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Third-party states' responsibility for violations of International Humanitarian Law during a non-international armed conflict within another state:
A case study of Syria

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Abstract

This thesis will focus upon third-party states' responsibility for violation of International Humanitarian Law (IHL) in an internal conflict of another state, with the on-going Syrian conflict as the case study. Third-party states' responsibility is derived from one of the general norms of established international law: responsibility arising from involvement by a third-party state in an internal conflict of another state. Such involvement can take the form of aid and assistance to combatants or direction and control of the combatants. Since the norms of international law were instituted only somewhat recently, there is not yet a lot of precedent in international law for third-party states' responsibility.

In this thesis, we will examine how third-party state responsibility can be argued for within the framework of established IHL. We will begin with a presentation of the justifications and the legal basis for holding third-party states responsible, i.e., the substantive laws that are violated and for which the third party state can be held accountable. Subsequently, a brief overview will be given of IHL conventions, the main point of focus will be upon Common Articles 1 through 4 of the Geneva Conventions. Thereafter, disarmament treaties and conventions will be examined, all of which expand the foundation, in that violations of treaty obligations can be defined to include *"transferring, aiding or assisting, encouraging or inducing, in any way, anyone to engage in any activity prohibited to a State Party under its international agreements."* Finally, the application will be made to Syria to demonstrate how third-party state responsibility might work in practice.

Table Of Abbreviations

- BWC - Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
- COI - Independent International Commission of Inquiry on the Syrian Arab Republic
- CWC - Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction
- CCCW- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects
- ECT – Effective Control Test
- ECtHR - European Court of Human Rights
- FSA - Free Syrian Army
- GA – General Assembly
- ICC – International Criminal Court
- ICTY - International Criminal Tribunal for Former Yugoslavia
- ICTR - International Criminal Tribunal for Rwanda
- ICJ - International court of justice
- IHL – International Humanitarian law
- ISIS - Islamic State of Iraq and Greater Syria
- OCT – Overall Control Test
- RSA - Responsibility of State for Internationally Wrongful Act
- SC – Security Council
- SCSL - Special Court for Sierra Leone
- SCT – Strict Control Test
- UN - United Nation
- UNC – United Nation Charter

Table of contents

1. Introduction

This thesis will focus upon third-party states' responsibility for violation of IHL in an internal conflict of another state, with the on-going Syrian conflict (since 2009) as the case study. Normally, international law norms and rules permit states to define their own international relations and engagements with each other as they see fit according to their national interests. However it may happen that the recipient government violates some of its IHL obligations. Therefore, there should exist clear and definite rules for identifying and assessing the responsibility of third-party states during another state's internal conflict, with the goal being to increase accountability and strengthen the positions of those who suffered as a result of the IHL violations to seek and win justice.

Third-party state responsibility is derived from one of the general norms of established international law: responsibility arising from involvement by a third-party state in an internal conflict of another state. Such involvement can take the form of aid and assistance to combatants or direction and control in violation of IHL. This is an important issue because international law norms were instituted only somewhat recently (after the Second World War). Consequently, there is not yet a lot of precedent in international law for third-party state responsibility.

Normally, states with respect to international law norms and rules are free to define their own international relations and engagement with each other based on their own proposed policy, profits and benefits. However it may happen that the government who received the aid and trade violate some of its international obligations such as international human rights and IHL. To be more specific, when a non-international armed conflict takes place within the recipient State, the third-party state can be held responsible for violations of IHL. In fact the aid from the third-party states facilitated committing the wrongful acts by the recipient of the aid so for this reason the third-party state is responsible. Those who have been suffered via this violation, by indicating the international norm of responsibility for aid and assistance in violation of international law, will be able to hold third-party states' responsible for its behaviour not in their own territory but in the territory under the jurisdiction of another state.

The reasons for using Syria as a case study are the magnitude of the war, the number of different actors such as rebels groups opposite to Al-Assad government, those who are in favour of the current government and finally the third-party states involvement. States that are involved in the Syrian conflict pursing an outcome to the Syrian conflict that would suit their own interest by providing support to particular participants to the Syrian armed conflict that makes the Syrian war much more complicated and protracted. These two aspects will serve well to highlight the fact that as long as there are no well-defined international norms for third-party state' responsibility, they continue to pursue

their own interests and find their own allies in this battle or any other similar internal conflicts.

This thesis will endeavour to analyse and explain (a) the justifications and legal basis for third-party states' responsibility in international legal documentation and judicial decisions by international courts, and (b) how this responsibility occurs under the criteria established by the courts. Moreover, the author find it necessary to takes the position that third-party states' responsibility must be understood in the context of an understanding of IHL that entails positive obligations upon states to act against violations of IHL, and the need for states to cooperate with each other whenever international community interest and public security is in danger. In addition, the role of Security Council and the possibility of use of force by the Security Council and United Nation charter have been analysed.

The author is not only interested in a theoretical discussion, but wishes to make a positive contribution to justice in Syria. A motivating factor for this thesis is whether the attribution of responsibility to third-party states for violations of IHL based on existing international norms can provide grounds for holding these states accountable for the humanitarian law violations that are happening at this very moment in Syria. To be able to answer this question, this thesis must identify:

- The international norms that can make a third-party state responsible for internationally wrongful acts;
- How these norms are implemented;
- How can holding third-party states accountable be improved;
- How third party states' responsibility can be applicable in Syria case.

These are the core questions that will be examined in this thesis. As long as there are no well-defined international norms for third-party state responsibility, states will continue to pursue their own interests, and support their own allies, in other states' internal conflicts. This will result in complicating and protracting internal conflicts and increasing the amount of IHL violations. The author finds it necessary to highlight and question the fact that there are no well-define criteria for recognizing the third-party state responsible for its intervention. Since, criticizing and questioning the existing system is always a incentive for a change and modification within the system.

The Syrian war is, after four years, still on going with a daily increase of the amount of humanitarian law violations and crimes committed. The tension continues to exist until today and the humanitarian crisis caused as consequences of violation of IHL is severe and should be addressed by IHL scholars. While there exists much research and criticism about state responsibility for violation of IHL and committing an internationally wrongful act, there remains little research

about third-party state responsibility. Moreover, to this author's knowledge, there has been also scholarly works around the issue of responsibility of state for direction and control, while it has not been discussed simultaneously with responsibility of state arising because of aid and assistance for the same purpose. Although the main points of arguments have been mentioned by some international law scholars, to name a few: Helmut, Briely and Bird, they have referred to the issue of "*complicity*". Mostly, they had explained what forms of support and involvement by third-party state for internationally wrongful acts entails responsibility for third party state, mainly referring to article 16 of "*Responsibility of State for Internationally Wrongful Act*" (RSA). Nonetheless, the originality of the paper can be proof by the fact that; firstly, the author is examining the issue of third-party state responsibility under both possibilities of "*direction and control*" or "*aid and assistance*" together. Secondly, there was not any similar comprehensive examination of the Syrian conflict and IHL violation conducted before.

The sources that have been used in this thesis include literature and academic articles, but also a large amount of Internet-based sources, particularly reports from international organizations in Syria and the discussions that have been taking place within the international community regarding third-party states' involvement in that conflict. This author is aware of the intrinsic risk of such sources, which may be biased or filtered and manipulated. Whenever possible, this author has tried to verify these sources and been critical when reading their content. Unfortunately, because of the violence in Syria, there has been no possibility for this author to communicate with either the Syrian government or international organizations working in the country.

Finally, this author highlights that this paper is intended to be legal and ultimately humanitarian in nature, not political. Naturally, the political aspects of both IHL and the on going Syrian conflict must be mentioned, but the discussion will be kept strictly within a legal context.

In this thesis, we will examine how third-party states' responsibility can be argued within the framework of established IHL. This thesis is constructed with the aim of giving the reader a clear and logical order to follow and thus to make it easier to understand the author's reasoning and ultimately the author's conclusions and recommendations. We will begin with a presentation of the justifications and legal basis for holding third-party states responsible, i.e., the substantive laws that are violated and for which the third party state can be held accountable. Subsequently, a brief overview will be given of the IHL conventions, the main point of focus will be upon Common Articles 1 through 4 of the Geneva Conventions. Thereafter, disarmament treaties and conventions will be examined, all of which expand the foundation, in that violations of treaty obligations can be defined to include *"transferring, aiding or assisting, encouraging or inducing, in any way,*

anyone to engage in any activity prohibited to a State Party under its international agreements." It will also be shown how existing case law provides a space for the possibility of attributing third-party states' responsibility. Specifically, we shall look at compliance with the "*overall control test*" (OCT) developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the "*effective control test*" (ECT) developed by the International Court of Justice (ICJ). OCT enables looking at an internal conflict as an international one and thus subject to IHL in the strongest sense, providing a higher standard of protection to civilians, while ECT enables attribution of responsibility to third-party states for their actions with a higher threshold, hence creating the less possibility for victims of IHL violations to seek compensation. In addition to OCT and ECT, we shall also examine the possible role that can be played by the United Nations Security Council (UNSC), including the possibility of force.

Following the legal discussion, we will evaluate how real-time implementation of third-party state responsibility can occur. In other words, we will consider a procedural legal framework for holding third-party states accountable. Different case law and judicial decisions will be examined, in particular the articles concerning RSA singed in 2001. Obstacles to holding third-party states responsible will also be discussed, as well as their possible remedies and the possible reparations that can be made.

At the conclusion of this thesis, application will be made to Syria to demonstrate how third-party state responsibility might work in practice. Syria's internal conflict is an on going war with a grave humanitarian crisis that is a direct result of violations of IHL by not only the state, but third-party states. Different actors and states, keen to see an outcome to the Syrian conflict that would suit their own interests, provide support to particular participants in the armed conflict.

2. Justifications and the legal basis for holding third-party states responsible

IHL is thought of as universal, meaning it is thought of as law applicable in all cases of armed conflict and respected by all parties, including state and non-state actors and groups.[1] Internal conflicts are considered just as much under the jurisdiction of IHL as international conflicts because an internal conflict poses an inherent threat to international peace and security when its neighbours get involved. Furthermore, the protection of civilians is one of the most basic elements of IHL, as well as for international human rights obligations in general not only for state but also for the whole international community. Therefore,

1 Levie, 1986,p.56.

protection of civilians is by extension one of the most basic elements of IHL in internal conflicts.[2]

In order to give the reader a good view over the third-party states' responsibility for violation of IHL in an internal conflict of another state, it is needed to explain the substantive law that is violated and for which the third party state can be hold accountable. Subsequently, in Sections 2.1 and 2.2, this author will make a general argument for the justification and applicability of IHL to internal conflicts and the obligation to make other states respect IHL, respectively. In Sections 2.1.1 and 2.2.2, special emphasis will be given to the protection of civilians and the obligation to make the recipient of third-party states, i.e., insurgent groups and other militants, respect IHL, respectively. In Section 2.3 and its sub-sections, we shall explore the relevant other substantive laws for holding third-party states responsible, including international judicial precedence (2.3.1), disarmament conventions and treaties (2.3.2), and the actual practices of states (2.3.3).

2.1. IHL applicable for internal conflicts

Common Article 3 of the four Geneva Conventions was the first to define an "*internal conflict*",[3] i.e., as being one "*armed conflict not of an international character occurring in the territory of one of the High Contracting Parties",* or in other words, a "*non-international conflict"*. This definition includes traditional civil wars, internal armed conflicts that spill over into other states, or internal conflicts in which third-party states or a multinational force intervenes alongside the government.[4]

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2 Pictet, 1966,p.26.

3 Ibidem.

4 Article 3*: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:"*
"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:"
"(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;"
"(b) taking of hostages;"
"(c) outrages upon personal dignity, in particular humiliating and degrading treatment;"
"(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."
"(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."
"The Parties to the conflict should further endeavour to bring into force, by means of special

Today, Common Article 3 has taken on the quality of customary law. For example, during the trial of Duško Tadić, the prosecution stated:

"It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most states, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3."[5]

Although the aims of the common article 3 is protection of civilians. Nevertheless, many IHL scholars put it under the category of Erga Omnes and they do not consider it as a Jus Cogens norm.[6] This author takes the position that Common Article 3 can indeed feed into the development of the peremptory norms that have been articulated in Article 53 o the "Vienna Convention on the Law of Treaty":

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[7]

However, in reality its application depends to domestic law.

There has actually been some attempt to give higher status to Common Article 3. For instance, in the trial against Zoran Kupreškić et al., the prosecution argued;

"*most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or Jus Cogens, i.e. of a non-derogable and overriding character*".[8]

From the wording of the article and its customary statute it can be concluded that this article in non-derogable and binding for all the parties involved in the conflict. Since upon ratification of a treaty by a state it will be also binding not only for that state, but also for the state's nationals among them we can consider rebels and armed groups.[9]

In addition to the common article 3, Additional protocol II to the Geneva conventions of 1949 is another tool that can be referred to in times of internal

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agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

5 ICTR, *Prosecutorv.Akayesu*,Case, 1998,para.608.

6 Moir, 2002,p.57.

7 Vienna Convention on the Law of the Treaty, 1969.

8 ICTY,Prosecutorv.Kupreskic,2000, para.520.

9 ICJ,Nicaraguav.UnitedStatesofAmerica., 1986.

conflict. This protocol is known as a second important IHL tools for protection of civilians in a non-international conflict which somehow can be considered a supplementary instrument for the common article 3, with the main intent to extend the essential rules of IHL to internal conflicts.[10]

The protocol is binding not only on the contracting parties but also on the insurgents although some specific criteria needed to meet for them, such as the contracting party intention at the time of ratifying to make it binding also for the insurgents. Moreover, the insurgents also should accept the rights and obligation that will be transferred on them by the protocol II.[11] These criteria in practice make the application of protocol II with difficulties.

While the application of additional protocol II might face difficulties and sometime be even impossible due to the lack of compliance with all the necessary criteria as it was stated by ICTY in Tadic case that:

"*it unnecessary to determine whether the conflict was internal or international for the purposes of the Geneva Conventions of 1949, considering that, by virtue of common article 3 of the Geneva Conventions, the issues were determinable by reference to customary international law relating to the applicability of minimum humanitarian principles to the use of force, whether in the course of an international armed conflict or in the course of an internal one*".[12]

Indeed, accordingly the rules of international armed conflict can also apply to internal one.[13]

It can be concluded that there are many difficulties in tackling the existing conflict resolutions when it comes to internal wars, and there should be much more stronger rule for supporting the civilians when it comes to gross violation of IHL.

2.1.1. Protection of civilians as a cornerstone of IHL

The aim of Common Article 3 is the protection of civilians. In addition to this article, Additional Protocol (II) to the Geneva Conventions has as its purpose the extension o the essential rules of IHL with respect to the protection of civilians to internal conflicts.[14] Protection of civilians is also highlighted in customary IHL rules. For instance, according to the principle of distinguishing between civilians and combatants, "*parties to the conflict must at all the times distinguish between civilians and combatants. Attacks may only be directed against combatants.*

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977.
11Cfr. supra footnote 6, p.97.
12 ICTY, *Prosecutor v. Tadic* 1999, para. 23.
13 Cfr. supra footnote 6, p.140.
14 Cfr. supra footnote 10.

Attacks must not be directed against civilians".15 Moreover one of the main obligations of a state, included in Article 1 and Additional Protocol (I) of the Geneva Conventions, is *"[to] respect and to ensure respect for the international humanitarian law in all circumstances".*[16]

This obligation has been included in article 1 of the fourth Geneva conventions and also first article of the Additional Protocol (I) to the Geneva Conventions. As it happens, prevailing state practice around the world reveals that this principle is applicable as a customary rule in all international and internal armed conflicts.[17] It is here that we see the universalism of IHL, as pursuant to these obligations, states are required to respect the content of the conventions in "*all circumstances*" and ensure its application. These are two distinct obligations, and the latter is important for third-party responsibility: the obligation to comply with IHL is specifically referring to each state act, while the obligation to ensure its application is specifically referring to the state's duty to make other states respect IHL, even in cases in which they are not involved in the conflict.[18]

2.1.2. The obligation to make other states respect IHL

The obligation that it is a state's duty to make other states respect IHL, can be understood as a form of collective responsibility by all states; it has also been considered by some as a "*quasi-constitutional*" statute in international law.[19] It is a particular kind of state obligation in international law rooted in the view that states are responsible not only for their own actions, but to some extent for the actions of other states. They are expected to provide appropriate grounds for respecting IHL by other states, up to and including diplomatically and militarily confronting delinquent states.[20] Although this interpretation from common articles one has been a debate point between IHL scholars. While many reject this idea based on the reasoning that the article needed to be interpreted in line with the purpose of the convention and in all the existing provisions of the four Geneva conventions there is not a possibility to derive the responsibility of state who are not involved in armed conflict because of non compliance with IHL.[21]

The expectation that states must confront delinquent states over IHL violations – and moreover, that failure to do so is a form of criminal culpability in itself – has been a source of much controversy, both among scholars and in the real world, with many rejecting such an interpretation of the articles as unreasonable or even

15 ICRC customary international humanitarian law, Rule 1.
16 Geneva conventions (I), (II), (III), (IV), 1949, Common article 1.
17 Henckaerts & Doswald-Beck, 2005.
18 Pictet, 1960, p. 27.
19 Chazournes & Condorelli, 2000, p-p.67-85.
20 Saberi, 1999, p185.
21 Pictet, 1958, p. 21.

unjust.[22] This author takes the position that such an interpretation is reasonable and just based upon the interpretative standard set in the Vienna Convention.

Although Section 3, Article 31 of the Vienna Convention states that "*a treaty needs to be interpreted in accordance with its immediate context in the light of the object and purpose of the Convention",*[23] Article 32 states that for the sake of a better and accurate interpretation, one should also take into consideration the supplementary means for interpretation of a treaty, e.g., preparatory work or the circumstances that caused the creation of that treaty to begin with.[24] Therefore, to be able to deduce the exact interpretation of the Geneva Conventions, it is not enough to just confine oneself to their immediate purpose and object and interpret it in in light of other provisions, but it is also important to examine their supplementary means. Furthermore, if we do as advised by Article 32 and scrutinize the "*travaux préparatoires*" of the Geneva Conventions, then it is clear that although the obligation to ensure IHL's application in other states might not be the strongest possible obligation, states are nonetheless subject to it.[25] We can also consider the following supplementary elements:

The International Committee of the Red Cross has repeatedly declared its support for such an interpretation.[26] The ICJ in its advisory opinion on nuclear weaponry has also declared its support for such an interpretation.[27]

In the final declaration of International Conference for the Protection of War Victims in 1993, the participants again affirm their *"responsibility, in accordance with Article I common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war".*[28]

All in all, the obligation created by common article one "*to ensure respect for IHL*" leads to state responsibility. So the obligation to ensure respect for IHL principles and their universal application is not only obliging state to make sure that their respective organs are obeying it but also order them to check whether other state are respecting the IHL rules.[29] This can be known as from of collective responsibility by all the state and it is known as "*quasi constitutional*" statute in international law.[30]

Moving on, states have two kinds of different obligations, "*active*" and "*passive*". Within the framework of IHL, the two kinds of obligations can be defined in the

22 *Ibidem.*
23 Cfr. supra footnote 7, Article 31.
24 *Ibidem,* Article 32.
25 Cfr. supra footnote 21.
26 Cfr. supra footnote 17.
27 ICJ, Advisory opinion on legality of the threat or use of nuclear weapons, 1994, para.158.
28 Final Declaration of the International Conference for the Protection of War Victims, 1993.
29 Focarelli, 2010, p-p.125,127.
30 Cfr. supra footnote 19.

following way:

Active obligation is the possibility for all states to influence all of the parties to an armed conflict to comply with IHL. IHL rules have Erga Omnes features; therefore, all states have the right and responsibility to enforce compliance. They may do so either through "*diplomatic pressure*" or "*collective measures*".[31]

Passive obligation is the restriction that *"states may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law"*.[32]

We can base this distinction in Article 2, Paragraph 5 of the United Nations Charter (UNC), which states that member-states are called upon to avoid providing any kind of aid or assistance for a state that is being subject to enforcement measures by the UN:

"All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."[33]

"*Every assistance*" certainly includes an active obligation, up to and including participating in the use of force, while "*refrain"* indicates a passive obligation.

