a state against another state. This also resembles the *Corfu Channel* and *Hostages* rationales.

^{cl} ICJ Reports, 2005, final judgment issued on December 19, 2005

^{cli} This can also be seen as a combined reasoning based on the principles elaborated in *Nicaragua* and the *Hostages* case. Diplomatic obligations were breached, as well as the obligation not to use force against another state. The thrust of this decision is its ability to go further in asserting that

Uganda had violated the sovereignty and territorial integrity of the DRC. The unlawful military intervention by Uganda was of such magnitude and duration that the Court considered it to be a grave violation of the prohibition on the use of force expressed in Article 2(4) of the UN Charter. Most eminently, the Court concluded that Uganda was internationally responsible for violations of international human rights and humanitarian law committed by the UPDF and by its members on the territory of the DRC.^{clii}

If the rules developed in this case are not special rules then the armed attack would have to be traditionally attributed to Afghanistan, and the impact such practice may have on the interpretative development of the rules of attribution should be scrutinised. As such, this iterative development may facilitate the application of international law to new phenomena of the use of force and national security. What it is more likely to do, however, is fritter away legalism allowing states to shop from a multiplicity of legal approaches, depending on their immediate political or strategic needs.^{cliii} This would inevitably, in the short run, confuse the application of the rules of attribution, and in the long run, contribute to impunity amongst states, preserving the existent legal vacuum for armed groups.

The role of State responsibility in global antiterrorism efforts continues to illustrate the collateral consequences of amending the secondary rules. It is arguable that the formal characterisation of

the acts or omission of UPDF forces were attributable to Uganda, even where such acts may have been outside the scope of a soldier's or officer's authority, as the UPDF is a state organ; McGuinness M.E. "Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations." *ASIL Insight*, January 9, 2006. Available at: <<http://www.asil.org/insights/2006/01/insights060109.html>> (last visited December 28, 2007)

^{clii} Uganda was held to be internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory; Press Release 2005/26 on the case of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). Available at: <<http://www.icj-cij.org/docket/index.php?pr=995&p1=3&p2=1&case=116&p3=6>> (visited December 28, 2007); see para. 181-221 of the judgment

^{cliii} Drumbl M.A. *supra* 84, 1050-51

terrorist acts as a species of “state action” risks overapplication^{cliv} and underapplication^{clv} of the relevant primary rules.^{clvi} It is therefore that the ‘harbour or support’ rule, which manifests from the retaliation to the September 11 attacks and amends the secondary rules,^{clvii} is *prima facie* ineffective and counterproductive. Although the present author joins the impetus to address State support for terror as a breach of primary obligations, the viability of this approach is still unclear due to previous failure to agree on a workable definition of “terrorism”.^{clviii} Meanwhile, if we have wholeheartedly decided to base attribution on territorial sovereignty, we are equally responsible to ensure that such attribution is not impeded midway. The secondary rules of international law cannot therefore vary from one violation of a primary rule to another.

2. The failed State: Lebanon and Gaza

The Israel-Lebanon war in the summer of 2006 is a considerably more complex case-study to undertake in this context. The most pertinent question is whether the legitimisation of Israel’s right to self-defence would concurrently attribute the Hezbollah group and its actions to the State of Lebanon?^{clix} The question whether the clashes between Hezbollah and the IDF were indeed

^{cliv} It would increase the costs of affecting regime change, might complicate constructive engagement in the “war on terror” by attributing radical illegality to too many states considering the width of the Al-Qaida network, and the self-application of international humanitarian law of international armed conflicts would limit states’ ability to employ non-military tactics effectively; Jinks D. *supra* note 146, 92-93

^{clv} It might confer on terrorist groups privileges and immunities inherent to the law of war, symbolically aggrandize terrorist groups by ascribing to them the status of an “army” or state-sponsored fighting force, and elevate terrorists to the status of state agent which might confer on them foreign sovereign immunity from civil suit; Ibid. 93-94

^{clvi} Ibid. 83-95

^{clvii} Assuredly, the *Hostages* case is a jurisprudential example of this principle. Where the Iranian government failed knowingly to take the appropriate security measures to ensure the safety of the embassy before the event, it was argued that the student riots and the embassy’s seizure was a direct effect in this chain of events. The subsequent endorsement of the group received confirmed the Iranian government’s responsibility for the events. Upon the facts, this particular occasion can be assimilated with the operations carried out by the Hezbollah in the war in Lebanon in 2006.

