PARTICIPATION IN A NON-INTERNATIONAL ARMED CONFLICT: A FAILED ANALOGY WITH CO-BELLIGERENCY

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ABSTRACT

Foreign interventions in support of a belligerent party to an existing non-international armed conflict ("NIAC") increased tremendously since the beginning of this century. This common practice evidences a pressing need to clarify, or determine, if and how International Humanitarian Law ("IHL") regulates these foreign interventions in favor of a belligerent party to a specific NIAC. Among others, one issue for IHL consists in establishing when the intervening actor becomes a belligerent party to a NIAC, i.e., to a separate and distinct NIAC or to the same existing NIAC, and therefore when this actor must respect the law of NIAC.

This article demonstrates that the law of NIAC does not regulate this issue yet. However, it emphasizes that State practice and International Criminal

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This article is based on the author's doctoral research and conclusions. The author's doctoral research was conducted between 2016 and 2021. The author defended her Ph.D. at the University of Louvain in September 2021. Her thesis is entitled *The Challenge of Cross-border Armed Conflicts for International Humanitarian Law — Material and Personal Scopes of Application: Between Continuity and Change [Le droit international humanitaire à l'épreuve des conflits armés transfrontières. Etude des champs d'application matériel et personnel : entre continuité et changement]* (Ph.D. dissertation, Université Catholique de Louvain [Catholic University of Louvain]), https://dial.uclouvain.be/pr/boreal/object/boreal:251444 [https://perma.cc/9TYE-XDME].

The author thanks Professors Robert Kolb and Marco Sassòli, University of Geneva, for their comments on the relevant sections of her Ph.D. thesis. She also thanks Lieutenant Colonel Brent Stricker, U.S. Marine Corps, Major Christopher J. Koschnitzky, U.S. Army, Major Aaron Johnson, U.S. Army, and Peter Haas, J.D., for their feedback and comments on previous drafts of this article. Additionally, many thanks go to the editing team of the *Boston University International Law Journal* for their helpful work.

Court case law (as well as scholarly works) suggest that the intervening actor becomes a belligerent party to the same pre-existing NIAC (one single NIAC) rather than to a distinct NIAC (multiple NIACs—one additional NIAC for each foreign intervention). This said, State practice (except for U.S. practice) and case law does not define the conditions for the intervening actor to become such a party to a pre-existing NIAC. Thus, this article contributes to the discussion about these conditions, granted that the law of NIAC will certainly accept the suggestion from practice of a single NIAC. This article proposes a method of analogical reasoning to establish these conditions and discards the analogy with co-belligerency which is suggested by U.S. practice.

CONTENTS

I. INTRODUCTION

Foreign interventions[1] in support of a belligerent party to a non-international armed conflict ("NIAC") increased tremendously since the beginning of this century.[2] For example, between October 2002 and March 2003, an organized armed group ("OAG") called the *Mouvement pour la Libération du Congo* ("MLC") helped the Central African Republic fight against rebels under General Bozizé.[3] Since 2005, the United Nations intervened through MONUC, later re-named MONUSCO,[4] to support the Congolese armed forces against the *Forces Démocratiques de Libération du Rwanda* ("FDLR") and March 23 Movement ("M23") rebels.[5] The increase in foreign interventions in favor of a belligerent party to a NIAC is even more striking in the fight against terrorism. For instance, since September 2011,

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[1] This article follows the available literature on the topic and uses the word "intervention" in its ordinary meaning, that is, "the action of becoming intentionally involved in a difficult situation, in order to improve it or prevent it from getting worse." *Intervention*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/intervention [https://perma.cc/PUD3-LSVY]. The word "intervention" does not refer here to its technical and legal meaning of an unsolicited or non-consensual interference in another State's armed conflict, or in its internal or external affairs.

[2] For information on State interventions, see, for example, Lotta Harbom & Peter Wallensteen, *Armed Conflict and Its International Dimensions, 1946-2004*, 42 J. PEACE RSCH. 623, 627 (2005); Lotta Themnér & Peter Wallensteen, *Armed Conflicts, 1946-2010*, 48 J. PEACE RSCH. 525, 528 (2011); Lotta Themnér & Peter Wallensteen, *Armed Conflicts, 1946-2012*, 50 J. PEACE RSCH. 509, 510 (2013); Therése Petterson & Peter Wallensteen, *Armed Conflicts, 1946-2014*, 52 J. PEACE RSCH. 536, 536–37 (2015); Erik Melander, Therése Petterson & Lotta Themnér, *Organized Violence, 1989-2015*, 53 J. PEACE RSCH. 727, 729–30 (2016).

[3] *See*, *e.g.*, *Central African Republic I*, INT'L CRIM. CT. PROJECT, https://www.aba-icc.org/situations/central-african-republic/ [https://perma.cc/XW7H-JJMT]; HUM. RTS. WATCH, BACKGROUND: THE VARIED CAUSES OF CONFLICT IN CAR (2007), https://www.hrw.org/reports/2007/car0907/4 [https://perma.cc/KXS8-ET24]. For further information, see *infra* Part II.B.3 on the developments by this author on the *Bemba* case.

[4] *Historique [Background]*, MISSION DE L'ORGANISATION DES NATIONS UNIES POUR LA STABILISATION EN RÉPUBLIQUE DÉMOCRATIQUE DU CONGO [MONUSCO], https://monusco.unmissions.org/historique [https://perma.cc/J3VT-TV2S]. The organization's former name was *Mission de l'Organisation des Nations Unies en République démocratique du Congo [MONUC]*. *Id*.

[5] *See*, *e.g.*, Ronald Hatto, *From Peacekeeping to Peacebuilding: The Evolution of the Role of the United Nations in Peace Operations*, 95 INT'L REV. RED CROSS 495, 512 (2013); U.N. Secretary-General, Eighteenth Rep. on the United Nations Organization Mission in the Dem. Rep. Congo, ¶¶ 21–22, 32–34, U.N. Doc. S/2005/506 (Aug. 2, 2005); U.N. Secretary-General, Nineteenth Rep. on the United Nations Organization Mission in the Dem. Republic Congo, ¶¶ 16, 23, U.N. Doc S/2005/603 (Sept. 26, 2005); U.N. Secretary-General, Twentieth Rep. on the United Nations Organization Mission in the Dem. Rep. Congo, ¶¶ 22, 25, 26, 32, U.N. Doc S/2005/832 (Dec. 28, 2005). For further information, see *infra* Part II.B.3 on the developments by this author on the *Mbarushimana* case.

Kenya fought the OAG Al-Shabaab on Somalia's territory with consent of Somalian authorities and in coordination with its armed forces.[6] Three years later, a U.S.-led coalition of States joined Iraq against the Islamic State ("ISIS")[7] after two requests from Iraqi authorities.[8] Since March 2015, a Saudi Arabia-led coalition of States supported the Yemen Government in its fight against the Houthis.[9] A few months later, Russia intervened in support of Syrian authorities against ISIS and other so-called terrorist groups.[10]

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[6] *See*, *e.g.*, Permanent Rep. of Kenya to the U.N., Letter dated Oct. 17, 2011 from the Permanent Rep. of Kenya to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/646 (Oct. 18, 2011); Joint communiqué Issued at the Conclusion of the Meeting Between the Government of Kenya and the Transitional Federal Government of Somalia, in annex to the letter dated Oct. 17, 2011 from the Permanent Rep. of Kenya to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/646 (Oct. 18, 2011); Jean-Philippe Rémy, *Le Kenya entre dans la guerre en Somalie [Kenya Enters the War in Somalia]*, LE MONDE (Mar. 14, 2012, 8:19 AM), https://www.lemonde.fr/afrique/article/2011/10/18/le-kenya-entre-dans-la-guerre-en-somalie_1589711_3212.html [https://perma.cc/NJ8X-CQRH].

[7] *See La coalition anti-jihadiste étend ses frappes en Syrie et en Irak [The Anti-Jihadist Coalition Expands Its Strikes in Syria and Iraq]*, RTBF (Sept. 27, 2014, 4:39 PM), https://www.rtbf.be/article/la-coalition-anti-jihadiste-etend-ses-frappes-en-syrie-et-en-irak-8365255 [https://perma.cc/V7CU-JGCT]; *La France frappe l'organisation Etat islamique en Irak [France Strikes the Islamic State Organization in Iraq]*, RFI (Sept. 20, 2014, 2:23 AM), https://www.rfi.fr/fr/moyen-orient/2min/20140919-armee-france-frappes-guerre-etat-islamique-jihadiste-ei-irak-coalition-etats-u [https://perma.cc/B2GL-FWRF]; Delphine Minoui, *Premiers succès de la coalition contre l'État islamique [First Successes of the Coalition Against the Islamic State]*, LE FIGARO (Nov. 11, 2015, 11:45 PM), https://www.lefigaro.fr/international/2014/11/26/01003-20141126ARTFIG00373-les-frappes-de-la-coalition-freinent-daech.php [https://perma.cc/AA2X-ASBD].

[8] Permanent Rep. of Iraq to the U.N., Letter dated June 25, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/440 (June 25, 2014); Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014) (reaffirming request made in June 25, 2014 letter).

[9] *See*, *e.g.*, ANNYSSA BELLAL, GENEVA ACAD., THE WAR REPORT: ARMED CONFLICTS IN 2017, at 144, 151–52 (2018); Hélène Sallon, *L'Arabie saoudite intervient militairement au Yémen pour contrer l'Iran [Saudi Arabia Intervenes Militarily in Yemen to Counter Iran]*, LE MONDE, https://www.lemonde.fr/proche-orient/article/2015/03/26/l-arabie-saoudite-intervient-militairement-au-yemen-pour-contrer-l-iran_4601876_3218.html [https://perma.cc/F3V7-9CMF] (last modified Aug. 19, 2019, 1:15 PM); Ali al-Mujahed & Karen DeYoung, *Saudi Arabia Launches Air Attacks in Yemen*, WASH. POST (Mar. 25, 2015, 10:20 PM), https://www.washingtonpost.com/world/middle_east/report-yemens-embattled-president-flees-stronghold-as-rebels-advance/2015/03/25/e0913ae2-d2d5-11e4-a62f-ee745911a4ff_story.html [https://perma.cc/2V29-9RHB].

[10] *See*, *e.g.*, Permanent Rep. of the Russian Federation to the U.N., Letter dated Oct. 15, 2015 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/792 (Oct. 15, 2015); *Que visaient les*

Such foreign interventions take various forms, including intelligence or logistical support, training, and territorial access.[11] For example, fighting Al-Qaeda and remnants of the Taliban regime in support of Afghan authorities, the international coalition of States (in particular, through the International Security Assistance Force, or "ISAF") and the United States benefited from significant foreign involvement: Japan offered gasoline to the coalition;[12] the Netherlands provided both the coalition and the U.S. with air-transport capacity (air-to-air refueling), naval forces, and naval aviation (Orion maritime patrol planes);[13] New Zealand sent two officers in the intelligence section of the U.S. Headquarters;[14] and Canada trained Afghan armed forces and police.[15] Additionally, the U.S. Central Intelligence Agency used detention centers in several European countries to detain Al-Qaeda and

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premières frappes russes en Syrie? [What Were the First Russian Strikes in Syria Aimed At?], LE MONDE (Oct. 1, 10:05 AM), https://www.lemonde.fr/proche-orient/article/2015/09/30/poutine-autorise-a-envoyer-des-soldats-a-l-etranger_4777870_3218.html [https://perma.cc/Z8T8-WFU2].

[11] For more discussion on these categories, see Neil Verlinden, "Are We at War?" State Support to Parties in Armed Conflict: Consequences Under *Jus in Bello*, *Jus ad Bellum* and Neutrality Law, at 117–18, 149, 163–64 (Nov. 25, 2019) (Doctor in Laws thesis, Katholieke Universiteit Leuven) (on file at the Katholieke Universiteit Leuven Law and Criminology Library).

[12] *See Chronology of Japanese Foreign Affairs in 2008*, 52 JAPANESE Y.B. INT'L L. 704, 704–05, 714 (2009); *Chronology of Japanese Foreign Affairs in 2010*, 54 JAPANESE Y.B INT'L L. 546, 546 (2011).

[13] *See The Dutch Contribution to the International Security Assistance Force (ISAF)*, NETH. MINISTRY OF DEFENCE (Nov. 1, 2009), https://english.defensie.nl/topics/historical-missions/mission-overview/2002/international-security-assistance-force-isaf/dutch-contribution [https://perma.cc/N9ZB-C5NG]; Permanent Rep. of the Netherlands to the U.N., Letter dated Dec. 6, 2001 from the Permanent Rep. of the Netherlands to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/1171 (Dec. 6, 2001).

[14] *See* Alex Conte, *New Zealand Defence Force Operations*, 2 N.Z. Y.B. INT'L L. 407, 411 (2005).

[15] *See Canada's Military Mission in Afghanistan*, CBC NEWS (May 10, 2011), https://www.cbc.ca/news/canada/canada-s-military-mission-in-afghanistan-1.777386 [https://perma.cc/W6YG-8BPF]; *Canadian Armed Forces in Afghanistan — Mission Timeline*, GOV'T OF CAN., https://www.canada.ca/en/department-national-defence/services/operations/military-operations/recently-completed/canadian-armed-forces-legacy-afghanistan/mission-timeline.html [https://perma.cc/NPP8-WVGL] (last modified Apr. 9, 2014); Ian Austen, *Canada to End Combat Role in Afghanistan at End of 2011*, N.Y. TIMES (Nov. 26, 2010), https://www.nytimes.com/2010/11/17/world/americas/17canada.html [https://perma.cc/QCG2-5RTF].

Taliban members,[16] while New Zealand[17] and Australia,[18] acting within ISAF, detained members of adverse armed groups.

