

The ICRC's 'support-based approach': A suitable but incomplete theory

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1. Introduction

The International Committee of the Red Cross (ICRC) recently developed a new theory, entitled 'support-based approach', which deals with foreign interventions by 'one or more States, a coalition of States or an international or regional organization'¹ in a pre-existing non-international armed conflict (NIAC) in support to one of the parties to this conflict.² This new theory helps to define the *ratione personae* scope of application of International Humanitarian Law (IHL). Indeed, its main legal effect is to make the intervening power a new party to the pre-existing NIAC, without requiring the hostilities between this power and its enemy to reach the intensity threshold necessary to trigger a new separate NIAC. In other words, according to the 'support-based approach', only one single NIAC exists, ie the pre-existing NIAC, but the intervening power becomes a new party to this conflict, fighting alongside the supported party. Therefore, the law of NIAC becomes applica-

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¹ T Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict' (2015) 97 *Intl Rev Red Cross* 1227, 1233.

² See T Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *Intl Rev Red Cross* 561, 583-587; Ferraro, 'The ICRC's Legal Position' (n 1) 1230-1234. Although the first paper contains a disclaimer (according to which it is 'written [by the author] in a personal capacity and does not necessarily reflect the views of the ICRC'), such disclaimer does not appear in the second paper. It is thus clearly the position adopted by the ICRC.

ble to the intervening power even before the traditional intensity threshold for a distinct NIAC is fulfilled or even if this threshold is never reached by its intervention itself.

Thus, the nature of the support provided by the intervening power is pivotal in the ICRC's theory. In the ICRC's view, this support is not limited to direct attacks by land, air or sea but also includes any other act of hostility, provided that such act is designed to directly impair the military capabilities of the adversary,³ such as transporting troops to the front lines or refueling aircrafts in order to allow them to directly launch attacks against the enemy.⁴ By contrast, providing the territorial State merely with general intelligence information, without any link to any specific attack, would not be enough to make the intervening and supporting power a party to the pre-existing NIAC.

The ICRC's 'support-based approach' and its main legal consequence do not seem unreasonable. The classical requirements for a NIAC to exist and, in particular, the intensity requirement,⁵ constitute a means to distinguish between two realities: on the one hand, situations of internal disturbances, which imply for State authorities to maintain public order and to which national law applies; on the other hand, situations of armed conflicts, which imply for State authorities to fight an enemy and to which IHL applies. If the intervening power directly contributes to the military action of the supported party against the other party in a pre-existing NIAC and shares the same goal of this supported party, it would be inconsistent to consider that this intervening power is acting under a paradigm of maintenance of public order – because its

³ Ferraro, 'The Applicability and Application' (n 2) 585.

⁴ See for instance regarding this kind of support, K Connolly, 'Germany Joins Anti-ISIS Military Campaign' *The Guardian* (4 December 2015) <www.theguardian.com/world/2015/dec/04/germany-joins-anti-isis-military-campaign>; see also for instance the support provided by Italy to the Western coalition fighting the Islamic state in Iraq, 'The Italian Contribution to the Global Coalition against Daesh' (4 October 2016) <theglobalcoalition.org/en/the-italian-contribution-to-the-global-coalition-against-daesh/>.

⁵ For further developments on these traditional requirements, see eg ICTY, Appeal Chamber, *Prosecutor v Duško Tadić*, Case No IT-94-1-T, Decision on the Defence motion for interlocutory appeal on jurisdiction (2 October 1995) para 70; ICTY, Trial Chamber II, *Prosecutor v Ljube Bošković and Johan Tarčulovski*, Case No IT-04-82-T (10 July 2008) paras 175-177 and 195-203; ICTY, Trial Chamber I, *Prosecutor v Ramuš Haradinaj and others*, Case No IT-04-84-T (3 April 2008) paras 49 and 60; ICTR, Trial Chamber I, *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T (2 September 1998) paras 619 and 620.



acts of hostility would not reach the required intensity threshold –, while the supported party would act under a different paradigm of armed conflicts.⁶

Despite seeming reasonable, the ICRC's approach leaves many questions unanswered and raises several issues. This paper will briefly address these issues,⁷ namely the added value of the theory in terms of protection (2), the nature of the supported and supporting powers according to this theory (3), the precise meaning and implications of its conditions (4), the applicable law to the NIAC in which the intervening power is involved (5), and the legal basis of this theory (6).

2. Better protection for civilians

Generally, the ultimate objective of the ICRC's theories and work is to ensure better protection of those affected by armed conflicts. The ICRC's 'support based-approach' also pursues this objective, especially for direct attacks committed by States (or international organisations). Under the classical view,⁸ international human rights law would not be

⁶ For more detailed considerations on the suitability of this approach, see also R van Steenberghe, 'Les interventions militaires étrangères récentes contre le terrorisme international. Seconde partie : droit applicable (*jus in bello*)' (2017) 63 *Annuaire Français de Droit International* 37, 47-48.

