

Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors

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In Syria, the United States is “training and equipping” non-state groups to battle ISIS. In Eastern Ukraine, Russia has provided weapons, training, and support to separatists. In China, “private” computer hackers operating with state support create codes designed to infiltrate sensitive computer systems. These are just a few examples of the many ways in which states work with non-state actors to accomplish their military and political objectives. While state/non-state collaboration can be benign, it can be malignant where a state uses a non-state actor as a proxy to violate international law. This is no mere academic hypothetical: consider the Former Republic of Yugoslavia’s support of the Free Serbian Army, which committed the genocide at Srebrenica.

Recognizing this problem, international courts have developed a doctrine of state responsibility designed to hold states accountable for internationally wrongful acts of their non-state-actor partners. Unfortunately, existing doctrine leaves an accountability gap and fails to correct the perverse incentive to use non-state actors as proxies for illegal acts. Moreover, it creates a second perverse incentive: states with good intentions might avoid training non-state actors in international law compliance to avoid crossing the “bright line” for attribution.

This Article proposes a fix to these problems, building on an interpretation of the Geneva Conventions released by the International Committee of the Red Cross (ICRC) in March 2016. It argues that the duty “to ensure respect” in Common Article 1 can fill the legal gap. In addition, it argues that Common Article 1 will be more widely embraced, and therefore more effective, if states that have exercised due diligence to prevent violations are allowed an affirmative defense against liability for any ultra vires violations. The Article concludes with recommendations for states that wish to fulfill their Common Article 1 obligations in good faith while working with non-state actors.

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Introduction

States frequently work with and through non-state actors, sometimes in cases where direct state action would have been politically or legally suspect. During the past few years, for example, the United States has financed,

armed, and trained opposition forces in Syria.¹ Russia has assisted and supplied separatist forces in eastern Ukraine.² Iran continues to arm and fund Hezbollah in Lebanon.³ Across the globe, states fund, arm, train, and assist non-state actors engaged in armed conflict.⁴ Moreover, in many of these cases, non-state actors take actions that would violate international law if undertaken directly by a state or its organs.⁵

1. Michael D. Shear, Helene Cooper & Eric Schmitt, *Obama Administration Ends Effort to Train Syrians to Combat ISIS*, N.Y. TIMES (Oct. 9, 2015), <http://www.nytimes.com/2015/10/10/world/middleeast/pentagon-program-islamic-state-syria.html> [<https://perma.cc/NHP4-22CM>].

2. David M. Herszenhorn & Peter Baker, *Russia Steps Up Help for Rebels in Ukraine War*, N.Y. TIMES (July 25, 2014), <http://www.nytimes.com/2014/07/26/world/europe/russian-artillery-fires-into-ukraine-kiev-says.html> [<https://perma.cc/EE9M-YAD2>].

3. Anthony H. Cordesman, *Iran's Support of the Hezbollah in Lebanon*, CTR. FOR STRATEGIC & INT'L STUD. 2–3 (July 15, 2006), http://csis.org/files/media/isis/pubs/060715_hezbollah.pdf [<https://perma.cc/P5DT-B5GE>].

4. The question of state responsibility for non-state-actor conduct certainly exceeds the context of armed conflict. Our inquiry here, however, focuses primarily on attempting to resolve the accountability gap in the armed-conflict context. We focus our attention here for at least three reasons: first, while it is ambiguous what aspects of international law apply to non-state actors generally, in the armed-conflict context it is clear that non-state groups, at a minimum, have obligations under Common Article 3 of the Geneva Conventions; second, the control tests for attribution of state responsibility themselves have been developed through assessment of non-state actors' roles in armed conflict; third, our proposed solution to the accountability gap relies on international obligations that apply in the context of armed conflict. We do not claim that the solution we offer here would suffice to close the accountability gap for all state engagement with non-state actors, but nevertheless hope that it may gesture toward future avenues of research for closing the gap entirely.

5. There is substantial literature dealing with the issue of what law binds non-state actors in the context of armed conflict. While norms in this area are continuing to develop, for the purposes of this Article we accept the consensus view that Common Article 3 of the Geneva Conventions applies to organized non-state groups that are party to an armed conflict. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 3518–20. Additionally, while not weighing in here on the complex debates about the scope of international law obligations that regulate non-state actors, we nevertheless argue that, at a minimum, it is quite clear that international law obligates state conduct in the context of armed conflict more extensively than it does the conduct of non-state actors. See Andrew Clapham, *Human Rights Obligations for Non-State-Actors: Where Are We Now?*, in *DOING PEACE THE RIGHTS WAY: ESSAYS IN INTERNATIONAL LAW AND RELATIONS IN HONOUR OF LOUISE ARBOUR* (Fannie Lafontaine & François Larocque eds., forthcoming 2017) (manuscript at 4–5) (suggesting non-state actors already have international obligations, just not as many as states); Hans-Joachim Heintze & Charlotte Lülff, *Non-State Actors Under International Humanitarian Law*, in *NON-STATE ACTORS IN INTERNATIONAL LAW* 97, 97–111 (Math Noortmann, August Reinisch & Cedric Ryngaert eds., 2015) (discussing the status of humanitarian non-state actors in the context of international humanitarian law); Christian Henderson, *Non-State Actors and the Use of Force*, in *NON-STATE ACTORS IN INTERNATIONAL LAW* 77, 77–96 (Math Noortmann, August Reinisch & Cedric Ryngaert eds., 2015) (arguing that international law governing the use of force by states *against* non-state actors is significantly more developed than the law governing the use of force *by* non-state actors); Tim Rutherford, *Everyone's Accountable: How Non-State Armed Groups Interact with International Humanitarian Law*, 198 AUSTL. DEF. FORCE J. 76, 76 (2015) (“[I]f the notion that international law is derived from the consent of those it governs remains true, there is a disconnect in whether international law can bind the non-state actor.”).

This raises a pressing issue: When is a state responsible for the actions of a non-state actor? This question leads, in turn, to a host of additional questions: What degree of control does a state need to exercise over a non-state actor to be held liable for that actor's conduct? What actions should states take to ensure their non-state partners comply with their international law obligations? When states train and advise groups not to commit violations of international law, should they be held responsible when those actors do commit violations?

This problem is not new. The use of non-state actors as proxies was a prominent feature of the Cold War, perhaps most famously in the Bay of Pigs Invasion in 1961⁶ and the proxy war in Afghanistan throughout the 1980s.⁷ But the problem has risen to new prominence in recent years. Faced by stringent legal limits on their own direct action, states have exploited what has become a large and growing loophole in the international legal framework: States that work through non-state actors operate in a zone of legal uncertainty. As long as the doctrine of state responsibility for the actions of non-state actors remains unclear, states can exploit that uncertainty to make an end-run around their own legal obligations. This allows states to appear to abide by the law, while achieving all their illegal aims indirectly through non-state actors that would be unable to act without their support. The potential damage to the international legal framework is enormous.

In this Article, we argue that existing state-responsibility doctrine is insufficient to meet the current challenges. The International Law Commission's Draft Articles on state responsibility and the jurisprudence of the international courts have continued to rely on a variety of "control tests" to determine the scope of state responsibility for non-state-actor conduct. The current law of state responsibility focuses on whether the actions of a non-state actor can be "attributed" to a state. Under the framework for attribution, states must be shown to exercise a sufficient degree of control over the act or the actor in order to be held liable for non-state actors' commission of internationally wrongful acts. Yet, despite states' pervasive engagement with non-state actors, courts have rarely found states liable under these control tests. The resulting framework has led to a critical accountability gap in state-responsibility doctrine: States too often

6. See, e.g., Chris Loveman, *Assessing the Phenomenon of Proxy Intervention*, 2 CONFLICT SECURITY & DEV. 29, 30–31 (2002) (discussing Bay of Pigs as a proxy intervention using a group of exiles). See generally POLITICS OF ILLUSION: THE BAY OF PIGS INVASION REEXAMINED (James G. Blight & Peter Kornbluh eds., 1998) (documenting an oral history of the invasion, including testimony from former CIA officials).

7. See generally, STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 (2004) (discussing U.S., Iranian, and Soviet use of proxies in Afghanistan from the late 1970s to the early 1990s).

effectively escape responsibility for violations of the laws of armed conflict if they act through non-state partners. It has also created dangerous incentives for states. They not only have little reason to police the actions of non-state actors that fall below the threshold for attribution, they may even be actively discouraged from taking actions to mitigate the danger of international humanitarian law (IHL) violations by non-state actors: They may worry that taking measures to prevent violations could cause them to exercise control that might subject them to liability even for *ultra vires* acts.

In March 2016, the International Committee of the Red Cross issued new commentaries on the Geneva Convention—the first in more than six decades.⁸ Contained within them is a possible answer to the problem created by modern state-responsibility doctrine: Common Article 1 of the Geneva Conventions obligates states to “undertake to respect and to ensure respect” for the Conventions in all circumstances.⁹ The ICRC Commentaries¹⁰ conclude that Common Article 1 imposes not only negative obligations on states not to encourage violations of the law of armed conflict, but also *positive* third-party obligations on a state that closely coordinates its activities with non-state actors.¹¹

8. The ICRC released a new set of commentaries in March 2016. This was the most extensive ICRC Commentary since the Pictet Commentaries, which were released in English in four volumes between 1952 and 1960. *See, e.g.*, INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., A.P. de Heney trans., 1960).

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol].

10. INT’L COMMITTEE OF THE RED CROSS, COMMENTARY OF 2016, art. 1, ¶ 154 (2d ed. Mar. 22, 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [<https://perma.cc/DS59-WWLZ>] [hereinafter ICRC] (“This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end.”).

11. It is also important to note that Common Article 1 places affirmative responsibilities on states in both a non-international armed conflict (a conflict between a state and one or more non-state actors), and an international armed conflict (where two or more states are parties). *Id.* at art. 1, ¶ 125 (“The High Contracting Parties undertake to respect and to ensure respect for ‘the present Convention’ in all circumstances. . . . Thus, the High Contracting Parties must also ensure respect for the rules applicable in non-international armed conflict, including by non-State armed

The precise scope of Common Article 1 obligations—in particular, whether Common Article 1 places any affirmative responsibility on states to ensure respect by actors it does not work with directly—has yet to be clarified by the ICRC. Nonetheless, this little-noticed provision carries immense possibility: It could close much of the gap in state responsibility for non-state actors in armed-conflict situations. Some states might worry that Common Article 1 places them in a no-win situation: If they do not take steps to meet positive Common Article 1 obligations, they are in violation of their Geneva Convention obligations. But if they do take actions necessary to meet positive Common Article 1 obligations, they may end up exercising sufficient “control” to trigger state responsibility—even for ultra vires actions. Indeed, it is precisely this danger that may be leading some states to resist the broader interpretation of Common Article 1 advocated by the ICRC. To address this concern, we propose an affirmative defense for actions taken by states in furtherance of their Common Article 1 duties. Doing so would be consistent with the intent of the applicable legal framework and would create the right incentives for state and non-state actor compliance with the laws of armed conflict. States would be obligated to ensure their non-state partners abide by their IHL obligations, without worrying that actions taken to assure such compliance would increase the state’s risk of liability for the non-state groups’ ultra vires actions.

The remainder of this Article is organized into five sections. Part I offers an overview of the current framework for attribution and the problems associated with the high evidentiary burdens that exist under its control tests for state responsibility. This Part aims not only to provide background for the argument that follows, but also to bring clarity to an important body of law that is frequently misunderstood. Part II provides an analysis of the perverse incentives that the modern attribution framework creates for state actors that wish to collaborate with non-state actors in the context of armed conflict. Part III examines state obligations under Common Article 1 of the Geneva Conventions and shows how the ICRC’s new proposed positive “due diligence” standard could ameliorate the gap in state-responsibility doctrine. Part IV proposes a new affirmative defense for actions taken in furtherance of compliance with Common Article 1 duties. Finally, Part V offers a set of *ex ante* and *ex post* recommendations to states seeking to fulfill their obligations to ensure non-state partners comply with international law in the context of armed conflict.

groups . . .”). While not all of the Articles of the Geneva Convention apply in an armed conflict, the “duty to ensure respect” that this Article discusses does.

I. The Current Legal Framework

The International Law Commission (ILC), International Court of Justice (ICJ), and International Criminal Tribunal for the Former Yugoslavia (ICTY) have all considered the problem of state responsibility for the actions of non-state actors in the context of armed conflict. Though these efforts have addressed elements of the accountability gap for the actions of non-state actors, they have thus far failed to resolve the problem.

There are several reasons for this failure. The first, and most obvious, is that each has taken a different—and sometimes even contradictory—approach to the dilemma of state responsibility. This has led to widespread confusion among those seeking to make sense of the legal obligations on states. Even putting the confusion and contradiction to one side, each of the approaches to the doctrine of state responsibility shares an additional, more troubling shortcoming: Each treats state responsibility as a bright-line test—a state is responsible, or it is not. There is nothing in between. This is because the doctrine of state responsibility has been centered around the question of attribution: Is the conduct of this non-state actor attributable to a state? In other words, should the conduct of the non-state actor be treated as if the state itself were the actor?

As we shall show in the sections that follow, this approach to state responsibility is at once too lenient and too strict. On the one hand, until a state passes the bright line and triggers state responsibility, it will not be held accountable for the actions of non-state actors. This is true even if the state has enabled a non-state actor to engage in behavior that violates international law and even if the state provided the enabling support with the intention that the non-state actor take actions that the state is itself legally prohibited from taking (for instance, an illegal use of force or extrajudicial killing). On the other hand, the bright-line approach to state responsibility also means that once states cross over the line for triggering state responsibility, they may be held responsible for the actions of non-state actors, even if they specifically directed those actors *not* to engage in the actions in question. Indeed, it is likely that this over- and under-inclusiveness has bred much of the disagreement in the doctrine of state responsibility. Faced with the bright line, international judicial bodies are forced to pick a poison—holding a state accountable for nothing or for everything, when the truth likely lies in between. The two bodies that have addressed this issue have found different poisons more palatable.

