

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

Dr Tristan Ferraro

Dr Tristan Ferraro is Legal Adviser in the Legal Division of the International Committee of the Red Cross, based in Geneva.

Abstract

This article looks at the legal position of the International Committee of the Red Cross (ICRC) on situations in which a State, a coalition of States or an international or regional organization intervenes in a pre-existing armed conflict, either giving support to one of the parties or exercising control over a non-State armed group party to the armed conflict (hereafter “non-State party”). For the purposes of this article, foreign intervention is considered to be a form of “co-belligerency” of such a degree that it makes the intervening power a party to the armed conflict. Situations in which there is no objective link between the foreign intervention in the territory of a third State and a pre-existing armed conflict in that same territory are therefore excluded from the scope of this article.

The aim of this article is to describe how the ICRC determines the applicability of international humanitarian law to such situations, based on the existing law and an approach that examines each bilateral relationship between belligerents separately.

The article also explains why the ICRC abandons the use of the term “internationalized internal armed conflict”, which is misleading in that it suggests

that only the law of international armed conflict applies. The ICRC is therefore using new terminology for the legal classification of such situations; this change is intended to align the terminology used with the realities of the applicable law.

Keywords: IHL, Geneva Conventions, armed conflict, foreign intervention, military support, ICRC.

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Introduction

An examination of contemporary armed conflicts shows that belligerents are often supported in their military operations by one or more third parties. The involvement of these third parties can vary in terms of the form and intensity of the support given: direct involvement in the conduct of hostilities, logistical assistance, or financial or political support. The intervening parties may be States, acting on their own or in coalition with other States, or supranational organizations with or without a United Nations (UN) mandate. The parties receiving support may be governments or non-State armed groups, depending on the goals pursued by the intervening power(s).

The legal position of the International Committee of the Red Cross (ICRC) on the notion of armed conflict involving foreign intervention refers only to situations in which the foreign intervention has a bearing on the application of international humanitarian law (IHL). This article does not, therefore, cover situations involving foreign intervention in support of a party to an international armed conflict (IAC), because these situations raise no specific legal issues concerning the determination of the applicable IHL rules. In such cases, the application of IHL is clear: all the different relationships between belligerents are governed by the law of IAC. This article is concerned only with situations in which foreign intervention is a component added into a pre-existing non-international armed conflict (NIAC).

It does not, however, cover all forms of direct and indirect foreign intervention in a pre-existing NIAC. Situations involving financial or political support are not included, as this type of assistance has no bearing on the application of IHL.

A look at recent conflicts shows that there are numerous examples of the types of situations examined in this article.¹ Despite the frequency with which such situations occur, there remains some uncertainty when it comes to determining the law applicable to them. It may seem, at first glance, that these armed conflicts are in a grey area of IHL, with no specific rules applicable to them. They may also appear not to fit into the traditional IAC/NIAC dichotomy

1 See, for example, the situations in Afghanistan, Mali, the Democratic Republic of the Congo and Somalia.

established in this body of law, casting doubt on the nature and scope of the legal framework governing them.

This difficulty in assessing armed conflicts involving foreign intervention raises the possibility of them being considered a third category of armed conflict,² in addition to the traditional categories of IAC and NIAC. Such an interpretation of the law would be problematic in that it would open the door to a definition of the applicable legal framework based on a subjective choice of rules,³ or to an overly idealistic approach to the application of IHL.⁴

For the ICRC, 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. The notion of armed conflict involving foreign intervention therefore fits perfectly well into the traditional IAC/NIAC dichotomy established by IHL.

The rules applicable to IACs and NIACs can be transposed to armed conflicts involving foreign intervention, because such situations are merely a form of IAC or NIAC; the rules of IHL are sufficiently flexible to govern such situations effectively and to deal with any humanitarian issues arising from them.

In light of these considerations, the ICRC's position is based on three key points:

1. The components of the notion of armed conflict involving foreign intervention are clearly defined. The ICRC's position identifies the various relationships between belligerents stemming from the notion of armed conflict involving foreign intervention and specifies the situations that are excluded.
2. The rules of IHL applicable to the various situations covered by the notion of armed conflict involving foreign intervention are determined. The ICRC confirms the choice of a fragmented approach for this purpose, based on the factual relationships between the belligerents and the traditional criteria for determining the existence of an armed conflict established in the relevant provisions of IHL. The ICRC's position therefore specifies how the various situations should be classified, qualifying them as an IAC, a NIAC or, in

2 Since IHL treaties contain no specific provisions on this type of conflict.

3 The *sui generis* nature of the situation might lead the belligerents to decide not to apply the whole of IHL and instead pick and choose the rules to be applied. This would result in greater emphasis on the rights established by this body of law than on the obligations it imposes on the parties to the conflict. Such an approach would lead to considerable legal insecurity and risk weakening the protection provided under IHL.

4 In other words, the application of the law of IAC to all the parties, with no regard for legal, political (in the case of States) or practical (in the case of non-State armed groups) contingencies. On the application of the law of IAC to all the parties to a conflict, see Éric David and Jean Salmon, *Droit international public*, 26th ed., Vol. 3, Presses Universitaires de Bruxelles, Brussels, 2012, pp. 728 ff.; Paolo Benvenuti, "The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping", in *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Office for the Official Publications of the European Communities, Luxembourg, 1995, pp. 96 ff.; Claude Emanuelli, "Les forces des Nations Unies et le droit international humanitaire", in Luigi Condorelli *et al.* (eds), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1996, pp. 357 ff.; Robert Kolb, *Droit humanitaire et opérations de paix internationales*, 2nd ed., Helbing & Lichtenhahn, Brussels, 2006, pp. 57 ff.

some cases, a conflict with dual IAC-NIAC classification, in which the laws governing both types of armed conflict apply in parallel. Based on a factual assessment of the situation, using the traditional criteria for establishing the applicability of IHL, armed conflicts involving foreign intervention are classified under the classic IAC-NIAC dichotomy. This same classification is used to identify the applicable legal framework (law of IAC, law of NIAC or both), which determines the terminology used to qualify the situation.

3. The term “internationalized internal armed conflict”, a source of confusion in the determination of applicable IHL, will no longer be used. It quite wrongly suggests a blanket application of the law of IAC in such situations, which is contrary to the fragmented approach described above. It could also give the impression that these situations form a third category of armed conflicts. The ICRC now uses new terminology consistent with the IHL applicable to the situations in question.

Types of situation covered by the notion of armed conflict involving foreign intervention

Types of intervention covered by the ICRC’s position

In order to define the scope of application of the ICRC’s position as precisely as possible, the notion of armed conflict involving foreign intervention must first be analyzed.

“Internationalized internal armed conflict” was the term used by the ICRC for many years to refer to situations in which one or more third States intervened in a pre-existing armed conflict affecting all or part of the territory of a given State. While this criterion remains valid, it is important to identify the characteristics of foreign intervention more precisely.

As explained in the introduction to this article, contemporary armed conflicts are increasingly characterized by the intervention of third parties in support of one or more of the parties to the conflict.⁵ Such interventions, which vary in form and intensity, generally consist of military, financial, logistical or political support. However, not all types of intervention by a third party in support of one or more of the belligerents are taken into account in the ICRC’s position on the concept of armed conflict involving foreign intervention. While political and/or financial support provided by third parties to the belligerents might have implications in

5 Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 70–75, 89–93; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford, 2010, pp. 92–102; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 56–70; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report to the 31st International Conference of the Red Cross and Red Crescent, October 2011, pp. 7–12, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf (all internet references were accessed in September 2016).

terms of the law of international responsibility,⁶ this type of assistance has no bearing on the applicability and application of IHL to the situation in question. Support of this kind is not therefore taken into account in the ICRC's position, which only covers foreign intervention that actually affects the applicability of IHL. Military or logistical support provided by third parties to one of the parties to a pre-existing conflict can, on the other hand, influence the application of IHL – and therefore falls within the scope of application of the ICRC's position – if it is considered as contributing to the collective conduct of hostilities.