⁷ For further developments on these issues, see P Lesaffre, R van Steenberghe, 'Military Interventions in a Pre-existing Non-international Armed Conflict: Understanding and Assessing the ICRC's "Support-based Approach"' (forthcoming).

⁸ See *Bankovic and others v Belgium and others*, App no 52207/99 (ECtHR [GC], 12 December 2001) para 82; UK, Court of Appeal, *Al-Saadoon & Ors v Secretary of State for Defence* (9 September 2016) <www.bailii.org/ew/cases/EWCA/Civ/2016/811.html#para29> paras 66-73; 'Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare' *European Parliament* (2013) 17; R Goodman, 'Al-Qaeda, the Law on Associated Forces and "Belonging to" a Party (did the new UN drones reports get it right?)' (18 October 2013) <www.justsecurity.org/>. However, some authors and judges disagree with this classical view and do support the applicability of international human rights law to extraterritorial direct attacks. See contra UK, High Court of Justice, *Al-Saadoon & Ors v Secretary of State for Defence* (17 March 2015) <www.bailii.org/ew/cases/EWHC/Admin/2015/715.html> para 95; IACoMHR, *Alejandro Jr and others v Republica de Cuba*, Case No 11.589, Report No 86/99 (29 September 1999) paras 23-25, 37 and 42; E Crawford, 'Terrorism and Targeted Killings under International Law', in B Saul (ed), *Research Handbook on International Law and Terrorism* (E Elgar 2014) 268; N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 227-231; M



applicable to such attacks because the effective control requirement, which is a prerequisite condition for the applicability of human rights instruments, is not met. The ‘support-based approach’ would fill this gap by making IHL applicable to such situations. In particular, such an attack would only be lawful under IHL if it conforms to the rules regulating the conduct of hostilities, including the principles of distinction and proportionality.

Would these IHL rules apply even when the ICRC’s support-based approach does not come into operation? Indeed, a member of the intervening power’s armed forces carrying out an attack could be considered as a civilian directly participating in the hostilities between the parties to the pre-existing NIAC. Technically speaking, this person could not be considered as a member of the armed forces of the belligerent parties to the NIAC and should therefore be qualified as a civilian. Under IHL, an individual is either a civilian or a member of the armed forces of a party to the conflict.⁹ Whoever is not a member of the armed forces of the parties to the conflict should thus be considered as a civilian. In addition to be considered as a civilian, this member of the intervening power’s armed forces would be acting in support of one of the parties in conflict to the detriment of the other. This conforms to the belligerent nexus required by the notion of direct participation in the hostilities.¹⁰ Consequently, IHL rules binding individuals would be applicable to this member’s acts of hostility.¹¹ By contrast, the ICRC’s ‘support-based approach’ offers greater protection to civilians because it would make the whole law of NIAC applicable to the intervening power *as such*, thus extending the applicable law beyond the mere IHL rules to which the member of its armed forces, as an individual, would

Milanovic, *Extraterritorial Application of Human Rights Treaties, Law, Principles and Policy* (OUP 2011) 209-221; C Heyns, D Akande, L Hill-Cawthorne, T Chengeta, ‘The International Law Framework Regulating the Use of Armed Forces’ (2016) 65 ICLQ 791, 824 and 825.

⁹ See for instance N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) <www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> 28-30.

¹⁰ On the notion of direct participation in the hostilities, see Melzer (n 9).

¹¹ These rules mainly consist in the criminalised IHL obligations, ie these rules whose violation amounts to war crimes. See notably Statute of the International Criminal Court (Rome, 17 July 1998) art 8(c) and (e).



have to abide by when carrying an act of hostility.¹² Moreover, the application of the whole law of NIAC to an intervening State or intervening international organisation would make it possible to establish its international responsibility for the IHL violations committed by its member of armed forces when carrying the act of hostility, since this State or international organisation would then be also bound by the infringed IHL rules as a party to the conflict.¹³ More fundamentally, it seems inappropriate – although technically correct – to qualify members of armed forces of the foreign State or intervening international organisation as civilians. Such qualification does not fit with reality. This evidences that, in line with the ‘support-based approach’, the intervening State or international organisation should be considered as a party to the pre-existing NIAC when it is acting in support of one of the parties to this NIAC through its armed forces.

In addition to a better protection for civilian population, the ICRC may also be pursuing another objective through its ‘support-based approach’. As the main consequence of this theory is to make the members of the intervening power’s armed forces targetable at any time – and not merely as long as they are directly participating in the hostilities –, the support-based approach may dissuade foreign powers from intervening in existing NIACs and therefore limit the involvement of third actors in such conflicts. The fact that, as we will see,¹⁴ the principle of equality of belligerents is invoked by the ICRC to legally justify its approach may support such a reading. The reasoning is as follows: if an intervening power is intervening in an existing NIAC, it must be treated like its adversary. This means that members of this intervening power’s armed forces can be targeted at any time.

