INTERNATIONAL LAW ON STATES ARMING NON-STATE GROUPS IN OTHER STATES

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ABSTRACT

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This thesis looks into states arming non-state groups in other states, seeking to offer an evaluation of the case under the current international law. To this end, the work advances a theoretical account of the issue, highlighting some of the paradoxes constitutive of its handling in the modern doctrine. Specifically, it critiques the main unquestioned assumptions of this doctrine by adopting the Critical Legal approach introduced by Koskenniemi. Next, the work moves on to the prohibition of the unilateral use of force among states and the principle of non-intervention in the context. Arguably more critical under these norms of international law are the arming of combatant groups in other states that may rely on some claim of self-determination and the discourse of humanitarian intervention, which receive some weight in the discussion. The work then moves on to depict the evolving nature of warfare responsible for the proliferation of non-state armed groups. International responsibility and the global attempts to regulate arms transfers, with some emphasis on the Arms Trade Treaty, are also addressed in the work.

The overall answer in the thesis to the question of arming non-state groups in other states is that various grey areas in the matter effectively prevent international law from providing one simple solution that might be applicable to all cases. International law has become so flexible that when the two sides in a dispute are unequal, international law inevitably serves the powerful side.

Keywords: Non-state armed groups, International Law, Small Arms and Light Weapons (SALWs), the Arms Trade Treaty (ATT)

ÖZ

ULUSLARARASI HUKUK VE DEVLETLERİN ÖTEKİ DEVLETLERDE BULUNAN DEVLET-DIŞI GRUPLARI SİLAHLANDIRMASI

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Bu tez, devlet-dışı grupların öteki devletler tarafından silahlandırılmasına cari uluslararası hukuk açısından bir değerlendirme sunma gayesindedir. Bu amaçla çalışma, modern doktrinin kurucu unsuru olan kimi paradoksları vurgulayarak, konuya ilişkin teorik bir çerçeve sunmaktadır. Bu tez özel olarak, Koskenniemi'nin temsil ettiği Eleştirel Hukuk çalışmalarını benimseyerek, modern doktrinin sorgulanmamış ana varsayımlarını eleştirmektedir. Akabinde çalışma, devletlerarası tek taraflı kuvvet kullanımı yasağına ve karışmazlık ilkesine değinmektedir. Uluslararası hukuk kuralları içerisinde belki de en kritik olanlar, insancıl müdahale söylemine ve halkların kendi kaderini tayin hakkına yaslanan kimi savaşan grupların silahlandırılmasına yönelik olanlardır. Çalışma akabinde, devlet-dışı grupların sayısındaki artışın müsebbibi olan savaşın değişen yapısını tasvire girişmektedir. Çalışmada ayrıca, Silah Ticaret Antlaşması'na (ATT) yapılan vurguyla birlikte, silah transferinin uluslararası alanda düzenlenmesine yönelik regülasyonlar ile uluslararası sorumluluk kurumuna da işaret edilmektedir.

Devletlerin öteki devletlerde bulunan devlet-dışı grupları silahlandırması sorunsalına yönelik verilecek en genel cevap ise, uluslararası hukukun tüm vakalara aynısıyla uygulanabilecek tek bir çözümü var etmesini etkili bir şekilde engelleyen gri alanların mevcudiyetidir. Uluslararası hukukun bu son derece esnek yapısı, herhangi bir uyuşmazlıkta taraflararasında güç eşitsizliği var ise, güçlüden yana tavır alması ile sonuçlanmaktadır.

Anahtar Kelimeler: Devlet-dışı silahlı gruplar, Uluslararası Hukuk, Küçük ve Hafif Silahlar, Silah Ticaret Antlaşması

To Berna and Utku

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LIST OF ABBREVIATIONS

ATGWs	Anti-tank Guided Weapons
ATT	Arms Trade Treaty
CIA	Central Intelligence Agency
ECOWAS	Economic Community of West African States
EU	European Union
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FRY	Former Republic of Yugoslavia
FSA	Free Syrian Army
i.e.	id est (in other words)
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISIL/ISIS	Islamic State of Iraq and the Levant/ Islamic State of Iraq and al-Sham
KFOR	the Kosovo Force
KGB	Komitet Gosudarstvennoy Bezopasnosti (Committee for State Security)
KLA	Kosovo Liberation Army
KRG	Kurdistan Regional Government
MANPADS	Man-Portable Air Defense Systems
MENA	Middle East and North Africa

NTC	National Transitional Council of Libya
NSG	Non-State Group
NSA	Non-State Actor
NSAG	Non-State Armed Group
OIEL	Open Individual Export Licenses
OSCE	Organization for Security and Co-operation in Europe
PMSC	Private Military and Security Companies
PYD	Partiya Yekîtiya Demokrat (The Democratic Union Party)
RENAMO	Mozambique National Resistance Movement
SALW	Small Arms and Light Weapons
SNC	Syrian National Coalition/ National Coalition for Syrian Revolution and Opposition Forces
SNC	the Syrian National Council
UÇK	Ushtria Çlirimtare Kosoves
UCLA	Unilaterally Controlled Latino Assets
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSC	United Nations Security Council
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
VRS	Vojska Republike Srpske (Army of the Srpska Republic)
WMD	Weapons of Mass Destruction

YPG	Yekîneyên Parastina Gel (People’s Protection Units)
YPJ	Yekîneyên Parastina Jin (Women’s Protection Units)

CHAPTER 1

INTRODUCTION

In this thesis I assess the possible legal basis for states arming non-state groups (NSG) active within other states in order to determine the legality of such activity, and address possible outcomes in the doctrine of international law as a result of its prevalence.[1] There seem to be two main camps in the study of international relations theory that advocate contrasting justifications for this activity, implying different legal consequences emanating from it. Scholars or practitioners operating within a "Realpolitik" intellectual framework appear ultimately to question the legal validity of such actions. Scholars that operate within intellectual frameworks deriving from transcendental norms of international law have a more accommodative approach.[2] Before examining the arguments in this debate, the motivation behind this thesis needs to be detailed.

The post-Cold War era has been characterized by a persistence and increase in the practice of states to provide support, including in the form of

[1] This thesis is dedicated to those who seek 'justice'.

[2] See André Nollkaemper, "A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition," *EJIL Talks*, June 17, 2013, accessed September 5, 2018 https://www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/; Marko Milanovic, "The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic," *EJIL Talks*, March 11, 2013, accessed September 5, 2018, https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/; Stuart Casey-Maslen, "The Arms Trade Treaty: a Major Achievement", *Oxford University Press Blog*, April 8, 2013, accessed September 5, 2018, https://blog.oup.com/2013/04/un-arms-trade-treaty-pil/; Jack Goldsmith, "The Remarkably Open Syrian Covert Action," *Lawfare Blog*, July 23, 2013, accessed September 5, 2018, https://www.lawfareblog.com/remarkably-open-syrian-covert-action.

armed material, to non-state actors (NSA) active in other states.[3] Examples of this activity can be found in Africa and the Middle East.[4] A paradigmatic current case is the civil war in Syria, which since 2011 has been a conflict zone characterized by the intervention of foreign powers in support of local armed NSAs. [5]

For instance, Barack Obama, the then President of the United States of America (USA), ordered sustained military aid to some of the rebel groups in the Syrian crisis in order to strengthen their ability to resist the military force deployed against them by the regime of Syrian President Bashar al-Assad. Since 2011 when the civil war erupted, Turkey, Qatar, Saudi Arabia, the United Arab Emirates, have joined the constellation of state actors supporting Syrian rebel groups.[6] While this activity is seldom publicly acknowledged, despite the fact that such support of foreign non state groups is integral to state decision-making processes formally, there has been an

[3] According to Akca, state-centric view of 'proxy warfare' dubs non-state armed groups as 'subordinated entities' which is no longer valid as non-state armed groups have complex objectives not overlapping with those states sponsoring them. In other words, non-state armed groups have become influential actors, possessing independent ontology in the international politics. See, Belgin San Akca, *States in Disguise: Causes of State Support for Rebel Groups* (Oxford University Press: New York, 2016), p.2.

[4] Shenali D. Waduge, "UN Resolution on Legality of Arming Rebels/Insurgents/ Freedom Fighters or Terrorists?," *Sinhala Net*, January 29, 2014, accessed March 15, 2019, http://www.sinhalanet.net/un-resolution-on-legality-of-arming-rebels-insurgents-freedom-fighters-or-terrorists.

[5] For the Syrian crisis and foreign aid to rebel groups, see Christopher M. Ford, "Syria: A Case Study in International Law," *University of Cincinati Law Review* 85, no.185, (2017): pp.185-229; Amy Barker Benjamin, "Syria: The Unbearable Lightness of Intervention," *Wisconsin International Law Journal* 35, no.3, (2017): pp.515-548.

[6] Michael N. Schmitt, "Legitimacy versus Legality Redux: Arming the Syrian Rebels," *Journal of National Security, Law and Politics*, no.7, (2014): pp.139-159.

ongoing debate in legal circles over the legal arguments needed to justify arming, aiding, and otherwise supporting non-state armed groups (NSAG).[7]

Broadly speaking, the debate is between two camps, with each camp seeking to define the contours of legality for such support. We can begin by briefly considering possible arguments against legality.

1.1. Possible Violations of International Law[8]

1.1.1. Use of Force and Intervention

The UN Charter Article 2/4 strictly prohibits the use of force and a threat to use of force in international relations of the member states.[9] These prohibitions reflect customary international law, as enshrined by the International Court of Justice (ICJ).[10] Thus, although Article 2/4 does not explicitly outlawed arming NSGs in other states, the ICJ did.

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[7] Ibid., p.139.

[8] Ibid., pp.140-158.

[9] There is a sizeable literature on non-intervention and the use of force, such as the following: Albrecht Randelzhofer, "Use of Force," in *Encyclopaedia of Public International Law: Use of Force, War and Neutrality, Peace Treaties*, ed. Rudolf Bernhar (Amsterdam: North-Holland Publishing Company, 1982), pp. 265-276; Christine Gray, "The Use of Force and International Legal Order," in *International Law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), pp. 589-620; Sondre Torp Helmersen, "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations," *Netherlands International Law Review* 61, no. 2, (2014): pp.167-93; Christine Gray, "The International Court of Justice and the Use of Force," in *The Development of International Law by the International Court of Justice*, ed. Christian J. Tams and James Sloan (New York: Oxford University Press, 2013), pp.237-262; R. J. Vincent, *Nonintervention and International Order* (New Jersey: Princeton University Press, 1974); I. Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1981).

[10] Nicaragua Case constitutes the one of the most essential reference points for interpreting the use of force and intervention in international relations. See, *Military and Paramilitary Activities In and Against Nicaragua,* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports, June 27, 1986, p.14.

In April 1984, Nicaragua filed an application against the USA, asserting that the latter was in material breach of its international obligations to not support the *Contras*, a paramilitary group aiming to overthrow Nicaragua's Sandinista government.[11] The ICJ ruled that supporting, arming, or aiding NSGs operating in another state violated the prohibition against the use of force and violated the principle of non-intervention. The ICJ's findings are one of the sources of international law, creating this a prohibition against aiding or otherwise supporting rebel groups operating in other states.

These legal elements are buttressed by the political will expressed by various UN General Assembly (UNGA) Resolutions that have emphasized that assisting, aiding, or otherwise supporting armed opposition groups breach the principle of non-intervention if such support amounts to threatening or using force.[12] While advisory and not direct sources of international law, they do provide support for arguments about the breadth of customary international law.

1.1.2. Arms Embargo

The UN Security Council (UNSC) is endowed with the power to decide whether international peace and security are in danger as envisaged under Article 39 of the UN Charter. With that authority it can authorize states to take all necessary measures individually or collectively to prevent, halt, or restore peace and security worldwide. It may therefore ban arms transfers to any entity through declaring arms embargos that are fully binding to UN member states. For instance, during the ongoing civil war in Libya, the

[11] Schmitt, "Legitimacy versus Legality Redux: Arming the Syrian Rebels," p.141.

[12] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, [Hereinafter Friendly Relations Declaration], UN Doc. A/RES/2625 (XXV), October 24, 1970.

UNSC adopted Resolution 1970 to impose an arms embargo on Libyan Arab Jamahiriya, which included prohibiting the provision of weapons to any military or paramilitary groups acting on behalf of Libyan Arab Jamahiriya.[13] According to mainstream doctrine, violating an arms embargo ordered by the UNSC under Chapter VII constitutes a breach of international obligations.

1.1.3. State Legal Responsibility for the Misconduct of Non-State Groups

Under international law, each state is responsible for any internationally wrongful acts that it commits.[14] A state may also be held responsible for the misconduct of NSAGs that they provide with arms, support, or aid. Traditionally, a state cannot be held responsible for the misconduct of private individuals unless they are organs of that state.

In its key judgments, namely the Nicaragua and Bosnian War Genocide Cases, the ICJ began by determining whether the perpetrators, in this case non-state entities, constituted *de jure* or *de facto* organs of the supporting state. If such a formal relationship between two cannot be established, then

[13] On Establishment of a Security Council Committee to Monitor Implementation of the Arms Embargo Against the Libyan Arab Jamahiriya, UN Doc. S/RES/1970 (2011), February 26, 2011.

[14] For the literature on the Law of State Responsibility, see Shruti Bedi, "International Human Rights Law: Responsibility of Non-State Actors for Acts of Terrorism," *Journal of the Indian Law Institute* 56, no. 3 (2014): pp. 386-397; Graham Cronogue, "Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors," *Duke Journal of Comparative & International Law* 23, (2012): pp. 365-88; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002); James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility," in *International Law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), pp.445-472 ; J. Craig Barker and Sandesh Sivakumaran, "I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina V Serbia and Montenegro)," *International & Comparative Law Quarterly* 56, no. 3 (2007): pp.695-708.

the Court applies the *effective control test* to determine factual links between them.[15] This requires a high threshold to establish a factual link between the sponsor state and NSG regarding the sponsor state's alleged international responsibility.

States are also obliged to take all necessary measures within their power to prevent atrocities, halt violations, and restore order. In the literature, this is called the obligation of *diligent conduct*, and is envisaged in various treaty provisions. For instance, regarding the arming of NSGs, the Arms Trade Treaty (ATT) proposes an assessment process that is essential when conducting arms transfers. This obliges states to stop arms transfers to clients if the assessment process leads to indicators of an 'overriding risk' that the clients would cause any of the violations listed in the text.

In summary, the argument against the legality of the support for NSGs rests primarily on the principle of non-intervention and the corpus of legal principles that result from it. I now explore the argument for legality.

1.2. Possible Justifications under International Law for Arming Non-State Groups

1.2.1. UNSC Authorization

Given its extensive powers of discretion in relation to maintaining international peace and security, the UNSC may take forceful action in pursuit of that mandate. Such decision can be based on Chapter VII of the

[15] The ICJ applies the effective control test in its judgments relating to establishing the international responsibility of states if there is a factual link between the sponsor state and non-state entity. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), [Hereinafter *Genocide Case*], Judgment, ICJ Reports 2007, p.43.

UN Charter, particularly Articles 41 and 42, to tackle an existing threat to peace and security, with binding power over member states.[16]

According to Article 42, “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”[17]

A UNSC resolution may thus enable lethal assistance to NSGs. However, the UNSC’s decision-making may be paralyzed by the risk of veto. Additionally, there can be controversial interpretations on whether UNSC resolutions authorize military aid to rebel groups/NSGs, as seen in the debates around Resolution 1973(2011).[18]

[16] See, UN Charter 1945, 1 UNTS xvi.

[17] Ibid.

[18] For conflicting interpretations on whether Resolution 1973(2011) allows military aid to rebels, see Olivier Corten, “The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum and jus in bello,” *Journal of Conflict and Security Law 18,* no.1, (2013): pp. 59–93; Dapo Akande, “Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?,” *the EJIL Talks*, March 31, 2011, accessed March 16, 2019, https://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/; Laura Trevelyan, “Libya: Coalition divided on arming rebels,” *BBC,* March 29, 2011, accessed March 19, 2019, https://www.bbc.com/news/world-africa-12900706.

1.2.2. The Discourse of Humanitarian Intervention or the Responsibility to Protect Doctrine[19]

Non-intervention and non-use of force are two basic and inseparable principles of the state system, at least in the discourse of modern legal doctrine. Therefore, unilateral or collective use of force without Security Council authorization or justified by the right to self-defence, is strictly prohibited under current international law. However, various cases indicate a tension between legality and legitimacy in terms of foreign intervention when that intervention is conducted in the name of humanitarian purposes, i.e. humanitarian intervention.

Humanitarian intervention is a type of coercive intervention in another state's domestic affairs without the consent of that targeted state to prevent "widespread suffering" or "death among the inhabitants".[20] Within international legal doctrine, it is controversial whether such military intervention is permissible without Security Council authorization. To determine whether this doctrine has been modified in practice, Franck seeks to identify the international community's approach to the issue.[21] A good

[19] For literature on the discourse of humanitarian intervention, see Adam Roberts, "The So-Called 'Right' of Humanitarian Intervention," *Yearbook of International Humanitarian Law* 3 (2000): pp.3-51; Board, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999); J. Peter Burgess, "Ethics of Humanitarian Intervention: The Circle Closes," *Security Dialogue* 33, no. 3 (2002): pp.261-264; The Independent International Commission On Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (New York: Oxford University Press, 2000); International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: the International Development Research Centre, 2001); Anne Orford, *Reading Humanitarian Intervention Human Rights and the Use of Force in International Law* (New York: Cambridge University Press, 2003).

[20] Roberts, "The So-Called 'Right' of Humanitarian Intervention," pp.4-5.

[21] Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (New York: Cambridge University Press, 2002), p.136.

example of the tension between legality and legitimacy is the Kosovo intervention to identify how and to what extent the international community responds to such unilateral use of force. The discourse of humanitarian intervention may provide a legitimate basis for supplying weapons to NSAGs; i.e the question is whether they create customary international law.

1.2.3. Right to Self-Determination[22]

During the 1960s and 70s, the right to self-determination was conditionally accepted as a fully legitimate right that paved the way to creating new states that had once been colonies under European powers. In this respect, self-determination was formulated as approving the right of peoples to "freely determine their political status" and "freely pursue their economic, social and cultural development". As Koskenniemi notes, it was easy to associate the right to self-determination with the anti-colonial struggle during the Cold War. However, after the dissolution of the Soviet Bloc and Josip Broz Tito's death in the Socialist Federal Republic of Yugoslavia (SFRY), the right to

[22] For literature on self-determination and secession, see Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice," *The International and Comparative Law Quarterly* 43, no. 2 (1994): pp.241-269; Iris Marion Young, "Two Concepts of Self-Determination," in *Ethnicity, Nationalism, and Minority Rights*, ed. Tariq Modood Stephen May, and Judith Squires (New York: Cambridge University Press, 2004), pp.176-198; Juan Francisco Escudero Espinosa, *Self-Determination and Humanitarian Secession in International Law of a Globalized World: Kosovo v. Crimea* (Springer, 2017); Margaret Moore (Ed.), *National Self-Determination and Secession* (New York: Oxford University, 2003); Burke A. Hendrix, *Ownership, Authority, and Self-determination* (Pennsylvania: Pennsylvania University Press, 2008); Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov, *Self-Determination and Secession in International Law* (New York: Oxford University Press, 2014); Ian Martin, *Self- Determination in East Timor: The United Nations, The Ballot, and International Intervention*, (Boulder: Lynne Rienner Publishers, 2001); Milena Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers* (New York: Routledge, 2013), James Summers (Ed.), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self- Determination and Minority Rights* (Leiden: Martinus Nijhoff Publishers, 2011); Allen Buchanan, *Justice, Legitimacy, and Self-determination Moral Foundations for International Law* (New York: Oxford University Press, 2007); Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2004).

self-determination, specifically in the form of secession, once again became controversial.

Cases such as Ossetia, the Crimea, Kosovo, Abkhazia, and other territories seeking independence became major international political issues.[23] These cases complicated the definition of self-determination, particularly after the Kosovo Assembly unilaterally declared the territory's secession in 2008. This declaration ignited a new debate about the Caucasus and Balkans as the right to self-determination offered a legal basis for outside countries to support NSAGs in these two regions. The legality argument thus stems from questions of legal change of territorial borders in international relations, as well as humanitarian concerns.

The debate between these two positions relates raise the question of the inability of international law to provide clarity on the legality or not of states arming NSGs in other states. This question is ultimately related to the structure of modern legal doctrine, which is assumed to be somehow objective, coherent, and value-free.

First, modern legal doctrine describes itself as possessing 'objectivity' - 'normativity' and 'concreteness' – characteristics distinct from 'international ethics' and 'political musings'. Based on the main assumptions of normativity and concreteness, international legal doctrine asserts that the objective and logical problem-solving mechanisms of international law enable it to restrict, halt, or resolve the problems caused by arms transfers.

However, normativity and concreteness inevitably cancel each other out, since a subjective element – interpretation – is injected into decision making. Because interpretation plays a leading role, particularly in hard cases, there

[23] Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice," pp.245-249.

is no way to avoid political musings and ethical concerns during decision making. The distribution of power among states certainly influences judges while resolving normative problems, thereby revealing their partiality and dependency. The intrusion of politics, and thus power, is unavoidable.

This legal tradition of separation between legal principles and political principles is a rather novel practice. During the medieval ages, order was easy to maintain because the conflicting interests of individuals and social order were reconciled by the law of nature or God's law, which was found rather than created by individuals by faith or reason.[24] In earlier centuries, particularly from the 16th to 18th century, 'natural justice' was emphasized as a meta-principle, constraining individual state will, consent, and behavior. This permitted its use as a mediating factor around the new basis of the interstate international political system, state consent. This tendency represented an epistemological break from scholastic thought, when the "demand for intellectual autonomy" appeared as an extension of the "demand for political liberty". Freeing individuals from constraining meta-principles somehow resolved a dilemma. That is, it reconciled "opposing demands for individual freedom" and "social order".[25] According to the liberal vision, order among states was sustained because "political order is normatively constraining because it is based on the concrete wills and interests of individuals".[26]

After the 19th century, this liberal vision of inter-state relations totally discarded the meta-principle constraining individual state will, as 'natural

[24] Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p.76.

[25] Ibid., p.71.

[26] Ibid., p.75.

justice' was reconceptualised as an epiphenomenon of state consent, i.e. state sovereignty. This eliminated the mediatory principle between individual states and the order of states while 'law' became a science, distinct from "theology, philosophy and natural law".[27] The paradox, according to Polat, is that one of the two principles accompanying the inauguration of states system from the 17th century onwards, namely justice, was eliminated, yet the system of states still survives.[28]

In sum, there are certain implications for the intercourse of states in international relations from reconceptualising 'natural justice', which once served as a mediatory principle between individual state consent and order, as a mere epiphenomenon of sovereignty. This transformation created at least two basic causes of contradiction in modern international law.

1.3. Absence of a Hierarchy of Norms

As previously highlighted, natural justice, which once mediated between individual state consent and the international order, was reconceptualised in the mid-19th century as a mere epiphenomenon of sovereignty. Instead, state consent, or sovereignty, became the sole regulatory principle governing the international order, which created contradictions in world politics. The dominance of legal positivism, which eliminated the principle of 'natural justice', which had constrained individual state consent, resulted in the loss of the hierarchy of norms. Without this, the normative problem-solving capacity of international law took a major blow.

[27] Ibid., p.122.

[28] Necati Polat, *International Relations Meaning and Mimesis* (London: Routledge, 2012), p.103.

Inevitably, as Koskenniemi points out, international law lacks a “coherent”, “objective”, and “convincing” problem-solving nature, which paves the way to arbitrary selection of rules of justification.[29] In other words, international law is useless – yet also useful – for justifying legal solutions since any solution “can be made to seem equally acceptable”.[30] There is no clear non-political way to resolve conflict between two norms, in this case between the non-intervention against humanitarianism and self-determination.

1.4. Absence of a Centralized Coercion Mechanism: No ‘Monopoly over the Use of Force’

Following the disappearance of natural justice as a constraining meta-principle over state sovereignty, the use of force came to be regarded as the right of the sovereign. Mainstream legal doctrine, as envisaged in the UN Charter, stipulates that use of force violates international law, which is also known as the pre-emptory norm of international law or *jus cogens*. However, the international community has failed to establish an international monopoly over violence. Although the UNSC is supposedly the sole regulatory and constitutive UN organ claiming monopoly over use of force, the veto system in its decision-making structure has paralyzed the power of its role to regulate use of force worldwide. When clashing interests are at stake, the international legal system frequently stays silent or leans towards the powerful states. Thus, attempts to resolve international legal disputes face the contradictory nature of international law, which prioritizes state consent and national interest in the event of inequality between actors.

[29] Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p.67.

[30] Ibid., p.69.

Another side effect of the absence of centralized control of violence is the emergence of NSAGs. Among others, such groups include terrorist organizations, warlord armies, private military companies, and rebel groups. These groups can arise because the international system lacks an international monopoly on violence. The inevitable consequence of this is that state interventions and use of force are embedded in the system as a way to make up for that lack.

Given the absence of a hierarchy of norms and central enforcement mechanisms in the international arena, it is not an exaggeration to say that normative conflicts and clashing legal arguments among the states or subjects of international law can only be resolved by applying "the arsenal of power politics, not the instruments of law".[31]

Considering the above empirical reality, in this thesis I investigate the following questions:

i. Why do some commentators claim that the issue of arming NSAs is extremely divisive?[32]

ii. Why do states use both ascending and descending arguments to justify their actions?

iii. Why international law cannot provide adequate answers to the basic question of whether it is legal to arm NSGs in other states?

[31] Hans Köchler, "Normative Contradictions in International Law: Implications for Legal Philosophy," *Wisdom* 2, no.7 (2016): pp.78-94, pp.79-80.

[32] Andrew Clapham, "Weapons and Armed Non-State Actors," in *Weapons under International Human Rights Law*, ed. Stuart Casey-Maslen, (New York: Cambridge University Press, 2004), pp.163-196, p.163.

The main argument of this thesis is that, thanks to the inherently contradictory nature of international law, there is no simple solution to normative problems under international law. To demonstrate this, I will present the tensions between the possible legal arguments addressed by the respondent sides. In this way, I will show that the applicable rules are mutually exclusive which leads to the primacy of politics.

1.5. The Contribution of the Thesis:

In this thesis I contribute to the literature on NSAGs in several ways. Although there is a growing body of literature that recognizes the importance of states arming NSGs in other states, there is a lack of systematic research on the legal aspects. Thus, the most important contribution of this thesis is to provide a systematic and compact study of the subject by integrating information from different branches of international law to build its argument regarding the issue.

Secondly, this thesis pays great attention to the law of state responsibility while also giving some weight to contemporary treaty provisions. By investigating the link between states and NSGs through the lens of law of state responsibility it highlights an untouched area regarding states arming NSGs in other states.

Finally, the methodology used exposes the myths in mainstream legal doctrine. Specifically, it critiques the main unquestioned assumptions of this doctrine by adopting the Critical Legal approach introduced by Koskenniemi.

1.6. Thesis Structure:

Because international law cannot provide determinacy or consistency regarding normative problems, ‘power politics’ is inevitably the main

determiner. [33] While mainstream legal doctrine seeks to show the illegality of arming NSGs in other states, I try to justify the opposite. To do so, I will first examine mainstream legal arguments before presenting counter-arguments and facts that challenge them. The rest of the thesis follows the structure described below, with each subsequent chapter presenting the discussion of a specific approach towards the issue at stake.

The second chapter explores the structure of international law and the definitions and various statuses of NSAGs, laying the theoretical foundation of the thesis. It presents a survey of the history of international legal thought.

In the second chapter, I begin from discussing the accepted view that the international legal order and the international states system are constructed on the principles of sovereignty and formal equality before the law. However, it was not until the mid-19th century that sovereignty alone became the basic constitutive element of international law. Prior to that period, international justice, a transcendent norm, was just as emphasized as sovereignty. Thus, legal jurisprudence was transformed by the maturation of international legal discourse. By omitting 'justice,' one of the two constitutive elements of legal thought, from legal jurisprudence, international legal thought became locked into paradoxes that should have destroyed the system. Nevertheless, international law somehow survives thanks to its indeterminate structure.

In the second part of the chapter, I introduce the definitions, rights, and responsibilities of NSAs, specifically NSAGs. Here, I come to the conclusion that a universally adopted definition of NSAGs is not valid. However, one is adopted here for the sake of clarity as a heuristic tool and only as such.

[33] For a comprehensive work relating to 'Power Politics in IR'; see John A. Vasquez, *The Power of Power Politics From Classical Realism to Neotraditionalism* (Cambridge University Press: Cambridge, 2004).

The third chapter discusses whether arming NSAGs violates the principles of non-intervention and non-use of force. The argument focuses on the principles of non-intervention and non-use of force as a reflection of the structure of the modern state system. Modern states are characterized by their sovereignty, which is the source of their legitimacy as the final authority in a given territory. The primary foundations of statehood occupy a privileged place in the UN Charter, which praises territorial integrity, political independence, and state sovereignty. It is also echoed in various UN documents and court decisions.

Various UNGA resolutions and ICJ decisions reaffirm that states must respect each other's sovereignty and equality. Consequently, organizing and assisting armed groups in another state is frequently deemed a violation of international law. Through various decisions, the ICJ has confirmed that arming NSGs in another country may be deemed a violation of sovereignty, non-intervention, and non-use of force. In other words, sending armed bands on behalf of an external state, providing weapons to NSAGs or funding them may constitute a violation of non-intervention. Nevertheless, the chapter demonstrates that this formal equality of states with a great emphasis on non-intervention and non-use of force is illusory.

The chapter then contains my examination of the arming of NSAGs in another state in the context of self-determination and humanitarian intervention, and explore the concept of 'self-determination'. Self-determination is both a legal and political right of people to freely determine their political status and freely pursue their economic, social, and cultural development, as stipulated by various UN documents. This part of the chapter discusses whether secession movements can be labelled as an extension of self-determination movements. This is critical because, particularly since the Cold War ended, national/ethnic and religious minorities have been given the right to self-determination, thereby altering

the traditional definition of the right. International law, however, does not universally grant secessionist movements legal shelter, although there is a tendency towards a change in context. After considering the inherent paradoxes that self-determination movements create, I conclude that the international state system neither affirms nor rejects secessionist interpretations of self-determination. Although mainstream doctrine seems to defend territorial integrity, the cases of de-facto secession in South Ossetia, Abkhazia, and Kosovo demonstrate the pragmatic and power-prone nature of current international law.

Humanitarian intervention has again become pivotal in international politics in the post-Cold War era. The concept of intervention for humanitarian purposes dates back to Franciscus de Victoria (1480-1546), who was the sole defender of Natural Law, enabling legitimate intervention in the 'new world'. De Victoria argued that both Europeans and Native Americans had a "right to preach" and a "right to trade" originating from natural law, distilled from nature via reason. Therefore, any violation of these rights would result in a 'just' war in his formulation.[34]

Although this extension of the 'just war' tradition for humanitarian intervention is still experienced today, it is doubtful whether there is a legal infrastructure enabling humanitarian intervention without UNSC authorization. In the third part of the third chapter I therefore explore questions regarding humanitarian intervention (and its evolution, the doctrine of responsibility to protect) as it relates to arming NSGs. While no humanitarian intervention rule under international law has yet matured, many states have applied such discourse to legitimize their unilateral coercive actions, both during and after the Cold War. Resorting to such a

[34] For detailed information; see Francisco de Vitoria, *Dersler*, trans. Cansu Muratoğlu (Ankara: Dost Kitabevi, 2017).

legally unstructured right has mostly depended on political choices, i.e. the arbitrariness of preferences conditioned by military power.

The fourth chapter deals with how and to what extent warfare has undergone deep and critical alterations, and how and to what extent these alterations have contributed to the rise of NSAGs. War, as an extension of diplomacy, has long been carried out by states against states. However, from technological developments to components, every single feature of classical warfare has changed.[35] To date, this pervasive modification has resulted in the proliferation of armed groups that often operate outside the international or national law. Additionally, the main sources of threat have recently shifted away from states to NSAs, leaving international law without coherent or comprehensive mechanisms to regulate such conflicts. Many factors have contributed to the escalation and proliferation of NSAGs in various parts of the world. One is 'state collapse' due to external intervention, specifically sometimes the ongoing USA led "War on Terror". To elaborate on this issue, I discuss the cases of Iraq, Syria, and Libya in detail in the chapter.

I then use the rest of the fourth chapter to explore global arms trade mechanisms, including a detailed survey of Small Arms and Light Weapons (SALWs). I present definitions of SALWs, their areas of use, and presents reasons for focusing on them and the global mechanisms of arms transfers as a locus of the question of arming NSGs. Here, I claim that the widespread use of such weapons will continue in the future because they can easily be used by both states and NSAs. SALWs are traded in three kinds of market: White Market, Grey Market, and Black Market, with most being transferred via the latter through arms brokers.

[35] See, Mary Kaldor, *New and Old Wars* (Cambridge: Polity Press, 2012).

In chapter five I discuss the law of state responsibility to determine whether a sponsor state is responsible for misconduct and violations of international law perpetrated by the armed groups that they sponsor. To set the context for this inquiry, the chapter begins by touching on the historical background of the codification process of the Law of State Responsibility, traced back to the foundation of the International Law Commission in 1948. The chapter examines the possibility of holding a state liable for the misconduct of NSAGs that are not incorporated into that state's domestic legal structure. In other words, it explores whether a factual link can be established between perpetrators and states. If this is possible, then the international responsibility of the sponsor state can be constructed. Secondly, states are obliged to take all necessary measures to prevent atrocities from occurring and sustain an expected result. If they fail to do so, then they can be held responsible. These obligations are called the "obligations of diligent conduct" and "obligations of the result", respectively. The law of state responsibility, which emphasizes 'complicity' and 'diligent conduct', is backed by various treaty provisions, particularly the Arms Trade Treaty, and several regional initiatives.

To summarize, in this thesis I seek to evaluate the inherent contradictions in international legal doctrine where various grey areas in the matter effectively prevent international law from providing one simple solution that might be applicable to all cases. I argue that, because international law is so flexible in resolving normative problems, this doctrine means that states eventually resort to the 'arsenal of powers' to solve international problems. Methodologically, in every chapter, I explain the relevant aspect of the mainstream legal doctrine before presenting state practices to show how and to what extent international law falls short of implementing its own rules.

CHAPTER 2

THEORETICAL FRAMEWORK

2.1 International Law and the State System

The Peace of Westphalia, which marked the end of Europe's Thirty Years' War, introduced a new era of law in international relations characterized by the secularization of law via the notion of *natural law*. Two distinct branches of law are relevant here: the *law of nations* (voluntary law) and the *law of nature* (unchanging and universal moral principles). Under the former, states with sovereign powers are only bound by the laws to which they consent. As Polat notes, 'sovereignty' here occupies a privileged position "as the sole basis of the order of states,"[36] as these states gradually became distinct and autonomous entities, regarded as having exclusive rights within their borders.

The sharp lines between domestic and external affairs delineated by the law of nations necessitated distinct and value-free rules for governing inter-state relations, free from the ethical concerns of natural law.[37] However, it was not until the mid-19th century that legal positivism fully superseded this doctrine.[38] Until that time, it was apparent that natural law (justice) and state consent (voluntary law) co-existed, with natural justice emphasized as much

[36] Polat, *International Relations Meaning and Mimesis*, p.103.

[37] Stephen C Neff, "A Short History of International Law," in *International Law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), pp.31-59, p.38.

[38] Polat, *International Relations Meaning and Mimesis*, p.103.

as voluntary law, serving as a mediatory between sovereign states.[39] Since the 19th century with the ascendency of legal positivism, state sovereignty has become the only principle governing order among states. This principle means that political independence, territorial integrity, exclusive jurisdiction within borders, and non-intervention currently dominate international law doctrine.

However, the principle of sovereignty inherently created a stalemate by de-emphasizing metaphysical principles. For example, while territorial integrity clashes with self-determination movements, non-intervention clashes with humanitarian necessity. This makes it difficult to determine the best legal solution, while also allowing any legal outcome to be justified.

Consequently, the mainstream doctrine of international law struggles to provide a satisfactory answer to the question of whether states arming NSGs in other states violate international law. Two camps have emerged. Some advocate that states arming NSGs in other states violate international law. Others, however, try to develop legal arguments that justify this activity. Under current international law, both sides can find supportive interpretations of legal principles.[40]

[39] Ibid., p.103.

[40] See André Nollkaemper, "A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition," *EJIL Talks*, June 17, 2013, accessed September 5, 2018 https://www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/; Marko Milanovic, "The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic," *EJIL Talks*, March 11, 2013, accessed September 5, 2018, https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/; Stuart Casey-Maslen, "The Arms Trade Treaty: a Major Achievement", *Oxford University Press Blog*, April 8, 2013, accessed September 5, 2018, https://blog.oup.com/2013/04/un-arms-trade-treaty-pil/; Jack Goldsmith, "The Remarkably Open Syrian Covert Action," *Lawfare Blog*, July 23, 2013, accessed September 5, 2018, https://www.lawfareblog.com/remarkably-open-syrian-covert-action.

Each group – intentionally or not – utilizes both voluntarist and metaphysical arguments, which Koskenniemi dubs *ascending and descending justifications*, respectively.[41] Those who claim that states arming NSGs in other states violate international law mostly draw on the sovereign liberty of a state, the basis of the ascending argument; i.e., as declared in the UN Charter, "The Organization is based on the principle of the sovereign equality of all its Members."[42] This raises the question of what exactly is sovereign equality.

The state is an entity with rights and responsibilities under international law. In addition to this fundamental presupposition, a state should have the following specifications: "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."[43] If all states possess the same qualifications and recognize others as equal before the law, they have a duty not to interfere with others' domestic or external affairs.[44] For example, in its judgment, *Military and Paramilitary Activities in and around Nicaragua*, the International Court of Justice determined that;

> [T]he United States, by training, arming, equipping, financing, and supplying the contra forces or otherwise encouraging, supporting, and aiding military and paramilitary activities in and against Nicaragua, had acted in breach of its obligation under

[41] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (New York: Cambridge University Press, 2005).

[42] Article 2/1. See : UN Charter 1945, 1 UNTS xvi.

[43] See Article 1 of Montevideo Convention 1933, 165 LNTS 19 15.

[44] See Article 8 of the Montevideo Convention: "No State has the Right to Intervene in the Internal or External Affairs of Another," ibid.

> customary international law not to intervene in the affairs of another State.[45]

Rulings like this clarify the starting point for evaluating the legal side of states arming NSGs in other states: that is, the definition of the state itself and the assumption of sovereign and equal states.

The position against states arming NSGs in other states can also offer a *descending justification*, building on the overriding principle of *human rights*. Although NSAs are considered to be bound by international humanitarian law and human rights law -i.e. where a UN Security Council Resolution, taken under Chapter VII of the UN Charter is valid- in reality, this cannot go beyond mere expectation and optimism. For instance, Middle Eastern politics faced a dramatic change after the Al-Qaida attacks on the United States in 2001. Although international law bans states from threatening another state or using force in their international relations, as formalized in Article 2(4) of the United Nations Charter, the coalition powers waged a unilateral war against terrorism and terrorist organizations, attacking Iraq and Afghanistan as their supposed bases of action.[46] The subsequent US-led invasions caused catastrophes in the region, providing new opportunities for terrorist organizations to grow.

Respectively and interestingly, while the people's demands for freedom (democracy) during the 'Arab Spring' from late 2010 brought down autocratic governments, this also enabled terrorist organizations to expand

[45] J.P. Grant and J.C. Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (New York: Oxford University Press, 2009), p.381.

[46] The term 'unilateral war', or 'unilateral use of force,' refers to the fact that states may resort to war without UN Security Council authorization, identifying such action as legitimate and necessary; as seen in the US use of force experiences after the Cold War period. See Marcelo G. Kohen, "ABD'nin Soğuk Savaşın bitişinden sonar kuvvet kullanması ve bunun uluslararası hukuka etkisi," in *ABD Hegemonyası ve Uluslararası Hukukun Temelleri*, ed.Michael Byers and Georg Nolte (Ankara: Phonex, 2007), pp.221-258.

in the chaotic domestic conditions created by the collapse of central governments. These proliferating NSGs have become powerful actors, particularly in Middle Eastern politics. Because their actions breach humanitarian law and human rights, arming such groups could be banned on moral grounds.

Conversely, in the face of this stalemate in the ongoing debate, those who argue that states arming NSGs in other states may be lawful under international law also utilize both ascending and descending arguments to justify their claims. An exemplary case is the argument of Akande.[47] Akande acknowledges that states arming or aiding armed groups fighting against a central government in another state breaches both prohibitions against the use of force and non-intervention, as determined by the ICJ in its judgment the Nicaragua Case, and by UN General Assembly Resolution 2625 (1970). Although the general tendency that identifies states arming NSGs in other states as an illegal activity is acknowledged in his arguments, he proposes possible legal grounds to justify arms transfers to rebels in Syria.

He first considers whether *humanitarian intervention* may justify states arming NSGs in other states, particularly in Syria.[48] Although most countries reject this notion, for Akande, there is a "little *opinio juris,*" a legal conviction in the society of states, that humanitarian concerns can sometimes supersede the principle of non-interference. Yet, he is also aware of the fact

[47] Dapo Akande, "Would It Be Lawful For European (or other) States to Provide Arms to the Syrian Opposition?" *EJIL: Talk,* January 17, 2013, accessed December 16, 2016, https://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/.

[48] Ibid.

that advocating this principle has little traction because it is not codified under international law.[49]

Secondly, he argues that an extended version of *the right of self-determination* would enable foreign states to arm opposition groups. However, the right of self-determination should apply to people within a state fighting to overthrow colonial and racist regimes. He therefore urges foreign countries to recognize insurgent movements as *self-determination movements*. There are at least two conflicting issues here. Firstly, some countries may refuse to grant rebels such recognition, for example, Russia, Iran, and China in the Syrian case. Second, notions of self-determination and sovereignty may conflict. For instance, while Article 1/2 of the UN Charter respects people's right to self-determination, it also supports sovereignty in international relations; thus, the two provisions contradict each other.

Thirdly, Akande proposes that European countries could upgrade the Syrian rebels from opposition to government status, which would make it lawful to assist them. The fourth option is to argue that if one side in a civil war is getting armed support, then the other side that is recognized as a belligerent by state parties also has the right to receive such support.[50]

So far, in this thesis I have discussed both *ascending* and *descending* justifications under international law concerning the legality of states arming NSGs active in other states. These arguments do not exhaust the possible solutions to the normative problem. Before legally evaluating the issue, it will be helpful to touch on the nature and structure of international law.

[49] Ibid.

[50] Ibid.

2.1.1 The Structure of International Law

The diversity of opinions on the legality of states arming NSGs active in other states reflects structural flaw of legal doctrine. This is, as Koskenniemi argues, the *indeterminacy* of international law. Taking its source from the dichotomy between apology and *utopia*, the law rests on the duality of incompatible concepts, such as positivism/naturalism, consent/justice, autonomy/community, and process/rule.[51] Although it is assumed that the dualities in such concepts can exist simultaneously, they actually contradict each other.

Lawyers working in international law claim that law is and should be objective, free from speculative utopian thinking, and has a normative constraining capability regardless of its source. Koskenniemi claims that law requires two constitutive features to be objective, namely concreteness and normativity.[52] Law is concrete because it is not isolated from the social context of human life; in other words, law is created by human beings. However, law should also have normativity so that it can constrain the behavior of its subjects via its own normative ontology. Being normative and concrete simultaneously is impossible because the more normative the law becomes, the more utopian it becomes. Conversely, the more concrete law becomes, which is becoming more reflective of the actual empirical behavior of states, the higher the risk that it becomes nothing but an apology for state interests .[53] As Koskenniemi points out, this is why binary oppositions recur in international law.

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[51] Apology and utopia two terms describing 'closeness to, or its distance from, state practice'. See; Martti Koskenniemi, *The Politics of International Law* (Portland: Hart Publishing, 2011), p.40.

[52] Ibid., p.38.

[53] Ibid.

The argument of Koskenniemi is valuable because it explains the nature of the legal structure. He notes that because law is assumed to be objective, it can be applied to every normative problem under international law. However, a subjective element, *interpretation*, is also needed, which obviates claims about law's objectivity. Thus, as Koskenniemi highlights, law is neither determined nor objective, so legal wisdom cannot avoid being accused of being either utopian or apologist.

In the face of this indeterminacy, there are two methods of debating about world order and state obligations. According to Koskenniemi, the liberal international law tradition envisages that states are equal and independent entities seeking to enhance their own interests. This necessarily entails that it is in the general interest of state to maintain order. Thus, the argument is both descending and ascending, as stated by Koskenniemi.[54] World order and state obligations are justified by either referencing a material principle that dictates where states should stop, or by referencing the actual behavior, interests, or will of states, on which the normative order is built. This enables world order and state obligations to be justified by ascending arguments that prioritize states as the foundation of the normative order. Meanwhile, world order and state obligations can also be justified by descending arguments that give material principles precedence over states.

The reality of the indeterminacy of international law raises the question of how such a self-contradictory concept can produce any result on state or human behavior. To understand this, we need to direct our attention to evaluating the nature of law.

[54] Koskenniemi, *From Apology to Utopia*, pp.89-94.

2.1.2. The Rule of Law

The Rule of Law is a notion inherent in the centuries-old Liberal tradition. It is generally understood that by ensuring at least some components of *order*, societies guarantee individual liberty and rights.[55] For instance, in 1984, "the Heads of State or Government of seven major industrial democracies with the President of the Commission of the European Communities"[56] (G7), namely the United Kingdom, France, Japan, Canada, the USA, Italy, and West Germany, stated that the rule of law is something "which respects and protects without fear or favor the rights and liberties of every citizen, and provides the setting in which the human spirit can develop in freedom and diversity."[57] More specifically, it assumes three basic purposes. First, "the Rule of Law should protect against anarchy and the Hobbesian war of all against all."[58] Secondly, the law should be evident; that is, the legal consequences of breaching the law should be predictable.[59] Lastly, the rule of law should constrain the arbitrariness of officials.[60]

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[55] For an illustrative book, see B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004), pp.1-6.

[56] "Declaration on the Democratic Values," *10th Summit of G7*, June 8, 1984, accessed November 23, 2016, https://www.mofa.go.jp/policy/economy/summit/2000/past_summit/10/e10_b.html; See also Tamanaha, *On the Rule of Law: History, Politics, Theory*, p. 1.

[57] Ibid.

[58] Richard H. Fallon Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97, no. 1, (1997): pp.1-56, p. 7. According to Hobbes, the state of nature is "a condition of war of everyone against everyone." T. Hobbes, *Leviathan*, ed. J.C.A. Gaskin (New York: Oxford University Press, 1998), p.86.

[59] Fallon Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," pp.7-8.

[60] Ibid.

The rhetoric of the rule of law and its liberal democratic values rest on a few basic pillars that characterize modern law. We can better understand this relationship by conducting a careful examination of how the UN describes the concept of rule of law. According to the UN, "the rule of law applies to all States equally, and international organizations"[61] – including the UN. That is, the rule of law is something beyond the will and interests of states, and which constrains the behavior of its subjects. As the UN declares regarding all entities, including states, "[they] are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law."[62] Thus, the law is unambiguously neutral, beyond the interest and wills of the actors whose behavior it regulates in order to protect their freedom. Law itself therefore, has an existence independent of its creators and has a normative character.

Given that law has a normative problem-solving ability regardless of its will, behavior, or interest of its subjects; it is assumed that it has an independent binding function that is totally different from politics.[63] This raises the

[61] See Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, November 30, 2012, ¶ 1.

[62] Ibid.

[63] See for instance Onuma Yasuaki, "International Law in and with International Politics: The Functions of International Law in International Society," *European Journal of International Law* 14, no. 1, (2003): pp.105-139, pp.113-116. Moreover, as Hedley Bull points out, international law, which functions to sustain order, has to adapt to rapid change in the international realm in order to cope with new threats to this international order. See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Palgrave Macmillan, 2012), p.147. On the other hand, the link between colonialism and international law has a central place in Anghie's inquiry, because international law has a civilizing mission covering the fundamental function that "has justified colonialism as a means of deeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe." See A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (New York: Cambridge University Press, 2004), p.3. According to Aust, "The raison d'être of international law is that relations between States should be governed by common principles and rules." See: Anthony Aust, *Handbook of International Law* (New York: Cambridge University Press, 2010), p.4.

question of the source of that binding nature, which leads to the question of the motives for state adherence to these normative constraints.[64]

To answer these questions, we need to explore in detail the philosophy of international law. In the next section, I first trace the history of legal philosophy, before embarking on analysis.

2.1.3. The Obligation to Obey International Law

During the 17th century, legal positivists began to develop a new philosophy of jurisprudence, although it was not until the 20th century that legal positivism *totally* dominated legal philosophy.[65] The rise of positivist legal philosophy is to a large extend the source of unavoidable legal fallacies.

According to legal positivism, states are bound by law only because they consent to it.[66] It is evident that there is no higher authority commanding states in the international arena. Hence, under international law, states are special entities with an international personality with rights and responsibilities. Legal positivists seek to determine "what the law is fundamentally rather than what it *ought* to be."[67] This is critical because, if law is seen as a result of the behavior of its subjects, logically moral elements should be omitted. Thus it was considered that there was no moral

[64] J. Craig Barker, *International Law and International Relations: International Relations for the 21st Century* (London: Continuum, 2004), Chapter 1.

[65] Anthony Clark Arend, Robert J. Beck, Robert Vander Lugt, eds. *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1996), p.56.

[66] Ibid.

[67] Ibid.

principle – for instance, *justice* – governing the man-made rules from the mid-19th century onwards.

According to the mainstream doctrine of international law, The Peace of Westphalia represents a turning point in international legal history, as it created a new world order grounded in individual, sovereign, and equal states.[68] From that historic moment in 1648, states began to free themselves from higher authorities, such as the Church. Moreover, the legitimacy of sovereignty (*suprema potestas*) was no longer based on God, but began to become secularized, which represented an epistemological break from the Medieval Ages.[69]

In contrast to legal positivism, the doctrine of natural law assumes that law can be derived from nature via reason. Therefore, law is not artificially created but rather exists with an independent ontology, waiting to be discovered. Hugo Grotius, Vitoria, Suarez, Gentili, and so on believed that (ignoring disagreements over details) the basis of all law originates from a "principle of justice" that covers everybody living on the earth. Having "a universal and eternal validity," the principle of justice could be deduced by "pure reason;" therefore, law is something that cannot be made but something to be discovered.[70]

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[68] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), p.11.

[69] For instance, in his individual opinion relating to the Customs Regime Between Germany and Austria, Judge Anzilotti described 'independence' as "the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law." See *Customs Regime Between Germany and Austria*, the PCIJ Series, A/B/No.41, September 5, 1931, Individual Opinion of Judge Anzilotti. As seen here, *suprema potestas,* which was God itself, was replaced with international law. International law is no more than man-made rules so *suprema potestas* is nothing but *man* itself.

[70] Malanczuk, *Akehurst's Modern Introduction to International Law*, p.15.

The international system was therefore founded on two constituent elements: sovereignty and justice.[71] Order and common good could only be achieved and preserved by applying justice in a mediatory role between sovereign states and the international system. If there is one meta-principle applicable to all, whether European or not, it is that the principle of justice is neutral and objectively applicable. However, since this can only be derived via human reason, the theory becomes anthropocentric, making the supposedly objective and neutral meta-principle somehow subjective. Because an international normative problem can only be solved by applying the principle of justice, which is about ascertaining the law, and implementing it in the concrete case by a judge, natural law doctrine is in fact both subjective and anthropocentric, involving interpretation and subjective reasoning.

'Justice' offers an escape route for judges and lawyers when they cannot find a coherent and adequate solution to normative problems within existing law. In such circumstances, judges refer to 'principle of justice' which constitutes the essence of the theory of natural law, in order to fill any gaps and uncertainties in the application of law.[72] Logically, such interpretative liberty gives courts – in particular, judges– a legislative role. As a result, moral elements are not just a supplementary component of international law but a fundamental one.

Positivism – in the social sciences in general and legal philosophy in particular – arose from the desire to emulate the success of the application of the scientific method in the material sciences. The rejection of innate principles that can be deduced via reason was accepted as simply reflecting

[71] See Necati Polat, *Ahlak, Siyaset, Şiddet: Bir Kuram Olarak Uluslararası Hukuk* (İstanbul: Kızıl Elma Yayıncılık, 1999), p.95.

[72] Malanczuk, *Akehurst's Modern Introduction to International Law*, p.16.

the speculative and subjective values of natural law. According to Locke and Hume, empiricism rejects the metaphysical acceptance of supreme principles that cannot be experienced, and "the scientific method of experiment and verification of hypotheses emphasized this approach."[73] The role of individuals who create the whole system voluntarily was highlighted, so theories of social contract became very important regarding the creation of law. Since the mediating principle – justice – was omitted, the tension between general will and individual liberty needed to be dealt with. According to Rousseau, the fundamental problem, which the social contract should solve, is to

> [f]ind a form of association which will defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain as free as before.[74]

Order among individuals is grounded on their consent, while sovereign authority guarantees individual rights. Thus, the law concerns the actual behavior, will, and the consent of its creators.

The dichotomy between law and international law is apparent here in that the central term is *law* while the subsidiary term is *international law*. International law can only be deemed as law if it complies with the basic definition of law and satisfies its preferences. Natural law doctrine offers a static picture of legal thought which envisaged a general and overarching meta-principle governing international affairs between individuals or, more pertinently, states. According to the natural law tradition, man-made laws must be in conformity with the dictums of natural law, as long as they could,

[73] M. N. Shaw, *International Law* (New York: Cambridge University Press, 2008), p.25.

[74] J.J. Rousseau, *Discourse on Political Economy and the Social Contract*, trans. Christopher Betts (New York: Oxford University Press, 1994), pp.54-55.

since nature endows a perfect justice to mankind.[75] Since justice is a given, the task of people is to discover and learn those pre-existing legal principles derived from justice. As some commentators highlight, this way of thinking places limits on the ability of international law to accommodate new developments in international affairs.[76] To avoid this artificiality of law, the positivist tradition declares that law is what states do; it is positive.

Law is –in general- an artificial construct developed in order to provide social order, peace, and security, as these are by no means sustainable by sovereign power. Thus, Hobbes' *Leviathan* and Bodin's *On Sovereignty* played central roles in defining what law should be.[77] According to Hobbes, people originally lived in a state of nature in which everyone followed their individual desires. Under such conditions and given human nature as seen by Hobbes, it is impossible to trust anyone, making it unreasonable to expect people to obey natural law principles voluntarily. Instead, a supreme sovereign authority is needed to impose and enforce natural law principles. Thus, a central enforcement mechanism and supreme authority predominate in Hobbes' theory.[78] Consequently, Hobbes concludes that law is something backed by sanctions and imposed by the sovereign.

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[75] "Natural Law," in *A Dictionary of Law*, ed. Elizabeth A. Martin (New York: Oxford University Press, 2003), p.326.

[76] "Natural law proponents saw international law as fixed and derivative from reason or religious principles; this provided only narrow spaces for legal change. Positivists emphasized law as created by humans, and thereby implicitly subject to change over time, although positivists did not necessarily have a theory about how and when such change would occur." See Paul F. Diehl and Charlotte Ku, *The Dynamics of International Law* (New York: Cambridge University Press, 2010), p.13.

[77] "Bodin held that sovereignty or supreme law making power was an essential characteristic of the ordered state." See John O'Brien, *International Law* (London: Cavendish Publishing Ltd., 2001), p.7.

[78] Hobbes, *Leviathan*, p.xx.

During the 17th and the 18th centuries, legal jurisprudence and natural and positive law doctrines co-existed in combination while natural justice mediated between the international system and states. In the 19th century, however scientific thinking found its counterparts in both the social sciences and law. In the social sciences this process was stimulated by 19th-century writers like August Comte. According to the positivist tradition, any superficiality should be ignored; empirical experience offers the only valid way of making epistemological claims.

These ideas also spread to legal thinking. It was claimed that, like other fields, law can be scientifically examined and re-formulated, with 'true law' being law freed from subjective values and metaphysical explanations. As one of the pioneering legal positivists of the 19th century, John Austin claimed that law can be value-free, consistent legal system with independent principles and an independent ontology that differentiates law from other elements, particularly moral ones.[79] Consequently, natural law doctrine, which envisages principles above individuals, began to lose ground.[80]

In *The Province of Jurisprudence Determined*, which collects his various lectures, John Austin foregrounds three basic terms: command, the sovereign, and sanctions. First, for Austin, "laws properly so called are a species of *commands*".[81] That is, commands should be derived from a

[79] As Anlue points out, "[f]or the positivist, law is a discrete or autonomous system of logically consistent concepts and principles that have no relevant characteristics or functions apart from their possible validity or invalidity within the system". S.L.R. Anleu, *Law and Social Change* (London: SAGE Publications, 2009), p.6.

[80] Neff, "A Short History of International Law," pp.41-45.

[81] John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (New York: Cambridge University Press, 1995), p.117.

determinate author or rational source, which can be an individual or group of individuals. Commands alone have no meaning, however, unless backed by *sanctions*. In other words, commands should be enforced with determination. Consequently, laws properly called are commands of the sovereign backed by sanctions.[82] The logical outcome of this reasoning is that international law is not properly called law. This is because there is no higher authority that legislates and commands it since the sovereign body – sets of states – accepts no superiority over itself. Rules are mutually constituted in the international arena but not backed by sanctions; that is, the international realm lacks a central enforcement mechanism, so it can only be deemed to be positive morality when compared to domestic law. Positive refers to the factual nature of international law while morality refers to its subjectivity.

By comparing international law with national law, Austin and other international jurists argue that the lack of any central enforcement mechanism leads to clear differences between the two that render international law not law properly called.

Austin also draws a sharp distinction between legislation and adjudication: a judge's only duty is to discover the appropriate law and apply it to solve normative problems, rather than interpreting it. The ICJ also adopts this distinction, noting in its South West Africa cases that: "As is implied by the opening phrase of Article 38, Paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it."[83] It is apparent that Austin gives legal priority to the will of the sovereign, their

[82] Ibid.

[83] *South West Africa*, Second Phase, Judgment, ICJ Reports, July 18, 1966, p.6, ¶ 89.

actual behavior, or interest. Law is binding because of the sovereign's consent; there is no higher normative principle beyond the sovereign will.

