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EXPLORING APPROPRIATE TESTS OF CONTROL FOR INTERNATIONALISED NON-INTERNATIONAL ARMED CONFLICTS

-Advaya Hari Singh[1]

ABSTRACT

The principle of state responsibility for violations of international humanitarian law (IHL) by its organs is well-established in international law, both in its customary and textual manifestations. Violations of international humanitarian law by an organ of the state attract attribution of the actions to the state itself and trigger the application of the law relating to international armed conflicts (IAC). It is only when an armed non-state actor is engaged in an armed conflict with the active support of another state, does the law begin to get murky in its application. This is because the degree of control that is required to trigger a state's responsibility is ill-defined in international law. The existing jurisprudence of attribution through 'control' is contained in Article 8 of the ILC Articles and judicial decisions which have competed with each other to posit the most appropriate standard of state control for actions of non-state actors, doing so at the cost of certainty and clarity of the law. Analyzing this becomes important because a state's involvement in the armed conflict can potentially convert the non-international armed conflict (NIAC) to an IAC between two states. This article begins by analyzing the reasons for the modern-day distinction that IHL draws between armed conflicts and its utility in the face of customary international law. In Part II, the article distils the law relating to attribution of a non-state actor to the state supporting it, unravelling the multiple interpretations that important judicial decisions have lent to 'control' under Article 8 of the ILC Articles. In Part III, the article argues for a distinct application of the 'effective control' test and 'overall control' test with the latter more suited for converting a NIAC to IAC.

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INTRODUCTION

International Humanitarian Law is commonly understood as a sub-branch of public international law which aims to "limit the effects of armed conflicts."[2] The existence of an armed conflict becomes a prerequisite for the application of the law. This is an important factor given that International Humanitarian Law, characterized as *jus in bello*, is routinely distinguished from *jus ad bellum* "which provides grounds justifying the transition from peace to armed force."[3] Historically and in the present-day, international humanitarian law has firmly relied on the distinction between armed conflicts for its application.[4] This is borne out by treaty law which, as early as 1949 with the adoption of the Geneva Conventions, entrenched the distinction between international armed conflicts and those not of an international character.[5] The distinction between international armed conflicts (IAC) and non-international armed conflicts (NIAC) was only reinforced when the Additional Protocols I and II (AP) to the Geneva Conventions were adopted in 1977.[6]

Since the application of the appropriate legal regime rests on the type of conflict, identifying the conflict is an important starting point of inquiry. Treaty law provides sufficient guidance for this exercise: Common Article 2 of the Geneva Conventions requires "declared war" or "armed conflict which may arise between two or more of the High Contracting Parties."[7] Common Article 3 of the Geneva Conventions mentions "armed conflict not of an international nature" and the simplistic nature of this provision is compensated for by the commentary of the International Committee of the Red Cross (ICRC). The Commentary defines NIACs as "armed conflicts where at least one Party is not a State" before going on to list specific cases.[8] Further, Article 1 of A.P. II, which applies to NIACs, adopts a more detailed definition of a NIAC as an

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[2]*War & Law*, INT'L COMM. RED CROSS, www.icrc.org/en/war-and-law, (last visited Dec. 19, 2020).
[3]Carsten Stahn, *Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? –Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921, 926 (2006).
[4]*How is the Term "Armed Conflict" Defined in International Humanitarian Law?*www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf.
[5]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 [Hereinafter Geneva Convention I].
[6]CecilieHellestveit, *The Geneva Conventions and the dichotomy between international and non-international armed conflict*, in SEARCHING FOR A PRINCIPLE OF HUMANITY IN INTERNATIONAL HUMANITARIAN LAW 86,90(KjetilMujezinović et al. eds.,2012).

