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Blurred Lines: Conflict Classification, Proxy Militias, and the Quest for Accountability in the Democratic Republic of the Congo

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ABSTRACT *This paper explores the complex challenges of classifying the armed conflicts that have plagued the Democratic Republic of the Congo (DRC), particularly since the resurgence of the M23 rebel group. Adopting a historical lens, it reveals that many of the ongoing conflicts in eastern DRC bear striking similarities to past violent episodes, underscoring the persistence of destabilizing patterns. The paper addresses the difficulties in accurately classifying these conflicts, particularly the reluctance to acknowledge them as anything beyond non-international armed conflicts (NIACs). It emphasizes the internationalization of the conflict, driven by foreign intervention, and advocates for the harmonization of the control test in conflict classification and State responsibility. This is particularly crucial in cases involving proxy militias operating within a fragile State framework, where the boundaries between internal and international armed conflicts become increasingly blurred.*

KEYWORDS Classification, Armed conflicts, proxy militias, DR Congo, International armed conflict by proxy, Accountability

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1 INTRODUCTION

The large-scale invasion of Ukraine by Russia has reignited the debate on the selectivity of international criminal law¹ and shed light on what the press, think tanks, and humanitarian organizations refer to as forgotten wars.² While some have welcomed the renewed interest in accountability for international crimes, others have raised the issue of double standards in the application of international criminal law.³ This discussion has led to a blending of legal concepts, with comparisons drawn between the invasion of Ukraine by Russia and the support for the M23 by Rwanda,⁴ according to United Nations experts⁵ and human rights organizations.⁶ Beyond this proliferation of concepts and comparisons, the real issue at stake is that of classification. Some authors do not mince words:

Notwithstanding its devastating consequences, the DRC conflict has not been accorded the same attention as many other hot wars underway around the world. This is partly because it is exceedingly difficult to keep track of the many layers of the country's armed conflicts, not least the characteristics, dynamics and networks of armed groups such as the M23.⁷

The armed conflicts that have ravaged the DR Congo for nearly three decades are characterized by their dual categorization as both intrastate and interstate conflicts.⁸ A defining feature of these conflicts is the transnational alliances between Congolese armed groups and neighboring States.⁹ Scholars and international bodies often misinterpret these conflicts, categorizing them narrowly

¹ Patryk I Labuda, 'Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion' (2023) 36 *Leiden Journal of International Law* 1095, 1096.

² Georg Häsler, 'Forgotten wars, part 2: Could conflicts in Congo, Brazil or Myanmar spread?' *Neue Zürcher Zeitung* (8 February 2024) <<https://www.nzz.ch/english/part2-forgotten-wars-could-conflicts-in-congo-brazil-or-myanmar-spread-ld.1777431>> accessed 22 May 2024.

³ Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher 2015).; Gabriel M Lentner, 'The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism' (2020) 20 *International Criminal Law Review* 251.

⁴ Daniel Levine-Spound, 'Will the World Respond to Potential Rwandan Aggression Against the Democratic Republic of the Congo?' (*Just Security*, 21 June 2023) <<https://www.justsecurity.org/86976/will-the-world-respond-to-potential-rwandan-aggression-against-the-democratic-republic-of-the-congo/>> accessed 22 May 2024.

⁵ 'Final Report of the Group of Experts on the Democratic Republic of the Congo' (United Nations Security Council 2023) S/2023/431.; 'Midterm Report of the Group of Experts on the Democratic Republic of the Congo' (United Nations Security Council 2023) S/2023/990.

⁶ Thomas Fessy, 'DR Congo: Atrocities by Rwanda-Backed M23 Rebels' (6 February 2023) <<https://www.hrw.org/news/2023/02/06/dr-congo-atrocities-rwanda-backed-m23-rebels>> accessed 22 May 2024.

⁷ Cathy Nangini and others, 'Visualizing Armed Groups: The Democratic Republic of the Congo's M23 in Focus' (2014) 3 *Stability: International Journal of Security and Development* 1–2.

⁸ Walter C Soderlund and others, 'The Congo: Understanding the Conflict', *Africa's Deadliest Conflict: Media Coverage of the Humanitarian Disaster in the Congo and the United Nations Response, 1997–2008* (Wilfrid Laurier University Press 2013) 10.

⁹ Henning Tamm, 'The Origins of Transnational Alliances: Rulers, Rebels, and Political Survival in the Congo Wars' (2016) 41 *International Security* 147, 148.

as non-international armed conflicts (NIAC)¹⁰ and failing to capture their broader implications for the study of foreign intervention by uninvited States in internal armed conflicts. However, foreign intervention is not unique to the Congolese context. It has been observed that in post-Cold War sub-Saharan Africa, every internal armed conflict that met the threshold of an armed conflict between 1990 and 2010 involved external support to rebel groups, often from at least one African State.¹¹

The purpose of this paper is to move beyond the textual tendency to define non-international armed conflicts negatively or residually in comparison to international armed conflicts,¹² especially in the context of complex conflicts like those in the DR Congo. What might initially appear as a conflict between a State and a non-State actor often reveals itself, upon closer examination, to be a conflict between two States.¹³ To address this complexity, the study advocates for the harmonization of the rules and thresholds governing conflict classification and State responsibility, particularly in cases involving proxy non-State armed groups. Such harmonization is essential for accurately categorizing conflicts and ensuring accountability in situations of transnational intervention.

Methodologically, this study adopts a hybrid approach, combining historical analysis, jurisprudential examination, and an exploration of the doctrinal evolution concerning the classification of armed conflicts and State responsibility. The choice of a historical method is particularly justified in the context of protracted conflicts such as those ravaging the Democratic Republic of Congo, where “historical legacies weigh heavily on the present”.¹⁴ More importantly, this approach underscores the necessity of accounting for the contemporary reconfiguration of armed conflicts, which often defy the traditional dichotomy between international and non-international armed conflicts.¹⁵ More concretely, the use of historical and political science literature in the first section of this study is justified by the need to establish the facts, in line with the idea that the legal qualification of a situation is closely dependent on its underlying factual reality, as highlighted by Taki.¹⁶ Regarding the analysis of primary sources—namely, international humanitarian law treaties and the Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) some of whose

¹⁰ Peter Rosenblum, ‘Kabila’s Congo’ (1998) 97 *Current History* 193.

¹¹ Tamm (n 9) 148.

¹² Dino Kritsiotis, ‘The Tremors of Tadić’ (2010) 43 *Israel Law Review* 262.

¹³ Marko Milanovic and Vidan Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict’, in Nigel White, Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2012) 293.

¹⁴ Jason Stearns, *Dancing in the Glory of Monsters. The Collapse of the Congo and the Great War of Africa* (Public Affairs 2011) 330.

¹⁵ See Elizabeth Holland, ‘The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?’ (2012) 34 *Suffolk Transnational Law Review*. ; Yahli Shereshevsky, ‘Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts’ (2016) 49 *Vanderbilt Journal of Transnational Law* 455.

¹⁶ Hiroshi Taki, ‘Effectiveness’, in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2021).

provisions are recognized as customary¹⁷—we have adopted a teleological approach, focusing on the purpose of the rule and its social objective.¹⁸ Given that the law is not rigid, it "must be interpreted in the light of present-day conditions",¹⁹ an approach that ensures rights and protections are "practical and effective rather than theoretical and illusory".²⁰ It is through the application of this teleological approach, coupled with a rigorous historical method, that we have examined throughout this study the relevance of the effective control test in governing the current dynamics of armed conflicts, where States, hidden behind the veil of proxy wars, seek to mask their direct involvement while exerting decisive influence. The examination of case law is essential, as international courts, by virtue of their expertise and mandate, provide authoritative interpretations regarding the application of relevant treaty provisions. In this study, the analysis of decisions from the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Court (ICC) aimed not only to identify divergences in classification and attribution rules but also to determine whether a consistent jurisprudential pattern emerges, suggesting that international humanitarian law constitutes a *lex specialis* in matters of attribution.²¹ Accordingly, this study focuses specifically on the situation unfolding in eastern DRC, particularly in the North Kivu province, since November 2021. This conflict involves key actors—the DRC, local militias, Rwanda, and the M23 armed group—and exemplifies a dynamic in which the boundaries between intrastate warfare and proxy warfare become increasingly blurred.

