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Identifying co-parties to armed conflict in international law

How states, international organizations and armed groups become parties to war

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Summary

- States have often relied on each other's support to wage wars. But, as military technology advances, contemporary armed conflicts are characterized by increasingly complex patterns of cooperation involving states, international organizations and non-state armed groups. These patterns make it difficult to identify who qualifies as a party to conflict. Such issues are likely to become even more pressing in future wars.
- This research paper analyses what party status means and how parties to armed conflicts are identified as a matter of international law. Despite the ubiquity of cooperation in armed conflicts, debates on party status have been marked by uncertainty regarding the criteria in international law for identifying parties, and confusion as to the legal implications. Yet, states, international institutions, courts and humanitarian organizations, as well as non-state armed groups, need to have a clear sense of how to address these questions. This paper, therefore, aims to provide a roadmap to establish who is party to an armed conflict and the legal implications of that finding.
- Support may include allowing the use of territory from which to launch an attack, the supply of war materiel or military intelligence, or the conduct of cyber operations. In such situations, the question arises as to if, and when, the supporting states themselves become parties to the conflict. That question also arises for support given to or received from non-state armed groups or international organizations in armed conflict.
- It is important to know which actors are the parties to an armed conflict, for both legal and political reasons. Most importantly, parties to an armed conflict have obligations under international humanitarian law, or the law of armed conflict, that states do not have in peacetime. Different rules from those applicable in peacetime apply to individuals engaged in or affected by armed conflict. Party status also has implications under international criminal law and international human rights law. And party status has significant legal implications for the relationship between multiple parties on the same side of an armed conflict – referred to as 'co-parties'. Thus, co-parties have multiple obligations, flowing from their party status, regarding how their fellow co-parties behave in an armed conflict.
- The law of neutrality has traditionally provided that states that are not parties to an inter-state conflict have obligations not to give assistance to the warring parties. The way in which neutrality law relates to the UN Charter is controversial, but even if neutrality duties still arise, a breach of those duties does not itself automatically render the violating state a party to the conflict.

- Becoming a co-party is not, in and of itself, a violation of international law. The legality of the conduct that makes a state a co-party depends chiefly on whether the use of force is authorized by the UN Security Council or amounts to (collective) self-defence.
- A state, international organization or non-state armed group does not become a co-party merely because the adversary considers it as such. Whether or not it is a party depends on its own acts. The relationship between adverse parties to an armed conflict – either international or non-international – is constituted by conduct that parties carry out against one another, i.e. that is intended to cause harm to the enemy. Criteria for being a co-party to an armed conflict must therefore be drawn from the legal framework of international law applicable in armed conflict, in light of state practice in past and current conflicts.
- The first criterion for being a ‘co-party’ is a relationship of directness to the hostilities. Considerations that are not determinative of party status but that can be used in reaching an assessment of directness include geographical and temporal proximity and the scale and nature of the activity.
- The second criterion is that there must be some degree of cooperation or coordination among the relevant states against a common enemy. If this were not so, those states would be in separate armed conflicts, even though against the same enemy. Institutionalized cooperation or coordination structures are not required, but their existence can be an important indicator for sufficient cooperation or coordination.
- Because co-party status has such significant legal implications – and may also have considerable political implications – states, international organizations and armed groups must be aware of when the threshold for becoming a co-party is crossed. They must understand the implications of co-party status for the rules that apply to their conduct, the rules that apply to their relationship with third parties and the rules that apply to individuals connected with them.
- States, non-state armed groups and international organizations should consider the benefits of making public, wherever possible, any determinations they make as to their co-party status when assisting others that are party to an armed conflict, as well as the reasons for any such determinations. They should also consider whether it is practicable to publicly release any determinations that they make concerning the status of others that assist parties to an armed conflict.

01

Introduction

The complexity of modern warfare makes it difficult to identify who qualifies as a party to conflict. But the need for clarity has never been greater.

The war in Ukraine has generated awareness and interest in questions of party status both among the public and in political spheres. Many states have been providing military assistance to Ukraine. This assistance includes the supply of a wide range of weapons, training of Ukrainian troops, the provision of targeting intelligence and support through cyber operations. On the other side of the conflict, Russia, too, has received external support. Belarus has allowed its territory to be used as a launchpad for Russia's invasion¹ and has delivered tanks to Russia,² while Iran has supplied drones and trained the Russian military in their use.³ Military support to both countries has raised questions and concerns as to when supporting states might themselves become parties to the international armed conflict alongside either Ukraine or Russia.

Yet, the same underlying issues have arisen in many, if not all, major armed conflicts from the 20th century onwards – even if those issues may have been less present in the wider public consciousness. The different forms of military support in the war in Ukraine have been recurring features in armed conflicts around the world. For example, prior to Germany's declaration of war on the US in the Second World War, the US's political objective regarding military assistance to the Allies was – much like today, with reference to Ukraine – to provide as much support as legally possible without becoming a co-belligerent.⁴ In the Iran–Iraq war, Kuwait faced allegations from Iran that its support for Saddam Hussein made it a party to the war alongside

¹ UN General Assembly, Eleventh Emergency Special session, 28 February 2022, UN Doc. A/ES-11/PV.1 5-6, 11-16, 20, 22-4, 26-7.

² Kuznetsov, S. (2022), 'Ukraine bats away Lukashenko's border threats', Politico, 12 October 2022, <https://www.politico.eu/article/ukraine-bats-away-lukashenkos-border-threats>.

³ Borger, J. and Sabbagh, D. (2022), 'Iran provides 'technical support' for Russian drones killing civilians, says US', *Guardian*, 20 October 2022, <https://www.theguardian.com/world/2022/oct/20/russia-ukraine-war-iran-drones-advisers-crimea>.

⁴ US Justice Department (1941), 'Address of Robert H Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941', <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf>.

Iraq.⁵ Such concerns were also prompted when Germany provided logistical and intelligence support to the multinational anti-Islamic State coalition in Syria and northern Iraq,⁶ and in the US over similar military assistance to the Saudi-led coalition against the Houthi rebels in Yemen.⁷ Regarding the Somalia-based Islamist militia group Al-Shabaab, its alleged support of Al-Qaeda raised questions in the US as to whether Al-Shabaab had become a party to the armed conflict between Al-Qaeda and the US.⁸ And the International Criminal Court (ICC) considered that military support between the Central African Republic (CAR) and a Democratic Republic of the Congo-based armed group led by Jean-Pierre Bemba made both parties to the armed conflict with other groups in the CAR.⁹

As military technology advances, contemporary armed conflicts are characterized by increasingly complex patterns of cooperation involving states, international organizations and non-state armed groups.

States have often relied on each other's support to wage wars. But, as military technology advances, contemporary armed conflicts are characterized by increasingly complex patterns of cooperation involving states, international organizations and non-state armed groups.¹⁰ These patterns make it difficult to identify who among the cooperating partners qualifies as a party to conflict. Such issues are likely to become even more pressing in future wars.

Determining whether a state, an armed group or an international organization is a party to an armed conflict is not merely a theoretical exercise. Party status has significant legal consequences in the regulation of armed conflict. Public discourse on party status – for example, in the case of states that provide military support to Ukraine in Russia's war of aggression – has to an extent been confused on what it would mean, in legal terms, to be a party.

Armed conflict is today regulated not by a single body of international law, but by different regimes – including, most fundamentally, the *ius ad bellum*, the *ius in bello* (otherwise referred to as international humanitarian law – IHL – or the law of armed conflict), international criminal law, international human rights law (IHRL) and the law of neutrality. The implications of party status cannot be understood without considering how these different bodies of law interact.

⁵ UN Digital library (undated), 'Letter Dated 14 August 1987 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General', UN Doc S/19044, <https://digitallibrary.un.org/record/139073?ln=en>.

⁶ German Federal Parliament, Stenographic Protocol Plenary Session 18/144 (4 December 2015) 14106, 14115.

⁷ Strobel, W. and Landay, J. (2016), 'Exclusive: As Saudis bombed Yemen, U.S. worried about legal blowback', Reuters, 10 October 2016, <https://www.reuters.com/article/us-usa-saudi-yemen-idUSKCN12A0BQ>.

⁸ Savage, C. (2017), *Power Wars: The Relentless Rise of Presidential Authority and Secrecy*, Back Bay Books, p. 274.

⁹ Bemba (Trial Judgment) ICC-01/05-01/08 (21 March 2016) [131], [652], [661], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

¹⁰ ICRC (2021), *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War*, p. 5, <https://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce>.

1.1 Purpose and structure of the paper

Despite the ubiquity of cooperation in armed conflicts, debates on party status have been marked by uncertainty regarding the criteria in international law for identifying parties and confusion as to the legal implications.¹¹ Yet, states, international institutions, courts and humanitarian organizations, as well as non-state armed groups, need to have a clear sense of how to address these questions.

The purpose of this research paper is, therefore, to provide a roadmap to establish who is party to an armed conflict and the legal implications of that finding. The paper analyses what party status means and how parties to armed conflicts are identified as a matter of international law. In doing so, it draws on illustrative examples from state practice in recent and current conflicts.

The paper does not aim to identify a specific state or other entity as a party to any of the conflicts mentioned. Instead, it seeks to provide the tools for any such analysis in the form of a general framework of legal criteria for establishing when a state, international organization or non-state armed group becomes a party to an armed conflict. As diverse forms of cooperation increasingly shape armed conflicts, the paper focuses on identifying parties in situations where there are multiple parties on the same side of conflict – referred to as ‘co-parties’.

This paper is structured as follows. Chapter 2 outlines the legal framework for identifying co-parties to an armed conflict. Chapter 3 discusses how and why party status is legally relevant and clarifies what turns on identifying parties to armed conflict. Chapter 4 draws out some specific legal implications of becoming a co-party. Finally, Chapter 5 concludes with practical recommendations for those facing the challenges of identifying (co-)parties to armed conflicts.

1.2 Scope of the paper

This paper addresses issues of party status in international armed conflicts (IACs) and non-international armed conflicts (NIACs). IACs are defined as ‘a resort to armed force between States’.¹² Accordingly, in principle, only states can be parties to IACs. While statehood under general international law remains the basic defining characteristic of parties to an IAC, there are two exceptions regarding collective entities other than states. First, international organizations can be parties to IACs, under customary international law.¹³ Second, national liberation movements involved in self-determination conflicts may be considered as parties

¹¹ For criticism of the debate in Germany in that regard, see Kress, C. (2022), *The Ukraine War and the Prohibition of the Use of Force in International Law*, TOAEP Occasional Paper Series No. 13, p. 14, <https://www.toaep.org/ops-pdf/13-kress>.

¹² *Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-A (2 October 1995) [70], <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

¹³ International Law Commission (2013), ‘Statement by Ms. Patricia O’Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel International Law Commission’, 23 May 2013, https://legal.un.org/ola/media/info_from_lc/ILC%20Legal%20Counsel%20statementrev3may20.pdf; UN Security Council (2015), ‘Report of the High-level Independent Panel on Peace Operations’, 17 June 2015, UN Doc A/70/95, [122], https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_446.pdf.

to an IAC, despite not (yet) fulfilling the criteria of statehood, in that the provisions of Additional Protocol 1 may be made applicable to them (Articles 1(4) and 96(3) of the Protocol).

