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Conflict Classification in Ukraine: The Return of the “Proxy War”?

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I. INTRODUCTION

The year 2014 witnessed the beginning of a conflict that few people foresaw—the crisis in Ukraine. While most people speak about the “Ukraine crisis” or “the conflict in Ukraine,” it is not that easy to classify this situation under international humanitarian law (IHL). There have been at least two clearly distinguishable areas of conflict that warrant examination from an IHL perspective: the events that took place in Crimea in early 2014 and those that have followed in eastern Ukraine in the second half of 2014 and early 2015. The conflict might have come as a surprise to some because it was a reminder of the Cold War-era, with Russia on one side, and NATO and the European Union on the other. There have been fears the situation could develop into a bigger crisis, one not limited to the territory of Ukraine. At the time of writing,¹ this danger can still not be completely dismissed, especially because both ceasefires, which were negotiated in Minsk in September 2014 (Minsk I) and in February 2015 (Minsk II), were only able to partly limit the fighting between the parties.²

Independent of the political implications of this crisis, a legal evaluation under IHL of the actions taken by the parties to the conflict is of crucial importance in order to correctly qualify the conflict.³ Since the various phases of the crisis are characterized not only by different geographical

1. February 2015.

2. For a brief overview of those two armistice agreements, see *Ukraine and Pro-Russia Rebels Sign Ceasefire Deal*, BBC (Sept. 5, 2014), <http://www.bbc.com/news/world-europe-29082574>; *Ukraine Ceasefire: The 12-Point Plan*, BBC (Feb. 9, 2015), <http://www.bbc.com/news/world-europe-29162903>. For the Russian version of the two agreements, see OSCE, *Protocol on the Results of Consultation of the Trilateral Contact Group, Signed in Minsk, 5 September 2014*, OSCE (Sept. 5, 2014), <http://www.osce.org/home/123257>; *Package of Measures for the Implementation of the Minsk Agreements*, OSCE (Feb. 12, 2015), <http://www.osce.org/cio/140156>.

3. On characterizing the conflict in Ukraine, see Laurie R. Blank, *Ukraine's Crisis Part 2: LOAC's Threshold for International Armed Conflict*, NATIONAL SECURITY JOURNAL (May 25, 2014), <http://harvardnsj.org/2014/05/ukraines-crisis-part-2-loacs-threshold-for-international-armed-conflict/>; Remy Jorritsma, *Ukraine Insta-Symposium: Certain (Para-) Military Activities in the Crimea: Legal Consequences for the Application of International Humanitarian Law*, OPINIO JURIS (Mar. 9, 2014), <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-certain-para-military-activities-crimea-legal-consequences-application-international-humanitarian-law/>; Noelle Quenivet, *Trying to Classify the Conflict in Eastern Ukraine*, INTLAWGRRLS (Aug. 28, 2014), <http://ilg2.org/2014/08/28/trying-to-classify-the-conflict-in-eastern-ukraine/>.

circumstances, but also by differences in the extent and intensity of the hostilities, it is important to distinguish each situation, even if hostilities are mainly occurring on the territory of one State (Ukraine). In this regard, it will not be possible to characterize the crisis as one single conflict. But rather, depending on the time and the location of the hostilities, different conclusions may be reached with regard to the characterization of the conflict.⁴ As the International Criminal Tribunal for the former Yugoslavia (ICTY) stated in its *Tadić* appeals judgment, it is possible that in some areas a situation can be characterized as an international armed conflict, while in other areas a non-international armed conflict is taking place.⁵ In addition, given the specific situation in eastern Ukraine where pro-Russian rebel groups seem to be supported by the Russian government in their fight against the Ukrainian armed forces, the question arises of whether what is perhaps a *prima facie* non-international armed conflict has been transformed into an international armed conflict because of Russian influence and control of these groups.⁶

This article will use the opportunity provided by events in Ukraine to look again into the exact requirements for the “internationalization” of an internal armed conflict. In doing so, I will consider the various approaches found in the jurisprudence of the International Court of Justice (ICJ) in its 1986 *Nicaragua* and 2007 *Genocide* judgments, and in the 1999 ICTY *Tadić* appeals judgment. The principal focus of the analysis will be on the situation in eastern Ukraine; questions with regard to events in Crimea will be only briefly addressed.

4. Similarly, see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 63 (Elizabeth Wilmshurst ed., 2012) (“International and internal armed conflicts may be going on simultaneously in the same area at the same time.”).

5. See Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶ 84 (Int’l Criminal Tribunal for the former Yugoslavia July 15, 1999) [hereinafter *Tadić* Appeals Judgment] (“[I]n case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending on the circumstances, be international in character alongside an internal armed conflict) if (i) another States intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State”). For a discussion of the *Tadić* judgment, see James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 313, 323–28 (2003).

6. For an analysis highlighting this possibility, see Quenivet, *supra* note 3.

II. WHAT DO OTHERS SAY?

Several independent organizations have come to different conclusions with regard to the characterization of the situation in Ukraine, illustrating both that conflict classification is not an easy task as well as the controversies that surround the issue. On July 23, 2014, Dominik Stillhart, Director of Operations of the International Committee of the Red Cross (ICRC), published the following statement: “Fighting in eastern Ukraine continues to take its toll on civilians, and we urge all sides to comply with international humanitarian law, otherwise known as the law of armed conflict. . . . These rules and principles apply to all parties to the *non-international armed conflict*”⁷

This is noteworthy since the ICRC is usually rather hesitant to make clear statements with regard to the character of an ongoing conflict.⁸ Furthermore, such a statement must always be taken quite seriously since the ICRC is often one of the few external actors allowed access to the area of hostilities, and, therefore, in addition to its undisputed expertise, is privy to facts which might not always be available to the public.⁹

As interesting as that statement is, only three months later, on September 7, 2014, Amnesty International published a report which stated “satellite imagery and testimony gathered . . . provide compelling evidence that the fighting has burgeoned into what Amnesty International now considers an *international armed conflict*.”¹⁰ Amnesty International, one of the largest human rights non-governmental organizations (NGOs), had obviously

7. News Release 14/125, International Committee of the Red Cross, Ukraine: ICRC calls in all sides to respect international humanitarian law (July 23, 2014), <https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> (emphasis added).

8. On the role of the ICRC in these kind of situations in general, see Robert Heinsch, *The International Committee of the Red Cross in Today's International and Non-International Armed Conflicts*, in *A WISER CENTURY?: JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE* 393–415 (Thomas Giegerich & Ursula Heinz eds., 2009).

9. Quenivet, *supra* note 3, correctly points out that “due to the large amount of claims and counter-claims that riddle the news media on the conflict in eastern Ukraine it is difficult to draw straight-forward, persuasive conclusions as to whether the conflict is international or has been internationalized.”

10. *Ukraine: Mounting Evidence of War Crimes and Russian Involvement*, AMNESTY INTERNATIONAL (Sept. 7, 2014), <https://www.amnesty.org/en/articles/news/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement/> (emphasis added).

taken new developments into account, developments which changed the classification of the conflict in the Ukraine from their perspective.

Only four days later, however, on September 11, 2014, the other major human rights NGO, Human Rights Watch, published a report on the crisis in the Ukraine stating that “international humanitarian law governing *non-international . . . armed conflict* may still apply to the conflict between the insurgents and Ukrainian forces, unless it is established that Russia exercises ‘*overall control*’ of the insurgent forces. . . .”¹¹ One can only assume that Human Rights Watch interpreted the available information more cautiously, or took into account different evidence, than the researchers at Amnesty International. They obviously focused on the fighting between Ukrainian government forces and insurgent forces, and wanted to characterize it as an international armed conflict only if Russia had overall control of the insurgents.¹²

Finally, one month later, on October 10, 2014, Michael Masson, Head of the ICRC mission in Ukraine, made it clear that for the ICRC the situation had not changed. He stated, “[a]t the current moment, we assess the situation in Donbass as a *non-international armed conflict*. With such classification the territory of conflict falls under the rule of the Third Article common [to] all of the Geneva Conventions and other norms of the IHL are implemented.”¹³

In general, these statements illustrate the breadth of possibilities with regard to classifying the situation in the Ukraine: an international armed conflict, a non-international armed conflict and an “internationalized armed conflict.” A very special feature of this conflict is the degree of involvement of an external actor, Russia, as indicated by the overall control condition noted in the Human Rights Watch report. If established, this level of control might change the characterization of a non-international armed conflict to that of an international armed conflict.

11. Update, *Eastern Ukraine: Questions and Answers about the Laws of War*, HUMAN RIGHTS WATCH (Sept. 11, 2014), <http://www.hrw.org/news/2014/09/11/eastern-ukrain-e-questions-and-answers-about-laws-war> (emphasis added).

12. *Id.*

13. ICRC: *Ukrainian Conflict is Not International*, RUSSIAN PEACEKEEPER (Oct. 10, 2014), <http://peacekeeper.ru/en/?module=news&action=view&id=22517> (emphasis added).