This essay will be organized into three main sections. The first section will examine the historical context of violence in the DRC, with a particular focus on the situation involving the M23 rebel group. The second section will explore the challenges surrounding armed conflict classification in the DRC. The third section will address the internationalization of these conflicts, emphasizing the need for a harmonized approach to the control tests used in armed conflict classification and State responsibility. This section will analyze the involvement of foreign actors and the accountability gap that arises from international neglect of proxy militias.

¹⁷See UNGA, Report of the Secretary-General, Responsibility of States for internationally wrongful acts: Compilation of decisions of International Courts, tribunals and other bodies, UN Doc A/62/62 and Add. 1 (2007); A/65/76 (2010); A/68/72 (2013); A/71/80 (2016); A/74/83 (2019).

¹⁸ Jean-Louis Bergel. (1999). *Théorie générale du droit*, 3rd edn, 251-252.

¹⁹ ECtHR *Tyler v. the United Kingdom*, App. No.5856/72, Judgment 25 April 1978, § 31.

²⁰ ECtHR *Mamatkulov and Askarov v. Turkey*, App No. 46827/99, Judgment 4 February 2005, § 121.

²¹ Patrick Daillier, 'The Development of the Law of Responsibility Through the Case Law' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 37 <<https://doi.org/10.1093/law/9780199296972.003.0004>>.

2 THE M23, FOLLOWING IN THE FOOTSTEPS OF THE "CONGO WARS"

2.1 Rwanda and the Saga of Armed Conflicts in the DRC

Tracking the situation in the DRC is no easy feat. Beyond the limited attention the conflict has garnered,²² it is often described as "a conceptual mess that eludes simple definition, with many interlocking narrative strands".²³ The benefit, however, is that over time, numerous scholars—especially in political science and history—have devoted significant effort to untangling the complexities of this conundrum.²⁴ Many authors now agree that the conflict in the Congo is best understood as three interconnected wars.²⁵ The first war began in September 1996 when a coalition of neighboring States—led by Rwanda—invaded what was then Zaire, resulting in the ousting of President Joseph Mobutu and the rise of Laurent-Désiré Kabila in May 1997. The second erupted in August 1998, when a similar coalition of neighboring States, some of whom had been Kabila's allies during the first war, broke up with him and sought to depose him. This attempt, however, lacked the success of the first war. It culminated in the signing of the Lusaka ceasefire agreement in July 1999 by the Kabila government and the MLC and RCD rebel groups, following a military stalemate and significant external pressure. The withdrawal of most foreign troops shortly thereafter created a power vacuum, and a third war emerged along UN-monitored ceasefire lines in northeastern Congo.²⁶

The First Congo War (1996-1997)

The first period of armed conflict is commonly referred to as the "War of Liberation", the "First Kivu War", or the "First Great Lakes War", which broke out in August 1996.²⁷ The hostilities pitted the Zairian Armed Forces (FAZ) against the troops of the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL), a Congolese rebel movement led by Laurent-Désiré Kabila and supported by Angolan, Ugandan, and Rwandan forces. To avert being perceived as aggressors or invaders, the Rwandan and Ugandan governments swiftly orchestrated the formation of an alliance comprising small, obscure, and exiled

²² Colette Braeckman, *Les nouveaux prédateurs: politique des puissances en Afrique centrale* (Fayard 2003).

²³ Stearns, *Dancing in the Glory of Monsters. The Collapse of the Congo and the Great War of Africa* (n 14) 3.

²⁴ See Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996–2006* (Cambridge University Press 2009).; Thomas Thomas Turner, *The Congo Wars: Conflict, Myth and Reality* (Zed Books 2007).; Gérard Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2009).

²⁵ Herbert F Weiss and Tatiana Carayannis, 'The Enduring Idea of the Congo' in Ricardo René Larémont (ed), *Borders, Nationalism, and the African State* (Lynne Rienner Publishers 2005) 135-178.

²⁶ Tatiana Carayannis, 'Webs of War in the Congo: The Politics of Hybrid Wars, Conflict Networks, and Multilateral Responses 1996-2003' (City University of New York 2017) <https://academicworks.cuny.edu/gc_etds/2153>.

²⁷ Nissé Nzereka Mugendi, *Les déterminants de la paix et de la guerre au Congo-Zaïre* (Peter Lang Group AG 2011) 21–22.; Auguste Mampuya, 'Responsabilité et réparations dans le conflit des Grands-Lacs au Congo-Zaïre' [2004] *Revue Générale de Droit International Public* 679.

Congolese revolutionary groups opposed to Mobutu.²⁸ This coalition, strategically designed to mask foreign intervention, advanced with remarkable speed, traversing the vast expanse of the Congo and seizing Kinshasa within a mere eight months.

Given the documented control and decisive influence exerted by Rwanda and Uganda over the AFDL,²⁹ it is entirely justified to characterize the First Congo War as an internationalized armed conflict. This classification highlights the conflict's hybrid nature, where domestic upheavals and foreign interventions merge, obscuring the traditional boundaries between civil wars and international confrontations. As Louise Arimatsu observes, the conflict between the AFDL and the Zairian armed forces should have been governed by the rules applicable to international armed conflicts, considering, as the Mapping Report underscores, the substantial control and influence wielded by foreign States over the AFDL's operations.³⁰

The Second Congo War: Africa's World War (1998-2003)

The second period of conflict extends roughly from August 1998 to September 2003.³¹ Hostilities began on August 2, 1998, with armed clashes between Rwandan and Ugandan forces on one side and the Congolese Armed Forces on the other. These events were triggered by the refusal of these foreign forces, previously allied with the AFDL, to withdraw from Congolese territory and by the Congolese government's attempts to expel them, as officially declared by President Laurent-Désiré Kabila on July 28, 1998.³² This marked the onset of an international armed conflict often referred to as the "Second War" or the "War of Rectification".³³

On August 4, 1998, Rwanda, aiming to overthrow President Kabila within ten days, launched an airborne operation, deploying its troops from the city of Goma in eastern DRC to Kitona in Bas-Congo, near the capital, Kinshasa.³⁴ By late August, several towns in Bas-Congo had fallen under the control of foreign

²⁸ Weiss and Carayannis (n 25) 147.

²⁹ This view is shared by several scholars who argue that the AFDL served merely as a façade, concealing a meticulously planned invasion orchestrated by Rwanda, Uganda, and, to a lesser extent, Burundi. These scholars contend that the AFDL's role was largely symbolic, a convenient cover for the broader geopolitical ambitions of its foreign backers. For a detailed analysis, see notably Jason K Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (Public Affairs 2010) 171.; Thomas Turner, *The Congo Wars: Conflict, Myth and Reality* (Zed Books 2007) ch 4.; Kevin C Dunn, 'A Survival Guide to Kinshasa' in John F Clark (ed), *The African Stakes of the Congo War* (Palgrave Macmillan US 2002) <https://doi.org/10.1057/9781403982445_4>; David van Reybrouck, *Congo: The Epic History of a People* (Fourth Estate 2014) 313.

³⁰ Louise Arimatsu, 'The Democratic Republic of the Congo 1993-2010', *International Law and the Classification of Conflicts* (Elizabeth Willmshurst, Oxford University Press 2012) 162.

³¹ Global Witness, *S.O.S. Toujours La Même Histoire. Une Étude Contextuelle Sur Les Ressources Naturelles de La République Démocratique Du Congo* (Global Witness Publishing Inc 2004) 10.

³² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (ICJ) [29–31].

³³ Déo Namujimbo, *Je reviens de l'enfer. Reportage de guerre à l'est de la RD Congo (août-septembre 1998)* (L'Harmattan 2014).

