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PROBLÉM PŘÍČITATELNOSTI JAKO NÁSTROJ LAWFARE

THE ATTRIBUTION PROBLEM AS A TOOL OF LAWFARE

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Abstrakt

Mezinárodní právo stanoví podmínky, kdy lze přičíst jednání jednotlivce státu a dovodit mezinárodněprávní odpovědnost tohoto státu. Pokud dané podmínky naplněny nejsou, stát může popřít svou odpovědnost a toto jednání mu nelze přičíst. Problém přičitatelnosti mohou státy zneužít. Tuto problematiku zkoumá následující článek prostřednictvím konceptu *lawfare* popisujícího situace, kdy je mezinárodní právo zneužito jako zbraň k dosažení vojenské výhody.

Abstract

International law prescribes conditions for attribution of private persons' conduct to a state. If those conditions are not met, the state shall not be responsible for actions of individuals. This attribution problem may be misused by states for denial of their responsibility. The following article approaches this phenomenon by using the concept of *lawfare*. Lawfare describes misuses of international law as a weapon to achieve military advantage.

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Klíčová slova

Lawfare; přičitatelnost; mezinárodní právo; odpovědnost; ozbrojený konflikt.

Keywords

Lawfare; Attribution; International law; Responsibility; Armed Conflict.

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INTRODUCTION

During the Russian annexation of Crimea, after 25th February 2014, local pro-Russian militia on the peninsula was accompanied by unmarked military troops. Those troops carried Russian equipment and gradually took over strategic spots, surrounding Ukrainian bases and preventing Ukrainian soldiers from abandoning their positions. However, Russia first denied any involvement of its military personnel in the conflict.¹ By doing this, Russia exploited so called *attribution problem*, i.e., the fact that activities of private persons cannot be automatically attributed to a state under international law and states bear no legal responsibility for such activities, unless specific set of conditions stipulated by international law is fulfilled. By exploiting the attribution problem, Russia was initially able to deploy troops on the Ukrainian ground without having any direct legal responsibility under international law.

This article demonstrates that also other states use the attribution problem to achieve military aims. The article approaches this phenomenon by using the concept of *lawfare*, which describes an intentional (mis)use of international law to gain military advantage. Lawfare gradually becomes both tactics and a strategy especially in asymmetric (hybrid)² conflicts. While other hybrid threats, such as terrorism, received intensive academic as well as institutional attention, lawfare and attribution problem as its tool remain rather under-researched. Unfortunately, using this type of lawfare undermines trust in international law and decreases its protective value. Moreover, because law and war become more interlinked,³ lawfare will be probably frequently used in the future.⁴ In a strictly regulated environment, attribution problem offers an attractive possibility how to deploy troops abroad and avoid legal consequences.

For those exact reasons, this article focuses on the attribution problem within the framework of lawfare. The first part of the article defines generally what lawfare is. The second part deals with the attribution problem, delineating legal conditions for attributing certain conduct to a state. It explains how the misusing of those conditions fits into the concept of lawfare. The third part suggests how to counter this practice. Reflecting the complexity of the issue, possible responses are divided into factual and legal ones as well as short-term (immediate) and long-term (systematic) ones. Thus, the third part intends to assess the utility of different reactions to the *attribution lawfare* and provide a general inspiration how to combat it.

¹ GILLICH, Ines. Illegally Evading Attribution? Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law. *Vanderbilt Journal of Transnational Law*. 2015, vol. 48, p. 1195-1197. ISSN 0090-2594.

² For more on hybrid warfare, cf., e.g., KUBEŠA, Milan - ŠPIŠÁK, Ján. Hybrid Threads and Development of NATO's New Operational Concept. *Obrana a strategie*. Brno: Univerzita obrany, 2011, vol. 11, no. 2, pp. 5-14. ISSN 1802-7199.

³ Cf. ANSAH, Tawia. Lawfare: A Rhetorical Analysis. *Case Western Reserve Journal of International Law*. 2010, vol. 43, Issue 1, pp. 87-199. ISSN 0008-7254.

⁴ Kittrie already speaks about countries like China or Iran employing lawfare regularly. Cf. KITTRIE, Orde, F. *Lawfare: Law as a Weapon of War*. Oxford: Oxford University Press, 2016, 481 p. ISBN-13: 978-0691128641.

LAWFARE: CONCEPTUAL ANALYSIS

The term lawfare was popularized by the US former deputy judge advocate general Charles J. Dunlap,⁵ who defined it as “the strategy of using - or misusing - law as a substitute for traditional military means to achieve a warfighting objective.”⁶ Law or its particular interpretation is supposed to serve as a weapon.⁷ Legal prescriptions and institutions “become coercive and strategic tools for states and nonstate actors to pursue a variety of political and operational objectives.”⁸ Since current armed conflicts occur in an environment ricocheting with legal norms, traditional kinetic warfare may be supported, undermined or even substituted by particular interpretation and application of law, deliberate disobedience of law or misuse of adversaries’ respect to law.⁹

While the *regular* application of law is restricting and regulating, lawfare, on the other hand, represents an enabling factor, when law becomes a tool for waging the war.¹⁰ Unlike simple disobedience or evasion,¹¹ lawfare aims at exploiting law in an armed conflict and using it to gain military advantage. The primary goal of lawfare is not to achieve the originally agreed purpose of particular norm and to protect the values that the norm was intended to protect, but rather to gain military or political advantage and weaken the opponent. In simple terms, lawfare might be understood as a type of legal bullying or (administrative/courtroom) chicane.