In the sections that follow, we seek, first, to outline the current approach to state responsibility by the international organizations that have addressed it most prominently. We begin with the ILC's Draft Articles on State Responsibility, which is the most widely embraced description of state responsibility, and yet the most ambiguous. We then turn to the case law of two international judicial bodies, each of which has adopted a different test

for state responsibility. The ICJ has embraced the “effective control” test, which draws a very high bar for triggering state responsibility. By contrast, the Appeals Chamber of the ICTY has embraced the “overall control test,” which relies on different elements of control to establish state responsibility. We show that it may be possible to reconcile these apparently contradictory approaches by viewing them as providing two different tests based on whether the state is being held responsible for a non-state actor or for just a single operation by the non-state actor. Yet even accepting this (admittedly minority) approach to making the best sense of existing doctrine, the problem remains that the bright-line approach is ill-suited to the project of encouraging states to act in ways that ensure the non-state actors that they support abide by international law.

A. *The ILC’s Draft Articles on State Responsibility*

The ILC’s 2001 Draft Articles on State Responsibility are currently the most authoritative statement on state responsibility in international law.¹² Through the Draft Articles, the ILC sought to clarify and codify the different standards international courts have elaborated for attributing non-state actors’ conduct to states.¹³ In 2007, in *Bosnian Genocide*, the ICJ also declared that both Articles 4 and 8 of the Draft Articles reflect customary international law.¹⁴

Articles 4 and 8 of the Draft Articles are the most significant articles for assessing state responsibility for non-state-actor conduct during armed conflict. Under the Draft Articles, a non-state actor’s act is attributable to a state if the state has sufficient connections with the actor (Article 4) or with the operation during which the act takes place (Article 8). Article 4 concerns responsibility for the conduct of non-state actors that can be considered *de jure* or *de facto* state organs. Article 8 concerns responsibility for violations committed by non-state actors during an operation that is imputed to a state.

Article 4 of the Draft Articles provides:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds

12. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, [2001] 2 Y.B. Int’l L. Comm’n 26–30, U.N. Doc. A/56/10 [hereinafter *Draft Articles*]. The *Draft Articles* “are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.” JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 43 (2013).

13. See CRAWFORD, *supra* note 12, at 43–44 (contending that the Draft Articles “are an active and useful part of the process of international law” that codify customary state responsibility).

14. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 385, 398 (Feb. 26) [hereinafter *Bosnian Genocide*].

in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.¹⁵

In its commentary to Article 4, the ILC clarifies that “a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.”¹⁶ Therefore, absent evidence that the non-state actor is a *de jure* organ of the state, the question under Article 4 boils down to whether the non-state actor is a *de facto* organ of the state. The Article thus precludes states from avoiding responsibility for a non-state actor that functions as a state organ by simply failing to acknowledge it as such. For instance, a state could not create, fund, and direct a militia, and then use it to evade legal limits on the state’s own actions—for instance, killing civilians in violation of the Geneva Convention’s principle of distinction. Under Article 4, the actions of the militia would be attributed to the state.

Article 8 of the Draft Articles provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.¹⁷

The ILC’s commentary to Article 8 notes that “the three terms ‘instructions’, ‘direction’ and ‘control’ are disjunctive; it is sufficient to establish any one of them.”¹⁸ Therefore, absent express instructions or direction from the state to the non-state actor to commit the act, the question boils down to whether the state exercised a sufficient degree of “control” over the act. The focus of the inquiries under Article 4 and Article 8 is therefore different. Under Article 4, the question is the level of control the state exercises over the *actor* that undertakes the act, whereas under Article 8, it is the level of control the state exercises over the *operation* during which the act occurs.

While some commentators have suggested that “the ILC sought to allow for greater state responsibility under the Articles as adopted,”¹⁹ most

15. *Draft Articles*, *supra* note 12, at art. 4.

16. *Id.* at art. 4 cmt. 11.

17. *Id.* at art. 8.

18. *Id.* at art. 8 cmt. 7.

19. See Dayna L. Kaufman, *Don’t Do What I Say, Do What I Mean!: Assessing a State’s Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State*, 70 *FORDHAM L. REV.* 2603, 2653 (2002) (“[C]hanges in the Articles on State Responsibility from their original draft form to their form as adopted suggest that perhaps the ILC sought to allow for greater state responsibility under the Articles as adopted. Additionally, there is greater interest

recognize the Draft Articles as codifying and clarifying the applicability of pre-existing judicial tests for state responsibility.²⁰ The most prominent judicial tests for state responsibility are the “effective control” test of the ICJ and the “overall control” test of the ICTY. It is therefore to those that we turn next.

B. The ICJ’s Effective Control Test

The ICJ was the first to confront the problem of state responsibility for non-state actors. It responded by creating a new legal standard for finding state responsibility: If an applicant could prove that a state had sufficiently close ties to, and had furnished sufficient support for, a non-state actor, courts would attribute the non-state actor’s actions to the state—essentially “piercing the veil” of the proxy relationship.

In 1984, in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua)*,²¹ Nicaragua instituted proceedings against the United States for its use of the Contras—a non-state armed group operating in and around Nicaragua—to fight the socialist Sandinista government. Nicaragua alleged, and the ICJ found, that the United States was directly responsible for the internationally wrongful act of mining Nicaraguan ports.²² However, Nicaragua also alleged indirect U.S. involvement—via training, financing, and direction provided to paramilitaries—in other internationally wrongful acts carried out by the Contras.²³

The ICJ found that the United States had supported the Contras in the following ways:

The United States financed, organized, trained, supplied, equipped, and armed the Contras, and provided them with reconnaissance aircraft, intelligence, and surveillance.²⁴

The United States decided and planned—or at least closely collaborated in deciding and planning—a number of military and paramilitary operations

internationally in holding States responsible for their conduct with respect to private individuals, as evinced by recent General Assembly resolutions regarding terrorism.” (citations omitted)).

20. See CRAWFORD, *supra* note 12, at 43–44. The ILC adopted the most recent version of the *Draft Articles* in August 2001—after the ICJ’s 1986 Judgment in *Nicaragua* and the ICTY’s *Tadić* Appeals Chamber decision, but before the ICJ’s repudiation of the ICTY’s overall control test in *Bosnian Genocide*. See *Draft Articles*, *supra* note 12, at 25; *cf. Bosnian Genocide*, Judgment, 2007 I.C.J. 43 (Feb. 26); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*]; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 327 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadić*].

21. *Nicaragua*, 1986 I.C.J. 14.

22. *Id.* ¶ 292(4).

23. *Id.* ¶¶ 100–08, 112, 115, 118–19, 122.

24. *Id.* ¶¶ 100–01, 108, 115.

by the Contras,²⁵ and devised and directed specific strategies and tactics on when to seize and hold territory.²⁶ In addition, the United States selected some of the Contras' military and paramilitary targets and provided operational support.²⁷

The United States prepared and distributed a manual suggesting that the Contras shoot civilians attempting to leave a town, neutralize local judges and officials, hire professional criminals to carry out "jobs," and provoke violence at mass demonstrations to create "martyrs."²⁸ In other words, the United States "encouraged" the commission of unlawful acts.²⁹

But in deciding what legal consequences should follow from these actions, the Court faced more than simply a legal challenge. After it found that it had jurisdiction, the United States not only withdrew from the case, but it also withdrew its optional declaration accepting the compulsory jurisdiction of the Court.³⁰ As a result, the Court was under significant pressure to deliver a judgment that, on the one hand, asserted its jurisdiction despite the withdrawal of the United States, and, on the other, was limited enough in scope that it would not undermine the legitimacy of the Court in the event the United States decided to flout the final ruling.

Likely as a result of this politically sensitive situation, the Court drew a bright line that established a high bar for state responsibility. It concluded that in order for a state to be held responsible for the actions of a non-state actor, "[I]t would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed."³¹ Under this "effective control" standard, a later case clarified, private conduct that is merely supported, financed, planned, or otherwise carried out on behalf of the state is not attributable unless the state also exercises a high level of control "in respect of *each operation* in which the alleged violations occurred."³²

25. *Id.* ¶ 106.

26. *Id.* ¶ 104. It is not clear whether the alleged violations of human rights and humanitarian law occurred in the course of these operations.

27. *Id.* ¶¶ 112, 115.

28. *Id.* ¶¶ 118–19, 122.

29. *Id.* ¶ 292(9).

30. Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, 24 I.L.M. 246; United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, Oct. 7, 1985, 24 I.L.M. 1742; *see also Text of the U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES (Jan. 19, 1985), <http://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html> [https://perma.cc/5FR2-KKKJ].

31. *Nicaragua*, 1986 I.C.J. ¶ 115 (emphasis added).

32. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26) (emphasis added).

Applying this standard, the ICJ found that the combination of funding, training, public support, strategic guidance, and tactical directives cited above was insufficient for a finding of state responsibility.³³ The opinion implied that this was because Nicaragua had failed to prove a direct link between these forms of support and the execution of any particular operation, i.e., the United States had not specifically *instructed* the commission of unlawful acts.³⁴ The ICJ took pains to note that proof of control over a *specific operation* was required for a finding of attribution.³⁵

Practically, this meant that unless the plaintiff could provide evidence directly connecting a state's funding, training, and tactical or strategic guidance to the execution of a discrete internationally wrongful act, there could be no finding of attribution. In other words, the test set a high evidentiary bar, particularly in the context of a contentious case, where evidence indicative of the kind of control required over a specific operation would generally be classified and in exclusive control of the state.³⁶

In its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnian Genocide)*, the ICJ confirmed the effective control test and again applied it in a way that indicated that it established a high evidentiary burden to find attribution.³⁷ The case raised the question of whether the acts of military and paramilitary groups operating on the territory of the Socialist Federal Republic of Yugoslavia (SFRY)³⁸ could be attributed to the government in the period

33. *Nicaragua*, 1986 I.C.J. ¶¶ 103–07, 115.

34. See *Nicaragua*, 1986 I.C.J. ¶ 115 (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary *operations* in the course of which the alleged violations were committed.” (emphasis added)).

35. The ICJ later explicitly affirmed the requirement of control over a specific operation in *Bosnian Genocide*. *Bosnian Genocide*, 2007 I.C.J. ¶ 400 (“It must . . . be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of *each operation* in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.” (emphasis added)). The requirement of control over a specific operation is the major factor that distinguishes the ICJ’s effective control test from the ICTY’s overall control test. The evidentiary threshold of the ICTY’s test is easier to clear—once it is proved that material support has flowed to an actor, this may provide the basis for a finding of control over the actor.

36. Although the ICJ has the authority to compel states to produce documents under Article 49 of its statute, in *Bosnian Genocide* the Court declined to order Serbia to produce unredacted versions of state documents that incriminated Belgrade in the Srebrenica genocide. See *Bosnian Genocide*, 2007 I.C.J. 241, ¶ 35 (dissenting opinion by Al-Khasawneh, V.P.).

37. *Bosnian Genocide*, 2007 I.C.J. 43, ¶¶ 208–09, 400–01.

38. The Socialist Federal Republic of Yugoslavia, often referred to by the acronym SFRY, existed until the end of World War II until 1991, when it broke into pieces. Its army is the Yugoslav National Army, often referred to by the acronym JNA. The Federal Republic of Yugoslavia, often referred to by the acronym FRY, existed from 1992–2003, and primarily consisted of a federation between the republics of Serbia and Montenegro. Its army was created

before its disintegration in the early 1990s.³⁹ Specifically, the suit alleged that the murder of Bosnian Muslim men at Srebrenica by members of the Republika Srpska's official military wing, the Bosnian Serb Army (VRS), should be attributed to the Federal Republic of Yugoslavia (FRY), as the legal successor to the SFRY.⁴⁰ (At the time, Republika Srpska was an unrecognized breakaway republic and therefore did not yet bear its own legal responsibilities as a state.)

The ICJ found that the FRY was "making . . . considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options" of the breakaway republic's authorities.⁴¹ The ICJ furthermore determined that there were "close ties" between the government of the FRY and officials of the Republika Srpska; there had been a major transfer of personnel, arms, and equipment from the army of the FRY to the VRS, as well as financial support from FRY authorities to VRS officers; and, furthermore, there was substantial economic integration between the Republika Srpska and the FRY (among other things, loans from the FRY underwrote most of the budget of the breakaway republic).⁴²

Despite these ties, the ICJ held that while Bosnia and Herzegovina had proven that FRY had supported the VRS and the Republika Srpska, and that the VRS's acts at Srebrenica had been acts of genocide, it had failed to prove that the acts of the VRS were attributable to the FRY under the effective control test.⁴³ Explaining its decision, it wrote:

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (*dolus specialis*) characterizing the crime of genocide All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.⁴⁴

Here, the ICJ appeared to require evidence of explicit instructions to commit the massacre—and even evidence of genocidal intent⁴⁵—in order to

from the remains of the JNA and was called "Vojska Jugoslavije," often referred to by the acronym VJ.

39. *Id.* ¶¶ 64–65, 236–37.

40. *Id.* ¶ 278.

41. *Id.* ¶ 241.

42. *Id.* ¶¶ 237–40.

43. Nor could any of the acts alleged that did not amount to genocide be attributed to the FRY.

44. *Bosnian Genocide*, 2007 I.C.J. ¶ 413.

45. Although the necessity of finding intent likely also was exacerbated by the *dolus specialis* requirements of the crime of genocide. See, e.g., Kai Ambos, *What Does 'Intent to Destroy' in*

meet the effective control standard. By requiring evidence of specific instructions tied to a particular operation, the ICJ set an extremely high bar for attribution.

Because the ICJ did not find effective control in either *Nicaragua* or *Bosnian Genocide*, it is unclear exactly what set of facts would satisfy the “effective control” test. However, it is clear that it sets a high threshold.⁴⁶ Hypothetically, a state’s use of a non-state actor to carry out a targeted killing would constitute an exercise of effective control over a non-state actor.⁴⁷ Yet, the state’s involvement would likely have to entail significant control over the military operation—at the very least, it would have to exceed that exercised by the United States over the Contras or the FRY over the VRS. The ICJ’s reasoning in *Nicaragua* and *Bosnian Genocide* might be read to suggest that a state could arm, fund, support, train, and facilitate the operations of an armed, non-state group, and even encourage the non-state group to carry out ethnic cleansing as a means of defeating the enemy, and nevertheless evade responsibility because there is no evidence state agents directly instructed the commission of the specific massacre.