III. THE FACTS: WHAT DO WE KNOW?

In order to classify the situation in Ukraine correctly, the first step is to establish the facts as accurately as possible. The principal actions began on February 26, 2014, when pro-Russian forces slowly started to take control of the Crimean peninsula.¹⁴ In this context, it is important to note that sources reported that military personnel in “Russian-made uniform[s] without insignia, and former members of the Ukraine military were involved.”¹⁵ Generally, the actual armed violence and resistance seems to have been kept to a minimum.¹⁶ This might be important for determining whether the situation meets a certain threshold which might be required for triggering the existence of an international armed conflict under Common Article 2.¹⁷ Another relevant consideration with regard to the situation in Crimea is that on April 17, 2014 Russian President Vladimir Putin actually confirmed the involvement of Russia with regard to the actions in Crimea when he said that “[o]f course, Russian servicemen backed the Crimean self-defense forces.”¹⁸

After the annexation of Crimea, the situation started to escalate in eastern Ukraine. On March 1–6, 2014, it was reported that pro-Russian demonstrators took over the Donetsk Regional State Administration (RSA) building, but were later removed by the Ukrainian government Security Service.¹⁹ The Ukrainian government claimed that the attack on the RSA buildings by pro-Russian forces was part of “a script . . . written in the Russian Federation” carried out by “about ‘1,500 radicals’ . . . who spoke with

14. Piyush K. Chaubey, *What is Crimean Crisis?*, CIVIL SERVICES STRATEGISTS (July 12, 2014), <http://www.civilservicesstrategist.com/what-is-crimean-crisis.html>.

15. Candace Sutton, *What You Need to Know about Ukraine: A Country Divided by Political Unrest in Strategic Game Played by Russia*, DAILY MAIL (July 18, 2014), <http://www.dailymail.co.uk/news/article-2696711/What-need-know-Ukraine-country-divided-political-unrest-strategic-game-played-Russia.html>.

16. Blank, *supra* note 3.

17. *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

18. Kathy Lally, *Putin’s Remarks Raise Fears of Future Moves against Ukraine*, WASHINGTON POST (Apr. 17, 2014), http://www.washingtonpost.com/world/putin-changes-course-admits-russian-troops-were-in-crimea-before-vote/2014/04/17/b3300a54-c617-11e3-bf7a-be01a9b69cf1_story.html.

19. Charlie D’Agata, *Ukrainian City of Donetsk Epitomizes Country’s Crisis*, CBS EVENING NEWS (Mar. 6, 2014), <http://www.cbsnews.com/news/ukrainian-city-of-donetsk-epitomizes-countrys-crisis/>.

clear Russian accents.”²⁰ Following this, protests in the Luhansk and Donetsk provinces progressively developed into an armed insurgency. The Ukrainian government reacted with a military counteroffensive against the insurgents, which led to the ongoing conflict in the Donbass region.

In June 2014, the U.S. State Department stated that three T-64 tanks, several rocket launchers and other military vehicles had crossed the border from Russia into Ukraine.²¹ The State Department claimed that these tanks came from storage sites in southwest Russia. If this observation is correct, this would indicate collusion between Russian authorities and the insurgents in eastern Ukraine. However, one needs to be cautious in accepting these observations, since the evidence is largely circumstantial.

An incident, which received worldwide attention and which could provide additional support in establishing a relationship between the insurgents and Russian authorities, took place on July 17, 2014 when Malaysia Airlines flight MH17 en route from Amsterdam to Kuala Lumpur was shot down near the village of Grabove.²² That territory, which is close to the Russian border, was at the time controlled by the insurgents. Interestingly, Western nations claimed that the airplane was struck by a SA-11 missile (or “*buk*”) that could only have been provided by Russia and that the missile had been fired by insurgents.²³ One of the theories as to why a civilian aircraft was struck was that the insurgents were unlikely to possess the necessary expertise required of trained air defense operators.

In August 2014, Ukraine captured ten Russian paratroopers in an area close to the Russian border.²⁴ What is not obvious, however, is the extent to which actions such as this have been controlled by Russian government or military authorities. One of the chief rebel leaders in Donetsk, Alexan-

20. Richard Balmforth & Natalia Zinets, *Protests in Eastern Ukraine Aimed at Bringing in Russian Troops, Warns PM*, REUTERS (Apr. 7, 2014), <http://www.reuters.com/article/2014/04/07/us-ukraine-crisis-storm-idUSBREA350B420140407>.

21. Kevin Rawlinson & Paul Lweis, *Ukraine Rebels Shoot Down Military Plane*, THE GUARDIAN (June 14, 2014), <http://www.theguardian.com/world/2014/jun/14/russian-tanks-enter-ukraine>.

22. *MH17 Crash: Shooting Down the Malaysia Airlines Flight “May Amount to a War Crime,” Says UN*, THE TELEGRAPH (July 28, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10995087/MH17-crash-Shooting-down-the-Malaysia-Airlines-flight-may-amount-to-a-war-crime-says-UN.html>.

23. *MH17 Malaysia Plane Crash in Ukraine: What We Know*, BBC (Sept. 9, 2014), <http://www.bbc.com/news/world-europe-28357880>.

24. *Russian Paratroopers Captured in Ukraine “Accidentally Crossed Border,”* THE TELEGRAPH (Aug. 26, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/1056312/Russian-paratroopers-captured-in-Ukraine-accidentally-crossed-border.html>.

der Zakharchenko, indicated at one point that “3–4,000 Russian citizens” had joined the fight alongside the insurgents.²⁵ He also claimed that Russian soldiers joined the insurgents’ forces on a continuous basis instead of “going to the beach.”²⁶ The questions this raises are whether the Russian soldiers were following orders from their superiors when joining the rebels or were leaving the regular Russian forces during their “free time,” and whether this has any effect on the classification of the conflict. Ukraine has consistently maintained that Russian regular forces are taking part in the fighting in Ukraine.²⁷

On August 27, 2014, the insurgents—allegedly supported by Russian heavy armor—opened a new front on the southeast portion of the border.²⁸ The insurgents’ actions included taking over the town of Novoazovsk and approaching Mariupol, a strategic port city. From September 2014 onwards, there were more reports and images from eastern Ukraine suggesting Russia’s involvement in activities such as training and equipping rebel forces.²⁹ At the time, the extent of such support and whether it would go further than training and equipping was still not completely clear. However, during the second half of August, there were increasing signs, including satellite images, reports from NATO and the capture of Russian soldiers within Ukraine that Russian forces were actively participating in military operations within Ukraine. Through the end of August and beginning of September the fighting escalated in eastern Ukraine. Armed groups of the self-proclaimed “Donetsk People’s Republic” and “Luhansk People’s Republic” were supported by a growing number of foreign fighters, including Russian citizens.³⁰

25. *Ukraine Crisis: “Thousands of Russian” Fighting in East*, BBC (Aug. 28, 2014), <http://www.bbc.com/news/world-europe-28963310>.

26. *Id.*

27. *Ukraine Crisis in Maps*, BBC (Feb. 18, 2015), <http://www.bbc.com/news/world-europe-27308526>.

28. Andrew E. Kramer & Michael R. Gordon, *Ukraine Reports Russian Invasion on a New Front*, NEW YORK TIMES (Aug. 27, 2014), http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html?_r=0#.

29. Michael R. Gordon & Andrew E. Kramer, *Russia Continues to Train and Equip Ukraine Rebels, NATO Official Says*, NEW YORK TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/04/world/europe/donestk-luhansk-ukraine-vote-zakharchenko-plotnitsky.html>.

30. Michael R. Gordon, *Russia Moves Artillery Units Into Ukraine, NATO Says*, NEW YORK TIMES (Aug. 22, 2014), <http://www.nytimes.com/2014/08/23/world/europe/russia-moves-artillery-units-into-ukraine-nato-says.html>.

As the fighting intensified, there was a corresponding increase in the number of casualties among civilians and the armed forces. A United Nations report indicates that at least 4,364 were killed and 10,064 wounded during the period mid-April to November 30, 2014.³¹

IV. THE LAW: HOW TO QUALIFY THE CONFLICT?

With this factual information in mind, I now turn to the question of how to qualify the conflict in eastern Ukraine. In order to decide whether IHL is applicable, the existence of an armed conflict must first be established. Once an armed conflict exists, the applicable regime is determined by the question of whether it is an international or a non-international armed conflict.

A. Hostilities in Ukraine: An International Armed Conflict?

The starting point for determining the application of the Geneva Conventions and Additional Protocol I³² is Common Article 2, which provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of War is not recognized by one of them.”³³ Beyond the need for two High Contracting Parties to be engaged, this language provides little definition as to what is meant by “armed conflict.” In the situation in eastern Ukraine, the requirement for two High Contracting Parties is met by the involvement of both Ukraine and Russia; however, Common Article 2 does not define the nature of the involvement necessary to give rise to an armed conflict between States. More guidance is found in Pictet’s commentaries,³⁴ which were published in the years following the ratification of the 1949 Geneva Conventions. With regard to

31. Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine* 4 (Dec. 15, 2014), http://www.ohchr.org/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf.