¹² They would include IHL obligations whose violation do not amount to war crimes, such as the obligation of precautions in the attack and against the effects of the attacks. These obligations are customary IHL obligations applicable in NIACs. See JM Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law*, Vol I: Rules (CUP 2005) Rules 15 to 24. Applicability of Rules 21, 23 and 24 is uncertain in NIACs.

¹³ Without the operation of the ‘support-based approach’, the foreign State or international organisation would not be bound by the rules applying to its member of armed forces carrying the act of hostility, since it could not be considered as a party to the conflict. It would only be bound by the IHL rules applying in peacetime.

¹⁴ See below Part 6.



3. *The nature of the supported and supporting powers*

The ICRC built its ‘support-based approach’ only in relation to situations in which ‘one or more States, a coalition of States or an international or regional organization’ intervene(s) to support a party to a pre-existing NIAC.¹⁵ Nevertheless, this approach is also formulated in general terms as including direct support provided by ‘a third power’ to ‘one of the belligerents’ of a pre-existing NIAC.¹⁶ Thus, the *ratione personae* scope of application of the approach is unclear: Who is supported by whom?¹⁷

The most obvious situation envisaged by the ICRC is when a State, several States or an international organisation support(s) a(nother) State fighting against an armed group. In practice, there are many (current or past) situations of this kind, especially in relation to the fight against international terrorism. These situations include, for example, the intervention of the Western coalition against the Islamic State in Iraq, at the request and in support of the Iraqi authorities;¹⁸ the French intervention in

¹⁵ Ferraro, ‘The ICRC’s Legal Position’ (n 1) 1233.

¹⁶ *ibid* 1231.

¹⁷ See nonetheless some clarifications given by T Ferraro to our question on this issue at the 19th *Bruges Colloquium*, 18-19 October 2018 (T Ferraro, ‘Military Support to Belligerents: Can the Provider Become a Party to the Armed Conflict?’, Q&A session, Proceedings of the Bruges Colloquium, 19th Bruges Colloquium: ‘Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts’ (18-19 October 2018, to be published).

¹⁸ See for instance the requests for assistance made by Iraq, HEH Zebari, Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/2014/440 (25 June 2014) and I al-U al-Ja’fari, Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691 (22 September 2014). See for instance, regarding the US interventions, ‘Obama Says Ending Iraq Crisis Could be “Long-Term Project”’, Reuters (9 August 2014) <www.reuters.com/article/us-iraq-crisis-usa-obama-idUSKBN0G90GL20140809>; B Obama, ‘Letter from the President-War Powers Resolution Regarding Iraq’ (17 August 2014) <obamawhitehouse.archives.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>; for Australian participation, see United Nations Security Council, UN Doc S/PV.7272 (24 September 2014) 17; for Belgian contribution, see Resolution adopted by the Parliament on 10 September 2014, <www.lachambre.be/FLWB/PDF/54/0305/54K0305004.pdf> Preamble, Point H; as far as Canadian participation is concerned, see Motion adopted by the Parliament on 7 October 2014 <publications.gc.ca/collections/collection_2014/parl/X2-412-124.pdf>; for Danish contribution, see ‘Danish Parliament approves military contribution to Iraq’ (27 August 2014) <um.dk/en/news/newsdisplaypage/?newsid=03254085-63a8-4df6-ab0f-d396b7c7ffba>; for French participa-



Mali, initially deployed at the request of the Malian government in order to support it in its fight against terrorist groups associated with Al-Qaida, such as AQIM;¹⁹ or the intervention of the African forces (AMISOM) in Somalia, in support of the Somali authorities, in order to fight against Al-Shabaab, another armed group associated with Al-Qaida.²⁰

However, no logical reason prevents the ICRC's 'support-based approach' from applying to other types of interventions in pre-existing NIACs, in particular to the support provided by armed groups to one party to a pre-existing NIAC. At least three other scenarios must be analysed in this respect. The first one is when an armed group supports another armed group fighting against a State. Such situation is expressly addressed by the United States in its doctrine of 'associated forces'. According to the United States, when armed groups support (associate themselves to) Al-Qaida (such as, in its views, Al-Shabaab in Somalia or AQAP in Yemen²¹), they automatically become a new party to the NIAC

tion, see 'Déclaration du Président au sujet de l'Irak' (19 September 2014) <discours.vie-publique.fr/notices/147002087.html>; for Dutch participation, see 'Artikel 100 brief over deelneming aan internationale strijd tegen ISIS' (24 September 2014) <www.tweedekamer.nl/kamerstukken/detail?id=2014D33682&did=2014D33682> 4; and as far as the United Kingdom is concerned, see 'Summary of the government legal position on military action in Iraq against ISIL' (25 September 2014) <www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil>.