Passive obligation can be difficult to define, as the "*exertion of influence*" since in English "*exertion*" means "*vigorous action or effort*", yet as indicated in just-cited paragraph of the UNC – and as in fact extensively demonstrated in existing case law and states practice – in practice exertion of influence can really mean refraining from acting. A famous example comes from the UNSC's Resolution 465, passed in 1980, concerning Israeli settlements in the Arab territories militarily occupied since 1967. The UNSC *"Calls upon all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories"*.[34]

Passive obligation can also be controversial because it is not always clear what "*encouragement*" and "*influence*" look like. One guidepost is the prohibition of selling or transferring weapons to parties to an armed conflict while the transmitter is aware that these weapons will be used to violate IHL.[35] Other guideposts of passive obligation include:

The ICJ ruled in Nicaragua v. the United States (1986) that the obligation to

31 Annual Report of International Conference of Red Cross, 1994, p-p. 9-12.
32 Cfr. supra footnote 15, Rule 144.
33 United Nation Charter, 1945, Article 2.
34 Year Book of United Nation, 1980, p.427.
35 ICRC, 2004.

respect and ensure respect for IHL is part of the general principle of international law. The court concluded that the United States was under the obligation to refrain from encouraging various individuals and groups involved in the internal armed conflict of Nicaragua to violate common Article 3 of the fourth Geneva Convention.[36] The ICJ stated, *"There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in al1 circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."*[37]

The 28th International Conference of the Red Cross and Red Crescent in December 2003 defined the obligation delineated by Common Article 1 of the Geneva Conventions as *"meaning that states must neither encourage a party to an armed conflict to violate IHL, nor take action that would assist in such violations."* According to the conference minutes, *"Participants illustrated this negative obligation by referring to the prohibited action of, for example, transferring arms or selling weapons to a state that is known to use such arms or weapons to commit violations of IHL."* [38] One of the third-party states' responsibility under the heading of "*Ensuring respect for IHL*" is to take into consideration all the possible precaution that these equipment and weapons will not be used for violation of IHL. Moreover it has been emphasized that the states in the light of their passive obligation has to abstain from encouraging parties to an armed conflict in violation IHL. Furthermore states have to avoid providing aid or persuasion in formation of such violations.[39]

So as it was explained a state can be held responsible for breaching its IHL obligation when it fails to stop a non-state groups in its territory not because of attributing the act of that group to state but because simply the state failed to prevent the situation and ensure the respect for IHL.[40]

The similar analysis can be drawn here, third-party states that are not involved in an armed conflict can be held responsible because of their failier to ensure respect for IHL, as ICJ also stated it in their nuclear weapon advisory opinion. Furthermore the passive obligation of state to ensure respect and the fact that as it was stated in Nicaragua case state have to refrain from encouraging the

36 Cfr. supra footnote 9, Para 215-220.
37 Ibidem, Para. 220.
38 28th International Conference of the Red Cross and Red Crescent, 2003, pp. 23, 47-51.
39 I*bidem* 47-51.
40 Crowe J & Bcheuber K, 2013.

individuals and different groups involved in the internal armed conflict to violate IHL.

Afterwards from the essence of the common article 1 of the Geneva conventions we can indirectly deduce that state parties to the conventions should not aid, assist or persuade the parties to an armed conflict whether it is an international conflict or internal one, in violation of IHL or aid and assist them for these violations. Although it is clearly obvious form the above-mentioned discussion that the interpretation of the common article 1 is not definite due to the vagueness that exist in the provision wording.

2.2.3. The obligation to enforce respect of IHL extends to third-party state clients

This author takes the position that the obligation to enforce respect of IHL extends to third-party states' clients in another state's internal conflict, i.e., non-state armed groups. In other words, the third-party state can also be held responsible for breaching its IHL obligations when it fails to stop non-state actors or groups, whether within its own territory or within the territory of another state undergoing an internal conflict, from violating IHL. Furthermore, this author takes the position that this obligation not only includes a third-party state's own clients, but also the clients of other third-party states, thereby completing the circle of collective responsibility. This is extremely important in order to ensure the enforcement of Additional Protocol (II), since increasingly it is client non-state actors and groups who violate it rather than third-party states themselves, e.g., the Sabra and Shatila refugee camp massacres in 1982 during Lebanon's internal conflict.

To this author's knowledge, there are not yet any strong legal articulations that directly assert Additional Protocol (II)'s binding nature for all non-state actors or groups, which is an important problem because increasingly third-party states are not entering into formal arrangements with clients. However, in this author's view, it is not necessary to prove that a non-state actors or groups are contracted clients of a third-party state in order for IHL obligations to be binding. The justification for this position comes from the findings of the Appeals Chamber of the ICTY with respect to the Tadić case, which argued:

"In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to

members of the group, instructions for the commission of specific acts contrary to international law".[41]

"*Overall control*" does not to be formal control, or even obvious control; it needs to be only effective and ultimate control. Furthermore, as it has already been established in Section 2.2 above and as will be established in Sections 2.3.a and 2.3.b below, it is also sufficient to diagnose a relationship between a third-party state and a non-state actor or group as a patron-client relationship if the former can be established to be an enabler of the latter, i.e., by providing assistance.

Finally, this author takes the position that it is or at least ought to be incumbent upon non-state actors and groups themselves to accept their obligations (although, of course, it may not be in their interest to do so).[42]

2.2. Other relevant substantive law

In this section, we shall explore the relevant other substantive laws for holding third-party states responsible, including international judicial precedence (2.2.1), disarmament conventions and treaties (2.2.2) and the actual practices of states (2.2.3).

2.2.1. International judicial precedent

Third-party state responsibility and its various aspects certainly exists according to international judicial precedent. We have already seen above how in Nicaragua v. the United States, the ICJ ruled firmly against the United States' involvement in Nicaragua's internal conflict. This was an important case in general historically because of the power and stature of the defendant (the United States), but also specifically because of the many different aspects of third-party state responsibility which the ICJ addressed:

- The ICJ upheld the principle of transnational responsibility of countries.
- The ICJ raised the issue of indirect damages and loss inflicted by a third-party state upon another state.
- The ICJ recognized the possibility of holding a third-party state responsible for the assistance it provided to non-state actors opposing the communist government of Nicaragua, particularly where IHL was concerned:[43]

"Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the 'UCLAs' ('Unilaterally Controlled Latino Assets'), while United

41 Cfr. supra footnote 12, Para. 131.
42 Cfr. supra footnote 6, p.97.
43 Gibney and others, *1999,* p. 284.

States nationals participated in the planning, direction and support. The immutability to the United States of these attacks appears therefore to the Court to be established."[44]

In this case ICJ by examining the claimed actions that had been appointed to United State concerning the military and paramilitary activities in and against Nicaragua, concluded that:

"There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances," since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."[45]

In addition to Nicaragua v. the United States, we can point to three other important example rulings by the ICJ and ICTY, which also address the various aspects of third-party state responsibility:

The ICJ's 1971 advisory opinion given by the ICJ at the request of the United Nations Security Council (UNSC) regarding the Republic of South Africa's intervention into South-West Africa (contemporary Namibia).

The ICJ's 2004 advisory opinion considering the "*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*".

The ICTY's 2007 decision in Bosnia and Herzegovina v. Serbia and Montenegro.

In South-West Africa, the ICJ invoked Article 25 of the UNC as grounds for collective responsibility, stating:

"*The member States of the United Nations; are under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia*."[46]

The advisory opinion also implies states' obligation to refrain from providing assistance to South Africa by recognizing the latter's occupation as such, since in 1966 the United Nations General Assembly (UNGA) passed resolution 2145 (XXI), which declared South Africa's Mandate terminated, and with it South Africa's right to further right to administer South-West Africa. Hence, states were

44 Cfr. supra footnote 9, Para. 86.
45 Cfr. supra footnote 9, Para. 220.
46 ICJ, Advisory opinion on legal consequences for states of the continued presence of south-Africa in Namibia, 1971, p.58.

obliged to refrain from any kind of act that would help South Africa to violate international law.[47] However, the tone of the advisory opinion's language suggests a passive obligation.

In Occupied Palestinian Territory, the ICJ again argued for collective responsibility, this time by invoking the illegality of the State of Israel's decision to construct the Wall in those territories which it had unilaterally annexed but which from the perspective of the international community it was actually military occupying.

"Legal consequences for States other than Israel - Erga Omnes character of' certain obligations violated by Israel:

Obligation for a11 States not to recognize the illegal situation resulting form construction of' the wall and not to render aid or assistance in maintaining the situation created by such construction. Furthermore, obligation for a11 States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wa11, to the exercise by the Palestinian people of its right to self determination is brought to an end.

Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting, from the construction of' the wall and its associated regime, taking due account of the Advisory Opinion."[48]

In this decision ICJ discussed state responsibility due to the "*Erga Omnes"* nature of violated obligations and stressed out the state are responsible to not to recognizing any illegal situations caused by the construction of a wall in the occupied Palestinian territory and around the east part of Jerusalem and to avoid providing any kind of assistance and aid that can help in maintaining the situation caused by this construction.[49] The language is quite clear that the obligation upon the states is both passive and active, although the emphasis is upon passive.

In the former Yugoslavia, the ICTY referred to the principle of a third-party state's responsibility with respect to its clients, in this case, the relationship between the then-Yugoslavian government (represented in the trial first by the successor-state Serbia-Montenegro then by Serbia) and the Army of the Republic of Srpska. *"The Court found that Serbia was neither directly responsible for the Srebrenica genocide, nor that it was complicit in it."*[50]

ICJ again in this decision refereed to the assistance in committing the crime of genocide. In its decision the court stated that:

47 *Ibidem,* p-p.53-58.
48 ICJ Reports, 2004, p.138.
49 *Ibidem*, Para.159-163.
50 ICJ Reports, 2007, Para 417.

"*None of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.*"[51]

However, the court ruled that Serbia had breached its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide (also known as the "*Genocide Convention*" or CPPCG) by failing to prevent the acts committed in Srebrenica in 1995 from occurring (as well as for its apparent obstruction of justice[52]). The significance of this ruling concerns the role a third-party state can play as an enabler for a non-state actor or group to violate IHL – in this case the role played by Serbia in harmonization and providing aid in the Army of the Republic of Srpska's military strategy planning – how enablement is as much as form of responsibility as other forms. This is important to keep in mind for Syria.

Following to this the court concluded that since Serbia neither conspired nor incited the commission of the crime of genocide can not be held responsible for assistance in committing the crime of the genocide.[53]

ICTY in Tadic case in 1999 after examining the possibility having direction and control by Yugoslavian government on Bosnia and Herzegovina Serbian stated:

"*In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.*"[54]

Based on the court judgment once that it is established that the government played a role in harmonization and providing aid in planning the whole military strategy of the group, the government had overall control, and it is enough to hold the state internationally responsible and accountable for any acts of the group in contrast to

51 *Ibidem*.
52 Specifically, for not cooperating with the ICTY in punishing the perpetrators of the genocide, in particular General Ratko Mladić, as well as for violating its obligation to comply with the provisional measures ordered by the Court.
53 Gibney, 2007, p-p.141-150.
54 Cfr. supra footnote 12, Para. 131.

international law.

All these cases can be used as evidence the to conclude that international judicial precedent also confirm the existence of the possibility to hold the third-party state internationally responsible for violation of IHL. An international norm which based on that states are obliged to avoid aid and assistance, encouragement and persuasion and recognizing any situation arising from wrongful acts in violation of international law committed by another state or non governmental groups settled down in the territory of that state especially in an internal conflicts.

2.2.2. Disarmament

As we will see when discussing Syria, disarmament is important for third-party state responsibility for two reasons. First, because it provides additional theoretical justification to the international treaties, conventions, protocols, and legal casework that explicitly deals with IHL, and second, because it specifically addresses a crucial element in the violation of IHL in internal conflicts, i.e., the use of weaponry that results in inhumane suffering, both of civilians and combatants.

With respect to the additional theoretical justification disarmament can provide to third-party state responsibility, of course on the surface, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (also known as the "*Chemicals Weapon Convention*" or (CWC), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (also known as the "*Biological Weapons Convention*" or (BWC), and various conventions on conventional weapons such as the "*Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects"* (also known as the "*Convention on Certain Conventional Weapons*" or (CCCW) all "*only*" deal with weaponry. the primarily focus will be on the use of certain prohibited weapons, as they were used in Syrian conflict.

However, this author takes the position, which she considers obvious but nonetheless necessary to articulate, that disarmament implicitly concerns human rights. After all, why should the international community seek to regulate or prohibit weapons if not because of a worry for the negative impact of weaponry upon human beings? For example, consider how the preamble of the 1925 Geneva Protocol, the first-ever international convention that regulated the use of chemical and biological weapons and which today many scholars consider part of

international customary law, invokes the importance of "*conscience*":[55]

"The use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations".[56]

There is a very clear moral dimension to the legal language of disarmament. Certain kinds of weaponry have been judged morally heinous because of the damage they do to human beings. For example, consider the prominent placement and frequency that the negation "*never*" occurs in the obligations upon signatories in following treaties and conventions, as well as the language of "*condemning*".

Article 1 of the CWC: "*Never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."*[57]

Article 1 of the BWC: *"Never in any circumstances to develop, produce, stockpile or otherwise acquire or retain weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict in order to exclude completely and forever the possibility of their use. The Conference affirms the determination of States Parties to condemn any use of biological agents or toxins other than for peaceful purposes, by anyone at any time."*[58]

Article 1 of the first Review Conference of the CCW in 1997 (also known as the "*Mine Ban Treaty*" or MBT): "*Never under any circumstances:(a) To use anti-personnel mines; (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone directly or indirectly, anti personnel mines; (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a state party under this convention. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention."*[59]

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55 Joachim, 2001, p.22.
56 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.
57 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, Article 1.
58 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972, Article 1.
59 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction, 1997, Article 1.

Collective responsibility is also very clearly expressed in these and other conventions. For example, consider the final sentence of Article 1 of the BWC quoted above. The 1925 Geneva Protocol states that signatories must "*exert every effort to induce other States to accede to the present Protocol"*.[60]

Article 3 of the BWC likewise obliges signatories to take, *"appropriate measures, including effective national export controls, by all States Parties to implement this Article, in order to ensure that direct and indirect transfers relevant to the Convention, to any recipient whatsoever, are authorized only when the intended use is for purposes not prohibited under the Convention".*[61]

Finally, it is also clear that the principles and obligations of disarmament extend to internal conflict and third-party state clients. For example, consider the restrictions placed upon the dissemination of prohibited weaponry, as well as the openness or generality of the subjects and objects of this dissemination ("*any*" and "*anyone*") in the conventions quoted above, as well as in the following conventions:

Article 1 of the Convention on Cluster Munitions (CCM) adopted in 2008: *"Never under any circumstances to: (a) Use cluster munitions; (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention."*[62]

The same comparison can be made between this article and similar article in the pervious mentioned conventions and treaties the same is applicable in the case of this convention. Therefore parties to the convention are not only prohibited to develop, produce, retain and transfer directly or indirectly cluster munitions to anyone; but also are obliged to prohibit from assisting, encouraging or inducing, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

Article 6 of the Arms Trade Treaty (ATT) adopted in 2014:

"1. A state party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes."

"2. A state party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international

60 Cfr. supra footnote 56.
61 Cfr. supra footnote 58, Article 3.
62 Convention on Cluster Munitions, 2008, Article 1.

agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms."

"*3. A state party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."*[63]

From the above mentioned obligation that parties to the convention are obliged to follow, it can be established that in case that any party to one of these treaties will violate its obligation by transferring these weapons specially to state which are involved in armed conflict, to use these weapons or any activity which is prohibited for Parties to the Convention, it will be considered breaching the contents of these conventions and is considered as violation of its own primary obligation.

Accordingly the context of the conventions provision it can be concluded that the non-assistance obligation is compulsory for the party member to the convention. For instance, when the CCM was under negotiation a lot of member state where concerned about the fact that how this convention will affect their relation with non-members states to this convention.

Furthermore, if we do as advised by Article 32 of the Vienna Convention and scrutinize the "*travaux préparatoires*" of these various conventions, we find that during negotiations, states were very concerned about how these obligations would effect their relations with non-state actors and groups. Indeed, such negotiations resulted in Article 21 of the CCM, which tellingly states:

"Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party."[64]

On the one hand, this is potentially a contradiction of the universalist goal of IHL, since based upon on the wording of this article it is possible to interpret that signatories cannot be held responsible for violations when either fighting against a non-signatory or involving themselves in the internal conflict of a non-signatory. On the other hand, this author argues that just the *attempt* by some parties to put this provision in the convention, as well as the efforts by some states to clarify whether Article 1 could lead them to be responsible for violations, is a sign of that

63Arms trade treaty, 2013, Article 6.
64 Cfr. supra footnote 62, Article 21.

states were concerned about whether their assistance to non-state actors or groups could be recognized as associating with wrongdoers.[65]

As it was explained the same provisions apply to most of this conventions and allow transferring state by referring to the fact that the recipient state is not a party member to the convention concerned and therefore they can not be held responsible for violating of their own primary obligation. These reality will not prevent us from recognizing the fact that the state which intentionally with the aim of aiding another state for committing an internationally wrongful act by the way of supplying weapon responsible. State can not run away free from the responsibility arising from aid or assistance in these kind of illegal acts.[66] Thus according to Gibeny it can be considered as aid and assistance for breaching international obligations.[67]

2.2.3. State practice

Before explaining the existing state practice regarding the issue of third-party state responsibility it is vital to highlight the distinction between the reason for fighting and the method of fighting. While jus ad bellum refers to legitimate reasons that one state might be involved in a conflict, jus in bello refers to the body of law that would be applicable in case of conflict. The conventions, treaties, and case law cited above has concerned jus in bello; in this subsection, we will now consider the possibility of third-party state responsibility in light of just ad bellum, which is best understood by looking at state practice.[68]

As established above, a key issue in third-party state responsibility is the provision of assistance to parties to another state's internal conflict which is then used to violate the third-party state's IHL obligations. One of the obvious cases, and yet the most common one for considering the third-party state internationally responsible is granting financial, arms and military aids, or in general any kind of material aid which is used by the recipient state for violation of its international obligations versus repression of rebels group in an internal armed conflict. In this regard, there have been many cases of states themselves ruling on third-party state responsibility, which demonstrates a very important precedence. Some important examples:

In 1958, when the British parliament challenged the British government regarding assistance provided by the latter to the Colony of Aden.