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

33. See, e.g., GC IV, *supra* note 17.

34. See, e.g., COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD (Jean Pictet ed., 1952).

Common Article 2, the *Commentary* on the First Geneva Convention states that an armed conflict is to be understood as

[a]ny difference between two States and leading to the intervention of members of armed forces. . . . It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces. . . . Even if there has been no fighting, the fact that persons covered by the Conventions are detained is sufficient for its application.³⁵

This statement highlights two important aspects for characterizing the conflict in Ukraine. There needs to be an “intervention of *members of armed forces*,” and there seems to be no required *threshold* with regard to the amount of armed force used. An ICRC opinion paper confirms the absence of a threshold when it states, “[a]n [international armed conflict] occurs when one or more States have recourse to armed force against another State, regardless of the reasons [for] or the intensity of this confrontation.”³⁶ That Common Article 2 does not establish an intensity threshold is especially relevant for the situation on the Crimean peninsula where almost no active fighting took place.

Interpretive texts and articles are helpful in defining what is meant by “international armed conflict” as it appears in Common Article 2. The last twenty years of jurisprudence in the area of international criminal law, especially by the ICTY, gives further detail to this important concept. The pivotal starting point is the famous 1995 Appeals Chamber decision on the Defense Motion for Interlocutory Appeal on Jurisdiction in the *Tadić* case, in which the ICTY stated: “[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³⁷

35. COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960) [hereinafter GC III COMMENTARY].

36. International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 1 (Opinion Paper, 2008), available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

37. Prosecutor v. Tadić; Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) (emphasis added).

This definition of armed conflicts has been consistently reflected in ICTY jurisprudence,³⁸ and was followed by the International Criminal Court (ICC) in the *Lubanga* case,³⁹ as well as by the Special Court for Sierra Leone.⁴⁰ The two main components set forth in the definition, as it applies to international armed conflicts, are: (a) the resort to armed conflict (without an intensity requirement) and (b) the involvement of two States. This definition had been accepted by a number of States, including the United States⁴¹ and Germany,⁴² as well as in academic literature.⁴³ It also conforms to the explanation of international armed conflict found in the official ICRC *Commentary*. In this context, it is not surprising that the ICTY made

38. See, e.g., Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ¶ 184 (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 1998); Prosecutor v. Dornević, Case No. IT-05-87/1-T, Judgment (Int'l Criminal Tribunal for the former Yugoslavia Feb. 23, 2011); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Nov. 30, 2005); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Apr. 3, 2008); Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Sept. 27, 2007).

39. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 506 (Mar. 14, 2012) (referring to the jurisprudence of the ICTY, citing in note 1579 *Dornević, Limaj, Haradinaj and Mrkšić et al.*, all *supra* note 38, and Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (Int'l Crim. Tribunal for the former Yugoslavia, May 7, 1997) [hereinafter *Tadić* Judgment]. See also Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01-04/01-06, Decision on the Confirmation of Charges, ¶ 209 (Jan. 29, 2007) [hereinafter *Lubanga*, Confirmation of Charges]; Prosecutor v. Katanga et al., Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 238 (Sept. 30, 2008); Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 220 (June 15, 2009).

40. See, e.g., Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Judgment, ¶ 95 (Mar. 2, 2009).

41. See *US-Syrian Aerial Incident*, 82 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 602, 609–11; *U.S. v. Noriega*, 808 F. Supp. 791 (1992); Letter from the State Department to the Attorney General of the United States (Jan. 31, 1990), quoted in 2 HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW, Case No. 158, at 12 (Marco Sassòli, Antoine A. Bouvier & Anne Quintin eds., 1999).

42. FEDERAL MINISTRY OF DEFENCE (GERMANY), JOINT SERVICE REGULATION (ZDV) 15/2 LAW OF ARMED CONFLICT MANUAL, ¶ 203 (2013), available at http://usnwc.libguides.com/ld.php?content_id=5616055.

43. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DE COURS 121, 131 (1979); Claus Kress, *The 1999 Crisis in East Timor and the Threshold of the Law of War Crimes*, 13 CRIMINAL LAW FORUM 409, 413 (2002) (with additional references).

an explicit reference to an ICRC *Commentary* in its *Delalić* judgment, when stating that:

In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that '[a]ny difference arising between two States and leading to the intervention of members of the armed forces' is an international armed conflict and '[i]t makes no difference how long the conflict last, or how much slaughter takes place.'⁴⁴

Furthermore, the ICTY clarified that the existence of armed force between two States is the only condition necessary to trigger the application of IHL in an international armed conflict.⁴⁵ The same reference can be found ad verbum in the ICC *Lubanga* decision on the confirmation of charges relating to Article 8(2) (b) of the Rome Statute when the Chamber analyzed the requirements of an international armed conflict.⁴⁶ In addressing the ICC provisions, Michael Cottier explains, "[g]enerally, no particular level, duration or territorial expansion of the armed hostilities is required to bring the law of international armed conflicts into application."⁴⁷

B. *Hostilities in Ukraine: A Non-International Armed Conflict?*

If we should come to the conclusion that the armed conflict in eastern Ukraine is not between two States, there is still the possibility that it can be characterized as non-international.⁴⁸ The lower threshold for a non-

44. *Delalić et al.*, *supra* note 38, ¶ 208.

45. *Id.*, ¶ 184.

46. *Cf.* *Lubanga*, Confirmation of Charges, *supra* note 39, ¶ 207. For a detailed discussion of the armed conflict requirement in Article 8 of the ICC Statute, see Michael Cottier, *Introduction/General Remarks*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 283, 290–93 (Otto Triffter ed., 2d ed. 2008). *See also* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT—A COMMENTARY ON THE ROME STATUTE 202–6. (2010).

47. Cottier, *supra* note 46, at 291.

48. On non-international armed conflicts and their definition in general, see Sivakumaran's pivotal work. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 155–211 (2012). *See also* Eric David, *Internal (Non-International) Armed Conflict*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 353 (Andrew Clapham & Paolo Gaeta eds., 2014); Dieter Fleck, *The Law of Non-International Armed Conflict*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 581 (Dieter Fleck ed., 3d ed. 2013).

international armed conflict can be found in Common Article 3 of the Geneva Conventions, which states that certain minimum legal standards have to be met in order for there to be an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Again, like the definition of an international armed conflict in Common Article 2, it is rather vague, seeming to set forth only two required criteria: (a) the existence of a conflict “not of an international character,” which has to (b) “occur on the territory of one of the High Contracting Parties.” This formulation was deliberately chosen to overcome objections to earlier drafts of the provision during the 1949 Diplomatic Conference.⁴⁹ While acknowledging that the language adopted is vague, the ICRC *Commentary* offers additional guidance, quoting criteria borrowed from earlier drafts of Common Article 3 that “constitute convenient criteria” to be considered when determining the existence of a non-international armed conflict:

1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

3. (a) That the de jure Government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

4. (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory. (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.⁵⁰

49. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 32–34 (Jean Pictet ed., 1958) [hereinafter COMMENTARY TO GENEVA CONVENTION IV].

50. *Id.* at 35–36.

As we will see, these criteria have been considered and further developed in international criminal law jurisprudence, especially that of the ICTY, which began with the previously quoted statement from the *Tadić* Appeals Chamber decision defining a non-international armed conflict as “protracted armed violence between government forces and organized armed groups or between such groups.” The influence of this definition, which is now seen as an authoritative interpretation of the term armed conflict,⁵¹ is evidenced by its virtually verbatim adoption by the drafters of the Rome Statute of the International Criminal Court in Article 8(2)(f): “It applies to armed conflicts that take place in the territory of a State when there is protracted armed *conflict* between governmental authorities and organized armed groups or between such groups.”⁵²

Apart from the slightly confusing second use of “conflict,” Article 8(2)(f) reproduces word-for-word the ICTY definition. Although there is a strong argument that this should be seen as a drafting error (otherwise it would be a circular definition to define an armed *conflict* as “protracted armed *conflict*”) and that it had been intended to exactly duplicate the ICTY definition, there have also been commentators who claim that this represents a new, slightly higher threshold for non-international armed conflicts, located above the threshold of a Common Article 3 conflict, but below that of an Additional Protocol II conflict.⁵³ The prevailing view, however, is that “Article 8(2)(f) should not be considered as creating yet another threshold of applicability.”⁵⁴ This definition has been further refined in

51. Use of Force Committee, International Law Association, The Hague Conference, *Final Report on the Meaning of Armed Conflict in International Law* 14 (2010) (citing in note 64 the Rome Statute, *infra* note 52, Articles 8 and 17, and Council of Europe, European Commission for Democracy Through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion No. 363/2005, CDL-AD(2006)009 (Mar. 17, 2006)).

52. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (emphasis added).