³⁴ For a comprehensive analysis of the Second Congo War, see F Reyntjens, 'Briefing: The Second Congo: More than A Remake' (1999) 98 *African Affairs* 241, 241.

troops. However, the intervention of Angola and Zimbabwe in support of the DRC successfully thwarted the capture of Kinshasa. Namibia also joined the conflict on the side of the Congolese government, albeit with a smaller contingent. Meanwhile, Uganda capitalized on Rwanda's offensive to launch its own incursion into the DRC.³⁵

This second period of armed conflict in the DRC involved the participation of a plethora of foreign States. Unsurprisingly, some scholars have aptly labeled this international conflict as "Africa's Great War".³⁶ Despite the humiliating failure to seize Kinshasa, Rwanda remained resolute in its ambitions. Together with Uganda, it continued to oppose the Kinshasa regime by supporting two rebel groups formed on August 12 and September 30, 1998, respectively: the Rwandan-backed Rally for Congolese Democracy (RCD)³⁷ and the Ugandan-sponsored Movement for the Liberation of Congo (MLC).³⁸ By early 1999, Rwandan and Ugandan forces, along with these two rebel factions, controlled one-third of Congolese territory.³⁹

In response to the foreign occupation, many Congolese in the occupied territories organized themselves into local self-defense groups known as Mai-Mai (or Mai-Mai or Mayi-Mayi).⁴⁰ These groups, by default, became allies of the Kinshasa regime in its struggle against foreign forces.

The Third Congo War: The Enduring Violence in Eastern DRC (2003-Present)

The peace agreement brought relative calm to Kinshasa and other parts of Congo, and the foreign armies largely withdrew. However, in the eastern provinces, what Gérard Prunier describes as "confused past conflict violence"⁴¹ persisted without interruption. The conflicts took on a protracted and fragmented nature, "producing a startling proliferation of belligerents".⁴² Many, if not most, of the problems in the eastern region stem from local causes—what Séverine Autesserre refers to as

³⁵ For an in-depth exploration of the motivations driving foreign governments to engage directly in hostilities during the Second Congo War, see International Crisis Group (ICG), 'CONGO AT WAR: A Briefing on the Internal and External Players in the Central African Conflict' (1998) 2.

³⁶ Roland Pourtier, 'Guerre et géographie: Du conflit des Grands Lacs à l'embrasement de l'Afrique centrale' in Jean-Louis Chaléard (ed), *Politiques et dynamiques territoriales dans les pays du Sud* (Éditions de la Sorbonne 2000).

³⁷ Koen Vlassenroot and Timothy Raeymaekers, 'New Political Order in the DR Congo? The Transformation of Regulation' (2008) 21 *Afrika Focus* 43.

³⁸ Gérard Prunier, 'Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986–99)' (2004) 103 *African Affairs* 359, 380 <<https://doi.org/10.1093/afraf/adh050>>.

³⁹ Global Witness (n 31) 10.

⁴⁰ According to Koen Vlassenroot, the Mai-Mai are militia groups that recruit along ethnic lines, drawing exclusively from indigenous Congolese populations. These groups emerged with the onset of the Congolese wars, their primary aim being to combat foreign forces and their Congolese proxies. See, Koen Vlassenroot, 'Violence et Constitution de Milices Dans l'est Du Congo: Le Cas Des Mayi-Mayi', in Filip Reyntjens, Stefaan Marysse (eds), *L'Afrique des grands lacs, annuaire 2002-2003* (L'Harmattan 2003).

⁴¹ Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2008) 353.

⁴² Jason Stearns, 'Involution and Symbiosis: The Self-Perpetuating Conflict in the Democratic Republic of Congo' (2022) 98 *International Affairs* 873, 35 <<https://doi.org/10.1093/ia/iia062>>.

bottom-up tensions—centered on issues such as land disputes, citizenship, resources, access to status and power, and questions of indigenous identity.⁴³

These localized tensions were further exacerbated during the third phase of the Congo war by the presence of predatory militias and external military interference. Among these external actors was Rwanda, which supported Congolese Tutsi-led insurrections, first the CNDP (Congrès National pour la Défense du Peuple) from 2004 until early 2009, and later the M23 movement in 2012.⁴⁴ According to Filip Reyntjens, "The ease with which the M23 was defeated in 2013 demonstrates that it was a hollow shell militarily, dependent on Rwandan support".⁴⁵ Jason Stearn has similarly emphasized that, without Rwanda's backing, it is difficult to imagine that the ensuing crisis would have escalated to the scale it did. The Rwandan Patriotic Front (RPF), the ruling party in Rwanda, had long viewed eastern Congo as critical to its national security. Additionally, many of its leaders had deep personal and economic ties to the region, further entangling Rwanda in the complex dynamics of the eastern Congo.⁴⁶

2.2 M23 Redux: A Proxy Force or a Congolese Armed Group?

Defeated in 2013, M23 resurfaced in 2021 with demands that, in some respects, echo those made at its inception in 2012. Initially, the movement accused the Congolese government of failing to honor the commitments outlined in the Nairobi Declarations, signed after their previous rebellion ended in 2013.⁴⁷ These commitments included amnesty for their members, demobilization, and social reintegration. However, this time, the M23 expanded its demands to include more ambitious goals such as the protection of Tutsi communities, the reform of the Congolese army, the fight against corruption, and, more broadly, significant improvements in governance.⁴⁸

Since its resurgence in 2021, the M23 rebel group has emerged as a formidable force, primarily due to its use of advanced military technology and equipment.⁴⁹ By early April 2024, the group was estimated to have approximately

⁴³ Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge University Press 2010) ch 4.

⁴⁴ On the trajectory of the M23, the origins of the CNDP, and the dynamics underpinning their formation and eventual defeats, read Jason Stearns, *From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo* (Rift Valley Institute 2012).

⁴⁵ Filip Reyntjens, 'L'araignée dans la toile. Le Rwanda au cœur des conflits des Grands Lacs' (2020) 179 *Hérodote* 73, 85.

⁴⁶ Jason K Stearns, *The War That Doesn't Say Its Name: The Unending Conflict in the Congo* (Princeton University Press 2021) 43.

⁴⁷ Point 1 of the Nairobi Declaration by the M23, dated November 12, 2013, available at <http://afrikarabia.com/wordpress/wp-content/uploads/2014/01/Dclaration-Nairobi-M23-dc.-2013.pdf>, accessed on December 4, 2024.

⁴⁸ 'Final Report of the Group of Experts Submitted in Accordance with Paragraph 6 of Resolution 2582 (2021)' (UN Security Council 2022) S/2022/479 paras 69–70.

⁴⁹ Group of Experts on the Democratic Republic of the Congo, 'Final Report of the Group of Experts on the Democratic Republic of the Congo' (United Nations Security Council 2024) S/2024/432 para 45.

3,000 active combatants.⁵⁰ This strength has enabled the M23 to seize control of vast areas in North Kivu province, particularly in the territories of Rutshuru, Nyiragongo, and Masisi.⁵¹ In response, numerous local armed groups have coalesced into a loosely organized coalition known collectively as the *Wazalendo* [patriots]. However, this alliance has been marked by ineffective coordination, a lack of cohesion, and deficits in trust and discipline, undermining their ability to confront the M23 effectively.⁵²

Meanwhile, the M23 has received substantial support from the Rwandan military. This multifaceted support includes military assistance, personnel reinforcement, logistical aid, and political backing.⁵³ Similarly, evidence gathered by a panel of UN experts suggests that Rwanda's involvement extends far beyond logistical support or the supply of weapons. The RDF not only positioned itself on the front lines but also operated advanced weaponry and directly participated in combat operations. Its presence played a pivotal role in repelling joint FARDC-Wazalendo offensives and in securing control over new territories in Petit Nord.⁵⁴

3 COMPLEXITY AND CHALLENGES OF CLASSIFYING THE CONGO SITUATION

The first challenge addressed in this section pertains to what some experts have termed the *horrid irrationality*⁵⁵ of armed conflicts in Congo. This characterization is evident in the sheer multiplicity of parties, factions, and groups engaged in hostilities, the absence of a clear chain of command, and the deliberate targeting of civilians with extreme violence. These factors have rendered the classification of such conflicts highly complex and fraught with ambiguity.