A NIAC is defined as ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.¹⁴ The baseline requirement for a collective entity to qualify as a party to a NIAC is thus one of sufficient organization. This does not presuppose state-like organizational structures. Rather, the criterion is a functional one. Sufficient organization requires being able: (i) to conduct intensive collective violence; and (ii) to implement at least the basic rules of IHL. International criminal jurisprudence has developed non-exhaustive indicators to assess the organization requirement.¹⁵ Unlike in IACs, there is no formal limitation of the types of collective entities that can be parties to NIACs. Any entities that meet the organization requirement can be parties. This includes states, international organizations and armed groups, as well as potentially certain corporations.

The findings of this paper apply to all collective entities that can be parties to either IACs or NIACs. However, the paper focuses on states as parties to IACs and on states and armed groups as parties to NIACs. For reasons of space, issues of the law of occupation are outside of the paper’s scope.

¹⁴ *Tadić* (Decision on Jurisdiction) [70].

¹⁵ See, for example, *Boškoski and Tarčulovski* (Trial Judgment) IT-04-82-T (10 July 2008) [199]–[203], https://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf; *Ntaganda* (Trial judgment), ICC-01/04-02/06, 8 July 2019, [704], <https://www.icc-cpi.int/court-record/icc-01/04-02/06-2359>.

02

The legal framework for identifying (co-)parties

This chapter explains how international law identifies co-parties to armed conflict.

Being a party to an armed conflict entails significant legal implications. (These implications are discussed further in Chapter 3.) It matters that we know when states, international organizations or armed groups cross the line to become a party to an armed conflict. Establishing the answer to that question is particularly challenging when there are multiple potential parties on the same side – that is, co-parties to armed conflict.

Traditionally, states fighting on the same side of a war have been referred to as ‘co-belligerents’.¹⁶ This paper, instead, refers to multiple parties on the same side of an armed conflict as ‘co-parties’. This change is intended to reflect the wider shift in international legal terminology from ‘war’ and ‘belligerents’ to ‘armed conflict’ and ‘parties to the conflict’. To be clear, the term ‘co-party’ simply means being a party to an armed conflict – either international or non-international – alongside other parties on the same side. It is not a separate status to that of a party. All the legal implications of party status set out in Chapter 3 apply equally to co-parties.

¹⁶ Greenspan, M. (1959), *The Modern Law of Land Warfare*, University of California Press, p. 531.

The question of identifying co-parties can arise in relation to various forms of cooperation in IACs or NIACs involving states, international organizations and/or non-state armed groups. There is one setting, however, in which such issues cannot arise. This is the scenario in which a state supports a non-state armed group in a conflict with another state. Here, if the supporting state were to become a party, the conflict between the two states could only be an IAC (provided the requirements for the existence of an IAC between the two states are met). The armed group, however, cannot be party to that IAC in its own right (as seen in Section 1.2) – if it is to remain a party on its own (and not simply form part of one of the states parties to the IAC), the armed group can only be a party to a separate NIAC against the adverse state.¹⁷ In such a scenario, there may be multiple parallel, but separate conflicts, but not multiple co-parties on one side of the same conflict.

This chapter develops an account of the legal framework for identifying who is a co-party to an armed conflict, as follows. First, methodological questions are addressed and the field of potential starting points and existing approaches to the issue charted briefly. Second, based on these considerations, legal criteria for identifying co-parties are sketched out and their practical operation is illustrated. Finally, the temporal scope of co-party status is analysed – that is, when co-party status begins and ends.

2.1 Methodology, related concepts and existing approaches

International law presupposes that there can be multiple parties on the same side of an armed conflict.¹⁸ But, at the same time, no rules of international law have been developed specifically to establish when that is the case. Neither treaty law nor customary international law explicitly provides criteria for determining co-party status. Therefore, rules must be drawn from the legal framework of international law in armed conflict and in light of state practice in past and current conflicts. The task in establishing criteria is thus to draw out what international treaty and customary rules presuppose, when they refer to parties to a conflict, about what has made the respective collective entity a party.

Methodologically, this task involves interpreting the relevant treaty provisions and establishing the content of customary international law rules. Interpreting treaty provisions usually begins with the ‘ordinary meaning’ of the terms of the relevant provisions.¹⁹ However, the identification of co-parties does not flow from the ‘ordinary meaning’ of the term ‘parties to an armed conflict’. Legal criteria for identifying co-parties may, instead, be drawn from other means of interpretation,

¹⁷ See Mačák, K. (2018), *Internationalized Armed Conflicts in International Law*, Oxford University Press, pp. 103–04 (suggesting that a non-state armed group may become a party to an IAC if it uses force jointly with a state against another state).

¹⁸ See Common Article 2 GC I-IV: ‘...between two or more of the High Contracting Parties’; for NIACs see, for example, *Bemba* (Trial), [129], (‘...the mere fact of involvement of different armed groups does not mean that they are engaged in separate armed conflicts’).

¹⁹ Art 31(1) VCLT.

namely from an interpretation that considers the ‘context’, as well as the ‘object and purpose’, of the terms.²⁰ Contextual – or systematic – interpretation,²¹ specifically, are crucial.²²

State practice can also help with interpreting treaties. Relevant incidents of practice may be considered as supplementary means of interpretation.²³ The practice of states and international organizations may also inform our understanding of the relevant customary international law rules. In sum, both the system of the law regulating armed conflict and international practice must be considered in coming to conclusions on criteria for identifying co-parties. The concepts of armed conflict are a natural place to start.

The relationship between the concepts of armed conflict and the identification of parties

Historically, the concept of war was either understood in subjective terms – i.e. as dependent on states’ intention to be at war, chiefly when expressed formally in declarations of war – or in objective, material terms as armed confrontations of a certain scale.²⁴ The latter conception of war, as defined through facts on the ground, is closer to present concepts of armed conflict. At the same time, a relic of subjective, formal concepts of war today is that declarations of war arguably remain possible between states. Indeed, Common Article 2 to the Geneva Conventions I-IV still provides that ‘the present Convention shall apply to all cases of declared war or any other armed conflict’.²⁵ Declarations of war thus present a theoretical way to co-party status in inter-state conflict (even if this might today constitute a prohibited threat of force), but they have long become rare in practice. Because of the scarcity of such declarations, it should not be lightly assumed that states intend to declare war.²⁶ Accordingly, an explicit statement to that effect should be required of any such state.

Today, IACs and NIACs – as defined in Section 1.2 of this paper – are the prevalent concepts in the legal regulation of war: both are characterized as factual situations of conflict (leaving aside the possibility of declared wars between states). In bilateral conflict settings, establishing that an IAC or NIAC exists and establishing that the two collective entities involved are parties to the conflict will generally be one and the same exercise. When the bilateral confrontation between two collective entities – states, international organizations or non-state armed groups – meets the requirements for the existence of either an IAC or NIAC, these two will be parties to an IAC or NIAC, respectively.

²⁰ Ibid.

²¹ See Art 31(3)(c) VCLT.

²² Systemic arguments arguably also matter in identifying the content of customary rules referring to parties.

²³ Art 32 VCLT. But State practice may not suffice to constitute subsequent practice in the application of a treaty (in the sense of Article 31(3)(b) VCLT) since practice cannot be said to have established an ‘agreement of the parties’ to the relevant treaties regarding the identification of co-parties.

²⁴ For the former conception, see, for example, McNair, A. (1925), ‘The Legal Meaning of War, and the Relation of War to Reprisals’, *Transactions of the Grotius Society*, vol. 11, pp. 29, 45; for the latter, see, for example, Oppenheim, L. (1906), *International Law: A Treatise*, Longmans, vol II, p. 57.

²⁵ Common Article 2 to GC I-IV.

²⁶ McNair, A. and Watts, A. (1966), *The Legal Effects of War*, 4th edition, Cambridge University Press, p. 8.

It is clear that the criteria for the existence of an IAC or NIAC must be met for there to be any party to the conflict. Less clear, however, is whether every co-party must meet these criteria *separately* in its conflict relationship with the other side in order to become a co-party.

Declarations of war present a theoretical way to co-party status in inter-state conflict, but they have long since become rare in practice.

The question may become relevant in the following two scenarios outlined below and to which this paper later refers. In the first scenario, party A and party B are already engaged in an armed conflict, when a potential party C joins that conflict on A's side. If the confrontation between A and B meets the criteria for the existence of an IAC or NIAC, does the same also need to be true of the confrontation between C and B, to establish that C has become A's co-party? In the second, the confrontation between (potential) parties A and C, on the one hand, and (potential) party B, on the other hand, meets the criteria for an armed conflict if A and C's action is taken together. Viewed in isolation, however, neither the confrontation between A and B, nor that between C and B, would suffice to create an armed conflict. Scenario 2 is mostly relevant in NIACs – namely if the requisite degree of intensity of armed violence is only reached jointly by A and C in regard to B. Since, on a widespread view, there is no intensity threshold for an IAC to exist or, at most, a low one,²⁷ it is hard to think of cases where the acts of parties A and C must be considered jointly to establish that there is a resort to armed force in regard to party B.²⁸ Scenario 1-type situations may, however, also arise in IACs. Even if no intensity threshold must be met in IACs, acts of a particular nature or quality are required to qualify as a resort to armed force that triggers an IAC. Not all acts that would form part of hostilities if carried out during an IAC would necessarily be sufficient to trigger an IAC in and of themselves²⁹ – for example, the provision of targeting intelligence for an airstrike against another state.

State practice and decisions by international courts and tribunals appear to point against assessing separately for each co-party whether its actions constitute an armed conflict with the adverse party. Neither states nor international courts and tribunals refer to the criteria for the existence of an IAC or NIAC when identifying co-parties, with practice instead taking (explicitly or implicitly) the contributions by multiple parties together when assessing whether an armed conflict exists. For example, during the 2003 Iraq war, the US considered Kuwait and Qatar as its co-parties in the IAC against Iraq, even though these two states had not resorted to armed force themselves – unlike the other states that the US considered as its co-parties – but had notably, among other things, allowed their territory to be used

²⁷ See, for example, ICRC (ed.) (2016), *Commentary on the First Geneva Convention*, Cambridge University Press [238]; though see, International Law Association (2010), 'Final Report on the Meaning of Armed Conflict in International Law', Committee on the Use of Force, pp. 18, 26–29, 32 (suggesting that there is an intensity threshold in IACs).

²⁸ A theoretical example for scenario 2 in an IAC might be the case of multiple states jointly setting up a blockade.
²⁹ Greenwood, C. (2008), 'Scope of Application of Humanitarian Law', in Fleck, D. (ed.) (2008), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, p. 57.

for US attacks on Iraq.³⁰ In *Bemba*, the ICC considered armed groups and the CAR government as co-parties to the same NIAC with other armed groups, without conducting a separate assessment of the intensity threshold – which the activities of the CAR government may not have met if considered on their own.³¹ Similarly, the ICC did not carry out separate intensity assessments to find several armed groups to be co-parties in *Katanga*³² and *Ntaganda*.³³ Importantly, however, the requisite degree of organization was assessed separately for each co-party in the latter cases.³⁴

Conceptually, there does not seem to be a need for requiring a separate assessment in either of the two scenarios outlined above. Regarding scenario 1 – i.e. where an armed conflict already exists – it seems strange to require that a potential co-party must carry out acts that would suffice to create a *new* armed conflict in order to become a party to an armed conflict that *already exists*. Regarding scenario 2 – i.e. where an armed conflict is jointly created – it is difficult to see why the same factual result (i.e. intense armed violence on the ground) should be treated differently merely because that result is reached by way of a division of labour between multiple entities. Structurally, both the requirement of resort to armed force in IAC and protracted armed violence in NIAC regard the nature of the conflict as a whole. It is therefore sufficient to require that these criteria must be met overall by all co-parties in their confrontation with the adverse side. In addition to being conceptually unnecessary, attempts to distinguish the action of multiple co-operating partners may also be difficult in practice.