[7]Geneva Convention I, art. 2.
[8]Lindsey Cameron et al., *Article 3 - Conflicts not of an international character*, *in* International Committee of Red Cross, COMMENTARY ON THE FIRST GENEVA CONVENTION 126,143 (2016).

armed conflict that takes place between the armed forces of a High Contracting Party and dissident armed forces or other organized armed groups. It further enumerates further elements which are required for meeting the threshold: responsible command in the armed group and territorial control which enables them to carry out sustained and concerted military operations.[9]

These criteria would presumably enable a clear determination of the appropriate law, especially when the distinction in the armed conflicts is straightforward. But this is not always the case and armed conflicts seldom adhere to this seemingly watertight classification. Over the years, while inter-state conflicts have occurred, "the vast majority of armed conflicts after 1949 have been non-international armed conflicts (NIACs) and they still outnumber IACs in the present time."[10] As recently as 2018, 51 NIACs occurred in the territory of 22 states outnumbering the number of IACs which occurred in 7 states.[11]These NIACs assume complex characteristics which make it difficult to determine the applicable law. The most common example of this is the intervention by a foreign state in the NIAC occurring in the territory of another state.[12] More precisely, the intervention through an armed non-state actor (ANSA) by exercising control over it.[13] This article is concerned with this type of armed conflict and the way international humanitarian law responds to NIACs which develop IAC-like characteristics.

Part I of the article explores the reasons for the modern-day distinction that international humanitarian law draws between armed conflicts and its utility in the face of customary international law. This is done because analysis of the law to complex conflicts can only be carried out if there are different legal regimes vying for application to the situation. If a common body of international humanitarian law is applicable, then the intervention of a third party to a conflict is immaterial since a single law will be applicable. With this premise, the article then highlights the growth of 'internationalized' NIACs. In Part II, the article distils the law relating to attribution of an ANSA to the state supporting it, unravelling the multiple interpretations that

[9]David Turns, *The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003, in*THE WAR IN IRAQ: A LEGAL ANALYSIS (Raul A. Pedrozo ed., 2010) [Describing the scope of application as "so restricted as to render it all but unworkable in practice."].
[10]Gabriella Venturini, *Whither the human in armed conflict? IHL implications of new technology in warfare*, iihl.org/wp-content/uploads/2019/10/Venturini.pdf.
[11]AnnyssaBellal, *The War Report: Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights (2019), www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf (last visited Dec. 23, 2020).
[12]Cameron, *supra* note 7, at 146.
[13]*Id*. at 147.

important judicial decisions have lent to 'control', under Article 8 of the ILC Articles on State responsibility. In Part III, the article analyses the suitability of the tests of control to international humanitarian law.

I. INTERNATIONAL HUMANITARIAN LAW AND COMPLEX NIAC

A. The Historical Underpinnings of the Classification of Armed Conflicts

Public international law has traditionally been considered as a branch of law which focuses on regulating inter-state relations.[14] Even international humanitarian law which now, as a distinct sub-branch of public international law, also seeks to regulate conflict within a state's boundaries, essentially finds its historical basis In limiting inter-state armed conflict.[15] Initially, international humanitarian law was marked by reluctance in interfering in conflict which took place within a state, completely unconnected to any other state.[16] This was the result of the Westphalia understanding of international affairs and approached matters of sovereignty with caution.[17] This was understandable given the fact that the recognition of the sovereignty of states required the simultaneous acknowledgement of the notion of *non-interference* in matters which had no international impact.[18] The necessary result of this was that international armed conflicts were not regulated and "(t)here was only one body of law which either applied in *toto* to international conflicts between states (or conflicts treated as such) or it did not apply at all."[19]

This changed with the advent of new limbs in international law which no longer restricted itself to regulating international relations but also extended to protecting and obligating individuals.[20] As Moir writes: (j)ust as a government's treatment of its own citizens in that sphere is now

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[14]BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW116 (James Crawford ed. 8th ed. 2012); MALCOLM SHAW, INTERNATIONAL LAW2 (7th ed. 2016); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW3 (2005).
[15]1 HOW DOES LAW PROTECT IN WAR(Marco Sassoli et al. eds. 3rd ed.).
[16]Dapo Akande,*Classification of Armed Conflicts: Relevant Legal Concepts, in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS193, 194 (Elizabeth Wilmshurst ed. 2012).
[17]*Id*.
[18]James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 850 INT'L REV. RED CROSS 313, 317 (2003).
[19]Akande, *supra* note 15, at 195.
[20]*Id*.at 196[mentioning the rise of "World War II prosecutions for international crimes and the development of international human rights law, beginning with the Universal Declaration of Human Rights 1948."].