The situation in Mali is also illustrative. France undertook many actions, such as detention,[19] to support Malian authorities against several armed groups, including Al-Qaeda in the Lands of the Islamic Maghrebin ("AQIM"). In its military campaign in Mali, the French armed forces

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[16] *See* DICK MARTY, EUR. PARL. ASS., SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT 4, AS/JUR (2007) 36 (June 7, 2007), https://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf [https://perma.cc/UXU8-2MCY]; Jean-Pierre Stroobants, *Tortures de la CIA: la complicité des pays européens [Tortures of the CIA: The Complicity of European States]*, LE MONDE (Aug. 19, 2019, 2:03 PM), https://www.lemonde.fr/europe/article/2014/12/10/tortures-de-la-cia-la-complicite-des-pays-europeens_4537835_3214.html [https://perma.cc/9MJW-MMXM]; *see also* Al-Nashiri v. Poland, App. No. 28761/11, ¶¶ 47–48, 51 (Feb. 16, 2015), https://hudoc.echr.coe.int/eng?i=001-146044 [https://perma.cc/HRH5-C4GJ]; Husayn v. Poland, App. No. 7511/13, ¶¶ 76–77 (Feb. 16, 2015), https://hudoc.echr.coe.int/eng?i= 001-146047 [https://perma.cc/K8WM-MWX5]; Al-Nashiri v. Romania, App. No. 33234/12, ¶¶ 117, 119, 121 (Oct. 8, 2018), https://hudoc.echr.coe.int/eng?i=001-183685 [https://perma.cc/6UDR-ACM6]; Abu Zubaydah v. Lithuania, App. No. 46454/11, ¶ 20 (Oct. 8, 2018), https://hudoc.echr.coe.int/eng?i=001-183687 [https://perma.cc/2DK2-GL8Z].

[17] *See* N.Z. DEFENCE FORCE, NEW ZEALAND DEFENCE FORCE COVER SHEET: NZDF OPERATIONS — AFGHANISTAN ¶ 14 (Aug. 31, 2011), https://operationburnham.inquiry.govt.nz/assets/IOB-Files/11-NTM-NZDF-Operations-Afghanistan.pdf [https://perma.cc/G5RA-P6JP]; N.Z. DEFENCE FORCE, NEW ZEALAND DEFENCE FORCE COVER SHEET: DETAINEE TREATMENT — AFGHANISTAN ¶ 11 (Oct. 20, 2011), https://operationburnham.inquiry.govt.nz/assets/IOB-Files/13-NTM-Detainee-Treatment-Afghanistan.pdf [https://perma.cc/EL53-Q6TN]; LISA FERRIS, N.Z. DEFENCE FORCE, MODULE 2 DAY 2 — DETENTION IN THE AFGHANISTAN THEATRE ¶ 13 (May 23, 2019), https://operationburnham.inquiry.govt.nz/assets/IOB-Files/23-May-2019-Module-2-Presentation-NZDF-Detention-Brig-Lisa-Ferris.pdf [https://perma.cc/T3RH-PGU9] (presenting information in public hearing made by Director of Defence Legal Services of New Zealand Defence Force).

[18] *See* Paul A. Cronan, *Australian Detention Operations in Afghanistan: Practices and Challenges*, *in* DETENTION OF NON-STATE ACTORS ENGAGED IN HOSTILITIES — THE FUTURE LAW 137, 137–38 (Gregory Rose & Bruce Oswald eds., 2016); Tom Hyland, *Torture Fear for POWs Captured by Australians*, AGE (Dec. 2, 2007, 11:00 AM), https://www.theage.com.au/national/torture-fear-for-pows-captured-by-australians-20071202-ge6fnf.html [https://perma.cc/RX9Q-LU6G].

[19] *See* Nathalie Guibert, *La France annonce de grosses opérations anti-djihadistes au Mali [France Announces Major Anti-Jihadist Operations in Mali]*, LE MONDE (Nov. 3, 2020, 1:50 PM), https://www.lemonde.fr/afrique/article/2020/11/03/la-france-annonce-de-grosses-operations-anti-djihadistes-au-mali_6058261_3212.html [https://perma.cc/3YC3-8FBK]; *Mali: une cinquantaine de djihadistes abattus par l'armée française [Mali: Fifty Jihadists Killed by French Army]*, LE POINT (Nov. 3, 2020, 8:43 AM), https://www.lepoint.fr/monde/mali-une-cinquantaine-de-djihadistes-abattus-par-l-armee-francaise-02-11-2020-2399194_24.php [https://perma.cc/JM5A-VLTD].

received international assistance: the United Kingdom provided intelligence support,[20] the U.S. and Germany offered air-to-air refueling,[21] and Belgium supplied C-130 military transport aircraft, medical helicopters, and force protection units.[22]

Examples of foreign assistance are not limited to Afghanistan and Mali. For instance, the U.S. and the United Arab Emirates allegedly detained members of Al-Qaeda in the Arabian Peninsula ("AQAP") in support of Yemen.[23] Additionally, Germany did not prevent the U.S. from using one of the U.S. military bases, the Ramstein airbase, located in German territory for drone operations in Yemen.[24] In the same line, Turkey authorized the U.S. to use one of its military bases to fight ISIS in Syria.[25]

This common practice evidences an urgent need to clarify, or determine, if and how International Humanitarian Law ("IHL") regulates foreign interventions in favor of a belligerent party to a specific NIAC. This need for

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[20] *See* Jacques Hartmann, Sangeeta Shah & Colin Warbrick, *United Kingdom Materials on International Law 2013*, 84 BRIT. Y.B. INT'L L. 526, 562, 801–04 (2014).

[21] *See* Stephanie Schlickewei, *The Deployment of the German Armed Forces to the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)*, 58 GERMAN Y.B. INT'L L. 443, 453, 456 (2015); John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 107 AM. J. INT'L L. 432, 468 (2013).

[22] *See* Eric David, *La pratique du pouvoir exécutif et le contrôle des chambres législatives en matière de droit international (2011-2014) [The Practice of Executive Power and the Control of Legislative Chambers in International Law (2011-2014)]*, 47 REVUE BELGE DE DROIT INTERNATIONAL 549, 692 (2014); Michèle Poulain, *Chronologie des faits internationaux d'intérêt juridique [Chronology of International Facts of Judicial Interest]*, 59 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 623, 641 (2013).

[23] *See* Oona A. Hathaway et al., *U.S. Federal Statute on Aiding and Abetting: War Crimes in Yemen — Part II*, JUST SEC. (Apr. 3, 2018), https://www.justsecurity.org/54472/u-s-federal-statute-aiding-abetting-war-crimes-yemen-part-ii/; Oona A. Hathaway et al., *State Responsibility for U.S. Support of the Saudi-Led Coalition in Yemen*, JUST SEC. (Apr. 25, 2018), https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/ [https://perma.cc/S28V-6QMQ].

[24] *See* VG Köln, May 27, 2015, 3 K 5625/14 (Ger.), https://www.zvr-online.com/archiv/2015/ausgabe-5/2015-juli/vg-koeln-us-drohnenangriffe-bleiben-erlaubt [hereinafter Köln Drone Judgment] (administrative law case holding "US-Drohnenangriffe bleiben erlaubt" or "U.S. Drone Attacks Remain Permitted"); Kate Connolly, *Court Dismisses Claim of German Complicity in Yemeni Drone Killings*, GUARDIAN (May 27, 2015, 11:57 AM), https://www.theguardian.com/world/2015/may/27/court-dismisses-yemeni-claim-german-complicity-drone-killings [https://perma.cc/K5L6-55DT].

[25] *See* Kristina Daugirdas & Julian D. Mortenson eds., *Contemporary Practice of the United States Relating to International Law*, 109 AM. J. INT'L L. 874, 885 (2015); Ceylan Yeginsu & Helene Cooper, *U.S. Jets to Use Turkish Bases in War on ISIS*, N.Y. TIMES (July 23, 2015), https://www.nytimes.com/2015/07/24/world/europe/turkey-isis-us-airstrikes-syria.html [https://perma.cc/H4E4-4S49]; *U.S. Relations with Turkey (Türkiye) — Bilateral Relations Fact Sheet*, U.S. DEP'T STATE (Jan. 9, 2023), https://www.state.gov/u-s-relations-with-turkey/ [https://perma.cc/BAS3-VC7Z].

a clear IHL regulation is strongly reinforced by the fact that the presence of foreign troops is said to increase the number of victims[26] and protract armed conflicts.[27]

Among others, one of the challenges for IHL relates to establishing when the intervening actor becomes a belligerent party to a NIAC and, therefore, at what point this actor must respect the law of NIAC. This article deliberately does not take into account situations where foreign interventions could trigger an international armed conflict ("IAC"), i.e., when a State or an international organization controls or joins an OAG fighting against another State or international organization.[28] Instead, this article focuses on the following questions in regard to belligerent status: when an intervening actor supports a belligerent party to an existing NIAC, which NIAC (i.e., a separate and distinct NIAC or the same existing NIAC) can this actor become a belligerent party to? And, under what conditions does it become a belligerent party and thus must abide by IHL?

This challenge of the intervening actor's belligerent status has important legal implications, not only for the actor itself, but also for its opponents and victims. First, this question leads to specify this actor's liability under International Law. If the intervening actor becomes a belligerent party to a NIAC, it bears responsibility under IHL[29] and, when applicable, under International Human Rights Law ("IHRL"). If the intervening actor does not become a belligerent party, it will not bear any responsibility under IHL,[30]

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[26] *See*, *e.g.*, Int'l Comm. of the Red Cross [ICRC], Conference of Gov't Experts on the Reaffirmation and Dev. of Int'l Humanitarian L. Applicable in Armed Conflicts (First Session), Part V: Protection of Victims of Non-International Armed Conflicts, CE/5b, at 18 (Jan. 1971), https://web.archive.org/web/20080327205610/https://www.loc.gov/rr/frd/Military_Law/pdf/RC-conference_Vol-5.pdf [https://perma.cc/EP4Q-LKVH]; Bethany Lacina, *Explaining the Severity of Civil Wars*, 50 J. CONFLICT RESOL. 276, 286–87 (2006).

[27] *See*, *e.g.*, Ibrahim A. Elbadawi & Nicholas Sambanis, *External Interventions and the Duration of Civil Wars* 50 (World Bank Dev. Rsch. Grp., Working Paper No. WPS 2433, 2000), http://documents.worldbank.org/curated/en/760801468766521682/External-interventions-and-the-duration-of-civil-wars [https://perma.cc/5LMR-J36B]; Patrick M. Regan, *Third-Party Interventions and the Duration of Intrastate Conflicts*, 46 J. CONFLICT RESOL. 55, 70–72 (2002); Dylan Balch-Lindsay & Andrew J. Enterline, *Killing Time: The World Politics of Civil War Duration, 1820-1992*, 44 INT'L STUD. Q. 615, 632–33, 636–38 (2000); Dylan Balch-Lindsay, Andrew J. Enterline & Kyle A. Joyce, *Third-Party Intervention and the Civil War Process*, 45 J. PEACE RSCH. 345, 359 (2008); *see also* ICRC, *supra* note 26, ¶ 290.

[28] Professor Jérôme de Hemptinne studied the question of the support provided by a State to an OAG fighting against another State. *See* JÉROME DE HEMPTINNE, LES CONFLITS ARMÉS EN MUTATION ¶ 169 (2019).

[29] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[30] This does not mean that the intervening actor's representatives would never hold any obligations under IHL *as individuals*. It is important to distinguish IHL applicability to

but still would be responsible under IHRL when this branch of International Law is applicable. Second, this question entails identifying what the intervening actor's opponents can do to stop or defeat the intervening actor, that is, whether the opponents are allowed to target the intervening actor's armed forces or its military equipment at all times. Third, the question of the intervening actor's belligerent status helps to define what protection victims may benefit from under International Law.

As significant as the question of the intervening actor's belligerent status may be, it is not regulated under the existing law of NIAC, as Part II of this article will demonstrate. However, State practice and the case law of the International Criminal Court ("ICC") (as well as scholarly works) suggest that the intervening actor becomes a belligerent party to the *same* pre-existing NIAC rather than to a distinct NIAC. Albeit, neither this State practice nor this case law provide the conditions for the intervening actor to become such a party.[31]

Assuming the law of NIAC will accept this suggestion from practice of a single NIAC, this article helps to determine under the *lex ferenda* the conditions for the intervening actor to become a party to an existing NIAC. More specifically, this article offers two contributions: it proposes a method of analogical reasoning to establish these conditions, and it discards the analogy with co-belligerency which is suggested by U.S. practice. Thus, Part III of this article will briefly present the analogical method and introduce the analogy which emerges from U.S. practice, i.e., the analogy with co-belligerency often associated with the Law of Neutrality. Part IV will analyze and reject this analogy. Part V will draw some general conclusions.

II. THE PROBLEM: A SILENCE IN THE LAW OF NIAC

NIAC treaty rules relating to IHL's scope of application are limited to common Article 3 of Geneva Conventions ("CA 3")[32] and Articles 1 and 2 of Additional Protocol II ("AP II") relating to the protection of victims in NIACs.[33] An interpretation of these provisions, through (A) primary and (B) supplementary means, shows that none clearly deals with foreign

individuals and to the intervening actor as an entity.

[31] See *infra* Part II.B.2–3.

[32] GC IV, *supra* note 29, art. 3; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 1–2, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

interventions in support of a belligerent party to a NIAC.