¹⁹ For further information about this force, see for instance French Department of Defense, 'Opération Serval (dossier actualisé)' <www.defense.gouv.fr/english/air/dossiers/operation-serval/operation-serval-dossier-actualise/presentation>. This operation ended for a new wider operation on 1 August 2014, extending the French fight against associated Al-Qaida forces to Mauritania, Niger, Burkina-Faso and Chad. This new operation is called operation 'Barkhane' (for further information on this operation, see French Department of Defense, 'Opération Barkhane' <www.defense.gouv.fr/english/operations/barkhane/dossier-de-presentation/operation-barkhane>).

²⁰ See for instance about this force <amisom-au.org/fr/>.

²¹ See eg MD Lumpkin, Assistant Secretary of Defense, 'Report of Associated Forces' (16 July 2014) <www.aclu.org/sites/default/files/field_document/report_on_associated_forces_2014.pdf>; S W Preston, 'The Legal Framework for the United States' Use of Military Force Since 9/11' Address delivered at the Annual Meeting of the American Society of International Law, Washington DC 10 April 2015 <www.defense.gov/News/Speeches/Speech-View/Article/606662/>; The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016) <www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf> 5 and fns n 21-23.



already opposing the US themselves and Al-Qaida. As a result, the hostilities between the US and these associated forces do not need to reach any separate intensity threshold to trigger a new NIAC and to make members of those forces targetable at any time.²² However, this doctrine is problematic in two main respects. Firstly, the support considered under this doctrine is not precisely defined and may possibly include very indirect support, which would extend too much the applicability of IHL.²³ Secondly, it relies on an analogy with the concept of ‘co-belligerency’: the supporting armed group becomes a ‘co-belligerent’ with Al-Qaida because of its support.²⁴ Yet, as explained below,²⁵ this concept is not relevant with respect to the issue at stake. Therefore, the application of the ICRC’s ‘support-based approach’ to such situations is to be preferred to the US doctrine.

The ICRC’s approach should also cover situations in which an armed group supports a State fighting against another armed group. One recent example is the military support provided by *Hezbollah* to the Syrian regime against ISIS and other armed groups in Syria.²⁶ Another possible example is the support given by a Congolese armed group, the *Movement for the Liberation of Congo* (MLC), to the internationally recognised President of the Republic of Central Africa, Mr. Patassé, who was overthrown

²² See for instance, about this doctrine, The White House, ‘Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations’ (n 21) 4.

²³ See for instance R Ingber, ‘Co-Belligerency’ (2017) 42 *Yale J Intl L* 67, 94.

²⁴ See United States District Court for the District of Columbia, *In Re Guantanamo Bay Detainee Litigation* (13 March 2009) Case No 08-442, ‘Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay’ <www.justice.gov/archive/opa/documents/me-mo-re-det-auth.pdf> 7; United States District Court for the District of Columbia, *Adel Hamlily v. Barack Obama* (and others), Case No 05-0763 (and others) (19 May 2009) <ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv1236-116> 8 and 16; JC Johnson, ‘National Security Law, Lawyers, and Lawyering in the Obama Administration’, Dean’s Lecture at Yale Law School, 22 February 2012 (2012) 31 *Yale L & Pol’y Rev* 141, 146.

²⁵ See below Part 6.

²⁶ See for instance ‘Syrie: le chef du Hezbollah reconnaît la participation du mouvement aux combats’ *Le Monde* (30 April 2013) <www.lemonde.fr/proche-orient/article/2013/04/30/syrie-le-chef-du-hezbollah-reconnait-la-participation-du-mouvement-auxcombats_3169077_3218.html>; ‘Hezbollah leader vows to stand by Syrian regime in fight against rebels’ *The Guardian* (25 May 2013) <www.theguardian.com/world/2013/may/25/hezbollah-leader-syria-assad-qusair>.



by rebels led by the General Bozizé and who was engaged in a NIAC against these rebels on his territory. This situation has been dealt with – not without any ambiguity – by the International Criminal Court (ICC) in the *Bemba* case.²⁷

Finally, the ICRC's 'support-based approach' should logically also apply to situations in which armed groups support another armed group that is engaged in a NIAC against a third armed group.

However, contrary to what is suggested by the ICRC that refers in general terms to the support given to *any* party to a pre-existing NIAC – which includes either a State or an armed group –, the 'support-based approach' could not include situations in which a State is providing direct support to an armed group fighting against another State. Such a support would amount to an act of war and would trigger an international armed conflict (IAC) between the foreign State and the territorial State, running in parallel to the pre-existing NIAC.