However, the ICJ has ultimately left the question of state liability for ultra vires actions underspecified. “Effective control” appears to contemplate state responsibility for an ultra vires act by a non-state actor in limited circumstances. In both *Nicaragua* and *Bosnian Genocide*, the ICJ held that the state needs to have “effective control” over the *operation* during which the violations occur in order to trigger a finding of attribution under this standard—mentioning nothing about control over the acts (or violations) themselves.⁴⁸ The choice to focus the inquiry on control over the *operation*,

Genocide Mean?, 91 INT’L REV. RED CROSS 833, 834–35 (2009) (describing the two separate mental elements of the genocide offense).

46. The *Bosnian Genocide* opinion suggests that to satisfy the effective control test there must be evidence a state directly instructed a non-state group to carry out the specific operation during which the violation took place. *Bosnian Genocide*, 2007 I.C.J. ¶¶ 408, 410–12. This appears to set a higher evidentiary standard than the ILC proposes in the Draft Article Commentaries for Article 8. In its formulation of the factors required to establish effective control, the ILC treats the terms “instructions,” “directions,” and “control” as disjunctive. *Id.* ¶ 398. The commentaries thus suggest that directions, instructions, or control are independently sufficient for a finding of state responsibility under Article 8. In the ICJ’s formulation of the same factors, however, the court reads “instructions” back into the control test, so that instructions are *always* necessary for a finding of effective control. *Id.* ¶ 413. Under this standard, courts may even have the flexibility to construe the term operation so narrowly as to foreclose the possibility of holding a state responsible for the ultra vires actions of its non-state partners.

47. A similar analysis might apply in a case involving an unorganized group of individuals carrying out specific operations on behalf of a state. If the non-state actor does not meet the *Tadić* threshold of organization, non-state actors must meet the effective or strict control test for state attribution.

48. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27) (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had

rather than the *act*, suggests that a state could be held responsible for ultra vires acts that take place in the course of an operation over which that state exercises effective control.

By contrast, the ILC, which endorses the ICJ's "effective control" standard (as articulated in *Nicaragua*),⁴⁹ limits liability for ultra vires acts during operations over which a state exercises "effective control" to those that are "an integral part" of the operation.⁵⁰ It does not extend responsibility to ultra vires acts that are only "incidentally or peripherally" associated with an operation.⁵¹ It explains that "[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation."⁵² It further explains, "The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control."⁵³

Indeed, some language in *Bosnian Genocide* and *Nicaragua* suggests that a state by definition does not have "effective control" over an ultra vires act.⁵⁴ In other words, to attribute an act of a non-state actor to a state under the "effective control" standard, the state must have instructed or directed the specific act that constitutes the violation in question.⁵⁵

In sum, the ICJ's application of effective control risks narrowing the scope of accountability to the point of rendering state-responsibility doctrine ineffective. In *Nicaragua* and *Bosnian Genocide*, "effective control"

effective control of the military or paramilitary operations in the course of which the alleged violations were committed."); *Bosnian Genocide*, 2007 I.C.J. ¶ 400.

49. *Draft Articles*, *supra* note 12, at art. 8 cmts. 3–4.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. See *Bosnian Genocide*, 2007 I.C.J. ¶ 400 ("It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred . . ."). One could interpret the "or" in this sentence as an explanatory word. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27) ("All the forms of United States participation [and control] mentioned above . . . would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."). One could interpret this sentence to mean that "direction" and "enforcement" are necessary to find the state responsible.

55. This depends on how one defines "operation." If the term "operation" is narrowly construed to mean that each act that makes up an operation must be directed by the state (*Tadić's* reading), then the state cannot be held responsible for acts that were not expressly instructed by the state. However, if "operation" is construed so that several acts are steps in one operation, then it is possible to be responsible for an ultra vires act under the ILC reading as long as the act in question is integral to the operation ordered by the state. The Appeals Chamber of the ICTY in *Tadić* appears to have interpreted *Nicaragua* and *Bosnian Genocide* in this manner. See *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 106 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("This [effective control] test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the *contras*.").

requires such a high degree of control and specificity of instructions that states can—merely by issuing instructions at a relative level of generality—easily avoid attribution for crimes as egregious as genocide.

The ICJ's approach to state responsibility thus leaves many unanswered questions. It does permit the actions of non-state actors to be attributed to states—and in this respect partially addressed the legal loophole created by the possibility of states acting through non-state actors. But it adopted a strict-liability rule that sets a very high evidentiary bar for triggering state attribution. In doing so, the Court left a substantial accountability gap that, taken alone, would permit states to escape legal limits on their own actions by encouraging and enabling non-state actors to take action on their behest.

C. *The ICTY's Overall Control Test*

Eleven years after the ICJ's ruling in *Nicaragua*, the Appeals Chamber of the ICTY also confronted the question of state attribution in *Prosecutor v. Dusko Tadić*.⁵⁶ In the case, the prosecutor brought a criminal suit against Dusko Tadić, a Bosnian Serb politician and member of a paramilitary group, for “grave breaches” of international humanitarian law.⁵⁷

Because it was a criminal case, the stakes of a finding of attribution in *Tadić* were somewhat different than in *Nicaragua*. In particular, finding Tadić guilty hinged on whether international humanitarian law applied to the parties to the conflict. After all, Tadić was charged with violating international humanitarian law that applies during international armed conflict—a charge that could only hold if the law was applicable to the conflict. The ICTY's ability to find criminal liability thus hinged on the attribution of paramilitary conduct against the state of Bosnia and Herzegovina to a second state, the FRY—an attribution that would make the conflict an international armed conflict (IAC) and would thereby trigger the full panoply of international humanitarian laws applicable to such conflicts.

The threshold question was whether the acts of the VRS could be attributed to the FRY. Since, as noted earlier, Republika Srpska was not a recognized state, the conflict between Republika Srpska and Bosnia Herzegovina—in which Tadić committed his offenses—was not an international armed conflict. However, if the acts of the VRS could be attributed to the Federal Republic of Yugoslavia (a recognized state), then the conflict would be an international armed conflict between two states (the FRY and Bosnia and Herzegovina). Members of the VRS could thus be held accountable for the atrocities committed during the war under the stricter

56. *Id.* ¶ 131.

57. *Id.* ¶ 68.

standards of conduct that international humanitarian law imposes on participants in international armed conflicts.⁵⁸

The Appeals Chamber explicitly rejected the application of the *Nicaragua* “effective control” test to the facts of the case.⁵⁹ It noted that the purpose of Article 8 of the Draft Articles—an earlier version of which had been adopted by the ILC drafting committee in 1998—was “to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials.”⁶⁰ As a result, it declared that “[t]he *degree of control* [required for attribution] may . . . vary according to the factual circumstances of each case.”⁶¹ In particular, it observed that for organized groups, “it is sufficient to require that the group as a whole be under the *overall control* of the State.”⁶²

In explaining this new “overall control” test, the Appeals Chamber clarified that the State must not only “equip[] and financ[e]” the group, but also “coordinat[e] or help[] in the general planning of its military activity.”⁶³ Distinguishing the ICJ’s effective control standard, the Appeals Chamber

58. This question came before the ICTY in 1994. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997). Article 2 of the ICTY Statute empowers the Tribunal to “prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions,” including crimes that only arise in the course of an IAC. *Id.* ¶ 577. Since the prosecution indicted Dusko Tadić for conduct that only constitutes a breach of the Geneva Conventions under IAC–IHL rules, the ICTY had to determine whether there was an IAC. In order to satisfy the elements required to establish grave breaches of the Geneva Conventions—for Bosnian Muslims to be considered “protected persons” within the meaning of the Geneva Conventions—the prosecution had to show that the victims were in the hands of a party to the conflict of which they were not nationals (i.e., that the VRS perpetrators were agents or organs of the Former Republic of Yugoslavia). In *Tadić*, the Trial Chamber recognized that there was an IAC before May 19, 1992. *Id.* ¶ 569. It held, however, with the presiding judge dissenting, that although “the JNA [the armed forces of the SFRY] played a role of vital importance in the establishment, equipping, supplying, maintenance and staffing of the . . . VRS units,” the VRS was not an organ or agent of the FRY [as successor to the SFRY]. *Id.* ¶¶ 595, 607. As a result, the Trial Chamber concluded that there was not an IAC, and so Tadić could not be found guilty of any of the counts postdating May 19, 1992 that relied on Article 2 of the ICTY Statute. *Id.* ¶ 608. The Prosecutor appealed this part of the judgment, claiming that even after May 19 there was an IAC between the FRY and Bosnia and Herzegovina. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 85. The Prosecutor argued that only international humanitarian law (and not the law of state responsibility) should be used to determine whether Article 2 of the statute applies. *Id.* ¶¶ 89, 103. Nevertheless, the Appeals Chamber held that international humanitarian law needed to be supplemented by general international rules on control under the doctrine of state responsibility. *Id.* ¶¶ 98, 103–05. The Appeals Chamber therefore turned to an analysis of the law of state responsibility. *Id.* ¶¶ 102–45.

59. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 115.

60. *Id.* ¶ 117.

61. *Id.*

62. *Id.* ¶ 120 (emphasis added).

63. *Id.* ¶ 131; *see also id.* ¶ 137 (“The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.”).

emphasized that the overall control test does not go so far as to require “the issuing of specific orders by the State, or its direction of each individual operation.”⁶⁴

In applying the test to the facts, the Appeals Chamber found that the FRY exercised overall control over the VRS.⁶⁵ It emphasized that:

The Yugoslav People’s Army (the Army of the SFRY, which ceased to exist with the creation of the Yugoslav Army (VJ) in April 1992) officers were directly transferred into their equivalent postings in the VRS;⁶⁶

The FRY/VJ paid the salaries of these officers;⁶⁷

The VJ had the same military objectives as the VRS;⁶⁸

The FRY/VJ provided “extensive financial, logistical and other assistance and support” to the VRS;⁶⁹ and

The FRY/VJ “directed and supervised the activities and operations of the VRS.”⁷⁰

The VJ and the VRS “did not, after May 1992, comprise two separate armies in any genuine sense.”⁷¹

The Appeals Chamber held that there was an IAC and that Tadić was therefore liable for grave breaches of the Geneva Conventions under Common Article 2 and Article 2 of the ICTY Statute.⁷²

By using the overall control standard, the ICTY Appeals Chamber was able to apply international humanitarian law applicable to international armed conflicts to the facts of *Tadić* and reject efforts to evade international criminal responsibility. Ultimately, the Appeals Chamber held that in cases involving organized, armed military groups, evidence the state exercised a more general level of control over the non-state group is sufficient to attribute the groups’ conduct to a state.

Moreover, the overall control test, as articulated by the ICTY, is a strict-liability standard: Once a non-state actor is considered to be under the overall control of a state, the state is responsible for all acts, including ultra vires acts carried out by the non-state actor.⁷³ If the test is regarded as a test for whether a group is functionally an organ of the state, this standard makes intuitive

64. *Id.* ¶ 137.

65. *Id.* ¶ 147.

66. *Id.* ¶ 150.

67. *Id.*

68. *Id.* ¶ 151.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* ¶¶ 162, 171.

73. *Id.* ¶¶ 120–22.

sense. There is little question that a state is responsible for an ultra vires act committed by its de facto organ. Article 7 of the Draft Articles provides: “The conduct of an organ of a State . . . shall be considered an act of the State under international law . . . even if [the organ] exceeds its authority or contravenes instructions.”⁷⁴ The ILC Commentary also points to an abundance of state practice and judicial decisions supporting this notion.⁷⁵ In fact, both the ICJ⁷⁶ and the Appeals Chamber of the ICTY⁷⁷ have come to a similar conclusion.

Indeed, many scholars have praised the overall control test precisely because it adopts a more capacious test for establishing state responsibility for the actions of non-state actors. The ICRC has expressly endorsed the overall control test as the appropriate standard in armed conflict, not only for purposes of classifying the conflict, but also for attributing state responsibility for the conduct of non-state actors.⁷⁸ Commentators have also noted the utility of the lower standard of attribution in the context of state-

74. *Draft Articles*, *supra* note 12, at art. 7.

75. *Id.* at art. 7 cmts. 3–7.

76. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶¶ 385–86 (Feb. 26); *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 109 (June 27).

77. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 121.

78. Acknowledging that the ICTY’s overall control test is the minority position, the ICRC nevertheless contends that it is the appropriate test in armed conflicts for several reasons:

In order to classify a situation under humanitarian law involving a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the *de facto* entity or non-State armed group as a whole and thus allows for the attribution of several actions to the third State. Relying on the effective control test, on the other hand, might require reclassifying the conflict with every operation, which would be unworkable. Furthermore, the test that is used must avoid a situation where some acts are governed by the law of international armed conflict but cannot be attributed to a State.

ICRC, *supra* note 10, at art. 3, ¶ 409 (citations omitted).

sponsored terrorism,⁷⁹ private military and security contractors,⁸⁰ and non-state paramilitary groups.⁸¹

Despite these advantages, the ICTY's overall control test has not been widely embraced. Instead, the effective control standard is regarded by many observers as the governing standard.⁸² In updating the Draft Articles, the ILC expressly supported the ICJ's effective control standard in the final text and commentary, leaving its assessment of the overall control test's viability ambiguous.⁸³ In the 2007 *Bosnian Genocide* case, moreover, the ICJ rejected the overall control standard and reaffirmed the effective control standard it

79. KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM: PROBLEMS AND PROSPECTS 44 (2011); Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 666 (2007); Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 120, 123 (2004); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 37, 39 (1999); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 20 (2002); Scott M. Malzahn, Note, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 100–01 (2002). For more commentators making similar remarks, see TRAPP, *supra*, at 42 n.111.