In some cases, the support provided by a third power is an action integrated into a military operation conducted by the party to the pre-existing conflict and is therefore considered an “act of war”. Such an act must be regarded as an integral part of the pre-existing NIAC. Therefore, actions such as logistical support involving the transportation of the troops of one of the belligerents on the front line, the provision of intelligence used immediately in the conduct of hostilities and the involvement of members of the third power in planning and coordinating military operations conducted by the supported party are all types of support that fall within the scope of application of the ICRC's position – in the same way as direct involvement by the intervening power in combat operations does – because they have a bearing on the applicability *ratione personae* and *ratione materiae* of IHL. In the ICRC's view, a third power supporting one of the belligerents can be regarded as a party to the pre-existing NIAC when the following conditions are met: (1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.

According to this support-based approach, the nature of the intervening power's involvement in the pre-existing NIAC could mean that it is considered a “co-belligerent”, making it a party to the conflict. When there is a close link between the action of the intervening power and the pre-existing NIAC, the assessment can be made on the basis of the nature of the support provided rather than on the traditional criteria for determining the existence of a NIAC, which will already have been met for the pre-existing conflict.

It is important to note that this approach, which takes into account the support provided to one of the parties to a pre-existing NIAC, complements, but does not replace, the test for determining the application of IHL based on the

6 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd Session, 2001, Art. 16; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, New York, 2002, pp. 148–151; Christian Dominicé, “Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State”, in James Crawford, Alain Pellet and Simon Olleson (eds), *Oxford Commentaries on International Law: The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 285–287; Shabtai Rosenne, *The International Law Commission's Draft Articles on State Responsibility, Part I, Articles 1–35*, Martinus Nijhoff, Dordrecht, 1991, pp. 282–288.

traditional criteria established in this body of law.⁷ It also prevents a situation in which powers making an effective contribution to military operations and undeniably involved in the collective conduct of hostilities in the context of a pre-existing NIAC can avoid being considered as parties to the conflict and therefore claim protection from direct attacks on their armed forces, under the pretext that the intensity of the armed violence has not reached the required threshold.

The ICRC therefore draws a distinction based on the nature of the internationalization of the conflict. It distinguishes between internationalization in the factual sense of the term (manifestation of a foreign intervention, whatever the form or extent) and internationalization that has a bearing on the applicability of IHL *ratione personae* (intervening power becomes a party to the conflict) or, depending on the circumstances, alters the scope of application of IHL *ratione materiae* (extension of the legal framework when application of the law of IAC – including occupation law, where relevant – is triggered).

The ICRC's position also takes into consideration the diversity of intervening powers, extending the circle to cover international and regional organizations. International organizations are increasingly involved in military operations to assist one or more parties already involved in an armed conflict. In recent years, the UN (in the Democratic Republic of the Congo (DRC)), NATO (in Afghanistan and Libya) and the African Union (in Somalia) have been directly involved in both international and non-international armed conflicts. The particular status of international and regional organizations under public international law⁸ means that they must be considered – through their subsidiary organs, which are the missions they deploy on the ground (such as MONUSCO,⁹ the UN mission in the DRC, and ISAF,¹⁰ the NATO mission in Afghanistan) – parties to the international or non-international armed conflict,¹¹ if the criteria for determining that IHL applies to them are met.

7 For more details on this approach, see Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891/892, 2013; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* above note 5, p. 21–23; ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, paras 445–446.

8 They have international legal personality – established explicitly or implicitly in their charters – distinct from that of their member States; see ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 178.

9 United Nations Organization Stabilization Mission in the Democratic Republic of the Congo.

10 International Security Assistance Force.

11 There is no longer any question today that it is by examining the purposes and functions of an international or regional organization, as explicitly or implicitly defined in its charter, that it can be determined what rules of international law are applicable *ratione personae* to it. It follows that international and regional organizations which have the material means to become involved in military operations also have, by extension, the subjective capacity to become belligerents within the meaning of IHL and therefore subjects of this body of law. The activities of an international organization cannot, however, be governed by IHL unless the forces it has at its disposal take part in military action that reaches the threshold required for it to be considered an armed conflict, be it international or non-international (see Robert Kolb, Gabriele Porretto and Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales: Forces de paix et administrations civiles transitoires*, Bruylant, Brussels, 2005, pp. 117–127; Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff, Dordrecht, 2005, pp. 151–158). As international and regional organizations cannot be party to IHL treaties, when they are involved in an armed conflict they are bound by customary IHL.

Lastly, it is important to note that situations in which there is no objective link between foreign intervention in the territory of a third State and a pre-existing armed conflict in that territory are not included in the scope of the ICRC's position, as the notion of armed conflict involving foreign intervention presupposes the existence of such a link. Such situations occur when a third power intervenes in a territory where a pre-existing NIAC is in progress, but not in support of one of the parties and without exercising overall control over a non-State party, or when it intervenes in a territory where there is no conflict taking place.¹²

Similarly, spillover NIACs that extend into the territory of one or more neighbouring States, with the express or tacit consent of the government(s) concerned,¹³ are not covered by the ICRC's position on the notion of armed conflict involving foreign intervention, unless a third party intervenes in the pre-existing armed conflict.¹⁴

In short, the ICRC's position covers foreign intervention by one or more States, a coalition of States or an international or regional organization that become a party to a pre-existing conflict as defined by IHL.

Different forms of foreign intervention covered by the ICRC's position

Situations covered by the ICRC's position on the notion of armed conflict involving foreign intervention are those in which a factual link can be established between the intervention of one or more third powers and the pre-existing or concomitant armed conflict. This link can take two possible forms.

Foreign intervention in support of one of the parties to a non-international armed conflict

Foreign intervention can take place with a view to providing *support* to one of the parties to the conflict. Very often, this support (which can be regarded as a form of "co-belligerency") consists of pooling military resources with one of the parties to the pre-existing or concomitant armed conflict in joint military operations aimed at weakening or neutralizing the adversary. Collaboration of this kind sometimes

12 Although it is hard to conceive of foreign intervention in the territory of a State where a NIAC is in progress not constituting support to one of the parties involved in the pre-existing NIAC, such situations do arise. One example is the initial US intervention in Afghanistan in October 2001 against the Taliban (triggering an IAC), at a time when the latter were involved in a NIAC against the Northern Alliance. The lack of a factual link between the two parallel conflicts meant that they were excluded from the scope of application of the ICRC's position, because the United States did not initially intervene in support of the Northern Alliance and did not exercise overall control over it. Several months after the launch of its military operations against the Taliban, however, the United States carried out actions in support of the Northern Alliance, thereby bringing the situation into the scope of application of the ICRC's position on the notion of armed conflict involving foreign intervention.

13 In general, these situations occur when government forces undertake action in pursuit of an armed group seeking to take refuge in the territory of a neighbouring State.

14 However, if the State into whose territory the NIAC has spilled over intervenes, undertaking military action in support of one of the parties, then the situation falls within the scope of application of the ICRC's position on the notion of armed conflict involving foreign intervention.

calls for the establishment of military coordination arrangements, consisting of common structures or platforms or even, at their most advanced, an integrated chain of command. However, the intervening power's support is not always so readily apparent. It may be military action of a more unilateral nature, although the purpose is the same: to weaken the military resources of a party to the conflict for the benefit or on behalf of the adversary. The key issue is to assess whether the military action of the third party in the prevailing circumstances can be reasonably and objectively interpreted as action designed to support one of the parties to the conflict to the detriment of the other. If it can, this military action will effectively be considered part of the collective conduct of hostilities by the intervening power and the supported party against the enemy. It would therefore clearly be considered support as defined by the ICRC's position.