4. *The requirements of the support-based approach*

According to the ICRC, the support-based approach requires the fulfilment of four conditions:

'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'.²⁸

The second condition refers to the type of support required to qualify the intervening power as a new party to the pre-existing NIAC. As already seen, this support cannot consist of a contribution to the general war effort of one party to the NIAC. It must be direct, ie closely linked to

²⁷ See ICC, Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08 (Judgment 21 March 2016) paras 131 and 652.

²⁸ Ferraro, 'The ICRC's Legal Position' (n 1) 1231.



specific military operations conducted by the supported party. This may raise problems when the intervening power provides support, such as intelligence information, which can be used either for a specific military operation or as a mean for contributing to the general war effort. Thus, the operation of the ‘support-based approach’ would depend upon the way the supported party uses the support. This could penalise the intervening power despite its intention to provide indirect support. Therefore, determining this power’s intent to directly contribute to the military action of the supported party seems crucial. However, the applicability of IHL cannot rest upon such subjective element. The intervening power’s intent must be objectivised by all the relevant facts. These facts must include the nature of the support (eg whether provided information is detailed information about specific individuals or more general information about the enemy’s location), when the support was provided (eg whether the supported and supporting powers agreed on the provided support while the former was already engaged in the NIAC) and which information was available or could have been available to the supporting power.

It is also under this second condition that the ICRC considers whether a repetition of direct supporting acts is necessary to trigger the ‘support-based approach’. The ICRC’s position is not straightforward in this respect. According to the Committee, ‘[a]lthough the all-important factor in the support-based approach is generally whether action in support of a party to a pre-existing NIAC is repeated, in some circumstances a single act could turn the [intervening power] into a party to the armed conflict’.²⁹ It is actually the issue of the intensity of the support which is under consideration. The significant legal consequences of the ‘support-based approach’, ie the application of the whole law of NIAC to the intervening power, commends to require that a certain intensity threshold be reached with respect to the support provided to the supported party.³⁰ The support must *substantially* contribute to undermine the military capabilities of the enemy of this party. However, this intensity threshold must not be confused with the one required to trigger a (new) NIAC. The former can be reached without the latter being met or even arising, in particular when the support does not consist in direct attacks.

²⁹ Ferraro, ‘The Applicability and Application’ (n 2) 586; see also *ibid*, fn 74.

³⁰ See below Part 5.



According to the third condition, the intervening power must act in support of one of the parties to the pre-existing NIAC and not for its own interests. This refers to the nexus between the intervening power's military action and the pre-existing NIAC. As acknowledged by the ICRC itself,³¹ it might prove very difficult to establish this nexus. This results from the difficulty to prove the supportive intent of the intervening power. Again, such intent must be objectivised by all the relevant facts. However, the ICRC remains confusing in this respect. Although emphasising that the nexus clearly exists when the intervening power cooperates or coordinates its military operations with the supported party,³² the Committee nonetheless admits that 'the intervening power's support is not always so readily apparent [and that] it may be military action of a more unilateral nature'.³³ This leaves unsettled numerous situations where foreign States intervene against armed groups who are already fighting against the territorial State, despite not conducting joint military operations with this latter State. This has been the case of the US interventions in Yemen against AQAP or in Libya against ISIS.³⁴ On the one hand, consent or mere approbation by the territorial State of the foreign intervention is undoubtedly not enough to establish the nexus. On the other hand, a formal request made by the supported party to the intervening power might be an objective circumstance particularly important in this respect, especially when the request is addressed by a State to another State as it is often made public.³⁵

³¹ Ferraro, 'The Applicability and Application' (n 2) 586.

³² *ibid* 587.

³³ Ferraro, 'The ICRC's Legal Position' (n 1) 1234.

³⁴ See for instance, about the limited targeted attacks carried out by the US (most often by drones) in Yemen before January 2017 and in Libya before August 2016 against international terrorist groups, R van Steenberghe, 'Les interventions militaires étrangères récentes contre le terrorisme international. Première partie : fondements juridiques (*ius ad bellum*)' (2015) 61 *Annuaire Français de Droit International* 145, 152-154.

³⁵ However, such request might be more difficult to identify in case of support given by armed groups either to States or other armed groups.



5. *The applicable law to pre-existing NIAC*

Under treaty law, a NIAC may amount either to a NIAC under common Article 3 to the four 1949 Geneva Conventions³⁶ or a NIAC under Additional Protocol II (APII).³⁷ Which rules apply to the pre-existing NIAC in which an intervening power supports a party to this conflict? It is clear that common Article 3 will at least apply to all belligerents, including when a foreign State intervenes in support of another State against an armed group. It is no longer disputed that common Article 3 is applicable even if the hostilities are taking place between a State and an armed group on the territory of another State. This results from an evolutive interpretation of common Article 3.³⁸ Likewise, this article will also be applicable to foreign armed groups intervening in a pre-existing NIAC between a State and another armed group in support to either this State or this armed group.

