IN SEARCH OF LOST CRIME: THE INTERNATIONAL COURT OF JUSTICE, NON-STATE ARMED GROUPS, AND STATE RESPONSIBILITY

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ABSTRACT

As the destabilizing activities of non-state armed groups (NSAGs) proliferate, it is becoming increasingly important to find new ways to hold states accountable for their support of these groups. This Note argues that the International Court of Justice (ICJ or the Court) has taken an overly restrictive approach to state responsibility for NSAGs with its "effective control" test, as promulgated in Nicaragua v. United States of America *and* Bosnia and Herzegovina v. Serbia and Montenegro. *Instead of this effective control test, the ICJ should adopt the "overall control" test in situations of armed conflict, as first developed by the International Criminal Tribunal for the Former Yugoslavia in its* Prosecutor v. Duško Tadić *appeal judgment. The difference in approach between the two tests can be explained partially by different perspectives on state responsibility and the structure of the ICJ compared with that of international tribunals. If the ICJ wants to better address the issues NSAGs pose and promote international peace and security, it should change its approach to state responsibility and adopt the overall control test.*

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I. INTRODUCTION

Non-state armed groups (NSAGs), such as irregular militias and terrorist groups, have become increasingly common in global conflicts, not only involving themselves in non-international armed conflict, but also in interstate conflict. This development has been complicated by the presence of "proxy" conflicts, in which NSAGs are sponsored by states or even act on behalf of states, such as the Wagner Group, an NSAG sponsored by Russia, or Hezbollah, sponsored by Iran. The International Court of Justice (ICJ or the Court) has addressed the issue of state responsibility for supporting NSAGs but has ultimately taken a relatively restricted approach in its jurisprudence on the subject, applying an overly stringent test for finding state responsibility for these non-state actors. According to the ICJ's current view, state responsibility for the behavior of these non-state actors must be direct and all-encompassing, which allows states to avoid accountability for supporting problematic groups.

This Note will examine the ICJ's adoption of the "effective control" test and compare it with the "overall control" test, which was first adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[1] Part II of this Note provides the background on the law of state responsibility and the ICJ, as well as the emergence of the problem of NSAGs. Part III describes the ICJ's effective control test as promulgated in the Court's Nicaragua v. United States of America and Bosnia and Herzegovina v. Serbia and Montenegro cases. Part IV introduces the overall control test, which was first laid out by the ICTY in Prosecutor v. Duško Tadić. Part V of the Note proposes possible reasons for the differences in approach between the ICJ and the ICTY (and other tribunals), while Part VI ultimately argues that the Court needs to adopt the overall control test of state responsibility for non-state actors in situations of armed conflict, as the test better responds to the structural and evidentiary issues NSAGs pose and better promotes international peace and security. Part VII concludes.

1. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶¶ 120-23 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter Prosecutor v. Tadić].

II. The Contradiction of State Responsibility and Non-State Armed Groups

This part provides background on the scope of the problem discussed in this Note. Section II.A discusses the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which provides the framework for how the ICJ approaches state responsibility. Section II.B explains the rise of NSAGs and the problems they pose for traditional international law.

A. *The ICJ and State Responsibility*

The ICJ has tended to look to ARSIWA, drafted by the International Law Commission (ILC), for its approach to the law of state responsibility.[2] The law of state responsibility regulates

> rules for the determination of the existence of an internationally wrongful act of the State, including rules on the attribution of non-state actor conduct to a state, on the breach of international obligations, the circumstances in which a State is responsible in connection with the wrongful act of another state, and rules concerning defences,[3]

which include state responsibility for non-state actors.[4]

The ILC initially played a role in "the codification and systemisation of the law of [state] responsibility and the ICJ took a 'supporting' role," leading to a dialogue between the two.[5] The ICJ often took on novel issues that were later codified by the ILC, with the ILC often going further than the ICJ, while on other occasions, the ICJ would give "its *imprimatur* to rules developed by the ILC."[6] At other times, the Court clarified certain rules.[7] However, the Court's practice has not been completely systematic. The Court has occasionally consolidated ILC approaches, although it has also expanded the scope of these rules.[8] Regarding the Court's views on any given ARSIWA rule, it can be

2. *See* G.A. Res. 56/83 (Jan. 28, 2002).

3. Federica Paddeu, *The Law of State Responsibility*, *in* The International Court of Justice 411, 411-12 (Carlos Esposito & Kate Parlett eds., 2023).

4. *See* G.A. Res. 56/83, *supra* note 2, arts. 4-11.

5. Paddeu, *supra* note 3, at 415.

6. *See id.* at 415-16.

7. *See id.* at 416.

8. *See id.* at 418.

said that "each judgment must be taken on its own and its import understood."[9]

On the Court's approach to attributing the conduct of NSAGs to states, the ICJ has rejected a looser overall control standard developed in the ICTY,[10] explored below in Part IV. However, because of the Court's ability to adapt and define rules on state responsibility,[11] it can alter its approach in the future, which, this Note argues, the Court should do by adopting the overall control test in lieu of the current effective control test.

B. *Rise of Non-State Armed Groups*

Neither treaties nor customary international law define the concept of an NSAG, although aspects of international humanitarian law regulate "ANSAs [(armed non-state actors)] according to a certain number of their characteristics."[12] Under different views, NSAGs can be defined in various ways. They "are frequently described as non-state actors that use violence or armed force to reach their goals," while the European Union defines such groups as those that "retain the potential to deploy arms for political, economic and ideological objectives, which in practice are often translated into an open challenge to the authority of the State."[13] Overall, the best way to view NSAGs, while taking into consideration these various definitions, is that they are groups that use armed force as a means to achieve political, economic, or social ends.[14] This definition includes insurgents, militias, private military security companies (PMSCs), and terrorist organizations, among other groups.[15]

This definitional ambiguity symbolizes larger issues related to the opaque nature of NSAGs in international law. Most importantly, because NSAGs are not states, they pose questions on how they should be addressed and regulated under international law, which has traditionally

9. *Id.* at 424-25.

10. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 404 (Feb. 26).

11. *See* Paddeu, *supra* note 3, at 418 ("The rules in ARSIWA are stated in broad and abstract terms so as to ensure the generality of their application. In applying them to specific (and often complex cases), the ICJ has thus contributed to fleshing them out.").

12. Annyssa Bellal, *What Are 'Armed Non-State Actors'? A Legal and Semantic Approach*, *in* INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS 21, 23 (Ezequiel Heffes et al. eds., 2020).

13. *Id.* at 27.

14. *Id.*

15. *Id.* at 28.

been state-centric.[16] Beyond NSAGs, non-state actors (NSAs) have often been ignored in the study and development of international law, and their "legal relevance" has been underemphasized.[17] This issue is even more pronounced in the area of attribution of the conduct of NSAs to states. During the ILC's drafting of the ARSIWA, there was skepticism regarding "the idea that conduct of a non-state actor could be attributed to a state."[18] Rather, there was a presumption that "attribution under international law only concerned conduct contrary to an obligation 'on the part of organs of the State or organs of another entity exercising elements of governmental authority.'"[19]

Moreover, under international law, whether an entity can be bound by an international obligation relies on whether it has an international legal personality as a *subject* of international law (not merely an object).[20] While states are always subjects, it is not always clear if NSAs have such an international legal personality as a subject, rather than an object, of international law.[21] On its own, this issue of the obligations of NSAs under international law is a difficult question, but when states and NSAs begin to interact, it becomes even more challenging to determine the responsibilities of different actors. States are the "principal subjects of international law," and when they work through NSAs, it is unclear whether and when they extend any of their obligations to NSAs.[22]

The proliferation of NSAG involvement in armed conflict over the past several decades has further complicated the issue of NSAGs in international law. In fact, non-international armed conflicts more than doubled between 2001 and 2016, and only one-third of armed conflicts (in 2018) involved just two belligerent parties; rather, the majority of these conflicts involved numerous smaller NSAGs, indicating the increasing challenge of this phenomenon for international law.[23] This rise in conflicts involving NSAGs represents an issue for international law generally, as well as international humanitarian law specifically, because "traditional units of analysis employed by international law

16. *See* Ezequiel Heffes et al., *Introduction: The Functions and Interactions of Non-State Actors in the Realm of International Humanitarian Law, in* INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS 1, 3 (Ezequiel Heffes et al. eds., 2020).

17. *Id.* at 4.

18. *See* RICHARD MACKENZIE-GRAY SCOTT, STATE RESPONSIBILITY FOR NON-STATE ACTORS 15 (2022).

19. *See id.*

20. *See id.* at 23.

21. *See id.*

22. *See id.*

23. *See* FIONA TERRY & BRIAN MCQUINN, THE ROOTS OF RESTRAINT IN WAR 13-14 (2018).

and international relations do not include NSAs."[24] However, with the increasing prominence of NSAs, they are becoming "law-shapers, law-influencers, law-interpreters, law-makers, law-enforcers, or a combination thereof," making an analysis of their role in the international legal system increasingly important.[25]

NSAGs are often supported or sponsored by states. PMSCs usually offer private military services, and states will hire these PMSCs to augment their military capabilities and aid state armed forces.[26] A relatively current example of such a group is the Russian group, Wagner Group, which has been involved in both Syria and Ukraine.[27] At other times, states may support these groups as a part of a strategy of targeting and besting geopolitical rivals.[28] Iran's support of Hezbollah over the past few decades is an example of this strategy.[29] In other circumstances, support is "due to the fact that the supporting State and the leaders (and members) of the armed group share a common discriminatory ideology against another social, political or religious group that is based on a complex interaction of historical, sociological and psychological factors."[30] Additionally, states sometimes support NSAGs in order to protect assets that are located in the territory in which the NSAG operates.[31] The attractiveness of the benefits of these relationships for states is one of the reasons for the proliferation of these situations.

The essential question in state-NSAG cooperation is how close this relationship is and how much direction and control the state has over the NSAG, which informs whether the NSAG's actions can be attributed to the state. In certain cases, "the operations of a N[S]AG within a given state are made possible because state institutions do not act to curb or prevent social groups or diasporas within the state from providing support to N[S]AGs."[32] In other cases, state-NSAG cooperation is "highly institutionalized."[33] Where the state support of such groups lies on this

24. Heffes et al., *supra* note 16, at 4.

25. *Id.* at 7.

26. Martina Gasser & Mareva Malzacher, *Beyond Banning Mercenaries: The Use of Private Military and Security Companies Under IHL*, *in* INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS 47, 56 (Ezequiel Heffes et al. eds., 2020).

27. *Id.*

28. Zeev Maoz, *Rivalry and State Support of Non-State Armed Groups (NAGs), 1946-2001*, 56 INT'L STUD. Q. 720, 720 (2012).

29. *Id.* at 726.

30. NARISSA KASHVI RAMSUNDAR, STATE RESPONSIBILITY FOR SUPPORT OF ARMED GROUPS IN THE COMMISSION OF INTERNATIONAL CRIMES 2 (2020).

31. *See id.*

32. Maoz, *supra* note 28, at 721.

33. *Id.*

spectrum is key to attributing the conduct of these NSAGs to states under international law.

