CLASSIFICATION OF NON-CONSENSUAL STATE INTERVENTIONS AGAINST AN OAG

by Pauline Lesaffre | Aug 11, 2022

Constant progress in weaponry and means of transportation increasingly enables belligerents to cross borders to fight their enemy. Although not a new reality, cross-border armed conflicts between one or several States and an organized armed group (OAG) surged after 9/11.

Intervening States often cross national borders to fight an OAG *with* the consent of the territorial State (the State on whose territory the armed conflict is engaged). For instance, in January 2013, France intervened in Mali with the consent of Malian authorities to fight – among others – Al-Qaeda in the Islamic Maghreb. A majority of authors agrees to classify these *consensual* State interventions against an OAG as a non-international armed conflict (NIAC) (see, e.g., here and here).

In other cases, intervening States engage an OAG in a territory where the consent of the territorial State is *not* available. For example, Turkish forces intervened in Iraq against the PKK without Iraqi consent from July 2015 until – at least – February 2019. In February 2019, Turkish-Iraqi relationships improved and Iraq ceased to expressly oppose the intervention. Another well-known example is the intervention of the United States and a Global Coalition of States against ISIS in Syria without Syrian consent since – at least – September 2015. Indeed, Syria clearly objected to foreign intervention as recently as last month. In

opposition to a clear and accepted classification for *consensual* State interventions, views remains divided for non-consensual State interventions. Therefore, this blog post briefly recalls the classification debate for such non-consensual interventions and explains which theory should be preferred.

Single or Double Classification? That Is the Question

Two main theories exist to appropriately classify non-consensual State interventions against an OAG. The first theory (the "single classification") argues that such interventions only trigger a NIAC between the intervening State and the OAG despite the absence of the territorial State's consent (see, e.g., here and here). Thus, the availability of the host nation's consent to the military operation engaged on its territory against the OAG is not relevant to the classification of armed conflict (*jus in bello*), although it can have implications under other rules of international law (e.g., under *jus ad bellum*). There is a degree of State practice, such as the Danish Military Manual (Chapter 2, 3.2., at 47), that supports this theory.

The second theory asserts that, in addition to a NIAC, non-consensual State interventions against an OAG also trigger an IAC between the territorial State and the intervening State (see, e.g., here and here). This theory is based on the idea that a non-consensual use of force against an OAG on a territorial State's territory is also a use of force *against that State* because statehood is not limited to and is not defined by the existence of armed forces but surely presupposes an effective government, a population, and a territory.

In other words, because of the territorial State's lack of consent, the intervening State's armed actions against the OAG would generate two conflicts: the intervening State would simultaneously be involved in a NIAC against the OAG and an IAC against the territorial State. Hence, this position is identified as the "double classification" theory. This

approach has been adopted by the ICRC (e.g., Geneva Convention I Commentary, ¶¶ 260-262, 477) and the ICC (e.g., Ntaganda Judgment, ¶¶ 726, 728).

The previous Turkish and American examples are useful to illustrate the nuances between these two theories. According to the single classification theory, Turkey engaged in a NIAC against the PKK, whereas the United States was a party to a NIAC against ISIS. In contrast, according to the double classification theory, Turkey would have been seen as participating in an IAC against Iraq *as well* because of the absence of Iraqi consent to military operations against the PKK (at least until February 2019). Similarly, the United States would *also* have been involved in an IAC against Syria because it engaged ISIS without Syrian consent (and not because it later directly targeted Syria).

As this author demonstrated elsewhere, the double classification approach creates problems rather than an effective protection for the victims of armed conflict. Difficulties arise not only regarding the traditional understanding of IAC, but also with respect to the law applicable to the intervening State's armed forces.

Double Classification: Difficulties with the Traditional Understanding of IAC

First, double classification proponents fail to consider the hostile intent of the States involved. They seem to presume hostile intent derived from the territorial State's lack of consent alone. This approach is contrary to International Humanitarian Law (IHL).

Since the adoption of the Geneva Conventions in 1949, the notion of hostile intent often appears banished from IHL discourses. Yet, there is one clear exception: States (such as Poland recently) and authors (see, e.g., here and here) rely on the absence of hostile intent to refuse an IAC classification in case of mistake or accident. If the absence of hostile intent suffices to discard such a classification when the other conditions

are met (i.e., the use of force by one State against another State), hostile intent is considered as a requisite condition for the existence of IACs.

The question then turns to how such a hostile intent must be ascertained. Given the objective spirit of IHL and, thus, the objective nature of classification – this means that IHL rules must reflect realities on the ground – such a criterion should depend on a combination of multiple factors rather than one single and disputable factor such as the absence of consent. Other relevant factors such as the target of military action, its location, or the overall relationship between the actors involved should also be taken into account.

Second, IACs and NIACs have different temporal scopes of application. Consequently, the additional IAC between the territorial State and the intervening State could start before the NIAC with the OAG materializes and could last after the latter came to a conclusion. On one hand, IAC starts with the first use of force by one State against another (see, e.g., *Tadić* decision, ¶ 70 and here) and only ceases to exist with the "general close of military operations" (AP I, art. 3(b) and GC IV, art. 6, sentence 2), that is, the end of any military movement with a hostile intent (see, e.g., here, 276-78). NIAC, on the other hand, requires a certain level of intensity in hostilities (see, e.g., *Limaj* Judgment, ¶ 90 and *Boškoski* Judgment, ¶ 175), but there is uncertainty as to when it comes to an end. This author shares the view that NIAC ends with a significant decrease in hostilities and no risk of resumption (see, e.g., the ICRC, here and here, and seemingly the ICC, such as in Ntaganda Judgment, ¶ 721).