Reflecting Lawfare Criticism

The concept of lawfare might be criticized firstly for certain ambiguousness and secondly for being normatively biased. Starting with the first point, this neologism has neither been defined by any international judicial or quasi-judicial body yet, nor is there any widely

⁵ The term lawfare was first used in an article of J. Carlson and N. Yeomans *Whither Goeth the Law - Humanity or Barbarity* published in 1975 in a new age journal *The way out - Radical alternatives in Australia*. The article asserted that lawfare should replace warfare as words should replace swords. SADAT, Leila Nadya - GENG, Jing. On Legal Subterfuge and the So-Called “Lawfare”. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, p. 157. ISSN 0008-7254.

⁶ DUNLAP, Charles J., Jr. Lawfare Today: A Perspective. *Yale Journal of International Affairs*. Winter 2008, p. 146. ISSN 1936-2633.

⁷ WEIZMAN, Eyal. Legislative Attack. *Theory, Culture and Society*. Los Angeles: SAGE, 2010, vol. 27, no. 6, p. 13-14. ISSN 1460-3616 [online].

⁸ TIEMESSEN, Alana. The International Criminal Court and the Lawfare of Judicial Intervention. *International Relations*. 2016, vol. 30, no. 4, p. 410. ISSN 1741-2862 [online].

⁹ TRACHTMAN, Joel, P. Integrating Lawfare and Warfare. *Boston College International and Comparative Law Review*. 2016, vol. 39, no. 2, p. 268. ISSN 0277-5778.

¹⁰ CRAIG, Jones, A., SMITH Michael D., War/Law/Space. Notes Toward a Legal Geography of War. *Environment and Planning D*. 2015, vol. 33, p. 585. Online ISSN 1472-3433 [online].

¹¹ Cf. BÚZÁS, Zoltán I. Evading International Law: How Agents Comply with the Letter of the Law but Violate its Purpose. *European Journal of International Relations*. 2017, vol. 23, no. 4, pp. 857-883. Online ISSN 1460-3713 [online].

accepted doctrinal legal definition.¹² Although states do use lawfare,¹³ they seldom¹⁴ refer to it as to an exact concept in their official or semi-official documents. It has been dealt with mostly in specialized academic papers.¹⁵

Many of those papers describe activities that lie on a borderline or could even contravene the definitions of lawfare above. Dunlap claims that lawfare entails also various actions under civil law: A government may offer a reward in exchange for information discovering terrorists. Or it may purchase exclusive rights to satellite images and thus prevent the enemy from obtaining intelligence from those images.¹⁶ Williams adds that lawfare includes also inserting loopholes into (peace) agreements.¹⁷ Finally, Kennedy accepts a very wide definition of lawfare as “*managing war and law together*”.¹⁸ We believe that lawfare is a useful and viable analytical concept, as long as we focus on its core - using (international) law¹⁹ to gain military advantage instead of achieving its original protective purpose. Although the situations described in this paragraph do not always fully meet this criterion, their eventual description as lawfare should not diminish the analytical potential of the core concept.

Secondly, lawfare has been criticized for being normatively²⁰ biased. Sadat and Geng pointed out that the term had been used as a label in PR campaigns to discredit the opponents instead of addressing their legal arguments meritoriously.²¹ By saying that the adversary uses lawfare, he should be deprived of any legal protection or legitimacy.²² Especially the US neoconservatives in the era of George W. Bush were blamed for using

¹² E.g., Max Planck Encyclopedia of Public International Law does not contain any definition.

¹³ DUNLAP, Charles J. Jr. Lawfare. MOORE, John N. - TURNER, Robert F. (eds.). *National Security Law*. Carolina Academic Press: 2015, p. 823

¹⁴ For such exceptional reference, cf. NATO's webpages: KITTRIE, Odre F. The Pros and Cons of Lawfare. NATO. [on-line] [ref. 2018-03-01]. Available from: <https://goo.gl/Xapri9>. Or as will be described later cf. footnote 24 or NATO. *Wales Summit Declaration*. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales on 5. 9. 2014. [on-line] [ref. 2018-03-01]. Available from: <https://goo.gl/xQRgmE>

¹⁵ Individual references are in the following footnotes.

¹⁶ DUNLAP, Charles J. Jr. Does Lawfare Need an Apologia? *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, pp. 121-143. ISSN 0008-7254.

¹⁷ WILLIAMS, Paul R. Lawfare: A War Worth Fighting. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, pp. 150-152. ISSN 0008-7254.

¹⁸ KENNEDY David. *Of War and Law*. Princeton: Princeton University Press, 2006, p. 125. ISBN: 978-0691128641.

¹⁹ I.e., the law itself, not just the economic capacity or negotiations and language strategies.

²⁰ Based on critical legal geography, Craig argues that *lawfare* may divide countries, spaces or peoples to good or bad: those who wage lawfare are bad; those who face it are the victims. CRAIG, Jones, A. Lawfare and the juridification of late modern war. *Progress in Human Geography*. 2016, vol. 40, no. 2, pp. 221-239. ISSN 1477-0288 [online].

²¹ SADAT - GENG, Ref. 5, pp. 153-161

²² NOONE, Gregory P. Lawfare or Strategic Communications? *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, pp. 73-85. ISSN 0008-7254.

this term in such a stigmatizing way,²³ even to disguise their mistakes.²⁴ Horton²⁵ also describes how the term was used as a justification for the oppression of pro-democratic lawyers by Musharraf in Pakistan.²⁶

This article, being aware of the described critique, uses the concept of lawfare in a neutral way:²⁷ Lawfare can serve either good or bad purpose; this subjective assessment always depends on circumstances and values of the reader. Moreover, this article proves that the employment of lawfare is not restricted to the “strong”, the “weak” or any other specific group of states or non-state actors, as some critics suggested. On the contrary, lawfare misusing attribution might be extremely popular for all states, without distinction. In spite of the described ambiguity and potential bias in its definition, lawfare as a strategic and tactical tool has been embraced in practice by the world’s most powerful countries such as China, Russia or the US.²⁸ Unfortunately, it may delegitimize the (international) law as a whole by undermining its values with relativism and opportunism.²⁹ Therefore, it represents a phenomenon worth studying from both military and legal perspectives.