regulated by international law, so the humanitarian protection of its citizens in situations of armed conflict is equally a matter of concern for the entire international community."[21] However, it will be inappropriate to paint a picture of absolute non-interference in internal armed conflicts that occurred before the adoption of the Geneva Convention in 1949. This is because there was a considerable interest that states had in the internal affairs of other states.[22] The 1928 Convention on Duties and Rights of States in the Event of Civil Strife attempted, not with the humanitarian intention that guides modern international humanitarian law, to enjoin states from aggravating civil war in other states. Further, states that were warring with armed non-state actors entered into agreements with them or "issued unilateral instructions to their armed forces, a notable example of which is the 1863 Lieber Code."[23]

Even the practice of recognizing the non-state actor involved in an armed conflict with its state as a belligerent only imported the law of neutrality from the laws and customs of war and nothing else.[24] And the view that laws of war could be applied through recognition of belligerency gradually became "obsolete."[25] The ICRC had already begun to work on applying international humanitarian law to Internal Armed Conflicts and two individual Red Cross Societies produced reports on the role that they could play in 'civil war' and 'insurrection' to the 9th International Conference of the Red Cross.[26]

But humanitarian aspirations were overshadowed by the need to preserve friendly international relations. As Jean Pictet notes: "(a)pplications by a foreign Red Cross or by the International Committee of the Red Cross have more than once been treated as unfriendly attempts to interfere in the internal affairs of the country concerned."[27] States like Russia felt that it was "improper" for the ICRC to work for "rebels regarded as criminals by the laws of the land."[28] The stance reflected a larger disconcertment of states' with potential insurgencies in their own territory and support for non-interference contained an implicit expectation of reciprocity from other states. With the "heavily internationalized" Spanish Civil War and the Second World War, the ICRC

[21]LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT2(2002).
[22]Cameron, *supra* note 7, at 132.
[23]*Id*.
[24]*Id*.
[25]Moir, *supra* note 20, at 19.
[26]Cameron, *supra* note 7, at 134.
[27]JEAN PICTET, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 39 (1952).
[28]Moir, *supra* note 20, at 22.

renewed its calls for application of international humanitarian law to internal armed conflicts.[29] the result was common article 3 which introduced certain minimum standards applicable to armed conflicts not of an international character.

The generality and minimalistic nature of common Article 3 in laying "down the principles without developing them which has sometimes given rise to restrictive interpretations" prompted the adoption of a more focused legal instrument for regulation of NIACs.[30] The ICRC Commentary notes several deficiencies in the wording of common Article 3 which have hindered its effective implementation: the lack of protection for doctors and medical personnel,[31] lack of specific protection for the civilian population and its silence on relief measures.[32] After several conferences and negotiations throughout the 1960s and 1970s, the A.P. II to the Geneva Conventions was adopted and characterized as a legal instrument which "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application."[33] This stipulation merits a closer examination.

On a first glance, it is rather confusing to note the presence of two different legal regimes to a similar type of conflict; A.P. II should have ideally replaced common Article 3. But a complete annihilation of the common article 3 "would have been very dangerous" since the application of A.P. II proceeds on a restrictive set of objective criterion.[34] The introduction of A.P. II created two situations: one, where both common article 3 and A.P. II applied and second, in case the high threshold for the application of A.P. II was not met, only Article 3 would apply.[35] In this way, it was ensured that common Article 3 "retains an automatic existence" and the inapplicability of A.P. II did not affect the application of the minimums standards of common Article 3.[36] With the introduction of A.P. II read together with common Article 3, the distinction between the law of armed conflict in IACs and NIACs has been firmly established.

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[29]Stewart, *supra* note 17, at 317.
[30]*Commentary of 1987, General introduction to the Commentary on Protocol II*, INT'L COMM. RED CROSS, ¶4363, ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=0F47AE2F6A509689C12563CD004399DF (last visited Dec. 24, 2020)
[31]*Id*., ¶4364.
[32]Id., ¶4366.
[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1), Jun. 8, 1977, 1125 U.N.T.S. 609.
[34]Moir, *supra* note 20, at 101; *Id.*
[35]Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29, 35 (1983).
[36]*Id*.

