

## Some thoughts on the ICRC Support Based Approach

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### 1. Introduction

In a recent article posted on this *Zoom in*, Raphael van Steenberghe and Pauline Lesaffre offer some insights on the ICRC Support Based Approach (SBA) developed by Tristan Ferraro and subsequently adopted by the ICRC.<sup>1</sup> This short commentary is intended to provide some feedback on both the ICRC position and the criticism and points of agreement put forward by van Steenberghe and Lesaffre in their position paper. While I am in broad agreement with the position they take on some aspects of the ICRC SBA, I am more critical of it than they are and do not think it represents the current state of the law, nor as it is presently formulated, that it should be accepted as a progressive development of the law. In my opinion, the SBA is not based on any legal rule, is unrealistic and largely redundant and has undesirable consequences, which outweigh any potential benefits it purports to convey. In short, I find it both untenable and unsuitable.

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<sup>1</sup> See R van Steenberghe, P Lesaffre, 'The ICRC's 'Support Based Approach: A Suitable but Incomplete Theory' (2019) 59 QIL-Questions Intl L 5-23; T Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 Intl Rev Red Cross 561; 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.



2. *Is the SBA a necessary and appropriate way to enhance IHL applicability?*

In their insightful piece, van Steenberghe and Lesaffre express their general agreement with the ICRC SBA as being in their view ‘not unreasonable’ in its general approach and main legal effect.<sup>2</sup> But they go on to point out a number of questions raised by and unanswered issues in the ICRC position.<sup>3</sup> I will devote attention to three of those named by them as well as a couple of issues which I find troubling in the ICRC position which they do not directly address.

To begin with, to whom is the SBA (primarily) addressed and what does it purport to do?

The SBA was originally brought forward to address the conditions which would trigger applicability of IHL in situations whereby a (group of) States, or in particular, an international organization was assisting a State which was involved in a pre-existing NIAC against one or more armed groups. The SBA was originally intended to make sure that the multinational (usually peacekeeping) operation in support of a State which was party to a NIAC could not shield itself from the applicability of IHL when its support was instrumental in assisting the State party and negatively affecting the armed group which the State was confronting.<sup>4</sup> The SBA purports to lower the threshold of applicability of IHL in relation to the operations of the intervening multinational force and to avoid a situation whereby it would not be subject to IHL despite its effect on the armed conflict. This lower threshold would signify that instead of having to meet the established criteria of intensity and organization, it would suffice if the intervening multinational force engaged in deliberate forms of support which had a direct nexus to the conflict and were sufficiently intense (but not necessarily of the intensity required under the general threshold criteria for the existence of a NIAC) to have a reasonably significant effect upon the ongoing hostilities between the parties.<sup>5</sup> Up to this point, the SBA seems reasonably clear. Why shouldn’t IHL apply if one gets involved in an ongoing NIAC? One problem is that an

<sup>2</sup> Van Steenberghe, Lesaffre (n 1) 2.

<sup>3</sup> *ibid* 3.

<sup>4</sup> Ferraro, ‘Applicability and Application’ (n 1) 561-62.

<sup>5</sup> Ferraro, ‘Applicability and Application’ (n 1) 583 ff; van Steenberghe Lesaffre (n 1) 2-3.



approach originally developed for one situation, namely the question of when IHL applies to a multinational peace operation, whereby the intervening force is mandated to assist a government in a situation of a severe breakdown in public order or insurgency does not readily lend itself to any other situation, despite there being ‘no logical reason preventing the SBA 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’ in the view of the two authors of the recent commentary.<sup>6</sup> The underlying rationale might be the same with respect to other types of intervention in so far as the goal of equal application of the law is concerned, but the forms such intervention by armed groups normally take will almost inevitably differ significantly from the situation whereby a multinational Peace Force is supporting a State government and for reasons of policy and expediency wishes to avoid becoming a party to an ongoing armed conflict. Why does this matter? It raises the question why an approach which on paper is supposed to apply to a whole range of situations, ends up really only having potential relevance for one type of scenario; namely the one it was originally designed for. This in turn raises the question whether this is really necessary and appropriate.