To bridge this gap, human rights law has often been mobilized, particularly given the argument that it offers greater protection to individuals than IHL⁵⁶ in situations of lower-intensity non-international armed conflicts⁵⁷—such as those involving the organized M23 group and local militias. This trend has given rise to what some have described as the *humanization* of international law,⁵⁸ which advocates for extending many rules traditionally applicable exclusively to international armed conflicts to non-international ones. As a consequence, the traditional distinctions between these two categories of conflicts in IHL have

⁵⁰ *ibid* 37.

⁵¹ IPIS, ASSODIP and DIIS, 'Le M23 « version 2 » : Enjeux, motivations, perceptions et impacts locaux' (2024) 8.

⁵² Group of Experts on the Democratic Republic of the Congo (n 49) para 67.

⁵³ UN. Group of Experts Established pursuant to Paragraph 8 of Security Council Resolution 1533 (2004), 'Letter Dated 13 June 2023 from the Group of Experts on the Democratic Republic of the Congo Addressed to the President of the Security Council' (2023) S/2023/431 para 41.

⁵⁴ Group of Experts on the Democratic Republic of the Congo (n 49) para 40.

⁵⁵ Mats Berdal and David Keen, 'Violence and Economic Agendas in Civil Wars: Some Policy Implications' (1997) 26 *Millennium: Journal of International Studies*.

⁵⁶ Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239, 240.

⁵⁷ David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflict' (2009) 42 *Israel Law Review* 25–26.

⁵⁸ Theodor Meron, *The Humanization of International Law* (Brill 2006).

gradually eroded,⁵⁹ leading many observers to refrain from classifying such conflicts altogether, highlighting the growing uncertainty in the legal framework.

In international law, there is near-unanimous consensus that IHL applicable to non-international armed conflicts is binding on rebel armed groups.⁶⁰ However, international human rights law has been more hesitant to impose direct obligations on non-State actors. Recently, the *principle of effective control* has been invoked to justify attempts at extending human rights obligations to rebel groups.⁶¹ That said, assuming it is always in the best interest of armed non-State actors to adhere to human rights obligations would be overly optimistic. In some cases, acts of terrorism or gross human rights violations are deliberately employed as tactics of warfare or as leverage to strengthen their negotiating positions.⁶² For instance, between 20 March and 31 May 2024, a total of 1,169 human rights violations and abuses were documented across the country. Of these, 959 occurred in conflict-affected provinces, with 63 percent reportedly committed by armed groups. Notably, the M23 accounted for the highest number of abuses (111), followed closely by various Mai-Mai groups and factions (104).⁶³ Relying on the assumption that armed non-State actors will respect human rights to gain international legitimacy or the support of populations under their control is, therefore, a precarious strategy. This approach risks failing to address human rights violations, particularly in the context of the Democratic Republic of Congo, where many non-State armed groups prioritize banditry, extortion, and resource exploitation over territorial governance or legitimacy.

It is imperative to challenge the alarming trend of refusing to classify armed conflicts in the DR Congo, a stance often justified by rhetoric depicting the violence in the DR Congo as chaotic and dominated by disorganized bands of outlaws, criminals, gangs, and traffickers. Such a reductive portrayal not only distorts the complex realities of these conflicts but also risks concealing their true nature, thereby denying countless victims of violence the justice and reparations to which they are entitled. Without the context of an armed conflict, the heinous acts perpetrated by these groups, however grievous, do not fulfil the criteria necessary for classification as war crimes.⁶⁴ This connection to an armed conflict

⁵⁹ Laurence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 *International and Comparative Law Quarterly* 297.

⁶⁰ *Prosecutor v Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)* [2004] Special Court for Sierra Leone; Appeals Chamber SCSL-2004-14-AR72(E) [22].

⁶¹ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (1st edn, Cambridge University Press 2002) 149.

⁶² Oliver Ramsbotham, Hugh Miall and Tom Woodhouse, *Contemporary Conflict Resolution* (Polity 2011) 68.

⁶³ 'United Nations Organization Stabilization Mission in the Democratic Republic of the Congo Report of the Secretary-General' (UN Security Council 2024) S/2024/482 para 22.

⁶⁴ One of the most significant breakthroughs of the ICTY emerged through the Tadić case, where it established that violations of Common Article 3 constitute war crimes, regardless of whether they occur within the context of a non-international armed conflict or an international armed conflict. *Prosecutor v Dusko Tadić aka 'Dule' (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [1995] ICTY IT-94-1 [137].

is crucial for establishing the jurisdiction of international tribunals and ensuring that perpetrators are held accountable on the global stage.⁶⁵

For a non-international armed conflict to be legally established, the involved groups must be sufficiently organized, and the hostilities must amount to a certain intensity.⁶⁶ In other words, in a situation where “armed groups engage in organized violence without belonging to a State” and their conduct cannot be imputed to a State, “it must be determined whether the hostilities are sufficiently intense or protracted for that group to become an independent party to a non-international armed conflict”.⁶⁷ In line with the two key elements, the ICTY Haradinaj Trial Chamber highlighted several factors for consideration in determining the *intensity* criteria—none of which, standing alone, were deemed sufficient. These factors include the duration and intensity of individual confrontations, the type of weapons used, and the number of individuals involved or affected.⁶⁸

In the eastern regions of the DRC, with respect to the intensity criteria, UN experts have observed since November 2021 the deployment of advanced military equipment by the M23, such as short-range air defense systems.⁶⁹ All sides have utilized heavy artillery and mortar attacks targeting or occurring near densely populated areas.⁷⁰ As a result, more than one million people have been displaced.⁷¹ Throughout the conflict, armed groups continued to commit severe violations of international humanitarian law and international human rights law, often with total impunity. Violations committed by both M23 and local militias included indiscriminate attacks using explosive weapons; systematic persecution and reprisals against civilians perceived as opposing the armed groups, encompassing acts of murder, torture, corporal punishment, kidnapping, and arbitrary detention; rape; recruitment and use of children in hostilities; pillaging and extortion; and forced labor.⁷²

While acknowledging that “no strict definition would be capable of capturing the factual situations that reality throws up”,⁷³ and recognizing that there are no strict criteria but rather “indicative factors, none of which are, in themselves,

⁶⁵ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)* [2002] International Criminal Tribunal for the former Yugoslavia (ICTY) IT-96-23 & IT-96-23/1-A [58].

⁶⁶ *Prosecutor v Dusko Tadic (Appeal Judgement)* [1999] International Tribunal for the former Yugoslavia (ICTY) IT-94-1-A [562].; *The Prosecutor v Jean-Paul Akayesu (Trial Judgement)* [1998] ICTR Case No. ICTR-96-4-T [620].

⁶⁷ Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 249–250.

⁶⁸ *Prosecutor v Haradinaj et al (Trial Judgment)* [2008] International Criminal Tribunal for the former Yugoslavia (ICTY) IT-04-84-T [49].

⁶⁹ Group of Experts on the Democratic Republic of the Congo (n 49) para 49.

⁷⁰ *ibid* 91.

⁷¹ ‘United Nations Organization Stabilization Mission in the Democratic Republic of the Congo’ (UN Security Council 2023) S/2023/932 para 40.

⁷² Group of Experts on the Democratic Republic of the Congo (n 49) para 92.