Foreign intervention in the form of overall control over one of the parties to a non-international armed conflict

The link between the intervention of one or more third parties and the armed conflict is stronger when the intervening power exercises some sort of *control* over the supported party. In some conflict situations, foreign intervention involves exercising significant and progressive control over one of the parties to a pre-existing armed conflict. Most commonly, it is over an insurgent non-State party in a pre-existing NIAC that control is exercised by a third party.¹⁵ One such example was the conflict in the former Yugoslavia in the 1990s, when the Serbian government exercised control over certain armed groups fighting in the NIACs taking place in Bosnia and Croatia. This kind of control entails a relationship of subordination between the non-State party and the intervening power.

In order to determine the existence of such a relationship of subordination, it must be proved that the non-State party is indeed acting on behalf of the intervening power. A link must therefore be established between the actions of the non-State party and the intervening power for those actions to be legally regarded as being committed directly by the latter. The question of attribution thus plays a major role – if the actions of the non-State party can be attributed to the intervening power,¹⁶ the relationship of subordination is thereby established.

15 Overall control could conceivably precede the outbreak of the NIAC. This would be the case if a foreign power were to establish overall control over an organized armed group that had not yet undertaken any military operations against the State party. In such a situation, any hostilities would immediately be governed by the law of IAC.

16 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 104: "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary question*: that of the conditions on which under international law an individual may be held to act as a *de facto organ* of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the grave breaches regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather,

Attribution, which is the process of establishing a link between an act and the individual or entity deemed to have carried it out, is particularly complicated in the case of collective entities such as States and international organizations, which must necessarily act through individuals. The second step in this process, after establishing who carried out the act (or series of acts), is to determine whether the individual or group of individuals concerned discharges a function within the collective entity. If this is the case, the acts of the individual or individuals can be interpreted as being those of the entity itself.¹⁷ Applied to the situations covered by the ICRC's position, the concept of attribution will help to reveal the extent of the relationship between the non-State party and the intervening power and play a crucial role in establishing whether the members of the non-State armed group can be considered agents of the latter, which will have legal implications, particularly with regard to the classification of the situation under IHL. Attribution ensures that the intervening power is prevented from hiding behind a proxy to avoid its international obligations and responsibilities under IHL and from refusing to be considered a party to the conflict.¹⁸

IHL is silent on the issue of attribution. It does not contain any specific criteria for establishing that an armed group initially perceived to be acting independently in a pre-existing NIAC is, in fact, subordinate to a third power, which would turn the conflict into an international one.¹⁹ The only reference to such a relationship of subordination is to be found in Article 4A(2) of the Third Geneva Convention of 1949, but it describes it in a factual way, without defining the legal conditions for establishing that a group of individuals forming an organized militia or resistance movement within the scope of this provision ultimately "belongs" to an intervening third power.²⁰ As there is no specific test

the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international."

17 Hervé Ascensio, "La responsabilité selon la Cour internationale de Justice dans l'affaire du génocide bosniaque", *Revue Générale de Droit International Public*, No. 2, 2007, p. 288.

18 Antonio Cassese, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18, No. 4, 2007, p. 656. See also ICTY, *Tadić*, above note 16, para. 117.

19 The members of the group must then be considered *de facto* agents of the intervening third power. See *ibid.*, para. 104; ICRC, *Commentary on the First Geneva Convention*, above note 7, paras 265–273.

20 Article 4A(2) of the Third Geneva Convention (GC III) states: "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: ... (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging* to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions" (emphasis added). According to the analysis of the ICTY Appeals Chamber – a view shared by the ICRC – armed conflict becomes international when the non-State party "belongs", within the meaning of Article 4A(2) of GC III, to the intervening third power, and this belonging is determined based on the attribution of the actions of the former to the latter in accordance with the overall control criterion. See D. Akande, above note 5, pp. 57 ff.

under IHL for establishing whether a non-State armed group “belongs” to a third power, one must refer to the general rules of public international law, which help to determine when and under what conditions private individuals (including members of non-State armed groups) are ultimately held to be acting as *de facto* agents of a third power.

In this regard, international law on responsibility and the developments therein concerning attribution offer suitable solutions that can be transposed to IHL. To all intents and purposes, the test for determining a connection between a non-State party and a third power for the purpose of classifying a conflict under IHL – just like under the international law on responsibility – involves attributing actions carried out by an individual or a group of individuals to a bearer of international obligations (a State or international organization).²¹

The International Law Commission (ILC),²² international courts such as the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC) and the European Court of Human Rights,²³ and doctrine²⁴ have also established that the question of attribution linking the acts of a *de facto* entity to an intervening outside power is determined by the notion of control. As Stefan Talmon so rightly points out, “the question of whether or not an act of a secessionist entity can be attributed to an outside power thus becomes a question of how one defines ‘control’”.²⁵ International courts called on to examine this question initially interpreted the concept of control in different ways when it came to attributing the actions of a non-State party to a third power. The different tests put forward, such as effective control and overall control, became the subject of a doctrinal debate.

International jurisprudence and doctrine have long wavered between the stricter effective control option favoured by the ICJ in a decision rendered in

21 Marten Zwanenburg, “International Organisations vs. Troop Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict During Peace Operations?”, Proceedings of the Bruges Colloquium, “International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility”, 12th Bruges Colloquium, 20–21 October 2011, *Collegium*, No. 42, Autumn 2012, p. 26; Marina Spinedi, “On the Non-Attribution of the Bosnian Serbs’ Conduct to Serbia”, *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 832–833.

22 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, adopted by the International Law Commission at its 53rd Session, 2001; see in particular the Commentary on Article 8, pp. 47–49.

23 See below.

24 See D. Akande, above note 5, pp. 57 ff; Marko Milanovic, “State Responsibility for Genocide”, *European Journal of International Law*, Vol. 17, No. 3, 2006; A. Cassese, above note 18, pp. 649–668.

25 Stefan Talmon, “The Responsibility of Outside Powers for Acts of Secessionist Entities”, *International and Comparative Law Quarterly*, Vol. 58, July 2009, p. 496.

1986,²⁶ and the broader notion of overall control espoused by the ICTY in 1999.²⁷ In its judgment of 17 July 1999 on the *Tadić* case, the ICTY held that:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.²⁸

The notion of overall control does not therefore refer simply to monitoring or checking, but also requires the exercise of some form of authority over the entity in question. There is no question, however, that the concept of authority referred to is broader and more general than the issuing of orders, and refers rather to general direction and coordination.

The recent case law of international courts displays a clear tendency towards applying the overall control test for the purpose of classifying armed conflicts.

The ICTY was clearly the forerunner in this area, as it was in its cases that the concept of overall control was first developed.²⁹ This approach was later followed by the ICC, whose Pre-Trial Chamber and Trial Chamber used the overall control test in the *Lubanga* case. The Pre-Trial Chamber made it clear that “where a State does *not intervene directly* on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State”.³⁰ Some years later, the ICC Trial Chamber echoed the analysis of the Pre-Trial Chamber in its judgment of 14 March 2012, in which it stated that:

26 ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, *ICJ Reports 1986*, p. 14, para. 115. Effective control as reflected in this judgment means that the party subject to control was not only in the pay of or financed by the intervening foreign power and that its actions were supervised by it, but also that it received direct instructions from it.

