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Transforming a Prima Facie NIAC into an IAC: Finding the Answer in IHL

Natia Kalandarishvili-Mueller[*]

In some non-international armed conflicts (NIACs) a foreign state is involved in favour of an armed group. This poses a challenge to classifying these armed conflicts under IHL. This article argues that evaluating the actions of a foreign state is best carried out by application of the 'overall control' test as developed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Tadić *case. The advantages of this approach are twofold. First, it is a more realistic benchmark for generating the required evidence than the complete dependency or effective control tests developed by the International Court of Justice. Second, using this test makes it less likely for a state to escape its responsibilities under IHL when it acts through armed groups in a prima facie NIAC on the territory of another state. To arrive at this conclusion, the article first critically discusses the different control tests. It then advances that Article 4 of Geneva Convention III 1949 and Article 29 of Geneva Convention IV 1949 themselves contain a threshold of control that can be used to identify foreign state participation in a prima facie NIAC.*

Keywords: armed conflict, classification, non-international armed conflict (NIAC), international humanitarian law (IHL), effective control, overall control

1. Introduction

International humanitarian law (IHL) distinguishes between international armed conflicts (IACs), including situations of military occupation, and non-international armed conflicts (NIACs).[1] Internal disturbances, tensions, and isolated or sporadic acts of violence do not come within the purview of IHL.[2] Armed conflicts are regulated by the 1949 Geneva Conventions, the 1977 Additional Protocols I (AP I)[3] and II (AP II),[4] and customary IHL.[5] IHL treats all parties

[*] Dr Natia Kalandarishvili-Mueller is Professor of Public International Law at Tbilisi Open University, Georgia. I wish to thank Dr Pontus Winther, and I am grateful to the anonymous reviewers and Professor Yaël Ronen for their helpful comments on an earlier version of this article.

[1] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, Appeals Chamber, 2 October 1995, [70] ('an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State').

[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 1; see also ICTR, *Prosecutor v Alfred Musema*, Judgment and Sentence, ICTR-96-13-A, Trial Chamber I, 27 January 2000, [248]; see also International Law Association, Use of Force Committee, Final Report on the Meaning of Armed Conflict in International Law, 2010, 28, http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I).

[4] AP II (n 2).

[5] Customary IHL is paramount for two main reasons. The first is that regardless of the fact that some states have not ratified IHL treaty law, they still are obliged by rules of customary IHL; the second reason is that the legal

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to such armed conflicts equally and demands its equal application by the parties.[6] However, IHL does not provide clear classification guidelines in the case where a state covertly[7] intervenes in a NIAC taking place in another state by supporting an armed group operating in the territory of that other state. IHL instruments contain no specific articles that address and determine the nature of such armed conflicts,[8] except perhaps Article 29 of Geneva Convention (GC) IV, which foresees a situation of occupation by a state's de facto agents (see below).[9] The question thus becomes which law applies: the IHL regulating IAC or that pertaining to NIAC? Or is this a situation of two armed conflicts taking place in parallel, or rather a new type of conflict of a mixed nature?[10]

Prima facie internal conflicts with foreign state intervention are subject to much controversy. The parties involved seldom agree on whether there is foreign state intervention.[11] For some, foreign intervention in a prima facie NIAC leads to an *internationalised internal armed conflict*.[12] Verhoeven regards this term to mean 'armed conflicts waged in a State between government forces and rebel factions or between armed groups with the intervention of one or more foreign states supporting the government, the rebel factions or armed groups'.[13] Mačák explains it as 'the process of transformation of the legal nature of a prima facie NIAC, which renders the law of IAC applicable to such a conflict'.[14] Yet the term 'internationalisation' can create confusion in determining the applicable IHL. It suggests a blanket application of the law of IAC.[15]

framework governing internal armed conflicts is more detailed under customary international law than under treaty law: see further International Committee of the Red Cross (ICRC), 'Customary International Humanitarian Law', 29 October 2010, https://waww.icrc.org/en/document/customary-international-humanitarian-law-0.

[6] For IACs see Vaios Koutroulis, 'And Yet It Exists: In Defence of the "Equality of Belligerents" Principle' (2013) 26 *Leiden Journal of International Law* 449, 464–65; for NIACs see Marco Sassòli, 'Ius ad Bellum and Ius in Bello: The Separation between the Legality of Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflicts: Exploring the Faultlines* (Martinus Nijhoff 2007) 241, 255–57.

[7] An overt intervention by the state would make that state a party to the IAC: see ICTY, *Prosecutor v Blaskić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000, [94] ('Croatia's direct intervention in BH, the Trial Chamber finds ample proof to characterise the conflict as international'); ICC, *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, Pre-Trial Chamber I, 29 January 2007, [209].

[8] Geoffrey Corn, Ken Watkin and Jamie Williamson, *The Law in War* (Routledge 2018) 15–17.

[9] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 29; Jean Pictet (ed), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Times of War* (ICRC 1958) 211 (Commentary GC IV (1958)).

[10] Sten Verhoeven, 'International and Non-International Armed Conflicts', Institute for International Law Working Paper No 107, March 2007, 15, https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP107e.pdf; see also Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* (Martinus Nijhoff 1979) 150.

[11] Hans-Peter Gasser, 'Internationalised Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon' (1983–84) 33 *American University Law Review* 145.

[12] See Marko Milanovic, 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2018) 27, 34–37.

[13] Verhoeven (n 10) 15.

[14] Kubo Mačák, *Internationalised Armed Conflicts in International Law* (Oxford University Press 2018) 27.

[15] Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' (2015) 97 *International Review of the Red Cross* 1227, 1230.

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In order to avoid confusion, the preferred term throughout this article is the notion of a NIAC *involving* foreign state intervention in support of an armed group fighting in it.[16] Obviously, what then needs to be clarified is the *type* (military, logistical, financial, political, and so on) and *degree* of involvement by the foreign state required to transform a NIAC into an IAC.[17] The differentiation between the type and degree of such involvement is key: financial or political support provided to an armed group would not make the intervening state a party to the armed conflict.[18] However, there may come a point when that state goes further and in fact provides the armed group with weapons, intelligence, instructions or even its own troops, thus in turn actually becoming engaged in the armed conflict.[19]

For this reason, some perceive the *effective control* test, developed by the International Court of Justice (ICJ),[20] to be a suitable benchmark.[21] For others, by contrast, it is the *overall control* test advanced by the International Criminal Tribunal for the former Yugoslavia (ICTY) that is appropriate.[22] Others again suggest a test that is 'general (in its scope) and strict (in terms of intensity)',[23] which would be met:[24]

> if State A had a crucial and leading role in organizing, coordinating and planning military actions of armed group C. It is not sufficient for State A to loosely accommodate the activities of armed group C, nor to merely help in the general planning of its military operations, as required by the overall control test. The room for manoeuvre of C should not be too large, and it must be possible to establish a chain of command between the armed group and the controlling State.