The prominent representative of contemporary legal positivism, H. L. A. Hart, rejected Austin's conception of law as commands backed by sanctions, basing his argument on the central role of linguistic context. According to Hart, Austin's insistence on *sanctions* in defining law is misleading because it is unfair to equate the context of law with a gunman's order.[84] Otherwise, there would be no difference between a gunman's order and proper law. At the center of his criticism is the argument that 'being obliged' (coerced) and 'having an obligation' (duty) are two distinct concepts.[85]

For Austin, relying on Hart's interpretation, if there are rules in a society, we assume that a sovereign body also exists to impose order over its subjects, who obey habitually.[86] However, Hart also disagrees with Austin regarding the habitual concept of obedience by questioning whether habitual obedience is enough to make law persist.[87] He also argues that the idea of the absolute power of the sovereign body, which is not bound by rules, goes too far in explaining the nature of law. According to Hart, the absolute immunity of the sovereign from law and the habitual explanation of the persistence and continuity of law fail to explain the binding power of law.

[84] H.L.A. Hart, *The Concept of Law*, ed. Penelope A. Bulloch and Joseph Raz (Oxford: Clarendon Press, 1994), pp.18-19.

[85] Ibid., p.19.

[86] Ibid., pp.50-79.

[87] Ibid., p.51.

Hart also touches on the nature of international law, highlighting doubts as to whether international law can be deemed law.

Hart's first point is that, in a society of individuals, individual "physical strength" and "vulnerability" are similar, in contrast to the society of states.[88] In a society of individuals, sanctions are not only possible but also necessary because aggression between individuals is "expected hourly".[89] In contrast, violence in a society of states fundamentally differs from that between individuals.

Secondly, for Hart, the claim that the international law is a fully self-imposed system that binds states because they consent to it is an exaggeration. The logical outcome of understanding international law in this way is that a sovereign state could withdraw its consent without question, which Hart finds problematic for at least two reasons. First, this theory of voluntary obedience cannot explain why a new state would accept existing international rules. Second, a state which gains territory welcomes existing rules applicable to such areas. Thus, according to Hart, exaggerated claims of voluntary obedience to international law have been "inspired by too much abstract dogma and too little respect for the facts".[90]

Lastly, Hart argues that a developed legal system is characterized by two basic sets of rules. These are primary rules, that "human beings are required to do or abstain from certain actions,"[91] and secondary rules of

[88] Ibid., p.218.

[89] Ibid., p.219.

[90] Ibid., p.226.

[91] Ibid., p.81.

"recognition, change, and adjudication".[92] The rule of recognition resembles Kelsen's famous formulation of the *Basic Norm (Grundnorm)*. However, Hart finds that it is inappropriate to apply the rule of recognition to international law as Kelsen does. That is, *pacta sunt servanda* – the principle that "States should behave as they have customarily behaved*"*– cannot be the rule of recognition of international law. Therefore, because international law lacks a rule of recognition, it is impossible to say that international law is a system of law rather than a set of rules. The only resemblance between national law and international law is content, not form. Thus, international law is similar to national law rather than proper law.[93]

In contrast, to distinguish law from non-law, Hans Kelsen proposes a normative approach to international law through his pure theory of law. For him, pure theory "aims to free science of law from alien elements",[94] to define a system of law that is coherent, certain, uniform, and positive. Moral elements, which were once considered the source of law's validity, are omitted. Instead the validity of law, specifically its norms, is derived from higher norms. Thus, a hierarchy of norms is apparent in Kelsen's theory. However, he is also aware of the danger of infinite regress in deriving norms. He therefore proposes a hypothetical 'infinite norm' or *Grundnorm* from which other norms derive their validity and which provides a formal

[92] See Beck et.al, *International Rules: Approaches from International Law and International Relations*, p.58.

[93] See Hart, *The Concept of Law*, pp.232-37.

[94] Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (New Jersey: The Lawbook Exchange, 2005), p.1.

category to understand the law.[95] Every society's norms rest on such a basic norm, which makes other norms valid.

This basic norm's validity does not come from another higher norm (because there is no higher norm beyond the basic norm) but from its efficacy.[96] Since every norm derives its validity from a higher norm, legal systems are coherent without a *lacuna*. This creates a unified structure, a "non-contradictory field of meaning".[97] However, Kelsen has been criticized for "rigidity and ambiguity" regarding the essence and distinctiveness of "the basic norm".[98]

Kelsen's philosophy also links national law and international law regarding their affiliation with coercion and sanctions. Kelsen does not ignore the role of coercion and sanctions as they have an essential constitutive function. Traditionally, there have been two inherently coercive ways of sanctioning under international law: *reprisal* and *retorsion*. International law is thus a primitive law without a fully-evolved central enforcement mechanism. However, because there are unilateral coercive actions, the lack of a central enforcement mechanism does not fully entail the absence of law because *reprisal* and *retorsion* enable sanctions that can be imposed for illegal acts.

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[95] Raymond Wacks, *Philosophy of Law: Very Short Introduction* (New York: Oxford University Press, 2006), p.32. However, hypothetical is something unintentionally performed, rather than a choice between more than two *Grundnormen*. "The basic norm, therefore, is not the product of free invention." See Kelsen, *Pure Theory of Law*, pp.200-201.

[96] Wacks, *Philosophy of Law*, p.35.

[97] Ibid., p.36.

[98] Anleu, *Law and Social Change*, p.7.

According to Kelsen, “international law constitutes authentic ‘law’ [in] that coercion by one state against another must be deemed illegal (‘delictual’) unless that forcible action is undertaken as ‘sanction’ response to a prior illegal act (‘delict’)”.[99] The definition of ‘delict’ under international law stems from its *Grundnorm*: “In relation to customary law, this basic norm is that States should behave as they have customarily behaved; and in relation to treaty law, the related principle *pacta sunt servanda*” (agreements must be kept).[100]

2.1.4. Contemporary Approaches to International Legal Thought

As mentioned above, from the 19th century onwards, one of the two pillars of the modern state system – namely *justice* – was replaced by *sovereignty*, with equal emphasis on both sovereignty and justice as the basic constitutive notions of the system.[101] The lack of a mediatory principle – namely *natural justice* – between the international system and sovereign states, should have meant the collapse of the system under normal conditions. However, the modern state system still functions despite lacking a mediatory notion.[102] Relying on sovereign will as the sole facet of the state system creates inherent paradoxes, although it seems to have none. That is,

[99] Beck et al., *International Rules: Approaches from International Law and International Relations,* p.57.

[100] Barker, *Parry and Grant Encyclopaedic Dictionary of International Law*, p.420; Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Harvard University Press, 1949), pp.369-370.

[101] See Necati Polat, “International Law, the Inherent Instability of the International System, and International Violence,” *Oxford Journal of Legal Studies* 19, no. 1 (1999): pp.51-70, pp.51-52.

[102] Ibid.

assumptions in international law accepted as reflecting truths, actually constitute myths, i.e. social constructs treated as universal 'givens'.

It is possible here to construct an analogy between IR myths and international law. "The *myth function* in IR theory is the transformation of what is particular, cultural, and ideological (like a story told by an IR tradition) into what *appears* to be universal, natural, and purely empirical."[103] Sovereignty itself also represents the mythic function of international law as it is impossible to sustain the state system by taking only sovereignty as its basis. Moreover, there should be overriding meta-principles as opposed to the mainstream international law that jurisprudence invokes. If there is no higher authority over every single sovereign body, how can normative conflicts between them be solved? Overemphasis on the individual state will, sooner or later, lead to clashes because one state's exercise of its sovereign rights may be a violation of another's.

Critical legal studies have emerged as a field of legal study. Those who work within it strive to deconstruct the general truths of international law. In order to understand the role of critical legal studies it is important to identify what they criticize, which is the thought patterns of mainstream international law. Generally speaking, drawing on Wacks, it is accepted that law is a determinate system that can provide clear normative answers to all normative problems. To provide such determinate solutions, the law uses valid reasoning based on epistemological presumptions that are neither time- nor space-bound. Thus, the doctrine (law) offers an order in which

[103] See C. Weber, *International Relations Theory: A Critical Introduction* (New York: Routledge, 2005), pp.6-7.

individual interests do not clash, thereby allowing a harmony of interest to develop between each individual and the whole.[104]

These features of international law reflect liberal philosophical thought. According to Purvis, there are two essential insights of liberal thinking: namely individual liberty and the rule of law. For Purvis, liberalism equates individuals to sovereign states. Therefore, the international system is a sovereignty-based system in which sovereign consent takes priority. Second, every sovereign is equal before the law so, logically, the law should apply to every individual (state) equally. Regarding the former point, liberalism struggles to avoid being accused of incoherence. For Purvis, there is a strong possibility, even inevitability, that one state's liberty eliminates that of another or vice versa.[105] On the other hand, the rhetoric of rule of law envisages a neutrality of law applicable to sovereign states in the same direction, meaning "formal equality" in the context of non-discriminative procedures "with respect to rules".[106] Equal treatment requires objectivity in the sense that abstract norms apply to concrete facts. Thus, legal reasoning is somehow formed in uniformity, thereby freeing it from political and moral elements with their subjective insights.

Ultimately, liberalism entails that rules and values should be separated. In the anarchical international arena states are bound by law just because they consent to be bound. This means that they can withdraw their consent at any time. However, order and peace are hard to provide under such

[104] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (New York: Oxford University Press, 2012), p.284.

[105] Nigel Purvis, "Critical Legal Studies in Public International Law," *Harvard International Law Journal* 32, no. 1 (1991): pp.81-127, pp.93-97.

[106] Ibid., p.95.

conditions, so it is essential to take collective action against infringing states. Yet, taking collective actions may violate sovereign liberty.

Liberal doctrine offers various inherently paradoxical concepts: individual liberty, order, the value/rule distinction, objectivity, neutrality, etc. If the international state system is based on state sovereignty, then no higher principle should exist that overrides a state's will, interest, and consent. However, Article 38 of the Statute of the International Court of Justice, lists the following sources of international law: international conventions, international custom, the general principles of law with judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.[107]

The Court, whose only duty is to decide in accordance with international law, has three basic applicable sources. First, it decides by applying "international conventions, whether general or specific, establishing rules expressly recognized by the contesting states".

Logically, states are not bound by treaties to which they do not consent. However, Article 2/6 of the UN Charter proposes a contrary argument: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."[108] In this sense, states are constrained by international law whether they consent to it or not. In addition, the Charter also respects the sovereignty of states by declaring that the UN will not intervene in any state's internal affairs. However, Security Council decisions taken under Chapter VII are presented as an

[107] See Article 38 of the Statute of the International Court of Justice, *supra* text accompanying note 16.

[108] See Article 2/6 of the UN Charter, ibid.

exception, while determining a threat to international peace and security remain a matter of the Security Council's subjective evaluation. Thus, there is no principle to mediate between sovereign liberty and the Security Council's *primus inter pares* status in the international realm. Moreover, Article 53 of the Vienna Convention on the Law of Treaties envisages that a treaty is void if it conflicts with *jus cogens* norms accepted by the international community.[109]

Second, under international law, subjective values are marginalized. Law is neutral and objective; hence, it is free from speculative values. However, in its judgment, the Court pointed out that:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of Law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive* necessities.[110]

For Carty, a state, despite lacking subjectivity, is assumed to have self-consciousness that enables it to determine and let itself be bound by customary international law. The duty to determine how and when to be bound by customary international law is the legal order's burden; however, legal order does not define any state organ for such a duty. Thereby, there cannot be "a sense of obligation" of states that specifically points out state

[109] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See Article 53 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[110] *North Sea Continental Shelf,* Judgment, ICJ Reports*,* February 20, 1969, p.3, ¶ 77.

identity.[111] Thus, if states are believed to be bound by customary international law because they accept it as law, the question arises about who identifies what the custom is. It is probable that the Court is given this legislative function although this is rejected in modern doctrine.

An important point to note is that under international law, along with treaties, customary international law has law-making features.[112] However, as Byers points out, customary international law has an inherent chronological paradox because of the belief of *opinio juris*. For Byers, setting up new customary rules means that states are acting in conformity with emerging law since they believe that law has already existed and is valid.[113] Logically, *opinio juris* is the belief that an existing law is a law, so the emergence of new customary law is impossible.[114] Finally, if a state declares itself not bound by some customary law, it can pave the way for violations of international law, which contradicts the sovereign liberty of states.

The general principles of law have both overriding and moral content and conclusions. As the ICJ commented, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[115] According to Shaw, 'good faith' is one of the

[111] Anthony Carty, *Philosophy of International Law* (Edinburg: Edinburg University Press, 2007), pp.26-27.

[112] See Hans Kelsen, *General Theory of Law and State, with a New Introduction by A. Javier Trevino* (New Brunswick: Transaction Publisher, 2006), pp.365-66.

[113] M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (New York: Cambridge University Press, 1999), p.131.

[114] Ibid.

[115] *Nuclear Tests (New Zealand v. France),* Judgment, ICJ Reports, December 20, 1974, p.457, ¶ 49.

most important general principles of law.[116] Another important general principle of law is *pacta sunt servanda*, "or the idea that international agreements are binding".[117]

In short, moral elements are not merely supplementary elements of law but constitutive ones. Therefore, modern international law doctrine includes inherent contradictions and paradoxes that should be addressed. The basic implication of these normative contradictions and disagreements is that the problem solving-nature of international law very much depends on power politics. We can now begin placing NSAGs within this contradictory legal framework.

2.2. Non-State Armed Groups and International Law

This section considers NSAGs and discusses whether they possess rights and responsibilities under international law. Determining whether they have legal personality under international law will affect the legal outcomes of states arming NSGs in other states. As for their legal status, NSAGs differ by context. After clarifying their legal status, I will briefly touch on definitions of such actors. There is no comprehensive definition that can apply to all NSAs or NSAGs specifically; nevertheless, I will propose a working definition for practical reasons.

2.2.1. Subjects of International Law

Any entity, in principle, can be labelled an actor on the international stage if it influences international politics. States, traditionally, have been regarded as the most prominent actors in international politics, given their capability of

[116] Shaw, *International Law*, p.103.

[117] Ibid.

creating the system itself. According to Rosenau, even individuals can greatly impact the course of events in international politics. Thus, a person or entity is deemed to be an actor only when their actions have macro or micro consequences and play an identifiable role in international relations. For example, Rosenau lists several newcomers that have emerged along with globalization, whose micro roles have had macro consequences in international politics to show the expanding nature of actors in international politics, such as combatants, innocent victims, urbanites, leftists, and aid workers. [118]

In any legal system, certain entities are granted legal personalities and assumed to have "rights and duties enforceable by law".[119] Having been granted such status, these actors gain an identifiable role in the complex web of international law. For Shaw, the status of legal personality has a pivotal function; without such a title, neither individuals nor corporations can bring a claim to be recognized and governed by law.[120] Therefore, being an actor in international politics differs in some respects from being a subject of international law. While any entity can be an actor in international politics, only a few– in abstract terms – are granted legal personality. States, international organizations, and individuals are all both international political actors and subjects of international law.

Traditionally, states are the main actors. Scholars have studied and will likely continue to study the intercourse of states with each other for the foreseeable future. While states can be differentiated from each other in

[118] James Rosenau, *The Study of World Politics* (New York: Routledge, 2006), p.16.

[119] Shaw, *International Law*, p.195.

[120] Ibid.

some points, they are considered to have an unchanging nature inasmuch as they are states. Although state formation has evolved since its introduction in The Peace of Westphalia,[121] the definition of a state is mostly accompanied by the terms 'sovereignty' and 'territoriality.' According to Biersteker, the concepts of 'state', 'sovereignty', and 'territory' are the principal concepts that IR studies stand on.[122] This assumption also applies to international law. As Wallace notes, states have the capacity to enter into relationships with other states, and are territorial entities with a central government and permanent population.[123]

This understanding of what constitutes a state has its roots in the Montevideo Convention relating to the duties and obligations of states. According to Article 1:

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.[124]

[121] Scholars consider The Peace of Westphalia as the origin of modern state. Since this peace was first established, the definition of the modern state has been clearly constructed and fixed. However, according to Skocpol, forms of states are deeply shaped by social revolutions. In other words, states gain their characteristics via social revolutions. Following this logic, each state has its unique way of forming its structure. See Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (New York: Cambridge University 2008), p.3. Before the Peace of Westphalia, we can trace the roots of modern states, as well. See Erdem Denk, "Uluslararası İlişkilerin Hukuku: Vestfalyan Sistemden Küreselleşmeye," in *Küresel Siyasete Giriş: Uluslararası İlişkilerde Kavramlar, Teoriler, Süreçler*, ed. Evren Balta (İstanbul: İletişim Yayınları, 2014), pp.51-74, pp.51-54.

[122] Thomas J. Biersteker, "State, Sovereignty and Territory," in *Handbook of International Relations*, ed. Thomas Risse and Beth A. Simmons Walter Carlsnaes (London: Sage Publishing, 2013), pp.245-273, p.245.

[123] Rebecca M.M. Wallace, *International Law* (London: Sweet and Maxwell, 2002), p.58.

[124] *Supra* text accompanying note 43.

Yet there is a further and essential element: all of these components are meaningless unless a state can claim a monopoly over physical violence within its territory. This so-called Weberian concept of the modern state[125] is essential because NSAs, particularly those who use violence to achieve their aims, are largely defined with reference to this concept. To sum up, states enjoy being both actors of international politics and subjects of international law. They are actors because they have influential effects in the international arena, while they have personality under international law because they can bring claims under it.

The second group that has personality under international law are International Organizations (IOs), which have been essential contributors to the development of both cooperation between states and international law itself. The first IOs were created in the 19th century, mostly to provide technical support, such as the Rhine (Commission), the International Telegraphic Union (1865), and the Universal Postal Union (1874).[126] The League of Nations was the first unambiguously universal organization created to deal with political or other issues between states. It was also the first IO offering membership to any state,[127] before its replacement by the United Nations.

In 1949, the International Court of Justice was asked to clarify whether the UN – as an international organization – has the capacity to bring an

[125] According to Weber, "a compulsory political association with continuous organization … will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the monopoly of the use of physical force in the enforcement of its order". See Max Weber, *The Theory of Social and Economic Organization* (New York: The Falcon's Wing Press, 1947), p.154.

[126] Dapo Akande, "International Organizations," in *International Law*, ed. Malcolm Evans (New York: Oxford University Press, 2003), pp.269-297, p.70.

[127] Ibid., p.270.

international claim against *de jure* or *de facto* states to obtain reparations if its employees are injured fulfilling their duties. First, the Court determined that 'states' are the subjects of international law with full capacity to bring an international claim against another state under international law.[128] The court than determined that such rights and obligations also extend to IOs like the.[129] In addition, the Court decided that the definition and requirements of international personality depend on the necessities of the international community. That is, subjects of law can vary in nature; they do not need to be equivalent. This interpretation thus enables individuals to gain the status of personality under international law.

There has been a gradual development that individuals may bring an international claim against a state under international law. Most specifically, in the area of human rights, individuals have both rights and obligations. For instance, according to Article 34 of the European Convention on Human Rights; individuals, NGOs or groups of indiviuals can submit a petition to the European Court of Human Rights if they claim to be the victim of a violation set forth in the convention and its protocols.[130] Moreover, under International Human Rights Law, individuals are obliged to obey certain regulations which prohibit certain acts. For instance, nobody is allowed to commit crimes against humanity including the crime of genocide. In its final judgment, the ICTY sentenced Ratko Mladić to life imprisonment for a series of crimes,

[128] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports, April 11, 1949*,* p.174, p.177.

[129] Ibid., p.179.

[130] Article 34 of the European Convention on Human Rights. See ECHR, November 4, 1950, 213 U.N.T.S. 221; E.T.S. No 5; as amended by Protocols Nos. 11 (E.T.S. No. 155) on November 1, 1998 and 14 (C.E.T.S. No. 194) of May 13, 2004, supplemented by Protocols Nos. 1 (E.T.S. No. 9), 4 (E.T.S. No. 46), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177) and 13 (C.E.T.S. No. 187).

including persecution, extermination, murder, and deportation.[131] This ruling demonstrates that individuals are obliged to obey international law and must refrain from violating international norms.

Having determined the important differences between being an actor of international relations and being a subject of international law, it is now time to address the question of whether NSAGs have legal personalities under international law.

2.2.2. Non-state Armed Groups

As mentioned above, states are the most important actors in international relations, which is why scholars typically start their academic inquiries by examining them. In reality, however, the international stage is filled with other actors, large and small.[132] During the Cold War, the main threats to international peace and security was perceived to be posed by states. However, after the 9/11 terrorist attacks, non-state and faceless threats gained international prominence.

These new threats, and the countermeasures against them, materialized in the "Bush Doctrine".[133] The pillars of this doctrine relied on the idea that the fight against international terrorism should be the main goal of all countries. According to the Bush administration, the world is divided into two sides: the liberal democratic order and its associated states versus what it designated as rogue or fragile states that provide fertile ground or even protection for

[131] *Prosecutor v. Ratko Mladić*, Judgement, Case No: IT-09-92-T, the ICTY Trial Chamber, November 22, 2017, ¶ 5214.

[132] Joshua Goldstein and Jon Pevehouse, *International Relations*, 10th ed. (New York: Pearson, 2014), p.12.

[133] George W. Bush, *National Security Strategy of the United States* (Washington DC: the White House, 2002).

terrorist groups. More recently, new armed groups, such as ISIS (IS or ISIL, the so-called Islamic State), that do not pledge supreme loyalty to the transcendent notion of any nation have emerged within this divided world.

According to Klabbers, the issue of how to address these newcomers in the international arena is becoming increasingly ambiguous.[134] The September 11 attacks disclosed how international law is ineffective regarding NSGs. This is because existing legal concepts are stretched beyond their limits to identifiably address them.[135] As a result, international law has fallen short in addressing NSAGs clearly.[136] This makes it difficult to hold NSAGs accountable for their illegal acts under current international law.[137] A clear example of this is the lack of any clear idea of what to do with ISIS members who were captured and are held in Syria.

Regarding the definition of NSAGs, it is clear that while many different descriptions co-exist, there are no widely accepted definitions. Josselin and Wallace propose that NSAs (i.e. NSAGs) are somehow defined by their liberty from states or by their apparatuses.[138] In other words, a definition could emerge from the identifiable gap between states and NSAs (e.g.

[134] Jan Klabbers, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors," in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, ed. Jarna Petman and Jan Klabbers (Leiden/Boston: Martinus Nijhoff, 2003), pp.351-369, p.353.

[135] Ibid.

[136] Ibid., pp.353-54.

[137] Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (New York: Cambridge University Press, 2002), p.164.

[138] Daphne Josselin and William Wallace, "Non-State Actors in World Politics: A Framework," in *Non-State Actors in World Politics*, ed. Daphne Josselin and William Wallace (New York: Palgrave, 2001), pp.1-20, p.2.

NSAGs). However, this imagined distinction cannot be clearly drawn because, as Josselin and Wallace themselves note, many NSAs have strong links or associations with the state itself.[139] On the other hand, a group may depend on a state or there may even be mutual interdependency, whether overt or hidden. This connection between states and NSAGs may trigger those states' obligations under the law of state responsibility. In the following sections, I will consider this issue in detail.

While still struggling to define NSGs as a category, international law has already granted rights and responsibilities to a few armed groups. Such rebels can be recognized as having rights and duties only when they are upgraded to the status of an insurgent or belligerent.[140] This is done according to at least two criteria. The first is that the insurgent group is "organized", "shows some degree of stability", "conducts sustained and concerted military operations", and that "the hostilities are not sporadic or short-lived".[141] Secondly, the rebels should carry their arms openly or wear a recognizable sign that distinguishes them from civilians.[142] Having fulfilled these two requirements, rebels may be granted the status of insurgency by the state via recognition.[143]

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[139] For them, "there are intermediate categories, with state sponsoring subversive groups (including 'state sponsored terrorism') to undermine other governments". See ibid., p.2.

[140] Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," *International Review of the Red Cross* 88, no. 863 (2006): pp.491-523, p.492.

[141] Antonio Cassese, "Should Rebels Be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane," in *Realizing Utopia the Future of International Law*, ed. Antonio Cassese (New York: Oxford University Press, 2012), pp.519-524, p.523.

[142] Ibid., p.523.

[143] Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," p.492.

Shaw also reminds us that rebellions may fall into three categories according to the political attitudes of third parties regarding the internal conflict: rebellion, insurgent, or belligerent. These three categories have different legal outcomes. For instance, as Shaw states, insurgency is a purely provisional category granted by third parties to secure their nationals and properties on the territory facing the rebellion. On the other hand, belligerency is a formal status that gives the rebellion legal personality, thereby creating rights and responsibilities under international law. The third party/recognizing state must then adopt a neutral position regarding the conflict. Thus, insurgency and belligerency are two categories given to rebellions by third parties in compliance with their attitude towards civil conflicts.[144]

These requirements for a conflict between a NSAG and a state to be considered an insurgency/belligerency are listed under the Additional (II) Protocol to the Geneva Conventions. According to Article 1 of the Second Additional Protocol to the Geneva Conventions of 1977, an armed group may be considered an insurgency if its members act within a command chain with a responsible commander on the top the hierarchy and have control over a particular territory where they can actualize 'sustained' and 'concerted' military operations.[145] Within this stipulation we can see that certain NSGs are more likely to be given legal personality than others. National liberation movements (NLMs) struggling for the right of self-determination are welcomed by international bodies as legitimate movements.

[144] Shaw, *International Law*, pp.1149-1151.

[145] See Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609.

UNGA resolutions provide a legal personality for NLMs to bring international claims under international law. For instance, in Resolution 2918 (XXVII) relating to the 'Question of Territories under Portuguese Administration', the UN General Assembly recognized the right of self-determination of the peoples of Angola, Mozambique, Guinea, and Cape Verde, and other areas under Portuguese administration.[146] Moreover, the resolution affirmed that the NLMs of these territories were the true representatives of the people. By so doing, the UN not only recognized the people's right of self-determination but also accepted NLMs as their true representatives. This status gives both rights and duties to these movements under international law.

As Culler notes, granting legal personality to insurgent groups significantly alters their legal status. This transformation is echoed on the international stage. For instance, a neutral state may gain rights recognized by international law for establishing formal relationships with the parties to the conflict in another state.[147] One of the most important reasons why states grant parties the status of belligerency – or refuse to – is because of their willingness to protect their national interests.[148] For instance, without receiving recognition by the majority of the international community as the legitimate representative of the Libyan people and the only government of Libya, the National Transition Government could not have gained significant support from the international community.[149]

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[146] Question of Territories under Portuguese Administration, UN Doc. A/RES/2918 (XXVII), November 14, 1972.

[147] Anthony Cullen, *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (New York: Cambridge University Press, 2010), p.18.

[148] Ibid.

[149] Ian Black, "Libyan Rebels Win International Recognition as Country's Leaders," *The Guardian*, July 15, 2011, accessed May 9, 2018,

As mentioned above, an armed group can enjoy the rights of the status of insurgency or belligerency through a state's recognition. However, other groups that lack such privileges are mostly called "armed opposition groups".[150] In such a situation, it is difficult to incorporate the wide variety of NSGs under international law. NSGs differ in kind, motivation, organization, and aim.[151] Given such variety, it is hardly possible to treat all NSGs in the same way under international law.

For the purposes of this analysis, it is helpful to look more closely at what is meant by NSAG. For Hofmann and Schneckener, a NSAG is firstly an entity that desires and is able to use force to pursue its objectives. Secondly, such a group is not incorporated into the formal organs if the state, such as the military. Finally, the NSG acts beyond state control, at least to a certain degree.[152] Given these criteria, and at the risk of over-simplification, NSAGs can also be subdivided. For example, Krause and Milliken suggest the following five categories to classify NSAGs: i. insurgent groups; ii. militant groups; iii. warlords, urban gangs, and criminal networks; iv. private militias, police forces, and security companies; and v. transnational groups.[153] Additionally, separation movements and self-determination struggles should

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https://www.theguardian.com/world/2011/jul/15/libyan-rebels-international-recognition-leaders.

[150] Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," p.495.

[151] Claudia Hofmann and Ulrich Schneckener, "Engaging Non-State Armed Actors in State and Peace Building Options and Strategies," *International Review of the Red Cross* 93, no. 883 (2011): pp.1-19, p.17.

[152] Ibid., p.2.

[153] Keith Krause and Jennifer Milliken, "Introduction: The Challenge of Non-State Armed Groups," *Contemporary Security Policy* 30, no. 2 (2009): pp.202-220, pp.204-205.

also be counted under the categories of NSGs in the present inquiry, as well.

Aware of this diversity in group character, and the difficulties it creates for classifying NSAGs, some simplify by declaring that they are alike in undermining states' monopoly on the use of force.[154] NSAGs should also involve institutionalism to sustain their existence and achieve their goals. Davis highlights the resemblance between the modern state and NSAGs in terms of their capacity to pursue warfare.[155] Referencing Weber and Tilly, Davis proposes that the modern state has several basic institutional characteristics.

Making war necessitates that states establish new institutions to gather taxes efficiently. They therefore need a population to take taxes from and need supreme loyalty from the citizens to consent to this.[156] For Davis, these building blocks of the modern state can somehow be co-opted by NSAGs. A NSAG must transfer these building blocks to provide ”material and moral”

[154] According to Petrasek, non-state actors are defined by their distinct character from states and their independence in terms of the use of force. Thus, a non-state actor is separate from state armed forces and uses violence to achieve its aims. See David Petresak, *Ends & Means: Human Rights Approaches to Armed Groups* (Versoix: International Council on Human Rights Policy, 2000), pp.5-6.

[155] Diane E. Davis, “Non-State Armed Actors, New Imagined Communities, and Shifting Patterns of Sovereignty and Insecurity in the Modern World,” *Contemporary Security Policy* 30, no. 2 (2009): pp.221-245, pp.225-226.

[156] Ibid., p.226.

justification to strengthen its movement and guarantee its survival.[157] This is a matter of legitimacy.[158]

By the same token, particularly in the MENA region after the Arab uprisings, many NSAs with a variety of structural foundations have been operating. Traditionally, they are generally characterized in broad strokes by whether they are outside the control of the state and whether they use violence to achieve their aims.[159] However, as Berti notes, these NSGs differ in both their strategies and identities.[160] For example, Hezbollah has wide and effective control over the territory in which it operates, and uses its well-established bureaucratic structure, specifically its alternative government, military power, and the composition of its ruling class, to act like a modern state.[161] Thus, we need to consider the complex web of NSAs in greater detail.

To sum up, in this thesis, NSAGs are characterized by their relative independence from the state and their use of force to achieve their objectives. Thus, while remaining faithful to the traditional definition of NSAGs, this thesis also takes into account the complexity of such groups' relationships and structural composition. The next chapter discusses

[157] Klaus Schlichte and Ulrich Schneckener, "Armed Groups and the Politics of Legitimacy," *Civil Wars* 17, no. 4 (2015): pp.409-424, p.410.

[158] Ibid.

[159] Benedetta Berti, "What's in a Name? Re-Conceptualizing Non-State Armed Groups in the Middle East," *Palgrave Communications* 2 (2016): pp.1-8, p.2.

[160] Ibid., p.3.

[161] Ibid., p.2.

whether states arming NSGs in other states violate the prohibition in international law of the use of force and the principle of non-intervention.

CHAPTER 3

ARMING NON-STATE GROUPS AND INTERVENTION

The international state system is constructed on the principles of sovereignty and the formal equality of states. That is, every state in the system is equal before the law and has the capacity to determine their political status in domestic affairs and the right to pursue an independent foreign policy. With some exceptions, these premises are backed by current international law at every stage.

According to Article 2/1 of the UN Charter, "The Organization is based on the principle of the sovereign equality of all its Members". However, one immediate exception to this provision is Article 2/7, which states:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle *shall not prejudice the application of enforcement measures under Chapter VII* (emphasis added).[162]

As set forth in the provisions, the drafters of the charter contemplated the issue of sovereignty and prioritized the territorial integrity and political independence of member states. That is, the UN state system is very sensitive about preserving the main building block, namely the privileges of state consent stemming from sovereign equality. Recently, there has been wide debate as to whether a state's sovereign rights can be violated to

[162] *Supra* text accompanying note 16.

resolve humanitarian issues.[163] Nevertheless, keeping the system stable is still the basic concern of conventional international law, at least in principle, since the system provides conflicting rules regarding the power of the UNSC. The UNSC has the power of intereference in the affairs of member states, as enshrined in the same Article upholding sovereign equality, i.e. Article 2/7 of the UN Charter.

Given these preferences, violations of the principles of the non-intervention and non-use of force definitely violate international law. However, it is unclear whether a NSA sponsored by another state constitutes a violation. To clarify this ambiguity requires deeper analysis. This part of the thesis is therefore divided into three parts, seeking to identify the conventional doctrine's approach to non-intervention and non-use of force to identify possible exceptions to non-intervention. These are namely the right to self-determination and the discourse of humanitarian intervention. The overall answer to this question is that principles of non-intervention and non-use of force are two inseparable components of the state system implied by mainstream doctrine.

Additionally, while states are willing to legally justify their actions by turning to positive law, they do not hesitate to benefit from the discourse of humanitarian intervention and self-determination as long as their national interests necessitate this. Thus, the following sections critically assess non-intervention and its possible exceptions.

[163] For a good illustration, see Anne Orford, *Reading Humanitarian Intervention Human Rights and the Use of Force in International Law* (New York: Cambridge University Press, 2003), *passim*.

3.1. Non-Intervention and Prohibition of the Use of Force under Mainstream Doctrine

Particularly since the 19th century, the international state system has been based on the sovereign equality of states. While developing the system itself, rules governing *jus ad bellum* and *jus in bello* also matured. Before the UN Charter, waging war was accepted as a means of diplomacy and there were no provisions strictly and universally prohibiting the use of force, as the UN Charter does.[164] Indeed, the more sovereignty gained a pivotal function in the intercourse of states, the more new regulations governing warfare developed. Today, it is no exaggeration to say that Article 2/4 of the UN Charter has shaped debates around the use of force.[165] It is now accepted by most states that the prohibition on the use of force is customary international law or even a *jus cogens* norm.[166]

To reduce the fatal effects of warfare, international law provided various rules and new regulations, with the principle of non-intervention being one of the most fundamental. According to Vincent, non-intervention gains meaning from the principle of state sovereignty, which accepts only one final and absolute authority within a given community and forbids other states from

[164] Albrecht Randelzhofer, "Use of Force," in *Encyclopaedia of Public International Law: Use of Force, War and Neutrality, Peace Treaties*, ed. Rudolf Bernhar (Amsterdam: North-Holland Publishing Company, 1982), pp.265-276, p. 265. The Briand-Kellog Pact, later transformed into international treaty, called the "General Treaty for Renunciation of War as an Instrument of National Policy", signed at Paris in 1927, was one of the greatest attempts at preventing the use of war between the high contracting parties. Yet, the expansionist policies pursued by Hitler and Mussolini, who were motivated by racist and nationalist impulses, brought an end to progressive peace-keeping efforts until the UN Charter was established. See General Treaty for Renunciation of War as an Instrument of National Policy, 27 August 1927, 94 League of Nations Treaty Series 57.

[165] Randelzhofer, "Use of Force," p.267.

[166] Christine Gray, "The Use of Force and International Legal Order," p. 591.

directly or indirectly interfering in either the domestic or foreign policies of that state.[167] There are various types of intervention, but they are most notably categorized as armed or non-armed intervention.

First, inter-state use of force is prohibited by Article 2/4 of the UN Charter.[168] However, at least in principle, the use of force *within* a state is not outlawed by current international law, provided that the parties to the conflict respect *jus in bello*; namely, the law governing armed conflicts and human rights obligations.[169]

There are at least three basic terms that need to be defined here, namely 'all members,' 'territoriality', and 'political independence.' The UN Charter uses the term 'all members' to make all member states obligated. As previously highlighted, however, it is unclear whether the term only applies to UN member states. Nonetheless, because *virtually* all states are UN members, this supposed norm has gained an inclusive character and is welcomed as a rule of customary international law.[170] Some commentators, court decisions, and internal state laws have officially instated the non-use of force as *jus cogens*.[171] Thus, the logical outcome is that there is no way to derogate from it or formulate a reservation.

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[167] R. J. Vincent, *Nonintervention and International Order*, p.14.

[168] *Supra* text accompanying note 16.

[169] Aust, *Handbook of International Law*, p.206.

[170] Erdem Denk, *Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi* (Ankara: Siyasal Kitabevi, 2015), p.229.

[171] Sondre Torp Helmersen, "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations," pp.167-93 and *infra* text accompanying note 197.

Customary international law is one of the three sources of international law according to Article 38 of the Statute of the ICJ. International customary law is a law that states obey over a meaningful time; i.e. states act uniformly and consistently in similar circumstances so that the so-called rule or law should be accepted as law. In other words, the parties should psychologically accept it as law. The 'custom' prevails as law only given these two features simultaneously. Because customs become binding on states, they should resist them from the very beginning to escape liability under customary international law. Such a state is called a 'persistent objector'.[172]

Jus cogens norms are slightly different from customs. Article 53 of the Vienna Convention on the Law of Treaties (1969) defines *jus cogens* norms as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[173]

Thus, all states, regardless of being party to the UN Charter, are obliged to obey the principle of the non-intervention and non-use of force because these two principles are categorized as customary international law or even *jus cogens* norms.

In addition, Article 2/6 of the UN Charter imposes on all states a duty to follow the instructions of the UN Security Council. Indeed, if the Security

[172] Denk, *Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi*, p. 230. For an illustrative book on the notion of 'Persistent Objector,' see James A. Green, *The Persistent Objector Rule in International Law* (New York: Oxford University Press, 2016).

[173] *Supra* text accompanying note 109.

Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression”[174] in accordance with Article 39 of the Charter, the organization has a duty to ensure that even non-member states act in accordance with the Charter.[175] To sum up, all states are obliged to show loyalty to the principles of non-intervention and non-use of force because they constitute not only customary international law but also *jus cogens* norms of international law.

The other terms, namely ‘territorial integrity’ and ‘political independence of a state’, are basic building blocks of the state system. Since the Peace of Westphalia, the centralized modern state has gradually evolved to become clearly distinct from feudal entities or empires. The definition of the modern state owes much to Max Weber:

> A compulsory political association with continuous organization … will be called a ‘state’ if and in so far as its administrative staff successfully uphold a claim to the monopoly of the use of physical force in the enforcement of its order.[176]

As seen here, only one authority, whether democratic or autocratic, has the right and power to enforce its rules.[177] There is one more distinctive feature of modern states. According to Tilly, the modern state is a political organization with a monopoly over coercion within a given territory. In other

[174] *Supra* text accompanying note 16, Article 39.

[175] *Supra* text accompanying note 16, Article 2/6.

[176] Weber, *The Theory of Social and Economic Organization*, p.154.

[177] In other words, “In any state sovereignty is vested in the institution, person, or body having the ultimate authority to impose law on everyone else in the state and the power to alter any pre-existing law.” See: “Sovereignty,” in *A Dictionary of Law*, ed. Elizabeth A. Martin (New York: Oxford University Press, 2003), p.469.

words, the boundaries of the modern state are more clearly marked than those of previous political organizations.[178]

Traditionally, IR theories accept the state as a political organization without investigating its historical development. The binary opposition of anarchy and order has been replaced by the mutual interactions of society and geopolitics. In other words, states are no longer deemed to be the sole representatives of a frozen system but are investigated in terms of their sociological development.[179] Nevertheless, although the trend is sociological, traditional understandings are still dominant in IR, particularly in international law. Consequently, the ghosts of idealism and realism still haunt IR studies, notably in international law.

The individualism proposed by idealists and the ideas of competition and balance of power advocated by realists all stem from similar ontological assumptions.[180] They take the state as a unitary actor that retains both domestic and external *supreme potestas*, namely sovereignty. This supposed sovereignty requires some basic assumptions, such as territoriality, citizenship, and *raison d'état*. In the 19th century, the state system was built on a horizontal landscape in contrast to earlier hierarchical social structures.[181] In this respect, horizontality brings with it the concept of

[178] Charles Tilly, "Western State-Making and Theories of Political Transformation," in *The Formation of National States in Western Europe*, ed. Charles Tilly (New Jersey: Princeton University Press, 1975), pp. 601-638, p.638.

[179] Faruk Yalvaç, "Devlet," in *Devlet Ve Ötesi: Uluslararası İlişkilerde Temel Kavramlar*, ed. Atila Eralp (İstanbul: İletişim Yayınları, 2006), pp.15-52, p.15.

[180] Yalvaç, "Devlet," pp.16-17. See also Ronen P. Palan and Brook M Blair, "On the Idealist Origins of the Realist Theory of International Relations," *Review of International Studies* 19, no. 4, (1993), pp.385-399, pp.397-98.

[181] Giofranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford: Stanford University Press, 1978), p.87.

equality, at least in principle. Before the modern state came into existence, the hierarchical organization of political units (empires, feudal lords, the church, etc.) were emblematic of inequality. For instance, empires saw themselves as being at the centre of the universe while denying the ability or right of other polities to be equal to them.[182]

Against the backdrop of this feudal and hierarchical past, the term 'sovereignty' was welcomed by the modern state as it developed through history. According to Held, sovereignty has two basic distinct characteristics. First, a sovereign state should have absolute authority within its jurisdiction, with no other authority having sovereign rights. That is, only one supreme authority can exist in a given territory. Secondly, this single final authority is, without external or internal shareholders, possessed by state itself.[183] In other words, a sovereign state does not show loyalty to another sovereign state or take commands from it. In this respect, violation of the principles of the non-intervention and non-use of force are the sole violations of the current state order. Consequently, international law has evolved to provide a legitimate legal basis for the contemporary intercourse of states.

3.1.1. Relevant UNGA Resolutions and ICJ Findings

UNGA resolutions relating to non-intervention and non-use of force are not independent from the generally accepted structure of the state system.

[182] According to Jackson and Sørensen, it is not an easy task to explain international relations in the Middle Ages in the way that we consider them today. Europe in the Middle Ages comprised empires rather than modern states. Supreme loyalty was not directly to the nation but to various supreme authorities, such as the Church, Kings, Emperors, etc. However, over time, as states captured a territory and declared it their property, the population became citizens of that state. See Robert Jackson and Georg Sørensen, *Introduction to International Relations: Theories and Approaches* (Oxford University Press, 2013), pp.13-17.

[183] David Held, *Political Theory and the Modern State: Essays on State, Power, and Democracy* (Oxford: Polity Press, 2000), pp.215-216.

Although these resolutions have a non-binding character, they may reflect the the *opinio juris* of states.[184] Therefore, particularly regarding politics, these resolutions have an echo in the international stage.

The UNGA has adopted resolutions at various times that express the stance of the UN and the majority of states regarding sovereignty. The first resolution to note here is the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty [2131 (XX)].[185] According to this resolution, all types of intervention, whether armed or not, are condemned. Intervention is depicted as a threat to international peace and security, and to the sovereign personality and political independence of states; hence, it is strictly condemned.

Moreover, the resolution also "solemnly condemns" any state for using or encouraging the use of economic, political, or other measures to coerce another state. The resolution repeatedly welcomes people's right to self-determination. Its logical implication is that every state has a right to choose its political status without interference from another state. One of the most important aspects of the resolution is that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State".[186] Other UNGA resolutions use the same expression without alteration.

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[184] In its numerous judgments, the ICJ draws on General Assembly resolutions to verify whether an international customary law exists. See Shaw, *International Law*, p.88.

[185] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UN Doc. A/RES/2131 (XX), December 21, 1965.

[186] Ibid.

The second crucial document here is the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[187] This sets out and explains the following seven principles in accordance with the interpretation of the UN Charter:

> 1. The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
> 2. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
> 3. The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
> 4. The duty of States to co-operate with one another in accordance with the Charter;
> 5. The principle of equal rights and self-determination of peoples;
> 6. The principle of sovereign equality of States;
> 7. The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.[188]

While using similar expressions to those of the earlier resolution, this resolution also attaches duties to member states to respect the sovereign equality of each other and universal human rights. Every state is obliged to "conduct their international relations … in accordance with the principles of sovereign equality and non-intervention".[189]

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[187] Friendly Relations Declaration. *Supra* text accompanying note 12.

[188] Ibid.

[189] Ibid.

Having urged states to respect each other's sovereign personality, the Friendly Relations Resolution also condemns "organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State", and

> organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts when the acts referred to in the present paragraph involve a threat or use of force.[190]

Lastly, the 1974 UNGA Resolution of the Definition of Aggression[191] and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations[192] should also be mentioned. The most cited paragraph of the Definition of Aggression resolution is 3/g:

> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[193]

[190] Ibid.

[191] Definition of Aggression, UN Doc. A/RES/3314 (XXIX), December 14, 1974.

[192] Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc. A/RES/42/22, November 18, 1987.

[193] See Article 3/g *supra* text accompanying note 191.

Moreover, refraining from the use of force or threat of use of force has a universally binding character, meaning that every state should obey this regardless of its membership in the UN.[194]

As seen here, sending or arming armed groups is condemned by such resolutions. Moreover, because these activities constitute the use of force, they certainly also violate non-intervention. I will now consider several contentious ICJ cases to make the issue concrete.

The ICJ has given judgments on the merits regarding the use of force in four different cases, and examined the issue in two advisory opinions.[195] The Corfu Channel Case,[196] the Nicaragua Case,[197] the Oil Platform Case,[198] and the Armed Activities Case[199] are the contentious cases, while the Nuclear Weapons Advisory Opinion[200] and the Wall Advisory Opinion[201] concern the principle of non-use of force.

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[194] See Article 2 *supra* text accompanying note 192.

[195] Christine Gray, "The International Court of Justice and the Use of Force," pp.37-38. There are several other cases in which ICJ touched on in its judgments relating to the use of force but not on the merits.

[196] *The Corfu Channel Case*, "The UK v. Albania," Judgment, ICJ Reports, April 9, 1949, p.4.

[197] *Military and Paramilitary Activities in and Against Nicaragua,* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports, June 27, 1986, p.14.

[198] *Oil Platforms,* (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports, November 6, 2003, p.16.

[199] *Armed Activities on the Territory of the Congo*, (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports, December 19, 2005, p.168.

[200] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports, July 8, 1996, p.226.

First, as explained previously, states are free to bring cases before the Court but they are not required to do so. Therefore, the Court must first determine whether it has jurisdiction over the parties to the cases, i.e. whether the states have consented to bring their dispute before the Court. In its advisory opinion, the Permanent Court of International Justice (the PCIJ) states the principle as follows: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement".[202]

There are four ways to determine whether a state party to a dispute has consented or not. First, "parties may refer a particular dispute to the ICJ by means of a special agreement"[203] that indicates their *ad hoc* consent.[204] Second, the Court has jurisdiction if a state accepts its jurisdiction after another state files an application and calls for the first state to assent, namely *forum prorogatum*.[205] Third, an international treaty may authorize the Court in advance if the dispute is the result of that international agreement. Fourth, states can accept the Court's jurisdiction via unilateral

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[201] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, July 9, 2004, p.136.

[202] *Status of Eastern Carelia*, Advisory Opinion, PCIJ Reports, Ser. B, No. 5, July 23, 1923, p.27.

[203] Shaw, *International Law*, p.1075.

[204] Polat, *Ahlak,Siyaset, Şiddet*, p.51.

[205] Ibid., p.51; Shaw, *International Law*, p.1076.

declarations.[206] In the four contentious cases listed above, the ICJ began by determining whether it had jurisdiction.

The Nicaragua Case has a privileged place regarding the use of force by NSGs backed by another state. On April 9, 1984, Nicaragua filed an application to the ICJ about an alleged violation of international law by the USA, specifically a violation of Nicaragua's sovereign rights. It claimed that the USA was accountable for military and para-military activities in and around Nicaragua. The Court, first, unanimously ruled that "The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines".[207] By fourteen votes to one, the Court also urged all states to respect each other's sovereign rights and refrain from intervening in each other's domestic affairs.[208] After considering arguments from both parties, the Court determined that it had jurisdiction. Finally, the Court delivered its judgment on the merits in 1986.

This case highlights certain critical points that are relevant for evaluating international law. First, in its judgment on the merits, the Court determined whether both parties – relying on various resolutions, declarations, and treaties – had consented that the prohibition of the use of force is customary international law. The Court reaffirmed that the prohibition of the use of force

[206] Polat, *Ahlak,Siyaset, Şiddet*, p.51.

[207] *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America)*, Provisional Measures, ICJ Reports, Order of May 10, 1984, p.22.

[208] Ibid.

is customary international law. In addition, it confirmed that non-use of force, namely *jus cogens*, is one of the mandatory norms of international law.[209]

According to the Court, intervening in civil strife within another state and supporting opposition groups should be strictly avoided with one possible exception, namely self-determination movements. In the Nicaragua case, however, the Court did not evaluate the issue of self-determination in terms of third state party intervention in civil strife within another state: "The Court is not here concerned with the process of decolonization; this question is not at issue in the present case".[210] For the Court, there should be general acceptance by states that intervention, armed or not, to support self-determination movements is legitimate. The Court "finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition".[211] Thus, any intervention, whether armed or not, violates international law.

According to the Court, there are four levels of assistance to opposition groups. The highest level is "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries" as set forth in Article 3/g of the Definition of Aggression Resolution. This level does constitute 'armed attack', which neither Nicaragua nor the United States was responsible for. The Congo Case provides a good illustration of this level. The Court ruled that Uganda was responsible for acts that violated both non-intervention and non-use of force because of its military actions against the DRC and various kinds of support to opposition groups fighting the DRC government.[212]

[209] *Supra* text accompanying note 197, ¶s 186-190.

[210] Ibid, ¶ 206.

[211] Ibid., ¶ 207.

[212] *Supra* text accompanying note 199, ¶ 345.

Furthermore, the Court pointed out that "the unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter".[213]

Secondly, the Court also determined that arming, organizing, or assisting an opposition group – in Nicaragua's case the *contras* – definitely violates the principle of non-use of force.[214] Yet, it does not constitute armed attack, as set forth in Article 3/g. The third category of intervention is that of funding opposition groups. In particular, the mere supply of funds to contras does not itself imply the use of force, although it violates the principle of non-intervention.[215] Lastly, because any kind of humanitarian aid is accepted under international law, such interference does not violate either the non-use of force or non-intervention principles.[216]

3.1.2. Paradoxes

3.1.2.1. Intervention is an Inevitable Feature of the International State System

Since the mid-19th century and the emergence of professionalism in legal doctrine, and thanks to positivism in the social sciences, law has discarded subjective elements and purified itself politically. In other words, as in other fields, positivism in law fully dominated and replaced natural law and ethical

[213] Ibid., ¶ 165.

[214] *Supra* text accompanying note 197, ¶ 228.

[215] Ibid.

[216] Funda Keskin, *Uluslararası Hukuk'ta Kuvvet Kullanma: Savaş, Karışma ve Birleşmiş Milletler* (Ankara: Mülkiyeliler Birliği Yayınları, 1998), p.113.

concerns constraining state consent. Consequently, natural justice was reconceptualised as a mere epiphenomenon of state sovereignty. This clearly reflected the victory of state consent as the sole regulative and constitutive feature of the international state system.

Reconceptualizing natural justice in terms of state sovereignty eliminated the hierarchy of norms and institutionalized non-centralized mechanisms regarding the use of force. Violence was deemed as a legitimate extension of consent, which is the logical outcome of a state-centered system. Therefore, thanks to the absence of a centralized coercive mechanism, violence and intervention became one of the constitutive elements of the system, rather than a supplementary apparatus.

Additionally, states' use of force against minorities or others within their territories enables different kinds of violence, operated via NSGs. Sometimes it shows itself through self-determination movements, sometimes in terrorism. Therefore, international law – according to various court decisions and resolutions – is assumed to preserve the system by marginalizing violence and intervention by depicting it as a dangerous supplementary element. Yet violence and intervention are inevitably incorporated into the system as a constitutive element of the system itself.

3.1.2.2. Factual and Formal Inequality between States

As enshrined in Article 2 of the UN Charter and referenced by various ICJ judgments, the sovereign equality of states is one of the most cited and highlighted myths of international law and international relations. However, this assumed formal equality is undermined in at least two ways by the UN's structure. First, the very structure of the UN endows it with the power to

interfere in the domestic affairs of states provided that UN Security Council applies “enforcement measures under Chapter VII”.[217]

If the Security Council detects that international peace and security is endangered, it may act under Chapter VII of the Charter, which is binding over states, to restore peace and security. This power raises the issue of the criteria by which the UNSC determines whether international peace and security is endangered. Because the Security Council has discretion regarding such threats to peace and security, it may determine this on an ad-hoc, thus political basis, regardless of the significance and implications for international politics of its decisions. This gives the Security Council unlimited authority to decide on the matter, i.e. there is a completely subjective arbitrariness.[218] By being fashioned with the Security Council having a right to intervention, the UN system violates the principle of non-intervention by its very character.

Additionally, another paradox arises from the decision-making procedure of the UN Security Council, which paralyzes the system. Article 27/3 regulates the Security Council’s voting procedures:

> Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.[219]

[217] Article 2/7 of the UN Charter; *supra* text accompanying note 16.

[218] Denk, *Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi*, pp.264-277.

[219] *Supra* text accompanying note 16.

At least two points should be highlighted here: the veto power of the permanent members and possible violation of the principle of *nemo judex in causa sua*.

Some commentators have asked whether the UN Security Council, acting under Chapter VII, can be depicted as a world government that is assumed to have claimed for itself the monopoly of the use of force.[220] It has indeed long been treated as a world government composed of permanent and non-permanent members. As mentioned above, the latter have the power of veto, which undermines the sovereign equality of states.

Article 27 frames how the voting system operates. Article 27/2 stipulates that "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members".[221] Thus, permanent members lack the power of veto in procedural matters. However, to decide what constitutes the procedures in the first place is a matter of merit, where permanent members may use their power of veto, thereby by-passing Article 27/2.[222]

We should also critically evaluate the UN Security Council's decision-making processes. Article 27/3 states that, if *disputes* between states are at stake and one side of the *dispute* is one of the permanent members, that member may use it's veto power to prevent the Security Council from deciding on the matter unless it is defined as a dispute.[223] Thus, to maintain their veto

[220] See Stefan Talmon, "The Security Council as World Legislature," *The American Journal of International Law 99*, no.1 (2005), pp.175-193.

[221] *Supra* text accompanying note 16.

[222] Denk, *Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi*, pp.180-184.

[223] "Abstentions under Article 27(3) are mandatory only if all of the following conditions apply: the decision falls under Chapter VI or Article 52(3) of Chapter VIII; the issue is considered a dispute; a Council member is considered a party to the dispute; and the decision is not procedural in nature." See "Article 27(3) and Parties to a Dispute: An

power, permanent members can ensure that ‘disputes’ are reformulated as ‘situations’, ‘matters’, or ‘questions’.[224] However, this violates one of the most well-known general principles of law, namely *nemo judex in causa sua*.[225] Therefore, given their veto power, the UN Security Council is unable to take coercive measures against permanent members when they are party to disputes, and where the final decision is shaped by their *political powers* and *interests*. These tensions have been evident when the right of people to self-determination clashes with the principle of territorial integrity.

3.2. Self-Determination: A Possible Exception to Non-Intervention under Mainstream Doctrine?

The tension between the right of self-determination and territorial integrity raises the question of the legality of interventions to help a warring side in a state in service of that principle. This also covers the question of humanitarian interventions. It is apparent here that moral concerns play the leading role in legitimizing foreign interventions. The legal argument is based on a transcendent moral principle that allows natural law to return to the legal realm through the backdoor. Consequently, it may be possible for an outside state to avoid the charge of violating the principles of the non-intervention and non-use of force regardless of the sovereign rights of state. This section determines whether states can legitimately support NSGs in another state for humanitarian purposes.

Abridged History,” *Security Council Report*, April, 2004, accessed 1 May, 2019 https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/article_27_3_and_parties_to_a_dispute.pdf.

[224]Denk, *Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi*, pp.182.

[225]Köchler, “Normative Contradictions in International Law: Implications for Legal Philosophy,” pp.81-82.

According to Malanczuk, self-determination concerns the right of people to determine the political and legal status of the territory they live on, establish a state, or choose to become part of another state.[226] As a *legal right*, self-determination neither fully existed nor was fully recognized by the international community before the establishment of the UN. Previously, while a few treaty provisions had governed local disputes, there were no general rules governing such rights.[227] One can trace the right back to President Wilson (1918) and Lenin (1917), although self-determination was a political issue rather than a legal one at that time.

More specifically, the idea of self-determination – the right of a people living in a particular territory to determine the form of their government – stemmed from concerns to protect minority rights. This originated in the 19th century. As O'Brien points out, the disintegration of the Ottoman Empire during the 19th century triggered concerns over minority rights and security.[228] That is, the right to self-determination emerged from the dissolution of empires. In his famous speech on the aims of war, Woodrow Wilson supported the right of people to determine their form of government. The assumptions inherent in his 14 Points seemed to contradict the stances of traditional colonial powers, such as the UK and France. Wilson's vision was to accelerate the dissolution of colonial empires and grant independence to colonies,[229]

[226] Malanczuk, *Akehurst's Modern Introduction to International Law*, p.326.

[227] "Before 1945 this right was conferred by specific treaties on the inhabitants of a few specific territories (for instance, the Treaty of Versailles 1919 provided for a plebiscite in Upper Silesia, to determine whether it should form part of Germany or of Poland); but there was probably no legal right of self-determination in the absence of such treaty provisions." See ibid.

[228] O'Brien, *International Law*, p.162.

[229] "Fourteen Points: United States Declaration." *Encyclopedia Britannica,* accessed January 24, 2019, https://www.britannica.com/event/Fourteen-Points.

although this idealism also masked an American Realism seeking to create new markets for American capitalism.[230]

In contrast, V. I. Lenin, as the founder of the Soviet Union and leading theorist of the Bolshevik revolution, had a two-dimensional approach to self-determination. The first was to support nations living under Tsarist Russia to determine their self-government. The second dimension concerned national liberation movements, whose victories were assumed to create crises for central capitalist countries, thereby fomenting revolutions in the center. That is, Soviet material and propaganda support for national liberation movements had anti-imperialist motivations.[231]

After the end of World War II, as decolonization became a routine feature of international politics, the right to self-determination gained currency as a feature of the international system. This was granted as a *right to peoples, not governments*, and thus the arming of self-determination movements was accepted as a legitimate form of intervention. In 1960, the right to self-determination was granted legal status by UN General Assembly Resolution 1514 (XV).[232] The UN viewed the issue of self-determination through the lens of human rights, in that the rights of people to obtain independence and determine their political status became human right norms deserving of full respect.