B. Questioning the Distinction in Legal Regimes

Despite the well-entrenched distinction between the law of IACs and NIACs, many commentators have questioned the propriety of the distinction given the common element of destruction and suffering shared by both international and internal armed conflicts. There are several significant differences in both the legal regimes. Most critics draw attention to the numerical inequality in the provisions regulating IACs and NIACs: "(t)he GCs and their protocols contain close to 600 articles, of which only CA 3 and the 28 articles in AP II apply to NIACs. So to say that there is an imbalance of Geneva Law is an understatement."[37] The staggering difference is self-explanatory of the lesser extent to which NIACs are regulated by international humanitarian law.

Unlike IACs, rules regulating conduct of hostilities (Hague law) are not applicable to NIACs. Common article 3 contains no rules on distinction and proportionality and A.P. II contains only "modest rules" on this.[38] A.P. II does match the law applicable to IACs in the "prohibition on indiscriminate attacks, methods and means of warfare causing unnecessary suffering and damage to natural environment."[39] A more notable difference is the absence of combatant and prisoner of war (POW) status to those participating in internal conflicts. This implies the lack of an entitlement to "participate directly in hostilities" and permits the state engaged in the internal armed conflict to prosecute the individuals who have participated in the conflict.[40]

Scholars have also raised questions on the continued utility of maintaining the distinction in light of recent developments. One of the prominent developments which have rendered the distinction otiose is customary international law, which is applicable to both IACs and NIACs.[41] The ICRC maintains a comprehensive database of customary rules based on state practice reflected in military manuals, national legislation and case law.[42] According to the ICRC, "90% of the

[37]Douglas Wedderburn-Maxwell, Classic Distinctions and Modern Conflicts in International Humanitarian Law 29(2014) (unpublished Master Thesis, Lund University); Akande, *supra* note 15, at 199-200; Stewart, *supra* note 17, at 320.
[38]Akande, *supra* note 15, at 200.
[39]Stewart, *supra* note 17, at 320; Maxwell, *supra* note 36, at 29.
[40]Stewart, *supra* note 16, at 320.
[41]Evan Ritli, *Unravelling Conventional Boundaries in International Humanitarian Law: The Classification and Regulation of Non-International Armed Conflicts in the Modern World*6 EPIK Journals Online (2015).
[42]*Customary Law*,INT'L COMM.RED CROSS, www.icrc.org/en/war-and-law/treaties-customary-law/customary-law (last visited Jan. 2, 2021).

customary rules of IHL identified . . . applied in both types of conflict."[43] Some still doubt a complete extinguishment of the distinction based entirely on the basis of customary international law: "the ICRC identifies seventeen customary rules applicable in IAC but not in NIAC and five applicable in NIAC but not in IAC."[44]

The lack of some customary international rules which are applicable in either of the regimes does not in way undermine the legitimacy of other rules. In fact, the role of customary international law in blurring the lines between the law applicable to IACs and NIACs has been underscored by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Tadić*[45] (*Tadić*): "(n)otwithstanding... limitations, it cannot be denied that customary rules have developed to govern internal strife."[46] It further stated that:

> *Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.*[47]

Apart from the role that customary international law has played in bridging the gap between the legal regimes of IACs and NIACs, developments in treaty law have also reduced this gap to a significant extent. There are several treaties which apply commonly to both IACs and NIACs: the Biological Weapons Convention 1972, the Chemical Weapons Convention 1993, the Convention Prohibiting Anti-Personnel Land Mines 1997, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999 and the 2001 amendment which has extended the Convention on Conventional Weapons and its protocols to non-international

[43]KUBO MACAK, INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW(2018).
[44]Adil Ahmad Haque, *Whose Armed Conflict? Which Law Of Armed Conflict?*45 GEORGIA J. INT'L & COMP. L. 475, 483 (2017).
[45]The Prosecutor v., Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[46]*Id*., ¶127.
[47]*Id*.,¶119.