This article argues that the requirements regarding the type and level of control needed for an intervening foreign state supporting an armed group to become a party to a prima facie NIAC,

[16] Note that Ferraro uses 'armed conflict with a double legal classification' ('When a foreign power intervenes in support of a non-state party over which it does not have overall control, … as the law of IAC and the law of NIAC apply in parallel in accordance with the fragmented approach advocated by the ICRC': ibid 1251). The recent Commentary on art 3 uses 'differentiated approach': see Lindsey Cameron and others, 'Conflicts Not of an International Character' in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC and Cambridge University Press 2016) 126, 147 (Commentary GC I (2016)).

[17] ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, [130]; *Thomas Lubanga Dyilo* (n 7) [205]–[212]; Tristan Ferraro and Lindsey Cameron, 'Application of the Convention' in Commentary GC I (2016) (n 16) 68, 98; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 225; Mačák (n 14) 39; Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493, 496 ('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"').

[18] Ferraro (n 15) 1228.

[19] Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 10.

[20] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v US*) Merits, Judgment [1986] ICJ Rep 14.

[21] Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 61–62.

[22] Nicholas Tsagourias and Alasdair Morrison, *International Humanitarian Law* (Cambridge University Press 2018) 34; Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649; Lindsay Moir, 'The Concept of Non-International Armed Conflict' in Clapham, Gaeta and Sassòli (n 12) 391; Milanovic (n 12) 36–37.

[23] Djemila Carron, 'When Is a Conflict International? Time for New Control Tests in IHL' (2018) 98 *International Review of the Red Cross* 1019, 1034.

[24] ibid 1035.

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and thereby transform it into an IAC, are contained within IHL itself. IHL has to be viewed as a self-contained system;[25] the level of control enshrined in the provisions of Article 4A(2) of GC III and Article 29 of GC IV corresponds to the type of control envisaged by the overall control test.[26] This, however, does not mean that IHL is an isolated regime incapable of dialogue with other branches of international law,[27] particularly with that of state responsibility (discussed below at Section 3.2). Failure to consider other branches risks increasing the fragmentation of international law.[28] Thus, the ICTY Appeals Chamber in the *Tadić* case should have gone beyond the ICJ in the *Nicaragua* case, using GC III Article 4 and GC IV Article 29 as primary sources for its analysis when identifying the role of the intervening state in a prima facie NIAC. This would have formed a bridge towards the regime of state responsibility. The ICJ, in turn, should have identified common grounds between IHL and the law of state responsibility. In the *Nicaragua* and *Genocide*[29] cases, the Court should not have kept separate the matters concerning conflict classification and state responsibility.

The second section of this article examines the effective and overall control tests as understood by the ICJ and the ICTY respectively. It demonstrates that the tension created between the law of state responsibility and that of conflict classification is artificial. The following section analyses GC III Article 4 and GC IV Article 29. From these the required level of control can be drawn in order to determine whether a foreign state's participation in a prima facie NIAC in support of an armed group engaged in it transforms that conflict into an IAC. This article concludes by upholding the overall control test for both conflict classification and state responsibility purposes. It maintains that the overall control test is more realistic to ascertain, thereby making it harder for states to escape their IHL obligations.

2. COMPLETE DEPENDENCY AND EFFECTIVE CONTROL VERSUS OVERALL CONTROL

This section focuses on the type and degree of control needed for attributing to a state the responsibility for wrongful acts committed in the context of a prima facie NIAC by armed groups which are not organs of that state. The tests of complete dependency and effective control as developed

[25] Kalle Kirss, 'Role of the International Court of Justice: Example of the Genocide Case' (2007–08) 3 *Acta Societatis Martensis* 143, 149; International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC finalized by Martti Koskenniemi (13 April 2006), UN Doc A/CN.4/L.682, paras 128–29, 132–37, 152(3); see also Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 *European Journal of International Law* 993, 1003.

[26] Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) (GC III), art 4; Sean Watts, 'Who Is a Prisoner of War?' in Clapham, Gaeta and Sassòli (n 12) 890, 898; Commentary GC IV (1958) (n 9) 212.

[27] Milanovic (n 12) 36.

[28] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 561–67.

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Merits, Judgment [2007] ICJ Rep 43 (*Genocide* case).

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by the ICJ in the *Nicaragua* case are contrasted with the overall control test developed by the ICTY Appeals Chamber in the *Tadić* case.

2.1. Complete Dependency and Effective Control Tests

Whether a state is responsible for an internationally wrongful act is determined based on the identification of the wrongful act and its attribution to the state as codified in the International Law Commission (ILC) Articles on the Laws of State Responsibility (ARSIWA).[30] Articles 4 and 8 provide important tests of control through which state responsibility can be examined. These articles require different levels of control and refer to various scenarios.

Pursuant to Article 4, an organ of the state 'includes any person or entity which has that status in accordance with the internal law of the State'.[31] The level of control is the highest and most stringent as that provision identifies state organs *stricto sensu*. The type of relationship that subsists between a state and its organs/agents thus amounts to complete dependency.[32] Based on Article 4, the conduct of an organ of the state (as per its internal law) can trigger the responsibility of the state.[33]

Persons or entities that do not legally form part of a state under its internal law may be regarded as 'de facto' organs, such that all of their conduct is attributable to it,[34] on the basis 'of a factual link with that organisation'.[35] ARSIWA Article 4 also provides for the possibility of state responsibility for the conduct of a group or individual based on 'the role that they in fact perform within the structure of the state'.[36]

Pursuant to ARSIWA, the conduct of private persons or entities is not generally attributable to a state.[37] However, ARSIWA Article 8 states:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The commentary to Article 8 does not explain what 'acting on the instructions' and 'under the direction or control' mean. Nonetheless, it considers the terms 'instructions', 'direction' and

[30] ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), with Commentaries (2001), Report of the ILC 53rd sess, UN Doc A/56/10, 2001(II) *Yearbook of the International Law Commission* 31; Malcolm Shaw, *International Law* (Cambridge University Press 2011) 778–822.
[31] ARSIWA (n 30) 40, art 4(2).
[32] Kirss (n 25) 151.
[33] ARSIWA (n 30) 40, para 6.
[34] Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Abdul Pellet and Said Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 237, 239.
[35] Paolo Palchetti, 'De Facto Organs of a State' in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law 2010), para 2, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1394.
[36] ibid para 10.
[37] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2005) 110.

