

# *Bringing occupation into the 21st Century : the effective implementation of occupation by proxy*

Article

Published Version

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(2017) Bringing occupation into the 21st Century : the effective implementation of occupation by proxy. *Utrecht Law Review*, 13 (1). pp. 60-81. ISSN 1871-515X doi: 10.18352/ulr.355  
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Identification Number/DOI: 10.18352/ulr.355 <<https://doi.org/10.18352/ulr.355>>

Publisher: Utrecht University School of Law

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## Bringing Occupation into the 21<sup>st</sup> Century: The effective implementation of occupation by proxy

Alexander Gilder\*

### 1. Introduction

*The well-being of an individual is the ultimate object of all law.<sup>1</sup>*  
Sir Hersch Lauterpacht QC

The application of the law of belligerent occupation under international humanitarian law (IHL) has been defined narrowly which significantly hampers its effectiveness in conflicts. However, it has evolved over the last 140 years showing the capacity for this body of law to adapt to new challenges. To be discussed in this article is the evolution of the law of belligerent occupation following *Tadić* to include occupations by proxy.<sup>2</sup> Such occupations are where a state can be an Occupying Power, invoking the law of occupation, when it has overall control of forces/local authorities which have effective control over territory of another state.<sup>3</sup> It is claimed by Benvenisti that, 'The law of occupation maintained its viability because its basic principles proved flexible enough to adapt to the changing circumstances and the evolving norms of general international law.'<sup>4</sup> This statement, until recently, was true but now entering the age of hybrid wars the protection of populations is endangered without the full recognition and implementation of occupation by proxy.<sup>5</sup> The discourse on occupation has been polarised by the Occupied Palestinian Territories (OPTs) and proxy wars present IHL with new challenges due to the blending of non-state actors and states and will test Benvenisti's claim about the law of occupation. Current proxy wars include conflicts in Ukraine, Yemen, Libya, and Syria. In general, IHL is 'not grounded on formalistic postulates. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from the standards to the maximum extent possible.'<sup>6</sup> To keep the law of occupation as effective in the 21<sup>st</sup> century the international community must be flexible in its application to recognise proxy occupations.

The key question which must be answered is whether or not occupation by proxy could be effectively implemented if attempts were made to advance the concept by the international community. The definition

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1 L. Oppenheim & H. Lauterpacht (ed.), *International Law: A Treatise* (1952), Vol. II, p. vi.

2 *Prosecutor v. Tadić*, [1997] Case No. IT-94-1-T, Trial Judgment (Int'l Crim. Tribunal for the former Yugoslavia), para. 584.

3 T. Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law', (2012) 94 *International Review of the Red Cross*, no. 885 pp. 133-163, 158.

4 E. Benvenisti, 'Occupation, Belligerent', in *Max Planck Encyclopaedia of Public International Law* [MPEPIL] (online ed.), para. 32.

5 Human Security Study Group, 'From Hybrid Peace to Human Security: Rethinking EU Strategy towards Conflict' (24 February 2016), <[http://www.feslondon.org.uk/cms/files/fes/img/publications/FES\\_LSE%20Berlin%20Report%20-%20From%20Hybrid%20Peace%20to%20Human%20Security.pdf](http://www.feslondon.org.uk/cms/files/fes/img/publications/FES_LSE%20Berlin%20Report%20-%20From%20Hybrid%20Peace%20to%20Human%20Security.pdf)> (last visited 19 January 2017), p. 4.

6 *Tadić* Trial Chamber, *supra* note 2, para. 96.

of occupation and current treaty law is inadequate and the non-recognition of occupations by proxy creates a gap in protection for civilians. States may deny their obligations as Occupying Powers because the international community is largely unwilling to recognise a law of occupation by proxy or an overall or effective control relationship with a third party cannot be easily established.

This article explains the emergence of occupation by proxy in multiple parts. Section 2 will include an internal critical evaluation of why regulation of occupation by proxy is necessary followed by an outline of the existence of a law of occupation by proxy through case law and discussion on the application of the overall and effective control tests. Section 3 is an examination of the situation in Ukraine to show whether the tests of overall control of the non-state actors operating in Ukraine and effective control of territory have been met. Drawing lessons from Ukraine, Section 4 confronts the wider complications of implementing occupation by proxy and analyses the level of obligations applicable, the role of the UN Security Council (UNSC), the international community drive for occupation by proxy and, lastly, state responsibility.

Naturally, this article has its basis in IHL. This is because an occupation is factual and the law of belligerent occupation applies no matter the result of a *jus ad bellum* analysis.<sup>7</sup> Furthermore, issues relating to the application of national laws in an occupied territory and its feasibility under a proxy occupation will not be assessed, instead the article will rest solely on public international law. Lastly, there are many factual anomalies relating to the current situation in Eastern Ukraine where even the most capable of international organisations face challenges when determining the situation on the ground. Consequently, Section three's factual evaluation of the applicability of the law of occupation is significantly impeded and rests on open source information from news media and UN institutions.

## 2. A law of occupation by proxy?

This section will demonstrate why regulation of occupation by proxy is a necessary adjunct to the law of belligerent occupation on the grounds of IHL's purpose, the greater obligations of an Occupying Power, and human rights law applicability. It will prove that occupation by proxy exists within the law, to be illustrated by case law development. Finally, it will cover the specific characteristics of occupation by proxy, especially surrounding effective and overall control, and civilians falling into the hands of the enemy.

### 2.1. Why is the legal regulation of occupation by proxy necessary?

There are criteria which necessitate the employment of the law of belligerent occupation. Where such criteria indicate the need to employ the law but there are non-state actors in control of territory rather than a High Contracting Party of Geneva Convention IV (GC IV) there is a gap in the legal protections afforded to protected persons. Roberts, in a seminal piece on occupation, outlined that there are four indicators for necessitating the use of the law of occupation: (1) there is a non-sanctioned military force in a territory or if that force is present by agreement, it has exceeded the conditions agreed to; (2) the military force has instituted its own authority to the exclusion of the ordinary public order and government; (3) there are differences in nationality and interests of the local population and the military force; and (4) there is an identifiable need for the law of occupation to limit the possible dangers of an ensuing conflict between the local population and the military force.<sup>8</sup> It is entirely reasonable to expect these criteria to be met by forces not belonging to a High Contracting Party in a non-international armed conflict where, traditionally, the law of occupation does not apply. However, Roberts does not expressly mention that the military force detailed in the criteria must be one belonging to a High Contracting Party.

7 D. Thürer, 'Current Challenges to the Law of Occupation', in College of Europe, *Current Challenges to the Law of Occupation* (Collegium No. 34 Autumn 2006), p. 10; C. Chinkin, 'Laws of Occupation' (Conference on Multilateralism and International Law with Western Sahara as a case study hosted by the South African Department of Foreign Affairs and the University of Pretoria, 4-5 December 2008), <<http://removethewall.org/wp-content/uploads/2014/05/Laws-of-Occupation-Christine-Chinkin-2009.pdf>> (last visited 19 January 2017) p. 198.

8 A. Roberts, 'What is a Military Occupation?', (1984) 55 *British Yearbook of International Law*, no. 1, pp. 243-305, 300; Y. Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (2009), pp. 8-9.

Discussion on the concept of occupation by proxy has been limited.<sup>9</sup> This does not mean it has been disregarded or glossed over by scholars. Sivakumaran recognised that the orthodox application of the law of occupation, not including by proxy situations, is 'problematic, in particular where destruction and confiscation of property is concerned, as well as with respect to issues of law and order'.<sup>10</sup> Likewise, an ICRC Expert Meeting on occupation debated occupation by proxy with experts arguing that the concept 'fill[s] the vacuum of authority' and it is 'important to identify who was the ultimate and overall bearer of responsibility in occupied territory'.<sup>11</sup> Without knowing who is the overall bearer of responsibility the local population has limited recourse during the conflict. Ultimately it has been suggested that, 'one should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and with appropriate regard for the factual constellation in the minds of the drafters'.<sup>12</sup> This statement gives the basis for a flexible interpretation and application of the law of occupation in light of the overall goal of IHL. That goal being to protect vulnerable persons and limit the overall effect of war on both protected persons and combatants.<sup>13</sup>

The obligations of the Occupying Power towards the local population under its control is paramount in necessitating occupation by proxy. The law is strict on the Occupying Power restricting the powers that may be exercised. For example, Article 46 of Hague Regulation IV obligates the occupier to respect family rights, the lives of persons, private property, and the religion of persons. Important in many occupations is the prohibition of the deportation or transfer of the Occupying Power's citizens into the occupied territories.<sup>14</sup> IHL goes further in places with the special protection of women, for example, placing a positive obligation on the Occupying Power to prevent rape, enforced prostitution or other forms of assault in the occupied territory.<sup>15</sup> When it comes to the practical administrative side of an occupation the Occupying Power can only make changes to the laws in force when it is militarily necessary.<sup>16</sup> It flows naturally that any changes made cannot remove any protections afforded to the occupied population under IHL.<sup>17</sup> With regard to courts the Occupying Power can only try individuals in military courts for breaches of IHL.<sup>18</sup> The law of occupation is expansive and a burden on an Occupying Power. The practicality of such a body of law through a proxy arrangement is addressed in Section 4 but does not detract from the need to recognise that the population under the control of foreign forces require greater protections like the duty to ensure public order and safety so that normal life can resume as soon as possible.

It has gained wide recognition that international human rights law (IHRL) continues to apply in cases of occupation.<sup>19</sup> Human rights takes the obligations of an Occupying Power further where IHL provides the minimum of protection but human rights law requires a higher standard which applies unconditionally to the occupied population.<sup>20</sup> The fundamental difference is that IHRL does not allow for the military and

9 See Ferraro, *supra* note 3; T. Gal, 'Unexplored Outcomes of Tadić', (2014) 12 *Journal of International Criminal Justice*, pp. 59-80.

10 S. Sivakumaran, 'Non-International Armed Conflicts: The Applicable Law', in College of Europe, *Scope of Application of International Humanitarian Law* (Collegium No. 43, Autumn 2013), p. 32.

11 ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory' (ICRC Pub Ref 4094, 2012), <<https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>> (last visited 19 January 2017), p. 20. N.b. Chatham House Rules applied to the Expert Meeting, therefore it is indeterminable to whom the particular lines of argument can be attributed.

12 M. Reisman, 'Editorial Comments Coercion and Self-Determination: Construing Charter Article 2(4)', (1984) 78 *American Journal of International Law*, pp. 642-645, 644.

13 H. Gasser, 'International humanitarian law and the protection of war victims' (ICRC, 1998), <<https://www.icrc.org/eng/resources/documents/misc/57jm93.htm>> (last visited 19 January 2017), para. 1.

14 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, Article 49 (hereinafter Geneva Convention IV and GCIV).