Types of Lawfare

The literature interconnects lawfare with several activities that can be divided into three categories according to the way of how lawfare operates: lawfare of litigations, lawfare of obedience exploitation and lawfare of ambiguity.

Lawfare of litigations means using claims, arbitrages and litigations during the (armed) conflict in support of one of its parties. US lawyers successfully launched domestic civil

²³ WERNER, Wouter, G. The Curious Career of Lawfare. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, 2010, pp. 61-72. ISSN 0008-7254.

²⁴ Horton challenges US 2005 Security strategy prepared by administration of George W. Bush. This document equated lawyers to terrorists and international litigations to terrorism by following words: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.” HORTON, Scott. The Dangers of Lawfare. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, pp. 163-179. ISSN 0008-7254.

²⁵ Ibid.

²⁶ Similarly, Scheffer emphasized the dual use of the term *lawfare* in the articles of some US authors. On the one hand, lawfare of the US was uncritically portrayed as useful innovative tool how to spare human lives and avoid deployment of conventional force. On the other hand, lawfare of the other nations was seen as a conspiracy of weaker opponents against US, meant to hinder the US or Israeli military power. SCHEFFER, David. Whose Lawfare is It, Anyway? *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, p. 221. ISSN 0008-7254.

²⁷ Dunlap defended such a neutrality claiming that the term was not intended to become a neat political category, but it was coined to demonstrate the potential of law to military staff. DUNLAP, Charles J. Jr. Lawfare Today ... and Tomorrow. *International Law Studies*. In: RAUL, A. Pedrozo - WOLLSCHLAEGER, Daria P. (eds.). *International Law and the Changing Character of War*. Newport: US Naval War College International Law Studies, vol. 87, 2011, pp. 316. ISBN 978-1782662396.

²⁸ DUNLAP, Charles J. Jr. Lawfare. In: MOORE, John N. - TURNER, Robert F. (eds.). *National Security Law*. Carolina Academic Press: 2015, p. 823

²⁹ NEWTON, Michael A. Illustrating Illegitimate Lawfare. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, pp. 225-277. ISSN 0008-7254.

litigations against banks that had enabled financing of terrorism.³⁰ In this regard, Kittrie³¹ or Holzer³² call for intensification of similar positive offensive lawfare by the US government, i.e., civil-law or administrative pressure on private entities or deployment of various litigation strategies. Lawfare of litigations appeared also when certain states resorted to “self-referral” to the *International Criminal Court* (ICC); they reported crimes on their domestic scene and hoped that ICC would remove their political rivals at home despite their impunity.³³ Last but not least, as described by Dunlap,³⁴ the Palestinian legal actions against Israel on different fora would also fall in this category.

Lawfare of obedience exploitation means preying on the fact that the enemy is law-obedient. This strategy exploits such obedience (usually by violating the international law) to gain military advantage: “By this logic, lawfare disproportionately harms the technologically advanced militaries that purportedly go to great pains to abide by the laws and norms of international law; meanwhile, it empowers those who deliberately break the law.”³⁵ In this category, the connection of lawfare with asymmetric (hybrid) warfare is the most significant. In asymmetric conflicts, militarily superior countries are law obedient. Their opponents, usually weaker in terms of forces, try to exploit this law obedience as a weakness;³⁶ metaphorically said, their attempts represent “an effort by the Lilliputians to bind Gulliver in a network of rules”.³⁷

Examples of this type of lawfare include misusing civilian population protection and the principle of distinction under international humanitarian law, when fighters hide among the civilian population and fraudulently rely on the protection granted to non-combatants.³⁸ Dunlap describes similar actions conducted by Hamas³⁹ or by Jihadi forces in Afghanistan;⁴⁰ Duřpektová and Kříž observed those tactics also during the operation Iraqi freedom.⁴¹ Another common practice is an artificial increase of civilian casualties.

³⁰ DUNLAP, ref. 27, p. 316

³¹ KITTRIE, Odré F. Lawfare and U.S. National Security. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 1, pp. 393-421. ISSN 0008-7254.

³² HOLZER, Mark, W. Offensive Lawfare and the Current Conflict. *Harvard Law School National Security Journal*. [on-line] 10. 4. 2012 [ref. 2018-03-01] Available from: <https://goo.gl/9doYNP>

³³ TIEMESSEN, ref. 8, pp. 409-431

³⁴ DUNLAP, ref. 27, pp. 315-325

³⁵ CRAIG, ref. 20, pp. 221-239

³⁶ DUŘPEKTOVÁ, Eva - KŘÍŽ, Zdeněk. Jus in Bello and Operation Iraqi Freedom. *Obrana a Strategie*. Brno: Univerzita obrany, 2010, vol. 10, no. 1, pp. 65-78. ISSN 1802-7199.

³⁷ LUBAN, David. Lawfare and Legal Ethics in Guantánamo. *Stanford Law Review*. 2008, vol. 60, p. 2020. ISSN 0038-9765.

³⁸ BLANK, Laurie R. Twist on an Old Story: Lawfare and the Mixing of Proportionalities. *Case Western Reserve Journal of International Law*. 2010, vol. 43, no. 3, 2011, pp. 724. ISSN 0008-7254. Also HOFFMAN, Frank, G. *The Conflict in the 21st Century: The Rise of Hybrid Wars*. Arlington: Potomac Institute for Policy Studies, 2007, pp. 35-39

³⁹ DUNLAP, Ref. 27, p. 315

⁴⁰ DUNLAP, Charles, J. Lawfare: A Decisive Element of 21st Century Conflicts? *JFQ*. 2009, no. 54, pp. 34-39.