A. Primary Means of Interpretation

In accordance with the provisions of the Vienna Convention on the Law of Treaties, the analysis will first consider (1) the ordinary meaning of the terms of the relevant provisions (2) in their context.[34] The context includes (but is not limited to) the other provisions of the Conventions and the Additional Protocol II.[35] Together with the context, subsequent State practice in the application of CA 3 and Articles 1 and 2 of AP II will be considered to verify whether this practice shows any agreement between all State Parties about the proper interpretation for the relevant provisions.[36]

1. Wording of Relevant Provisions

The wording of CA 3 considers the emergence of a new NIAC, rather than the evolution of an existing NIAC, for instance through the involvement of an intervening actor. This provision applies "in the case of armed conflict not of an international character *occurring* in the territory of one of the High Contracting Parties."[37] The verb "occur" means that a NIAC "happens" or "comes into existence" in a State Party's territory.[38] In the French version (equally authentic to the English version),[39] CA 3 applies to armed conflicts "ne présentant pas un caractère international *et surgissant sur* le territoire de l'une des Hautes Parties contractantes."[40] The verb "surgir" refers to a NIAC that "suddenly appears" or "is born unexpectedly" in a State Party's territory.[41] Thus, both the English and the French versions appear to support that CA 3 governs situations triggering a *new* armed conflict between *new* belligerent parties.

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[34] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[35] *Id*. ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context . . . ."); *id*. art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, *in addition to the text*, including its preamble and annexes . . . .") (emphasis added).

[36] *Id*. art. 31(3)(b).

[37] GC I, *supra* note 32, art. 3; GC II, *supra* note 32, art. 3; GC III, *supra* note 32, art. 3; GC IV, *supra* note 29, art. 3 (emphasis added).

[38] *See Occur*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/occur [https://perma.cc/9GR8-SB7F].

[39] GC I, *supra* note 32, art. 55; GC II, *supra* note 32, art. 54; GC III, *supra* note 32, art. 133; GC IV, *supra* note 29, art. 150.

[40] GC I, *supra* note 32, art. 3; GC II, *supra* note 32, art. 3; GC III, *supra* note 32, art. 3; GC IV, *supra* note 29, art. 3 (emphasis added).

[41] *See Surgir,* TRÉSOR DE LA LANGUE FRANÇAISE INFORMATISÉ [TLFI], http://atilf.atilf.fr/ (click "Entrer dans le TLFi"; then enter "surgir" into search bar; then click "Valider 1") (author translation).

Furthermore, Article 1 of AP II limits the second Protocol's scope of application to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces *or other organized armed groups* which, under responsible command, exercise such control over a part of its territory . . . ."[42] Although an AP II armed conflict can oppose a State to *a single* OAG, the provision uses the plural form and accepts that *several OAGs* can be parties to the *same* armed conflict. Yet, it does not specify whether it only covers cooperation between OAGs from the start of a new NIAC, or also encompasses circumstances where an intervening OAG later supports the military action of another OAG already party to a NIAC. Additionally, Article 1 of AP II clearly does not allude to other types of foreign interventions falling within the ambit of this study, such as States' and international organizations' interventions in support of the territorial State and against the adverse OAG.

As far as Article 2 of AP II is concerned, it does not give further guidance on supportive foreign interventions in a NIAC. Rather, it deals with individuals who can benefit from the Protocol, and does not define actors that must abide by it.

2. Context of Relevant Provisions and Subsequent State Practice

All the other provisions of the Geneva Conventions and of AP II confirm that States did not contemplate foreign interventions in support of a party to a NIAC. No provision touches upon these circumstances except for Article 3(2) of AP II. This article makes clear that "[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."[43] While this provision echoes a fear of State intervention in support of a non-State enemy—which would trigger an IAC—it does not regulate as such any kind of intervention, especially those in support of a belligerent State, which would not provoke the emergence of an IAC.

When it comes to subsequent State practice, it does not show an agreement between State Parties as to the correct interpretation of CA 3 and Article 1 of AP II for supportive foreign interventions in a NIAC.[44]

In sum, the meaning and interpretation of CA 3 and Article 1 of AP II remain obscure with respect to supportive foreign interventions in a NIAC.[45] Accordingly, this article's analysis can move further and establish whether

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[42] AP II, *supra* note 33, art. 1 (emphasis added).

[43] *Id*. art. 3(2).

[44] *See* Vienna Convention, *supra* note 34, art. 31(3)(b).

[45] *See id*. art. 32(a).

supplementary means of interpretation offer more clarity on the issue.[46]

B. Supplementary Means of Interpretation

Unfortunately, supplementary means of interpretation do not help to clarify with certainty the meaning of CA 3 and Article 1 of AP II. Nevertheless, they provide useful information; thus, it is worth examining (1) the *travaux préparatoires*, (2) the practice of some States, and (3) ICC case law.

1. *Travaux Préparatoires*

CA 3 and AP II *travaux préparatoires* do not expressly mention foreign interventions in support of a belligerent party to a NIAC—which would not trigger an IAC. To the best of this author's knowledge, CA 3 drafters did not discuss any supportive foreign intervention in a NIAC. In addition, as previously mentioned, AP II drafters were mostly concerned with foreign interventions in support of their non-State enemy and did not express any opinions relating to foreign interventions on the side of the State. Instead, discussions only evidence a focus on non-favorable interventions. For instance, at the twenty-second session of Committee I, the representative of the German Democratic Republic underlined that "Protocol II as at present worded was dangerous, for it was aimed at the internationalization of internal conflicts, and would thus encourage interference in the domestic affairs of States."[47] At the twenty-fourth session of the same Committee, the Yugoslav representative explained that "there were some provisions which he would like to see worded somewhat differently, since in their present form they could be used as a pretext for foreign interference in an internal conflict."[48] During the twenty-ninth plenary meeting of the Conference, the Indian representative added that "any international instrument designed to regulate non-international conflicts might in actual application impede the settlement of the conflict and lead to external interference."[49]

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[46] *See id.* art. 32.

[47] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, at 207, ¶ 29, CDDH/I/SR.22 (Vol. VIII) (1974-1977) https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_08.pdf [https://perma.cc/5NU6-V4U6].

[48] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, at 230, ¶ 6, CDDH/I/SR.24 (Vol. VIII) (1974-1977) https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_08.pdf [https://perma.cc/5NU6-V4U6].

[49] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, at 345, ¶ 50, CDDH/I/SR.29 (Vol. V) (1974-1977) https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_05.pdf [https://perma.cc/UD53-AVB3].

2. Practice of Some States

Several States recently took a position—albeit intuitively rather than deliberately—on supportive foreign interventions in a NIAC. Their practice does not expressly cite the CA 3, nor AP II, but recognizes the existence of a NIAC and, therefore, can be implicitly linked to either CA 3 or the combination of both CA 3 and AP II (depending on AP II applicability to the situation). For example, in *R. v Gul*,[50] the British Government submitted a certificate that seems to accept that Great Britain participated in the Iraqi NIAC (from June 2004) and in the Afghan NIAC (from December 2001):

> 1. Her Majesty's Government takes the view that the armed conflict in Iraq after 28 June 2004 *involving UK armed forces* as part of a United Nations Security Council-authorised multi-national force, then, from 1 January 2009, as specifically authorised by the Government of Iraq, constituted a *non-international armed conflict between the Government of Iraq and various insurgent armed forces*.
>
> 2. Her Majesty's Government takes the view that the armed conflict in Afghanistan *involving UK armed forces* as part of the United Nations Security Council-authorised International Security Assistance Force since its establishment in December 2001 constitutes a *non-international armed conflict between the Government of Afghanistan and various insurgent armed forces*.[51]

Admittedly, British armed forces and Iraqi or Afghan armed forces became *simultaneously* involved in NIACs respectively in June 2004 and December 2001. Before these dates, the armed conflicts in Iraq and Afghanistan were both of an international nature: the first between Saddam Hussein's regime and the U.S.-led coalition, the second between the international coalition of States (notably, through ISAF) and the Taliban regime (the official authorities of the Afghan State at the time). Regarding the Iraqi situation, the U.S.-led coalition handed over sovereignty to an interim Iraqi government in June 2004.[52] Therefore, the Iraqi armed conflict evolved from an IAC to a NIAC between, on the one hand, the U.S.-led coalition and the new Iraqi authorities and, on the other hand, the armed forces remaining loyal to then-defeated Saddam Hussein. Regarding the

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[50] R v. Gul [2012] EWCA Crim 280, [2012] 1 WLR 3432 (Eng.).

[51] *Id*. [20] (emphasis added); *see also* Jacques Hartmann, Sangeeta Shah & Colin Warbrick, *United Kingdom Materials on International Law 2012*, 83 BRITISH Y. INT'L L. 298, 663–64 (2013).

[52] *See US Hands Over Power in Iraq*, GUARDIAN (June 28, 2004, 4:35 PM), https://www.theguardian.com/world/2004/jun/28/iraq.iraq1 [https://perma.cc/9AKA-A3UN]; Dexter Filkins, *Transition in Iraq: The Turnover; U.S. Transfers Power to Iraq 2 Days Early*, N.Y. TIMES (June 29, 2004), https://www.nytimes.com/2004/06/29/world/transition-in-iraq-the-turnover-us-transfers-power-to-iraq-2-days-early.html [https://perma.cc/GG4Z-VCDH].

Afghan situation, the Bonn Agreement was signed in December 2001 and led to the installation of an interim Afghan government.[53] Thus, the Afghan conflict similarly evolved from an IAC to a NIAC between, on one side, the international coalition of States and the new Afghan government and, on the other side, remnants of the Taliban regime. Consequently, Great Britain could not—as such—intervene in a *pre-existing* NIAC between Iraq and insurgent forces or between Afghanistan and remnants of the Taliban. There were no pre-existing NIACs in Iraq and Afghanistan in which Great Britain could have taken part, but only IACs. As soon as the Iraqi and the Afghan IACs turned into NIACs, Great Britain became a party to NIACs, alongside and at the same time as Iraq and Afghanistan.

Nevertheless, and interestingly, the British government's certificate suggests that Great Britain envisioned the existence of *one single NIAC* between, on the one hand, British and Iraqi or Afghan forces and, on the other hand, insurgent forces in Iraq or remnants of the Taliban in Afghanistan. Indeed, it underlines that NIACs between respectively the government of Iraq and the government of Afghanistan and "various insurgent armed forces" "involv[ed] U.K. armed forces." In its ordinary meaning, "involve" refers to "engage as a participant" or "have within or part of itself."[54]

In Germany, in a case dealing with the use of armed drones by the U.S. in Yemen, the Administrative Court of Cologne held that the U.S. took part in the NIAC between the Yemeni Government and AQAP—but did not think that Germany was required to prevent U.S. drone operations in Yemen launched from German territory (U.S. Ramstein base).[55] Although overruling this decision by concluding that Germany was under an obligation to check the compliance of U.S. drone operations with international law, the High Administrative Court of North Rhine-Westphalia agreed with the Administrative Court's finding on U.S. participation in the preexisting Yemeni armed conflict.[56] This High Administrative Court also concluded

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[53] Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001), https://peacemaker.un.org/sites/peacemaker.un.org/files/AF_011205_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf [https://perma.cc/5SKD-MLPM]; Steven Erlanger, *Afghans Negotiating Makeup of New, Interim Government*, N.Y. TIMES (Dec. 4, 2001), https://www.nytimes.com/2001/12/04/international/afghans-negotiating-makeup-of-new-interim-government.html [https://perma.cc/TH83-WTUP].

[54] *See Involve*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/involve [https://perma.cc/XT7K-PVPY].

[55] Köln Drone Judgment, *supra* note 24, ¶ 59 ("It also appears reasonable to assume with the defendant that the United States is supporting the Yemeni government *in this conflict* through the drone operations against AQAP. This is because the drone strikes are conducted with the consent and in coordination with the Yemeni government and are directed against a common adversary.") (emphasis added) (author translation).

[56] OVG Nordrhein-Westfalen [Higher Administrative Court for the State of North Rhine-

that the U.S. participated in a distinct NIAC between the Government of Yemen and ISIS.[57]

The Danish Manual of Military Law includes a section on "transnational armed conflicts." This section affirms that "[a] different type of NIAC is the so-called 'transnational armed conflict'" and that "[t]he transnational character of these conflicts consists of the *participation of one or more States in a NIAC* outside their own territories."[58] The Danish Manual provides the example of a transnational NIAC that "arise[s] when a State requests assistance to fight an OAG within its own territory."[59] Further, like the British certificate, the Danish Manual embraces the position that Danish armed forces "took part" in the NIACs in Iraq and Afghanistan.[60] Concerning the Afghan conflict, it further indicates that "once new leadership had been established in Afghanistan . . . , the character of the conflict transformed into a transnational NIAC because the coalition then *forged a common front* with the State of Afghanistan against the Taliban and Al Qaeda."[61]

In France, declarations of the former Director for Legal Affairs at the Department of Defense support that the French State intervened in both

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Westphalia], Mar. 19, 2019, 4 A 1361/15, ¶¶ 441, 454, 458 (Ger.) [hereinafter North Rhine-Westphalia Appeal], https://openjur.de/u/2170527.html [https://perma.cc/3ZQR-9DYH] ("The overall picture that emerges from these sources is that of *an ongoing non-international armed conflict between the U.S.-backed Yemeni government and AQAP*.") (emphasis added) (author translation). For an unofficial English translation, see https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Judgment_Higher_Administrative_Court_NRW_Faisal_bin_Ali_Jaber.pdf [https://perma.cc/TA6X-4XNZ]. On this case, see also Jürgen Bering, *Legal Explainer: German Court Reins in Support for U.S. Drone Strikes*, JUST SEC. (Mar. 22, 2019), https://www.justsecurity.org/63336/legal-explainer-german-court-reins-in-support-for-u-s-drone-strikes/ [https://perma.cc/CT7J-66FB]; Emma DiNapoli, *German Courts Weigh Legal Responsibility for U.S. Drone Strikes*, LAWFARE (Apr. 4, 2019, 9:18 AM), https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes [https://perma.cc/5LTT-FVZU]; Press Release, Higher Administrative Court for the State of North Rhine-Westphalia, US Drone Operations in Yemen: Plaintiffs Achieve Partial Success (Mar. 19, 2019), https://www.ecchr.eu/fileadmin/user_upload/English_translation_of_Court_s_press_release_in_bin_Ali_Jaber_v_Germany_19_March_2019.pdf [https://perma.cc/C3EG-EC65] (unofficial translation).