27 This wavering is clearly reflected in the commentaries of the ILC on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Discussing the notion of control in its Commentary on Article 8, the ILC declines to choose between effective control and overall control, simply stating: “In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it” (p. 48).

28 ICTY, *Tadić*, above note 16, para. 131.

29 The concept of overall control appears in the *Aleksovski* case (ICTY, Case No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999). In this judgment, Judges Vohrah and Nieto-Navia concluded, in their joint opinion regarding the applicability of Article 2 of the Statute (para. 27), that “the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina. The majority of the Trial Chamber finds that the HVO was not a *de facto* agent of Croatia Therefore, the Prosecution has failed to establish the internationality of the conflict to the satisfaction of a majority of the Trial Chamber.”

30 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 211.

As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the ‘overall control’ test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State.³¹

Lastly, in its decision of 26 February 2007, the ICJ expressly stated that the notion of overall control could be used to determine the legal characterization of a situation under IHL: “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.”³²

The ICRC has consistently opted to apply the overall control criterion for the purpose of determining the legal classification of a conflict situation under IHL when there seemed to be a close connection, if not a relationship of subordination, between a non-State party and a third power. The reason for this choice is that the notion of overall control takes better account of the reality of the relationship between the non-State armed group and the third power, in that it does not imply that the armed group is not subordinate to the State if specific instructions are not issued for every belligerent act. Additionally, the overall control test is particularly useful because it assesses control over the non-State party as a whole, thereby allowing its *overall actions* to be attributed to the intervening foreign power. This is wholly consistent with the classification of armed conflicts in IHL, whereby the overall actions carried out by persons participating in organized armed violence are objectively assessed based on criteria established by the rules of this body of law.³³

The option chosen by the ICRC is therefore in line with recent international jurisprudence of the ICJ, the ICTY and the ICC.³⁴

31 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute, Trial Chamber I, 14 March 2012, para. 541.

32 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, *ICJ Reports 2007*, para. 404.

33 Proving effective control for every single operation would be virtually impossible, because it would require a level of proof unlikely to be attained. *A fortiori*, the “complete dependence” criterion, advocated by some authors (Marko Milanovic, for example) and used by the ICJ in 2007 in the *Genocide* case to determine responsibility for an internationally wrongful act, makes the attribution test even stricter. According to H. Ascensio, above note 17, pp. 290–292, “taken literally, the term [complete dependence] is absurd, because virtually the only actors that would meet the criteria are *de jure* organs with circumscribed powers! Any shred of discretionary power would destroy the hypothesis [for attributing the actions in question to a third State] With the criteria envisaged by the Court, no puppet State ... would ever be identified for what it is: a fiction.” See also Jörn Griebel and Milan Plücker, “New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in *Bosnia v. Serbia*”, *Leiden Journal of International Law*, Vol. 21, No. 3, 2008. It is important to note that although the ICJ used the “complete dependence” test to establish whether certain acts committed by Bosnian Serb militias could engage the international responsibility of the Serbian State, it nonetheless expressly stated that the less restrictive test of overall control could be used to classify a conflict in IHL. For the ICJ, then, both tests are valid but each should be used for different purposes.

34 It is important to clarify, however, that acceptance of this option – and the legal reasoning behind it – is not unanimous. A (minority) part of the doctrine holds that the use of the overall control test for classifying armed conflicts in IHL is based on a legal analysis that is faulty on two counts. First, some authors call into question the soundness of the reasoning in relation to overall control, arguing that it

The use of the notion of control for determining applicable IHL has a decisive legal impact, because the non-State party becomes subordinate to the intervening third power. In the eyes of international law, the members of the non-State armed group become agents of the third power. In terms of IHL application *ratione personae*, this means that the intervening power entirely substitutes the non-State party and becomes itself a party to the pre-existing armed conflict instead of the non-State armed group.³⁵ The link between the foreign intervention and the pre-existing armed conflict – whether it takes the form of support given to one of the parties to the armed conflict or overall control over that party – is the crucial element that places an armed conflict involving foreign intervention within the scope of the ICRC's position.

It is important to note, in this regard, that the timing of the support given by one or more intervening powers can vary. The intervention generally takes place once the NIAC is in progress, but it can also coincide with the outbreak of the conflict, although this is more uncommon. The vast majority of armed conflicts involving foreign intervention fall into the first category. Some examples are MONUSCO in the DRC (from 2008) and NATO operations in Libya (2011) and Afghanistan (from 2003).

Foreign intervention resulting in *control* over the non-State party is less common, although not exceptional, as evidenced by the situations observed in the former Yugoslavia between 1992 and 1996.

The different relationships between belligerents covered by the ICRC's position on the notion of armed conflict involving foreign intervention are as follows:

- State party v. non-State party;³⁶
- State, coalition of States or international or regional organization intervening in support of the State party v. non-State party;

would be legally and conceptually inappropriate to use the secondary rules of public international law (attribution as defined in international law regulating responsibility) to determine the scope of application of primary rules of international law (IHL). In the view of these authors, although IHL is silent on this matter, it should be possible to deduce from this body of law attribution rules of its own to establish the link between a State and a non-State armed group. The second argument made by these authors is that the concept of overall control could not be used to attribute the *overall* actions of a non-State actor to a State. In this regard, they point out that the ICJ, in its 2007 decision in the Bosnia-Herzegovina *Genocide* case, specified that the effective control test could only be used to attribute individual and specific acts and that only the complete dependence criterion was suitable for attributing the overall actions of a *de facto* entity to a State. However, the proponents of this argument seem to have ignored the fact that the ICJ made a distinction between the situations in para. 404. It opened the door to the use of the overall control test in classifying conflicts in IHL, but indicated that it was insufficient to establish the international responsibility of a State for actions carried out by a non-State group. For a more detailed analysis of these arguments, see M. Milanovic, above note 24; Marko Milanovic, "State Responsibility for Genocide: A Follow-Up", *European Journal of International Law*, Vol. 18, No. 4, 2007; S. Talmon, above note 25; D. Akande, above note 5, pp. 57 ff.; Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law", *European Journal of International Law*, Vol. 21, No. 1, 2010; Theodor Meron, "Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout", *American Journal of International Law*, Vol. 92, No. 2, 1998.

35 The legal implications for IHL application *ratione materiae* are examined below.

36 Although this initial belligerent relationship does not, in itself, involve intervention by a third party, it is essential, because it is the basic component onto which are grafted all the other belligerent relationships that are covered by the ICRC's position.

- State party v. State, coalition of States or international or regional organization intervening in support of the non-State party;
- State party v. State, coalition of States or international or regional organization exercising overall control over the non-State party;
- State, coalition of States or international or regional organization intervening in support of the State party v. State, coalition of States or international or regional organization intervening in support of the non-State party or exercising overall control over it.

The ICRC and the rules of IHL applicable to armed conflicts involving foreign intervention

As the question of determining IHL applicable to armed conflicts involving foreign intervention is open to controversy, the ICRC has undertaken to clarify how IHL is applicable to this type of conflict.

For the ICRC, determining the applicable law involves the objective application of the traditional criteria for armed conflict to the facts on the ground. On this question, both the prevailing doctrine³⁷ and international jurisprudence³⁸ have consistently maintained that armed conflicts should be classified based on an assessment of the facts in light of the conditions established for IACs in Article 2 common to the four Geneva Conventions and Article 1 of Additional Protocol I (AP I) of 1977, and for NIACs in Article 3 common to the four Geneva Conventions and Article 1 of Additional Protocol II (AP II) of 1977.³⁹ In connection with the *Boškovski* case, the ICTY noted the following:

Consistent with this approach, Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the

37 See Éric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, p. 120; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, pp. 75–76; Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008, pp. 47–48; Geoffrey S. Corn *et al.*, *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law and Business, New York, 2012, pp. 72, 80.