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[230] Baskın Oran, "Dönemin Bilançosu," in *Türk Dış Politikası, Kurtuluş Savaşından Bugüne, Olgular, Belgeler, Yorumlar*, ed. Baskın Oran (İstanbul: İletişim Yayınları, 2002), pp.97-110.

[231] For an illustrative analysis, see Fahir Armaoğlu, "Bolşevik İhtilali ve 'self Determination' Prensibi," *Ankara Üniversitesi SBF Dergisi* 17, no.2 (1962), pp.211-250.

[232] Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly resolution, UN Doc. 1514 (XV), December 14, 1960.

In the resolution, the UN reflected its awareness of the irrevocability of decolonization and its concern to stop or prevent any brutality that would destroy peace and security.[233] Thus, the right to self-determination was accepted as the right of citizens of Trust and Non-Self-Governing Territories. In addition, to support the perpetuation of colonial rule would have raised doubts about the UN's universal role of safeguarding international peace and security. Resolution 1514 therefore proposed the following definition: "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[234]

The right of people to self-determination was also recognized in the twin covenants on human rights, namely the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which came into force in 1976. According to their shared Article 1, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[235]

Similarly, the Friendly Relationship Resolution strongly highlights the issue in that every state is obliged to respect the fundamental human rights and right to self-determination of people. Moreover, every state has a duty to "promote, through joint and separate action, the realization of the principle of

[233] Ibid.

[234] Ibid.

[235] See International Covenant on Civil and Political Rights (ICCPR), December 16, 1966, 999 UNTS p. 171 and International Covenant on Economic, Social and Cultural Rights (ICESCR), December 16, 1966, 993 UNTS, 3.

equal rights and self-determination of peoples".[236] According to the Resolution, there are three fundamental ways of using the right to self-determination. First and foremost, a people have right to form or found 'a sovereign and independent State'; or have right to join to or integrate with another sovereign state. Lastly, a people may freely determine the status of the state they live in, i.e. regime of the state.[237]

However, the resolution also affirmed the sovereignty and territorial integrity of states, and reaffirmed that none of its provisions should be taken as undermining state sovereignty.

This paradox was addressed by assuming that certain international legal organs have the right to determine whether a specific territory and people living in it have a legal right to self-determination. For instance, the UN General Assembly, through its various resolutions, and the UN Security Council, which has "responsibility for the maintenance of international peace and security" according to Article 24 of the UN Charter, are the key international organs seem to have the right to determine this legal status. Thus, regarding the question of Southern Rhodesia, the UN General Assembly confirmed "the inalienable rights of the people of Southern Rhodesia to self-determination and to form an independent African State".[238]

Similarly, the UN Security Council also has the right to determine whether a movement can be dubbed as a self-determination movement and what

[236] *Supra* text accompanying note 12, Article.1.

[237] Ibid.

[238] See the Question of Southern Rhodesia, UN Doc. A/RES/1747(XVI), June 28, 1962; UN Doc. A/RES/1755(XVII), October 12, 1962; UN Doc. A/RES/1760(XVII), October 31, 1962; Doc. A/RES/2138(XXI), October 22, 1966; UN Doc. A/RES/2151(XXI), November 17, 1966; UN Doc. A/RES/2379(XXIII), October 25, 1968; UN Doc. A/RES/2383(XXIII), November 7, 1968.

territory they operate in. For example, in Resolution 183 (1963), the Security Council ruled that African people under Portuguese rule had the right to self-determination, reaffirming General Assembly Resolution 1541 (1961).[239] In addition, the Security Council supported Namibia's right to self-determination consistent with General Assembly Resolution 1541 (1961).[240] Finally, regarding Western Sahara, the UN Security Council again cited UN General Assembly Resolution 1541[241] while the ICJ also touched on this issue in its Advisory Opinion.[242]

The second group of organs with the capability and authority to determine whether a right to self-determination is valid are internationally recognized judicial organs. As Shaw points out, there are few judicial contributions on self-determination, with just two basic cases,[243] namely the ICJ's Advisory Opinions on Namibia[244] and Western Sahara.[245] Regarding Namibia, the Court was asked to give its opinion on "the legal consequences for States of

[239] See Situation between Portugal and African States, UN Doc. S/RES/183 (1963), December 11, 1963.

[240] See Situation between Portugal and African States, UN Doc. S/RES/301, October 20, 1971.

[241] See Situation Concerning Western Sahara, UN Doc. S/RES/ 377 (1975), October 22, 1975; for its Resolution on East Timor see UN Doc. S/RES/ 384 (1975), December 22, 1975.

[242] *Western Sahara*, Advisory Opinion, ICJ Reports, October 16, 1975, p.12.

[243] Shaw, *International Law*, p.254.

[244] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports, June 21, 1971, p.16.

[245] *Western Sahara*, Advisory Opinion, ICJ Reports, October 16, 1975, p.12.

the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)". Concluding that South Africa's presence in Namibia was illegal, the Court urged South Africa to withdraw its administration immediately. In reaching this judgment, the Court determined that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them".[246]

The statuses of non-self-governing territories are defined under Chapter XI of the UN Charter while the territories themselves are listed in Chapter XII, Article 77. According to these documents, non-self-governing territories include "territories now held under mandate", "territories which may be detached from enemy states as a result of the Second World War", and "territories voluntarily placed under the system by states responsible for their administration".[247] The Court added that the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV) of December 14, 1960) had made a progressive contribution to the UN Charter by enlarging the scope of self-determination to "all peoples and territories which '*have not yet attained independence*" (emphasis added).[248]

The Court also heard another disputed territory claim concerning Mauritania and Morocco. During its decolonization from Spanish administration, Western Sahara became the subject of irredentist policies by Mauritania and Morocco.[249] Before Spanish colonization, there had been legal ties between

[246] *Supra* text accompanying note 207, ¶: 52.

[247] Article 77 of the UN Charter, *supra* text accompanying note 16.

[248] *Supra* text accompanying note 207, ¶ 52.

[249] Shaw, *International Law*, p.254.

Western Sahara, and Mauritania and the Kingdom of Morocco. Therefore, at the time of its colonization, Western Sahara could not be regarded as a territory belonging to no one (*terra nullius*). However, there were no legal ties preventing the right to self-determination of the inhabitants. In other words, it is evident in the decision that "the Court regarded the principle of self-determination as a legal one in the context of such territories".[250]

In sum, the right to self-determination is not merely an internal issue of a state; rather, it has international dimensions. Moreover, hindering the right to self-determination of a people violates international law. For instance, using force against those implementing their right to self-determination violates the Friendly Relation Declaration.[251] Thus, the right to self-determination consists of a people's right to choose their political status freely and to freely pursue their cultural, economic, and social development. In this respect, people have the right to establish an independent and sovereign state, integrate with another sovereign state, or freely determine any other political status.

The list of people who has right to self-determination (non-self-governing territories mentioned above)[252] can also be expanded. According to the Additional Protocols to the Geneva Conventions of 1949, it should include "peoples (who) are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-

[250] Ibid., 255.

[251] *Supra* text accompanying note 12, Article 1.

[252] Article 77 of the UN Charter, *supra* text accompanying note 16.

determination". Because these involve armed conflict, this latter group is particularly relevant for the question at hand.[253]

Having determined that the right to self-determination is a legitimate international right of people, and that depriving them of their right to self-determination violates international law, it is now time to ask whether arming such movements is permitted by international law.

UN General Assembly Resolution 2160 (XXI) on the Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination, says that "peoples subjected to colonial oppression are entitled to seek and receive all support in their struggle which is in accordance with the purposes and principles of the Charter".[254] Additionally, UN General Assembly Resolution 2787 (XXVI) "calls upon all States dedicated to the ideals of freedom and peace to give all their political, moral and material assistance to peoples struggling for liberation, self-determination and independence against colonial and alien domination".[255] Consequently, all types of aid, assistance, or support to self-determination movements are welcomed by international law, given peoples' inherent right to create their own government. That said, the legal and political right of self-determination was created in the specific context of the

[253] See Article 1/4 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),* June 8, 1977, 1125 UNTS 3.

[254] Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination, UN Doc. A\RES\2160 (XXI), November 30, 1966.

[255] Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, UN Doc. A\RES\2787 (XXVI), December 6, 1971.

decolonization period. This raises its question for modern self-determination struggles, many of which take the form of secession movements.

3.2.1. Self-Determination and Secession

The right of self-determination was welcomed by international lawyers because it was relatively easy to describe during the 1960s and 1970s since 'the people' clearly referred to those living under colonial regimes or alien domination. However, since the end of the Cold War, the concept has gained a new context. Beyond people living under colonial regimes and alien domination, more specifically mandates and trusteeships, national/ethnic and religious minorities have been given the right to self-determination, thereby altering the traditional definition of the right.

Following the two World Wars, colonized people started to gain independence, whether either through violence or mutual agreements. With the establishment of the UN Charter, the right of self-determination was recognized legally and given legitimacy. During the last quarter of the 20th century, the human dimension of politics became prioritized in discourse as the international political system evolved. As crystallized in the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe, the right to self-determination began to be understood from a perspective based on the concept of human rights, and especially the sub-category of minority rights.[256]

According to Koskenniemi, the provisions of the Final Act have an intrinsically revolutionary potential, which was limited by its strong emphasis on state sovereignty, territorial integrity, and political independence.[257] In

[256] See the Helsinki Final Act 1975, 14 ILM, 1292.

[257] Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice," p.242.

other words, while the declaration provided a new conceptual understanding of the right of self-determination beyond colonialism, it also strongly emphasized classical legal doctrine. Like most of the edifice of international law it was caught in a paradox.

For Koskenniemi, the paradox which the Final Act of Helsinki created paved the way for re-conceptualizing the right of self-determination. The tension between the two notions brought minority protection rather than secession to the surface.[258] Current international legal jurisprudence also considers that the right to self-determination is no longer valid once people living under colonial regimes have gained their independence.[259] This is also confirmed by the ICJ. According to the Court, "International law – and consequently the principle of *uti possidetis* (a state's right to retain the territory it possesses) – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards".[260] This raises the question if people have a right to leave an established sovereign state via secession.

International law seems to prevent *minorities* from leaving an already established state via secession, in terms of the right to external self-determination.[261] In its 1998 judgment regarding the secession of Quebec, the Supreme Court of Canada ruled:

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[258] Koskenniemi, "National Self-Determination Today," p.256.

[259] See Barker, *Parry and Grant Encyclopaedic Dictionary of International Law*, p.551.

[260] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali),* Judgment, ICJ Reports, December 22, 1986, 554, ¶ 30.

[261] In its advisory opinion on the legality of the unilateral declaration of independence, which I will investigate in subsequent sections, the ICJ noted that "the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law." See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403.

> The emphasis in all the relevant instruments, and in the state practice … on the importance of territorial integrity, means that 'peoples' is to be understood in the sense of all the peoples of a given territory … minorities as such do not have a right of self-determination. That means, in effect, that they have no right to secession, to independence or to join with comparable groups in other states.[262]

Clearly, the contradiction with international legal doctrine regarding self-determination has created indeterminacy and unpredictability. Following the events of 1989, geopolitics and nationalism have expanded everywhere.[263] International law has struggled to tackle secessionist demands, such as South Ossetians wanting to integrate with their Northern kin at the beginning of the 1990s, or Kurdish ethnic demands and related secessionism, most notably in Iraq and Turkey.

The right of self-determination has created paradoxes that have deeply affected the international state system. Traditionally, this system was constructed on state consent, which prioritizes state sovereignty as the sole foundation of the system. On the other hand, thanks to the dynamics of international politics, a human dimension was introduced that limits absolute sovereignty.[264] The system is thereby forced to choose one of these principles, sovereignty or self-determination, leading the state system into a paradox.

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[262] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 Cited in; Barker, *Parry and Grant Encyclopaedic Dictionary of International Law*, p.551.

[263] Koskenniemi, "National Self-Determination Today," p.243.

[264] Interestingly, religious minority rights were also dealt with the Peace of Westphalia, in its various documents including treaties of Osnabruck and Münster. See Andre Liebich, "Minority as Inferiority: Minority Rights in Historical Perspective." *Review of International Studies* 34, no. 2 (2008): pp. 243–263.

In 1992, the office of the UN Secretary-General released its Agenda for Peace Report suggesting how to peacefully resolve this paradox. The report starts by highlighting state sovereignty, territorial integrity, and political independence.[265] Simultaneously, it supports the changing nature of the state system regarding absolute and exclusive sovereignty.[266] That is, there is no longer room for strict sovereignty in the changing political realm. The report also urges state leaders to consider human rights, secessionist demands, etc. and find moderate ways to reconcile contradictions, namely "good internal governance" and "the requirements of an ever more interdependent world".[267] Crucially, the report takes the following stance: "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."[268]

The first inherent paradox that self-determination creates is that the principles of self-determination and state sovereignty cancel each other out. The state system was constructed on state sovereignty, which prioritizes state consent as the sole creator of the system. The system consequently treated the right to self-determination as a subversive activity. However, in the aftermath of World War II, newly emerged states forced the system to accept and recognize the right to self-determination. By undermining the international state system, self-determination gradually created a domino effect through division into *nation-states*. To counter this, the right to self-

[265] An Agenda for Peace, UN Doc. A/47/277, June 17, 1992, ¶ 17.

[266] Ibid.

[267] Ibid.

[268] Ibid.

determination was limited and reformulated as the rights of minorities to a secure existence. However, secession was excluded as a legal means to that end. Thus, the right to self-determination was marginalized by the system.[269]

This marginalization brought about the second paradox intrinsic to the state system. As Young correctly points out, any entity enjoying the right to self-determination claims freedom from legal and political intervention and interference.[270] Since self-determination is the right of the people to freely determine their political status and pursue economic, cultural, and social development, the right to self-determination somehow equals the right to sovereignty. In other words, the 'people' fighting to gain independence from a sovereign state are actually fighting to achieve the same rights as those they are fighting against, with the ultimate aim of joining the club of sovereign states. Thus, the marginalized notion of self-determination became the sole principle of the system.[271] From being an epiphenomenon of state consent, the right to self-determination was transformed into one of the branches of human rights. Therefore, within any state with a multi-ethnic structure, 'power-sharing' as a mode of remedy was at stake.

3.2.2. Clashing National Interests and their Implications for International Politics

Until the 1970s and the end of the process of decolonization, court decisions and the writings of scholars limited the applicability of the right of self-

[269] Many secessionist movements, building their arguments over right to self-determination, used the Kosovo Advisory Opinion as a legal basis to legitimize their movements. Upcoming sections will deal with this. *Supra* text accompanying note 252.

[270] Iris Marion Young, "Two Concepts of Self-Determination," p.177.

[271] See Polat, *Ahlak,Siyaset, Şiddet*, pp.88-89.

determination. It only covered the aspirations of colonized people and non-self-governing territories.

The status of people living in colonies and non-self-governing territories somehow controversial or blurred. The issue is whether the inhabitants of such territories belonging to different ethnic groups are treated separately or amalgamated them into one group treated as the 'people'. This relates to the principle of *uti possetitis*, which provides stability in international politics when independence is declared by transforming former colonial or, in the Yugoslavia case, administrative boundaries into international frontiers.[272] Therefore, no matter their character , minorities cannot legitimately secede from an established state since they are counted under the definition of the people *as a whole*.[273]

[272] Barker, *Parry and Grant Encyclopaedic Dictionary of International Law*, p.655; also *supra* text accompanying note 251.

[273] Milena Sterio, *The Right to Self- Determination under International Law "Selfistans", secession, and the rule of the great powers*, pp.11-12. The term 'people', in terms of rights, is highly controversial. According to some commentators, a group of people – whether minorities or indigenous – should possess the status of 'people' to enjoy certain rights, for instance the right to self-determination. To reduce such confusion, UNESCO experts proposed defining 'the people' as "a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life" See "International Meeting of Experts on further study of the concept of the rights of peoples," UNESCO Doc. SHS-89/CONF.602/7, February 22, 1990, p.8. There are, for some writers, tests to identify whether such groups constitute a people under international law. See Michael P. Scharf, "Earned Sovereignty: Juridical Underpinnings," *Denv. J. Int'l L. & Pol'y 31*, no.3 (2002): pp.373-387, p.380. Besides, according to Judge Cançado Trindade, "the 'factual preconditions or configurations of a 'people'' are not determined by international law. There are no legal limits to the criteria by which a group may identify itself as a 'people'. Whether or not such identification exists is merely a matter of fact. The presence of that fact (i.e. the self-identification of a group as a 'people') may contribute to and strengthen the desire of a group to establish itself as a State – including doing this by secession." See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), Response Submitted by Finland to Questions of Judge Koroma and Judge Cançado Trindade, December 2009, accessed April, 2019, https://www.icj-cij.org/files/case-related/141/17888.pdf.

Therefore, non-colonized people (indigenous people, minorities, etc.) cannot pursue the right of self-determination by secession. The right for them takes the form of demands for internal self-determination, such as democratic participation in decision-making processes, the establishment of autonomy, or schemes of regional political governance.[274]

This is evident in questions/cases heard by the League of Nations on the Aaland Island claims and the Canadian Supreme Court on the Quebec question. In both circumstances, a common understanding of self-determination is apparent: that people have internal and external rights to self-determination whereby the latter may become valid if the former are insufficiently provided. For instance, according to report of the Committee of Jurists delegated by the Council of the League of Nations to give an advisory opinion upon the legal aspects of the Aaland Islands question, war and revolution are two extraordinary periods that "create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law".[275]

One year after this report, the Commission of Rapporteurs established by the Council released its report, noting that "(t)he separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an *altogether exceptional solution*, *a last resort* when the State lacks either the will or the power to enact and apply just and effective guarantees (emphasis added)"[276] conditional on the supremacy of

[274] Ibid., p.12.

[275] "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question The International Committee of Jurists of the Council of the League of Nations," *League of Nations Official Journal*, Special Supp. No. 3 (1920).

[276] "The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs," League of Nations Doc. B7/21/68/106 (1921).

territorial integrity. The Canadian Supreme Court, as cited before, reached a similar conclusion to that of both the Committee and Commission decades ago: external secession is only valid if the mother state fails to provide the necessary opportunities for the secession-demanding people to enjoy their cultural, linguistic, or other rights effectively.[277]

With the end of decolonization, the definition of self-determination was reinterpreted to extend its scope to sub-national groups. According to this new view, states should enjoy territorial integrity and political independence only if they treat "the whole people belonging to the territory without distinction as to race, creed or color".[278] This was the case for subsequent UN resolutions, which were construed as allowing peoples to apply for external self-determination if the mother state discriminated against people living under its administration.[279]

Thus, in contrast to the statist view of self-determination, interpretations have evolved through the lenses of human rights and minority rights that seek to promote cultural, linguistic, and other intrinsic preferences. As Koskenniemi puts it, external self-determination is linked to internal self-determination, implying that groups may resort to secession to preserve their rights if the mother state oppresses them.[280] This so-called remedial secession – the right to resort to secession as the final remedy following

[277] *Supra* text accompanying note 262.

[278] Friendly Relations Declaration, *supra* text accompanying note 12.

[279] Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/RES/50/6, October 24, 1995, ¶1.

[280] Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice," pp.246-248.

grave breaches of minority rights – has been widely debated in the literature.[281]

This is also the case for the Venice Commission Report on Self-determination and Secession in Constitutional Law, indicating that external self-determination, i.e. secession, is opposed by the constitutions of various states, which instead prioritize territorial integrity', the indivisibility of the state, and national unity.[282] Conversely, some constitutions include self-determination provisions to enhance fundamental rights via self-government instruments, implying that people should freely observe internal self-determination rights so long as these comply with the territorial integrity of the mother state. Thus, federal or regional self-governmental boundaries may be allowed to avert the risk of secession.[283]

Logically, external self-determination, i.e. secession, can only apply alongside internal self-determination, i.e. right to enjoy basic minority or group rights, as enshrined in reports/judgments regarding the Aaland Island Claim and Quebec Question.[284] The question though is who will determine,

[281] Allen Buchanan, "Democracy and Secession," in *National Self-Determination and Secession*, ed. Margaret Moore (New York: Oxford University Press, 2003), pp.14-33, p.15.

[282] "Self-Determination and Secession in Constitutional Law," Report adopted by the Commission at its 41th meeting, 10-11 December 1999, CDL-INF (2000) 2, January 12, 2000.

[283] Ibid., p.13.

[284] A contrary reading of the wording of The World Conference on Human Rights of 1993 – "thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind" – may mean that peoples or groups that are not represented by a government have a right to external self-determination. See Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights, A/CONF. 157/24, June 25, 1993. Also see Hüseyin Pazarcı, *Uluslararası Hukuk* (Ankara: Turhan Kitabevi, 2010), pp.141-143.

on the basis of what criteria about which groups or people have the right to remedial secession.

This controversial question is highlighted by secessionist demands that have spread worldwide.[285] It makes it necessary to consider how the international community deals with the demands of peoples for secession and determine the acceptable criteria for demanding remedial secession.

First, it is assumed theoretically that a people or group of people need to indicate that they are under pressure or even severely oppressed by the mother state, which prevents them from exercising their basic rights. A second criterion is that the oppressed should show that the central government has no effective control where they live. Thirdly, linked to the second criterion, people demanding secession must show that an international administrative authority is needed to govern the territory they live in. Finally, but most importantly, these groups or people(s) must receive the support of major powers to gain international recognition and legitimacy.[286]

The last criterion is so critical that clashing national interests and power politics have repeatedly shaped debates around self-determination. As Sterio rightfully notes, “the East Timorese, the Kosovar Albanians, and the Southern Sudanese have been successful in exercising rights to external self-determination, whereas Chechens, South Ossetians, and the Abkhaz

[285] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1996), p.1.

[286] Milena Sterio, *The Right to Self- Determination under International Law “Selfistans,” secession, and the rule of the great powers*, pp.3-4.

peoples have been denied the same rights"[287] from a pro-Russian perspective.

The following sections therefore consider how clashing national interests influence the rights of people to self-determination, i.e. secession, through concrete examples. In particular, Kosovo's unilateral declaration of independence and the ICJ's contributions regarding secession, which constituted a basis for subsequent secessionist movements, opened a new era in which self-determination was re-interpreted outside its earlier colonial context.

3.2.2.1 State Collapse and Self-determination

As the Cold War ended, signified by the collapse of the Soviet Union and other Soviet Bloc communist regimes, the right to self-determination came to be reinterpreted. The cause of this was the demand of peoples within federal states, particularly the Soviet Union and Yugoslavia, for independence. It became necessary to consider whether the right to self-determination needed new justifications. Two valuable examples are the cases of Kosovo-Serbia and South Ossetia-Abkhazia which highlight the conflicting legal arguments and clashing national interests of powerful countries when it comes to the question.

3.2.2.1.1. Self-determination and the Balkans

The unilateral declaration of independence by Kosovo cannot be effectively understood without examining all the preceding events in the Balkans, most notably in the Socialist Federal Republic of Yugoslavia (SFRY), during the last decade of the 20th century. The SFRY was a federal state with six republics (Bosna-Herzegovina, Croatia, Macedonia, Montenegro, Serbia,

[287] Ibid., p.3.

and Slovenia) and two autonomous provinces (Vojvodina and Kosovo), "which are constituent parts of the Socialist Republic of Serbia, and the Socialist Republic of Slovenia".[288]

During the 1980s, ethnic dissolution spread and escalated, particularly after the constitutional amendments introduced in 1989 by the central government in Serbia. These amendments abolished the autonomous administrative status of both Kosovo and Vojvodina.[289] On 25 June 1991, Slovenia became the first republic to declare independence from Yugoslavia, following a referendum in 1990.[290] It was joined by Croatia, which unilaterally declared independence in September 1991 after another 1990 referendum.[291] In October 1991, Bosnia-Herzegovina adopted a parliamentary resolution enacting independence that was opposed by the Serbian community.[292] In 1992, two constitutive republics, namely Montenegro and Serbia, rejected secession and renamed the SFRY as the

[288] See Article 2 of the Constitution of the Socialist Federal Republic of Yugoslavia, Belgrad 1974, accessed April 7, 2019, http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf.

[289] İlhan Uzgel, "Yugoslavya'nın Dağılması Kutusu," in *Türk Dış Politikası, Kurtuluş Savaşından Bugüne, Olgular, Belgeler, Yorumlar (Volume: II˙1980-2001)*, ed. Baskın Oran (İstanbul: İletişim Yayınları, 2010), p.491.

[290] Alain Pellet, "The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples," *EJIL 3*, no.1 (1992): pp.178-185, p.183; and see Arif Bağbaşlıoğlu, *NATO'nun Dönüşümü'nün Balkanlar'a Yansımaları: Müdahale, Genişleme, Ortaklıklar* (Ankara: Nobel Yayınevi, 2018), pp.113-166.

[291] Pellet, "The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples," p.183; and Bağbaşlıoğlu, *NATO'nun Dönüşümü'nün Balkanlar'a Yansımaları: Müdahale, Genişleme, Ortaklıklar*, p.119.

[292] Pellet, "The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples," p.183; and Bağbaşlıoğlu, *NATO'nun Dönüşümü'nün Balkanlar'a Yansımaları: Müdahale, Genişleme, Ortaklıklar*, p.120.

Federal Republic of Yugoslavia, claiming to be its successor. These developments led to several armed conflicts accompanied by ethnic cleansing. Given these circumstances, determining the legal implications of the SFRY's disintegration became one of the leading legal problems regarding the right to self-determination.

In 1991, the President of the Arbitration Committee of the Peace Conference on Yugoslavia, Robert Badinter, received a letter from Lord Carrington, who was President of the Peace Conference on Yugoslavia. In the letter Lord Carrington asked about the legal consequences of the unilateral declarations of independence by SFRY's former republics to clarify whether they constituted secession or dissolution. The Committee concluded that SFRY was indeed dissolving, which might justify the individual claims for state succession posed by its constitutive republics.[293]

Various legal outcomes are possible between state dissolution and secession. In the former case, new states emerge from a previous one whereby each new state has the right to claim to be the original state's successor and demand that all the assets and liabilities of the former state are divided in accordance with the law. On the other hand, secession is more controversial , as in the case of Kosovo.[294] Here, the Badinter Commission determined that SFRY was dissolving, so it was relatively easy to declare the use of force by its warring republics to be illegal.

Additionally, the Badinter Commission was asked another critical question which sought to clarify whether Serbian groups living in Bosnia-Herzegovina

[293] Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples," pp. 182-183.

[294] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, p.33.

and Croatia had a right to self-determination and therefore the right to integrate with the newly-formed the Federal Republic of Yugoslavia (FRY). The Committee first recalled the principle of *uti possitetis* under international law, which defines and preserves the territoriality of states after declaring independence. From this, it concluded that Bosnian and Croatian Serbs should respect the new borders as long as they were afforded all minority and group rights by Bosnia and Croatia. Thus, the Committee granted Bosnian and Croatian Serbs the status of a 'minority' rather than a 'people'.[295] In so doing, the Committee seems to have adopted similar conclusions to the League of Nations in the Aaland Island Claims and the Canada Supreme Court in the Quebec Case.[296] I will now look at the applicability of this judgement to the case of Kosovo.

Kosovo, one of SFRY's two autonomous provinces, was predominantly populated by ethnic Albanians. During the 1980s, the SFRY's 1974 constitution granted significant opportunities to Kosovars to enjoy their basic rights, such as to education in their mother tongue, and legislative authority within the province. Nevertheless, Kosovar Albanians increasingly protested against Yugoslavia (particularly Serbia) to gain independence. In 1989, under the crude, mismanaged administration of Slobodan Milosevic, who was eventually indicted for war crimes before dying during his long trial by the UN tribunal for the former Yugoslavia,[297] Serbia passed constitutional amendments that suspended Kosovo's autonomous rights and put a hold on

[295] Pellet, "The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples," p.184.

[296] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, pp.34-35.

[297] Goldstein and Pevehouse, *International Relations*, p.35.

basic rights.[298] These developments escalated conflicts between Serbs and Kosovars and encouraged the rise of the Kosovo Liberation Army (UÇK - Ushtria Çlirimtare Kosoves).[299]

In 1991, Kosovo declared independence along with other former SFRY republics. However, its declaration was ignored by the European Community because the international community did not yet recognize Kosovo as an independent state, given that it had been declared part of the FRY in the Dayton Accords of 1995.[300] In response to this failure to receive international support and recognition, Kosovars began a military campaign to attract international attention with the ultimate aim of winning an independent state recognized by the international community.[301] In March 1998, Security Council Resolution 1160 described UÇK's actions as terrorism, thereby condemning UÇK as a terrorist organization. A peaceful and considerable political process at this point to resolve the Kosovo problem would have enhanced Serbia's international status.[302] That is, Serbia had a chance to restore its legitimacy in the community of states by resolving its Kosovo problem peacefully.

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[298] İlhan Uzgel, "Kosova Sorunu Kutusu," in *Türk Dış Politikası, Kurtuluş Savaşından Bugüne, Olgular, Belgeler, Yorumlar (Volume: II·1980-2001)*, ed. Baskın Oran (İstanbul: İletişim Yayınları, 2010), p.509.

[299] Ibid.

[300] Richard Caplan, "International diplomacy and the crisis in Kosovo," *International Affairs* 74, no.4 (1998): pp.745-761, p.745.

[301] Adem Demaçi: "I will not condemn the tactics of the Kosovo Liberation Army because the path of nonviolence has gotten us nowhere … The Kosovo Liberation Army is fighting for our freedom", ibid., p.752.

[302] See the letters from the United Kingdom (S/1998/223) and the United States (S/1998/272), the UN Doc. S/RES/1160 (1998), March 31, 1998.

One of several reasons why Milosevic was given such room for maneuver was the fear that an independent Kosovo would have a domino effect in the region and the wider geography.[303] Nevertheless, on 24 March 1999, NATO forces began a military campaign against the FRY to halt the humanitarian crisis in Kosovo. This had no prior Security Council authorization "due to Russian and Chinese opposition".[304]

Consequently, the Kosovo crisis was ended by peace built on foreign military intervention. On 10 June 1999, the Security Council adopted Resolution 1244[305] to define the administrative structure of Kosovo. The resolution first demanded that the FRY withdraw all military forces, including paramilitaries, from the territory of Kosovo. In addition, an international security presence – the KFOR (the Kosovo Force) – was to be deployed. To complement this an international security presence – the UN Mission in Kosovo (UNMIK) – was created to provide a framework for the international administration of Kosovo, particularly civil administrative facilities. Thus, Security Council Resolution 1244 envisaged a political process that would lead to another Security Council decision.[306]

On 17 February 2008, the Kosovo Assembly declared unilateral independence, which was opposed by Serbia yet rapidly recognized by the European Union (EU) and several countries individually, including USA,

[303] Caplan, "International diplomacy and the crisis in Kosovo," p.755.

[304] James Summers, "Kosovo," in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov (New York: Oxford University Press, 2014), pp.235-254, p.239.

[305] On the Situation on Kosovo, the UN Doc. S/RES/1244 (1999), June 10, 1999.

[306] Ibid., ¶19.

France, Albania, Turkey, Afghanistan, and Costa Rica.[307] However, this unilateral declaration of independence escalated debates surrounding issues of secession.[308]

In 2010, the ICJ gave an Advisory Opinion on the legality of the unilateral declaration of Kosovo at the request of the UNGA.[309] In it the Court ruled by ten voted to four[310] that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law.[311]

In its decision, the Court made clear that there was no need to rephrase the question posed by the UNGA. On the contrary, the Court retained its position from previous judgments.[312] The Court concluded that the question asking for a legal advisory opinion was well formulated in requesting "an answer to the accordance of the declaration of independence with

[307] Summers, "Kosovo," in *Self-Determination and Secession in International Law*, p.244.

[308] For an illustrative article on the ICJ's findings, see Dov Jacop, "International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion Of 22 July 2010," *The International and Comparative Law Quarterly* 60, no.3 (2011): pp.799-810.

[309] Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, the UN Doc. A/RES/63/3, October 8, 2008.

[310] Ibid., ¶123.

[311] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, July 22, 2010, p. 403.

[312] Ibid., ¶50.

international law",[313] rather than on the legal consequences of the declaration. In other words, the question did not ask the Court to clarify whether or not "Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State".[314]

The Court determined that, under general international law, the unilateral declaration of independence of Kosovo was in accordance with international law; i.e. it did not violate international law. To reach this conclusion, the Court noted that the practices of states, as seen in the history of international relations, have not created norms prohibiting unilateral declarations of independence. Thus, the Court used history to exemplify that past unilateral declarations did not lead to an outlaw status for the states that had made them.[315] Some participants in the proceedings claimed that the unilateral declaration of independence violated the principle of the territorial integrity of states. However, the Court pointed out that territorial integrity is a matter of inter-state relations: "the scope of the principle of territorial integrity is confined to the sphere of relations between States".[316]

Additionally, several UN Security Council resolutions condemning the recognition of the declarations of independence by some entities were given as evidence that current international law outlaws unilateral declarations of independence. However, the Court rejected the claim that Security Council

[313] Jacop, "International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion of 22 July 2010," p.802.

[314] *Supra* text accompanying note 311, ¶51.

[315] Ibid., ¶79.

[316] Ibid., ¶80.

resolutions condemned independence gained via the illegal use of force, "or other egregious violations of norms of general international law, in particular, those of a peremptory character (*jus cogens*)".[317] It gave Southern Rhodesia and Cyprus (Turkish Republic of Northern Cyprus) as examples.

Lastly, the Court did not evaluate the issues of the right to self-determination and remedial secession as the Court found them irrelevant to the current case.[318] While it hesitated to delve into the legal consequences of the right to self-determination, the Court seemed to build its legal reasoning on the issue of self-determination in a non-colonial context using the Wall advisory opinion.[319] In that case, the Court had reaffirmed the right to self-determination as having an *erga omnes* character as applied to the Palestinian people.[320] In other words, the Court did not regard the Wall case as representing a competition among great powers, i.e. politically prejudicial.

Several legal scholars believe that the Court should have clarified various other questions that have created complexity in the political realm. Those claiming that the Court's decision was illegal emphasized that it should have more deeply considered the principle of territoriality between Kosovo and the recognizing states.[321] Those supporting the legality of the Court's

[317] Ibid., ¶81.

[318] Ibid., ¶83.

[319] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136.

[320] Ibid., ¶155-156.

[321] Jacop, "International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion of 22 July 2010," p.804. See also Malcolm Shaw's speech defending Serbia before the Court, highlighting that the 'territorial integrity of states' is essential under international law. After pointing out its important place in international relations, he further reminds us that territorial

findings argued that the Court should have examined principles of self-determination and remedial secession more deeply.[322]

Besides such criticisms, the findings of the Court have several implications for international politics. First, the Court considered the scope of the principle of the territorial integrity within "the sphere of relations between States".[323] In other words, NSAs, in this case Kosovo, are not obliged to respect the principle of territorial integrity during secession because "you cannot oppose a right to a group which has no obligation to respect it".[324] This implies that a state cannot oppose a NSG within its territory in abstract sense, which undermines the principle of territorial integrity.[325] Judge Koroma, in his dissenting opinion, argued that the principle of territorial integrity does apply to non-state entities engaged in territorial secessionism from an existing state. For him, rather than considering general international law abstractly, the Court should have focused on details to conclude that "the unilateral declaration of independence of 17 February 2008, is neither in

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integrity applies to non-state actors as well. Malcolm Shaw, "The Unilateral Declaration Of Independence Violates The General International Law Principle Of Respect For Territorial Integrity," in *on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion submitted by the General Assembly of the United Nations)*, VERBATIM RECORD, CR 2009/24, December 1, 2009, pp.63-76.

[322] Jacop, "International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion of 22 July 2010," p.804.

[323] *Supra* text accompanying note 311, ¶80.

[324] Jacop, "International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion of 22 July 2010," p.805.

[325] Ralph Wilde, "Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion," *Leiden Journal of International Law* 24, no.1 (2011), pp.149-154, p.152.

conformity with international law nor with the principles of the Charter of the United Nations, nor with resolution 1244 (1999)".[326]

A second possible implication of the Court's finding for international relations is that the unilateral declaration of independence was not actualized by violating any *jus cogen* norms, such as illegal use of force. However, this contradicts other UNSC declarations outlawing such actions. Thus, the Court's ruling implies that Kosovo's recognition by third parties conforms with international law.[327]

These legal interpretations were echoed in the case of former republics of the Soviet Union. Accordingly, the next section deals with events in Abkhazia and South Ossetia.

3.2.2.1.2. Self-determination and the Caucasus

3.2.2.1.2.1. Factual Background

In summer 2008, South Ossetia and Abkhazia, two entities with some degree of autonomy along with some legal constraints over their administration, found themselves in a war involving Georgia and Russia. While the war escalated self-determination debates, as happened in Kosovo, the lack of international support has meant that neither entity has gained independence, in contrast to Kosovo.

The non-Georgian populations of the two provinces, with long and unique historical backgrounds, have always had disagreements with Georgia that

[326] See Dissenting Opinion of Judge Koroma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, July 22, 2010, p. 403, ¶20-21.

[327] Jacop, "International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion of 22 July 2010," p.805.

have sometimes led to brutal clashes regarding territoriality and power sharing. Following the collapse of the Soviet Union, as happened in various parts of the world, nationalism and geopolitics were the element igniting new conflicts. During Soviet rule, relations between Georgia and Ossetians were relatively calm and peaceful.[328] However, conflict was reignited at the end of the 20th century, which led Ossetia to declare independence in 1990.[329]

Until 1992, armed clashes between Georgia, Ossetia, and Russia left thousands dead, injured, or displaced before a ceasefire was negotiated.[330] Russian, Georgian, and Ossetian peace-keeping forces were deployed to South Ossetia to maintain the ceasefire under the auspices of the Conference on Security and Co-operation in Europe (OSCE).[331] This maintained peace between 1992 and 2003 by freezing the conflicts between parties. However, conflicts broke out one year later when President Saakashvili took office in Georgia to end Shevardnadze's term.

Initially, Saakashvili had been willing to grant wider autonomous rights to South Ossetia through a power-sharing model. In 2005, for instance, South Ossetia was promised "broad self-governance" with a high degree of control

[328] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, p.145.

[329] "Georgia: Avoiding War in South Ossetia", *ICG Europe Report N°159*, November 26, 2004, p.3, accessed April 25, 2019, http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019224.pdf.

[330] "Roughly 60.000 Ossetians and Georgians were displaced from their homes during the conflict," see Christopher Waters, "South Ossetia," in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov (New York: Oxford University Press, 2014), pp.175-190, p.176.

[331] Ibid., p.177.

over economic and social affairs.[332] These promises, backed by Western countries, aimed to reunify Georgia and sustain its territorial integrity.

Georgia considered that Russia was not a neutral country offering regional peace and stability. For instance, in an interview made in 2006, two years before the 2008 war, EU South Caucasus envoy Peter Semneby said that

> Recent events have added weight to the Georgian argument that Russia is not a neutral participant in the peacekeeping arrangements and negotiation formats [for Georgian separatist regions] … that the current status quo is not tenable, that in fact it's not a status quo but is gradually deteriorating.[333]

Russia, whose currency was valid in South Ossetia, also gave Russian passports to Ossetians. Such observations indicated that war between Georgia and Russia was approaching as both defended their national interests in the region.

A similar situation occurred in Abkhazia, which ended in armed conflict, resulting in an ambiguous international status. Like South Ossetia, Abkhazia had a unique historical background. For instance, during the independent Georgian Republic (1918, 1921), Abkhazia was granted autonomy under the constitution.[334] After the Bolshevik Revolution, particularly the Red Army's occupation in 1919, Abkhazia was granted Soviet Socialist Republic status, which was equal to Georgia in terms of administrative capacity.[335] However,

[332] Ibid.

[333] Andrew Rettman, "Russia 'not neutral' in Black Sea conflict, EU says," *EU Observers*, October 12, 2006, accessed April 25, 2019, https://euobserver.com/foreign/22622.

[334] Emil Souleimanov, *Understanding Ethnopolitical Conflict Karabakh, South Ossetia, and Abkhazia Wars Reconsidered* (New York: Palgrave MacMillan, 2013), p.114.

[335] Ibid.

in 1931, it was reintegrated with Georgia when Stalin transformed Abkhazia into an autonomous republic within Georgia.[336] After his death, Abkhazia enjoyed wider autonomy until the last quarter of the twentieth century, particularly as the Soviet Union was collapsing.

In 1992, conflict between Georgia and Abkhazia restarted, with Russia as party to the conflict via covert aid to Abkhazia. Tensions between the two forces evolved into ethnic cleansing.[337] A Human Rights Watch Report on Abkhazia found that Russia aided, assisted, armed, and supported Abkhazian militias in their fight against Georgia that violated humanitarian legal standards.[338] Efforts to settle the conflict via negotiations were supervised by the UN, OSCE, and Russia. In 1994, a Declaration on Measures for a Political Settlement of the Georgian–Abkhaz Conflict was adopted,[339] leading to Proposals Relating to Political and Legal Elements of the Comprehensive Settlement of the Georgian–Abkhaz.[340] For both South Ossetia and Abkhazia, the war of summer 2008 was a critical turning point for debates over their self-determination.

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[336] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, p.146.

[337] "Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict," *Human Rights Watch Report* 7, no.7 (March 1995), accessed April 25, 2019, https://www.hrw.org/reports/pdfs/g//georgia/georgia953.pdf.

[338] Ibid.

[339] Farhad Mirzayev, "Abkhazia," in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov (New York: Oxford University Press, 2014), pp.191-213, pp.193-194.

[340] See Annex II of the Report of the Secretary-General 'On the Situation in Abkhazia, Georgia. Proposals for Political and Legal Elements for a Comprehensive Settlement of the Georgian/Abkhaz Conflict', the UN Doc. S/1994/529, May 3, 1994, ¶3.

In August 2008, war began between Russia and Georgia, following the killing of a Russian soldier in South Ossetia, although it remains uncertain who fired first. It opened a new debate that resembles the Cold War era. The five-day war left a disputable region behind. Russia did not allow Western states, most notably NATO, to infiltrate her 'near abroad' via force, although the conflict was apparently between Russia, and Russian-backed militias, and Western-backed Georgia.[341] On 12 August, a ceasefire was declared, although it remained unsigned until 19 August. The ceasefire had six points: "(a) the commitment to renounce the use of force; (b) the immediate and definitive cessation of hostilities; (c) free access to humanitarian aid; (d) the withdrawal of Georgian forces to their places of permanent deployment; (e) the withdrawal of Russian forces to their lines of deployment prior to 7 August 2008; and (f) the convening of international discussions on lasting security and stability arrangements for Abkhazia and South Ossetia."[342]

Because it was unwilling to withdraw its troops back to their positions prior to 7 August, Russia immediately recognized both enclaves, namely South Ossetia and Abkhazia, to legalize its presence via invitation.[343] However, the statuses of the two regions remain debatable today.

[341] Charles King, "The Five-Day War: Managing Moscow After the Georgia Crisis," *Foreign Affairs* 87, no.6 (November/December 2008), pp. 2-11.

[342] *Repertoire of the Practice of the Security Council Supplement 2008-2009 Volume I* (New York: United Nations Publications, 2014), pp.130-135.

[343] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, p.148.

3.2.2.1.2.2. Self-determination: A Legal Right for South Ossetia and Abkhazia

Are there considerable differences between self-determination claims of South Ossetians, Abkhazians, and Kosovar Albanians? This question can be viewed through the lenses of the rule of law and politics, both of which offer contradictory answers. Some may claim that South Ossetia and Abkhazia have the right to external self-determination whereas some commentators find this difficult to support.[344] Granting the right to external self-determination necessitates determining which groups have the status of a people under international law who should enjoy internal self-determination. ICJ judgments provide two contexts defining 'people': colonial and non-colonial. For instance, in its judgment concerning "certain activities of Australia with respect to East Timor", the Court noted that "the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination".[345] The other example that can apply to non-colonial contexts is the Kosovo Advisory opinion, even though it did not touch on the right to self-determination *directly*.

Generally, a people distinguishes itself from others in terms of culture, language, territorial ties, ethnicity, etc.[346] More subjectively, a group of people might consider themselves as constituting 'the people' and depict themselves as having the capacity to constitute a political entity.[347] The cases of South Ossetia and Abkhazia, which lack a colonial background,

[344] Mirzayev, "Abkhazia," p.194.

[345] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, ¶31.

[346] *Supra* text accompanying note 273.

[347] Waters, "South Ossetia," p.185.

exemplify the non-colonial context of self-determination. However, both groups meet the criteria to be considered as a people to enjoy the right to self-determination.

The next issue regarding the self-determination of South Ossetia and Abkhazia is whether either province has a remedial right to external self-determination. That is, one needs to determine whether the peoples of these two provinces have been prevented from enjoying their basic rights and suppressed by the mother state that they have never shown loyalty to. According to Sterio, neither have fully enjoyed their right to internal self-determination as "any dissent was harshly repressed" during the Soviet era, and also under Georgian rule.[348]

Although Georgia offered the two break-away regions power-sharing arrangements, it now seems impossible to reintegrate them into Georgia's state apparatus to maintain its territorial integrity. Thus far, their cases clearly resemble Kosovo's declaration of independence. Nevertheless, neither South Ossetia nor Abkhazia have gained considerable international recognition, except from a few states, including Venezuela, Nicaragua, Nauru, and Tuvalu.[349]

Ultimately, we therefore need to clarify two possibilities. On the one hand, such cases may create a dangerous precedent that can threaten multi-ethnic states – as Serbian president Boris Tadić warned in an Emergency Session of Security Council following Kosovo's Declaration of Independence. On the other hand, the Kosovo case is *sui generis,* which

[348] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, p.150.

[349] Waters, "South Ossetia," p.180.

sets no precedent but needs to be explained – as USA and its allies have argued.[350]

3.2.2.1.3. Flexing the Law out of Shape: A Failed Attempt at Self-determination?

Because neither South Ossetia nor Abkhazia could gather sufficient international support, it crippled their struggles to gain recognition. Although Russia officially recognized them as separate states, its real objectives remain opaque.

Here, one needs to determine why major powers opposed the two regions' self-determination efforts. Western powers initially backed Georgia out of concern for its territorial integrity given that they consider Georgia a reliable partner in the Black Sea region. Conversely, based on its "near-abroad" foreign policy following the collapse of the Soviet Union,[351] Russia wished to weaken Georgia and prevent NATO entering the region through further color revolutions.[352] Clearly then, both Russia and Western powers had vital interests in the region, although the latter hesitated to alienate Russia by intervening in regional conflicts.[353] This unwillingness may have deterred

[350] "Security Council Meets in Emergency Session Following Kosovo's Declaration of Independence, with Members Sharply Divided on Issue," *UN Security Council Press Release*, SC/9252, February 18, 2008, accessed April 30, 2019, https://www.un.org/press/en/2008/sc9252.doc.htm.

[351] See David R. Cameron and Mitchell A. Orenstein, "Post-Soviet Authoritarianism: The Influence of Russia in Its 'Near Abroad'," *Post-Soviet Affairs* 28, no.1 (2012): pp.1-44.

[352] About Colour Revolutions in the Black Sea region, see Abel Polese, "Russia, the US, "the Others" and the "101 Things to Do to Win a (Colour) Revolution": Reflections on Georgia and Ukraine," *Debatte: Journal of Contemporary Central and Eastern Europe* 19, no.1-2 (2011): pp.421-451.

[353] Sterio, *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*, p.152.

Western powers from intervening in South Ossetia and Abkhazia. Additionally, USA and its allies condemned Russia for recognizing South Ossetia and Abkhazia because it threatened Georgia's territorial integrity. Ultimately, these clashing national interests in the region have made the South Ossetia and Abkhazia issue unresolvable so far.

Given these clashing interests, the rhetoric of international law has also multiplied. That is, the language of law sometimes does not match state practices, as in the cases of Kosovo, South Ossetia, and Abkhazia. For instance, Western great powers accepted Kosovo's independence as legitimate under international law, but as a *sui generis* example; conversely, Russia and its allies condemned Kosovo's independence as opening a way to amputate states. As Borgen puts it, "despite the similarities of the roles that they have played, the US and Russia have taken positions in each case that are *diametrically* opposed to each other (emphasis added)".[354] Thus, both sides use the principle of territorial integrity to condemn secession in different cases while not refraining from intervening by force in the domestic affairs of other states. This flexibility in the modern discourse of international law has enabled both sides to defend their actions both before and via law. Therefore, neither South Ossetia nor Abkhazia will be recognized by a considerable majority of states since they lack the support of the major powers, whose interests current international law seems to serve. In short, as Borgen rightfully points out, it is the major powers that are the most powerful interpreters of international law.[355]

[354] C.J. Borgen, "The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of SelfDetermination in the Cases of Kosovo and South Ossetia," *Chicago Journal of International Law* 10, no.1 (2009): pp.1-33, p.6.

[355] Ibid., pp.30-32.

3.2.3. Concluding Remarks

Modern legal doctrine, which supposedly provides determinate and objective normative solutions to legal problems, fails in hard cases. Traditionally, the ICJ restricts itself to interpreting cases that alienate state parties with clashing national interests. As the ICJ noted regarding the South West Africa case, "As is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it."[356] Nevertheless, despite supposedly limiting itself in this way, the Court has not hesitated to act as a law maker in other cases. Why is this?

At least two basic paradoxes are relevant.[357] Firstly, the hypothetical distinction between 'making' and 'applying' law is misleading and illusory. The Court has to use discretion to resolve problems. For instance, finding the relevant rule of customary law is itself an interpretive process. Which rule constitutes custom and suitable for the case at hand is a matter of interpretation.

The second basic paradox – which applies no matter which court it is – is that the Court did not hesitate to go beyond the existing law to act like a law-making organ.[358] The only valid answer as to why the ICJ can champion legal positivism while acting like this is that it acts differently in cases that may aggrieve the international community. For instance, in its Kosovo Advisory Opinion, the Court refrained from considering issues of self-

[356] *Supra* text accompanying note 83.

[357] Polat, *Ahlak,Siyaset, Şiddet*, pp.131-133.

[358] See *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports, April 11, 1949*,* p.174.

determination (remedial secession) and the legal consequences of Kosovo's independence declaration: "Debates regarding the extent of the right of self-determination and the existence of any right of 'remedial secession', however, concern the right to separate from a State. As the Court has already noted …, and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly."[359]

Thus, international judiciary organs sometimes avoid hurting or alienating states while sometimes acting like law-makers. Self-determination and secession are two issues where the national interests of opponents' clash. Therefore, the law serves the interests of the powerful when states are unequal. The cases of Kosovo, South Ossetia, and Abkhazia demonstrate that international law cannot produce effective normative solutions when there is a risk of alienating powerful states.

Many states, such as Serbia, Russia, and China, strongly opposed Kosovo's declaration whereas others, including USA, Turkey, and Belgium, recognized the new state. Those against Kosovo's unilateral declaration of independence claimed it clearly violated the territorial integrity of states and could have a domino effect. However, John Sawer concluded for the UK that the violent break-up of Yugoslavia had created a *sui generis* context that legitimized Kosovo's actions despite the lack of a peacefully negotiated secession agreement.[360]

In contrast, Serbia and its supporters claimed that the principle of territorial integrity applies to non-state entities as well as states, so the lack of a negotiated secession was a clear violation of Serbia's territorial integrity. In

[359] *Supra* text accompanying note 311, ¶83.

[360] *Supra* text accompanying note 350.

its advisory opinion, the ICJ, determined that "the scope of the territorial integrity is confined to the sphere of relations between States".[361]

Regarding the South Ossetia case, Western powers, who defended Kosovo's secession, strongly condemned the breakaway provinces and prioritized Georgia's territorial integrity. This implies that the discourse of international law has become so flexible that similar circumstances may produce different legal justifications in future.

In sum, arming or otherwise supporting NSGs seeking their right to self-determination remains controversial. The law cannot provide adequate and determined legal solutions to this question because clashing national interests make such problems unresolvable. Whereas Kosovo garnered considerable international support to gain recognition as a new state, South Ossetia's independence was outlawed by those same states. This demonstrates that international law serves powerful actors when there is inequality between actors.

3.3. Humanitarian Intervention: A Legitimate Way to Intervene in the Domestic Affairs of Other States?

In this section I will consider whether states arming NSGs in other states for humanitarian purposes have currency under international law. My basic concern is whether the concept of humanitarian intervention allows material assistance to NSGs, such as weapons. Despite the illegality of intervention in international law, enshrined by the ICJ in the Nicaragua case, some commentators nevertheless claim that humanitarian intervention is one of the exceptions.[362]

[361] *Supra* text accompanying note 311, ¶80.

[362] For an illustrative sample see Ian Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World," *Ethics & International Affairs* 25, no.3 (2011): pp.293-313.

In classical legal terms, intervention conflicts with the basic building blocks of the international state system, namely state consent, territorial integrity, and political independence. Because of these features, intervention without the consent of the targeted state would definitely violate the principle of non-intervention.

Although the state system is constructed on the principles of sovereignty and territoriality, intervention and the use of force have been located at the heart of the system since its inauguration. Many terms that we are familiar with today are as old as the system itself, their origins going back to the 15th century. Humanitarian intervention is one of these terms with a six-hundred-year history. A brief look at this history is instructive for the question at hand.

During the Salamanca Debates in the 16th century, the legitimacy of the European conquest of the New World was deeply discussed. According to Francisco de Vitoria, Professor of Theology at the University of Salamanca (Universidad de Salamanca), the people of the new world had the same legitimate rights as Europeans because both are bound by Natural Law, which is transcendent and inclusionary. Europeans, like 'Natives', only had a right to wage war with *just cause*.[363] Two basic principles emerge from Natural Law doctrine, namely the 'right to trade' and the 'right to preach', which legitimized the European presence in the New World.[364] Violation of these rights constituted a just cause to restore 'order', through violence if necessary.

Additionally, the terms and application of trusteeship can also be traced back to Vitoria's era. For Chowdhuri, as 'civilized' nations, Western countries

[363] Shaw, *International Law*, pp.22-23.

[364] Erdem Denk, "Uluslararası İlişkilerin Hukuku: Vestfalyan Sistemden Küreselleşmeye," p.56.

benefitted from their role as trustees of civilization, based on the 'benevolent protection of native rights' and the 'moral obligation of the advanced nations'.[365]

Taking the right to wage just war and the trusteeship doctrine together, it is apparent that they were embedded in Europeanness according to De Vitoria. His formulation included a self-evident binary opposition. A just war could only be waged by a sovereign from a developed European civilization because the New World lacked the administrative capacity to self-govern.[366] That is, the international system was built on a binary opposition of civilizations. On the one side was a sovereign, well-structured, developed world; on the other side was a civilization that lacked self-administrative capacity and could not reach the level of European development. In sum, European intervention in the New World had a moral basis that located indigenous Americans on a lower developmental level. This gave Europeans a legitimate right and moral duty to intervene in the New World or wage war there.

The doctrine of humanitarian intervention is built on the same logic of binary opposition. This time between tyranny and democracy. Accordingly, there are two types of state groups: developed and under-developed. Developed countries are characterized by a high standard of democracy, liberal political structure, and a free market economy. In such countries, *the rule of law* underlies the relationship between citizens and government by protecting human rights and the right of people to bring claims against those who hold power. Such states represent the 'good' or 'ideal'.

[365] R. N. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (The Hague: Martinus Nijhoff, 1955), p.13.

[366] Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.26.

On the other hand, in some states, human rights are not protected by the law but remain the whim of rulers. In such a state, accountability, predictability, and equality before the law are in doubt. Since such states pay insufficient attention to these principles, grave violations of human rights are commonplace. In principle, states without liberal values threaten the system itself, and thereby global peace and security. However, the international state system also needs such an opposition to reproduce itself in that underdeveloped countries with grave human rights violations legitimize the interventions of developed ones. Thus, there is a *de facto* hierarchy despite a supposed international equality before the law.

It should be noted briefly here, and will be expanded on below, that the discourse of humanitarian intervention is mostly applied by powerful states, most notably states with UNSC veto power, to realize their national interests by bypassing opposition in the UNSC. Weak states, on the other hand, cling to the mainstream prohibition of use of force in international relations to protect their *raison d'etat*. The discourse of 'humanitarian intervention' thus serves powerful states, although they also make a minimum demand for legality by basing their arguments on positive law. This is the case when such interventions reflect clashing interests that affect international politics. My aim in this section is therefore to determine whether humanitarian intervention is a legitimate way to intervene in another state's domestic affairs to support one side in terms of the logic from 16th century humanitarian legal thoughts.

3.3.1. Humanitarian Intervention: A Definition

Humanitarian intervention can be defined as forceful activities carried out by one state against another to halt grave violations of human rights or other humanitarian catastrophes. As indicated before, the use of force by a state in international relations is strictly forbidden by international law as institutionalized in the *jus cogens* norm of international law, codified in

Article 2/4 of the UN Charter. However, there are two basic exceptions to this prohibition: self-defence, as defined in Article 51 of the UN Charter, and UNSC authorization under Chapter VII of the UN Charter. In these two circumstances, the use of force becomes legal under international law. However, this legality does not always entail legitimacy. Therefore, the basic distinction to make here is whether the use of force can be an appropriate action under international law without UNSC authorization or presence of the self-defense clause when grave violations of human rights are taking place.

For Roberts, humanitarian intervention is a type of coercive intervention in another state's domestic affairs without the consent of that targeted state, based on the aim of preventing "widespread suffering" or "death among the inhabitants".[367] Two further elements can be added to this definition. Humanitarian intervention without UNSC Council authorization is a coercive action to prevent or end "gross" and "massive violations" of human rights or international humanitarian law.[368]

The doctrine of humanitarian intervention first appeared in the literature in the mid-19th century, following European intervention in the domestic affairs of the Ottoman Empire.[369] During the 20th century, humanitarian intervention discourse gained new momentum, which Burgess suggests can be divided into two periods, namely the Cold War and post-Cold War. During the Cold

[367] Adam Roberts, "The So-Called 'Right' of Humanitarian Intervention," *Yearbook of International Humanitarian Law* 3 (2000): pp.3-51, p.4-5.

[368] Board, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999), p.11.

[369] J. Peter Burgess, "Ethics of Humanitarian Intervention: The Circle Closes," *Security Dialogue* 33, no. 3 (2002): pp.261-264, p.261. Also see Malanczuk, *Akehurst's Modern Introduction to International Law*, p.20.