⁷³ Jelena Pejic, ‘Status of Armed Conflicts’, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Elizabeth Wilmshurst, Cambridge University Press 2007) 85.

essential to establish whether the 'organization' criterion is fulfilled",⁷⁴ certain crucial indices emerge to clarify the organizational requirements amidst the numerous criteria considered in both doctrine and case law. Drawing on the *Boskoski et al.* case of 2008⁷⁵ and the *Haradinaj et al.* case,⁷⁶ Yoram Dinstein has identified five key factors for a non-State armed group to qualify as a party to a NIAC. These factors include: the presence of a clear chain of command, the group's operational capacities, its logistical abilities, a certain level of internal discipline necessary to uphold the laws of NIAC, and evidence that the armed group can effectively present a unified stance.⁷⁷

Although many factors are readily observable, the fragmented nature of armed conflicts in the Democratic Republic of Congo⁷⁸—marked by the proliferation of over 120 rebel groups⁷⁹—renders the evaluation of these criteria increasingly complex. According to the ICRC, which has been investigating the challenges posed by the current configuration of armed conflicts for several years: “The presence of fluid, multiplying, and fragmenting non-State armed groups makes it increasingly challenging—factually and legally—to identify which armed group can be considered party to a particular armed conflict”.⁸⁰ A recent example is the alliance formed in December 2023 between the politico-military movement Alliance Fleuve Congo (AFC) and the M23 rebel movement. This coalition appears to aim at legitimizing the M23 and framing the conflict as a purely Congolese issue, as noted in the latest UN experts' report.⁸¹ In this context, the ICRC suggests that it may be more practical to assess the intensity criterion collectively by considering the cumulative impact of all military actions carried out by these groups working in concert.⁸² Kleffner has recently supported that, “where acts of violence by several organized armed groups occur on a geographical and temporal continuum”, the intensity should be assessed cumulatively.⁸³ For instance, in October 2023, following coordinated offensives by local armed groups, commonly referred to as Mai-Mai and *Volontaires pour la défense de la patrie*, which temporarily forced the M23 out of Masisi territory, the

⁷⁴ *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (Judgment)* [2008] ICTY IT-04-84-T [60].

⁷⁵ *Prosecutor v Boskoski and Tarculovski (Trial Judgment)* [2008] ICTY IT-04-82-T [199–2003].

⁷⁶ *Prosecutor v. Haradinaj et al. (Trial Judgment)* (n 68) para 60.

⁷⁷ Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 42.

⁷⁸ Jason Stearns, ‘Rebels Without a Cause: New Face of African Warfare’ (2023) May/June Foreign Affairs (Council on Foreign Relations).

⁷⁹ Stearns, *The War That Doesn't Say Its Name* (n 46).

⁸⁰ ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting To Protection In Armed Conflict On The 70th Anniversary Of The Geneva Conventions’ (International Committee of the Red Cross 2019) Publication 69.

⁸¹ Group of Experts on the Democratic Republic of the Congo (n 49) para 25.

⁸² ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting To Protection In Armed Conflict On The 70th Anniversary Of The Geneva Conventions’ (n 80) 70.

⁸³ Jann Kleffner, ‘The Legal Fog of an Illusion: Three Reflections on “Organization” and “Intensity” as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict’ (2019) 95 *International Law Studies* 177.

M23 quickly regained control of their former positions in Kitchanga and along the Sake-Kitchanga-Mweso axis. This series of offensives and counteroffensives alone led to the displacement of over 150,000 civilians.⁸⁴ This highlights the importance of considering the coalitions formed by the belligerents when analyzing the intensity criteria in such complex situations.

The second challenge this essay aims to dwell upon is the tendency to classify the armed conflict in the DR Congo as a non-international armed conflict. Emmanuel Murhula denounces a process aimed at ethnicizing armed violence.⁸⁵ Early analyses of the Congo Wars predominantly framed them as civil or internal wars, emphasizing the chaotic aftermath of Mobutu's collapse and the ensuing local power struggles.⁸⁶ Initial studies focused on the complex interplay of internal dynamics, such as identity politics and the vulnerable position of Kinyarwanda-speaking communities in the Kivu provinces.⁸⁷ The internal nature of the Congolese conflicts was thus justified, drawing on analyses such as Kalyvas's, who argues that "violence often (but not always) grows from within communities even when it is executed by outsiders".⁸⁸ To justify the non-international character of the Congolese conflicts, scholars highlighted that these conflicts primarily unfolded within Congolese territory, involving alternately government forces and various local militias. These confrontations sometimes pitted militias against one another, often over issues such as citizenship, land access, voting rights or eligibility, as well as rivalries concerning the status of customary chiefs and other community-related matters.⁸⁹ From a legal perspective, the non-international character of the Congolese conflicts was primarily derived from a straightforward textual interpretation of Common Article 3 of the 1949 Geneva Conventions (CA3) and the definition of a NIAC as outlined in Additional Protocol II to the Geneva Conventions of 1949 (AP2). These texts suggest that NIACs pertain exclusively to non-international armed conflicts, as indicated by the references to the territory of the State party within the legal framework.⁹⁰ One might argue, beyond a purely textual interpretation, that a normative approach suggests the law of NIAC may be a more appropriate legal framework for regulating the conflicts

⁸⁴ 'United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (n 71) para 24.

⁸⁵ Emmanuel Murhula, 'Médias et Diplomatie : La Guerre Du Congo Dans Le Journal' (2003) 9 La Revue Nouvelle 98.

⁸⁶ Georges Nzongola-Ntalaja, *The Congo from Leopold to Kabila: A People's History* (Zed Books 2002).; Crawford Young and Thomas Edwin Turner, *The Rise and Decline of the Zairian State* (University of Wisconsin Press 1985).; Thomas M Callaghy, *The State-Society Struggle: Zaire in Comparative Perspective* (Columbia University Press 1984).

⁸⁷ Emizet François Kisangani, *Civil Wars in the Democratic Republic of Congo, 1960-2010* (Lynne Rienner Publishers 2012).

⁸⁸ Stathis Kalyvas, 'The Ontology of "Political Violence": Action and Identity in Civil Wars' (2003) 1 Perspectives on Politics 482.

⁸⁹ Autesserre (n 43).; Séverine Autesserre, 'Local Violence, National Peace? Postwar "Settlement" in the Eastern D.R. Congo (2003-2006)' (2006) 49 African Studies Review 1.

⁹⁰ Noam Lubell, 'The War (?) Against Al-Qaeda' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 435 <<https://doi.org/10.1093/law/9780199657759.003.0013>>.

in the DR Congo. In these conflicts, non-State armed groups are not only participants but also key perpetrators of IHL violations.⁹¹ This perspective gains weight considering that the norms of IACs were specifically crafted for State actors, without adequately addressing the complexities posed by non-State armed groups.⁹²

Under the influence of journalistic accounts and the “grey literature” of aid agencies, which tend to supplant academic monographs⁹³ in torn war zones, Congo's armed conflicts have been portrayed as civil wars or non-international armed conflicts.⁹⁴ However, the reality on the ground reveals a more complex situation:

The external dimension of the conflict has seen multiple invasions of the territory of a sovereign state by various coalitions of African states claiming security threats, while the internal dimensions of the wars involve multiple internal rebellions with competing agendas and foreign sponsors, and with varying degrees of local mobilization and support...There is no neat dividing line, however, between the external and internal dimensions of this conflict, because while they may be discrete systems of conflict, they contain financial, political, and ideological factors that cut across conflict boundaries and link them together in global networks of war.⁹⁵

Whether we agree that the armed conflict currently unfolding in the DR Congo, involving the M23 rebellion, should be accurately characterized as a mixed conflict—comprising both internal and international aspects—largely depends on the legal reasoning applied. Drawing on precedents like the *Tadić* case⁹⁶ concerning the conflict in Bosnia-Herzegovina, or the *Nicaragua* case⁹⁷ where the court assessed the imputability of the Contras' conduct to the U.S., one could argue that an international conflict exists between the DR Congo and Rwanda. This argument is bolstered by the undeniable fact that Rwanda is conducting military

⁹¹ As an illustration, the United Nations Joint Human Rights Office documented various human rights violations across the Congolese national territory in January 2024, of which 58% are attributable to non-state armed groups.

⁹² Sandesh Sivakumaran, ‘Re-Envisaging the International Law of Internal Armed Conflict’ (2011) 22 *European Journal of International Law* 219, 237–238 <<https://doi.org/10.1093/ejil/chq083>>.

⁹³ Johan Pottier, *Re-Imagining Rwanda Conflict, Survival and Disinformation in the Late Twentieth Century* (Cambridge University Press 2002) 1.

⁹⁴ Kisangani (n 87).; Jed Odermatt, ‘Between Law and Reality: “New Wars” and Internationalised Armed Conflict’ (2013) 5 *19*, 29. ; Cherif Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98 *Journal of Criminal Law and Criminology* 748.