15 *Ibid.*, Article 27.

16 1907 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, International Conferences, Article 43; Geneva Convention IV, Article 64.

17 Geneva Convention IV, Article 47; Y. Dinstein, 'Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding' (Occasional Paper Series, Program on Humanitarian Policy and Conflict Research, Harvard University, 2004), <<http://www.hpcresearch.org/sites/default/files/publications/OccasionalPaper1.pdf>> (last visited 19 January 2017).

18 G. Barrie, 'The international law relating to belligerent occupation at the advent of the twenty-first century', (2012) *Journal of South African Law*, pp. 433-460, 434.

19 G. Harris, 'Human Rights, Israel, and the Political Realities of Occupation', (2008) 41 *Israel Law Review*, pp. 87-174, 112; Chinkin, *supra* note 7, p. 211; K. Boon, 'Obligations of the New Occupier: The Contours of a *Jus Post Bellum*', (2009) 31 *Loyola of Los Angeles International and Comparative Law Review*, pp. 57-84, 70; However, the applicability of human rights treaties to situations of occupation is denied by both the USA and Israel (see Benvenisti, *supra* note 4, para. 13).

20 Chinkin, *supra* note 7, p. 215.

security considerations which IHL gives leeway for.<sup>21</sup> An example of this is the right to life where IHL permits civilians to be killed as collateral damage but under IHRL the law enforcement laws apply where persons can only be killed when necessary.<sup>22</sup> Harris highlights that the application of IHRL specifically brings in the jurisdiction of human rights enforcement bodies, whether it be a regional human rights court or UN treaty body.<sup>23</sup> Such scrutiny is hugely beneficial to occupied persons. One area of expansion is the applicability of economic, social and cultural rights (ESC). These rights are of particular concern in occupations due to the fact that normal life resumes often with serious constraints on services such as health, education and also general employment.<sup>24</sup> IHL does have laws similar to the rights found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) that cover areas such as the prohibition on causing unemployment,<sup>25</sup> the right to food, medical supplies and supplies necessary for their survival,<sup>26</sup> and public health guarantees.<sup>27</sup> Arai importantly highlights that with regard to ESC rights IHL protects and respects some but does not require the Occupying Power to fulfil those rights which means that applying IHRL would increase protections innumerablely.<sup>28</sup>

The law of belligerent occupation goes beyond the rest of IHL in that an Occupying Power has far more expansive legal obligations than a standard party to a conflict. When territory is under the control of forces other than the sovereign state to which the territory belongs the civilians living in the space fall into a void with a distinct lack of governance. The combination of GC IV, Additional Protocol I (AP I), and IHRL place weighty legal burdens on the Occupying Power that limit the exercise of the occupation administration's authority. Establishing the relationship between the non-state actor and a state for occupation by proxy quite simply expands the legal protections afforded to the local population tenfold and includes rights which are non-derogable. The relationship's recognition by the international community would put pressure on the state in question to take control of the situation to ensure the obligations are being carried out to the best of the state's ability. The next sub-section will detail the development in jurisprudence of occupation by proxy since *Tadić*.

## 2.2. Case law development

The ability to have an occupation by proxy was first identified in *Tadić* by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY assessed if the actions of the Republic of Srpska in the Bosnian War were attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). It found that through the customary law of state responsibility a group can be attributed to a state if they are acting as de facto organs of that state, regardless of a difference in nationality (the individuals in the forces of the Republic of Srpska were nationals of the Republic of Bosnia and Herzegovina but ethnically Serbian).<sup>29</sup> On the further basis of Article 29 of GC IV the ICTY found there must be responsibility for 'whose hands protected persons may be [in]'.<sup>30</sup> Most importantly the ICTY found that, 'the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power "occupies" or operates in certain territory solely through the acts of local de facto organs or agents'.<sup>31</sup> The ICTY in its Appeals judgment held that such a relationship is one of overall control, contradicting the jurisprudence of the International Court of Justice (ICJ) in *Nicaragua* which applied the effective control test.<sup>32</sup> The ICTY

21 Harris, *supra* note 19, p. 167.

22 N. Lubell, 'Applicability of Human Rights Law in Situations of Occupation', in College of Europe, *Current Challenges to the Law of Occupation* (Collegium No. 34 Autumn 2006), p. 51.

23 Harris, *supra* note 19, p. 167.

24 Lubell, *supra* note 22, p. 53-54.

25 Geneva Convention IV, Article 52(2).

26 Geneva Convention IV, Article 69(1); J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (2009) p. 199.

27 Geneva Convention IV, Article 56.

28 Arai, *supra* note 8, p. 370.

29 *Tadić* Trial Chamber, *supra* note 2, para. 584.

30 Geneva Convention IV, Article 29.

31 *Tadić* Trial Chamber, *supra* note 2, para. 584.

32 *Prosecutor v. Tadić*, [1999] Case No. IT-94-1-A, Appeals Judgment (Int'l Crim. Tribunal for the former Yugoslavia), para. 117; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep, p. 14.

determined that the effective control test could not be used in all situations and split the kinds of non-state actors.<sup>33</sup> Where individuals and unorganised groups are concerned the ICTY deemed effective control to be applicable but for organised armed groups overall control could be applied.<sup>34</sup> Furthermore, if the state to which the group are attributed has territorial ambitions the ICTY speculated it could be justified to lower the threshold.<sup>35</sup> The ICTY applied this reasoning because it sought to use a 'realistic concept of accountability' to prevent states sheltering behind excuses to prevent accountability.<sup>36</sup> The mixing of tests for attribution to states is not without critics, notably by a former ICJ judge, who claimed the use of different tests could be dangerous.<sup>37</sup> Dinstein rightfully highlights that an occupation must be the resultant of an armed conflict of an international nature.<sup>38</sup> The *Tadić* Appeal clarifies that overall control is to be used for the internationalisation of an armed conflict creating the possibility of occupations by proxy.<sup>39</sup>

The ICTY confirmed its conclusions from *Tadić* in *Blaškić* shortly thereafter.<sup>40</sup> The case concerned a commander of the Croatian Defence Council (HVO) who were an organised armed group created by ethnic Croats in Bosnia and Herzegovina. Croatia was in occupation of parts of Bosnia and Herzegovina but some of the territory was controlled by the HVO. The ICTY needed to determine if the law of occupation was applicable to the HVO with respect to the destruction of property. It found that,

*'Croatia played the role of occupying Power through the overall control it exercised over the HVO, the support it lent it and the close ties it maintained with it. Thus, by using the same reasoning which applies to establish the international nature of the conflict, the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory.'*<sup>41</sup> (emphasis added)

It is also useful to note that this Trial Chamber finding was not overturned in the Appeals Chamber.<sup>42</sup>

However, the Trial Chamber's findings in *Blaškić* were challenged by the ICTY in *Naletilić & Martinović* three years later.<sup>43</sup> The case considered commanders of the Convicts' Battalion (KB) which operated under the auspices of the HVO. The ICTY had to determine the applicability of the law of occupation and in doing so took the opportunity to clarify its own interpretation and application of the law. The essential passage for occupation by proxy reads,

*'The Chamber notes that the jurisprudence of the Tribunal relating to the legal test applicable is inconsistent. In this context, the Chamber respectfully disagrees with the finding in the Blaškić Trial Judgement argued by the Prosecution. The overall control test, submitted in the Blaškić Trial Judgement, is not applicable to the determination of the existence of an occupation. The Chamber is of the view that there is an essential distinction between the determination of a state of occupation and that of the existence of an international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation.'*<sup>44</sup> (emphasis added)

Ferraro disagrees with this finding of the ICTY and contends the Court confused overall control of a territory with overall control of a non-state actor which has effective control over the territory in question.<sup>45</sup> In *Blaškić*

33 *Tadić* Appeals Chamber, *supra* note 32, para. 117.

34 *Ibid.*, paras. 118-120.

35 *Ibid.*, para. 129.

36 *Ibid.*, paras. 121-123.

37 G. Guillaume, 'The Future of International Judicial Institutions', (1995) 44 *International and Comparative Law Quarterly*, pp. 848-862, 862; R. Heinsch, 'Conflict Classification in Ukraine: The Return of the "Proxy War"?' (2015) 91 *International Law Studies Series US Naval War College*, pp. 324-360, 343-344.

38 Y. Dinstein, *The International Law of Belligerent Occupation* (2009), pp. 33-34.

39 *Tadić* Appeals Chamber, *supra* note 32, para. 137.

40 *Prosecutor v. Tihomir Blaškić*, [2000] Case No. IT 95-14-T, Trial Chamber (Int'l Crim. Tribunal for the Former Yugoslavia).

41 *Ibid.*, para. 149.

42 *Prosecutor v. Tihomir Blaškić*, [2004] Case No. IT 95-14-A, Appeals Chamber (Int'l Crim. Tribunal for the Former Yugoslavia); Also see M. Zwanenburg, 'The Law of Occupation Revisited: The Beginning of an Occupation', (2007) 10 *Yearbook of International Humanitarian Law*, pp. 99-130, 113.

43 *Prosecutor v. Naletilić and Martinović*, [2003] Case No. IT-98-34-T, Trial Chamber (Int'l Crim. Tribunal for the Former Yugoslavia).

44 *Ibid.*, para. 214.

45 Ferraro, *supra* note 3, p. 159.

the ICTY was clear in its holding that the HVO was responsible by delineating the two relationships of control needed for the territory and control of the non-state actor itself. The ICTY in *Naletilić & Martinović* is not clear on this delineation. Benvenisti, however, does not highlight this difference and agrees with *Naletilić & Martinović* in that further control (i.e. effective control) is the correct conclusion with respect to control over territory due to the fact the occupant must be liable for its own and the non-state actor's actions.<sup>46</sup> There is a substantial lack of literature on the clash of *Blaškić* and *Naletilić & Martinović* and despite Benvenisti's attestation for the latter, the fact that there is a clear difference in the formulation applied by the ICTY in both decisions lends support to Ferraro's disregarding of *Naletilić & Martinović* when determining the existence of an occupation by proxy.