War, intervention was undertaken unilaterally by the same actor that legitimized it, i.e. states individually legitimized their own interventions. However, since the Cold War ended, international organizations such as the UN have become involved.[370]

NATO's 1999 bombardment of Yugoslavia exemplifies this shift in players. After the death of Josib Broz Tito, who "was the chief architect of the 'second Yugoslavia,' a socialist federation that lasted from World War II until 1991",[371] Yugoslavia experienced a rapid and brutal dissolution. Escalating nationalism in Serbia led to the annulment of Kosovo's autonomy in 1989, and ignited ethnic rivalry because of Serbia's attempts to alter Kosovo's demographic structure.[372]

From the 1990s, the crisis in Kosovo gradually gained considerable international attention. To draw this attention, a Kosovar armed group, the KLA (Kosovo Liberation Army), began using guerrilla tactics against Serbian armed forces. The main motivations behind its activities were to direct international attention to the Kosovo problem and to seek international intervention.[373]

Serbia's brutal counter measures against the KLA triggered an international response that led to a NATO campaign in 1999 to prevent mass human rights violations and stop war crimes. According to the Kosovo Report,

[370] Burgess, "Ethics of Humanitarian Intervention: The Circle Closes," pp.261-62.

[371] Ivo Banac, "Josip Broz Tito," *Encyclopaedia Britannica*, May 5, 2018, accessed May 31, 2018, https://www.britannica.com/biography/Josip-Broz-Tito.

[372] The Independent International Commission On Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (New York: Oxford University Press, 2000), p.1.

[373] Ibid., pp.1-2.

NATO's bombing was legitimate, despite being illegal because it lacked UN Security Council authorization.[374] It was legitimate because all peaceful ways to prevent hostilities between the parties to the conflict and stop mutual aggression had been exhausted. Ultimately, the main outcome of the intervention was to liberate Kosovars after a long period of oppression, which was the international community's main goal.[375]

Does the Kosovo example carry to other cases? According to Griffiths et al., humanitarian intervention is a highly subjective foreign policy based on the national interests of countries, so there is no general standard for determining when to intervene or not. For instance, no states launched air strikes to stop the Rwandan genocide or the refugee crises in Zairean and Tanzanian camps.[376]

In all circumstances, states seek to base their arguments on legal terms. For instance, the no-fly zone established by the United States, the UK, and France in 1991 in both Northern and Southern Iraq was justified by a combined discourse of UNSC authorization and humanitarian need. Although UNSC Resolution 688 did not authorize states to use force to protect Kurds and Shiites for humanitarian purposes, a no-fly zone was established. Only the UK government defended its "humanitarian intervention" explicitly. For the UK, military intervention can take place even without the consent of the targeted state or UNSC authorization under

[374] Ibid., p.4.

[375] Ibid.

[376] Terry O'Callaghan, Steven C. Roach and Martin Griffiths, *International Relations: The Key Concepts* (London & New York: Routledge, 2008), p.150. The Kosovo Report reached the same conclusion. See Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, p.187.

Chapter VII if there are grave violations of human rights.[377] Russia and China opposed the military intervention in Iraq as a violation of Article 2/4 of the UN Charter.

In Resolution 1973, the UNSC authorized all states, individually or collectively, "to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya"[378] for humanitarian purposes. Additionally, the UNSC acted under Chapter VII in authorizing states to take all necessary measures, including the use of force. In such a case, it is easy to determine whether the use of force is legal and/or legitimate in comparison with the Kosovo case.

As seen here, the discourse of humanitarian intervention has two camps with competing approaches. Roughly, one group of states claims that humanitarian intervention is a violation of the non-use of force and is therefore against international law whereas the other group of states proposes a new interpretation of Article 2/4. Therefore, complete agreement over the issue has not yet been reached. A middle way is relatively safe, which is UNSC authorization for humanitarian purposes.

3.3.2. Criteria of Military Intervention for Humanitarian Purposes

To date, there is no consensus among scholars that humanitarian intervention without UNSC authorization is legal. Nevertheless, the international community has agreed that every state has an obligation to stop humanitarian catastrophes. For instance, heads of states and

[377] See Gray, "The Use of Force and International Legal Order," p.596.

[378] On the Situation in the Libyan Arab Jamahiriya, UN Doc. S/RES/1973 (2011), March 17, 2011, ¶ 4.

governments gathered at UN Headquarters on September 14-16, 2005 and released the following declaration adopted by the UN General Assembly as General Assembly Resolution 60/1:[379]

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity…
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law…

This declaration, which foregrounds the responsibility of states to protect their citizens, received international support. Paragraphs 138 and 139 are the logical consequences of the doctrine of responsibility to protect, which was drafted by the International Commission on Intervention and State Sovereignty in 2001.[380] According to the Responsibility to Protect report, the classical duality and debate between *intervention* and *state sovereignty* cannot provide helpful language for solving grave human rights violations

[379] See 2005 World Summit Outcome, UN Doc. A/RES/60/1, October 24, 2005.

[380] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: the International Development Research Centre, 2001).

whereas the doctrine of responsibility to protect may provide a better way out of the paradox.[381] In the Responsibility to Protect report, "the proposed change in terminology is also a change in perspective".[382] In other words, foreign intervention is re-conceptualized to interpret intervention as a duty of sovereigns.

According to the report, states are obliged to protect their citizens as an inseparable component of state sovereignty. Where a group of people suffer from grave violations of human rights or other crimes described in the international documents, whether from 'internal war', 'insurgency', 'repression', or 'state failure', and the state at hand is reluctant or unable to stop or end it,[383] military intervention may be a legitimate way to restore order.

The report lists three types of responsibilities. The first is the responsibility to *prevent*. At first glance, prevention of violations and humanitarian catastrophes is the responsibility of sovereign states.[384] The second component is responsibility to *react.* The community of states and organizations have the right to intervene to stop disorder, which overrides the burden of responsibility of individual states during incidents that deeply affect the international community.[385] The last component is the responsibility to *rebuild,* which mostly concerns post-conflict re-ordering.

[381] Ibid., pp.16-17.

[382] Ibid., p.17.

[383] Ibid., p.XI.

[384] Ibid., p.19.

[385] Ibid., pp.29-37.

Following military intervention, states should be responsible to rebuild appropriate social conditions and reduce the likelihood that violent conflict may reoccur.[386]

The report lists six criteria for a possible military intervention: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.[387] Among these criteria, *just cause* is one of the most important. As the last resort, war or military intervention is legitimate if large-scale loss of life or large scale ethnic cleansing is taking place. These two conditions constitute *the just cause principle* for judging whether military intervention is legitimate or legal.[388] Additionally, the intervening power should possess the right intention "to halt or avert human suffering".[389] Moreover, before waging war against human rights violators, all diplomatic and peaceful means should have been exhausted. In other words, military intervention should be the last resort.[390]

Proportionality is also envisaged as an element of its precautionary criteria. 'The scale', 'duration', and 'intensity' of the planned military intervention should not permit the intervening state to operate beyond the aims of the military intervention.[391] In other words, it should be limited to achieving its

[386] Ibid., pp.39-45.

[387] Ibid., p.32.

[388] Ibid., pp.32-37.

[389] Ibid., p.35.

[390] Ibid., p.36.

[391] Ibid., p.37.

humanitarian objectives. Finally, there shall be a concrete possibility of "halting or averting the suffering" that legitimizes the intervention, with the results of intervention being sufficiently better than the results of inaction.[392]

The Danish Institute of International Affairs proposes similar criteria for legitimate humanitarian intervention to halt or avert human suffering.[393] The first criterion of its framework is Serious Violations of Human Rights or International Humanitarian Law. Humanitarian intervention is only applicable following gross violations of humanitarian law and human rights. Moreover, one can only resort to military intervention for humanitarian purposes if the perpetrators are unwilling or unable to stop such atrocities themselves.[394]

What kinds of violations are involved? According to the Danish report, the key elements to determine the threshold are crimes listed and recognized by international covenants. Generally, this is built on the Rome Statute of the International Criminal Court. According to Article 5/1 of the ICC, its jurisdiction is limited to the crime of genocide, crimes against humanity, war crimes, and crimes of aggression.[395]

The second possible criterion for humanitarian intervention according to the Danish Report on Humanitarian Intervention is "a failure by the UN Security Council to act". According to the UN Charter, Chapter VII, only the UNSC can authorize the use of force. Therefore, any unilateral or multilateral use of force requires prior UNSC authorization. However, the UNSC may fail to act

[392] Ibid. This also overcomes the criticism that, in cases of humanitarian intervention, the international community opts for one humanitarian catastrophe rather than another.

[393] Board, *Humanitarian Intervention: Legal and Political Aspects*, pp.103-10.

[394] Board, p.106.

[395] The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

due to a veto by one or more of its permanent members. In some cases of inaction this may raise the right of other states to intervene.[396]

Thirdly, the Danish report claims that the international community is more willing to accept collective action against human rights violators because the legitimacy of collective action minimizes the accusation that they are motivated by national interest.[397] The fourth criterion is the use of 'necessary' and 'proportionate' force. The principles of necessity and proportionality have two parts. First, military intervention should be the last resort after exhausting all non-military measures. Second, the use of force to halt or avert human suffering should not go beyond the proposed aims or targets of the military campaign. It should not attempt to shape the administrative structure of the targeted state, and its duration, scale, and purposes should delimited.[398] The last criterion concerns the "disinterestedness of the intervening states".[399]

3.3.3. Concluding Remarks: State Practices versus Mainstream Assumptions

My goal in this thesis is to determine whether the arming by states of non-state opposition groups in another state is allowed by international law. The doctrine of humanitarian intervention may provide a legal and moral basis for doing so. Therefore, an effort to create *opinio juris sive necessitates* (a belief that an action is carried out as a legal obligation) among the

[396] Board, p.108.

[397] Board, pp.108-09.

[398] Board, pp.109-10.

[399] Board, pp.110-11.

international community is being set up. Although many initiatives have been organized and implemented, this basis seems to lack considerable support.

One reason is that few states accept that international law provides a legal basis for humanitarian intervention. The UK and Belgium are two exceptions. In the Legality of Use of Force Case, only Belgium and the UK defended the doctrine of humanitarian intervention in their arguments.[400] Against Belgium, Yugoslavia claimed that there is no 'right' to humanitarian intervention under international law; therefore, the air campaign against Yugoslavia by NATO members constituted a breach of the law against the use of force. Moreover, Yugoslavia argued that "by taking part in the training, arming, financing, equipping and supplying terrorist groups", specifically the KLA, Belgium violated the principle of non-intervention in Yugoslavian domestic affairs and failed to respect Yugoslavia's sovereign rights.[401] Thus, Yugoslavia's claims were based on a traditional approach to international law regarding the use of force.

NATO member states involved in the bombing proposed varied legal justifications for their acts. Except for the UK and Belgium, the member states clearly sought to build their argument based on a possible UNSC Resolution. For instance, USA government listed a variety of humanitarian necessities to justify the bombing. However, it ultimately relied on a UNSC resolution that did not authorize the use of force but which had pointed out that international peace and security were under threat and requested "a halt to such violations"[402] under Chapter VII.

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[400] Christine Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2008), pp.44-45.

[401] *Legality of Use of Force (Yugoslavia v. Belgium),* Provisional Measures, ICJ Reports, 2 June 1999, p.124.

[402] Gray, *International Law and the Use of Force*, p.46.

In their declaration, the Group of 77 (G77, the coalition of developing nations) also rejected humanitarian intervention as a legitimate way to intervene militarily in another state's domestic affairs:

> We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called "right" of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law … Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.[403]

Representing the vast majority of states, the Group of 77 considers that humanitarian assistance and humanitarian intervention are two distinct concepts. While humanitarian assistance is legal under international law, humanitarian intervention is not. Even in cases of humanitarian assistance, the G77 countries take a clear position of defending their state rights, namely sovereignty, territorial integrity, and political independence.

The search for legality (and legitimacy) regarding the validity of the doctrine of humanitarian intervention is also apparent in the cases of *Operation Enduring Freedom* in 2001 and *Operation Iraqi Freedom* in 2003. For Gray, both coalition force operations referred to the UNSC resolutions to legitimize their interventions. For instance, as Yoo reminds us, President George W. Bush claimed that Iraq was in breach of its obligations under international law, as codified in several UNSC resolutions.[404] Regarding Bush's

[403] "Declaration of the South Summit," *Group of 77 South Summit Havana/Cuba*, April 10-14, 2000, accessed November 29, 2018, http://www.g77.org/summit/Declaration_G77Summit.htm, ¶ 54.

[404] John Yoo, "International Law and the War in Iraq," *The American Journal of International Law* 97, no. 3 (2003): pp.,563-576, p.563.

declaration, the UNSC adopted Resolution 1441, reminding Iraq of its obligations. Acting under Chapter VII, the UN Security Council declared that

> Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991).[405]

Seeking a UNSC resolution to legitimize unilateral military operations against Iraq shows that the discourse of humanitarian intervention has little or no legal basis in international law. This was also apparent in the military intervention in Libya following mass demonstrations against Gaddafi's regime. Here, military intervention was legitimized by UNSC Resolution 1973 (2011), which authorized states to take all necessary measures to avert humanitarian catastrophes.[406] Seeking UNSC authorization proves that states have not fully adopted the notion of humanitarian intervention as a legitimate way of unilateral intervention.

In its judgment regarding the Nicaragua case, the ICJ declared that:

> In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, *the protection of human rights, a strictly humanitarian objective, cannot be compatible with* the mining of ports, the destruction of oil installations, *or again with the training, arming and equipping of the Contras*. The Court concludes that the argument derived from *the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States*, and cannot in any event be reconciled with the legal strategy of the respondent State,

[405] Concerning Iraq, UN Doc. S/RES/1441 (2002), November 8, 2002.

[406] On the Situation in the Libyan Arab Jamahiriya, UN Doc. S/RES/1973 (2011), March 17, 2011.

> which is based on the right of collective self-defence (emphasis added).[407]

Given these statements and rulings, it is hard to claim that the doctrine of humanitarian intervention has been fully accepted by the international community. Moreover, military intervention and material aid to NSAGs for humanitarian purposes have no clarity under international law. Although humanitarian assistance has a place under international law, the distinction between it and humanitarian intervention needs to be drawn clearly.

Although most states and the international community seek to base their actions on a possible UNSC resolution to avoid liability for violating the principle of the non-use of force, their practices sometimes show the opposite. Here, military activities lacking prior UNSC authorization will be listed to determine whether the practice of states have modified international law on the principle of humanitarian intervention.

3.3.3.1. State's Use of Force without Prior UNSC Authorization

There are several cases of interest on this issue.

3.3.3.1.1. India, Pakistan, and Bangladesh (1971)

India and Pakistan have long been in conflicts relating to border issues. The secessionist demands of East Pakistan, later Bangladesh, and the violent reaction of Pakistan escalated disputes between India and Pakistan.

After general elections in December 1970, disputes between the parties of the conflict escalated into civil war. In 1971, East Pakistan declared its independence from Pakistan and established its own government as Bangladesh in a town close to its border with India. Pakistan reacted by

[407] *Supra* text accommanying note 197, ¶ 268.

using military force, resulting in a civil war that forced 300,000 people to migrate to India.[408]

In March 1971, the Indian government intervened in the dispute as it was directly affecting India. The Soviet Union also condemned Pakistan for its brutal attacks and urged it to halt its aggression. These military operations morphed into a wider war between India and Pakistan after Pakistan's air strikes against military airbases in western India.[409] Indian armed forces then marched into East Pakistan, resulting in India's official recognition of Bangladesh as an independent state. The Soviet Union followed India while the US and China supported Pakistan.[410]

From the start of the conflict, India received thousands of immigrants on an "unprecedented scale",[411] and complained that the refugees fleeing East Pakistan were causing harm. Additionally, India noted that "[t]here was no appreciable progress towards political reconciliation, the principal cause being *gross violation of basic human rights* amounting to *genocide*, with the object of stifling the democratically expressed wishes of a people (emphasis added)".[412]

India thus used the discourse of humanitarian necessity to justify its actions by claiming that the flow of immigrants constituted an aggression that

[408] Oral Sander, *Siyasi Tarih: 1918-1994* (Ankara: İmge Kitabevi, 1994), pp.465-466.

[409] Ibid., pp.466-467.

[410] Ibid., p.468.

[411] See Year Book of the United Nations, 1971, p.137.

[412] Ibid., p.140.

triggered the right of India to self-defense. Conversely, Pakistan, along with China, claimed that no other state had the right to intervene because the crisis was an internal affair. Moreover, for Pakistan, the self-defense justification by India for its military campaign was invalid, making it a material breach of the principle of non-use of force.[413]

India argued that the refugees were fleeing because of Pakistan's political persecution and because of a food shortage that raised the specter of famine.[414] This created a humanitarian necessity for intervention. Therefore, India's representative on the UNSC did not hesitate to base their argument on humanitarian law and human rights violations in a clear defense of humanitarian intervention.[415] Additionally, India's representative denied all accusations that India's use of force violated Pakistan's territorial integrity and political independence. Interestingly, India's counter argument was valuable as it reinterpreted the UN Charter by not only dealing with use of force, but also questions of human rights and the right to self-determination. Indeed, India referred to the Genocide Convention, which it claimed obliged states to halt genocide.[416]

Pakistan and China demanded that India withdraw its military forces from Pakistan, depicting the issue as an 'internal one', which would make India's use of force illegal. Because the Soviet Union supported India's claims, it vetoed the US-sponsored UNSC resolution. India restated her arguments

[413] Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, pp.139-143.

[414] Year Book of the United Nations, 1971, p.141.

[415] Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, p.140.

[416] Ibid.

before the UNGA, condemning all states for their silence regarding the 'genocide' occurring in Pakistan (East Pakistan).[417]

Although the UNGA did not accuse India of a material breach of the non-use of force, it demanded an immediate ceasefire and the withdrawal of forces[418] because the hostilities constituted a threat to international peace and security.[419] Consequently, India tried to justify its arguments using the discourse of humanitarian necessity; i.e. that intervention had a 'just' cause.

3.3.3.1.2. Tanzania and Uganda (1978)

Border issues were a significant issue for Uganda and Tanzania, which led to a large-scale war and the overthrow of Idi Amin's regime. In 1978, serious border incursions by Ugandan military forces provided a legitimate reason for Tanzania to occupy Uganda.[420]

On February 1979, Idi Amin wrote a letter to the UN, complaining about Tanzania's military occupation. However, the UN responded with complete indifference.[421] On 15th of February 1979, Libya, one of the leading supporters of Idi Amin regime, transmitted a letter urging the UN to take measures to halt Tanzania's military occupation and restore Uganda's

[417] Ibid.

[418] Question considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 December 1971, the UN Doc. A/RES/2793(XXVI), December 7, 1971.

[419] Ibid.

[420] Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, p.143.

[421] Ibid.

stability – meaning the stabilization of Idi Amin's regime.[422] Libya relied on the principles of non-intervention and non-use of force to argue that Idi Amin's rights had been violated by Tanzania. As time passed with no UN response to either Uganda or Libya's demands, Tanzanian forces captured Uganda's capital, Kampala, thereby ending Idi Amin's administration.

Idi Amin was one of the most brutal dictators in African history, causing approximately 300,000-500,000 deaths, mostly of members of rival ethnic groups to Amin's Kakwa ethnic group.[423] Tanzania's unopposed occupation showed that the international community was unwilling to defend Uganda despite it having suffered a military invasion, which is strictly banned by current international law. By staying silent, the international community affirmed a military invasion at the expense of violating the well-established principles of non-intervention and non-use of force, for the sake of humanitarian necessity.

3.3.3.1.3. France and the Central African Republic (1979)

Another case is the involvement of France in the *coup d'etat* against the authoritarian Jean-Bedel Bokassa, the first President of the Central African Republic, and then self-declared Emperor, ruling from 1966 to 1979. His rule was characterized by multiple human rights violations which sparked several attempts to overthrow his government.[424]

In 1979, while Bokassa was on an official visit to Libya, a successful *coup d'etat* was organized, backed by France, to change the regime and force

[422] Year Book of the United Nations, 1979, p.262.

[423] *Encyclopedia of African history and culture: Vol. 5 Independent Africa (1960 To present)*, ed. R. Hunt Davis, Jr. (New York: Facts on File, 2005), p.18.

[424] Ibid., pp.58-59.

Bokassa into exile.[425] In this case, the French presence in the Central African Republic was welcomed, while few states condemned the intervention though this did include the Soviet Union.[426] Although none of the outside states involved in the coup defended their presence on the basis of 'humanitarian intervention', the outcome was welcomed as such.[427]

France has long intervened in African affairs. In 2013, just after Hollande took office, France sent troops to Mali for humanitarian purposes to fight against terrorism. Again in 2013, France once more military intervened in the Central African Republic.[428] In all cases, the international community showed a double standard as to whether these military interventions violated the non-use of force principle. These interventions were welcomed as humanitarian.

3.3.3.1.4. Operation Just Cause – USA and Panama (1989)

The US invasion of Panama was one of the most important indicators that discourse of humanitarian intervention had become prominent under international law, where no great power rejections are valid. By 1989, relations between the US and Panama had deteriorated , with the latter accusing USA of violating the 1977 Panama Canal Treaties and interfering in Panama's domestic affairs.[429] USA, on the other hand, claimed three

[425] Ibid., p.59.

[426] Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, p.152.

[427] Ibid.

[428] Paul Melly, "Central African Republic crisis: Another French intervention?" *BBC News*, December 2, 2013, accessed May 14, 2019, https://www.bbc.com/news/world-africa-25183377.

[429] Year Book of the United Nations, 1989, p.172.

reasons for its intervention: to protect USA's citizens living in Panama, to support and enhance democracy in Panama, and to fight against drug trafficking and money laundering.

D'amato defended the USA invasion of Panama by claiming that it neither violated Article 2/4 nor any other international law restriction. D'amato partly based his argument on the changing nature of international politics, which forced a reinterpretation of legal documents. For example, he claimed that USA invasion did not violate Panama's territorial integrity or political independence because it supported the people of Panama. Therefore, the invasion was not a material breach of international law.[430] Additionally, his evaluation was based on human rights, "on the basic civil liberties and fundamental freedoms of the people of Panama themselves".[431]

A draft resolution sponsored by Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal and Yugoslavia was then brought to vote in the UNSC that strongly condemned USA military intervention in Panama. It garnered 10 votes in favor and 4 against with 1 abstention. USA, the UK, Canada, and France all vetoed the draft resolution, which clearly violated the principle of *nemo judex in causa sua*.[432]

3.3.3.1.5. France, Great Britain, and USA intervention to protect Kurds (1991)

In 1990, Iraq invaded Kuwait, which Iraq claimed as a natural extension of its territory. The invasion was immediately condemned by the international

[430] Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," *The American Journal of International Law* 84, no.2 (1990), pp. 516-524.

[431] Ibid., p.516.

[432] Year Book of the United Nations, 1989, p.175.

community and was debated by UN organs. It resulted in the formation of the largest military coalition ever seen against Iraq, which was supported by a majority of states both within and outside the region. A critical reason why states acted so fast was the threat to the world oil trade.[433] After series of UNSC resolutions,[434] Iraq was forced to withdraw its forces from Kuwait. After Iraq's defeat, its ruler, Saddam Hussein, turned on the Kurds in Iraq's north and the Shiites in the south who had both risen in rebellion in the hopes of coalition support.

A serious humanitarian catastrophe ensued as millions of Kurds fled to the borders of Turkey and Iran. In response, the coalition powers took active measures. Among others, USA, France, and the UK determined the 36th parallel as a red line that Iraqi military forces could not cross. Troops were then deployed to assist and protect Iraqi Kurds, and provide humanitarian aid.[435] These efforts were made without either Iraq's permission or UN Security Council authorization.[436] Initially, none of these countries applied for legal justifications of their military intervention until Iraq demanded this. They then defended their actions indirectly through UNSC Resolution 688, which later became a precedent for intervening states. The military actions of the coalition forces all used the claim of pursuit of humanitarian objectives as their moral basis. Given this moral standing, the international community

[433] Sander, *Siyasi Tarih: 1918-1994*, p.509.

[434] See Security Council Resolutions on Iraq's invasion to Kuwait: 660 (1990) of 2 August 1990, 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990 and 677 (1990) of 28 November 1990.

[435] Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, p.153.

[436] Gray, *International Law and the Use of Force*, p.36.

remained largely silent regarding the operations of the coalition forces, with the important exceptions of Russia and China, who condemned them as illegal.[437] The UK's position was critical because it defended 'humanitarian intervention' as a legitimate base for its military actions. In contrast, USA, having said nothing initially, tried to construct its legal justification via UNSC resolutions. As Gray reminds us, the UK broadly interpreted international law as it had gradually evolved.[438]

To give a few examples of the UK's approach to humanitarian intervention, Douglas Hurd, the then UK Secretary of State for Foreign and Commonwealth Affairs at that time, claimed that "[i]nternational law recognizes extreme humanitarian need" as providing legal support for unilateral acts without prior UNSC authorization.[439] Similarly, Malcolm Rifkind, the then UK Secretary of State for Defense, claimed that "it is perfectly within the basis of international law to take action when there is this possibility of very great suffering to a population in southern Iraq".[440] Baroness Chalker, UK Minister of State also focused on humanitarian intervention when addressing the House of Lords.[441]

These examples clearly show the gradual construction of moral and legal discourses justifying military intervention without UNSC authorization,

[437] Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, p.154.

[438] Gray, *International Law and the Use of Force*, p.37.

[439] Geoffrey Marston, "United Kingdom Materials on International Law 1992," *British Yearbook of International Law* 63, no.1 (1993): pp. 615–841, p.824.

[440] Ibid.

[441] Ibid., p.825.

namely humanitarian intervention. This includes an equal emphasis with positive law as the humanitarian intervention discourse matures. Ultimately, however, such humanitarian interventions are only welcomed if they match the national interests of powerful states.

3.4. Conclusion: A Critical Assessment

The inherent contradictions in the legal element of the international states system results in indeterminacy and subjectivity. These paradoxes and contradictions prevent the international legal framework from providing effective and consistent normative solutions to normative problems, particularly when the national interests of states clash. There are at least two basic reasons for this.

First, thanks to the consent-based nature of the system, there is no hierarchy of norms. That is, international rules are treated equally regarding their application to international normative problems. As a result, contradictory or incompatible rules may be applied in similar concrete cases. Second, there is no higher authority to dictate what is right or wrong. Therefore, defining the circumstances that make the use of force (or intervention) lawful depends on the subjective evaluations of individual states. The result is an incoherent system that somehow survives despite these problems.

Additionally, there are implications for international politics. If international law is so flexible, making it unable to resolve international normative problems effectively, these problems can only be solved by power relations. Therefore, subjectivity influences every aspect of international dispute settlements, contrary to the general belief that law is objective and objectively applicable. While the modern doctrine envisages some degree of predictability in legal judgments, reality shows the opposite.

In this chapter I examined the inherent dichotomies within modern legal doctrine. As already outlined, non-intervention and non-use of force are the two basic principles that are assumed to be the building blocks of the international states system. According to mainstream doctrine, as enshrined in various ICJ's judgments, arming and otherwise supporting NSGs operating in other states clearly violates such principles. However, the right to self-determination and the discourse of humanitarian intervention – later the doctrine of responsibility to protect – are considered exceptions to the principle of non-interference into domestic affairs. Therefore, according to some commentators, arming or otherwise supporting NSGs operating in other states are welcomed in such circumstances.

Although non-intervention is given central status as a pillar of stability for the international system, the members of that very system have to rely on intervention to sustain its *raison d'etat*. This is apparent in the wording of the UN Charter, and especially in the UNSC's structure. As an international organization claiming to uphold the sovereign equality of states, it actually institutionalizes formal inequality between states. Firstly, as a UN organ, the UNSC has been given executive functions that make it something like a world government, with the right to intervene in any state's internal affairs. When international peace and security are threatened, the UNSC is expected to identify the threat and restore order. However, which 'disputes' or 'matters' in the international arena constitute a threat to peace and security is a matter of discretion, giving the UNSC an unconstrained right to define any event as such or not.

Thus, the Security Council may stay silent, i.e. not react – which demonstrates the double standards in international power relations. The second problem with the UNSC concerns its structure, which grants veto power to its permanent members, who can individually prevent any draft resolution becoming binding. The UNSC's structure and decision-making

procedures also enable permanent members to veto a matter that they might be party to, which clearly violates the principle of *nemo judex in causa sua*, as seen in invasion of Panama by USA.

A third issue that needs to be highlighted is that there is no hierarchy of norms. Prioritizing state consent in the international arena has transformed the recourse to the use of force into an extension of state sovereignty. Waging war becomes a matter of national interest, without the need for a just cause. Consequently, contrary to the mainstream legal doctrine, which marginalizes intervention as an extraordinary and usually illegal act, this action has become a constitutive element of the modern states system. Thus, determining whether arming or otherwise supporting NSGs operating in other state violates non-intervention needs case-by-case evaluation, since clashing national interests inevitably produce contrary legal arguments that ultimately benefit the more powerful side.

The right to self-determination is said to legitimize arming or otherwise supporting NSGs operating in other states. What initially was developed as a legal principle in the service of de-colonization - by the beginning of the last quarter of the 20th century, has now become a question of human rights. Therefore, secession in the name of self-determination became a matter of power sharing or the right to benefit from basic minority or group rights. This led to considering *external self-determination* as the last resort if a people could not benefit from their right to *internal self-determination*. In such a complex environment, international law has produced contrary legal arguments to similar concrete facts, as seen in the cases of Kosovo, South Ossetia, and Abkhazia.

The three cases showed how the major powers treated each case of secession as a special case based on their specific interests. For example, USA recognized the declaration of independence of Kosovo, but not Abkhazia, or Russia doing so for Ossetia but not Kosovo. These

contradictory outcomes indicate that external self-determination is a right that can only be realized by gaining international attention, particularly the great powers' support. Otherwise, initiatives for secessions may fail.

Additionally, international judicial organs sometimes merely apply the law as they find it whereas they sometimes act like law-making entities willing to introduce broader legal interpretations. Thus, the ICJ hesitated to alienate the international community of states in its advisory opinion on Kosovo. It thereby avoided elaborating on the right to self-determination, most notably the right to secession. This makes it difficult for international lawyers to determine the law regarding each issue by looking at international judicial decisions.

Humanitarian intervention is said to be an exception regarding the prohibition of international support and arming of NSGs operating in other states. A few states have been willing to alienate their rivals by explicitly advocating the validity of humanitarian intervention in international politics because of their relatively powerful international political status. For instance, the UK explicitly argued for the humanitarian necessities for its actions in Iraq (1991) and Kosovo (1999). However, the vast majority of states are aware that there is no overall consensus over the validity of humanitarian intervention; moreover, there is no codified positive law relating to it. Instead, these states seek legality for interventions by applying positive law, such as UNSC resolutions. Although states generally trend to this approach in theory, their practices often prove the opposite.

As my analysis in this chapter indicates, many military interventions that *prima facie* clearly violate the principles of non-intervention and non-use of force have not been condemned by the international community. Additionally, the UN has mostly remained silent. For example, Tanzania's military intervention in Uganda and the US invasion of Panama clearly illustrate the currently incoherent state of international law.

Thus, determining whether arming or otherwise supporting NSGs operating in other states is valid or legal is difficult. International law has become so flexible that when the two sides in a dispute are unequal, international law inevitably serves the powerful side.

CHAPTER 4

EVOLVING NOTIONS OF WARFARE AND ARMING NON-STATE GROUPS

So far, in this thesis I have discussed the principles of non-intervention, non-use of force, the right to self-determination, and humanitarian intervention in the context of the legality of arming NSAGs. This chapter examines the casual mechanisms encouraging the proliferation of NSAGs. Part of the original argument of this thesis is that recent developments in warfare have deeply and significantly changed the conditions of NSAGs. This in turn has resulted in the proliferation of NSAGs – in quantity, form, size, and variety of ideological stances. Understanding why these groups have gained such a significant role in contemporary warfare is only possible by examining the metamorphosis of warfare.

This chapter is divided into four sections dealing with the changing nature of warfare, the War on Terror, the proliferation of NSAGs in conflict zones, and the mechanics of arms transfers. Three cases where international military interventions have been conducted are used to demonstrate how international military interventions, the collapse of central state authority, and ultimately the changing nature of warfare itself, have allowed NSAGs to proliferate. I will also explore the enabling role of arms transfers for protagonists.

In this chapter I aim to show the various motivations for the actions of both states and NSGs. By showing such a variety of interests, I highlight how the influence of power politics international law prevents it from effectively regulating international military behavior.

4.1. The Changing Nature of Warfare

With the inauguration of the modern state system, the practice of War has always been a part of the tool kit of the modern state system, and the rise of the nation-state did not change this. It has been an institution for resolving political issues between *sovereign states*.[442] Barry Buzan classifies the changing nature of military security through the lens of securitization theory. He divides military agendas into four separate but interrelated periods.

The first runs from the Peace of Westphalia until 1945. The second is the Cold War. The third is the Post-Cold War era, from about 1990 to 2001. The last period started with the terrorist attacks on the Twin Towers in 2001.[443] All of these periods, except the last, concern the intercourse of states and their military and security concerns. The securitization of the valued referent object, in this case *raison d'etat*, was securitized by considering that external threats come from *states*. However, the main source of threat has recently shifted from states to NSAs,[444] which has deeply affected traditional security concepts and military agendas, and thereby warfare itself.

War is just one type of use of force between states which also includes the broader category of militarized interstate disputes.[445] Recalling the very distinct character of the modern state, which has a monopoly on coercion,

[442] Hugh Smith, *On Clausewitz a Study of Military and Political Ideas* (New York: Palgrave Macmillan, 2004), pp.73-111.

[443] Barry Buzan, "The Changing Agenda of Military Security, Globalization and Environmental Challenges," in *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century*, ed. Hans Günter Brauch (New York: Springer, 2008), pp.553-560.

[444] Ibid., p.554.

[445] Martin Griffiths, *International Relations the Key Concepts*, p.326.

war occurs between states. Logically, in keeping with the concept of sovereignty, there is no other authority for using force apart from the state. Moreover, taking its source from sovereignty, war is external rather than related to the internal affairs of a state.

In Buzan's periodization, NSAs, whether terrorist organizations, rebel groups, warlords, or private security companies, have gained an essential place in warfare, particularly since the Cold War ended. Meanwhile, the number of inter-state wars has gradually decreased, deeply changing the form and context of warfare.[446] According to Newman, there are several variables to investigate to understand the changing nature of these conflicts. The first is the various protagonists. The second is the fundamental sources of the motivations of protagonists. The third concerns spatiality. The fourth concerns the effective of new technology on warfare strategy. Fifth, old and new wars differ in terms of human participation and human harm. Finally, Newman highlights the role of political economy and the social structure of conflict.[447]

The methods or variables utilized to approach the 'new war' debates show that the majority of armed conflicts are now intra-state rather than inter-state. Globalization and social transformation have also multiplied the motivations of actors and encouraged the emergence of new actors. Intra-state wars often have an ethnic and/or religious character, so the perpetrators and victims of warfare have expanded and the line between civilians and combatants has blurred. Lastly, new wars reflect state failure in

[446] For a counter argument see Bear Braumoeller, *Only the Dead: The Persistence of War in the Modern Age* (New York: oxford University Press, 2019).

[447] Edward Newman, "The 'New Wars' Debate: A Historical Perspective Is Needed,'" *Security Dialogue* 35, no. 2 (2004), pp.173-189, p.174; see also Kaldor, *New and Old Wars*, *passim*.

that new armed actors fill the gap when state authority fails.[448] In addition to state failure, international interventions and aid programs can foster new wars[449] because belligerents or combatants can gain significant external support through such efforts.

By the early 1990s, the Pentagon was espousing a new military doctrine that reduced material and human participation while increasing technological potentials. Based on this new method of warfare, 'victory' was declared in Iraq and Afghanistan after both regimes were toppled. In reality, however, insurgencies were never actually defeated. Instead, insurgent groups immediately reorganized and began to resist.[450] This resurgence epitomizes *fourth generation warfare*. We are in fact familiar with this kind of warfare from USA defeats in Vietnam, Lebanon, and Somalia, France's defeats in Vietnam and Algeria, and Union of Soviet Socialist Republics' (the USSR) defeat in Afghanistan.[451] However, particularly after the Cold War era, many things changed in terms of fourth generation warfare.

The basics of fourth generation warfare are twofold. First, insurgent groups engaged in guerrilla warfare utilize all available means to transmit the idea that they cannot be defeated. Second, NSGs mobilize all opportunities to engage with the enemy. There are at least three political purposes here. First, it makes their enemies believe that the war is endless and costly. Second, it motivates their supporters to give unceasing assistance. Third, it

[448] Ibid., pp.174-75.

[449] Ibid., p.175.

[450] Thomas X. Hammes, "War Evolves into the Fourth Generation," *Contemporary Security Policy* 26, no. 2 (2005), pp.189-221, p.189.

[451] Ibid., pp.189-90.

forces third parties to remain neutral instead of joining the conflict.[452] The age of information has made these purposes achievable.

As the Cold War era ended, the existing huge armies begun to demobilize and transform from personnel intensive formations to technology intensive formations. Since the 1980s, neoliberal economic policies have dominated both civilian markets and military industries. State-owned or state-centric economies were replaced by market-oriented approaches, causing state-oriented security approaches to likewise lose prominence dramatically. Meanwhile, the privatization of warfare has become a real phenomenon, with private military and security companies (PMSCs) becoming an indispensable component of the security industry and greatly influencing contemporary armed conflicts. Contractors working for these companies are highly trained, having usually once worked for national military special units. The end of the Cold War era created a flood of ex-soldiers as national armies were downsized who began working in all kinds of security sectors, whether internal or international.[453]

As distinct from mercenaries, PMSCs have a legal structure and are bound by laws. However, this does not guarantee that they are not involved in human rights violations or illegal weapon transfers. For instance, DynCorp is one of the most notorious companies because of its involvement in a series of scandals in post-war Bosnia. The UN had hired DynCorp to re-establish Bosnia's police forces. However, from illegal arms trading to woman trafficking, it participated in many illegal activities.[454] Another example is the

[452] Ibid., p.190.

[453] See Filiz Zabçı, "Private Military Companies: 'Shadow Soldiers' of Neo-Colonialism," *Capital & Class* 31, no. 2 (2007): pp.1-10.

[454] Ibid., p.6.

complex web of violations during the Iraq war. PMSCs, which were the second largest armed group after USA national army,[455] engaged in mass killings, the drugs trade, human trafficking, and – most notably in relation to this thesis – the illegal arms trade.[456]

Conflict zones provide fertile ground for illegal activities like illicit arms trading. According to an *International Alert* report, arms transfers are organized and conducted by arms brokers and transport agents to provide weaponry to conflict regions and 'human rights crisis zones'.[457] Illegal arms trading and other illicit activities are easier to conduct where state institutions have collapsed. Eventually, conventional weapons find themselves in the hands of NSGs, such as terrorist groups, warlords, or rebels. Such arms transfers are mostly conducted by PMSCs and mercenaries to avoid state accountability. According to another *International Alert* report:

> Arms procurement and brokering of small arms and light weapons (SALW) are integral aspects of the activities of mercenaries, private military companies and private security companies. The links between these actors and the arms trade relates not only to their role in obtaining or facilitating the

[455] "Private corporations have penetrated western warfare so deeply that they are now the second biggest contributor to coalition forces in Iraq after the Pentagon, a *Guardian* investigation has established." See Ian Traynor, "The Privatization of War," *The Guardian*, December 10, 2003, accessed January 12, 2018, https://www.theguardian.com/world/2003/dec/10/politics.iraq.

[456] See Jose L. Gómez del Prado, "The Role of Private Military and Security Companies in Modern Warfare: Impacts on Human Rights," *Global Research Centre for Research on Globalization*, August 11, 2012, accessed January 12, 2018, https://www.globalresearch.ca/the-role-of-private-military-and-security-companies-in-modern-warfare/32307.

[457] Elizabeth Clegg and Michael Crowley, "Biting the Bullet Briefing 8 - Controlling Arms Brokering and Transport Agents: Time for International Action," *Basic - International Alert - Saferworld*, January 2001, accessed January 12, 2018, https://www.files.ethz.ch/isn/124852/btb_brf8.pdf, p.5.

> purchase of weapons but also how the military and security services and training that they provide contributes to the demand for, and misuse of, weapons in the regions where they operate.[458]

States also arm NSGs for political purposes cloaked by humanitarian concerns, as is well illustrated by the case of Syria. Since 2011, Syria's civil war has cost thousands of lives and millions of dollars while the collapse of state authority, at least in some areas, has enabled terrorist organizations to emerge. USA funding and aid to anti-jihadist organizations was also legitimized in this context; the United States National Security Strategy lists ISIL (IS or ISIS, the so-called Islamic State) and Al-Qaida as the world's most dangerous terrorist organizations,[459] so fighting against them has a supposed moral justification that legitimizes the use of force. Logically, arming or funding groups fighting against ISIL or Al-Qaida becomes a moral duty for the civilized world. Thus, USA began supporting Kurdish militias and other groups in the region to tackle the jihadists.

The United States National Security Strategy document is also evidence of these political purposes. It states that USA will continue to support and assist its allies to enhance their capacities to conduct counterterrorism and counterinsurgency operations.[460] USA has described the Kurdish YPG (People's Protection Units) as the most influential actor fighting jihadist

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[458] Sami Makki, Sarah Meek, Abdel-Fatau Musah, Michael Crowley and Damian Lilly, "Biting the Bullet Briefing 10 - Private Military Companies and the Proliferation of Small Arms: Regulating the Actors," *Basic - International Alert - Saferworld*, January 2001, accessed January 12, 2018, https://www.international-alert.org/sites/default/files/publications/Btb_brf10.pdf, p.7.

[459] Donald Trump, *National Security Strategy* (Washington DC: the White House, 2017), p.49.

[460] Ibid., p.50.

groups in Syria.[461] Based on this logic, USA has already transferred large quantities of arms. However, while USA support for the Kurdish groups seems to have a moral justification, arming or structuring Kurdish autonomy in northern Syria also coincides well with USA foreign policy priorities. That is, the supposed moral basis may be an epiphenomenon of more fundamental USA policies.

The term 'proxy warfare' can be used to describe such aid, in that each situation includes warring parties and an external figure – here USA. As already mentioned, PMSCs are also hired to conduct military actions on behalf of third parties to armed conflicts. Proxy warfare has become so essential for countries and for the military-industrial complex, that states may sometimes pursue a proxy-oriented foreign policy. For instance, President Eisenhower described proxy wars as "the cheapest insurance in the world".[462] Eisenhower also noted the importance of foreign aid programs in foreign affairs since "the want of a few million bucks" had led the United States to take part in a war in Korea.[463] According to such logic, proxy warfare or aiding proxies clearly helps to ensure world security and peace because it prevents great powers from directly entering such wars.

According to Mumford, proxy warfare is one of the logical ways to pursue national interests without engaging in armed conflicts that could be bloody

[461] Meghan Bodette, "Commentary: American arms to Syrian Kurds protects US interests in the region", *Military Times*, December 3, 2017, accessed April 16, 2018, https://www.militarytimes.com/opinion/commentary/2017/12/03/commentary-american-arms-to-syrian-kurds-protects-us-interests-in-the-region/.

[462] Andrew Mumford, "Proxy Warfare and the Future of Conflict," *The RUSI Journal* 158, no. 2 (2013): pp.40-46, p.40.

[463] Saki Dockrill, *Eisenhower's New-Look National Security Policy: 1953-61* (New York: Palgrave Macmillan, 1996), p.168.

and costly.[464] Under international law, states are banned from the use of force in their international relations. In addition, most international rules concerning humanitarian issues impose responsibility on states. Therefore, using proxies may enable states to avoid being bound by international law or being held responsible for misconduct in international relations.

Once rebel groups, terrorist organizations, insurgents, or warlords in a given territory receive external support, however, civil strife is not just an internal issue but becomes internationalized .[465] Bassiouni explains the complex network of terrorism by highlighting where they gain their legitimacy from, namely "domestic" and "foreign populations".[466]

During the Cold War, insurgent groups received significant support from either USA or the USSR, mostly for ideological reasons. That is, both superpowers mostly became involved depending on the ideological stance of each insurgent group, specifically whether it was communist or not. The basic motivation behind the support was shaped by an ideologically divided world.[467] In contrast, the end of the Cold War multiplied the number of NSAs while the principles legitimizing the political movements of insurgents proliferated. Because of cutbacks in funding from their erstwhile supporters, NSAGs were forced to find other ways to survive.[468]

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[464] Mumford, "Proxy Warfare and the Future of Conflict," p.40.

[465] See Özden Selcan Özmelek, "Internationalization of Civil Wars: Inward and Outward Orientations of a Complex Conflict Type through Case Studies," (Unpublished Ph.D. Thesis, İstanbul, Galatasaray University-Graduate School of Social Sciences, 2017), pp.149-62.

[466] M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment," *Harvard International Law Journal* 43, no. 1 (2002): pp.83-104, p.86.

[467] Özmelek, "Internationalization of Civil Wars," p.150.

[468] Ibid., p.150.

Ironically, for example, the mujahedeen, who were previously armed and supported by USA to fight against the Soviet invasion of Afghanistan, later became the most influential and dangerous enemy of USA national interests.[469] Supporting or aiding proxies creates new proxies that may become the enemy of the creator. Another cause of the proliferation of NSAGs is the so-called War on Terror, which has caused state failures and the proliferation of NSGs. The following section deals with this issue in detail.

4.2. A New Concept: The War on Terror

Immediately after the September 11, 2001 attacks on the Twin Towers, the Bush administration declared war against a faceless enemy, namely 'terrorism'. The War on Terror had a four-step strategy that distinguished it from traditional definitions of war: i. "the seizure of all financial assets of the terrorists"; ii. "to pressure those states that harbour terrorists"; iii. "to spread democracy to the areas of the Middle East"; iv. "to fight against poverty and social deprivation in countries where these factors have become sources of recruitment for terrorists".[470] The new means of tackling terrorism differ widely from traditional methods of dealing with adversaries. There is no state counterpart to which international law and diplomacy can apply. Furthermore, the motivations behind the acts of terror groups are variable, but USA declaration ignored this aspect. The groups themselves may be secessionist movements based on ethnic identity or religious movements with violent policies. Therefore, counter-arguments to legitimize acts against such groups have also multiplied. However, as Kiras notes, all non-state armed activities have political purposes to achieve, so what matters is to

[469] Ibid., p.41.

[470] Martin Griffiths, *International Relations the Key Concepts*, pp.331-332.

understand the identity and contextual ecosystem behind non-state violence.[471]

The paradox here is that while NSAs have become one of the 'others' who are deemed a threat to the system, the system itself needs NSGs to reproduce itself due to the contingencies of modern warfare. That is, the legitimacy of the state system rests on the illegality of NSAGs.

The War on Terror doctrine became the central policy of the Bush administration as international terrorism rose to unprecedented levels. This was fostered by access to new technologies that permitted the ideological reach of terrorists groups to reach unprecedented levels. The fight against such groups required new methods. According to the Bush administration, it is impossible to predict where and when terrorists will attack, or which weapons they might use. Thus, the unilateral use of force by USA was depicted not as an exceptional way to tackle the threat but as a necessity.[472]

This unilateral use of force was placed under the legal mantle of the right to self-defense. More specifically, the Bush administration used the term 'pre-emptive self-defense' to justify its unilateral actions. Under international law, a pre-emptive strike is indeed valid under some conditions in that a state can defend itself legitimately if the expected attack is *imminent*. In USA case, there are great differences between the past and today because previously the origin of the threat was clear. The so-called threat could be

[471] James D. Kiras, "Irregular Warfare: Terrorism and Insurgency," in *Strategy in the Contemporary World: An Introduction to Strategic Studies* ed. James J. Wirtz John Baylis, and Colin S. Gray (New York: Oxford University Press, 2018), pp.183-202.

[472] "While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country." See Bush, *National Security Strategy of the United States*, p.6.

detected by investigating “the mobilization in the army, navy and air force” of an opposing state.[473] In contrast, terrorist organizations can attack at any time and from anywhere, making it hard to determine when and from where they can launch a terrorist attack.[474] For the Bush administration, this made pre-emptive strikes against terrorists and countries harboring them legal under the international law governing the use of force.

The reality is that the Bush administration used the term ‘pre-emptive’ to describe a ‘preventive’ strike. However, a *preventive strike* has no place in international law whereas a *pre-emptive strike* has a small degree of legitimacy.[475] Thus, USA administration clearly shifted the meaning and context of pre-emptive strike for the sake of its national interests. Although the unilateral use of force against a faceless enemy is not valid legally, USA legitimized its war against Afghanistan and Iraq through its mutation of the term.

Having outlined the *pre-emptive strike doctrine* adopted in USA foreign policy strategy, I will now move on to discussing the use of democracy promotion. According to the Bush administration, the key elements for prosperity are democracy, a free market economy, and liberal ideology. To achieve these, as part of its War on Terror strategy, USA government pursued a foreign policy based on aiding organizations or states that foster democracy. However, exporting democracy by force caused deep changes in the state structure in the targeted countries that caused state authority to

[473] Natalino Ronzitti, “The Expanding Law of Self-Defence,” *Journal of Conflict and Security Law* 11, no. 3 (2006): pp.343–359, p.347.

[474] Ibid., p.347.

[475] See Erdem Denk, “Önalıcı Savaş (Pre-Emptive War)-Önleyici Savaş (Preventive War),” in *Kavram Sözlüğü Ii*, ed. Fikret Başkaya (Ankara: Özgür Üniversite, 2006), p.457.

collapse. Most notably in the Middle East, it encouraged the emergence of many non-state organizations and terrorist groups. Iraq and Afghanistan are key examples where state authority struggled to restore order while NSAGs proliferated.

The traditional social structures of Middle Eastern countries became the subject of a great transformation after foreign interventions, particularly in Iraq, Libya, and Syria. Iraq, for instance, was divided into three parts, geographically and demographically. The Kurds in the north gained significant legitimacy after the invasion by USA, while Sunni Arabs lost power in Iraqi politics. Finally, the Shia took a leading position in Iraq's new administration.[476]

Rather than bringing peace and security to the region, the invasion of Iraq brought infinite chaos, with sectarian conflicts starting after 2005 and escalating after 2010. Faaisa Rashid identifies four reasons why these sectarian conflicts severely affected Iraqi politics. First, conflicts between Kurds, Sunnis, and Shias led to coups and military interventions in the political order. Secondly, the conflicts have a transnational character in that they have weakened the sovereignty of Iraq and neighboring countries. Thirdly, due to Iraq's oil capacity, foreigners have used the conflict to expropriate the country's oil resources. Lastly, it is a human rights issue since millions of people have died in these brutal conflicts.[477]

[476] See "Iraq Profile – Timeline," *BBC News*, 26 October 2017, accessed April 18, 2018, https://www.bbc.com/news/world-middle-east-14546763.

[477] Faaiza Rashid, "Iraq: The Challenge of Non-State Actors*," Lehigh University Reviews: A Student Journal of the Arts and Sciences* 13, Paper 6 (2005): pp. 55-66, accessed January 12, 2018, https://preserve.lehigh.edu/cas-lehighreview-vol-13/6.

The Iraqi case demonstrates that foreign intervention combined with internal divisions creates political turmoil in which NSAGs can multiply. The following section deals with the proliferation of such groups in the Middle East.

4.3. Proliferation of Non-State Armed Groups in the Middle East

As noted already, one way that states can enhance their national interests is to use proxies. Kausch argues that, it is relatively easy for such organizations to operate in conflict zones, with state weakness being a basic source of political vacuum. This environment also captures the attention of foreigners. Consequently, foreign powers engage with NSGs, which have local roots but lack financial and military support, to enhance their own national interests rather than helping the central government to restore order.[478] NSAs are a useful proxy for external powers wishing to oppose or support a government, without having to directly intervene in a conflict. Thus Iran supports Hezbollah which supports the Assad regime in Syria, while anti-Assad foreign government support the Free Syrian Army.

I will now focus on the specific case of Iraq.

4.3.1. Iraq

Iraq constitutes a useful example to scrutinize the role of NSAGs in terms of power- and identity-based politics. As pointed out above, Iraq's sectarian conflicts have also shaped the social and ideological stances of such organizations. Because of these divisions, identity or religious-based NSAGs can easily recruit combatants and attract covert foreign aid. One of the most critical illustrations of this is ISIL.

[478] Kristina Kausch, "State and Non-State Alliances in the Middle East," *The International Spectator* 52, no. 3 (2017): pp.36-47, pp.37-38.

ISIL first emerged in 2013 after its forces captured Fallujah and Ramadi in western Iraq.[479] Many people were surprised by how rapidly it captured such large provinces and gained so many fighters. Its dramatic expansion in terms of both territory and fighters has its roots in the sectarian policies of Nouri Al Maliki, who governed Iraq between 2006 and 2014.[480] The Iraqi state institution was also clearly not powerful enough to dominate every part of the country.[481] Taking its roots from Al Qaida and feeding over Sunni discontent with the new regime, ISIL[482] eventually gained control of significant portions of both Iraq and Syria. Declaring a global caliphate in 2013, it then established a state organization that acted in line with Islamic Law or *Sharia*.

Nouri Al Maliki initiated a new form of resistance against the ISIL by supporting other paramilitary groups to combat it. Particularly in Sunni-populated areas, Maliki aimed to restore the central government's dominance. However, after the fall of Mosul, new paramilitary organizations were used and supported widely as the fall of the city showed the impotence of the Iraqi army.[483] Therefore, despite the move contradicting the Iraqi constitution, Maliki formed the Commission for the Popular Mobilization Forces (*Hay'at al-Hashd al-Shaabi*),[484] an umbrella organization for more

[479] Vincent Durac, "The Role of Non-State Actors in Arab Countries after the Arab Uprisings," *IEMed Mediterranean Yearbook* no. 2 (2015): pp.37-41, p.39.

[480] Ibid., p.39.

[481] Ibid., pp.39-40.

[482] Hereinafter I will use the term Islamic State interchangeably with ISIS/ISIL.

[483] Faleh A. Jabar and Renad Mansour, *The Popular Mobilization Forces and Iraq's Future* (Washington DC: The Carnegie Foundation, 2017), p.6.

[484] Ibid., p.6.

than 40 paramilitary Shia groups.[485] It is consistently reported that these paramilitary Shia groups have committed human rights violations, particularly in Sunni majority areas.

The fight against ISIL brought into existence many organizations seeking to defend their territory. For instance, in 2014, an Assyrian Christian group called *Dwekh Nawsha* and a Yazidi military group called the *Sinjar Resistance Units* (SRU) were formed.[486] SRU militants were backed and armed by the PKK (the Kurdistan Workers' Party).

In Iraq's case, many NSAGs have fought against both ISIL and each other, backed by many foreign countries and other NSGs. The war against ISIL legitimizes the provision of foreign aid to these NSAGs. For instance, government of USA has long supported, aided, and trained Kurdish groups because of their struggle against ISIL, although they may have committed humanitarian law and human rights violations. For instance, a deputy UN spokesman, Farhad Haq, urged USA to stop arming Kurdish and Sunni groups because doing so could destabilize Iraq and result in grave human rights violations.[487]

4.3.2. Syria

Syria has been struggling with a brutal civil war since 2011. While the initial street demonstrations were relatively peaceful, these protests later turned

[485] Bilgay Duman and Göktuğ Sönmez, "An Infuential Non-State Armed Actor in the Iraqi Context: Al-Hashd Al-Shaabi and the Implications of Its Rising Infuence," in *Non-State Armed Actors in the Middle East: Geopolitics, Ideology, and Strategy*, ed. Murat Yeşiltaş and Tuncay Kardaş (Palgrave Macmillan, 2018), p.171.

[486] Durac, "The Role of Non-State Actors in Arab Countries after the Arab Uprisings," p.40.

[487] Majid Nizamaddin Guli, "UN Worries Over Arming 'Non-State' Groups in Iraq," *Rudaw*, May 2015, accessed April 19, 2018, http://www.rudaw.net/english/kurdistan/02052015.

into a civil war, resulting in the deaths of thousands and the displacement of millions. As in Iraq, NSAGs have proliferated throughout Syria. The Syrian government, Russia, Iran, and NSGs backed by these powers have fought against the anti-government movements, as well as ISIL, Jabhat al-Nusra, and Ahrar al-Sham.

There are currently numerous actors operating in Syrian territory. Because of the variety of these actors, this thesis will only touch on a few. The Kurds are one of the most important armed groups in Syria, particularly the Democratic Union Party (Partiya Yekîtiya Demokrat – PYD),[488] which will be considered here. It operates in northern Syria and has had considerable victories against ISIL. Ideologically, the PYD's views parallel those of the PKK, which sees Abdullah Öcalan as the leader of the movement and the Kurdish people in general. There are plenty of reasons behind the PYD's successes. Firstly, although it is a political party, it has military branches (the YPG and YPJ) fighting ISIL. Secondly, it has wisely negotiated many political and military conflicts due to its ties with both the PKK and USA. Thirdly, it is welcomed globally because of its mission to defeat ISIL.[489]

However, despite its great legitimacy, most notably in the Western world, it has also perpetrated humanitarian law and human rights violations. For example, a Human Rights Watch report[490] released in 2014 listed violations within the territory under PYD control. The report made recommendations

[488] For more information, see Berkan Öğür and Zana Baykal, "Understanding "Foreign Policy" of the Pyd/Ypg as a Non-State Actor in Syria and Beyond," in *Non-State Armed Actors in the Middle East: Geopolitics, Ideology, and Strategy*, ed. Murat Yeşiltaş and Tuncay Kardaş (Palgrave Macmillan, 2018), pp.43-76.

[489] Ibid., p.71.