^{clviii} The only legal instrument that has arrived at defining the concept of a “terrorist group” is the European Council Framework Decision of 13 June, 2002 on combating terrorism. Article 2 states as follows: “...a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences...” Whilst the other articles aspire to gather what such “terrorist offences” would include; Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0475:EN:HTML> (last visited March 10, 2008)

^{clix} The question to be asked here is whether the counter-attacks undertaken by the State of Israel can constitute legitimate measures of self-defence in the sense of Article 51 of the UN Charter. This can only be fathomable if the Hezbollah militias can be attributed to Lebanon – in other words, the latter has to have exerted the sufficient level of “control and direction” over the group and its operations.

only frontier incidents^{clx} or whether there was such a gravity as to amount to an actual “armed attack”^{clxi} in the sense of the UN Charter, is yet to be conclusively answered. The majority opinion holds that the Hezbollah group could not be attributed to the State of Lebanon.^{clxii} The State of Israel cannot claim self-defence without establishing a previous “armed attack”,^{clxiii} which would in turn require the involvement of the State in the threat or use of force. The effects of attribution on *jus ad bellum* in such cases is to legitimise attacks on non-state actors within the State’s territory, where otherwise such an attack constitutes a violation of that State’s territorial sovereignty.

Analogously, the recent missile launching by the Hamas militia have been affecting neighbouring Israeli towns, notably Sderot, where Palestinian rockets fired from Gaza^{clxiv} have caused casualties among civilians.^{clxv} On such occasions the classical interpretational question with regards to Article 51 of the UN Charter is asked: can an “armed attack” be procured by a non-

^{clx} As observed in the Eritrea-Ethiopia claims commission, “frontier incidents” do not amount to an armed attack in international law, in a particular award it was decided that the armed exchange in the town of Badme did not permit the use of force under the right to self-defence in international law Eritrea-Ethiopia Claims Commission, *Jus Ad Bellum* (Partial Award, December 19, 2005). This was previously stated in *Nicaragua* (*supra* note 4, para. 102-3) where the Court distinguished minor armed exchanges/ frontier incidents from attacks that give rise to the right to self-defence; see also O’Connell, M.A. “Proportionality and the Use of Force in the Middle East Conflict”. *Jurist*. Available at: <http://jurist.law.pitt.edu/forumy/2006/07/proportionality-and-use-of-force-in.php> (last visited 9 November 2007).

^{clxi} The two questions that were a standard asking: (i) what is the level of aggression required for an attack to constitute an “armed attack”? and (ii) what is the level of state involvement that needs to be exercised in order to allow for the exercise of the right to self-defence? The second limb merits even greater attention; see Redsell G. “Illegitimate, unnecessary and disproportionate: Israel’s use of force in Lebanon.” 3 *Cambridge Student Law Review* 70, 2007. 74-78 (who holds that self-defence can be legitimated without the attribution of the group to the State for the purposes under the law of state responsibility)

^{clxii} Upon a factual observation, it was concluded that the Lebanese officials did not actively fulfil the necessary level of control and that it was Iran and Syria who actively provided the group with financial, logistical support, intelligence, training or arming. Nevertheless, although beyond the examination of this work, it is doubted whether the circumstance could indeed fulfil the *Corfu Channel* (*supra* note 51, para. 11) and *Hostages* tests. The former based on obligation of states not to allow knowingly its territory to be used for acts contrary to the rights of other states,” and the latter on the affirmative obligation to prevent the result of illicit force being used against another state. Both obligations are not limited to acts of state organs but are understood to comprise control of private activities.

