

## ZOOM IN

### *The Question:*

#### **The qualification of armed conflicts and the ‘Support-Based Approach’: Time for an appraisal**

*Introduced by Giulio Bartolini and Marco Pertile*

Foreign intervention in armed conflicts continues to generate legal challenges, as emphasized by the recurring debates on the lawfulness and the limits, under *ius ad bellum* parameters, of interventions supporting local governments involved in non-international armed conflicts.<sup>1</sup> Still, also from a *ius in bello* perspective, these scenarios raise significant questions, especially in relation to the qualification of armed conflicts. In particular, the recently published new Commentaries to the Geneva Conventions have fueled a lively debate by supporting the theory – tested against the hostilities in Syria<sup>2</sup> – according to which armed activities by a State against an organized armed group in the territory of another State, in case of unconsented operations, would generate not only a non-international armed conflict with the organized armed group, but also a parallel international armed conflict with the territorial State.<sup>3</sup> Another contentious aspect of the Commentaries regards their preference for the

<sup>1</sup> See, for instance, the Zoom-in devoted to this issue with contributions by O Corten, ‘L’intervention de la Russie en Syrie: que reste-t-il du principe de non-intervention dans les guerres civiles?’ (2018) 53 QIL-Questions Intl L 1 and P Pustorino, ‘The principle of non-intervention in recent non-international armed conflicts’ (2018) 53 QIL-Questions Intl L 17.

<sup>2</sup> For different views see, for instance: T Gill, ‘Classifying the Conflict in Syria’ (2016) 92 Intl L Studies 353; V Koutroulis, ‘The Fight Against the Islamic State and Jus in Bello’ 29 (2016) Leiden J Intl L 827; K Watkin, ‘The ICRC Updated Commentaries: Reconciling Form and Substance, Part II’ Just Security (30 August 2016); A Hacque, ‘The United States is at War with Syria (according to the ICRC’s New Geneva Convention Commentary)’ EJILTalk! (8 April 2016); G Bartolini, ‘Gli attacchi aerei in Siria, l’operazione *Inherent Resolve* e la complessa applicazione del diritto internazionale umanitario’ (2017) 11 Diritti umani e diritto internazionale 387.

<sup>3</sup> T Ferraro, L Cameron, ‘Article 2, in ICRC, *Commentary on the First Geneva Convention* (ICRC 2016) paras 261-263.



‘overall control’ test, rather than the ‘effective control’ one,<sup>4</sup> in order to determine whether organized armed groups can be equated to *de facto* organs of the State for the purposes of the qualification of armed conflicts.

Conversely, a recent development which has been somehow overlooked by scholars and practitioners<sup>5</sup> is the adoption by the ICRC, mainly through papers<sup>6</sup> pre-dating the new Commentaries (where this topic has been addressed in a cursory manner<sup>7</sup>), of a so-called ‘Support-Based Approach’ to identify under which criteria activities carried out by States or International Organizations in favor of one State involved in a non-international armed conflict imply the qualification of the intervening actors as parties to the same armed conflict. Even if consensus has finally emerged among scholars and in practice on the application of rules pertaining to non-international armed conflicts in such scenarios, some issues raised by this emerging theory still deserve analysis.

In our opinion, this theory has certainly some merits, especially as it clarifies, through creative interpretation, situations hardly fitting the wording of the Geneva Conventions’ provisions on the qualification of armed conflicts. It certainly tackles qualification issues of paramount relevance in contemporary armed conflicts – as shown, just to mention recent examples, by the significantly different typologies of support provided to Iraq by the States involved in operation *Inherent Resolve* against ISIS – ranging from combat roles to more limited functions of logistic support, intelligence activities and protection of critical infrastructures, or the robust combat role assumed by the Intervention Brigade in the UN mission in the Democratic Republic of Congo.<sup>8</sup>

<sup>4</sup> *ibid* paras 265-273.

<sup>5</sup> See however ‘Remarks by Marten Zwanenburg’ (2014) 108 Proceedings of the American Society of Intl L 151.

<sup>6</sup> 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 of Red Cross 1227. Only the first paper contained the disclaimer that the article was written by the author in a personal capacity.