⁴¹ DUŘPEKTOVÁ - KŘÍŽ, ref. 36, pp. 65-78

Thus, the adversary's actions are discredited by the caused damage that breaches the principle of proportionality under the international humanitarian law.⁴²

The "civilian casualties" rhetoric may be deployed to restrict airstrikes and thus counter the military advantage of the opponent given by their vast airpower. Another example may be represented by the Al Qaeda's "Manchester" manual that encouraged the captured terrorist to claim torture in order to slow down their judicial process and drain manpower.

Lawfare of ambiguity capitalizes on different existing interpretations⁴³ and various understandings⁴⁴ of law or on gaps in the applicable law. "*Lawfare in this context thrives on legal ambiguity and exploits legal thresholds and fault lines.*"⁴⁵ For example, lawfare might misuse the fact that applicable law prescribes a certain threshold for activation of the right to self-defence or to countermeasures. The low scale operations might be carefully prepared to fall exactly below this threshold and thus in a bad faith deprive the adversary of their rights.⁴⁶

Using attribution problem to gain military advantage falls strictly within this category of lawfare. The attribution problem has not been fully examined through conceptual lenses of lawfare yet. Consequently, the next chapter will provide an inquiry into this issue, and elaborate on the attribution problem and explore its legal background.

USING ATTRIBUTION PROBLEM TO GAIN MILITARY ADVANTAGE

The attribution problem describes a situation when a conduct of private persons cannot be legally connected with a state, therefore, this state does not bear international legal responsibility for such a conduct. According to the international law governing the responsibilities of states, activities of private persons cannot be automatically attributed to a state and the state is not responsible⁴⁷ for private actions, unless specific

⁴² BLANK, Laurie R. Twist on an Old Story: Lawfare and the Mixing of Proportionalities. *Case Western Reserve Journal of International Law*. 2011, vol. 43, no. 3, pp. 707-738. ISSN 0008-7254.

⁴³ E.g., Bisharat describes Israeli attempts to redefine systematically the international law and spread the interpretation favourable for Israel. BISHARAT, George E. Violence's Law Israel's Campaign to Transform International Legal Norms. *Journal of Palestine Studies*. 2013, vol. 42, no. 3, pp. 68-84. ISSN 15338614.

⁴⁴ Significant numbers of authors connect lawfare with the justification of war on terror on the one hand or its de-legalization on the other. Cf. LUBAN. Ref. 37, pp. 1981-2025. RICHTER-MONTPETIT, Melanie. Beyond the erotics of Orientalism: Lawfare, torture and the racial-sexual grammars of legitimate suffering. *Security Dialogue*. 2014, vol 45, no. 1, 2014, pp. 43-59. ISSN 1460-3640 [online]; HORTON, ref. 24, pp. 171-175; STAMPNITZKY, Lisa. The Lawyers' war: states and human rights in a transnational field. *The Sociological Review*. 2015, vol. 64, pp. 170-193. ISSN 1467-954X [online].

⁴⁵ MOSQUERA, Andres B. M. - BACHMANN, Sascha D. Lawfare in Hybrid Wars: The 21st Century Warfare. *Journal on International Humanitarian Legal Studies*. 2016, vol. 7, p. 75. ISSN 1878-1527 [online].

⁴⁶ SARI, Aurel. Legal aspects of hybrid warfare. Lawfare institute. [on-line] [ref. 2018-03-01]. Available from: <https://goo.gl/UBvi31>

⁴⁷ Earlier literature described the attribution as a subjective element of international legal responsibility of a state. The objective element was a specific breach of law conducted by particular person.

conditions are met. The set of conditions for attribution is described in the Draft Articles on Responsibility of States for Internationally Wrongful Acts⁴⁸ (hereinafter referred to as), which is a comprehensive record of international legal regulation⁴⁹ prepared by the UN International Law Commission. Only if the following conditions are fulfilled, a conduct of private persons can be considered an activity of state and establish state's international legal responsibility:

- The person acts as an *organ of a state* and in the capacity of this organ⁵⁰ (even if it exceeds its authority or instructions);⁵¹
- The person is *empowered* to exercise elements of governmental authority,⁵² or the person exercises the elements of *governmental authority* in the actual absence of government;⁵³
- The actions of a particular person are *directed or controlled by the state*;⁵⁴
- The actions are conducted by insurgents who succeed in establishing their own state (the actions are then attributed to their newly established state);⁵⁵
- The conduct of the person is *acknowledged and adopted* by a state as its own.⁵⁶

The judicial decision-making practice⁵⁷ developed two types of attribution tests, based upon the criteria above. Firstly, the so-called *overall control test*⁵⁸ is supposed to review whether the persons act as an organ under article 4 of DARSIVA, either legally (*de iure*) or factually (*de facto*) recognised by the state. In order to establish this attribution basis, it has to be proved beyond reasonable doubt that the state (1) recognized those acting persons, (2) integrated them into its hierarchical operational structures in the relationship

⁴⁸ UN International Law Commission. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. 2001. UN ILC Report A/56/10, hereinafter referred to as DARSIVA.

⁴⁹ DARSIVA mostly records international customary law; to a certain extent, however, it constitutes progressive development of international law. Its authority derives from their status of an ILC text approved *ad referendum* by the General Assembly. DARSIVA has been very widely approved and applied in practice, including by the International Court of Justice.