⁹⁵ Tatiana Carayannis, ‘The Complex Wars of the Congo: Towards a New Analytic Approach’ (2003) 38 *Journal of Asian and African Studies* 232, 233 <<https://doi.org/10.1177/002190960303800206>>.

⁹⁶ *Prosecutor v. Dusko Tadic aka ‘Dule’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 66) paras 74–77.

⁹⁷ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* [1986] International Court of Justice 1986 I.C.J. 14 [219].

operations with its troops on Congolese soil without the latter's consent.⁹⁸ Concurrently, a NIAC exists between the DRC and the M23 rebel group or between M23 and local militias. However, the complexity of the Congolese situation lies not only in Rwanda's independent military actions against the Congolese government forces but also in the critical role Rwanda plays in supporting M23. The Rwandan Defense Forces (RDF) have exercised *de facto* control and direction over M23 operations,⁹⁹ which has been pivotal in repelling government offensives and occupying new territories in the North Kivu region. According to the UN Group of Experts, in some operations, RDF forces matched or even surpassed M23 in numbers.¹⁰⁰ This brings us to the crucial question: what level of involvement by a State supporting a non-State group is sufficient to internationalize the conflict between the DR Congo and M23?¹⁰¹

4 INTERNATIONALIZATION OF THE M23 ARMED CONFLICT

4.1 Fragmentation of International Law

The reality of the armed conflicts that have ravaged the DR Congo in recent years starkly highlights the persistent phenomenon of third-State intervention in civil wars and points to the issue of what has been labelled internationalized armed conflict.¹⁰² Despite the clear stipulation in Paragraph (2) of Article 3 of Additional Protocol II, which states: "Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs"¹⁰³ the frequency and scale of such interventions suggest a troubling disregard for this principle. As noted, "Foreign military interventions in civil wars have been so common in our day that the proclaimed rule of non-intervention may seem to have been stood on its head".¹⁰⁴

Undoubtedly, the involvement of a foreign State's military in a civil conflict, when siding with rebel factions, invariably transforms the conflict into an

⁹⁸ In February and March 2024, several Governments and the High Representative of the European Union for Foreign Affairs and Security Policy demanded that Rwanda halt all support for M23 and immediately withdraw all RDF personnel from the Democratic Republic of the Congo. See Communiqués from the United States of America (see www.state.gov/escalation-of-hostilities-in-eastern-democratic-republic-of-the-congo) and France (see www.diplomatie.gouv.fr/fr/dossierspays/republique-democratique-du-congo/evenements/article/republique-democratique-du-congosituation-a-l-est-du-pays-20-02-24).

⁹⁹ Group of Experts on the Democratic Republic of the Congo (n 49) para 45.

¹⁰⁰ *ibid* 40.

¹⁰¹ See Christine Byron, 'Armed Conflicts: International or Non-International?' (2001) 6 *Journal of Conflict & Security Law* 63, 63.

¹⁰² James Graham Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 *International Review of the Red Cross* 316.

¹⁰³ International Committee of the Red Cross (ICRC), 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' <<https://www.refworld.org/legal/agreements/icrc/1977/en/14705>>.

¹⁰⁴ Oscar Schachter, *International Law in Theory and Practice* (M Nijhoff Publishers 1991) 160.

IAC between the foreign State and the territorial State.¹⁰⁵ However, complexities emerge when this intervention by the foreign State assumes covert or subtle forms of support for non-State armed groups, thereby sparking what is often termed a proxy war, “a conflict in which a third party intervenes indirectly and covertly in order to influence the strategic outcome in favor of its preferred faction”.¹⁰⁶ In such scenarios, the distinction between internal and external conflicts blurs, presenting intricate challenges for both legal interpretation and practical resolution.

The question of proxy warfare holds significant interest within the scope of this analysis and understanding it can shed light on why the M23 rebellion is portrayed by Congolese media and politicians as a proxy rebel group. However, from the perspective of international humanitarian law, the situation is not as straightforward. Not only does the concept of a non-State armed group acting as a proxy pose semantic difficulties,¹⁰⁷ but it also sparks a debate about the relevance of the existing dichotomy in the classification of armed conflicts, with some authors even proposing a third classification.¹⁰⁸ This interpretation is not shared by the ICRC, for whom: “...armed conflicts involving foreign intervention do not form a third category of conflicts, but merely constitute a specific manifestation, in a particular context, of an IAC, a NIAC or both types of conflict simultaneously”.¹⁰⁹

The unresolved issue within Geneva law pertains to the criteria for determining when a party involved in a NIAC, particularly a non-State armed group, is acting on behalf of a foreign State. IHL lacks clarity on the matter of attribution, offering no specific guidelines for identifying whether an armed group initially perceived as independent in a pre-existing conflict is subordinate to a third power, thereby transforming the conflict into an international one.¹¹⁰ While Article 4A (2) of the Third Geneva Convention of 1949 touches upon such subordination, it merely describes it factually without delineating the legal conditions for establishing such a relationship.¹¹¹ Consequently, in the absence of a specific test under IHL, recourse to general principles of public international law becomes necessary to ascertain when private individuals, including members of non-State

¹⁰⁵ Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar Publishing 2017) 94.

¹⁰⁶ Andrew Mumford, ‘Proxy Warfare and the Future of Conflict’ (2013) 158 *The RUSI Journal* 40 <<https://doi.org/10.1080/03071847.2013.787733>>.

¹⁰⁷ Assaf Moghadam, Vladimir Rauta and Michel Rauta, ‘The Study of Proxy Wars’, in Assaf Moghadam, Vladimir Rauta and Michel Wyss (eds), *Routledge Handbook of Proxy Wars* (Routledge 2023) 1.

¹⁰⁸ Pietro Verri, *Dictionnaire Du Droit International Des Conflits Armés* (Comité International de la Croix-rouge 1988) 37.; Michel Deyra, *L’essentiel Du Droit Des Conflits Armés* (Gualino 2002) 17–19.

¹⁰⁹ Tristan Ferraro, ‘The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict’ (2015) 97 *International Review of the Red Cross* 1227, 1229.

¹¹⁰ *ibid* 1235.

¹¹¹ Zamir (n 105) 113.

armed groups, may be deemed *de facto* agents of a third power.¹¹² Drawing from international law on responsibility and its developments concerning attribution, viable solutions emerge that can be applied within the framework of IHL.¹¹³ Essentially, the test for establishing a connection between a non-State party and a third power, for the purpose of conflict classification under IHL, mirrors that of international law on responsibility, entailing the attribution of actions undertaken by individuals or groups to entities with international obligations.¹¹⁴

The analysis of State responsibility for its support of a non-State armed group acting as a proxy has prompted divergent approaches from both international criminal jurisdictions and the ICJ, which examined the attribution of acts of a non-State armed group to an intervening State. These divergences have resulted in one of the greatest fragmentations of international law,¹¹⁵ fluctuating between the *overall control*¹¹⁶ test advocated by international criminal jurisdictions and a *defense of effective control*¹¹⁷ or *complete independence*¹¹⁸ by the ICJ. The central question lies in the level of support or control necessary for a State to be internationally responsible for the actions of a non-State armed group used as a proxy.¹¹⁹ Similarly, the legal process of transforming a conflict subject to the law of NIACs into one regulated by the law of IACs when the State supports or controls a non-State armed group remains ambiguous. This persistent uncertainty also surrounds whether a non-international armed conflict internationalizes through the application of the *primary rules* of IHL or through *secondary rules* of attribution, such as Article 8 of the Articles on State Responsibility for Internationally Wrongful Acts of the International Law Commission (ILC).¹²⁰ Moreover, this issue raises questions about the appropriate approach to adopt for armed conflicts, such as those in the DR Congo, which occur in a context of State fragmentation, porous borders, and where conflicts have become less visible and less sensational.¹²¹

In our view, the criterion of complete dependence or effective control—entailing such a strict control that it leaves virtually no autonomy¹²²—presents

¹¹² Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 91 *International Review of the Red Cross* 57.