[57] North Rhine-Westphalia Appeal, *supra* note 56, ¶ 460.

[58] DANISH MINISTRY DEF., MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 47 (2016) (emphasis added), https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/DK-Military-Manual-International-Operations.pdf [https://perma.cc/CU8R-VKG6]; *see also id*. at 35 ("If, on the other hand, it is an invitation to assist a State in its fights against insurgent groups, deployment will be made to a non-international armed conflict (NIAC) of a transnational character. . . .").

[59] *Id*. at 47.

[60] *Id*. at 84 ("Since then, Denmark has . . . taken part in transnational NIACs in Iraq and Afghanistan").

[61] *Id*. at 47, example 2.3 (emphasis added).

Malian and Iraqi NIACs. These declarations analyze the existing armed interactions between, on the one hand, Malian and Iraqi armed forces and, on the other hand, terrorist groups such AQAP and ISIS, to determine the law applicable to French armed forces. In other words, French intervention is not considered separately from these interactions.[62]

The U.S. Department of Defense Law of War Manual encompasses a section that deals with "States' Support to Other States in Hostilities Against Non-State Armed Groups."[63] This section establishes that "[i]nternational law does not prohibit States from assisting other States *in their armed conflicts* against non-State armed groups" and adds that "[t]o the extent those States intend to conduct hostilities or actually do so, they may incur obligations under the law of war."[64] Accordingly, the intervening State participates in a pre-existing conflict between the supported State and an OAG. Further, the U.S. theory on "associated forces" to Al-Qaeda—presented in further details in Part III[65]—asserts that the associated force (i.e., an OAG) participates and becomes a party to the NIAC between the U.S. itself and Al-Qaeda, which benefits from the OAG's support.[66]

3. ICC Case Law

ICC case law also enlightens CA 3 interpretation. Indeed, international criminal tribunals, including the ICC, rely on the CA 3 conception of NIAC to define the notion of NIAC under customary international law. Thus, their case law is enlightening not only for identifying customary IHL,[67] but also

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[62] Claire Landais, *Entre l'application du droit et les hostilités, cadre légal et règles d'engagement*, *in* THE DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS: CHALLENGES FOR IHL? 131, 132, 136 (Carl Marchand ed., 2015), https://iihl.org/wp-content/uploads/2019/03/Distinction-IAC-NIAC.pdf [https://perma.cc/YF24-X5WK]; Claire Landais, *Les défis juridiques que posent les actions extraterritoriales contre les groupes armés [Legal Challenges in Fighting Armed Groups Extra-Territorially]*, *in* TERRORISME, CONTRE-TERRORISME ET DROIT INTERNATIONAL HUMANITAIRE [TERRORISM, COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW] 75, 75–78 (2016), https://www.coleurope.eu/sites/default/files/uploads/page/collegium_47_v7.pdf [https://perma.cc/52GY-5LUD].

[63] U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 17.18.3 (2016) [hereinafter U.S. MANUAL], https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190 [https://perma.cc/4B2V-9ZBJ].

[64] *Id.*

[65] *See infra* Part III.B.

[66] *See generally* WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 4–7 (Dec. 2016) [hereinafter REPORT ON THE LEGAL AND POLICY FRAMEWORKS], https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf [https://perma.cc/E94P-PJFZ].

[67] *See* Marco Sassòli, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES,

for interpreting CA 3.[68] Two ICC judgments are worth mentioning.

First, in the 2011 *Mbarushimana* judgment on the confirmation of charges,[69] the ICC assessed the MONUC and Rwandan support to the Congolese authorities in their fight against the FDLR. This decision seems to approve the existence of one single armed conflict between, on the one hand, the Democratic Republic of Congo and Rwanda or the MONUC and, on the other hand, the FDLR. Indeed, the ICC stated the following:

> 101. The Chamber finds substantial grounds to believe that the presence and involvement of Rwandan troops in DRC territory during *Umoja Wetu* was aimed at *assisting and supporting the FARDC in its efforts aimed at neutralising the FDLR*. It was a *joint military operation*, whereby the presence of the Rwandan forces was, at all times, *with the consent of the authorities of the DRC*. . . .
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> 106. Based on the evidence discussed above, as well as on the fact that the military wing of the FDLR was able *to oppose the FARDC-RDF coalition (during Umoja Wetu) and then the FARDC-MONUC coalition (during Kimia II) throughout 2009*, the Chamber is satisfied that there are substantial grounds to believe that the FDLR as an armed group possessed the degree of organisation required under Article 8(2)(f) of the Statute.
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> 107. Accordingly, the Chamber finds that there are substantial grounds to believe that, from at least 20 January 2009 until at least 31 December 2009, an armed conflict not of an international character took place in the North and South Kivus *between the DRC government forces, supported at times by Rwandese or MONUC forces, on the one side, and at least one organised armed group (the FDLR), on the other*.[70]

The second judgment, the 2016 *Bemba* judgment pursuant to Article 74 of the Rome Statute,[71] concerns MLC support to the Central African Republic in its fight against rebels led by General Bozizé. The ICC position in this judgment appears less straightforward than in the *Mbarushimana* judgment.

At first, like in the *Mbarushimana* judgment, the ICC seems to favor the

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[68] Yet, under customary international law, NIACs in the meaning of CA 3 are regulated not only by CA 3 customary rules, but also by other customary rules, inspired by AP II or the law of IAC.

[69] Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_22538.PDF [https://perma.cc/4G4A-FXJH].

[70] *Id.* ¶¶ 101, 106–07 (emphasis partially added) (footnotes omitted).

[71] Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [https://perma.cc/7WVG-EY4D].

existence of one single NIAC between, on one side, the supporting actor (the MLC) and the supported belligerent party (Central African Republic) and, on the other side, the adverse belligerent party (rebels under Bozizé). Indeed, the court underscored that "the mere fact of involvement of different armed groups does not mean that they are engaged in separate armed conflicts."[72] It then continued:

> The Accused is charged with bearing criminal responsibility for the commission of war crimes in the context of an armed conflict not of an international character *between government authorities of the CAR, supported by the MLC, amongst others, on the one hand, and the organized armed group lead* [sic] *by General Bozizé*, *on the other hand*.[73]

Nevertheless, the ICC's response to an inquiry from the defense team is surprising. The Bemba defense argued that the court had to assess the armed interactions as separate conflicts: (i) between the MLC and the OAG led by Bozizé, and (ii) between the Central African armed forces and Bozizé's OAG. The ICC answered as follows:

> [T]he conflict was between the forces supporting President Patassé and General Bozizé's rebels. The MLC, with a limited number of CAR forces frequently accompanying them, operated independently of other armed forces in the field. However, *it is irrelevant that*, for example, before the arrival of the MLC troops in the CAR, forces other than the MLC were engaged, in support of President Patassé, in hostilities with General Bozizé's rebels.[74]

The ICC thus stated that armed interactions preceding the MLC intervention on the Central African territory should not be considered in the analysis. It is debatable whether these sentences bring any useful insight on the questions under examination. Yet, even though the court appeared to have accepted at first the existence of one single NIAC (which would make previous armed confrontations relevant), it then seemed to agree with the defense team that pre-existing hostilities and subsequent MLC intervention should be examined separately as two different belligerent relationships. For this reason, some authors suggest caution in determining the ICC's position.[75]

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[72] *Id.* ¶ 129.

[73] *Id.* ¶ 131 (emphasis added) (footnote omitted).

[74] *Id.* ¶ 652 (emphasis added) (footnote omitted).

[75] *See*, *e.g.*, NOAM ZAMIR, CLASSIFICATION OF CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW: THE LEGAL IMPACT OF FOREIGN INTERVENTION IN CIVIL WARS 89 (2017); Raphaël van Steenberghe, *Les interventions étrangères récentes contre le terrorisme international — Seconde partie: Droit applicable (Jus in Bello)*, 63 ANNUAIRE FRANÇAIS DE DROIT INT'L 37, 49 & n.86 (2017).

In conclusion of this section (Part B), these three supplementary means of interpretation do not offer clear understanding of CA 3 and AP II regarding supportive foreign interventions in a NIAC. Drafters of relevant treaties did not discuss this issue during the preparatory works. While State practice remains too sparse and timid, ICC case law appears ambiguous. Therefore, conventional Law of NIAC is essentially silent on the questions under examination. Similarly, with respect to customary international law, customary NIAC rules do not solve them because of the lack of general and constant State practice.

Nevertheless, despite negative observations, the analysis still allows two positive remarks. First, the silence in the Law of NIAC is not deliberate. There is no opposition to any regulation of such supportive foreign interventions in a NIAC. CA 3 and AP II drafters did not express such an opposition. Additionally, no State practice is opposed to and, thus, no customary rule prohibits such a regulation. Second, State practice and ICC case law show a clear trend: the general and shared intuition reckons that the intervening actor—whether it be a State, an international organization, or an OAG—takes part in the *same* pre-existing NIAC between the supported belligerent party and the adverse belligerent party. In other words, there is one single NIAC between, on one side, the intervening actor and the supported belligerent party and, on the other side, the adverse belligerent party. Thus, there is a single NIAC rather than multiple NIACs for each foreign intervention. No State practice rejected this approach, nor defended a different one.

In sum, there is a non-deliberate silence, i.e., a lacuna, in the Law of NIAC, but a current trend in State practice and ICC case law favors the intervening actor's participation to the *same* pre-existing NIAC. If the Law of NIAC is indeed to evolve in this direction, one piece of information remains missing: at what conditions does the intervening actor becomes a party to the pre-existing NIAC? State practice—except for U.S. practice[76]—and ICC case law do not determine these conditions. Therefore, Parts III and IV of this article contribute to define what these conditions could be. As indicated previously, Part III explains the method of reasoning whereas Part IV explores a first possible solution based on U.S. practice, which does not convince this author.

III. THE METHOD: AN ANALOGICAL REASONING

Before analyzing a first possible solution to establishing the conditions for the intervening actor's belligerent status, it is crucial to (A) briefly introduce the analogical reasoning utilized and (B) justify the choice of source for the

[76] *See infra* Part III.B.

present developments.

A. Brief Introduction to Analogical Reasoning

Analogies can help uncover the conditions that could govern the intervening actor's belligerent status. Discussed since antiquity,[77] they are a common method of reasoning in everyday and professional discourses,[78] including in International Law[79] and, more specifically, in IHL. The Geneva Conventions occasionally rely on analogical arguments.[80] Moreover, military State practices—such as American,[81] British,[82] and Australian[83]—sometimes also favor analogies. Further, legal scholarship and case law now extensively use such a method of reasoning. If scholars frequently used it since the adoption of the four Geneva Conventions, they increasingly did so in the last two decades due in part to the fast-evolving realities of warfare[84] and the explosive growth of NIACs,[85] whose legal framework is limited in

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[77] *See*, *e.g.*, VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 36 (2016); Paul Bartha, *Analogy and Analogical Reasoning*, STANFORD ENCYC. OF PHIL. (Jan. 25, 2019), https://plato.stanford.edu/entries/reasoning-analogy/ [https://perma.cc/GP7Z-22LJ].

[78] *See*, *e.g.*, LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 73 (2005); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARVARD L. REV. 923, 926 (1996); MAURICE DOROLLE, LE RAISONNEMENT PAR ANALOGIE 115 (1949).

[79] *See generally* JEAN SALMON, DROIT INTERNATIONAL ET ARGUMENTATION 413, 416 (2014).

[80] *See* GC IV, *supra* note 29, art. 126 (cross-referencing arts. 71–76); GC II, *supra* note 32, art. 5; GC I, *supra* note 32, art. 4.

[81] *See*, *e.g.*, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, 2, 7, *In re* Guantanamo Bay Detainee Litigation, No. 08-442 (D.D.C. Mar. 2009) [hereinafter Guantanamo Memorandum], https://www.justice.gov/archive/opa/documents/memo-re-det-auth.pdf [https://perma.cc/FAW4-VMVP]; U.S. MANUAL, *supra* note 63, §§ 8.1.4, 8.1.4.4, 17.2.2.3, 17.17.1.1, 3.7.2, 3.7.2.3, 11.1.3.2.

[82] *See*, *e.g.*, U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 11.1.2 (2004) [hereinafter U.K. MANUAL], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf [https://perma.cc/AGZ7-6TMP].

[83] *See*, *e.g.*, AUSTL. DEFENCE FORCE, LAW OF ARMED CONFLICT § 12.4 (2006) [hereinafter AUSTRALIAN MANUAL], https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf [https://perma.cc/5WZH-VXQ8].

[84] For the use of analogies in relation to the fast-evolving realities of warfare, see generally TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed. 2013); Jeffrey T. Biller & Michael N. Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 INT'L L. STUD. 179 (2019); Rebecca Crootof, *Autonomous Weapon Systems and the Limits of Analogy*, 9 HARV. NAT'L SEC. J. 51 (2018).

[85] For the use of analogies in relation to the explosive growth of NIACs, see, for example,

comparison with IACs. Analogies enable international lawyers to apply existing rules and develop new rules for these new realities.

Thus, analogy has several meanings and plays a role both in the interpretation and application of existing rules (*de lege lata*) and the suggestion of new rules (*de lege ferenda*). Part II demonstrated that an interpretation of CA 3 and Article 1 of AP II does not solve the questions under examination, i.e., the identification of the conflict to which the intervening actor can become a belligerent party and the conditions under which this actor will have such a belligerent status. Admittedly, it is possible that an interpretation by analogy prompts some judges and legal advisors to apply existing rules for the emergence of a new NIAC to supportive foreign interventions in an existing NIAC. In other words, such an interpretation may prompt judges and legal advisors to consider each foreign intervention as a separate new NIAC, thereby using the traditional criteria of intensity and organization.[86] However, such an interpretation by analogy would not be appropriate as it would deny fundamental differences between the emergence of a new NIAC and a supportive foreign intervention in an existing NIAC.[87] Moreover, it would run counter to the existing trend in State practice and ICC case law (as well as in legal scholarship). Consequently, at most, an interpretation by analogy of CA 3 and Article 1 of AP II allows a conclusion that these provisions indeed apply to the intervening actor when it becomes a belligerent party to a NIAC (albeit depending on the status of ratifications by the involved States), as much as CA 3 and AP II would apply to actors becoming belligerent parties to a NIAC emerging from new hostilities. Language found in CA 3 and AP II does not enable further conclusions, even by analogy.