⁵⁰ DARSIVA, article 4, p. 40

⁵¹ Ibid., article 7, p. 45

⁵² Ibid., article 5, p. 42

⁵³ Ibid., article 9, p. 49

⁵⁴ Ibid., article 8, p. 47

⁵⁵ Ibid., article 10, p. 50

⁵⁶ Ibid., article 11, p. 52

⁵⁷ Cf. ICJ. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), judgement as of 27 June 1986; ICTY. *Case IT-94-1-A* (Prosecutor v Tadić), judgement as of 15th July 1999, 38 ILM 1518; ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosna and Hercegovina v. Serbia and Montenegro), judgement as of 26th February 2007. ICJ. *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgement as of 19th December 2005. For further overview of decision-making practice, cf. OLLESON, Simon. *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongfull Acts*. British Institute of International and Comparative Law. Preliminary draft [on-line] [cit. 2018-03-01]. Available from: <https://goo.gl/ujDyj7>

⁵⁸ ICTY *Case IT-94-1-A, Prosecutor v Tadić*, judgement as of 15th July 1999, 38 ILM 1518.

of dependency, (3) entrusted them with certain function(s), (4) and it could exercise general control over those persons, providing them guidance and/or supporting them.⁵⁹

Secondly, the *effective control test*⁶⁰ focuses on the situations when the persons are being directed or controlled by the state under article 8 of DARSİWA. As those persons are not integrated in the state structures, general control of a state and state support are insufficient for attribution. As the International Court of Justice famously stated in the Nicaragua case, the mere financial or material support for guerrilla activities does not constitute a basis for attribution.⁶¹ Existence of a direct control must be proved, usually in the form of an exact order or detailed guidance issued by the state, which enables the attribution of conduct described in that order.⁶²

It remains uncertain which test should take precedence and whether and how the tests may be applied together. There has been a tension in application of those tests between the International Court of Justice (ICJ) and International Criminal Tribunal for former Yugoslavia (ICTY). On the one hand, ICJ requested for attribution either complete dependence of the acting person on the state (as a *de facto* state organ under article 4 of DARSİWA) or passing *effective control test* under article 8 DARSİWA.⁶³ On the other hand, ICTY asserted that passing the *overall control test* is a sufficient basis for attribution and qualifies the acting private person as a *de facto* state organ.⁶⁴ The dispute remains unsettled and the opinion cleavage is apparent also in the literature. Cassese⁶⁵ or Svaček⁶⁶ advocate the approach of ICTY, arguing that the conclusions of ICJ might be unpersuasive and too burdensome with respect to the evidence threshold. Other Czech leading authors prefer the reasoning of ICJ.⁶⁷ De Frouville⁶⁸ aptly concludes that this is a typical example of fragmentation of the international law, where opposing

⁵⁹ For details, cf. judgement in the previous footnote or GLACOVÁ, Markéta. *Přehodnocení testu efektivní a celkové kontroly (Nikaragua v. Tadić) ve světle rozhodnutí mezinárodního soudního dvora v případě genocidy ve Srebrenici*. Brno: Masarykova univerzita v Brně, 2011, 68 p., p. 37.

⁶⁰ ICJ. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), judgement as of 27 June 1986.

⁶¹ Ibid.

⁶² For details cf. judgement in the footnote 63 or CASSESE, Antonio. The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide. *The European Journal of International Law*. Vol. 18, no. 4, 2007, p. 653. ISSN 1464-3596.

⁶³ ICJ. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), judgement as of 27 June 1986. ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosna and Hercegovina v. Serbia and Montenegro), judgement as of 26th February 2007.

⁶⁴ ICTY Case IT-94-1-A (Prosecutor v Tadić), judgement as of 15th July 1999, 38 ILM 1518.

⁶⁵ CASSESE, ref. 64

⁶⁶ SVAČEK, Ondřej. Srebrenica: Nikaragua či Tadić? K subjektivnímu prvku mezinárodně protiprávního chování. In: *Sborník příspěvků z konference Monseho olomoucké právnické dny 2007*. Olomouc: Vydavatelství Univerzity Palackého, 2007, pp. 457-462.

⁶⁷ ONDŘEJ, Jan - ŠTURMA, Pavel - BÍLKOVÁ, Veronika - JÍLEK, D. et al.: *Mezinárodní humanitární právo*. Praha: C.H.Beck, 2010, p. 423. ISBN 978 80 7400 185 7.

⁶⁸ De FROUVILLE, Olivier. Attribution of Conduct to the State: Private Individuals. IN Crawford, James (ed.). *The Law of International Responsibility*. New York: Oxford University Press, 2010, p. 258. ISBN 978-0199296972.

interpretations exist.⁶⁹ Those discrepancies represent additional reason why lawfare of ambiguity easily exploits the rules for attribution.

If neither of the above described conditions is met or there is insufficient evidence to establish attribution on the basis of the overall or effective control tests, a state is not responsible for the activities of private persons. The inability to identify the degree of association of actors with a state renders the attribution impossible.⁷⁰ The burden of proof lies predominantly on the “victim” country. Therefore, a state-perpetrator can intentionally avoid responsibility as long as it is not proved that the activities of individuals fulfil the criteria above.

As a result, states may misuse the high standard of proof and different interpretations of the attribution criteria. They avoid international legal responsibility for certain actions claiming that those actions were conducted by private persons and cannot be attributed to the state in any way. This phenomenon represents the *lawfare of ambiguity*: “*The necessary attribution of direction or control in a conflict, which entirely depends on the appreciation and assessment of facts, becomes a ‘mission impossible’ in Hybrid Warfare environments where subterfuge dominates the stage.*”⁷¹ As a result, this decreases the adherence to the international law (humanitarian law, human rights law, or international law in general) and the belligerent parties emphasize military necessity and freedom of action.⁷²

On the tactical level, this type of lawfare (exploiting attribution problem) is intended to confuse the adversaries by disguising who they are fighting with. Moreover, it enables the deployment of troops on the ground without legal justification and restrictions, as nobody is seemingly accountable for their conduct. On the strategic level, it is aimed at avoiding international responsibility, sanctions or loss of international credibility:

*“These operations will strictly and precisely circumvent international law through the attribution problem either by denying the physical presence of soldiers violating territorial integrity of an occupied country, denying participation in a cyber-attack disrupting critical infrastructure or influencing minds of people that are supposed to stay loyal to their authorities in order to preserve the integrity of the state. All three situations have one characteristic in common - to circumvent the international law by exploiting the attribution problem in its ultimate expectation - to prove the identity behind an attack on 100 %.”*⁷³

⁶⁹ Detailed account of judicial and other decisions preferring either the reasoning of ICJ or ICTY can be found *ibidem*.