armed conflicts.[48] States even have military manuals which apply international humanitarian law "to any type of conflict whatever its legal characterization."[49]

Despite the growing convergence, there are indications that the distinction is alive and kicking. In fact, after the adoption of the Geneva Conventions in 1949, states had two opportunities to merge the law but expressly rejected such calls. The first time it arose was during the adoption of the A.Ps in 1977, where states chose to maintain a strict distinction and even entrenched it in treaty law. Another opportunity opened up during the preparation for the Rome Statute of the International Criminal Court (Rome Statute) which was adopted several years after the A.Ps.[50] States had ample opportunity here to "abolish the distinction."[51] But it continued to be reflected in the provisions of the Rome Statute with thirty-four war crimes recognized for IACs and only nineteen war crimes for NIACs.[52] It is perhaps a concern of "sovereignty . . . national unity and security" that dissuades states from importing comprehensive protection of the law applicable in IACs to NIACs which are occurring within their territory.[53] In fact, states fear that importing applying IAC standards will require them to grant POW status to belligerents and a corresponding immunity from prosecution for acts which are unlawful under domestic law.[54]

C. The IAC/NIAC Distinction and Complex Conflicts

The distinction between the law applicable to IACs and NIACs runs into difficulty in situations of IACs which turn complex due to the intervention of a third state. The IAC is "a civil war characterized by the intervention of the armed forces of a foreign power."[55] Although their history can be traced back to the Spanish Civil War in the 1930s, there was a surge in internationalized armed conflicts during the Second World War.[56]

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[48]Akande, *supra* note 15, at 200-201.
[49]Macak, *supra* note 42.
[50]The Rome Statute of the International Criminal Court was signed in 1998 and came into force in 2002.
[51]Akande, *supra* note 15, at 206.
[52]Haque, *supra* note43, at 483; Article 8(2)(a) and (b) enumerate war crimes for IACs and Article 8(2)(c) and (e) do so for NIACs.
[53]Akande, *supra* note 15, at 207.
[54]Hellestveit, *supra* note 5, at 103.
[55]Peter Brits, *When history no longer suffice : towards uniform rules for armed conflicts*, 45 SCIENTIA MILITARIA: S. AFR. J. MIL. STUD. 64, 73 (2017).
[56]Dietrich Schindler, *International Humanitarian Law And Internationalized Internal Armed Conflicts*, 22 INT'L REV. RED CROSS 255, 255 (1982).

The impact of the intervention on the applicable law depends on which side the foreign state intervenes: on the side of the state which is fighting with the ANSA or on the side of the ANSA itself.[57] Support by a third state to the state does not affect the nature of the conflict since it is still between an ANSA and two states.[58] It is only when the foreign state intervenes on the side of the ANSA and exercises sufficient control over the latter, does the NIAC begin to turn to an IAC.[59] In fact, most intervening states will do so only through ANSAs and never directly by engaging in armed conflict with the other state. Djemila Carron illustrates this situation aptly:

> Imagine an armed group C engaged in massive hostilities against State B within the territory of this State B. Now, imagine a State A endorsing the actions of armed group C with arms supplies, finances and military advisers. Does this support transform the pre-existent non-international armed conflict (NIAC) between armed group C and State B into an international armed conflict (IAC) between States A and B? What is the *control* State A should have over armed group C for an IAC between States A and B to occur.[60] (Emphasis supplied)

Therefore, it becomes important to identify the link between the ANSA and the foreign state and "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."[61] International humanitarian law, either in its treaty or customary manifestations, does not contain any criteria to determine the extent of control required to establish a connection.[62] The answer to these issues lays in general international law of state responsibility and is discussed in the next part.

[57]Akande, *supra* note 15, at 207.
[58]Cameron, *supra* note 7, at 147.
[59]*Id*.
[60]Djemila Carron, *When is a conflict international? Time for new control tests in IHL*, 98 INT'L REV. RED CROSS 1019, 1020 (2016).
[61]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*, 97 INT'L REV. RED CROSS 1227, 1234(2015).
[62]*Id*. at1235-36.