¹¹³ In *Tadic*, it is precisely the reasoning that the Court had developed. See *Prosecutor v. Dusko Tadic (Appeal Judgement)* (n 66) para 98.

¹¹⁴ Ferraro (n 109) 1235–1236.

¹¹⁵ Remy Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts' (2018) 23 *Journal of Conflict and Security Law* 405, 406 <<https://doi.org/10.1093/jcsl/kry025>>.

¹¹⁶ *Prosecutor v. Dusko Tadic (Appeal Judgement)* (n 66) para 131.

¹¹⁷ *Nicaragua v. United States of America* (n 97) para 115.

¹¹⁸ *ibid* 109.

¹¹⁹ Djemila Carron, 'When Is a Conflict International? Time for New Control Tests in IHL' (2016) 98 *International Review of the Red Cross* 1019, 1022.

¹²⁰ Jorritsma (n 115) 406. For Marko Milanovic and Vidan Hadzi-Vidanovic, it looks "conceptually inappropriate for secondary rules of attribution to determine the scope of application of the primary rules of IHL". Milanovic and Hadzi-Vidanovic (n 13) 294.

¹²¹ Stearns, 'Rebels Without a Cause: New Face of African Warfare' (n 78) 5.

¹²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (ICJ) [391, 394].

significant challenges. This standard, characterized by an exceptionally close level of oversight, proves particularly difficult to apply in conflicts like those in the DR Congo. These gray-zone conflicts¹²³ are marked by covert support, cross-border linkages, and conflicting narratives, making it virtually impossible to prove complete dependence or effective control for every single operation. The level of proof required to establish such a stringent criterion is unlikely to be attained in these complex and murky conflict scenarios.¹²⁴

4.2 Legal Consequences of International Law's Neglect of Proxy Wars and Harmonization of Tests

International law largely overlooks the reality of proxy wars,¹²⁵ despite substantial evidence demonstrating that external support to belligerents in civil wars, insurgencies, and other forms of political violence escalates their lethality and increases the likelihood of conflict relapse.¹²⁶ This dynamic is evident in the ongoing proxy war in the DR Congo, where a coalition of governmental forces, United Nations Mission soldiers (MONUSCO), and Southern African Development Community (SADC) forces are pitted against the M23 rebellion group, which is reportedly sponsored by Rwanda, according to United Nations experts.¹²⁷ The conflict in North Kivu province has displaced more than a million people¹²⁸ and is marked by numerous human rights abuses and violations.¹²⁹ Remarkably, the M23 group resurfaced after a decade of dormancy, underscoring the persistent and cyclic nature of proxy conflicts.

The effective control, as conceived, entails a dual dimension. Horizontally, it demands comprehensive coverage of all individual acts in question, while vertically, it implies oversight from planning to execution, encompassing every intermediate step.¹³⁰ However, considering overall control, rooted in the

¹²³ “Gray-zone conflict is able to remain below the threshold of traditional war because it is a patchwork of different tactics, consisting of cyber-attacks, terrorism and insurgency campaigns, disinformation campaigns, economic coercion, covert targeted killings, creeping military expansionism, and other military maneuvers performed in the shadows.”, see Shane Fischman, ‘Redefining Law of War in the Wake of Gray-Zone Conflict’s Ubiquity’ (2019) 41 University of Pennsylvania Journal of International Law 491, 526.

¹²⁴ Ferraro (n 109) 1238.

¹²⁵ Daphné Richemond-Barak, ‘International Law and Proxy Wars: A Critical Assessment’, in Assaf Moghadam, Vladimir Rauta and Michel Wyss (eds), *Routledge Handbook of Proxy Wars* (Routledge 2023) 85.

¹²⁶ Moghadam, Rauta and Rauta (n 107) 2. Patrick M Regan, ‘Third-Party Interventions and the Duration of Intrastate Conflicts’ (2002) 46 The Journal of Conflict Resolution 55.

¹²⁷ ‘Final Report of the Group of Experts Submitted in Accordance with Paragraph 9 of Resolution 2641 (2022)’ (UN Security Council) S/2023/431.

¹²⁸ ‘Près de 7 millions de personnes déplacées en RDC : un record’ (*International Organization for Migration*) <<https://www.iom.int/fr/news/pres-de-7-millions-de-personnes-deplacees-en-rdc-un-record>> accessed 4 June 2024.

¹²⁹ ‘Communiqué de Presse : Le Bureau Conjoint Des Nations Unies Aux Droits de l’homme Publie Les Principales Tendances Des Violations Des Droits de l’homme En République Démocratique Du Congo Pour Le Mois de Janvier 2024 - Democratic Republic of the Congo | ReliefWeb’ (22 March 2024).

¹³⁰ Giovanni Distefano and Aymeric Heche, ‘L’organe de Facto Dans La Responsabilité Internationale : Curia, Quo Vadis ?’ (2015) 61 *Annuaire français de droit international* 18.

jurisprudence of international criminal jurisdictions, a perspective emerges that it is better suited to address the classification issue, a thesis supported by the ICJ.¹³¹ Moreover, it seems to offer the potential to capture proxy conflicts, as this type of control "does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation".¹³² However, due to the typically less formalized nature of the relationship between sponsors and proxies, in contrast to military alliances, and the frequent informality and ambiguity inherent in these associations—often driven by the sponsor's desire to maintain covert or secretive involvement¹³³—the absence of direct military command and authority over non-State armed groups acting as proxies makes attributing actions within these relationships highly improbable.¹³⁴

The stringent evidentiary requirements pose a significant challenge in the context of proxy warfare, where State sponsors engage in indirect and covert interventions precisely to circumvent the political, strategic, and legal repercussions of direct engagement.¹³⁵ Demonstrating the existence of such an informal relationship between sponsors and proxies proves arduous, let alone establishing the extent of direction, control, or knowledge regarding specific actions on the part of the sponsor.¹³⁶ This predicament is highlighted in the case of the Rwandan intervention in the M23 conflict. The RULAC, an online portal systematically assessing situations of armed violence within the framework of international humanitarian law, initially refrained from categorizing the conflict as international, citing insufficient evidence to conclude Rwanda's overall control over the M23.¹³⁷ However, this stance shifted six months later when the conflict was reclassified as international, underscoring the complexities and evolving nature of attributing responsibility in proxy conflicts.¹³⁸

International law, driven by a State-centric paradigm,¹³⁹ has notably neglected the matter of proxy wars for the sake of self-preservation.¹⁴⁰ This

¹³¹ "Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, ... it may well be that the test is applicable and suitable." *Bosnia and Herzegovina v. Serbia and Montenegro* (n 122) para 404.

¹³² *Prosecutor v. Dusko Tadic (Appeal Judgement)* (n 66) para 137.

¹³³ Moghadam, Rauta and Rauta (n 107) 4.

¹³⁴ Kilian Roithmaier, 'Holding States Responsible for Violations of International Humanitarian Law in Proxy Warfare: The Concept of State Complicity in Acts of Non-State Armed Groups Special Section' (2022) 14 *European Journal of Legal Studies* 140, 147.

¹³⁵ Mumford (n 106) 41.

¹³⁶ Richemond-Barak (n 125) 87.

¹³⁷ 'Non-International Armed Conflicts in Democratic Republic of Congo' <<https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-democratic-republic-of-congo>> accessed 4 June 2024.

¹³⁸ 'International Armed Conflict in Democratic Republic of Congo' <<https://www.rulac.org/browse/conflicts/international-armed-conflict-in-democratic-republic-of-congo>> accessed 23 May 2024.

¹³⁹ Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution', in Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert (eds), *Responsibilities of the Non-State Actor in Armed Conflict: Theoretical Considerations and Empirical Findings*, Brill, (2015) 4.