[490] "Under Kurdish Rule: Abuses in PYD-Run Enclaves of Syria," *Human Rights Watch Reports*, June 19, 2014, accessed April 19, 2018, https://www.hrw.org/sites/default/files/reports/syria0614_kurds_ForUpload.pdf.

for the Kurdish authorities under nine headings: Arbitrary Arrests, Due Process, Abuse in Detention, Legal Reform, Prison Conditions, Unsolved Disappearances and Killings, Child Soldiers, the Amuda Protest, and International Cooperation.[491]

The Syrian National Coalition for Opposition and Revolutionary Forces, another umbrella organization incorporating many anti-government armed groups, has also received huge amounts of foreign aid, training, and arms. The European Union officially promoted arms support and training opportunities for the Syrian opposition in the EU Council's decision of 2013/109/CFSP. In response to the Syrian conflict, Article 3 of Decision 2012/739/CFSP, which regulates exceptions on the import and export of weapons, was amended:

> (1) Article 3(1) is hereby amended as follows: points (b) and (c) are replaced by the following: (b) the sale, supply, transfer or export of non-lethal military equipment or of equipment which might be used for internal repression, intended for humanitarian or protective use or for the protection of civilians, or for institution building programmes of the United Nations (UN) and the European Union, or for European Union and UN crisis management operations, or for the Syrian National Coalition for Opposition and Revolutionary Forces intended for the protection of civilians; (c) the sale, supply, transfer or export of non-combat vehicles which have been manufactured or fitted with materials to provide ballistic protection, intended solely for the protective use of personnel of the European Union and its Member States in Syria, or for the Syrian National Coalition for Opposition and Revolutionary Forces intended for the protection of civilians;
>
> … the following point is added: (f) the provision of technical assistance, brokering services and other services for the

[491] Ibid.

> Syrian National Coalition for Opposition and Revolutionary Forces intended for the protection of civilians.[492]

In other words, due to humanitarian concerns, the EU allowed opposition groups in Syria to import non-lethal weapons to protect human rights and respond to the humanitarian crisis caused by Syrian government forces. Another form of foreign aid to rebels in Syria was the US-led Train and Equip Program launched in 2014 and intensified in 2015. To fight against terrorist organizations, most notably ISIL, and resist the Syrian government, the United States proposed to transfer up to 500 million dollars.[493] Since then, the United States has continued arming and assisting rebel groups, purportedly for humanitarian reasons.

Among other outside countries, Turkey, in its efforts to be an influential power in the region, has long provided material support to Syrian opposition groups. Its foreign policy has been deeply affected by the Arab Spring, which forced Turkish policy makers to adapt to a new situation. Initially, Turkey was caught unprepared, as the uprisings were not predicted by Turkish authorities. Later, however, Turkey adapted to the new conditions by seeing them as "a golden opportunity to expand Turkey's role and influence in the region".[494] Thus, Turkey became one of the leading countries influencing the region while benefitting in many ways by changing the *status quo*.

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[492] See EU Council Decision 2013/109/CFSP of February 28, 2013 amending Decision 2012/739/CFSP concerning restrictive measures against Syria OJ L 58, March 1, 2013, p.8.

[493] See Christopher M. Blanchard and Amy Belasco, "Train and Equip Program for Syria: Authorities, Funding, and Issues for Congress," *Congressional Research Service*, June 9, 2015, accessed April 26, 2018, https://fas.org/sgp/crs/natsec/R43727.pdf.

[494] Bilgin Ayata, "Turkish Foreign Policy in a Changing Arab World: Rise and Fall of a Regional Actor?," *Journal of European Integration* 37, no.1 (2015): pp.95-112, p.95.

As the uprisings in Syria turned into a bloody civil war, Turkey's attitude to the Syrian regime sharpened while its policy shifted to providing broad military support for armed opposition groups. Among others, the Free Syrian Army received a great amount of material support from Turkey, including weapons, money, and equipment. The motivations behind Turkey's interest in Syria specifically and the Middle East in general stem from the political doctrine of neo-Ottomanism, which was reinterpreted by Davutoğlu as the chief architect of the ruling AKP's foreign policy.[495] Neo-Ottomanism represents a geographical realm that offers significant opportunities for accumulation, as conceptualized by Harvey.[496] It later turned into nationalism as Turkey's military interventions in the region increasingly focused on protecting its borders.[497]

Turkey experienced problems in implementing its new foreign policy after the unexpected uprisings in the greater Middle East that stalled its goal of "zero problems with neighbors".[498] This hindered Turkey's planned economic, cultural, and political expansion in the region. After this "zero problems with neighbours" policy proved inadequate, Turkey began to adopt more sectarian policies towards the region.[499] Thus, in Syria, as Assad's

[495] Raymond Hinnebusch, "Back to enmity: Turkey-Syria relations since the Syrian Uprising," *Journal of German Orient Institute* 56, no.1 (2015): pp.14-22, p.14.

[496] For "accumulation by dispossession", see David Harvey, *the New Imperialism* (New York: Oxford University Press, 2003), pp.137-183.

[497] Faruk Yalvaç, "A Historical Materialist Analysis of Turkish Foreign Policy: Class, State, and Hegemony," *Uluslararası İlişkiler* 13, no.52 (2016): pp.3-22, p.17.

[498] See Cihan Tuğal, "Democratic Janisseris? Turkey's Role in the Arab Spring," *New Left Review* 76, (July-August 2012): pp.5-24, pp.10-13.

[499] Ibid., p.14.

suppression of demonstrations harshened, Turkey's determination to overthrow the regime increased. Turkey has long supported the Muslim Brotherhood in the region generally and in Syria specifically. According to Hinnebusch, Turkey strongly backed Syrian opposition leaders, most notably the Muslim Brotherhood, and helped them create an umbrella organization called the Syrian National Council (SNC) and a military group called the Free Syrian Army. In response, Syria's government allowed PKK-affiliated groups to gain control of Syrian provinces bordering Turkey,[500] which later triggered Turkey's motivation to sponsor other NSAGs.

4.3.3. Libya

Another significant example of how foreign intervention encourages the proliferation of NSAGs and human rights violations is the civil war in Libya. In 2010, a young man burned himself alive in Tunisia. The resulting movement – the Arab Spring – led Arab countries into a turmoil that caused several regimes to collapse. The self-immolation of Muhammed Bouazizi strongly affected Tunisia's neighbor, Libya,[501] rapidly sparking protests against its ruler, Qaddafi.

[500] Hinnebusch, "Back to enmity: Turkey-Syria relations since the Syrian Uprising," pp.14-15.

[501] Bouazizi earned his income by selling fruit on the streets. In 2010, he burned himself alive in front of the local government offices. His death became a symbol of a revolution that overthrew many governments in the MENA region. See Adeel Hassan, "A Fruit Vendor Whose Death Led to a Revolution," *The New York Times*, December 17, 2014, accessed April 26, 2018, https://www.nytimes.com/2014/12/16/us/arab-spring-a-fruit-vendor-who-started-a-revolution.html?rref=collection%2Ftimestopic%2FBouazizi%2C%20Mohamed&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection.

Emerging anti-Qaddafi forces received international support in various forms, while the Libya Transitional Government was recognized as the sole and legitimate government of Libya by the Libya Contact Group. [502]

Given that toppling Qaddafi was critical for the country's future, it is useful to divide Libya's civil war into two separate but interrelated periods, namely Qaddafi and post-Qaddafi. Protests began on 15th of February 2011 with a peaceful demonstration demanding the release of Fathi Terbil, a human rights activist who had been taken into custody in Benghazi.[503] The protests rapidly turned into a brutal civil war. The Libyan National Transitional Council was established as an umbrella organization gathering many anti-Qaddafi groups. As the civil war continued, the UN Security Council passed resolutions condemning the Qaddafi regime for human rights and other violations.[504] The UNSC called for "an immediate end to the violence" and "steps to fulfil the legitimate demands of the population".[505] In addition, the resolution urged all states to participate in an arms embargo against Libya. The assets of the Libyan authorities listed in the Annex of the Resolution were frozen, including international bank accounts.[506] In sum, Resolution

[502] See I. Black, "Libyan Rebels Win International Recognition as Country's Leaders," *The Guardian*, July 15, 2011, accessed April 26, 2018, https://www.theguardian.com/world/2011/jul/15/libyan-rebels-international-recognition-leaders.

[503] Inez von Weitershausen, "Contentious Politics: Europe and the 2011 Uprisings in Libya," in *Contentious Politics in the Middle East: Popular Resistance and Marginalized Activism Beyond the Arab Uprisings*, ed. Fawaz Gerges (New York: Palgrave Macmillan, 2015), p.157.

[504] On Establishment of a Security Council Committee to Monitor Implementation of the Arms Embargo Against the Libyan Arab Jamahiriya, UN Doc. S/RES/1970 (2011), February 26, 2011.

[505] Ibid., p.1.

[506] Ibid., pp.4-5.

1970 included primary measures to stop the conflict and restore peace and security.

However, Resolution 1970 did not solve Libya's problems. Instead, the civil war escalated raising the fear of a humanitarian catastrophe. The UNSC therefore adopted a more effective resolution, Resolution 1973, to stop the humanitarian catastrophe. Evoking the measures envisaged in Resolution 1970, Resolution 1973 authorized member states "to protect civilians" and "civilian populated areas" from the Qaddafi regime, but without allowing any external occupying power to attack Libyan territory.[507] Drawing legitimacy from Resolution 1973, NATO member states launched an air bombardment that ended with Qaddafi's capture and death in 2011. However, the civil war in Libya did not end here. Rather, it evolved into new rivalries between different segments of Libyan society.

These divisions reflected a broad political and social confrontation in Libyan society. In 2014, General Haftar, who had previously worked for Qaddafi, launched Operation Libya's Dignity against Islamist powers. Haftar's initiatives to control Libya created its own counterpart, namely Libya Dawn. Thus, there were two sides in the civil war of 2014. On one side was the Operation Dignity Alliance led by General Haftar that relied on the loyalty of the National Army, the Zentan Revolutionaries, and the Tribal Army in Warshefana.[508] On the other side was the Libya Dawn Alliance of Islamists, which included the Misrata Revolutionaries, the Libya Revolutionary Operation Room, the Libya Shield Force, the Shura Council of Benghazi Alliance of Islamists, the February 17th Martyrs Brigades, Ansar Al-Sharia,

[507] On the Situation in the Libyan Arab Jamahiriya, see UN Doc. S/RES/1973 (2011), March 17, 2011, ¶ 4.

[508] Ibrahim Fraihat, *Unfinished Revolutions Yemen, Libya, and Tunisia after the Arab Spring* (New Haven and London: Yale University Press, 2016), p.32.

and Libya Shield.[509] The 2014 civil war divided Libya into two rival governments, each claiming legitimate rule over the country. By 2017, the picture had become even more complex after ISIL emerged as a significant power in 2015 while local militias became relatively major powers in their regions.

In sum, foreign intervention in Libya and the ensuing state collapse simply created more complex issues to be resolved. In such a situation, new actors filled the vacuum following state collapse while human rights violations became an increasingly painful reality.

4.4. Mechanics of Arms Trade and Transfer: Possible Ways to Arm Non-State Groups

There is currently a massive market for small arms and light weapons (SALW). As defined in the Report of the Panel of Governmental Experts on Small Arms,[510] small arms are for "personal use" whereas light weapons are for use by "several persons serving as a crew".[511] This implies that individuals and small groups of individuals can easily use such weapons in both their daily life and in armed conflict areas.

According to a Small Arms Survey conducted in 2017, trade in SALWs reach over six billion dollars in 2014.[512] The trade begins with manufacturing

[509] Ibid.

[510] The Report of the Panel of Governmental Experts on Small Arms Annexed to the UN Document on General and Complete Disarmament: Small Arms, Doc. A/52/298, 27 August 1997.

[511] Ibid., ¶ 25.

[512] Paul Holtom and Irene Pavesi, *Trade Update 2017: Out of the Shadows* (Geneva: the Small Arms Survey, 2017), p.13.

in any of about 100 states.[513] The world's leading manufacturers are the USA, the UK, Austria, the Russian Federation, Belgium, Brazil, Canada, China, North Korea, Germany, India, Italy, Pakistan, Switzerland, and Turkey, among others.[514]

Logically, because each state has the right to ensure its own national security strategy, it also has the right to make, buy, and sell SALWS so long as there is no UNSC-authorized arms embargo preventing them from doing so.[515] States often buy SALWs for the use of police forces or military personnel. In addition, many individuals also procure these weapons for personal interest. Therefore, the legal exchange of SALWs is "indeed global".[516]

Apart from this legal trade in SALWs, there are also transfers to NSAGs, which are mostly conducted illegally. As this is one source for support to NSGs engaged in conflict with governments, I will now consider the white, grey and black market transfers of SALWs to such groups.

4.4.1. White-Market Transfers

White-market transfers represent the legal side of arms transfers. In white market transfers, states, or agents authorized to represent them, are involved directly in the transfers, which are regulated by national and

[513] A. A. Biggs, "Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty Can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups," *Creighton Law Review* 44 (2010): pp.1311-1356, p.1320.

[514] Ibid., p.1320.

[515] Nicholas Marsh, "Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms," *The Brown Journal of World Affairs* 9, no. 1 (2002): pp.217-228, p.227.

[516] Ibid.

international legal standards.[517] More specifically, legal sales must conform with UNSC decisions taken under Chapter VII, particularly arms embargoes.[518]

White market exporters generally need a license given by the exporting country. Before it is issued, exporting countries may demand an end user acknowledgement, ratified or signed by the importing state/s.[519] However, there is no universal legal standard which applies equally to the exporting and importing mechanisms of SALWs trade. Instead, each state has a different licensing system. The resulting diversity and fragmentation of licensing systems creates uneven and decentralized regulations globally. For instance, the UK may issue an Open Individual Export License (OIEL) to an individual arm exporter. According to UK regulations, this licensing system differs "depending on the type of goods, destination and nature of export".[520] For instance, weapons and explosives must be listed under the UK strategic export control list as designated for export.[521] There are two basic exceptions regarding weapons and explosives exports: first, it is illegal

[517] Matt Schroeder, Rachel Stohl, and Col. Dan Smith, *The Small Arms Trade: a Beginner's Guide* (Oxford: One World Publications, 2007), p.13.

[518] For instance, in its resolution relating to the situation in Libya, the UNSC, acting under Chapter VII and taking its decision in accordance with Article 41, demanded that all countries obey the arm embargo imposed on Libya. See On Establishment of a Security Council Committee to Monitor Implementation of the Arms Embargo Against the Libyan Arab Jamahiriya, UN Doc. S/RES/1970 (2011), February 26, 2011.

[519] Marsh, "Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms," p.218.

[520] "Open Individual Export Licences (OIELs)," *Invest Northern Ireland*, accessed July 25, 2018, https://www.nibusinessinfo.co.uk/content/what-open-individual-export-licence.

[521] "Export Military or Dual Use Goods, Services or Technology: Special Rules," the UK Government, May 29, 2018, accessed July 25, 2018, https://www.gov.uk/guidance/export-military-or-dual-use-goods-services-or-technology-special-rules#taking-military-or-dual-use-goods-out-of-the-uk-temporarily.

to export any component of weapons of mass destruction (for example, biological agents, chemicals, or technology that might be used in a nuclear weapons facility);[522] second, it is illegal to export to embargoed countries.[523]

A recent USA example of arm transfers to regional governments is H.R. 5747, which proposed arming Iraq's Kurdish Regional Government and its armed forces, the Peshmerga.[524] The bill enables USA government to provide military assistance and transfer arms to the Kurdistan Regional Government, which is recognized by the Iraqi Constitution. According to the bill, the Peshmerga is the strongest force on the ground fighting against ISIL. To ensure Iraq's territorial integrity and political independence, the bill assumes that ISIL must be defeated. It therefore authorized the President to transfer both SALWs and conventional weapons, specifically "anti-tank and anti-armour weapons", "armored vehicles", "long-range artillery", "crew-served weapons and ammunition", "secure command and communications equipment", "body armor", "helmets", and "logistics equipment" according to the President's decision.[525]

The bill also granted the President the right to issue licenses to exporters to transfer "export defense articles", "defense services", and "related training" directly to the Kurdistan Regional Government. Accordingly, President of

[522] Ibid.

[523] Ibid.

[524] U.S. Congress. House. 113th Cong., 2d sess. H.R. 5747.20 November 2014.

[525] Ibid., Section 4/b/3.

USA has the authority to approve End Use Certificates validated by the Kurdistan Regional Government.[526]

In contrast to this example, other arms transfers may not reflect lawful activity in which importers and exporters comply with regulations. The following sections therefore consider grey- and black-market transfers.

4.4.2. Grey-Market Transfers

Grey-market transfers involve activity by state parties or their agents but usually through covert operations, making such illicit trading hard to detect. Indeed, the aim of such transfers is to evade the law and to use unregulated methods to avoid liability.[527] At times, the line separating white- and grey-market transfers is blurred.[528] Similar methods may be used in both markets.[529] Here, one of the most important points to emphasize is that the end user of a grey-market transfer is generally a NSAG or embargoed state.[530] According to Bourne, these types of transfers are the logical outcome of the political aim of one state to change the situation in another country. Thus, states apply covert aid to support rebel groups in another

[526] Ibid., Section 4/b/2.

[527] Rachel Stohl and Suzette Grillot, *The International Arms Trade* (Cambridge: Polity Press, 2009), p.94.

[528] Schroeder, Stohl, and Smith, *The Small Arms Trade: a Beginner's Guide*, p.13.

[529] Biggs, "Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty Can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups," p.1322.

[530] Ibid.

country to, such as “to support victory”, “create a stalemate”, “escalate or balance a conflict”, or “undermine the government in the conflict”.[531]

An example of covert aid provided via grey-market transfers is that of the “direct and indirect arming of Mujahedeen”[532] from 1979 to 1989, when the government of USA transferred about $3 billion dollars to the Afghan mujahedeen to back them against the Soviet invasion. Most of these funds were allocated by the CIA under a covert budget.[533]

The political purpose behind the covert aid transferred to the Afghan mujahedeen was to halt the Soviet invasion, whereby the government of USA would have gained victory against international communism in Afghanistan. However, due to the political vacuum in the region, the weapons found their way via illegal means to different groups. This is the negative side effect of USA’s covert aid; humanitarian crises in the region are undesired, but at the same time an unavoidable result of grey market transfers.[534]

4.4.3. Black Market Transfers

Black market transfers are those activities which contravene both international and national regulations. Contrary to ‘grey market transfers’ where there is a violation of norms and regulations but not of law, in ‘black

[531] Mike Bourne, *Arming Conflict: The Proliferation of Small Arms* (New York: Palgrave McMillan, 2007), p.95.

[532] Biggs, “Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty Can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups,” p.1322.

[533] Stohl and Grillot, *The International Arms Trade*, p.105.

[534] Ibid.

market transfers" both national and international law are intentionally violated. In sum, grey market transfers are semi-illegal whereas black market sales are fully illegal.[535]

There are several ways that illicit arms trade is realized on the black market. First, official government authorities themselves operate outside of the law and engage in such trade with the help of the governmental power at their discretion. For instance, in Ukraine, state officers are believed to be responsible for million dollar illegal arms transfers to conflict areas.[536]

The second possible way of engaging in illicit arms transfer is through large-scale robbery of government stocks. The stolen weapons may then be spread throughout conflict zones. For instance, in 2017, Portugal suffered a very professional robbery which cost the Portuguese army "1,450 9mm cartridges," "18 teargas grenades," "150 hand grenades," "44 anti-tank grenades" and "264 units of plastic explosives."[537] A grave statement made by Portuguese Defense Minister José Azeredo Lopes lays out the severity of the situation. According to Lopes, the stolen weapons and explosives are

[535] Ibid., p.94. As Marsh notes: "A 1996 UN report provides a useful definition of the illicit trade in arms as being "that international trade in conventional arms, which is contrary to the laws of States and/or international law." An illicit arms transfer would necessarily breach international law; the laws of the exporting, transit, and/or importing states; or a combination of these laws." See Marsh, "Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms," p.220.

[536] Stohl and Grillot, *The International Arms Trade*, p.100.

[537] Sam Jones, "Grenades and Plastic Explosives Stolen from Portuguese Arsenal," *The Guardian*, July 3, 2017, accessed July 7, 2018, https://www.theguardian.com/world/2017/jul/03/grenades-and-plastic-explosives-stolen-from-portuguese-arsenal.

now on their way to terrorist organizations. Additionally, it is certain that these materials will appear in illegal activity.[538]

Thirdly, weapons in private hands are also a source for illicit arms trafficking. Such a weapon could be stolen from or intentionally sold by their owners. Originally, weapons for private use are regulated by the law; however, second-hand sales are questionable.[539] Fourthly, lack of a strong state structure may lead to a vacuum in arms transfers, which could cause a flood of arms to black markets.[540] For instance, some military personnel of DynCorp, a private security and military company hired for post-war reconciliation in Bosnia, were accused of involvement in woman trafficking and arms sales[541] due to the lack of strong regulations and monitoring of their activities.

Fifth, legal guns and weapons manufacturers may get into black market transfers after their license expires. For instance, different versions of AK-47s have been manufactured throughout the world without license. The price for an AK-47 varies depends upon the way it travels. According to some reports, the price for an AK-47 is between $148 dollars (for sale in Pakistan) and $3,600 (for sale on the dark net).[542] The above does not expend the sources for weapons on the black market.

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[538] Ibid.

[539] Stohl and Grillot, *The International Arms Trade*, p.101.

[540] Ibid.

[541] Anthony Barnett and Solomon Hughes, "British Firm Accused in UN 'Sex Scandal,'" *The Guardian,* July 29, 2001, accessed July 29, 2018, https://www.theguardian.com/world/2001/jul/29/unitednations.

[542] Niall McCarthy, "The Cost of an AK-47 on the Black Market around the World [Infographic]", *Forbes*, March 30, 2017, available at:

Black market transfers gained momentum after the dissolution of the Soviet Union in the post-Cold War era. During the Cold War period, black market transfers were rare compared to the post-1990s because of the increasingly large scale of covert aids in the latter period.[543] Also the collapse of the Warsaw Pact saw a large amount of military hardware flood the grey and black markets for weapons. Furthermore, many post-Cold War black market transfers are done in the form of private trades.[544] Arms dealers and brokers[545] play a significant role here.

The post-Cold War period has seen a change in the way arms dealers operate. During the Cold War period, arms dealers acted primarily on behalf of countries in the context of ideological concerns. In the aftermath of the Cold War, arms brokers have found opportunities to sell weapons to the higher bidders.[546] In other words, the ideological barriers that had been in place even in terms of the black market arms trade have vanished. Therefore, NSGs –namely rebel groups, terrorists, death squads, and

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https://www.forbes.com/sites/niallmccarthy/2017/03/30/the-cost-of-an-ak-47-on-the-black-market-across-the-world-infographic/#31c1d86b7442, accessed July 29, 2018.

[543] Bourne, *Arming Conflict: The Proliferation of Small Arms*, p. 108.

[544] Ibid.

[545] "A private individual or company that acts as an intermediary between a supplier and a recipient of weapons to facilitate an arms transaction in return for a fee." See Schroeder, Stohl, and Smith, *The Small Arms Trade: a Beginner's Guide*, p.17.

[546] Ibid.

pirates – have been provided with necessary military hardware via arms brokers.[547]

In arming NSGs, arms brokers are the key players. An example is Viktor Bout.[548] Also called 'the merchant of death,' Bout has made great numbers of arms transfers to various parts of the world, most notably in Africa. He was a resident of the United Arab Emirates and had five passports. His wife Alla's father was one of the top officers of the KGB. Viktor Bout's air cargo company was utilized for illicit arms transfers.[549] In 2008, he was caught in Bangkok while attempting to sell arms to USA secret agents introducing themselves as Colombian FARC representatives.[550]

In order to regulate arms transfer, or at least reduce the fatalities causes by such weapons, a number of initiatives have been taken by the state system. In the next section I will consider them in detail.

4.5. Conclusion: A Critical Assessment

The first part of this chapter addressed the changing nature of warfare and how NSAGs rose to prominence in the post-Cold War era. This is due to the transformation of warfare from an inter-state activity to an activity in which NSAs increasingly partake. The decrease in the size of the armies of the

[547] Biggs, "Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty Can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups," p.1324.

[548] For his short profile; see, Final report of the Monitoring Mechanism on Angola Sanctions, UN Security Council Doc., S/2000/1225, December 21, 2010, ¶ 120-122.

[549] Ibid., ¶ 120-122.

[550] "Viktor Bout," *Global Policy Forum*, accessed July 29, 2018, https://www.globalpolicy.org/international-justice/rogues-gallery/viktor-bout.html.

great powers fostered a flight of ex-soldiers who found employment in the service of NSGs. State collapse has created a political vacuum in many places that has opened space for the rise of NSAs. This has led to a blurring of the lines between combatant and non-combatant, and a weakening of humanitarian law. In turn these NSAs have begun the preferred means for intervention by foreign powers.

Foreign aid and intervention by foreign states have increased the number of NSAGs, which weakens the implementation of laws due to the lack of authority over these groups. The circulation of arms results in the death of civilians and human right breaches. In this respect, as the following chapter will explore in detail, arming NSGs can trigger a third party's international legal responsibility because of the human rights violations perpetrated by actors who receive arms from international actors.

As for the weapon transfers themselves, there are basically three ways in which both states and NSAs transfer weapons, namely the white market, the grey market, and the black market. The legal white market transfers only continue a small part of the global arms trade. The semi-legal transactions of the grey market, and the illegal ones of the black market predominate.

As we noted the international legal system lacks a hierarchy of norms, or a central enforcement mechanism that dictates what is lawful and what is not. In the context of the changing nature of warfare, every single state has been pursuing a policy which is in conformity with their national interests. This results in the fusion of the contrasting interpretations of international law on the legality of arming NSGs. This multiplicity weakens the power of law, replacing it with power politics instead. Therefore, it is almost impossible to entitle arming NSGs as lawful, or *vice versa*. The major powers vary their justifications for accepting or opposing foreign support for NSGs on a case by case basis.

CHAPTER 5

LAW OF STATE RESPONSIBILITY AND ARMING NON-STATE GROUPS

As previously discussed, proxy warfare has reached a new and distinct stage compared to the past. One of the most important aspects of this new stage is that the ideological demarcation of the Cold War faded. This resulted in a change in the logic and motivation behind the numerous NSGs (i.e. armed) and the support they receive. Given this increased complexity, the question becomes whether states who support NSGs can legally liable for any international law violations those groups commit.

States have been supporting, and continue to support, non-state entities/groups that may be violating humanitarian law and human rights. However, as states themselves being the major actors and subjects of international law, and states are responsible for human rights protection, it is almost impossible to hold NSAGs themselves liable for human rights violations. This creates thus a gap in international law.

There are two possible ways to bridge this gap. The first is to make NSAGs liable for human rights violations.[551] This would require making them legal entities under international law. The second is to establish a link between non-state entities/groups and their state patrons, in order to make states responsible for the violations of their proxies/ protégés.[552] In the following

[551] See Shruti Bedi, "International Human Rights Law: Responsibility of Non-State Actors for Acts of Terrorism," pp.386-397.

[552] Graham Cronogue, "Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors," *passim*.

sections, I will consider the latter proposal, since I have already covered the former in the previous chapters of the thesis.

In 1948, the UN General Assembly established the International Law Commission (ILC) to codify international law in conformity with Article 13/1(a) of the UN Charter, with the aim of "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification."[553] The ILC started its work with 14 topics, including state responsibility, under Garcia Amador as a special rapporteur.[554] As regard to state responsibility, the ILC released its final draft in 2001, which attracted considerable attention from the international community. The ICJ, most notably, as well as other judicial organs, adopted the Draft Article on State Responsibility as a reliable source of wisdom to be applied. Although it was never drafted in a multilateral convention or granted binding force, it was deemed as accurately representative of custom in international law and has been cited by many judiciary organs in the international arena.[555] For instance states, although it is not binding over them, may accept Draft Articles as the sole representative of the custom in international law on responsibilities of states.[556]

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[553] Article 13/1(a) of the UN Charter, *supra* text accompanying note 16.

[554] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), p.1.

[555] "But, being essentially a codification of customary international law, the ILC's work was a good indication of what the international law is on this subject. International courts and tribunals have over the years cited previous ILC drafts. Even if the final draft Articles are never turned into a new convention, they are certain to continue to be very influential with international courts and tribunals," see Aust, *Handbook of International Law*, p.377.

[556] See *GabCikovo-Nagymaros Project (HungarylSlovakia)*, Judgment, ICJ Reports 1997, p.7, ¶50.

According to the stipulations of the Draft Article, as being representative of customs in international law, every international wrongful act or breach of obligations, in a traditional sense, entails state responsibility. In other words, responsibility is the logical and necessary consequence of obligation.[557] For iexample, according to Judge Huber:

> responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.[558]

In addition, the PCIJ highlighted in 1928 that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[559]

Moreover, rights and responsibilities under international law necessitate updates. These are provided for in Article 56 of the Draft Article: "The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles."[560] According to Crawford,

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[557] James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility," in *International Law*, ed. Malcolm D. Evans (New York: Oxford University Press, 2003), pp.445-472.

[558] Shaw, *International Law*, p. 781.The original passage reads, « La responsabilité est le corollaire nécessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l'obligation d'accorder une réparation au cas où l'obligation n'aurait pas été remplie. Reste à examiner la nature et l'étendue de la réparation. » See : Affaire des Biens Britanniques au Maroc Espagnol (Espagne contre Royaume Uni), May 1, 1925, Volume II, 615-742, accessed June 26, 2018, http://legal.un.org/riaa/dtSearch/Search_Forms/dtSearch.html.

[559] Shaw, *International Law*, 781. See: *Case Concerning The Factory At Chorzow*, the PCIJ, Series A, No. 17, 1928, p.29.

[560] Crawford, *The International Law Commission's Articles on State Responsibility*, p.309.

Article 56 lays down “the general secondary rules of State Responsibility” via “codification” of “progressive developments.”[561]

Here, the terminology of state responsibility, relying on the Draft Articles, should be examined and clarified. State obligation is one of the most important terms laid down in these articles. Accordingly, an obligation that is owed by a state to another state under international law refers to an obligation among states. In addition, the primary rules of international law are the sole detector of whether there is a violation of primary obligations. The secondary rules of international law, on the other hand, determine whether a violation of the primary rules can be attributable to a state or not. An international wrongful act is a combination of an act or omission committed by a state, which constitutes a breach of obligations under international law.[562]

Benevolently, Article 1 set out the spirit of the law on state responsibility saying, every internationally wrongful act of States brings that state’s responsibility along with.[563] This primary rule has been ascertained and referenced in various judicial processes.[564] Article 2 lays down the elements of internationally wrongful acts of states as an act or omission which “is

[561] Ibid.

[562] Primary Rules: “the rules of international law which determine whether there has been a breach of a primary obligation.” Secondary rules: “the rules of international law which determine whether a breach of a primary obligation is attributable to a State and the legal consequences (i.e. the law of State responsibility);” see Aust, *Handbook of International Law*, p.377.

[563] Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), Chapter IV.E.1.

[564] See *the Corfu Channel Case*, *supra* text accompanying note 192; and *Nicaragua Case*, *supra* text accompanying note 197.

attributable to the State under international law," and "constitutes a breach of an international obligation of the State."[565]

There are two elements that define when state conduct can trigger state responsibility. First, there should be an internationally wrongful act or misconduct imputable to the state. Second, that wrongful act should breach international obligations of that state, as indicated by the ICJ:

> First, [the court] must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[566]

Article 4 of the Draft Articles deals with how conduct can be imputable to the state. First and foremost, the conduct must be performed by a state organ, irrespective of its status under the domestic hierarchy of the state. Being a 'state organ' is determined and clarified by the domestic law of the state.[567] The term 'state organ,' in Article 4, is broadly interpreted,[568] and may refer to the central government or an individual. This tenet also enshrined in the Claim of the Salvador Commercial Company: "a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial

[565] Article 2 of the Draft Articles, *supra* text accompanying note 563.

[566] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 81. Also see *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ. Reports, 1980, p. 3, ¶ 56.

[567] Article 4 of the Draft Articles, *supra* text accompanying note 563.

[568] Crawford, *The International Law Commission's Articles on State Responsibility*, p.95.

department of the Government, so far as the acts are done in their official capacity."[569]

Here, it is necessary to emphasize that Articles 5, 6, and 7, all address the conduct of state organs. Article 5 deals with the entities that use governmental authority without being a state organ, as stated in Article 4. Article 6 covers the conduct of an organ acts for another state. Finally, the conduct of an organ using governmental authority can be imputable to the state even if that organ "exceeds its authority or contravenes instructions."[570] In all these circumstances, the state is liable for the organ's conduct under international law.

Additionally, Article 16, for example, envisages that a state is held responsible for another state's misconcuct or wrongful act if the former consciously assists and supports the latter, and, thereby, "the act would be internationally wrongful if committed by that State."[571] Article 17 goes one step further by including the phrase "direction and control exercised over the commission of an internationally wrongful act."[572] According to Article 18, if one state coerces other states to perpetrate an internationally wrongful act, the former is accountable for the action.

So far, we have discussed the misconduct of an entity imputable to a state, legally linked to it, and thus considered a state responsibility. Article 8 deals

[569] Ibid. See also: *Claim of the Salvador Commercial Company ("El Triunfo Company")*, Reports of International Arbitral Awards, May 8, 1902, Volume XV, p.477.

[570] Article 7 of the Draft Articles, *supra* text accompanying note 563.

[571] Ibid., see Article 16 of the Draft Articles.

[572] Ibid., see Article 17 of the Draft Articles.

with whether the conduct of NSGs having no formal link with the state under domestic law, can also be put to a state:

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

Here, a person or a group that neither uses governmental authority nor has legal status under the domestic law of a state, is the subject of investigation, and the state may be found liable for their illegal actions.

This thesis looks into the legal questions entailed in states arming NSGs operating in another state. The question of whether a state is accountable for the misconduct of non-state entities/groups that violate humanitarian law and human rights is an essential component of my problematique. Traditionally, a state cannot be liable for misconducts of an individual or a private entity. However, the Draft Articles on State Responsibility addresses two elements for establishing a concerete nexus between a private entity and a state. First, accountability of a state may be arisen for the misconduct of a private entity if that entity's actions are under the instruction of that state. Second, if the misconduct committed by the private entity is carried out under the control of or by direction of a state, this may trigger the accountability of that state. For Crawford, finding a factual link between a NSG and a state is the crux of the issue.[573]Since NSAGs have weaker chains of command compared to national armies, it is hard to control the actions of these groups and restrict or prevent them from committing human rights violations. Given their high degree of autonomy and low degree of accountability, therefore, they are more likely to undertake such violations. Thereby, in sum, a state, intentionally or not, may be liable for these actions

[573] Crawford, *The International Law Commission's Articles on State Responsibility*, p.110.

if a NSG acts under its instruction or control. Moreover, arming such groups, in and of itself, may establish a relevant link between them and the state. Therefore, the next section will deal with how the ICJ establishes the link between a state and a NSG that is a human rights violator. I will explore this by considering the *overall control* test and *effective control* test applied in the Tadic*,* Nicaragua*,* and Genocide cases. These examples will show that arming NSGs may, eventually, trigger state responsibility for their alleged human rights violations.

5.1. Attributing Conduct to States

Various rebel groups have received considerable support from states, although the intention behind the support differs in nature. For instance, states may justify –most probably mask- their possible assistance and arming of rebel groups by using the discourse of human rights. An excellent exemplar of this behavior is the USA President Ronald Reagan's (1981-1989) speech in 1985, were he declared:

> We must stand by all our democratic allies. And we must not break faith with those who are risking their lives – on every continent, from Afghanistan to Nicaragua – to defy Soviet-supported aggression and secure *rights which have been ours from birth* (emphasis added).[574]

[574] See Funda Keskin, "ABD Başkanlarının Ünlü Doktrinleri Kutusu," in *Türk Dış Politikası, Kurtuluş Savaşından Bugüne,Olgular, Belgeler, Yorumlar*, ed. Baskın Oran (İstanbul: İletişim Yayınları, 2002), p.543. "Proponents of the Reagan Doctrine, such as Jeane Kirkpatrick, Michael Ledeen, and Charles Krauthammer, contend that U.S. assistance to anti-communist insurgencies in the Third World would serve three beneficial purposes. First, it would enhance U.S. security by tying down Soviet-bloc military resources and perhaps reversing Soviet expansionist gains. Second, it would achieve these objectives without serious military risk or financial cost to the United States. Finally, it would promote the growth of democracy throughout the Third World." See Ted Galen Carpenter, "Cato Institute Policy Analysis No. 74: U.S. Aid to Anti-Communist Rebels: The "Reagan Doctrine" and Its Pitfalls," *Cato Institute*, June 24, 1986, accessed July 2, 2018, https://www.cato.org/sites/cato.org/files/pubs/pdf/pa074.pdf.

Having recognized that states use anti-government movements to achieve political aims, it is possible that states have chance to be held accountable for the misconduct of their proxies/protégés irrespective of their intentions. However, establishing a link between a NSG and a state in order to distribute responsibility for misconduct is not an easy task. This is where the *effective control test* and *overall control test* become relevant.

The ICJ effectively interpreted the law on state responsibility and Genocide.[575] To begin with, the Court upheld its jurisdiction over the case, which is essential because Serbia and Montenegro both asserted that the ICJ lacked jurisdiction.[576] After declaring it had jurisdiction, it turned to the claims of Bosnia and Herzegovina.

Bosnia and Herzegovina put forward serious accusations, according to which Serbia and Montenegro were accountable for "committing genocide," "being complicit in genocide," "aiding and abetting entities engaged in genocide," "conspiring to commit genocide," and "inciting genocide," and that they had "failed to prevent genocide," and "failed to punish genocide."[577] Here, two basic interlinked branches of law need to be examined: the law on state responsibility and the crime of Genocide.

Regarding the Law of State Responsibility, the Court determined first whether the genocide occurred in Srebrenica in July 1995 could be attributable to Serbia and Montenegro. For this, the Court sought to determine whether any Serbian organ was involved in the misconduct,

[575] See *Genocide Case*, *supra* text accompanying note 15.

[576] Ibid., ¶ 140-141.

[577] J. Craig Barker and Sandesh Sivakumaran, "I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina V Serbia and Montenegro)," p.697.

because this would automatically imply that it was the result of the conduct of the state. That is, the starting point for establishing state responsibility, according to the Court, is to identify the perpetrator's legal status according to Article 4 of the Draft Articles.[578]

The Court found that none of the perpetrators accused of committing massacres in Srebrenica constituted a *de jure* organ of the FRY (Former Republic of Yugoslavia) at the time the massacres occurred, stating that "neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law."[579]

The Court then turned into the issue of the *de facto* organs accused of committing massacres in Srebrenica. Bosnia and Herzegovina claimed that not being recognized as a formal and *de jure organ* by FRY does not jeopardize attributing conduct to states, since, for Bosnia, the "Republika Srpska and the VRS," along with paramilitary organizations called "the Scorpions," "the Red Berets," "the Tigers," and "the White Eagles,'"[580] should be taken *de facto* organs of the FRY regardless of their legal status under the FRY's internal law.

To decide on this allegation, the Court referred to a previous judgment – the *Nicaragua Case*, in which it had stated that it had to

> determine… whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it

[578] See *Genocide Case, supra* text accompanying note 15, ¶ 385.

[579] Ibid., ¶ 386.

[580] Ibid., ¶ 390.

> would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[581]

After examining the evidence and referencing the Report of the Intelligence Committee in May 1983, which concluded that the contras "constitute[d] an independent force" and that the "only element of control that could be exercised by the United States" was "cessation of aid,"[582] the Court reached the following determination:

> Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.[583]

This ruling requires a legal test, so that the link between the USA and the contras had to be drawn clearly to determine responsibility. According to the evidence, the Court decided that:

> the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but [are] insufficient to demonstrate their *complete dependence* (emphasis added) on United States aid.[584]

Ultimately, the Court was "unable to determine that the contra force may be equated for legal purposes with the forces of the United States."[585]

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[581] *Nicaragua Case*, *supra* text accompanying note 197, ¶ 109.

[582] Ibid.

[583] Ibid.

[584] Ibid., ¶ 110.

[585] Ibid.

Based on the decision made in the *Nicaragua Case,* an act of an individual or an entity that is not an organ of a state under internal law, may be dubbed as the so-called state's only if that person or entity has 'complete dependence' on that state. In other words, there should be great degree of control of the state over the relevant person or entity in order to count them as a state organ. Therefore, in the Genocide Case, "the acts of genocide were not attributable to Serbia through its organs, or persons or entities completely dependent upon it."[586]

The Court answers two separate questions here. The first, already answered in the negative, is to determine whether any of the organs of the FRY committed atrocities. The Court also determined whether any of the NSGs accused of atrocities acted under the complete dependence of the FRY, and whether there was no way that these NSGs could be deemed anything other than as *de facto* organs of the FRY. This determination was made under Article 4 of the Draft Articles.[587] After determining that the perpetrators were not *de jure* or *de facto* organs of the FRY, the Court examined whether they were acting "on the Respondent's instructions, or under its direction or control."[588]

The Court took Article 8 of the Draft Articles as its starting point, which is the applicable rule:

[586] Barker and Sivakumaran, "I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)," p.701.

[587] Article 4 of the Draft Article: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State." *Supra* text accompanying note 563.

[588] *Genocide Case*, *supra* text accompanying note 15, ¶ 397.

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[589]

Therefore, it remains possible to hold a respondent liable for the alleged violations if the perpetrators performed on the respondent's instruction or controlled and directed by, as was also reaffirmed by the Court:

> The Court has taken the view… that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States.[590]

As seen here, the Court sought to determine whether the contras acted on the instructions and under the control of the United States. After applying the *effective control* test to assess the link between the United States and the contras, it concluded that it was not possible to ascertain that the United States had *effective control* regarding the contras' humanitarian law and human rights violations:

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[589] See Article 8 of the Draft Articles, *supra* text accompanying note 563.

[590] *Nicaragua Case*, *supra* text accompanying note 197, ¶ 115.

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* (emphasis added) of the military or paramilitary operations in the course of which the alleged violations were committed.[591]

Returning to the *Genocide Case*, the Court found that only "supporting, aiding, or arming non-state groups" accused of committing humanitarian law and human rights violations was insufficient to establish the responsibility of the donor state. In response, Bosnia and Herzegovina "(drew the Court's) attention to the Judgment of the ICTY Appeals Chamber in the *Tadic´* case"[592] and asked why the ICJ had not opted for the *overall control* test to establish state responsibility, as the ICTY had.[593]

5.1.1. The Effective Control versus the Overall Control Test

In the *Tadic'* case, the ICTY applied the *overall control* test, which is rather different and lighter than the *effective control* test to set state responsibility for the misconducts of non-state entities/groups. For the ICTY, there are considerable legal mainstays for a state to be liable for the acts of irregular armed forces which are sponsored by it. For instance, relying upon criteria for being combatants listed under Article 4 of the Third Geneva Convention, specifically the phrase 'belonging to a party,' it can be rightfully asserted that states should be responsible for the acts of irregular forces they sponsor.[594] Furthermore, the ICTY also quoted the decision taken in 1969 by the Israeli

[591] Ibid.

[592] *Genocide Case*, *supra* text accompanying note 15, ¶ 397.

[593] *Prosecutor v. Dusko Tadic,* Judgement, Case No: IT-94-1-A, the ICTY Appeal Chamber, July 15, 1999.

[594] Ibid., ¶ 93.

Military Court stating that the sorrow of the World War II had led nations to ensure "the total responsibility of Governments for the operations of irregular corps"[595] to fill the vacuum in the area.

Indeed, the wording of Article 4 of the Third Geneva Convention requires an actual link between belligerent parties and irregular forces in conflict zones, in order to grant so-called paramilitary and irregular corps the legal statute of 'combatants.' This in turn then permits the application of the legal concept of 'prisoner of war' to them. Thereby, a test is needed to disclose a link for the law to apply to the case at hand. If such a link is established, then the characterization of war may turn into an international one, in which a foreign country, under certain circumstances, may be responsible for the acts of irregular units fighting elsewhere on its behalf.

Before turning to the test applied by the ICJ, the ICTY touched upon two preliminary issues relating to context. First and foremost, a distinction between individual criminal responsibility and state responsibility is not valid for the present case. This is because, in both circumstances, determining whether individuals or groups of individuals are acting on behalf of the state or not matters. Second, and possibly more controversially, they considered whether the *effective control* test is a separate one to the 'dependence and control' test. This is because the ICJ applied two different tests to two different individuals, both of which acted on behalf of the United States.

On the one side, there were non-U.S. nationals who were directed and instructed by U.S. officials, namely the UCLAs (Unilaterally Controlled Latino Assets). On the other side, there were individuals who were not directly instructed by U.S. officials to fulfil specific operations, namely the contras. In sum, the *dependence and control* test was applied to the UCLAs, whereas

[595] Ibid.

the *effective control* test was applied to the contras. According to the ICTY, these two are not separate tests, but "instead spelling out the requirements of the same test."[596]

After identifying the basic assumptions regarding the tests that the ICJ applies, the Appeal Chamber could not find these tests 'persuasive' for two reasons. First, the ICTY Appeal Chamber starts by examining the logic behind state responsibility, against which tests of *Nicaragua Case* cannot fit:

> The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility.[597]

Thus, international law tries to prevent states that are indirectly participating in atrocities or internationally wrongful acts by using private entities, from avoiding legal responsibility for those violations. However, the ICTY is also aware that each case should be treated in terms of its own circumstances. Put differently, the ICJ's *effective control* test may not be a one-size-fits-all method, so different tests may be needed to determine the threshold of state responsibility.[598]

According to the ICTY, two types of individuals acting on behalf of the state need to be distinguished. "One situation is the case of a private individual

[596] Ibid., ¶ 102-114.

[597] Ibid., ¶ 117.

[598] "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." See Ibid.

who is engaged by a State to perform some specific illegal acts in the territory of another State."[599] In such a situation, one should show that that the individual or group of individuals acted under the specific instruction of the state, because "generic authority over the individual would not be sufficient to engage the international responsibility of the State."[600] The second situation involves an individual or group of individuals acting under a command structure, such as an armed group with a hierarchical structure and chain of command. In such circumstances, "for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State."[601]

Then again, the ICJ, in its judgement in the *Nicaragua Case*, said that the United States could only be accountable for the misconduct of the contras only if they were acting under the United States' *complete dependence* and were therefore equivalent to a *de facto* organ acting on its behalf.[602] According to the Court, however, the contras did not depend exclusively on the United States and had some degree of autonomy. Thus they were not deemed a *de facto organ* of the United States. Moreover, for the second step, there was no *effective control* of the United States over the contras to hold the United States accountable for the contras' misconduct. Thus, the first group consists of those persons or groups completely "dependent on the state for money, equipment, guidance, and direction."[603] The second

[599] Ibid., ¶ 118.

[600] Ibid.

[601] Ibid., ¶ 120.

[602] *Nicaragua Case*, *supra* text accompanying note 197, ¶ 109.

[603] Cronogue, "Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors," p.370.

group has some degree of liberty in their actions.[604] The contras, according to the ICJ, fall into the second group, so their human rights violations cannot be attributed to the United States

In the *Tadic'* case, the ICTY divided persons or group of persons into two different camps. As noted above, there should be a stricter test for establishing state responsibility when dealing with an individual. This test resembles the *effective control test* established by the ICJ in both the *Nicaragua* and *Genocide* cases.[605] However, regarding assessing group activities, it is enough to determine whether the organized group acts under the *overall control* of that state. Thus, the ICTY proposes a less demanding test than the ICJ.

According to the ICTY, Article 10 of the First Reading by the ILC may be enlightening. It states that:

> The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.[606]

Taking its logic from this article, the ICTY concluded that "the rationale behind this provision is that a State must be held accountable for acts of its

[604] Ibid.

[605] Ibid., p.372.

[606] Report of the International Law Commission on the work of its thirty-second session, the U.N. Doc. A/35/10, May 5-July 25, 1980, p.31.

organs whether or not these organs complied with instructions, if any, from the higher authorities."[607]

Thus, for the ICTY, international law does not enable states to escape liability if their organs act *ultra vires*. In line with this logic, the ICTY states that when it comes to acts of an organized group, a state may be responsible for the misconduct of the group, if the group is acting under the *overall control* of that state. Therefore, bearing in mind Article 10, it is not necessary for all of the misconduct to have been carried out on the instruction or under the control and direction of a state. Otherwise, "States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility."[608]

For the ICTY, the second issue that makes the ICJ's finding unpersuasive is that the tests proposed by the ICJ are inconsistent with "Judicial and State Practice."[609] Here, the ICTY starts from the pre-accepted rules that courts automatically opt for the *effective control* test when military and para-military groups are in question. For instance, in many circumstances, states adopt the *overall control* test which demands less in respect to the misconduct of individuals. For instance, the Iran-United States Claims Tribunal, relating to "the forced expulsion of Americans," did not evaluate whether the guards acted under the specific instructions of the Iranian State; rather, as an

[607] *Prosecutor v. Dusko Tadic, supra* text accompanying note 593, ¶ 122.

[608] Ibid., ¶ 123.

[609] Ibid., ¶ 124-145.

organized group, they were understood to be acting as de facto organ of the Iranian state.[610]

In sum, merely arming NSGs may not trigger the responsibility of the acting state for the human rights violations conducted by said groups. That said, the ICTY proposes a less demanding test. Rather, the state should exercise some degree of control over the group for attribution to be established. The next section will deal with *obligations of the result* and *obligations of diligent conduct*.[611]

5.1.2. Obligations of Result and Obligations of Diligent Conduct

As set out above, a state may be accountable for the misconduct of a NSG even if the latter is not a *de jure* organ of the state. In other words, if a NSG acting on behalf of a state commits a violation, this may trigger that state's international responsibility. To determine whether a state is responsible for the acts of a NSG, various tests have been employed by international courts. But what happens when an externally supported NSG does internationally wrongful acts which cannot be attributed to the state sponsor.

Obligations of result and *obligations of diligent conduct* are two legal terms that prevent states from escaping their liability under international law. States not only have obligations to refrain from misconduct in international relations, but also must take *positive actions* to prevent such violations.[612] Thus, there may be a distinction between *obligations of result* and *obligations of diligent conduct*. The former owes much to the civil war

[610] Ibid., ¶ 126-127.

[611] The title is borrowed from Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (New York: Cambridge University Press, 2011), p.63.

[612] Ibid., p.59.

tradition. That is, *obligations of result* means that one is in debt to a certain expected and previously promised result.[613] Here, it does not matter if a state does whatever it can to prevent a violation. Rather, the main point that should be emphasized here is *the final result,* because a state cannot escape responsibility just because it has done everything needed. On the other hand, regarding *obligations of diligent conduct*, states are not responsible for the outcome so long as they took all measures to prevent the action. What is at stake here is the effort of the state, not the result.

The distinction between these two terms was also ascertained by the ICJ in the *Genocide Case* "in relation to the obligation to prevent genocide in Article 1 of the Genocide Convention."[614] According to the Court,

> it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.[615]

International humanitarian law, for example, imposes various obligations on states with which they must comply. Common Article 3/1 of the Four Geneva Conventions, specifically, envisages that:

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[613] Pierre-Marie Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility," *EJIL* 10, no. 2 (1999): pp.371-385, p.375.

[614] Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, p.59.

[615] *Genocide Case*, *supra* text accompanying note 15, ¶ 430.

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[616]

Article 89 of the Fourth Geneva Convention, in the context of "the requisite standards of treatment for interned civilians during armed conflict,"[617] stipulates that:

> Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees. Internees shall also be given the means by which they can prepare for themselves any additional food in their possession. Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted. Internees who work shall receive additional rations in proportion to the kind of labour which they perform. Expectant and nursing

[616] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), August 12, 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), August 12, 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), August 12, 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 75 UNTS 287.

[617] Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, p.61.

> mothers and children under fifteen years of age shall be given additional food, in proportion to their physiological needs.[618]

The doctrine of the *obligations of result* is also apparent in human rights issues. The European Convention on Human Rights, among others, imposes *obligations of result* on state parties. For instance, Article 6/1 protects people's right to fair trial, thereby imposing obligations of result on state parties to ensure this right. According to Article 6/a:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[619]

In its interpretation of Article 6/1, the ECtHR declared that;

> The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 para. 1 (art. 6-1) in this field. The Court's task is not to indicate those means to the States, but to determine *whether the result called for by the Convention has been achieved* (emphasis added).[620]

In short, *obligations of result* may render a State responsible even when a NSA's misconduct cannot be imputable to it. Therefore, arming, supporting or aiding a NSAG may trigger the donor state's responsibility under the *obligations of result* doctrine. However, because the primary rules of international law should be applied on a case-by-case basis, it is impossible to treat all arms transfers uniformly under this doctrine.

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[618] Article 89 of the Fourth Geneva Convention; *supra* note accompanying text 616.

[619] *Supra* text accompanying note 130.

[620] *Case of Colozza v. Italy*, no. 9024/80, ECHR, February 12, 1985, ¶ 30.

On the other hand, *obligations of diligent conduct* may well render a state responsible for the misconduct of an armed group that receives considerable quantities of arms from that State, because *obligations of diligent conduct*, rather than result, focus on the processes whereby states engage "all reasonable means in order to achieve a specific result."[621] The main point here concerns conduct rather than result in that a state may be responsible if it is unsuccesful to take all necessary measures and positive steps to prevent violations of humanitarian law and human rights.

The ICJ, in the *Genocide* case, listed various conventions that impose obligations on a state for diligent conduct. States are under an obligation to prevent and punish certain crimes proscribed by international law and must take all necessary measures to prevent and halt such misconduct. For instance, according to the ICJ,

> A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence," which calls for an assessment in concreto, is of critical importance.[622]

The period of time to act diligently, specifically in the case of genocide, is another important issue to be resolved. For the Court, "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a

[621] Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, p.63.

[622] See *Genocide Case*, *supra* text accompanying note 15, ¶ 430.

serious risk that genocide will be committed" (emphasis added).[623] This is backed by Article 14/3 of the Draft Article:

> The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.[624]

In a broader sense, taking positive measures to prevent misconduct is, by itself, not enough for diligent conduct. A state must implement legal regulations to punish those who committed the misconduct; thus, perpetrators will be discouraged. As Ago, Special Rapporteur of the ILC puts it:

> Prevention and punishment are simply two aspects of the same obligation to provide protection and have a common aim, namely to discourage potential attackers of protected persons from carrying out such attacks. The system of protection that the State must provide therefore includes not only the adoption of measures to avoid certain acts being committed but also provision for, and application of, sanctions against the authors of acts which the implementation of preventive measures has failed to avert. In omitting to punish the individual who, despite the surveillance exercised, has succeeded in attacking a particular person, the State commits a violation of this obligation that is no less serious than that committed by a State which neglects to take the appropriate preventive action.[625]

In *Democratic Republic of the Congo v. Uganda* case, the ICJ ruled that Uganda's responsibility arose from its lack of vigilance (due diligence) when

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[623] Ibid., ¶ 431.

[624] Article 14/3 of the Draft Articles, *supra* text accompanying note 563.

[625] Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, p.63, and Roberto Ago, "Fourth Report on State Responsibility," *Yearbook of the International Law Commission* II (1974): p.98.

it was the occupying power in Ituri (Democratic Republic of Congo). Besides the misconduct of its *de jure organs* and military groups acting on its behalf, Uganda was also under an obligation "to take all the measures in its power to restore and ensure, as far as possible, public order and safety in the occupied area."[626] This obligation was envisaged in Article 43 of the Hague Convention of 1907.[627] In respect to its occupation, Uganda was responsible for the acts of its organs and also liable "for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, *including rebel groups acting on their own account* (emphasis added)."[628]

Foreseeability and predictability are two notions that may trigger the responsibility of a state for *diligent conduct*. In its judgment in Keenan v. the UK, the ECtHR pointed out that if the applicant's life is in danger and state is aware of this, then that state is obliged to take all necessary measures to protect the potential victim's life. Thus, the due diligence obligation is closely related to foreseeability and predictability.[629]

In sum, acting diligently requires that a state acts diligently to prevent an event from occurring, halt an ongoing event, or take all measures to prevent

[626] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), supra* text accompanying note 199, ¶ 178.

[627] "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Article 43, October 18, 1907, 36 Stat. 2277, Treaty Series 539.

[628] *Supra* text accompanying note 199, ¶ 179.

[629] *Keenan v. The United Kingdom*, no. 27229/95, Judgment, ECHR, April 3, 2001, ¶ 90.

a reoccurrence. Moreover, if possible, a state should punish the perpetrator(s) of such misconduct. Thus, the due diligence obligation may provide a legal basis for state responsibility even where attribution of conduct is impossible. In other words, a state may violate its international obligations by arming, supporting, or financing a NSAG guilty of humanitarian law and human rights violations.

5.2. Treaty Provisions: State Responsibilities, Regulations on Arms Transfers, and Arming Non-State Groups

5.2.1. Treaty Obligations of States on Arms Trade and Transfers

Today, alongside the prohibition against the manufacture, use, or stockpiling of certain weapons, considerable attempts are being made to regulate, limit, and prohibit their transfers on a global scale. Central to this process is the responsibility of the states for imposing these prohibitions. One such significant international convention conducted under International Humanitarian Law is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects with Additional Protocols.[630] For instance, the Protocol on Non-Detectable Fragments prohibits the use of "any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays."[631]

In July 2001, an international conference named 'the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its

[630] See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Text With Amendments And Protocols Adopted through November 28, 2003), October 10, 1980, 1342 UNTS 137.

[631] Protocol (I) on Non-Detectable Fragments, 1342 U.N.T.S. 168, 19 I.L.M. 1529, entered into force December 2, 1983.

Aspects,' being one of the most significant ever, gathered in New York. A decision was drafted, without vote, A/DEC/55/415 which set up an international conference laying down the mishaps of the illicit arms trade, and finding possible remedies for the illicit arms trade. The subject matter of the conference was to strengthen policies at the national, regional and international level, to counter the problems that stem from the trade in SALWs.[632] At the conference, an action plan was adopted by the participating states. The action plan's main focus was to deal with illicit arms trafficking. At the national level, states agreed:

> to put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients. [633]

As seen here, two basic purposes are listed. At first glance, states agree to implement an effective regulative legal system over the weapons industry while promising to provide oversight for the post-manufacture process as the second step.

In respect to measures implemented over arm exporters, the responsibilities of states are triggered unless 'the risk of diversion' of weapons into illegal hands would be taken into account truly and seriously.[634] At the regional

[632] Alexandra Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons," *International Review of the Red Cross* 87, no. 859 (2005):pp.467-496, p.485.

[633] Part 2 and Article 2 of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects [Hereinafter Action Plan], in Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, New York, July 9-20, 2001, UN Doc. A/CONF.192/15.