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'control' to be disjunctive, as 'it is sufficient to establish any one of them'.[38] All three constitute instances of control exerted by the state over private persons or entities. However, the *type and degree* of control that should be exercised by the state over such entities remains unspecified.

2.2. THE *NICARAGUA* CASE

The basis for any discussion of the complete dependency and effective control tests is the judgment of the ICJ in *Nicaragua v United States of America*. Nicaragua argued that the United States was recruiting, training, arming, equipping, financing, supplying, encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua. According to Nicaragua, the US government was effectively in control of the Contras paramilitary group, formulating its strategy and guiding its tactics, with the initial purpose of overthrowing the government of Nicaragua. Nicaragua also accused the US of having mined Nicaragua's territorial waters and attacked its ports and oil installations.[39] Nicaragua claimed that these acts were committed by US military personnel or persons with the nationality of unidentified Latin American countries, who were paid by and acted on the direct instructions of US military or intelligence personnel: 'These persons were apparently referred to in the vocabulary of the CIA as "UCLAs" – "Unilaterally Controlled Latino Assets"'.[40]

The ICJ established that in late 1983 and early 1984, acts against Nicaragua were indeed carried out by UCLAs and civilian US pilots contracted by the CIA.[41] Even though it was not proven that US military personnel took a direct part in the operations, US agents had participated in the planning, direction, support and execution of operations, while the execution was the task of the UCLAs. Hence, responsibility on the part of the US for these attacks was established.[42] The Court then proceeded to examine the genesis, development and activities of the Contras, which Nicaragua maintained the US had 'conceived, created and organized [as] a mercenary army'.[43]

The ICJ thus queried – based on ARSIWA Article 4 – whether the relationship of the Contras to the US government was 'so much *one of dependence* on the one side and *control on the other* that it would be right to equate the Contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government'.[44] The Court decided that the evidence available to it indicated that the various forms of assistance provided to the Contras by the US were crucial for their activities, yet this was insufficient to show and establish their complete dependence on it.[45] The ICJ considered that despite the fact that the US heavily subsidised and provided support, there was no clear evidence that it had actually exercised such a degree

[38] ARSIWA (n 30) 48, para 7.
[39] *Nicaragua* (n 20) [20].
[40] ibid [79].
[41] ibid [80]–[86].
[42] ibid [86].
[43] ibid [93].
[44] ibid [109] (emphasis added).
[45] ibid [110].

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of control in all fields so as to substantiate that the Contras were to be treated as acting on its behalf.[46] The ICJ therefore concluded that the Contras could not be equated, for legal purposes, with US armed forces proper.[47]

Next, the ICJ considered whether the US – based on its financing, organising, training, equipping, selection of military and paramilitary objects, and planning of the Contras' operations – was responsible for specific violations of IHL committed by the Contras. It decided that in order for the acts of the Contras to give rise to responsibility on the part of the US, '[i]t 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'.[48] The ICJ took the view that the Contras alone (and not the US) were responsible for their acts, and that the US was responsible for its own actions 'vis-à-vis Nicaragua, including the conduct related to the acts of Contras'.[49] According to the Court, while the UCLAs had been under complete US control, the Contras were not subject to the same oversight and control by the US, despite the latter providing a great amount of material and financial support. The ICJ thus concluded that the effective control test was not met either, as the Contras' actions against Nicaragua were not carried out under US operational control.[50] Thus, the US did not control each and every operation by the Contras.

In sum, the ICJ, finding the US not responsible for the acts committed by the Contras in the course of their military or paramilitary operations in Nicaragua,[51] classified the conflict between the Contras and the government of Nicaragua as a NIAC. As for US actions in and against Nicaragua, according to the Court they fell under the rules of IAC.[52] Had the Court found that the US was responsible also for the acts of the Contras, it would by implication have considered the Contras to have been de facto agents of the US.[53] This would have prompted the Court not to split the law between the engaged parties and ultimately classify the prima facie NIAC between Nicaragua and the US as an IAC. This, in turn, would have paved the way towards more effectively forming a deterrent for states to covertly intervene in a NIAC on the territory of other states.

2.3. THE *TADIĆ* CASE

The approach of the ICJ in examining US state responsibility in the *Nicaragua* case was scrutinised by the ICTY Appeals Chamber in the *Tadić* case in the course of classifying the armed conflict in Bosnia-Herzegovina.[54]

[46] ibid [109].
[47] ibid [110].
[48] ibid [115].
[49] ibid [116]; see also Cassese (n 22) 652–53.
[50] See also *Nicaragua* (n 20) separate opinion of Judge Ago, [15]–[16].
[51] *Nicaragua* (n 20) [216].
[52] ibid [219].
[53] ibid [216].
[54] *Tadić* (n 17).

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In order to determine whether the grave breaches regime applied (the latter being applicable only in times of IAC),[55] the Appeals Chamber needed to re-examine the classification of the conflict, and indeed found it to be an IAC.[56] The question before the Tribunal was whether Serbia (or, from 1992 to 2003, the 'Federal Republic of Yugoslavia' (FRY)) could be regarded as participating in the armed conflict after 19 May 1992. To this end, the ICTY analysed whether the acts of the Bosnian-Serb army, the VRS, could be attributed to the FRY. Because conventional IHL is silent on this link, the ICTY looked at the attribution mechanism in the law of state responsibility for the acts of an armed group which is not the de jure organ of that state. It examined the relationship through which such attributability arises.

The ICTY examined the notion of control and its threshold as propounded by the ICJ in the *Nicaragua* case. There, effective control in terms of attribution required a high level of control over the course of the operation, including decision making and total operational control, specifically controlling each and every step of the operation and its participants. However, while the ICTY Trial Chamber had adhered to the ICJ text, the Appeals Chamber came up with a completely novel approach – namely overall control – thus lowering the bar set by the ICJ.