When an armed group supports another armed group or a State in an ongoing NIAC, such support will almost inevitably take the form of direct participation in ongoing hostilities on the side of a party, rather than the types of support that the SBA purports to address, which go beyond mere financial, and material support but fall short of direct kinetic operations on one side of a conflict to the detriment of the other.<sup>7</sup> Refueling aircraft *en route* to an attack, providing intelligence for targeting purposes and transporting forces of the entity being supported to or from a combat engagement<sup>8</sup> are not forms of support normally engaged in by armed groups for a variety of reasons, not least of which is that they are most often not capable of rendering such support. The only example that was given in the commentary by van Steenberghe and Lesaffre of how the SBA might apply in relation to support by armed groups other than through their direct participation was in the context of the controversial doctrine of ‘associated forces’ used by the US government to allow

<sup>6</sup> van Steenberghe, Lesaffre (n 1) 8.

<sup>7</sup> Ferraro, ‘ICRC Position’ (n 1) 1230-31.

<sup>8</sup> These are examples given in Ferraro, ‘ICRC Position’ (n 1) 1231.



its authorization to use force under domestic US law in response to the 9-11 attacks to (continue to) apply IHL in the targeting of armed groups and to intervene in situations not contemplated when the authorization was originally granted.<sup>9</sup> But this hardly qualifies as a reason to apply the SBA as an alternative to the even more controversial doctrine of ‘associated forces’ to a question which has virtually nothing to do with the applicability of IHL, but everything to do with domestic US law and politics.<sup>10</sup> Likewise, the SBA has no relevance when a State intervenes on the side of an armed group against a State in an ongoing NIAC, as such intervention automatically renders it a party to an IAC between the intervening State and the target State.<sup>11</sup> So we are left with an approach which despite the arguments used in favour of its purported general application seems to potentially fit essentially one type of scenario and then only when the support lies between mere training and general support in reinforcing the capacity of the State to function at one end of the spectrum and direct sustained participation in hostilities at the other end. This is because training and traditional peacekeeping missions which avoid becoming involved in hostilities would fall outside the SBA and the scope of application of IHL, while direct sustained participation in combat obviously would render the participant, be it a State, internationally mandated force operating under the control of an international organization, or armed group, a party to the conflict on the basis of the established criteria for applicability of IHL. This makes it redundant to also include such sustained direct combat engagement within the SBA as it is settled law that if a party directly intervenes in an ongoing conflict and conducts hostilities against one of the parties either on its own or in close cooperation with another party, such action renders it a party to the conflict (or

<sup>9</sup> Van Steenberghe, Lesaffre (n 1) 8-9. For a discussion of how this doctrine emanates from US domestic law and its relationship to international law see ia R Ingber, ‘Co-belligerency’ (2017) 42 *Yale J Intl L* 67.

<sup>10</sup> Ingber, ‘Co-Belligerency’ (n 9) 68-71. The Authorization to Use Military Force (AUMF) is a domestic US legal authorization by the US Senate to the Executive Branch to use force against the organizations responsible for the 9-11 attacks and dates from 2001. In the absence of further authorization, successive Administrations have relied on it to conduct operations against a wide array of ‘associated forces’ under a disputable doctrine of co-belligerency. Without the AUMF, the US Government lacks any domestic legal basis to conduct such operations. This has nothing to do with the applicability of IHL as such.

<sup>11</sup> Ferraro, ‘ICRC position’ (n 1) 1245; van Steenberghe, Lesaffre (n 1) 10.



generates a new conflict). Likewise, there is no additional value in applying the SBA to situations where a State exercises overall or effective control over an armed group involved in a pre-existing NIAC. In such a case, the level of control will make the action of the armed group attributable to the State and if the hostilities are conducted against a State, will render the conflict international or result in two parallel conflicts; one NIAC (between the armed group and the target State) and one IAC (between the intervening State and the target State), depending on the level of control exercised. But this result is achieved without any need for reference to the support based approach.<sup>12</sup> So again, why have an ICRC tailor made approach which only really addresses a rather narrow set of operations primarily conducted by international organizations in support of a State which happen to cross the proverbial Rubicon from peacekeeping to peace enforcement?