State support of these groups is increasingly important because NSAGs are more frequently becoming the perpetrators of atrocities during armed conflict. Before the first half of the twentieth century, atrocities tended to be perpetrated by state organs.[34] However, in the past few decades, NSAGs have been the main culprits committing these atrocities.[35] Examples of this phenomenon include Bosnian Serb militias following the breakup of Yugoslavia, as discussed later in this Note, Al-Qaeda, and the Revolutionary Armed Forces of Colombia, also known as FARC.[36] As previously mentioned, NSAGs occupy a gap regarding their status under international law and responsibility for internationally wrongful acts. The current favored approach to holding groups accountable is through the "regime of individual criminal responsibility," which fails to hold groups as a whole accountable and also understates the role states often play in these crimes.[37] This limitation in international law falls short of proper deterrence and the broader notion of accountability under international law.[38] Analyzing the issues surrounding state responsibility for the actions of NSAGs and finding the best way to approach these challenges is of the utmost importance for the international community.

III. THE ICJ'S APPROACH TO STATE SUPPORT OF NON-STATE ARMED GROUPS

The ICJ has approached the topic of state support of NSAGs several times, most directly in the *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* judgment from 1986 and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* judgment from 2007.[39] In these cases, the Court fleshed out its approach on state support of NSAGs, an approach that this Note argues is too strict.

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34. *See* RAMSUNDAR, *supra* note 30, at 1.

35. *See id.* at 3

36. WILLIAM CASEBEER, DETERRING NON-STATE ACTORS IN THE NEW MILLENIUM 3 (2002), https://apps.dtic.mil/sti/pdfs/ADA525955.pdf.

37. *See id.*

38. *See id.*

39. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

A. *Nicaragua v. United States of America*

The dispute between the United States and Nicaragua at issue in *Military and Paramilitary Activities in and Against Nicaragua* arose in the early 1980s with the rise of a new "democratic coalition government" in Nicaragua.[40] While initially favorable to this new government, the United States' support soured, and U.S. aid to Nicaragua was suspended in January 1981 before being terminated in April of that year.[41] In September 1981, the United States decided to undertake activities against Nicaragua and eventually supported armed opposition to the Nicaraguan government in the forms of two NSAGs, the Fuerza Democrática Nicaragüense (FDN) and the Alianza Revolucionaria Democrática (ARDE).[42] While this support was initially kept secret, it was later made public that the United States was supporting these *contras* (a blanket term for the armed opposition), with Congress passing legislation to fund these groups in 1983.[43] Nicaragua claimed these groups "caused it considerable material damage and widespread loss of life."[44]

Critical in this case was Nicaragua's claim that "the United States Government [was] effectively in control of the *contras*, that it devised their strategy and directed their tactics, and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua."[45] Nicaragua furthermore claimed that certain paramilitary or military operations were committed "against it, not by the *contras*, . . . but by persons in the pay of the United States Government, and under the direct command of United States personnel, who also participated to some extent in the operations."[46] This involvement of personnel paid and directly commanded by the United States, Nicaragua alleged, was a violation of the obligation to "refrain from the threat or use of force" pursuant to Article 2, paragraph 4 of the United Nations Charter, as well as customary international law.[47] Nicaragua argued that these actions were, in fact, an "intervention in the internal affairs of Nicaragua," and thus a violation of the state's sovereignty and customary international law.[48] Nicaragua also claimed this "intervention" defeated the purpose of the Treaty of

40. Nicar. v. U.S., 1986 I.C.J. ¶¶ 18-19.
41. *Id.* ¶ 19.
42. *Id.* ¶¶ 19-20.
43. *See id.* ¶ 20.
44. *Id.*
45. *Id.*
46. *Id.* ¶ 21.
47. *Id.* ¶ 23.
48. *Id.*

Friendship, Commerce, and Navigation between the two countries and breached its provisions.[49]

The United States did not appear at the hearings during the merits phase.[50] However, the United States did "make clear in its Counter-Memorial . . . to be acting in reliance on the inherent right of self-defense 'guaranteed . . . by Article 51 of the Charter' of the United Nations, that is to say the right of collective self-defense."[51] The United States claimed to be responding to requests from Honduras, El Salvador, and Costa Rica, in accordance with the Inter-American Treaty of Reciprocal Assistance, to act in collective self-defense against aggression by Nicaragua, which, the United States alleged, had been giving support to armed opposition in El Salvador and had "conducted cross-border military attacks on its neighbors, Honduras and Costa Rica."[52]

As to the question of the United States' support of the *contra* forces, the Court found the presented evidence "insufficient . . . 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."[53] Although the United States financed, organized, trained, supplied, and equipped the *contras* and had some level of general control over the group, there was not enough evidence to indicate that the United States explicitly "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."[54] In order to attribute to the United States the acts of the *contras*, the evidence would have to prove that the United States had "effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[55]

B. *Bosnia and Herzegovina v. Serbia and Montenegro*

The issue in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* arose out of the wars following the breakup of the Socialist

49. *Id.*

50. *See United States Decides Not to Participate in World Court Case Initiated by Nicaragua*, 22 UN CHRON. 8, 8 (1985) (explaining that the United States declined to participate in the proceedings of the *Nicaragua* case because the United States believed the case was a "misuse of the Court for political purposes" and that the Court lacked jurisdiction and competence to hear the case).

51. Nicar. v. U.S., 1986 I.C.J. ¶ 24.

52. *See id.* ¶¶ 126, 128.

53. *Id.* ¶ 115.