There are concerns that this conclusion risks lowering the threshold for the application of IHL, particularly in NIACs – with the effect that the more permissive IHL rules of targeting reduce human rights protection for the affected individuals.³⁵ Such concerns must still be taken seriously, but can potentially be accommodated by formulating strict criteria for when actions by different (potential) co-parties may be assessed together.

More widely, Section 3 shows that legal consequences of identifying parties go beyond targeting implications under IHL. The effect of imposing IHL obligations on an entity once it becomes a party to conflict, or the legal implications for establishing international criminal responsibility, may lead to an overall more nuanced picture than an exclusive focus on the above targeting implications. This is all the more significant, as insisting on separate assessments carries the same risks. Notably, there may be a temptation to read down the intensity assessment in cooperation settings when carrying out a separate intensity assessment for each co-party, particularly given the practical difficulties involved in such a separate assessment. That temptation may ultimately lead to an even more extensive – and unfettered – application of IHL, to the detriment of human rights protection.

³⁰ US Office of the Legal Counsel (2004), ‘“Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention’, Memorandum Opinion, p. 44, <https://www.justice.gov/file/145761-0/dl?inline>.

³¹ *Bemba* (Trial), [131]; [137]-[141]; [652]; [658]; [661]-[663].

³² *Katanga* (Trial Judgment) ICC-01/01-10/07 (7 March 2014) [1211], [1218], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

³³ *Ntaganda* (Trial), [711]; [713]; [714]; [725].

³⁴ *Katanga* (Trial), [1207]-[1211]; *Ntaganda* (Trial), [719].

³⁵ See, for example, Zwanenburg, M. (2019), ‘Double Trouble: The ‘Cumulative Approach’ and the ‘Support-Based Approach’ in the Relationship Between Non-State Armed Groups’, *Yearbook of International Humanitarian Law* 2019, 22, pp. 43, 57.

In sum, therefore, the conflict-related criteria for the existence of an IAC or NIAC, respectively, (i.e., ‘recourse to armed force between States’ in IACs and meeting the threshold for intensity of hostilities in NIACs) must only be met overall, considering the contributions by all co-parties jointly. By contrast, the party-related criteria for the existence of an IAC or NIAC (i.e. statehood in IACs and sufficient organization in NIACs) must be met separately by each co-party. As noted in the introduction to this paper, these party-related criteria are basic prerequisites for any party to either an IAC or NIAC.³⁶

Whether an aggregated assessment is accepted or not, additional legal criteria are needed for establishing that multiple states or armed groups are parties to *the same* armed conflict (i.e. co-parties), and not parties to separate armed conflicts. To be clear, these additional criteria will necessarily need to be met by each co-party on its own. Distinguishing parties to the *same* armed conflict from parties to *separate* armed conflicts matters for several reasons. First, in both IACs and NIACs, the legal implications of party status (naturally) only apply regarding the conflict to which the particular entity is a party. In particular, there arguably are duties *between* co-parties, flowing from their party status.³⁷ Additionally, in IACs, the relationship between states that are parties to separate armed conflicts would be regulated by the law of neutrality.

Accordingly, the criteria for the existence of an IAC or NIAC are important parameters in identifying parties – they must necessarily be met (at least overall) – but they do not give a complete answer to the question of how to identify co-parties.

Relationship to (breaches of) neutrality obligations and *ius ad bellum* standards

International law traditionally recognized two, mutually exclusive statuses in war – a state was either a party or a neutral. Neutral states owed certain duties of prevention and abstention to the parties to the conflict.³⁸ Scholars have sometimes suggested that there is a necessary relationship between compliance with the law of neutrality and retention of neutral status, such that a neutral state might lose that status and become a co-party to an international armed conflict where they systematically or significantly violate their obligations under the law of neutrality.³⁹

Curtis Bradley and Jack Goldsmith applied this interpretation of the law of neutrality – which applies in inter-state conflicts – by analogy to define the scope of the US’s domestic law authorization to use force against non-state armed groups under the 2001 US Authorization for the Use of Military Force (AUMF), arguing that this scope extended beyond those groups responsible for the 9/11 attacks to include ‘co-belligerents’.⁴⁰ While highly controversial, this reading of the law

³⁶ See Section 1.2.

³⁷ Wentker, A. (2022), ‘Partnered Operations and the Positive Duties of Co-Parties’, *Journal of Conflict and Security Law*, 27(2), p. 159, <https://academic.oup.com/jcsl/article/27/2/159/6661221>. See Chapter 4.

³⁸ See Section 3.5.

³⁹ Bradley, C. and Goldsmith, J. (2005), ‘Congressional Authorization and the War on Terrorism’, *Harvard Law Review*, 118(7), pp. 2047, 2112, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5902&context=faculty_scholarship.

⁴⁰ *Ibid.*, p. 2113.

of neutrality, and the approach of defining the scope of its authority under the AUMF by analogy to that law, has found some support in US government and judicial practice in US domestic litigation, in the context of establishing that an armed group is an ‘associated force’ of the groups responsible for 9/11.⁴¹ On this account, an ‘associated force’ must first ‘be an organized, armed group that has entered the fight alongside Al-Qaeda or the Taliban. Second, the group must be a co-belligerent with Al-Qaeda or the Taliban in hostilities against the US or its coalition partners’ and ‘a co-belligerent with Al-Qaeda or the Taliban in hostilities against the United States or its coalition partners.’⁴²

The extent to which the pre-1945 dichotomy in international law between party and neutral status has survived the UN Charter is not entirely settled, given that the UN Charter (and custom) now establish generally applicable rules governing when armed force is lawful, together with the collective security system.⁴³

Assuming that the law of neutrality continues to exist to some degree, modified by the UN Charter framework in particular circumstances,⁴⁴ it is clear from practice and scholarship that there is no necessary relationship between compliance with the law of neutrality and party status.⁴⁵ Despite carrying consequences under the law on state responsibility, violations of the law of neutrality (even significant or systematic violations), such as providing a party with continuous financial support or access to the neutral state’s airspace have not hitherto been considered to lead to a loss of neutral status and the acquisition of co-party status by the violating state.

During the Iran–Iraq war of 1980–88, for example, the various states supporting Iraq in violation of neutrality law were not considered to be co-parties to the conflict. For example, Kuwait, which was reported to have allowed its airspace to be used by Iraqi combat aircraft and extended logistical and financial support to Iraq,⁴⁶ was not considered a co-party by states other than Iran (which appeared to do so not as a consequence of Kuwait violating its neutrality obligations, but rather because of the extent of Kuwait’s involvement in the conflict).⁴⁷ Similarly, following the 2003 invasion of Iraq by US-led coalition forces, many European states (including Germany and Italy) assisted and permitted use of their territories by the coalition states without themselves being considered parties to the conflict.⁴⁸

⁴¹ Ingber, R. (2017), ‘Co-belligerency’, *Yale Journal of International Law*, 42(1), pp. 67, 83–4, <https://openyls.law.yale.edu/handle/20.500.13051/6714>.

⁴² The White House (2016), *Report on the Legal and Policy Frameworks Guiding the United States’ use of Military Force and Related National Security Operations*, p. 4, https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

⁴³ See, for discussion of whether the law of neutrality continues to exist but can be displaced or modified in certain circumstances, Greenwood, C. (1983), ‘The relationship between *Ius ad Bellum* and *Ius in Bello*’, *Review of International Studies*, 9(4), pp. 221, 230; Bothe, M. (2021), ‘The Law of Neutrality’, in Fleck, D. (ed.) (2021), *The Handbook of International Humanitarian Law*, 4th edition, Oxford University Press, p. 607, <https://opil.ouplaw.com/display/10.1093/law/9780199658800.001.0001/law-9780199658800-chapter-11>; Upcher, J. (2020), *Neutrality in Contemporary International Law*, Oxford University Press, p. 19.

⁴⁴ *Legality of the Threat or Use of Nuclear Weapons* (AO) [1996] ICJ Rep 226 [89].

⁴⁵ Chinkin, C. (1993), *Third Parties in International Law*, Clarendon Press, p. 306; Lauterpacht, H. (1952), *Oppenheim’s International Law*, 7th edition, Longmans, vol II, p. 752.

⁴⁶ US Senate (1987), *War in the Persian Gulf: The U.S. Takes Sides – A Staff Report to the Committee on Foreign Relations*, US Government Printing Office, p. 37.

⁴⁷ Upcher (2020), *Neutrality in Contemporary International Law*, pp. 57–62.

⁴⁸ Bothe (2021), ‘The Law of Neutrality’, in Fleck (ed.) (2021), *The Handbook of International Humanitarian Law*, p. 603.

The object and purpose of the law of neutrality was to contain hostilities. It is consistent with this purpose that violations of one's obligations as a neutral, even if substantial or systematic, do not as such lead to a loss of neutral status and the acquisition of party status. This purpose would clearly be frustrated if a consequence of violating that law was the extension of hostilities to the violating state. In consequence, the content of the law of neutrality cannot, as a matter of law, provide the criteria for determining party status.

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In addition to violating the law of neutrality, providing assistance to a state party to an armed conflict may also engage international law rules on complicity.⁴⁹ As a general matter, the breach by an assisting state of a complicity rule does not affect whether or not it is a party. For example, the fact that an assisting state's authorization of the transfer of weapons breaches Article 6(3) of the Arms Trade Treaty does not mean that it becomes a party to the conflict. Rather, this is considered as a discrete breach of international law. Similarly, a state's breach of the rule on aid or assistance in Article 16 of the Articles on State Responsibility (ASR) does not itself make the assisting state a party to the conflict.

The same must also apply insofar as the military assistance attracts the *ius ad bellum*. The *ius ad bellum* is that body of international law that governs the legality of the use of force by one state against another. If a state provides assistance to another state that uses force, that assistance may in certain circumstances itself constitute a use of force as a matter of the *ius ad bellum* under Article 2(4) of the UN Charter and customary international law.⁵⁰ It might be argued that once the acts of a state providing assistance cross the threshold of 'force' against another state under the *ius ad bellum*, the assisting state would become a co-party to an IAC that is occurring between the state receiving the support and the adverse state. Under this argument, the question of when assistance constitutes a use of force and party status would be based on the same standard. However, there are no indications in international practice that such a connection is drawn. The debates on 'indirect uses of force' and party status are separate discourses both in practice and scholarship. It is also doubtful how much would be gained from making such a connection, since the *ius ad bellum* issues in question are perhaps no less contested and unsettled.⁵¹ Finally, it should be noted that the

⁴⁹ On complicity, see further Section 3.6.

⁵⁰ Kreß (2022), *The Ukraine War and the Prohibition of the Use of Force in International Law*, pp. 15–16; see, generally, Schmitt, M. and Biggerstaff, W. C. (2023), 'Aid and Assistance as a "Use of Force" Under the *Jus ad Bellum*', *International Law Studies*, 100, p. 186, <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3042&context=ils>.

⁵¹ Nußberger, B. (2023), *Interstate Assistance to the Use of Force*, Nomos.

ius ad bellum question here is whether there is a *separate* use of force. *Ius ad bellum* standards could thus conceivably help to find that a separate IAC exists. They do not seem to be particularly helpful to discern when states become co-parties to the *same*, rather than to separate, armed conflicts.