^{clxiii} It was said that Article 2(4) of the UN Charter should be interpreted actively as well as passively thereby imposes, *in casu*, an obligation on the State of Lebanon and not only prohibiting it from using force, but also obligating it to prevent any use of force from emanating from their territory. Analogously, it is arguable that as a result of the principle of sovereignty Lebanon was under a duty to ensure that force will not be used by other actors within the State. Wedgewood argues that if a host country has the possibility of shutting these operations down, and refuses to take action, it cannot expect to insulate its territory against measures of self-defence; see Wedgewood R, “Responding to terrorism: the strikes against bin laden.” 24 *Yale Journal of International Law* 599, 1999. 565

^{clxiv} The reasoning relating to Gaza is more complex. Israel’s “disengagement” in 2005 was an exercise of deceptive politics and the region remains *de facto* occupied as far as international humanitarian law is concerned. It is thereby that the consideration made by the ICJ in its *Wall Opinion*, as to whether an attack from an “occupied territory” is included in the framework of Article 51, resurfaces in this context; see also Caplen R.A. “Rules of disengagement: relating the establishment of Palestinian Gaza to Israel’s right to exercise self-defence as interpreted by the International Court of Justice at the Hague.” 18 *Florida Journal of International Law*, 2006. 679-716

^{clxv} Berger J.F. “Israel-Palestine: a tragedy without end?” *The Magazine of the International Red Cross*. <http://www.redcross.int/EN/mag/magazine2007_2/4-9.html> (last visited 9 November 2007)

state actor?^{clxvi} There is however, in the examination of *ratione personae*, a required threshold that attacks by non-state actors have to fulfil in order to legitimise retaliatory action from the other State.^{clxvii} Three lines of reasoning have emerged.^{clxviii}

On one extreme, State involvement is seen as irrelevant – it is the gravity of the attack and not at its originator that are called to be examined. On the other extreme, self-defence can only be exercised when attacks by non-state actors can be imputed to a state in accordance with the rules of State responsibility. In between, a third position, claims that State involvement remains a precondition albeit of a lower threshold than that of State responsibility. In other words, following this middle option, a state can be responsible for the illicit use of force but not for any of the group’s other violations of international law – a position, alike the judgment in *Genocide in Bosnia*, that negates the doctrinal foundations of the secondary rules and is operatively unfeasible.

In the Hezbollah or Hamas, we are confronted by a ‘state within a state’ scenario, which clearly falls within the ambits of Draft Article 9, addressing situations where the State apparatus has totally or partially collapsed and the group is operating in default or in the absence of the official authorities.^{clxix} The factual situation in “Hezbollahland”^{clxx} fulfilled two of the three preconditions of Article 9; namely, the absence of officials and the exercise of authority. The third was satisfied

^{clxvi} Ruth Wedgewood is a true pioneer of this critical approach to the law of self-defence. She says that there is nothing in the UN Charter or state practice that restricts the identity of aggressors against whom states may respond. It is equally assumed, she states, that each territorial sovereignty will control criminal conduct in its own territory, preventing the use of its borders by private actors who may mount attacks against other states. It is under this premise that she concludes that the US had the right to take forcible measures against Bin Laden; Wedgewood R. *supra* note 162, 564

^{clxvii} Ruys T. “Crossing the thin blue line: an inquiry into Israel’s recourse to self-defense against Hezbollah.” 43 *Stanford Journal of International Law* 265, 2007. 274

^{clxviii} *Ibid.*

^{clxix} A “default of official authority” was exemplified by the absence of governmental jurisdiction over large parts of territory in Southern Lebanon. Hezbollah forces exercised functions traditionally exercised by government and had positioned its armed militia on the southern borders with its flag flying above - a strategically laid out Hezbollah deployment along the blue line.