In 1984, when the Islamic republic of Iran accused the United Kingdom for

65 Aust Philipp H, 2011, p-p.204-207.
66 Lauterpacht E, 1959, p. 551.
67 Cfr. supra footnote 43, p. 287.
68 Bugnion, 2004, p.2

violating IHL by supplying the Iraqi government chemical weapons, and in general facilitating its aggression during the Iran-Iraq War. – a move which eventually led to the passing of important UNSC resolutions.

Various UNGA resolutions and actions. (Although UNGA resolutions occur at an international level, they are nonetheless important to consider as a form of state practice because of the important role played by states in their development and adoption.)

Before going into explaining the detail of the cases the authors find it relevant to refer to United Nation Charter (UNC). The Fifth Paragraph of the second article of the UNC call upon all the member states to avoid providing any kind of aid or assistance for the state which is under prevention or enforcement measures by the UN.

"All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."[69]

This proof that the states whom has ratified the UNC believe; that facilitating the action of the state which are under the UN preventive or enforcement action because of violation of their international obligations or breach of international peace and security, is in reality contrary to the aim and main objective of the UN charter and should be avoided. This notion is based on the same theory that the foundation of the state responsibility due to Aid or assistance in the commission of an internationally wrongful act principle comes from.[70]

In the Colony of Aden during the state of emergency declared in May 1958, the British parliament requested the British government to provide it with an explanation about equipment and weapons shipped from the Soviet bloc and used on the colonial frontier. The Secretary of State for Colonial Affairs justified its act by issuing the following Answer:

"[...] the policy of her majesty's government has always been to urge restraint in arms delivery to the Middle East while arms deliveries in themselves would not constitute grounds for protest. Her majesty's government have of course reported to the United Nation act of Yemeni aggression on the frontier and have protested to the Yemeni government."[71]

Elihu Lauterpacht remarked that this answer is based on three principles:

The provision of arms and weapons by one state for another state when there is no

69 Cfr. supra footnote 33, Article 2.
70 López-Jacoiste, 2010, P.280.
71 Cfr. supra footnote 34, p-p.58-59.

ban by UN is completely legal.

The responsibility arising from illegal use of these weapons is born by the recipient state.

"*There is, however, nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape legal responsibility for complicity in such illegal conduct*."[72]

In reality the state whom provide aid and assistance, by stressing out non-use of these received recourses for violating international obligation by the recipient state, and emphasizing on the fact that they will stop providing aid and assistance in case that the recipient state act against this commitment, have acknowledged the illegitimacy of providing aid and assistance for illegal and wrongful objectives principle. As for instance, United State in its agreements with the state whom receive the aid clarifies that the provided facilities can be used only for the sake of internal security, self-defence, providing the recipient state to become a member to regional or international organizations, adopting collective measures in accordance with the UN charter or participating in collective measures ordered by the UN in maintaining international peace and security.[73]

The United Kingdom reappears again in our analysis when in 1984, when the Islamic republic of Iran accused the United Kingdom for violating IHL by supplying the Iraqi government chemical weapons, and in general facilitating its aggression during the Iran-Iraq War.[74] The United Kingdom rejected both accusations.[75] Nevertheless, the UNSC stated its concern:

"*Members are profoundly concerned by the unanimous conclusion of the specialists that chemical weapons on many occasions have been used by Iraqi forces against Iranian troops and the members of the Council strongly condemn this continued use of chemical weapons in clear violation of* the Geneva Protocol of 1925 which prohibits the use in war of chemical weapons."[76]

After these reports and declaration United state and some of other European countries stopped selling chemicals needed to make chemical weapons to Iraq. In the year 1998 a similar claim had accused Sudan stating that this country helped Iraq in making chemical weapons by providing access to its Facilities and installations to Iraq governments to examine and carry out the process of making

72 Cfr. supra footnote 66, p. 551.
73 Quigley, 2006, p-p. 89-90.
74 New York Times, 6 March 1984, P. A1, Col. 1.
75 *Ibidem,* p. A3, Col. 1.
76 Security Council Report, S/17911 1986.

nerve gas. Although the Iranian representative in the UN rejected this claim. [77]

Then in Resolution 620, the UNSC called upon all member-states:

"to continue to apply or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established or when there is a substantial reason to believe that they have used chemical weapons in violation of international obligations."[78]

UNSC in this resolution condemned use of chemical weapon in Iran and Iraq war, asked all the member state to impose restriction and exercise accurate control on exporting chemicals that can be used in process of making chemical weapon in Iraq. Furthermore UNSC specially asked the member state to take into consideration selling these chemicals to countries involved in a conflict while using these chemical weapons is against international obligation and where exist strong evidence that the country involved in a conflict will use them. The UNSC further specifically asked member-states to take into consideration that selling these chemicals to countries with a proven track record of using these chemical weapons was against IHL obligations.[79] In seeming response, the United States and various European allies some of other European stopped selling chemicals to the Iraqi government which indeed were needed to make unconventional weapons. This is important, as these moves could be interpreted as these states recognizing their potential culpability in the eyes of international law.

In the year 1980 the UNSC in its 465 resolution considering the settlements in the Arab territories occupied from 1967, use the wording of assistance in breaching an international law in its 465 resolution. In this resolution, UNSC first underline that Israel by making these settlements had violated international law. Afterwards, it claimed all the member state to avoid providing any kind of assistance to Israel, specifically regarding to the settlements in occupied territories, as it had been stated in paragraph 7th of this resolution:

" *Calls upon all States not to provide Israel with any assistance to be used specifically in connexion with settlements* in the occupied territories"[80]

United Nation General Assembly in different resolutions requested all its member state to avoid recognizing any act of Israel in occupied territory, as long as it is in violation of international law. To name some of these resolutions we can refer to UNGA resolution 35/110 dated in December 1980, which had been ratified with high number of votes. In the paragraph 5th of this resolution the UNGA specified:

"All States, international organizations, specialized agencies, investment

77 New York Times, 26 August 1998, p. A8.
78 Year Book of United Nation, 1988, p.190.
79 *Ibidem.*
80 Year Book of United Nation, 1980, p. 427.

corporations and all other institutions not to recognize, or co-operate with or assist in any manner in, any measures undertaken by Israel to exploit the resources of the occupied territories or to effect any changes in the demographic composition, geographic character or institutional structure of those territories."[81]

In another resolution UNGA in another resolution urges all governments:

"to renounce the policy of providing Israel with military, economic and political assistance, thus discouraging Israel from continuing its aggression, occupation and disregard of its obligations under the charter and relevant resolutions of the United Nations."[82]

In 1982, the UNGA similarly requested all member-states not to provide arms or any other kind of military assistance for Guatemala as long as the government's serious breaches of IHL in its counterinsurgency campaign continued to exist.[83]

In general, throughout its history the UNGA has reminded member-states of their passive obligation, i.e., warning or advising them to refrain from providing any kind of aid for another state implicated in committing serious violations of IHL.[84]

All in all the each of the above mentioned is a sign of approval to proof how international community, organizations and states believe in the obligation and responsibility not to aid or assists another state in violation of its international obligations.

3. Evaluating third-party state responsibility

In the previous section, we demonstrated how third-party state responsibility is something that exists within IHL. In this section, we now discuss how third-party state responsibility could be implemented in real life. However, the focus here will not be upon judicial procedure, as that is something that must be left to the courts to figure out. Instead, the focus here will be upon laying out the groundwork for implementation, specifically evaluating evidence, i.e., as the means by which to evaluate third-party state responsibility and then exact justice.

In this section the possible methods of implementing third-party state responsibility will be explored. In Section 3.1, we will establish a procedural legal framework, focusing upon two articles from RSA Sections 3.1.1.1 and 3.1.1.2); then, For the sake of better perception, different case law and judicial decisions

81 Year Book of United Nation 1998, p. 436.
82 General Assembly Resolution. 37-7/4, 1982, p. 413.
83 General Assembly Resolution . 37/185(XVII), 1982, p.1127.
84 Report of The Economic and Social, Report of Third Committee of the General Assembly, 1982, p. 50.

that exist in this regards will be examined and explained in depth (Section 3.1.2.), among with the International law commission viewpoint about RSA Section 3.1.3). In Sections 3.2 and 3.3, we will discuss various obstacles to implementation, then possible remedies and reparations, respectively.

3.1. Scope of third-party responsibility

What is the general scope of third-party responsibility? In this sub-section, we will apply the document RSA drafted by the International Law Commission (ICJ) and adopted in 2001.[85]

3.1.1. Responsibility of state for internationally wrongful act article

The general principle underlying this level of responsibility derives from Article 17: when a third-party state directs and controls another state in the commission of an internationally wrongful act, responsibility of that act extends to the third-party state itself.[86]

Alongside with article 17, Article 8, concerning when a third-party state directs and controls a person or group in the commission of an internationally wrongful act, extends responsibility of that act to the third-party state itself:

"*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*."[87]

Based on the wording of this article the conduct of a person or group of persons, if it is on the instruction or under the direction and control of that state, will be considered as an act of that state.

Typical example for article 8 is when a state exercise control or direct a rebel or armed groups in state with internal conflicts or in situations when a state control or direct terrorist groups in another states. Of course, this requires proving a link between the third-party state and a person or group, and furthermore, that the person or group is (effectively) acting as a state agent (discussed in the next section).[88]

Thirdly, Article 14, concerning when a third-party state is "*aided or assisted by*" an international organization to commit an internationally wrongful act,

85 Responsibility of State for Internationally Wrongful Act, 2001.
86 Ebrahim Gol, 2012, p119.
87 Cfr. supra footnote 85, Article 8.
88 Derek Jinks, 2003, p-p.90-91.

responsibility then extends to the organization.

"*An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) The former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that organization."*[89]

Based on article 17:

"*A State which directs and controls another State in the commission of an internationally wrongful the latter is internationally responsible for that act if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State."*[90]

This article talk about other factors that make the state internationally responsible those factors are "direct" and "control". Therefore, in addition to aid or assistance, if a state, directs or control another state in committing an internationally wrongful act that state will be also held responsible for that act.

It should be noted that in article 16, the state that provide the aid will be held responsible just to the extent of its aid or assistance for committing an internationally wrongful act by another state. While in article 17 whenever a third-party state can be proven to have directed or controlled an agent of IHL violation, responsibility of that act extends to the third-party state itself.[91]

A grey zone opens with respect to the issue of aid and assistance. A 1978 draft article, Article 27, provides a guidepost:

"Aid or assistance by a state to another state, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute a breach of an international obligation."[92]

On the one hand, in its commentary, the ICL remarks that this article's phraseology makes it clear that the third-state party action should not go beyond the limited area of aid or assistance. Otherwise, the third-party state is crossing the threshold for which it can be considered embarking upon a real cooperation for committing a crime which is internationally illegitimate.[93]

89 Cfr. supra footnote 85, Article 14.
90 Cfr. supra footnote 85, Article 17.
91 Cfr. supra footnote 86.
92 Cfr. supra footnote 85, Article 27.
93 International law commission commentary. 2001.

On the other hand, the phrase, "*even if, taken alone, such aid or assistance would not constitute the breach of an international obligation*", indicates that participation in committing an internationally wrongful act is not the same as committing it. There is a grey zone here as to when the provision of aid or assistance, when it contributes to or participates in an internationally wrongful act, can be considered internationally wrong or not.[94] While in the final draft article of the international law commission meaning the draft article adopted in 2001, which has been gone through several changes in comparison the first draft, discussion about the third-party states' responsibility arising from aid or assistance or somehow playing a role in committing an internationally wrongful act by government or NGOs, has been referred to in articles 8, 16, 17 and 18.

This distinction re-emerges, and then is somewhat resolved, in Article 16:

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State."[95]

While the problematic issue rise here when we talk about providing aid or assistance for non-state groups, since based on the wording of the provision the third-party state can be hold responsible only if it provides aid and assistance to another state in committing an internationally wrongful act. Examining the following articles of the convention it will be clear that states will be held responsible only when they practice direction or control over an internationally wrongful act of individuals or group of individuals. What can be concluded is that in practice the state responsibility article pose lower threshold for holding third-party state responsible because of aid and assistance to committing an internationally wrongful act to another state rather than private group, due to the fact that international legal personality of the state is undoubtedly accepted.

Hence, aid or assistance provided by a third-party state should not be confused with the recipient state's own responsibility; rather, the providing state is only an enabler and hence partially responsible, since it was the recipient state that performed the action.[96] Presumably, this distinction carries over to a third-party state's clients among non-state actors and groups.

Responsibility is deflected in the scenario of an international organization aiding or assisting the third-party state's violation of IHL, as according to Article 15 the

94 Year Book of the International Law Commission, 1978, Para1, P.59.
95 Cfr. supra footnote 85, Article 16.
96 Cfr. supra footnote 86, p59.

responsibility extends only to the organization itself:[97]

"*An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if: (a) The former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that organization."*[98]

This law is potentially problematic if the international organization only appears to be acting independently but is in fact under the hidden direction and control of the third-party state, in which case it is serving as the "*fall guy*" for the IHL violation. However, if direction and control can be proven, then responsibility once again extends to the third-party state.

Other article that can be referred to regarding the responsibility arising from aid or assistance is article 41. This article is referring to the situation when serious breaches of an obligation happen and third-party states should avoid recognizing or providing any aid or assistance for such a circumstances. Article 41 recognizes an important dimension to the role played by the provision of aid or assistance.

The principle of collective responsibility is invoked in Paragraph 2 of Article 41:

"*No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40 [i.e., if it involves a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation."*[99]

First obligation in the second paragraph of article 41 is considered to be so important that is known as *"An essential legal weapon in the fight against grave breaches of the basic rules of international law,"*[100] Article 41 covers very complicated scenarios. For example, states are obliged not to recognize the unilateral annexation of sovereign territory from one state by another, especially when this either results in or causes the denial of the right of self-determination of civilians residing in the annexed territory.[101]

The next obligation stated in second paragraph of article 41, prevent states to provide aid or assistance in maintaining the situation created by a serious breaches of an obligation.

This issue is more than just providing aid or assistance for commission of

97 Draft Articles on Responsibility of International Organizations, 2011.
98 Cfr. supra footnote 85, Article 15.
99 Cfr. supra footnote 85, Article 41.
100 Tomuschat,1998, p. 253.
101 Crawford, 2002, p250.

internationally wrongful act that has been mentioned in article 16. Therefore this article has went one step forward than just a breach that has happened and take into consideration the maintenance of the situation which has been created because of the breach, whether the breach continue for a period of time or not.[102]

Hence article 41 refer to the situation in which the third-party state provide aid or assistance for the responsible state in maintaining the situation which itself is a breach of "*Erga Omnes*"" or "*peremptory norms*" obligations. Thus its legitimation is not acceptable because of the fact that it is in contradiction with international law, and this responsibility can be attributed by all states. More importantly, it prevents de facto legitimation of unlawful situations.[103]

We have seen Article 41 in action very recently, during the annexation of the Crimean peninsular from Ukraine by the Russian Federation in 2014. In response, the UNGA adopted a non-binding resolution affirming the *"territorial integrity of Ukraine within its internationally recognized borders",* and in Paragraph 6 draws attention to the obligation of all states and international organizations not to recognize or to imply the recognition of Russia's annexation.[104]

3.1.1.1. Aid or assistance

Third-part state responsibility because of violation of IHL in an internal conflict of another state can occur by providing aid and assistance to the government of that country or the rebels group and armed opposition groups that exist.

One of the most common examples of third-part state responsibility in an internal armed conflict of another state is by providing financial, arms and military aids, or in general any kind of material aid which is used by the recipient state or opposition groups in violation of the international obligations considering IHL.

When a state provide financial aid for another state while these aids are being used by the recipient state for violation of international obligations and IHL, it will cause the international responsibility for the state who has provided these aids. For instance, UNGA several times have had asked the member state to avoid providing any kind of weapon and military aid to countries whom are considered to be serious violators of human rights.[105]

As it was mentioned before, states based on their commitment deduced from article 1 which is common to all four Geneva Conventions that today is known as part of customary law,[106] are obliged to avoid any kind of aid or assistance and

102 Bird, 2011, p. 889.
103 Cfr. supra footnote 46, Para.126.
104 Official Documents System of United Nations.
105 Cfr. supra footnote 12, Para.96.
106 Focarelli, *2010,* p.127.

encouraging or inducing, in any way, anyone to violate IHL. In this regard, international court of justice in Nicaragua case, refers to states obligation arising from common article 1 to all of four Geneva conventions and state that united state was obliged to refrain from encouraging any parties involved in Nicaragua armed conflict to violate common article 3 of the four Geneva conventions.[107]

In the same way, article 16 of the state responsibility act provided, states that are providing assistance to another state in committing an internationally wrongful act is internationally responsible for this action.[108] However, states in many cases disregard their obligation to refrain from providing aid and assistance, third-party state by trading arms and providing financial assistance to state that are violating IHL, facilitated committing the wrongful acts by the recipient of the aid and staying in power. For instance, United State of America aid to some of the Latin-America countries, such as, Peru, Chile, Argentina, Guatemala, Nicaragua and El Salvador which has committed serious violation IHL.[109]

Aid and assistance can come in many forms, and is not limited to material aid but also can have political and legal characteristics, such as recognition of an internationally illegal situation.[110] Aid and assistance also does not need to be formal and in full view of the public or international community; it can be provided non-publicly, both in legal and illegal ways, e.g., via charitable funds, construction firms, interbank money transfers, gold transfers, hand-to-hand transfers of equipment, finances, people, etc.[111]

Article 16 of the state responsibility act has defined some conditions under which the providing state with aid and assistance can be recognized responsible. Initially, the state, which is providing aid and assistance, need to know the condition that will lead to committing an internationally wrongful act by the recipient state. Therefore, if a state who is offering financial or material aid for another state did not know that these aids are being used by the recipient to committee an internationally wrongful act, they will not be held responsible because of this assistance and aid.[112]

In another word, donor state is not responsible unless the aim from that aid and assistance is to facilitate committing an internationally wrongful act, and in reality the recipient of the aid and assistance has committed the internationally wrongful

107 Cfr. supra footnote 9, Para.255.
108 Although article 16 is only referring to aid and assistance of a foreign state to another state for committing an internationally wrongful act, but in reality based on a unity of criteria in article 16 of state responsibility act, in case of aid or assistance by a foreign state to private groups, rebel or armed groups it is possibleto refer to the same article.
109 Cfr. supra footnote 102, p.889.
110 Lauterpacht, 1947, pp. 93-94.
111 Azari, p.4.
112 Year book of International Law Commission, 2001, para. 3-4.

act.[113]

However, according to established states' practice, regardless of how a state's action appears, international law will only attribute responsibility if the aid and assistance has been given with the knowledge that it will be used for committing an internationally wrongful act. Hence, in the example from 1958, when the British parliament challenged the British government regarding assistance provided by the latter to the Colony of Aden, the members of parliament ultimately justified this act by arguing that sending weapons for another state per se is legal, and in this specific occasion the sender at the time of provision was unaware how the recipient intended to use them.[114]

This position has some obvious caveats: It is incumbent upon a providing state to perform its due diligence and assess how their aid or assistance will be used prior to the act of provision. Secondly, if the recipient already has a track record of violating IHL, then the providing state cannot deny knowledge, certainly not reasonable inference. Thirdly, the same applies if the situation in which the recipient is acting itself has a track record of IHL violations. Owing to the fact that while an internal conflict is going on and the international community is aware, states that had provided the aid can not cite that they were unaware of the situation. More obviously, in the situation of internal conflict the third-party state aid will not only facilitate committing of violation but also will cause the continuation of the war. [115]

There is a potential grey zone with respect to the providing state actively wanting to continue a war, as of course so long as parties to a conflict, international or non-international, respect their IHL obligations, states do reserve the right under international law to engage in armed combat according to their interests, especially for self-defence. Nevertheless, this right is in some sense abridged the moment that either the conduct or the goal of the war has violation of IHL as a key component, as in the example of the Iran-Iraq War.