There is one, specific, potential complication to this general rule that *ius ad bellum* standards do not determine whether a state is a party to the underlying conflict – Article 3(f) of the Definition of Aggression of 1974,⁵² which qualifies as an act of aggression:

The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.

The complication follows from the phrasing. This distinctive form of complicity – making available territory to an aggressor – is itself qualified as an ‘act of aggression’. It may seem intuitive that an act of aggression will also make the assisting state a party, and specifically a co-party to the underlying conflict. But there does not seem to be practice that specifically makes the connection between the conduct under Article 3(f) and becoming a (co-)party to the underlying conflict.

The ICRC’s ‘support-based approach’

To establish when states or international organizations assisting states that are parties to an ongoing NIAC themselves become parties to that NIAC, the International Committee of the Red Cross (ICRC) has proposed what it labels the ‘support-based approach’. The support-based approach requires the following criteria to be met cumulatively:

(1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.⁵³

The ICRC has extended this approach beyond its initial scope to support provided to non-state armed groups fighting other armed groups,⁵⁴ and to support provided by non-state armed groups in NIACs.⁵⁵ Regarding ‘coalitions’ of armed groups, the ICRC has suggested that these could be deemed parties to the same NIAC if they ‘display a form of coordination and cooperation’, provided that ‘the sum of the military actions carried out by all of them fighting together’ meets the intensity

⁵² Art 3(f), GA Res. 3314 (XXIV), 14 December 1974.

⁵³ Ferraro, T. (2015), ‘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’, in *International Review of the Red Cross*, 97 (900), pp. 1227, 1231, <https://doi.org/10.1017/S1816383116000448>; see Ferraro, T. (2013), ‘The applicability and application of international humanitarian law to multinational forces’, *International Review of the Red Cross*, 95 (891–92), pp. 561, 584, <https://doi.org/10.1017/S181638311400023X>.

⁵⁴ Ferraro (2015), 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, p. 1228.

⁵⁵ Ferraro, T. (2019), ‘Military Support to Belligerents: Can the Provider Become a Party to the Armed Conflict?’, *Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts*, pp. 49, 53, https://www.coleurope.eu/sites/default/files/uploads/page/collegium_49.pdf.

threshold.⁵⁶ Some aspects of the ICRC's approach and its underlying structural considerations can usefully be drawn on in setting out an overarching legal framework for identifying co-parties in both IACs and NIACs.

2.2 The legal criteria for identifying co-parties

This section outlines the legal criteria for identifying co-parties. Two preliminary points are necessary.

First, the account put forward here builds on the previous sections of this paper. It thus presupposes that each co-party meets the 'party-related' criteria flowing from concepts of IAC and NIAC. That is, the criteria related to the nature and structure of the entity itself – i.e. statehood in IACs (with the exceptions noted in Section 1.2) and sufficient organization in NIACs.⁵⁷ The account also presupposes that the 'conflict-related' criteria for the existence of an IAC or NIAC are met overall – i.e. resort to armed force for an IAC and protracted armed violence for a NIAC.⁵⁸ In addition, the account focuses solely on how states, international organizations or non-state armed groups can become co-parties by virtue of their *acts*. The theoretical possibility for states to become co-parties by declaring war is excluded for the purposes of the paper.

Second, saying that a collective entity 'acts' as a matter of international law presupposes that acts of individuals can be attributed to that collective entity.⁵⁹ There may be complex questions of attribution in establishing that a state, international organization or non-state armed group has become a (co)-party, particularly when these actors operate in 'coalitions' of different sorts.⁶⁰ These problems, however, are not specific to identifying co-parties and will therefore not be further considered here. Indeed, attribution of individual acts to the relevant collective entities is also presupposed when establishing that an armed conflict exists.

Provided that these baseline requirements are satisfied, two legal criteria must cumulatively be fulfilled to establish that a state, an international organization or a non-state armed group becomes a party to an armed conflict, whether this is a conflict that is already ongoing or just being initiated, and whether this is an IAC or a NIAC.

First, the acts of the respective state, international organization or non-state armed group must possess a *direct connection to hostilities*. Second, there must be some degree of *cooperation or coordination* with at least one other co-party

⁵⁶ Nikolic, J., de Saint Maurice, T. and Ferraro, T. (2020), 'Aggregated intensity: classifying coalitions of non-State armed groups', ICRC, 7 October 2020, <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups>.

⁵⁷ See above Section 1.2.

⁵⁸ See above Section 3.1.

⁵⁹ ILC, Commentary on the Articles of State Responsibility for Internationally Wrongful Acts (2001) YILC 2001/II(2) 31, 35 [5].

⁶⁰ Among other questions, there is the issue of 'dual' or 'multiple' attribution, that is, whether the same acts can be attributed to multiple states and/or international organizations when they cooperate, including in situations of armed conflict. See, for example, Dannenbaum, T. (2015), 'Dual Attribution in the Context of Military Operations', *International Organizations Law Review*, 12(2), pp. 401, <https://doi.org/10.1163/15723747-01202007>.

against a common adversary. The rationale for each of these criteria and how they can be assessed will briefly be explained in turn. Thereafter, any subjective dimensions of these criteria will be discussed. Practical examples of support scenarios in armed conflict will be considered to illustrate how the criteria proposed in this section operate in practice.

Criterion 1: Direct connection to hostilities

At their core, armed conflicts – whether international or non-international – consist of hostilities. These are the acts that parties perform against each other, and therefore constitute the essence and the most granular components of the conflict relationship between adverse parties. The notion of hostilities is broader than that of ‘attacks’ in the sense of Article 49(1) AP I (‘acts of violence against the adversary, whether in offence or in defence’) and also includes acts preparing or supporting attacks.⁶¹ At the same time, the concept of hostilities is narrower than ‘the entire war effort’.⁶² Hostilities can thus be defined as the means and methods of causing harm to the adversary.⁶³ Since hostilities make up the conflict relationship between parties, all co-parties must have a specific connection to the hostilities. That connection should be understood as one of ‘directness’.⁶⁴

Requiring such a direct connection to hostilities is not only sound in light of the foregoing considerations as to the structure of the international legal regulation of armed conflict. The requirement also resonates with how states have drawn the line of co-party status in their practice. Regarding IACs, for example, reference can be made to the US’s position that it would not consider other states as its ‘co-belligerents’ against Iraq absent such a direct connection.⁶⁵ The Netherlands reasoned similarly to conclude that Kuwait had not become a co-party to Iraq in the Iran–Iraq war, in which Kuwait supported Iraq by various means.⁶⁶ More recently, Russia based its claims that the US had become a co-party of Ukraine in the latter’s conflict with Russia partly on the notion that the US ‘essentially coordinates and develops military operations, thereby directly participating in the hostilities’ against Russia and was ‘directly involved in the conflict’.⁶⁷ Regarding the NIAC with Islamic State, Denmark referred to similarly worded considerations

⁶¹ See Dinstein, Y. (2016), *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edition, Cambridge University Press, p. 2; see also Art 44(3) AP I.

⁶² Sandoz, Y., Swinarski, C. and Zimmermann, B. (eds) (1987), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC [1679].

⁶³ For similar notions, see *ibid.* [1942]; ICRC (2009), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, p. 43.

⁶⁴ See similarly, for IACs, Greenwood, C. (2008), ‘Scope of Application of Humanitarian Law’, p. 58; Upcher (2020), *Neutrality in Contemporary International Law*, p. 63; for NIACs, see similarly the ICRC’s explanation of the requirement of a ‘relation to the conduct of hostilities’ as part of its ‘support-based approach’, Ferraro (2013), ‘The applicability and application of international humanitarian law to multinational forces’, p. 585 (‘direct impact on the opposing party’s ability to conduct hostilities’).

⁶⁵ US Office of the Legal Counsel (2004), ‘“Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention’, p. 45 (‘direct nexus with belligerent or hostile activities’).

⁶⁶ Siekmann, R. (1988), ‘Netherlands State Practice for the Parliamentary Year 1986-1987’, *Netherlands Yearbook of International Law*, 19, pp. 279, 390 (‘not directly involved in the armed conflict’).

⁶⁷ Vakil, C. (2022), ‘Russian official claims US participating in direct hostilities with his country’, *The Hill*, 7 May 2022, <https://thehill.com/policy/defense/3480589-russian-official-claims-us-participating-in-direct-hostilities-with-his-country>; UNSC (2022), ‘9135th Meeting’, 22 September 2022, UN Doc S/PV.9135, pp. 17–18, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv.9135.pdf.

to assess whether it was a party to that NIAC,⁶⁸ as well as more generally whether it was a co-party to an IAC or NIAC by virtue of its involvement alongside other partners.⁶⁹

To assess whether a sufficiently direct connection to hostilities exists, a range of factors may be considered without being in themselves determinative of co-party status.⁷⁰ These factors include the nature and scale of the activities performed,⁷¹ and their geographical and temporal proximity to harm caused to the adversary.⁷²

Criterion 2: Cooperation or coordination

Criterion 1 relates to the character of a co-party's conduct. Criterion 2, which must be fulfilled cumulatively with the first, concerns the relationship between co-parties.

In addition to a direct connection to hostilities, the relationship between multiple co-parties must be such as to warrant treating them as parties to the same armed conflict. Parallel fighting against a common enemy would be insufficient, as this could simply involve separate armed conflicts against the same enemy.⁷³ To tie the acts of multiple states or other collective entities together so that they become co-parties, there must be some degree of cooperation or coordination of their activities against a common adversary regarding the specific hostilities, so that they effectively build on one another as part of one armed conflict.⁷⁴ More specifically, each co-party must cooperate or coordinate with at least one other co-party on the same side of the conflict. It is not necessary that all co-parties on one side cooperate or coordinate with each of the others for there to be a sufficient link of cooperation connecting them.

The exact degree of cooperation or coordination required cannot be delineated in the abstract. Here again, certain non-determinative considerations can be used in practice to assess the degree of cooperation. These considerations include the geographical and temporal proximity of one's own activities to one's partners' activities, and the existence of institutionalized structures for coordinating one's activities. For example, where states delegate 'operational command' and/or 'operational control' (in NATO terminology) in the context of multinational forces, that will be sufficient cooperation or coordination in practice.

⁶⁸ Danish Foreign Ministry (2015), 'Proposal for a parliamentary resolution on the deployment of an additional Danish military contribution to support the effort against ISIL' (08/10/2015) B8 (2015-16) [IV] ('overall active military participation in the international coalition in support of Iraq'), https://www.ft.dk/samling/20151/beslutningsforslag/b8/20151_b8_som_fremsat.htm.

⁶⁹ Danish Armed Forces (2016, English version 2019), *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, p. 53, <https://www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf>.

⁷⁰ These factors are drawn from discussions with experts held at Chatham House.

⁷¹ See, similarly, Schmitt, M. (2022), 'Ukraine Symposium – Are We at War?', *Articles of War*, 9 May 2022, <https://lieber.westpoint.edu/are-we-at-war>.

⁷² See Kleffner, J. (2019), 'The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict', *International Law Studies*, 95, pp. 161, 177 (considering these factors to be determinative for considering multiple armed groups as parties to the same armed conflict), <https://digital-commons.usnwc.edu/ils/vol95/iss1/5>.

⁷³ See Lubell, N. (2019), 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups', in Williams, W. and Ford, C. (eds) (2019), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, Oxford University Press, p. 25, <https://academic.oup.com/book/4951/chapter-abstract/147383208?redirectedFrom=fulltext>.

⁷⁴ See, similarly, Nikolic, de Saint Maurice and Ferraro (2020), 'Aggregated intensity: classifying coalitions of non-State armed groups'; Schmitt (2022), 'Ukraine Symposium – Are We at War?'.