^{clxx} Ruys T. *supra* note 166, 287

when the Security Council called upon the Lebanese government to exercise its governmental functions throughout the South, and it failed to do so.^{clxxi} In theory, this could have granted Israel the right to self-defence through the attribution of the group's acts to the State of Lebanon.^{clxxii} The more logically convincing counter arguments are based principally on factual disputes pertaining to the nature of the targets attacked, and Israel's general military policy, which goes beyond the ambits of this work.

If we follow the formulaic reasoning of Draft Article 9, *a fortiori*, the State should be accountable for all the relevant actions of the group. Otherwise, the conclusion would be, once again, that there are different secondary rules applying to different violations of international humanitarian law (i.e. one set for *jus ad bellum* and another for *jus in bello*), a concept inconsistent with the doctrinal foundations of the law of State responsibility.

3. Some dogmatic reflections

The Chatham House principles were a succeeding attempt to provide a coherent source of interpretation for the rules of self-defence. They assert, controversially, that the same criteria for the use of force in self-defence against attacks by states are to be used by non-state actors.^{clxxiii} Trapp,^{clxxiv} however, notes that although the ICJ's jurisprudence need not be read as absolutely

^{clxxi} UN Security Council Resolution 1583, UN Doc S/RES/1583 (Jan 28, 2005)

^{clxxii} Dinstein argues that the threshold is even lower than that of Draft Article 9, and engages with the theory of self-help, an argument the present author laments to accept. He notes that "the Government of Arcadia may be unable to stop the use of its territory as a springboard for attacks by armed bands or terrorists against Utopia...it is incumbent on Arcadia to exercise *due diligence*...so as to prevent the attacks and punish them after an attack had been perpetrated." Even if it cannot condone or stop these activities it does not mean that Utopia will have to endure the painful blows; Dinstein Y. *War, aggression and self-defense*. Cambridge University Press, 2005. 244-251

^{clxxiii} The criteria are as follows: the attack must be large-scale, self-defence must be "necessary" and the State must demonstrate that there is no other means of meeting the attack and that this way will do so, the attack is not ongoing but imminent so that action in self-defence may not be taken by another state save in the most compelling emergency; Wilmhurst E. *supra* note 143, 971

^{clxxiv} It was asked whether Article 51 refers strictly and restrictively to 'state attacks', although it appears to be the route chosen by the ICJ, the ICTY challenged this view and so do most contemporary scholars. It is overtly clear that non-state actors have gained a pivotal role in international law and armed conflicts and it has therefore become necessary to define this role's ambits and the rights and obligations this newly

requiring that armed attacks be launched by, or are attributable to, a state before the right to self-defence is engaged,^{clxxv} this does not mean that there is a right to use force in self-defence against non-state actors irrespective of the host State's non-involvement in their activities. Such a right would sit uneasily within the UN Charter paradigm.^{clxxvi} There is hereby a strong argument in favour of the internal inconsistencies within the doctrine of self-defence itself, creating an additional, internal inconsistency in the rules. This, however, goes beyond the purpose and capacity of this work.

Although international humanitarian law applicable to armed opposition groups extends well beyond Common Article 3 and Additional Protocol II to the Geneva Conventions, it continues to be based on principles rather than detailed rules.^{clxxvii} Perhaps, because of the difficulties involved in holding armed opposition groups to account, the best opportunity for redress for those affected by their actions is a claim against the State for failing to prevent those actions. But dealing with this quest for accountability can be considerably disillusioning, particularly if it is unclear whether individual, group or State accountability is most effective at preventing violations of international law by armed opposition groups, and by what mechanisms we can bring them to bear on the parties.

acquired independence brings along; see Tams C.J. "Light treatment of a complex problem: the law of self-defense in the Wall case." *European Journal of International Law*, Vol 16, No 5, 2005. 970-973; and an analysis of Article 51 by Murphy S.D. "Self-defense and the Israeli Wall advisory opinion: An ipse dixit from the ICJ?" 99 *American Journal of International Law* 62, 2005. 62-76

^{clxxv} Both *Nicaragua* (*supra* note 2) and the *Wall Advisory Opinion (Legal consequences of the construction of a wall in the occupied Palestinian territory)*, ICJ Reports 2004, para. 135) hold that armed attacks giving rise to the right of self-defence must be imputable to a foreign state.