Fourthly, the same applies if the nature of the aid or assistance itself cannot be for anything else than to violate IHL, or cannot accomplish its purpose without violating IHL. Indeed, Article 16 makes it clear that the providing state should consider whether it would be found responsible were it to be the one using the aid or assistance and not the recipient. However, if the providing state both lacks the intention and the knowledge that its aid or assistance would be used unlawfully, then the mere provision of such aid or assistance is in-itself insufficient to attribute responsibility, at least in any meaningful sense.

Nevertheless, without the intention of the state who had provided the aid to be

113 *Ibidem.*
114 *Ibidem* p-p.58-59.
115 Mostaghimi & Tarmsari, 1998, p.118.

used by the recipient for illegitimate purposes and violation of international law, or without the knowledge of that state about the possibility of using them in this way, aid and assistance on their own are not enough to proof that the state is internationally responsible. It is important to distinguish between knowledge and intention. Looking at the wording of Article 16 it is clear that having an element of knowledge is required, while ILC commentary also mention the necessity of having intention.[116]

So based on the interpretation of the article and ILC commentary third-party state should not even have the knowledge but also the aim and intent. But in reality this is high thresholds which make it rare to hold third-party state responsible and it will give third-party state a possibility to always skip their responsibility.[117]

However, if we just accept the existence of a "*presumption of intention*" meaning whenever it has been clear for international community that a state is committing an international violation any kind of aid and assistance to that state with the possibility to be used for violation of international law should be used to held third-party state responsible.[118]

Second condition mentioned in article 16 is that wrongful act even if it happened by the state who had given the aid, will be considered as an internationally wrongful act. This condition limit article 16 to the situation that aid and assistance has been given for violation of obligation by which the giving state itself is bound by them. Logically, It is rare that the states, intentionally aid or assist another state to violate an obligation which both of them are bound by it but in reality it happen everyday.[119] Thus, concerning the responsibility of the state that has provided the aid, it is necessary that the concerning act, if it is attributable to that state, to be violation of international obligation of that state. In the basis of article 16 of the state responsibility act, state that is providing another state with aid and assistance for committing an internationally wrongful act, will be recognized internationally responsible appropriate to the amount of the aid it has provided.[120]

3.1.1.2 Direction and control

Articles 8 and 17 refer to the responsibility of a state arising from practicing "*direction*" and "*control*" over the commission of an internationally wrongful act by another state or non-state actor or group. Protectorates and military occupations are the most typical scenarios in which Article 17 may be applied, but

116 Jackson, 2015, p 159
117 Graefrath, 1996, p.376.
118 *Ibidem,* p.377.
119 Cfr. supra footnote 86, p115.
120 for more information look at: The Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries.

such a scenario is increasingly rare. Hence, our focus will be upon scenarios in which Article 8 may apply, according to which attribution and degree of responsibility depends upon the amount of direction and control of the state over a non-state actor or group.[121]

Article 8: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct."[122]

There are some uncertainties concerning the terminology of "instruction", "direction" and control" that have been problematic for international jurisprudence.[123] The ICTY in particular has expressed consternation.[124] The issue is important because state responsibility can be determined by each of these key phrases alone;[125] it is when they are taken together the degree of responsibility is influenced.

It is necessary to mention, basically act of a person or private institutions are not attributable to state. Yet, in some situations it is possible to attribute the act because of the relationship that might exist between the individual or the group with that state. For instance we can refer to individuals or group of people that although have not been specifically employed by a state and are not a part of armed forces and military, but they are being used as auxiliary force or they are situated outside the territory of that state and they have been asked to perform some specific task and missions, or that state is directing or controlling those activities.[126]

Hence, our focus will be upon scenarios in which Article 8 may apply, according to which attribution and degree of responsibility depends upon the amount of direction and control of the state over a non-state actor or group. What kind of criteria must therefore be satisfied?

It is first necessary to philosophically and legally distinguish between direction and control: the former means the ability to order a non-state actor or group to perform or not perform an action, the latter means the ability to ensure that a non-state actor or group does as ordered. Similar to the distinction between intention and knowledge, control increases responsibility, whereas direction on its own does not necessarily increase responsibility. That is because direction is fundamentally an expression of desire or intent, whereas control is the ability to

121 Cfr. supra footnote Art. 8, paras. 1, 2.
122 Cfr. supra footnote 85, Article 8.
123 Crawford, 2002, p. 105.
124 Cassese, 2005, p. 250.
125 Momtaz & Ranjbariyan, 2007, pp.105-106.
126 Cfr. supra footnote 112, Paras. 1-2.

carry it out. Presumably, direction and control presume each other; at a minimum, if a state controls a non-state actor or group, then the state can also direct them. However, there have been cases in which a state directs a non-state actor or group but does not necessarily control it in all instances. For example, there is widespread public and press sentiment that pro-Russian separatists in eastern Ukraine are armed, funded, and directed by the Russian Federation but not always under its control, as in the shooting down of Malaysian Airlines Flight 17. Although the results of an official investigation are still pending, there is a general feeling in the West that the incident was probably the result of the separatists acting without their patron's approval.[127] Note that this does not necessarily diminish the responsibility of the state to a significant extent if it can be proven that the non-state actor or group is in a condition of complete dependency upon its supporting state (discussed below).

Note that the ICL has stressed that it is impossible to attribute full responsibility of an entity upon its supporting or controlling state. That means: when evaluating the control exercised by a state during an internationally wrongful act, it is important to make one's analysis within the context of the entity that committed the act.[128]

It is also necessary to philosophically and legally distinguish between agency and enablement: on the one hand, responsibility for an action in an immediate sense lies in the entity concretely performing it, but on the other hand, the action might only be performable because of the relationship the performing entity has with another entity. Hence, responsibility for an action by a non-state person or group that violates IHL can be distributed between the actor it/themselves and to the state so long as it can be proven that the latter enabled and facilitated the former. There are many possible difficult scenarios that follow from this. For example, there could exist a group of people that, although they have not been specifically employed by a state and are not a part of its armed forces and military, are nonetheless used as an auxiliary force situated outside of the state's territory and answering to its government. Furthermore, this entire situation could be arranged and maintained by proxies for the state, the auxiliary force could be entirely financed and composed by the state but pretend to be self-financed and composed of ideologically-driven volunteers, and the state might officially distance itself from the group, perhaps even going so far as to formally condemn them for IHL violations.

Based on the defined framework in article 8, to be bale to find a state internationally responsible, the issue of attribution of the internationally wrongful act to a third-party state is depending to the amount of direction and control and it

127 Oosterom,, 2014.
128 Cfr. supra footnote 93, Paras.3-5.

is needed to be investigated, which in reality is precondition to the issue of state international responsibility.[129]

Therefore considering the amount of direction and control, which has been exercised, theses questions rise up; based on what kind of criteria third state responsibility can be proved? Or in another word, what kind of control can lead us to state responsibility?

In response to this question, international judicial tribunals, international law scholars and international law commission have made an attempt to find an answer and to identify various factors in this regard. They interduce different criteria for attributing the act of a person or group of persons to a state, so that the issue of practicing control, especially in judicial decisions is ambiguous and even in contradiction to one another and in practice there had been identified different criteria.

Therefore, efforts will be made to explain and analysis the issue of direction and control by referring to some of the most important judicial decisions and international law commission viewpoint in this regard. This will allow us to find an answer for above mentioned questions and responsibility arising from practicing direction and control over rebel group or armed opposition group in an internal conflict.

3.1.2. Judicial decisions

From the above considerations, control emerges as the important element in determining third-party state responsibility. International law tribunals, international law scholars, and the ILC have devised several IHL compliance testing tools that directly address control:

- The "*strict control test*" (SCT) and "*effective control test*" (ECT) developed by the ICJ in Nicaragua v. the United States;
- The "*overall control test*" (OCT) developed by the ICTY in Bosnia and Herzegovina v. Serbia and Montenegro.

(Note that all these compliance tests can often serve as kinds of "*on-off switches*": if switched on, an internal conflict becomes "*internationalized*" in the sense that it is subject to IHL as an international conflict, i.e., because at least one internationally-recognized outside power has gotten involved.)

In this part the decisions of the international court of justice in Case Concerning military and paramilitary activities in and against Nicaragua in 1986, Bosnia and Herzegovina v. Serbia and Montenegro case in 2007 and finally the decisions of

129 Cfr. supra footnote 112, Paras.1-2.

ICTY in Tadic case 1999 will be examined.

- ***The International court of justice decision in Nicaragua case***

  Scenario: The Frente Sandinista de Liberacion Nacional (hereinafter FSLN) overthrew Nicaragua's President Anastasio Somoza Debayle in 1979 and instituted a revolutionary government. [130] Opponents to the new regime formed the armed opposition groups Fuerza Democratica Nicaragüense (FDN) and Alianza Revolucionaria Democratica (ARDE), who eventually became known as la contrarrevolución or "*Contras*". They were mainly active along the border with Costa Rica and Honduras and kidnapped, raped, tortured, and killed many innocent civilians. [131] From nearly the beginning, the Contras received a wide range of financial and military aid from the United States, leading the Nicaraguan government to claim that they were practically under American control, if not even created by the Americans.[132] On 9 April 1984, the Nicaraguan government filed a claim against the United States in the ICJ, attributing the acts of the Contras to the United States.[133]

  Assessment: *"The ICJ found that the United States was "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", "not to violate its sovereignty", "not to interrupt peaceful maritime commerce", and "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956". The ICJ had 16 final decisions upon which it voted."*[134]

  ICJ after examination of Nicaragua claimed considering the fact that United State has created and organized an armed group called "*Contra*" stated that based on the available information, it is not convincible to conclude that United State had played a role in creating Contra forces in Nicaragua. While, undoubtedly united State had provided financial aid, arm equipment and training for FDN which is a part of the Contra forces. Moreover ICJ in response to Nicaragua claim which considered Contra forces as a part of United State organ, stated that the evidence at disposal is not adequate enough to approve that Contra forces had been completely dependent to United State aids.[135]

  Since Contra forces were not considered as an official organ's of United State, ICJ needed to adopt a suitable scale to attribute the act of Contra forces to United state and for that ICJ needed to concentrate on the issue of control.[136] Although ICJ has

130 Shafi, 1996, p.460.
131 Public International law, 2008.
132 Cfr. supra footnote 9*,* Para.21.
133 *Ibidem*, Paras.75- 86.
134 *Ibidem.*
135 *Ibidem*, Para.85-125.
136 Rostami, 2012, p.209.

pointed out "*effective control test*" in this case, but in reality ICJ has defined two different criteria in this case.[137]

To explain more, ICJ by identifying two different levels of control and dependency deduce two different tests for control. These test are as strict control test, which is based on complete dependency, and effective control test that is based on relative dependency.[138]

The premier test meaning the strict control test has been mentioned in paragraph 109 and 110 of the ICJ's decision. Based on the explanation in order to be able to attribute the act of non governmental organ, other actors or paramilitary groups to a state, it is needed to determine the relationship of that state with each of these individuals or groups based on the degree of dependency from one side and from another side the degree of control that have been exercised over them. According to ICJ, strict control, basically means that the individual or groups do not have any real authority separated from of the one that controlling state has over them.[139] In another word, depending group is only a tool or agent of the controlling state which act through them.[140]

Complete dependency to controlling state will be recognized when different kind of help such as, financial aid, logistical support and information services have been provided by the controlling state. While for example in Nicaragua case the court has stated: *"Contras have been recruited, organized, paid and commanded by the Government of the United States*."[141]

Moreover, complete dependency should be distributed to all fields of activities that depending groups is active in them.[142] Therefore it is necessary to proof that a whole or great part of the activities of the group has received multifaceted support from controlling state or the state which had created that group.[143]

The type and degree of support should be equal to the type and degree of control that the controlling state is practicing over its organs, forces and its territory. Furthermore, the controlling state is responsible for any acts that have been committed by this group, even if the act is out of the purview and scope of the group allowance and against the clear order that they have received from controlling state.[144] A non-governmental group, which is under control of a state, can be considered as a non-official organ of a state. The only time that distinguishes these kinds of group and governmental organs is when we want to

137 Cfr. supra footnote 124, p. 673.
138 Talmon, 2009, p. 5.
139 Cfr. supra footnote 9, Para. 114.
140 Cfr. supra footnote 129 p.211.
141 Cfr. supra footnote 9para. 114.
142 *Ibidem,* Para.109.
143 *Ibidem,* Para.111.
144 *Ibidem,* Para.116.

identify the legal effects of these kinds of group in internal law.[145]

Proofing the complete dependency of the depending and protégé group to controlling and protecting state from one side and assuring the high level of control from froing state from another side in most of the cases if it is not impossible, yet, it remain very difficult.[146] That is the reason why ICJ usually uses and focuses on another test in its investigations, known as effective control test. Although it should be mention that ICJ only uses effective control test when it concluded that the essentialities for strict control test and identifying the agency relationship is not proofed and as a result the wrongful act can not be attributed to the state.[147]

Effective control test is base on relative dependency.[148] This dependency can be deduced from financial aid, military or logistical support, information services, appointing and training services that are provided by controlling state.[149] Relative dependency also can cause control, although limited degree of control will be caused comparing to situation with complete control over the group.[150] Nevertheless, unlike complete dependency, relative dependency don't allow ICJ to consider a person or group of person under control and support as a de facto organ of the controlling state.

Relative dependency can be refined into something like a scale or spectrum, as the ICJ did in the case of the Contras. If the entity can exist and operate quite well after the state withdraws its support, then arguably this is a sign that the dependency was small. However, if the entity's existence and operation becomes very minimal after the state withdraws its support, then arguably this is a sign that the relative dependency was large. However, one should be careful of ascribing a one-to-one causal relationship between these such phenomena, sincere there may be other mitigating factors, e.g., the entity either suffers significant military losses or gains significant new support from another patron at the same time that its patron state withdraws support.

ICJ regarding to Nicaragua claim about attribution of acts of Contra forces to United State announced in its decision that strict control test is not enough to attribute Contra acts to United State. The control needed to be complete and it needs a high degree of dependency to be able to attribute it to another state, this means that the state should have effective control regarding those specific acts that by them violation of international law and IHL have happened.[151]

145 Cfr. supra footnote 131, p.8.
146 Cfr. supra footnote 9, Para.111.
147 Cfr. supra footnote 129, p.213.
148 Cfr. supra footnote 131, p.5.
149 Cfr. supra footnote 9, Para. 112, and Bosnian Genocide Case, 2007, Paras. 241, 388, 394.
150 Cfr. supra footnote 131, p. 8.
151 Cfr. supra footnote 9, Para. 115.

Therefore ICJ in order to be able to attribute the responsibility arising from violation of international law and IHL to United State selected effective control test. ICJ aim in choosing this test was to establish the conclusion that Unites State either have committed the violation of international law and IHL itself or it have been commanded them.

Anyhow, based on what have been mentioned ICJ has stated that in order to attribute the act of Contra forces and violation of international law and IHL to United State fulfilment of two conditions is necessary:

First it is needed that the state have the effective control over the military or paramilitary and rebel group, secondly, this control should have been practiced regarding to specific conflicts during which the IHL have been violated.[152]

Consequently, ICJ in Nicaragua case finally by applying effective control test in relation to Contra forces illegal acts, did not consider their acts attributable to United State. ICJ by choosing to apply effective control test was following two different goals:

Issuing construction for Contra forces by United State in relation with specific acts such as, killing civilians is as same as ordering these actions by United State itself.

Each of the specific acts of Contra forces whish has been happened by United State, meaning that United State has effectively compelled rebels to commit these activities.[153]

ICJ did not confirmed this fact in Nicaragua case, because according to ICJ opinion Contra forces could have committed these acts without United State control. Therefor, United State acts did not mean practicing effective control over Contra forces activities by United State, rather to be able to deduct United State responsibility they should have practiced effective control over activities that leaded to violation of IHL.[154]

As it was explained ICJ in Nicaragua case has defined two criteria: first criteria was strict control test which is a general measure and include complete control of a state over all functions and activities of the considered group. Second criteria, meaning the effective control test is referring to the control of a state over specific activities during a special operation during which some violations have happened. Second criteria will be applicable only when the conditions for the first criteria have not been meet.

Undoubtedly, both standards have high burden of proof, because in the

152 *Ibidem*.
153 Cfr. supra footnote 130, p. 658.
154 Asgari, 2009, p.153.

international arena gathering evidence and documents which are acceptable by courts to be able to approve effective control or strict control of a foreign state over military or paramilitary and rebel group party to a internal armed conflict is extremely difficult. Therefore, it is always possible that third-party state by practicing general direction and control over a rebels group or even a terrorist group achieve their illegal goals and at the same time avoid international responsibility.

In reality, state should not be possible to skip their international responsibility when instead of acting through their own officials' agents and organs for practicing illegal practices in another state use private persons or group of person. States, who act like this, should respond to these private individuals which have acted under their order even if these individuals and groups have exceeded their limits and have violated the orders of that state.[155]

At the same time, ICJ also refers to the principle of non-intervention, while it found out that the United State financial support, training, supply of weapons, intelligence and logistic support is one of the examples of violating the non-intervention principle.[156] In this regard ICJ stated that:

"*the principle forbids al1 States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty. to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State*."[157]

- ***The International court of justice decision in Bosnia case***

Scenario: During the breakup of Yugoslavia in 1992-1995, it has been estimated that between 100-250 thousand civilians were killed in ethnic cleansing campaigns inside Bosnia and Herzegovina by the army of the Republika Srpska, a group of ethnic Serbian enclaves that had declared independence and were being supported by the then-Yugoslavian government, which had been dominated by Serbia. In 1993, the government of Bosnia and Herzegovina filed a suit against the Yugoslavian government, arguing that the its actions had resulted in genocide.

155 Cfr. supra footnote 130, p.654.
156 Ohlin, 2015, pp. 56-57.
157 Cfr. supra footnote 9, Para.205.

158

Assessment: The ICJ found that *"Serbia was neither directly responsible for the genocide, nor that it was complicit in it."*[159] However, it did rule that Serbia had committed a breach of the Convention on the Prevention and Punishment of the Crime of Genocide (also known as the "*Genocide Convention*" or CPPCG) by failing to prevent the acts committed in Srebrenica in 1995 from occurring.