38 See, for example, US Military Tribunal, Nuremberg, *United States v. Wilhelm List*, Case No. 47, February 1948; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 8, 1949, p. 59; ICTY, *The Prosecutor v. Mladen Naletilić, aka “Tuta”, and Vinko Martinović, aka “Štela”*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 211; ICTY, *The Prosecutor v. Ljube Boškovski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment, Trial Chamber II, 10 July 2008, para. 174.

39 For a more detailed analysis of the criteria for defining armed conflicts, see ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, Opinion Paper, March 2008, available at: www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* above note 5, pp. 7–12; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, New York, 2010, pp. 149–156; E. Wilmshurst (ed.), above note 5; Daniel Bethlehem, Sandesh Sivakumaran, Noam Lubell and Philip Leach, “International Law Meeting Summary: Classification of Conflicts: The Way Forward”, Chatham House, 2012, available at: www.chathamhouse.org/sites/default/files/public/Research/International%20Law/011012summary.pdf; S. Vité, “Typology of Armed Conflicts in International Humanitarian Law” above note 5, pp. 69–94.

fighting and the organisation of the armed group or groups involved depending on the facts of each case.⁴⁰

The ICRC proposes a fragmented approach to the determination of applicable law. It has used this approach consistently for this purpose in numerous cases involving different types of armed conflict. The approach consists of determining applicable IHL by examining each bilateral relationship between belligerents separately in light of the facts on the ground. This fragmented approach reflects the current state of the law, as it has been validated by the ICJ⁴¹ and reaffirmed by the ICTY⁴² and more recently the ICC. In the *Lubanga* case, the Pre-Trial Chamber of the ICC specified that

an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside an internal armed conflict – if i) another State intervenes in that conflict through its troops (direct intervention) or if ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).⁴³

Most of the doctrine also supports this approach.⁴⁴

This fragmentation in the application of legal regimes according to the parties involved in the armed conflict means that applicable IHL – law of IAC, law of NIAC or both – depends on the nature of the different bilateral relationships, as identified above, that can exist between belligerents in an armed conflict. In other words, according to this fragmented approach, when different

40 ICTY, *Boškovski and Tarčulovski*, above note 38, para. 176; ICTY, *The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgment, Trial Chamber, 26 February 2009, para. 125: “The existence of an armed conflict does not depend upon the views of the parties to the conflict.” See also International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Chamber I, 2 September 1998, para. 603: “If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto.”

41 ICJ, *Nicaragua*, above note 26, p. 14.

42 ICTY, *Tadić*, above note 16, para. 84, and Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, para. 77: “the conflicts in the former Yugoslavia have both internal and international aspects”.

43 ICC, *Lubanga*, Decision on the confirmation of charges, above note 30, para. 209. See also ICC, *Lubanga*, Judgment pursuant to Art. 74 of the Statute, above note 31, paras 536, 565.

44 Marco Sassòli, “The Legal Qualification of the Conflict in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in Sienho Yee and Tieya Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001; Luigi Condorelli, “Les attentats du 11 septembre et leurs suites: Où va le droit international?”, *Revue Générale de Droit International Public*, No. 4, 2001; Hans-Peter Gasser, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon”, *American University Law Review*, Vol. 33, 1983; James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003; Robert Kolb, *Ius in bello, le droit international des conflits armés, Précis*, 2nd ed., Bruylant, Brussels, 2009, pp. 183–192; D. Akande, above note 5, pp. 63–64; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, pp. 26–28; Dietrich Schindler, “International Humanitarian Law and Internationalized Internal Armed Conflicts”, *International Review of the Red Cross*, No. 230, September–October 1982, pp. 255 ff.

types of actors – State and non-State – are involved in the same conflict, the rules of IHL applicable to them vary depending on the nature of the relationship that each belligerent has with each of the others. When a State party is engaged in military activities against one or more non-State parties, the relationship is governed by the law of NIAC. If this same State is also fighting against another State in the context of that same conflict, their relationship will be governed by the law of IAC. Accordingly, the direct intervention of a third State in support of one or more non-State parties does not internationalize all the relationships between the parties to the conflict, and the law of IAC does not apply to all the actors involved in that conflict. In this case, the intervention of a third power is a separate component added onto the pre-existing NIAC, leading to a situation in which there are two armed conflicts, different in nature, existing concurrently with each other in the same territory.⁴⁵

This fragmented approach, supported by most of the jurisprudence and doctrine,⁴⁶ responds to the need to adopt a method that results in a legal outcome more consistent with the reality of the conflict on the ground. It has the advantage of being precise, because by focusing on the bilateral relationships, it takes better account of the nature of the parties to the conflict and their ability to implement the relevant provisions of IHL. Furthermore, the fragmented approach

45 This fragmented approach, endorsed by international jurisprudence, is not, however, without its critics. Some have questioned it, decrying the legal complexity involved in applying different sets of law-of-war rules in the same territory, depending on the nature of the parties to the conflict. See T. Meron, above note 34, pp. 236–238. In the same vein, see also ICTY, *The Prosecutor v. Duško Tadić, aka “Dule”*, Case No. IT-94-1-T, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, separate opinion of Judge Li, para. 7; George H. Aldrich, “The Laws of War on Land”, *American Journal of International Law*, Vol. 94, No. 1, 2000, p. 63; E. David and J. Salmon, above note 4, pp. 728 ff. These positions were, however, disregarded by the ICC in 2009 in the *Bemba Gombo* case, when the Pre-Trial Chamber decided that the conflict in the Central African Republic should be classified as non-international despite the intervention of foreign troops in support of the government in power (ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the confirmation of charges, Pre-Trial Chamber II, 15 June 2009, para. 246).

46 Besides the arguments outlined above, States are very clearly in favour of maintaining the IAC-NIAC distinction underlying the fragmented approach. One of the main reasons for this is their concern to preserve their sovereignty (States are averse to the idea of merging these two types of conflict for fear of legitimizing the actions of insurgent groups, being required to grant prisoner-of-war status to members of rebel groups and not being able to prosecute all the actions carried out by such groups in connection with the armed conflict). At the conferences of experts held in 1971 and 1972, the ICRC proposed that the whole of IHL should apply in the event of foreign intervention in an internal conflict. This proposal was not, however, accepted by the States. It was argued that the proposal would contribute to increasing the scale of such conflicts, as it would encourage insurgent parties to actively seek the intervention of third States in order to benefit from the application of the law of IAC (ICRC, “Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts”, Geneva, August 1971, pp. 50 ff). See also Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses of the Hague Academy of International Law*, Vol. 163, 1979, p. 150. According to E. Wilmshurst, above note 5, p. 489, “there is still some support for taking a global view ... and regarding them all as international. But what is perhaps the common view, and the view espoused by the contributors to this book, is that the only acceptable way of classifying mixed conflicts is to split them up into their component parts.”

tends to preserve the coherence of the legal system established under IHL⁴⁷ and avoids negative responses from States and international organizations, which are always averse to the idea of applying the law of IAC to their relationships with non-State armed groups.

In summary, the fragmented approach has the twofold advantage of being accepted by States and international organizations – which have also opted for a differentiated approach to the application of IHL in armed conflicts involving foreign intervention – and of resulting in a practical outcome that is more consistent with the realities of contemporary armed conflicts.

Law applicable in the case of foreign intervention in support of the State party

Pursuant to the fragmented approach described above, the ICRC considers that when a foreign power intervenes in support of the State party, the law of NIAC applies. The belligerent relationship between the State party and the non-State party is governed by the law of NIAC, as is the belligerent relationship between the intervening foreign power and the non-State party.