<sup>7</sup> See L Cameron, B Demeyere, J-M Henckaerts, E La Haye, I Müller, ‘Article 3’ in ICRC, *Commentary on the First Geneva Convention* (ICRC 2016) paras 412, 445-446.

<sup>8</sup> On this scenario see: D Lilly, ‘The United Nations as a Party to Armed Conflict: The Intervention Brigade of MONUSCO in the Democratic Republic of Congo’ (2016) 20 J of International Peacekeeping 313; Y Arai-Takahashi, ‘The intervention brigade



The 'Support-Based Approach' has also, however, implications that have not yet been properly tested by legal analysis. It might imply, for instance, a loss of relevance of the traditional intensity criterion employed to identify non-international armed conflicts, being its individual assessment irrelevant for conducts of States and International Organisations fulfilling the requirements of the new approach. In other words, the 'Support-Based Approach' covers also activities that would not, if considered alone, reach the required threshold of intensity for the existence of a non-international armed conflict. Significant consequences are obviously linked with this outcome. Firstly, members of national armed forces or contingents placed at the disposal of International Organisations would become lawful targets of attacks under international humanitarian law. Secondly, the application of international instruments criminalizing attacks against individuals involved in 'humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations', as provided by the ICC Statute, could be challenged. On a point of method, it is noteworthy that the typologies of activities fulfilling the 'Support-Based Approach' criteria, and thus marking this significant shift in the legal status of members of the armed forces and contingents of supporting the territorial State in a non-international armed conflict, are mainly based on deductive reasoning, lacking significant practice by relevant stakeholders. This theory is thus likely to reproduce the dilemmas already faced by the scholarly debate on the qualification of civilians' participation in hostilities as 'direct' or 'indirect', merely transferring similar questions and doubtful solutions from the individual level to the one of collective entities. Finally, we believe that this emerging standard should probably be tested also with regard to cases involving other entities' support to the parties of ongoing non-international armed conflicts. In this respect, the complexities of current conflicts emphasize, for instance, how some 'external' armed groups may provide to other armed groups or even to State armed forces involved in non-international armed conflicts forms of assistance capable of fulfilling the requirements of the 'Support-Based Approach'.

within the MONUSCO. The legal challenges of applicability and application of IHL' (2015) 13 QIL-Questions Intl L 5; B Sonczyk, 'The protection of the Intervention Brigade under Article 8 (2)(e)(iii) of the Rome Statute of the International Criminal Court' (2015) 13 Questions Intl L 25.



Against this background, the two main contributions of this Zoom-in are timely, and to some extent, also provocative. They foster a debate on a theory that is going to play a significant role in the qualification of the parties involved in armed conflicts. Raphaël van Steenberghe and Pauline Lesaffre focus their attention on the added value of the ‘Support-Based Approach’ in terms of protection for civilians in the theatre of operations and its dissuasive effects with respect to the involvement of third actors in such conflicts. They further investigate the potential different nature of the supported and supporting actors involved in hostilities, as to evaluate the applicability of this test to more complex scenarios such as support provided by an external organized armed group toward other organized armed groups or even in favor of a state involved in an ongoing non-international armed conflicts, the conditions under which this criteria might be fulfilled, the applicable law in such contexts, also introducing an alternative framework to regulate such scenarios. Bianca Maganza tests this theory against a significant case-study, namely the role played by the Joint Force of the G5-Sahel, a coalition of multinational forces created within a regional cooperation body instituted in 2014 by five members of the Sahel region (Burkina Faso, Chad, Mali, Mauritania and Niger) and operating in Mali. This complex case study, partly different from the classical UN context commonly used to address the hypotheses relevant for the ‘Support-Based Approach’, allows her to address whether, in this hybrid context, the Joint Force of the G5-Sahel can be qualified as a party to the ongoing non-international armed conflict in Mali in the light of the functional relationships of support it has established with the United Nations Stabilisation Mission.

Given the importance and the complexity of the issues at stake, a third piece will be added to this Zoom-in to stimulate further debate. We have asked an experienced and respected scholar, Terry D. Gill, to comment upon these two contributions and to take position on the ‘Support-Based Approach’.