What is important in ICJ decision in this case is that ICJ comebacks again to effective control test concerning attribution of act of non-official organs to a state. In this case ICJ has to investigate the issue of attribution from two different angels:

Firstly ICJ needed to make it clear that, whether the acts committed in Srebrenica has been committed by the organs of defendant state and more specifically by individuals or organs that their act necessarily is attributable to defendant state? If not, it needed to be defined whether the individuals who are not agent of the defendant state have committed the concerned acts but they have been acted under the order or direction and control of the defendant state?[160]

In Bosnia case ICJ again highlighted from one side to dependency criteria and from another side to control criteria. Therefore, in this case first issue was whether the individuals and organs that have committed genocide in Srebrenica have had dependency to Yugoslavia and only if there is such a situation, these organs will be considered equal as a organs of the defendant state?[161]

To answer the above question, ICJ found out that attribution of crime of genocide which have been committed in Srebrenica, in respect to dependency relation of organs and individuals who has committed the crimes can not be attributed to Yugoslavia, and based on this the international responsibility of defendant state is not explicit.[162]

In the next step ICJ has to investigate the case to see weather the slaughter in Srebrenica have been committed by individuals and organs that are not part of the defendant state but despite of this there were under order or direction and control of that state. In this case ICJ has referred to its former procedures and stated that this issue has to be investigated in the light of military and paramilitary activities of United State in and against Nicaragua and announced that special features of genocide can not convince ICJ to recede from test and criteria established in Nicaragua case (effective control test). Physical exercise crime of genocide till the time that it have been committed by individuals and organs separated from those

158 Encyclopaedia Britannica, Dayton Accords International agreement.
159 I.C.J Reports, 2007, para 417.
160 *Ibidem*, paras. 384, 396-397; Cfr. supra footnote 149.
161 *Ibidem*, para 393.
162 *Ibidem*, para. 394.

who are agent of the state but based on the order, direction or effective control of that state those act can be attributable to defendant state.[163]

Moreover, ICJ grounded on the accuser claim that has objected the attribution criteria test for responsibility in Nicaragua case (effective control test) has referred to ICTY decision in Tadic case. This decision by relying upon overall control test has concluded that act committed by Bosnian Serbs can lead to international responsibility of Srpska republic and its military forces.[164] Additionally, ICJ stated that in this case because of two reasons they are not convinced to accept ICTY decision and confirming the overall control test that have been applied in this case;

Firstly, because this criteria have been defined by ICTY concerning the issue that whether the armed conflict was international conflict or not which is a different issue from international responsibility of that state. Secondly, applying the overall control test in any case can cause growth in the scope of state responsibility.[165]

Therefore, ICJ could not suffice to use overall control test for considering Yugoslavia responsible. In the end, ICJ concluded that Serbian state whether by its own organs or whether by individuals whose acts based on international law can be attributed to this state has not committed genocide. Moreover, Serbia has not colluded with anyone for committing the crime of genocide and has not persuaded anyone to do genocide; consequently it is not responsible for abetting in the crime of genocide.[166]

As it has been observed in this case, ICJ has used the same criteria as in Nicaragua case namely effective control test that make it difficult to proof the attribution of acts to defendant state. In practice endorsement of effective control test is difficult. For this reason, ICTY and the European court of human rights (ECtHR), significantly, has put aside the approach of ICJ and instead has choose different control test which require a lesser degree of control.[167]

Method: The ICTY Trial Chamber applied the ECT and found that the the conduct of the army of the Republika Srpska could not be attributed to the Yugoslavian government. However, the ICTY Appeals Chamber employed the OCT and came to the opposite conclusion, arguing that Bosnian Serb forces had been "*as a whole*" under the control of Yugoslavia. According to the ICTY Appeals Chamber, the "*requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual*

163 *Ibidem*, para. 401.
164 Cfr. supra footnote 12, para. 83-162.
165 Cfr. supra footnote 137, p.650.
166 Cfr. supra footnote149, p. 471.
167 Cfr. supra footnote 136, p.215.

circumstances of each case".[168] While the ECT may be applied with regard to "*private individuals*" or "*unorganized groups of individuals",* in the case of "i*ndividuals making up an organized and hierarchically structured group*", e.g., a military unit of regular or irregular soldiers, a military or paramilitary group, a military organization, a secessionist or "*de facto"* state entity, then it must be proven that an outside power has "*overall control"* over the entity.

OCT: Determines the extent to which an entity is really an organ or agent of a third-party state according to the extent to which the latter not only "*(a) provides financing, training, equipping or providing operational support, but also (b) has a role in organizing, coordinating, planning or directing the entity's military or other activities.*[169] *However, it is not necessary that the third-party state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law"*[170] Furthermore, the OCT can be fulfilled even if the secessionist entity has provable autonomous choices of means and tactics while participating in a common strategy along with the outside power – what matters more is whether that strategy ultimately originates and/or is organized, coordinated, planned, directed, and/or supported by the outside power.[171]

In its statement, the ICTY Appeals Chamber expressed two critical views of the ECT:

- it cannot be efficiently used as a dual standard to determine *both* an individuals' criminal responsibility and a state's responsibility within the framework of IHL;[172]
- it contradicts the logic of state responsibility norms and previous IHL judicial precedence.[173]

Indeed, this author feels there may be some justification to this latter view. The concept of overall control echoes the obligation not to maintain an internationally unlawful situation, the logic of which is that an enabling environment is in-itself dangerous for IHL. It is for this reason that maintaining an internationally unlawful situation is already considered sufficient by existing judicial precedence to begin holding a third-party state accountable for IHL violations conducted by those within the situation.For example, the European Court of Human Rights ruled in *Loizidou v. Turkey* (2003) ruled, as per the OCT:

"It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the

168 Cfr. supra footnote 12, Paras117-137.
169 Cfr. supra footnote 138, p.11.
170 Cfr. supra footnote 12, Paras.130-131.
171 *Ibidem*, para.12.
172 *Ibidem*, para. I04.
173 *Ibidem*, paras, l26- I23.

policies and actions of the authorities of the 'TRNC' (Turkish Republic of Northern Cyprus). It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC'".[174]

Nevertheless, the ICTY Appeals Chamber felt that when seeking to attribute acts that have been committed sporadically and individually to a third-party state, ECT remains more suitable than OCT because its evidential requirements require proof that such acts have been committed by a special order originating from another state.[175] OCT is best used when considering the extent to which a third-party state has been involved in instructing, harmonizing, and designing the activities of armed groups and in addition to providing them with financial aid, training, equipment or logistical support.[176] In such situations, the OCT seeks to determine whether the entity can be considered an organ or agent of a third-party state *without* the necessity of the latter issuing a specific order for each and every action committed by the entity.[177]

- ***The Appeals Chamber of international criminal tribunal for the former Yugoslavia decision in Tadic case***

  The question that have been raised up with regard to this case was whether violation of IHL by Serbian forces in Bosnia, under the control of Yugoslavia and therefore can be attributable to that state or not?

  The first chamber of international criminal tribunal for the former Yugoslavia in response to this question in its decision dated 7th May 1997 in Tadic case by following the effective control test which have been used by ICJ in Nicaragua case, stated that there is not any sufficient reason and evidence available to proof that Serbian military activities have been controlled or directed effectively by Yugoslavia. Therefore, it is impossible to consider Serbian forces as agent of Yugoslavia.[178]

  This decision has been faced with many criticisms.[179] Judge McDonald, president of the same chamber for the international criminal tribunal for the former Yugoslavia, in opposition to this decision had also stated that it is clear that Serbian forces had been agent of Yugoslavia and there was no need for court to apply and bring up the effective control test by Yugoslavia state over these

174 *ECtHR, Loizidou v. Turkey*, 1996, Para. 56.
175 *Ibidem*, para. 131.
176 Cfr. supra footnote *138,* p. 6.
177 *Ibidem*, Paras. 137-138.
178 Cfr. supra footnote 12, para. 605.
179 Fenrick, 1998.

forces.[180] Later, the decision of first chamber had been questioned in appeal chamber and there the judges had proposed overall control test rejected the first chamber decision and reasoning about using effective control test.[181]

Appeal chamber in its decision firstly stated that the body of law relevant to this case and determining the kind of armed conflict is IHL[182]and following to this the court explain in accordance with IHL norms, especially article 4 of the third Geneva convention 1949 context if it is established that an armed group which is fighting against the central government inside a country belong to another state it should be stated that the armed conflict is international one.[183]

Based on the chamber view the phrase "*belong to the party to the conflict*"[184] implicitly has raised the issue of control. However, in IHL there is no such a criteria or test to identify and define the amount and degree of state control, in this respect it is needed to refer to international law and more specially state responsibility norms in international law.[185]

The appeal chamber then by referring to effective control test that has been used by the ICJ in Nicaragua case argued that it is not possible to use dual standard to determine individuals' criminal responsibility in international armed conflict and then also using the same standard for determining state responsibility in the framework of international responsibility.[186] The appeal chamber in following paragraph of its decision indicated that the effective control test is in contradiction with standard and logic of state responsibility norms.[187] The appeal chamber believes that this test is also in contradiction with some of the international decisions and judicial precedent. The appeal chamber for proving this point refer to some of the court cases which has used the overall control test among those the decision of Iran-United States Claims Tribunal in which for attributing the act of "*evolutionary guards*" or "*revolutionary Komitehs*" to Iran state issuing specific order to these groups were not necessary and the claims tribunal based on overall control of these individuals and groups by Iranian state has attested the Iranian state international responsibility.[188]

Moreover, the European court of human rights in LOIZIDOU case has also applied the overall control test. In this case the court stated:

"It is not necessary to determine whether, as the applicant and the Government of

180 *Prosecutor v. Tadic*, *op. cit.,* Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 8 of the Statute.1997.
181 Cfr. supra footnote *12,* para 104.
182 *Ibidem*. Para. 90.
183 *Ibidem*. Para. 92.
184 Belonging to a party to the conflict.
185 *Ibidem*, paras. 95-98.
186 *Ibidem*, para. I04.
187 *Ibidem*, paras, l26- I23.
188 *Ibidem*, para. I27.

Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the (TRNC) It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the (TRNC).”[189]

The ICTY after referring to these judicial precedents stated that:

“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.”[190]

Obviously, the appeal chamber for attributing the acts that have been committed sporadically and individually to third-party state and controlling state has distinguished that the use of effective control test is more suitable because it is needed to proof that these acts have been committed by special order coming from defendant state.[191] According to the appeal chamber, the test that is slightly in international law, will be when a state in an armed conflict is involved by giving instruction, harmonizing, designing the armed group activities and in addition to these, is playing a role in providing them with financial aid, training, arm equipment or logistical support and activities.[192] In this case, these kinds of groups or their member can be considered as agents of controlling state, without even the necessity and need to have the controlling state specific order for every and each of the activities that have been committed by them.[193]

Finally in Tadic case, the judges of the appeal chamber by applying the overall control test has concluded that Yugoslavia had a complete overall control over Bosnian Serbs and this group activities (among them activities against international law, international human rights law and IHL) are attributable to Yugoslavia state.[194] In any case the chamber has used the overall control test in other cases also, for instace, Aleksovic,[195] Celebici[196] and Blaskic[197] cases, which

189 Cfr. supra footnote 174, Para. 56.
190 Cfr. supra footnote 12, Paras.130-131.
191 *Ibidem*, para. 131.
192 Cfr. supra footnote *138,* p. 6.
193 *Ibidem*, paras. 137-138.
194 *Ibidem*, para. 145.
195 ICTY, Aleksovic Case, 2000, Para. 134.
196 ICTY, Celebici Case, 1998, Paras. 230-234.
197 ICTY, Blaskic Case, Judgment, 3 March 2000, Para. 149.

is the clear sign of international evolution with regard to identifying third-party state international responsibility.[198]

After explaining all the existing case law and examining their different test, before going into next part it would be essential to proclaim that the test that this author feel is ultimately more suitable for attributing third-party state responsibility? It does indeed seem that the ECT is insufficient, and could even end up creating a "*safe corner*" for a state to achieve their interests by violating IHL. The OCT has a relatively lower threshold and in this author's views avoids creating false dichotomies in judicial decisions and precedents. Furthermore and therefore, if the OCT becomes the standard compliance test, states will be inclined to be more careful and demonstrate greater respect in practice toward IHL.[199]

3.1.3. International law commission viewpoint about Responsibility of state for internationally wrongful act article 2001

International law commission in article 8 of the state responsibility act stated that:

"*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*"[200]

As it is mentioned the commission in article 8 has used the word "*control*" without any further shackle. The existence of some uncertainties and lack of compromise between the commission's members itself can be considered the main reasons for this situation.[201]

Commission in interpretation of article 8 has referred to ICJ decision in Nicaragua case and also to international criminal tribunal for the former Yugoslavia decision in Tadic case. Commission by referring to different apostolate that international criminal tribunal for the former Yugoslavia which is attributing criminal responsibility for individuals and not state responsibility, expressly did not rejected the court reasoning and decision but tacitly accept the effective control test expressed by ICJ. The commission in its commentary stressed that for attributing the international responsibility arising from the wrongful act of a person or group of persons, whether organized or not and it is impossible to attribute all actions of that person or group of persons to the controlling state by just acknowledging the overall control of that state. Thus, it is important that in each case control, direction and instruction done by third-party state be examined

198 For more information look at ICTY, ICYR, MICT case law debates.
199 Cfr. supra footnote 138.
200 Cfr. supra footnote 85, Article 8.
201 Crawford, 2002, p. 105.

in the main part of the wrongful act of that group.[202]

Therefore, it can be concluded that the international law commission has adopted the same approach as of ICJ's and it is clear that this commission's methodology has dissatisfied the judges who were in international criminal tribunal for the former Yugoslavia.[203]

Another perception that can be understood from commission viewpoint and commentary is that commission in ratifying the 2001 draft, has taken into account and even go beyond it, because based on the framework of article 8 of the state responsibility act "*instruction*", "*direction*" and "*control"* each of the alone and not all together and at once is enough to attribute the wrongful act to a state. In practice, proofing each of these elements can attribute the wrongful act of that person or group of persons to a state.[204]

Now at the end of this discussion we need to answer this question that which test is more suitable for attributing the act that is against international human rights law and IHL committed by armed group or rebels group in an internal conflict to a control and supporter state?

As it was mentioned before proofing the effective control test and providing enough evidence and records in this regard is extremely difficult, therefore, it seems that using effective control test in area of state responsibility and it is just trying to create a safe corner for state and allow them to achieve their demands by training, equipping and arming of some groups without taking into consideration the international consequences of their acts and violate international human rights law and IHL, or through terrorist groups committee murder and create fear.

In any case using overall control test, which has a lower threshold for attributing the responsibility to state, in addition to low threshold has some other benefits. Firstly, using this test will avoid scattering and dichotomy in judicial decisions and precedents. Moreover, state in international arena will not act in a way that their international responsibility arise and being discussed by international community, rather they will try to follow international rules in a more respectful manner and choose a neutral position in an internal conflict of another state.[205]

3.2. Obstacles to hold third states responsible

In this part a short interference will be given based on the features of the existing law to hold third-party state responsible and the barriers that might make it impossible.

202 Cfr. supra footnote 95, paras, 3-5.
203 Cfr. supra footnote 124, p. 250.
204 Momtaz, 2007, pp.105-106.
205 Cfr. supra footnote 138.

The first problem that can arise is to distinguish the responsibility because of aid and assistance from the international cooperation that exists between states.[206]

Another problem concerning applicability of the aid and assistance case is that in reality it can be limited either to a number of cases that it can be applicable or by subjective element.[207] While the latter has been stated in statute of ICJ article 38:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

b. International custom, as evidence of a general practice accepted as law."[208]

International custom and state practice often distinguish to *two* features: "*material element*" of the act of criminal perpetration and the "*state of mind*" of the perpetrator. Unfortunately, there are no clear criteria for defining and assessing this latter subjective element.209 It becomes all the more difficult at the interstate level, i.e., between an assisting state and a recipient state. Indeed, the ILC has stated that since Article 16 refers to the violation of various aspects of IHL that can happen by the provision of aid and assistance, it is *impossible* to develop a clear framework for diagnosing the subjective element.210 In practice this requirement is a great barrier that make the application of this article difficult.

What can be said is that because of international legal order and the characteristic of responsibility itself it is impossible to dismiss the subjective element necessity but the courts must apply various tests to check whether the intent element was there or not by the assisting state.[211]

However, just because it is impossible to clearly diagnose the subjective element of an IHL violation that does not mean there should therefore be no attempt to diagnose at all. In fact, courts have gone ahead and devised and applied various checks. Yet, this often serves only to complicate matters further since many existing court systems were originally created to deal with bilateral situations and are not well equipped to deal with the complexities of contemporary multilateral affairs.[212]

In case that the court finally decided that the subjective element exists and condemned the assisting state yet, another problems occurs.

First of all there is structural barriers in the courts system while they are basically created to deal with bilateral situation and in this cases usually courts are faced

206 Cfr. supra footnote 65, p.377.
207 *Ibidem*, p.231.
208 Statute of the International Court of Justice, 1945, Article 38.
209 Mauriche, 1995, p.177
210 ILC p.127
211 Cfr. supra footnote 65, p.249.
212 *Ibidem*,p. 378.

with situations that they are not used to deal with.[213]Another problem still exist and that is that can occur after holding a state responsible is that to what degree the assisting state should be responsible for the wrongful act.[214]

3.3. Remedies and reparation

Although it is not the main focus of this thesis paper to go through the possible legal consequences of a third-party state being found responsible for an internationally wrongful act, we should nonetheless spend a few minutes on the topic. Various guideposts or minimums can be found in the draft version of RSA, specifically in Chapter I Articles 28-41 ("*Legal consequences of an internationally wrongful act*") and Chapter II Articles 24-54 ("*Implementation of the international responsibility of the state*").[215]

To explain more going through the text of the provisions in the first chapter it can be seen that there have been recognized three consequences.[216]

First consequence have been mentioned in article 29 as follow:

"The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached."[217]

The next article discuss the second possible result:

"The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require."[218]

Finally article 31 talks about third outcome and explain:

"The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[219]

In the second chapter is explaining different form of reparation such as, restitution, compensation, and satisfaction.

While the question that arises here is to what extent this rules in the second and third chapter of state responsibility act article can be applicable in the case of third

213 *Ibidem*.
214 *Ibidem*, p-p.276-279.
215Cfr. supra footnote 85.
216 Cfr. supra footnote 65, p.271.
217 Cfr. supra footnote 85. Article 29.
218 *Ibidem,* Article 30.
219 *Ibidem*, Article 31.

state responsibility? While personally I believe it needed to be addressed and highlighted by the international law scholars for modification and changes in accordance with current changes.

4. The possibility of holding third states' responsible for violation of IHL in Syria internal conflict

In the previous section, we discussed how it would be possible to implement third-party state responsibility. Specifically, we reviewed a wide range of established laws and judicial precedence, as well as three possible compliance tests (the SCT, ECT and OCT). The question is whether any of this would be sufficient in the kinds of complex multilateral and irregular conflicts that are increasing in number. Thus, we now turn to this thesis paper's case study, the on-going conflict inside Syria, which has been raging since 2011.