Shortly after the aforementioned ICTY cases the ICJ rendered judgments in two notable cases for the jurisprudence on overall and effective control. Firstly, in 2005, the *Armed Activities* case concerning Ugandan occupation of the DRC through Congolese non-state actors (the MLC).<sup>47</sup> Secondly, the *Genocide* case concerning the acts of the Army of the Republika Srpska (VRS) and their potential attribution to Serbia.<sup>48</sup> In the *Armed Activities* case the ICJ examined the situation of Uganda and the MLC in accordance with the International Law Commission's Draft Articles on Responsibility of States for internationally wrongful acts (ARSIWA).<sup>49</sup> It was found that there was not sufficient evidence to find that the MLC was under the direction or control of Uganda.<sup>50</sup> Both Zwanenburg and Ferraro note that the ICJ accepted the possibility of indirect effective control (where the third state has overall control over the non-state actor which itself has effective control of the territory) akin to the ICTY's finding in *Blaškić*.<sup>51</sup> The ICJ seemingly reversed its position in the *Genocide* case where the Court declared that the killing of Bosnian Muslims at Srebrenica was genocide but that the respondent, Serbia, were not directly responsible under international law since they were committed by the VRS.<sup>52</sup> It must be noted that this case did not concern the law of occupation, or occupation by proxy for that matter, and instead only the attribution of conduct of a non-state actor to a state. The ICJ, when determining if the VRS' actions were attributable to the Federal Republic of Yugoslavia (FRY), applied its reasoning from *Nicaragua* to Article 8 of ARSIWA that for attribution the test that must be used is effective control.<sup>53</sup> The ICJ went on to say that it could not agree with the ICTY's overall control test because the ICTY was not answering questions of state responsibility.<sup>54</sup>

The ICJ has complicated matters in that the long-running battle between overall and effective control has repercussions on attempting to regard a situation as an occupation by proxy. Following the *Genocide* judgment, Antonio Cassese commented that overall control would possibly be more appropriate than effective control when determining the responsibility of organised armed groups.<sup>55</sup> Due to the fact that the ICJ in *Genocide* was not discussing attribution where a non-state actor has effective control over territory itself, this limited the weight that should be afforded to the decision. The cases which directly concern the situation of effective control of territory under the overall control of a third intervening state are the most relevant. Lastly, in further support of the overall control test in occupation by proxy, the International Criminal Court (ICC) in its *Lubanga* judgment discussed the overall control test. The ICC agreed with the ICTY that when a non-state actor acts under the control of a state in the territory of another state, like in occupation by proxy, the overall control test is correct.<sup>56</sup> The ICC did not mention the *Genocide* case. The

46 E. Benvenisti, *The Law of Occupation* (2012), p. 62.

47 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICI Rep, p. 168.

48 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICI Rep, p. 43.

49 *Armed Activities*, supra note 47, paras. 160, 177.

50 *Ibid.*

51 Zwanenburg, supra note 42, p. 119; Ferraro, supra note 3, p. 159.

52 *Genocide*, supra note 48, para. 394.

53 *Nicaragua*, supra note 32; *Genocide*, supra note 48, para. 400; The fact Article 8 uses effective control is not express by the drafters of ARSIWA but rather implied, see Heinsch, supra note 37, p. 347.

54 *Genocide*, supra note 48, para. 403.

55 A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 *European Journal of International Law*, no. 4, pp. 649-668, 667; O. Engdahl & P. Wrangle (eds.), *Law at War: The Law as it was and the Law as it Should be* (2008) p. 114.

56 *Lubanga*, [2012] ICC-01/04-01/06, Trial Chamber, para. 541.

next sub-section will highlight the necessary nature of the internationalisation of the armed conflict for occupation by proxy.

### 2.3. Characteristics of occupation by proxy

#### 2.3.1. Internationalisation of the conflict and overall control

Traditionally, the law of occupation only applies in international armed conflicts. However, following *Tadić*, IHL recognises the existence of an internationalised non-international armed conflict (NIAC) where a High Contracting Party exercises overall control over a non-state actor and becomes a party to the conflict for the purposes of IHL effectively internationalising the conflict and making the laws of an international armed conflict (IAC) apply.<sup>57</sup> This allows the law of occupation to apply in a proxy situation. To that end the ICTY in *Tadić* found that the FRY was in overall control of the Republic of Srpska and was an IAC because,

‘Control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training) (...) The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.’<sup>58</sup>

The difference between occupation by proxy and internationalisation is thus: overall control of the non-state actor by a state internationalises a NIAC and then the further effective control of territory by the non-state actor establishes an occupation by proxy. It is a positive note for the future recognition and practice of occupations by proxy that the first step is a regular part of the discourse in IHL and internationalised conflicts are readily discussed and seen as possibilities in modern conflicts. For example, Chatham House discussed the viability of internationalised NIACs in the cases of Syria, Yemen and Libya since those situations involve armed groups supported by intervening states.<sup>59</sup> Unfortunately, none of those situations were deemed to be internationalised NIACs but the situation remains possible.

The test applicable to the state’s control of the non-state actor for an internationalised NIAC is that of overall control which has been clarified by the ICTY to attempt to discover what ‘organising, coordinating or planning the military actions’ entails.<sup>60</sup> The Court has said that it includes the paying of salaries by the controlling state,<sup>61</sup> similarities in military structure,<sup>62</sup> the sharing of troops,<sup>63</sup> the controlling state gives orders for strategies,<sup>64</sup> decisions are made in meetings with the controlling state,<sup>65</sup> and the troops of the state and non-state actor are seeking the same goal or same ambitions with regard to the territory.<sup>66</sup> This is a non-exhaustive list of examples that can indicate overall control. Where overall control is established there must next be effective control of territory, which is discussed next. The implementation of occupation by proxy would stretch the discourse to allow for the application of GC IV, Hague Regulation IV and AP I in an internationalised NIAC.

57 ‘[I]f (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.’ *Tadić* Appeals Chamber, *supra* note 32, para. 84.

58 *Ibid.*, para. 137.

59 L. Arimatsu & M. Choudhury, ‘The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya’ (Chatham House, March 2014), <[https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public\\_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf)> (last visited 19 January 2017).

60 Ferraro, *supra* note 3, p. 158.

61 *Blaškić* Trial Chamber, *supra* note 40, para. 101.

62 *Tadić* Appeals Chamber, *supra* note 32, para. 151.

63 *Blaškić* Trial Chamber, *supra* note 40, para. 117.

64 *Tadić* Appeals Chamber, *supra* note 32, para. 151.

65 *Blaškić* Trial Chamber, *supra* note 40, para. 118.

66 *Ibid.*, paras. 106, 108.

### 2.3.2. Effective control of territory: actual or potential?

One of the key issues with occupation by proxy is the control needed by the non-state actor over the territory concerned. This sub-section will look at the essential nature of effective control, concepts of actual and potential control and examine examples of where there are factual determinations of effective control of territory. Roberts says that the heart of an occupation is the fact that a State exercises 'some kind of domination or authority' over another territory.<sup>67</sup> Roberts does not specify what level of control since the piece was published in 1984 prior to the ensuing overall vs effective control debate. Dinstein clarifies later that effective control is *conditio sine qua non* in the law of occupation but that factually determining such effective control is difficult.<sup>68</sup> Effective control of territory therefore is necessary and the law of occupation does not enter into force without it.<sup>69</sup>

Support for effective control of territory is drawn from the changing practice of actual and potential control but there has been no easy agreement on the matter.<sup>70</sup> The difference is where the passage of troops or stationing of troops on the border presents the ability to potentially exercise effective control whereas actual control requires the troops to effectively and physically displace the local forces. The ICTY in *Naletilić and Martinović* followed the concept of potential control saying that 'the occupying power must be in position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly'.<sup>71</sup> However, the *Armed Activities* case sided with actual control, despite a separate opinion to the contrary, in saying, 'The Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government'.<sup>72</sup> The discourse leans towards the requirement of actual, effective control of territory to the exclusion of the territory's own government because without actual control the Occupying Power cannot carry out the duties required under the law of occupation.

Seeking to demonstrate the difficulty in determining the effective control of territory element the following examples show the reasoning used in varying situations. The first example is that of Georgia and its 2008 conflict with Russia over the territories of Abkhazia and South Ossetia. An EU Commission of Inquiry reported on the conflict where Russia denied its status as an Occupying Power on three grounds: (1) the Russian Armed Forces did not replace the local governments; (2) no regulations have been created by an occupying administration and (3) the number of troops in the territories are insufficient to give Russia effective control.<sup>73</sup> However, the Russian troops were able to establish roadblocks and Russia itself later claimed that Russian troops protected homes from looting in furtherance of public safety.<sup>74</sup> The Commission found that Russia was in effective control of the territory because,

'these elements demonstrate that to a certain degree, Russian forces were in a position to ensure public order and safety in the territories they were stationed in, and claim to have undertaken measures in this regard. This contrasts strikingly with what happened on the ground, where there was a serious lack of action by the Russian troops to prevent violations and protect ethnic Georgians'.<sup>75</sup>

The fact that Russia had not in fact prevented violations of IHL was irrelevant and to be deemed an Occupying Power the state does not need to be in effective control of both territory and the population.<sup>76</sup> Furthermore, the troops do not need to be in control of all of Georgia for there to be effective control because there can be smaller areas of occupation.<sup>77</sup> The extensive report was able to fact-find through dialogue and participation

67 Roberts, *supra* note 8, p. 300.

68 Dinstein, *supra* note 38, p. 43.

69 Ferraro, *supra* note 3, p. 140.

70 See Zwanenburg, *supra* note 42, at p. 103 for the disagreement between states at the conference negotiating the 1874 Brussels Declaration.

71 *Naletilić and Martinović*, *supra* note 43, para. 217.

72 *Armed Activities*, *supra* note 47, para. 173.

73 Independent International Fact-Finding Mission on the Conflict in Georgia (IIFMCG, September 2009), [http://www.caucasus-dialog.net/Caucasus-Dialog/Activities\\_&\\_Docs\\_files/IIFMCG\\_Volume\\_II%20Kopie.pdf](http://www.caucasus-dialog.net/Caucasus-Dialog/Activities_&_Docs_files/IIFMCG_Volume_II%20Kopie.pdf) (last visited 19 January 2017) pp. 308-309.

74 *Ibid.*, p. 373.

75 *Ibid.*, p. 373.

76 *Ibid.*, p. 310

77 *Ibid.*, p. 311.

of both states plus NGOs in determining the nature of the occupation in Georgia. The Commission found the existence of an occupation in the buffer-zones between South Ossetia, Abkhazia and Georgia on the basis of Russian ability to exercise effective control where public safety was concerned. Importantly for occupation by proxy it was found that 'The territory [of Abkhazia] was occupied by Abkhaz forces, supported by Russian paratroopers.'<sup>78</sup> The statement was not elaborated upon by the Commission but it is known that the troops of the Republic of Abkhazia are secessionist forces and the Commission clearly felt occupation applied to those forces with the support of Russian troops.

A second example, also involving Russia, is Crimea in 2014. The situation in Crimea highlighted the fine line between actual and potential control since the Russian Black Sea Fleet was stationed at Sevastopol in Crimea under the Agreement on the Presence of the Black Sea Fleet (BFSA).<sup>79</sup> That meant that Russia, at all times, had the ability to send more troops within a reasonable time, demonstrative of potential control.<sup>80</sup> Grieß is blunt in his assessment of the situation in Crimea in determining that there are strong arguments for finding Russia in effective control of Crimea before the March 2014 referendum took place largely because there is 'no mathematical benchmark to determine how much control is needed'.<sup>81</sup> Due to sheer numbers, 25,000 Russian soldiers as part of the Black Sea Fleet, Russia had clear actual effective control of Crimea due to its ability to exclude the Ukrainian government blocking access to the peninsula. Much of the ability to exercise effective control is geographic and based on the numbers involved being able to overwhelm any opposition from the other state.