80. EVGENI MOYAKINE, THE PRIVATIZED ART OF WAR: PRIVATE MILITARY AND SECURITY COMPANIES AND STATE RESPONSIBILITY FOR THEIR UNLAWFUL CONDUCT IN CONFLICT AREAS 275 (2015); Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT'L L. 239, 271, 289 (2009); Amanda Tarzwell, Note, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States Under the Doctrine of State Responsibility*, 11 OR. REV. INT'L L. 179, 204 (2009).

81. MOYAKINE, *supra* note 80, at 274; *see id.* at 281–82 (“[T]he ‘overall control’ test appears to be the most suitable one, while States, especially those hiring PMSCs [which can be equated with paramilitary units], are likely to easily satisfy the set of criteria for the application of this test. It will automatically lead to the attribution of their unlawful conduct to the States concerned if the reasoning of the ICTY positioning its control theory as realistic is followed.” (citations omitted)); Cassese, *supra* note 79, at 665–67.

82. *See* CRAWFORD, *supra* note 12, at 156 (“[The ICJ’s determination in *Bosnian Genocide*] effectively ends the debate as to the correct standard of control to be applied under Article 8. Moreover it does so in a manner that reflects the ILC’s thinking on the subject from the time the term ‘control’ was introduced into then-Draft Article 8.”); MOYAKINE, *supra* note 80, at 269 (“[O]ne can draw the conclusion that the ‘effective control’ test is the leading theory according to the World Court”); Christian J. Tams, *Law-making in Complex Processes: The World Court and the Modern Law of State Responsibility*, in SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 287, 301 (Christine Chinkin & Freya Baetens eds., 2015) (“As a result, it would seem far-fetched today to suggest that overall control is sufficient to justify attribution of private conduct—faced with dissent the ILC-ICJ has struck back.”).

83. *Draft Articles*, *supra* note 12, at art. 8 cmts. 3–5.

had first established in *Nicaragua*.⁸⁴ Unbowed, the ICTY has since reaffirmed the overall control standard on at least two occasions.⁸⁵

Commentators generally present the ICJ's "effective control" and the ICTY's "overall control" standards as alternatives.⁸⁶ And in many ways, they are: The ICJ and the ICTY each explicitly rejected the other court's approach after characterizing the tests as standards of attribution under Article 8 of the Draft Articles. In *Tadić*, the ICTY criticized the ICJ's "effective control" standard from *Nicaragua* and proposed the "overall control" standard to replace it in cases where the non-state actor is an organized group.⁸⁷ Responding in *Bosnian Genocide* to the ICTY's appraisal, the ICJ criticized the ICTY's "overall control" standard and reaffirmed the "effective control" standard it had first established in *Nicaragua* (notwithstanding the non-state actor's level of organization).⁸⁸ In the commentary on Article 8, meanwhile, the ILC itself took note of the dispute between the ICJ and ICTY.⁸⁹ But the ILC leaves room for reconciliation. The Draft Articles favorably cite the effective control test and note that the ICTY's mandate was directed toward

84. While the ICJ acknowledged that "overall control" may well be the appropriate standard for determining whether or not an armed conflict is international or not, the Court rejected its application in the context of state-responsibility doctrine. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶¶ 403–07 (Feb. 26). *But see id.* ¶ 39 ("The inherent danger in [the effective control test] is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.") (dissenting opinion by Al-Khasawneh, V.P.).

85. *See, e.g.*, Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (confirming that the "overall control" standard articulated in *Tadić* was the applicable criteria in ascertaining the existence of an international armed conflict); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (holding that the question of Yugoslavia's responsibility for the acts of Bosnian Serb forces was subject to an "overall control" test).

86. *See, e.g.*, CRAWFORD, *supra* note 12, at 156 (noting critiques that the effective control test sets the bar too high and the test of overall control "would better meet the needs of the international community in dealing with the threat of terrorism"); Tams, *supra* note 82, at 301 (describing the ICJ and ILC's defense of the effective control test against the ICTY's overall control test).

87. *See Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 123 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. . . . [T]he fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.").

88. *Bosnian Genocide*, 2007 I.C.J. ¶¶ 403–07.

89. *Draft Articles*, *supra* note 12, at art. 8 cmts. 4–5.

“issues of individual criminal responsibility, not state responsibility,” but the ILC does not expressly reject the overall control test.⁹⁰

In sum, in the context of armed conflict, the ICJ and the ICTY have relied primarily on two⁹¹ standards for evaluating the level of control required to attribute an act of a non-state actor to a state under the Draft Articles: effective control and overall control. These two tests have traditionally been understood as mutually inconsistent. Yet it is possible to see them as reconcilable. According to the ICJ in *Nicaragua*, an act of a non-state actor is attributable to a state if the state exercises “effective control” over the operation during which the act occurred.⁹² Under the effective control standard, private conduct that is merely supported, financed, planned, or otherwise carried out on behalf of the state is not attributable unless the state also exercises a high level of control “in respect of *each operation* in which the alleged violations occurred.”⁹³ According to the ICTY in its *Tadić* appeals judgment, however, in cases where the non-state actor is an organized military group, the state only needs to exercise overall control over the *actor* for the act to be attributable to the state.⁹⁴ As long as the non-state actor is organized, evidence that the state financed and equipped a “military organization” and participated in the general planning of the group’s

90. *Id.* at art. 8 cmt. 5. The ILC’s commentary has itself been the subject of significant scholarly debate. The ILC concludes its assessment of the ICJ and ICTY’s disagreement by noting that “it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.” *Id.*

91. The ICJ also articulated the additional “strict control” standard, which establishes that all of the acts of a non-state actor are attributable to a state if that non-state actor is in a relationship of “complete dependence” on the state. *Bosnian Genocide*, 2007 I.C.J. ¶ 391 (asking “whether it is possible in principle to attribute to a State conduct of persons—or groups of persons—who, while they do not have the legal status of State organs, in fact act under such *strict control* by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act” (emphasis added)). In *Nicaragua*, the court uses the phrase “complete dependence” to refer to the same control standard. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 110 (June 27). The “strict control” standard is, on our view, the most stringent (i.e., the most difficult for establishing attribution). Under strict control the accountability gap is therefore also widest. Given our critique of the limitations of the arguably lower evidentiary burdens of effective and overall control, we do not discuss strict control in detail in this paper.

92. *Nicaragua*, 1986 I.C.J. ¶ 115 (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”).

93. *Bosnian Genocide*, 2007 I.C.J. ¶ 400 (emphasis added). Admittedly, it is difficult to ascertain the exact content of the effective control standard—thus far no court or tribunal has found sufficient evidence of effective control to trigger state responsibility.

94. *Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 131 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group . . .”).

operations is sufficient to establish state responsibility, even if the state did not issue specific instructions.⁹⁵

These two approaches, moreover, might be seen as reflected in the ILC Draft Articles, the overall control test addressing attribution under Article 4 and the effective control test addressing attribution under Article 8. Indeed, a handful of commentators have suggested that the “overall control” standard is best understood in terms of the legal theory of attribution underlying the ICJ’s control standard under Article 4, rather than under Article 8.⁹⁶ Indeed, this understanding of the relationship between the standards adopted by the ICJ and the ICTY on the one hand, and the Draft Articles on the other, might even make the best sense of current state-responsibility doctrine.⁹⁷

Regardless of the standard, however, all these approaches share a common vice: By drawing a bright line, they force a difficult—if not impossible—decision as to how much control over a non-state actor is enough to hold a state responsible for its actions. On the one hand, drawing the line for triggering state responsibility too high allows states easily to evade legal limits on their own actions. On the other hand, drawing it too low can threaten to place states in an unfair position of being held liable for actions they could not reasonably prevent. Both approaches, moreover, allow

95. *Id.* ¶ 145 (“In the case at issue, given that the Bosnian Serb armed forces constituted a ‘military organization’, the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.”).

96. *E.g.*, Elena Laura Álvarez Ortega, *The Attribution of International Responsibility to a State for Conduct of Private Individuals Within the Territory of Another State*, REVISTA PARA EL ANÁLISIS DEL DERECHO, January 2015, at 1, 22–23 (2015), http://www.indret.com/pdf/1116_es.pdf [<https://perma.cc/FWU4-72D9>]; Claus Kress, *L’Organe de Facto en Droit International Public: Réflexions sur l’Imputation à l’Etat de l’Acte d’un Particulier à la Lumière des Développements Récents*, 105 REVUE GÉNÉRALE DE DROIT INT’L PUB. 93, 131 (2001); Marko Milanović, *State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücker*, 22 LEIDEN J. INT’L L. 307, 312–14, 316–19 (2009); Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L & COMP. L.Q. 493, 506–07 (2009).

97. The Draft Articles Commentary discusses overall control as a standard of attribution under Article 8. *Draft Articles*, *supra* note 12, at art. 8 cmt. 5. Nevertheless, a close reading of *Tadić* reveals that the overall control standard assesses whether the conduct of the non-state actor can be attributed to the state by virtue of the control it exercises over the group (Article 4), rather than the specific operation (Article 8). In *Tadić*, because the Appeals Chamber found the non-state armed group to be a de facto state organ, it classified the conflict as an international armed conflict (effectively between two states) rather than a non-international armed conflict (between a state and a non-state group). Like standards of attribution under Article 4, once the conduct of the state in this case met the overall control threshold, all of the conduct of the non-state actor could be attributed to it, regardless of whether the state had exercised a high level of control over particular operations. In this sense, the overall control inquiry asks whether the non-state armed group in question can be attributed to the state, and with it, all of the group’s conduct.

states to avoid responsibility for taking actions that enable non-state actors to violate international law, as long as they stay far below the bar.

In the next Part, we examine more fully the incentives that modern attribution doctrine creates for states, before turning in Part III to elaborating a possible solution presented by Common Article 1 to the Geneva Conventions.

II. Perverse Incentives

The bright-line approach to state responsibility that characterizes modern attribution doctrine creates perverse incentives for states. First, the high bar established by state-responsibility doctrine may encourage states to use non-state partners to undertake actions that are prohibited to the states themselves. This may be true even under the more capacious overall control standard, for even that standard requires a significant level of state control over the non-state actor before triggering responsibility. Second, the doctrine may encourage states to hold non-state actors at arm's length—for instance, providing them weapons but little training or instructions on compliance with international humanitarian law—for fear that closer involvement might trigger attribution. This is particularly true for those concerned about how the overall control test may be applied, for that test creates a greater likelihood that the state could be held responsible even for *ultra vires* actions.

A. *The Incentive to Use Non-State Actors to Violate International Law*

Consider the following possibility: Suppose a state supports a non-state group seeking to overthrow its government. (This is no mere hypothetical: Think, for example, of the many states supporting various non-state groups at war in Syria.) The state would like to assure the victory of the side it supports, but it would also like to avoid any responsibility for violations of international law. It also knows that it would be prevented from sending in its own troops unless the government of Syria were to give its permission—unlikely if the non-state group it supports is seeking to topple the government. Due to *jus ad bellum* concerns and domestic legal and political limits on sending in the troops, the state may already prefer to send non-state actors instead of its own armed forces.⁹⁸ Because of the high bar established

98. States working through non-state actors are not immune from *jus ad bellum* constraints. The *Nicaragua* Court found that “the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.” *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 228 (June 27). It nonetheless indicated that “‘organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State’, and ‘participating in acts of civil strife . . . in another State’” could, in some circumstances, violate the customary law prohibition on use of force. *Id.* The potential violation of Article 2(4) of the U.N. Charter was not before the Court, but the same

by modern attribution doctrine, states in this circumstance may believe that they can work through non-state actors and thereby avoid legal responsibility that would be triggered if they employed their own forces.

It is undisputed that any and all acts of the state's armed forces would be attributable to the state. Under Article 4 of the Articles on State Responsibility, the armed forces of a state are widely considered "organs" of the state.⁹⁹ Therefore, any and all acts committed by the armed forces, even if *ultra vires*, could be attributed to the state. So if a state's soldier goes rogue and commits war crimes, the state would be directly responsible (a responsibility it could discharge by court-martialing the offender).

Moreover, the rules of international law governing the conduct of the state's armed forces impose substantial risks and burdens on the state. If a state sends its own armed forces, their conduct is more likely to be governed by the law that applies to international armed conflict. Those rules are, on the whole, more comprehensive than the rules governing the behavior of non-state actors in a non-international armed conflict. (For instance, non-state actors do not need to treat captured government forces as POWs, entitled to the full protections of the Geneva Conventions, though they are bound by the humane-treatment obligations of Common Article 3.)

For a state in this position, working through a non-state actor may seem an appealing alternative. Instead of sending the state's armed forces into the conflict, the state might instead provide material support to the non-state group fighting on its side of the conflict. Because of the accountability gap left by modern attribution doctrine, the chances that the conduct of the non-state actor will be attributed to the state are slim. Even the less generous overall control standard allows states to provide significant support to non-state actors without triggering legal responsibility.

States thus have ample incentives to capitalize on modern attribution doctrine by using non-state actors as proxies to accomplish what international law otherwise forbids. As a result, states may hope to act with impunity through their non-state partners in situations where international law bars states from acting themselves. This, in turn, renders some of the most important international legal limits on states deeply vulnerable.

logic would suggest that this prohibition applies to the overlapping Charter provision on the use of force. *Id.*

99. See *Draft Articles*, *supra* note 12, at art. 4 ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions An organ includes any person or entity which has that status in accordance with the internal law of the State.").

B. The Incentive Not to Exercise Control Over Non-State Actors

There is an additional set of perverse incentives created by the bright-line approach of modern attribution doctrine: States may be reluctant to exercise control over their non-state partners in ways that might minimize the risk that they will violate international law. In fact, states might even be said to have an incentive *not* to train and instruct non-state partners to comply with international law. Training and instructing might serve as evidence that the state exercised the level of control required to attribute the wrongful conduct of non-state actors to the state. Again, this is true regardless of the specific test applied, whether effective control or overall control.