The issue is more complex with respect to the applicability of APII, especially when that Protocol is already applicable to the pre-existing NIAC. The logical consequence of the ‘support-based approach’ is that only one single NIAC exists between all the belligerents, with the intervening power fighting alongside the supported party against the other party. The existence of such a single NIAC should logically imply that all belligerents, including the intervening power, are subject to the same regulation. This also seems justified on a practical level: it might prove ar-

³⁶ Art 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949); art 3 of the Convention (II) for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949); art 3 of the Convention (III) relative to the Treatment of the Prisoners of War (Geneva, 12 August 1949); art 3 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).

³⁷ Art 1 Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977).

³⁸ See for instance N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 101-104 and the numerous scholars mentioned in footnote 103; E Crawford, A Pert, *International Humanitarian Law* (CUP 2015) 81; S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 *Intl Rev Red Cross* 69, 78; S Radin, ‘Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts’ (2013) 89 *Intl L Studies Series US Naval War College* 696, 715-718.



tificial to distinguish between the application of two different legal regimes (common Article 3 and APII) depending on the nature of the armed forces (foreign or local ones) involved when these forces are conducting combined military operations. However, it is questionable whether the same regulation, in particular APII, may apply to both the intervening and supported powers, although they are both parties to the same NIAC on the same side.

Regarding interventions of States, some consider that APII cannot apply to foreign forces since Article 1 of APII defines the conflict that the Protocol regulates as any conflict 'which take place in the territory of a High Contracting Party between *its* armed forces and ... organized armed groups'.³⁹ The conflict considered by the Protocol is the traditional 'internal armed conflict', ie a conflict that occurs within the territory of a State between this State and an armed group. This has led some scholars to argue that foreign forces are to be excluded from the scope of application of APII.⁴⁰ Even if one does not agree with such a view and admits the applicability of APII to foreign forces – as we have argued elsewhere –,⁴¹ problems remain when the foreign State, such as the United States, did not ratify APII, unlike the territorial State. The intervening State would not be bound by APII although it is a party the pre-existing NIAC alongside the territorial State to which the Protocol applies.

Problems also arise with respect to the intervention of armed groups into a pre-existing NIAC between a State and another armed group in support to either this State or this armed group when the pre-existing NIAC is already regulated by APII. The issue of the applicability of APII to 'foreign' armed groups intervening against a State in support to another armed group arises when these 'foreign' armed groups exercise some control over the territory on which they are based but do not have such a control in the territory where they intervene. Indeed, according to Article 1 of APII, the Protocol only applies to armed conflicts between the

³⁹ Emphasis added.

⁴⁰ See for instance D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 55; N Melzer, *Targeted Killing in International Law* (OUP 2008) 257; C De Cock, 'Legal Implications Surrounding Operation "Inherent Resolve" in Iraq and Syria' (2017) 47 *Israel YB Human Rights* 69, 114.

⁴¹ See for instance, in favour of the applicability of APII to foreign forces, van Steenberghe, 'Les interventions militaires' (n 34) 58-60.

armed forces of a State and armed groups ‘exercise[ing] control over a part of [the] territory [of this state]’.⁴² This seems to exclude ‘foreign’ armed groups, which do not have any control over the territory of the State where the intervention takes place. Again, even if one rejects such a view and admits the applicability of APII to such armed groups, another problem remains with respect to situations akin to the situation that occurred in the Republic of Central Africa, where a ‘foreign’ armed group (the MLC) intervened in support of a State (the internationally recognised President of the territorial State, Mr. Patassé) already engaged in a NIAC regulated by APII against another armed group (led by General Bozizé). Contrary to common Article 3, APII does not apply to conflicts between armed groups themselves. Therefore, the same regulation (APII) could not apply *de lege lata* to all the belligerents, although they are considered as parties to one single NIAC according to the ICRC’s ‘support-based approach’.

In any case, the distinction between the rules applicable to NIACs falling into the scope of common Article 3 and those regulating NIACs defined by APII should not be overstated. Such distinction may have been significantly narrowed or even may have disappeared through customary IHL,⁴³ although the exact content of the relevant customary norms remains unsettled and the issue of the customary threshold for NIAC rules is still debated.

6. *The legal basis of the support-based approach*

Even though the ICRC’s ‘support-based approach’ seems suitable, it lacks any firm legal basis. It is not confirmed by any conclusive State practice.⁴⁴ The ICRC based its approach on the logic of IHL and the principle of equality of belligerents.⁴⁵ The logic of IHL is too vague to in-

⁴² Art 1(1) APII (n 37) (Emphasis added).

⁴³ See for more details on this issue van Steenberghe, ‘Les interventions militaires’ (n 6) 60-64.