53. Cottier, *supra* note 46, at 291–93. For an overview of the current state of the debate, see SCHABAS, *supra* note 46, at 205–6. For a discussion of Additional Protocol II, see *infra* Part III.B.1. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

54. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 260 (2000). See also Claus Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISRAEL YEARBOOK ON HUMAN RIGHTS 103, 118 (2001); Sandesh Sivakumaran, *Identifying*

subsequent ICTY and International Criminal Tribunal for Rwanda (ICTR) jurisprudence, and is now reflected in ICC decisions.⁵⁵ While it was initially believed the reference to “protracted” armed violence would have a temporal meaning,⁵⁶ the decisive factor is the “intensity” of the hostilities⁵⁷ and the duration of the conflict is just one factor to take into account when judging its intensity.⁵⁸

In this context, the ICTY, especially in the 2008 *Haradinaj* Trial Chamber judgment, clarified that in practice the term “protracted” has been seen “as referring more to the intensity of the armed violence than to its duration.”⁵⁹ The Chamber listed certain criteria that are to be taken into account when deciding whether the armed violence has reached a sufficient level of intensity to be seen as a non-international armed conflict.⁶⁰ These conditions include, but are not limited to:

- The number, duration and intensity of individual confrontations;
- The type of weapons and other military equipment used;
- The number and caliber of munitions fired;
- The number of persons and type of forces partaking in the fighting;

an Armed Conflict not of an International Character, in EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 363, 373–77 (Carsten Stahn & Göran Sluiter eds., 2009).

55. See, e.g., Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 60 (Mar. 4, 2009).

56. Andreas Zimmermann, *Article 8*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ¶ 334, at 285 (Otto Triffterer ed., 1st ed. 1999).

57. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 620 (Sept. 2, 1998); *Tadić* Judgment, *supra* note 39, ¶¶ 560–76; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶¶ 92–93 (Dec. 6, 1999). On this jurisprudence, see Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 57, 66 (1999).

58. In this regard, see Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int’l Crim. Tribunal for the former Yugoslavia, July 10, 2008) (emphasizing the importance of the duration element). The Trial Chambers decision was confirmed in Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-A, Appeals Judgment, ¶ 21 (Int’l Crim. Tribunal for the former Yugoslavia, May 19, 2010). *But cf.* SIVAKUMARAN, *supra* note 48, at 168.

59. *Haradinaj*, *supra* note 38, ¶ 49.

60. *Id.*

- The number of casualties;
- The extent of material destruction; and
- The number of civilians fleeing combat zones; as well as
- The involvement of the Security Council.⁶¹

As the *Akayesu* Trial Chamber stated, these criteria are mainly used to distinguish “genuine armed conflicts” from “acts of banditry or unorganized and short-lived insurrections.”⁶² It also excluded “internal disturbances and tensions” from the scope of application.⁶³ In doing so, the Trial Chamber addressed the two main criteria of a non-international armed conflict: the intensity of the conflict and the organization of the non-State armed group. That these are the principal criteria has been confirmed consistently in ICTY jurisprudence, for example, in the *Delalić* judgment in which the Trial Chamber stated: “[I]n order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved.”⁶⁴

The 2008 *Haradinaj* Trial Chamber judgment also provided a list of useful criteria for deciding whether the non-State armed group is sufficiently organized to fall within the definition of a non-international armed conflict.⁶⁵ These criteria included, among others:

- The existence of a command structure and disciplinary rules and mechanisms within the group;
- The existence of a headquarters;
- The fact that the group controls a certain territory;
- The ability of the group to gain access to weapons, other military equipment, recruits and military training;
- Its ability to plan, coordinate and carry out military operations, including troop movements and logistics;

61. *Id.*

62. *Akayesu*, *supra* note 57, ¶ 619.

63. *Id.*, ¶ 620.

64. *Delalić et al.*, *supra* note 38, ¶ 184.

65. *Haradinaj*, *supra* note 38, ¶ 60. While the Chamber stated that “none of [these] are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled,” they can be a helpful indicator.

- Its ability to define a unified military strategy and use military tactics; and
- Its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.⁶⁶

In the *Musema* judgment, the ICTR underscored that, despite these criteria, the evaluation of the conflict has to be done on a case-by-case basis.⁶⁷ Furthermore, there are commentators who stress that the threshold for intensity, as well as organization, should not be too high: “[T]he insurgents have to exhibit a minimum amount of organization. Their armed forces should be under responsible command and be capable of meeting minimum humanitarian requirements.”⁶⁸ Kress concludes that the requirements for the organizational structure should not be set too high and that the demands with regard to the intensity of the conflict should not be exaggerated.⁶⁹ The decision of the Inter-American Commission for Human Rights in the *Tablada* case is consistent with that conclusion: “Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular state.”⁷⁰ In this context, it is important to remember there is no need for the insurgent groups in a Common Article 3 conflict to exercise control over territory.⁷¹

Common Article 3 conflict norms provide only a very minimal set of rules regulating non-international armed conflicts, especially with regard to the means and methods of warfare. Considering the rather complex fighting activities in eastern Ukraine, it would be preferable, were it possible, to apply Additional Protocol II.⁷² Additional Protocol II, although not

66. *Id.*

67. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 249 (Jan. 27, 2000).

68. Schindler, *supra* note 43, at 147.

69. Kress, *supra* note 43, at 417.

70. *Abella v. Argentina*, Case 11.137, Inter-Amer. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 ¶ 152 (1997).

71. *Akayesu*, *supra* note 57, ¶ 619.

72. For an overview of the difference between the scope of application of Additional Protocol II and Common Article 3, see Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 55–57 (Dieter Fleck ed., 2d ed. 2008). See also Noelle Quenivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES:

as extensive in its rules as Additional Protocol I, offers a more sophisticated legal regime applicable in non-international armed conflicts than does Common Article 3. However, for reasons reflected in the drafting history of Additional Protocol II,⁷³ the threshold for its application is clearly higher than that for Common Article 3.⁷⁴ Article 1 clarifies that the Protocol is only applicable to a conflict between government armed forces and organized armed groups.⁷⁵ The criteria for these groups require they be “under responsible command” and, in a very important distinction to Common Article 3 conflicts, must “*exercise such control over a part of its territory* [the State concerned] as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁷⁶ These criteria lead to a considerably higher threshold than that of Common Article 3, and exclude the applicability of Additional Protocol II in many situations, especially when it is not clear that the armed group actually has control over territory.

C. Hostilities in Ukraine: An “Internationalized” Armed Conflict?

Even if we come to the conclusion that the conflict in eastern Ukraine does not *prima facie* fulfill the criteria of an international armed conflict as a result of the lack of actively engaged official Russian troops, there is the possibility that the existing non-international armed conflict has been internationalized by Russia’s involvement on the side of the insurgent groups.

This concept of so-called “proxy wars”⁷⁷ and the support of non-State actors by outside States has been a focus of international law at least since

INTERNATIONAL ASPECTS 31 (Derek Jinks, Jackson N. Maogoto & Solon Solomon eds., 2014).

73. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 4450–55 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

74. For more details on this threshold, see Akande, *supra* note 4.

75. The Protocol also applies in cases of armed conflict between a State’s armed forces and dissident armed forces, which is not the case in Ukraine.

76. Additional Protocol II, *supra* note 53, art. 1(1) (emphasis added).

77. See, e.g., Michael A. Newton, *War by Proxy: Legal and Moral Duties of “Other Actors” Derived from Government Affiliation*, 37 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 249 (2006). See also Greg Travalio & John D. Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 97, 105 (2003) (Describing why the ICJ in the *Nicaragua* judgment used such a strict standard in declining to attribute the actions of the contras to the United States: “[This case was] decided in the context of a bipolar world, in which the United States and the former Soviet Union had fought and were fighting ‘proxy wars’ of varying intensities

the ICJ's 1986 *Nicaragua* decision.⁷⁸ In this seminal case, the ICJ had to decide whether the actions of the *contras* in Nicaragua, and especially their alleged violations of IHL and human rights law, could be attributed to the United States, which had provided support to them. The ICJ made clear that support alone was insufficient; the decisive factor was whether the third State (the United States) had "effective control" over the non-State actors (the *contras*). The Court articulated the test in terms of whether the *contras* could be seen as an "organ" of the United States:

[W]hether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or acting on behalf of that Government.⁷⁹

In order to achieve this, the Court held that the exercise of mere general control would not be sufficient:

All the forms of the United States participation mentioned above, and even the general control by the respondent State of a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the US directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.⁸⁰

The ICJ in *Nicaragua* required a rather high threshold to be fulfilled, namely "effective control" over the non-State armed group, in order to establish legal responsibility on the part of the outside State: "[I]t would in principle have to be proved that *that State had effective control of the military or*

throughout the world. To hold that both the United States and the Soviet Union had engaged in armed attacks whenever groups that they supported did so would have obviously created a far more dangerous world.").

78. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*]. On the judgment's relevance to the classification of armed conflicts, see Theodor Meron, Editorial Comment, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 236 (1998). See also Antonio Cassese, *The Nicaragua and Tadić Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 649 (2007).

79. *Nicaragua*, *supra* note 78, ¶ 109.

80. *Id.*, ¶ 115.

paramilitary operations in the course of which the alleged violations were committed.”⁸¹ The Court clarified that the mere financing, organization, training and general support of the non-State actors was not enough.⁸² In *Nicaragua*, the ICJ came to the conclusion that the extent of support of the contras by the United States was insufficient to fulfill the effective control test.