Subjective dimensions

Whether a state or other collective entity is a co-party to an armed conflict does not depend on whether a state (or other potential party) *wants* to be a co-party.⁷⁵ The point is important. States or other potential co-parties do not need to specifically intend their own co-party status and the legal consequences attached to that status. It is the object and purpose of the current international legal framework regulating armed conflict – for which party status is a crucial reference point – that these rules apply when the facts on the ground so require.⁷⁶ Accordingly, attempts to identify who is a party must be based on an objective assessment of the relevant facts.

Whether a state considers itself or another state a co-party will play a role in practice. While not legally determinative, states can hardly ignore the political implications of an opinion on party status voiced publicly by another state.

At the same time, fulfilling the two criteria proposed in this paper presupposes that the respective state, international organization or armed group acts with knowledge of the relevant facts. As has been noted, this is particularly true of the cooperation or coordination requirement. Cooperating or coordinating with respect to specific hostilities presupposes an awareness by the state or armed group of the factual context in which its activities are embedded, and thus some degree of knowledge of the circumstances surrounding its partners' activities. If its activities consist of providing military assistance to partners, the two criteria advanced here for co-party status presuppose that the provider of the assistance knows how the assistance is used. This would not be the case if the provider has been misled or errs about these facts. In that sense, an element of knowledge is inherent to the criteria for identifying co-parties. Crucially, however, this subjective element relates only to the underlying *facts*, not the ensuing legal consequences in terms of party status. In practice, evidence for the requisite knowledge will usually have to be drawn from the factual circumstances surrounding the potential co-party's acts,⁷⁷ unless it is clear from official statements or documents.

It should be acknowledged, however, that whether a state considers itself or another state a co-party to a particular armed conflict will play a role in practice. While not legally determinative, states can hardly ignore the political implications of an opinion on party status voiced publicly by another state. For example, if a state considers other states that support its adversary as the adversary's co-parties, that claim does not, in and of itself, affect whether they actually

⁷⁵ Again, the theoretical possibility of declarations of war is left aside here, see Section 3.1.

⁷⁶ See, for example, Common Article 2 GC I-IV ('the present Convention shall apply ... even if the state of war is not recognized by one of them [i.e. the States parties to the IAC]').

⁷⁷ See also ICRC (2015), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, p. 8.

are co-parties as a matter of law in that situation.⁷⁸ At the same time, the respective states will certainly consider such statements in deciding their further course of action. To be in a position to counter false claims of co-party status – and prevent them from affecting the development of the legal rules on this point – states need to be aware of the legal criteria for establishing that status.

Practical examples

To illustrate how the account set out in this paper operates in practice, it is helpful to consider some hypothetical examples.

On one end of the spectrum, joint airstrikes by combat aircraft from multiple states against a common adversary clearly bear out the requisite direct connection to hostilities and presuppose sufficiently close cooperation and coordination to make these states co-parties.⁷⁹ The same would be true of joint ballistic attacks by multiple armed groups against a particular target of an adverse state.⁸⁰

On the other end of the spectrum, there are certain activities in support of a party to a conflict that could not conceivably meet the criteria for co-party status. For example, providing financial or political assistance to other states, international organizations or armed groups does not constitute a sufficiently direct connection to hostilities. Provision of humanitarian assistance of any kind is even less sufficient. General supply of weapons or other military materiel still lacks a direct connection to specific hostilities – understood as acts harming the adversary – since it is only the actual *use* of weapons that harms the adversary.

For other activities, the *context* in which they are taking place will be paramount. Facilitating the acquisition of general capabilities does not constitute a sufficiently direct connection to any specific hostilities. Examples include providing general combat training to soldiers of another state or fighters of an armed group or training designed to teach soldiers or fighters how to use weapons systems. In both cases, it is only the implementation of these skills on the battlefield that causes harm. By contrast, if military advisers of one state assist in the planning of specific military operations by another state, to the point that both states are involved in the decision-making process for specific operations in the conduct of hostilities, there can be both a sufficiently direct connection to hostilities and a sufficient degree of cooperation and coordination.

Similarly, logistical support often does not suffice to meet the criteria for co-party status, though it may do so in specific contexts. For example, transporting military equipment from one military base to another, or providing air-to-air refuelling for such transport, do not suffice. Transporting the troops of another state to the front line or providing air-to-air refuelling to combat aircraft as part of specific

⁷⁸ If the claim were to manifest itself in a declaration of war against the supporting states, it could at most give rise to a separate ‘declared war’ in the sense of Common Article 2 GC I-IV.

⁷⁹ If the adversary is a non-state armed group, the intensity threshold for the existence for NIAC must be met overall.

⁸⁰ Again, these attacks must take place as part of a situation that, overall, meets the intensity threshold for a NIAC.

military operations in the conduct of hostilities could, however, have a sufficiently direct connection, and would also involve a sufficient degree of cooperation or coordination.

Context also matters regarding the provision of intelligence. Routine provision of intelligence to another state – for example, under a standing agreement – will not make the state providing the intelligence a co-party. Even if intelligence is provided that can be militarily helpful – for example, in assessing the adversary’s capabilities – that would not suffice. The matter may be different if intelligence on specific military targets is provided. Geo-locating and verifying a target are part of the targeting cycle and thus of a military operation against that target. The same would be true of intelligence that enables a partner to disrupt such a specific targeting operation by the adversary. Both scenarios would constitute a direct connection to hostilities, and involve significant cooperation or coordination between the provider and the recipient. Whether intelligence is provided to a partner in real-time, rather than in longer intervals, may be a helpful consideration in establishing a sufficiently direct connection to hostilities and close cooperation or coordination between partners, but alone it is neither sufficient nor necessary.

For cyber support, similar distinctions can be drawn. Merely enhancing the general cyber capabilities of another state, international organization or armed group would not suffice for co-party status. Cyber operations can, however, either be integrated into specific kinetic military operations of the recipient of assistance or by themselves constitute operations that harm the adversary and thus form part of hostilities.⁸¹ In the latter case, whether or not the state, international organization or armed group conducting the cyber operation would become a co-party would depend on whether they cooperate or coordinate with the recipient of such cyber support. Cyber operations launched against a common adversary without any cooperation could only constitute a separate armed conflict, provided the criteria for creating an IAC or NIAC with that adversary are met.

Again, when states allow their territory to be used by other states, international organizations or armed groups, different scenarios must be distinguished. When states allow overflights through their airspace, or even stopovers for carrier or combat aircraft on the way to the front line, this does not make them co-parties with any state that they allow to use their territory. By contrast, when a state allows its territory to be used as a launchpad for specific hostilities against another state or armed group, this may constitute a sufficient connection to the hostilities. The cooperation or coordination requirement is also relevant to this example. If a state uses another state’s territory without at all involving that other state – perhaps even without that state being aware that its territory is being used or what it is being used for – the territorial state would not become a party, even if hostilities are launched from its territory.

⁸¹ See, generally, Schmitt, M. (ed.) (2017), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, p. 383, https://assets.cambridge.org/97811071/77222/frontmatter/9781107177222_frontmatter.pdf.

2.3 Temporal scope of co-party status

In principle, an entity becomes a co-party when its actions meet the criteria developed above. The first acts taken in relation to an armed conflict may suffice. In practice, however, some repetition will be helpful evidence to establish co-party status,⁸² for example, through recurrent air strikes or the regular provision of targeting intelligence.

Conversely, the end of co-party status is, in principle, the point in time at which a co-party ceases to meet the legal criteria set out above.⁸³ This can, but need not, involve a complete cessation of activities supporting the other co-parties. It would suffice if a (hitherto) co-party changes its actions such that they no longer meet the two criteria for co-party status. For example, if a state that has conducted airstrikes as part of a coalition alongside its partners, then moves to merely delivering combat aircraft to those partners, it would no longer be a co-party. The same would be true of a state that has previously provided targeting intelligence which reduces its activities to reconnaissance or surveillance operations. In practice, however, it is useful to require evidence of a relevant change of pattern of that co-party's actions over a prolonged period⁸⁴ – i.e. the co-parties' actions must have fallen below the legal criteria for co-party status 'with a degree of stability and permanence'⁸⁵ to avoid the legal uncertainty of 'revolving door' situations.

Some legal effects of (co-)party status extend after the end of that status. For example, parties must still discharge certain obligations flowing from their party status after they cease being a party, such as obligations under IHL regarding persons deprived of their liberty.⁸⁶

2.4 'Proxy wars'

Military assistance in war, whether provided by states or armed groups, frequently generates claims that the conflict has become a 'proxy war', implying that it is actually fought by those providing the assistance. Such claims are often political in nature, and it is not always possible to make sense of them in legal terms. They do, however, raise the question of whether and at what point control over a party to an armed conflict makes the state (or non-state entity) exercising that control itself a (co-)party to the conflict.⁸⁷

⁸² Ferraro (2013), 'The applicability and application of international humanitarian law to multinational forces', p. 586.

⁸³ See Weizmann, N. (2016), 'The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF', *Columbia Human Rights Law Review*, 47, pp. 204, 224–25, 232.

⁸⁴ Wentker, A. (2023), 'At war? Party status and the war in Ukraine', *Leiden Journal of International Law*, 36(3), pp. 643, 652, <https://doi.org/10.1017/S0922156522000760>.

⁸⁵ ICRC (2015), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* [277].

⁸⁶ See, for example, Art 5 GC III, Art 2(2) AP II on the temporal scope of application of such obligations.

⁸⁷ Ferraro (2015), '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', pp. 1234–239. As regards inter-state settings, the standard is particularly high, see Article 17 ARSIWA (speaking of direction and control of the acts of another state). On the issue of dual or multiple attribution, see above footnote 60.

‘Control over a party’ is not a separate legal test for becoming a *co*-party that would somehow coexist or even conflict with the framework outlined above. If a state controls another state or armed group to the point that the action of the ‘proxy’ can be attributed under international law to the controlling state, only that controlling state is considered a party to the conflict.⁸⁸ This is because, under international law, the proxy does not then act in its own right. There is no room for *co*-party status if there is only one subject that acts as a matter of international law.

‘Control’ can mean many different things. Where the alleged ‘control’ is below the threshold of attributing it to the controlling entity, there is still room for *co*-party status. In such cases, however, whether the entity exercising such ‘control’ is a *co*-party alongside the controlled entity can and should be assessed simply by reference to the criteria outlined earlier in this section. There is no need for any additional or separate criteria.

⁸⁸ Ibid.

03

The legal relevance of party status in international law

Multiple legal regimes apply to parties and co-parties to an armed conflict. This chapter discusses what co-party status means for the application of the different bodies of international law, and how those bodies of law interact.

3.1 Party status and the *ius ad bellum*

Concerns in governments and among their domestic audiences over becoming a party to an inter-state armed conflict seem to be driven on occasion by the view that this would entitle the adverse party to use force against them.⁸⁹ Avoiding the perception of being ‘at war’ with another state may be an important factor in assessing the escalatory potential of one’s action. And it may be an important political consideration. Valid as they may be, however, these military and political concerns should be distinguished from the *legality* of the use of force by or against states that are parties to an (international) armed conflict.

Article 2(4) of the UN Charter and customary international law prohibit the use of force by one state against another, subject to narrowly confined exceptions of individual or collective self-defence and authorization by the UN Security Council (UNSC). The prohibition of the use of force also applies between states that are parties to an IAC.⁹⁰ Under international law, therefore, a state that is party to

⁸⁹ German Federal Parliament, Stenographic Protocol 20/33 (11 May 2022) 2954.