The ICTY Appeals Chamber upheld the Trial Chamber in a finding of fact that the armed conflict prior to 19 May 1992 was an IAC; but whether the armed conflict after 19 May 1992 continued to be an IAC or had descended into a NIAC depended on whether Bosnian Serb forces (in whose hands the Bosnian victims found themselves) could be considered de jure or de facto organs of a foreign state, namely the FRY.[57] The reasoning engaged here by the ICTY reflected ARSIWA Article 8. In other words, for the conflict to have become international, it must be proved that the VRS and the Republika Srpska – the entity set up by ethnic Serbs on the territory of Bosnia in 1992 – were acting not on their own but on behalf of the FRY, meaning that both were under its control. The question then becomes what kind of control.[58]

The ICTY Appeals Chamber stated that IHL had no criteria for determining when a group of individuals could be said to be under the control of a state (that is, acting as de facto state officials/agents). Hence, it examined the notion of control by a state over individuals as laid down in general international law (such as in the law of state responsibility), trying to ascertain whether certain individuals can be regarded as acting as de facto state officials.[59] The ICTY analysed the notion of control as propounded by the ICJ in *Nicaragua*. According to the ICTY Appeals Chamber:[60]

[55] Oren Gross, 'The Grave Breaches System and the Armed Conflict in the Former Yugoslavia' (1995) 16 *Michigan Journal of International Law* 783, 825.
[56] *Tadić* (n 17) [74], [80]–[87]; Kirss (n 25) 152; See additionally Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (24 May 1994), UN SC Doc S/1994/674, Annex, para 44.
[57] *Tadić* (n 17) [87].
[58] ibid [97] ('It is nevertheless imperative to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is prima facie internal … Should the conflict eventually be classified as international, it would inter alia follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf').
[59] ibid [98].
[60] ibid [104].

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> In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, 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.

Thus, the ICTY considered and contemplated the same test for state responsibility and conflict classification. It held that the degree of control that rendered an individual or a group 'agents' of a state could vary depending on the circumstances.[61] In the case of individuals who are members of an organised armed group – such as a military unit or, in the case of a NIAC, armed bands of irregulars or rebels – overall control by the state is required.[62] Such control 'to some extent equates the group with state organs proper'.[63] For the acts of a military or paramilitary group to be attributed to a state, it must be shown that:[64]

> 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 … 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.

What is the exact meaning of the 'overall control' threshold carved out by the ICTY Appeals Chamber? What amounts to this control of an outside state over armed groups? Clearly such control is lower than both complete dependency and effective control as envisaged by the ICJ, as it does not include specific orders or directing each and every operation; but it is also higher than the mere provision of financial assistance, military equipment or the training of soldiers. It seems that the state has to have 'a role' and generally direct the actions of such groups. It is therefore not necessary that the controlling authorities plan all the operations of the dependent units, choose every target, or issue specific instructions on the conduct of military operations.[65] Pursuant to the overall control test, the ICTY Appeals Chamber found the actions of the Bosnian Serbs in fact to be attributable to the FRY and the conflict in Bosnia-Herzegovina after 19 May 1992 to be an IAC.[66]

To summarise, the ICTY Appeals Chamber in *Tadić* diverged from the ICJ *Nicaragua* standard of complete dependency and effective control for the purposes of establishing state responsibility, thus crafting a single test for both state responsibility and conflict classification. However, the ICTY's actions should be examined pursuant to Article 92 of the UN Charter, which regards the ICJ as 'the principal judicial organ of the United Nations'.[67] The ICJ deals

[61] ibid [117].
[62] ibid [120].
[63] ibid [121].
[64] ibid [131].
[65] ibid [137].
[66] ibid [162].
[67] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

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with general matters of public international law, whereas the jurisdiction of the ICTY concerns only matters of individual criminal responsibility. The approach of the ICTY was based on the *absence* of a clear test in IHL that could deal with conflict classification given outside state involvement in a prima facie NIAC. Whether the ICTY was too audacious or gave a fresh look at the matter[68] and paved the way to harmonise the issues of state responsibility and conflict classification that are separate but nevertheless very close to one another will be discussed next through the ICJ *Genocide* case.

2.4. THE *GENOCIDE* CASE

In 2006, when the ICJ adjudicated *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,[69] it also opined on the stance of the ICTY Appeals Chamber as expressed in *Tadić*. The ICJ examined the question of responsibility for events in Srebrenica, notably whether the responsibility of the FRY was implicated through the actions of persons or entities that were not its de jure organs.[70] The ICJ employed ARSIWA Articles 4 and 8.[71] Unlike the *Nicaragua* case, the Court on this occasion dealt with the matter more clearly, and in two steps.[72]

The Court first found that the criteria of ARSIWA Article 4 were not met. It had not been shown that the FRY army itself had taken part in the massacres, nor that its political leaders had had a hand in preparing, planning, or in any way carrying them out. While there was much evidence on the direct or indirect participation of the FRY official army, together with the VRS, in military operations in Bosnia and Herzegovina in the years *prior* to the events in Srebrenica, it was not shown that there had been such participation in the actual massacres. Also, 'neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law'.[73] The ICJ further stated that although the salaries of Republika Srpska officials and some VRS officers were paid by the FRY, the former were not the de jure organs of the latter. The ICJ also considered whether the FRY was responsible for the actions of the Scorpions paramilitary unit. Based on the materials presented to it, the ICJ was unable to find that the Scorpions were de jure organs of the FRY in mid-1995.[74]

The Court then turned to consider whether it was possible, still under Article 4, to attribute to the FRY the conduct of (groups of) persons who did not have the legal status of state organ, but which in fact acted under such strict control by the state that they had to be treated as such. After

[68] Bruno Simma, 'Universality of International Law from the Perspective of Practitioner' (2009) 20 *European Journal of International Law* 265, 280.
[69] *Genocide* case (n 29).
[70] ibid [379].
[71] ibid [384].
[72] Kirss (n 25) 157.
[73] *Genocide* case (n 29) [386].
[74] ibid [388]–[389].