¹⁴⁰ Richemond-Barak (n 125).

omission creates a significant accountability gap,¹⁴¹ especially when considering the consequences of States violating international norms using proxy non-State armed groups. Tom Gal's observations are particularly poignant when examining situations where such proxy groups assert territorial control akin to occupation, as exemplified by the case of the DR Congo where the M23 has maintained control over large regions for over two years:

While a state has responsibility towards the protected persons in the occupied territory, it could escape such responsibility by using a proxy, over which it exercises 'overall control'. As a result, the protected persons in the 'occupied territory', whose rights are violated, will not be able to demand state reparations for the violations committed, since the law of state responsibility will not apply in those cases, unless the more stringent tests of effective control or complete dependence test are established to attribute the acts of the proxy to the state...In other words, once the territory in question is no longer under the control of the state of nationality, thus occupied, the civilian population, i.e. the victims of alleged violations of international law (specifically, IHL) have no entity to complain to or receive reparations and compensation from their state of nationality is not responsible, the third state occupying through a proxy will not be responsible either, since the violations will not be attributable to it and the non-state armed group is not an entity bearing international responsibility.¹⁴²

The armed conflicts in the DRC embody profound complexity, exacerbated by the covert involvement of foreign State actors seeking to evade their international responsibilities. The paradigmatic example is the M23 rebellion, supported by Rwanda, where, despite several United Nations reports since the group's resurgence,¹⁴³ it is only in the most recent report that Rwanda's *de facto* control, as well as its role in directing, planning, and commanding operations, has been explicitly acknowledged.¹⁴⁴ This delayed recognition highlights the fluctuating and elusive nature of foreign support in these conflicts. Continuing to label these conflicts as mere non-international armed conflicts, especially in a context of State disintegration where the Congolese State fails to meet its international commitments, deprives a significant portion of the population of the protection afforded by the law of international armed conflicts and the principles of State responsibility.

In this analysis, we assert that the ICJ's reasoning—namely, its claim that the ICTY, in addressing questions of State responsibility, "addressed an issue

¹⁴¹ Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 *Netherlands International Law Review* 49, 62.; Tom Gal, 'Unexplored Outcomes of Tadić: Applicability of the Law of Occupation to War by Proxy' (2014) 12 *Journal of International Criminal Justice* 59, 64 <<https://doi.org/10.1093/jicj/mqt076>>.

¹⁴² Gal (n 141) 64.

¹⁴³ Group of Experts on the Democratic Republic of the Congo (n 49).

¹⁴⁴ *ibid* 43–45.

which was not indispensable for the exercise of its jurisdiction",¹⁴⁵ and its dismissal of the "overall control" test applied in *Tadić*—is "unpersuasive" when evaluating State responsibility for acts carried out by armed forces or paramilitary units that are not formal organs of the State. To support this argument, we align with Antonio Cassese's critique that the effective control test may not be entirely persuasive. This is primarily because, in the *Nicaragua* case, the Court established the test without providing a clear rationale or detailing the legal foundations on which it rested. Notably, the judgment lacks any reference to State practice or authoritative sources that could substantiate the standard.¹⁴⁶ This absence of justification raises doubts about the test's robustness and its ability to serve as a definitive criterion for attributing State responsibility in cases of armed conflict.

Furthermore, we reject the position of certain scholars who argue that the *Nicaragua* test is better suited for determining issues of State responsibility.¹⁴⁷ The ICJ's approach, combined with advocacy for the *Nicaragua* test in matters of State responsibility, has created perilous incentives for States. Faced with stringent legal constraints on direct action, States have increasingly exploited a significant loophole in the international legal framework, operating through non-State actors in a zone of legal uncertainty.¹⁴⁸ As one scholar aptly questioned, is it "possible to regard a State as a party to an armed conflict although no acts of the persons involved in the fighting are attributable to it?"¹⁴⁹ The *Bosnian Genocide* ruling effectively decoupled conflict classification from the rules governing State responsibility, subjecting the former to a less stringent test than the latter. This distinction creates a paradox: a third State can exert sufficient control over an organized armed group (OAG) to trigger the classification of an IAC—with all the attendant rights and obligations of belligerency—without necessarily bearing legal responsibility for the actions of its proxy forces.¹⁵⁰ In practical terms, as evidenced by multiple UN expert reports and statements from several Western governments, this reasoning suggests that Rwanda, through its substantial support for the M23 rebel group, is a party to the armed conflict against the DR Congo. Yet, under the prevailing legal framework, Rwanda is not held directly accountable for M23's conduct, exposing a critical gap in the application of international law.

To address this accountability gap and respond to the growing trend of States employing proxy armed groups—an issue exemplified by the historical

¹⁴⁵ *Bosnia and Herzegovina v. Serbia and Montenegro* (n 122) para 403.

¹⁴⁶ A Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 653 <<https://doi/10.1093/ejil/chm034>>.

¹⁴⁷ See Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *The American Journal of International Law* 236, 237.

¹⁴⁸ Oona A Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 *Texas Law Review* 542–543.

¹⁴⁹ Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 *Journal of International Criminal Justice* 829, 832 <<https://doi.org/10.1093/jicj/mqm050>>.

¹⁵⁰ Marko Milanovic, 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts' in Andrew Clapham, Paolo Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015).

trajectory of armed conflicts in the DR Congo—we argue that the overall control standard is more effective for both conflict classification and the attribution of State responsibility. This proposition is supported by practice and case law,¹⁵¹ which strongly endorse the overall control standard for assigning

State responsibility for the actions of organized armed groups or militia units.¹⁵² Crucially, this standard does not require direct instructions or directions concerning specific actions but instead focuses on a more global form of control, encompassing financial support, equipment supply, coordination, and assistance in the general planning of the group’s activities.¹⁵³

Likewise, the principle of equality of belligerents dictates that all parties to an IAC must operate under the same legal framework, with identical rights and obligations.¹⁵⁴ This equilibrium is only achievable if IACs are conducted under the premise of equal State responsibility. If a NIAC becomes internationalized due to external State involvement, then, by logical extension, the legal regime governing IACs must apply equally to the controlling State, the territorial State resisting the organized armed group (OAG), and the OAG itself. It would be legally inconsistent—and strategically untenable—for a territorial State to be bound by IAC law in its engagement with OAGs acting as proxies for a third State while being unable to hold that third State accountable for the actions of its agents. The principle of functional differentiation, as applied in the *Bosnian Genocide* case, disrupts the traditional IAC/NIAC distinction by permitting the internationalization of a conflict based on a legal test that fails to capture the full scope of belligerent activities. This selective approach risks distorting the classification of conflicts and undermining the coherence of international humanitarian law.¹⁵⁵

5 CONCLUSION

For nearly three decades, the DR Congo has endured a tragic history etched in blood and sorrow, rendering the country's name almost synonymous with violence and armed conflict. Beyond its horrific human toll, these protracted conflicts pose formidable challenges, particularly in terms of legal classification under international humanitarian law.

The resurgence of the M23 rebel group epitomizes a recurring pattern of internal conflicts tainted with significant foreign involvement. This duality—conflicts that are ostensibly domestic yet heavily influenced by external actors—has been a central theme of this study. Among the challenges explored are the persistent refusal to properly classify these conflicts, often dismissed as too

¹⁵¹ ECtHR, *Ireland v. the United Kingdom*, judgment of 18 Jan. 1978, at para. 159. See also *Ila ş cu and others v. Moldova and Russia*, judgment of 8 July 2004, at para. 319.

¹⁵² *Cassese* (n 146).

¹⁵³ *Prosecutor v Dusko Tadic aka 'Dule' (Decision on the Defence Motion on Jurisdiction)* [1995] International Criminal Tribunal for the former Yugoslavia (ICTY) IT-94-1 [125–130].

¹⁵⁴ See ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 94

¹⁵⁵ Remy Jorritsma, ‘International Responsibility and Attribution of Conduct: An Analysis of Case Law on Human Rights and Humanitarian Law’ (Maastricht University 2021) 209.

"irrational", and the tendency to view them as purely internal, despite evidence to the contrary.

Our contribution to addressing this intricate issue lies in advocating for the harmonization of the *overall control* test for conflict classification and State responsibility. This approach seeks not only to shed light on the realities unfolding on the ground but also to bridge the accountability gap that foreign States exploit by wielding proxy militias in fragile States. By refining these legal frameworks, we aim to disrupt the cycle of impunity and foreign intrusion, thereby fostering a more robust mechanism for accountability and protection under international law.