This test remained the standard for judging the involvement of outside States in an internal armed conflict until the 1999 ICTY *Tadić* appeals judgment,⁸³ when the Appeals Chamber had to decide whether the *prima facie* non-international armed conflict in Bosnia-Herzegovina had been internationalized by the involvement of Serbia (Federal Republic of Yugoslavia), even after the official Serbian troops had retreated. The Appeals Chamber revisited the *Nicaragua* decision and came to the conclusion that the effective control standard was not equally applicable in all situations.⁸⁴ It principally distinguished three different categories of non-State actors that could be supported by a State: private individuals,⁸⁵ unorganized groups of individuals⁸⁶ and organized armed groups.⁸⁷ For the former two, the effective control standard would be still applicable. For the latter, the Appeals Chamber introduced a new standard—that of overall control—in order to transform a non-international armed conflict into an international armed conflict. In the case before it, the Appeals Chamber reached the conclusion that Serbia did exercise overall control over the organized

81. *Id.* (emphasis added).

82. *Id.*

83. *Tadić* Appeals Judgment, *supra* note 5. For a critical analysis of this judgment with regard to the overall control test, see Danesh Sarooshi, *Command Responsibility and the Blaškić Case*, 50 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 452 (2001); Marco Sassòli & Laura M. Olson, *International Decision: Prosecutor v. Tadić (Judgement), Case No. IT-94-1-A*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 571 (2000); Marco Sassòli & Laura M. Olson, *The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case—New Horizons for International Humanitarian and Criminal Law?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 733 (2000); George H. Aldrich, Comment, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 64 (1996); Christopher Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*, 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 97 (1998).

84. *Tadić* Appeals Judgment, *supra* note 5, ¶ 117 (“The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.”).

85. *Id.*, ¶ 118.

86. *Id.*

87. *Id.*, ¶ 120.

armed group opposing the government of Bosnia-Herzegovina, thereby transforming a non-international armed conflict into an international armed conflict.

The Appeals Chamber set forth a number of grounds for determining that *Nicaragua's* effective control test was not applicable in all situations. It first found that “[t]he ‘effective control’ test propounded by the ICJ as an exclusive and all-embracing test is at variance with international judicial and State practice.”⁸⁸ It also saw no logical reason why this strict test should be applied to all possible circumstances: “The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”⁸⁹ It therefore concluded with regard to organized armed groups that a lower threshold of control would be sufficient:

In the case of an organised armed group, the group normally engages in a series of activities. If it is under an overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State.⁹⁰

The overall control test, as articulated by the ICTY in the *Tadić* appeals judgment clearly lowered the requirements for an outside State’s control over organized armed groups. Instead of the necessity of detailed direction as required by the ICJ in *Nicaragua*, the Chamber held that

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*. . . . 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.⁹¹

Controversy over this new standard of overall control has been reflected in academic literature,⁹² and in statements such as those of former ICJ president Gilbert Guillaume. The latter has remarked that different stand-

88. *Id.*, ¶ 124.

89. *Id.*, ¶ 117.

90. *Id.*, ¶ 122.

91. *Id.*, ¶ 131 (emphasis added).

92. See authorities cited *supra* note 83.

ards resulting from the “proliferation of tribunals, courts and quasi-judicial bodies” could be dangerous.⁹³ Although still controversial in some ways, the overall control test nevertheless has become the accepted standard in international courts and tribunals when it comes to the classification of armed conflicts. It has been confirmed by the consistent case law of the ICTY⁹⁴ and ICC,⁹⁵ as well as by the Commission of Inquiry on Darfur.⁹⁶

Some commentators argue that the different standards can be justified by the fact that the ICTY, unlike the ICJ in *Nicaragua*, was not dealing with the question of State responsibility.⁹⁷ This is a very questionable argument as it is difficult to understand why in different areas of law (State responsibility and classification of armed conflicts when determining individual criminal responsibility) there should be different requirements for the control exercised by the third State. Even the rationale found in ICTY jurisprudence, that IHL should be given as much of a protective scope as possible,⁹⁸ is not persuasive in this context, particularly because the Appeals Chamber left no doubt that the question with which it was dealing had to

93. Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 848, 862 (1995).

94. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 95–123 (Int'l Crim. Trib. for the former Yugoslavia Mar. 3, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14-1-A, Appeals Judgment, ¶ 145 (Int'l Crim. Trib. for the former Yugoslavia Mar. 24, 2000); Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeals Judgment, ¶ 20 (Int'l Crim. Trib. for the former Yugoslavia Feb. 20, 2001).

95. *Lubanga* Judgment, *supra* note 39. See also *Lubanga* Decision on Confirmation of Charges, *supra* note 39, ¶¶ 210–11.

96. Commission of Inquiry, *Report of the International Commission on Darfur to the Secretary-General to the Secretary General* ¶ 123, transmitted by Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2005/60 (Feb 1, 2005), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2005/60; 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 301–4 (2009), available at <http://rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf>.

97. See, e.g., William J. Fenrick, *Development of the Law of Armed Conflict*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 85 (Michael Schmitt & Leslie Green eds., 1998) (Vol. 71, U.S. Naval War College International Law Studies); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 237 (2002). See also HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 118–19 (2011).

98. See, e.g., *Tadić* Appeals Judgement, *supra* note 5, ¶ 168 (“Article 4 of the Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible.”).

be decided according to the principles of State responsibility.⁹⁹ The only judge of the Appeals Chamber who saw this differently was Judge Shahabudeen, who in his separate opinion first raised the issue that the ICTY was dealing with different circumstances than the ICJ.¹⁰⁰ The seriousness with which this argument has been taken by commentators on the correct standard of attribution is evidenced by the fact it was addressed in the International Law Commission's (ILC) commentary on Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) when, in making reference to Judge Shahabudeen's separate opinion, it states:

But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case [*Nicaragua*]. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.¹⁰¹

As Cassese highlighted in an article revisiting the control standard issue after the ICJ's *Genocide* decision,¹⁰² it is unfortunate that the ILC did not use the opportunity to clearly decide which standard should be applied in what kind of situations.¹⁰³ The argument that the two judicial institutions—the ICJ and the ICTY—deal with different kinds of responsibility seems to be rather a fig leaf in order to avoid taking a clear position. It could be perceived that Judge Shahabuddeen offered an explanation of the differences in order to prevent too stark a contrast between the ICJ and the ICTY. In

99. *Id.*, ¶ 105 (“As stated above, international humanitarian law does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be had upon the criteria established by general rules on State responsibility.”).

100. *Tadić* Appeals Judgment, *supra* note 5 (separate opinion of Shahabuddeen, J., ¶¶ 17–21).

101. Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries 48, Report of the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

102. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 2007 I.C.J. 43 (Feb. 26) [hereinafter *Genocide* Judgment].

103. Cassese, *supra* note 78, at 664.

addition, he states that the decisive factor is the distinction between the use of force by a State and violations of IHL:

[I]t is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force.¹⁰⁴

Notwithstanding this explanation, it is difficult to understand why there should be two different of standards of State responsibility: one which is used to attribute actions giving rise to the use of force by one State against another (and according to Judge Shahabuddeen then obviously to the existence of an armed conflict) and a second which, based on a violation of IHL, results in individual criminal responsibility. What is also interesting in this context is that Judge Shahabuddeen seems to use language from the *jus ad bellum* regime (“use of force”) in order to argue for the existence of an armed conflict governed by the *jus in bello*,¹⁰⁵ a result that is normally to be avoided. A “use of force” under Article 2(4) of the UN Charter might indeed be seen as independent from the attribution of certain actions of the supported armed group due to the broader scope of situations which trigger the violation of the prohibition of the use of force.¹⁰⁶

The core issue both in establishing the responsibility of a State for the international law violations of an organized armed group (*Nicaragua*) and in determining the existence of an international armed conflict as the basis for individual criminal responsibility (*Tadić*) is *attribution*. To be more specific, the question concerns the attribution of the actions of the organized armed

104. *Tadić* Appeals Judgment, *supra* note 5 (separate opinion of Shahabuddeen, J., ¶ 18).

105. *Id.*, ¶ 18 (“This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an ‘armed conflict’ had arisen between BH [Bosnia and Herzegovina] and the FRY [Federal Republic of Yugoslavia (Serbia and Montenegro)] acting through the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska], not that the FRY committed breaches of international humanitarian law through the VRS.”).

106. *Cf.* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200–34 (Bruno Simma et al. eds., 3d ed. 2012).

group to a State. According to ARSIWA Article 8, the standard of control required for actions of non-State armed groups to be attributed to a State is that “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.”¹⁰⁷

Although Article 8 does not state explicitly whether effective or overall control is required,¹⁰⁸ the inclusion of the language “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct,” in the Article and the official commentary¹⁰⁹ could in theory be interpreted as reflecting the drafters’ intention to refer to an effective control standard. Such an interpretation would be supported by the statement quoted above in which the ILC highlights the different areas in which the ICJ and the ICTY made their determinations. It would also be in line with the fact that shortly after the ICTY issued the judgment in *Tadić*, the overall control test was criticized by commentators as “controversial.”¹¹⁰

However, Article 8 places no explicit qualifications on the control standard, stating only that the necessary condition is one of persons or group of persons acting on “instructions of, or under the direction or control of” a State.¹¹¹ While the alternatives “instructions of” and “under the direction of” use the language of the *Nicaragua* judgment and can be understood in that context, the absence of qualifications for “control of” is especially important because the commentary to Article 8 indicates that the terms “instructions,” “direction” and “control are “disjunctive” and not

107. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 101, at 47.