Consider again a situation in which a state supports a non-state group seeking to overturn its government. In an ideal world, the state would choose to instruct and train the non-state actor to capture rather than kill enemies who surrender, to refrain from torturing detainees, and to ensure the material and procedural conditions of confinement do not render detention arbitrary—both in order to comply with their Common Article 3 obligations and to avoid mass atrocities and war crimes. However, engaging in such instruction and training might bring the state closer to the strict-liability line. In particular, this additional instruction and training—and the level of control required to implement it—could tip the state over the bright line for attribution. The state's efforts to comply with international humanitarian law could even render it responsible for the non-state actor's *ultra vires* war crimes.

Under existing doctrine, states cannot mitigate responsibility for a non-state actor's conduct once they have met the requisite threshold of control. Furthermore, any and potentially all actions of the non-state actor—including *ultra vires* actions—may be attributed to a state as if its own agents or organs had performed them. State actors may therefore understandably be concerned that more oversight over non-state actors (even in the form of *ex ante* and *ex post* measures designed to encourage non-state actors' compliance with the rule of law) will only bring states acting in good faith closer to the attribution line. Once the control threshold has been reached, current doctrine provides states with no explicit mitigation defense that lessens the extent of liability.

Modern attribution doctrine arguably creates precisely the wrong incentives. Where states do work with non-state actors to ensure compliance with international norms, the law should decrease rather than increase the possibility of attribution of internationally wrongful *ultra vires* acts, encouraging states to take steps to mitigate and avoid violations. Indeed, the common practice of international humanitarian organizations and NGOs—which encourage states partnering with non-state actors to train leaders and secure assurances of lawful conduct, among other recommendations—suggests that an accountability regime that opens a state up to liability for exercising due diligence *vis-à-vis* non-state partners may be

counterproductive. In the next two Parts, we consider ways in which these incentives might be significantly mitigated.

III. How to Fill the Gap: Common Article 1 Due Diligence Standard

Thus far this Article has examined modern attribution doctrine in isolation. This has long been the approach to state responsibility. Here we change course. We argue that, in the context of armed conflict, attribution doctrine can only be properly understood in concert with other legal frameworks—in particular, with the legal obligations created by international humanitarian law. Indeed, Common Article 1 of the Geneva Conventions provides a source of state responsibility for the actions of non-state actors that cures many of the deficiencies of state attribution doctrine viewed on its own.¹⁰⁰

This is a unique moment to embrace a broader and more integrated understanding of state-responsibility doctrine, one that incorporates a robust understanding of Common Article 1. On March 22, 2016, the International Committee for the Red Cross issued its first revised commentaries on the Geneva Conventions in more than six decades.¹⁰¹ These revised commentaries adopt a broader vision of Common Article 1—a vision that, if embraced by states, could cure many of the infirmities of state-responsibility doctrine in the context of armed conflict. In particular, the Commentary of 2016 argues for a more robust reading of Common Article 1’s “to ensure respect” provision.¹⁰² On the ICRC’s view, this clause entails both negative duties “neither [to] encourage, nor aid or assist in violations of the Conventions” and positive duties that High Contracting parties “must do

100. The obligations established in Common Article 1 operate in addition to, not in lieu of, the rules on attribution in the Draft Articles. Article 55 of the Draft Articles provides that a more specific rule on state responsibility may replace general rules on state responsibility codified in the Draft Articles. *Draft Articles*, *supra* note 12, at art. 55. However, the ILC notes in its commentary that this principle of *lex specialis* applies only when there is “some actual inconsistency between [the rules].” *Id.* at art. 55 cmt. 4. Since there is no inconsistency between the obligations of Common Article 1 and the rules on attribution in the Draft Articles, both are applicable. Indeed, the ICJ in *Nicaragua* applied both Common Article 1 and the general rules on attribution. *Nicaragua*, 1986 I.C.J. ¶¶ 109, 115, 220.

101. ICRC, *supra* note 10.

102. *Id.* at art. 1. For the most directly relevant and significant contributions to the literature on “to ensure respect” duties, see generally Fateh Azzam, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC J. INT’L L. 55 (1997); Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT’L REV. RED CROSS 67 (2000); Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUR. J. INT’L L. 125 (2010); Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT’L HUMANITARIAN L. 3 (1999). For the articulation of ICRC staff that most clearly anticipated the Commentary of 2016, see generally Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT’L REV. RED CROSS 707 (2014).

everything reasonably in their power to prevent and bring such violations to an end.”¹⁰³

This Part of the Article makes the case in three steps: First, it outlines Common Article 1 obligations and explains the case law supporting the extension of the duty to “ensure respect” to states’ interactions with non-state partners. Second, it explains the new 2016 ICRC Commentaries and their decision to embrace an expansive vision of Common Article 1 obligations that include a positive due diligence obligation on states working with non-state actors. Third, it explains why Common Article 1, as interpreted in the 2016 Commentaries, promises to close the accountability gap left by modern attribution doctrine and address the perverse incentives described in Part III.

A. *Common Article 1 Duties Prior to the 2016 Commentaries*

Common Article 1 provides: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”¹⁰⁴ The ICJ recognized that Common Article 1’s “to ensure respect” provision obligates state parties in both its *Nicaragua* judgment and *Wall* advisory opinion. Despite this, Common Article 1 is often forgotten as a source of legal obligation in discussions of state responsibility. However, thanks to recent efforts by the International Committee for the Red Cross advocating a more robust reading of Common Article 1’s “to ensure respect” provision, viewing attribution doctrine in isolation is no longer possible.

A state’s obligations under Common Article 1 are both broader and narrower than its obligations under the Draft Articles. Common Article 1 obligations are broader because states’ duties to “ensure respect” for the rules set forth in the Geneva Conventions are distinct from—and arguably much more extensive than—duties “to respect” the Conventions.¹⁰⁵ But Common Article 1 obligations are narrower in that they only pertain to violations of parties’ duties under international humanitarian law. By contrast, the Draft Articles address state responsibility for any “internationally wrongful act.” In the context of armed conflict, Common Article 1’s obligation on states “to ensure respect” implies that states have a responsibility to make sure their partner non-state actors abide by their IHL obligations,¹⁰⁶ even when the

103. ICRC, *supra* note 10, at art. 1, ¶ 154.

104. Geneva Convention I, *supra* note 9; Geneva Convention II, *supra* note 9; Geneva Convention III, *supra* note 9; Geneva Convention IV, *supra* note 9; *see also* First Additional Protocol, *supra* note 9.

105. For overview and discussion, see generally Boisson de Chazournes & Condorelli, *supra* note 102; Birgit Kessler, *The Duty to ‘Ensure Respect’ Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 GERMAN Y.B. INT’L L. 498 (2001).

106. In the 2016 Commentaries, the ICRC also explicitly adopts the view that non-state parties to an armed conflict are bound by Common Article 3 of the Geneva Conventions. ICRC, *supra*

state's relationship with the non-state actor falls short of standards of attribution under the Draft Articles.

It is widely accepted that compliance with international humanitarian law is the responsibility of parties to any international or non-international armed conflict and that Common Article 1 is customary international law.¹⁰⁷ Duties "to respect" international humanitarian law apply directly to states and their organs.¹⁰⁸ The relevant inquiry for determining whether a state is responsible for a non-state actor's violations of "to respect" duties of Common Article 1 thus concerns the degree to which actors or acts can be seen as attributable to the state. The tests for state responsibility codified in the Draft Articles and articulated in the jurisprudence of the ICJ and ICTY also apply to liability for non-state actor violations of "to respect" duties under Common Article 1.

1. The ICJ's "Not to Encourage" Standard.—In *Nicaragua*, the ICJ refused to attribute the action of the Contras to the United States. But it then went on to consider the applicability of an alternate source of legal obligation—Common Article 1. It determined that the Common Article 1 duty to "ensure respect" also creates an obligation for the state not to assist or "encourage" others (whether states or non-state actors) to violate their obligations under the Geneva Conventions.¹⁰⁹ It explained:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances" The United States is thus under an obligation *not to encourage* persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions¹¹⁰

note 10, at art. 1, ¶ 125. Additionally, the ICRC argues that non-state actors also incur duties "to ensure respect" for Common Article 3 as it pertains to their members and those acting on their behalf. *Id.* at art. 1, ¶ 132 ("[I]t follows from common Article 3, which is binding on all Parties to a conflict, that non-State armed groups are obliged to 'respect' the guarantees contained therein. Furthermore, such groups have to 'ensure respect' for common Article 3 by their members and by individuals or groups acting on their behalf. This follows from the requirement for armed groups to be organized and to have a responsible command which must ensure respect for humanitarian law. It is also part of customary international law." (citations omitted)).

107. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 509–13 (2005).

108. See CRAWFORD, *supra* note 12, at 43 (providing, as an example, a ruling by the International Court which stated that "[an act] will be considered as attributable to a State if and to the extent that the [acts] that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control").

109. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

110. *Id.* (emphasis added).

The ICJ held that the United States had violated this obligation by publishing and distributing a manual on psychological operations that encouraged the commission of IHL violations.¹¹¹ In applying this principle, the ICJ noted that it evaluated whether the “encouragement” in question pertained only to violations of Common Article 3 of the Geneva Conventions,¹¹² which creates obligations for both non-state actors and state parties to armed conflict. With regard to the handbook, the ICJ found that the United States encouraged the extrajudicial killing of noncombatants in violation of Common Article 3.¹¹³ The ICJ thus explicitly distinguished duties under Common Article 1 not to “incite” or “encourage” violations of Common Article 3 from state responsibility for the actions of the paramilitary groups.¹¹⁴

The ruling indicates that the standard for finding responsibility for violating the Common Article 1 duty to “ensure respect” is less stringent than that of state responsibility for attribution of a non-state actor’s acts. This section of the opinion focuses on state “encouragement” rather than state control.¹¹⁵ The ICJ found that the United States knew of allegations that the Contras were violating international humanitarian law and held that knowledge of these allegations was sufficient to show the foreseeability of future IHL violations by the non-state actor.¹¹⁶ Significantly, the ICJ found a breach of customary international law duties even though the CIA framed the manual as an attempt to moderate the IHL violations of the Contras.

In its compendium on the “rules of customary international humanitarian law,” the ICRC argues that state practice supports the ICJ’s ruling in *Nicaragua*. According to Rule 144 of the compendium, “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to

111. *Id.* ¶ 256.

112. *Id.* ¶¶ 255–56.

113. *Id.*

114. *See id.* ¶ 255 (“The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement.”).

115. *Id.* ¶ 256 (“[I]t is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable.”).

116. *Id.* (“When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to ‘moderate’ such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.”).

stop violations of international humanitarian law.”¹¹⁷ In commentaries on this rule, the ICRC argues that years of state practice also support a customary international law obligation “not to encourage” violations of international humanitarian law. While *Nicaragua* remains the clearest and most compelling articulation of this standard, the ICRC and other scholars make a strong case that state practice, ICTY cases, U.N. resolutions, and U.N. committee reports support its judgment.¹¹⁸

In sum, under *Nicaragua*, state encouragement of a non-state actor’s actions may be unlawful and trigger state liability under Common Article 1 when it is “likely or foreseeable” that that the non-state actor will commit the suggested violations. Even providing advice geared towards moderating a non-state actor’s violations of international humanitarian law could render a state responsible for a violation of Common Article 1.¹¹⁹

2. *Positive “Third-State” Obligations.*—In its 2004 *Wall* Advisory Opinion,¹²⁰ the ICJ adopted an even more generous reading of Common Article 1 than it had in *Nicaragua*. The ICJ found that the Article not only imposed negative duties “not to encourage” abuses, but that the Article also imposed some *positive* third-state obligations.¹²¹ Moreover, unlike negative

117. HENCKAERTS & DOSWALD-BECK, *supra* note 107, at 509.

118. *Id.* at 512 (“The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in its judgments . . . that the norms of international humanitarian law were norms *erga omnes* and therefore all States had a ‘legal interest’ in their observance and consequently a legal entitlement to demand their respect. State practice shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try and stop violations of international humanitarian law.”). For additional support that Common Article 1 and customary international law require states not to encourage other states and non-state actors to violate international humanitarian law, see Azzam, *supra* note 102, at 69 (explaining that the scope of the duty of third states includes a duty not to encourage offending states in further violations); Boisson de Chazournes & Condorelli, *supra* note 102, at 68 (“Some fifty years ago, the drafting of [the Geneva Conventions] led to the inclusion in their common Article 1 of a provision that provides the nucleus for a system of collective responsibility.”); Kessler, *supra* note 105, at 498–99 (arguing that states’ duties are more extensive than a cursory interpretation of “ensure respect” might imply).

119. It remains unclear whether states that make a good faith effort to encourage non-state actors to abide by international humanitarian law will still be held to violate their Common Article 1 duties. In *Nicaragua*, the ICJ found the United States liable for violating Common Article 1 because of a CIA manual that the United States claimed was intended to discourage the Contras from violating international humanitarian law. *Nicaragua*, 1986 I.C.J. ¶¶ 255–56. The ICJ took the manual’s recommendations geared towards “mitigating” the violations of the Contras as evidence that the United States knew future violations were “likely or foreseeable.” The ICJ, however, also found that the manual included additional recommendations that encouraged violations of international humanitarian law. It remains unclear whether future courts will find good faith instructions intended to mitigate non-state actors’ IHL violations sufficient to violate Common Article 1 duties absent additional “encouragements” to violate international humanitarian law.

120. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Wall* Advisory Opinion].

121. *Id.* ¶¶ 156–60.

duties “not to encourage” that are owed to specific actors, the ICJ explained that third-state obligations are *erga omnes* obligations owed to the international community as a whole.¹²² Such obligations typically have been construed as a general grant of authority for third states to act to ameliorate grave breaches of the Conventions or other *jus cogens* violations¹²³ (including breaches of the 1949 Genocide Convention).¹²⁴ The ICJ interpreted Common Article 1 to imply that “every state party” to the Fourth Geneva Convention had an obligation to “ensure that the requirements” of the Convention are upheld: “[E]very State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”¹²⁵

In its application of this principle, the ICJ held that “all the States parties to the Geneva Convention . . . are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”¹²⁶ The ICJ thus explicitly found that Common Article 1 imposed third-state obligations on all High Contracting Parties to halt Israel’s violation of the Fourth Convention. Given that many state parties do not have direct ties to Israel’s military action in Palestine, the ICJ opinion implies that this duty exists regardless of whether a state had provided support to Israel or “encouraged” its violations.