A different example where the Occupying Power is no longer physically present is Gaza, post-2005. Clearly, Israeli forces are not currently present in the territory of the Gaza Strip which leaves the question, does Israel still retain effective control to remain an Occupying Power? First the Israeli Supreme Court answered the question in the negative saying, 'The State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner' and a 'real possibility of carrying out the duties required of an occupying power'.<sup>82</sup> Jurists, however, disagree with Dinstein claiming that the fact Israel is vocal in its ability to invade Gaza when needed and arrest persons who attack Israel from Gaza means occupation has not been terminated.<sup>83</sup> Darcy argues that the fact there has been an occupation for four decades then the reality is that Israel has preserved effective control for itself by control of airspace, coastline, and economic reliance.<sup>84</sup> Darcy further bases this conclusion on the Goldstone Report that an Occupying Power can allow a new local administration to exist, such as Gaza's own local government, as long as the ultimate authority is saved for itself.<sup>85</sup>

There is a clear thread in the law of occupation that effective control of territory is necessary. However, the measurement of that effective control is difficult and whether the control must be actual or potential is not always consistently applied. Erring on the side of caution, the safest option for a recognised occupation by proxy would be to determine actual control. Actual control would follow the recent examples in Georgia and Crimea and distinguish Gaza as a unique situation where potential control can be appropriate due to the specific geographic nature of the area and length of occupation. Another issue is that the examples are of much more powerful states which possess large militaries but international law, nevertheless, raises doubt over the effective control of territory. This is a potential roadblock for occupation by proxy because if the High Contracting Parties with large, organised, militaries are able to contend that they do not have effective

78 Ibid., p. 290.

79 1997 Agreement between Ukraine and the Russian Federation on the Status and Conditions of Presence of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine.

80 R. Greiß, 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind', (2015) 91 *International Law Studies Series US Naval War College*, pp. 426-447, 444.

81 Ibid., p. 444.

82 *A and B v. State of Israel*, [2008] (Supreme Court of Israel), <[http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Anonymous\\_SupremeCourt\\_Judgment\\_11-6-2008.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Anonymous_SupremeCourt_Judgment_11-6-2008.pdf)> (last visited 19 January 2017).

83 Dinstein, *supra* note 38, p. 279.

84 S. Darcy & J. Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law', (2010) 15 *Journal of Conflict & Security Law*, pp. 211-243, 227.

85 'Report of the United Nations Fact Finding Mission on the Gaza Conflict' (15 September 2009), UN Doc A/HRC/12/48, para. 276; Darcy, *supra* note 84, p. 236.

control with thousands of troops deployed then it could be difficult for the international community to be convinced that a non-state actor is able to do the same.

### 2.3.3. Falling into the hands of the enemy

To be discussed is the scope *ratione personae* and how IHL has a dilemma between protected persons falling into the hands of the enemy and how that clashes with the need for an occupier to be a party to the conflict. The situation in which protected persons find themselves is a key part of the law of occupation. Thürer states an occupation enters into force when a party is exerting 'some level of control' over the territory of another state.<sup>86</sup> This is a low threshold that impliedly seeks greater protection for protected persons but in practice this is dependent on the parties to the conflict being recognised as occupiers, clearly a key issue in proxy situations. In *Naletilić & Martinović* it was accepted that obligations under GC IV exist as soon as the individuals 'fall into the hands of the enemy' regardless of if there is actual authority over the territory.<sup>87</sup> Military manuals do not lend support to this view.<sup>88</sup> This was partially addressed by the Eritrea Claims Commission where the Ethiopian troops were fleetingly present in some areas and the Commission found that even where the troops had only been present for a few days the law of occupation applied.<sup>89</sup> Clearly, this shows that IHL is willing to lower the legal thresholds strictly required in the interests of protecting persons.

Quintessentially, the fact persons are in the hands of the enemy requires the guarantees of the Geneva Conventions and AP I. Article 29 GC IV reads, 'The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.' This provision is particularly relevant for occupation by proxy because the Pictet commentary specifically discusses the acts of agents and that 'under the Convention protected persons are entitled to protection against *all acts of violence* or threats of violence (...).'<sup>90</sup> Gal elaborates on this by saying the purpose of Article 29 is to ensure adherence to the law of occupation no matter whose hands the protected persons fall into and that due to the provision occupation by proxy exists in the primary legal framework of IHL.<sup>91</sup> Therefore, it is possible to demonstrate that IHL is able to be applied solely in the interests of people to give the necessary protections to occupied populations in varying situations.

## 2.4. Conclusion

The protection of individuals is undeniably increased by the application of the law of occupation. To that end the law of occupation must apply to more situations to guarantee the well-being of persons and this must include proxy wars. The ICTY recognised the ability of a state to occupy another through a non-state actor in *Tadić* and confirmed the findings in *Blaškić*. The ICJ concurred in theory in the *Armed Activities* judgment. The cases which seemingly disagree, *Naletilić & Martinović* and *Genocide*, have different outcomes because the concepts were altered. The former does not discuss the different levels of control of territory and the non-state actor and the latter does not concern a situation of occupation where control of territory was an issue. The law of occupation only applies in IACs but the relatively new concept of internationalised NIACs creates the possibility for occupation by proxy to be further recognised. At an ICRC expert meeting which discussed occupation by proxy one expert sided with a traditional view of occupation in that there must be foreign forces invading.<sup>92</sup> However, other experts argued that non-state actors would be in actual control and that would-be foreign involvement due to the groups being *de facto* agents of the other state.<sup>93</sup> The correct tests that must be applied are, first, the ICTY's overall control of the non-state actor with the

86 Thürer, *supra* note 7, p. 12.

87 *Naletilić and Martinović*, *supra* note 43, paras. 219-221.

88 Arai, *supra* note 8, p. 15.

89 *Central Front: Ethiopia's Claims 2, 4, 6, 7, 8 & 22 between The Federal Republic of Ethiopia and the State of Eritrea (Partial Award)*, Eritrea Ethiopia Claims Commission (28 April 2004), para. 57.

90 J. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) p. 212 (emphasis added).

91 Gal, *supra* note 9, p. 66.

92 ICRC Expert Meeting, *supra* note 11, p. 23.

93 *Ibid.*

aforementioned examples of how to determine that control taken from *Tadić* and *Blaškić*. Second, the control of territory by the non-state actor must be actual in order to be effective and engage the law of occupation. Finally, when persons fall into the hands of the enemy the law of occupation is necessitated but actual control of territory is still needed.

### 3. Case study – Eastern Ukraine

This section will attempt to delineate the situation in Eastern Ukraine alongside the concept of occupation by proxy. It will discuss the application, possible relationships between the armed groups fighting in Eastern Ukraine and Russia and the extent of territorial control of the Donetsk People's Republic (DNR) and Luhansk People's Republic (LNR).

#### 3.1. Brief background

The November 2013 Euromaiden protests engulfed Kiev in violence. Former president Yanukovych suspended the ongoing negotiations for signing the Ukraine–European Union Association Agreement which would have brought greater cooperation between the EU and Ukraine.<sup>94</sup> Instead Yanukovych suggested a new agreement between the EU, Russia and Ukraine that sparked violent protests in the capital. Yanukovych was subsequently ousted and fled to Russia.<sup>95</sup> Unmarked forces took control of the Crimean peninsula in late February 2014 and President Putin later admitted the unmarked forces were in fact Russian troops, just as the world media had previously speculated.<sup>96</sup> Crimea has since been formally annexed by Russia in violation of the Budapest Memorandum on Security Assurances.<sup>97</sup> The annexation has not been recognised by the wider international community and has been denounced by the UN General Assembly.<sup>98</sup> Following the Russian success in Crimea, April 2014 saw the rise of pro-Russian forces in a state of revolution in Eastern Ukraine attempting to replicate the Crimean result. The forces seized cities and established control over swathes of territory.<sup>99</sup> The fighting over the territories surrounding Donetsk and Luhansk continue as of writing this text.<sup>100</sup> The two territories formed governments and declared themselves the DNR and LNR respectively. The two republics later formed a confederation known as Novorossiya that sought unification with Russia but the advancement of the confederation has since effectively been suspended.<sup>101</sup> However, the aforementioned republics still seek independence from Ukraine and the United Armed Forces of Novorossiya (UAF), the combined forces of the republics and other armed groups still fight the Ukrainian government forces daily.<sup>102</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR) has reported that from the commencement of fighting in April 2014 and February 2016 there have been 30,211 casualties in Eastern Ukraine, 9,167 of which have been deaths.<sup>103</sup> The relationship between Russia and the UAF, as the military arm of the DNR and LNR, will be speculated upon next.

94 Ukraine–European Union Association Agreement, OJ L 161, 29.5.2014, pp. 3-2137 (signed 27 June 2014).

95 S. Walker, 'Ousted Ukrainian leader Viktor Yanukovych reported to be in Russia', *The Guardian*, 27 February 2014, <<https://www.theguardian.com/world/2014/feb/27/viktor-yanukovych-russia-ukrainian-president-moscow>> (last visited 19 January 2017).

96 K. Stallard, 'Putin Comes Clean On Crimea's Little Green Men' (Sky News, 10 March 2015), <<http://news.sky.com/story/putin-comes-clean-on-crimeas-little-green-men-10368423>> (last visited 19 January 2017); V. Shevchenko, "Little green men" or "Russian invaders"? (BBC News, 11 March 2014), <<http://www.bbc.com/news/world-europe-26532154>> (last visited 19 January 2017); A. Tancredi, 'The Russian annexation of the Crimea: questions relating to the use of force', (2014) *Questions of International Law*, pp. 5-34, 8.

97 1994 Budapest Memorandum on Security Assurances, UN Doc A/49/765.

98 United Nations General Assembly, 'Territorial Integrity of Ukraine' (1 April 2014), UN Doc A/RES/68/262.

99 'Armed pro-Russian protesters seize city in eastern Ukraine', *The Guardian*, 13 April 2014, <<https://www.theguardian.com/world/2014/apr/12/pro-russian-protesters-wind-up-tension-in-eastern-ukraine>> (last visited 19 January 2017).