II. DEMYSTIFYING THE TEST OF CONTROL UNDER INTERNATIONAL LAW

The test of internationalization of an NIAC depends on the involvement of the third state in the NIAC and the level of control that it exercises over the ANSA in order for the latter's actions to be considered its own. This is called attribution of conduct to the state and is a necessary condition for holding a state responsible under international law, in addition to a breach of an international obligation.[63] Although attribution is considered in determining state responsibility, it is also utilized to determine the characterization of the armed conflict in international humanitarian law. It helps "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."[64]

Article 4 of the International Law Commission's Articles on state responsibility attributes the conduct of a state organ to the state irrespective of the function that the organ performs.[65] This is the "first principle of attribution for the purposes of State Responsibility" and is relatively uncontroversial in application.[66] Issues arise in attributing the conduct of persons or groups which are not organs of the state and, as noted above, this is relevant for the purpose of determining the type of conflict. Article 8 of the Draft Articles provides three ways in which such conduct can be attributed to the State: "(t)he 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 provision uses *instruction*, *direction* and *control* disjunctively and it is only necessary to establish one of these.[67]

Instruction is "(t)he most clear-cut situation in which state responsibility arises under ARSIWA Article 8 where a State instructs a private person or entity to do something on its behalf.[68] Although direction appears together with control, separated only by *or*, it is an entire separate

[63]International Law Commission, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Articles of State Responsibility].
[64]Ferraro, *supra* note 60, at 1235.
[65]ILC Articles of State Responsibility, art. 4.
[66]*Id*.
[67]*Id*.
[68]JAMES CRAWFORD, STATE RESPONSIBILITY THE GENERAL PART142 (2013).

way to establish attribution of the conduct to the state. In the context of a foreign intervention in an NIAC, it is highly unlikely for the state to issue specific instructions or directions to the ANSA. Without "express instructions or direction from the state to the non-state actor to commit the act, the question boils down to whether the state exercised a sufficient degree of "control" over the act."[69] The existing jurisprudence on attribution through 'control' has been at the center of controversy, with judicial decisions competing with each other to posit the most appropriate standard of 'control' required to attribute the conduct to the state.

The interpretation of 'control' fell for the first time before the International Court of Justice (ICJ) in *Nicaragua v. US*[70] where it had to decide whether violation of international humanitarian law by a non-state armed group, *contras*, could be attributed to the United States. The evidence of the United States' involvement was overwhelming: it had financed, trained, equipped, armed the contras.[71] The Court further noted the United States provided logistical support, supplied information about Sandinista troop movements, supplied aircrafts to the contras.[72] Nicaragua wanted the Court to consider military and paramilitary activities not as part of a civil strife within its territory but as acts of the United States.[73] However, the Court did not consider this argument convincing and refused to attribute the conduct of the contras to the United States and devised an 'effective control' test:

> United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. . . . *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the*

[69]Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEXAS L. REV. 540, 547 (2017).
[70]Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US), Judgment, 1986 I.C.J. Rep. 14 (June 27)
[71]*Id*., ¶108.
[72]*Id*., ¶106.
[73]*Id*., ¶114.

military or paramilitary operations in the course of which the alleged violations were committed.[74] *(Emphasis supplied)*

The Court did not elaborate further on what 'effective control' would require but a closer reading of the Court's judgment reveals that it required that the United States to have "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."[75] This implied that without a State having issued directions for specific operations or forcefully having the rebels carry out the operations, attribution under Article 8 could not happen.[76]

The Appeals Chamber of the ICTY was the next to consider the appropriate test of control under Article 8 in *Tadić*. The factual situation in *Tadić* was different since it was a case which dealt with the individual criminal responsibility of Duško Tadić for committing war crimes and crimes against humanity in the Bosnian genocide. The ICTY had to determine the nature of the armed conflict as an IAC for the purpose of applying Article 2 of the ICTY Statute. Article 2 which dealt with grave breaches of the Geneva Conventions, 1949 was only applicable in IACs. Thus, the ICTY had to determine whether paramilitary conduct of Republic Srpska could be attributed to the Federal Republic Yugoslavia (FRY) and convert the conflict into an IAC between the FRY and Bosnia Herzgovina. The Trial Chamber refused attribution drawing guidance from the ICJ's judgment in *Nicaragua*.[77] On appeal by the Prosecution to the Appeals Chamber, it rejected the ICJ's judgement in *Nicaragua* since it flew in the face of state responsibility:

The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility.[78]

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[74]*Id*., ¶115.
[75]*Id*.;Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in* Bosnia, 18 EUR. J. INT'L L. 649, 653 (2007).
[76]Cassese, *supra* note 73, at 653.
[77]The Prosecutor v. Tadić, Case No. IT-94-1, Opinion and Judgment, ¶206 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
[78]The Prosecutor v. Tadić, Case No. IT-94-1, Judgment, ¶117 (Int'l Crim. Trib. for the Former YugoslaviaJul. 15 1999) [*Tadić, Appeals Chamber*].

The Appeals Chamber drew a distinction between the situation of individuals acting on behalf of a state without specific instructions and . . . an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.[79] It devised a new test of control and held that "(f)or the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the *overall control* of the State."[80] Different from the stringent 'effective control' test which required specific instructions by a controlling State for each of the actions, the 'overall control test' required it to only play a broad role in "organising, coordinating or planning the military actions.[81] This was in addition to "financing, training and equipping or providing operational support to the group."[82]

The 'effective control' test was explicitly endorsed by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro*[83] where it also regarded the 'overall control' test "unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility."[84] In fact, the Court acknowledged the role of the 'overall control' test in determining the type of conflict but noted that this was different "from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict."[85]

III. APPLYING AN APPROPRIATE TEST OF CONTROL IN INTERNATIONAL HUMANITARIAN LAW

The decision of the ICJ in the *Bosnian Genocide Convention* case has brought out a clear distinction between the tests of control for the purpose of State responsibility and for the purposes of determining 'internationalisation' of an NIAC. The ICTY which was required to decide a limited issue of whether the armed conflict was an IAC for the purpose of individual

[79] *Id*.¶120.
[80] *Id*.
[81] *Id*. ¶139.
[82] *Id*.
[83] 2007 I.C.J. Rep. 43.
[84] *Id*., ¶406.
[85] *Id*., ¶405.

criminal responsibility waded into alien waters by critiquing the 'effective control' test.[86] The appropriateness of the 'overall control' test has to be judged in light of the consequences that flow from its application.

Applying the 'overall control' test to a foreign intervention in an NIAC is relevant only for the purposes of characterising the NIAC to an IAC and triggering the more robust law applicable to IACs. It only "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."[87] This may be explained through an example: if State A has intervened in an between State B and armed group C and exercises overall control over the latter's actions, State A, through the armed group C, acquires the rights and obligations contained in the Geneva Conventions and A.P.I. State B is also obligated to follow the law applicable in IACs and is entitled to exercise its rights under the law. Both the States Parties now have the duty to protect cultural objects and the natural environment, to take precautions in the conduct of military operations, to ensure that legal advisers are available to instruct military commanders, to repress breaches of the Geneva Conventions and their Additional Protocols, etc.[88]

But a blanket application of the law of IACs may create difficulties. Since the foreign State is fighting through the members of the armed group, does the conversion of the NIAC to an IAC bestow POW status to such members? As a logical consequence of the 'overall control', they must be properly regarded as members of State A and thus granted POW status. But as Clapham notes: "States may baulk at the idea of granting POW status to their own nationals captured in what they may consider an illegal insurrection."[89] He, therefore, proposes that the grant of POW status should not be an automatic result of an NIAC's conversion to IAC but on the fulfilment of the criteria of Article 4 of Geneva Convention III.[90] This would require the armed group to 'belong' to the foreign State under Article 4(A)(1).