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repeating the test enunciated in the *Nicaragua* case on equating an armed group with a state organ,[75] the Court held that pursuant to its jurisprudence persons, groups of persons or entities, for purposes of international responsibility, may be equated with state organs even if that status was not granted by the internal law of the state, 'provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument'.[76] Such an equation, according to the Court, was exceptional and required 'proof of a particularly great degree of State control over them'.[77] The Court did not find the existence of such dependence on the FRY. According to the Court, differences in military strategy between the Yugoslav authorities and the Bosnian Serb leaders evidenced that the latter had some real 'margin of independence'.[78]

Finally, the ICJ considered attributing the Srebrenica genocide to the FRY via the 'instructions', 'direction' or 'control' of Article 8 ARSIWA.[79] In the Court's view, whether the perpetrators of the genocide were acting on the instructions of the FRY, or under its direction or control, was a completely separate issue. An affirmative answer to this question would not imply that the perpetrators should be regarded as organs of the FRY. It would, however, mean that the FRY was internationally responsible based on the conduct of those of its organs that issued the instructions or exercised the control that resulted in the breaches of its international obligations. Accordingly, the Court had to determine whether FRY organs having that status under the state's own internal law had ordered the genocide via instructions given to the perpetrators or via exercising direction or control.[80]

The ICJ thus viewed the 'effective control' test for the purposes of state responsibility to be different from complete dependency in two respects. First, it was not necessary to show that the persons who performed the alleged acts were in a general relationship of 'complete dependence' on the state in question. Instead, it had to be ascertained that they acted in accordance with the instructions of the organs of that state or under their 'effective control'. Second, according to the Court, it had to be demonstrated that such 'effective control' was *indeed exercised* – that is, that specific instructions were issued with regard to each operation and that they were not just generally given with regard to the overall actions taken by the persons or groups of person that committed the violations.[81] As the Court suggests, the difference between the tests of total and effective control lies in both the *type* and *degree* of control they embody. The former envisages these groups to be subject completely to the state's will, leaving no room for independence in their actions; the group is therefore a mere instrument of that state. The latter test, in turn, is different in kind and also possesses a lower threshold: state organs merely instruct or control a group's specific actions.

[75] ibid [391].
[76] ibid [392].
[77] ibid [393].
[78] ibid [394].
[79] ibid [396].
[80] ibid [397].
[81] ibid [400].

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Because Bosnia-Herzegovina questioned the validity of the application of the *Nicaragua* ruling to its case and instead drew attention to the *Tadić* case, the ICJ, without further elaboration, separated the issue of state responsibility from other matters, notably conflict classification. The ICJ observed that in *Tadić* the ICTY had not been called upon, nor was it in general called upon, to rule on the issue of state responsibility, as its jurisdiction was limited to criminal matters that extended to persons only.[82] The ICJ held that the ICTY test of overall control had broadened the scope of state responsibility too much and that the 'overall control' test was therefore unsuitable as it stretched 'too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'.[83] As regards determining whether the armed conflict was of an international or non-international character, however, the overall control test may still be 'applicable and suitable'.[84] Hence, the ICJ maintained two different tests for two different undertakings.

2.5. *Democratic Republic of the Congo v Uganda*

Another case (which preceded the *Genocide* case) in which the ICJ dealt with concerns regarding a foreign state supporting a dissident armed group involved in an internal conflict, was the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v Uganda)*. The DRC claimed that Uganda had engaged in military and paramilitary activities against the DRC, occupied its territory and militarily, logistically and financially supported irregular forces operating there.[85] Here, too, the ICJ found no credible evidence that Uganda had formed the MLC armed group. According to the Court, the conduct of the MLC was not that of 'an organ' of Uganda (ARSIWA Article 4), it did not fall under an entity that was exercising elements of governmental authority on its behalf (ARSIWA Article 5), nor was it considered to be acting 'on the instructions of, or under the direction or control of' Uganda (ARSIWA Article 8). None of the tests for holding the actions of paramilitaries attributable to the intervening state had been met.[86]

The Court also remarked that the DRC claimed 'indirect administration' by Uganda through various Congolese rebel factions and supervision by Ugandan officers over local elections in the territories under Ugandan army control. However, according to the Court, the DRC had provided no concrete evidence to demonstrate that authority was exercised by Ugandan armed forces in any areas other than Ituri. There was no evidence to allow the ICJ to characterise the presence of Ugandan troops stationed at Kisangani Airport as occupation pursuant to Article 42 of the

[82] ibid [403].
[83] ibid [406]; see also *Genocide* case (n 29) dissenting opinion of Vice President Al-Khasawneh, [37]–[39].
[84] *Genocide* case (n 29) [404].
[85] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Merits, Judgment [2005] ICJ Rep 168, [24], [28].
[86] ibid [160].

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1907 Hague Regulations;[87] nor did the ICJ uphold the DRC claim that Uganda was an occupant outside Ituri district, in areas controlled and administered by Congolese rebel movements, as no supportive evidence was found that these groups were 'under the control' of Uganda.[88]

This case demonstrates that an armed group could occupy a territory militarily if acting as a de facto organ of an outside state, exercising elements of governmental authority on its behalf, or acting 'on the instructions of, or under the direction or control' of that outside state. The ICJ could indeed have characterised the situation as occupation had the evidence demonstrated that Congolese rebels were under the effective control of Uganda. Had this been proved, the group would have had to exercise effective control over the territory pursuant to Article 42 of the Hague Regulations. It is through this armed group that the state in question would have exercised control over the territory, thus making the armed conflict international. Similarly, had the overall control test been met, this would have been enough to classify the armed conflict as an IAC – although, pursuant to the ICJ, meeting the overall control test would not be enough to establish state responsibility.

3. Assessment and Possible Solutions in IHL for Transforming a NIAC into an IAC

The diverging stances of the ICJ and the ICTY raise the broader question of whether establishing state responsibility and conflict classification are matters that are sufficiently similar to warrant a single test.[89] While the ICTY in *Tadić* offered one test for both conflict classification and establishing state responsibility, the ICJ in the *Genocide* case kept the two issues apart without further explanation. In my opinion, the ICJ had to state explicitly that IHL consisted of primary rules which provided the answer for conflict classification because this branch of public international law regulates these types of situation. In sum, the route taken by the ICJ in the *Genocide* case explored a narrow question within the context of an armed conflict. In my understanding the ICJ had first to identify *the context* in which the contended violations of the convention occurred and only then deal with the issue of state responsibility.[90]

In the *Genocide* case, the following three questions should therefore have been elaborated upon by the Court. First, *when does an armed conflict exist?* Second, *through whom* does a state act in a situation of armed conflict? Third, how may *the responsibility of a state* be triggered

[87] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461 and Regulations annexed to it.

[88] *Armed Activities on the Territory of the Congo* (n 85) [177].

[89] Remy Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflict' (2018) 23 *Journal of Conflict and Security Law* 405, 418 ('immutable connection that exists between belligerency in an IAC, and the responsibility that comes with it').