In Section 4.1, we will provide a brief overview of the main belligerents in the conflict. In Section 4.2, we will discuss the role of IHL violations in the conflict. Later, the importance of the effect of the geopolitical environment and interest of the third-party state in the conflict and continuation of the war will be highlighted. Finally, in section 4.3 it will be examined whether based on the currently established international rules it is possible to hold third-party state internationally responsible because of their involvement in Syrian war or not, if yes based on what existing rules or practices.

4.1. Main belligerents of the Syrian conflict, including third-party states

What Mohamed Bouazizi had done in 17 December 2010 undoubtedly was the most influential event in the history of the Arabs country and Middle East and crucial for the whole future of this region during the recent years. The protest movements start from Tunisia and passed trough African countries and Middle East, the storms that become known as Arab spring, and now it is still on going in Syria.

In 15th March 2011 "*Day of rage*" organization planned a demonstration against Al-Assad government, with the same inspiration from similar movement in other Arabic countries such as Tunisia, Egypt and Libya known as "*Arab Spring*". 220 The main request of the protestors at the beginning was about more social and political freedom and guarantees such as relasing the political prisoners and more free media.[221]

The situation become worst when Bashar al Assad's refused to solve this problem

220 Midwest diplomacy, The syrian civil war is far from over, 2014.
221 van der Wolf & Tofan, 2013, p. 3.

by peaceful settlement of dispute and change and amendment in the existing structure, The Syrian Armed Forces first used deadly force against protesters on March 18th, where five were killed and based on reports more than 5000 have been injured in Daraa.[222] The use of force by government's against civilians leads to the radicalization of the demonstration with an Islamist element, which facilitated the grounds for involvement of extremist Muslims and terrorist groups. It make the country to internal conflict and by passing time the range become wider and became a field for struggling for region countries and world's power.

It is difficult to classify different actors and groups that are now involved in the Syrian war due to the fact that depending to the approach one will choose to classify them and in most of the cases it leave us with a deadlock. [223] Different rebels and military armed groups such as "*Military forces of Al-Assad, Kurdish forces, Islamic Front forces, Free Syrian Army (FSA), Jabhit Al-Nusra, Islamic State of Iraq and Greater Syria (ISIS), Al-Qaeda, Hezbollah Army, Abo Fade El Abbasi and Militia*" are playing a role in the conflict. Based on different criteria such as religious ideology and political background you can classify the same groups sometime as ally and sometime as enemy.

Looking at the geopolitical division of different minority and ethnic groups along side with different religious and ideology groups the on going conflict in Syria can not be considered as a war between governments forces and rebel groups nevertheless as a war between government and terrorist groups and different terrorist groups with each other at the same time.[224]

Government	Opposition	Kurdish	Jihadist
National Progressive Front (NPF):	Syrian National Council (SNC) / Syrian Revolutionary Command Council	Rojava:	Islamic State of Iraq and the Levant (ISIL also known as ISIS and the Islamic State):
- Armed Forces	(SRCC):	- People's Protection Units (YPG)	- ISIL Military
- National Defence Force (NDF)	- Free Syrian Army (FSA)	- "Euphrates Volcano" (FSA-YPG joint operations room)	- Yarmouk Martyrs Brigade
- al-Baʿath party	- Islamic Front (IF)		- Jaysh al-Jihad
- Shabiha	- Ajnad al-Sham Islamic Union	Peshmerga allied militias:	
Allied militias:	- Army of Mujahedeen	- Syriac Military Council (MFS)	al-Nusra Front
- al-Abbas	- Authenticity and Development Front (AD	- Sutoro	Jabhat Ansar al-Din
- Popular Front for the Liberation of the Liwa			

222 CNN World, 2013.
223 Faiyad, 2014.
224 Agapova, 2014.

of Iskandarun (also known as the "Syrian Resistance") - Jaysh al-Mujahhideen (JM) - Sootoro - Asaʿib Ahl al-Haq (AAH) - Kataʿib Sayyid al-Shuhda (KSS)	Front) -Sham Legion	- Khabour Guards	Muhajirin wa-Ansar

Third-party states (and other third-party non-state groups)			
Allied militias: - Hezbollah (from Lebanon) - Popular Front fro the Liberation of Palestine – General Command (PFLP-GC) (from the West Bank but headquartered in Syria) - Arab Nationalist Guard (ANG) (from multiple Arab states) Primary support by the Islamic Republic of Iran: - Quds Force - Basiji Additional support by : - Russian Federation - Democratic People's Republic of Korea (North Korea)	Primary support by: - Qatar - Saudi Arabia Additional support by: - Turkey - United States - France	Peshmerga allied militias: - Kurdistan Workers' Party (PKK) - Marxist-Leninist Communist Party-Turkey (MLKP-T)	Al-Qaeda (for al-Nusra Front) Combined Joint Task Force-Operation Inherent Resolve (CJTF–OIR): - United States - Canada - Saudi Arabia - Qatar - Jordan - Bahrain - UAE - Morocco

Immediately it is very evident that this is not only a highly complex and fractious

conflict, but it is one in which third-party states are heavily involved, either:

- directly through state military organs, e.g., Iran's Quds Force and Basiji, and the various airforces of the CJTF-OIR;
- directly through military aid and assistance, e.g., the Russian Federation's many arms and equipment shipments to the Syrian government, and the West's own aid and assistance to the SRCC;
- indirectly through client non-state actors or groups, e.g., Iran's Hezbollah.

In fact, there is reason to believe that more than 20 countries are in one way or another involved in the Syrian civil war.[225]

Adding whole other levels of complexity are:

- ISIL is a wholly independent non-state group originating from outside Syria but exploiting the country's conflict to establish its own unilaterally self-declared Muslim caliphate or "*Islamic State*". It is seeking the conquest of Syria, as well as Iraq and several other neighboring Muslim-majority countries. As of July 2014, ISIL controlled a third of Syria's territory and most of its oil and gas production; it also conquered large parts of Iraq, including its second-largest city. This prompted an international military response, thereby internationalizing the conflict to a new degree.
- The presence of the Kurdish Peshmerga internationalizes the conflict in an entirely new way. The Peshmerga could be considered a "*semi-state group*" in that they originate in Kurdish Autonomous Region (KAR) inside neighboring Iraq and answer to its government.
- The presence of ISIL as well as al-Qaeda means that the Syrian conflict is no longer just a dialectic between a government and opposition rebels, but now a trilectic between a government, rebels, and terrorists, all fighting each other at the same time.[226]
- There may be well over 200 armed non-state groups fighting in Syria. For instance, the SRCC itself encompasses a total of 72 factions. Because of varying religious and political ideologies and tactical considerations,[227] the various factions end up fighting each other and making temporary alliances outside of their normal coalitions.[228] The conflict is increasingly taking on an ethnic and sectarian character: approximately 74% of the Syrian population is Sunni and the rest is divided between Alawi, Shia, Druze, and Christians. Today, all four of

225MotherAgnes-MariamoftheCross, 2014 ,p.8.
226Agapova, 2014.
227Kandil, 2010.
228 Daly, 2013.

these groups are confronting each other.[229]

- Government forces are estimated at being between 150,000 and 315,000 troops, while the Iranian intervention has officially involved 70,000 Islamic Revolutionary Guards. According to Jeff White of the Washington Institute for Near East Policy, "*You don't see very many pure Syrian army formations anymore. [The Iranians are] what basically kept the [al-Assad] regime in the war.*"[230]

- The CJTF-OIR was established to combat ISIL in both Syria and Iraq. This military alliance coordinates with the SRCC and the SNC, but not the Syrian government.

The issue of sovereignty and international representation is especially messy:

- The SNC was originally formed in 2011 to serve as a replacement government for the current al-Assad regime and was briefly a member of the Syrian National Coalition for Syrian Revolutionary and Opposition Forces, which was formed in 2012 to serve as a pluralistic/inclusive replacement government.[231] Since its establishment, the SNC has been recognized by seven UN member-states – including core CJTF-OIR allies the United States and Saudi Arabia – as well as by important international organizations: the European Union, the International Union of Muslim Scholars, and the Arab League as the "*legitimate representative of the Syrian people*". Indeed, the Arab League gave Syria's seat to the SNC in 2013.[232] Although, it does not mean that they have been recognized as a government, but it has its own impact. Meaning that Al-Assad government will not be held responsible for the acts committed by the insurgents as well as for non acting in area where the power of insurgents is the dominant power. On the other hand states needed to clarify their attitude to belligerent, since the substantial part of the Syria has been occupied by them and in those part IHL have had happened by the responsible authority. [233]

- The al-Assad regime's allies in the Russian Federation and the Islamic Republic of Iran, by contrast, refuse to recognize the SNC and insist upon the present government's legitimacy. Indeed, as of July 2013, the al-Assad regime controlled only approximately 30–40% of the country's territory but 60% of the country's population.

What is particularly important about the rivalry between the SNC and the al-Assad regime is that the growing recognition of the former is increasingly

229 Islamic World Peace Forum.
230Masi, 2015.
231 It is consist of 13 different military group and together they formed the Islamic front line. Islamic front is known to be formed by Saudi Arabia. For more information look at: Golubiewski, 2013.
232 Syria' n.d.
233 Cfr. supra footnote 6, p. 14. □

resulting in the effective termination of formal relations with the latter by some key states and international organizations. Yet, the al-Assad regime remains for the moment the internationally-recognized government of Syria by the majority of the international community, and it rules over the majority of Syria's population.

Furthermore, there is the complexity represented by the potential dissolution of Iraq, as well as the emergence of two potential successor states to both Syria and Iraq, i.e., ISIL's Islamic State and Kurdistan:

- ISIL does not consider the internationally-recognized borders of Syria and Iraq as legitimate and has even dismantled the border crossings in the territories it controls.
- The KAR pledged support to the SNC in 2012. The KAR is something of a state within a state, and the involvement of the Peshmerga has been more or less a unilateral decision by the KAR with Western approval (and instigation) and Iraqi governmental acquiescence.
- Rojava is a *de facto* Kurdish-majority autonomous region in northern and northeastern Syria. The region's autonomy is not formally recognized by the Syrian government. However, it has many of the features of a functioning government, including a constitution and political system.[234]

Since the time that the war has started several reports acknowledged the serious breaches of human rights law and IHL in Syria by both sides of conflict. Based on reports since 2013 over 100,000 Syrians[235] have been killed and more than 4 million people[236] had forcedly immigrated to other countries because of fear.[237] Intensification of the conflicts between Al-Assad government supporters and the opponent groups had affected civilians in many different ways such as torture and executions, enforced disappearances, detention, arbitrary arrests, rape, abduction.[238]

4.2. The role and scope of IHL violations in the Syrian conflict

The Syrian conflict has been described by at least one expert as one of the most devastating humanitarian and IHL crises of our time.[239] The Independent International Commission of Inquiry on the Syrian Arab Republic has confirmed in its reports grave violations of IHL committed by practically all state and non-

234 Kolokrtronis, 2015.
235 Estimated by the UN Secretary General Ban Ki-moon, 2013.
236 UN Syria Regional Response Plan 2014.
237 MADRE, 2013, p. 2-3.
238 FIDH, 2012, p. 6-10.
239 Guterres, 2014.

state forces.[240] Indeed, IHL violations almost seem to be part of the combatants' rival strategies.

Violations of IHL have been at the core of the Syrian conflict from the very beginning – indeed, they can even be said to have been the match that lit the fire. The conflict originated in peaceful civilian protests against IHL violations by the al-Assad regime, which responded with further IHL violations by using the Syrian Armed Forces to lehtally suppress the demonstrators on 18 March 2011 in Daraa, resulting in five civilians killed and more than 5000 civilians injured.[241] This began a cycle of violence, beginning with defections from the Armed Forces and the establishment of the FSA, then eventually spiralling out, radicalizing, and fragmenting to the present situation.

As of January 2015 the death toll had risen above 220,000, with more than 6.5 million civilians displaced.[242] International organizations have accused the Syrian government, ISIL and other opposition forces of severe IHL violations, including massacres, the use of barrel bombs, the use of chemical weapons, the use of forced mass starvation as a siege tactic, and the use of rape as a weapon of war. In addition, tens of thousands of protesters and activists are said to have been disappeared or imprisoned and tortured. Another report describes the sum total of IHL violations in the following way:

"attacks on civilians, systematic murder, massacres, execution without due process, torture, rape, recruiting and using children in hostilities, hostage-taking, forced displacement of civilians and enforced disappearances. Protection to hospitals, medical and humanitarian personnel and cultural property was disregarded in many cases. Furthermore, medical and religious personnel and journalists were often targeted. Attacks were conducted with the usage of weapon causing superfluous injury and unnecessary suffering. Aerial bombardment, contrary to the norms of the law of war, was disproportionate and indiscriminate."[243]

It is difficult to report the detailed current situation in Syria but based on several reports more than 130 000 Syrians have been killed since the beginning of 2014 and more than 9 million had been roved and exiled out from their home country,[244] while the number of the flow is increasing day by day and it can turn into a threat a threat to international peace and security.[245]

As it was stated before Geneva conventions emphasize on the protection of

240 Cfr. supra footnote 72.
241 CNN World, 2013.
242 UN Syria Regional Response Plan 2014.
243 COI, 21st Session, 2012; COI, 22nd Session, 2013; COI, 24th Session, 2013; The Daily Star, 2013.
244 Zerrougui,2014.
245 Cfr. supra footnote 57.

civilian and providing them with proper and necessary protection, health care and nutrition. While there is a sever lack of access to nutrition and medicine in areas controlled by rebels, the problem is less sever in governmental controlled area although even in that area it is expensive.[246]

There is also growing evidence that children, one of the most vulnerable populations, are now experiencing many IHL violations:

- Schools have been used as military bases or prisons, which in turn makes them targets for reprisal attacks. However, under IHL schools categorized as "*restricted military targets*".[247] Although in the Geneva Conventions such a restriction has not been articulated, the consequences of such attacks have nonetheless been highlighted by IHL. Furthermore, the principle of precaution implies that a school should not be used as a military based or prison to begin with,[248] and so it can be concluded that both their use and reprisal attacks against them are war crimes.[249]
- There are reports that the FSA is engaging in child recruitment, while children who are suspected of being involved with opposition groups have been arrested by the government. The Geneva Conventions forbids children under the age of 15 years old from taking part in hostilities[250] or to be imprisoned or kept as hostages.[251] On the other hand contrary to Geneva conventions children under the age of 15 years old can not take part in hostilities[252] or to be imprisoned or kept as hostages[253] while children who are suspected of involving in opposition group to current government have been arrested. The same is true about opposition group, as for example the Free Syrian Army has been listed as one of the groups who is recruiting children.[254] Furthermore Geneva conventions and its additional protocol also demand the party member to facilitate the access to education for children.[255]

  Another category of civilians which has been classified as the one needed to be protected are women, while based on published report they have been experiencing different act of violence Women civilians have also been negatively effected: it has been reported that all sides of the conflict have used rape as a weapon. This would constitute a crime against humanity and is prohibited by IHL.[256]

246 Sabaneh, 2014.
247 Corn, 2014.
248 Gaggioli, 2014.
249 Zerrougui, 2014(a).
250 Zerrougui, 2014.
251Cfr. supra footnote 75.
252 Zerrougui, 2014.
253 Cfr. supra footnote 75.
254 Cfr. supra footnote 79.
255 Cfr. supra footnote 77.
256CICR, 2014.

Several UN inquiries have reported "*evidence that rebel forces in Syria have been guilty of human rights abuses*". However, these inquiries have also said that "*the Syrian government appears to be responsible for the majority of crimes and the systematic nature of the abuse points to government policy*," and that responsibility can be traced to "the highest level of government, including the head of state".[257]

To all the abovementioned humanitarian violation, the use of chemical weapon can be added. The use of chemical weapon confirmed the use of chemical weapon have been confirmed by United Nation Mission to Investigate Allegation.[258]

The use of chemical weapon in Syria has been also condemned but its still unclear who used it. Consequently the CWC from 1993 to which Syria is a member, by its Article I prohibits under any circumstances the use of chemical weapon regardless of the situation and type of conflict.

In 21 August 2013, the use of chemical weapons in Syria caused the death of thousands of people.[259] The United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic in its report confirmed the use of chemical weapons,[260] later UN Secretary General stresses his view and reiterates the main conclusion of the UN mission's report and that a war crime has been committed and that the international community has a moral responsibility to hold those responsible accountable.[261]

The evidence indicated responsibility "*at the highest level of government, including the head of state*." The inquiry has also previously reported that "*it has evidence that rebel forces in Syria have been guilty of human rights abuses." However, the investigators have always said that "the Syrian government appears to be responsible for the majority of crimes and the systematic nature of the abuse points to government policy."*[262]

Moreover Customary international law imposes certain limitations regarding means and methods of warfare used in an internal armed conflict, as for example the international community already in the case of Iraq had condemned it when the government used chemical weapon against its own Kurdish population.

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257 Navi Pillay is the first UN figure to directly implicate Mr Assad in alleged war crimes, The UN's human rights chief has said an inquiry has produced evidence that war crimes were authorised in Syria at the "highest level", including by President Bashar Al-Assad.1/12/2013.
258 UNHRC, 2014.
259 The grouping of clans in Syria n.d.
260 Cfr. supra footnote 85.
261 United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus, 2013.
262 Navi Pillay is the first UN figure to directly implicate Mr Assad in alleged war crimes, The UN's human rights chief has said an inquiry has produced evidence that war crimes were authorised in Syria at the "highest level", including by President Bashar Al-Assad.1/12/2013.

Besides in Syria militants are fighting with homemade rockets or mortars, use of which is also not explicitly regulated. In any case, the use of unconventional weapons doesn't allow performing humanitarian law violations since common Article 3, Additional Protocol II and customary rules of the law of war remain applicable.

4.3. Third countries involvement in Syria conflict

Being familiar with the political geography of Middle East and the changes that have happened during the last decades on one side and interests and values that each of the actors in the region might have is essential key to understand the reasons that put Syria in the current situation. While from one side there is competition between Iran and turkey to gain the region leadership,[263] from another side there is also a battle between Shia and Sunni Islamic ideology and mostly Iran, Shia-dominated government in Iraq and Al-Assad in one side are facing with Gulf states (Saudi Arabia, Qatar and Kuwait) on the other side.[264] In addition to above mention there exist another battle between the Islamic country and Zionist.[265] Moreover, since the access to the Mediterranean is of great importance for Russia, this alongside with many other political reasons make Russia to be involved in the region and to find its own allies in order to reach its own interests.[266] In practice, different actors and states, keen to see an outcome to the Syrian conflict that would suit their own interest, provide support to particular participants conflict.

As it was mentioned Syria since January 2011 was a scene for civilian protest which was somehow under the affects of the political evolution of Middle East. The peaceful protest of people whom were demanding some political and economical reforms in country after a period of time due to lack of accountability to society's demands by government and of curse the involvement of foreign elements leaded to use of force and violence in this country. Today after four years time after Syria crisis evidence implied that this crisis gradually has changed into an internal conflict within the framework and criteria defined in IHL conventions, resulting in thousands of deaths and vagabonds of millions of Syrian citizens.