54. *Id.*

55. *Id.*

Federal Republic of Yugoslavia (SFRY).[56] In 1991, Bosnia and Herzegovina declared independence from the SFRY, which was contested by the Serbian community in the country.[57] This Bosnian Serb community then "proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina," and established the Republika Srpska, the state for Bosnian Serbs (although it was not recognized internationally).[58] In 1992, a referendum was held, and Bosnia and Herzegovina officially declared its independence, which was quickly recognized by much of the international community.[59]

Following this declaration, non-Bosnian members of the Yugoslav Peoples' Army (JNA), formerly of the SFRY, withdrew from Bosnia.[60] Those of Bosnian Serb origin were formed into or joined the army of the Republika Srpska (VRS).[61] A civil war subsequently erupted between Serbians, Bosnians, and Croatians in Bosnia, in which Serbia (which, following the breakup of the SFRY, had become the dominant entity in the Federal Republic of Yugoslavia (FRY)) and Croatia intervened at various stages to support the co-ethnic forces in the conflict.[62] As the war progressed, Bosnian Serb leadership pushed not only for victory, but an ethnically homogenous state to rule, leading to ethnic cleansing of non-Serbian groups and questions of genocide.[63] The FRY supplied assistance to Bosnian Serb militants "in the form of finance, military equipment and other supplies."[64] The conflict ended in 1995.[65]

On the question of whether a genocide occurred in Bosnia, the Court found that the acts occurring in the town of Srebrenica, in which 7,000 Bosnian Muslims were rounded up and killed,[66] "were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina" and were thus acts of genocide.[67] Bosnia and Herzegovina claimed that the FRY bore some legal responsibility for

56. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

57. *Id.* ¶ 233.

58. *Id.*

59. *Id.* ¶ 234.

60. *Id.* ¶ 238.

61. *Id.*

62. *See* David Turns, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: Bosnia and Herzegovina v. Serbia and Montenegro*, 8 MELB. J. INT'L L. 398, 399 (2007).

63. *See id.* at 400.

64. *See id.* at 401.

65. *Id.*

66. Bosn. & Herz. v. Serb. & Montenegro, Judgment, 2007 I.C.J. ¶ 278.

67. *Id.* ¶ 297.

this genocide in Bosnian territory and that acts by Bosnian Serb forces should be attributed to the FRY.[68] The Court disagreed.[69]

The Court set out a test for attributing these acts to the FRY. The test first focused on "ascertaining whether the acts were committed by persons or organs whose conduct is attributable … to the Respondent."[70] Second, the Court needed to "ascertain whether acts of the kind referred to in Article III of the [Genocide] Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility."[71] However, this second test only dealt with Serbia's direct responsibility for complicity in genocide and did not implicate questions of attributing responsibility for Bosnian Serb actions to Serbia, making the second test not relevant to the topic of this Note.[72]

As to the first test, the Court looked to Article 4 of ARSIWA, which states,

> 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.[73]

The Court noted that "it has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres."[74] While there was evidence of both direct and indirect participation of the FRY army in military operations with the Bosnian Serb forces previously, no

68. Turns, *supra* note 62, at 402.

69. Bosn. & Herz. v. Serb. & Montenegro, Judgment, 2007 I.C.J. ¶ 415.

70. *Id.* ¶ 379.

71. *Id.*

72. *See id.* ¶ 423. As to the second question, the Court found that the evidence could not conclusively show that the FRY was aware of the VRS's intent to eliminate the adult male Bosnian Muslim population in Srebrenica when it occurred, and as such not responsible for genocide via complicity.

73. *Id.* ¶ 385.

74. *Id.* ¶ 386.

such evidence existed at Srebrenica.[75] Additionally, "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."[76] While Bosnia and Herzegovina claimed that officers of the VRS remained "under FRY military administration" and on their payroll, and as such were de jure organs of the FRY, the Court disagreed, stating that there was no evidence of a de jure relationship between the VRS and the FRY, and the officers of the VRS did not act on behalf of the FRY, but rather acted on behalf of the Republika Srpska.[77]

Bosnia and Herzegovina made the secondary claim that the Republika Srpska, the VRS, and other Bosnian Serb paramilitary groups that participated in the Srebrenica massacre were "*de facto* organs" of the FRY.[78] The Court found otherwise.[79] Referring to its *Nicaragua* judgment, the Court indicated that "persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs . . . provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are merely an instrument," which could mean looking beyond a person or group's legal status.[80] However, when these groups do not have this legal status under international law, attributing their actions to that state requires exceptional proof.[81] In this case, the Court found that the VRS and the Republika Srpska could not be "regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy."[82] Therefore, the "complete dependence" necessary was lacking in this case. The Court found that "the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it"—and therefore not *de facto* organs of the state—"and thus do not on this basis entail the Respondent's international responsibility."[83]

For the final part of its analysis of the first question, the Court considered whether the massacre was perpetrated under instruction or direction of the FRY and could therefore be attributed to the FRY on this basis.[84] Here, the Court applied a different test, but again looked at

75. *Id.*
76. *Id.*
77. *Id.* ¶¶ 387-88.
78. *Id.* ¶ 390.
79. *Id.* ¶ 394.
80. *Id.* ¶¶ 391-92.
81. *Id.* ¶ 393.
82. *Id.* ¶ 394.
83. *Id.* ¶ 395.
84. *Id.* ¶ 397.

ARSIWA. In this case, it looked at Article 8, which states, "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[85]

The important aspect of this test is whether effective control of the group was exercised by the state in question or the "State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by persons or groups of persons having committed the violations."[86] This is essentially the same test from the *Nicaragua* judgment.[87] The Court noted that previous investigations and reports on the Srebrenica massacre indicated that "there [was] no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency," despite these entities being aware of the intended attack on Srebrenica.[88] Furthermore, "everything point[ed] to a central decision by the General Staff of the VRS."[89] Other reports also did not "establish a factual basis for finding the Respondent responsible on a basis of direction or control."[90] In conclusion, the Court could not find that the genocide at Srebrenica was attributable to the FRY "under the rules of international law and State responsibility."[91]

Overall, the Court's judgment establishes its key principles for state responsibility for the actions of NSAGs: if a group is legally an organ of a state, then its actions can be attributed to that state—although this will almost never, by definition, be the case for NSAGs. If the NSAG is not legally an organ of the state, its actions can still be attributed to the state if it was in "complete dependence" on the state and therefore a de facto organ of the state. If neither of these is true, actions of an NSAG can still be attributed to a state if the state is in effective control of the NSAG and directs and instructs said group, an extension of principles first expounded in *Nicaragua*. This last and least strict of the ICJ's tests for state responsibility for the actions of NSAGs, the effective control test, will be the focus of the rest of this Note.