Therefore, analogy strictly means, in this article, a similarity of relations to fill a gap in IHL that interpretation of existing rules could not address and, thus, to suggest a new rule or framework.[88] In other words, an unregulated

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Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED Cross 599, 623–24 (2008).

[86] *See, e.g.*, Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) (citing Prosecutor v. Tadić, Case No. IT-94-1, Trial Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

[87] Most importantly, as far as the emergence of a new NIAC is concerned, hostilities still need to reach the intensity threshold and a first assessment of the level of violence needs to be conducted to declare the law of NIAC applicable. For supportive foreign interventions in an existing NIAC, there is already, by definition, a NIAC: the required threshold of intensity is reached by pre-existing hostilities and the law of NIAC is already applicable to the belligerent parties.

[88] On this understanding of analogy, see, for example, CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, TRAITÉ DE L'ARGUMENTATION: LA NOUVELLE RHÉTORIQUE [THE NEW RHETORIC: A TREATISE ON ARGUMENTATION] 501 (1970); DOROLLE, *supra* note 78, at 7; LUCIEN SIORAT, LE PROBLÈME DES LACUNES EN DROIT INTERNATIONAL 328, ¶ 404 (1958);

situation A is similar, although not identical, to a regulated situation B. Consequently, the rule B governing situation B can inspire the creation of a new rule A which could govern situation A. The new rule A does not reflect the *lex lata* but constitutes the *lex ferenda*.

More specifically, the analogical reasoning follows several steps in this article. First, a *source* for the analogical reasoning, i.e., a situation already regulated under existing law, must be identified based on *prima facie* similarities.

Second, the *target*, i.e., the situation unregulated under existing law and for which a regulation is needed, and the *source* must be compared in detail: relevant similarities and dissimilarities must be listed.[89] The relevancy of (dis)similarities depends on the "subject matter, historical context and logical details particular to each analogical argument."[90] This comparative exercise has several limits. A first limit is the inherently subjective nature of the definition of the *target*-situation. Unavoidably, the expert who undertakes an analogical reasoning already has an idea of what are or should be the main features of this situation. The second limit is the hardship to identify the features of the *source*-situation independent of its existing regulation because the law frames how lawyers think about the facts. The third, and last, limit is the process of comparison itself entails a subjective dimension: different scholars might be sensitive to different (dis)similarities when identifying and assessing them.[91] These limits in the comparative exercise must be acknowledged. However, they do not make the analogical argument unreasonable; this argument still offers an interesting approach to develop a framework for an unregulated situation.

Third, once the comparative exercise is over, similarities and dissimilarities must be put in balance and perspective. When similarities prevail over dissimilarities between the *target*-situation and the *source*-

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BENOÎT FRYDMAN, *Les formes de l'analogie*, 4 REVUE DE LA RECHERCHE JURIDIQUE 1053 (1995); Damiano Canale & Giovanni Tuzet, *Analogical Reasoning and Extensive Interpretation*, *in* ANALOGY AND EXEMPLARY REASONING IN LEGAL DISCOURSE 65, 70, 80 (Hendrik Kaptein & Bastiaan van der Velden eds., 2018).

[89] For this specific vocabulary of "target" and "source," see, for example, WEINREB, *supra* note 78, at 71; Scott Brewer, *Indefeasible Analogical Argument*, *in* ANALOGY AND EXEMPLARY REASONING IN LEGAL DISCOURSE 33, 38 (Hendrik Kaptein & Bastiaan van der Velden eds., 2018); Brewer, *supra* note 78, at 966; Bartha, *supra* note 77, § 2.2. For this vocabulary of relevant (dis)similarities, see, for example, HENDRIK KAPTEIN & BASTIAAN VAN DER VELDEN, *Introduction*, *in* ANALOGY AND EXEMPLARY REASONING IN LEGAL DISCOURSE 7, 7 (2018); Fernando L. Bordin, *Analogy*, *in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 25, 36 (Jean d'Aspremont & Sahib Singh eds., 2019); Brewer, *supra* note 78, at 950.

[90] *See*, *e.g.*, Bartha, *supra* note 77, § 2.4.

[91] *See*, *e.g.*, SALMON *supra* note 79, at 306 (*in fine*).

situation, the analogy is valid.[92] Thus, this conclusion leads to a fourth step: the existing regulation for the *source*-situation can be transferred and, most importantly, adapted to the *target*-situation. If, on the contrary, dissimilarities prevail over similarities, the analogy fails, and the analogical reasoning stops here. No fourth step is justified. The existing regulation for the *source*-situation cannot inspire a new framework for the *target*-situation.

Whether similarities prevail over dissimilarities is a question of quality rather than quantity. Indeed, "[t]wo analogues can be similar in many respects, and yet one difference between them may destroy the value of the analogy."[93] What is of upmost importance in the assessment is the degree of relevancy and significance of these (dis)similarities for the subject matter.[94]

In the present case, supportive foreign interventions in a pre-existing NIAC constitute the *target*-situation. This situation can be described as such: an intervening actor—whether it be a State, an international organization, or even an OAG—intervenes in a NIAC and supports one party or several of the belligerent parties to this conflict against the other(s). What then could be the *source*-situation already regulated under International Law to which the *target*-situation can be compared? U.S. practice suggests that co-belligerency, often associated with the Law of Neutrality, could constitute the appropriate *source*-situation.

B. Co-Belligerency as a Source of Analogy

For more than fifteen years, the U.S. has been using a specific notion, i.e., "associated forces," in its NIAC against Al-Qaeda and other terrorist groups. While this notion will be defined below, it is worth broadly underlining here that an "associated force" is an OAG which supports Al-Qaeda in its fight against the U.S. and partners of the U.S. This notion enabled the U.S. to justify the scope of its targeting and detention operations in various theaters of war, such as Afghanistan, Yemen, Syria, and Somalia.[95]

The notion of "associated forces" first appeared in July 2004 (under the George W. Bush administration) in a memorandum addressed by the Deputy Secretary of Defense to the Secretary of the Navy.[96] This memorandum

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[92] *See* John H. Farrar, *Reasoning by Analogy in the Law*, 9 BOND L. REV. 149, 149 (1997).

[93] James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833, 852 (1982).

[94] *See id.* at 851–52; Fiori Rinaldi, *Is Analogy a Decision Process in English Law?*, *in* LE RAISONNEMENT JURIDIQUE: ACTES DU CONGRÈS MONDIAL DE PHILOSOPHIE DU DROIT ET DE PHILOSOPHIE SOCIALE [LEGAL REASONING: PROCEEDINGS OF THE WORLD CONGRESS FOR LEGAL AND SOCIAL PHILOSOPHY] 363, 367 (1971).

[95] *See* REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 66, at 3–7, 15–18.

[96] Memorandum, Paul Wolfowitz, Deputy Secretary of Defense, Department of Defense, Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 4, 2004), https://islandora.wrlc.org/islandora/object/torture%3A9934/

defines the concept of "enemy combatant" for the purpose of detention as "an individual who was part of or supporting Taliban or al Qaeda forces, or *associated forces* that are engaged in hostilities against the United States or its coalition partners."[97] This definition, including its reference to "associated forces," was later codified by the Congress in the 2006 Military Commissions Act[98] and incorporated in other official documents.[99]

Although the Department of Justice withdrew the previous definition of "enemy combatant" under the Obama administration,[100] the notion of "associated forces" made its way through in U.S. practice. The same Department of Justice referred to this notion in a March 2009 memorandum submitted to the District Court for the District of Columbia in relation to the U.S. President's power to detain in Guantanamo.[101] This memorandum meant to specify the government's position regarding the Authorization for the Use of Military Force of 2001 ("AUMF") for the purposes of Guantanamo Bay Detainee Litigation.[102]

This 2009 memorandum first indicated that the AUMF authorized U.S. armed forces to use "all necessary and appropriate force against those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[103] The memorandum then added that this authorization to use force entails the authorization to "detain persons who were part of, or substantially supported, Taliban or al-Qa'ida forces *or associated forces* that are engaged in hostilities against the United States or its coalition partners . . . ."[104] Even though the memorandum noted that "[i]t [was] neither possible nor advisable . . . to identify . . . the precise

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datastream/PDF/view [https://perma.cc/A3RV-J5BJ].

[97] *Id*. at 1 (emphasis added).

[98] United States Military Commissions Act of 2006 § 948(a)(1)(A)(i), PUB. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948–50).

[99] *See*, *e.g*., Exec. Order No. 13,440, 3 C.F.R. 13440 (2007) ("Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency"); John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 107 AM. J. INT'L L. 650, 666 (2007).

[100] *See* Press Release, Eric Holder, Attorney General, Department of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees (Mar. 13, 2009), https://www.justice.gov/opa/pr/department-justice-withdraws-enemy-combatant-definition-guantanamo-detainees [https://perma.cc/L7LG-D8UM].

[101] *See* Guantanamo Memorandum, *supra* note 81, at 2.

[102] *See id*. at 1; *see also* Authorization for Use of Military Force of 2001, PUB. L. No. 107-40, 115 Stat. 224 [hereinafter AUMF] (codified as amended at 50 U.S.C.§ 1541 note).

[103] AUMF, *supra* note 102, § 2(a).

[104] Guantanamo Memorandum, *supra* note 81, at 2 (emphasis added).

characteristics of 'associated forces,'"[105] it specified that the U.S. could detain "individuals who, *in analogous circumstances in a traditional international armed conflict* between the armed forces of opposing governments, would be detainable *under principles of co-belligerency*."[106] Thus, for the very first time, the Department of Justice introduced a nexus between the notion of "associated forces" and "the principles of co-belligerency."

In May 2009, the District Court for the District of Columbia found "associated forces" to be interchangeable with "co-belligerents," "as that term is understood under the law of war."[107] Further, while the Bush administration introduced this notion for detention purposes, the Obama administration applied it more extensively, i.e., also for targeting operations.[108] In addition, the Obama administration regularly linked the notion of "associated forces" to co-belligerency. For instance, the 2011 National Strategy for Counterterrorism considered this notion as a "legal term of art that refers to *cobelligerents* of al-Qa'ida or the Taliban against whom the President is authorized to use force (including the authority to detain)."[109]

Despite a widespread use of the notion of "associated forces" since 2006, the Obama administration only provided a proper definition in June 2012. At

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[105] *Id*.

[106] *Id*. at 7 (emphasis added).

[107] Hamlily v. Obama, 616 F. Supp. 2d 63, 70 (D.D.C. 2009).

[108] For this observation on the evolution between the two administrations, see Pierce Rand, *Back to the Congressional Drawing Board: Inapplicability of the AUMF to Al-Shabaab and Other New Faces of Terrorism*, 37 LOY. L.A. INT'L & COMP. L. REV. 117, 139 (2015). For the same observation on the notion of "associated forces" in relation to the use of force, see Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 635 (2016). For U.S. practice in relation to the use of force, see, for example, DEP'T OF JUST., LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL QA'IDA OR AN ASSOCIATED FORCE 1 (2011), https://irp.fas.org/eprint/doj-lethal.pdf [https://perma.cc/XF6Y-AFYQ]; Speech, Harold H. Koh, Legal Adviser, U.S. Department of State, The Obama Administration and International Law (Mar. 25, 2010), https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc/9ZRZ-DZXG]; Remarks, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an [https://perma.cc/P7NW-DQEG]; Remarks, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy [https://perma.cc/N3WA-JL2B].

[109] WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 3 n.1 (2011) (emphasis added), https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism_strategy.pdf [https://perma.cc/6CZG-MVTZ].

that time, the General Counsel of the Department of Defense, Jeh C. Johnson, defined "associated forces" as:

> An "associated force", as we interpret the phrase, has two characteristics: (1) it is an organized, armed group that has entered the fight alongside al Qaeda, and (2) it is a *cobelligerent* with Al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with Al Qaeda. It must have also entered the fight against the United States or its coalition partners.[110]

This definition was reiterated multiple times by representatives of the U.S. executive branch[111] and became—for all intents and purposes—the interpretation favored by the U.S. government.

After the Bush and Obama administrations, the Trump administration also resorted to the notion of "associated forces" and often recalled its relation to co-belligerency. For example, in its 2020 Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force, former President D. Trump asserted: "The determination that the 2001 AUMF provides sufficient authority to use military force against the organizations

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[110] Jeh C. Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL'Y REV. 141, 141, 146 (2012) (emphasis added). On this definition of associated force, see Speech, Jeh C. Johnson, General Counsel, U.S. Department of Defense, The Conflict Against Al Qaeda and Its Affiliates: How Will It End (Nov. 30, 2012), https://ogc.osd.mil/Portals/99/Law%20of%20War/Practice%20Documents/GC%20Johnson%20-%20Oxford%20Union%20remarks%20-%20Nov%202012.pdf?ver=Tq48LfUJKY1Azg5QanM3yQ%3D%3D [https://perma.cc/E3SC-3ZS9]; Brief for Appellants at 29–30, Hedges v. Obama, 568 U.S. 1153 (2013) (No. 12-3644).