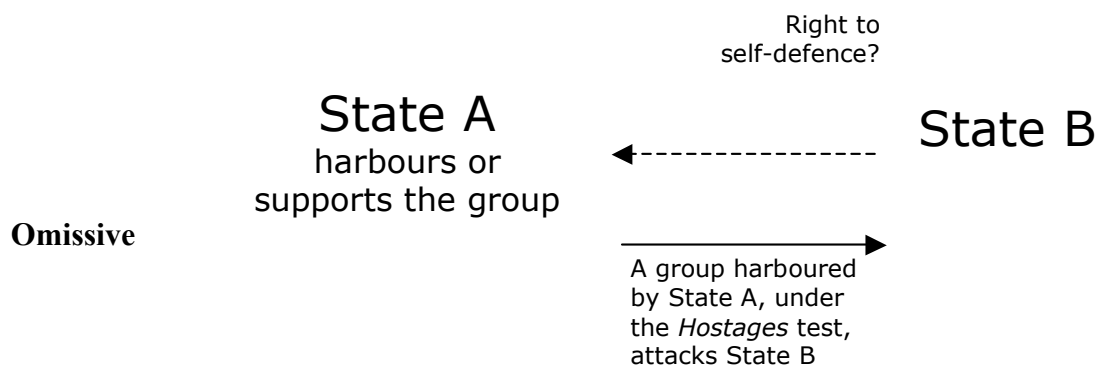
^{clxxvi} The use of force against the territorial integrity of states is prohibited in the Charter, which provides for the limited exception of self-defence set out in Article 51; Trapp K.N. "Back to basics: necessity, proportionality and the right to self-defence against non-state actors." 56 *International & Comparative Law Quarterly* 1, 2007. 141-142

^{clxxvii} The most prevalent example of these evolving developments is a growing demand that belligerents, national liberation movements and insurgent entities respect human rights. Clapham undertakes a detailed discussion of the law applicable to armed groups and its workability; Clapham A. "Human rights obligations of non-state actors in conflict situations." 88 *International Review of the Red Cross* 863, 2006. 491-523

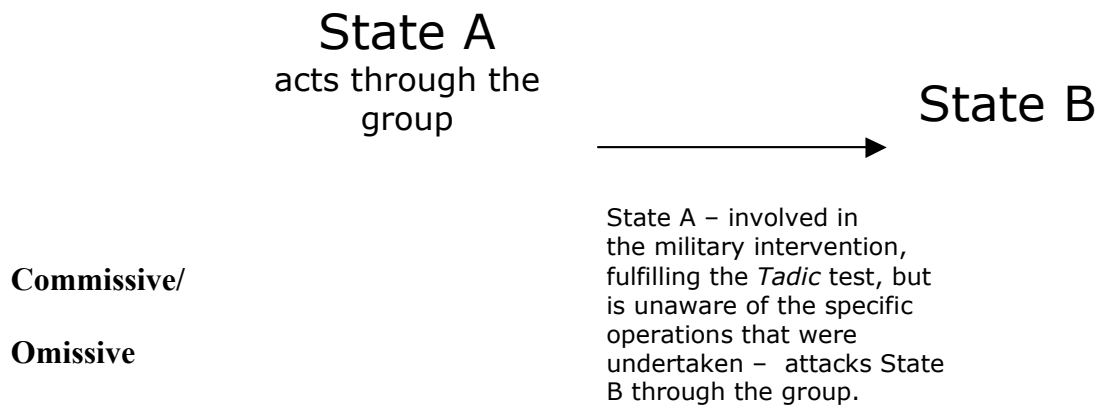
If a decision is made as to the parameters of the legal structure in this domain (i.e. operating within the sphere of attribution), it must be concrete and unyielding. Despite the fading of the Westphalian strictness of the international legal order, it is premature to assert the existence of a viable legal structure governing the rights and obligations of non-state actors. The inoperability of the middle-option calls for a pragmatic reconciliation to allow for apprehension by states of their obligations and rights vis-à-vis armed groups that they may harbour or support.