⁷⁰ Iran-U.S. Claims Tribunal. *Kenneth P. Yeager v. The Islamic Republic of Iran*, 1987, para 92, pp. 101-102.

⁷¹ MOSQUERA - BACHMANN, ref. 47, p. 75

⁷² *Ibidem*.

⁷³ SCHMIDT, Nikola. Neither Conventional War, nor a Cyber War, but a Long-Lasting and Silent Hybrid War. *Defence & Strategy (Obrana a Strategie)*. Brno: Univerzita obrany, 2010, vol. 10, no. 1, p. 74. ISSN 1802-7199 [online].

Even NATO addressed this phenomenon within the strategy of *Countering Hybrid Threats*⁷⁴ and denoted similar operations “*unattributed warfare*”.⁷⁵ The following section lists examples of such operations and elaborates on one of them - the use of unmarked soldiers during the Crimea annexation.

Examples of Attribution Lawfare

The attribution problem was exploited through the recent history by various countries, regardless of their ideology, strength or position in the international system. Already on 31st of August 1939, German commando dressed as Polish troops pretended to ambush the German communication tower in Gliwice/Gleiwitz. This instigated incident, a covert false flag operation, provided Hitler with the justification for the response (though apparently disproportional): an invasion of Poland. Attribution rules were directly misused here for provocation. Similarly, the lack of attribution was exploited for the dissemination of propaganda.⁷⁶ Moving to more recent examples, NATO and its members probably calculated with the attribution problem when establishing “stay-behind” armies of partisans, such as Gladio in Italy. Those troops were trained and supposed to fight communism in the event of a local coup.⁷⁷

A significant example is the Russian lawfare operation during the annexation of Crimea. Bachmann and Mosquera recalled the Russian term *maskirovka* to denote special strategy intended to confuse the enemy also by exploiting the attribution problem. In the Budapest memorandum of 5th December 1994, Ukraine abandoned their nuclear arsenal in exchange for the guaranteed border integrity, including the Crimean border. The signatories, including Russia, were obliged to respect the borders of Ukraine.⁷⁸ After the Russian annexation of Crimea, the Russian Minister of Foreign Affairs claimed:

*“In the memorandum, we also undertook to refrain from the threat or use of force against Ukraine’s territorial integrity or political independence. And this provision has been fully observed. Not a single shot was fired on its territory (...) The loss of Ukraine’s territorial integrity has resulted from complicated internal processes, which Russia and its obligations under the Budapest Memorandum have nothing to do with.”*⁷⁹

⁷⁴ Cf. NATO. *Wales Summit Declaration*. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales on 5. 9. 2014. [on-line] [cit. 2018-03-01]. Available from: <https://goo.gl/wGqG4x>

⁷⁵ GILLICH, ref. 1, p. 1221

⁷⁶ ANDROUNAS, Elena - ZASSOURSKY, Yassen. Protecting the Sovereignty of Information. *Journal of Communication*. 1979, vol. 29, no. 2, pp. 186-192. WHITTON, John - BOARDMAN, Arthur, L. *Propaganda: Towards disarmament in the war of words*. Oceana Publications, 1963, pp. 133-139.

⁷⁷ Cf. GANSER, Daniele. *NATO’s Secret Armies: Operation GLADIO and Terrorism in Western Europe (Contemporary Security Studies)*. 1st edition. London: Routledge, 336 p.

⁷⁸ BACHMANN, Sascha D. - MOSQUERA, Andres B Munoz. Lawfare and hybrid warfare - how Russia is using the law as a weapon. *Amicus Curiae*. 2015, No. 102, p. 3

⁷⁹ The Ministry of Foreign Affairs of the Russian Federation, Foreign Ministry Spokesman Alexander Lukashevich answers a media question about the situation around the Budapest Memorandum, 12 March 2015. Taken from BACHMANN - MOSQUERA, ref. 80, p. 3

Thus, the Russian Federation directly claimed that the loss of Ukraine territory cannot be attributed to Russia, but to local *complicated internal processes*.⁸⁰ The obligation in the Budapest memorandum was allegedly obeyed, because the territorial disintegration was not caused by Russia and could not be attributed to Russia.

Moreover, as of 25th February 2014, local militia on Crimea were accompanied by unmarked military troops that gradually took over strategic places on the peninsula and raised Russian flags there. They surrounded Ukrainian bases and prevented soldiers from abandoning them. In interviews, a few troopers admitted being members of Russian task forces. They were equipped by the Russian arms. Russia first denied any involvement of its military personnel in the conflict.⁸¹ Thus, Russia used the problematic attribution to gain the military advantage and blur the situation.⁸² Once the annexation successfully proceeded, Vladimir Putin admitted Russian involvement in the conflict.⁸³ In the initial phase of the Crimea annexation, Russia used the attribution problem as lawfare in order to deploy its troops without assuming direct international responsibility for their conduct. The following lines explain why the threshold for any kind of attribution has not been reached.

It was impossible to prove that the troops acted as legal or factual organ of Russia and in that capacity (under the *overall control test*). In order to attribute their conduct to Russia under article 4 of DARSIVA, one would have to prove that they were integrated⁸⁴ into the Russian military structure, or that they acted in complete dependence on Russia and ultimately merely as its tool.⁸⁵ This was impossible in the initial phases of the conflict.