[634] Ibid., Part 2 and Article 11.

level, the Action Plan aims to materialize a regional and sub-regional 'point of contact' which would serve as 'liaison' for the purpose of "the implementation of the Programme of Action."[635] At the global level, the Action Plan highlights its intention to ensure the effectiveness of the arms embargoes imposed by the UN Security Council by cooperating with the UN.[636]

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, in short the Firearms Protocol, was adopted by General Assembly Resolution of 55/255 of May 31, 2001. This is the Third Protocol of the United Nations Convention against Transnational Organized Crime. The purpose of the Protocol is "to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition."[637]

The Firearms Protocol requires all signatory parties to put signs on firearms to identify every single legally manufactured, transferred, and used weapon. Additionally, every single state is asked to implement an effective regulative mechanism over every step that firearms undergo, namely manufacture, sale and use. Thereby, a 'tracing' system, which provides advantages in 'detecting,' 'investigating and analysing illicit manufacturing' and 'illicit trafficking',[638] may be established. Additionally, parties to the Firearms

[635] Ibid., Part 2 and Article 24.

[636] Ibid., Part 2 and Article 32.

[637] Article 1 of Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted by resolution A/RES/55/255 of May 31, 2001, 2326 UNTS 208.

[638] Article 3 of the Firearms Protocol, *supra* text accompanying note 633.

Protocol are required to keep all necessary information relating to 'parts and components and ammunition' of firearms to better trace and detect them in case of illicit trafficking, for at least 10 years.[639] The Firearms Protocol's main aim is to combat illicit trafficking. Therefore, state-authorized sales are not covered specifically by the Protocol. Yet, by criminalizing acts of illicit trafficking, manufacturing, and related activities, the Protocol provides fertile ground to tackle illegal arms trade/transfer. Therefore, brokers and their businesses are taken under state control.[640]

In order to strengthen the tracing system to prevent and halt illicit arms trafficking, a politically binding instrument, the International Tracing Instrument (ITI) was adopted by UN member states in 2005.[641] The ITI recognizes the extreme importance of the tracing system declared in the Action Plan relating to illicit arms trafficking. Commencing from that point, the ITI aims "to enable States to identify and trace, in a timely and reliable manner, illicit small arms and light weapons."[642] International cooperation and assistance among states are to be enhanced 'to prevent,' 'combat,' and 'eradicate' the illicit trade in small arms and light weapons from every angle.[643] States will ensure appropriate marking methods for small arms and

[639] Ibid., Article 7.

[640] Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons," p.486.

[641] See Draft International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, [Hereinafter International Tracing Instrument], Annexed to Report of the Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, UN Documents A/60/88, June 27, 2005.

[642] Ibid., ¶ 1.

[643] Ibid., ¶ 2.

light weapons. No standard marking methods are requested; this is left to national prerogatives.

Another significant initiative of the ITI is that of the record-keeping system, the methods of which are left to national prerogatives also. States are obliged to keep records of all marked SALWs. For manufacturing records, the timescale cannot be less than 30 years; all other records are to be kept for no less than 20 years.[644] States are expected to share necessary information relating to marked weapons. To establish a comprehensive and reliable sharing mechanism, states are tasked with the responsibility to set up and maintain an appropriate mechanism in their domestic affairs. States are also encouraged by the ITI to adopt new technologies in order to enrich their tracing and record-keeping capacity.[645] Lastly, states are to report their marking, tracing, and record-keeping experiences biennially to the Secretary-General.[646]

Apart from specific international conventions which directly prohibit particular weapons, a general ban over weapon transfer is also possible. UN Security Council Resolution 1540 imposes an obligation over states to regulate their arms transfers in conformity with its imperatives. According to the Resolution, every state is under obligation to halt any kind of support to a non-state actor which attempts to 'develop,' 'acquire,' 'manufacture,'

[644] Ibid., ¶ 11-12.

[645] Ibid., ¶ 24-26.

[646] Ibid., ¶ 36.

'possess,' 'transport,' 'transfer' or 'use' nuclear, chemical or biological weapons and their means of delivery.[647]

Moreover, the Security Council deems that every state must take necessary measures to "adopt and enforce appropriate effective laws" to prevent a NSA from acquiring any of the above-mentioned weapons of mass destruction or their components.[648] The Security Council also urges all states to take necessary and appropriate measures to prevent the proliferation of weapons of mass destruction, namely nuclear, biological and chemical ones. To this end, all states are obligated to implement vital and necessary legal regulations to take weapons of mass destruction under effective control. Therefore, states are not only under obligation not to take part in any kind of support directed to NSAs seeking to acquire weapons of mass destruction, but also under obligation to establish a legal mechanism to prevent and halt the proliferation of weapons of mass destruction.[649]

To the above global initiatives, we can add regional ones that are launched to regulate arms trades/transfers in conformity with humanitarian purposes and to prevent weapons from ending in the hands of illegal users. Examples are the he European Union (EU) Code of Conduct for Arms Export and the ECOWAS Moratorium. EU Code of Conduct for Arms Exports is one of the most comprehensive and effective initiatives to regulate the area in question. The Code of Conduct was adopted by the Council of the EU in

[647] On Proliferation of Nuclear, Chemical and Biological Weapons, as Well as their Means of Delivery, UN Doc. S/RES/1540 (2004), April 28, 2004.

[648] Ibid., Article 2.

[649] Ibid., Article 3.

1998.[650] It was built upon the principles of common criteria adopted at the Luxembourg and Lisbon European Councils in 1991 and 1992. The main focus is to create a set of common standards for arms exports that includes licensing procedures, information sharing, consultation and many other issues relating to arms exports.[651] Here, humanitarian law and human rights concerns occupy the very heart of the Code of Conduct.

As mentioned above, the Cold War period offered less of a challenge in respect to arms exportation. Arms trades were restricted by two ideological camps; therefore, there was not as much chance to implement various regulations over arms export.[652] Because the political environment had changed dramatically since the Cold War period, the EU decided that new implementations and adaptations to the new system should be operated by the EU States.

The collapse of the Soviet Union brought about new opportunities but also new threats in the realm of arms exports. For instance, the post-Cold War environment became an open playing field. For example one exporter might be denied the privilege of selling weapons or being issued a valid export license by one of the EU member states, whereas another EU member state might provide all opportunities.[653] This would cause competition among EU

[650] Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons," p.486.

[651] Sibylle Bauer and Mark Bromley, "The European Union Code of Conduct on Arms Exports Improving the Annual Report," *Stockholm International Peace Research Institute* (*SIPRI) Policy Paper*, No. 8, November 2004, accessed August 9, 2018, https://www.files.ethz.ch/isn/10471/doc_10501_290_en.pdf, p.1.

[652] Bauer and Bromley, "The European Union Code of Conduct on Arms Exports Improving the Annual Report," p.2.

[653] Ibid.

member states. In order to abolish such competition, a set of standardization rules was needed. Another factor that triggered the need for common standards on arms export was that suppliers could be targeted by the weapons they sold because of the proliferation of armed conflicts.

Although it was not conducted as a legally binding document, the Code of Conduct became a widely accepted and cited document among EU members. The Code of Conduct proposed 'high common standards' to enhance the regulative mechanism and transparency among the EU states.[654] The Code of Conduct consists of three parts. The first part is 'the preamble,' which lays down the logic and motivation behind the Code of Conduct. The second part establishes eight (8) criteria on export guidelines. Finally, the last part deals with operative provisions.[655] In 2008, the Code of Conduct was codified in the form of a legally binding document.[656]

The eight criteria governing export guidelines were built upon concerns relating to 'human rights violations,' 'regional stability,' and 'regional risks' which would be the negative outcomes of unpredictable 'end users' that would not qualify as recipients under the criteria.[657] Therefore, the export

[654] Annyssa Bellal, "Arms Transfers and International Human Rights Law," in *Weapons under International Human Rights Law*, ed. Stuart Casey-Maslen (New York: Cambridge University Press, 2004), p.464.

[655] See "EU Code of Conduct on Arms Exports," [Hereinafter the Code of Conduct], Council of the European Union, June 1998, accessed August 9, 2018, http://www.seesac.org/f/img/File/Res/EU-Documents/EU-Code-of-Conduct-on-Arms-Exports-512.pdf.

[656] See Council Common Position 2008/944/CFSP of December 8, 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L 335/99, Vol. 51, pp.99-103.

[657] Bauer and Bromley, "The European Union Code of Conduct on Arms Exports Improving the Annual Report," p.3.

guidelines can be divided into two parts. In the first 4 criteria, the conditions under which denial of a license is obligatory are taken under consideration. In the second part of the outline, some sense of discretion is left to the exporting countries in respect to the outcomes of the trade.[658]

According to the Code of Conduct, a state is prohibited from issuing a license to exporters if approval would be inconsistent with the licensing state's international commitments, "in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations" (Criterion 1).[659] One of the most critical criteria outlined under the guideline is Criterion 2 in which EU member states are obligated to respect human rights issues in the importing states. In particular, a member states shall not issue an export license if "there is a clear risk that the proposed export might be used for internal repression" (Criterion 2/a).[660] Moreover, EU member states shall act with due diligence, case by case, "where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU" (Criterion 2/b).[661] In Criterion 3, member states are banned from allowing exports "which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination."[662] Additionally, "Member States will not issue an export license if there is a clear risk that

[658] Ibid.

[659] See the Code of Conduct, *supra* text accompanying note 655, Criterion 1.

[660] Ibid., Criterion 2/a.

[661] Ibid., Criterion 2/b.

[662] Ibid., Criterion 3.

the intended recipient would use the proposed export aggressively against another country or assert by force a territorial claim" (Criterion 4).[663]

The term 'clear risk' appears in both Criterion 2 and Criterion 4. It may seem a high threshold to detect whether an importing country would use the weapons for human rights violations. As Boivin notes, the EU prohibits weapons transfers whether or not the exporting country would be 'actually or constructively' involved in breaches of international law.[664] In other words, complicity in the commission of human rights violations is interpreted broadly, as seen in Article 16 of the Draft Articles on State Responsibility:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.[665]

As seen here, the Draft Articles envisages 'knowledge-based' responsibility, whereas the Code of Conduct bases its argument upon 'clear risk.' Both ways of understanding/interpreting situations of potential harm are part of the progressive initiatives to reduce illegal arms transfers. An amended version of the Code of Conduct was published in December 8, 2008. This was the Council Common Position 2008/944/CFSP in which common rules governing control of exports of military technology and equipment were defined. Novel elements concerned humanitarian issues. According to the new wording, EU member states shall deny export licensing where they

[663] Ibid., Criterion 4.

[664] Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons," p.488.

[665] Article 16 of the Draft Articles, *supra* text accompanying note 563.

notice a *clear risk* that the military equipment subjected to transfer would be used "in the commission of serious violations of international humanitarian law."[666]

Another regional initiative to support the non-proliferation of SALWs is the Declaration of a Moratorium on Importation, Exportation, and Manufacture of Light Weapons in West Africa by the Economic Community of West African States (ECOWAS).[667] The member states placed a politically binding moratorium on 'the importation,' 'exportation,' and 'manufacture of light weapons' for a period of three years, renewable.[668]

The Moratorium gained substantial international support and attention. The very first aim of the Moratorium was to build a new and comprehensive platform that restricts the proliferation of arms, and places an effective regulative mechanism over the entire continent.[669] Member states of the Wassenaar Arrangement,[670] the EU, and the Organization for Security and

[666] Council Common Position 2008/944/CFSP, *supra* text accompanying note 656, at Article 2, Criterion 2/c.

[667] See Declaration of a Moratorium on the Importation, Exportation and Manufacture of Small Arms and Light Weapons in West Africa, United Nations Doc. A/53/763-S/1998/1194, December 18, 1998.

[668] Ibid.

[669] Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons," p.490.

[670] "The Wassenaar Arrangement has been established in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. Participating States seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities. The aim is also to prevent the acquisition of these items by terrorists." "The Wassenaar Arrangement," accessed August 12, 2018, https://www.wassenaar.org/about-us/.

Co-operation in Europe (OSCE)[671] all supported the Moratorium financially and legally.[672]

Despite the optimism with which the Moratorium was welcomed it failed to operate effectively for several reasons. First and foremost, as a politically binding document, the Moratorium failed to provide the mean to satisfactorily monitor and regulate the non-proliferation of weapons. In other words, the voluntary nature of the Moratorium hindered its implementation.[673] Weak government structure also contributed to a failure to provide an effective monitoring system.[674]

Second, the drafters of the Moratorium did not take into account the effectiveness of NSAs involved in arms transfers, especially those which play and have been playing a substantial role in arms proliferation and

[671] "The OSCE has a comprehensive approach to security that encompasses politico-military, economic and environmental, and human aspects. It therefore addresses a wide range of security-related concerns, including arms control, confidence- and security-building measures, human rights, national minorities, democratization, policing strategies, counter-terrorism and economic and environmental activities. All 57 participating States enjoy equal status, and decisions are taken by consensus on a politically, but not legally binding basis." See, "the Organization for Security and Co-operation in Europe (OSCE)," accessed August 12, 2018, https://www.osce.org/whatistheosce.

[672] Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons," p.491.

[673] Ilhan Berkol, "Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan," *GRIP Note d'Analyse*, April 1, 2007, accessed August 12, 2018, http://archive.grip.org/en/siteweb/images/NOTES_ANALYSE/2007/NA_2007-04-01_EN_I-BERKOL.PDF, p.1.

[674] Mohamed Coulibaly, "From Moratorium to a Convention on Small Arms: a Change in Politics and Practices for the 15 Member Countries of the Economic Community of West African States (ECOWAS)," *Oxfam International*, June 2008, accessed August 12, 2018, https://oxfamilibrary.openrepository.com/bitstream/handle/10546/112514/fp2p-cs-from-moratorium-convention-small-arms-ECOWAS-140608-en.pdf;jsessionid=7CAD371E47CBFCAFA7AFD3E72319A539?sequence=1, p.2.

transfers across the region. For instance, according to one report, rebels in Sierra Leone received a huge number of weapons "through interlinked networks of traders, criminals and insurgents moving across borders."[675] Finally, in the wording of the Moratorium, there is a possible exit gate for a state not to implement such provisions, found in Article 9 of the Moratorium: "Member States may seek an exemption from the Moratorium in order to meet legitimate national security needs or international peace operations requirements."[676] Therefore, states enjoy a wide margin of discretion as to which arms imports, exports, transfers, or manufacture fall into the category of being necessary for national security.

Bearing in mind the pitfalls of the Moratorium, a legally binding instrument appeared necessary in respect to the import, export, and manufacturing of SALWs. The Moratorium became a legally binding convention in 2006, namely the Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials.[677] The Convention is composed of a preamble and 32 Articles divided into 7 chapters. Article 1 stipulates the terms that the Convention uses. For instance, small arms, light weapons, NSAs, ammunition, transfers, illicit marketing, brokering, and so on are defined in conformity with other international instruments.[678]

[675] Ibid.

[676] Moratorium, *supra* text accompanying note 667, Article 9.

[677] ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, [hereinafter ECOWAS Convention] signed at Abuja, June 14, 2006. For the text see, Kerstin Vignard, ed.,*The Complex Dynamics of Small Arms in West Africa*, Disarmament Forum (Geneva: United Nations, 2008), pp.35-54.

[678] Ibid., Article 1.

The second article lays out the scope and objectives of the convention. Accordingly, Article 2 proposes an overarching frame to ban, regulate, or restrict not only illicit arms transfers but also the import, export, and manufacturing of SALWs. The first objective is to sustain regional peace and security by preventing the escalation of SALWs accumulation within ECOWAS countries which could trigger instability and insecurity.[679] The Convention provides, or at least proposes, a coherent and harmonized system of information exchange and transparency in respect to efforts undertaken by Member States to enhance the capabilities of the regulation mechanism. Therefore, the Convention adopts all of the positive outcomes of the Moratorium and tries to build mutual trust among member states.[680]

One of the most important aspects of the Convention is drafted in Article 3, which states: "Member State shall ban, without exception, transfers of small arms and light weapons to Non-State Actors that are not explicitly authorized by the importing Member."[681] In addition to this ban, member states are obliged to ban "the transfer of small arms and light weapons and their manufacturing materials into their national territory or from/ through their national territory."[682]

There are multiple exemptions included by the Convention, although it maintains a strict ban over arms transfers to NSAs.[683] Article 4 addresses

[679] Ibid., Article 2/1.

[680] Ibid., Article 2.

[681] Ibid., Article 3/2.

[682] Ibid., Article 3/1.

[683] Berkol, "Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan," p.3.

these exemptions. As set forth in Article 4, states can authorize arms transfers to NSAs as long as their national security/ defense concerns are eliminated; additionally, if the NSAs are participating in operations "in accordance with United Nations, the African Union, ECOWAS, or [an]other regional or sub-regional body of which it is a member."[684] States are allowed to transfer arms to NSAs as set forth in the Article 4/1 provided that an effective import and export regime is established.

Articles 5 and 6 draw the framework of 'the conditions,' 'procedures,' and 'criteria for exemptions.'[685] Request for exemptions are transmitted to the Executive Secretariat of ECOWAS to be examined in respect to 5 criteria laid down in Article 5; namely 'details of the arms to be transferred' (Article 5/a), 'details of the supplier' (Article 5/b), 'details of the supply process' (Article 5/c), 'details of the final end user' (Article 5/d); and 'details of the end use' (Article 5/d). If the request is approved after the first deliberation of the Executive Secretariat as to whether it merits exemption, the request is transmitted to the member states. The decision should be taken by consensus for the final approval of the request. If a consensus cannot be reached, for the final decision, "the exemption request as well as the reasoned opinion of the Executive Secretary" must be transferred to the ECOWAS Mediation and Security Council.[686]

In Article 6 of the ECOWAS Convention, 'Cases for Refusal of Exemptions for Transfers' are taken into account. There are 5 headings and various sub-headings which list the conditions for refusal of exemptions for transfers.

[684] The ECOWAS Convention, *supra* text accompanying note 677, Article 4/1.

[685] Berkol, "Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan," p.3.

[686] The ECOWAS Convention, *supra* text accompanying note 677, Article 5/2.

These criteria are designed in line with international documents relating to arms transfers. In addition, Article 6 requires full respect to international human rights law and humanitarian law, as well as peace and security.[687]

Chapter III consists of Article 7 and Article 8, which have to do with the regulation of arms manufacturing. Both Articles place great importance on the obligation of member states to establish a necessary mechanism to take arms manufacturing under control. Attempts to implement the Moratorium had revealed that prohibiting local arms manufacturing is almost impossible to achieve voluntarily. Therefore, the Convention tries to limit and control local arms manufacturing. In order to regulate local arms manufacturing, member states are to list every single manufacturer to take their activities under state control. Article 8 of the Convention deals with the possible conditions that member states have to fulfil in full respect if they want to produce or authorize production of SALWs. These conditions are covered in the sections on 'Details of the arms to be manufactured' (Article 8/a) and 'The procedure for marking' (Article 8/b).[688]

Chapter IV of the Convention establishes a legal base for possible registration and information sharing systems. At first glance, every single member states shall "establish where they do not exist already, national computerized registers and databases of small arms and light weapons."[689] In addition to national registration mechanisms, a sub-regional registration database and mechanism has been established by the Convention, and the Executive Secretariat has been appointed as to establish the so-called

[687] Berkol, "Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan," p.4.

[688] The ECOWAS Convention, *supra* text accompanying note 677, Article 7 and Article 8.

[689] Ibid., Article 9.

regional registration mechanism.[690] At the end of the day, optimism remerged in respect to reducing fatalities from SALWs.

A global initiative to ensure transparency on arms transfers and manufacturing is that of the UN Register of Conventional Arms. In line with the recommendations of a group of experts appointed by the Secretary-General of the UN, the UN Register of Conventional Arms was set up by the UN General Assembly Resolution 46/36.[691] The resolution asks member states to file annual reports to the UN Register of Conventional Arms in respect to seven categories of conventional weapons: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, and missiles or missile systems.[692] According to a report penned in 2003, member states should also include MANPADS (Man-Portable Air-Defense Systems) to their yearly reports within the missile category.[693] Also in 2006, the Report of the Group of Government Experts highlighted three more recommendations. According to the report, ‘”states should report transfers of small arms and light weapons on a standardized form as additional background information.”[694] Apparently, the globally established registration system was outdated in respect to arms transfers of SALWs. The Arms Trade Treaty (ATT) emerged in such an environment.

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[690] Ibid., Article 10.

[691] General and Complete Disarmament: Transparency in Armaments, UN Doc. A/RES/46/36, 6 December 1991.

[692] Ibid.

[693] Stohl and Grillot, *The International Arms Trade*, p.147.

[694] Ibid.

In 2013, the final version of the Arms Trade Treaty was adopted by the UN General Assembly[695] as an international convention regulating and standardization the area in question. A landmark international convention on arms transfers had long been a necessity; thereby the Arms Trade Treaty was conducted as a solution to the deceptive nature of arms markets. Although every single state has their own regulative mechanisms to take arms manufacturing, imports, and exports under their control, there was no universal standard for dealing with the issue.

5.2.2. The Arms Trade Treaty and Its Implications over State Responsibilities on Arms Transfer and Arms Trade

Long before the adoption of the Arms Trade Treaty (ATT), global initiatives had emerged to bring forth a global convention that would bring global standardization to the import, export, and transfer of conventional weapons. The unprecedented increase in the number of casualties due to the unregulated arms trade in the post-Cold War era also led to some civil society initiatives that furthered the birth of the ATT.

In 1997, an international code of conduct was drafted by Nobel Peace Laureates and placed at the disposal of states.[696] The document provided inspiration for the contemporary ATT and paved the way for a global standardization process. At the first glance, it is apparent that human rights concerns occupy the very heart of the International Code of Conduct. For

[695] Arms Trade Treaty of 2 April 2013, adopted by resolution A/RES/67/234 B of June 11, 2013, annexed to UN Doc. A/CONF.217/2013/L.3 of March 27, 2013.

[696] "Nobel Peace Laureates' International Code of Conduct on Arms Transfers," *International Human Rights Lexicon*, accessed August 28, 2018, http://www.internationalhumanrightslexicon.org/hrdoc/docs/armsnobel.htm.

instance, universal human rights documents are the main resource cited by the International Code of Conduct in various parts of the document.[697]

The International Code of Conduct has also made a great contribution to the law governing the issue at hand. The International Code of Conduct, like other similar documents, prefers the term 'transfer' rather than 'trade.' In other words, the International Code of Conduct broadly interprets arms transactions. In Section II, the principles of the International Code of Conduct are listed. According to Section II, human rights concerns, humanitarian necessities, regional peace and security, the democratic culture of the recipients, and anti-terrorism are the principles upon which the International Code of Conduct is mostly based.

The International Code of Conduct forces states to act diligently and envisages a due diligent responsibility for states. According to Article 3 (A), "Arms transfers may be conducted only if it can be *reasonably demonstrated* (emphasis added) that the proposed transfer will not be used by the recipient state, or recipient party in the country of final destination, to contribute to grave violations of human rights," and arms transfers may be permitted only if recipients issue an effective investigation to bring the perpetrators before the law and take all necessary measures to prevent such misconduct. Both exporting and importing sides are held responsible separately. These responsibilities are called the *obligation of result* and *obligation of due diligence*, respectively. What is striking in the International Code of Conduct is the resemblance between it and the ATT.

In the years following the International Code of Conduct, the UN's efforts to mature an international convention began to develop. Therefore, in 2006,

[697] The Universal Declaration of Human Rights is one of the documents cited.

UN General Assembly resolution 61/89 was adopted.[698] The Resolution determined that the lack of common legal regulative norms on the transfer of conventional arms, export, and import paves way for the displacement of people, crime, conflict and terrorism. It therefore jeopardizes security, stability, peace, safety, reconciliation, and sustainable development.[699] Additionally, the Resolution acknowledges that a legally binding instrument is needed for a standardization of international legal regulations for the transfer, export, and import of conventional arms.[700]

For these purposes, Resolution 61/89 requested that the Secretary-General ask the opinion of Member States on the "feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export, and transfer of conventional arms."[701] Also, the Secretary-General was asked to establish a group of governmental experts to investigate the scope, feasibility, and draft parameters for a comprehensive, legally binding instrument[702] which would be the basis for international standardization of the export, transfer of arms, and import.

In their report, the Group of Governmental Experts acknowledged that achieving a comprehensive solution and standardization on import, export,

[698] Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms, UN Doc. A/RES/61/89, December 18, 2006.

[699] Ibid.

[700] Ibid.

[701] Ibid., ¶ 1.

[702] Ibid., ¶ 2.

and transfers of weapons is a difficult process. The Expert Group, first and foremost, recommended that state parties implement effective regulative mechanisms within their national jurisdiction to prevent legally manufactured weapons from entering into illicit markets. The Group of Governmental Experts also confessed that the issue in question has a complex nature in terms of clashing interests. Both exporters and importers have various and complex webs of interests that prevent the issue from being solved easily. Therefore, the Expert Group proposed that since addressing "the international trade in conventional arms" is a complex issue with clashing interests, there should be a step-by-step evaluation that would foster a consensus which would enable mutual satisfaction. In other words, there should be a balance between clashing interests to achieve international common standards.[703]

Following these recommendations, the UN General Assembly established an Open-ended Working Group to further elaborate upon the Group of Governmental Experts' recommendations, and adopted Resolution 64/48 which called for an Arms Trade Treaty conference to be held in 2012 to discuss the issue in question.[704] The Assembly decided to convene an international conference "to meet for four consecutive weeks in 2012 to elaborate a legally binding instrument on the highest possible common

[703] Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms, UN Doc. A/63/334, August 26, 2008, ¶ 27, 28, and 29.

[704] The Arms Trade Treaty, UN Doc. A/RES/64/48, January 12, 2010.

international standards for the transfer of conventional arms"[705] which was intended to follow the Open-ended Working Group's report.[706]

It was further decided by UN General Assembly Resolution 64/48 that the remaining sessions of the Open-ended Working Group, to be held between 2010 and 2011, would be considered "as a preparatory committee for the United Nations Conference on the Arms Trade Treaty."[707] In accordance with UN General Assembly Resolution 64/48, four preparatory committee meetings were gathered.[708] After all these preparatory efforts, in 2012, an international conference was held in New York under the presidency of Ambassador Roberto García Moritán of Argentina.[709]

Unfortunately, the Conference could not adopt the draft treaty proposed by Ambassador Moritán. In the end, the UN General Assembly decided to convene another conference to finalize the Convention. In its Resolution 67/234, the General Assembly decided that the conference would be convened in New York, from March 18-28, 2013,[710] under the presidency of Ambassador Peter Woolcott of Australia.[711] After 'hard-fought diplomatic

[705] Ibid., ¶ 4.

[706] See Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms, UN Doc. A/RES/63/240, January 8, 2009.

[707] The Arms Trade Treaty, UN Doc. A/RES/64/48, January 12, 2010, ¶ 6.

[708] Parker, *The Arms Trade Treaty a Practical Guide to National Implementation*, p.18.

[709] Ibid., pp.18-20.

[710] Arms Trade Treaty, UN Doc. A/RES/67/234, January 4, 2013, ¶ 2.

[711] Parker, *The Arms Trade Treaty a Practical Guide to National Implementation*, p.20.

conferences convened by the UN,'[712] the Arms Trade Treaty was, finally, adopted, on April 2, 2013 for 154 to 3 votes.[713] Syria, North Korea, and Iran did not consent to the adoption of the draft convention. 2014 marked the date of the ATT's entry into force; it is the first globally binding instrument on the arms trade.[714] Currently, there are a total of 104 States Parties to the Treaty and 33 Signatory States that are not yet party to the Treaty.[715]

The ATT establishes the Conference of States Parties in Article 17. The rights and responsibilities of the Conference of States Parties are listed under Article 17/4:

The Conference of States Parties shall:

> (a) Review the implementation of this Treaty, including developments in the field of conventional arms;
> (b) Consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular the promotion of its universality;
> (c) Consider amendments to this Treaty in accordance with Article 20;
> (d) Consider issues arising from the interpretation of this Treaty;
> (e) Consider and decide the tasks and budget of the Secretariat;
> (f) Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of this Treaty; and

[712] Annyssa Bellal, "Arms Transfers and International Human Rights Law," in *Weapons under International Human Rights Law*, ed. Stuart Casey-Maslen (New York: Cambridge University Press, 2004), p.468.

[713] See the last version of the Draft ATT which was annexed to UN Doc. A/CONF.217/2013/L.3, March 27, 2013.

[714] The Arms Trade Treaty, UN Doc. A/RES/67/234 B, June 11, 2013.

[715] The Arms Trade Treaty (ATT), *Treaty Status*, accessed September 26, 2019, https://www.thearmstradetreaty.org/treaty-status.html?templateId=209883.

(g) Perform any other function consistent with this Treaty.

There have been four Conferences of States Parties to date. At the first meeting which was held in Cancun, Mexico, 24-27 August 2015,[716] the Conference took several decisions; it "adopted by consensus the Rules of Procedures and the Financial Rules and took note with appreciation of the reporting templates," "approved by consensus to designate Geneva, Switzerland as the seat of the Secretariat," "decided upon the appointment of Mr. Simeon Dumisani Dladla from South Africa, as the first Head of the Secretariat of the Arms Trade Treaty," "established a Management Committee composed of States Parties: Côte d'Ivoire, Czech Republic, France, Jamaica, Japan and Nigeria."[717] The Second Conference was held in Geneva, Switzerland from August 22-26, 2016.[718] The third Conference was again held in Geneva, from September 11-15, 2017.[719] The final Conference was held in Tokyo, from August 20-24, 2018.[720]

One can find the objectives and purposes of the Convention in Article 1, which states that the basic purposes of the Convention is to establishing a high common standard of regulative mechanisms over conventional arms

[716] See "First Conference of States Parties," *Events*, accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-1.html?templateId=139784.

[717] Ibid.

[718] "Second Conference of States Parties," *Events*, accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-2.html?templateId=139059.

[719] "Third Conference of States Parties," *Events,* accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-3.html?templateId=133166.

[720] "Fourth Conference of States Parties," *Events*, accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-4.html?templateId=137319.

trade, and eradicating or preventing illicit market transfers.[721] The Article discloses the logic and purposes behind the objectives explained in the first part of the Article 1 as follows:

> contributing to international and regional peace, security and stability; reducing human suffering; promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.[722]

Article 2 lists the conventional weapons to which the present Convention shall apply. Accordingly, armored combat vehicles, battle tanks, combat aircraft, large-caliber artillery systems, attack helicopters, missiles and missile launchers, warships, and SALWs are the weapons covered under the present convention.[723] All kinds of international arms trade, including transit, trans-shipment, export, import, and brokering are referred to as forms of 'transfer.'[724]

In the following articles, 'ammunition' and their parts and components are included under the conventional weapons category listed in Article 2/1. In both Article 3 and Article 4, every state party is obliged to establish an effective national monitoring and regulating system to observe 'the export of ammunition/munitions' and parts/components of conventional weapons listed under Article 2/2.[725]

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[721] See Arms Trade Treaty of April 2, 2013, adopted by resolution A/RES/67/234 B of June 11, 2013, annexed to UN Doc. A/CONF.217/2013/L.3 of March 27, 2013, Article 1.

[722] Ibid.

[723] Ibid., Article 2/1.

[724] Ibid., Article 2/2.

[725] Ibid., Article 3 and Article 4.

It is said in Article 5/1 that every single state party is required to implement this Treaty "in a consistent, objective and non-discriminatory manner."[726] In this frame, every state party is requested to establish a national monitoring system "in order to implement the provisions of this Treaty."[727] Additionally, Article 5/3 enables state parties to interpret conventional weapons in a broader sense. In other words, this article establishes the lower base for state parties, which can add more weapons into the definition given in Article 2/2.

Article 5/4 also envisages an exchange of control list which is connected to the national regulative systems of state parties. Thereby, it aims to establish a transparency among state parties relating to arms transfers, and, by exchanging checklists, trust and willingness among state parties are targeted to be enhanced.[728]

Article 6 and 7 prohibit some sorts of transfers, and oblige state parties to make a risk assessment before transferring weapons to the recipient.[729] Article 8 proposes core obligations over import, while Article 9 deals with transit or trans-shipment. Article 10 deals with brokering. These articles constitute the core of the treaty and regulate all sorts of arms transfers.

Article 6 sets out the conditions of prohibited transfers of arms. A state party shall not authorize any arms transfer under the following circumstances:

[726] Ibid., Article 5/1.

[727] Ibid., Article 5/2.

[728] Ibid., Article 5/4.

[729] Sarah Parker, "Breaking New Ground? The Arms Trade Treaty," in *Small Arms Survey 2014: Women and Guns*, ed. Glenn McDonald et.al. (New York: Cambridge University Press, 2014), p.83.

> 1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes. (Article 6/1)
>
> 2. … if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms. (Article 6/2)
>
> 3. … if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party. (Article 6/3)

The first two paragraphs reemphasize obligations that have already been in force. In other words, the ATT did not bring new prohibitions. For instance, all states have already accepted the binding nature of the Security Council Resolutions which are drafted under Chapter VII. The second paragraph also refers to the existing commitments of states. So, what is essential in Article 6 is the last paragraph, although criticisms of the ATT have not been limited to it. Indeed, there are few blurred areas that need to be clarified.

First and foremost, the wording of the paragraph is full of ambiguities. The ‘knowledge-based’ threshold may give states an opportunity to escape being liable under the law on state responsibility. The knowledge-based threshold means that a state can only be held accountable for the crimes listed in Article 6/3 if that state transfers arms knowingly and consciously aware that these weapons will be used to commit crimes. Actually, Article 6/3 refers to Article 16 of the Draft Article on State Responsibility, which describes a state’s ‘complicity for international wrongful acts.’ In its judgment, the ICJ declares that to establish complicity a state must act, at the crucial time, with “*full awareness* that the aid supplied would be used to commit genocide”

(emphasis added).[730] The Swiss approach to the issue in question is rather broader than the traditional perception. According to Switzerland's model interpretive declaration, the term 'knowledge' should be understood as 'reliable awareness,' which proposes a lesser threshold.[731] But, at the end of the day, "ATT Article 6(3) is closely related to the customary international law on aid or assistance."[732]

Article 7, on the other hand, requires exporting states to make an effective assessment before authorizing an arms transfer. Each and every state party shall make a thorough assessment to determine whether the so-called weapons may undermine peace and security before authorizing a weapons transfer. In the second place, a state party shall be sure that the so-called weapons would not be used to commit serious humanitarian law and human rights violations.

Bellal criticizes the ambiguous definitions used in the convention, particularly the expression 'serious violation of international human rights law,' for not receiving enough attention and debate. This expression has a central role in the convention and should have been deeply investigated. For instance, as Bellal notes, there is no global consensus over what constitutes a grave/serious violation of human rights although this expression is widely touted. Here, it is not clear whether the qualifying adjective 'serious' refers to

[730] *Genocide Case*, *supra* text accompanying note 15, ¶ 423.

[731] Parker, "Breaking New Ground? The Arms Trade Treaty," p.84.

[732] Nina H. B. Jørgensen, "State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty," *The American Journal of International Law,* 108, no. 4 (2014): pp.722-749, p.727.

the violation itself or to human rights, according to Bellal.[733] Indeed, the ATT requires a high threshold to take human rights violations into consideration.

In Article 7/1(b)(III) and (IV), the exporting state should critically assess whether the weapons are to be used to commit terrorist acts or organized crimes, which are against the provisions of international protocols or conventions to which the exporting state is party. As seen here, since there is no internationally accepted definition of terrorism or terrorist acts, the ATT relies on the definitions that are adopted by states.[734]

Returning to the provisions of the ATT, it prohibits authorization of transfer, if the weapons are to be used "to commit or facilitate serious acts of gender based violence or serious acts of violence against women and children."[735] After the state party determines whether the arms transfer would result in the violations listed in the first paragraph, "the exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1."[736] Eventually, the exporting state shall not authorize the arms transfer if the outputs of both risk assessment and measures to mitigate risks are negative.

When it comes to imports, the ATT states that, first and foremost, every importing state is under obligation to provide all necessary documents and information when requested by the exporting state; therefore, an exporting

[733] Bellal, "Arms Transfers and International Human Rights Law," pp.469-70.

[734] Parker, "Breaking New Ground? The Arms Trade Treaty," p.87.

[735] Arms Trade Treaty of April 2, 2013, adopted by resolution A/RES/67/234 B of June 11, 2013, annexed to UN Doc. A/CONF.217/2013/L.3 of March 27, 2013, Article 7/4.

[736] Ibid., Article 7/2.

state can make its own assessment pursuant to Article 7 of the ATT.[737] In Articles 9 and 10, state parties are obliged to take and ensure all appropriate measures to regulate the transit or trans-shipment and brokering of the transfer. Brokers may be requested to provide a valid license taken from a state party.

The ATT introduces the concept of diversion, which implies the procedure through which weapons find themselves in unauthorized hands, or used for unauthorized acts.[738] Therefore, the ATT obliges all state parties involved in weapons transfer to take all appropriate measures to prevent diversion (Article 11/1). To this end, all state parties including 'importing, transit, trans-shipment and exporting' countries are requested to cooperate with each other and exchange information (Article 11/3). When a diversion is detected by a state party, all appropriate measures to address that diversion shall be implemented (Article 11/4). However, the ATT allows states to apply discretion in determining which methods are to be used to mitigate such diversion (Article 11/4). Lastly, states are encouraged to share relevant information as to how to tackle diversion.

Article 12 deals with record keeping. Every state party is under obligation to keep records relating to export license issuance or actual exports (Article 12/1). The striking point here is that weapons subjected to record keeping include all the weapons listed in Article 2/1, but not ammunition and their parts. Besides direct exports, a state is encouraged to keep records of weapons "that are transferred to its territory as the final destination or that are authorized to transit or trans-ship territory under its jurisdiction" (Article 12/2). All of these records shall be kept for at least ten years (Article 12/4).

[737] Ibid., Article 8/1.

[738] Parker, *The Arms Trade Treaty: a Practical Guide to National Implementation*, p. 23.

In the first year after the ATT enters into force, state parties are obliged to submit an 'initial report' indicating the measures taken to implement the ATT, which shall include "national laws, national control lists, and other regulations and administrative measures."[739] Additionally, every state party shall submit annual reports "concerning authorized or actual exports and imports of conventional arms covered under Article 2 (1)."[740] For the sake of transparency and trust, all of the reports shall be made available to all state parties. Pursuant to the ATT, state parties are under obligation to use all appropriate measures to implement the ATT, including national laws and regulations (Article 14).

International cooperation to effectively implement the ATT is not a matter of choice but an obligation. Article 15/1 puts the matter with the modal 'shall.' So, 'State Parties shall cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty.'[741] After it declares that international cooperation is a must, Article 15/2 softens its language and uses the verb 'encourage.' Throughout Article 15, state parties are obliged to cooperate and assist each other to implement the ATT while they are encouraged "to facilitate international cooperation," "to consult on matters of mutual interest," "to share information, "to exchange experience and information" on lessons learned in relation to any aspect of the treaty.[742]

[739] Arms Trade Treaty of 2 April 2013, adopted by resolution A/RES/67/234 B of 11 June 2013, annexed to the UN Doc. A/CONF.217/2013/L.3 of March 27, 2013, Article 13/1.

[740] Ibid., Article 13/3.

[741] Ibid., Article 15/1.

[742] Ibid., Article 15.

In implementing the ATT, a separate article deals with international assistance. Every state party may demand 'institutional capacity-building,' 'legal or legislative assistance,' and 'technical,' 'material' or 'financial assistance'[743] in such areas as 'disarmament,' 'stockpile management,' 'model legislation,' 'demobilization and reintegration programmes,' and 'effective practices for implementation.'[744] If it is requested, every state party shall respond to the demand for assistance in an affirmative way.

The ATT, similar to other international conventions, establishes a Secretariat to assist state parties to implement the Convention efficaciously. Therefore, Article 18, ultimately, is separated from the others in order to design the Secretariat. For the sake of the effective and coherent functioning of the Secretariat to undertake its responsibilities, "the Secretariat shall be adequately staffed."[745] This is to say that staff shall be fully educated and have full expertise in their fields. The responsibilities of the Secretariat are listed as follows:

> Receive, make available and distribute the reports as mandated by this Treaty (Article 18/3(a)), Maintain and make available to States Parties the list of national points of contact (Article 18/3(b)), Facilitate the matching of offers of and requests for assistance for Treaty implementation and promote international cooperation as requested (Article 18/3(c)), Facilitate the work of the Conference of States Parties, including making arrangements and providing the necessary services for meetings under this Treaty (Article 18/3(d)), and Perform other duties as decided by the Conferences of States Parties (Article 18/3(d)).

[743] Ibid., Article 16/1.

[744] Ibid.

[745] Ibid., Article 18/2.

5.3. Conclusion: A Critical Assessment

This chapter considered the Law of State Responsibility in relation to states arming NSAGs in other states. It investigated in detail whether a state can be held responsible for the misconduct of NSAGs if these groups receive considerable support (arms, aid, finance, etc.) from that state. To do so, this section touched on the Law of State Responsibility and referenced several international cases to indicate possible ways of answering the question at hand. Firstly, Article 4 of the International Law Commission's Draft Articles on State Responsibility envisages that all the conduct of a state is deemed to be that state's responsibility. Therefore, the first task is to identify whether the perpetrators constitute a state organ under the internal law of the patron state. Being a *de jure organ* of the state means that the state has international responsibility.

If the answer is negative, then it should be determined whether the perpetrators constitute a *de facto organ* of that state. The ICJ determined that to consider the NSAG a *de facto organ,* it must act under the 'complete dependence' of that state. If the threshold of "complete dependence" is not met, responsibility may result from two other criteria. The ICJ applied the *effective control* test to determine whether the misconduct of a NSA can be attributable to a state or not. In contrast, the ICTY used the *overall control* test to establish state responsibility. Besides these tests, the Law of State Responsibility includes *obligations of result* and *obligations of diligent conduct* to hold states accountable.

Here, I draw attention to NSGs that perpetrate humanitarian law and human rights violations. Although these groups receive considerable support from foreign states for various reasons, there is a question about whether supporting states can be held liable for human rights violations by the groups they support. Turning to the legal basis of responsibility, it is

apparent that politics and law generate an interpenetrating structure, with legal discourses revolving in a vicious circle.

The *effective control* test, for example, proposes a very high threshold for state responsibility. Based on this test, a state can easily escape liability for the misconduct of NSAGs. Under similar conditions, the *overall control* test also fails to establish state responsibility, even though its criteria are less stringent. The differences in these tests show that there is no uniformity between the ICJ and the ICTY. Moreover, they indicate that the international legal system suffers from contradictions.

These two tests also contradict the assertion that international law is neutral and objective. In addition to the *effective control* and *overall control* tests, *obligations of result* and *obligations of diligent conduct* also require subjective evaluation. Law is formulated in the abstract to ensure neutrality and objectivity. However, subjective evaluations determine the fate of concrete actions, making it possible to reach different conclusions about each case. Thus, because modern doctrine is inherently undetermined, a state may be held responsible or not for the acts of the NSGs it supports in other states by applying the legal instruments discussed here. Ultimately, this forces states to resort to the arsenal of power politics to solve normative problems – as is also apparent in treaty provisions.

Regarding illegal arms transfers, international and regional legal efforts have emerged to tackle the problem, most of which remain inadequate since the roots of the issue are political. Moreover, there are large amounts of money generated by arms trafficking while legal regulations fail to close the loopholes used for this trade. There are many international legal documents that attempt to eliminate the problems caused by the illegal arms trade. Almost all try to regulate the licensing process by putting arms transfers under the control of states. However, the secret objective of these treaties is to create loopholes for illicit trafficking. Therefore, the arms trade is

normalized and legitimized as long as it is conducted in conformity with the law, in contrast to illicit trafficking. In addition, states can blur the line between legal and illegal trafficking by appealing to 'military necessities'. Lastly, an unspoken problem is that states are the entities that manufacture these weapons, benefit financially from their sale, and are, ironically, obliged to try to restrict their circulation.

In consequence, illicit arms transfers and the lack of legal regulative mechanisms allow armed conflicts and human casualties to escalate. In response, international law creates legally-binding documents to regulate both the manufacturing and trafficking of weapons. However, as noted above, illegal arms transfers are surrounded by paradoxes. In particular, the arms trade and manufacture of SALWs are deemed as legitimate as long as they are conducted in accordance with the law.

The Arms Trade Treaty (ATT), an internationally binding document drafted to tackle illegal arms transfers and oblige states to act accordingly, has both advantages and disadvantages. One of the most striking criticisms is that it normalizes and legitimizes war-making. Firstly, the treaty does not outlaw arms transfers. Rather, as long as arms transfers comply with its provisions, they are welcomed. Therefore, there is a power-knowledge relationship hiding the domination or superiority of one state over another in their relations. Furthermore, according to Stavrianakis, the ATT introduces a balancing mechanism. States can ignore human rights concerns for the sake of 'the interests of peace and security' and 'justify exports in the name of the latter'.[746]

Indeed, this justification applies to almost all international conventions, which include provisions allowing states a legitimate way to avoid their

[746] Anna Stavrianakis, "Legitimising Liberal Militarism: Politics, Law and War in the Arms Trade Treaty," *Third World Quarterly* 37, no. 5 (2016): pp.840-865, p.841.

obligations. The ATT, in particular, serves as a shield for the actions of Western states, whose arms transfers contribute to humanitarian law and human rights violations 'by the existence of regulatory regimes' that envisage full respect to international human rights law and humanitarian law.[747] Thus, argues Stavrianakis, these regulatory regimes enable the liberal form of militarism to reproduce itself.[748]

It is instructive to consider Article 6/3 on certain prohibitions on arms transfers. First, it introduces a 'knowledge-based' responsibility. Here, the attribution of responsibility has a highly complex formation. As Lustgarten reminds us, there are no objective criteria as to how states may know of upcoming violations. 'Subjective' responsibility, in this case, opens room for maneuver so that establishing the responsibility of a state becomes a matter of discretion.[749]

Second, a state is prohibited from transferring arms "if it has knowledge at the time of authorization that the arms or items" would be used in the commission of certain violations. Here, officially, it could be interpreted that, as long as the recipient's intention to violate international law with the help of the weapons they import is unknown at the time of authorization, the arms transfer will be permitted. This allows the recipients to use these items for future atrocities.[750] That is, authorization does not cover future events or

[747] Ibid., p.841.

[748] Ibid.

[749] Laurence Lustgarten, "The Arms Trade Treaty: Achievements, Failings, Future," *International & Comparative Law Quarterly,* 64, no. 3 (2015): pp.569-600, p.589.

[750] Ibid.

possible future violations, even though Article 7 proposes reassessment in light of new evidence.

When we turn back to customary international law, we can immediately realize that Article 6/3 is very much related to 'complicity' under the law of state responsibility. In its judgment, the ICJ deals with 'complicity' in respect to genocide. According to the Court, "an accomplice must have given support in perpetrating the genocide with full knowledge of the facts" at the time "its organs were aware that genocide was about to be committed or was under way".[751] Therefore, two elements are required for complicity to be established. First, "the arms must enable or facilitate the violations".[752] Second, the furnishing state "must be aware at the time of the transfer that the arms were about to be used, or were being used, to commit violations of international law".[753]

In Article 7, on the other hand, the future matters in that, although a state is permitted to transfer arms if they are not prohibited under Article 6, before authorizing such transfer, every state party must conduct a risk analysis and take mitigating measures to eliminate the identified risks. If a state is not convinced that the arms transfer would not be used in the commission of acts listed in Article 7, transfers should not be made. In contrast to Article 6's knowledge-based evaluation, Article 7 introduces an 'overriding risk' criterion whereby balance or overall assessment[754] matters.

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[751] *Genocide Case*, *supra* text accompanying note 15, ¶: 432.

[752] Andrew Clapham, "Weapons and Armed Non-State Actors," in *Weapons under International Human Rights Law*, ed. Stuart Casey-Maslen, (New York: Cambridge University Press, 2004), p.164.

[753] Ibid.

[754] Lustgarten, "The Arms Trade Treaty: Achievements, Failings, Future," p.591.

Under Article 7 of the ATT, a 'due diligence' obligation applies if a state party fails to adopt all necessary steps to assess risk. For Jorgensen, a state may avoid responsibility if the assessment is made in good faith.[755] Therefore, for Jorgensen, the 'due diligence' responsibility is far more objective than 'knowledge-based' responsibility.[756]

The term 'transfer' also needs to be examined. The ATT defines the term 'transfer' much more broadly than arms sales, although Article 2/2 directly refers to 'international trade.' Firstly, 'international trade' is something more than one country selling weapons to another country.[757] It includes "export, import, transit, trans-shipment and brokering" (Article 2/2). One controversial issue here is that of donations. As highlighted above, many countries have donated and most probably will continue to donate weapons to other actors. In the process of these transfers, money is not involved. Therefore, it is apparent here that a 'transfer' does not have to be commercial in nature.[758] Secondly and logically, arms transfers to national armies operating outside the homeland of a state are not covered by the ATT. This also applies to peacekeeping operations.[759]

What about NSAGs? Does the ATT deals with them? The answer is yes, although the treaty does not explicitly refer to NSAGs. Instead, it is limited to

[755] Jørgensen, "State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty," p.729.

[756] Ibid.

[757] Lustgarten, "The Arms Trade Treaty: Achievements, Failings, Future," p.578.

[758] Ibid.

[759] Ibid.

international transfers of arms, identified in Article 2/2. Here, the scope of the transfer should be examined. According to the United States Department of State, international transfers should include "imports, exports, transit, trans-shipment, or brokering of conventional arms, whether the transfers are state-to-state, state-to-private end-user, commercial sales, leases, or loans/gifts".[760]

According to this definition, NSAs clearly constitute one of the subjects of the ATT although they may not be directly mentioned because there is no mutually agreed definition of them. Ultimately, given all the evidence mentioned above, arms transfers to NSAs are indirectly embedded in the ATT.

We can see both ascending and descending arguments in the Preamble of the ATT. For instance, the sovereign rights of all states are welcomed while humanitarian concerns are placed at the top of the hierarchy of priorities. Furthermore, in the Preamble, the drafters of the ATT recognize "the legitimate political, security, economic and commercial interests of States in the international trade in conventional arms".[761] Additionally, in principle, the ATT also recognizes the rights of territorial integrity, political independence, and non-intervention in the domestic affairs of all states. However, the ATT also highlights human rights and humanitarian concerns. In other words, for the sake of humanitarian concerns, the inherent rights of states can be limited. But this can also work in the opposite direction as humanitarian concerns may be suspended if they clash with those inherent rights. There is a mutual deadlock, and it is unclear which principle outweighs the other.

[760] "Arms Trade Treaty," the US Department of State, September 25, 2013, accessed April 9, 2018, https://2009-2017.state.gov/t/isn/armstradetreaty/index.htm.

[761] See Preamble, Arms Trade Treaty of April 2, 2013, adopted by resolution A/RES/67/234 B of 11 June 2013, annexed to UN Doc. A/CONF.217/2013/L.3 of March 27, 2013.

The ATT is aware of the dilemma this produces and tries to harmonize these two clashing principles. The Preamble attempts to formulate a stance by "acknowledging that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing".[762] Regrettably, it is impossible for concreteness and normativity to apply simultaneously. Coherent and determined solutions to normative problems are impossible due to the structure of legal discourse.

Another problematic area inherent to the ATT is whether the provisions observed by the treaty constitute international custom or not. the USA, the UK, the Russian Federation, Turkey, Austria, Belgium, Brazil, Canada, China, Germany, India, Italy, North Korea, Pakistan, and Switzerland[763] are key manufacturers and top exporters of conventional weapons, particularly SALWs. Investigation state by state reveals another part of the story. For instance, Syria, Iran, Yemen, Saudi Arabia, Iraq, and Afghanistan have not joined the treaty or even signed it while Libya and Israel have not ratified or approved it.[764] The common feature of the latter two countries is that they are major weapons importers, located at the heart of major conflict zones.

[762] Ibid.

[763] See, Biggs, "Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty Can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups," p.1320.

[764] As this part was being written, US President Trump declared that the US would withdraw from the ATT. See Roberta Rampton, "Trump pulling U.S. out of U.N. arms treaty, heeding NRA," REUTERS, April 26, 2019, accessed May 28, 2019, https://www.reuters.com/article/us-usa-guns-nra-trump/trump-heeds-nra-decides-to-pull-us-out-of-un-arms-treaty-idUSKCN1S21RD.

The arms trade, legal or not, is an important part of the daily life of these countries making restrictions hard to fulfil. There should be customary international law matured through norms implemented by the ATT to remedy these gaps.

CHAPTER 6

CONCLUSIONS

International law is mainly understood as a body of law governing relations among states. Being the main actors and subjects of international law, states occupy an important position at the very heart of the system. Given that states make war, sign treaties, create international customs, form international organizations, and establish peace, they warrant such attention in the international arena. Without states, the international legal structure and politics as we know it would collapse. However, all these regulations and mutual affairs in which states engage in, are ultimately *for humanity*, for human beings living separately within different states. Thus, the issue applies to all of us.

This is also relevant regarding warfare. Traditionally, war, deemed as a legitimate extension of diplomacy, was an event occurring among states through their national armies. Therefore, logically, military affairs and civilian daily life were two different divisions of labor. In other words, war was the customary business of armies; there was no room for civilian concerns. This does not mean that civilians did not get harmed by the brutal and savage nature of warfare; rather, civilians were not deemed participants in professionally-executed warfare. Contemporary warfare, however, which is now experiencing its fourth generation, does include civilians in its sphere as they have become both practitioners of war and those most affected by it.

One reason civilians have become so much more involved in warfare is the rapid and uncontrolled proliferation of NSAGs. These entities have a distinctive autonomy from the state apparatus and follow their own agenda.

Although their motivations vary, political agendas predominate. Given the difficulty of classifying NSAGs precisely into categories, this thesis adopts the following list: i. insurgent groups, separation movements ii. militant groups, iii. warlords, urban gangs, and criminal networks, iv. private militias, police forces, and security companies; v. transnational groups.

As clearly seen here, NSAGs have different dimensions while the networks in which they operate form complex webs. In this thesis I have tried to illuminate the dark side of these networks by asking whether states arming NSGs in other states is behavior in agreement with international law. This question involves several further interrelated questions. To answer the primary question, I adopted a theoretical approach that avoided considering one specific NSAG or geographical location as a case study. Instead, answers to the problematique were taken *in abstracto*, with multiple concrete sample cases.

I asserted that a tendency marks the era we are living in as the era of chaos, with the collapse of the modern state in terms of its monopoly on the legitimate use of physical violence. Many factors can result in the collapse of state authority and the emergence of various groups demanding power, most notably military or non-military foreign intervention. One way of intervening into the affairs of another state is by arming NSAGs for the sake of the sponsor state. This is the starting point of the present inquiry. One may claim that there is a prejudice embedded in this thesis: that its author believes that arming NSAGs without the consent of the home state violates international law. However, the problem is that the structure of international legal doctrine is incoherent and indeterminate, thereby allowing contradictory outcomes. Accordingly, I built the theoretical arguments of the thesis by calling attention to the contradictory nature of international legal doctrine.

This thesis is divided into six chapters, including introduction and conclusions. Chapter Two present the theoretical framework for the thesis, which adopts a critical legal understanding. Chapter Three presents the principles of the non-intervention and non-use of force while considering whether states arming NSAGs in other states has any place under international law in the context of self-determination and humanitarian intervention discourses. Chapter Four present the analysis of the evolving nature of warfare, which has enabled NSAGs to proliferate. Chapter Five presents the exploration of another critical question, namely whether states arming NSGs in other states trigger the sponsor state's international responsibility, with some emphasis on arms transfer mechanisms and global attempts to regulate them.

Basically, the overall answer in the thesis to the question of arming NSGs in other states is that various grey areas effectively prevent international law from providing one simple solution applicable to all cases. This is because international law lacks a hierarchy of norms and a central enforcement mechanism to dictate to every single state what is lawful or not. In hard cases, i.e. in the event of an unequal power struggle, the instruments of law cannot be applied to figure out the relevant normative solutions to normative problems. Instead, the law is so flexible that it ultimately serves the more powerful side in each conflict.

Most notably, beginning from the mid-19th century, one of the basic principles on which the international state system was constructed, namely international justice, was re-conceptualized. Sovereignty and international justice had been two inseparable and equally emphasized principles constituting state systems. International justice was considered to be a transcendent principle playing a mediating role between sovereign will and the system. From the mid-19th century, however, justice became an epiphenomenon of state sovereignty in a consent-based legal order. In other

words, legal positivism has dominated legal thought since the 19th century. Omitting one of the primary constitutive principles, namely justice, from the system and degrading its importance, the state system might have been expected to collapse. Yet, paradoxically, it survives, albeit with inherent contradictions. Since the rise of legal positivism, however, there has not been a mediatory principle between sovereign states and the states system.

In such a system, legal discourse relies on two camps, one of which traces its argument from a transcendent ideal through *descending justification*, whereas the other takes its source from state sovereignty through *ascending justification*. Because 'justice' lost its currency and equal treatment with sovereignty, both ascending and descending justifications cannot survive simultaneously. This creates inherent deadlock in the structure of the system, such that international legal doctrine cannot produce determinate and consistent normative solutions to normative problems. This argument is the base of the theoretical foundation of this thesis.

In addition to this problem, proponents of the modern legal doctrine claim that is free from speculative notions that jeopardize the objectivity of the law. Here, Koskenniemi's argument is taken as a starting point to evaluate the issue. He argued that law should possess both concreteness and normativity to be objective. It should be concrete because it is created by states, while must also be normative to constrain its creators. According to Koskenniemi, the two elements, concreteness and normativity, cannot survive together since they cancel each other out. The more normative the law becomes, the more utopian it becomes; conversely, the more law bases its arguments on actual state behavior, will, or interest, the more it becomes a subjective apology for state interests.

Another criticism of the claim of the objectivity of law is that interpretation is omitted in describing modern legal doctrine. Norms are created in abstract forms to be implemented generally. But, at the same time, norms should be

specific to find normative solutions to each case separately. Here, creation *in abstracto* precludes authenticity since a subjective element, namely interpretation, should be injected into the decision-making process. This prevents coherent and determinate normative outcomes. Therefore, approaches to any normative problem can vary in outcomes, meaning that the question of whether states arming NSAGs in other states violates international law has no single, universal answer due to the inherent paradoxes of modern legal doctrine.

The thesis also included an examination of states, international organizations, and individuals as subjects of international law. Central question was whether NSAGs can possess rights and responsibilities under international law. This is essential because the September 11 terrorist attacks disclosed the inadequacy of international law regarding NSAGs. I questioned this lacuna while also providing a definition of NSAG for the sake of inquiry, although there is no universally agreed definition. My definition noted NSAGs as having considerable freedom from state apparatus and using weapons to achieve political purposes.