The present author concedes that it is considerably different to attribute the actions of a group to an omissive state for the purpose of invoking the right to self-defence, than to assert the commissive involvement of the State in a particular conflict for the purpose of its internationalisation. What remains under question is whether they are or can be achieved by performing a similar legal exercise, that of attribution under a homogeneous structure of secondary rules. At present, the typology of the applications of secondary rules that can be deduced from this sample of case-studies can be presented in a tripartite structure, and demonstrated diagrammatically in the following way:

❖ **The doctrine of self-defence**



❖ **The rules for the internationalisation of armed conflicts**



❖ **The rules of attribution under Chapter II, Draft Articles**



In the first case, so that a state can invoke the right to self-defence, it needs to attribute the acts of the group to the hostile State, *ratione personae*, using the "harbour and support" test adopted by the *Hostages*^{clxxviii} case and applied subsequently by the US in Afghanistan. In the second case, in

^{clxxviii} Although the court could not, upon the facts, assimilate the students to an organ of the State of Iran, it did find that the State had violated its international obligations because the government did not take "apparent steps either to prevent the militants from invading the embassy or to

order to internationalise a conflict it is required that the State be involved, satisfying the Tadic “overall control” test. Finally, in the third case, if a state is to be held accountable, under the law of State responsibility, for all violations procured by a group during an armed conflict it needs to fulfil, according to the ICJ in *Genocide in Bosnia*, an even stricter evidential threshold than that allowing for the attribution of the illicit use of force by a group to the State or that for the internationalisation of the conflict.^{clxxix}

There is arguably a general confusion that limits a transparent understanding of whether it is the group itself, or solely the group’s actions in particular circumstances that are being attributed. It is equally unclear what “attribution” means – whether it is causation, interaction or amalgamation? It seems that sometimes it is none of the above and sometimes all of them.

The incomprehensible discrepancy between, on the one hand, State practice and, on the other, the ICJ’s application of the rules accentuates the problematic that the international legal order faces in understanding the relationship between primary and secondary rules. Without dwelling upon whether the differentiation in the phraseology is a means to maintain ambiguity or a genuine campaign for the adjustment of the whole structure of the secondary rules, it is of greater imminence to ask whether such graduated or varied normativity is not counter productive to the rules’ inherent agenda.

persuade or to compel them to withdraw.” It thereby failed to use the means at its disposal to comply with its obligations under the Diplomatic and Consular Convention. Although this is a case where failure to act was the basis for State responsibility, or an affirmative obligation to ensure or prevent a certain result, it is also a means for attribution of private activities to the State when private activities produce the prohibited result or if it was hindered by them to ensure the result. In both cases, it has failed to negate the harbouring and support of the group and becomes thereby responsible for their actions; ICJ Reports 1980, para. 58-68

^{clxxix} The perplexity arises out of *Nicaragua* where the ICJ mentioned that the US was liable to Nicaragua for illicit use of force, thereby conceding that the group was attributable to the US for the purposes of self-defence (and internationalisation). Nevertheless, it states that this was not enough to allow for the attribution of the group to the State for the invocation of the responsibility of the State. This further blurs the standards for the application of the secondary rules and negates their unicity.