[86] *Tadić, Appeals Chamber*, Separate Opinion of Judge Shahbudeen, ¶¶ 17-19.
[87] Ferraro, *supra* note 60, at 1239.
[88] Carron, *supra* note 59, at 1027.
[89] Andrew Clapham, *The Concept of International Armed Conflict in 1949*, *in* and others (eds) THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham et al. eds. 2015).
[90] *Id*.

Thus, applying the 'overall control' test makes sense because "(p)roving effective control for every single operation would be virtually impossible, because it would require a level of proof unlikely to be attained."[91] The 'overall control' has also been endorsed by the ICRC:

> *In order to classify a situation under humanitarian law involving a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution.*[92]

But the importance of the 'overall control test' should not be overemphasised and should be limited to determining the type of conflict and not the responsibility of the foreign State. These two matters are different. Applying the 'overall control' test converts an NIAC to an IAC and obligates the foreign State to ensure that the armed group it controls, and the warring State, complies with the law applicable to IACs.[93] Additionally, it may be relevant at the stage of prosecuting individuals under the Rome Statute's more elaborate provisions applicable in IACs. All that is required through internationalisation is the application of the more comprehensive law applicable to IACs.

It does not need to be applied for attributing specific violations committed by armed groups to the foreign state and attaching the consequence of breaching international humanitarian law on the latter. For the purposes of state responsibility, it is important to retain the 'effective control' test and to require a higher standard of proof to be met. Some commentators propose an even stricter version of the 'overall control' test of internationalisation because the consequences of this require compliance by the ANSA.[94] There are two reasons for a stricter test:

> *A State needs a strict control over an armed group to ensure that the rules of IACs are respected. In the same sense, an armed group would only be able to apply the law of IACs if it was under the close scrutiny of a State. Finally, the State attacked by the*

[91]Ferraro, *supra* note 60, at 1236.
[92]Cameron, *supra* note 7, at 149.
[93]Ferraro, *supra* note 60, at 1250.
[94]Carron, *supra* note 59, at 1035.

armed group would accept applying the law of IACs against its adversary only if the armed group was tightly controlled by another State.[95]

Since the foreign state is intervening only through the ANSA, it is important to ensure that there is sufficient control for it to be able to ensure that the ANSA complies with the obligations under the law applicable to IACs. However, there is disagreement over the use of the secondary rules of attribution to determine the application of primary rules of international humanitarian law.[96] Instead, some authors argue that a test should be developed in international humanitarian law itself for characterising an armed conflict, for e.g. by proving the ANSA's belonging to the intervening state through a *de facto* agreement between them.[97] International humanitarian law may even use the 'overall control' test to determine the type of conflict.

CONCLUSION

There is a difference between attributing actions of an ANSA to a foreign state for 'internationalisation' of the conflict and attributing the actions for the purpose of state responsibility. In the former case, attribution is intended to apply the law relating to IACs and in the latter case, the intervening state becomes responsible for each of the violations committed by the ANSA. The judgment of the ICJ in *Bosnian Genocide Convention* case has given its imprimatur to using two different tests for the dual purposes outlined above. A relaxed 'overall control' test can be applied to internationalise a conflict while the stricter test of 'effective control' can be applied for State responsibility.

This analysis always proceeds on the assumption that there are two different legal regimes applicable to armed conflicts. In fact, the sole purpose of attribution in case of a foreign intervention is to ensure the application of a more comprehensive law. However, a more effective solution would be to lessen the gap between the law applicable in IACs and NIACs. This is easier than done, as the article has shown above. Customary international law can be used

[95] *Id*.

[96] Marko Milanovic, *What Exactly Internationalizes an Internal Armed Conflict?*, EJIL:TALK(May 7, 2010), https://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/.

[97] Akande, *supra* note 15, at 270-71.

to bridge this gap and the ICRC has done substantial work in this area. But robust implementation of customary international law will depend on widespread dissemination of the law so that ANSAs are well-equipped to comply with it. ANSAs will not always have the support of a foreign state since customary international law will apply to even NIACs simpliciter. Given that international humanitarian law aims at reducing suffering and the impact of war, differentiating the applicable law based on the type of armed conflict is abominable. Till a complete convergence does happen, a reliance on the 'overall control' test remains the best way to apply law of IAC.