I then provided an overview of the principles of non-intervention and the non-use of force under international law, which constitute the basic pillars of modern international doctrine. As seen in the UN Charter, the sovereign equality of states is very much emphasized and appreciated, which signifies that violations of this principle definitely constitute a breach of international law. Therefore, I analyzed in depth the sovereign equality of states, noting that political independence and territorial integrity are two factors that constitute sovereignty, among others. Any harmful activity towards the political independence and territorial integrity of a state entail a direct aggression towards the underlying philosophy of the state system, thereby constituting both a violation of international law and a threat to international peace and security. The importance given to not jeopardizing international

peace and security are echoed in the prohibition of the use of force and intervention in another state's domestic affairs.

To give a clear account of how international law approaches the question of whether states arming NSGs in other states have a place under international law, I considered many documents that have been accepted internationally, both politically and legally. For instance, as previously mentioned, the UN Charter is the primary source setting up a clear understanding of the issue. Article 2/4 was a benchmark development that prohibited not only the use of force but also the threat to use force against 'territorial integrity', 'political independence', and in 'any other manner inconsistent with the UN Charter.' Many subsequent UNGA resolutions elaborate how and to what extent non-intervention and the non-use of force may be implemented. Key among these is the Friendly Relations Declaration. It includes seven principles that explicitly set up the modern international doctrine, obligating every state to "conduct their international relations … in accordance with the principles of sovereign equality and non-intervention".

The use of force against the territorial integrity and/or the political independence of a state are categorized under "intervention" as described in various judgments of the ICJ. There are four levels of intervention, armed attack and use of force being the most relevant here. "Sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries" are considered armed attack while arming', 'organizing', or 'assisting' opposition groups constitute use of force. In short, except for humanitarian aid, any kind of intervention, whether armed or not, is considered to violate the principles of the non-intervention and non-use of force.

Despite this apparent clarity, international law has inherent paradoxes in various subject areas, including the principles of the non-intervention and non-use of force. Reconceptualising natural justice in terms of state sovereignty has eliminated the hierarchy of norms along with the absent of a

centralized mechanism controlling the use of force internationally. Violence is now deemed a legitimate extension of consent, which is the logical outcome of a state-centered system. Thanks to the absence of a centralized coercive mechanism, violence and other interventions have become one of the constitutive elements of the system rather than a supplementary apparatus.

Additionally, the use of force by a state against minorities or others within its territory enables different kinds of violence imposed via NSGs. Sometimes it shows itself in self-determination movements, sometimes in terrorism. International law, through various court decisions and resolutions, is assumed to preserve the system by marginalizing violence and other interventions as a dangerous supplementary element. However, the system has inevitably incorporated violence and other interventions into itself as a constitutive element. In reality, although it is known to be prohibited, international violence as use of force and intervention, will retain their utility unless a new world order is constructed.

In this thesis I also tried to decide whether states arming NSGs in other states in the name of self-determination and humanitarian purposes is legitimate under international law or not. To explore this question, the thesis first examined whether the right of people to self-determination allows foreign assistance. It then examined whether or not states can arm NSAGs in other states under the principle of humanitarian intervention.

Traditionally, the right to self-determination of people is welcomed by international law. The first universal document that mentions this right is the UN Charter itself. Yet while it, albeit ambiguously, affirms the right to self-determination, it does not evaluate or elaborate it. The decolonization period meant that the right to self-determination of people gained a central place in the diplomatic arena. Notably, whereas there were only 60 UN member states in 1950, there were 99 by 1970. The rapid proliferation of members

was mostly due to new states gaining their independence from colonial powers, a process fostered by the international legal doctrine.

Many legally and politically binding documents have been adopted by the various organs of the UN. For instance, the Friendly Relations Declaration recognizes peoples' right to self-determination while UNGA Resolution 2160 (XXI) provides legal grounds for any kind of support to people pursuing self-determination. In short, self-determination movements are welcomed by international law and any kind of support for them is both legal and legitimate under its auspices.

However, this clarity becomes muddled when the question of self-determination becomes connected with secession demands relying on minority, ethnic, and human rights discourses. One crucial point here is that, once a movement gains the status of a self-determination movement, it achieves legal personality with rights and responsibilities under international law. Such an extension may have a domino effect in that states may begin to disintegrate. Therefore, international law currently sides with the more powerful when states are unequal. To show that that international law cannot produce effective normative solutions when there is a risk of alienating powerful states, I presented the cases of Kosovo, South Ossetia, and Abkhazia as examples.

Regarding Kosovo, many states, such as Serbia, Russia, and China, strongly opposed its independence declaration whereas others, including the United States, Turkey, and Belgium, recognized it. The opposing states claimed that this act clearly violated the territorial integrity of states and could lead to a domino effect. However, John Sawer for the UK concluded that the violent break-up of Yugoslavia had created a *sui generis* context.

Therefore, the independence of Kosovo could be accepted without a peaceful negotiated process of secession .[765]

In contrast, Serbia and its supporters claimed that the principle of territorial integrity applies to non-state entities as well as states. Therefore, the lack of a negotiated secession clearly violated its territorial integrity. However, in its advisory opinion, the ICJ determined that "the scope of the territorial integrity is confined to the sphere of relations between States".[766]

In the South Ossetia case, Western powers, having alone defended Kosovo's secession, strongly condemned the Ossetian secession as a violation of territorial integrity. This shows that the discourse of the law is so flexible that similar circumstances may produce different legal justifications.

As for the outcome, arming or otherwise supporting NSGs who are trying to gain their right to self-determination is controversial. Law cannot provide adequate and determined legal solutions to this question because clashing national interests make the problem unsolvable. Kosovo garnered considerable international support to be recognized as a new state whereas South Ossetia's independence was outlawed by the same states. This demonstrates that law serves powerful actors if there is inequality between actors.

Having determined how contemporary international law approaches self-determination movements, I then dealt with the principle of humanitarian intervention. Although its roots date back to the era of de Vitoria, humanitarian intervention has gained prominence recently. Many armed

[765] *Supra* text accompanying note 340.

[766] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* text accompanying note 311, ¶80.

interventions attempt to justify themselves by applying the concept of humanitarian intervention, such as the bombardment of Serbia by NATO forces. However, are violations of the basic building blocks of international law, namely sovereignty, territorial integrity, and political independence, indeed permissible in these circumstances? Does the discourse of humanitarian intervention enable foreign states to arm or otherwise assist insurgent groups operating in another country?

In its various judgments, for instance the Legality of Use of Force Case and the Nicaragua Case, the ICJ appears to reject such a right without a Chapter VII UNSC resolution. Nevertheless, there is not much state support for humanitarian intervention as a legitimate way to intervene in the domestic affairs of another state by arming or otherwise assisting NSAGs. Only the UK and Belgium have straightforwardly built their arguments on the right to humanitarian intervention. It is therefore no exaggeration to say that the discourse of humanitarian intervention is a highly subjective formulation of the foreign policy decision-making process. The international community may distinguish between humanitarian catastrophes, picking and choosing which it is willing to address under the umbrella of humanitarian intervention.

Although states and most of the international community of states base their actions on UNSC resolutions to avoid liability for violating the principle of non-use of force, their practices may sometimes show the opposite. The moral and legal discourses used to justify military intervention without UNSC authorization, namely humanitarian intervention, have been gradually constructed, with an equal emphasis on positive law as humanitarian intervention discourse matures. However, humanitarian intervention is ultimately only welcomed as long as it complies with the national interests of powerful states.

In Chapter Four, I explored the arguments about the changing nature of warfare and evaluated how and to what extent it affects world politics,

specifically in terms of arms transfers. It argued that warfare has evolved into conflicts involving both states and NSAs. First, war has entered its fourth generation, marked by the emergence of new actors and methods. The sources of threat in international politics have also changed dramatically. Previously, threats came from states whereas NSAs are now the primary source of threat in world politics, introducing a period of uncertainty.

In the chapter I listed the reasons why NSAs have gained an essential and critical place in world politics, primarily because the protagonists of warfare have changed. The proliferation of protagonists has opened a new debate regarding the motivations behind their actions. Additionally, warfighting technology has developed significantly while human participation has also affected this metamorphosis.

For these reasons, particularly after the Cold War era, large armies began to reduce their manpower while increasing their technological capabilities. The gap created due to the disbanding of soldiers was filled by NSAs that received considerable support from various actors, especially states. These developments unsurprisingly also stimulated a substantial increase in arms trading. Various reports have shown how arms transfers and trading are inseparable aspects of the facilities of NSAGs. There is thus a strong correlation between the proliferation of armed actors and the increase in arms transfers.

As outlined above, many reasons underlie the proliferation of NSAGs. One fundamental factor is state collapse due to foreign intervention. Accordingly, I discussed Iraq, Syria, and Libya as examples showing how state collapse enables the proliferation of NSAGs. I also examined the newly adopted concept of the War on Terror.

The War on Terror created its own enemies and alliances. For instance, the United States government has backed Kurdish groups in both Syria and Iraq to fight against another armed group, ISIL. I therefore argued that NSAGs can be both enemies and friends of the international system. They are enemies in the sense of being “others”, via whose actions the system can restore and reproduce itself. Yet they are somehow also friends that provide the international system with international legitimacy by fighting against them.

I then dealt with the global arms trade, particularly the widespread use of SALWs. I considered the brutal effects of these weapons, of which 850 million currently circulate worldwide, with multiple ways for them to be transferred. I also highlighted the mechanisms of arms transfers, namely the white, grey, and black markets.

White-market transfers involve states, or their agents who are authorized to act for them. This kind of transfer is bound by national and international legal standards, making them legal and in conformity with regulative standards. Grey-market transfers take place in the loopholes of the law that benefit states. They are not fully illegal, yet there are considerable doubts over their legality. Black-market transfers are the illegal dark side of the arms trade. Most legal violations are perpetrated with weapons traded on the black market.

Given such a complex network of legal, political, and commercial aspects, I then used the thesis to discuss whether states could be held responsible for the misconduct of NSAGs that violates international human rights law and humanitarian law, if they supported such groups. It tried to establish the donor international responsibility of the donor state for the misconduct of NSAGs which they support. Here ‘supporting’ means arming and otherwise assisting NSAGs. I considered this concept in terms of the general provision on the responsibilities of states under international law. Every right under

international law entails responsibility as well. Thus, states, having rights and responsibilities, may be held responsible for the misconduct of their organs.

To determine such responsibility, the NSG is generally investigated to determine whether it constitutes a *de jure* organ of the state or not. As we have seen before, states are responsible for the acts of their organs, as codified in Article 4 of the Draft Articles on State Responsibility. I therefore examined whether a state should be held responsible for violations of humanitarian law and human rights by a NSAG it has supported by arming it, or assisting it in any other way. If that NSAG is, somehow, a *de jure* organ of the state, it is possible to assert state responsibility. If not, however, is it still possible to establish a link between a state and a NSA that creates international liability?

The ICJ, in its various judgments, adopted the “complete dependence” test to determine whether the NSAG should be deemed a *de facto* organ of the donor state. The perpetrators should act under the “complete dependence” of the supporting state, indicating no possible way to think of the perpetrators other than as a *de facto* organ of the supporting state. If such a link cannot be established, Article 8 of the Draft Articles on State Responsibility may provide an alternative way to attribute responsibility.

According to Article 8, a state may be liable for the misconduct of NSAs if that actor a*cts on the instruction or under the control and direction of* the state. That is, a state may be responsible for the misconduct of humanitarian law and human rights violators if that state has *effective control* over the actor. According to the ICJ, it is difficult to determine whether a state has effective control over perpetrators, which makes establishing state responsibility for NSA behavior a challenge.

A state can also be liable for the misconduct of the perpetrators if it fails to act diligently. In other words, if a state is aware that crime may occur, it must take all necessary measures to prevent or halt it. Failing to take all necessary measures may trigger the *obligation of diligent conduct* by a state. To stop arming or otherwise assisting a NSAG is a one way of preventing or halting violations. Secondly, a state also has an *obligation of result*, which focuses on the result rather than the process. In both situations, an evaluation by official organs may establish the international responsibility of a state for arming or otherwise assisting non-state perpetrators of human rights abuses.

Additionally, various international documents have been created to regulate the area in question, and specifically to standardize the export, import, prohibition, and licensing processes of arms transfers. Specific international conventions have been adopted to tackle the issue, and many meetings have discussed the unregulated nature of arms transfers. These documents and meetings eventually resulted in a globally agreed convention regulating the arms trade.

The Arms Trade Treaty (ATT) was signed in 2013 and came into force in 2014 under Article 22, which envisions “the fiftieth instrument of ratification, acceptance or approval with the Depositary” for entry into force. The ATT, with its Preamble, consists of 28 articles to regulate the conventional global arms trade. It was formulated to achieve globally-accepted arms transfers standards and reduce the human suffering caused by these weapons. Signatory states are encouraged to show respect for international humanitarian law and human rights law. Nevertheless, in the preamble, the sovereign rights, territorial integrity, and political independence of states enjoy equal emphasis alongside humanitarian issues. These two opposing justifications cancel each other out.

The ATT introduces a new, legitimate way of war making and arms trade. As long as states comply with the treaty provisions, they are free to buy and sell arms. This standardization indeed introduces a power relation that outlaws and delegitimizes any other forms of transfers. Therefore, it will not be easy to adopt the rules of the ATT in the near future.

To sum up, one of my basic aims in this thesis was to discover whether states are permitted under international law to arm NSAGs in other states. The conclusion is that this is a matter of interpretation because of the indeterminate and incoherent structure of current legal doctrine. This prevents there being any one universally accepted answer to the problem. Throughout the thesis, the inherent paradoxes of international law have been highlighted. For instance, violence is marginalized under international law by prohibiting the use of force and intervention in another states' domestic affairs. However, the UN Charter designates that the UNSC has a privileged role to use or authorize states to use force legitimately. To do so, the UNSC should operate under Chapter VII and identify threats to international peace and security under Article 39. Nonetheless, a crucial and problematic question is whether objective criteria exist to define a threat to peace and security. The exploration I conducted in this thesis provides indicators that they do not exist; indeed, UNSC decisions are completely subjective. Therefore, international legal doctrine in general and in terms of the use of force in particular is constructed upon a very subjective structure – which nevertheless denies that subjectivity.

Second, Article 51 regulates the "inherent right of self-defense" of states. Yet, if something is inherent, there is no need to rewrite it as 'inherent'. Here, by writing "inherent", the drafters shaped the contents of the right. Additionally, if self-defense is an inherent right, logically, violence/use of force is also inherent to the system itself. Thus, marginalizing

violence/intervention in international law is somehow contradictory. This is also apparent in international conventions that try to regulate arms transfers.

The above-mentioned subjectivity and paradoxical structure is evident in the issue of self-determination and humanitarian intervention. The thesis outlined why these two concepts cannot gain value under international law without UNSC determination. That is, if there is a UNSC resolution permitting an international intervention and basing its legitimacy on humanitarian considerations, the armed intervention becomes a legitimate use of force. However, there are no universally-accepted criteria to determine which intervention may be legitimate because of humanitarian necessities. International law consequently stays silent regarding politically hard cases.

The ATT cannot be effective unless the major arms manufacturers become party to it. Ultimately, subjectivity enters every aspect of the modern legal doctrine despite the assumption that it is objective. Of course, this does not mean that progressive developments in international law are meaningless. The argument in this thesis fully supported progressive developments emerging on the international stage. Yet, it also disclosed the paradoxes inherent to international law, specifically regarding states arming NSAGs in other states. In sum, the legality of arming NSAGs remains an undecided area of law although the ATT is already in force.

The major limitation of this study is the impossibility of considering all branches of international law while dealing with the issue of states arming NSGs in other states. Further studies should therefore focus on determining whether the issue can be approached from different theoretical perspectives and for different branches of international law.

BIBLIOGRAPHY

Abushov, Christian Walter, Antje Von Ungern-Sternberg and Kavus. *Self-Determination and Secession in International Law*. New York: Oxford University Press, 2014.

Ago, Roberto. "Fourth Report on State Responsibility." *Yearbook of the International Law Commission* II (1974): 71-160.

Akande, Dapo. "International Organizations." In *International Law*, edited by Malcolm Evans. New York: Oxford University Press, 2003.

Akca, Belgin San. States in Disguise: Causes of State Support for Rebel Groups. Oxford University Press: New York, 2016.

Anghie, A. *Imperialism, Sovereignty and the Making of International Law.* New York: Cambridge University Press, 2004.

Anleu, S.L.R. *Law and Social Change.* London: SAGE Publications, 2009.

Armaoğlu, Fahir. "Bolşevik İhtilali ve 'self Determination' Prensibi." *Ankara Üniversitesi SBF Dergisi* 17, no.2 (1962): 211-250.

Aust, Anthony. *Handbook of International Law.* New York: Cambridge University Press, 2010.

Austin, John. *The Province of Jurisprudence Determined.* Edited by Wilfrid E. Rumble. New York: Cambridge University Press, 1995.

Ayata, Bilgin. "Turkish Foreign Policy in a Changing Arab World: Rise and Fall of a Regional Actor?" *Journal of European Integration* 37, no.1 (2015): 95-112.

Bağbaşlıoğlu, Arif. *NATO'nun Dönüşümü'nün Balkanlar'a Yansımaları: Müdahale, Genişleme, Ortaklıklar*. Ankara: Nobel Yayınevi, 2018.

Barker, J. Craig. *International Law and International Relations: International Relations for the 21st Century*. London: Continuum, 2004.

Barker, J.P. Grant and J.C. *Parry and Grant Encyclopaedic Dictionary of International Law.* New York: Oxford University Press, 2009.

Barker, Sandesh Sivakumaran, J. Craig. "I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina V Serbia and Montenegro)," *International & Comparative Law Quarterly* 56, no. 3 (2007): 695-708.

Bassiouni, M. Cherif. "Legal Control of International Terrorism: A Policy-Oriented Assessment." *Harvard International Law Journal* 43, no. 1 (2002): 83-103.

Baykal, Berkan Öğür and Zana. "Understanding "Foreign Policy" of the Pyd/Ypg as a Non-State Actor in Syria and Beyond." In *Non-State Armed Actors in the Middle East: Geopolitics, Ideology, and Strategy*, edited by Murat Yeşiltaş and Tuncay Kardaş, 43-76: Palgrave Macmillan, 2018.

Bedi, Shruti. "International Human Rights Law: Responsibility of Non-State Actors for Acts of Terrorism." *Journal of the Indian Law Institute* 56, no. 3 (2014): 386-97.

Bellal, Annyssa. "Arms Transfers and International Human Rights Law." In *Weapons under International Human Rights Law*, edited by Stuart Casey-Maslen, 448-71. New York: Cambridge University Press, 2004.

Benjamin, Amy Barker. "Syria: The Unbearable Lightness of Intervention," *Wisconsin International Law Journal* 35, no.3, (2017): 515-548.

Berti, Benedetta. "What's in a Name? Re-Conceptualizing Non-State Armed Groups in the Middle East." *Palgrave Communications* 2 (2016): 1-8.

Biersteker, Thomas J. "State, Sovereignty and Territory." In *Handbook of International Relations*, edited by Thomas Risse and Beth A. Simmons Walter Carlsnaes. London: Sage Publishing, 2013.

Biggs, A. A. “Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty Can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups.” *Creighton Law Review* 44 (2010): 1311-56.

Board, *Humanitarian Intervention: Legal and Political Aspects*. Copenhagen: Danish Institute of International Affairs, 1999.

Boivin, Alexandra. “Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons.” *International Review of the Red Cross* 87, no. 859 (2005): 467-96.

Borgen, C.J. “The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of SelfDetermination in the Cases of Kosovo and South Ossetia.” *Chicago Journal of International Law* 10, no.1 (2009): 1-33.

Bourne, Mike. *Arming Conflict: The Proliferation of Small Arms.* New York: Palgrave McMillan, 2007.

Braumoeller, Bear. *Only the Dead: The Persistence of War in the Modern Age*. New York: oxford University Press, 2019.

Brownlie, I. *International Law and the Use of Force by States*. Clarendon Press, 1981.

Buchanan, Allen. *Justice, Legitimacy, and Self-determination Moral Foundations for International Law*. New York: Oxford University Press, 2007.

----------. “Democracy and Secession.” in *National Self-Determination and Secession*, ed. Margaret Moore, 14-33. New York: Oxford University Press, 2003.

Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics.* Palgrave Macmillan, 2012.

Burgess, J. Peter. “Ethics of Humanitarian Intervention: The Circle Closes,” *Security Dialogue* 33, no. 3 (2002): 261-264.

Bush, George W. *National Security Strategy of the United States.* Washington DC: the White House, 2002.

Buzan, Barry. “The Changing Agenda of Military Security, Globalization and Environmental Challenges.” In *Globalization and Environmental Challenges Reconceptualizing Security in the 21st Century*. Hexagon Series on Human and Environmental Security and Peace, 553-60. New York: Springer, 2008.

Byers, M. *Custom, Power and the Power of Rules: International Relations and Customary International Law.* New York: Cambridge University Press, 1999.

Cameron, David R. and Orenstein, Mitchell A. “Post-Soviet Authoritarianism: The Influence of Russia in Its ‘Near Abroad’.” *Post-Soviet Affairs* 28, no.1 (2012). 1-44.

Caplan, Richard. “International diplomacy and the crisis in Kosovo.” *International Affairs* 74, no.4 (1998): 745-761.

Carty, Anthony. *Philosophy of International Law.* Edinburg: Edinburg University Press, 2007.

Cassese, Antonio. “Should Rebels Be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane.” In *Realizing Utopia the Future of International Law*, edited by Antonio Cassese, 519-24. New York: Oxford University Press, 2012.

----------. *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge: Cambridge University Press, 1996.

Chowdhuri, R. N. *International Mandates and Trusteeship Systems: A Comparative Study.* the Hague: Martinus Nijhoff, 1955.

Clapham, Andrew. "Weapons and Armed Non-State Actors." In *Weapons under International Human Rights Law*, edited by Stuart Casey-Maslen, 163-96. New York: Cambridge University Press, 2004.

Clapham, Andrew. "Human Rights Obligations of Non-State Actors in Conflict Situations." *International Review of the Red Cross* 88, no. 863 (2006): 491-523.

Corten, Olivier. "The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum and jus in bello," *Journal of Conflict and Security Law 18,* no.1, (2013): 59–93.

Crawford, James and Olleson, Simon. "The Nature and Forms of International Responsibility," in *International Law*, ed. Malcolm D. Evans 445-472. New York: Oxford University Press, 2003.

Crawford, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries.* Cambridge: Cambridge University Press, 2002.

Cronogue, Graham. "Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors," *Duke Journal of Comparative & International Law* 23, (2012): 365-388.

Cullen, Anthony. *The Concept of Non-International Armed Conflicts in International Humanitarian Law.* New York: Cambridge University Press, 2010.

D'Amato, Anthony. "The Invasion of Panama Was a Lawful Response to Tyranny." *The American Journal of International Law* 84, no.2 (1990): 516-524.

Davis, Diane E. "Non-State Armed Actors, New Imagined Communities, and Shifting Patterns of Sovereignty and Insecurity in the Modern World." *Contemporary Security Policy* 30, no. 2 (2009): 221-45.

De Vitoria, Francisco. *Dersler*, trans. Cansu Muratoğlu. Ankara: Dost Kitabevi, 2017.

Denk, Erdem. "Uluslararası İlişkilerin Hukuku: Vestfalyan Sistemden Küreselleşmeye." In *Küresel Siyasete Giriş: Uluslararası İlişkilerde Kavramlar, Teoriler, Süreçler*, edited by Evren Balta, 51-74. İstanbul: İletişim Yayınları, 2014.

----------. *Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi.* Ankara: Siyasal Kitabevi, 2015.

----------. "Önalıcı Savaş (Pre-Emptive War)-Önleyici Savaş (Preventive War)." In *Kavram Sözlüğü Ii*, edited by Fikret Başkaya, 449-57. Ankara: Özgür Üniversite, 2006.

Dockrill, Saki. *Eisenhower's New-Look National Security Policy: 1953-61.* New York: Palgrave Macmillan, 1996.

Dupuy, Pierre-Marie. "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility." *EJIL* 10, no. 2 (1999): 371-85.

Durac, Vincent. "The Role of Non-State Actors in Arab Countries after the Arab Uprisings." *IEMed Mediterranean Yearbook*, no. 2 (2015): 37-41.

Encyclopedia of African history and culture: Vol. 5 Independent Africa (1960 To present). ed. R. Hunt Davis, Jr. New York: Facts on File, 2005.

Espinosa, Juan Francisco Escudero. *Self-Determination and Humanitarian Secession in International Law of a Globalized World: Kosovo v. Crimea*. Springer, 2017.

Fallon Jr, Richard H. "" The Rule of Law" as a Concept in Constitutional Discourse." *Columbia Law Review* 97, no. 1 (1997): 1-56.

Ford, Christopher M. "Syria: A Case Study in International Law," *University of Cincinati Law Review* 85, no.185, (2017): 185-229.

Fraihat, Ibrahim. *Unfinished Revolutions Yemen, Libya, and Tunisia after the Arab Spring.* New Haven and London: Yale University Press, 2016.

Franck, Thomas M. *Recourse to Force: State Action against Threats and Armed Attacks.* New York: Cambridge University Press, 2002.

Gillis, Melissa. *Disarmament a Basic Guide.* New York: the UN, 2009.

Gray, Christine. "The International Court of Justice and the Use of Force." In *The Development of International Law by the International Court of Justice*, edited by Christian J Tams and James Sloan, 237-62. New York: Oxford University Press, 2013.

----------. "The Use of Force and International Legal Order," in *International Law*, ed. Malcolm D. Evans 589-620. New York: Oxford University Press, 2003.

----------. *International Law and the Use of Force.* New York: Oxford University Press, 2008.

Green, James A. The Persistent Objector Rule in International Law. New York: Oxford University Press, 2016.

Grillot, Rachel Stohl and Suzette. *The International Arms Trade.* Cambridge: Polity Press, 2009.

Hall, Margaret. "The Mozambican National Resistance Movement (Renamo): A Study in the Destruction of an African Country." *Journal of the International African Institute* 60, no. 1 (1990): 39-68.

Hammes, Thomas X. "War Evolves into the Fourth Generation." *Contemporary Security Policy* 26, no. 2 (2005): 189-221.

Hart, H.L.A. *The Concept of Law.* Edited by Penelope A. Bulloch and J oseph Raz. Oxford: Clarendon Press, 1994.

Harvey, David. *The New Imperialism.* New York: Oxford University Press, 2003.

Held, David. *Political Theory and the Modern State: Essays on State, Power, and Democracy.* Oxford: Polity Press, 2000.

Helmersen, Sondre Torp. “The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations.” *Netherlands International Law Review* 61, no. 2 (2014): 167-93.

Hendrix, Burke A. *Ownership, Authority, and Self-determination*. Pennsylvania: Pennsylvania University Press, 2008.

Hinnebusch, Raymond. “Back to enmity: Turkey-Syria relations since the Syrian Uprising.” *Journal of German Orient Institute* 56, no.1 (2015): 14-22.

Hobbes, T. *Leviathan.* Edited by J.C.A. Gaskin. New York: Oxford University Press, 1998.

Honwana, Alcinda. *Child Soldiers in Africa.* Philadelphia: University of Pennsylvania Press, 2006.

Hurd, Ian. “Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World.” *Ethics & International Affairs* 25, no.3 (2011): 293-313.

International Commission on Intervention and State Sovereignty. *The Responsibility to Protect*. Ottawa: the International Development Research Centre, 2001.

Jacop, Dov. “International Court of Justice, ‘Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo’, Advisory Opinion Of 22 July 2010.” *The International and Comparative Law Quarterly* 60, no.3 (2011): 799-810.

Jørgensen, Nina H. B. “State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty.” *The American Journal of International Law* 108, no. 4 (2014): 722-49.

Kaldor, Mary. *New and Old Wars*. Cambridge: Polity Press, 2012.

Kausch, Kristina. “State and Non-State Alliances in the Middle East.” *The International Spectator* 52, no. 3 (2017): 36-47.

Kellenberger, Jakob. “Foreword.” In *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Text with Amendments and Protocols Adopted through 28 November 2003)* Geneva: International Committee of the Red Cross, 2004.

Kelsen, Hans. *General Theory of Law and State, with a New Introduction by A. Javier Trevino.* New Brunswick: Transaction Publisher, 2006.

----------. *Pure Theory of Law.* Translated by Max Knight. New Jersey: The Lawbook Exchange, 2005.

Keskin, Funda. “ABD Başkanlarının Ünlü Doktrinleri Kutusu.” In *Türk Dış Politikası, Kurtuluş Savaşından Bugüne,Olgular, Belgeler, Yorumlar*, edited by Baskın Oran, 543. İstanbul: İletişim Yayınları, 2002.

----------. *Uluslararası Hukuk’ta Kuvvet Kullanma: Savaş, Karışma Ve Birleşmiş Milletler.* Ankara: Mülkiyeliler Birliği Yayınları, 1998.

King, Charles. “The Five-Day War: Managing Moscow After the Georgia Crisis.” *Foreign Affairs* 87, no.6 (November/December 2008): 2-11.

Kiras, James D. “Irregular Warfae: Terrorism and Insurgency.” In *Strategy in the Contemporary World: An Introduction to Strategic Studies* edited by James J. Wirtz John Baylis, and Colin S. Gray, 183-202. New York: Oxford University Press, 2018.

Klabbers, Jan. “(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors.” In *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, edited by Jarna Petman and Jan Klabbers. Leiden/Boston: Martinus Nijhoff, 2003.

Knop, Karen. *Diversity and Self-Determination in International Law*. Cambridge: Cambridge University Press, 2004.

Köchler, Hans. “Normative Contradictions in International Law: Implications for Legal Philosophy,” *Wisdom* 2, no.7 (2016): 78-94.

Kohen, Marcelo G. “ABD’nin Soğuk Savaşın bitişinden sonar kuvvet kullanması ve bunun uluslararası hukuka etkisi,” in *ABD Hegemonyası ve Uluslararası Hukukun Temelleri*, ed.Michael Byers and Georg Nolte, 221-258. Ankara: Phonex, 2007.

Koskenniemi, Martti. “National Self-Determination Today: Problems of Legal Theory and Practice.” *The International and Comparative Law Quarterly* 43, no. 2 (1994): 241-69.

----------. *From Apology to Utopia: The Structure of International Legal Argument.* New York: Cambridge University Press, 2005.

----------. *The Politics of International Law.* Portland: Hart Publishing, 2011.

Ku, Paul F. Diehl and Charlotte. *The Dynamics of International Law.* New York: Cambridge University Press, 2010.

Lustgarten, Laurence. “The Arms Trade Treaty: Achievements, Failings, Future.” *International & Comparative Law Quarterly* 64, no. 3 (2015): 569-600.

Malanczuk, P. *Akehurst's Modern Introduction to International Law.* London: Routledge, 1997.

Mansour, Faleh A Jabar and Renad. *The Popular Mobilization Forces and Iraq's Future.* Washington DC: The Carnegie Foundation, 2017.

Marsh, Nicholas. “Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms.” *The Brown Journal of World Affairs* 9, no. 1 (2002): 217-28.

Marston, Geoffrey. “United Kingdom Materials on International Law 1992.” *British Yearbook of International Law* 63, no.1 (1993): 615–841.

Martin Griffiths, Terry O'Callaghan and Steven C. Roach. *International Relations the Key Concepts.* London & New York: Routledge, 2008.

Martin, Elizabeth A. (Ed.) *A Dictionary of Law*. New York: Oxford University Press, 2003.

Martin, Ian. *Self- Determination in East Timor: The United Nations, The Ballot, and International Intervention*. Boulder: Lynne Rienner Publishers, 2001.

Milliken, Keith Krause and Jennifer. “Introduction: The Challenge of Non-State Armed Groups.” *Contemporary Security Policy* 30, no. 2 (2009): 202-20.

Mirzayev, Farhad. “Abkhazia.” in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov, 191-213. New York: Oxford University Press, 2014.

Moore, Margaret (Ed.) *National Self-Determination and Secession*. New York: Oxford University, 2003.

Mumford, Andrew. “Proxy Warfare and the Future of Conflict.” *The RUSI Journal* 158, no. 2 (2013): 40-46.

Neff, Stephen C. “A Short History of International Law.” In *International Law*, edited by Malcolm D. Evans. New York: Oxford University Press, 2003.

Newman, Edward. “The ‘New Wars’ Debate: A Historical Perspective Is Needed.’” *Security Dialogue* 35, no. 2 (2004): 173-89.

O'Brien, John. *International Law.* London: Cavendish Publishing Limited, 2001.

Olleson, James Crawford and Simon. "The Nature and Forms of International Responsibility." In *International Law*, edited by Malcolm D. Evans, 445-72. New York: Oxford University Press, 2003.

Oran, Baskın. "Dönemin Bilançosu." In *Türk Dış Politikası, Kurtuluş Savaşından Bugüne, Olgular, Belgeler, Yorumlar*, edited by Baskın Oran, 97-110. İstanbul: İletişim Yayınları, 2002.

Orford, Anne. *Reading Humanitarian Intervention Human Rights and the Use of Force in International Law.* New York: Cambridge University Press, 2003.

Özmelek, Özden Selcan. "Internationalization of Civil Wars: Inward and Outward Orientations of a Complex Conflict Type through Case Studies." Unpublished Ph.D. Thesis, İstanbul, Galatasaray University-Graduate School of Social Sciences, 2017.

Palan, Ronen P, and Brook M Blair. "On the Idealist Origins of the Realist Theory of International Relations." *Review of international studies* 19, no. 4 (1993): 385-99.

Parker, Sarah, "Breaking New Ground? The Arms Trade Treaty." In *Small Arms Survey 2014: Women and Gun*, edited by Glenn McDonald et.al., 77-108. New York: Cambridge University Press, 2014.

---------- (Ed.) *The Arms Trade Treaty a Practical Guide to National Implementation*. Geneva: Small Arms Survey, 2016.

Pavesi, Paul Holtom and Irene. *Trade Update 2017: Out of the Shadows.* Geneva: the Small Arms Survey, 2017.

Pazarcı, Hüseyin. *Uluslararası Hukuk*. Ankara: Turhan Kitabevi, 2010.

Pellet, Alain. “The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples.” *EJIL* 3, no.1 (1992): 178-185.

Petresak, David. *Ends & Means: Human Rights Approaches to Armed Groups.* Versoix: International Council on Human Rights Policy, 2000.

Pevehouse, Joshua Goldstein and Jon. *International Relations.* 10th ed. New York: Pearson, 2014.

Poggi, Giofranco. *The Development of the Modern State: A Sociological Introduction.* Stanford: Stanford University Press, 1978.

Polat, Necati. *International Relations Meaning and Mimesis.* London: Routledge, 2012.

----------. “International Law, the Inherent Instability of the International System, and International Violence.” *Oxford Journal of Legal Studies* 19, no. 1 (1999): 51-70.

----------. *Ahlak,Siyaset, Şiddet: Bir Kuram Olarak Uluslararası Hukuk.* İstanbul: Kızıl Elma Yayıncılık, 1999.

Polese, Abel. “Russia, the US, “the Others” and the “101 Things to Do to Win a (Colour) Revolution”: Reflections on Georgia and Ukraine.” *Debatte: Journal of Contemporary Central and Eastern Europe* 19, no.1-2 (2011): 421-451.

Purvis, Nigel. “Critical Legal Studies in Public International Law.” *Harvard International Law Journal* 32, no. 1 (1991): 81-127.

Rachel Stohl, Matt Schroeder, and Col. Dan Smith. *The Small Arms Trade a Beginner’s Guide.* Oxford: One World Publications, 2007.

Randelzhofer, Albrecht. “Use of Force,” in *Encyclopaedia of Public International Law: Use of Force, War and Neutrality, Peace Treaties*, ed. Rudolf Bernhar 265-276. Amsterdam: North-Holland Publishing Company, 1982.

Repertoire of the Practice of the Security Council Supplement 2008-2009 Volume I. New York: United Nations Publications, 2014.

Robert J Beck, Anthony Clark Arend, Robert Vander Lugt, ed. *International Rules: Approaches from International Law and International Relations*. New York: Oxford University Press, 1996.

Roberts, Adam. "The So-Called 'Right' of Humanitarian Intervention." *Yearbook of International Humanitarian Law* 3 (2000): 3–51.

Ronzitti, Natalino. "The Expanding Law of Self-Defence." *Journal of Conflict and Security Law* 11, no. 3 (2006): 343-59.

Rosenau, James. *The Study of World Politcs.* New York: Routledge, 2006.

----------. *Discourse on Political Economy and the Social Contract.* Translated by Christopher Betts. New York: Oxford University Press, 1994.

Sander, Oral. *Siyasi Tarih: 1918-1994*. Ankara: İmge Kitabevi, 1994.

Scharf, Michael P. "Earned Sovereignty: Juridical Underpinnings." *Denv. J. Int'l L. & Pol'y* 31, no.3 (2002): 373-387.

Schmitt, Michael N. "Legitimacy versus Legality Redux: Arming the Syrian Rebels," *Journal of National Security, Law and Politics*, no.7, (2014): 139-159.

Schneckener, Claudia Hofmann and Ulrich. "Engaging Non-State Armed Actors in State and Peace Building Options and Strategies." *International Review of the Red Cross* 93, no. 883 (2011): 1-19.

Schneckener, Klaus Schlichte & Ulrich. "Armed Groups and the Politics of Legitimacy." *Civil Wars* 17, no. 4 (2015): 409-24.

Shaw, M.N. *International Law.* New York: Cambridge University Press, 2008.

Skocpol, Theda. *States and Social Revolutions: A Comparative Analysis of France, Russia and China.* New York: Cambridge University 2008.

Smith, Hugh. *On Clausewitz a Study of Military and Political Ideas.* New York: Palgrave Macmillan, 2004.

Sönmez, Bilgay Duman and Göktuğ. "An Infuential Non-State Armed Actor in the Iraqi Context: Al-Hashd Al-Shaabi and the Implications of Its Rising Infuence." In *Non-State Armed Actors in the Middle East: Geopolitics, Ideology, and Strategy*, edited by Murat Yeşiltaş and Tuncay Kardaş, 169-90: Palgrave Macmillan, 2018.

Sørensen, Robert Jackson and Georg. *Introduction to International Relations: Theories and Approaches.* Oxford University Press, 2013.

Souleimanov, Emil. *Understanding Ethnopolitical Conflict Karabakh, South Ossetia, and Abkhazia Wars Reconsidered*. New York: Palgrave MacMillan, 2013.

Sovereignty, International Commission on Intervention and State. *The Responsibility to Protect.* Ottawa: the International Development Research Centre, 2001.

Stavrianakis, Anna. "Legitimising Liberal Militarism: Politics, Law and War in the Arms Trade Treaty." *Third World Quarterly* 37, no. 5 (2016): 840-865.

Sterio, Milena. *The Right to Self- Determination under International Law "Selfistans," secession, and the rule of the great powers*. New York: Routledge, 2013.

Stohl, Rachel. "Reality Check: The Danger of Small Arms Proliferation." *Georgetown Journal of International Affairs* 6, no. 2 (2005): 71-77.

Summers, James (Ed.) *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self- Determination and Minority Rights*. Leiden: Martinus Nijhoff Publishers, 2011.

----------. “Kosovo.” in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov, 235-254. New York: Oxford University Press, 2014.

Talmon, Stefan. “The Security Council as World Legislature.” *The American Journal of International Law* 99, no.1 (2005): 175-193.

Tamanaha, B.Z. *On the Rule of Law: History, Politics, Theory.* New York: Cambridge University Press, 2004.

Taşdemir, Fatma. “Kuvvet Kullanma Hukuku (Jus Ad Bellum) Açısından IŞİD Ile Mücadele.” In *Suriye: Çatışma Ve Uluslararası Hukuk*, edited by Fatma Taşdemir, 63-96. Ankara: Nobel Yayınevi, 2016.

The Independent International Commission On Kosovo. *The Kosovo Report: Conflict, International Response, Lessons Learned*. New York: Oxford University Press, 2000.

Tilly, Charles. “Western State-Making and Theories of Political Transformation.” In *The Formation of National States in Western Europe*, edited by Charles Tilly, 601-38. New Jersey: Princeton University Press, 1975.

Toman, D. Schindler and J. *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*. Leiden: Martinus Nijhoff Publishers, 2004.

Tonkin, Hannah. *State Control over Private Military and Security Companies in Armed Conflict.* New York: Cambridge University Press, 2011.

Trump, Donald. *National Security Strategy.* Washington DC: the White House, 2017.

Tuğal, Cihan. “Democratic Janisseris? Turkey’s Role in the Arab Spring.” *New Left Review* 76, (July-August 2012): 5-24.

Uzgel, İlhan. “Yugoslavya’nın Dağılması Kutusu.” in *Türk Dış Politikası, Kurtuluş Savaşından Bugüne, Olgular, Belgeler, Yorumlar (Volume: II·1980-2001)*, ed. Baskın Oran, 491. İstanbul: İletişim Yayınları, 2010.

----------. “Kosova Sorunu Kutusu.” in *Türk Dış Politikası, Kurtuluş Savaşından Bugüne, Olgular, Belgeler, Yorumlar (Volume: II·1980-2001)*, ed. Baskın Oran, 509. İstanbul: İletişim Yayınları, 2010.

Vasquez, John A. *The Power of Power Politics From Classical Realism to Neotraditionalism*. Cambridge: Cambridge University Press, 2004.

Vignard, Kerstin, ed. *The Complex Dynamics of Small Arms in West Africa*, Disarmament Forum. Geneva: the United Nations, 2008.

Vincent, R. J. *Nonintervention and International Order.* New Jersey: Princeton University Press, 1974.

Wacks, Raymond. *Philosophy of Law: Very Short Introduction.* New York: Oxford University Press, 2006.

----------. *Understanding Jurisprudence: An Introduction to Legal Theory.* New York: Oxford University Press, 2012.

Wallace, Daphne Josselin and William. “Non-State Actors in World Politics: A Framework.” In *Non-State Actors in World Politics*, edited by Daphne Josselin and William Wallace, 1-20. New York: Palgrave, 2001.

Wallace, Rebecca M.M. *International Law.* London: Sweet and Maxwell, 2002.

Waters, Christopher. “South Ossetia.” in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje Von Ungern-Sternberg, and Kavus Abushov, 175-190. New York: Oxford University Press, 2014.

Weber, C. *International Relations Theory: A Critical Introduction.* New York: Routledge, 2005.

Weber, Max. *The Theory of Social and Economic Organization.* New York: The Falcon's Wing Press, 1947.

Weitershausen, Inez von. “Contentious Politics: Europe and the 2011 Uprisings in Libya.” In *Contentious Politics in the Middle East Popular Resistance and Marginalized Activism Beyond the Arab Uprisings*, edited by Fawaz Gerges, 155-68. New York: Palgrave Macmillan, 2015.

Wilde, Ralph. “Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion.” *Leiden Journal of International Law* 24, no.1 (2011): 149-154.

Yalvaç, Faruk. “Devlet.” In *Devlet Ve Ötesi: Uluslararası İlişkilerde Temel Kavramlar*, edited by Atila Eralp. İstanbul: İletişim Yayınları, 2006.

----------. “A Historical Materialist Analysis of Turkish Foreign Policy: Class, State, and Hegemony.” *Uluslararası İlişkiler* 13, no.52 (2016): 3-22.

Yasuaki, Onuma. “International Law in and with International Politics: The Functions of International Law in International Society.” *European Journal of International Law* 14, no. 1 (2003): 105-39.

Yoo, John. “International Law and the War in Iraq.” *The American Journal of International Law* 97, no. 3 (2003): 563-76.

Young, Iris Marion. “Two Concepts of Self-Determination.” In *Ethnicity, Nationalism, and Minority Rights*, edited by Tariq Modood Stephen May, and Judith Squires 176-98. New York: Cambridge University Press, 2004.

Zabçı, Filiz. “Private Military Companies: ‘Shadow Soldiers’ of Neo-Colonialism.” *Capital & Class* 31, no. 2 (2007): 1-10.

Zegveld, Liesbeth. *Accountability of Armed Opposition Groups in International Law.* New York: Cambridge University Press, 2002.

Online Sources

"Addressing UN Assembly, Annan urges nations to restore respect for rule of law," *UN News*, September 21, 2004, accessed November 22, 2016, https://news.un.org/en/story/2004/09/115712-addressing-un-assembly-annan-urges-nations-restore-respect-rule-law.

"Article 27(3) and Parties to a Dispute: An Abridged History," *Security Council Report*, April, 2004, accessed 1 May, 2019 https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/article_27_3_and_parties_to_a_dispute.pdf.

"Conventional Weapons," *UN Regional Centre for Peace and Disarmament in Asia and Pacific*, accessed July 31, 2018, http://unrcpd.org/conventional-weapons/.

"Export military or dual use goods, services or technology: special rules," *UK Government*, May 29, 2018, accessed July 25, 2018, https://www.gov.uk/guidance/export-military-or-dual-use-goods-services-or-technology-special-rules#taking-military-or-dual-use-goods-out-of-the-uk-temporarily.

"First Conference of States Parties," *Events*, accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-1.html?templateId=139784.

"Fourteen Points: United States Declaration." *Encyclopedia Britannica,* accessed January 24, 2019, https://www.britannica.com/event/Fourteen-Points.

"Fourth Conference of States Parties," *Events,* accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-4.html?templateId=137319.

"Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict," *Human Rights Watch Report* 7, no.7 (March 1995), accessed April 25, 2019, https://www.hrw.org/reports/pdfs/g//georgia/georgia953.pdf.

"Guided light weapons reportedly held by non-state armed groups 1998-2013: Report current as of March 2013," *Small Arms Survey,* March 2013, accessed July 24, 2018, http://www.smallarmssurvey.org/fileadmin/docs/M-files/Armed%20groups'%20guided%20missiles%20-%20March%20update.pdf.

"Nobel Peace Laureates' International Code of Conduct on Arms Transfers," *International Human Rights Lexicon*, accessed August 28, 2018, http://www.internationalhumanrightslexicon.org/hrdoc/docs/armsnobel.htm.

"Open Individual Export Licences (OIELs)," *Invest Northern Ireland*, accessed July 25, 2018, https://www.nibusinessinfo.co.uk/content/what-open-individual-export-licence.

"The Organization for Security and Co-operation in Europe (OSCE)," accessed August 12, 2018, https://www.osce.org/whatistheosce.

"Weapons and Markets," *Small Arms Survey at the Graduate Institute of International and Development Studies*, accessed July 24, 2018, http://www.smallarmssurvey.org/index.php?id=122.

"Who are child soldiers?" *Child Soldiers International*, accessed July 27, 2018, https://www.child-soldiers.org/who-are-child-soldiers.

"The Arms Trade Treaty (ATT)," *Treaty Status*, accessed September 26, 2018, https://www.thearmstradetreaty.org/treaty-status.html?templateId=209883.

"Third Conference of States Parties," *Events,* accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-3.html?templateId=133166.

"Arms Trade Treaty," *US Department of State*, September 25, 2013, accessed September 4, 2018, https://2009-2017.state.gov/t/isn/armstradetreaty/index.htm.

"Iraq profile – timeline," *BBC News*, October 26, 2017, accessed April 18, 2018, https://www.bbc.com/news/world-middle-east-14546763.

"Child Soldiers," *Human Rights Watch,* accessed July 24, 2018, https://www.hrw.org/topic/childrens-rights/child-soldiers.

"The Wassenaar Arrangement," accessed August 12, 2018, https://www.wassenaar.org/about-us/.

"Second Conference of States Parties," *Events*, accessed September 4, 2018, https://www.thearmstradetreaty.org/csp-2.html?templateId=139059.

Akande, D. "Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?," *the EJIL Talks*, March 31, 2011, accessed March 16, 2019, https://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/.

Akande, D. "Would it be Lawful for European (or other) States to Provide Arms to the Syrian Opposition?" *EJIL: Talk,* January 17, 2013, accessed December 12, 2016, https://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/.

Banac, I. "Josip Broz Tito." *Encyclopaedia Britannica*, May 5, 2018, accessed May 31, 2018, https://www.britannica.com/biography/Josip-Broz-Tito.

Barnett, A. and Hughes, S. "British Firm Accused in UN 'Sex Scandal."" *The Guardian,* July 29, 2001, accessed July 29, 2018, https://www.theguardian.com/world/2001/jul/29/unitednations.

Bauer, S. and Bromley, M. "The European Union Code of Conduct on Arms Exports Improving the Annual Report." *Stockholm International Peace Research Institute* (*SIPRI) Policy Paper*, No. 8, November 2004, 1, accessed August 9, 2018, https://www.files.ethz.ch/isn/10471/doc_10501_290_en.pdf.

Berkol, I. “Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan.” *GRIP Note d’Analyse*, April 1, 2007, accessed August 12, 2018, http://archive.grip.org/en/siteweb/images/NOTES_ANALYSE/2007/NA_2007-04-01_EN_I-BERKOL.PDF.

Black, I. “Libyan Rebels Win International Recognition as Country’s Leaders.” *The Guardian*, July 15, 2011, accessed September 5, 2018, https://www.theguardian.com/world/2011/jul/15/libyan-rebels-international-recognition-leaders.

Blanchard, C. M. and Belasco, A. “Train and Equip Program for Syria: Authorities, Funding, and Issues for Congress.” *Congressional Research Service*, June 9, 2015, accessed April 26, 2018, https://fas.org/sgp/crs/natsec/R43727.pdf.

Bodette, M. “Commentary: American Arms to Syrian Kurds Protects US interests in the Region.” *Military Times*, December 3, 2017, accessed April 16, 2018, https://www.militarytimes.com/opinion/commentary/2017/12/03/commentary-american-arms-to-syrian-kurds-protects-us-interests-in-the-region/.

Carpenter, T. G. “Cato Institute Policy Analysis No. 74: U.S. Aid to Anti-Communist Rebels: The “Reagan Doctrine” and Its Pitfalls.” *Cato Institute*, June 24, 1986, accessed July 2, 2018, https://www.cato.org/sites/cato.org/files/pubs/pdf/pa074.pdf.

Casey-Maslen, S. “The Arms Trade Treaty: A Major Achievement.” *Oxford University Press Blog*, April 8, 2013, accessed September 5, 2018, https://blog.oup.com/2013/04/un-arms-trade-treaty-pil/.

Clegg E. and M. Crowley. “Biting the Bullet Briefing 8 - Controlling Arms Brokering and Transport Agents: Time for International Action,” *Basic - International Alert - Saferworld*, January 2001, accessed December 1, 2018, https://www.files.ethz.ch/isn/124852/btb_brf8.pdf.

Coulibaly, M. “From Moratorium to a Convention on Small Arms: A Change in Politics and Practices for the 15 Member Countries of the Economic Community of West African States (ECOWAS).” *Oxfam International*,

June 2008, accessed August 12, 2018, https://oxfamilibrary.openrepository.com/bitstream/handle/10546/112514/fp2p-cs-from-moratorium-convention-small-arms-ECOWAS-140608-en.pdf;jsessionid=7CAD371E47CBFCAFA7AFD3E72319A539?sequence=1.

Goldsmith, J. “The Remarkably Open Syrian Covert Action.” *Lawfare Blog*, July 23, 2013, accessed September 5, 2018, https://www.lawfareblog.com/remarkably-open-syrian-covert-action.

Gómez del Prado, J. L. “The Role of Private Military and Security Companies in Modern Warfare: Impacts on Human Rights.” *Global Research Centre for Research on Globalization*, August 11, 2012, accessed December 1, 2018, https://www.globalresearch.ca/the-role-of-private-military-and-security-companies-in-modern-warfare/32307.

Guli, M. N. “UN Worries over Arming ‘Non-state’ Groups in Iraq,” *Rudaw*, May 2015, accessed April 19, 2018, http://www.rudaw.net/english/kurdistan/02052015.

Hassan, A. “A Fruit Vendor Whose Death Led to a Revolution.” *The New York Times*, December 17, 2014, accessed April 26, 2018, https://www.nytimes.com/2014/12/16/us/arab-spring-a-fruit-vendor-who-started-a-revolution.html?rref=collection%2Ftimestopic%2FBouazizi%2C%20Mohamed&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection.

Human Rights Watch, “Under Kurdish Rule Abuses in PYD-run Enclaves of Syria.” June 19, 2014, *Human Rights Watch Reports*, accessed April 19, 2018, https://www.hrw.org/sites/default/files/reports/syria0614_kurds_ForUpload.pdf.

Jones, S. “Grenades and Plastic Explosives Stolen from Portuguese Arsenal.” *The Guardian*, July 3, 2017, accessed September 20, 2019, https://www.theguardian.com/world/2017/jul/03/grenades-and-plastic-explosives-stolen-from-portuguese-arsenal.

Makki S., S. Meek, A.F. Musah, M. Crowley and D. Lilly. “Biting the Bullet Briefing 10 - Private Military Companies and the Proliferation of Small Arms: Regulating the Actors.” *Basic - International Alert - Saferworld*, January 2001 accessed December 1, 2018, https://www.international-alert.org/sites/default/files/publications/Btb_brf10.pdf.

McCarthy, N. “The Cost of an AK-47 on the Black Market around the World [Infographic].” *Forbes*, March 30, 2017, accessed July 29, 2018, https://www.forbes.com/sites/niallmccarthy/2017/03/30/the-cost-of-an-ak-47-on-the-black-market-across-the-world-infographic/#5a7decd47442.

Melly, Paul. “Central African Republic crisis: Another French intervention?” *BBC News*, December 2, 2013, accessed May 14, 2019, https://www.bbc.com/news/world-africa-25183377.

Milanovic, M. “The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic.” *EJIL Talks*, March 11, 2013, accessed September 5, 2018, https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/.

Nollkaemper, A. “A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition.” *EJIL Talks*, June 17, 2013, accessed September 5, 2018, https://www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/.

Rashid, F. “Iraq: The Challenge of Non-State Actors.” *Lehigh University Reviews: A Student Journal of the Arts and Sciences* 13, Paper 6 (2005): 55-66, accessed December 1, 2018, https://preserve.lehigh.edu/cas-lehighreview-vol-13/6.

Rettman, Andrew. “Russia 'not neutral' in Black Sea conflict, EU says,” *EU Observers*, October 12, 2006, accessed April 25, 2019, https://euobserver.com/foreign/22622.

Small Arms Survey, “Armed Groups and Guided Light Weapons: 2014 Update with MENA Focus.” *Small Arms Survey Research Notes*, No: 47, December 2014, accessed July 24, 2018,

http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-47.pdf.

Traynor, I. “The Privatization of War.” *The Guardian*, December 10, 2003, accessed December 1, 2018, https://www.theguardian.com/world/2003/dec/10/politics.iraq.

Trevelyan, L. “Libya: Coalition divided on arming rebels,” *BBC,* March 29, 2011, accessed March 19, 2019, https://www.bbc.com/news/world-africa-12900706.

Waduge S. D., “UN Resolution on Legality of Arming Rebels/Insurgents/ Freedom Fighters or Terrorists?,” *Sinhala Net*, January 29, 2014, accessed March 15, 2019, http://www.sinhalanet.net/un-resolution-on-legality-of-arming-rebels-insurgents-freedom-fighters-or-terrorists.

Other Documents

“EU Code of Conduct on Arms Exports.” *Council of the European Union*, June 8, 1998, accessed August 9, 2018, http://www.seesac.org/f/img/File/Res/EU-Documents/EU-Code-of-Conduct-on-Arms-Exports-512.pdf.

“Georgia: Avoiding War in South Ossetia”, *ICG Europe Report N°159*, November 26, 2004, p.3, accessed April 25, 2019, http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019224.pdf.

“International Meeting of Experts on further study of the concept of the rights of peoples,” UNESCO Doc. SHS-89/CONF.602/7, February 22, 1990, p.8.

“Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question The International Committee of Jurists of the Council of the League of Nations,” *League of Nations Official Journal*, Special Supp. No. 3 (1920).

"Security Council Meets in Emergency Session Following Kosovo's Declaration of Independence, with Members Sharply Divided on Issue," *UN Security Council Press Release*, SC/9252, February 18, 2008, accessed April 30, 2019, https://www.un.org/press/en/2008/sc9252.doc.htm.

"Self-Determination and Secession in Constitutional Law," Report adopted by the Commission at its 41th meeting, 10-11 December 1999, CDL-INF (2000) 2, January 12, 2000.

"The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs," League of Nations Doc. B7/21/68/106 (1921).

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), Response Submitted by Finland to Questions of Judge Koroma and Judge Cançado Trindade, December 2009, accessed April, 2019, https://www.icj-cij.org/files/case-related/141/17888.pdf.

Dissenting Opinion of Judge Koroma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, July 22, 2010, p. 403.

Shaw, Malcolm. "The Unilateral Declaration of Independence Violates the General International Law Principle of Respect for Territorial Integrity," in *on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion submitted by the General Assembly of the United Nations)*, VERBATIM RECORD, CR 2009/24, December 1, 2009: 63-76.

The Constitution of the Socialist Federal Republic of Yugoslavia, Belgrad 1974, accessed April 7, 2019, http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf.

Year Book of the United Nations, 1971.

Year Book of the United Nations, 1979.

Year Book of the United Nations, 1989.

APPENDICES

A. TABLE OF AUTHORITIES

Cases

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, July 22, 2010, p. 403.

Affaire des Biens Britanniques au Maroc Espagnol (Espagne contre Royaume Uni), May 1, 1925, Volume II, pp. 615-742.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p.43.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports, December 19, 2005, p. 168.

Case Concerning the Factory at Chorzow, the PCIJ, Series A, No. 17, 1928.

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, ICJ Reports, December 22, 1986, p. 554.

Case of Colozza v. Italy (dec), no. 9024/80, ECHR, February 12, 1985.

Case of Keenan v. The United Kingdom, no. 27229/95, Judgment, ECHR, April 3, 2001.

Claim of the Salvador Commercial Company ("El Triunfo Company"), Reports of International Arbitral Awards, May 8, 1902, Volume XV.

Corfu Channel Case, (the UK v. Albania), Judgment, I.C. J. Reports, April 9, 1949, p. 4.

Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union, L 335/99, Vol. 51.

Customs Regime Between Germany and Austria, the PCIJ Series, A/B/No. 41, September 5, 1931.

East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 90.