108. This has been confirmed by the then–Special Rapporteur of the International Law Commission James Crawford. See JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 147 (2013).

109. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 101, at 47.

110. See, e.g., Danesh Sarooshi, *Command Responsibility and the Blaškić Case*, 50 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 452, 455 (2001).

111. Crawford clarified that

ARSIWA Article 8 itself does not specify this, and the field has subsequently divided between the ‘effective control’ test devised by the International Court in *Nicaragua* and affirmed tangentially in *Armed Activities* and more forcefully in *Bosnian Genocide*, and the ‘overall control’ test formulated by the ICTY Appeals Chamber in *Tadić* and reaffirmed in the later case law of that tribunal.

CRAWFORD, *supra* note 108, at 147.

cumulative.¹¹² Therefore, it can be deduced that instructions are not always required.

The commentary's explanation is confusing, however, in its reference to "two alternatives" ("instructions of" and "under the direction or control") in attributing responsibility to a State.¹¹³ This statement makes sense only if "under the direction or control" were to read "under the direction *and* control." The wording of Article 8, with its double use of "or," has been interpreted by other commentators as indicating there are three, not two, alternatives.¹¹⁴ In support of the approach that finds only two alternatives in Article 8, it could be argued that "under the direction or control of" are a single category because of the absence of a comma before the "or." But even in this case, interpreting Article 8 in accordance with the rules set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties¹¹⁵ leaves room to read different standards of control into the article depending on the situation (individuals or organized armed groups). Therefore the ICTY's standard of overall control is consistent with Article 8 of ARSIWA. This conclusion finds support in the ILC commentary: "In any event it is a matter *for appreciation in each case* whether particular conduct was or was not carried out under the control of a State, *to such an extent* that the conduct controlled should be attributed to it."¹¹⁶

Furthermore, the UN General Assembly's action in taking note of the Draft Articles in 2001¹¹⁷ supports the argument that the rule (and its commentary) were confirmed as *opinio juris* by the States who approved the resolution. In so doing they tacitly agreed that different standards, including the ICTY's overall control standard, were possible in different situations.

It is also important to note that the Appeals Chamber itself did not reject the effective control test.¹¹⁸ Rather, it confirmed that the test would be applicable in situations where the actions were carried out by either single individuals or groups which were not sufficiently organized.¹¹⁹ However, in

112. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 101, at 48.

113. *Id.*, at 47.

114. *See, e.g.*, Cassese, *supra* note 78.

115. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

116. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 101, at 48 (emphasis added).

117. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 22, 2002).

118. *Tadić* Appeals Judgment, *supra* note 5, ¶ 117.

119. *Id.*, ¶ 137.

the case of a hierarchal group with a responsible commander, it held overall control would be sufficient.¹²⁰

In differentiating between individuals, unorganized groups and organized groups, one of the most important statements in the *Tadić* judgment was that “[t]he *degree of control* may . . . vary according to the factual circumstances of each case.”¹²¹ The Appeals Chamber supported the conclusion that the overall control standard could be applied to organized groups by reference to State practice and international jurisprudence, confirming the possibility of a lower threshold of control than that found in *Nicaragua*.¹²² Since Article 8 sets forth no qualifications for the type of organized armed group to be controlled and because it allows for different standards of control, the article is not inconsistent with the ICTY’s jurisprudence as such.

In addition to State practice and especially subsequent jurisprudence, there is also a logical argument that supports the findings of the ICTY with regard to the overall control standard if one uses a systemic approach to the law of State responsibility, understanding that the main objective of the law is to prevent States from avoiding responsibility for actions being taken on their behalf.¹²³ If one looks at Articles 4 to 11 of ARSIWA, it becomes clear that the requirements for attribution are the most relaxed for those actors which can be clearly allocated to a State, i.e., the organs of the State (Article 4).¹²⁴ The next step in this spectrum of attribution standards is represented by entities that—although not organs of the State—are exercising government authority (Article 5). Further along the spectrum are actions of “an organ placed at the disposal of a State by another State” (Article 6) and of “an organ of a State or . . . entity empowered to exercise . . . governmental authority” even if it “exceeds its authority or contravenes instructions” (Article 7). In these articles the requirements for attribution are mainly focused on the function or the capacity in which the organ or entity is acting.¹²⁵ The logic behind this is clear: the more obvious it is that an individual is acting on behalf of a State; the less strict are the requirements for attribution.

120. *Id.*, ¶ 120.

121. *Id.*, ¶ 117 (emphasis added).

122. *Id.*, ¶¶ 124–45.

123. *Id.*, ¶ 117.

124. For a discussion of this group of attribution cases, see CRAWFORD, *supra* note 108, at 113–40.

125. Crawford calls the category of attribution provisions found in Articles 4 to 7 the “hard core of the doctrine of attribution, dealing with organs and agencies of state exercising sovereign authority.” *Id.* at 115.

Articles 8 to 10 address circumstances in which the relationship with the State is not as obvious as is the case in the preceding articles. Article 8 addresses actions of a private person or group of persons,¹²⁶ Article 9 concerns conduct carried out in the absence of, or default by, the State's official authorities and Article 10 provides for attribution of acts of an insurrection movement that becomes the new government of a State. Finally, Article 11 provides that conduct, which would otherwise not be attributable to a State, becomes so if the conduct is acknowledged and adopted by the State as its own.¹²⁷

It is important to keep these different levels of attribution in mind when dealing with the different categories of actors—private persons, groups of private persons and organized armed groups—identified by the ICTY. While there is good reason to apply the standard of effective control to the first two since as private persons they are not easily seen as acting on behalf of States and it is more difficult to determine their objective when they take certain actions, this is not the case when dealing with organized armed groups whose objective is usually clear (e.g. fighting against the current government and/or against other rebel groups). Even if a State only has overall control of an organized armed group that it supports, the consequences of that control and support can be easily predicted (e.g., overthrow of another State's government). Under these circumstances, it is not necessary to have effective control in order to establish the "existence of a real link" required by the ARSIWA commentary.¹²⁸ The "real link" can be seen as the common objective the supporting State and the organized armed group are pursuing.

The wording of Article 8, its commentary, and the systematic structure of the Articles on State responsibility therefore do not exclude the use of the overall control standard for attribution in cases that deal with organized armed groups. If one takes into account the other circumstances dealt with by Articles 4 to 11 of the Articles on State responsibility, one can even argue that the legal regime of State responsibility supports a differentiated

126. Crawford sees Article 8 as a category of its own, in which "a state, through the direction and control of another entity, creates a *de facto* organ or agent for the purposes of attribution." *Id.*

127. Crawford describes Articles 9, 10 and 11 as "certain exceptional categories of attribution in which the actions of non-state actors may be considered attributable to a state without any prior intervention, delegation or instruction from an Article 4 organ." *Id.* at 116.

128. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 101, at 47.

approach towards the different persons or groups of persons whose actions are to be attributed to a State.

Another example illustrating that one standard cannot be applied to all situations is the instance in which the controlling State is not seeking to take over territory of the second State, as was the case addressed in the *Nicaragua* decision. In this instance, one could argue that a higher evidentiary threshold is needed, because the existence of the “real link” is less obvious. The Appeals Chamber in the 1999 *Tadić* judgment highlighted the importance of territorial ambition when it found that a lower threshold of control could be applied if the third State had “territorial ambitions” on the State which is the target of the organized armed group.¹²⁹ That decision is consistent with the point made above, which found that the sharing of a common objective by the State and organized armed group could lower the level of control required to attribute conduct of the group to the controlling State. The only problematic aspect here is that territorial ambition is a rather subjective concept, and usually is not easily proven. It might be established, however, in cases such as that in the Ukraine, where shortly before beginning its support and control of an organized armed group, the supporting State had attacked or annexed part of the territorial State. In this regard, *dolus directus*, a method which is well-known in international criminal law, could be used to prove the specific intent of the State providing support, i.e., the subjective motivation could be deduced from the objective circumstances.

While this discussion has shown that there are valid reasons to use the overall control test in dealing with organized armed groups, the ICJ unfortunately did not use the opportunity in its *Genocide* decision to clarify its statements in *Nicaragua*. Although the Court did not completely reject the possibility that the overall control test could be applied in certain situations, it took up the argument first found in Judge Shahabuddeen’s separate opinion to the *Tadić* judgment, and emphasized that the ICTY applied this test in cases dealing with individual criminal responsibility in order to determine

129. *Tadić* Appeals Judgment, *supra* note 5, ¶ 140. For a description of the *Tadić* criteria as “eminently useful,” see SIVAKUMARAN, *supra* note 48, at 228. Sarooshi finds that there is no reason why the illegal motivation of “territorial ambitions” should have a special place in this evaluation, while other possibly illegal motivations, like the overthrow of a government should be not considered. Sarooshi, *supra* note 83, at 456. However, the ICTY did not exclude that other motivations could also lower the threshold, but gave territorial expansion as an example.

the existence of an international armed conflict.¹³⁰ Since the ICJ was dealing with Serbia's State responsibility, the ICJ concluded that it had to apply the effective control test. This has to be viewed as a missed opportunity to clarify that, although the Court and international criminal courts and tribunals were concerned with different legal regimes (State responsibility versus individual criminal responsibility), the legal standards for attributing the behavior of private individuals or groups should be decided through the application of the same standards.