3. *Does the SBA result in a greater or lesser scope of protection?*

Be that as it may, another more serious drawback is the lack of extra protection the SBA gives in comparison to the expansion of the scope of IHL it results in, which renders civilians and military personnel alike more vulnerable than they need to be. As van Steenberghe and Lesaffre point out, the main purpose behind a 'theory' of the ICRC is to render better protection to civilians. While they seem to think this objective is achieved through the SBA, I am less than convinced. Firstly, I see no logical reason why a lower threshold for the applicability of IHL would enhance protection of civilians in situations where an intervening force was engaging in forms of support to the State in a NIAC which went beyond mere financial and general support for the State, but fell short of deliberate sustained direct kinetic involvement in hostilities which would, in any case, trigger the applicability of IHL. Why would civilians benefit from enhanced protection if IHL applied to the direct supply of logistical support to forces directly engaged in hostilities or intelligence related to the targeting of specific persons or objects? These acts would

<sup>12</sup> For treatment of the direct conduct of attacks as part of the SBA, see van Steenberghe, Lesaffre (n 1) 4 and Ferraro 'ICRC Position' (n 1) 1231. For the purported application to situations involving effective or overall control, see Ferraro *ibid* 1234-38.



most likely qualify as direct participation in hostilities (DPH) and would render the persons engaged in them subject to attack for the duration of their participation, but this hardly enhances protection of civilians either. To the extent one includes direct kinetic attacks in the context of the SBA, there is no more protection of civilians resulting from that inclusion than there otherwise would be if they were deemed as DPH. The argument that the protection would be enhanced as a result of the extension of the whole law of NIAC to the intervening force as a consequence of a single kinetic attack (it would become applicable in any case if there was more than sporadic direct attacks) is not convincing.<sup>13</sup> What added value would this bring in terms of protection of civilians? I fail to see how this would be achieved, nor do I think making a State a party to a conflict necessarily adds anything in terms of attributability in the context of international responsibility if its forces otherwise engaged in acts which violated international (humanitarian) law.<sup>14</sup>

What is clear is that by deeming the types of support directly addressed in the SBA which fall short of the traditional criteria for becoming party as the threshold for making the intervening force a party to the conflict, the intervening force would become targetable as such at any time. This would hardly contribute to any enhanced protection of civilians, but would certainly expand the scope of hostilities and make persons subject to attack who otherwise would not be. Before one says this is a desirable, or in any case a just consequence of providing support to one side in a conflict, a preliminary question should be answered which neither the proponents of the SBA, nor the commentators in this position paper address. Why should there be a lower threshold for making one a party to an ongoing conflict than those that constitute a NIAC in the first place? Put differently, why should the criteria for shooting to kill without direct danger to oneself be lower in relation to someone who refuels an

<sup>13</sup> This is a position taken by van Steenberghe, Lesaffre (n 1) at 5.

<sup>14</sup> Van Steenberghe and Lesaffre (n 1) 5, where they mistakenly conclude in their fn 14 that without the SBA the State whose forces engaged in DPH would not be bound by IHL relating to hostilities. This conclusion is mistaken; any time a State engages in an act constituting DPH, IHL relating to targeting becomes applicable to it and the entity the DPH is directed against. Any other conclusion would result in the effect that if a war crime were committed by a individual engaging in DPH, he would not be criminally liable since his State was not a party to an armed conflict. This is clearly not correct. This would be the case any time the persons concerned were agents of the State and acting in an official capacity.