100 May-June 2016.

101 'East Ukraine separatists seek union with Russia' (BBC News, 12 May 2014), <<http://www.bbc.com/news/world-europe-27369980>> (last visited 19 January 2017); 'Ukraine and the project of Novorossiya: Aleksandr Zakharchenko holds online dialogue with the people of Odessa' (NewColdWar.org, 13 May 2016), <<https://www.newcoldwar.org/ukraine-and-the-project-of-novorossiya-aleksandr-zakharchenko-holds-online-dialogue-with-the-people-of-odessa/>> (last visited 19 January 2017).

102 For example, 'BBC team under fire on Ukraine front line' (BBC News, 27 May 2016), <<http://www.bbc.com/news/world-36398519>> (last visited 19 January 2017).

103 Office of the United Nations High Commissioner for Human Rights, 'Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016' (3 March 2016), <[http://www.ohchr.org/Documents/Countries/UA/Ukraine\\_13th\\_HRMMU\\_Report\\_3March2016.pdf](http://www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf)> (last visited 19 January 2017).

### 3.2. Extent of Russian control over the forces in Eastern Ukraine: Is there overall control?

As has been previously discussed, whether or not an invasion becomes recognised as an occupation is a question of fact where the Occupying Power exercises effective authority and control to the exclusion of the ousted government.<sup>104</sup> This factual determination is complicated by the involvement of non-state actors where conflicting reports cast doubt on the veracity of both side's claims. Every report cannot be covered by this article, therefore this is an attempt at establishing a relationship between the DNR, the LNR (consequently the UAF) and the Russian Federation based on the information reported by the UN, NATO and other mass media sources.

August 2014 saw the first claims and open discussion of seemingly verified Russian involvement in the Eastern Ukraine conflict. Two major events occurred to start the debate. First, Russian paratroopers were captured on Ukrainian territory 20km from the international border with Russia. Second, reports emerged of troop and equipment movements from Russia directly into Ukraine, claims that spilled over into 2015. The paratroopers captured were alleged, by Ukraine, to be active servicemen which was confirmed by the Russian Defence Ministry.<sup>105</sup> However, the Russian Defence Ministry put forward the explanation that the paratroopers had crossed the border accidentally as part of a border patrol.<sup>106</sup> Given the distance from the border where they were captured it does not seem believable that the incursion was accidental. August 2014 saw the return of Russia's 'little green men' but this time, according to NATO, the troops crossed the border into Ukraine with artillery and other military equipment.<sup>107</sup> The artillery was later reported by Brigadier General Nico Tak to be in firing positions on Ukrainian territory.<sup>108</sup> NATO proclaimed that 'Russia continues to supply weapons to militants in eastern Ukraine; and it maintains thousands of combat-ready troops on its border with Ukraine'.<sup>109</sup>

These movements sparked a response from the UNSC. Lithuania noted that the Russian 98<sup>th</sup> Guards Airborne Division had taken control over the city of Novoazovsk located in Donetsk.<sup>110</sup> Notably, the USA used the language of accusing Russia of 'illegally seizing territory' with regard to Novoazovsk.<sup>111</sup> Other representatives reaffirmed the reports that Russian forces were active in the territory of Ukraine and strongly denounced the actions as violations of international law.<sup>112</sup> Australia and the UK highlighted that Russian troops were in fact operating in Ukraine and weaponry was given to the UAF.<sup>113</sup> Particularly that those troops were in numbers 'over 1,000 regular Russian troops equipped with armoured vehicles, artillery and air defence systems'.<sup>114</sup> The UK detailed a breakdown of what the UAF possessed at the time, most of which were supplied by Russia, which included '100 main battle tanks, 80 armoured personnel carriers, 100 man-portable air defence systems, 500 anti-tank weapons and more than 100 artillery pieces'.<sup>115</sup> This equipment has had a direct effect on the ability of the UAF and governments of the DNR and LNR to effectively control territory because the weaponry transforms the UAF into a more formidable force for the Ukrainian forces to counter.<sup>116</sup> Galbreath goes as far to say that the fact the advanced weapons are being used is indicative of Russian forces being present since

<sup>104</sup> *Hostages Case, US v. List (Wilhelm) and ors*, Trial Judgment, Case No. 7, [1948] 8 LRTWC 34; OUP Ref. ICL 491 (US 1948) (Nuremberg Military Tribunal), para. 42.

<sup>105</sup> A. Swain, 'Further claims of Russian troop deployments follow capture of soldiers in Donetsk' (The Conversation, 27 August 2014), <<https://theconversation.com/further-claims-of-russian-troop-deployments-follow-capture-of-soldiers-in-donetsk-30945>> (last visited 19 January 2017).

<sup>106</sup> *Ibid.*

<sup>107</sup> N. MacFarquhar & M. Gordon, 'Ukraine Leader Says "Huge Loads of Arms" Pour in From Russia', *The New York Times*, 28 August 2014, <<http://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html>> (last visited 19 January 2017).

<sup>108</sup> *Ibid.*

<sup>109</sup> NATO, 'Joint Statement of the NATO – Ukraine Commission' (NATO, 4 September 2014), <[http://www.nato.int/cps/en/natohq/news\\_112695.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/news_112695.htm?selectedLocale=en)> (last accessed 16 May 2016).

<sup>110</sup> United Nations Security Council, 7253<sup>d</sup> Meeting (28 August 2014), UN Doc S/PV.7253 3 per Ms Murmokaité.

<sup>111</sup> *Ibid.*, p. 9 per Ms Power.

<sup>112</sup> *Ibid.*, p. 5 per Mr Maes.

<sup>113</sup> *Ibid.*, p. 7 per Mr Bliss.

<sup>114</sup> *Ibid.*, p. 13 per Sir Mark Lyall Grant.

<sup>115</sup> *Ibid.*, pp. 13-14 per Sir Mark Lyall Grant. Also note that the US State Department found that tanks and rocket launchers had crossed the border in months previous, Heinsch, *supra* note 37, p. 329.

<sup>116</sup> D. Galbreath, 'Russia's masquerade continues in Ukraine – and fools no-one' (The Conversation, 27 January 2015), <<https://theconversation.com/russias-masquerade-continues-in-ukraine-and-fools-no-one-36738>> (last visited 19 January 2017).

training is required to use the weaponry.<sup>117</sup> President Obama stated that the US was concerned with the ‘Russian backing, Russian equipment, Russian financing, Russian training and Russian troops’ the UAF was receiving.<sup>118</sup> This is demonstrated by the fact that the Prime Minister of the DNR, Alexander Zakharchenko, claimed UAF troops were trained for four months in Russia.<sup>119</sup>

The keyword occupation is not mentioned by commentators or the UNSC when discussing Russia’s involvement. Only Ukraine and the OHCHR explicitly refer to occupation. The UNSC favours a more general approach to denouncing Russian actions under international law in terms of the territorial integrity of Ukraine rather than placing more specific obligations on Russia such as the law of occupation. The ICTY’s overall control test has a non-exhaustive list of what could entail organising, coordinating and planning military actions for the controlling state (see above Section 2.3.1). Furthermore, ‘Such “overall control” resided not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity.’<sup>120</sup> In light of the above claims by various bodies compared alongside the requisites for overall control it is difficult to conclude that Russia is in fact exercising overall control over the UAF without further information concerning the planning of operations. The ICRC reached the same conclusion in that there was no internationalised NIAC when the conflict was classified as a mere NIAC.<sup>121</sup> However, the US stated in the UNSC that ‘A robust combined Russian separatist military force, led by Russian officers, continues to operate in Ukrainian territory.’<sup>122</sup> This shows that the troops of the state and non-state actor are likely seeking the same goal or same ambitions with regard to the territory which is one of the ICTY’s criteria indicative of overall control.<sup>123</sup> Due to the fact that Russian troops are present it could tentatively be presumed that that entails some level of Russian state authority over operations conducted with UAF forces but unfortunately the factual evidence does not exist in mainstream sources to verify this. There is the possibility that if further information was discovered of Russian involvement in planning then the conflict would become internationalised and due to the control of the oblasts of Donetsk and Luhansk (discussed next) effective control of the territory would flow naturally allowing for an occupation by proxy. Such accountability would likely result in widespread allegations of violations of IHL due to the fact the DNR and LNR’s substitutions as authorities are not in keeping with the law of occupation and particularly human rights are denied to the population.<sup>124</sup> Lastly, the determination of Russian involvement would be far easier after the fact if the conflict is resolved and international criminal hearings commenced in the future. If that occurred then *ex post facto* judgments with greater knowledge of the conflict such as the above determinations in *Tadić, Blaškić, Armed Activities* and *Genocide*, for example, would resolve the factual deficiencies and be able to carry out a more successful investigation into a potential Russian occupation by proxy.

### 3.3. Control of territory by the DNR and LNR: Is there effective control?

Determining the existence of effective control of territory for the purposes of the law of occupation is one which focuses on the total exclusion of the original government as per Article 42 of the Hague Convention IV. The Occupying Power, or non-state actor acting under the overall control of the Occupying Power, must be in a position to exercise control over the territory and discharge the obligations of an occupant. In the *Armed Activities* judgment Uganda was only found to be in occupation of territory where Ugandan

117 Ibid.

118 Ibid.

119 M. Fisher, ‘30 tanks and 1,200 troops just crossed from Russia into Ukraine, according to the rebels’ (Vox, 16 August 2014), <<http://www.vox.com/2014/8/16/6023605/30-tanks-and-1200-troops-just-crossed-from-russia-into-ukraine>> (last visited 19 January 2017); ‘Лідер терористів ДНР визнав, що отримав від РФ нове підкріплення – ЗМІ’ (Ukrainian Pravda, 16 August 2014), <<http://www.pravda.com.ua/news/2014/08/16/7034973/>> (last visited 19 January 2017).

120 Cassese, *supra* note 55, p. 657; *Tadić* Appeals Chamber, *supra* note 32, paras. 131, 137.

121 ICRC, ‘Ukraine: ICRC calls on all sides to respect international humanitarian law’ (ICRC, 23 July 2014), <<https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>> (last visited 19 January 2017).

122 United Nations Security Council, 7576<sup>th</sup> Meeting (11 December 2015), UN Doc S/PV.7576, p. 23 per Ms Power.

123 *Blaškić* Trial Chamber, *supra* note 40, paras. 106, 108.