This difference in temporal scope of application is problematic. When both armed conflicts would coexist as suggested by the double classification theory, both the laws of IAC and NIAC would be applicable to the same intervening State's actions against the OAG (see next section below). However, when the IAC would start before and/or end after the NIAC, the law of IAC alone – which must be examined in the relationship between the territorial State and the intervening State – would regulate

the latter's actions against the OAG on the former's territory. This sole applicability of the law of IAC to actions against the OAG's members and goods and, therefore, the analysis of these members' and goods' status under the law of IAC would largely prevent the intervening State from fighting the OAG.

Let us take a concrete example to prove this point. In March 2019, ISIS lost its last battle for territorial control in Syria and was, thus, said to be defeated. Yet, the United States and the Global Coalition never ceased all military actions, quickly resumed operations in December 2019, and continue to this date with sporadic actions against ISIS. Admittedly, the level of intensity in hostilities significantly decreased in 2019, however, the US-led Coalition continued to undertake military movements with a hostile intent. Therefore, it is arguable (although greatly debatable due to a high risk of resumption in hostilities at the time) that the NIAC against ISIS was over in March 2019. By contrast, the IAC against Syria would be ongoing in the absence of any general close of military operations.

Consequently, any U.S. military operation after March 2019 would have had to be governed by the law of IAC. Under this law, ISIS members are neither combatants, that is, members of a belligerent party's armed forces, nor are they civilians directly participating in hostilities due to the absence of belligerent nexus (if understood according to the ICRC's Interpretive Guidance, 58). Indeed, ISIS members do not support Syria. Therefore, they do not support a party to the conflict. U.S. attacks against ISIS members would thus be characterized as attacks against protected civilians, no matter how threatening these civilians could be.

Double Classification: Difficulties with the Law Applicable to Foreign Armed Forces

If the intervening State's non-consensual actions against the OAG would trigger both an IAC against the territorial State and a NIAC against the

OAG, these actions would then simultaneously be part of both armed conflicts. Consequently, and as previously indicated, the same intervening State's actions would be governed by both the laws of IAC and NIAC; both legal regimes would *overlap*. Under the law of IAC, the intervening State's actions would be assessed with reference to the belligerent relationship between the intervening State and the territorial State. Under the law of NIAC, the same actions would be examined with reference to the belligerent relationship between the intervening State and the OAG.

Yet, the laws of IAC and NIAC did not develop to apply at the same time to the same actions. Admittedly, their concurrent applicability is manageable in some instances. Without doubt, IAC and NIAC rules were designed in the same spirit, that is, to protect victims and regulate means and methods of warfare. Thus, it is not a surprise that both bodies of law sometimes would justify the same behavior from the intervening State. It would not matter whether the legality of its action is considered under the law of IAC in its belligerent relationship with the territorial State or under the law of NIAC in its belligerent relationship with the OAG.

However, in many instances, a normative conflict between the laws of IAC and NIAC would arise; both legal regimes would (or, at least, could) lead to different behaviors from the intervening State (on normative conflicts, see here, ¶ 24 and here, ¶ 251(2)). For instance, for such frequent actions as attacks against the OAG's members, the laws of IAC and NIAC could result in different actions from the intervening State. Indeed, the OAG's members are members of a party's armed forces in the NIAC and, therefore, targetable at all times. Thus, the law of NIAC does not prohibit the intervening State to target them. Conversely, the law of IAC prohibits the intervening State to undertake such an action. Indeed, as previously explained with the Syrian example, the OAG's members are protected civilians in the IAC. A full prohibition on

targeting the OAG's members does not align with operational realities on the ground and with IHL spirit, which requires a balance between the principles of humanity and military necessity.

Such normative conflicts between the laws of IAC and NIAC would be difficult to reconcile on the battlefield and in court. Legal advisers and judges would need to resort to the *lex specialis* principle (a well-established – although still sometimes disputed (see, e.g., here, ¶ 48 and here, 523) – principle according to which the more specific rule prevails over the more general rule (see here, ¶ 56 and here, ¶ 251(5))). In that context, it would be extremely difficult to ensure foreseeability and coherence in the law applicable to foreign armed forces.

A Single NIAC Classification: That's the Conclusion

Due to these difficulties, first, with the traditional understanding of the notion of IAC and, second, with the law applicable to foreign armed forces, non-consensual State interventions against an OAG should be classified as a single NIAC. Although the law of NIAC is far from perfect to deal with all aspects of cross-border armed conflicts, it brings more legal certainty and clarity for intervening States, which contributes to better protection for victims of armed conflict.

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Dr. Pauline Lesaffre is a Postdoctoral Research Fellow of the Belgian American Educational Foundation (BAEF), working as a visiting research scholar at the Stockton Center for International Law (U.S. Naval War College) and at the Paul Tsai China Center (Yale Law School).

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LIEBER INSTITUTE

MADN-LAW

United States Military Academy

646 Swift Road

West Point, NY 10996

+1-845-938-2572

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