⁹⁰ Cohen, G. (2022), ‘Mixing oil and water? The interaction between *jus ad bellum* and *jus in bello* during armed conflicts’, *Journal on the Use of Force and International Law*, 9(2), pp. 352, 366–71 (with reference to state practice), <https://doi.org/10.1080/20531702.2022.2059154>.

an IAC may only use force against another state which becomes a party to that IAC on the adverse side if that force is permitted by self-defence or authorized by UNSC resolution.

If a state joins an armed conflict as a party on the side of the state subject to an armed attack which has sought its help, its actions would be justified by collective self-defence, provided it kept within the confines of necessity and proportionality. In such a case, the adverse (aggressor) state may not lawfully use force against it.

To be clear, therefore, it is not *because* a state becomes a party to an armed conflict that it may use force, or have force used against it, under the *ius ad bellum*. If a supporting state joins in hostilities to such an extent that it becomes a party to the conflict, that *in itself* does not authorize the adverse state to attack it. If the supporting state uses force on the side of the aggressor, then the adverse party is entitled to exercise self-defence against the aggressor. But if the supporting state is joining in lawful self-defence, then the adverse party has no right to attack the supporting state – there is no right of self-defence against a lawful act of self-defence.

It is not *because* a state becomes a party to an armed conflict that it may use force, or have force used against it, under the *ius ad bellum*. If a supporting state joins in hostilities to such an extent that it becomes a party to the conflict, that *in itself* does not authorize the adverse state to attack it.

Becoming a party may, however, have consequences for the legality of targeting under the *ius in bello*. When a state becomes a party, it generally is not considered a violation of the *ius in bello* to target members of that state's armed forces.⁹¹ That assessment does not affect, and is not affected by, whether or not the act in question constitutes a lawful or an unlawful use of force under the *ius ad bellum*.⁹² Still, the practical significance of the *ius in bello* assessment should not be underestimated. Frequently, both sides – rightly or wrongly – consider themselves to be acting in conformity with the *ius ad bellum*. In such situations, the decision of whether force may lawfully be used against a particular individual should be driven by whether or not that individual is targetable under the *ius in bello*. More generally, the *ius in bello* assessment is important for its more specific guidance on *how* force is to be used on the battlefield. It is also crucial for establishing whether or not individuals who act on the battlefield violate international law (and, potentially, commit war crimes), since individuals are bound by certain *ius in bello* rules, while the *ius ad bellum* only applies between states.

⁹¹ Art 48, 50(1) AP I; CIHL rule 1.

⁹² Kreß (2022), *The Ukraine War and the Prohibition of the Use of Force in International Law*, p. 14.

In sum, the *ius ad bellum* and the *ius in bello* apply to states that are parties to IACs in parallel. Although the *ius ad bellum* applies without regard to the respective states' party status, the following sections show that party status remains central to the regulation of contemporary armed conflicts in many respects.

3.2 Party status and the *ius in bello*/IHL

Under IHL, party status is relevant on several levels.

Parties' obligations and 'rights'

It is the parties who bear the primary responsibility for ensuring that the conflict is carried out in accordance with international law. Parties to international, as well as non-international, armed conflicts have many obligations under IHL, both regarding the means and methods of warfare and on the protection of individuals. For example, it is the parties that have the obligation to distinguish combatants and military objectives from civilians and civilian objects in the conduct of hostilities,⁹³ as well as the obligation to care for the wounded and sick.⁹⁴ And, if there are multiple parties on the same side of an armed conflict, the obligations flowing from party status also translate into particular positive duties regarding the conduct of their partners in the conflict.⁹⁵

In addition, parties to an IAC historically enjoyed 'belligerent rights'. These included the establishment of blockades, searching and seizing vessels for contraband and using self-help against neutrals violating their obligations under the law of neutrality. While ancient, these rights still play a certain role in state practice.⁹⁶ Yet, to the extent that they would permit the use of force, exercising these rights would today also attract the *ius ad bellum* prohibition on the use of force.⁹⁷ The relationship between these rules and the *ius ad bellum* is not settled in international practice. It appears to be consistent with the current structure of the international legal order, however, that the prohibition of the use of force circumscribes the exercise of these rights. In other words, they cannot grant any permissions that extend beyond what would be permissible for the respective state under the *ius ad bellum*.⁹⁸ As noted below, however, party status may have certain permissive effects under other rules of IHL, notably those of the law of targeting and detention, as well under IHRL.

⁹³ Art 48 AP I; CIHL rule 1.

⁹⁴ Arts 15 GC I, 18 GC II, 16 GC IV; CIHL rule 109.

⁹⁵ See in more detail below Chapter 4.

⁹⁶ For a review of this practice, see Farrant, J. (2014), 'Modern Maritime Neutrality Law', *International Law Studies*, 90, pp. 198, 220–300, <https://digital-commons.usnwc.edu/ils/vol90/iss1/13>; Danish Armed Forces (2016), *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*.

⁹⁷ For criticism of the very idea of belligerent rights in current international law, see Clapham, A. (2021), *War*, Oxford University Press, p. 519.

⁹⁸ UK Ministry of Defence (2004), *The Manual of the Law of Armed Conflict*, Oxford University Press, [13.3]; Upcher (2020), *Neutrality in Contemporary International Law*, p. 211.

Parties and the protection of individuals

Beyond bearing obligations and rights, parties are also relevant as reference points in determining which rules apply to individuals engaged in or affected by armed conflict. This is chiefly the case regarding combatants, who are defined as members of the armed forces of a party,⁹⁹ and who are therefore targetable under IHL, but also have obligations under IHL in relation to matters such as the conduct of hostilities and the treatment of prisoners of war. In addition, many categories of individuals protected under IHL are defined by their connection to a party to the conflict – for example, prisoners of war or individuals *hors de combat*.¹⁰⁰

Party status and the geographical scope of IHL

Identifying who are the parties to an armed conflict matters in establishing the geographical scope of application of IHL. This is particularly the case in IACs, where IHL will generally apply only to the territory of the states that are parties to the conflict.¹⁰¹ The position in NIACs is more nuanced. It remains unsettled whether IHL applies to the territories of *all* states that are parties to a NIAC – an issue that arises where foreign states intervene against armed groups extraterritorially alongside the host state.¹⁰² More widely, there is debate on whether the application of IHL within a state party should be confined to acts with a nexus to the conflict, and whether, conversely, IHL could be extended to such acts beyond the territory of a state (the latter both in IACs and in NIACs).¹⁰³ However, even if such a nexus approach is accepted, party status would still play a role as part of the assessment of the nexus to the conflict.¹⁰⁴

Party status and the mandates of humanitarian organizations

Party status may also affect the formal roles and mandates of certain impartial humanitarian organizations in armed conflict. This is notably the case for the ICRC and National Red Cross and National Red Crescent Societies. The ICRC engages with all parties to an armed conflict, particularly to seek compliance with IHL – for example, by reminding them of their obligations. Under the four Geneva Conventions of 1949 and their 1977 Additional Protocol I, parties to a conflict must permit the ICRC to carry out specific humanitarian activities. These include the ICRC's ability to visit prisoners of war and civilian internees. Accordingly, the ICRC has a particular interest in identifying the parties to an armed conflict.¹⁰⁵

Moreover, parties to a conflict should grant certain facilities to their respective National Red Cross or Red Crescent Society, the International Federation of Red Cross and Red Crescent Societies and (as far as possible) other humanitarian organizations

⁹⁹ Art 43(1)-(2) AP I; *CIHL* rule 3; see also Art 4(A) GC III.

¹⁰⁰ Arts 21, 118 GC III, Art 13(1) GC I, Art 13(1) GC II; by contrast, see Art 8(a), (b) AP I (defining wounded, sick, and shipwrecked individuals not by their formal affiliation but by virtue of their need for protection).

¹⁰¹ *Tadić* (Decision on Jurisdiction) [68]; see, generally, Art 29 VCLT.

¹⁰² ICRC (2015), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* [473].

¹⁰³ In favour, for example, *Afghanistan* (Investigation Decision) ICC-02/17 (12 April 2019) [55], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02068.PDF; Lubell, N. and Derejko, N. (2013), 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', *Journal of International Criminal Justice*, 11(1), pp. 65, 75–76; against ICRC (2015), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, p. 14.

¹⁰⁴ On this notion, see Section 3.3.

¹⁰⁵ Art 126 GC III; Art 143 GC IV; Art 5, 81(1) AP I.

that are duly authorized by the respective party.¹⁰⁶ This is to enable such organizations to carry out humanitarian activities in favour of the victims of the conflict. These humanitarian activities are further defined in the 1949 Geneva Conventions and Additional Protocol I. Knowing a state's party status can therefore help humanitarian organizations to understand what roles they may undertake and the related facilities they may expect to receive while working on the territory of that state.

3.3 Party status and international criminal law

Under international criminal law, party status matters in three main ways for establishing whether individuals have committed war crimes.

First, indirectly and at a very basic level, identifying who is a party may matter for establishing whether a specific rule of IHL is violated – so that international criminal responsibility can be attached to a violation. For example, only once a state becomes a party to an IAC do members of their armed forces become lawful targets on the basis of their combatant status under IHL.

Second, at a more specific level, party status also matters for those war crimes – in both international and non-international armed conflict – that presuppose that the perpetrator and/or victim have a specific connection to the parties. Examples include the war crimes of killing or wounding treacherously individuals belonging to the hostile nation or army; destroying or seizing enemy property; declaring abolished the rights of nationals of the hostile party in court; or compelling nationals of the hostile party to take part in the operations of war directed against their own country.¹⁰⁷

Third, party status plays a role in establishing that a crime has a sufficient nexus to an armed conflict to constitute a *war* crime. International case law has established the following, non-exhaustive, set of indicators for the nexus assessment: 'the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.'¹⁰⁸ All of these indicators entail a connection between the perpetrator, victim or conduct and the parties.

3.4 Party status and IHRL

IHRL continues to bind a state once the state becomes a party to an international or non-international armed conflict.¹⁰⁹ War and peace can no longer be conceived of as entirely separate legal spheres, and becoming a party does not have the effect

¹⁰⁶ Art 81(2)-(4) AP I.

¹⁰⁷ Art 8(2)(b)(xi), (xiii)-(xv), (e)(xii) Rome Statute.

¹⁰⁸ *Kunarac* (Appeal Judgment) IT-96-23&IT-96-23/1-A (12 June 2002) [59], <https://www.icty.org/x/cases/kunarac/acjug/en>.

¹⁰⁹ *Nuclear Weapons* [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (AO) [2004] ICJ Rep 136 [106]; *Armed Activities (DRC v. Uganda)* (Merits) [2005] ICJ Rep 168 [216].

of freeing a state of its peace time obligations. But the relationship between IHRL and IHL is not entirely settled.¹¹⁰

There are some differences in the application of the human rights treaties to parties to armed conflict. Party status may play a role under derogation clauses such as Article 15(2) of the European Convention on Human Rights (ECHR), which permits states not to apply the provision on the right to life with regard to ‘deaths resulting from lawful acts of war’. Moreover, the killing of combatants by a party to a conflict is not generally considered ‘arbitrary’ under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR)¹¹¹ or Article 4(1) of the American Convention on Human Rights (ACHR), if it complies with IHL.¹¹² The European Court of Human Rights, in *Hassan*, also interpreted the right to liberty and security under Article 5 ECHR more leniently regarding detention by states that are parties to an IAC.¹¹³ In *Georgia v Russia (II)*, the court even excluded the application of the ECHR altogether ‘in respect of military operations (...) during the active hostilities phase’ of an IAC,¹¹⁴ although the contours of this scope exclusion remain unsettled,¹¹⁵ and the court seems more recently to have retreated from this jurisprudence.¹¹⁶

3.5 Party status and the law of neutrality

Party status also matters for establishing the rights and duties of third states – that is, those states that are not party to a particular armed conflict. In interstate conflicts, the legal relationship between third states and states parties to an armed conflict has traditionally been regulated by the law of neutrality. This regime of customary international law is partly codified in the 1907 Hague Conventions V and XIII.