In accordance with the fragmented approach described above, the situation referred to here therefore covers the following two belligerent relationships:

- State party v. non-State party;
- State, coalition of States or international or regional organization intervening in support of the State party v. non-State party.

As explained above, the applicability of IHL to the relationships between belligerents identified in the context of foreign intervention in support of the State party is determined – as it is for relationships between the parties in “traditional” armed conflicts – with reference to the classic criteria for NIAC pursuant to common Article 3 and Article 1 of AP II.

The legal framework governing the situation described above is therefore as follows: common Article 3, AP II (provided that the State party has ratified the Protocol and the conditions of applicability are met) and customary law of NIACs will be applicable to the belligerent relationship between the State party supported by the intervening power on one side and the non-State party on the other.⁴⁸

Foreign intervention does not therefore alter what IHL applies (it is still the law of NIAC); it simply extends the scope *ratione personae* to include the party

47 Specifically, IHL considers – pursuant to Articles 2 and 3 common to the four Geneva Conventions of 1949 – that the law of IAC only applies when the opposing parties are all States or other entities with international legal personality. *A contrario*, IHL calls for the application of the law of NIAC in all situations in which a State or some other entity with international legal personality is fighting one or more non-State actors.

48 This identification is based on the four Geneva Conventions of 1949 and the two Additional Protocols of 1977; it does not refer to other applicable IHL treaties.

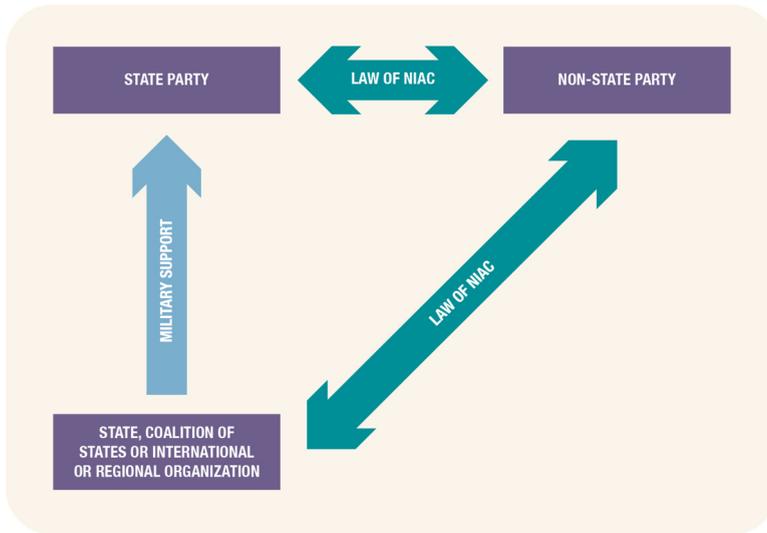


Figure 1. Relationships between the parties to the conflict and the IHL applicable in this scenario.

intervening in support of the State party, regardless of whether that party is a multinational force,⁴⁹ a State or a coalition of States.

The main reasons for rejecting the option of applying the law of IAC in such situations include the following.

First, common Article 2 implies that the law of IAC only applies when the armed conflict is between at least two entities possessing international legal

49 The term “multinational force” refers to the armed forces made available for a peace operation by troop-contributing countries. There is no clear-cut, recognized definition of peace operations in public international law. Generally speaking, the term “peace operations” covers both peacekeeping and peace enforcement operations conducted by international organizations, regional organizations or coalitions of States acting on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter. The nature of armed conflicts involving multinational forces and the determination of the rules of IHL applicable to them has been the source of much controversy. For some authors, such situations are to be equated with IACs. In their view, as the military operations are decided, defined and carried out by international organizations, they are, by their very nature, to be included in this category. For these authors, the special status of international organizations and their international legal personality would prevail over the non-State status of the insurgent party and would be enough, in itself, to determine the nature of the conflict. See Claude Emanuelli, “Les forces des Nations Unies et le droit international humanitaire”, in Luigi Condorelli *et al.* (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law: Proceedings of the International Symposium Held on the Occasion of the 50th Anniversary of the United Nations (Geneva, 19, 20 and 21 October 1995)*, Pedone, Paris, 1996, pp. 357 ff.; R. Kolb, above note 4, pp. 57 ff. However, this position (which does not consider the non-State component of the belligerent relationship and therefore disregards the fact that legal classification in IHL always takes into account the nature of the parties to the conflict) is not borne out by the practice of States and international organizations recently involved in conflict situations, which reveals consistent support for the fragmented approach advocated by the ICRC. See S. Vité, “Typology of Armed Conflicts in International Humanitarian Law” above note 5, pp. 87–88; E. Wilmshurst, above note 5, p. 487: “Although not without controversy, the better view is that such conflict is indeed non-international, regardless of the international component of the multinational force.”

personality, be it a conflict between two States or between one State and a coalition of States. On the other hand, when the conflict is between an entity with international legal personality and a non-State armed group with no legal status under international law, the law that applies is that of NIAC.

Second, a blanket application of the law of IAC would not be an acceptable solution for the State party or for the powers intervening to assist it, because the implementation of the relevant rules would mean them having to grant members of the non-State armed groups combatant and prisoner-of-war status (provided that the established criteria were met), and that in itself would make it impossible for them to be prosecuted for the mere fact of having taken up arms. It is quite inconceivable that States would be willing to renounce the possibility of dealing with individuals taking part in armed uprisings under domestic law.

Third, application of the law of IAC would require not only State parties and intervening States but also non-State parties to fulfil the relevant IHL obligations. IHL is intended to be a realistic and pragmatic body of law based on the principle of effectiveness. It is therefore pointless to impose on a party to a conflict obligations that the party cannot fulfil because it does not have the means to do so. The law of IAC was designed to be applied by States possessing logistical means that the vast majority of non-State armed groups simply do not have. Making the whole of IHL applicable *de jure* to non-State armed groups incapable of complying with its provisions would render those provisions meaningless and prevent them from fulfilling the purpose for which they were crafted. Systematic failure to respect a body of law spells its demise; it is therefore much more realistic to require non-State armed groups to implement the more basic provisions established in the law of NIAC.

Law applicable in the case of foreign intervention in support of a non-State party

In this scenario, the ICRC considers that when a foreign power intervenes in support of a non-State party, the law of NIAC and the law of IAC apply in parallel. The belligerent relationship between the State party and the non-State party is governed by the law of NIAC, while the belligerent relationship between the State party and the intervening foreign power is governed by the law of IAC.

In accordance with the fragmented approach described above, the scenario referred to here therefore covers the following two belligerent relationships:

- State party v. non-State party;
- State party v. State, coalition of States or international or regional organization intervening in support of the non-State party.

It is here that the full significance of the fragmented approach advocated by the ICRC can be appreciated, as such situations give rise to the application of a composite legal framework including both the law of IAC and the law of NIAC.