85. *Id.* ¶ 398.
86. *Id.* ¶ 400.
87. *Id.*
88. *Id.* ¶ 411.
89. *Id.*
90. *Id.* ¶ 412.
91. *Id.* ¶ 415.

IV. THE *TADIĆ* OVERALL CONTROL TEST

Several international courts and tribunals have taken a slightly different approach to this same question, applying a looser overall control standard for the attribution of the acts of NSAGs to states.

The International Criminal Tribunal for the former Yugoslavia (ICTY) first developed this overall control standard, which arose in *Prosecutor v. Duško Tadić* in 1996.[92] In the case, the individual in question, Tadić, had been charged with war crimes that can only apply "as a matter of law in international armed conflicts."[93] The ICTY stated that it was unpersuaded by the ICJ's effective control test as articulated in *Nicaragua* and decided to advocate for a less stringent test.[94]

The ICTY found the effective control test "unconvincing" because "it ran contrary to the 'very logic of the entire system of international law on State responsibility.'"[95] First, the ICTY felt that a high attribution threshold when an NSA acts on the behalf of a state was not required in every instance.[96] Second, the effective control test was limited to a small number of situations in which specific instructions had been given by a state to an NSA, which does not encompass all scenarios of this proxy behavior.[97] Third, this test did not account for the myriad of other scenarios in which an NSAG acted on behalf of a state.[98] Fourth, there needed to be distinctions between individuals acting on behalf of a state and hierarchical groups acting on behalf of a state, and the ICTY indicated that, for individuals, specific requests and control would be necessary for attributing an individual's actions to a state.[99] For the actions of hierarchical groups, this would not be an appropriate indicator for state attribution, as the structure of these groups leads to a conformity to the overall standards of the group, better reflected by an overall control standard.[100] Fifth, the ICTY found effective control to be unrealistic and ineffective, as it undermined the idea that state responsibility was "based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some

92. *See* SCOTT, *supra* note 18, at 78-79.

93. Shane Darcy, *Assistance, Direction, and Control: Untangling International Judicial Opinion on Individual and State Responsibility for War Crimes by Non-State Actors,* 96 INT'L REV. RED CROSS 243, 260 (2014).

94. *Id.*

95. SCOTT, *supra* note 18, at 79.

96. *See id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *See id.* at 79. *See also* Prosecutor v. Tadić, *supra* note 1, ¶ 120.

functions to individuals or groups" are held accountable for their actions.[101] Finally, the ICTY believed that international law should be able to "hold any state responsible for acts in breach of its international obligations – whether through actors that have a de jure or de facto connection to a state" and should do so irrespective of whether the state specifically instructed an actor, as states might hide behind this formalism.[102]

The ICTY also rejected the test because it was an invention of the ICJ and not necessarily suited for attributing conduct of NSAGs to states.[103] This attribution should rely instead on whether the "State wields overall control over the group."[104] In this area, the level of state control will always fluctuate.[105] The test was explained as follows,

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[106]

It should be of note that this approach is specifically focused on "when a non-international armed conflict might become 'internationalized' through the provision of aid or assistance by an outside State to a non-State armed party to the conflict."[107] This tends to be the case for state support of NSAGs, but this test may not be applicable in other situations.

The overall control test remained as the approach at the ICTY and provided precedent for several other international courts and tribunals. The International Criminal Court (ICC) utilized the test, as seen in the *Prosecutor v. Lubanga Dyilo* judgment in 2007. The Trial Chamber in *Lubanga* held that the overall control test was the "correct approach" in situations in which "a non-international conflict has become

101. SCOTT, *supra* note 18, at 79.
102. *Id.*
103. *See id.*
104. *See id.* at 79-80.
105. *See id.*
106. Prosecutor v. Tadić, *supra* note 1, ¶ 131.
107. Darcy, *supra* note 93, at 260.

internationalized."[108] The ICC extended its use of the overall control test in the *Prosecutor v. Katanga* and *Prosecutor v. Ntaganda* cases.[109] In *Ilaşcu and Others v. Moldova and Russia*, the European Court of Human Rights adopted the overall control test and applied it to a separatist NSAG supported by Russia in Transnistria, stating it was not necessary for the state to have "actually excersis[ed] detailed control over the policies and actions of the authorities [of the regime controlling Transnistria]."[110] The Special Court for Sierra Leone applied the overall control test in *Prosecutor v. Sesay et al.* in 2009 when deciding on whether to classify the armed conflict in Sierra Leone as international or non-international.[111]

Different international bodies have also adopted the overall control test. The test was applied by several bodies of the U.N., including the Working Group on Arbitrary Detention when attributing the actions of the South Lebanon Army to Israel in 1999,[112] and the U.N. Secretary-General when reporting on attributing acts of NSAGs during the war in Darfur in 2005.[113] Furthermore, the International Committee of the Red Cross, in its 2020 Commentary on Article III of the Third Geneva Convention, stated,

> In order to classify a situation under humanitarian law involving a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third state, including for the purpose of attribution. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency.[114]

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108. *Id.* at 261.

109. Rogier Bartels, *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*, 20 INT'L CRIM. L. REV. 595, 627, 633 (2020).

110. Ilaşcu v. Moldova & Russia, App. No. 48787/99, ¶¶ 315-16 (July 8, 2004), https://hudoc.echr.coe.int/fre?i=001-61886.