The law of neutrality chiefly requires third states – neutral states – to refrain from certain acts of military assistance to the parties, and to prevent the parties from using neutral territory for waging their war.¹¹⁷ Conversely, the parties are required to respect the inviolability of neutral territory.¹¹⁸ The parties have also been said to possess certain ‘belligerent rights’ against neutral states, including searching for and seizing contraband, and establishing blockades.¹¹⁹ As noted earlier, there is ongoing debate as to how exactly these different elements of neutrality law can apply in light of today’s *ius ad bellum*.¹²⁰ A considerable body of state practice,

¹¹⁰ For one attempt to explain the interrelationship, see Murray, D. (2016), *Practitioners’ Guide to Human Rights Law in Armed Conflict*, Oxford University Press.

¹¹¹ *Nuclear Weapons* [25]; UNHRC General Comment No. 36 Art. 6 ICCPR (30 October 2018) UN Doc CCPR/C/GC/36 [64].

¹¹² Unlike the right to life under Article 6(1) ICCPR and Article 4(1) ACHR, the ECHR in Article 2(2) lists specific permissible grounds for depriving a person of life, rather than referring to ‘arbitrariness’.

¹¹³ *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) [104], [106].

¹¹⁴ *Georgia v Russia (II)* App no 38263/08 (ECtHR, 21 January 2021) [138].

¹¹⁵ For criticism, see, for example, Tan, F. and Zwanenburg, M. (2021), ‘One Step Forward, Two Steps Back? *Georgia v Russia (II)*’, European Court of Human Rights, Appl No 38263/08’, *Melbourne Journal of International Law*, 22(1), pp. 136, 143, https://law.unimelb.edu.au/__data/assets/pdf_file/0004/3900622/Tan-unpaginated.pdf.

¹¹⁶ *Ukraine and the Netherlands v Russia (Jurisdiction and Admissibility)* App nos 8019/16, 43800/14 and 28525/20 (ECtHR, 25 January 2023) [558].

¹¹⁷ Arts 2-5 Hague Convention V; Arts 5-6 Hague Convention XIII.

¹¹⁸ Art 1-4 Hague Convention V; Art. 1 Hague Convention XIII.

¹¹⁹ See Farrant (2014), ‘Modern Maritime Neutrality Law’; Danish Armed Forces (2016), *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*.

¹²⁰ See generally, Upcher (2020), *Neutrality in Contemporary International Law*, chapters 1, 4.

international judicial decisions, and scholarly literature supports the general notions that the law of neutrality persists to this day, and that it can apply to inter-state conflicts.¹²¹ To the extent that neutrality rules still apply to inter-state conflicts, knowing who is a party to a particular conflict – and, by implication, who is not a party and thus a third state – is crucial in applying these rules.

3.6 Party status and rules on complicity

Beyond neutrality law, in any situation where a state or international organization provides support to another state in the course of an armed conflict, there will be a question of whether the provision of that support is itself lawful. International law imposes what has been referred to as a ‘network of rules on complicity’ on states.¹²² There are specific primary rules that prohibit forms of support that do or would facilitate wrongdoing by the recipient state, and there is a general complicity rule set out in Article 16 ASR.¹²³ Examples of the former include obligations in relation to the trade in arms or weapons¹²⁴ and the prohibition on complicity in genocide.¹²⁵ The latter is a general rule that prohibits aid or assistance by one state to another that facilitates an internationally wrongful act by the recipient. In general, these rules turn on the commission – or risk of commission – by the assisted state of a wrongful act. In all cases, assisting states will need to undertake a context and rule-specific assessment of their potential responsibility.

In specific circumstances party status may trigger, or affect the scope of, an obligation binding the assisting state.

Complicity rules binding assisting states do not generally themselves turn on whether the assisting state is a party to the conflict. To use the examples above, under Article 6(3) of the Arms Trade Treaty, it does not matter whether the state authorizing the transfer of conventional weapons is a party or not. Similarly, under Article 16 ASR, the assisting state need not be a party for the rule to apply – all that is required is that the assisted state’s act would have been wrongful if it were committed by the assisting state.¹²⁶

Beyond this general statement of principle, in specific circumstances party status may trigger, or affect the scope of, an obligation binding the assisting state. Under Common Article 1 to the Geneva Conventions, states ‘undertake to respect and to ensure respect for the present Convention in all circumstances.’¹²⁷ As to the

¹²¹ For a recent review, see Antonopoulos, C. (2022), *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality*, Cambridge University Press, pp. 26–38.

¹²² Aust, H. (2011), *Complicity and the Law of State Responsibility*, Cambridge University Press, p. 376.

¹²³ Articles on the Responsibility of States for Internationally Wrongful Acts UN Doc A/56/10 (2001). There is a parallel rule for international organizations in Article 14 of the Articles on the Responsibility of International Organizations (UN Doc A/56/10 (2001)).

¹²⁴ See, for example, Art 1(1)(d) Chemical Weapons Convention; Art 6(3) Arms Trade Treaty.

¹²⁵ Art III(e) Genocide Convention; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [416]-[424].

¹²⁶ Article 16(b) ASR.

¹²⁷ Common Article 1 to GC I-IV.

‘ensure respect’ limb of the provision, it is generally – if not universally – accepted that all states are bound not to assist or encourage violations of international humanitarian law by other states.¹²⁸ Whether or not the *assisted* state or non-state armed group is a party to the conflict is important, in that most obligations in IHL, which the assisted state could potentially violate, are addressed to the parties. The non-assistance duty in Common Article 1 also applies regarding assistance to a non-state party to an armed conflict. The controversial question of whether the general complicity rule reflected in Article 16 ASR also covers assistance to non-state actors can therefore be left aside.¹²⁹

3.7 Party status and domestic law

Besides the international law implications, being ‘at war’ has traditionally had a wide range of implications in many domestic legal systems – which in some instances refer to international law concepts of party status. Such provisions range from ‘war clauses’ in insurance contracts, to constitutional law arrangements for deploying armed forces abroad,¹³⁰ and criminal law offences outlawing treason or terrorist acts.¹³¹ For example, under Danish law it is a criminal offence to enter into the armed forces of an adverse party.¹³² Belgian law, meanwhile, excludes acts of the armed forces during armed conflict from the application of terrorist offences.¹³³

Whether a particular domestic law provision is to be understood in the light of international law concepts of party status must be considered case-by-case under the relevant domestic law. When a domestic law provision does refer to party status under international law, a state’s understanding of the domestic provision may incidentally also reveal its views on the parallel international law question. For example, if a government is using its constitutional processes for participating in war, this may indicate it considers itself a party to the respective armed conflict as a matter of international law. If the US Congress were to authorize the use of force by statute, or if the US president were to issue reports in compliance with the Wars Powers Resolution, these acts may indicate that the US considers itself a party to an armed conflict under international law, even if the domestic notion of ‘hostilities’ may not be coterminous with the international law concept of party status.

Having sketched out in this chapter how party status, in general, matters to the regulation of armed conflict, the next chapter specifically explores the implications of becoming a co-party.

¹²⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14 [220].

¹²⁹ In favour of such a position, see, for example, Jackson, M. (2015), *Complicity in International Law*, Oxford University Press, pp. 214–15; Mackenzie-Gray Scott, R. (2022), *State Responsibility for Non-State Actors: Past, Present and Prospects for the Future*, Hart, pp. 169–77.

¹³⁰ Clapham (2021), *War*, pp. 169–93.

¹³¹ *Ibid.*, pp. 169–93 and 222–32.

¹³² Section 101(a) Danish Criminal Code.

¹³³ Art 141 bis Belgian Criminal Code.

04

Implications of co-party status

This chapter elaborates on specific implications of party status for co-parties to armed conflict.

Becoming a co-party to an armed conflict can have significant political implications. This is particularly true in IACs, due to the significant symbolic weight associated with being ‘at war’, and the escalatory potential of such a signal both to other states and to domestic audiences. States may, therefore, have legitimate political reasons to avoid actions that would make them a co-party. In setting this red line for their conduct, however, states should be clear that choosing to abstain from certain actions to avoid becoming a co-party is itself a political choice.

There can be a risk of portraying a distorted image of international law on this point. Becoming a co-party is not, in and of itself, a violation of international law. As discussed previously, whether the acts of a state that becomes a co-party are lawful depends chiefly on their compliance with applicable rules of international law, including, first and foremost, the *ius ad bellum* and *ius in bello*. As regards the former, this means that the acts, if they amount to a use of force, must be authorized by the UNSC or, more likely, be justified in individual or collective self-defence. Co-party status, by contrast, is about which rules apply to the conduct of a state, international organization or non-state party, to their relationship with third states and to individuals connected to the co-party.

In addition to communicating accurately the political nature of their perceived constraints, it is crucial that states, international organizations, and non-state armed groups base their course of action on an accurate understanding of what becoming a co-party means as a matter of international law. The actual legal implications may be relevant to the political calculus and must, in any event, be carefully considered so as to enable the correct application of – and compliance with – international law.

As a general matter, being a co-party has all the legal implications of being a party to an armed conflict, as set out in Chapter 3. Factual circumstances will determine which of these many legal implications of party status will be most relevant to a particular co-party in a given conflict. Co-parties will have to consider how their obligations apply in cooperation contexts. For example, in situations where multiple co-parties contribute to a coordinated attack, a state must consider the whole of the attack when making the proportionality assessment for targeting purposes, not simply its own contribution.¹³⁴ These multiple contributions will have to be considered in assessing whether the expected civilian harm is excessive in relation to the anticipated military advantage of the ‘attack as a whole’.¹³⁵

Importantly, co-party status for a single co-party also has significant legal implications for the relationship between multiple co-parties.¹³⁶ Specifically, co-parties have obligations flowing from their party status regarding how their fellow co-parties behave in an armed conflict. There are many specific obligations in IHL treaties and customary international law addressed to the parties to an armed conflict, which, for co-parties, can be understood as requiring positive steps in regard to fellow co-parties in the conflict. This does not entail adding further obligations for co-parties. Instead, it flows from interpreting and applying to co-parties the general obligations addressed to all parties to an armed conflict.

Consider, for example, the obligation of parties to take ‘constant care’ in the conduct of military operations to spare civilians.¹³⁷ ‘Constant care’, like other precautions, should be understood as requiring such measures as are ‘feasible’. For co-parties, doing what is ‘feasible’ includes taking steps to ensure that partners also spare civilians in the conduct of military operations. This obligation only applies, however, to those military operations in the conduct of which the respective co-party has some involvement. That is, the obligation will be particularly relevant to military operations coordinated between multiple co-parties. The extent to which action is ‘feasible’ regarding fellow co-parties depends on a range of circumstantial factors, including the degree of coordination and the degree of influence of a given party over the specific military operations. In practical terms, relevant measures may include providing expertise, technological means or intelligence (e.g. on the location of civilian objects) for implementing target selection and verification processes that build in sufficient precaution to spare civilians.