[111] *See*, *e.g.*, Joint Statement, Robert S. Taylor et al., Acting General Counsel, Department of Defense, Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force, at 3 (May 16, 2013), https://www.armed-services.senate.gov/imo/media/doc/Taylor-Sheehan-Nagata-Gross_05-16-133.pdf [https://perma.cc/2AFX-KXLL]; Statement, Stephen W. Preston, General Counsel, Department of Defense, The Framework Under U.S. Law for Current Military Operations (May 21, 2014), https://www.foreign.senate.gov/imo/media/doc/Preston_Testimony.pdf [https://perma.cc/8L8P-XP7P]; Speech, Stephen W. Preston, General Counsel, Department of Defense, The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015), https://www.defense.gov/Newsroom/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/ [https://perma.cc/BS5Z-8HEU]; REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 66, at 4–5; Joint Statement, Michael D. Lumpkin, Assistant Secretary of Defense, Department of Defense, Report on Associated Forces, at n.1 (July 16, 2014), https://www.aclu.org/sites/default/files/field_document/report_on_associated_forces_2014.pdf [https://perma.cc/9HRL-LMX8]; Statement, Harold H. Koh, Authorization for Use of Military Force After Iraq and Afghanistan (May 21, 2014), https://www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf [https://perma.cc/NFH2-TZD9].

listed above . . . is informed by *the traditional concept of co-belligerency in conflicts between States*."[112] The Trump administration also endorsed the pre-mentioned definition of "associated forces."[113]

The foregoing chronological overview of the notion of "associated forces" demonstrates that the U.S. favors an analogy with co-belligerency to determine when an OAG becomes a belligerent party to its NIAC against Al-Qaeda. Although it is beyond the scope of this article to further scrutinize U.S. practice which applies the notion of "associated forces" to specific groups,[114] this practice gives an opportunity and a reason to seriously analyze the analogy with the situation of co-belligerency, often associated with the Law of Neutrality.

While the U.S. suggested this analogy exclusively for the intervention of additional OAGs, Part IV of this article contemplates it for all types of supportive foreign interventions in a pre-existing NIAC. Two reasons explain this extension. First, international bodies, such as the International Committee of the Red Cross ("ICRC")[115] and the Group of Eminent

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[112] WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2020), https://man.fas.org/eprint/frameworks-2019.pdf [https://perma.cc/LFZ6-XWFG] (emphasis added).

[113] Letter from Charles Faulkner, Bureau of Legis. Affs., to Bob Corker, President of the Comm. on Foreign Rels. (Aug. 2, 2017), https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000 [https://perma.cc/D5C7-DX9C]; Speech, William S. Castle, Principal Deputy General Counsel, Department of Defense, Congressional Authorizations on Use of Force (Dec. 11, 2017), https://fr.scribd.com/document/366923593/Dod-Acting-General-Counsel-William-Castle-NYC-Bar-Remarks-Aumf-Dec-11#fullscreen&from_embed; Respondent's Factual Return at 15, Doe v. Mattis, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069), https://www.aclu.org/wp-content/uploads/legal-documents/66-1._ECF_46_Redacted_Version_for_Public_Filing_2.14.18.pdf [https://perma.cc/C2LF-8YDB]; Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018); *see also* Scott Roehm, *Bringing the AUMF Debate Back to Its Constitutional Roots, and Recent History*, JUST SEC. (Aug. 11, 2017), https://www.justsecurity.org/44135/bringing-aumf-debate-constitutional-roots-history/ [https://perma.cc/REW7-23GT]; Tess Bridgeman, *Will Trump Administration Claim Congress Authorized Force Against Iran? — Analysis of Existing Statutory Authority and New Proposals*, JUST SEC. (June 4, 2018), https://www.justsecurity.org/57338/trump-administration-claim-congress-authorized-force-iran-analysis-existing-statutory-authority-proposals/ [https://perma.cc/AT76-69L7].

[114] For further analysis of U.S. practice, see this author's Ph.D. thesis, *supra* p. 259.

[115] 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, 1231 (2015) [hereinafter Ferraro, *ICRC's Legal Position*]; Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT'L REV. RED CROSS 561, 584 (2013). Ferraro's 2013 article does not reflect the ICRC's position but only its representative's personal perspective. Nonetheless, Ferraro defended in 2013 a position that was later endorsed by the ICRC itself, as shown by the 2015 article. *See* Ferraro, *ICRC's Legal Position*, *supra* note 115.

International and Regional Experts on Yemen,[116] also relied on an analogy with co-belligerency for States' and international organizations' interventions—although, the ICRC later highlighted that it was for a descriptive (rather than a normative) purpose.[117] Second, such an analogical argument with co-belligerency was discussed again in 2021 for many kinds of supportive interventions during an expert workshop organized at the U.S. Naval War College (in which this author participated) on the legal implications of the Afghan conflict.[118]

At first sight, situations of co-belligerency and supportive foreign interventions in a pre-existing NIAC share common features. Whereas the intervening actor that becomes a belligerent party (a State, an international organization, or an OAG) intervenes in a NIAC in support of a belligerent party and to the detriment of the other, the neutral State which becomes a co-belligerent intervenes in an IAC against a belligerent State and often in favor of another State. Therefore, it is worth examining in more detail how these situations are similar.

IV. THE ANALYSIS: A FAILED ANALOGY WITH CO-BELLIGERENCY

Following the methodology previously laid out, Part IV assesses the analogy with co-belligerency. The analysis does not intend to determine how the United States conducted its analogical reasoning with co-belligerency and will not focus on U.S. practice. Rather, the analysis offers to independently investigate whether the suggested *source*-situation of co-belligerency leads to a valid or invalid analogy. First, the analysis will scrutinize (A) similarities and (B) dissimilarities between, on the one hand, the situation of supportive foreign interventions in a pre-existing NIAC (*target*-situation) and, on the other hand, the situation of co-belligerency

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[116] Hum. Rts. Council, *Rep. of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen*, ¶ 50, U.N. Doc. A/HRC/42/CRP.1 (Sept. 3, 2019).

[117] *See* Tristan Ferraro, *Military Support to Belligerents: Can the Provider Become a Party to the Armed Conflict?*, *in* LEGAL AND OPERATIONAL CHALLENGES RAISED BY CONTEMPORARY NON-INTERNATIONAL ARMED CONFLICTS, 47, 58 (2018).

[118] *See Law of Armed Conflict Annual Workshop: Afghanistan 2021: International Legal Implications of the Conflict*, U.S. NAVAL WAR COLL. (Dec. 6, 2021), https://usnwc.edu/News-and-Events/Events/Law-of-Armed-Conflict-Annual-Workshop-Afghanistan-2021-International-Legal-Implications-of-the-Conflict [https://perma.cc/WC5Z-CF4J]. To learn more on the workshop's discussions, see Steve Szymanski & Chris Koschnitzky, *Afghanistan 2021: Reflections from the Stockton Center for International Law's Workshop*, ARTICLES OF WAR (Jan. 24, 2022), https://lieber.westpoint.edu/afghanistan-2021-reflections-stockton-center-workshop/ [https://perma.cc/3CFR-2W5X]; *see also* U.S. Naval War College, *LOAC: A Conversation on the International Law Implications in Afghanistan Following the Withdrawal of Troops*, YOUTUBE (Jan. 19, 2022), https://www.youtube.com/watch?v=rNbvE6nXEsU&t=410s [https://perma.cc/PAS8-AEAJ].

(*source*-situation). It will then assess all together these (dis)similarities and (C) draw some final remarks on the validity of the analogy with co-belligerency. It concludes by explaining why the analogy with co-belligerency fails and is thus inadequate to inspire a new legal framework for an intervening actor's participation in a pre-existing NIAC.

A. Similarities with Supportive Foreign Interventions in a NIAC

To this author's opinion, there are five significant similarities between the situation of supportive foreign interventions in a NIAC (the *target*-situation) and the situation of co-belligerency (the *source*-situation): (1) the pre-existence of an armed conflict; (2) the nature of the third actor's actions (i.e., the actor that is not a party to the pre-existing armed conflict); (3) the intensity threshold of the third actor's actions; (4) the location of the third actor's actions; and (5) the absence of formalism for the third actor. These similarities deserve more explanation.

(1) The first similarity is the pre-existence of an armed conflict. Whether the foreign actor in a NIAC or the previously neutral State in an IAC, both third actors intervene or participate in similar circumstances, i.e., an armed conflict. Additionally, they both become a belligerent party that must abide by IHL: while the foreign actor becomes a party to the pre-existing NIAC, the previously neutral State becomes a party to an IAC (possibly the pre-existing IAC).[119]

(2) The second similarity relates to the nature of the third actor's actions. Both situations cover two types of actions: on the one hand, direct actions against a belligerent party and, on the other hand, support actions to the other belligerent party without direct hostile interaction against the opponent. In the *target*-situation, practice shows that the intervening actor does participate in (and to this author's viewpoint, becomes a party to) a pre-existing NIAC not only by direct attacks against one of the belligerent parties, but also by certain support actions which have a significant impact on the other belligerent party's military action (e.g., in-flight refueling for combat operations, specific and detailed intelligence sharing, etc.).

Regarding the *source*-situation, in addition to the scenario of a declaration of war (which does not exist in NIACs and thus is not relevant for the *target*-

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[119] See *infra* Part IV.B (third dissimilarity) for an explanation of how the situation of "co-belligerency" refers to circumstances where a State, previously a neutral State, takes actions against a belligerent State to an existing IAC and becomes a belligerent party to an IAC. Nevertheless, it does not imply a collaborative relationship between this State (previously neutral) and another belligerent State to the existing IAC. Therefore, it is hard to consider that the State becoming a "co-belligerent" always participates in the same pre-existing IAC. It could be a separate IAC between the previously neutral State and a belligerent State to the existing IAC.

situation), a neutral State *can* lose its neutral status in two other scenarios:[120] when directly participating in hostilities against a belligerent State or when violating, either systematically or substantially, its duties of impartiality[121] The scenario of systematic or substantial violations encompasses cases of support actions in favor of a belligerent State.

(3) The third similarity refers to the intensity threshold of the third actor's actions. The *target*-situation and the *source*-situation both reveal that the third actor's support actions need to reach a certain level of intensity for this actor to become a belligerent party. Concerning the latter situation, it is true that a previously neutral State becomes a co-belligerent whenever it violates its non-participation duty and directly participates in the pre-existing IAC, independent of the level of intensity of its direct attacks against one of the belligerent States.[122] Yet, when the neutral State violates another of its obligations, it does not automatically become a co-belligerent.[123] There is no automatic cause-effect relationship between the violation of a neutrality duty and the status of belligerent party.[124] As previously pinpointed, only systematic or substantial violations of neutrality duties *may* lead to loss of neutral status and to attainment of belligerent status.[125] Simple or ordinary violations of neutrality duties do not have such an effect.[126] In other words, a

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[120] See *infra* Part IV.B (second dissimilarity) for nuances on the critical importance of the opponent's reaction.

[121] *See*, *e.g.*, Nathalie Weizmann, *Associated Forces and Co-Belligerency*, JUST SEC. (Feb. 24, 2015), https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/ [https://perma.cc/59H6-JV69]; Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 549, 558 (Dieter Fleck ed., 3d ed. 2013); 2 L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW: A TREATISE, §§ 312, 358 (Hersch Lauterpacht ed., 7th ed. 1952); *see also* AUSTRALIAN MANUAL, *supra* note 83, § 11.35; MINISTÈRE DE LA DÉFENSE ET DES ANCIENS COMBATTANTS [MINISTRY OF DEFENSE AND VETERANS AFFAIRS], MANUEL DU DROIT DES CONFLITS ARMÉS À L'USAGE DES FORCES ARMÉES MALIENNES [LAW OF WAR MANUAL FOR MALIAN ARMED FORCES] 80–81 (2016) [hereinafter MALIAN MANUAL].

[122] *See* Verlinden, *supra* note 11, at 307; *see also* Raul "Pete" Pedrozo, *Ukraine Symposium — Is the Law of Neutrality Dead*, ARTICLES OF WAR (May 31, 2022), https://lieber.westpoint.edu/is-law-of-neutrality-dead/ [https://perma.cc/VYB9-M8RY].

[123] *See* Weizmann, *supra* note 121; *see also* Pedrozo, *supra* note 122; U.S. MANUAL, *supra* note 63, § 15.4.1 ("Distinction Between Violations of Neutral Duties and the End of Neutral Status").

[124] *See* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L L.J. 75, 87, 96 (2011) [hereinafter Ingber, *Untangling Belligerency*]; Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. 67, 92 (2017) [hereinafter Ingber, *Co-Belligerency*].

[125] *See supra* Part IV.A (second similarity). As later explained, the opponent's reaction is also of critical importance to determine whether a State loses its neutral status for a belligerent status. *See infra* Part IV.B (second dissimilarity).

[126] *See*, *e.g.*, FED. MINISTRY OF DEF. OF THE FED. REPUBLIC OF GER., LAW OF ARMED CONFLICT MANUAL ¶ 1202 (2013) [hereinafter GERMAN MANUAL], https://www.bmvg.de/

neutral State can support a belligerent party and violate its duties while not losing its status of neutral State.[127]

Similarly, with respect to the *target*-situation, an intervening actor sometimes supports a belligerent party to a NIAC but does not become a party to this conflict. This author believes that such an actor only becomes a party if its intervention (whether direct attacks or supportive actions) has a significant impact on a belligerent party's military action.[128] This makes sense under the law of NIAC because the consequences of the belligerent status for the intervening actor are tremendous. On the one hand, this actor must abide by the whole body of the law of NIAC (CA 3, AP II when applicable, and customary international law) and, on the other hand, its armed forces can be legally targeted at all times as members of a party's armed forces. Indeed, the law of NIAC does not prohibit the OAG to target the armed forces of an intervening actor which became party to the existing conflict.[129]

(4) The fourth similarity concerns the location of the third actor's actions. Both the intervening actor and the previously neutral State can conduct actions on a territory different than the territory where hostilities occur while still becoming a belligerent party. For instance, a neutral State must prevent the belligerent State's armed forces from crossing *its own territory* and must

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resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf [https://perma.cc/GB3K-4FUR]; Bothe, *supra* note 121, at 557; Verlinden, *supra* note 11, at 306.