In a separate opinion, Judge Kooijmans clarified that he disagreed with the majority precisely because it interprets Common Article 1 as entailing positive duties:

I simply do not know whether the scope given by the Court to [Common Article 1] in the present Opinion is correct as a statement of positive law. . . . I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.¹²⁷

The separate opinion helps elucidate two points: first, that the ruling *does* impose some positive third-party obligations on states; and second, that the scope of these obligations remains underspecified.

ICJ case law on Common Article 1 thus supports the conclusion that Common Article 1 imposes not only negative duties “not to encourage” violations of international humanitarian law, but also some minimal positive

122. *Id.* ¶ 157.

123. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 139–40 (2005).

124. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶¶ 161–62 (Feb. 26).

125. *Wall* Advisory Opinion, 2004 I.C.J. ¶ 158.

126. *Id.* ¶ 159.

127. *Id.* ¶ 50 (separate opinion by Kooijmans, J.) (emphasis added).

third-state obligations. Considering the *Nicaragua* and *Wall* cases together, it may be that *Nicaragua* indicates the “floor” or minimal conditions that would suffice to establish a violation of the Common Article 1 duties “to ensure respect.” The *Wall* Advisory Opinion takes this a step further, suggesting that third states might even be liable for their failure to take preventative action against foreseeable IHL violations by other states.¹²⁸

B. The 2016 ICRC Commentaries: Embracing a Positive Due Diligence Obligation

On March 22, 2016, the ICRC released the first major new commentaries on the Geneva Conventions since the famous 1952 Pictet Commentaries.¹²⁹ The release followed several years of preparations. In the period preceding the release, the legal staff of the ICRC published interpretations of the legal obligations under Common Article 1 under their own names, providing a preview of the commentaries to come.¹³⁰ These initial releases provoked controversy and push-back by states, which caused the release to be delayed by more than half a year.¹³¹ The final release promises to be a signal moment in the development of international humanitarian law—and an important touchstone for understanding the legal obligations of states under the Geneva Conventions for decades to come.

Building on *Nicaragua* and *Wall*, the ICRC legal staff argued in its precommentary writings that duties “to ensure respect” should include “positive” third-state obligations to prevent and halt other states and non-state actors’ violations of the Conventions.¹³² This proposed expansion suggests only that states are required to take “all possible steps, as well as any lawful means at their disposal” to “ensure” all other parties to armed conflict respect the Geneva Conventions.¹³³ In contrasting its interpretation of Common Article 1 with a narrower view, the ICRC’s Commentary of 2016 also makes clear that states’ duties “to ensure respect” extend to their interactions with both states *and* non-state actors.¹³⁴

128. *See supra* notes 125–127.

129. *Launch of the Updated Commentary on the First Geneva Convention*, ICRC (Apr. 6, 2016), <https://www.icrc.org/en/document/launch-updated-commentary-first-geneva-convention> [<https://perma.cc/XV52-K5BS>].

130. Dörmann & Serralvo, *supra* note 102.

131. Revisiting the Role of International Law in National Security: A “Papers” Workshop, Cardozo Law School (May 19, 2016) (on file with author).

132. Dörmann & Serralvo, *supra* note 102, at 707–09.

133. *Id.* at 724.

134. ICRC, *supra* note 10, at art. 1, ¶ 120 (“The interpretation of common Article 1, and in particular the expression ‘ensure respect’, has raised a variety of questions over the last decades. In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing

Additionally, the ICRC legal staff and Commentary of 2016 argue that a “due diligence” standard should apply when determining whether states have discharged positive “to ensure respect” obligations.¹³⁵ This standard would impose obligations on the conduct of states, but does not require them to attain specific outcomes.¹³⁶ States are not to be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they “ma[d]e every effort”¹³⁷ to prevent the violation.¹³⁸ The

view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties.”).

135. Dörmann & Serralvo, *supra* note 102, at 724; ICRC, *supra* note 10, at art. 1, ¶ 165. Due diligence is not a novel standard; international courts and commentators have relied on similar standards under various international human rights frameworks. The Inter-American Court and the European Court of Human Rights have interpreted similar “to ensure respect clauses” in their respective human rights treaties as imposing positive due diligence obligations on states. *See infra* note 149. Commentators have also argued states and corporations have positive due diligence obligations in the context of corporate social responsibility. The Guiding Principles on Business and Human Rights provide that positive obligations include, but are not limited to “human rights due diligence,” which requires business enterprises “to identify, prevent, mitigate and . . . [assess responses to] adverse human rights impacts.” U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at 17, U.N. Sales No. HR/PUB/11/04 (2011). The Guiding Principles also provide that states should take steps to prevent human rights abuses by enterprises that are owned or controlled by the state, “or that receive substantial support and services from State agencies.” *Id.* at 6. Interestingly, in the context of corporate social responsibility, some corporate counsel have raised concerns that exercising due diligence could increase exposure to liability by making the company aware of potential risks, imposing positive duties to mitigate. These concerns are not unlike some of the objections that detractors of a more expansive reading of Common Article 1 might raise. In the context of corporate social responsibility, the short response seems to be that these concerns are overstated. Due diligence allows companies to “identify potential human rights risks and address them before they occur, which should reduce the company’s exposure to litigation of all kinds, and help the company defend against human rights claims that might be filed.” John F. Sherman III & Amy Lehr, *Human Rights Due Diligence: Is It Too Risky?* 4 (Corp. Soc. Responsibility Initiative, Working Paper No. 55, 2010).

136. Dörmann & Serralvo, *supra* note 102, at 723–25; *see also* ICRC, *supra* note 10, at art. 1, ¶ 165.

137. Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 9, 47–48 (1992).

138. ICRC legal commentators have been clear, however, that the general prohibition on the use of force of Article 2(4) of the U.N. Charter provides the upper limit on actions states may take to discharge their Common Article 1 obligations. Third-state obligations under Common Article 1 could not be used as a means to justify unilateral humanitarian interventions. *See* Dörmann & Serralvo, *supra* note 102, at 725–26 (“CA 1 should not be used to justify a so-called ‘*droit d’ingérence humanitaire*’. In principle, permitted measures must be limited to ‘protest, criticism, retorsions or even non-military reprisals’. Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter. The rules on the resort to armed force (*jus ad bellum*) govern the legality of any use of force, even if it is meant to end serious violations of international humanitarian law. The content of CA 1 is not part of *jus ad bellum* and thus cannot serve as a legal basis for the use of force.”). For an extended and speculative discussion of possible options a state may take to discharge “to ensure” Common Article 1 duties, *see generally* Umesh Palwankar, *Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law*, 34 INT’L REV. RED CROSS 9 (1994).

ICRC publications foreshadowed the new commentaries on the Geneva Conventions that also embrace these positive obligations of third states to “ensure respect” of the Conventions by other states and non-state actors.¹³⁹

Importantly, the ICRC embraces an interpretation of Common Article 1 obligations that, unlike attribution doctrine, does not establish a bright-line rule. Indeed, the Commentary of 2016 makes it clear that duties to ensure respect extend to state interactions with private persons, even when such persons’ conduct is “*not attributable to the state*.”¹⁴⁰ Instead, there is a sliding scale that adjusts state legal obligations based on their degree of connection and control.¹⁴¹ The Commentary of 2016 makes clear that duties to ensure respect extend to any efforts to finance, equip, arm, or train the armed forces of parties to a conflict.¹⁴² Prior to the release of the commentaries, the ICRC legal staff additionally characterized third-state duties as context-dependent obligations, which increase in scope according to a state’s engagement with a party to a conflict.¹⁴³ Accordingly, significant ties (whether diplomatic, geographic, social, or economic) between states increase the due diligence responsibility that arises vis-à-vis other states and non-state actors under the Common Article 1 obligation to ensure respect for the Conventions.¹⁴⁴

Even in the new commentaries, however, it is unclear whether and how obligations based on “context” are derived from the third-party state’s capacity for influence in a given situation. On one reading, a state might incur greater Common Article 1 obligations in any given conflict simply by virtue of its pervasive worldwide military, economic, and diplomatic influence.¹⁴⁵ In alternative construction, a state might be required to take voluntary steps to engage another state or non-state actor in order to comply

139. For the most directly relevant and significant contributions to the literature on “to ensure respect” duties, see *supra* note 102.

140. ICRC, *supra* note 10, at art. 1, ¶ 150 (emphasis added). (“The duty to ensure respect covers not only the armed forces and other persons or groups acting on behalf of the High Contracting Parties but extends to the whole of the population over which they exercise authority, i.e. also to private persons whose conduct is not attributable to the State. This constitutes a general duty of due diligence to prevent and repress breaches of the Conventions by private persons over which a State exercises authority . . .” (citations omitted)).

141. *See id.* at art. 1, ¶ 167 (“The duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation, even more so as this case is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions. The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions.”).

142. *Id.*

143. Dörmann & Serralvo, *supra* note 102, at 723–25 (citing *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26)).

144. *Id.* at 725.

145. *Id.* at 724.

with its Common Article 1 due diligence obligations. At the very least, direct support for another state's involvement in an armed conflict would increase a third state's responsibility under Common Article 1. The lack of clarity on the scope of the obligation has been part of the reason states have been slow to embrace the new commentaries on this point.

C. *Closing the Gap*

The Commentary of 2016 supports a reading of Common Article 1 as entailing positive obligations for states regarding the conduct of non-state actors. There is good reason to embrace this reading. First, the text, commentary, and case law support it. Second, applying due diligence obligations to states working with non-state actors would close much of the accountability gap otherwise left by state-responsibility doctrine.

The text of Common Article 1 itself offers no basis for distinguishing between state actors and non-state actors.¹⁴⁶ The Article simply provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”¹⁴⁷ This entails duties to ensure respect by other State Parties. But non-state actors also have both legal rights and legal responsibilities under Common Article 3. Hence, the best reading of Common Article 1 is that offered by the ICRC: the duty to “ensure respect” ought to be read to require states to ensure respect by state and non-state actors engaged in armed conflict.

Existing case law supports this reading of Common Article 1. The ICJ in *Nicaragua* concluded that states have some Common Article 1 duties toward non-state actors.¹⁴⁸ This reading finds support, moreover, in related case law by the European Court of Human Rights and the Inter-American Court of Human Rights. Both have interpreted their respective conventions, which contain similar duty “to ensure” language, to impose affirmative “due

146. For the idea that third-state obligations apply to states and non-state parties alike, see Dieter Fleck, *International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 179, 182 (2006) (“[The obligation to ensure respect] extends to acts of third states, not directly involved in an armed conflict, in their relations to state and non-state parties to the conflict.”); see also Hannah Tonkin, *Common Article I: A Minimum Yardstick for Regulating Private Military and Security Companies*, 22 LEIDEN J. INT’L L. 779, 783 (2009) (“According to the ICRC, [the obligation to ensure respect] imposes a legal obligation not only on the parties to the armed conflict, but also on third states not involved in the conflict.”).

147. Geneva Convention I, *supra* note 9, at art. 1.

148. *Nicaragua*, Judgment, 1986 I.C.J. 14, ¶ 220 (June 27) (“The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances’ . . .”).

diligence” obligations on state parties for the conduct of non-state actors within their territory.¹⁴⁹

Commentators have similarly argued that there are “due diligence” obligations under Common Article 1,¹⁵⁰ in particular with regard to the use of private military and security contractors by states.¹⁵¹ Additionally, other scholars have suggested affirmative due diligence obligations extend to the context of U.S. support for paramilitary groups in Syria.¹⁵² Hannah Tonkin argues that a state’s due diligence obligations towards the conduct of private military and security contractors will vary with context.¹⁵³ In her analysis, three factors are relevant for determining a state’s due diligence requirements: the level of control a state exercises over the non-state actor, the risk the non-state actor will violate international humanitarian law, and the state’s actual or constructive knowledge of this risk.¹⁵⁴ Arguably, a state dealing with a non-state actor will need to take additional measures to ensure compliance with international humanitarian law when any one of these factors is present to a significant degree.

Applying the ICRC reading of the “to ensure respect” provision of Common Article 1 significantly ameliorates the gap in current state-responsibility doctrine. Unlike the attribution framework of the Draft Articles, Common Article 1 creates obligations for states to ensure compliance even when they do not exercise effective or overall control over a non-state actor. As *erga omnes* obligations, states owe Common Article 1 duties not only to the particular parties to an armed conflict but also towards the international community as a whole.¹⁵⁵ Moreover, Common Article 1’s

149. Keenan v. United Kingdom, 2001-III Eur. Ct. H.R. 93, 128, ¶ 89; Alonso Eugénio da Silva v. Brazil, Case 11.598, Inter-Am. Comm’n H.R., Report No. 9/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 40 (2000).

150. Dörmann & Serralvo, *supra* note 102, at 708–10.

151. HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 136 (2011) (“If the host state does not take adequate measures to control a PMSC and the company violates IHL in state territory, the state could incur international responsibility for its failure to ensure respect for IHL. Although no court to date has found a state responsible under Common Article 1 merely on the basis of such inaction, the above analysis has shown that this pathway to responsibility is certainly possible in principle.”).

152. Nathalie Weizmann, *What Happens If American-Trained Rebels Commit War Crimes?*, JUST SECURITY (Aug. 18, 2015, 1:00 PM), <https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/> [<https://perma.cc/6UXW-82M9>].

153. Tonkin, *supra* note 146, at 794–95.

154. *Id.* at 794 (“Just as the measures necessary to discharge the due diligence obligation may vary between states, so too may the measures required of a particular state vary with the circumstances. Three factors are particularly pertinent to this assessment: first, the level of influence or control that the hiring state in fact exercises over the PMSC in question; second, the risk that the company’s activities will give rise to a violation of IHL; and third, the state’s actual or constructive knowledge of that risk.”).