EU Council Decision 2013/109/CFSP of 28 February 2013 amending Decision 2012/739/CFSP concerning restrictive measures against Syria, OJ L 58, 1.3.2013, p. 8.

GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, ICJ Reports 1997, p.7.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports, June 21, 1971, p. 16.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports, July 9, 2004, p. 136.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, July 8, 1996, p. 226.

Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, ICJ Reports, June 2, 1999, p. 124.

Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports, June 27, 1986, p. 14.

Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Provisional Measures, I. C.J. Reports, Order of May 10, 1984, p. 22.

North Sea Continental Shelf, Judgment, ICJ Reports, February 20, 1969, p. 3.

Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports, December 20, 1974, p. 457.

Oil Platforms, (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports, November 6, 2003, p. 16.

Prosecutor v. Dusko Tadic, Judgement, Case No: IT-94-1-A, the ICTY Appeal Chamber, July 15, 1999.

Prosecutor V. Ratko Mladić, Judgement, Case No: IT-09-92-T, the ICTY Trial Chamber, November 22, 2017.

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports, April 11, 1949, p. 174.

South West Africa, Second Phase, Judgment, ICJ Reports, July 18, 1966, p. 6.

Status of Eastern Carelia, Advisory Opinion, PCIJ Reports, Ser. B, No. 5, July 23, 1923, p. 27.

U.S. Congress. House. 113th Congress, 2nd session, H.R. 5747.20, November 2014.

United States Diplomatic and Consular Staff in Tehran, Judgment, I. C. J. Reports, 1980, p. 3.

Western Sahara, Advisory Opinion, ICJ Reports, October 16, 1975, p. 12.

Conventions-Treaties-Protocols

Arms Trade Treaty of 2 April 2013, adopted by resolution A/RES/67/234 B of 11 June 2013, annexed to the UN Doc. A/CONF.217/2013/L.3 of March 27, 2013.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (Text With Amendments And Protocols Adopted Through 28 November 2003), October 10, 1980, 1342 UNTS 137.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972, 1015 UNTS 163; 11 ILM 309 (1972).

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 1974 UNTS 45; 32 ILM 800 (1993).

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, September 18, 1997, 2056 UNTS 241; 36 ILM 1507 (1997).

Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chapter IV.E.1.

ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, signed at Abuja, June 14, 2006.

European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221; E.T.S. No 5; as amended by Protocols Nos. 11 (E.T.S. No. 155) on November 1, 1998 and 14 (C.E.T.S. No. 194) of May 13, 2004, supplemented by Protocols Nos. 1 (E.T.S. No. 9), 4 (E.T.S. No. 46), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177) and 13 (C.E.T.S. No. 187).

General Treaty for Renunciation of War as an Instrument of National Policy, 27 August 1927, 94 League of Nations Treaty Series 57.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), August 12, 1949, 75 UNTS 31.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), August 12, 1949, 75 UNTS 85.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 75 UNTS 287.

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), August 12, 1949, 75 UNTS 135.

Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277; Treaty Series 539.

International Covenant on Civil and Political Rights (ICCPR), December 16, 1966, 999 UNTS p. 171.

International Covenant on Economic, Social and Cultural Rights (ICESCR), December 16, 1966, 993 UNTS p. 3.

Montevideo Convention 1933, 165 LNTS 19 15.

Protocol (I) on Non-Detectable Fragments, 1342 U.N.T.S. 168, 19 I.L.M. 1529, entered into force December 2, 1983.

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3.

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609.

Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted by resolution A/RES/55/255 of May 31, 2001, 2326 UNTS 208.

Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by resolution A/RES/55/25 of November 15, 2000, 2241 UNTS 507.

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, XCIV League of Nations Treaty Series 2138.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by Resolution A/RES/55/25 of November 15, 2000, 2237 UNTS 319.

The Helsinki Final Act 1975,14 ILM, p. 1292.

The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

UN Charter 1945, 1 UNTS xvi.

Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

Security Council Resolutions and Documents

Concerning Iraq, UN Doc. S/RES/1441 (2002), November 8, 2002.

East Timor, UN Doc. S/RES/ 384 (1975), December 22, 1975.

Final Report of the Monitoring Mechanism on Angola Sanctions, UN Security Council Doc. S/2000/1225, December 21, 2010.

Letters from the United Kingdom (S/1998/223) and the United States (S/1998/272), the UN Doc. S/RES/1160 (1998), March 31, 1998.

Namibia, UN Doc. S/RES/301 (1971), October 20, 1971.

On Establishment of a Security Council Committee to Monitor Implementation of the Arms Embargo Against the Libyan Arab Jamahiriya, UN Doc. S/RES/1970 (2011), February 26, 2011.

On Proliferation of Nuclear, Chemical and Biological Weapons, as Well as their Means of Delivery, UN Doc. S/RES/1540 (2004), April 28, 2004.

On the Situation in the Libyan Arab Jamahiriya, UN Doc. S/RES/1973 (2011), March 17, 2011.

On the Situation on Kosovo, the UN Doc. S/RES/1244 (1999), June 10, 1999.

Question considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 December 1971, the UN Doc. A/RES/2793(XXVI), December 7, 1971.

Report of the Secretary-General 'On the Situation in Abkhazia, Georgia. Proposals for Political and Legal Elements for a Comprehensive Settlement of the Georgian/Abkhaz Conflict', the UN Doc. S/1994/529, May 3, 1994.

Security Council Resolutions on Iraq's invasion to Kuwait: 660 (1990) of 2 August 1990, 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990 and 677 (1990) of 28 November 1990.

Territories Under Portuguese Administration, UN Doc. S/RES/183 (1963), December 11, 1963.

Western Sahara, UN Doc. S/RES/ 377 (1975), October 22, 1975.

General Assembly Resolutions and Documents

2005 World Summit Outcome, UN Doc. A/RES/60/1, October 24, 2005.

An Agenda for Peace, UN Doc. A/47/277, June 17, 1992.

Annex II of the Report of the Secretary-General 'On the Situation in Abkhazia, Georgia. Proposals for Political and Legal Elements for a Comprehensive Settlement of the Georgian/Abkhaz Conflict', the UN Doc. S/1994/529, May 3, 1994.

Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, November 30, 2012.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625 (XXV), October 24, 1970.

Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc. A/RES/42/22, November 18, 1987.

Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly resolution, UN Doc. 1514 (XV), December 14, 1960.

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UN Doc. A/RES/2131 (XX), December 21, 1965.

Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/RES/50/6, October 24, 1995.

Definition of Aggression, UN Doc. A/RES/3314 (XXIX), December 14, 1974.

Draft International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, [Hereinafter International Tracing Instrument], Annexed to Report of the Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, *the UN Documents*, A/60/88, June 27, 2005.

General and Complete Disarmament: Transparency in Armaments, UN Doc. A/RES/46/36, December 6, 1991.

Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, UN Doc. A\RES\2787 (XXVI), December 6, 1971.

Question considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 December 1971, the UN Doc. A/RES/2793(XXVI), December 7, 1971.

Question of Territories under Portuguese Administration, UN Doc. A/RES/2918 (XXVII), November 14, 1972.

Report of the International Law Commission on the Work of its Thirty-second Session*,* U.N. Doc. A/35/10, May 5-July 25, 1980, p. 31.

Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, the UN Doc. A/RES/63/3, October 8, 2008.

Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination, UN Doc. A\RES\2160 (XXI), November 30, 1966.

The Arms Trade Treaty, UN Doc. A/RES/64/48, January 12, 2010.

The Arms Trade Treaty, UN Doc. A/RES/67/234 B, June 11, 2013.

The Arms Trade Treaty, UN Doc. A/RES/67/234, January 4, 2013.

The Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects [Hereinafter Action Plan], in Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects: New York, July 9-20, 2001, the UN Documents A/CONF.192/15.

The Question of Southern Rhodesia, UN Doc. A/RES/1747(XVI), June 28, 1962.

The Question of Southern Rhodesia, UN Doc. A/RES/1755(XVII), October 12, 1962.

The Question of Southern Rhodesia, UN Doc. A/RES/1760(XVII), October 31, 1962.

The Question of Southern Rhodesia, UN Doc. A/RES/2138(XXI), October 22, 1966.

The Question of Southern Rhodesia, UN Doc. A/RES/2151(XXI), November 17, 1966.

The Question of Southern Rhodesia, UN Doc. A/RES/2379(XXIII), October 25, 1968.

The Question of Southern Rhodesia, UN Doc. A/RES/2383(XXIII), November 7, 1968.

The Report of the Panel of Governmental Experts on Small Arms Annexed to the UN Document on General and Complete Disarmament: Small Arms, UN Doc. A/52/298, August 27, 1997.

Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms, UN Doc. A/RES/63/240, January 8, 2009.

Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms, UN Doc. A/RES/61/89, December 18, 2006.

Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights, A/CONF. 157/24, June 25, 1993.

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EDUCATION

Degree	Institution	Year of Graduation
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BA	Ankara Uni., International Relations	2010
High School	Fethiye Super High School	2005

WORK EXPERIENCE

Year	Place	Enrollment
2013-Present	Kırşehir Ahi Evran University	Research Assistant
2011	State Personnel Presidency of Turkish Prime Ministry	Intern Student

FOREIGN LANGUAGES

English

PUBLICATIONS

1. Güneş, Burak. *Private Military/Security Companies International Law and State Responsibility: Blackwater and Middle East.* Lambert Publishing House, 2013.
2. Güneş, Burak and Tamçelik, Soyalp. "Uluslararası Sistemde Savaşın Değişen Yapısı Ve Afrika'da Çocuk Askerlerin Ortaya Çıkması." In

Küresel Politikada Yükselen Afrika, edited by Soyalp Tamçelik. Ankara: Gazi Kitabevi, 2014.
3. Güneş, Burak. "Uluslararası Örgütler Hukuku Birleşmiş Milletler Sistemi." *Hitit Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 8, no. 2 (2015): 771-76.
4. Güneş, Burak. "Uluslararası Hukuk'ta Üçüncü Dünya Yaklaşımları." *21. Yüzyılda Sosyal Bilimler* 13, no. Fall (2015): 865-75.
5. Donelli, Federico. "Türkiye'nin İnsani Diplomasi Anlayışı: Somali'ye Yönelik Tek Taraflı Entegre Stratejisi." Translated by Burak Güneş. In *Türkiye'de ve Dünyada Dış Yardımlar*, edited by Erman Akıllı. Ankara: Nobel Yayıncılık, 2016.
6. Güneş, Burak. "Uluslararası Politika'da Güvenliği Yeniden Düşünmek: Bush ve Obama Üzerinden Bir Değerlendirme." *Hitit Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 10, no. 2 (2017): 1663-86.
7. Güneş, Burak. "Causation in International Relations: Reclaiming Causal Analysis." *Hitit Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 10, no. 1 (2017): 671-78.
8. Güneş, Burak. "Mercenaries, Private Military/Security Companies and Modern States." *Akademik Orta Doğu* 12, no. 1 (2017): 17-43.
9. Güneş, Burak. "Uluslararası İlişkiler Disiplininde Post-Pozitivist Bilim Felsefesi: Eleştirel Gerçekçilik Bağlamında Neden-Sonuç İlişkisini Yeniden Düşünmek." In *Türkiye'de Bilgi Üretimi ve Bilim Politikaları Uluslararası Sempozyumu*, edited by Orhan Neçare, 131-48. Kırşehir: Atatürk Araştırma Merkezi, 2018.
10. Güneş, Burak. "Afrika'nın Paylaşılması ve Berlin Batı Afrika Konferansı." In *Diplomasi Tarihi I*, edited by Barış Özdal ve Kutay Karaca. Bursa: Dora, 2018.
11. Güneş, Burak. "Libya İç Savaşı Ve Kriz Yönetimi." *Güvenlik Bilimleri Dergisi* 7, no. 2 (2018): 263-91.

HOBBIES

Strolling around bookstores, swimming, and playing basketball.

C.TURKISH SUMMARY / TÜRKÇE ÖZET

Bu tezde devletlerin, diğer devletlerin ülkesinde faaliyet gösteren devlet-dışı silahlı grupların silahlandırmasının Uluslararası Hukuk açısından değerlendirilmesi yapılmıştır. Özellikle Soğuk Savaş sonrası dönemde, gerek silahlı çatışmaların sayısında gerekse çatışmaların taraflarında dramatik dönüşümler meydana gelmiştir. Devlet dışı silahlı grupların silahlı çatışmalardaki etkinliği artmış, Uluslararası Hukuk ise söz konusu gruplara karşı tam ve etkili düzenlemeler getirmekte eksik kalmıştır. Bu tez, silahlı grupların silahlandırılmasının ya da başka bir deyişle desteklenmesinin hukuki sonuçlarının neler olabileceğini araştırmaktadır. Bu bağlamda, tezin temelini oluşturan 'silahlandırma' ya da 'destekleme' olgusunun tek ve genel-geçer bir hukuki karşılığının olamayacağı; modern hukukun –ve bilhassa Uluslararası Hukuk'un- kendi iç paradoksal yapısı gereği birbirine zıt normatif çıktılara sahip olabileceği ortaya konmaya çalışılmaktadır. Bunun yapılabilmesi için, ilk elde, devlet dışı silahlı grupların yeşerdiği ortamın resminin çizilmesi gerekmektedir.

Geleneksel olarak ele alındığında 'savaş' devletler arasında meydana gelen bir olgudur. Devletlerin Uluslararası Hukuk'un en temel aktörü ve kişisi olması, doğal olarak, devletler arasında meydana gelen savaş olgusunun etkili bir şekilde düzenlenmesine, bu alanı alakadar eden hukuk kurallarının ise kapsamlı bir şekilde kodifiye edilmesine vesile olmuştur. Hâlbuki savaş olgusunun dönüşüme uğraması, başka bir deyişle yeni aktörler ve yeni düzlemler ile yeniden ete kemiğe bürünmesi, savaşa yönelik kuralların gözden geçirilmesini gerekli kılmıştır. Zira devlet dışı grupların hukuki statüsünün nasıl belirleneceği, bir kez belirlendikten sonra hangi normatif düzlemlerde hak ve yükümlülüklere sahip olacakları devletlerin 'rıza'sına bırakılmayacak kadar hassas bir içeriğe sahiptir. Bunda, önceye nazaran,

sivillerin silahlı çatışmalarda büründükleri rollerin farklılaşması da rol oynamaktadır. Buna göre siviller, eskiye nazaran daha fazla savaşların hem yürütücüsü hem de mağduru konumundadırlar. Evvelemirde tartışılan 'şey' insanın bizatihi kendisidir. Tezi önemli kılan biricik 'şey' de tam olarak budur.

Sivillerin silahlı çatışmalardan bu denli etkilenmelerinde, devlet-dışı silahlı grupların hızlı ve kontrolsüz çoğalması başta gelen nedenlerden yalnızca birisidir. Devlet-dışı silahlı gruplar tabiri ise, devlet aygıtından bir ölçüde bağımsız, kendisine has bir gündemi olan ve motivasyon kaynağı değişse dahi politik mülahazaların diğerlerine galebe çaldığı bir yapılanma olarak karşımıza çıkmaktadır. Her ne kadar devlet-dışı silahlı grupların tek ve genel geçer bir tanımı olmasa da, bu tez bağlamında savaşan silahlı gruplar, militan/savaşçı gruplar, savaş lordları, çeteler, suç örgütlenmeleri, özel askeri şirketler, özel polis güçleri ve bağımsızlık hareketleri devlet-dışı silahlı gruplar içerisinde sayılmaktadır.

Bu denli karmaşık bir yapı içerisinde varlık bulan devlet-dışı silahları gruplar, aynı zamanda çok boyutlu ve çok katmanlı bir matris dâhilinde anlam kazanmaktadır. Bu tezin bir diğer amacı ise tam da bu noktada ortaya çıkmaktadır. Bu karanlık ve karmaşık ilişki ağlarının biraz olsun aydınlatılması ve devlet-dışı silahlı grupların silahlandırılmasının çok boyutlu yapısının anlamlandırılması gerekmektedir. Bu bağlamda, eldeki tez, tek bir bölgenin ya da belli devlet-dışı grupların tahliline odaklanmaktan ziyade; kuramsal olarak konuyu ele almaya çalışmaktadır. Böylelikle 'devletlerin öteki devletlerde bulunan devlet-dışı grupları silahlandırması sorunsalı ile organik bağı olan başkaca sorular üzerinden tez şekillendirilmiştir. Örneğin, 'devletlerin başka devletlerdeki devlet-dışı grupları silahlandırması Uluslararası Hukuk'un temel ilkelerinden olan kuvvet kullanmama ve karışmama ilkelerine aykırı mıdır?'; 'Devletler, devlet-dışı örgütlere destek

olmalarından dolayı, bu yapıların hukuk ihlallerinden dolayı sorumlu tutulabilirler mi?' gibi sorulara cevap aranmaktadır.

Ek olarak yukarıda belirtilen araştırma sorularının altında, içinde bulunduğumuz dönemde modern devletin ayırt edici özelliği olduğu varsayılan 'fiziki şiddet kullanımı üzerinde tekel olma iddiasının' büyük ölçüde zedelendiği; buna mukabil merkezi devlet otoritesinin çökmesi ile birlikte söz konusu silahlı grupların kendilerine yaşam alanı bulduğu ve kontrolsüzlüğün karmaşık düzeni beslediği fikri yatmaktadır. Böylesi bir ortamda, yabancı devletlerin silahlı çatışma ortamlarına müdahil olmaları kaçınılmaz bir hal almaktadır. Bu 'karışma' durumu ise, esas itibariyle Uluslararası Hukuk'un üzerine bina edildiği ilkelerin de yok sayılması anlamına gelebilmektedir.

Bu bağlamda tez en temelde şu soruları sormaktadır; i. Neden bu kadar farklı hukuksal sonuç olabilmektedir? ii. Devletler neden hem inici hem de çıkıcı argümanları kullanmak istemektedirler? ve iii. Uluslararası hukuk 'başka bir devlette faaliyet gösteren devlet-dışı bir grubun silahlandırılması hukuka uygun mudur?' sorusuna neden tek ve genel geçer bir cevap veremez?

Tezin ilgili literatüre katkısı ise şu şekilde ifade edilebilir; i. Her ne kadar devlet-dışı silahlı grupların silahlandırılmasına yönelik olarak gelişen bir literatür olsa da, eldeki tez bilgi parçacıklarını bir araya getirerek bütüncül bir analiz yapmaktadır. ii. Tez ayrıca çokça dile getirilmesine rağmen aynı oranda değer verilmediği düşünülen 'devletlerin uluslararası sorumluluğu' alanına da eğilmektedir. Buna göre, bir devlet ile silahlandırmış olduğu bir devlet-dışı grup arasındaki sorumluluk bağı ele alınmaktadır, iii. Son olarak eldeki tez, ana akım uluslararası hukuk anlayışına karşı çıkmaktadır. Bunu yaparken Eleştirel Hukuk çalışmalarının ön kabullerini kendisine rehber

edinmektedir. Yöntemsel olarak ayrıca ikili okuma olarak adlandırabileceğimiz bir çaba göstermekte ve ana akım uluslararası hukuk anlayışını ortaya koyduktan sonra, söz konusu akıma içkin paradoksal yapıyı açığa çıkarmaya çalışmaktadır. Tezin 'Giriş' bölümünde ayrıca, tez boyunca tartışılacak konularla ilgili literatür dipnotlarda detaylandırılmıştır.

Tezde uluslararası hukukun esnek yapısından kaynaklanan, nesnel ve aynıyla uygulanabilir bir hukuksal mütalaa yapılamayacağı, bu esnekliğin sonuçta siyasal güç ilişkilerinin alanına gireceği ve çözümün hukuksal araçlardan ziyade çıkar ekseninde yaratılacağı savlanmaktadır.

Yukarıda kısaca resmedilmeye gayret edilen hususların detaylandırılması için, eldeki tez, giriş ve sonuç bölümleri dâhil olmak üzere, altı (6) bölüme ayrılmıştır. Giriş bölümünde, tezin ana sorunsalları, tezin ilgili literatüre katkısı ve tezin varsayımlarının uluslararası politikadaki yansımalarına değinilmiştir. İkinci bölüm, tezin teorik varsayımlarını içermektedir. Üçüncü bölüm ise, karışmazlık ve kuvvet kullanmama ilkelerini ele almaktadır. Devamla bu bölümde self-determinasyon hakkı ve insancıl müdahale doktrinleri temelinde, devletlerin öteki devletlerdeki devlet-dışı silahlı grupları silahlandırmasının Uluslararası Hukuk'taki karşılığı tartışılmaktadır. Dördüncü bölüm ise, savaşın değişen yapısını ele almakta ve devlet-dışı silahlı grupların varlık nedenlerini sorgulamaktadır. Beşinci bölümde, devlet-dışı silahlı gruplara yapılan yardımların, yardımı yapan devletin uluslararası sorumluluğunu doğurup doğuramayacağı tartışma konusu edilmektedir.

Giriş bölümünde tezin ana sorunsalları ve varsayımları tartışma konusu edilmektedir. Buna göre özetlemek gerekirse, uluslararası hukukun 'rıza'ya dayalı yapısı, başka bir deyişle, 19'uncu yüzyılın ortalarından itibaren keskin bir şekilde 'adalet' ilkesinin egemenliğin bir iz düşümü halini alması, egemenlik sayesinde anlam kazanması; normlar hiyerarşisi ve merkezi

yaptırım mekanizması eksikliğini de beraberinde getirmektedir. Bu durum, neyin hukuki neyin ise hukuk dışı olduğunun nesnel tespitine imkân vermemektedir. İşte tam bu nedenle, hukuksal bir uyuşmazlığın çözümünde uluslararası hukuk, taraflar arasında en ufak bir güç eşitsizliğinde, siyasal olarak güçlüden yana tavır almaktadır. Bu esnekliktendir ki benzer hukuksal sorunlara farklı hukuksal cevaplar verilebilmektedir. Konumuz açısından değerlendirildiğinde de durum farklı değildir. Bir başka devlette faaliyet gösteren devlet-dışı örgütün silahlandırılması hususunda da birbirinden tamamen farklı yaklaşımlar söz konusu olabilmektedir. Örneğin, kimileri bu durumu 'kuvvet kullanma hukukunun' ve 'karışmazlık ilkesinin' ihlali olarak görebilmekteyken; kimi ülkeler ise halkların kendi kaderini tayin hakkı çerçevesinde ayrılma hakkını kullanmasından dolayı silahlandırılmasının hukuken mümkün olabileceğini ileri sürmektedir. Devamla, kimi devletler (ya da otoriteler) herhangi bir Güvenlik Konseyi yetkilendirmesi olmadan yapılacak 'karışma' eylemlerinin hukuksuz olabileceğini ileri sürerken, kimileri ise ağır insan hakları ihlallerinin bulunduğu yerlerde tek taraflı karışmanın ve her türlü yardımın mümkün olduğunu ileri sürebilmektedirler. Özünde çelişkili olan bu durumun sonucunda, normatif sorunların çözümü için siyasetin cephaneliğine yönelmekten başka bir yol bulunamadığı, tezin savlarının uluslararası politikaya muhtemel etkisi olarak resmedilmektedir.

İkinci bölüm iki alt başlığa ayrılmıştır. İlk elde, Uluslararası Hukuk'un yapısı konu edilirken, ikinci alt başlıkta devlet-dışı silahlı grupların hukuk kişiliği sorgulanmaktadır. Modern Uluslararası Hukuk tarihsel olarak iki temel ilke üzerine bina edilmiştir: egemenlik ve adalet. Bu iki temel ilkeye aynı anda ve eşit derecede önem atfedilmiştir. Tek tek egemen iradelerin üzerinde, devletler sistemi ile devlet iradeleri arasında adeta bir arabulucu/düzenleyici ilke görevi görmekte olan 'adalet'; on dokuzuncu yüzyıl ile birlikte dönüşüme uğramaya başlamıştır. Adalet de, diğer birçokları gibi, egemenlik nosyonundan neşet eden ve bizatihi egemenlik tarafından tanımlana gelen

bir iz düşüm halini almıştır. Hukuksal pozitivizm olarak da adlandırılan bu yeni düşünsel ortamda, devletler sistemini ayakta tutan ilkelerden birisinin başkalaşma geçirmesi sistemin çökmesiyle sonuçlanmamış; aksine sistem sakat bir yapı ile ve bizatihi bu sayede ayakta kalabilmiştir. Tek tek egemen devletlerin iradeleri ile devletler sistemi arasında arabulucu bir aşkın ilke olan 'adalet' kavramının başkalaşım geçirerek egemenliğin bir gölge-görüntüsü halini alması, hukuk doktrini içerisinde ikili bir meşrulaştırma yolu ve yöntemi de ortaya çıkarmıştır. Başka bir deyişle, hukuki mülahazaların esasını, Koskenniemi'nin tabiri ile, *inici* ve *çıkıcı* argümanlar oluşturmaya başlamıştır.

Buna göre, herhangi bir normatif sorun alanına yaklaşımlar meşruluğunu, ya aşkın bir ilke olan adalet ve insan hakları gibi kavramlardan alan *inici* bir anlayışla ele almakta; ya da devlet egemenliğini esas başlangıç noktası yapan *çıkıcı* argümanlar ile. Bu ikili argüman seti diyor Koskenniemi, aynı anda ve aynı önemde varlığını sürdüremez. İşte bu yüzden, Uluslararası Hukuk ya da genel tabiriyle modern liberal hukuk, bir paradoks üzerine bina edilmiştir.

Bu bina ediş aynı zamanda, pozitivizmin de etkisi ile kendisini hukuk olan ve hukuk olmayan arasında bir ayrıma da tabi tutmaktadır. Başka bir deyişle olgusal olan ile spekülatif olan arasında yapılacak bir ayrımda hukuk, olgusal alanda kendisine yer edinmiştir. Böylelikle hukukun objektifliği savları ete kemiğe bürünmüş, herkese ve her şeye rağmen sübjektiviteden uzaklaşmış bir hukuk ortaya konabilmiştir. Ne var ki, hukukun objektif olabilmesi için iki şeyin aynı anda var olması gerekmektedir: somutluk (concreteness) ve normatiflik (normativity). Hukuk somut olmalıdır, içinden doğduğu toplumsal olgudan münezzeh bir anlayış kabul edilemez. Aynı zamanda hukuk normatif olmalıdır; içinden doğduğu toplumdan ayrı bir ontolojik varlığı olmalı ve bağlayıcılığı kısıtlanmamalıdır. Başka bir deyişle,

hukuku devletler yapar; hukuk bir kez ortaya çıktıktan sonra kendisini yaratan devletleri de bağlayan bir normatif yapıya kavuşur. Koskenniemi'ye göre hukuk bu iki kavram arasında bir salınım yapmaktadır. Bu iki kavram aynı anda ve aynı derecede var olamayacaktır. Somutluğa yaklaştıkça, hukuk, devletlerin birer apolojisi halini alacak; normatifliğe yaklaştığında ise ütopyacılığa sıçrayacaktır. Bu yüzden hukuk, ya da Uluslararası Hukuk, bu ikisi arasında bir devinim halinde varlığını sürdürecektir.

Son olarak, hukukun mekanik bir sorun çözme mekanizması olarak görülmesi ve sübjektif elementlerin hukuktan cımbızlanarak ayrılması istenci, kendi içerisinde ayrıca sorunludur. Normatif sorun alanlarına uygulanacak hukukun her halükarda aynı olabileceği ve sonuçları önceden bilinebilen mekanik bir süreç olduğu varsayımı sorunludur. Hukuk kuralları özü itibariyle soyut formüle edilmektedirler. Her olay ve olgu için ayrı hukuk kuralı ihdas edilemeyeceği ve herkesin aynı kurallarla bağlı olması temel prensibi gereğidir bu. Ancak, soyut olarak formüle edilen hukuk kurallarının aynı zamanda her bir somut olay nezdinde özgün niteliğe de sahip olması gerekmektedir. İşte tam bu noktada, yani soyut kuralları somut olaylara uygulamada, gayet sübjektif bir akıl yürütme ortaya çıkmaktadır: *yorum*. Yorum unsuru iç hukuk düzenlerinde, en azından zor davalarda zorunlu bir unsurken, Uluslararası Hukuk'u ilgilendiren hemen her davanın özü itibariyle zor olması, yorum unsurunu vazgeçilmez kılmaktadır. İşte tam bu nedenle objektif olduğunu iddia eden modern liberal hukuk, sübjektif bir öğenin varlığı ile hayat bulabilmekte, anlam kazanabilmektedir. Sonuç olarak, hukukun bu içsel paradoksları bu tezde tartışma konusu yapılan 'devletlerin öteki devletlerdeki devlet-dışı silahlı grupları silahlandırılması' sorunsalına yönelik tek bir hukuksal çıktının olamayacağını göstermektedir. Tezin teorik alt yapısını oluşturan bu tespitler, tez boyunca varlığını devam ettirmektedir.

İkinci bölümün ikinci kısmı, devlet-dışı silahlı grupların tanımını yapmaya, hukuksal statüsünü belirlemeye çalışmaktadır. Özellikle 11 Eylül saldırıları sonucunda Uluslararası Hukuk'un bu güçlü aktörlere yönelik son derece cılız kaldığı ortadadır. Bu bağlamda, Uluslararası Hukuk'ta ne tür hak ve yükümlülüklere sahip olabileceklerinin ortaya konulması için hukuki statüleri hakkında bazı tespitlerin yapılması gerekmektedir. Genel itibariyle Uluslararası Hukuk, bir devletin sınırları içerisinde meydana gelen silahlı çatışmalarda, merkezi hükümetin karşısında konumlanan gruplara 'isyancı', 'asi' ya da 'savaşan' statüsü verebilir. Her bir statünün hukuken ortaya çıkardığı hak ve yükümlülükler bulunmaktadır. Buna göre, devletlerin tek taraflı bir işlemi olarak 'tanıma' kurumunun tekelinde olan yukarıdaki statüler, reel politiğin bir yansıması olarak devletlere hareket alanı sağlamaktadırlar. Her ne kadar belli bir serbesti sağlasa da, karmaşıklaşan ilişki yapısında, farklı silahlandırma ve destek hamleleri yeterince açıklanamaz olmaktadır. Son olarak bu alt bölümde, devlet-dışı silahlı aktörlerin/grupların bir tanımı yapılmaya gayret edilmiştir. Evrensel bir tanıma sahip olmasa da, bu tez, devlet dışı grupları devlet aygıtından bir katreye kadar bağımsız olan ve kendisine has politik bir ajandaya sahip yapılar olarak görmektedir.

Üçüncü bölümde, modern Uluslararası Hukuk doktrininin, başka bir deyişle modern devletler sisteminin, üzerine inşa edildiği temel iki prensip olan, karışmazlık ve kuvvet kullanmama ilkeleri üzerinden tezin ana sorunsalına değinilmektedir. BM Şartında da açıkça belirtildiği üzere, devletler sistemi, devletlerin egemen eşitliği üzerine kurulmuştur. Bu temel prensip, diğer tüm ilkelerin alt yapısını oluşturmaktadır. Buna göre, devletlerin siyasal bağımsızlığı ve toprak bütünlüğü gibi kimi düsturlar, devletlerin egemen eşitliği prensibiyle ilintilidirler. Bu bağlamda değerlendirildiğinde, devletlerin egemenlik haklarına, özelde toprak bütünlüğü ve siyasal bağımsızlıklarına yönelik ihlaller, Uluslararası Hukuk ihlali olarak değerlendirilebilecektir. Asıl

sorun ise, herhangi bir devlet-dışı silahlı grubun yabancı bir devlet tarafından silahlandırılmasının, yukarıda belirtilen ilkeleri ihlal edip etmediğinin tespit edilmesidir.

Söz konusu tespitin yapılabilmesi için, bu bölümde, gerek hukuksal gerekse politik bağlayıcılığa sahip birçok uluslararası belgeye referans verilmektedir. Bu belgelerden ilk akla gelen BM Şartı ve Şartın 2.maddesinde sıralanan ilkelerdir. Madde 2/4, devletlerin uluslararası ilişkilerinde bir başka devletin 'toprak bütünlüğü', 'siyasal bağımsızlığı' ve 'BM Şartıyla uyuşmayan başkaca konularda' kuvvet kullanmasını ve kuvvet kullanma tehdidinde bulunması yasaklamaktadır. Ayrıca, 1970 tarihli BM Genel Kurulu Dostça İlişkiler Bildirisi de, ortaya koymuş olduğu prensipler baz alındığında, devletlerin egemen eşitliği düsturunu temel çıkış noktası yapmaktadır. Bildiriye göre her devlet, uluslararası ilişkilerini egemen eşitlik ve karışmazlık ilkelerine göre yürütmekle yükümlenmektedir.

Uluslararası Hukuk'ta karışmazlık ve kuvvet kullanma yasağını dile getiren birçok mahkeme kararı da bulunmaktadır. Bu kararlardan en önemlisi, 1986 tarihli Nikaragua'da Askeri ve Yarı-Askeri Faaliyetler vakasıdır. Buna göre Divan, 4 ana karışma şekli tespit etmiştir. Bunlardan ilki, BM Genel Kurulunun Saldırının Tanımı kararında belirtmiş olduğu, "silahlı çetelerin, grupların, gayri nizami askerlerin veya paralı askerlerin gönderilmesi" hususudur ve bu husus saldırı tanımı içerisine girmektedir. Buna mukabil, isyancı grupların silahlandırılması, organize edilmesi, desteklenmesi gibi hususlar ise, kuvvet kullanma ihlali anlamına gelmektedir. Bu iki unsur, kuvvet kullanma ilkesinin ihlali olurken, isyancı gruplara finansal destek sağlanması ise karışmazlık ilkesinin ihlali olarak tespit edilmiştir. İnsancıl yardımlar dışındaki –gıda, malzeme ve ilaç gibi- karışma örnekleri, kuvvet kullanma yasağı ve karışmazlık ilkelerinin ihlali anlamına gelecektir.

Her ne kadar modern doktrin ‘karışmazlık’ ilkesine büyük önem veriyor gibi gözükse de, bu durum bir yanılsamadır. Zira, ‘karışmanın’ uluslararası ilişkilerin ve uluslararası hukukun doğasına içkin olduğu vakıadır. ‘Karışmazlık’ ilkesi söz konusu olduğunda uluslararası hukuk ‘zor vakalarda’ –ki doğası gereği her uluslararası olay zor bir vakadır- güçlüden yana bükülmektedir. Örneğin, sadece BM’nin yapısının küçük bir incelemesi bile bizlere, egemen-eşit devletler anlayışı üzerine bina edildiğini iddia ettiği yapısının, hem formel hem de enformel şekilde eşitsizliği kurumsallaştırarak, ‘karışmazlık’ ilkesinin farklı somut durumlar karşısında aldığı farklı şekilleri gösterebilmektedir. Bir başka ülkede faaliyet gösteren devlet-dışı grupların silahlandırılmasının ‘karışmazlık’ ilkesinin bir ihlali olup olmadığı, en azından ‘zor vakalarda’, güç ilişkilerine başvurularak çözümlenebilecektir.

Üçüncü bölümde ayrıca, halkların kendi kaderini tayin hakkı ve insancıl müdahale kavramları çerçevesinde, devletlerin öteki devletlerdeki devlet-dışı silahlı grupları silahlandırılmasının hukuki boyutunun ele alınması oluşturmaktadır. Buna göre ilk elde, halkların kendi kaderini tayin hakkı masaya yatırılmakta ve self-determinasyon mücadelesi veren halklara yapılacak silah ve diğer tüm yardımların, Uluslararası Hukuk’taki anlamı tartışılmaktadır. Devam eden kısımda ise, fikri kökleri Vitoria dönemine kadar uzanan ‘insancıl müdahale’ kavramı masaya yatırılmaktadır. Herhangi bir devletin ‘insancıl müdahale’ üst başlığında yapacağı silah ve bu yöndeki her türlü yardımın niteliği sorgulanmaktadır.

Halkların kendi kaderini tayin hakkını kabul eden ve evrensel bağlamda ortaya koyan ilk bağlayıcı belge BM Şartı’dır. BM Şartı’nın halkların kendi kaderini tayin hakkına yer vermiş olmasına rağmen, bu hakkın muhtevasını detaylandırmadığı ve sınırlarını net biçimde çizmediği için ilk başlarda hakkın kapsamı tam olarak belli değildir. Ne var ki dekolonizasyon süreciyle birlikte, bağımsızlığını yeni kazanan devletlerin politik konumlanmaları, söz

konusu hakkın zaman içerisinde ete kemiğe bürünmesinin yolunu açmıştır. Örneğin, halkların kendi kaderini tayin hakkı ile ilgili ilk belgelerden olan 1960 tarihli BM Genel Kurulu 'Sömürge Ülkelerine ve Halklara Bağımsızlık Verilmesi' bildirgesinde de belirtildiği üzere, halklar özgür biçimde siyasal statülerini belirlemek ve ekonomik, sosyal ve kültürel gelişimlerini de serbestçe sürdürmek hakkına sahiptirler. Bu hak, halkların kendi kaderini tayin hakkının en temel referans cümlesi olmuştur. Gerçekten de, bir çok mahkeme kararı da hakkı bu şekilde yorumlamış ve meşru bir mücadele tarzı olarak kaydetmiştir. Zaman içerisinde meydana gelen kimi gelişmeler hakkın kapsamının, sömürge altında yaşayan halklarının da ötesinde olduğunu gündeme taşımıştır.

Buna göre, sömürgeciliğin tasfiyesi süreci dışında deneyimlenebilecek ve self-determinasyon hakkına dayandığı iddia edilebilecek bir ayrılmanın hukuken mümkün olup olmadığı tartışmaya açılmaktadır. Bu konudaki farklı görüşleri ve tarihsel olguları incelediğimiz bu bölümde, bir halkın ayrılma (external self-determinasyon) hakkı olup olmadığının, uluslararası siyasetin bu konudaki müdahil tavrıyla doğrudan ilgili olduğu mütalaa edilmektedir. Bir halkın ayrılma hakkı uluslararası kamuoyu tarafından tanınırken, başkaca bir halkın aynı isteği 'toprak bütünlüğü' ve 'karışmazlık ilkesinin' ihlali gerekçe gösterilerek hukuk dışı ilan edilebilmektedir. Balkan (Kosova) ve Kafkas (Güney Osetya ve Abhazya) coğrafyasında meydana gelen olaylar ve uluslararası kamuoyunun tavrı, söz konusu güç ilişkilerinin hukuka sirayeti konusunda aydınlatıcıdır.

İkinci olarak 'insancıl müdahale' kavramı üzerinden, bir başka devletin iç işlerine karışma anlamına gelebilecek devlet-dışı grupların silahlandırılması hususu değerlendirmeye alınmıştır. Kökleri Vitoria dönemine kadar geri götürülebilecek bir meşrulaştırma aracı olan 'insancıl müdahale' kavramı, özellikle Soğuk Savaş sonrası dönemde uluslararası toplum nezdinde ciddi

tartışmalara neden olmuştur. Örneğin, 1999 tarihli NATO marifetiyle gerçekleşen Kosova bombardımanı, insancıl müdahale tartışmalarına ivme kazandırmıştır. Bu bağlamda, herhangi bir BM Güvenlik Konseyi kararı ya da yetkilendirmesi olmadan, sadece insancıl nedenlerle, bir başka ülkede faaliyet yürüten devlet-dışı bir silahlı grup desteklenebilir mi? Bu bölümün temel sorunsalını yukarıdaki soru oluşturmaktadır.

Bu bağlamda, Uluslararası Adalet Divanı'nın ele aldığı birçok vakada, 'insancıl müdahale' kavramını kabul eder bir görüntü çizmediği; zira geleneksel doktrinin -egemenlik- yürürlükte olduğu yönünde tavır aldığı görülmektedir. Buna ek olarak, sadece İngiltere ve Belçika'nın, Kuvvet Kullanmanın Hukukiliği vakasında 'insancıl müdahale' doktrinini kendilerine geçerli birer gerekçe olarak gördükleri ortadadır. Bunu açık anlamı, her ne kadar bu konu devamlı gündeme taşınsa da, devletler nezdinde bir *opinio juris* oluşmadığı ortadadır. Sonuç olarak, isyancı bir silahlı grubun, BM Güvenlik Konseyinin BM Şartının yedinci bölümü uyarınca alacağı zorlama tedbirlerin dışında, insancıl müdahale doktrini çerçevesinde desteklenmesi ana akım doktrince olumlanmamaktadır.

Ancak fiili devlet davranışları, ana akım anlayışın tersine, devletlerin ulusal çıkarlarını ilgilendiren konularda hiç çekinmeden insancıl müdahale kavramına sarılabildiğini de göstermektedir. Bu bölümde bazı fiili devlet davranışları listelenmektedir. Bunlar arasında 1971 tarihli ve Bangladeş'in kuruluşuna hız kazandıran Hindistan ve Pakistan arasındaki silahlı çatışma durumu, Tanzanya'nın Uganda Devlet Başkanı İdi Amin'in görevi bırakıp ülkeyi terk etmesiyle sonuçlanan askeri işgali (1979), Fransa'nın Orta Afrika Cumhuriyeti hükümetine karşı müdahil olduğu askeri darbe girişimi (1979), ABD'nin türlü insancıl bahanelerle 1989 yılında gerçekleştirdiği ve adına '*Haklı Neden Operasyonu* (*the Operation Just Cause*)' dediği Panama işgali, 1991 yılında Iraklı Kürtlerin korunması amaçlı Fransa, Birleşik Krallık ve

ABD öncülüğünde Irak'ın kuzeyinde oluşturulan güvenli bölge girişimleri bulunmaktadır. Sonuç itibariyle, yukarıda sayılan askeri müdahale girişimlerinin arka planında insancıl nedenler bulunmakla beraber, uluslararası kamuoyu söz konusu askeri müdahalelere ya sessiz kalmış ya da destek olmuştur. Örneğin Tanzanya'nın Uganda işgaline BM sessiz kalarak, dünyanın başka yerlerinde hiç çekinmeden 'karışmazlık ilkesinin ihlali' ya da 'kuvvet kullanma yasağının ihlali' olarak değerlendirebileceği bir olguyu es geçmiştir. Dahası ABD'nin Panama işgaline karşı hazırlanan taslak Güvenlik Konseyi kararı, yine ABD'nin veto etmesi neticesinde Güvenlik Konseyinin gündemine alınmamıştır. Böylelikle evrensel bir hukuk ilkesi olan 'kişi kendi mahkemesinde yargıç olamaz (*nemo judex in causa sua*)' ilkesinin de ihlal edildiğine tanık olmaktayız. Bu durum da bize, dünya kamuoyunu yakından ilgilendiren konularda ve taraflar arasında güç eşitsizliğinin olduğu durumlarda hukukun güçlüden yana tavır aldığının veya sessiz kalarak müdahil olmaktan çekindiğinin somut örneklerini sunmaktadır.

Dördüncü bölümde savaşın değişen yapısı ele alınmış, devlet-dışı aktörlerin uluslararası arenadaki varlıkları tartışma konusu edilmiştir. Bu bölümde savaşın artık sadece devletler arasında meydana gelen bir olgu olmaktan çıktığı, devlet-dışı aktörlerin/grupların doğrudan etkili oldukları bir alan olduğu iddia edilmektedir. 4. Kuşak Savaş terimlerinin kullanılmaya başlandığı günümüz çatışma sahalarında, tehdit algısının yönü de dönüşüme uğramıştır. Buna göre, geleneksel tehdit algısı doğrudan devletlerden gelmekteyken, artık devlet-dışı aktörlerden gelebilmektedir. Kimi zaman terör örgütleri olarak karşımıza çıkan söz konusu yapılanmalar, yüzü olmayan bir düşman hüviyetine bürünebilmektedir.

Bu bölümde ilk elde, devlet-dışı silahlı grupların uluslararası arenada neden bu derece önemli ve etkili bir yere sahip oldukları tartışma konusu yapılmaktadır. Buna göre, savaşın tarafları, diğer bir deyişle bileşenleri,

dramatik bir dönüşüme uğramıştır. Siviller savaşın yürütülmesinde son derece etkili roller almış ve savaşın sivil hayata bu denli sirayeti, sivil kayıplarını da artırmıştır. İkinci olarak, teknolojik gelişmeye paralel olarak, silah temini ve kullanımı kolaylaşmış; profesyonel orduların dışında silah kullanımı günlük hayatın birer parçası halini almıştır. Tüm bu gelişmelere ek olarak, özellikle Soğuk Savaş sonrası dönemde, asker sayısı açısından büyük ordular hızla terhis işlemlerine başlamıştır. Asker sayılarındaki azalma, teknolojik üstünlükle kapatılmaya çalışılmış; boşa çıkan askerler de devlet-dışı silahlı gruplar için insan kaynağı potansiyeli taşımışlardır. Orduların geniş alanlardan çekilmeleri sonucu oluşan boşluk, devlet-dışı aktörler tarafından doldurulmuştur. Söz konusu yapıların silah ihtiyaçlarının karşılanması için ise silah ticareti olanakları çeşitlenmeye başlamıştır. Sonuç olarak, devlet-dışı silahlı grupların sayısının artması ve niteliğinin dönüşüme uğraması, silah ticaretinin niteliğini ve yoğunluğunu da derinden etkilemiştir.

Merkezi devlet otoritesinin, bir dış müdahale ya da iç savaş sonucu çökmesi bahsi geçen yapıların hızla çoğalmasında bir başka etmendir. Bu durumu analiz edebilmek için Irak, Suriye ve Libya örnekleri tartışmaya dâhil edilmiştir. Örneğin, Irak, Suriye ve Libya'da devam ede gelen iç çatışma ortamının tarafları incelendiğinde, ortaya birbiri içine geçmiş ilişki ağları ve onlarca yeni silahlı yapının çıktığı görülecektir. Ayrıca bu bölümde, son derece etkili olduğu su götürmeyen devlet-dışı silahlı grupların, silah ticareti ve transferindeki yerleri de ele alınmaktadır. Küresel silah ticareti ile küçük ve hafif silahların kullanım alanları da konuya dahil edilmiştir. Dünya ölçeğinde yaklaşık 850 milyon küçük ve hafif silahın üç çeşit mekanizma vasıtasıyla –Beyaz, Gri ve Siyah Silah Pazarı- dolaşımda olduğu bilinmektedir. Bu bölümde, Beyaz Silah Pazarı, Gri Silah Pazarı ve Siyah Silah Pazarı (Kara Borsa) mekanizmalarına değinilmiştir.

Yukarıda bahsi geçen üç çeşit mekanizmadan Beyaz Silah Pazarı, Uluslararası Hukuk'a uygun silah ticaret mekanizmasıdır. Bu pazarda silah ticaretinin bileşenleri hukuka uygun şekilde hareket etmektedirler ve devletlerin yasal prosedürlerine göre lisans kullanım hakkına sahip olabilmektedirler. Gri Silah Pazarı'nda ise, hukuka uygunluk ya da hukuk ihlalleri açık bir şekilde belli değildir. Bu Silah Pazarı'nda silah ticareti yapan kişi ya da kurumlar, hukukun boşluklarından yararlanmaktadırlar. Hukukun açık şekilde yasaklamadığı alanlar bu Silah Pazarı'nın konusunu oluşturmaktadır. Siyah Silah Pazarı ise, hukukun sınırları dışında gerçekleşen ve yetkisiz kişilerce hayata geçirilen transferleri kapsamaktadır. Sonuç olarak, ulusal çıkarların son derece hassas olduğu bu alanda, devletlerin silah ve diğer her türlü yardımı yapmaya devam edecekleri ve hukukun söz konusu duruma nesnel cevaplar üretemeyeceği vurgulanmaktadır.

Beşinci bölümde ise, devletlerin öteki devletlerdeki devlet-dışı silahlı grupları silahlandırmasına farklı bir açıdan yaklaşılmaya çalışılmaktadır. Buna göre, silah yardımı ve diğer desteklerde bulunulan devlet-dışı grupların, yaptıkları hukuk ihlallerinden, yardımda bulunan devletin uluslararası sorumluluğu öne sürülüp sürülemeyeceği sorunsalına değinilmiştir. Bunun için bu bölümde ilk olarak, genel anlamda devletlerin uluslararası sorumluluğu konusuna değinilmiştir. Devamla bu bölümde, Uluslararası Adalet Divanının devlet-dışı aktörlerin hukuk ihlallerinin devletlere atfedilebilirliği üzerine geliştirdiği 'etkili kontrol' test ile Eski Yugoslavya için Ceza Mahkemesi'nin Tadic vakasında tercih ettiği 'genel kontrol' test karşılaştırılması yapılmıştır. Bunlara ilaveten bu bölümde, devletlerin 'sonuç yükümlülüğü' ile 'özenli davranış' ilkeleri bağlamında sorumlulukları değerlendirilmiştir. Buradaki temel gaye, devletlerin yardımda bulundukları bir devlet-dışı silahlı yapılanmanın hukuk ihlallerinden dolayı, destekleyici devletin sorumluluğunun ileri sürülüp sürülemeyeceğinin aydınlatılmasıdır.

Uluslararası Hukuk'ta hak ve yükümlülüklere sahip olmak, doğal olarak beraberinde uluslararası sorumluluk kurumunu da gerekli kılmaktadır. Devletler, organlarının yapmış olduğu tüm eylemlerden sorumludurlar. Ne var ki bir devlet-dışı aktörün hukuk ihlallerinden de sorumlu olabilmeleri için izlenecek yollar nelerdir? Uluslararası Adalet Divanı, Srebrenitsa Soykırım Davasında bu konuya yönelik iki aşamalı bir yaklaşım sergilemiştir. Srebrenitsa'da meydana gelen olayların sorumlusu olan devlet-dışı grupların/aktörlerin (Republika Srpska, Scorpions vb.) suçlarının Sırbistan devletine atfedilebilmesi için, söz konusu grupların Sırbistan devletinin iç hukukuna göre *de jure* organı olması gerekmektedir. Divan ilk olarak, bu grupların Sırbistan devletinin *de jure* organı olmadığını tespit ederek analizine başlamaktadır. Divan, bu soruya olumsuz yanıt vermesinden sonra, söz konusu grupların *de facto* organ olup olmadığını sorgulamaktadır. Burada ise, söz konusu grupların, Sırbistan devletine 'topyekûn bağımlı' olması testini uygulamaya sokmuş ve olumsuz yanıt vermiştir. Bu iki soruya olumsuz yanıt verdikten sonra Divan, sözü geçen grupların Sırbistan devletinin kontrolü, yönlendirmesi ya da direktifleri dâhilinde mi hareket ettiğini tespit etmeye çalışmıştır. Bu tespiti yaparken de 'etkili kontrol' testini işletmiştir. Buna göre, Sırbistan devletinin sözü geçen gruplar üzerinde etkili kontrolünün olmadığı sonucuna varmıştır. Divanın bu yargılamasında ortaya koyduğu hükümlerin bir eleştirisinin yapıldığı Beşinci bölümde, Eski Yugoslavya için Ceza Mahkemesi'nin Tadic vakasında başvurduğu 'genel kontrol' test referans noktası olarak alınmıştır. Böylelikle, iki farklı uluslararası mahkemenin, benzer durumlar için ortaya koymuş oldukları kriterlerin farklılığı, modern doctrine içkin paradoksal yapıyı resmetmektedir.

Ayrıca bu bölümde, silah ticareti ve transferi temelinde, uluslararası sözleşmeler ve bu sözleşmelerin devletlerin uluslararası sorumluluğu hukukuna etkileri tartışma konusu edilmiştir.

Silah ticaretinin olumsuz ve kontrolsüz yanlarının önlenmesi için uluslararası boyutta bir çok girişim olmuştur. Bunlar arasında belli konulara özgü uluslararası sözleşmeler ya da kamuoyu oluşturucu kimi toplantılar yapılmıştır. Örneğin, 1997 tarihli Anti-personel Mayınlarının Yasaklanması Sözleşmesi, özellikli bir alanı işaret eden ve o alanda düzenlemeler getiren uluslararası bir antlaşmadır. Bunun yanı sıra, Birleşmiş Milletler himayesinde 2001 yılında gerçekleştirilen BM Küçük ve Hafif Silahların Yasadışı Ticaretinin Önlenmesi konferansı uluslararası çapta kamuoyu oluşturmak için gerçekleştirilen ve sonucunda uluslararası bir antlaşma metni ile taçlandırılan çabalara örnektir.

Tüm bu gayretler alanlarında etkili çalışmalar olmakla birlikte, evrensel çapta, bağlayıcı ve silah transferine standart kurallar bütünü getiren uluslararası bir metin ihtiyacı hep olagelmiştir. Sonuçta, 2013 yılında imzalanan ve Antlaşmanın 22'nci maddesi uyarınca 50 onaya ulaştıktan sonra 2014 yılında yürürlüğe giren Silah Ticaret Antlaşması (the Arms Trade Treaty- ATT) ortaya çıkmıştır. ATT, uluslararası düzeyde silah transferine bir standart getirmek, konvansiyonel silahlardan kaynaklı ölümleri azaltmak ve devletler arasında koordinasyonu sağlamak için kodifiye edilmiştir. Tüm bu amaçların temelinde, devletlerin hukuka riayeti –özelde insan hakları ve insancıl hukuka riayeti- amaçlanmaktadır. Başka bir deyişle, silah ticaretinin meşruluk nedeni ancak ve ancak insan hakları ve insancıl hukuka riayet ile mümkün kılınmaktadır. Böylelikle ATT, devletlerin omuzlarına insan hakları ve insancıl hukuka riayet temelli yükümlülükler yükleyerek, silah ticaretinin neden olabileceği insanlık dramlarından devletleri peşinen sorumlu tutmanın da kapısını aralamış olmaktadır.

Elbette her antlaşma gibi ATT'nin de kendi içinde çıkmazları bulunmaktadır. İlk elde, devletlerin egemenlik haklarına peşinen yapmış olduğu güçlü vurgu

ile aşkın ilkeler manzumesi olan insan hakları ve insancıl hukuk kurallarının gücüne sekte vurmuş olmaktadır. İkincisi, belli bir standardizasyon çabası her zaman belirtilenin dışındaki çabaları yasa dışı sayma; ya da gayri meşru sayma eğilimi içerisindedir. Bu nedenle, ATT'nin ortaya koymuş olduğu ilkeler göz önüne alındığında, belli bir ticaret anlayışının meşrulaştırıldığı rahatlıkla söylenebilir.

Sonuç olarak, yukarıda açıklandığı üzere, her bir bölüm iki amaca hizmet etmektedir. İlk olarak, her bölümün üzerinde durduğu konunun detaylı bir biçimde ele alınmasını sağlamak her bölümün birincil amacı olarak kodlanabilir. Bunlara ek olarak ise, her bölüm, modern doktrinin kendi iç çelişkilerini ortaya koymaya da çalışmaktadır. Başka bir deyişle, her bölüm, modern hukuk doktrinin üzerine bina edildiği iç tutarlılıktan uzak yapının ve paradoksların ortaya konmasını amaç edinmektedir. Örneğin, 'şiddet' olgusu uluslararası doktrinde uçsulaştırılmış, yasaklanmış ve dışlanmış bir olgu olarak kodlanmaktadır. Kuvvet kullanma yasağı Uluslararası Hukuk'ta emredici kural olarak kabul edilmektedir. Bu yasağın iki temel istisnası bulunmaktadır. Bunlardan ilki BM Şartı 51.Madde ile düzenlenen 'doğal meşru müdafaa' hakkıdır. 'Doğal' kelimesinin varlığı, bu hakkın BM Şartına yazılmasa da var olduğunu niteleyen bir işaret görevi görmektedir. Eğer savunma hakkı doğal ise, saldırı da doğal bir olgudur. Başka bir deyişle, saldırının olmadığı yerde savunmadan bahsedilemeyeceği için, saldırının – yani şiddetin- uluslararası ilişkilere içkin olduğunu söylemek haksızlık olmayacaktır. Birinci paradoks işte tam da bu noktada ortaya çıkmaktadır, uçsulaştırılan şiddetin bizatihi sistemin temelinde konumlanması ve sistemin bunu saklamaya gayret etmesi. Kuvvet kullanımına dair ikinci istisna ise, BM Güvenlik Konseyinin BM Şartının Yedinci Bölümü uyarınca alacağı zorlama tedbirlerdir. Bunun için BM Güvenlik Konseyinin 39.Madde uyarınca 'uluslararası barış ve güvenliğin tehlikede' olduğunu tespit etmesi gerekmektedir. Sorulması gereken soru, BM Güvenlik Konseyinin bu tespiti

yaparken kullandığı herhangi bir objektif/nesnel kıstasa yaslanıp yaslanmadığı üzerine olmalıdır. Maalesef bu sorunun cevabı olumsuz olacaktır. Uluslararası barış ve güvenliğin tehlikede olduğunun tespiti son derece sübjektif/öznel bir değerlendirmenin sonucudur. Bu da, objektif olduğunu iddia eden modern hukuk doktrinin en başından yara alması anlamına gelmektedir.

Uluslararası Hukuk'un içsel çelişkiler ve düzensizlikler üzerine kurulduğunu göstermek için başkaca örnekler de verilebilir. Tez boyunca bu çabanın gösterildiğini söylemekle yetinmek yanlış olmasa gerekir. Bu bağlamda, tezin birinci tespiti şudur: öteki devletlerdeki devlet-dışı silahlı yapıların, grupların ya da aktörlerin başkaca devletler tarafından silahlandırılması da dâhil desteklenmesi olgusu her ne kadar uçsulaştırılmak istense de, aslında sistemin temelinde bulunan bir fenomendir. İkinci tespit ise; modern hukuk doktrinin içsel paradokslar ve çelişiler üzerine bina edilmesi, tezin ana sorunsalı olan 'devletlerin öteki devletlerdeki devlet-dışı silahlı grupları silahlandırılması' olgusuna yönelik, tek ve genel geçer bir hukuksal değerlendirmenin mümkün olamayacağıdır. Argümanın nereden ve nasıl inşa edildiği, bu soruya verilecek cevabın niteliğini derinden etkilemektedir. Uluslararası uyuşmazlıkların tarafları arasındaki güç eşitsizliklerinde ise hukukun güçlüye yaradığı, bu tezin bir başka önemli varsayımıdır. Son olarak, tez boyunca yapılan tüm sistem eleştirileri, hukukun insanlığa kazandırdığı olumlu gelişmeleri gölgelemek amacında değildir. İlerici ve faydacı tüm kazanımlar, eleştiriler saklı kalmak kaydıyla, olumlu karşılanması gereken olgulardır.

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