111. *See* Bartels, *supra* note 109, at 615.

112. *See* Working Grp. on Arbitrary Detention, Comm'n on Hum. Rts., *Civil and Political Rights, Including Questions of: Torture and Detention*, ¶¶ 14-18, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999), https://docs.un.org/en/E/CN.4/2000/4.

113. U.N. Secretary-General, Letter dated 31 Jan. 2005 from the Secretary-General addressed to the President of the Security Council, ¶¶ 121-23, U.N. Doc. S/2005/60 (Feb. 1, 2005), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf.

114. *Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12, August 1949: Commentary of 2020, Article 3 – Conflicts Not of an International Character*, INT'L COMM. OF THE RED CROSS ¶ 443, https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020?activeTab=undefined (last visited Nov. 24, 2023).

This overall control test, therefore, is gaining acceptance in different spheres of international law, from courts to tribunals to U.N. bodies, and is offering an alternative to the ICJ's approach to state responsibility for NSAGs.

V. The Reasons for the Difference

What is the reason for this difference in approach towards state responsibility for NSAGs? While the previous part explained the ICTY's reasoning for rejecting the ICJ's effective control test, the ICJ's response to the overall control test as developed by the ICTY is helpful to understand the difference in approaches.

The ICJ directly addressed the ICTY's test in the previously mentioned *Bosnian Genocide* case, stating it found the test "unpersuasive."[115] The Court noted in its opinion that an important flaw of the test was the effect of "broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf."[116] Aside from being held accountable for its own conduct or a person acting on its behalf, a state can only be held responsible for acts committed by groups when an "organ of the state gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed."[117] The overall control test, in this instance, was not the proper approach, as it broadened the scope of state responsibility too far.[118] Notably, in the 2005 judgment of *Armed Activities on the Territory of the Congo*, adjudicated after the *Tadić* rule was promulgated and two years before the *Bosnian Genocide* case was decided, the Court applied the effective control test without specifically mentioning *Tadić*.[119] While not the only argument against expanding state responsibility via the overall control test,[120] this difference in

115. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 404 (Feb. 26).

116. *Id.* ¶ 406.

117. *Id.*

118. *See id.*

119. Darcy, *supra* note 93, at 261.

120. It should be of note that the ICJ and a number of scholars have argued that the ICTY "had no mandate to rule on questions of state responsibility" and develop international law more generally. This view is not relevant for this Note's argument as I am arguing for the ICJ to adopt the overall control test whether the ICTY had jurisdiction or not to rule on the question of state responsibility in the first place. *See* Scott, *supra* note 18, at 80. *See also* Darcy, *supra* note 93, at 262.

perspective on what should be the scope of state responsibility for the actions of NSAGs is the main schism between the ICJ's jurisprudence and that of other international courts and tribunals.

Furthermore, in many ways, the ICJ is limited by its institutional design within the U.N. and its dependence on the support and involvement of states.[121] The Court "must interact with various U.N. organs as part of its institutional design," and other organs play "an important role in selecting judges, providing funding, bringing requests for advisory opinions and . . . enforcing decisions."[122] In this way, the Court needs to maintain good relations with the other organs of the U.N. and may be hesitant to adopt legal theories that could be unpopular or controversial with other U.N. organs. Furthermore, as the U.N. Security Council takes the lead in international security, with the "role of ensuring the pacific settlement of disputes,"[123] the Court may want to take a slightly more conservative approach in the realm of international peace and security in order to allow the Security Council to take the initiative in this area. Similarly, the Court relies upon states to bring it cases and follow its decisions.[124] By developing a doctrine such as the overall control test that holds states more accountable for actions they do not directly perpetrate, the Court may risk a backlash from states, who would prefer the Court not develop such a state-oriented doctrine for internationally illegal acts, and from which the Court relies to bring cases and establish its legitimacy. A deterioration in the relationship between states and the ICJ would undermine the Court, as states might decrease their involvement with the Court.

In contrast, international criminal tribunals such as the ICTY have a more limited mandate. These ad hoc tribunals are temporary, which may give them more room to experiment compared with permanent courts, as they have less of a need to adopt a "long-term view" or "embed themselves in existing legal frameworks."[125] In addition to this temporary nature, ad hoc tribunals have a limited jurisdiction covering only certain events and crimes involving certain states and parties.[126] This limited

121. *See* Tom Ginsburg, *The Institutional Context of the International Court of Justice*, *in* THE CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 13, 99 (Carlos Esposito & Kate Parlett eds., 2023).

122. *Id.* at 87, 95.

123. *Id.* at 96.

124. *Id.* at 93.

125. Philippa Webb, *The ICJ and Other Courts and Tribunals: Integration and Fragmentation*, *in* THE CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 208, 216 (Carlos Esposito & Kate Parlett eds., 2023).

126. *See, e.g.*, S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia).

jurisdiction requires less involvement from the international community and does not have the same restrictions regarding maintaining state cooperation that permanent courts have. Therefore, ad hoc tribunals may have more freedom to develop and apply the law as they see fit, with less restraint due to less backlash from states. In a certain way, this may be a positive, as judges can interpret the law as they feel it *should* be correctly interpreted, with less outside pressure. However, maintaining state cooperation is of the utmost importance for permanent international courts like the ICJ, making a pragmatic approach not only preferable, but perhaps necessary for the Court.

VI. A Shift, An Opportunity

The ICJ should adopt the overall control test promulgated by the ICTY for its future approach to dealing with NSAGs if it desires to better deter violence from NSAs. On an international stage that is increasingly threatened by NSAGs, such as the Rapid Support Forces in Sudan[127]—and the states that use them as proxies—the ICJ must adapt its approach to state responsibility in this area. Because of the Court's ability to adapt and define rules on state responsibility pronounced in ARSIWA, as explained in Section II.A, it can again do so in the future.