A final question relevant to the determination of the nature of the conflict in the Ukraine is the possibility that an international armed conflict and a non-international armed conflict can exist side by side. This was the holding of the ICJ in the *Nicaragua* case in which it concluded that there was an international armed conflict between the United States and Nicaragua, while at the same time there was a non-international armed conflict between the contras and the government of Nicaragua. The *Tadić* Appeals Chamber reached the same determination in finding that the conflict in the former Yugoslavia had both internal and international characteristics, and that a determination had to be made as to whether the conduct occurred during the course of an international armed conflict or non-international armed conflict.¹³¹

V. EVALUATION OF THE CRISIS

After having established an overview of the currently known facts concerning the crisis in the Ukraine¹³² and having clarified the legal standards used to determine the type of armed conflict,¹³³ I turn now to the evaluation of which legal regime is applicable in the Ukraine, recognizing that the character of a conflict can change over time.

A. *Crimea*

As noted previously, this article does not focus in detail on events in Crimea, which are addressed elsewhere in this volume, and only briefly addresses the specific issues surrounding the question of the existence of armed conflict on the Crimean peninsula and the potential relationship

130. *Genocide* Judgment, *supra* note 102, ¶ 208.

131. *Tadić* Appeals Judgment, *supra* note 5, ¶ 84.

132. *See supra* Part III.

133. *See supra* Part IV.

between an armed conflict and a later occupation. In contrast to the events in eastern Ukraine, the situation in Crimea was not characterized by extensive fighting between insurgents and government authorities. The seizure of government officials and the taking over of government institutions by pro-Russian forces was carried out with almost no violence. While President Putin initially denied these actions were carried out by official Russian troops, he later confirmed that “[o]f course, Russian servicemen backed the Crimean self-defense forces.”¹³⁴

Even though Putin confirmed the participation of Russian troops, the almost complete lack of armed opposition from Ukrainian forces seems, at first glance, to make it hard to qualify the situation as an international armed conflict under Common Article 2 since there was no “armed conflict” taking place. However, as has been shown, in contrast to the requirements for a non-international armed conflict, the threshold for an international armed conflict under IHL is rather low; requiring only that it be established that there is “any difference between two States . . . leading to the intervention of members of armed forces.”¹³⁵ As the ICRC *Commentary* on Geneva Convention III states concerning the application of Common Article 2, even if there “has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.”¹³⁶ In view of the low threshold which triggers the existence of an international armed conflict under IHL, one can conclude that at least for a short period of time an armed conflict as defined by Common Article 2 existed. However, this appears to have been a rather short-lived conflict, since the resistance from the Ukrainian authorities, most of whom were pro-Russian, was rather minimal.

This raises the question of whether, notwithstanding the occurrence of some armed violence and the presence of Russian forces, an international armed conflict did not exist because the local Crimean government gave consent to the takeover. This argument, however, does not hold up since the only government authority which could have consented to the Russian actions in Crimea was the central government in Kiev. The consent of the

134. Kathy Lally, *Putin's Remarks Raise Fears of Future Moves against Ukraine*, WASHINGTON POST (Apr. 17, 2014), http://www.washingtonpost.com/world/putin-changes-course-admits-russian-troops-were-in-crimea-before-vote/2014/04/17/b3300a54-c617-11e3-bf7a-be01a9b69cf1_story.html.

135. GC III COMMENTARY, *supra* note 35, at 23.

136. *Id.*

Crimean government did not change the nature of the conflict; it was an international armed conflict, even though it might have been in existence only for a short time.

What was a brief international armed conflict was replaced by an occupation under Common Article 2. There are two circumstances in which an occupation triggers the application of the Geneva Conventions. First, an occupation can occur as a consequence of an international armed conflict. This situation would be covered by Common Article 2, paragraph one. However, even if it were concluded that there had been no international armed conflict in Crimea, this would not exclude the applicability of the Geneva Conventions. According to Common Article 2, paragraph two, “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with *no armed resistance*.”¹³⁷ This paragraph was inserted in the 1949 Conventions after the experience of World War II which saw “peaceful occupations,” that is, occupations occurring without armed resistance.¹³⁸ Paragraph 2 thus fills a gap that would have limited the situations of occupation which followed an international armed conflict.

B. Eastern Ukraine

In eastern Ukraine, the conflict can potentially be qualified in distinctly different manners as (a) a classic international armed conflict, (b) a non-international armed conflict or (c) a non-international armed conflict which is “internationalized” by the involvement of a third State (Russia).

A classic international armed conflict in the sense of Common Article 2 would require the involvement of the armed forces of two sovereign States. Although available information indicates that Russia, probably including its military forces, is supporting the pro-Russian insurgents, it is much less clear that Russian troops are fighting on Ukrainian territory against the Ukrainian armed forces. In its *Naletilić & Martinović* decision,¹³⁹ the ICTY held that the participation in the conflict of volunteers from a third State’s armed forces does *not* trigger an international armed conflict. Some reports indicate that Russian soldiers have removed identifying insignia and are fighting on behalf of the pro-Russian rebel groups. They remove insignia

137. Emphasis added.

138. COMMENTARY TO GENEVA CONVENTION IV, *supra* note 49, at 21.

139. Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶¶ 191, 194 (Int’l Crim. Trib. for the former Yugoslavia Mar. 31, 2003).

apparently in an attempt to show they are participating as individuals, not as members of the Russian armed forces. As volunteers they would not satisfy the “intervention of members of armed forces” criterion of Common Article 2. Other reports suggest that Russian tanks are crossing the border into Ukraine under official orders. Even if true, it is important to keep in mind that according to ICTY jurisprudence the “significant and continuous military action” of the outside troops is necessary.¹⁴⁰ Sivakumaran summarizes ICTY jurisprudence as indicating that “the presence of soldiers and units on the territory in question” is determinative in deciding whether the conflict has become internationalized.¹⁴¹ However, at least to the author’s knowledge, the extent to which official Russian troops are participating and military material is being used in the conflict is unclear. If tanks were just supplied by Russia to the insurgents, this would not automatically trigger the applicability of Common Article 2. Given the uncertainties surrounding the nature of Russia’s involvement, one should be hesitant in qualifying this as a classic international armed conflict.

If it cannot be clearly established that this is an international armed conflict between Russia and Ukraine, at least not through the direct involvement of Russian troops, the obvious alternative is to consider whether this is a Common Article 3 non-international armed conflict. According to the definition examined above, “protracted armed violence” between the Ukrainian armed forces on the one side and a sufficiently organized group on the other side is required.¹⁴² The fact that the hostilities have been ongoing for several months, there are a high number of victims and heavy weaponry has been used by both sides provides sufficient evidence in terms of both duration and intensity to establish the existence of protracted armed violence. The second requirement, the organizational structure of the pro-Russian insurgents also seems to be established. The group calls themselves the United Armed Forces of Novorossiia,¹⁴³ and there are several indica-

140. Prosecutor v. Rajić & Andrić, Case No. IT-95-12-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 13 (Int’l Crim. Trib. for the former Yugoslavia Sept. 13, 1996).

141. SIVAKUMARAN, *supra* note 48, at 225 (citing Naletilić & Martinović).

142. *See supra* text accompanying notes 50–71.

143. *Kremlin-backed Rebels Form Novorossiia Army*, KYIVPOST (Sept. 16, 2014), <http://www.kyivpost.com/content/ukraine/kremlin-backed-rebels-form-novorossiia-army-364887.html>. Novorossiia is a term describing an area controlled by Russia in the nineteenth century. Nick Robins-Early, *Here’s Why Putin Calling Eastern Ukraine “Novorossiia” Is Important*, THEWORLDPOST (Apr. 18, 2014), http://www.huffingtonpost.com/2014/04/18/putin-novorossiia-ukraine_n_5173559.html.

tions that they have a hierarchical structure in which commanding officers give orders to the fighters. There are even reports that the insurgents claim to be better organized than the Ukrainian army. Therefore, one can conclude that the requirements of Common Article 3 are fulfilled and a non-international armed conflict is taking place.

The next question is whether Additional Protocol II applies. As discussed above, the threshold for the existence of an Additional Protocol II non-international armed conflict is slightly higher than that for a Common Article 3 conflict.¹⁴⁴ As with the latter, an organized armed group under responsible command is required, and in the case under discussion, is fulfilled. Additionally, the armed group needs to “exercise such control over a part of its [the State’s] territory as to enable them to carry out sustained and concerted military operations” and “to implement th[e] Protocol.”¹⁴⁵ The events on the ground of the last year indicate that both these requirements seem to be satisfied. Therefore, the armed conflict in eastern Ukraine can be categorized not just as a Common Article 3 conflict, but also as an Additional Protocol II conflict. Since Ukraine is also party to the Protocol,¹⁴⁶ this should lead to the direct applicability of its rules.