[90] I rely on ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-T, Trial Chamber, 7 May 1997, separate and dissenting opinion of Judge McDonald, [26]–[27] (regarding the applicability of art 2 of the ICTY Statute (Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993), UN Doc S/25704, adopted by the Security Council in Resolution 827 (25 May 1993)).

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in an armed conflict when it is involved through informal forces? The first and second questions share a close bond: the first opens the door to the second question, which establishes the responsibility of a state acting through its de jure armed forces. The third question then deals with the de facto organs of the state, if present. All three questions derive from IHL as primary rules[91] and are based on the inter-application of Common Article 2 of the 1949 Geneva Conventions, Articles 1 and 43 of AP I, customary IHL rule 149,[92] as well as GC III Article 4 and GC IV Article 29. Each question is addressed in turn.

3.1. WHEN DOES AN ARMED CONFLICT EXIST?

Pursuant to IHL, an armed conflict exists – be it an IAC or a NIAC – when there is use of force resulting in hostilities.[93] The recent commentaries to Common Article 2 of the 1949 Geneva Conventions hold that 'the determination of the existence of an armed conflict … must be based solely on the prevailing facts demonstrating the de facto existence of hostilities between the belligerents, even without a declaration of war'.[94] More specifically, a NIAC exists when parties resort to violence that reaches a certain kind and level of intensity;[95] and the armed group involved displays a minimum level of organisation.[96] Whether there is an armed conflict and its type determine the applicable legal framework.

3.2. THROUGH WHOM DOES A STATE ACT?

States usually act, and are held responsible, through their armed forces.[97] These are:[98]

[91] Marco Sassòli, *International Humanitarian Law* (Edward Elgar 2019) 33–52; ILC (n 25) paras 128–29, 132–37, 152(3); Gourgourinis (n 25) 1003.
[92] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International HumanitarianLaw, Vol I: Rules* (ICRC and Cambridge University Press 2005, revised 2009) (ICRC Study).
[93] *Tadić*, Decision on the Defence Motion (n 1) [70] ('an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there').
[94] Ferraro and Cameron (n 17) 76.
[95] Cameron and others (n 16) 126, 141.
[96] ibid. See also ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', ICRC Opinion Paper, March 2008, 5, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf; IACHR, *Juan Carlos Abella v Argentina*, Case 11.137, Report No 55/97, Inter-AmCHR, OEA/Ser.L/V/II.95, Doc 7 Rev (18 November 1997), [152]; ICTR, *Prosecutor v Alfred Musema*, Judgment and Sentence, ICTR-96-13-A, Trial Chamber I, 27 January 2000, [256]–[258].
[97] *Tadić* (n 17) separate opinion of Judge Shahabuddeen, [17].
[98] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff 1987), Commentary to Article 43, paras 1659–72.

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> persons, groups and units which are under a command responsible to [a party to a conflict] for the conduct of its subordinates … Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

To ascertain whether the armed forces belong to a state in question, it should be established whether they receive instructions and directions from that state to carry out certain military manoeuvres or engage in specific military actions. The instructions and directions are premised on a level of control which demonstrates that the armed forces actually belong to the state in question.[99] Such affiliation does not exist solely because the armed forces have their status pursuant to domestic law, but because of the existing link of control exerted by a state over the armed forces outside the understanding of its internal organ.[100] This is in line with the reading of customary IHL rule 149 (which applies in both IAC and NIAC), according to which a state would be responsible for IHL violations attributable to it, which include:[101]

(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

This rule reflects ARSIWA. It lists persons who are also presumed in its Articles 4, 5, 8 and 11. Specifically, rule 149 suggests that ARSIWA would govern the question despite the debate on how to interpret the level of control needed for identifying de facto organs.[102] It is this customary IHL rule that allows a dialogue between the laws of state responsibility and of IHL.

3.3. How May the Responsibility of the State Be Engaged in an Armed Conflict When It Is Not Its Own Formal Forces that Are Involved?

In light of rule 149, clarification is needed in terms of identifying when a state would be engaged in an armed conflict when it does *not* act through its own armed forces. This question is particularly important in the context of NIACs with foreign state participation. Based on rule 149, from the viewpoint of the armed forces that bear the status of organs under domestic law, the level of control exerted by the state presupposes complete and total control over their actions. As for establishing whether the state is a party to an armed conflict through 'persons or groups acting

[99] Sassòli (n 91) 86–87, 251, 253–54.
[100] ibid.
[101] ICRC Study (n 92) 530–37.
[102] Talmon (n 17) 496 ('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"').

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in fact on its instructions, or under its direction or control', it is submitted that IHL is capable of offering *its own* solution. This solution specifies the required level of control to prove foreign state intervention in a prima facie NIAC in support of a non-state actor.[103] The following discussion looks at the level of control contained in GC III Article 4 and GC IV Article 29. Both articles apply in times of IAC and unveil potential foreign state involvement.

3.3.1. GC III ARTICLE 4

GC III Article 4 determines who is considered a prisoner of war in times of IAC.[104] Seemingly a very specific article, it has general validity because it establishes a link between a state party to the armed conflict and non-formal armed forces. Article 4A(2) includes persons who are not part of the armed forces of the state *stricto sensu*:

> 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: …

The formulation 'belonging to a Party to the conflict'[105] is 'best understood as a comment on the nature of the authority the militia or volunteers corps in question answers to overall'[106] – that is, the relationship that exists between the armed group and a sponsoring state.[107] The Appeals Chamber in *Tadić* considered the conditions under which armed forces may be assimilated to organs of a state other than that on whose territory they operate.[108] Under GC III, militias or paramilitary groups and units can be regarded as combatants – and therefore eligible for the status of POW – if they form 'part of the armed forces' of a party to the conflict (Article 4A(1)) or 'belong to a Party to the conflict' (Article 4A(2)) and satisfy the other four requirements (a) to (d) provided for in that article.[109]

According to the ICTY Appeals Chamber, one of the logical consequences of Article 4 was that if, in an armed conflict, paramilitary units 'belong' to a state other than the one against which they are fighting, the conflict is of an international nature.[110] Consequently, serious violations of

[103] Milanovic, too, considers that 'it is for IHL to fashion a test which determines when the relationship between a state and a non-state actor is such that a NIAC is to be internationalised, and that test may well be that of overall control': Milanovic (n 12) 36.
[104] Sassòli (n 91) 174; Watts (n 26) 891.
[105] See generally Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press 2015) 73, 158.
[106] Watts (n 26) 897.
[107] ibid.
[108] *Tadić* (n 17) [91].
[109] Jean Pictet (ed), *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War* (ICRC 1960) 57–58 (Commentary GC III (1960)).
[110] *Tadić* (n 17) [92].