Before considering policy justifications for shifting to the overall control test, pragmatic concerns provide reasons for this shift. As the Appeals Chamber in *Tadić* noted, the underlying logic concerning the law on attribution to states of acts performed by third parties, as seen in ARSIWA, focuses on private *individuals*, not *groups*.[128] For an individual committing specific illegal acts, it would be necessary to show that a state "issued specific instructions concerning the commission of the breach in order to prove . . . that the individual acted as a *de facto* State agent."[129] "Generic authority over the individual" would not be enough to attribute the individual's acts to a state.[130] Individuals have more room to act on their own than groups and have more discretion under generalized control of a state, making it necessary to only hold states accountable for their actions when they exercise strict control.[131]

127. The Rapid Support Forces (RSF) is a paramilitary group in Sudan that sparked the current Sudanese civil war by attacking Sudanese military bases across the country. The group has been accused of mass atrocities, including ethnically-targeted killings. *See, e.g.*, *Who is Fighting in Sudan?*, Reuters (Apr. 15, 2024), https://www.reuters.com/world/africa/who-are-sudans-rapid-support-forces-2023-04-13/.

128. *See* Prosecutor v. Tadić, *supra* note 1, ¶ 117.

129. *Id.* ¶ 118.

130. *Id.*

131. *See id.* ¶¶ 118-20.

Organized groups, such as NSAGs, need to be approached differently due to their nature and structure. These groups have "a structure, or a chain of command and a set of rules as well as the outward symbols of authority."[132] Members of these groups lack the discretion of private individuals, as they usually "conform to the standards prevailing in the group and [are] subject to the authority of the head of the group."[133] This type of group, with different chains of command and divisions, has to be controlled through overall control; direct instructions from a state to every commander, to every division, and to every individual member is not possible. In this way, these NSAGs are like state organs, who are also under the overall control of a state.[134] Under Article 10 of the Draft on State Responsibility (as provisionally adopted at the time[135]), "a State is internationally accountable for *ultra vires* acts or transactions of its organs."[136] This builds on the assumption undergirding the international law of state responsibility, which is that the law is "based on a realistic accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individual or groups of individuals must answer for their actions, even when they act contrary to their directives."[137] NSAGs could be treated in a similar way as state organs,[138] as this treatment would provide the "realistic accountability" that ARSIWA addresses.

Furthermore, and relatedly, evidentiary concerns present a challenge for the effective control standard for NSAGs. As mentioned, these groups are hierarchically organized with different chains of command and are composed of individuals that conform to the actions of the group. If a state is supporting an NSAG, it would likely keep its contacts hidden and vague to avoid accountability, especially if there is a risk of that group carrying out

132. *Id.* ¶ 120.

133. *Id.*

134. *Id.* ¶ 121.

135. At the time of the judgment referenced here, this language was found in Article 10 of ARSIWA as provisionally adopted by the International Law Commission Drafting Committee. This language has since moved to Article 7 in ARSIWA's adopted form. *See id.* n. 139. *See also* G.A. Res. 56/83, *supra* note 2, art. 7.

136. Prosecutor v. Tadić, *supra* note 1, ¶ 121.

137. *Id.*

138. Taking this viewpoint would not necessarily mean eschewing the complete dependence test for de facto state organs used in the *Bosnian Genocide* case for the overall control standard. Rather, it is helpful to view the structure of NSAGs supported by states as similar to state organs in regard to understanding the logic of the law of state responsibility. This does not necessarily mean NSAGs are automatically de facto state organs (although, in certain circumstances, they could be de facto state organs).

illegal acts.[139] It would be especially difficult in this context to prove that a group acted on a state's specific and direct instructions. By shifting to an overall control test, it would be easier to procure evidence in cases revolving around state support of NSAGs, because all that would need to be proven would be proof of linkages between the two actors showing general support and guidance from the state from which one could infer the responsibility of the state in these situations.[140]

But why *should* states be held accountable for the actions of the NSAGs? Why do these problems of group structure and evidence matter for broader accountability in international law? This is where questions of policy regarding international peace and security must be addressed.

Some ICJ judges have shown support for the overall control test. In his dissent in *Bosnian Genocide*, Court Vice-President Judge Al-Khasawneh voiced support for the overall control test and expressed concerns regarding the effective control test, stating that requiring control over both the specific operations of NSAs in the context of international crimes and the NSAs themselves was "too high a threshold."[141] The danger in this approach, according to Judge Al-Khasawneh, lays in the fact that it "gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore."[142] Judge ad hoc Mahiou, also dissenting in *Bosnian Genocide*, indicated that the overall control test should have been applied, because the FRY's general support incited the Republika Srpska, allowing the NSAG to continue its policy of ethnic cleansing.[143]

This legalistic cover for states is exactly the danger of the ICJ's approach; in many ways, a state does not need effective control to incite an NSAG to commit international crimes in the context of armed conflict. By providing a baseline of material support and helping with coordination of actions and strategy, states can help protect NSAGs and embolden them to commit acts illegal under international law and international humanitarian law. Because the ICJ applies a strict, formalistic effective control test, states can feel protected by remaining in the

139. *See* Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 666 (2007).

140. *See id.*

141. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 241, ¶ 39 (Feb. 26) (Al-Khasawneh, J., dissenting).

142. *Id.*

143. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 381, ¶ 117 (Feb. 26) (Mahiou, J., dissenting).

shadows and tacitly supporting NSAGs, allowing them to continue this practice without accountability.