[127] In the Dubsky case, the Irish High Court agreed that a violation of the Law of Neutrality does not automatically trigger the belligerent status. *See* Ireland High Court, Dubsky v. Government of Ireland & Ors., [No. 2002 No 571 JR (Dec. 13, 2005)] IEHC 442 (H. Ct.) (Ir.), *ORIL*, ILDC 485 (IE 2005), ¶¶ 89–90. Nonetheless, the court accepted that such a violation of the Law of Neutrality automatically triggers the loss of the neutral status. *See id*. This is debatable and not this author's opinion. A neutral State, although violating its duties, can maintain its neutral status. There is no legal intermediary status between the neutral status and the belligerent status. Intermediary statuses, such as the non-belligerent status, are actual violations of the Law of Neutrality. *See* AUSTRALIAN MANUAL, *supra* note 83, § 11.36; Dietrich Schindler, *Aspects contemporains de la neutralité [Contemporary Aspects of Neutrality]*, *in* 121 RECUEIL DES COURS [121 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 225, 265, 272 (1967); OPPENHEIM, *supra* note 121, §§ 312, 358; JEAN-JACQUES LANGENDORF, HISTOIRE DE LA NEUTRALITÉ: UNE PERSPECTIVE 250 (2007); Wolff Heintschel von Heinegg, *"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, *in* INTERNATIONAL LAW AND ARMED CONFLICTS: EXPLORING THE FAULTLINES 543, 555 (Michael N. Schmitt & Jelena Pejic eds., 2007); ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 451–52 (1954) ("[T]he term non-belligerent State is an entirely *political concept*. There ought to be no intermediate forms between belligerency and neutrality."); Verlinden, *supra* note 11, at 303.

[128] For further details on this impact, see this author's Ph.D. thesis, *supra* p. 259.

[129] *See* Jean-Marie Henckaerts & Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1 RULES, at 3, 5–8, 17, 23–24 (2005) (discussing rules 1 and 5 pertaining to distinction between civilians and combatants).

intern members of this State's armed forces who would do so.[130] If this neutral State never prevents a belligerent State to cross (systematic violations) or, worse, authorizes this State to cross (possibly a substantial violation), it *could* lose its neutral status and become a co-belligerent.[131]

Regarding supportive foreign interventions in a NIAC, practice also demonstrates that some foreign States put one or several military bases *on their own territory* at the disposal of a belligerent State which fights an OAG on another territory.[132] Depending on the circumstances, it should not be excluded that such foreign States could become themselves a party to the existing conflict.

(5) The last similarity touches upon an absence of formalism for the third actor. A declaration of "neutrality" or "war" does not constitute a *necessary* condition in the determination of the neutral State's or the foreign actor's status. With respect to the *source*-situation, the neutral State does not need to declare its neutrality to have a neutral status.[133] Such a status can rely on the

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[130] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 5, 11, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague Convention (V)]; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War arts. 1, 3, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague Convention (XIII)].

[131] Again, the change in status (from neutral to co-belligerent) also depends on the opponent's reaction, i.e., whether the opponent decides to use force against the neutral State. *See infra* Part IV.B (second similarity).

[132] *See* Köln Drone Judgment, *supra* note 24, ¶¶ 12, 40; *see also* sources cited *supra* notes 24–25.

[133] *See*, *e.g.*, ISIDRO FABELA, NEUTRALITÉ 51 (1949); CASTRÉN, *supra* note 127, at 424, 452; Tess Bridgeman, Note, *The Law of Neutrality and the Conflict with Al Qaeda*, 85 N.Y.U. L. REV. 1186, 1198 (2010); JOHANN C. BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ 415 (1874); RICHARD KLEEN, LOIS ET USAGES DE LA NEUTRALITÉ D'APRÈS LE DROIT INTERNATIONAL CONVENTIONNEL ET COUTUMIER DES ÉTATS CIVILISÉS 176 (1898); PAUL FAUCHILLE, 2 TRAITÉ DE DROIT INTERNATIONAL PUBLIC 644 (1921); CHARLES CALVO, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC ET PRIVÉ 21 (1885); HAMED SULTAN, L'ÉVOLUTION DU CONCEPT DE LA NEUTRALITÉ 113 (1938); AUSTRALIAN MANUAL, *supra* note 83, § 11.3; U.S. MANUAL, *supra* note 63, § 15.2.1.4; MINISTÈRE DE LA DÉFENSE [FRENCH DEPARTMENT OF DEFENSE], MANUEL DU DROIT DES CONFLITS ARMÉS 66 (2012), https://docplayer.fr/23955569-Manuel-du-droit-des-conflits-armes.html [https://perma.cc/EY9W-7UKF]; CANADIAN NATIONAL DEFENSE, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS § 1303 (2001) [hereinafter CANADIAN MANUAL], https://www.fichl.org/fileadmin/_migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf [https://perma.cc/7A89-XSWM]; KONINKLIJKE LANDMACHT [ROYAL NETHERLANDS ARMY], HUMANITAIR OORLOGSRECHT [HANDLEIDING] 140, § 2, ¶ 0907, 141 (2005) [hereinafter THE NETHERLANDS MANUAL]. *But see* JENS D. OHLIN, *Targeting Co-Belligerents*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 60, 72 (Claire Finkelstein, Jens D. Ohlin & Andrew Altman eds., 2012); Ove Bring, *The Changing Law of Neutrality*, *in* CURRENT INTERNATIONAL LAW ISSUES: NORDIC PERSPECTIVES — ESSAYS IN HONOUR OF JERZY SZTUCKI 25, 37 (Ove Bring & Said Mahmoudi eds., 1994); MALIAN MANUAL, *supra* note 121, at 81, § A(2)(b).

State's declaration of neutrality together with its behavior or simply on its behavior. The absence of declaration of neutrality does not give a State the status of co-belligerent. Likewise, a declaration of war, acts of direct participation in hostilities *or* certain support actions to a belligerent party suffices to trigger a State's co-belligerent status. The absence of declaration of war alone does not grant this State the status of neutral.

With respect to the *target*-situation, the absence of declaration of "neutrality" by an actor—which is the most frequent practice in the context of a NIAC—does not make this actor a party to the pre-existing NIAC when it does not undertake hostile actions. Further, the absence of declaration of "war" or support by the intervening actor does not enable this actor to avoid a belligerent status when it does undertake hostile actions.

B. Dissimilarities with Supportive Foreign Interventions in a NIAC

In addition to these similarities, there are, in this author's opinion, four differences between the situations of supportive foreign interventions in a NIAC and of co-belligerency: (1) the nature of the pre-existing armed conflict and involved actors; (2) the critical importance of the opponent's reaction; (3) the critical importance of the third actor's support to a belligerent party; and (4) the relationship with the legal body of collective security.

(1) The nature of the pre-existing armed conflict and the involved actors represent the first difference between the *target*-situation and the *source*-situation. While the neutral *State* intervenes in an *IAC* between *sovereign States*,[134] the foreign actor—i.e., a *State, an international organization or an OAG*—intervenes in a *NIAC* involving *at least one OAG*. Therefore, the

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[134] *See*, *e.g.*, Hague Convention (V), *supra* note 130, tit., pmbl., art. 20; Hague Convention (XIII), *supra* note 130, tit., pmbl., art. 28; Convention on Maritime Neutrality, pmbl., art. 16, Feb. 20, 1928, 135 L.N.T.S. 187 [hereinafter Havana Convention]; THE NETHERLANDS MANUAL, *supra* note 133, at 139, § 2, ¶ 0902, 142; U.K. MANUAL, *supra* note 82, §§ 1.42–1.42.3; CANADIAN MANUAL, *supra* note 133, at 13-1, 13-2 (Law of neutrality); *id.* GL-9 (definition of international armed conflicts); GERMAN MANUAL, *supra* note 126, ¶¶ 209, 1201–02; MALIAN MANUAL, *supra* note 121, at 80, § A; Legality of the Threat or Use of Nuclear, Advisory Opinion, 1996 I.C.J. 226, ¶ 89 (July 8); *see also* Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, ARTICLES OF WAR (Mar. 1, 2022), https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/ [https://perma.cc/PNF2-YXZL]. It remains unsettled in practice whether the Law of Neutrality only applies to certain IACs of a sufficient threshold of intensity. In favor of such a threshold, see Heintschel von Heinegg, *supra* note 134; Bothe, *supra* note 121, at 555. For a similar but cautious observation, see MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 477 (2019). *But see* ICRC Commentary on Geneva Convention (III) Relative to the Treatment of Prisoners of War ¶ 238 (2020), https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/2020 [https://perma.cc/RJ7C-W8GL].

target-situation is characterized by a variety of actors and a NIAC-type armed conflict whereas the *source*-situation concerns States only[135] and an IAC-type armed conflict. The *source*-situation thus strictly occurs in inter-State relations whereas the *target*-situation presupposes at least one relation between a State or an international organization and an OAG or one relation between two OAGs.

(2) The *source*-situation and the *target*-situation also differ as to the decisiveness of the opponent's reaction in the determination of the intervening actor's status (second difference). This reaction does not matter in the *target*-situation: the opponent's reaction, whether active or passive, does not establish the intervening actor's status as a belligerent party to the same NIAC. The intervening actor's status in the conflict is determined by the intervening actor's own behavior. This aligns with the principle of effectiveness under IHL[136] which requires this branch of International Law to be in tune with what happens on the ground.[137] The opponent's reaction or absence of reaction could be motivated by political considerations rather than the factual reality. As IHL does not consider political motivations, it does not take the opponent's reaction into account. Otherwise, it would risk withholding the status of belligerent party to an intervening actor solely due to the opponent's absence of reaction while the actor is nevertheless deeply involved in the hostilities.

Conversely, the opponent's reaction is critical for the previously neutral State to attain co-belligerent status. Part IV previously explained that such a

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[135] The Law of Neutrality, often associated with the situation of co-belligerency, concerns sovereign States. This Law has been designed on the basis and articulated around the notion of sovereignty. *See* KLEEN, *supra* note 133, at 154, 159; SIDNEY SCHOPFER, LE PRINCIPE JURIDIQUE DE LA NEUTRALITÉ ET SON ÉVOLUTION DANS L'HISTOIRE DU DROIT DE LA GUERRE [THE LEGAL PRINCIPLE OF NEUTRALITY AND ITS EVOLUTION IN THE HISTORY OF THE LAW OF WAR] 289, 304 (1894); FABELA, *supra* note 133, at 51; SULTAN, *supra* note 133, at 112; Schindler, *supra* note 127, at 241–42; Ingber, *Untangling Belligerency, supra* note 124, at 86–87; Dietrich Schindler, *Transformations in the Law of Neutrality Since 1945*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD — ESSAYS IN HONOUR OF FRITS KALSHOVEN 367 (1991); s*ee also* U.K. MANUAL, *supra* note 82, §§ 1.42, 1.42.1; GERMAN MANUAL, *supra* note 126, ¶ 209; AUSTRALIAN MANUAL, *supra* note 83, § 11.1; U.S. MANUAL, *supra* note 63, § 15.1.1.

[136] On the importance of this principle under IHL, see, for example, DE HEMPTINNE, *supra* note 28, ¶¶ 127–52; Ferraro, *ICRC's Legal Position*, *supra* note 115, at 1245.

[137] On the meaning of the principle of effectiveness under International Law in general, see, for example, KATHARINE FORTIN, THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW 242 (2017); ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 22 (2005); Salvatore Zappalà, *Can Legality Trump Effectiveness in Today's International Law?*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 105 (Antonio Cassese ed., 2012); CHARLES DE VISSCHER, LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC 13 (1967); JEAN TOUSCOZ, LE PRINCIPE D'EFFECTIVITÉ DANS L'ORDRE INTERNATIONAL 2, 8 (1964).

State *may* lose its neutral status and receive co-belligerent status when it violates, either systematically or substantially, its obligations.[138] Actually, whether the neutral State loses its neutral status when violating its duties depends on the injured State's reaction, i.e., whether the latter chooses to use force against the former that is in substantial or systematic violation of its obligations.[139] When the neutral State violates its neutrality duties, it undertakes an internationally wrongful act which triggers its responsibility.[140] Thus, the injured State (i.e., the adverse belligerent State) can decide to reply by force and engage in hostile fighting against the neutral State, but it could claim reparation instead,[141] maybe compensation.[142] In other words, neutrality violations do not trigger as such the co-belligerent status; only the use of force by the injured State against the neutral State (and, of course, the neutral State's direct participation in the hostilities) can trigger this status. Although this conclusion is certainly disputable based on the principle of effectiveness,[143] it follows the traditional and current understanding of IHL rules governing the status of belligerent party to an IAC.[144] Under the existing law of IAC, this is the rule for the emergence of a new IAC: a State (here, the adverse belligerent State or the neutral State) must use armed force against another State (here, the neutral State or the enemy belligerent State).[145]

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[138] *See supra* Part IV.A (third similarity).

[139] *See* Ingber, *Co-Belligerency*, *supra* note 124, at 90, 92.

[140] *See* Int'l L. Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, Annex to Resolution 56/83 of the General Assembly, U.N. Doc. A/RES/56/83, art. 2 (2001) [hereinafter ARSIWA].

[141] *Id*. art. 31; *see also* MALIAN MANUAL, *supra* note 121, at 82; KLEEN, *supra* note 133, at 24; Kevin J. Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Change*, 47 TEX. J. INT'L L. 115, 136 (2011); Havana Convention, *supra* note 134, art. 27.

[142] ARSIWA, *supra* note 140, art. 36. *See, e.g.*, MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 584 (1959).