155. ICRC, *supra* note 10, at art. 1, ¶ 119 (“Moreover, the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions

text stipulates that the High Contracting Parties must ensure respect for the Conventions “in all circumstances.”¹⁵⁶ As a result, these obligations do not have a geographic or temporal threshold: Common Article 1 duties apply to any and all state interactions with a non-state actor whenever the Geneva Conventions are applicable.

A breach of Common Article 1 duties differs from a finding of attribution liability. The Commentaries of 2016 rightly characterize Common Article 1 duties and state-responsibility doctrine as “operat[ing] at different levels.”¹⁵⁷ States failing to discharge their duties to ensure respect by partner non-state actors would be found responsible for violating their *own* international legal obligations. Instead of imputing the actions of the non-state actor to the state, Common Article 1 creates a direct duty on the part of a state to ensure respect by non-state actors. For example, when a state’s non-state partner commits war crimes in violation of its Common Article 3 obligations, a state would be held responsible for breach of its Common Article 1 duties, not for the war crimes themselves. To take a simple analogy, the difference between attribution doctrine and Common Article 1 is akin to the difference between holding a company responsible for the actions of an employee because those actions can be attributed, or imputed, to the company and holding a company responsible for failing to take steps to prevent its employees from taking certain actions.

Because Common Article 1 places direct duties on states, it establishes “more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting.”¹⁵⁸ State support that facilitates non-state groups’ ability to commit violations of international humanitarian law constitutes an independent violation of the state’s Common Article 1 duties, even if such actions may not pass the attribution bar under state-responsibility doctrine.¹⁵⁹

themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally. The Conventions thus create obligations *erga omnes partes*, i.e. obligations towards all of the other High Contracting Parties.” (citations omitted)).

156. *Id.* ¶ 145 (“The novelty of the provision lies in the addition of the duty to ‘ensure respect’, which must be done ‘in all circumstances’. This sets a clear standard, as ‘ensuring’ means ‘to make certain that something will occur or be so’ or inversely ‘make sure that (a problem) does not occur’. States are thus required to take appropriate measures to prevent violations from happening in the first place. Accordingly, the High Contracting Parties must—starting in peacetime—take all measures necessary to ensure respect for the Conventions.” (citations omitted)).

157. *Id.* ¶ 160.

158. *Id.* (“Common Article 1 and the rules on State responsibility thus operate at different levels. The obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting.”).

159. *Id.* (“Financial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though

This broad application of Common Article 1 duties would require states to make respect of international law a major focus of their interactions with non-state actors in armed conflicts. In fulfilling their Common Article 1 “to ensure respect” obligations, states would be required to take affirmative steps to ensure their non-state partners complied with relevant law. Failures to properly instruct and train non-state partners in their international law obligations could thus be construed as a violation of a state’s Common Article 1 duties.

Under the proposed framework of the 2016 Commentaries, states have obligations to take significant action towards insuring international law compliance in at least two ways. First, following *Nicaragua*, states must adequately assess whether assisting a non-state actor is likely or foreseeable to lead to violations of the Geneva Conventions; if a state’s assistance to a non-state actor will enable violations of the Conventions, Common Article 1 requires that they forgo offering such assistance.¹⁶⁰ Second, when states do engage in partnerships with non-state actors in armed conflicts, Common Article 1 requires that, even in relatively low-level engagements (supplying equipment, providing arms, or sharing intelligence), states must exercise due diligence and take affirmative steps to ensure the non-state actors comply with the Geneva Conventions.¹⁶¹

Common Article 1 has the potential to eliminate the perverse incentive for states to avoid fully engaging with non-state partners as a means of skirting responsibility for violations of the laws of armed conflict: the very failure to ensure non-state-actor compliance with international law could—even absent a finding of state control—still be the basis of state liability. Moreover, any deliberate effort to use a non-state actor to engage in conduct that violates the Conventions would clearly violate Common Article 1. Common Article 1 duties thus encourage states to make compliance with the Geneva Conventions a central feature of their broader foreign policy agendas.

In sum, Common Article 1, as interpreted by the ICRC in its new commentaries, promises to close much of the state-responsibility gap identified in Part III. Common Article 1 requires states to exercise due diligence to ensure that their non-state-actor partners respect international law, even if the level of control they exercise falls short of what would be necessary to trigger modern attribution doctrine. These Common Article 1 duties are not only important as a set of stand-alone obligations. They help

it may not amount to aiding or assisting in the commission of a wrongful act by the receiving States for the purposes of State responsibility.”)

160. See *supra* section III(A)(1) for a discussion of a state’s responsibility not to encourage or assist a non-state actor in the commission of acts that violate international humanitarian law.

161. See *infra* Part VI for a discussion of steps we recommend states take to discharge these duties.

alleviate the perverse incentives that can otherwise be created by modern attribution doctrine's bright-line rule.

IV. Getting the Incentives Right: An Affirmative Defense

There is just one problem: States seeking to comply with their Common Article 1 duties might fear triggering liability under attribution doctrine. While Common Article 1 duties may be discharged under a due diligence framework—in which adequate effort to discharge a duty would shield a state from liability—overall control and potentially effective control function as a regime of strict liability under which even *ultra vires* acts may be attributed.¹⁶² In other words, a state seeking to meet its due diligence obligations under the ICRC's reading of Common Article 1 might trip over the bright line drawn by attribution doctrine.

As a result, even states that do not intend to use non-state actors to skirt their international responsibilities may be reticent to embrace a reading of Common Article 1 that imposes positive due diligence obligations to curb potential violations of international humanitarian law by non-state partners. States are likely to be concerned that measures taken to discharge Common Article 1 obligations may contribute to breaching the attribution threshold. Under the strict and overall control standards, once the state meets the requisite level of control, all of the conduct of non-state actors—including *ultra vires* actions—can be imputed to the state regardless of the kinds of measures the state took to prevent violations. Under the effective control standard, at least some of the *ultra vires* conduct of non-state partners may be imputed to the state. The ILC has clarified that under Article 8, a state may be held responsible for *ultra vires* acts during operations over which a state exercises “effective control,” as long as those acts are “an integral part” of the operation.¹⁶³ However, it does not extend responsibility to *ultra vires* acts that are only “incidentally or peripherally” associated with an operation.¹⁶⁴ This example illustrates yet again how the strict-liability regime of attribution doctrine can create incentives for states *not* to provide IHL training and instructions to non-state actors.

The perverse incentives for good faith actors become particularly apparent when we consider the types of factors that courts and commentators examine to establish attribution: support, training, instructions, and strategic guidance. All four overlap with the kinds of activities states are expected to use to discharge their Common Article 1 due diligence duties when they partner with non-state armed groups. This raises the distinct possibility that

162. For a discussion of liability for *ultra vires* action under effective control, see *supra* notes 46–55 and accompanying text.

163. *Draft Articles*, *supra* note 12, at art. 8 cmt. 3.

164. *Id.*

measures taken by a state to encourage non-state actors to comply with international humanitarian law will render the state responsible for any violations non-state actors commit in the course of an operation. This potential for liability means states are likely to oppose a reading of Common Article 1 that risks making them responsible for the ultra vires actions of non-state groups without any possibility of mitigation.

To address this problem, states ought to be permitted to offer an affirmative defense in cases where actions taken to address Common Article 1 due diligence obligations push them over the bright line for state attribution. Practically speaking, states should be able to invoke such a defense if they are ever brought before an international or domestic court, a human rights body, a special rapporteur, or even if their conduct is simply being assessed by the court of public opinion. The concern is that key evidence of control over a non-state actor could rely on measures taken by a state to prevent violations of international humanitarian law by the non-state actor. In a case where a state has taken measures to avoid certain IHL violations by the non-state actor, the state should not be held legally responsible for those ultra vires violations. Here we explain how such a legal innovation would work.

A. An Affirmative Defense to Liability for Ultra Vires Actions

In order to resolve the perverse incentive problem, we propose an affirmative defense to state liability. In particular, measures taken to fulfill Common Article 1 obligations may be offered as an *affirmative defense* when determining whether ultra vires conduct is attributable to the State, whether under the effective control or overall control standard. States would have more incentive to embrace positive obligations under Common Article 1 and to take action to encourage non-state actors to comply with their IHL obligations (for example, offering IHL training to non-state actors).

We are not proposing a change to the law on state responsibility. Instead of modifying the legal standard of effective control, international courts would recognize an affirmative defense in line with the spirit of the current attribution framework. This has the advantage of leaving the attribution framework intact, but allows states to embrace the positive obligations under Common Article 1 without thereby triggering liability for ultra vires actions under attribution doctrine.

A comparison to domestic law in the context of Title VII vicarious liability for supervisor harassment offers insight into how this would work.¹⁶⁵

165. We are only offering a loose analogy to illustrate our argument; vicarious liability in the context of domestic employment obviously features a number of elements that differ widely from the context of accountability for non-state-actor conduct in the context of armed conflict.

In *Burlington Industries v. Ellerth*¹⁶⁶ and *Faragher v. City of Boca Raton*,¹⁶⁷ the Supreme Court found that employers could be subject to vicarious liability under Title VII to a harassed employee for actionable discrimination caused by a supervisor.¹⁶⁸ In *Ellerth*, however, the Court allowed employers to raise an affirmative defense to vicarious liability. The defense requires two necessary elements: (1) that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁶⁹ The first prong of the *Ellerth* test is directly analogous to the state responsibility context: States that can show they adequately exercised reasonable care to prevent and correct non-state-actor violations of the Geneva Conventions should be able to avoid liability for some non-state-actor ultra vires actions.

Adopting this affirmative defense strikes the right balance between accountability and states’ concerns about liability risk from positive Common Article 1 obligations. The affirmative defense would only allow states to avoid liability for a narrow set of actions committed by non-state actors: ultra vires actions that violate international humanitarian law and are taken against states’ efforts to ensure non-state-actor compliance with international law. Because it is framed as an affirmative defense, the burden would fall on states to prove that they had adequately discharged their Common Article 1 duties in an effort to avoid the violations. The test thus parallels the domestic example above: a defense to employer liability for supervisory actions requires employers to take adequate steps to ensure supervisors were aware of what actions would constitute harassment.

Moreover, when a state is found to exercise control over a non-state group, the state would *not* be able to use the affirmative defense to escape liability for the group’s violations of international humanitarian law if the state: (1) directly instructed the group to commit the violations, or (2) failed to take reasonable steps to insure against the violations. Thus, even with the option of raising an affirmative defense, states could still be held liable for some ultra vires actions taken by a non-state actor. Additionally, as discussed in detail below, the affirmative defense would ameliorate states’ concern about liability for actions done against their instructions; even when a state exercises effective or overall control over a non-state group, proper discharge of its Common Article 1 duties offers a shield against ultra vires liability.

166. 524 U.S. 742 (1998).

167. 524 U.S. 775 (1998).

168. See *Ellerth*, 524 U.S. at 765 (holding that an “employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor”); *Faragher*, 524 U.S. at 807 (same).

169. *Ellerth*, 524 U.S. at 745.

Ultimately, this affirmative defense would encourage states to freely sponsor and implement such IHL training programs, without any fear that such programs would be used against them when trying to establish attribution.¹⁷⁰

How would this play out in practice? Consider again the not-so-hypothetical case, described above, in which a state supports a non-state group seeking to overthrow its government. Imagine that the state engages in a substantial training program intended to ensure that the members of the non-state group not engage in IHL violations. The training program brings all members of the non-state group together to a camp run by the state's armed forces. There, the state's armed forces integrate international humanitarian law into their training in ways that are meaningfully intended to inform the non-state actors about international humanitarian law. They also require members of the non-state group that seek to receive the state's support to sign declarations in which they commit to abide by international humanitarian law (declarations that are meaningfully calculated to be understood by those signing them—written in their own language and read out loud to those who are illiterate). To take these actions, the state will have provided extra financing to the armed group (by financing the training program) and exercised more managerial control over the non-state actor (by bringing all members of the group to one location and running the program). Moreover, the state will probably also have given more specific directions to the non-state actor (e.g., “Do not attack this village because there are too many innocent civilians.”).

After this training program, imagine that the non-state actor still commits ultra vires IHL violations, and an international court, rapporteur, investigative body, or other authority must decide whether the ultra vires conduct of the non-state actor is attributable to the state. In this case, the applicable legal standard for state attribution would apply—overall control or effective control. However, if the state could offer a good faith demonstration that the training program was undertaken to discharge its Common Article 1 duties, it could argue that this provides an affirmative

170. It is important to note that in the ICJ's *Bosnian Genocide* judgment, the court appears to suggest that ultra vires actions may not be attributable to states under the effective control test. This, however, is an evidentiary issue: the opinion implies that only evidence of direct instructions from the officers of a state to the non-state actor in the prelude to an internationally wrongful act will suffice as the basis for attribution. The effect of this evidentiary rule, however, is to effectively foreclose the possibility of a finding of attribution for an ultra vires act. Only acts for which there is evidence that the state ordered them are potentially ripe for attribution. An affirmative defense would be unnecessary in this context. The Commentary to the Articles on State Responsibility, on the other hand, leaves open the possibility of attribution of ultra vires acts to the state under effective control. It is difficult to weigh the relative authority of the ICJ and the ILC against each other, with the result that one could plausibly apply either articulation of the standard. The applicability of the affirmative defense, however, avoids the question of relative authority entirely: states can offer the affirmative defense of discharging Common Article 1 duties even if a court had made a determination that effective control already existed.

defense to attribution of the ultra vires conduct—particularly where the training program constitutes a significant source of the evidence that the state exercises the level of control required to trigger attribution.

B. A Solution for Good Faith Actors

The affirmative defense is an ideal solution for “good faith actors” (i.e., states that engage with non-state actors for reasons beyond just trying to avoid responsibility). The affirmative defense would allow them to take reasonable steps to ensure that armed non-state groups with whom they work abide by their IHL obligations. Because any good faith measure they take to fulfill their Common Article 1 obligations would support an affirmative defense against attribution of ultra vires actions, they would have less reason for concern that taking such measures would push them across the attribution threshold.