It was even impossible to prove that their conduct may be attributed to Russia under article 8 of DARSIVA (*effective control test*), as activities directed or controlled by the state: "*it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.*"⁸⁶ Mere support and material or financial aid is insufficient for successful attribution of particular action, therefore, it is irrelevant that the troops carried Russian equipment and were apparently supported by Russia.⁸⁷

⁸⁰ Ibid.

⁸¹ GILLICH, ref. 1, pp. 1195-1197

⁸² I.e. to blur the distinction between international involvement, foreign soldiers or domestic insurgents, international combatant or domestic criminal. Cf. KORHONEN, O. Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars. *German Law Journal*. [on-line] [cit. 2018-03-01]. Available from: <https://goo.gl/My2bKt>

⁸³ GILLICH, ref. 1, p. 1197

⁸⁴ ICTY Case IT-94-1-A, *Prosecutor v Tadić*, judgement as of 15th July 1999, 38 ILM 1518 p. 56, para. 131.

⁸⁵ ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgement as of 26th February 2007. p. 392.

⁸⁶ ICJ. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), judgement as of 27 June 1986. Para 115, pp. 64-65.

⁸⁷ Ibid.

The burden of proof would be lying on the state that would invoke the Russian responsibility, under the principle *actiory incumbit probatio*.⁸⁸ This state would have to provide satisfactory evidence that would beyond reasonable doubt demonstrate that the deployed troops were either integrated under the Russian army structures or that they were directed and controlled by Russia (i.e., exact orders existed). Gaining this evidence (e.g., by intelligence services) could be rather difficult and in some cases even unlawful. For Russia it was enough to deny any involvement to avoid any international responsibility effectively. Ukraine could legally fight just with the insurgents and unmarked troops involved in the conflict, while Russia would formally remain uninvolved and irresponsible towards Ukraine or the international community. Thus, Russia was able to exploit the attribution problem as a lawfare in the initial phase of the Crimea annexation, regardless of the fact that the Russian president admitted Russian presence later on.⁸⁹ Similar to this example, the attribution problem may be used to gain military advantage in other cases and areas. The following section outlines several suggestions how to respond to this practice and compares their advantages and drawbacks.

COUNTERING THIS PRACTICE

The first section of this contribution demonstrated that lawfare constitutes a complex and multifaceted phenomenon both on the level of facts and on the level of applicable laws. The second section highlighted that attribution lawfare as lawfare of ambiguity thrives on both legal and factual uncertainties and suspicions. This complexity must be reflected in the typology of actions in response to attribution lawfare. Possible answers can be divided into actions of factual or legal character, depending on the nature of the proposed solution. This distinction contributes to analytical clarity, because two different environments enable different possibilities how to overcome uncertainty and prove/disprove suspicion.

Another criterion for categorization of possible reactions is the time-scope. Possible reactions may either be short-term ones, aiming at particular situation, or long-term ones, focused on the prevention of attribution lawfare as such. An outline of typology of reactions is summarized below in Table 1.

Short-term factual response might be represented by various investigative missions. Fact finding missions can provide further information necessary for verification of the state involvement in the activity. Peacekeeping activities done by international organizations can ensure that the borders of states are controlled and unpenetrated by fighters. Those activities could provide immediate remedy to situations when lack of attribution is used as lawfare. They would overcome the usual obstacle that disables attribution - lack of evidence. Their major disadvantage is that they require political consensus. If a state is trying to avoid responsibility, one can hardly expect that it will cooperate in or just

⁸⁸ “it is a litigant seeking to establish a fact who bears the burden of proving it”. ICJ. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA), judgement, ICJ Reports, ICJ, 1986. Para 101, p. 49.

⁸⁹ The attribution could be either established under article 11 DARSIVA, because Russia adopted and acknowledged the conduct, or Mr. Putin’s statement could be taken as an evidence that the local troops were part of Russian forces and the attribution is possible under article 4 DARSIVA.

tolerate a fact-finding or monitoring mission supposed to explore the situation. Usually, this type of solution would have to be imposed by the United Nations Security Council.

Long-term factual response entails lawfare denial.⁹⁰ This counter-lawfare tactics means willingness to point out to violations of international law (misuses of attribution problem) constantly and willingness to demonstrate that one's actions were in compliance with the international law. Those responses display readiness to defend the international law and enhance the confidence in it. Scheffer quotes an example of lawfare denial when NATO was criticized for the Kosovo bombings:

“Questions surrounding the legality of the targeting decisions arose very early during the bombing campaign and should not have been surprising. In reality, once Washington and its NATO partners organized their review of the targeting decisions, their response to the ICTY demonstrated a professional and confident assertion of the facts and the careful review that went into each targeting decision prior to execution. No ICTY indictments were issued and, indeed, the ICTY prosecutor found no basis for investigating NATO for war crimes violations. Aggravated, but not intimidated by the ICTY inquiries, the Clinton Administration worked with NATO headquarters to respond to every question posed by the ICTY Prosecutor. The legal persuasion and sound reasoning behind every NATO bombing run under inquiry presents a good example of a response to lawfare.”⁹¹

Table 1: Possible Responses to Attribution Lawfare

Response:	Short-term:	Long-term:
Factual:	International observations, peacekeeping, borders monitoring, investigation.	Lawfare denial either by constant pointing out to the misuse or incorrect application of international law; or by constant proving that some approach was correct.
Legal:	Shifting the burden of proof, allowing liberal recourse to evidence. Preferring overall control test to effective control test.	Customary or progressive development of public international law (creating legal presupposition), emphasizing responsibility of state for omission.