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the Geneva Conventions may be classified as 'grave breaches'[111] – even if committed by armed groups in situations of prima facie NIAC. The rationale for this provision is that after the Second World War it was agreed that states should be legally responsible for the conduct of all irregular forces they sponsored.[112] So that the irregulars were classed as combatants, it was required that a party to an IAC 'controlled' them. This type of control would result in a 'relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict. These then may be regarded as the ingredients of the term "belonging to a Party to the conflict"'.[113]

The Appeals Chamber, therefore, considered that the requirement of 'belonging to a Party to the conflict' in Article 4 was an implicit reference to a control test.[114] The 1960 Commentary to GC III also states that paragraph 4A(2) is based on experience from the Second World War, particularly with resistance movements fighting against occupation regimes.[115] Nevertheless, this does not mean that other categories, such as armed groups engaged in NIACs, are to be excluded from being considered as potentially 'belonging to a Party to the conflict'. The Commentary does not explain the meaning of 'belonging to a party to the conflict'. It speaks solely of the fact that resistance movements must be fighting on behalf of a party to the conflict and that:[116]

> it is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.

There are at least three approaches to interpreting 'belonging to a party to the conflict'. For Del Mar the 'belonging' requirement 'demands nothing more than a form of acceptance, either express or tacit, on the part of the state and individuals concerned that the latter are fighting on behalf of the state'.[117] For Melzer 'it appears essential that [the armed groups] conduct hostilities on behalf and with the agreement of'[118] the party to the conflict. The US *Department of Defense Law of War Manual* (2015) considers that a state's formal acknowledgement that an armed group 'belongs' to it is sufficient to make this armed group enjoy the privileges of combatant status, yet a mere claim by the armed group that it acts on behalf of a state would be insufficient for its members to enjoy such status.[119]

The second position appears preferable, because 'belonging' goes beyond mere tacit agreement, which seems too little. In turn, demanding a formal acknowledgement by a state that an

[111] ibid [92].
[112] ibid [93].
[113] ibid [94].
[114] ibid [95].
[115] Commentary GC III (1960) (n 109) 57.
[116] ibid 57.
[117] Katherine Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law' (2010) 21 *European Journal of International Law* 105, 112.
[118] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 23.
[119] US Office of General Counsel, Department of Defense, 'Department of Defense Law of War Manual', June 2015, para 4.6.4.1.

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armed group belongs to it seems too high a threshold to require, and one that states may easily avoid if they so wish. This leads to a further question: if the armed group 'belongs' to the state, does it really need to be proved that it is actually controlled by it? In a way one would not need to be controlled because one already belongs to the state in question.

Yet an armed group that belongs to a foreign state is not only fighting in the interests of that state; it is also under a certain degree of control. For example, the state may instruct the group on what and how to perform certain actions. Further, when an armed group 'belongs to a party to the conflict', arguably it may be bound to this state by ties of dependence or allegiance, and may follow the state in its ideology.[120] Based on such a relationship, the armed group can thus be considered a de facto organ of the state.[121]

In sum, the standard of control contained in 'belonging to a party to the conflict', based on the reading of the 1960 Commentary to GC III, is perceived here as the group receiving general directions from the state and, based on these, opposing the adversary state. The same reading of the standard of control is detected in the ICRC's recent commentary on GC III. A de facto relationship, while it signifies a factual existing relationship between the state and the armed group, indicates that it might not amount to day-to-day control from the side of the state, nor to control exercised specifically over each detail of the operation/task, but rather to control exercised in a general manner.[122] Such an interpretation of the threshold of control is preferable based on the view that generating facts that would substantiate that a state is exercising overall control over an armed group is more realistic than proving total dependency or effective control.

3.3.2. GC IV ARTICLE 29

A second possible basis in IHL for turning a foreign state into a party to an armed conflict through an armed group engaged in a conflict with another state can be found in GC IV Article 29:

> The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by *its agents*, irrespective of any individual responsibility which may be incurred.[123]

While again dealing with a very specific aspect of IAC, the focus here is on the formulation 'its agents'. According to the *travaux préparatoires*, this wording refers to any employee of a state.[124]

[120] Commentary GC III (1960) (n 109) 57–58.
[121] Provision of supplies or other logistical support only would not be enough to determine that a group belongs to a state in question: see Watts (n 26) 898.
[122] ICRC, Commentary on the Third Geneva Convention of 1949 (Cambridge University Press and ICRC 2021 forthcoming), para 1008, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1796813618ABDA06C12585850057AB95#_Toc42431478. See, however, Mačák (n 14) 173–74 (who considers that 'in comparison with the "overall control" standard, the belonging requirement sets a much lower threshold. While the former standard requires the outside power to have a share in the organization, coordination or planning of the operations of the armed group in question, the requirement of "belonging" only demands acceptance, whether express or tacit, that the armed group is fighting on behalf of the outside power. Hence, in any conflict internationalized by a connection qualifying as "overall control", this connection will always meet the requirement of belonging, as well').
[123] Emphasis added.
[124] Final Record of the Diplomatic Conference of Geneva, 1949, vol 2, Section A, Committee III, Report, 822.

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In her dissenting opinion in the *Tadić* case, Judge Mcdonald held Article 29 to be useful both for classifying a prima facie NIAC as an IAC, and also for establishing situations of military occupation through an armed group.[125] For Judge Mcdonald, this article barred puppet regimes from absolving their sponsoring states.[126] According to the judge, it was important to disregard the formal criteria of the military structure and focus on establishing whether the VRS was dependent on and controlled by the FRY.[127] Pursuant to the 1958 Commentary to GC IV, by means of 'a general formula' Article 29 defines the persons who by their acts give rise to the responsibility of a certain state.[128]

The word 'agent' in Article 29 is worthy of further consideration. It may include anyone in the service of a state, including an armed group. Again, what has to be examined is the relationship between that outside state and the agent, in this case the armed group. The 1958 Commentary, while clarifying that the term 'agent' embraces a wider circle than the definition in the Fourth Hague Convention of 'persons forming part of its armed forces', also provides an essential reservation:[129]

> the word 'agent' limits the scope of the provision to those persons alone who *owe allegiance* to the Power concerned. The nationality of the agents does not affect the issue … It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; *what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given*.