[143] The massive foreign support to Ukraine in the ongoing IAC between Ukraine and Russia demonstrates that there is an operational need to further investigate whether and which supportive actions other than participation in hostilities could in themselves trigger the co-belligerent status.

[144] *See* Michael N. Schmitt, *Providing Arms and Material to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, ARTICLES OF WAR (Mar. 7, 2022), https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/ [https://perma.cc/9KYA-UYYJ] ("Co-belligerency is a different legal question than compliance with neutrality law and is determined by a different body of law, international humanitarian law (IHL).").

[145] *See* GC I, *supra* note 32, art. 2; GC II, *supra* note 32, art. 2; GC III, *supra* note 32, art. 2; GC V, *supra* note 32, art. 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Prosecutor v. Tadić, Case No. IT-94-1, Decision

(3) The third difference relates to the critical importance of the third actor's support of a belligerent party. As far as the *source*-situation is concerned, there is no need for a cooperative relationship between the neutral State and a belligerent State.[146] The sole hostile relationship between this neutral State—which violates its neutrality duties—and another belligerent State—which is injured by the neutrality violation—suffices to trigger the co-belligerent status for the former. When a neutral State violates its obligations to the detriment of a belligerent State, it may lose its neutral status *even though* it does not support, or its violation does not benefit, another belligerent State.

Admittedly, some definitions of co-belligerency mention a cooperative dimension. For example, Professor Greenspan defines "co-belligerents" as "fully fledged belligerent[s] fighting *in association with* one or more belligerent powers."[147] However, a neutral State could decide not to abide by its obligations for its own sake. The idea of "co"-belligerency relies on the joint opposition of the previously neutral State and a belligerent State to a same adverse belligerent State, rather than on the cooperation between this previously neutral State and a supported belligerent State.[148]

Conversely, the cooperative relationship between the intervening actor and a belligerent party to the NIAC is key to the *target*-situation. Indeed, as a reminder, the starting point of these developments is the acceptance in State practice of the existence of one single NIAC in case of supportive foreign interventions in a NIAC.[149] Yet, the intervening actor really *participates in* (rather than simply intervenes in) the pre-existing NIAC only if it supports one or several belligerent parties (cooperative relationship) *and* fights against another/others (hostile relationship). When an intervening actor fights

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on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); ICRC, *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 1–3 (Mar. 2008), https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf [https://perma.cc/4XMY-5MW6].

[146] *See* OHLIN, *supra* note 133, at 72; *see also* BLUNTSCHLI, *supra* note 133, at 413.

[147] GREENSPAN, *supra* note 142, at 531 (emphasis added).

[148] *See* JOHN P. GRANT & J. CRAIG BARKER, PARRY & GRANT ENCYCLOPÆDIC DICTIONARY OF INTERNATIONAL LAW 102 (3d ed. 2009) ("In strictness, co-belligerents are simply States engaged in a conflict *with a common enemy*, whether in alliance with each other or not.") (emphasis added); OHLIN, *supra* note 133, at 72 ("The concept of co-belligerency is built around the notion that combatants fighting a common enemy—even if they are not fighting on a unified front—can be linked together *simply by virtue of their common enemy*. The old adage that the enemy of my enemy is my friend best expresses the principle. Simply by virtue of standing in the common relationship of belligerency against the same enemy, two entities become co-belligerents.") (emphasis added); *see also* Schmitt, *supra* note 144 ("The term 'co-belligerent' refers to allies or other States engaged in an international armed conflict (IAC) *with a common enemy*.") (emphasis added).

[149] *See supra* Part II, p. 278 (conclusion).

against a belligerent party to a NIAC but does not support another, it is hardly participating in this NIAC—although it may be a party to a separate NIAC.

(4) The last difference refers to the relation with the legal body of collective security. The *target*-situation is impervious to this body of law. In other words, whether the intervening actor acts in collective self-defense or with the United Nations Security Council's ("UNSC") authorization does not impact its status as a belligerent party or a third actor to the conflict. Again, this lines up with the principle of effectiveness under IHL. The intervening actor's participation in the pre-existing NIAC and, therefore, the applicability of the law of NIAC to this actor depends on its behavior on the ground rather than on the implementation of the rules on collective security.

On the contrary, the adoption of the United Nations Charter ("U.N. Charter" or "the Charter") and the prohibition on the use of force tremendously influenced the *source*-situation, i.e., the situation of co-belligerency as often associated with the Law of Neutrality.[150] This situation of co-belligerency now occurs in a reduced number of circumstances.

First, when the UNSC authorizes the use of force under Chapter VII of the Charter,[151] the Law of Neutrality does not apply.[152] Member States must respect the UNSC's decision, and their obligations under the U.N. Charter, which includes their obligations under such a UNSC's decision, prevail over any other obligation they might have.[153] Member States using force do not violate their neutrality duties. Further, Member States not using force cannot prevent military force nor refuse to support it by other means.[154] Therefore, the *source*-situation of co-belligerency as associated with the Law of Neutrality never happens.

Second, when the UNSC imposes non-military sanctions in accordance

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[150] *See*, *e.g.*, U.K. MANUAL, *supra* note 82, § 1.42.2; GERMAN MANUAL, *supra* note 126, § 1103.

[151] U.N. Charter art. 42.

[152] *See* Schmitt, *supra* note 144. See Heintschel von Heinegg, *supra* note 134, for a discussion on the ongoing Russia-Ukraine armed conflict: "Because of the veto of the Russian Federation there has been no decision by the UN Security Council based on Chapter VII of the U.N. Charter that would allow neutral States to deviate from their obligations under the law of neutrality."

[153] U.N. Charter arts. 25, 103.

[154] *See id*. arts. 2(5), 25; *see also* U.S. MANUAL, *supra* note 63, § 15.2.3.2; DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 7.2.2 (2022) [hereinafter U.S. COMMANDER'S HANDBOOK], https://usnwc.libguides.com/ld.php?content_id=66281931 [https://perma.cc/5T4H-B67B]; *see also* Georgios C. Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNATIONAL L. 575, 581 (1998); Kai Ambos, *Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?*, EJIL: TALK! (Mar. 2, 2022), https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/ [https://perma.cc/5WCF-7C33].

with Article 41 U.N. Charter, only a limited form of neutrality remains possible: qualified neutrality.[155] Member States must implement the measures but can refrain from participating in the hostilities and respect their neutrality duties when these duties do not contradict the measures.[156] In the circumstances, the *source*-situation only subsists in a modified version: the situation of co-belligerency as associated with the Law of Neutrality cannot result from the compulsory implementation of the non-military sanctions—it would not violate the Law of Neutrality, but only from the participation in the hostilities or the violation of the non-contradictory impartiality duties.

Third, when States do not have an obligation to support under the U.N. Charter or another convention, they have the discretion to either remain neutral or support a belligerent State, in accordance with their right to collective self-defense provided by Article 51 U.N. Charter[157] or in accordance with a non-binding decision of the UNSC. This situation occurs when the UNSC does not make any kind of decision or only makes a recommendation,[158] or when it declares sanctions but precludes certain Member States from their obligation to implement these sanctions.[159] If States were to choose to offer assistance, they would not violate their neutrality duties and the *source*-situation would not occur.[160]

C. The Failure of the Analogy with Co-Belligerency

The comparative exercise between the *target*-situation, i.e., supportive foreign interventions in a NIAC, and the *source*-situation, i.e., co-belligerency, led to the identification of five relevant similarities and four relevant differences. Thus, a quantitative approach would quickly allow to validate the analogical argument with co-belligerency: there are more similarities than differences. Nonetheless, as previously stated, only a qualitative examination of these similarities and differences constitutes a legitimate assessment of the validity of the analogy. This is why the

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[155] *See*, *e.g.*, JEAN SALMON, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 740 (2001); Robert W. Tucker, *Neutrality and the Legal Position of War*, 50 INT'L L. STUD. 165, 174 (1955); Bridgeman, *supra* note 133, at 1208; Schindler, *supra* note 135, at 372; OPPENHEIM, *supra* note 121, at §§ 292e, 305.

[156] *See*, *e.g.*, Bridgeman, *supra* note 133, at 1210–11.

[157] U.N. Charter art. 51.

[158] *Id.* arts. 36–39.

[159] *Id.* art. 48(1).

[160] *See* Schindler, *supra* note 127, at 248–49, 262, 270. With a focus on the right to collective self-defense, see, for example, THE NETHERLANDS MANUAL, *supra* note 133, at 145, ¶ 0912; *see* U.S. COMMANDER'S HANDBOOK, *supra* note 154, § 7.2.2 (implicitly asserting); Schindler, *supra* note 135, at 372–73; Tucker, *supra* note 155, at 178; Christopher Greenwood, *The Relationship Between* Ius ad Bellum *and* Ius in Bello, 9 REV. INT'L STUD. 221, 230 (1983); Bothe, *supra* note 121, at 553, 575; GREENSPAN, *supra* note 142, at 523 (the author is not explicit on this point); OPPENHEIM, *supra* note 121, § 292h; *see also* Ambos, *supra* note 154.

following conclusive remarks will adopt a qualitative perspective.

The analysis demonstrated that similarities between the *target*-situation and the *source*-situation are imperfect. First, these situations correlate as to the nature of the third actor's actions, which can be either direct attacks against an opponent or supportive actions to a belligerent party. Yet, a declaration of war can only trigger the *source*-situation.[161] Second, even though both situations share a certain intensity threshold for the third actor's actions, this threshold only stands, with respect to the *source*-situation, for systematic and substantial violations of the Law of Neutrality and not for direct participation in hostilities.[162] Third, if neither situation necessarily results from formalities, such formalities may suffice for the *source*-situation (e.g., a declaration of war) but not for the *target*-situation (e.g., a declaration of support).[163]

Moreover, the identified differences systematically weaken relevant similarities. Although there is a pre-existing armed conflict in both situations, this conflict is of a different nature and involves different actors.[164] Additionally, although both situations are characterized by actions of a similar nature and intensity, the opponent's reaction only matters for the *source*-situation.[165] Besides, the actual situation taking place in the conflict is important in both situations, but the *source*-situation is nevertheless deeply affected by the legal body of collective security.[166]

Further, relevant differences touch upon fundamental features of both situations. The specific nature of the actors, the critical roles of the opponent's reaction and of the cooperative relation between the third actor and a belligerent party, as well as the relation with the legal body of collective security are at the core of what the *target*-situation and the *source*-situation really are.

In conclusion, by contrast with a purely quantitative approach, a qualitative approach of relevant similarities and dissimilarities forces to discard the analogy with the situation of co-belligerency. Consequently, the legal regime and conditions of co-belligerency, associated with the Law of Neutrality, cannot be transposed to develop the conditions for an intervening actor to become a party to a pre-existing NIAC.

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[161] *See* discussion *supra* Part IV.A (second similarity).

[162] *See* discussion *supra* Part IV.A (third similarity).

[163] *See* discussion *supra* Part IV.A (fifth similarity).

[164] *Compare* discussion *supra* Part IV.A (first similarity), *with supra* Part IV.B (first dissimilarity)

[165] *Compare* discussion *supra* Part IV.A (second and third similarities), *with supra* Part IV.B (second dissimilarity).

[166] *Compare* discussion *supra* Part IV.A (fifth similarity), *with supra* Part IV.B (fourth dissimilarity)

V. CONCLUSION

Supportive foreign interventions in a pre-existing NIAC significantly increased these past few years but did not generate massive interest in legal scholarship (in contradistinction, for instance, with the sudden, current, and significant scholarly interest for foreign participation in a pre-existing IAC, driven by the extensive State support to Ukraine in its IAC against Russia). However, as Part II of this article tries to demonstrate, the law of NIAC does not regulate these interventions and leaves both belligerent actors and victims in an insecure grey zone. Still limited, State practice and international case law does not tackle the issue up-front and only provides one postulate to work with: the intervening actor becomes a belligerent party to the *same* pre-existing NIAC.

If this postulate evolves into law, it appears crucial to think about the conditions for the intervening actor to become such a party to a pre-existing NIAC. Part III presents a useful method to do so: the analogical reasoning. Part III also shows how U.S. practice on "associated forces" suggests an analogy with the situation of co-belligerency associated with the Law of Neutrality. Even though this analogy seems attractive at first sight, the analysis in Part IV reveals that relevant differences between the situation of supportive foreign interventions in a pre-existing NIAC and the situation of co-belligerency prevail over relevant similarities between both situations. Therefore, the analogy with co-belligerency associated with the Law of Neutrality fails.

Thus, other analogical arguments or solutions must be explored to recommend an appropriate legal framework.[167] It appears to the author that the analogical argument with the direct participation in hostilities ("DPH") by an individual, as regulated under IHL, has a better chance for success. As a matter of fact, this analogical argument already constitutes a source of inspiration for the ICRC's approach on participation in a pre-existing NIAC, i.e., the so-called "support-based approach."[168] Although the ICRC's approach seems incomplete,[169] it opens the way for further discussions on an analogical argument with DPH, which are outside the scope of this article and are left to future publications.[170] In any case, the final word will probably

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[167] *See* author's Ph.D. thesis, *supra* p. 259. Where, in addition to the two types of analogical reasoning mentioned in this article (co-belligerency and direct participation in hostilities), the author also studied possible analogies with the situation of aid or assistance regulated by the Law of State Responsibility and with the situation of complicity governed by International Criminal Law.

[168] *See, e.g.*, Ferraro, *ICRC's Legal Position*, *supra* note 115, at 1231–32.

[169] *See generally* Raphaël van Steenberghe & Pauline Lesaffre, *The ICRC's "Support-Based" Approach: A Suitable but Incomplete Theory*, 59 QUESTIONS INT'L L. 5 (2019).

[170] See author's Ph.D. thesis, *supra* p. 259, for an examination of this analogical argument.

be for States as their practice contributes both to the interpretation of treaties and the evolution of customary international law. This said, it is our duty to keep raising concerns and incite them to start working on this pressing issue for the necessary development of IHL.