124 See generally, OHCHR March Report, *supra* note 103.

troops had direct authority over the population.<sup>125</sup> What was necessary was the substitution of authority in the place of the ousted government.<sup>126</sup> This was achieved in the DRC by ‘occupying the nerve centres of governmental authority – which in the specific geographic circumstances were the airports and military bases (...).’<sup>127</sup> This does not require troops to be omnipresent, instead that the occupying power can actually enforce its authority.<sup>128</sup>

The DNR and LNR both have formed governments to administer the regions to the exclusion of the government of Ukraine. The DNR, for instance, has a significant online presence detailing the governmental structure in place.<sup>129</sup> In practice, this structure has facilitated the military control of the territory. The DNR possesses the actual, effective control of the large majority of Donetsk. As was found in *Armed Activities*, an Occupying Power does not need to control an entire territory for the law of occupation to apply in some areas, therefore, it is immaterial that sections of the Donetsk oblast are under the control of Ukrainian troops. Particularly demonstrative of effective control of territory by the DNR is the ‘tacit recognition’ of a border where Ukrainian border guards stamp the passports of persons crossing between Ukraine and the DNR.<sup>130</sup> The OHCHR details that this border arrangement is used by 8,000 to 15,000 civilians each day and encompasses three checkpoints operated by the Ukrainian authorities and three by the DNR.<sup>131</sup> The Ukrainian government extended its derogations from the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) to include the territories of Donetsk and Luhansk which ‘it does not effectively control’.<sup>132</sup> The OHCHR has recognised the control the DNR and LNR have over the population since it has engaged with the groups to communicate the human rights and IHL standards that must be adhered to.<sup>133</sup> Another example of the control that can be exercised by the DNR and LNR is the denial of access for humanitarian relief excluding both humanitarian agencies and the OHCHR for reporting purposes.<sup>134</sup>

The OHCHR reports on Ukraine provide some further useful insights. Even into 2016 persons in military clothing cross the border of Ukraine and Russia demonstrating that Ukraine no longer has effective control of the territory near that border or parts of Donetsk and Luhansk.<sup>135</sup> The report also highlights a recent draft law submitted to the Verkhovna Rada of Ukraine by a number of MPs.<sup>136</sup> The law, currently being considered by committee, would mean Ukraine is not responsible for violations of human rights in the DNR and LNR due to the declaration of Russia as an ‘occupant state’. The OHCHR feels that the law would violate Ukraine’s human rights obligations due to fact that the populations of the DNR and LNR are dependent on Ukraine’s infrastructure for water and electricity which the law would cut off.<sup>137</sup> This law, if passed, would recognise the inability of Ukraine to control the territories of the DNR and LNR to enforce human rights law. However, the OHCHR does not delve into the capability, or obligation as a possible occupier, of Russia to meet the needs of the people in the DNR and LNR. Likewise, also discussed is how the territorial application of UN human rights treaties are not guaranteed in uncontrolled occupied territories but does not speculate on the

125 Benvenisti, *supra* note 46, p. 50.

126 Benvenisti, *supra* note 4, paras. 32, 5.

127 *Armed Activities*, *supra* note 47, Separate Opinion of Judge Kooijmans, para. 46.

128 *Ibid.*, para. 169.

129 The DNR has established the offices of the Prime Minister, People’s Council, Ombudsman, General Prosecutor, Ministries of Defence, Justice, State Security, Revenues, among others (the full list can be found at <http://mid-dnr.ru/en/pages/links/pravitelstvo-doneckoj-narodnoj-respubliki/> (last visited 19 January 2017)).

130 A. Ferris-Rotman, ‘In the Donetsk People’s Republic, Russia Is Everywhere and Ukraine Is Nowhere’ (Atlantic, 21 July 2015), <http://www.theatlantic.com/international/archive/2015/07/russia-ukraine-donetsk/398942/> (last visited 19 January 2017).

131 OHCHR March Report, *supra* note 103, p. 11.

132 *Ibid.*, para. 20.

133 Office of the United Nations High Commissioner for Human Rights, ‘Report on the human rights situation in Ukraine 16 February to 15 May 2016’ (15 May 2016), [http://www.ohchr.org/Documents/Countries/UA/Ukraine\\_14th\\_HRMMU\\_Report.pdf](http://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf) (last visited 19 January 2017), para. 10.

134 *Ibid.*, paras. 21, 36.

135 OHCHR March Report, *supra* note 103, para. 24.

136 *Ibid.*, paras. 176-178; Verkhovna Rada of Ukraine ‘Draft Law on temporarily occupied territory of Ukraine’ (Draft Law No. 3593, 8 December 2015), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=57317](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57317) (last visited 19 January 2017).

137 OHCHR March Report, *supra* note 103, para. 178.

identity of the occupier under strict IHL, only that Ukraine has lost sovereignty over the territories in the east.<sup>138</sup> Therefore, the DNR and LNR must be in effective control of the territory to the exclusion of Ukraine.

There is no evidence the Russian troops active in Donetsk and Luhansk are carrying out operations akin to the situation in Georgia where Russian troops established roadblocks and claimed to protect homes and ensure public safety, resulting in the EU Commission finding effective control. Instead, it is the authorities of the DNR and LNR which therefore control the UAF troops and which clearly exercise actual effective control over the territories. That effective control places the DNR and LNR in the position to ensure the public order and safety of the population and the ability to discharge the duties under the law of occupation. This is particularly possible due to the government structure in place similar to a local administration used in occupation situations that has excluded the Ukrainian government.

### 3.4. Conclusion

The situation in Ukraine is one that needs addressing by the international community. However, access is limited for international organisations, both for relief and observation purposes, and that presents difficulties when attempting to determine the current picture. However, it is clear that the DNR and LNR have made progress in independently administering the territories putting them in the position to ensure public order and safety. With a border established in parts and the capacity to refuse Ukraine and other actors access to the territory the DNR and LNR governments exercise actual effective control over the territory and inhabitants. That control has been recognised by both the OHCHR and Ukraine itself. Lack of clarity arises when analysing the existence of Russian control over DNR and LNR armed forces. Despite UNSC claims that forces are being led by Russian officers the exact nature of the planning and direction of operations is not known. It is now undeniable that Russian troops are present, which Russia may in due time acknowledge as was done in Crimea, but the overall control of the UAF troops cannot be determined with the current available reports. It is possible that an investigatory commission could make the determination *ex post facto* but at present a situation of occupation by proxy cannot be proven to exist due to the lack of overall control of UAF forces by a High Contracting Party.

## 4. Can occupation by proxy be effectively implemented?

This section will provide one of the first discussions on the feasibility of implementing occupation by proxy. The issue has been discussed by Gal in her award winning 2014 article but the discussion has not since been advanced any further. First the obligations applicable by proxy will be discussed before moving to the idea that the UNSC could be the driving force in advancing IHL towards a mainstream acceptance of occupation by proxy. The last two sub-sections concern the legitimacy of an occupation and lastly the issues surrounding state and individual responsibility for an occupation by proxy. This is necessary because although the ICTY in particular has accepted the existence of occupation by proxy the actual implementation of the concept has not been fleshed out.<sup>139</sup>

### 4.1. What level of obligations are applicable?

It is paramount in a situation where forces seize control of territory to identify when the law of occupation is applicable and what obligations that entails. This determination is, to this day, up for debate just as it was at the Brussels negotiations in 1874. This is a key practical problem with demanding that states and non-state actors adhere to occupation by proxy. Under the current formulation of the law the concept cannot be effectively implemented.

The Pictet Commentary determined that the occupation begins when the local population falls into the hands of the enemy.<sup>140</sup> This is because there would be 'some level of authority or control over territory' even

138 Ibid., para. 168.

139 Gal, *supra* note 9, p. 64.

140 Pictet, *supra* note 90, p. 60.

in an invasion phase of a conflict where the troops cross through towns.<sup>141</sup> However, the other option is to find that the law of occupation is in force once the troops are ‘in a position to exercise the level of authority over enemy territory that is necessary to enable it to discharge *all* the obligations imposed by the law of occupation’.<sup>142</sup> For an occupation by proxy the latter interpretation is most suitable. It is logical that to apply the law of occupation and hold a non-state actor and High Contracting Party responsible there must be the ability of those forces to carry out the obligations therein. Especially where a non-state actor is concerned the assessment is likely to focus on the level of organisation in relation to the ability to control territory. The ICTY compiled its jurisprudence on the assessment of armed group organisation in the *Boškoski* case.<sup>143</sup> The requirements included (1) an identifiable command structure with ranks and regiments which coordinate with each other; (2) the carrying out of operations in an organised fashion with the cooperation of units and the ability to control territory/civilian infrastructure with divisions of responsibility; (3) logistics that include the ability to fund the group and use sophisticated communication equipment; (4) internal discipline and the ability to implement Common Article 3 to the GCs; (5) the ability to speak with one voice as a unified group.<sup>144</sup> It can be argued that any body assessing the ability of a non-state actor to implement the law of occupation under GC IV would require these requirements to be met to the highest standard since the *Boškoski* requirements are a lower requirement to assess whether the group can implement the provisions relating to a NIAC which are far fewer in number. Especially the territorial control would have to be to the complete exclusion of the sovereign government for instance.

Gal advocates a functional approach applying a different level of obligations under the law of occupation to different groups.<sup>145</sup> This approach would mean highly organised groups are considered able to implement the whole of GC IV whereas groups of a lesser organisation with less control of a population’s daily lives would only be obligated to apply the basics of GC IV listed in Article 6(3).<sup>146</sup> Such an approach simply would not give ‘stability and foreseeability’ or a ‘coherent and acceptable legal framework’ as Gal suggests.<sup>147</sup> Enforcing IHL against armed groups is already troublesome and the ability for intermediaries in the field and international organisations to be able to pinpoint obligations in a codified treaty law and communicate them to a group is paramount. IHL’s universalism is part of the very essence of the law and one of its greatest achievements.<sup>148</sup> By dividing up the obligations and creating one rule for one group and another rule for a different party to the conflict is dangerous and would not form a coherent legal framework. The law of occupation exists in its entirety and its Hague Convention IV origins have been expanded in GC IV to give adequate protections to civilian populations. For instance, the Articles listed in 6(3) do not include the passage and supply of medical supplies (Article 23, Article 55), specific protections for children (Article 24, Article 50) or any of the provisions for internees in Chapter IV. The latter provisions on internees is a potent example due to the fact the ICRC visited 928,812 detainees in 2015 and under application of occupation by proxy some of whom would no doubt become protected by GC IV Chapter IV.<sup>149</sup> Dividing the obligations would not only be difficult to explain to a non-state actor during the occupation but also *ex post facto*. Gal notes that applying IHL strictly would be difficult for some groups to implement and would encourage groups to not comply with a law it cannot implement.<sup>150</sup> Dividing obligations would likely have the same result where the non-state actor is unsure which provisions under the law of occupation it must implement to avoid prosecution after the conflict. To avoid such an issue, the international community, or the ICRC, would need to determine the level of organisation of the group and clearly communicate the outcome and what provisions of GC IV would need to be implemented. Clearly due to factual deficiencies, demonstrated

141 Thürer, *supra* note 7, p. 12.

142 *Ibid.*, p. 12 (emphasis added).

143 *Prosecutor v. Boškoski & Tarčulovski*, [2008] Case No. IT-04-82, Trial Chamber (Int’l Crim. Tribunal for the Former Yugoslavia), paras. 199-203.