There are strong signs, as previously set forth,¹⁴⁷ that official Russian military personnel, as well as a number of Russian citizens, have actively supported the pro-Russian forces in Donetsk and Luhansk. The Security Service of Ukraine claimed that it had detained a group of Russian paratroopers on Ukrainian territory.¹⁴⁸ There are also indications that on August 27, 2014, a significant amount of Russian military equipment crossed the border from Russia into southern Donetsk Oblast, territory that was previously under control of the Ukrainian government.¹⁴⁹ On August 28 a NATO commander stated that “well over 1,000 Russian soldiers were op-

144. See *supra* text accompanying notes 72–76.

145. Additional Protocol II, *supra* note 53, art. 1(1).

146. See International Committee of the Red Cross, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 13 Apr. 2015*, http://www.icrc.org/applic/ihl/dihl_setup.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/dihl_setup.nsf/6A9E93D954458967C1257DF100397C0C/%24File/IHL_and_other_related_Treaties.pdf?Open.

147. See *supra* Part III.

148. *Russian Paratroopers Captured*, *supra* note 24.

149. Kramer & Gordon, *supra* note 28.

erating in the Donbass conflict zone.”¹⁵⁰ There have been reports that Russia had been shelling Ukrainian units from across the border. If all these reports are accurate, then Common Article 2’s requirements for the existence of an international armed conflict would be fulfilled. This is the case notwithstanding Russia’s subsequent denial of the reports since Common Article 2 clearly states that an international armed conflict can exist “even if the state of war is not recognized by one of them.”

What is lacking, however, is evidence establishing the *continuous* direct involvement of Russian armed forces that is necessary to prove the existence of an international armed conflict.¹⁵¹ The reports of fighting activities by Russian forces on Ukrainian territory are rather sparse. And even though an international armed conflict does not need protracted armed violence in order to come into existence, if there is no direct involvement of Russian troops on a continuous basis, one would have to characterize the conflict as non-international.¹⁵²

Although in this author’s view there is insufficient evidence to establish that the conflict is international in nature on the basis of the direct involvement of Russia, there is a question as to whether the conditions for the “internationalization” of a non-international armed conflict have been met through the Russian government’s *indirect* involvement. In this context, there is little doubt that Russia has supplied arms, armored vehicles, tanks and other equipment to the insurgent forces.

The conflict in eastern Ukraine might be a prime example of why in certain situations the overall control standard is the appropriate standard to determine whether the conduct of an organized armed group should be attributed to a State, thereby transforming a non-international armed conflict into an international armed conflict. Although the Russian support of the separatist movement is obvious, it is very difficult to prove that an organ of the Russian government or military has exercised effective control

150. Adrian Croft, *More than 1,000 Russian Troops Operating in Ukraine: NATO*, REUTERS, (Aug. 28, 2014), <http://www.reuters.com/article/2014/08/28/us-ukraine-crisis-nato-idUSKBN0GS1D220140828>.

151. See *supra* notes 140 and 141 and accompanying text.

152. Neither Common Article 2 nor Common Article 3 indicates when the respective armed conflict ends. There is some guidance, however, in *Tadić*; Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* note 37, ¶ 70, which states, “[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached: or, in the case of internal conflicts, a peaceful settlement is achieved.” In this case, the two ceasefires, neither of which was respected, did not bring about a cessation of hostilities.

by giving direct orders to the insurgent groups. The conflict also illustrates that the effective control standard does not address a situation in which the organized armed group's objective (separating part of the country from the control of the central government) appears to coincide with the motivation of the supporting State (enlarging its own territory or creating a buffer zone with a friendly population). In these situations, both State practice and logic lead to the conclusion that overall control over the organized armed group is the appropriate standard.¹⁵³

For attribution to occur, it would be necessary to show "that the State wield[s] . . . 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."¹⁵⁴ While it is still difficult to judge whether Russian authorities are coordinating or helping in the planning of the insurgents' military activities, there are certain indications that this is taking place. As noted, it is obvious Russia is providing them with military equipment and supplies, and that many Russian citizens and military personnel are fighting on the side of the insurgent groups. The close ties between the separatists and Russia is also evidenced by the separatists' decision to call themselves the Novorossyian army. And given the reports about the constant delivery of heavy weaponry from Russia to eastern Ukraine, it can be assumed that Russian authorities are also giving guidance on how these weapons should be used. The situation must also be viewed against the background of the annexation of Crimea by Russia very shortly before the fighting in eastern Ukraine gained momentum, as well as alongside statements by President Putin that "[i]f I want to, I can take Kiev in two weeks."¹⁵⁵ During the armistice talks in Minsk in February of this year, it was very clear that Putin had the decisive word on the terms of any agreement with Ukraine, further evidence of the close cooperation between Russia and the separatists.

Analyzing Russian involvement under the 1999 *Tadić* appeals judgment holding that in cases "[w]here the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial en-

153. See *supra* note 123 and accompanying text.

154. *Tadić* Appeals Judgment, *supra* note 5, ¶ 140.

155. Ben Farmer & Nick Squires, *I Can Take Kiev in Two Weeks, Vladimir Putin Warns European Leaders*, THE TELEGRAPH (Sept. 1, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11069070/I-can-take-Kiev-in-two-weeks-Vladimir-Putin-warns-European-leaders.html>.

largement through the armed forces which it controls, it may be easier to establish the threshold,¹⁵⁶ it might be simpler to conclude that the conflict in eastern Ukraine can be characterized as an international armed conflict.

Against this background, it is time to consider additional criterion that could make it easier to judge the scope of control a State has over a non-State armed group in a neighboring country.¹⁵⁷ The ICTY in the *Tadić* appeals judgment made a first step when lowering the threshold in situations involving expansion of territory. In its *Tadić* and *Blaškić* decisions, the Tribunal listed additional factors that could be used to establish that a State exercised overall control of an armed group, to include that the its member's wages were paid by the State,¹⁵⁸ the State and the armed group shared personnel,¹⁵⁹ and the ranks and military organization of the State and armed group were similar.¹⁶⁰ Other factors cited by the Tribunal concerned shared decision making. These included that the State and armed group are pursuing the same goal,¹⁶¹ the State gives orders for movements of troops and issues military strategies,¹⁶² and decisions are coordinated through common meetings.¹⁶³

The situation in eastern Ukraine illustrates the principal difficulty that exists in determining whether conflicts such as this are an international armed conflict, i.e., obtaining sufficient intelligence and evidence to establish the degree of control exercised by an outside State over organized armed groups. As the ICTY experience has shown, the determination is likely to be easier for an international criminal court or tribunal *after* the conflict, having had the opportunity to search for evidence and use witness statements that clarify the degree of control exercised by an outside State; it

156. *Tadić* Appeals Judgment, *supra* note 5, ¶ 140.

157. Similarly, Sivakumaran suggests that “[w]hat has to be determined is whether the armed group is acting as a proxy for the state, or rather whether the two are but extremely close allies.” SIVAKUMARAN, *supra* note 48, at 227. It is important to note that he agrees that it is not a question of effective or overall control “but the facts on the ground and the indicia at play.” *Id.* Unfortunately, Sivakumaran also cited Judge Shahabuddeen in indicating that the decisive question is “whether the degree of control is such that the one state is, in essence, using force against another state.” *Id.* It would have been preferable to use the terminology of the law of armed conflict and the term “armed violence” in order to prevent confusion with the legal regime of the *jus in bello*.

158. *Blaškić* Judgment, *supra* note 94, ¶ 101.

159. *Id.*, ¶¶ 114–17.

160. *Tadić* Appeals Judgment, *supra* note 5, ¶ 151.

161. *Blaškić* Judgment, *supra* note 94, ¶¶ 108–10.

162. *Tadić* Appeals Judgment, *supra* note 5, ¶ 151.

163. *Blaškić* Judgment, *supra* note 94, ¶ 101.

is much more difficult to determine the character of the conflict *during* the conflict. This probably also explains why the ICRC, which usually has much more access to battlefield information than most other organizations, has nevertheless been quite reluctant to classify the conflict in eastern Ukraine as anything other than a non-international armed conflict.

VI. CONCLUSION

In establishing whether armed violence has given rise to a non-international armed conflict, an international armed conflict or an internationalized non-international armed conflict, it is the facts on the ground that are critical to the determination. It is clear that the last several months have witnessed at least a non-international armed conflict in eastern Ukraine. Even after the two ceasefire agreements (Minsk I and Minsk II), the fighting has continued to the present¹⁶⁴ at a level of intensity that falls within the definition of protracted armed violence. There are reports of events indicating that there is also a direct involvement of official Russian troops and weaponry, which, if established, would support an international armed conflict classification in the sense of Common Article 2. However, these reports are not conclusive from the author's point of view.

The ICTY's jurisprudence adopting the overall control standard has clarified the circumstances in which the internationalization of a non-international conflict may be found to have occurred. While greater clarity of information would be desirable, it seems likely that the situation in eastern Ukraine can be qualified as an internationalized non-international armed conflict, i.e., an original non-international armed conflict, which, through the indirect influence of Russia and the support it is providing to, and control it is exercising over, the pro-Russian separatists, has become an international armed conflict. Whether this represents the beginning of the rampant proxy wars that characterized the Cold War or is limited to the assertion of Russian interests in an area to which it has historic ties, remains to be seen.

164. February 28, 2015.