After starting the armed conflict between Syrian governments forces and opponent groups to government, some of the countries such as Saudi Arabia, Qatar, turkey alongside with many western countries had quickly expressed their support for opponent armed groups based in Syria and even recognized the

263 Hokayem, 2012.
264 Cfr. supra footnote 59.
265 Cfr. supra footnote 90.
266 *Ibidem*.

national council of oppositions as the legitimate representative of the Syrian people [267] It appears that this early recognition is in contradiction with international law norms.[268] While, Al-Assad government has been benefiting from Iran and Russia support. For instance Iran has provided assistance in organizing repressions, monitoring the Internet, purchasing weapons and also shoring up economy.[269] Based on the survey and evidence more than 20 countries are involved in Syrian civil war.[270]

According to the given news and received information's, since the beginning of unrest in the year 2011 and with intensification of the crisis its turn into an internal armed conflict, western state specially United State, United Kingdom and France along side with their allies in the middle east (Arab countries and Turkey) adopted many different measures in supporting the armed forces against Bashar Al-Assad government. These measures are including financial, logistical, information and arms support and also training opponent armed forces. Moreover, some of the Arabic countries of the region such as Saudi Arabia and Qatar[271] frankly acknowledged that they armed the opponent armed group against the Bashar Al-Assad government with different kind of arms.[272]

As it has been stated by the independent international commission of inquiry on Syrian Arab Republic, *"Several non-State actors from States in the region have participated in the war either through the direct deployment of their forces or by the provision of logistical and financial support to one side or the other. Their entry has been facilitated by the porosity of large parts of the Syrian borders. The increasing engagement of these players has led to a spillover of violence into their countries of origin. The military intervention of Hizbullah and Iraqi Shia militia on the side of the Government and the involvement of thousands of extremist militants in support of the rebels have heightened the pre-existing risks of instability in neighbouring States. The continuous armed confrontations in northern Lebanon and the rise of ISIS and its subsequent offensive in Iraq are indicators of the increased regionalization of the crisis."*[273]

Arms and financials assistance provided by the aforementioned countries is

267 Masherghnews, 2014.
268 According to Lauterpacht as long as the revolution did not win and the evidence proofs the existence of the legal government, which is still practicing its competences over that territory the presumption, is that it is legal state of that country. Till the time the old government is still struggling and resisting the recognition of the opponent as a legitimate government will be early recognition which will be considered as an intervention to the self-determination rights. For more information see: H. Lauterpacht, 1947, pp. 93-94.
269 Cfr. supra footnote 90.
270 MotherAgnes-MariamoftheCross, 2014 ,p.8.
271 Cfr. supra footnote 59.
272 Civil War in Syria.
273 28th session of the Human Rights Council: Reports, 2013, para.121-122

violation of article 2 of United Nation charter[274] namely *"the principle of non-interference in internal affairs of state and also United Nation General assembly Declaration 1970 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."*[275]

ICJ by citing the same principles in Nicaragua case stated that United State government with military training and providing financial aid to rebels group opponent to Nicaragua governments or even by encouraging, inducing, assisting them for military activities or guerrilla against Nicaragua government has violated its international obligation not to intervene in internal affairs of another state and also non use of force in international relations against other states.[276]

In addition to international responsibility of intervening states because of the violation of non interference principle and use of force against territorial integrity and political independence of Syria which is one of the basic rule and Jus Cogens norms of international law, these states can be held responsible based on article 8 and 16 of the state responsibility act and also article 1 common to Geneva conventions 1949, because of the measures and actions that violated human rights law and specifically IHL and have been committed by armed group under their support.

According to article 8 of the state responsibility article, act of individuals and private groups inside a country according to the order, or under control and direction of another state will be attributed to the controlling state. As it have been seen the extent to which a state practice control over the individuals or private groups have been under different interpretation, specially in international arena as it was discussed before about the two different test (effective control, overall control) that have been used as an interpretation of article 8 of the state responsibility act by different international tribunals and courts.

What is certain is that in the light of ICJ decision in Nicaragua case in 1986 and then later in 2007 in Bosnia and Herzegovina genocide case by using effective control test, all of the activities against human rights law and IHL which have been done by opponent groups to Bashar Al-Assad or the governments act itself are not attributable to the supporting and equipping states, because attribution in each case need confirmation of effective control by each of these state or proofing the existence of specific order in each of these activities which have been against human rights law and IHL.

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274 *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."*
275 General assembly resolution A/RES/25/2625, 1970.
276 Cfr. supra footnote 9, para. 146.

But as it was stated by ICJ in Nicaragua case, financial, military aid and equipping and providing arms for these groups or training them and sending troops for them while there is an internal conflict going on will cause international responsibility for controlling and supporting state.[277] Specially, in case of Syria the state who are involved have complete knowledge about the situation and circumstances that exist in Syria and the inhumanities and violations that is happening there by both side of conflict which is completely against any human rights and IHL norms. Yet despite all of these, they are providing them with aid and assistance and sending them arms and information.

However in the light of overall control test and following the international criminal tribunal for the former Yugoslavia precedent specially because in Tadic case the discussion was about violation of IHL in an internal conflict, proofing the third-party state involvement in this conflict will be much more easier by using this test.

Moreover, according to article 16 of the state responsibility act article, states that are providing arms and military equipment for Syria or the opponent group because of aid and assistance in committing an internationally wrongful act by one of these actors will be held responsible. As it was also stated by special court for Sierra Leone in Taylor case: *"Anyone who provides arms to the government forces or to armed opposition groups who is aware of the substantial likelihood that they would be used to commit international crimes may themselves be guilty of aiding and abetting those crimes.*"[278]

Based to this article, state that is aiding or assisting another state for committing an internationally wrongful act will be internationally responsible:

"*If that state with knowledge of the circumstances of an internationally wrongful act do so;*

In case that the act would be internationally wrongful act if it was committed by the state who provided the aid itself."

International law commission in its commentary stated that state that is providing financial aid for another state to use them for violation of human rights law and IHL will cause its own international responsibility. United Nation General Assembly frequently demanded its member state to avoid providing arms and other source of military assistance to state, which are serious violators of human rights law and IHL.[279]

Providing aid and assistance for violation of IHL, in practice happen by providing arms equipment. Up to the level that the use of certain arm product is not

277 *Ibidem,* Paras. 93, 146.
278 SCSL,*Prosecutorv.Taylor*, 2013,para.427.
279 Cfr. supra footnote 112, para. 9.

forbidden the state that provided that specific arm will not be held responsible for the violation of IHL that has happened by using of these weapons and committed by the recipient state or groups. But in any case, merely the awareness and knowledge of the providing state about the fact that recipient state or groups by using these weapons continuously are violating IHL, they should stop transferring and providing these weapons to the recipient even if these weapons can be use in a peaceful means.

Authenticity, since the time that providing state realized that the recipient state is using these weapons for violation of IHL, it is Chrystal clear that the subsequent aid and assistance is for facilitating the commitment of these wrongful acts and violations. Therefore, that state that with the knowledge of continues violation of IHL by recipient state or groups is still providing them with military aid and arm equipment is violating its own obligation to respect and follow IHL and also article 16 of state responsibility act.[280] Hence, bearing in mind all of these norms and then the fact that all of the states that are involved in Syrian conflict today are completely aware of the war crimes that is happening in Syria such as murder, kidnapping, execution without proper investigation and by a competent court, torture and use of different type of arms on civilians that have been reported by the Reports of the Independent International Commission of Inquiry on the Syria Arab Republic of the United Nation[281] and also international medias and presses and yet still they are providing them with financial aid and military assistance to the parties of the conflict, base on the article 16 of the state responsibility article the grounds for holding them responsible because of aiding and assisting for violation of IHL in Syria will be prepared.

In addition to above mention, it can be indicated that third-party states that are providing financial, military and training aid to one of the parties to an internal conflict such as the one in Syria because of violation the customary law *"obligation to guarantee respect for IHL norms"* stated in common article 1 to Geneva conventions can be held also responsible for that:

As it was stated previously based on this customary rule third-party state are not only responsible to act individually or collectively when parties to an armed conflict are violating IHL norms, specially if they can they have to react to these violators in a way to affect them and make them stop these violations,[282] besides they have negative pledge and commitment not to encouraging or inducing, in any way the parties to a conflict to violate IHL or adopting measures to aid or assist them in violation of these norms as it was stated by ICJ in Nicaragua case.[283] For

280 Sassoli, 2002, p-p. 412- 413.
281 Reports of the Independent International Commission of Inquiry on the Syria Arab Republic, 2012-2013.
282 ICRC, 2004.
283 Cfr. supra footnote 9, Para. 200.

instance we can refer to the ban on transferring and providing arms and military equipment for one of the parties to an armed conflict while it is clear that it will be used for violation of IHL in that conflict.[284]

Hence, states that are sending arms and military equipment to one of the parties involved in Syrian conflict with the knowledge to the continues violation of IHL by these parties are still continuing to provide them with aid and assistance have violated their commitment and obligation to guarantee respect for IHL norms.

4.3.1 Applying compliance tests

The picture that emerges if we apply the ECT and OCT looks like the following:

The Syrian and Iranian governments fail the ECT, both internally in terms of state responsibility, i.e., the Syrian government because of the complete dependency of its Armed Forces and affiliate militias, and externally in terms of third-party state responsibility, i.e., the Iranian government because of the complete dependency of its Revolutionary Guard and Basiji units operating inside Syria and because of the strong relative dependency of Hezbollah. Indeed, the failure of the ECT for Iran is so bad, in that the Syrian government itself is in a position of strong relative dependency upon the Islamic Republic as per White's remark from above, that as time goes forward and the conflict deepens, Iran's responsibility will be immense.

The many other governments involved, i.e., the Western and Arab states, and the Russian Federation, for the most part fail the ECT, if only somewhat, due to the weak relative dependency of the SNC/SRCC and Kurdish groups vis-a-vis the Western and Arab states, and the weak to moderate relative dependency of the Syrian government upon the Russian government. What is obviously clear is that arms and financial assistance provided by the aforementioned countries and many others must be contributing to the violation of IHL inside Syria.

However, in terms of the OCT, the assessment remains open. It is clear there is much organizing, coordinating, planning, directing, and/or supporting going on by third-party states in the Syrian conflict, but it is hard to determine the depth to which the SNC/SRCC's existence and strategy hinges upon the Western and Arab states, and likewise the extent to which the Syrian government's existence and strategy hinges upon Russia and especially Iran.

4.3.2. Response of the *international* community

There are gross violations of several other aspects of international law going on in Syria at the moment:

284 *Ibidem,* Para.120.

- Article 2 of the UNC, namely, "*the principle of non-interference in internal affairs of a state*";[285]
- Non-interference and refraining from the use of force against the territorial integrity and political independence of a state as *jus cogens* norms of international law;
- UNGA Declaration 1970 on *"Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations"*;[286]
- Articles 8 and 16 of RSA;
- Common Article 1 of Geneva Conventions.

What is disturbing is that, rather than seek to enforce Iran and Iraq's obligations under international law, several Arab and Western states have responded by increasing aid and assistance to the Syrian opposition – which itself, as explained above, has been implicated in IHL violations.

With the exception of the drive to end the use of chemical weapons, there has not been any well-defined response by the international community to the humanitarian and IHL disaster happening inside Syria – this despite the fact that Common Article 3 makes it incumbent upon all states to "*apply certain rules in the case of conflict, not of an international character..."*[287]

With respect to chemical weapons, a UN fact-finding mission was requested by member-states to investigate 16 alleged incidents of chemical weapons attacks by the Syrian government. The United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic was established:

- Seven alleged incidents were investigated.
- Nine alleged incidents were dropped for lack of "*sufficient or credible information*".
- In four cases, the UN inspectors confirmed use of sarin gas.

However, the investigators' reports did not attribute any responsibility to any party of using chemical weapons.[288] Many countries, including the United States, and many international organizations, including and the European Union, nonetheless accused the Syrian government of conducting these confirmed and other chemical attacks. A significant international outcry following chemical attacks in Ghouta in

285 *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."*
286 General assembly resolution A/RES/25/2625, 1970.
287 Cfr. supra footnote 6,p.31.
288 UNHRC, 2014.

2013 led to an international agreement that resulted in the destruction of Syria's chemical weapons.

Perhaps the issue of chemical weapons use was capable of being handled by the international community precisely because responsibility lied overwhelmingly (or was perceived to lie overwhelmingly) with the Syrian government and not with the many third-party states that have been involving themselves in the civil war.

5. Conclusion

As it was investigated and explained at the international level, there are rules for regulating the conduct of third-party countries when they are involved in an infernal conflict of another state. Nevertheless, the existing instruments are not strong enough to regulate the third party state behaviour and mostly their application are left at the hand of the state to act with good intention, and there is a need for mechanism to control and influence the third-party state behaviour in a more accurate way.

In any case, the rising supports and assistance of countries for military and paramilitary groups opponent to states and even terrorist groups in an internal armed conflict of another state will cause lengthening the scope of these conflicts and consequently continuation of the conflict.

Moreover, the occurrence of these conflicts is a serious threat to international peace and security. Therefore, surely it is needed to define criteria for attribution that has a lower threshold to be able to easily held the third-party state responsible for their interventions and violation of IHL that has been committed by the recipients by refer to this test.

Third-party states' responsibility is derived from one of the general norms of established international law: responsibility arising from involvement by a third-party state in an internal conflict of another state. Such involvement can take the form of aid and assistance to combatants or direction and control of the combatants. Since the norms of international law were instituted only somewhat recently (after the Second World War), there is not yet a lot of precedent in international law for third-party states' responsibility.

It is certainly possible to implement third-party state responsibility. We have reviewed a wide range of established laws and judicial precedence, as well as three possible compliance tests (the SCT, ECT and OCT), all of which have been used, can be used again, and certainly *will* be used again, with increasing precision. Yet, it is also quite clear that what exists is insufficient, since the travesties in Syria are happening *right now*, fuelled by third-party states, and there has been effectively nothing to stop them so far. Thus, the real story is not the

possibility of implementing third-party state responsibility, but instead, in the words of Judge Rosalyn Higgins, it is "the [current] fragmentation of international law", and hence, the increasing disregard for it entirely.[289] The existing body of law and methods of enforcement are not up to the task to make the norms of IHL truly universally respected, or at least universally obeyed.

OCT by defining a lower threshold for attribution of the acts of armed and rebel groups involved in an internal conflict to the controlling and supporter state provide us with a wider range of possibility to guarantee more support for civilians and victims of armed conflict and later better and easier prosecution of those who has committed these acts will be fulfilled only by using the OCT.

On the other hand, using the OCT and a simpler affirmation of third-party state involvement in the conflict will change the statute of an internal armed conflict to an international one, and therefor the IHL that will be applicable is the IHL for an international conflict which has better and complete guarantee and support comparing to IHL for internal conflict.

It is important to mention this point that unlike international law commission opinion using the OCT is not limited to ICTY which has the duty to determine individuals' criminal responsibility and evolving IHL norms to internal conflicts, rather this test have been used also by other international tribunals and courts.

In any case if the OCT should not be or can not be used in all the situations and cases, it is better in cases which there is a gross and serious violation of IHL which its basic aim is to provide human beings with more support use the OCT for attribution of the committed acts to controlling state and in other situations and circumstances use the effective control test.

Although this author has stated her preference for the OCT as an evaluative mechanism, the truth is she sees it only as a temporary measure in the long run. On the one hand, this author believes that by sufficiently lowering the threshold for responsibility – not to the point of meaninglessness, but certainly lower than the high burden of proof of SCT and ECT – then states will be more inclined to obey their IHL obligations. Furthermore, our first priority should be defending citizens, so if OCT, even if it is imperfect, can accomplish this in the short-term, then this author feels the argument for its use is quite strong indeed. On the other hand, without robust enforcement methods, it does not matter how much we adjust the threshold. Furthermore, enforcement is difficult to achieve in the present international order, for two reasons. First, because the international community remains very divided. Second, and more importantly, because the entire project of IHL itself is still too open to interpretation and debate: the final

289Higgins, 2007, 4.

conclusion that can be drawn from all of the discussions and explorations in this thesis paper is that it is very doubtful whether an abstract and normative framework for third-party state responsibility is really useful in *every specific case*. After all, there are different levels of enabling, facilitating, and even committing an internationally wrongful act, by a state or a non-state actor or group, much less a third-party state.

Nevertheless, we must not relax; we must try to develop better criteria and mechanisms. Internal conflicts are a serious threat to international peace, security and well-being. It is only a matter of time before the OCT and its derived punitive actions will be proven to be insufficient to prevent them, and there will be many more Syria until then.

Bibliography

- ***Books & articles*** *(Alphabetical order)*

- Asgari P, *"International responsibility of persons and states in the light of overall control test",* international law journal, N 40, 2009.
- Kolokotronis A, *"The No State Solution: Institutionalizing Libertarian Socialism in Kurdista",* New Politics, 2015. http://www.truth-out.org/news/item/29059-the-no-state-solution-institutionalizing-libertarian-socialism-in-kurdistan (Accessed July 14, 2015).
- Azari B, *"International responsibility of state considering the violence acts of individual in the framework of terrorism",* 2012. http://www.internationallaw.ir (Accessed July 10, 2015).
- Aust Philipp H, *"Complicity and law of state responsibility",* Cambridge, 2013.
- Bird A, *"Third State Responsibility for Human Rights Violations",* EJIL, vol. 21, No. 4, 2011.
- Bianchi A & Naqvi, Y, "*International Humanitarian Law and Terrorism*, Hart Publishing", Oxford, 2011.
- Boivin A, *"Complicity and beyond: International law and the transfer of small arms and light weapons",* international review of the red cross, Vol 87. Nom 859, September 2005.
- Bugnion F, *"Jus ad bellum, Jus in bello and non-international armed conflicts",* 2004. https://www.icrc.org/eng/assets/files/other/jus_ad_bellum,_jus_in_bello_and_non-international_armed_conflictsang.pdf (Accessed July 10, 2015).

- Cassese A, "*International Law"*, Oxford University Press, Second Edition, 2005.

- Cassese A, *"The Nicaragua and Tadic Case, Rivisited in the Light of the ICJ Juclgment of Genocide in Bosnia"*, *EJIL*., vol. 18, No. 4. 2007.

- Chazournes L & Condorelli L, *"common artoicle one of the Geneva convention revisited: protecting collective interest",* international review of the red cross, (837), 2000.

- Crawford J, "*The Draft Articles on Responsibility of States for International Wrongful Acts"*, Cambridge University, 2002.

- Crowe J & Bcheuber K, *"Principles of international humanitarian law",* Edward Elgar, Cheltenham 2013.

- Daly E, *"He Won't Be Home for Holidays", The* Huffington Post, 23 December, 2013. http://www.huffingtonpost.com/emma-daly/he-wont-be-home-for-the-h_b_4494876.html (Accessed July 10, 2015).