V. Conclusion

This work has sought to remind us of the innate intention of this particular codification – the consolidation of the rules concerning responsibility, and their unification in relation to all possible violations of international obligations. For this purpose, the analysis has aimed to give an all-embracing picture of the conceptual framework of State responsibility.^{clxxx} The *Genocide in Bosnia* judgment asserts that under customary international law “effective control” is needed to attribute conduct of non-state actors to the State, and that according to the Court “overall control” test risks of unjustly broadening the present responsibility frontiers. The Draft Articles continue, nevertheless, to embody the traditional rigidity of the Westphalian State that has failed to mould to the changing image of the State and its interaction, both internally and externally, with non-state entities.^{clxxxii} The recognition of the role of non-state actors, such as the approach taken by international human rights legal framework, has yet to materialise.^{clxxxiii}

We are reminded that in order to determine whether international humanitarian law would apply, both *Tadic* and *Nicaragua* had to start with the same question. This exercise of contextualization of the concepts of internationalisation and attribution confirms that contemporary state and judicial practice continue to exemplify the inconsistent application of the secondary rules. The internationalisation of an armed conflict, a mechanism of the framework of international

^{clxxx} This was done in order to understand responsibility as a general legal institution or principle, as an essential element of the international legal order and not only as a bilateral relationship. Graefrath B. “New Trends in State responsibility.” in *Responsibility of States*, Institute of Public International law and International Relations of Thessaloniki, 1993. 113

^{clxxxii} Crawford J. *International law as an open system*. London: Cammeron, 2002. 306

^{clxxxiii} Statal responsibilities with regards to the violations of human rights by non-state actors is discussed by Andrew Clapham in Chapter 7 of his book *Human Rights Obligations of Non-state Actors*, Oxford: Oxford University Press, 2006. Antonio Cassese also mentions the loose requirements for eligibility to become an insurrectional group (effective control over a territory and a certain degree of intensity and duration of the civil commotion) who, if recognized by the state against whom they were fighting, could be assimilated to a state actor with all the attendant rights and obligations which flow from the laws of international armed conflict; see Cassese A, *International Law*, 2nd edition. Oxford: Oxford University Press, 2005. 125.

humanitarian law is *prima facie* a mirroring of the general rules of attribution. This should hold *a fortiori* that the two are substantively one of the same things differentiating only in form.

What remains to be answered is whether international humanitarian law can be applied in a vacuum, or whether the *Tadic-Nicaragua* dilemma can be resolved by confirming the unicity of the secondary rules, a question reverberated but sidestepped in *Genocide in Bosnia*. It appears, therefore, that the ICJ believes in the applicability of Weil's concept of relative normativity to the secondary rules, having chosen to apply the rules subjectively on a case-by-case basis. The ICJ, however, asserts that these are exclusive notions, negating any theoretical relation between the two.

In order to correct the harm done by *Tadic*, the ICJ has created a third level of variation for the rules of attribution. Whether this was in order to institutionally assert its own jurisdiction and discretionary powers over those of the ICTY, or in order to maintain the subjectivity of the rules of attribution, the result is the same. Analogously, the use of the right to self-defence has formulated a divergent level of application of the rules of attribution with a varied evidential threshold for omissive actions. This is a further blurring of the standards for the interpretation and application of the rules, which similarly neglects the traditional parameters of the relationship between secondary and primary rules.

The traditional doctrines of the international law of State responsibility are considerably contorted by this piece of judicial dicta.^{clxxxiii} It endangers the foundational premise of the rules of

^{clxxxiii} The problematic with the Commission's work results primarily from the aged nature of the codification and the absence of any work for its updating: "The international legal system has evolved significantly to reflect the changing nature of international society and the growing role of non-state actors...while the Commission's exclusive concern with states may have been appropriate at the beginning of its work, it does not

attribution, and negates their contribution to the unity, operability and enforceability of international law, which is under constant institutional and political stress. To borrow from Allott's criticism, "there is reason to believe that the Commission's long and laboured work on State responsibility is doing serious damage to international law and international society."^{clxxxiv}

A concurrent difficulty lies in the representation of the secondary rules as "articles", which requires simplicity in their composition masking both the complexity and the abstraction of Ago's doctrinal approach.^{clxxxv} This problematic is reinforced by the Western concept of the State, adopted by the ILC, reinforces an ideological preference for the 'public' sphere, which is discriminatory in effect if not also intent.^{clxxxvi}