As explained above, the applicability of IHL to the relationships between belligerents identified in the context of foreign intervention in support of the

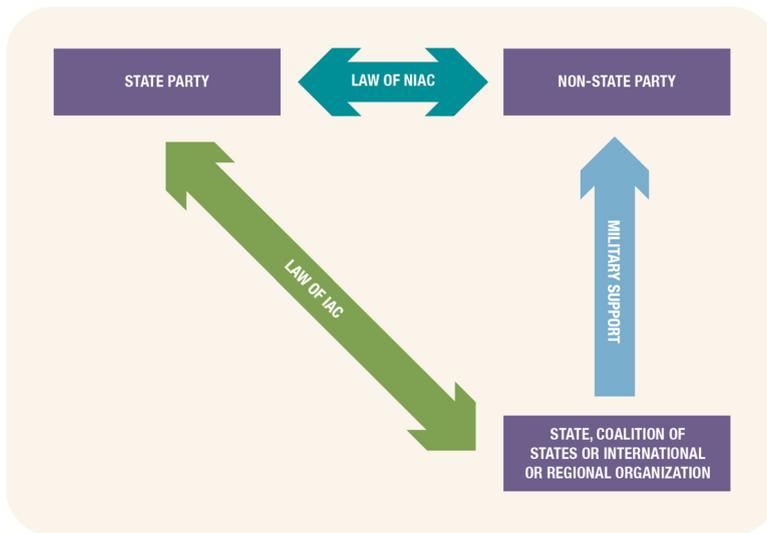


Figure 2. Relationships between the parties to the conflict and the IHL applicable in this scenario.

non-State party is determined with reference to the classic criteria pursuant to common Article 2 and Article 1 of AP I (for IACs) and the criteria drawn from common Article 3 and Article 1 of AP II (for NIACs). If foreign intervention in support of the non-State party involves the occupation of territory, Article 42 of the Regulations annexed to Hague Convention IV of 1907 (complemented by paragraph 2 of common Article 2) provides the criteria for determining whether occupation law applies to the situation in question.⁵⁰

Therefore, pursuant to the fragmented approach, the belligerent relationship between the State party and the non-State party will be governed by the law of NIAC and, at the same time, the belligerent relationship between the State party and the foreign intervening party will be governed by the law of IAC. The legal framework governing the NIAC situation will be common Article 3, AP II (provided that the State party has ratified the Protocol and the conditions of applicability are met) and customary law relating to NIACs. The IAC situation existing alongside the NIAC will be governed by treaty law and customary law relating to IACs (including occupation law, where relevant), specifically the provisions of the Geneva Conventions, AP I and the Regulations annexed to Hague Convention IV of 1907.

The involvement of UN-mandated multinational forces as an intervening party in no way modifies the determination of IHL applicable to these situations.

⁵⁰ Occupation law – as a branch of the law of IAC – applies when foreign intervention results in effective control over all or part of the territory in question. For more details on the notion of effective control, see Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

The same approach is used as in armed conflicts in which there is foreign intervention by a State or coalition of States without a UN mandate.

Lastly, in practical terms, this fragmented approach will have little impact in terms of the law of the conduct of hostilities, because the vast majority of the IHL treaty-based rules applicable in IACs are also generally accepted as applying in NIACs as a matter of customary law. The status of detainees is, however, a different matter.⁵¹ The fragmented approach means that the legal rules applicable to persons captured and detained in the context of the belligerent relationship between the State party and the non-State party are not the same as those applicable to persons captured and detained in the context of the belligerent relationship between the State party and a State, a coalition of States or an international or regional organization intervening in support of the non-State party.⁵²

Law applicable in the case of foreign intervention in support of both the State party and the non-State party

In this scenario, the ICRC considers that when foreign powers intervene in support of both the State party and the non-State party, the law of NIAC and the law of IAC apply in parallel:

- The law of NIAC governs the belligerent relationship between the State party and the non-State party and the belligerent relationship between the foreign power intervening in support of the State party and the non-State party.
- The law of IAC governs the belligerent relationship between the State party and the foreign power intervening in support of the non-State party and the belligerent relationship between the foreign power intervening in support of the State party and the foreign power intervening in support of the non-State party when the criteria for international armed conflict are satisfied for both belligerent relationships.

51 Similarly, the fragmented approach will have a bearing on the legal basis for the ICRC's activities. In an IAC, the ICRC will carry out its humanitarian activities under a strong treaty-based mandate (specifically, the *right* granted to the ICRC under IHL to visit people detained in connection with an IAC), while in a NIAC it can only undertake activities if its offer to provide its services is accepted by the parties to the conflict (who are free to deny the ICRC access to detainees in a NIAC).

52 The application of the law of IAC and the law of NIAC in parallel in no way weakens the prohibition – established in Article 12 of GC III and Article 45 of GC IV – on transferring to the non-State party persons detained in the context of an IAC between the third State and the State party (because an insurgent group cannot be party to the Geneva Conventions). In the event that such a transfer were to be undertaken, it would not compromise the legal protection provided under the law of IAC for persons initially detained by the third State. Detainees transferred to the non-State party would continue to be protected under GC III or GC IV.

Fig. 3 - Colour online, Colour in print

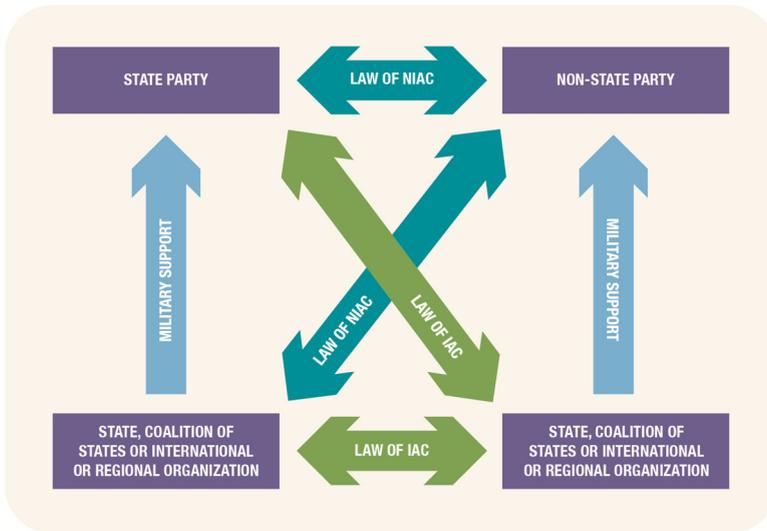


Figure 3. Relationships between the parties to the conflict and the IHL applicable in this scenario.

The scenario referred to here is a combination of the situations examined above:

- State party v. non-State party;
- State party v. State, coalition of States or international or regional organization intervening in support of the non-State party;
- Non-State party v. State, coalition of States or international or regional organization intervening in support of the State party;
- State, coalition of States or international or regional organization intervening in support of the State party v. State, coalition of States or international or regional organization intervening in support of the non-State party.

An example of such a case is the situation in the DRC in 1998–99, when the FARDC⁵³ were supported by Angolan, Namibian, Chadian and Zimbabwean forces in a NIAC against a rebel group known as the Rally for Congolese Democracy, which received military support from Burundian, Ugandan and Rwandan forces. In this situation, the law of IAC governed the relationships between the States allied with the State party (Angola, Namibia, Chad and Zimbabwe) and the States allied with the non-State party (Burundi, Uganda and Rwanda).

As explained above, a belligerent relationship between two or more entities with international legal personality is governed by the law of IAC. Consequently, the belligerent relationship between the State party and a power intervening in support of

53 Armed Forces of the Democratic Republic of the Congo.

Fig. 4 - Colour online, Colour in print

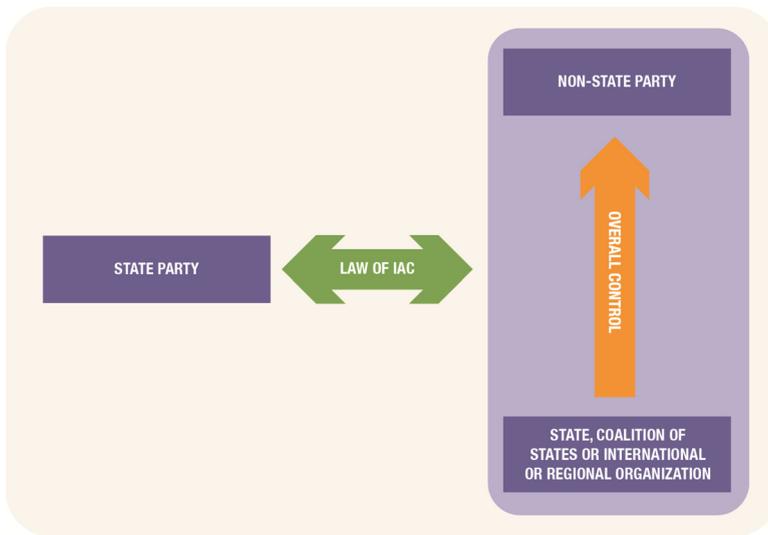


Figure 4. Relationships between the parties to the conflict and the IHL applicable in this scenario.

the non-State party and the relationships between the intervening powers are governed by the law of IAC. In accordance with the fragmented approach described above, the belligerent relationships existing correlatively between the State party and the non-State party and between the non-State party and the power intervening in support of the State party are, however, governed by the law of NIAC.