aircraft or provides intelligence than for someone who is directly engaged in a conflict to start with? If the object is to provide a 'level playing field' this is achieved by using the traditional criteria for being or becoming a party to an armed conflict for everyone. The criterion of intensity for the existence of a NIAC is not restricted to kinetic attack. A pattern of sustained deliberate acts constituting DPH which have a significant impact on the military capabilities of the parties to the conflict, but which do not necessarily include pulling a trigger, will, by any reasonable standard, render the entity performing them a party to the conflict, assuming the requirement of organization is also met. The factual indicators named in various decisions of the ICTY to assist in determining when the intensity criterion is met are illustrative and not limitative and do not categorically exclude forms of direct participation in hostilities which do not necessarily constitute directly performing an attack.<sup>15</sup> Consequently, there is no logical reason for there to be a different – lower – standard for the types of support named in the SBA to render one a party, than for the existence of an armed conflict in the first place. Van Steenberghe and Lesaffre name an additional possible motive for the lower standard, namely that it might deter States from providing forces for such forms of intervention in a NIAC.<sup>16</sup> Leaving aside the fact that if a foreign power or international organization is intervening at the invitation or with the consent of the lawful government, there is no 'intervention' in the legal sense, this hardly seems to be an objective which would fall within the scope of IHL. IHL is the legal regime which applies on how the parties to an armed conflict must conduct hostilities and treat persons affected by the conflict and is not an instrument to deter intervention. To the extent the ICRC would pursue such an objective, it would be *ultra vires* and fall outside its mandate to promote respect for IHL. Finally, as Tristan Ferraro infers, the SBA potentially widens the geographical scope of applicability of IHL to include the territory of States participating in a multinational operation under the guise of 'equality of belligerents'.<sup>17</sup> Leaving aside the fact that the geography of armed conflict is a complex issue

<sup>15</sup> ICTY, *Prosecutor v Dusko Tadić*, Judgment no IT-94-1-T (7 May 1997) para 561-568. See also ICTY, *Prosecutor v Fatmir Limaj*, Judgment no IT-03-66-T (30 November 2005) para 135 ff and ICTY, *Prosecutor v Ljube Bošković and Johan Tarčulovski*, Judgment no IT-04-82-T (10 July 2008) paras 177-194.

<sup>16</sup> Van Steenberghe, Lesaffre (n 1) 6.

<sup>17</sup> Ferraro, 'Application and Applicability' (n 1) 608-12.



which involves many more considerations than where IHL may apply, the notion of ‘equality of belligerents’ has nothing to do with the applicability of IHL *ratione loci* any more than it does to whom IHL applies as van Steenberghe and Lesaffre correctly point out.<sup>18</sup> Equality of belligerents is about application of IHL to the parties to an armed conflict without regard to the justifications or motivations they raise for their participation; it is not related to the applicability of IHL *ratione personae* or *loci*.<sup>19</sup>

#### 4. *Does the SBA have any legal basis?*

Finally, as van Steenberghe and Lesaffre also correctly point out (without seemingly to attach any meaningful consequences to this conclusion), the SBA completely lacks any basis in law.<sup>20</sup> It is neither based on any treaty provision, not even read expansively, nor is it reflected in the practice of States or international organizations. On the contrary, it is implicitly rejected in the doctrine of international organizations conducting the types of operations it was originally intended to address and, as we have seen, ends up addressing.<sup>21</sup> Likewise, there is no State at present, at least as far as I am aware of, which endorses the ICRC SBA. This might have other reasons, but the fact remains that the SBA is no more than a policy position at present. In my view, it should be rejected or in any case drastically overhauled before anyone considers giving it legal status.

#### 5. *Conclusion: Untenable and unsuitable*

The SBA is for the reasons given above, including its lack of added value or relevance for most situations it purports to address along with its selective and narrow focus and its probable negative impact on enhancing protection, both for civilians and for other personnel in

<sup>18</sup> Van Steenberghe, Lesaffre (n 1) 16.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.* 15-16.

<sup>21</sup> See *Leuven Manual on the International Law Applicable to Peace Operations*, (CUP 2017) 96-7.



multidimensional peace operations, a theory which is unnecessary and inappropriate and which ends up doing more potential harm than good if taken to its logical conclusion. Moreover, it has no basis whatsoever in the law and shouldn't have in its present form at least. While it is indeed important to promote application of IHL where the objective criteria for its application are met, regardless of the type of mission being undertaken or the status or motivations of the participating States or international organizations conducting it, there are better ways to promote and induce compliance than this theory. And while a level playing field is indeed a principle of IHL, it has nothing to do with lowering the threshold for application of IHL beyond what is already established or potentially extending its application across the globe when there is no rational reason to do so. IHL is an exceptional law for an exceptional situation and should be handled with care. This theory needlessly sets out to lower the threshold for its application without any basis in law or good policy justification. It is therefore in my view neither tenable as a matter of law, nor suitable in its present form as a progressive development of the law or even as a policy position.