⁴⁴ See nonetheless above Part 2 the inconclusive US practice regarding the support provided by armed groups to other armed groups in the framework of its doctrine of ‘associated forces’.

⁴⁵ See Ferraro, ‘Military support to belligerents: can the provider become a party to the armed conflict?’, Q&A session (n 17), to be published.



fer from it such enlargement of the applicability of IHL. Besides, the principle of equality of belligerents is not relevant. It means that the belligerents are bound by the same IHL rules, irrespective of the legality of their use of force under *jus ad bellum*. It has nothing to do with the *ratione personae* scope of application of IHL. Finally, the 'support-based approach' cannot rely on the concept of co-belligerency, despite the ICRC's allusion to such concept in its description of the approach.⁴⁶ This concept is part of the law of neutrality that only applies in international armed conflicts (IACs).⁴⁷ Moreover, according to this concept, the type of support considered in the ICRC's approach would not necessarily make its author a co-belligerent.⁴⁸

One alternative view is to anchor another new theory in an already existing IHL concept applicable in NIACs. Thus, we suggest a new theory, entitled the 'direct participation in a pre-existing NIAC', which builds upon the notion of 'direct participation in hostilities' as defined by the ICRC.⁴⁹ This new suggested theory would adapt this well-defined IHL notion to the specificity of the situations at stake.⁵⁰ The logic underlying hypotheses of foreign interventions in a pre-existing NIAC is similar to the logic of the notion of direct participation in the hostilities. On the one hand, according to the latter notion, civilians lose their immunity against any attack when they directly participate in hostilities to support a party to the conflict and for such a time of this participation. On the other

⁴⁶ See Ferraro, 'The Applicability and Application' (n 2) 584; Ferraro, 'The ICRC's Legal Position' (n 1) 1227, 1231 and 1233. However, it has been emphasised by this member of the ICRC's legal division that these references to the concept of 'co-belligerency' were made by the ICRC not with the aim of identifying a legal basis for its approach (as the US did with respect to the doctrine of associated forces (see supra n 24) but to provide a useful description of the situations resulting from its application (see Ferraro, 'Military support to belligerents: can the provider become a party to the armed conflict?', Q&A session (n 17) to be published, where the ICRC's senior legal adviser underlines that the ICRC realised that this notion of co-belligerency raised some difficulties and thus tries now not to use it anymore).

⁴⁷ See for instance C Finkelstein, JD Ohlin, A Altman, *Targeted Killings? Law and Morality in an Asymmetrical World* (OUP 2012) 71.

⁴⁸ See for instance in this sense H Lauterpacht, L Oppenheim, 'International Law', in L Oppenheim (ed), *Disputes, War and Neutrality* (Longman 1952) 752.

⁴⁹ See the ICRC's *Interpretive Guidance of the Notion of Direct Participation in Hostilities under International Humanitarian Law* (n 10).

⁵⁰ For a similar suggestion, see A Deeks, 'Common Article 3 and Linkages Between Non-State Armed Groups' (4 October 2017) <www.lawfareblog.com>, who deals with support between organised armed groups.



hand, as far as foreign interventions in a pre-existing NIAC are concerned, an entity carries out some acts in support of one party to a NIAC to the detriment of the other and becomes, through its acts, a participant in the hostilities. As a result, one may argue that most of the criteria identified by the ICRC in order to delimit the scope of the notion of direct participation in hostilities seem also relevant with respect to the definition of the 'direct participation in a pre-existing NIAC'. Actually, the terminology used by the ICRC for its support-based approach is already very similar to the terminology used to define the notion of direct participation in hostilities. It is clear the latter has inspired the former.⁵¹ We may mention in this respect the direct causation test, according to which the act must directly undermine the military capabilities of the adversary, or the belligerent nexus requirement, according to which the act must be carried out in support of one party of the armed conflict to the detriment of the other. These two conditions are required with respect to both the 'support-based approach'⁵² and the notion of 'direct participation in hostilities'.

However, despite a same logic, the notion of direct participation in hostilities is different from the 'direct participation in a pre-existing NIAC' in at least two main respects: first, it concerns the participation of individuals in hostilities and not the participation of collective entities such as States or armed groups to a NIAC. Second, its effect is to make the participant no longer immune against attacks, while the effect of the 'direct participation in a pre-existing NIAC' is to make the participant as a party to a NIAC and to render the whole law of NIAC applicable to it. Therefore, the effect is much wider. These differences would justify to adapt some aspects of the notion of direct participation in hostilities: first, *ratione personae*, the theory of 'direct participation in a pre-existing NIAC' applies to entities that are States, non-State armed groups or international organisations rather than singular individuals; second, *ratione materiae*, acts of participation should include acts that can be carried out

⁵¹ See in this sense the answer given by Tristan Ferraro to our question on this issue at the 19th *Bruges Colloquium*, 18-19 October 2018 (Ferraro, 'Military support to belligerents: can the provider become a party to the armed conflict?', Q&A session (n 17), to be published).