144 *Ibid.*

145 Gal, *supra* note 9, p. 74.

146 *Ibid.*

147 *Ibid.*

148 F. Mégret, ‘Theorizing the Laws of War’, in A. Orford & F. Hoffman, *The Oxford Handbook of the Theory of International Law* (2016), p. 764.

149 ICRC, ‘Annual Report 2015’ (ICRC, 9 May 2016), <[https://app.icrc.org/files/2015-annual-report/files/2015\\_annual\\_report.pdf](https://app.icrc.org/files/2015-annual-report/files/2015_annual_report.pdf)> p. 90 (last visited 19 January 2017).

150 Gal, *supra* note 9, p. 73.

above with Eastern Ukraine, the determination of exact situations is difficult to say the least and usually occurs after the fact in international courts. It would be unfair on individuals under international criminal law or a state under state responsibility to determine the level of organisation and hold them accountable for a higher level of obligations if that was not communicated earlier under Gal's division of GC IV approach.

#### 4.2. The Security Council's role

The UNSC acts on behalf of the Member States of the UN and has the primary responsibility for the maintenance of international peace and security under Article 24 of the UN Charter.<sup>151</sup> As a political organ the UNSC is naturally hampered in its abilities by geopolitics and posturing by the permanent members.<sup>152</sup> Politics govern the effectiveness of the UNSC in responding to situations in specific resolutions or simply denouncing them in general terms.<sup>153</sup> The UNSC has the ability under Chapter VII to enforce binding resolutions on states that can be used to adapt IHL or enforce existing IHL rules on situations the UNSC has deemed a threat to international peace and security. Due to the binding nature of resolutions the UNSC presents the best possibility for the international community to change the application of the law of occupation. Unlike an international court, the UNSC could also change the application of IHL during the conflict and not *ex post facto*, directly affecting the protection afforded to the population concerned. The two possibilities of adaption and enforcement will be looked at for the purposes of occupation by proxy.

The UNSC has been termed the *deus ex machina* of the law of occupation due to how it can pass resolutions which alter international law ad hoc.<sup>154</sup> The positive here is that resolutions under Chapter VII which are declaratory of IHL and potentially alter its application can improve situations where the treaty law does not fully cover the scenario at hand.<sup>155</sup> An example of this is the rewriting of the law of occupation to allow for multilateral operations.<sup>156</sup> There is the worry that the power of the UNSC to change the law of occupation in such a way with the current membership of the permanent five would not be suitable.<sup>157</sup> Attempts to renegotiate the treaty law would make adaptions of the law clearer but it would be a poisonous process that would likely be preoccupied with the situation of the OPTs and not the issue of proxy wars.<sup>158</sup> Nevertheless, the UNSC has the clear legal capacity to adapt the law of occupation to expressly include occupation by proxy if the UNSC decided the concept applied to a threat to the peace before it and passed a resolution to that end. However, this is on the proviso that such a resolution would almost certainly not involve the permanent five or a close ally of the permanent five which is why the situation in Eastern Ukraine cannot hope to be addressed by UNSC intervention enforcing or adapting IHL.

Enforcement of IHL by the UNSC has taken place multiple times over the last fifty years. Resolutions can, in practice, make rulings on the lawfulness of the actions of parties to a conflict and then include enforcement mechanisms to prevent unlawful acts continuing.<sup>159</sup> Again under Chapter VII the UNSC can use its powers to restore international peace and security but this often requires the UNSC to restate IHL.<sup>160</sup> The restatement is needed due to the fact that regularly the first action of states is to deny the applicability of IHL to a situation.<sup>161</sup> Particularly with the new, and little tested, concept of occupation by proxy a state would likely first seek to deny that the law of occupation is applicable but the UNSC could step in to declare that it in fact is. This could be done by express declarations in a resolution that a party is in overall control

151 1945 Charter of the United Nations, 1 UNTS XVI, Article 24 (hereinafter UN Charter).

152 Harris, *supra* note 19, p. 149.

153 *Ibid.*, p. 150.

154 *Ibid.*, p. 140.

155 *Ibid.*, p. 171.

156 K. Boon, 'The Future of the Law of Occupation', (2008) 46 *Canadian Yearbook of International Law*, pp. 107-142, 138-139; See below (Section 4.3) for the content of the Security Council's recognition of multilateral occupations.

157 Harris, *supra* note 19, p. 170.

158 G. Harris, 'The Era of Multilateral Occupation', (2006) 24 *Berkeley Journal of International Law*, pp. 1-78, 72-73; B. Parsons, 'Moving the Law of Occupation into the Twenty-First Century', (2009) 57 *Naval Law Review*, pp. 1-48, 41.

159 Harris, *supra* note 19, p. 147; UN Charter, Articles 41, 42.

160 M. Bothe, 'Beginning and End of Occupation', in College of Europe, *Current Challenges to the Law of Occupation* (Collegium No. 34 Autumn 2006), p. 32.

161 R. Cryer, 'The Security Council and international humanitarian law', in S. Breau & J. Agnieszka (eds.), *Testing the boundaries of international humanitarian law* (2006), p. 249.

of a non-state actor and the non-state actor is in effective control of territory making the law of occupation in force. The UNSC has previously reaffirmed that GC IV applies in the situation of the OPTs. Resolution 271 stated that the OPTs were under military occupation and Israel must observe GC IV.<sup>162</sup> Further examples of UNSC practice declaring occupations include Angola and Kuwait. Resolution 545 condemned the ‘continued illegal military occupation of the territory of Angola’ and Resolution 662 said the UNSC was ‘determined to bring the occupation of Kuwait and Iraq to an end’.<sup>163</sup> The noted flaw, however, is that these statements do not mention that the law of occupation must apply to the situation and nor are these two situation the only two to arise in the second half of the 20<sup>th</sup> century. Harris highlights that the UNSC did not mention the law of occupation even for UN-supported actions in the former Yugoslavia, Somalia, Haiti, Mozambique, Western Sahara or East Timor.<sup>164</sup> The UNSC is flawed in nature in that it does not respond to all situations equally whether it be because of politics or because the international community’s attention is simply not grasped. The ability of the UNSC to recognise occupation by proxy is not in doubt but its ability to actively and consistently apply occupation by proxy is questionable.

The UNSC does have various treaty provisions which give effect to its enforcement powers. Article 94(2) of the UN Charter gives the UNSC the power to take action against Member States which have not adhered to a judgment of the ICJ. This would include cases where the Member State has been found in violation of IHL and the UNSC must then enforce IHL.<sup>165</sup> The UNSC can also refer situations of war crimes to the ICC under Article 13(b) of the ICC Statute.<sup>166</sup> Lastly, Article 89 of AP I requires parties to cooperate with the UN and in conformity with the UN Charter which implies that parties must also observe UNSC resolutions.

The UNSC can also investigate situations by creating a Commission of Inquiry which can conduct an independent investigation to discover the facts and advise the UNSC on what steps to take.<sup>167</sup> The Commission of Inquiry into the situation in Darfur in 2004 reported in 2005 recommending that the situation be passed on to the ICC under the ICC Statute. This is an example of a Commission of Inquiry with partial success in that the UNSC followed the advice given. Such a Commission could investigate future alleged occupation situations and provide a perhaps politically divided council with impartial factual advice on the applicability of IHL to a situation, or whether or not an occupation by proxy exists for that matter. The UNSC asked the Secretary-General in Resolution 681 ‘to develop further the idea, expressed in his report, of convening a meeting of the High Contracting Parties to [GC IV] to discuss the possible measures that might be taken by them under the Convention’.<sup>168</sup> That request led to a meeting of the High Contracting Parties in 2001, with the notable exception of the USA.<sup>169</sup> A similar request could, albeit slowly, pave the way towards greater recognition of occupation by proxy.

The UNSC offers a plethora of options to advance the concept of occupation by proxy. If the political will exists in a situation, then it is possible that the UNSC could adapt IHL to expressly encompass occupation by proxy. Express recognition in a binding resolution under Chapter VII would increase the feasibility of occupation by proxy due to the simple fact that the Member States concerned would be obligated to implement the resolution and take into account the applicability of the law of occupation. In the absence of a resolution the other options include a Commission of Inquiry or a UNSC-instigated meeting of parties to the Geneva Conventions. These methods would have a lower chance of success but could bring occupation by proxy to the forefront nonetheless.

162 United Nations Security Council, Resolution 271 (15 September 1969), UN Doc S/RES/271; Cryer, *supra* note 161, p. 250.

163 United Nations Security Council, Resolution 545 (20 December 1983), UN Doc S/RES/545; United Nations Security Council, Resolution 662 (9 August 1990), UN Doc S/RES/662.

164 Harris, *supra* note 19, p. 142-143.

165 M. Roscini, ‘The United Nations Security Council and the Enforcement of International Humanitarian Law’, (2010) 43 *Israel Law Review*, pp. 330-359, 337.

166 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90; Roscini, *supra* note 165, p. 338.

167 Cryer, *supra* note 161, p. 261.

168 United Nations Security Council, Resolution 681 (20 December 1990), UN Doc S/RES/681.

169 Cryer, *supra* note 161, p. 265.

#### 4.3. Legitimacy and international community impetus

This sub-section contains more general examples of the international recognition of legitimacy and its importance in conflicts beyond the approach and actions of only the UNSC. Differing applications of the law of occupation, non-traditional ones, carry more weight when the international community accepts the new approach as legitimate. This should not be the case since the preamble to AP I states that 'the provisions of the Geneva Conventions of 12 August 1949 and of this protocol must be fully applied in all circumstances (...) without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict'. Barrie suggests that the idea could be advanced further to create a permanent method for the UN to cooperate with Occupying Powers in seeking compliance with IHL.<sup>170</sup> Nevertheless, despite AP I's preamble, observance of the law of occupation often requires a drive from the international community. One such drive can be the adaption of the law of occupation to recognise a new style of occupation as legitimate and encourage the states concerned to implement the law.