In the aftermath of military operations, the duty to investigate may comprise investigations into potential IHL violations of one’s fellow co-parties. Particularly where one co-party is not in a position to investigate on its own (for example, due to a lack of expertise, technological means or other resources), assistance by fellow co-parties becomes relevant – for example, by way of cooperating

¹³⁴ Arts 51(5)(b), 57(2)(a)(iii), and 85(3)(b) API.

¹³⁵ See Gillard, E.-C. (2018), *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Research Paper, London: Royal Institute of International Affairs, p. 9, <https://www.chathamhouse.org/2018/12/proportionality-conduct-hostilities-incident-harm-side-assessment>; see also van den Boogaard, J. (2023), *Proportionality in International Humanitarian Law: Refocusing the Balance in Practice*, Cambridge University Press.

¹³⁶ See, generally, Wentker (2022), ‘Partnered Operations and the Positive Duties of Co-Parties’.

¹³⁷ Art 57(1) AP I; *CIHL* rule 15.

in gathering information.¹³⁸ In such a case, the co-party that requires assistance is under an obligation to request such assistance (if feasible), and the co-party that is able to assist is under an obligation to provide the assistance (to the extent that this is feasible).

In addition to these ‘active’ precautions, ‘passive’ precautions – as a defending party – may, for co-parties, also include assisting one’s partners in removing their civilian nationals from the vicinity of military objectives. In this way, passive precautions can also become relevant to co-parties operating extraterritorially, without their own civilian nationals being at risk through military operations by the adversary.

A co-party’s positive obligation to take all ‘possible’ measures to search for, collect and care for missing, wounded, sick and dead individuals includes assisting fellow co-parties in providing for such protection, and, conversely, requesting such assistance if needed.

There are also positive duties regarding fellow co-parties in the realm of protecting individuals affected by armed conflict. A co-party’s positive obligation to take all ‘possible’ measures to search for, collect and care for missing, wounded, sick and dead individuals¹³⁹ includes assisting fellow co-parties in providing for such protection, and, conversely, requesting such assistance if needed.¹⁴⁰ This is because the positive duties of parties to provide for protection apply to *all* protected individuals, irrespective of who has, for example, injured the respective individuals. What measures are ‘possible’, again, depends on the circumstances. Appropriate measures for co-parties to fulfil their obligations in this respect may include, for example, providing medical facilities, personnel, and other resources either to ensure adequate medical treatment or to facilitate the identification of missing and dead persons by gathering and sharing information.

Beyond specific obligations addressed to parties, the general duty under Common Article 1 to the Geneva Conventions to ‘ensure respect’ for IHL may entail positive obligations of relevance to co-parties. It is controversial whether *all* states have a positive obligation, under Common Article 1 to the Geneva Conventions,

¹³⁸ ‘The Netherlands on its own does not have sufficient capacity and capabilities to gather intelligence (...) to be able to deal with such a conflict (...). We can only do these things as part of a coalition.’ (translated with DeepL). Netherlands House of Representatives of the States General (2020), ‘Parliamentary Debate Nr. 71 item 7 (2019-20)’, 14 May 2020, <https://zoek.officielebekendmakingen.nl/h-tk-20192020-71-7.html>.

¹³⁹ Arts 15 GC I, 18 GC II, 16 GC IV, 33 AP I; *CIHL* 109, 112-114, 116-117.

¹⁴⁰ See, similarly, ICRC (ed.) (2016), *Commentary on the First Geneva Convention*; ICRC (ed.) (2017), *Commentary on the Second Geneva Convention*, Cambridge University Press, [1632].

to ensure respect for IHL by the parties to an armed conflict.¹⁴¹ There is a good case, however, that co-parties at least bear such an obligation with regard to their fellow co-parties. For co-parties, such an obligation would be in line with their primary responsibility – as parties to a conflict – to ensure that the conflict is carried out in accordance with IHL.¹⁴²

As previously discussed, military operations between multiple partners must be closely coordinated for states, international organizations or armed groups to become co-parties. This close coordination must then also be used to fulfil positive duties of protection imposed on parties. Co-parties must cooperate to fulfil their protection obligations. In short, co-party status is about protection through cooperation. The demands placed on co-parties by international law in this regard are not unrealistic. Unlike co-parties' *negative* obligations to refrain from certain actions – which constitute absolute prohibitions of actions such as attacking undefended localities¹⁴³ – co-parties' *positive* obligations are limited to what can be 'feasibly' or 'possibly' expected. To meet these standards, co-parties must exercise due diligence, but they are not bound to secure a specific result. This is true of the specific positive obligations of co-parties in the realms of the conduct of hostilities and the protection of persons, just as for the positive obligation under Common Article 1 to ensure respect for IHL by fellow co-parties.

The positive duties of co-parties thus are sufficiently flexible to account for the specific operational realities that states may face in a given conflict. For example, how far parties are required to go to fulfil their positive duties to take precautions depends, among other things, on the extent to which a co-party is involved in the conduct of the relevant part of the hostilities. The further co-parties operating in coalitions have intertwined their command-and-control structures, the greater a co-party's influence on the conduct of hostilities by its fellow co-parties will be – and the more precautions will be feasible. This consideration may, for example, be relevant in situations of multinational operations where states may delegate operational command and control to others. Turning to an example in the realm of the protection of individuals, the reach of the obligations to care for protected persons will depend on what personnel or technical resources of protection a co-party has available – or can make available.

In addition to the legal implications that follow specifically from being a co-party, the factual context of cooperation in military operations may also give rise to responsibility for aiding and assisting violations of international law committed by partners – be it under general complicity rules, IHRL or domestic law. As stated in Section 2.6, such responsibility does not necessarily attach to being a (co-)party, although this and other possible wider implications of cooperation in armed conflict should be kept in mind.

¹⁴¹ In favour of such an obligation, see, for example, Dörmann, K. and Serralvo, J. (2014), 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations', *International Review of the Red Cross*, 96, pp. 707, 722, <https://doi.org/10.1017/S181638311400037X>; for the opposing view, see, for example, Robson, V. (2020), 'The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions', *Journal of Conflict and Security Law*, 25(1), pp. 101, 103; Schmitt, M. and Watts, S. (2020), 'Common Article 1 and the Duty to "Ensure Respect"', *International Law Studies*, 96(895–96), pp. 674, 679, <https://digital-commons.usnwc.edu/ils/vol96/iss1/22>.

¹⁴² Wentker (2022), 'Partnered Operations and the Positive Duties of Co-Parties', pp. 175–77.

¹⁴³ Art 59(1) AP I.

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Conclusion and recommendations

This chapter identifies a set of principles to aid application of international law amid the complexity of modern warfare.

Armed conflicts today are increasingly characterized by various forms of cooperation. This research paper has sought both to outline the international legal challenge arising from this fact and provide a roadmap to establish who is party to an armed conflict. The paper has not sought to exhaust all legal questions pertaining to cooperation in war and has, in particular, not examined the *ius ad bellum* questions of when military assistance amounts to a use of force or an armed attack. Instead, the paper has sought to clarify precisely how and when states, international organizations and armed groups become co-parties to an armed conflict, and the implications that flow from this status. Because co-party status has significant legal implications – and may also have considerable political implications – it is crucial that states, international organizations and non-state armed groups are aware of when the line to becoming a co-party is crossed.

The following recommendations are intended to identify a set of principles to aid practical application of the ideas in this paper. Applying these principles in practice will be challenging. But doing so in good faith is crucial, to ensure that international law's regulation remains effective amid the complex reality of today's wars.

The following section sets out as the key recommendations of the research paper:

1. That the following principles be applied to the identification of co-party status in armed conflict:
 - a) At the outset, to qualify as a potential co-party, an entity must meet the party-related criteria governing international and non-international armed conflicts independently. That is, parties to an international armed conflict

- (IAC) must be states (with the exceptions listed in Section 1.2) and parties to a non-international armed conflict (NIAC) must independently meet the threshold of organization.
- b) The conflict-related criteria governing IACs (i.e. resort to armed force) and NIACs (i.e. protracted armed violence) can be met by the conduct of the co-parties taken cumulatively.
 - c) The acts constituting co-party status must be attributable to the collective entity for it to be considered a co-party.
 - d) Co-party status is to be established according to two cumulative criteria:
 - i) The acts of the purported co-party are directly connected to hostilities; and
 - ii) There is some degree of cooperation or coordination between the purported co-party and the other party that they support.
 - e) These two criteria inherently presuppose that a co-party acts with knowledge of the facts that establish the direct connection to hostilities and the element of cooperation or coordination.
 - f) Whether the legal criteria for co-party status are met in a given case is determined by an objective assessment of the facts.
 - g) Once established, co-party status persists until such time as the legal criteria for that status cease to be met, and that change in situation has attained a degree of stability and permanence.
2. That caution is warranted to avoid three common misunderstandings that have been regularly present in the public discourse on co-party status:
- a) '*Becoming a co-party to a conflict necessarily entails an illegal act.*' In fact, becoming a co-party and the legality of the acts that determine party status are separate questions. Whether a state, international organization or non-state armed group becomes a party depends solely on whether the legal criteria set out in Recommendation 1 are fulfilled. Whether the acts carried out by that prospective co-party are lawful depends notably, in inter-state conflicts, on whether force is used in self-defence on the side of the victim of an armed attack – as permitted by the *ius ad bellum*. By contrast, if the acts that make a state a party to an inter-state conflict amount to participation in aggressive war, they are prohibited by that body of law.
 - b) '*If a state becomes a party to a conflict it necessarily entitles the adversary under international law to attack that state.*' In fact, whether or not the adversary is entitled to use force against a party to the armed conflict depends on the *ius ad bellum* rules on the use of force by one state against another (see Section 3.1). Being a co-party does not affect the applicability of the *ius ad bellum*. Any conduct by a co-party that constitutes a use of force must have a justification under the UN Charter, so that it does not violate Article 2(4). However, the rules of international humanitarian law regarding lawful targets will also apply.

- c) *'Supporting a party to a conflict involves breaking the law of neutrality and therefore makes the supporting state a party.'* Co-party status does not necessarily arise as a consequence of violations of neutrality law (see Section 2.1). The law of neutrality has nothing to say on when the line to co-party status is crossed. Co-party status and neutrality are separate legal questions.
3. That states, international organizations and non-state armed groups consider the benefits of making public, wherever possible, whether they determine themselves to be co-parties, and the reasons for taking that view where they assist others that are parties to an armed conflict. This transparency would carry several possible advantages:
 - a) Securing trust both domestically and internationally that the international law applicable to their actions is understood and can be implemented with the necessary legal certainty;
 - b) Countering confusion and anxiety in public discourse and bad-faith claims by other actors regarding who is a co-party; and
 - c) Actively shaping the development of international law on this point.
4. That states, non-state armed groups, as well as international and humanitarian organizations – for the same reasons – consider whether it is practicable to release publicly any determinations made concerning the status of those assisting parties to an armed conflict.
5. That political reasons for not taking particular actions – valid as they may be – are not confused with the legal implications of becoming a (co-)party.
6. That, in determining their course of action in an armed conflict, states, international organizations and non-state armed groups are aware of how becoming a co-party determines the rules that apply to their conduct (and how these rules apply), to their relationship with third parties and to individuals connected to them.
7. That co-parties take appropriate measures to comply with their positive obligations in relation to their fellow co-parties in the conduct of hostilities, and regarding the protection of individuals in armed conflict.

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