Source: authors

Similar response could be viable in the cases when the attribution problem is exploited as a tool of lawfare. The countries allegedly damaged by this tactics should systematically point out to violations of international law. The countries accused of using such tactics

⁹⁰ TRACHTMAN, ref. 9, pp. 267-282

⁹¹ SCHEFFER, ref. 26, pp. 222-223

or provoked by misusing the attribution problem should be ready to disprove any accusation and defend the lawfulness of their approach. The major drawback of this approach is that it results in a protracted process and requires that the states not only engage in a lengthy dialogue but disclose their operations as well. Short-term legal response encompasses several legal norms and their application that should discredit lawfare, prove its unlawfulness and legally force the alleged state-perpetrator to cooperate. The first possibility is to discredit lawfare by the concept *abus de droit* (abuse of rights). This general legal principle, present in many advanced domestic legal systems, international treaties and partly in customary international law,⁹² prescribes that law must be interpreted in a good faith and its interpretation must not be used against its purpose or to harm intentionally other members of the (international) community.⁹³ States misusing the attribution problem should be therefore deprived of the legal protection granted to them in the form of relief from responsibility, which they seek by recalling high standard of proof.

It is rather problematic to determine when a state misuses international rules for attribution and resorts to *abuse of rights*. Therefore, this legal principle should be supplemented by the application of two other principles. Firstly, the victim of attribution lawfare could be allowed to more liberal recourse of evidence. As ICJ stated in the Corfu Channel Case:

*“By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.”*⁹⁴

Secondly, the burden of proof could be shifted from the victim country⁹⁵ to the alleged perpetrator that would have to prove no involvement. By combining those three principles (prohibition of abuse of rights, liberal recourse of evidence and shifting the burden of proof), the victim state could provide just a general evidence pointing to the attribution, while the alleged state-perpetrator would have to prove being innocent.

This approach faces several difficulties. On the level of applicable international law, the shifting of burden of proof should be rather an exceptional legal tool; one cannot demand its application in every situation. On the level of facts, it is hard to prove a negative fact, especially absence of any control over troops. Moreover, as Mosquera and Bachmann pointed out, lawfare transforms in a boomerang like way.⁹⁶ Therefore,

⁹² BYERS, Michael. Abuse of Rights: An Old Principle, A New Age. *McGill Law Journal*. 2002, vol. 47, pp. 389-400. ISSN 1920-6356.

⁹³ *Ibid.*, pp. 429-430

⁹⁴ ICJ. *The Corfu Channel Case*. Judgement as of 9th April 1949, p. 18.

⁹⁵ Cf. ICJ. *Case Concerning Oil Platforms. Islamic Republic of Iran v. United States of America*. Judgement as of 6 November 2003.

⁹⁶ MOSQUERA, ref. 47, p. 75

shifting the burden of proof to the accused country could be again misused by lawfare. Similar to the Gleiwitz ambush, instigated incidents could cause provocations intended to create a burdensome and blaming situation for the accused state that would have difficulties to prove being innocent. Therefore, short-term legal responses must be chosen carefully, with respect to circumstances of each individual case, always assessing whether there is a sufficient basis in international law and what the unintended consequences could be.

Long-term legal response would request either progressive development of international law in the form of adoption of a convention, or gradual development of international customs regulating attribution and their eventual codification. It should be based on the following two legal principles. Firstly, states must not knowingly allow its territory to be used in a way that adversely affects other states.⁹⁷ Secondly, states must adhere to the principle of amicable settlement of disputes and friendly relations among nations.⁹⁸ Those principles could be gradually interpreted further and developed, so that they could establish an obligation for states not to allow its citizens and inhabitants systematically to harm other states. A state knowing about the conflict in a territory of its neighbour could be obliged to guard the permeability of its borders not to allow the fighters to pass through. If its citizens get systematically involved in a conflict, the state would be obliged to find the ways how to stop this involvement. Again, fostering this approach would require at least basic willingness of states to cooperate as well as including certain *de minimis* threshold not to make the obligations too burdensome.

CONCLUSION

Dunlap suggests a metaphor. The airports were not abandoned when terrorists used jet planes for their attacks; instead, measures were adopted to prevent such misuse in the future. Similarly, the importance of the international law should not be diminished by the fact that it may be (mis)used by lawfare. On the contrary, it proves the relevance of international law in providing measures to stop or restrict this practice.⁹⁹

This article identified that misusing the attribution problem has its place among various lawfare activities. It may be categorized as lawfare of ambiguity, where the states attempt to avoid the responsibility for actions of individuals by referring to the high criteria for attribution under international law. In the spirit of Dunlap's metaphor, the article classified and discussed possible solutions, dividing them into legal or factual and long-term or short-term ones. If there is a lack of political will to pursue short-term factual solutions such as peacekeeping, fact-finding missions or border controls, the combination of legal responses and long-term factual response should be employed to address the attribution lawfare.

⁹⁷ ICJ. *The Corfu Channel Case*. Judgement as of 9th April 1949. Although the actual practice of states may seem differently than the quoted norm prescribes, the norm itself has been respected and embedded in public international law, as the ICJ judgement confirmed. Occasional disrespect to this norm cannot and should not undermine its validity (cf. principle *ex iniuria ius non oritur*).

⁹⁸ Cf. UN. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Adopted on 24th October 1970, UN Doc. A/RES/25/2625.

⁹⁹ DUNLAP, ref. 27, pp. 315-325

The effectivity of the responses is likely to increase proportionately to how systematic and interconnected the responses will be. The willingness to defend *bona fide* legal interpretation and to uncover misuses of attribution rules systematically could result in a progressive (contractual) or customary development of international law. This could bring increased responsibility of states for guarding their borders, exercising due diligence, or mandatory participation in investigation. The importance of lawfare, including the attribution problem exploitation, is likely to rise, therefore, the suggested solutions are at least worth testing and exploring further.