Because agents show allegiance to the state, the state controls them, at least to some extent. Allegiance itself can be interpreted to mean a demonstration of devotion and of voluntary subordination to a certain entity. This amounts to a general form of control, which need not require the state to control each step of the agent. Such a type of relationship resembles overall control, as proposed by the ICTY Appeals Chamber in *Tadić*. The latter part of the quote above indicates the level of the foreign state's control over the armed group. Allegiance is therefore the mechanism which allows the state to wield power over the group in generally planning its actions.[130]

One could object that Article 29 deals with protected persons only in times of IAC, particularly in situations of military occupation. However, it also applies in all contexts as per Common Article 2 of the Geneva Conventions. Hence, Article 29 can also be used to turn a prima facie

[125] *Tadić* (n 90) separate and dissenting opinion of Judge McDonald, [20] and [31]–[34]. Other Judges at the ICTY did not discuss IHL provisions that would be helpful in classifying a prima facie NIAC as an IAC. Instead the focus lay on the possibility of the application of the grave breaches regime in NIAC, and the application of the IHL of IAC to NIACs by the warring parties through special agreements: see further *Tadić*, Decision on the Defence Motion (n 1) separate opinion of Judge Abi-Saab; and separate opinion of Judge Li, [19].
[126] *Tadić* (n 90) separate and dissenting opinion of Judge McDonald, [33]–[34].
[127] ibid.
[128] Commentary GC IV (1958) (n 9) 211.
[129] ibid 212 (emphasis added); see also Tom Gal, 'Unexplored Outcomes of *Tadić*: Applicability of the Law of Occupation to War by Proxy' (2014) 12 *Journal of International Criminal Justice* 59, 66.
[130] See additionally the clarification of the ICTY allegiance theory and protected persons status: Sassòli (n 91) 291–92.

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NIAC into an IAC because it holds a possible mechanism of control, thereby linking an armed group to an outside state. Through this, a state is less likely to escape its responsibilities under IHL when acting through armed groups for which it does not wish to account but which it controls.

3.3.3. SOME POSSIBLE CONCERNS

Deriving control tests from GC III Article 4 and GC IV Article 29 may appear to be unsuitable and problematic. First, both articles assume that an IAC exists, and employing them as the reference for the classification of a conflict may seem circular. However, this concern misses a crucial point: while these articles primarily concern straightforward scenarios of IAC, they recognise categories of persons – forming non-formal armed forces – who may be linked to a foreign state. Such persons may then be engaged in a prima facie NIAC despite not having official status under the internal law of that state. A link that determines their relationship with the state concerned is proved either in belonging to the state or in their allegiance. Both terms imply a certain level of control. Instances of belonging and allegiance need not denote manifestations of effective control, but both may very well meet the overall control test, as argued above.

Second, AP I Article 43 is used in this article to identify a party to the conflict based on its armed forces. Some would possibly argue that Article 43 does the converse – it identifies the armed forces of a given party. In other words, Article 43 would assume an IAC already to exist. This article, however, should not be viewed as only espousing such a stance. Article 43(1) could be employed to bridge the gap between situations where armed groups are fighting in a prima facie NIAC against a state, and those where armed groups are controlled by a foreign state. That state would ultimately be hindered in avoiding its status as party to an armed conflict: 'In essence, this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command'.[131] This definition reads as an example of foreign state control over an armed group that is fighting in a prima facie NIAC. If a state controls such an armed group, then it also acts through it, and the existence of an IAC can be established based on such a connection.

Third, it was advanced that IHL is a self-contained system. Referring to ARSIWA may thus seem incoherent for our analysis. However, being a self-contained system, IHL does not exclude the fact that there is a dialogue with other branches of international law, especially with the law of state responsibility. The existence of such a dialogue was demonstrated by IHL referencing the laws of state responsibility in rule 149 (Section 3.2 above). Hence, instead of looking at the relationship between these two branches as one of tension and differences, perhaps it is worth identifying grounds for considering them as mutually reinforcing.

[131] ICRC Study (n 92) 15, also 16.

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4. CONCLUSION

In times of armed conflict states act through either their armed forces or de facto agents. Either means is foundational in establishing that a state is a party to an armed conflict. This article advocates that evaluating a state's actions in times of a prima facie NIAC on another state's territory is best carried out via the overall control test as developed by the ICTY Appeals Chamber in the *Tadić* case. The advantages of this approach are twofold. First, it is a more realistic benchmark for generating the required evidence than the complete dependency or effective control tests developed by the ICJ. Second, this test makes it less likely for a state to escape its responsibilities under IHL when it acts through armed groups in a prima facie NIAC on the territory of another state.

Some problems remain, however. It is highly unlikely that the ICJ, the principal judicial organ of the United Nations, will abandon its own approach to interstate disputes using the complete dependency and effective control tests for determining state responsibility for internationally wrongful acts of its de facto organs. Hence, ambiguities and contradictions in classifying conflicts and establishing state responsibility during armed conflicts will most likely remain in the future, unless grounds for their cooperation and mutual reinforcement are pursued. Consequently, one test for both state responsibility and conflict classification should exist,[132] as the responsibility of a state in an armed conflict is determined by its actions. For determining the nature of armed conflicts in which a foreign state is involved through exercising control over an armed group, the complete dependency and effective versus overall control test dichotomy should be assessed against the backdrop and within the context of IHL. This should not ignore the fact that IHL itself echoes ARSIWA. Indeed, GC III Article 4 and GC IV Article 29 themselves contain a threshold of control which may be helpful in determining the nature of armed conflicts with foreign state participation.

[132] ILC (n 25) para 50; Marco Sassòli and Laura M Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case' (2000) 82 *International Review of the Red Cross* 733, 740; Sassòli (n 91) 175. See, however, Iris van der Heijden, 'Other Issues Relating to the Treatment of Civilians in Enemy Hands' in Clapham, Gaeta and Sassòli (n 12) 1241, 1253 ('In order to discover whether a state is responsible for the treatment accorded to protected persons, reference may be made to the ILC Articles on State Responsibility, as well as to the case law of the ICJ and ICTY, where discussion is still ongoing as regards the degree of control necessary for attribution to a state of the acts and omissions of individuals not having the formal status of an organ of the state. A possible solution might be to argue that the test of control applies differently in each situation. The test for the degree of control by a state over an individual who is not a de jure organ of the state might then differ, so that one would apply the overall control test for the classification of the conflict, whereas the effective control test would apply as regards the attribution of acts for the purposes of state responsibility').

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