- Ebrahim Gol A, *"States international responsibility"*, Tehran, Shahr Danesh, 2012.
- Fawcett L, "*International Relations in the Middle East"*, Oxford University Press, Oxford, 2013.
- Focarelli C, *"Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble",* The European Journal of International Law Vol. 21 no. 1 © EJIL 2010.
- Fenrick W, *"The Development of the Law of Armed Conflict through the Jurisprudence of the lnternational Criminal Tribunal for the Former Yugoslavia",* Journal of Armed Conflict Law, vol. 2, No, 3, 1998.
- Gibney M, *"State Responsibility and the Object and Purpose of the Genocide Convention",* International Studies Journal, vol. 4, No. 283, □2008.
- Gibeny M, Tomasevski K & Vedsted– Hansen J, *"Transnational State Responsibility for Violation of Human Rights"*, Harvard Human Rights Journal, vol. 129, 1999.
- Graefrath B, *"Complicity in the law□of international responsibility, revue international",* Bruxelles, Éditions Bruylant, 1996.
- Henckaerts Jean-Marie & Doswald-Beck Louise, *"Customary International Humanitarian Law",* ICRC and Cambridge University Press, Vol I, 2005.
- Hokayem E, *"Syria and its Nighbours", Survival: Global Politics and Strategy*, vol. 54, no. 2, 2012.
- Joachim K, *"The Changing International System and Chemical Disarmament. In CHEMICAL DISARMAMENT and U.S. Security",* Global Society, Vol.15,No.4, *2001.* http://www.the-trench.org/wp-content/uploads/2013/06/2001-4-Global-Society-BTWC-regime.pdf
- Jackson M, *"Complicity in international law",* Oxford University Press, 2015.
- Jinks D, *"State Responsibility for the Acts of Private Armed Groups",* Chicago Journal of International Law, Volume 4 - Number 1, 2003.
- Lauterpacht H, "*Recognization in International Law"*, Cambridge University Press, 1947.
- Lauterpacht E, *"The Contemporary Practice of the United Kingdom in the Field of International Law"*, International Comparative Law Quarterly, vol. 7, Part 3, 1959.
- Levie HS, *The Code of International Armed Conflict*, London, vol. 1, Oceana Publications Inc, 1986.
- Lehman Ronald F, *"Concluding the Chemical Weapons Convention, in*

CHEMICAL DISARMAMENT and U.S. Security, Brad Roberts", Oxford: Westview Press, 1992.

- Langford M, Vandenhole W, Scheinin M & Genugten W, *"Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law",* Cambridge, Cambridge University Press, 2013.
- *López-Jacoiste E*, "*The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights***",** A. von Bogdandy and R. Wolfrum, (eds.), Max Planck Yearbook of United Nations Law, Volume 14, , p. 273-335, Netherlands, 2010.
- Ma'Oz M, 'The *"Arab Spring" and the New Geo-strategic Environment in the Middle East"*, Insight Turkey, vol. 14, no. 4, pp. 16-17, 2012.
- Mauriche M, *"The subjective element in customary international law",* Oxford journal, law, British Yearbook of International Law, Volume 66, Issue 1, pp. 177-208, 1995.
- M'Boge YA, *"In the interests of peace and the interests of justice": Security Council deferrals as a constructive tool for conflict resolution"*, in Quenivet, N & Shah-Davis, S (eds.), *"International Law and armed conflict, Challenges in the 21", century*, Asser Press, Hague, 2010.
- McMillan N & Mickler D, *"From Sudan to Syria: locating 'regime change' in R2P and the ICC",* Global Responsibility to Protect, no. 5, pp. 283-316, 2013.
- Moir L, "*The Law of Internal Armed Conflict"*, Cambridge, Cambridge University Press, 2002.
- Mostaghimi B & Tarmsari M, *"International responsibility of state in light of Iraq invasion to Iran",* Political science and law faculty of Tehran university, N 1, 1998.
- Momtaz J & Ranjbariyan A*, "International Humanitarian law of internal armed conflicts",* Mizan, 2007.
- Ohlin J, Govern K, Finkelstein C, *"Cyber War: Law and Ethics for Virtual Conflicts",* Oxford, Oxford University Press 2015.
- Pictet J, *"Commentary on the Geneva Convention I of 1949",* ICRC, Geneva, 1960.
- Pictet J, *"Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War",* ICRC, Geneva, 1958.
- Pictet, J, "*The Principles of International Humanitarian Law"*, Geneva, International Committee of the Red Cross,1966.
- Quigley J.K, "Transnational States Responsibility for Violations of International Law", *Australian Journal of International Law*, vol. 226, 2006.

- Rostami Z, *"International responsibility of states and international organizations in peace keeping mission",* Shahid Beheshti University, 2012.
- Saberi H, *"Enforcement measures for international humanitarian law, states obligation in encouraging each other for obeying international humanitarian law*, Tehran*"*, ministry of foreign affairs, 1999.
- Sassoli M, *"State Responsibility for Violations of International Humanitarian Law"*, IRRC, vol. 84, no. 846, June 2002.
- Shafi M, *"Study over the legitimacy of humanitarian intervention from international law viewpoint",* International law Journal, N 20, 1996.
- Schotten G & Biehler A, *"The role of the UN Security Council in implementing international humanitarian law and human rights law",* in Arnold R & Quenivet N (eds.), "*International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law"*, Martinus Nijhoff Publishers, Leiden, 2008.
- Talmon, *"The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist",* International and Comparative Law Quarterly, vol. 58, 2009.
- Thakur R, "*The United Nations, Peace and Security"*, Cambridge University Press, Cambridge, 2006.
- Tomuschat C, *"International Crimes by States: an Endangered Species"*, in Wellens K. (ed), International Law*, Theory and practice*, 1998.
- Van der Wolf W & Tofan, C (eds.), "*Law and war in Syria. A legal account of the current crisis in Syria"*, International courts association, Nijmegen, 2013.

♦ ***Legal cases (****chronological order****)***

- ICJ, Advisory opinion on legal consequences for states of the continued presence of south Africa in Namibia (south west Africa) notwithstanding security council resolution 276 (1970), June1971.
- ICJ (International Court of Justice), *Nicaragua v. United States of America*, judgement of 27 June 1986.
- ICJ, Advisory opinion on legality of the threat or use of nuclear weapons, 15 December 1994.
- ECHR (European Court of Human Rights*), Loizidou v. Turkey*, European Court of Human Rights, Judgment, 18 December 1996.
- ICTY (International Criminal Tribunal for the former Yugoslavia), *Procesutor v. Tadic,* Case IT- 94-1-A, judgement of 07 May 1997.
- ICTY, *Prosecutor v. Tadic*, *op. cit.*, Separate and dissenting opinion of Judge

McDonald Regarding The Applicability of Article 8 The Statute, 1997.
- ICTY, *Prosecutor v.* Celebici Case, IT-96-21-T, Judgment of 16 November 1998.
- ICTY, *Prosecutor v. Tadic*, The Position of the Prosecution on the Applicability of Nicaragua, IT-94-1-A, 1999.
- ICTR (International Criminal Tribunal for Rwanda), *Prosecutor v. Akayesu*, Case ICTR-96-4-T, 1998.
- ICTY (International Criminal Tribunal for the former Yugoslavia), *Prosecutor v. Kupreskic*, Case IT-95-16-T, judgement of 14 January 2000.
- ICTY, *Prosecutor v.* Blaskic Case, IT-95-14-T, Judgment of 3 March 2000.
- ICJ, Bosnian BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO, I.C.J Judgment of 26 February 2007.
- ICTY, *Prosecutor v.* Aleksovic Case, IT-05-87-T, judgment of 24 March 2000.
- SCSL (Special Court for Sierra Leone), *Prosecutor v. Taylor*, Case SCSL-03-01-A, judgement of 26 September 2013.

♦ ***International treaties*** *(Chronological order)*

- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925. http://www.un.org/disarmament/WMD/Bio/1925GenevaProtocol.shtml (Accessed July 11. 2015).
- Charter of the United Nations, and Statute of the International Court of Justice, 1945. San Francisco. https://treaties.un.org/doc/publication/ctc/uncharter.pdf (Accessed July 13. 2015).

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 1949. Geneva. http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument (Accessed June 17, 2015). □

- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked □Members of Armed Forces at Sea. 1949. Geneva. http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/370?OpenDocument (Accessed June 17, 2015).

- Convention (III) relative to the Treatment of Prisoners of War. 1949. Geneva. http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument (Accessed July 3, 2015).

- Convention (IV) relative to the Protection of Civilian Persons in Time of War. 1949. Geneva. http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380 (Accessed July 3, 2015).
- Vienna Convention on the Law of Treaties. 1969. Vienna.

https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (Accessed July 3, 2015).

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. 1977. Geneva. http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument (Accessed June 17, 2015).
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972. http://www.unog.ch/80256EE600585943/%28httpPages%29/29B727532FECBE96C12571860035A6DB?OpenDocument (Accessed July 10, 2015).
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. 1993. http://www.opcw.org/chemical-weapons- convention/articles/ (Accessed June 3, 2015).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), 1980. https://www.icrc.org/ihl/INTRO/500?OpenDocument (Accessed July 10, 2015).
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997. https://www.icrc.org/ihl/INTRO/580
- Rome Statute of the International Criminal Court, Rome, 1998. http://www.icc-cpi.int/nr/rdonlyres/ea9aeff 7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (Accessed June 4, 2015).
- Responsibility of States for Internationally Wrongful Acts, 2001. http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (Accessed July 3, 2015).
- Convention on Cluster Munitions, Oslo, 2008. http://www.clusterconvention.org/ (Accessed July 10, 2015).
- Updated Statute of the International Criminal Tribunal for the Former Yugoslavia. 2009. The Hague. http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (Accessed July 13, 2015).
- Arms trade treaty, 2013. http://www.nti.org/treaties-and-regimes/arms-trade-treaty-att (Accessed July 11, 2015).

♦ ***Official document*** *(Chronological order)*

- United Nation Security Council Resolutions, SC/RES/232, 1966.
- United Nation Security Council Resolutions, SC/RES/253, 1968.

- Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, 1970. http://www.un-documents.net/a25r2625.htm (Accessed July 11, 2015).

- International Court of Justice, *"Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution"* 276 (1970) & 1. C. J Reports 1971.

- Year Book of United Nation, Vol.II, 1978.
- International law commission draft article on state responsibility, A/CN.4/SER.A1978/Add.l(Part 1, Yeat Book of International Law Commission, 1978.
- United Nation Security Council Resolutions, SC/RES/465, 1980.
- United Nation General Assembly Resolutions, Resolution 35/110 December 5, 1980.
- Year Book of United Nation, 1980.
- Year Book of United Nation, 1982.
- United Nation General Assembly Resolutions, Resolution 37/184, 17 December 1982.
- United Nation General Assembly Resolutions, Resolution 7/4, 25 April 1982.
- Report of The Economic and Social, Report of Third Committee of the General Assembly, Draft Resolution XVII, A/37/145, 14 December 1982.
- General Assembly Resolution. 37-7/4, 25 April 1982, Year Book of United Nation, 1982.
- General Assembly Resolution. 37/185(XVII) in Year Book of United Nation, 1982.
- Security Council Report of the mission dispatched by the secretary general to investigate allegation of the use of the chemical weapons in the conflict between the Islamic Republic of Iran and Iraq, S/17911, 12 March 1986.

- Final Declaration of the International Conference for the Protection of War Victims, Geneva, 1.9.1993.

- Annual Report of International Conference of Red Cross, No. 298, January – February 1994.

- Year Book of United Nation, Vol.52, 1998. http://unispal.un.org/UNISPAL.NSF/0/A6409A5489B8DEC085256AD40072B7BD (Accessed July 7, 2015).

- The Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries Y. I. L. C, 2001, vol. II, part Two, Commentary. http://untreaty.un.org/ilc/dtsearch (Accessed July 11, 2015).

- 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003. http://www.icrc.org (Accessed July 11, 2015).

- ICRC, *"Improving Compliance with International Humanitarian Law, Background Paper Prepared for Informed High–Level Expert Meeting on Current Challenges to International Humanitarian Law",* Cambridge, June 25-27, 2004.

- Annual Report of the International Court of Justice, 2004. http://www.icj-cij.org/court/en/reports/report_2004-2005.pdf (Accessed July 11, 2015).

- Annual Report of the International Court of Justice, 2007. http://www.icj-cij.org/court/en/reports/report_2006-2007.pdf (Accessed July 11, 2015).

- Draft Articles on Responsibility of International Organizations (DARIO), Yearbook of the International Law Commission, vol. II, Part Two, 2011.

- UN General Assembly security Council, 21st Session, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 2012.

- UN General Assembly, 22nd Session, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59 2013.

- UN General Assembly, 24th Session, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/24/46 2013.

- United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, note by secretary general. http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf (Accessed July 11, 2015).
- 28th session of the Human Rights Council: Reports, A/HRC/28/69, 2013.
- UNHRC Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/26/CRP.2, UNHRC, Geneva, 2014.
- United Nations High Commissioner for Human Rights 2014, Opening Statement by Ms. Navi Pillay, UNHCHR, Geneva, 2014.
- United Nations Human Rights Council, Report of the independent international

commission of inquiry on the Syrian Arab Republic, A/HRC/25/65, UNHRC, Geneva, 2014.

- UNHRC (a), Resolution adopted at HRC 25th regular session – A/HRC/25/L.7, UNHRC, Geneva, 2014.
- CICR, "Hidden wounds: the long-lasting consequences of sexual violance in armed conflict", Side-event at the 25th UN HRC session, ICRC Humanitarian, Geneva, 10 March 2014.

♦ ***Speeches*** *(Alphabetical order)*

- Agapova E, 'Syria — the Path to Peace', speech presented at a side-event at the 25th UN HRC session, Geneva, 12 March 2014.
- Corn G, 'Promoting and protecting education in situations of armed conflict', speech presented at a side-event at the 25th UN HRC session, ICRC Humanitarium, Geneva, 14 March 2014.
- CICR, 'Hidden wounds: the long-lasting consequences of sexual violance in armed conflict', Side-event at the 25th UN HRC session, ICRC Humanitarium, Geneva, 10 March 2014.
- European Peace and Security Studies, Brussels, 25 November 2013.
- Faiyad MN, 'Syria — the Path to Peace', speech presented at a side-event at the 25th UN HRC session, Geneva, 12 March 2014.
- Gaggioli G, 'Promoting and protecting education in situations of armed conflict', speech presented at a side-event at the 25th UN HRC session, ICRC Humanitarium, Geneva, 14 March 2014.
- Golubiewski, 'The European Union and the Syria Crisis', speech presented at the European peace and security studies 2013.
- Higgins R, President of the ICJ, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 Oct 2007.
- Mother Agnes-Mariam of the Cross 'Syria — the Path to Peace', speech presented at a side-event at the 25th UN HRC session, Geneva, 12 March 2014.
- Sabaneh, 2014, 'Children and conflict', speech presented at a side-event at the 25th UN HRC session, UN HRC, Geneva, 11 March 2014.

- Sheppard B, 'Promoting and protecting education in situations of armed conflict', speech presented at a side-event at the 25th UN HRC session, ICRC Humanitarium, Geneva, 14 March, 2014.
- Syrian Arab Republic's Delegation to UN HRC, UN HRC Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, concern presented at the 25th UN HRC session, Geneva, 12 March 2014.
- Syrian Arab Republic's Delegation to UN HRC (a), UN HRC Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, concern presented at the 25th UN HRC session, Geneva, 11 March 2014.
- Zerrougui L, 'Children and conflict', speech presented at a side-event at the 25th UN HRC session, UN HRC, Geneva, 11 March 2014.
- Zerrougui L (a), 'Protecting schools and hospitals from attacks: Challenges and opportunities in implementing Security Council resolution 1998', speech presented at a side- event at the 25th UN HRC session, UN HRC, Geneva, 13 March 2014.

♦ ***Other sources (****Alphabetical order)*

- Antonio Guterres, U.N. High Commissioner for Refugees (UNHCR), http://abcnews.go.com/blogs/headlines/2013/07/un-calls-syrian-refugee-crisis-worst-since-rwandan-genocide (Accessed June 13, 2015).
- CNN World, http://www.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts (Accessed July 28, 2015).
- Encyclopaedia Britannica, Dayton Accords International agreement http://www.britannica.com/EBchecked/topic/153203/Dayton-Accords (Accessed June 21, 2015).
- Global Coalition to Protect Education from Attack 2014, *Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, GCPEA, http://www.protectingeducation.org/sites/default/files/documents/draft_lucens_guidelines.pdf (Accessed July 1, 2015).

- ICRC customary international humanitarian law, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (Accessed July 11, 2015).

- ICRC, Customary International humanitarian law rule 144, available at; https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 (Accessed June 8, 2015).

- International Federation for Human Rights (FIDH), Violence Against Women in Syria: Breaking the Silence, December 2012, http://fidh.org/IMG/pdf/syria_sexual_violence- web.pdf (Accessed June 17, 2015).

- Islamic World Peace Forum, http://en.iwpeace.com (Accessed July 11, 2015).

- Kaplan, Face The Nation, July 20, 2014. http://www.cbsnews.com/news/malaysia-airlines-flight-17-john-kerry-enormous-amount-of-evidence-russia-involved-in-mh17-crash (Accessed July 1, 2015).

- Madre, International Women's Human Rights (IWHR), Clinic the City University of New York (CUNY) School of Law and the Women's International League for Peace and Freedom (WILPF), Seeking Accountability and Effective Response for Gender-based Violence Against Syrian Women: Women's Inclusion in Peace Processes, March 2013, http://www.law.cuny.edu/academics/clinics/iwhr/publications/Seeking-Accountability-and-Effective-Response-for-Sexual-and-Gender-Based-Violence-Against-Syrian-Women-Womens-Inclusion-in-Peace-Processes.pdf (Accessed June 21, 2015).

- Mashregh News, http://www.mashreghnews.ir (Accessed June 13, 2015).

- Midwest diplomacy, 2014. http://midwestdiplomacy.com/category/syria (Accessed June 2, 2015).

- New York Times, 6 March 1984.

- New York Times, 26 August 1998.

- Organization for the prohibition of chemical weapons, available at https://www.opcw.org/chemical-weapons-convention (Accessed June 21, 2015).

- OHCHR 2014, *Independent International Commission of Inquiry on the Syrian Arab Republic*, http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx

- Syria' n.d., wiki article, http://en.wikipedia.org/wiki/Syria (Accessed July 1, 2015).
- Syrian civil war, https://crowdvoice.org/protests-in-syria?gclid=Cj0KEQjww42tBRCO-sfEiO3DvYMBEiQAHeqMKLJm-a3E5SuYkmhYBY_9sTsLJn4AdV1tyFtg-bLw2UgaAvU_8P8HAQ (Accessed July 1, 2015).
- United Nation office for disarmaments affairs, available at: http://www.un.org/disarmament/WMD/Chemical/ (Accessed June 11, 2015).
- United Nation Office for disarmaments affairs available at: http://www.un.org/disarmament/WMD/Bio (Accessed July 6, 2015).
- United Nation treaty collections, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en (Accessed July 11, 2015).
- United nation office for disarmament affairs, available at: http://www.un.org/disarmament/ATT (Accessed July 12, 2015).
- United Nation, International Criminal Tribunal for the former Yugoslavia http://www.icty.org/action/cases/4
- The daily Star, November 2013, http://www.dailystar.com.lb/News/Middle-East/2013/Nov-25/238863-rape-used-as (Accessed July 9, 2015).
- U.N. Syria Regional Response Plan 2014, http://www.unhcr.org/syriarrp6/docs/Syria-rrp6-full-report.pdf (Accessed July 1, 2015).