Recognising legitimacy encourages states to adhere to the law of occupation. Although not situations of occupation by proxy the following examples show the volatility of the international community with occupation legitimacy in general which is applicable to the recognition of state interventions in occupations by proxy. The Vietnamese occupation of Cambodia lending support to the Kampuchean United Front following the reign of Pol Pot is an example where an occupation was denounced for decades, despite support from the local population. It was only in 1989 when the Vietnamese troops withdrew that the community recognised that it did in fact represent the best interests and public support of the Cambodian people.<sup>171</sup> There is a fine line between condoning the Occupying Power's actions intervening in a sovereign state and respecting the territorial integrity of the sovereign state. Further examples include Eastern Pakistan and Cyprus. Eastern Pakistan (today's Bangladesh) was occupied by India after Western Pakistan attacked its population in Eastern Pakistan. The Eastern Pakistanis were linguistically, culturally and ethnically different from Western Pakistan. India's intervention, resulting in an occupation, was quickly recognised by the international community as legitimate despite breaches of Pakistan's territorial integrity.<sup>172</sup> In Cyprus the converse occurred where the Turkish intervention to support self-determination claims of the Turkish-Cypriot minority was systematically denounced by the international community. Benvenisti notes that the fact Turkey supported the Turkish-Cypriot minority rather than the constitutional order of the whole island was the decisive factor for the international community.<sup>173</sup> It is a favourable position to have an occupation regarded as legitimate to encourage adherence to IHL and a legitimate occupation particularly for Eastern Ukraine would likely improve the livelihood of the inhabitants, particularly those who are openly loyal to Ukraine.<sup>174</sup> The key barrier preventing this would be the fact that recognising the occupation as legitimate would recognise the non-state actor. In turn, recognising the non-state actor would breach the provisions of IHL that limit an occupying power to only establish an administrative authority and does not allow for secessionist governments that would invariably be involved with a proxy situation. However, the international community has recently bypassed this limitation with multilateral occupations.

The perfect example of modern international community impetus is that of multilateral occupations that advance agendas of state building since they contradict the traditional law of occupation in that they do not preserve the ousted state's sovereignty and expressly seek to overthrow it. The law of occupation is still in the interests of the occupied population for humanitarian law protects despite the occupation's different objectives. Following the invasion of Iraq, the law of occupation came into effect throughout the nation from May 2003.<sup>175</sup> This was the first time GC IV had been applied without being disputed by the Occupying Powers. The difference here, though, was that occupation was the end goal enabling the Occupying Powers

170 Barrie, *supra* note 18, p. 459.

171 Benvenisti, *supra* note 46, p. 186.

172 *Ibid.*, pp. 190-191.

173 *Ibid.*, p. 194.

174 The OHCHR Reports (*supra* notes 103 and 133) note numerous examples of discrimination in Ukraine against internally displaced persons and minority groups. Particularly in Crimea those who refuse Russian citizenship have their rights openly restricted.

175 M. Kelly, 'Iraq and the law of occupation: new tests for an old law', (2003) 6 *Yearbook of International Humanitarian Law*, pp. 127-165, 130.

to work towards regime change supported by the UN and international community.<sup>176</sup> This changed attitudes towards the use of occupation and is demonstrative of the law of occupation's possibility for flexibility. The application of the law of occupation to multilateral operations was by no means simple. The Coalition forces in Iraq moved directly into the capital and then spread control outwards but only after looting and other damage had been done.<sup>177</sup> The law of occupation therefore did not apply to all of Iraq immediately and the Coalition had to extend its effective control. This was not done quickly enough 'to establish public security and to shoulder law of occupation responsibilities as there were simply not "troops to task" to perform these functions'.<sup>178</sup>

To advance humanitarian and regime change the UNSC adopted Resolution 1483 which restated the law of belligerent occupation.<sup>179</sup> The Resolution recognised the USA and UK as Occupying Powers but instead of this being a hindrance on the occupied population the UNSC framed it as being a benefit to the population and not alien domination.<sup>180</sup> The Resolution called on Member States to rebuild Iraq and required the Occupying Powers to administer the territory so that the Iraqi people could, in due time, determine their own future.<sup>181</sup> This is demonstrative of the law of belligerent occupation's flexibility when its application is supported and enforced by the international community. Over 100 years since the Hague Regulations and over 60 years since the Geneva Conventions the law of occupation is able to move with the times as long as there is a driving force in the international community. An occupation by proxy could be feasible where it is recognised by the international community like multilateral occupations have been and lent support. The Occupying Power would then, theoretically, be more willing to implement the law of occupation with the support of the international community which would change the law of occupation in that the textual law would be applied in a new fashion. Article 29 of GC IV provides the textual basis for the expansion that when protected persons fall into the hands of the enemy the law of occupation must apply. The new era of proxy wars demands the law not stay static and as was done with multilateral occupations the protection of persons would be furthered if occupations by proxy were encouraged as legitimate and rendered assistance by the international community.

#### 4.4. State responsibility

A potential stumbling block for occupation by proxy being implemented in conflicts is the law of state responsibility due to the earlier discussion in Section 2 concerning the overall and effective control tests. There is no doubt that where a state has committed an internationally wrongful act it must make full reparation when it has been deemed responsible.<sup>182</sup> This includes violations of IHL which are traditionally resolved through the law of state responsibility.<sup>183</sup> Third parties can invoke the law of state responsibility for grave breaches of IHL regardless of whether they are an injured state.<sup>184</sup> The ICJ in the *Wall* Advisory Opinion based this decision on Common Article I to the GCs which provides that all state parties, even those not party to the conflict, must ensure compliance with the GCs.<sup>185</sup>

However, the stumbling block is the differing control tests used. As previously established the test specifically articulated for an occupation by proxy following the internationalisation of a conflict is overall control of the non-state actor. On the other hand, the *Genocide* case, when specifically determining state responsibility of the FRY had to apply Article 8 of ARSIWA and used the effective control test. Article 8 reads, 'The conduct of a person or group of persons shall be considered an act of a State under international law

176 See Harris, *supra* note 158, pp. 11-67. Harris details a model for how multilateral occupations with international support and humanitarian goals was created because of the situation in Iraq.

177 Kelly, *supra* note 175, p. 129.

178 *Ibid.*, p. 129.

179 United Nations Security Council, Resolution 1483 (22 May 2003), UN Doc S/RES/1483.

180 *Ibid.*, para. 2; Barrie, *supra* note 18, p. 441.

181 *Ibid.*, paras. 2, 4.

182 ARSIWA, Article 31; Y. Ronen, 'Illegal Occupation and its Consequences', (2008) 41 *Israel Law Review*, pp. 201-245, 228.

183 A. Zimmermann, 'Abiding by and Enforcing International Humanitarian Law in Asymmetric Warfare: The Case of "Operations Cast Lead"', (2011) 31 *Polish Yearbook of International Law*, pp. 47-78, 73.

184 *Ibid.* p. 74.

185 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, [2004] ICJ Rep 136, para. 158.

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.' The Article does not expressly mention that the direction and control must be effective but the commentary on the Article discusses both *Nicaragua* and *Tadić* before subsequently stating that, 'where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored'.<sup>186</sup> In the *Genocide* case effective control was applied which led to the VRS' actions not being attributable to the FRY.<sup>187</sup> When it comes to occupation by proxy the issue is uncertainty and potential escaping of liability of the state. If the state only has overall control of the non-state actor, then a court applying ARSIWA would determine that the state is not internationally responsible. If a court was determining responsibility of the non-state actor, or at least the leaders of the non-state actor, then the applicability of the law of occupation could be deemed to exist under overall control making those individuals criminally liable. Gal rightfully notes that this situation is unsavoury due to the possibility that future occupations by proxy could occur through 'puppets' separate enough from the state to limit international responsibility.<sup>188</sup> Heinsch argues that where the consequences of an overall control scenario would result in the overthrow of another government as the common objective then there would be a real link between the non-state actor and the state and effective control would not be required.<sup>189</sup> This has not been applied by international courts and therefore effective control is still a severe limitation on the feasibility of occupation by proxy because it would give a state the 'get out of jail free card' under state responsibility even if the occupation was deemed to exist.

If the tests for attribution could be harmonised in future, then the financial burden that could result from a judgment against the state for not enforcing the law of occupation adequately in an occupation by proxy could encourage compliance with IHL.<sup>190</sup> The *Wall* Advisory Opinion held Israel responsible for damages in the wall's construction during occupation and was ordered to make reparations.<sup>191</sup> Institutions such as the United Nations Register of Damages Caused by the Construction of the Wall in the Occupied Palestinian Territory could serve as a deterrent against non-adherence to the law of occupation. States are rational actors and carry out actions as long as it is in their best interests. Therefore, states deny the applicability of the law of occupation for as long as it is in their best interests which would cease if state responsibility for a proxy was a risk resulting in damages to persons affected.

## 5. Conclusion

The law of occupation can change beyond its textual treaty law existence. There are notable uncertainties concerning its application that have existed as far back as the Brussels Declaration but the law of occupation has shown itself to be versatile and capable of being applied to a number of situations. Unfortunately, acceptance by an Occupying Power that it is in fact in occupation is not easily resolved. Proxy wars or non-international armed conflicts with intervening states are rife and occupation by proxy fills the gap of a higher threshold of protection that is needed when a non-state actor does have control over the daily lives of inhabitants of a territory. The concept exists through case law and its application is supported by Article 29 GC IV. When a sovereign government is wholly excluded by another force the legal vacuum that ensues is a risk for those who continue to live in the area under a new regime. The overall control test of the non-state actor is the most appropriate for closing that vacuum with occupation by proxy. Unfortunately, international law is not consistent and the effective control test under state responsibility presents a clash of views. This author's belief is that in order for occupation by proxy to be effectively implemented by states the threshold for state responsibility for actions of the non-state actor needs to be lowered to overall

<sup>186</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (November 2001), UN Doc A/56/10, Commentary, p. 48.

<sup>187</sup> *Genocide*, supra note 48, para. 403.

<sup>188</sup> Gal, supra note 9, p. 78.

<sup>189</sup> Heinsch, supra note 37, p. 350.

<sup>190</sup> Ronen, supra note 182, p. 231.

<sup>191</sup> *Wall Advisory Opinion*, supra note 185, para. 152.

control. Equally, if the test for control identifying the occupation was raised the effective control concept would rarely be applicable decreasing the availability of protection for inhabitants.

The UNSC presents occupation by proxy with its strongest hope of implementation. The UNSC is able to modify international law when needed to restore international peace and security. Although politically hindered, one could anticipate that the UNSC could advance occupation by proxy if a less politically sensitive scenario arises in future. Eastern Ukraine sits in the uncomfortable position where the UNSC cannot respond under Chapter VII due to Russia's veto and, nevertheless, the DNR and LNR cannot currently be proven to be under the overall control of Russia. This is a setback for occupation by proxy and the challenge for the future is how can the law of occupation be effectively implemented with the barriers of overall and effective control? Occupation under the law may be factual but enforcement of the obligations require international will and cooperation. Declaring that a non-state actor is under overall control may be a step too far for many during the conflict as opposed to *ex post facto* determinations such as in the ICTY where political fallout is less of a risk. This is despite the advantages and protections the law of occupation brings to a local population under threat. In time change may occur since it is possible to effectively implement occupation by proxy if driven by the international community and consensus is found on the control tests and the level of obligations applicable. As the International Military Tribunal notes,

'This law is not static, but by continual adaptation follows the needs of a changing world.'<sup>192</sup>

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192 *The Nuremberg Trial*, [1946] 6 FRD 69 (Int'l Military Tribunal), p. 109.