

ICRC Legal Division in Geneva,

As the International Committee of the Red Cross (ICRC) legal advisors, it is important to take into account the humanitarian initiative as it is stated in article 5.3 of the Statute of the ICRC. Moreover, this principle, which finds its origins in customary law, will be applicable to any situation, no matter its qualification by the parties concerned(1).

In spite of the previous statement, given the task assigned to us, the aim of this work is to perform the qualification of the situation occurring in the Peninsula of Palagos. For this purpose, we shall describe the conflict as it evolves from mere internal disturbances and tensions, growing into a non-international armed conflict (NIAC), and finally building itself into an international one (IAC).

The events begin with the appearance of the FB in the territory of Seayard. This group—by launching operations against the government—created internal disturbances and tensions.

With the evolution of the conflict, a two months war arises, between the separatist group and the Seayard armed forces, turning the qualification into a NIAC. Considering the requirements that should be met by the dissident forces according to Article 1 of the Additional Protocol II (AP-II), we can affirm that the FB have their own governance and control over the territory of Lagun “[...] as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

Following the war, the FB proclaims its independence from Seayard and constitutes the Republic of Lagun in January 2009. Even though there is not a single position regarding the declarative or constitutive effect of the recognition of a State, adopting the first theory, the conflict immediately turns into a IAC, regulated in common article 2 of the Geneva Conventions(2).

However, there are more actors involved in the conflict, and we shall evaluate each of their interventions, to determine other elements that may be transcendent for the internationalization of the conflict. International jurisprudence provides two alternative tests to judge a state’s intervention: “overall control” and “effective control”.

In *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted the first test, saying that “control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character[...]. The control required by international law may be deemed to exist when a State[...] has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training, [...] that group. Acts performed by the group or member thereof may be regarded as acts of the de facto State organs regardless of any specific instruction by the controlling State[...]”(4).

The International Court of Justice (ICJ), in *Bosnia Herzegovina v. Serbia and Montenegro*, reassuring the position taken in *Nicaragua v. USA*(3), evokes the second test saying that “to determine whether a person or entity may be equated with a State organ[...] it has to be proved that they acted in accordance with that State’s instructions or under its ‘effective control’. It must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given[...] not generally in respect of the overall actions taken”(5). We shall enroll in this test, since the ICTY only has jurisdiction to impose personal responsibility, while the ICJ can attribute responsibility to States(6).

A-Nuna only provides financial support to the FB forces. However, providing monetary funding isn’t enough to determine the “effective control”. Therefore, the intervention of Nuna does not internationalize the conflict.

Subsequently, the Movement for the Liberation of Lagun (MLL) is created in Coasty. The MLL has the solely purpose to support the government of Seayard in regaining control over the district of Lagun. The alleged link existing between the two States (Coasty and Seayard) and the FB forces provide information as to analyze their intervention.

B-Seayard authorities—according to reports from western intelligence services—regularly transfer funds to the MLL. As pointed above, the sole monetary support is not enough to create a link of “effective control”. Hence, this participation wouldn’t be transcendent when evaluating the internationalization of the conflict.

C-The armed forces of Coasty allegedly provide training and information on FB positions to the MLL. If this information was reliable, it still wouldn't be enough to fulfill the standards of "effective control" as expressed in the ICJ cases quoted above. Specifically, in *Nicaragua v. USA* "The Court has taken the view that the United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras[...]is still insufficient in itself, [...] for the purpose of attributing to the United States the acts committed by the contras [...]"(7).

On September 15th 2009, the MLL attacked the FB in the district of Lagun. The FB responded with a series of strikes against alleged MLL training camps, in the territory of Coasty. Considering these events, the qualification changes dramatically to an IAC.

As we have seen, the LOAC doesn't provide a clear answer to the situation in the Peninsula of Palagos. Still, by interpreting other elements together with the regulations, we have achieved a possible qualification of the situation. However, we must remember, as mentioned previously, that the purpose of the ICRC is to ensure the respect of IHL, having in mind the principles of neutrality, impartiality and humanity.

Notes:

(1)ICRC "Action outside the context of non-international armed conflicts and internal disturbances"
Extract from an article published in the *International Review of the Red Cross*, May-June 1993, No 294

(2)This standard was applied by the ICTY in *Prosecutor v. Tadić*, T-94-1-A, Judgement, July 15th 1999, para. 84: "It is indisputable that an armed conflict is international if it takes place between two or more States"

(3)ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgement, June 27th 1986, para. 115

(4)Idem 2, para.137

(5)ICJ *Bosnia Herzegovina v. Serbia and Montenegro*, Judgement, February 26th 2007, para. 398-400

(6)Idem 5, para. 403

(7)Idem 3