⁵² See Ferraro, 'The Applicability and Application' (n 2) 585 regarding the direct causation test; see *ibid*, 586 regarding the condition similar to the belligerent nexus requirement.



by entities and not merely by individuals, such as the securing of zones or perimeters for the supported party, which requires the contribution of several individuals; third, *ratione temporis*, the effect of the participation to the NIAC should not automatically start just after one act of participation and terminate when this act has been carried out, as this is the case with respect to the notion of direct participation in hostilities. Legal certainty requires that the legal effects of the participation to the NIAC start after the participation has reached a certain intensity threshold, which may require some repetition of the acts of participation, and terminate when there is no longer any objective reason that it will start again soon.⁵³

Finally, it is questionable whether the issue of the legal basis is relevant at all with respect to the ICRC's 'support-based approach'. Indeed, one of the main roles of the Committee as the 'guardian of IHL' is to reaffirm and strengthen IHL. In most of its work and studies on IHL, the ICRC has pushed for some developments of this law, although these developments could not take root in any conclusive State practice and were not necessarily shared by all the States.⁵⁴ The underlying objective is precisely to influence State practice, mainly by triggering States' reactions (including implicit or explicit approval) with regard to its studies on IHL or, more particularly, by pressing for the incorporation of the main conclusions of these studies in national instruments, such as military manuals or national legislation.⁵⁵ Only State practice may formally lead to the development of IHL, either through the formation of customary IHL or through the interpretation of existing IHL conventional norms. The ICRC's 'support-based approach' may thus be seen only as an attempt by the ICRC to influence State practice in order to indirectly contribute to

⁵³ See for a more detailed analysis of this issue, van Steenberghe, 'Les interventions militaires' (n 6) 60-64.

⁵⁴ See for instance the famous section IX of the ICRC's *Interpretive Guidance of the Notion of Direct Participation in Hostilities under International Humanitarian Law* (n 10). See also the US criticisms of the ICRC's Study on customary IHL, JB Bellinger, WJ Haynes, 'A US Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study' (2007) 89 *Intl Rev Red Cross* 443-471.

⁵⁵ See for instance about the ICRC's role in making IHL, R van Steenberghe, 'The ICRC: A Privileged Non-State Actor in International Law Making', *Cahiers du CeDIE*, Working paper No 2019/2 (2019) <uclouvain.be/fr/instituts-recherche/juri/cedie/cahiers-du-cedie.html>.



the development of IHL in this sense, rather than as a theory already established under IHL or international law in general.

7. Conclusion

The ICRC's support-based approach seems suitable and desirable to deal with various actors' interventions within a pre-existing NIAC. Contemporary IHL does not contain any notion or principle which can explain when and how foreign actors become party to a pre-existing NIAC when they support one of the belligerent parties. Yet, although not new, such situations occur on a more frequent basis since the beginning of this millennium. Thus, the ICRC reacted to a need emerging from the field and offered an interesting theory to fill in a lacuna in IHL.

Albeit suitable and desirable, the ICRC did not develop thoroughly its new theory: it did not offer an in-depth analysis of its conditions nor looked carefully into its consequences in terms of applicable law. Thus, foreign interventions in a pre-existing NIAC remains a legal area to be further explored. Admittedly, at first sight, a theory dealing with these interventions has a much more reduced focus than other major ICRC pieces of work such as the *Interpretative guidance on the notion of direct participation in the hostilities* or the study on customary IHL. While these pieces of work are of great interest for *any* existing conflict – whether IAC or NIAC, whether internal NIAC or NIAC with a foreign intervention –, the former only touches upon NIACs with a foreign intervention. Nonetheless, NIACs are now the predominant type of conflict and there are increasing interactions between actors. Therefore, we think that the legal and current issue of foreign interventions in a pre-existing NIAC is worth further discussions on the possible and available solutions and would deserve more consideration from actors involved in the field as well as experts and academics.

Trying to generate further debate on the issue, this article suggests a close alternative to the support-based approach, which is the 'direct participation in a pre-existing NIAC'. This alternative makes more transparent what the inspiration behind the support-based approach is and gives another framework for thinking about the issue. It elaborates from the criteria developed for the notion of direct participation in hostilities but adjusts them to hypotheses of foreign interventions in an existing NIAC.



More specifically, one should look upon three significant changes: (1) the alternative suggested theory pertains to collective entities and not individuals; (2) it covers not only traditional acts of direct participation but also acts that can solely be conducted by these collective entities and (3) it applies once the participation reaches a certain intensity threshold and stops to apply when there is no risk that this participation resumes.