A possible however outdated consolation is that this is a phase of trial and error for the Draft Articles and perhaps it would be appropriate to grant them more time to evolve before a convention is adopted.^{clxxxvii} Notwithstanding the present difficulties, the growing importance of the co-existence of states makes detailed regulation necessary to ensure equal enjoyment of sovereign rights by all, and most eminently, the achievement of a peaceful coexistence of the international community, state and non-state actors alike.

reflect the international system of the twenty-first century"; see Weiss E.B. "Invoking State responsibility in the Twenty-first Century." 96 *American Journal of International Law*, 2002. 799 (observes the available fields of law in which non-state actors can invoke State responsibility but does not ask whether a State could do the same, vice versa)

^{clxxxiv} Allott P. "State responsibility and the Unmaking of International law", 29 *Harvard International Law Journal* 1, 1988. 1

^{clxxxv} Ago distinguishes these rules as the trans-substantive rules, that is, a set of rules present in State responsibility independently of the particular substantive obligation in question; Caron D. "Symposium, the ILC's articles on state responsibility: the paradoxical relationship between form and authority." *American Journal of International Law*, 2002. 870-871

^{clxxxvi} Crawford J. "Revising the Draft Articles on State responsibility." in *International Law as an Open System*. London: Cameron, 2002. 307

^{clxxxvii} The elaboration of the Draft Articles is perhaps the most important codification of international law after the Vienna Convention on the Law of Treaties. The ultimate goal was to introduce an element of clarity and stability into the realm of State responsibility by welcoming a convention. It appears so far, however, that the State practice test and the usage of the rules by the ICJ have formulated no clear interpretational patterns or application standards for the secondary rules; see similar assertions by Yamanda C. "Revisiting the International Law Commission's Draft Articles on State responsibility." In *International Responsibility Today: Essays in Memory of Oscar Schachter*. Leiden: Martinus Nijhoff, 2005. 121-123

This international community is persistently called to cooperatively take on the common struggles of protecting human rights, eradicating poverty and securing humanity. This requires principally the establishment of a functioning dynamic legal framework that would contribute to the realisation of an international legal order that recognises and enforces each State party's obligation to "ensure respect"^{clxxxviii} for international humanitarian law and advocates for its effective implementation and enforcement. This demands uncompromisingly that the ICJ undertake considerable judicial activism on such highly topical and controversial issues, as that presented by *Genocide in Bosnia*, instead of continuing to refrain from providing clarifications on primordially important questions that, despite their topicality and eminence, remain largely disregarded.^{clxxxix}

^{clxxxviii} It was difficult to believe that the intervention in the Gulf war had in mind to primarily protect the persons most vulnerable, those whose rights were being violated. Similarly it is uneasy to reconcile with the unacceptable delays in the cases of both the ex-Yugoslavia and Rwanda, amongst many others; see Maufima E. "Responsabilité de l'Etat en cas de non-respect du droit internationale humanitaire applicable aux conflits armés internationaux." *Memoire de masters – IUHEI, Genève, Mars 1994*. 59-61

^{clxxxix} The ICJ's role is well premised on its utilization of certain aspects of a case in hand which have a wider interest or connotation in order to make general pronouncements of law and principle that may enrich and develop the law. Judicial restraint has been particularly noticeable in the field of the legality of the use of force, although it had ample opportunity to pronounce itself on the way the prohibition has to be interpreted in the beginning of the 21st century (e.g. Advisory opinion on the construction of the Wall, *Uganda v DRC*). The Court boldly ignored the Security Council resolutions pertaining to Article 51 UN Charter adopted after 9/11, regrettably bypassing an element the legal application of which marks undeniably a new approach to the concept of self-defence, although the issue had been explicitly raised by Israel in the Wall opinion; see also Kooijmans P. "The ICJ in the 21st century: judicial restraint, judicial activism, or proactive judicial policy." *56 International and Comparative law Quarterly* 4, 2007. 741-753

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