Law applicable in the case of foreign intervention resulting in control over the non-State party

In this scenario, the ICRC considers that when foreign intervention in support of the non-State party results in a situation in which the intervening foreign power exercises control over it, the law of IAC alone applies. The belligerent relationship between the State party and the non-State party disappears, and the only belligerent relationship remaining is the one between the State party and the intervening foreign power.

In accordance with the fragmented approach described above, the scenario referred to here therefore covers the following belligerent relationship:

- State party v. State, coalition of States or international or regional organization exercising overall control over the non-State party.

The ICRC therefore considers that, in the event of foreign intervention resulting in overall control over the non-State party by the intervening power, it is the law of IAC that applies.

In this scenario, the initial support provided by the intervening power turns into control over the non-State party.⁵⁴

As explained above, since IHL does not provide its own criteria for the notion of control, it is necessary to look to public international law (particularly developments in the law of responsibility) in order to determine whether a non-State armed group is acting on behalf of a third party. If it is established that such control does exist, the acts of the non-State armed group can be attributed to the intervening party.

Under this specific hypothesis, when the control exercised can be legally qualified as “overall control”, the non-State armed group is considered to have been “absorbed” by the foreign intervening power and to have become its agents under public international law. The intervening power therefore substitutes the non-State party, becoming the single party engaged in armed conflict against the government forces of the territory in which the military operations are taking place.

As the members of the non-State armed group are considered agents of the intervening power because they are under its control, the law of IAC will govern the relationship between the State party and the intervening power, now the only party fighting the government forces. The initial NIAC between the State forces and the non-State party turns into an IAC.

The law of IAC applicable in such cases is to be found in the Geneva Conventions of 1949, AP I (when the conditions of applicability are met) and customary law relating to IACs.

This legal framework also includes occupation law (Regulations annexed to Hague Convention IV of 1907, the Fourth Geneva Convention and AP I), when the third State exercises overall control over a non-State armed group or groups exercising effective control over a given territory.⁵⁵

54 In this regard, the notion of control is of crucial importance in determining the legal framework applicable to armed conflicts involving foreign intervention. See above.

55 The concept of indirect effective control has been put forward recently to avoid the creation of a legal loophole allowing States to use proxies as a way of sidestepping their responsibilities under occupation law. Effective control can be exercised by proxy armed forces, as they are under the overall control of the foreign State. In such situations, a State would be considered an occupying power for the purposes of IHL when it exercises overall control over *de facto* local authorities or other local organized groups exercising effective control over all or part of a given territory. The existence and soundness of this theory are corroborated by a number of verdicts handed down by international courts. In the *Tadić* case, for example, the ICTY decided that “the relationship of *de facto* organs or agents to the foreign Power includes those circumstances in which the foreign Power ‘occupies’ or operates in certain territory solely through the acts of local *de facto* organs or agents” (ICTY, *The Prosecutor v. Duško Tadić, aka “Dule”*, Case No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 584). In the *DRC v. Uganda* case, the ICJ examined the question of whether Uganda exercised overall authority over the Congolese insurgent groups (ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, para. 77). This clearly shows that the ICJ had adopted the position established by the ICTY, accepting the possibility of an occupation carried out by an indirect effective authority. For more details on this theory, see T. Ferraro, above note 50; ICRC, *Expert Meeting – Occupation and Other Forms of Administration of Foreign Territory*, Geneva, March 2012, p. 23.

Terminology used by the ICRC to refer to armed conflict situations involving foreign intervention

The term “internationalized internal armed conflict” is misleading, as it blurs the fundamental distinction between IACs and NIACs established in IHL. It might seem to suggest that a single legal framework – the law of IAC – applies to such situations or that they constitute a third category of armed conflict for which the applicable legal framework is uncertain.

As the legal reality is otherwise, the ICRC has chosen to use terms that are consistent with the IHL applicable to the various situations covered by the notion of armed conflict involving foreign intervention.

Based on this, the ICRC considers that armed conflict involving foreign intervention is simply a manifestation, in a particular context, of an IAC, a NIAC or both in parallel, depending on the specific circumstances.

Therefore, when a foreign power intervenes in favour of the State party against the non-State party, the ICRC classifies the situation as a NIAC, because the law of NIAC alone applies.

As the aim is to align the terminology with applicable law, these situations will henceforth be considered by the ICRC to be NIACs, and not internationalized NIACs, as only the law of NIAC is applicable. While it is true that this new designation gives no indication that the NIAC involves foreign intervention, it is, legally speaking, more accurate, in the sense that the applicable legal framework is clearly identified from the outset, without the determination being clouded by ambiguities about the scope of application of IHL *ratione materiae* inherent in the concept of internationalized internal armed conflict.

When a foreign power intervenes in support of a non-State party over which it does not have overall control, the ICRC classifies the situation as an “armed conflict with a double legal classification”, as the law of IAC and the law of NIAC apply in parallel in accordance with the fragmented approach advocated by the ICRC.

It was in relation to this situation in particular that the ambiguity created by the term “internationalized internal armed conflict” was particularly troublesome, because it misleadingly gave the impression that the law of IAC applied to the entire situation, ignoring the fragmented approach described earlier in this article.

When foreign powers intervene in support of the State party and in support of a non-State party over which the foreign power does not exercise overall control, the ICRC also classifies the situation as an “armed conflict with a double legal classification”, as the law of IAC and the law of NIAC apply in parallel in accordance with the fragmented approach advocated by the ICRC.

This new terminology will also be applicable when support given to the non-State party results in occupation of the territory where the armed conflict is taking place. As occupation is a form of IAC and occupation law is itself a branch of the law of IAC, effective control of the territory by the intervening power following on from the support provided to the non-State party therefore

fits in perfectly with the concept of an armed conflict with a dual legal classification, provided that this effective control over the territory does not also entail overall control over the rebel forces.

Lastly, when the State party is in conflict with an intervening foreign power exercising overall control over a non-State armed group, the ICRC classifies the situation as an IAC, as the law of IAC alone applies. The situation qualifies as a state of “occupation” if foreign intervention accompanied by overall control over the non-State armed group results in effective control over all or part of the territory in question.

The position also draws inferences, with regard to the terminology to be adopted, from the notion of overall control and its implications in terms of applicable IHL.

When the non-State party is legally absorbed by the foreign power because it is considered to be under its overall control, the only two parties remaining in the conflict are the intervening foreign power and the State party. Such situations are therefore classified as IACs, with any other classifications becoming superfluous.

However, when non-State armed groups under the overall control of the intervening foreign power exercise effective control over all or part of the territory concerned, occupation law applies. Based on this and for the sake of accuracy and consistency between the terminology and applicable IHL, the situation is classified as occupation.