Several influential and problematic state-NSAG relationships exist today on the international stage, which demonstrates the need for the ICJ to shift to a looser approach to state responsibility for NSAGs to better address this ambiguity in international law. Iran supports a host of proxy groups across the Middle East, most notably Hezbollah in Lebanon, a group with significant strength that has engaged in numerous armed conflicts, thus playing a destabilizing role in the Middle East.[144] In 2014, Russia sent "little green men" into Ukraine, which Russia initially denied, characterizing these troops as local "self-defense units," whose actions it had simply supported.[145] This seemed to be a sleight of hand to take advantage of the ambiguity of international law on state responsibility for these groups, as there is room for states to support NSAGs without being held accountable for the actions of these groups.[146] Russia has also used private groups, most notably the Wagner Group, to carry out operations around the globe to further its interests.[147] If states are able to use NSAGs to pursue their interests without facing any accountability due to the ambiguity of NSAGs in international law and the strictness of the effective control test, there will be no disincentive for using proxy groups to destabilize other states.

Developing the law on state responsibility for the actions of NSAGs would help the ICJ discourage this kind of state support and fulfill one of the Court's core functions: "the promotion of peace and security."[148] In the past, the Court has mentioned its desire to "lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security."[149] By adopting a looser standard for state responsibility for NSAGs, the Court can help maintain international peace and security by providing

144. *See* CHRISTOPHER C. HARMON, WARFARE IN PEACETIME: PROXIES AND STATE POWERS 204-06 (2023).

145. *See* Carl Schreck, *From 'Not Us' To 'Why Hide It?': How Russia Denied Its Crimea Invasion, Then Admitted It*, RADIO FREE EUR./RADIO LIBERTY (Feb. 26, 2019), https://www.rferl.org/a/from-not-us-to-why-hide-it-how-russia-denied-its-crimea-invasion-then-admitted-it/29791806.html.

146. Russia would later take responsibility for these groups after Russia had officially annexed Crimea. *See id.*

147. Kimberly Marten, *Russia's Use of Semi-State Security Forces: The Case of the Wagner Group*, 35 POST-SOVIET AFFS. 181, 182 (2019).

148. James Crawford et al., *Functions of the International Court of Justice*, *in* THE INTERNATIONAL COURT OF JUSTICE 13, 39 (Carlos Esposito & Kate Parlett eds., 2023).

149. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 161 (July 9).

deterrence for state support of these armed groups, as states will be wary of possible legal ramifications for their support. While there is an issue of lack of enforcement in international law generally,[150] which is a common criticism of international law, ICJ decisions have had an impact in developing international law in a way that influences state practice, as states "generally believe that decisions of the Court reflect rules of international law, and therefore act consistently with them."[151] By holding states more accountable for their support of NSAGs, the Court can address some of the enforcement issues in international law by creating a norm that, hopefully, states will incorporate into their practice and essentially self-regulate. The development of such an expectation of self-regulation for states will help maintain international peace and security.

There is flexibility in the ICJ's approach that allows for such an expansion of the doctrine of state responsibility because the Court, as mentioned in Section II.A, has the authority to develop, change, and codify rules of state responsibility as it sees fit.[152] The Court's issue with the overall control test was not necessarily with its application to armed conflict, but rather with the possibility of its broader application to the area of state responsibility in international law.[153] Why not allow for separate tests in these situations, especially considering the threat of armed conflict? It seems acceptable to limit the application of the overall control test to situations in which armed conflict occurs and in which questions of international humanitarian law and obligations incurred under it must be addressed.[154] In situations outside of armed conflict, the ICJ could maintain the effective control test. Given the severity of the concern of addressing armed conflict and the evidentiary and structural issues of demonstrating direct instructions between NSAGs and states in these situations, it makes sense to extend the overall control test for state responsibility only in situations of armed conflict. By taking such an approach, the ICJ can better deter both NSAGs and the

150. *See* Crawford et al., *supra* note 148, at 42.

151. *See* Dire Tladi, *The Role of the International Court of Justice in the Development of International Law*, *in* THE INTERNATIONAL COURT OF JUSTICE 68, 82 (Carlos Esposito & Kate Parlett eds., 2023) (explaining how the Court's judgements and rules in *Arrest Warrant* and *Barcelona Traction* were not based on existing rules but have been adopted by states nonetheless because of the Court's esteem and the authority of its decisions).

152. *See id.* at 68-69 (noting that one of the roles of the ICJ, as the "pre-eminent international court in the international legal system," is to develop rules of international law).

153. Darcy, *supra* note 93, at 262.

154. SCOTT, *supra* note 18, at 81.

states that support such groups without upsetting broader rules on state responsibility.

VII. Conclusion

This Note has argued that the ICJ's effective control test for state responsibility for NSAGs has been overly strict and formalistic, and, as such, the Court should shift its approach. Part II of the Note outlined the ICJ's ability to adapt rules on state responsibility and highlighted the problems NSAGs pose for international law. Part III defined the ICJ's current approach as demonstrated by the *Nicaragua v. United States of America* and *Bosnia and Herzegovina v. Serbia and Montenegro* cases. Part IV explained the proposed alternative approach to state responsibility to NSAGs, the overall control test, first seen in the ICTY's *Prosecutor v. Duško Tadić* appeal judgment. Part V explored possible reasons that explain why the ICJ has taken a more restrictive approach to state responsibility for NSAGs, while Part VI ultimately argued that the ICJ would better address the problem of state sponsorship of NSAGs by adopting the overall control test in situations in which armed conflict occurs and questions of international humanitarian law must be addressed.

In changing its approach to state responsibility for NSAGs, the Court will not only apply a test that is better suited to address NSAGs and their structure, but also, and perhaps more importantly, be able to better deter future international criminal activity from NSAGs and states in times of armed conflict, thus strengthening international security. In an era in which the provocateurs of armed conflict are increasingly NSAGs, not states, it has never been more important for the ICJ to modernize its approach to state responsibility. In doing so, the Court can help calm tensions in an increasingly polarized international order.