Not only would the affirmative defense encourage states to fulfill their Common Article 1 obligations, but it would also encourage states to recognize the applicability of the Common Article 1 obligation “to ensure respect” to their relationships with non-state actors. One of the reasons States may resist the ICRC interpretation of the positive obligation “to ensure respect” is a fear that taking action to satisfy these obligations could trigger additional responsibilities. Since the affirmative defense would ameliorate this problem, it would reduce states’ objections to the ICRC interpretation on this ground. The net consequence is that there would be greater recognition of and compliance with the “to ensure respect” obligation under Common Article 1.

C. A Solution for Bad Faith Actors

The affirmative defense does not close the accountability gap that under existing state-responsibility doctrine advantages what we could call “bad faith actors”: states that deliberately use non-state actors to commit acts they themselves could not legally do, in order to evade legal responsibility. Because of the high substantive and evidentiary bars for a finding of attribution under the effective and overall control standards, bad faith actors can provide significant support to a non-state actor engaged in internationally wrongful acts without triggering a finding of attribution. These states would, however, be liable for violating their Common Article 1 duties to ensure respect for the Geneva Conventions.

According to the ICRC, the duty to ensure respect under Common Article 1 also imposes due diligence obligations on states to prevent violations of international humanitarian law.¹⁷¹ This interpretation of

171. ICRC, *supra* note 10, at art. 1, ¶¶ 164–73.

Common Article 1 may provide even bad faith actors with an incentive to take prophylactic measures with their non-state proxies, since a state that fails to take measures to avoid violations of law by its proxies will have failed to meet its due diligence obligations. Liability for the failure to uphold Common Article 1 obligations may not be a moral equivalent to a finding of state responsibility where a state has used proxies to evade international law deliberately. However, it can go a significant way toward providing accountability for states that fail to take reasonable measures to prevent IHL violations and thus toward creating the proper incentives for states.

V. Recommendations to States in an Era of Uncertainty

The legal landscape we have outlined in this Article is one in which the law of state responsibility remains in flux. There is limited case law on the doctrine of state responsibility, and there is even less on the legal obligations that attend to states under Common Article 1. Nonetheless, the danger for states is a real one: States working with non-state actors must be concerned about legal liability for those non-state actors' behavior.

Here we propose concrete, IHL-protective measures that states can take to alleviate this danger. These measures would fulfill states' Common Article 1 duty to ensure respect. Moreover, even absent an affirmative defense for purposes of a finding of attribution, as we recommend in Part IV, the attribution bar is high enough that these measures, taken alone, are unlikely to trigger attribution. These measures also have the important feature of decreasing the likelihood of significant IHL violations. That should be reason enough for states to take the steps recommended here.

The literature on Common Article 1 does not provide a clear list of what measures a state can take with regard to non-state actors to discharge its Common Article 1 obligations.¹⁷² However, a number of international NGOs that engage with non-state actors, such as the ICRC and the humanitarian organization Geneva Call, have recorded best practices for encouraging these

172. Writings by ICRC legal staff have suggested, however, that under Common Article 1, third-state obligations are not obligations "of result." Accordingly, the ICRC argues that due diligence imposes obligations on the conduct of states, but does not require them to attain specific outcomes. States will not be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they "ma[d]e every effort" to prevent the violation. Dörmann & Serralvo, *supra* note 1022, at 724 ("[T]he obligation of result is an obligation to 'succeed', while the obligation of diligent conduct is an obligation to 'make every effort' . . . [T]hird States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. This does not turn the duty to ensure respect into a vacuous norm, since States are under the obligation, depending on the influence they may exert, to take all possible steps, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States. If they fail to do so, they might incur international responsibility.") (internal quotation marks omitted).

actors to respect international humanitarian law.¹⁷³ Drawing on their work, as well as recent regulatory and policy developments in the parallel area of promoting international humanitarian law among private military security contractors (PMSCs),¹⁷⁴ this Article sets forth some actions that a state should (and perhaps must) take with respect to a non-state actor in order to discharge its duties to “ensure respect.” These steps are divided into those taken *ex ante* and *ex post*. This is not meant as an exhaustive list of steps states may take to meet their obligations under Common Article 1 when working with non-state actors, but it is meant to be instructive.

Some scholars have argued that the knowledge factor for assessing due diligence requirements under Common Article 1 is more exacting than that under the Draft Articles.¹⁷⁵ In exercising due diligence, states may be held responsible not only if they were “aware” of the risk of a non-state actor’s violation of international humanitarian law, but also if they “ought to have been aware” of the likelihood of such violations.¹⁷⁶ In light of this

173. See *infra* notes 179, 186 and accompanying text.

174. Many commentators have elaborated on the positive obligations states have under international law with respect to PMSCs. See, e.g., LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 579 (2013); MOYAKINE, *supra* note 80, at 303–05; Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 217, 223–25 (Simon Chesterman & Chia Lehnardt eds., 2007); *Expert Meeting on Private Military Security Contractors: Status and State Responsibility for Their Actions*, U. CTR. FOR INT’L HUMANITARIAN L. 34–35 (2005), http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privées.pdf [<https://perma.cc/6679-QT7Z>]. One strand of international negotiations culminated in the Montreux Document of 2008, which the United States and fifty-two other states supported. See Montreux Document on Pertinent International Legal Obligations and Good Practices for States Relating to Private Military and Security Companies Operating in Armed Conflict, Annex to the Letter dated October 2, 2008 from the Permanent Rep. of Switzerland addressed to the Secretary-General, U.N. Doc A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter Montreux Document]; see also *Participating States of the Montreux Document*, SWISS FED. DEP’T OF FOREIGN AFF. (July 21, 2016), <https://www.eda.admin.ch/eda/en/dfdf/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> [<https://perma.cc/RM79-PCRJP>]. The most relevant part of the Montreux Document provides that Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to educate and train PMSCs and their personnel in international humanitarian law; to take measures to prevent PMSCs from violating international humanitarian law; and to take measures to correct violations of international humanitarian law by PMSCs’ personnel through appropriate regulatory measures and sanctions. See Montreux Document, *supra*, ¶ 3.

175. See Dörmann & Serralvo, *supra* note 102, at 734 (noting that under Articles 6 and 7, respectively, of the 2013 U.N. Arms Trade Treaty, a state may not transfer arms to non-state actors if it has knowledge that the recipients will use the weapons to violate the Geneva Conventions or if there is an “overriding risk” of a violation); Tonkin, *supra* note 144, at 794–95 (suggesting that a hiring state could be liable for an IHL violation if, in hiring a PMSC, it knows or should know of an increased risk that the PMSC will violate international humanitarian law).

176. Tonkin, *supra* note 146, at 795 (“The third key consideration is whether the hiring state was aware, or ought to have been aware, of the enhanced risk of violation by the PMSC. Although

consideration, policies adopted by states to ensure IHL compliance should be established and made clear to all actors in advance, and a non-state actor's acceptance and understanding of a state's IHL policies should be a condition precedent to engagement.¹⁷⁷

A. *Ex Ante Recommendations*

1. *Vetting*.—The state should vet any non-state actor with which it plans to work, along with its members. Depending on the context, this process may require national or international records from the host state, possibly including criminal records and civil complaints alleging human rights violations;¹⁷⁸ psychological testing;¹⁷⁹ mental health checks;¹⁸⁰ and information collection on the ground, from social media, and from other public sources to the greatest extent practicable. If the non-state actor—or its members—has a history of violating international law, such that a

the law of state responsibility contains no general requirement of fault, obligations of prevention frequently require some degree of knowledge or constructive knowledge on the part of the state in order to establish breach. For example, in assessing responsibility for a failure to protect life, the European Court of Human Rights employs a test of 'foreseeability of the event': the state is responsible if the authorities knew or ought to have known of the risk to life and failed to take measures which, judged reasonably, might have prevented the occurrence of the fatal event. In [a] similar vein, in the *Genocide* case the ICJ held that the obligation to prevent and punish genocide applies wherever a state *is aware, or should normally be aware*, of a serious risk that genocide will occur." (citations omitted).

177. See Olivier Bangerter, *The ICRC and Non-State Armed Groups*, in GENEVA CALL: EXPLORING CRITERIA & CONDITIONS FOR ENGAGING ARMED NON-STATE ACTORS TO RESPECT HUMANITARIAN LAW & HUMAN RIGHTS LAW 74, 81 (2007) (arguing top-level commanders must insist that international humanitarian law be incorporated in all planning, organization, and execution of operations).

178. Cf. ANNE-MARIE BUZATU, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, EUROPEAN PRACTICES OF REGULATION OF PMSCS AND RECOMMENDATIONS FOR REGULATION OF PMSCS THROUGH INTERNATIONAL LEGAL INSTRUMENTS 42–43 (2008) (suggesting such vetting for PMSCs).

179. DynCorp (a PMSC) and the French Foreign Legion engage in psychological testing as part of their vetting processes. *Id.* at 43.

180. Cf. *First Armed Guard ISO Vetting Scheduled for March*, INTERMANAGER (Dec. 11, 2012), <http://www.intermanager.org/2012/12/first-armed-guard-iso-vetting-scheduled-for-march/> [<https://perma.cc/PY4R-R8ZN>] (noting that mental health checks are part of vetting maritime PMSCs).

violation in the future is reasonably foreseeable,¹⁸¹ the state should refrain from working with it.

2. *Training*.—Given that non-state actors often commit international law violations in part because they are unaware of them,¹⁸² a state should ensure that a non-state actor is aware of the applicable international humanitarian law.¹⁸³ In some cases, this will require that the state assist in training the non-state actor. The Geneva Conventions require, moreover, that states disseminate the texts of the Conventions to relevant belligerents.¹⁸⁴

In implementing training programs, NGOs have emphasized the following best practices: (1) providing training that is not overly academic or theoretical, but rather, relevant to the given context;¹⁸⁵ (2) focusing on particular norms rather than all norms generally (although there is disagreement among NGOs on this issue);¹⁸⁶ (3) conducting training at the highest levels of command;¹⁸⁷ (4) engaging former members of the non-state actor in developing the training;¹⁸⁸ (5) engaging local populations in

181. For evidence of the “foreseeability of the event” standard used to determine state responsibility for failure to fulfill “to ensure respect” duties under the European Convention on Human Rights, see *Keenan v. United Kingdom*, 2001-III Eur. Ct. H.R. 93, 128, ¶ 89; *Kiliç v. Turkey*, 2000-III Eur. Ct. H.R. 75, 96–98, ¶¶ 65–68.

182. ANNYSSA BELLAL & STUART CASEY-MASLEN, GENEVA ACAD. INT’L HUMANITARIAN LAW & HUMAN RIGHTS, RULES OF ENGAGEMENT: PROTECTING CIVILIANS THROUGH DIALOGUE WITH ARMED NON-STATE ACTORS 6 (2011), <http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules%20of%20Engagement.pdf> [https://perma.cc/D5P4-3ELH] [hereinafter *ADH Report*]; INT’L COMM. OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 12 (2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf [https://perma.cc/62CF-GHDW] [hereinafter ICRC REPORT].

183. See Tonkin, *supra* note 146, at 796 (“The hiring state should also take steps to ensure that PMSC personnel are adequately trained and instructed in IHL. The obligation to ensure respect for IHL is commonly taken to include an obligation to ensure that national troops are trained and instructed in accordance with IHL standards. This would also require that a state ensure the training and instruction of any PMSCs it hires to perform military and security activities in armed conflict or occupation.”).

184. Geneva Convention I, *supra* note 9, at art. 47; Geneva Convention II, *supra* note 9, at art. 48; Geneva Convention III, *supra* note 9, at art. 127; Geneva Convention IV, *supra* note 9, at art. 144; see also First Additional Protocol, *supra* note 9, at art. 83 (affirming these provisions and obligations). These provisions should be interpreted to impose the requirement for states to disseminate the texts of the Geneva Conventions to non-state actors they are supporting. See MOYAKINE, *supra* note 80, at 314 (identifying and explaining the dissemination provisions cited above); TONKIN, *supra* note 151, at 197–98 (noting the application of the dissemination provisions to PMSCs).

185. ICRC REPORT, *supra* note 182, at 13.

186. *ADH Report*, *supra* note 182, at 26.

187. *Id.* at 19; Bangerter, *supra* note 177, at 82.

188. *ADH Report*, *supra* note 182, at 35.

developing the training;¹⁸⁹ and (6) emphasizing the legitimacy benefits of abiding by international humanitarian law.¹⁹⁰

3. *Written Agreements.*—The state should have the non-state actor sign written agreements that the non-state actor will respect its international legal obligations. This recommendation addresses the fact that non-state actors often assert that they are not bound by international humanitarian law because they are not (and in most cases cannot be) parties to the relevant treaties.¹⁹¹ Having non-state actors sign written agreements provides another means to hold them accountable. It puts them on notice, moreover, that any support that is provided is contingent on continued compliance with IHL obligations.

NGOs have noted that these agreements can take different forms: (1) special agreements between parties to a conflict,¹⁹² (2) unilateral declarations that are made generally or to an NGO,¹⁹³ and (3) codes of non-state actor conduct that incorporate international humanitarian law.¹⁹⁴ These agreements may also be analogized to contracts undertaken between states and PMSCs. When hiring PMSCs, scholars have suggested that exercising due diligence requires including contract provisions that stipulate PMSC personnel will follow international humanitarian law.¹⁹⁵

189. GENEVA CALL, ENGAGING WITH ARMED NON-STATE ACTORS IN THE BROADER MIDDLE EAST ON THE PROTECTION OF CIVILIANS 13 (2012), http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20120331_engaging_with_armed_non-state_actors.pdf [<https://perma.cc/9253-QFFW>] [hereinafter GENEVA CALL REPORT].

190. *ADH Report*, *supra* note 182, at 23 (noting that most non-state actors desire to be recognized as legitimate, including among local populations); Olivier Bangerter, *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not*, 93 INT'L REV. RED CROSS 353, 358 (2011), <https://www.icrc.org/eng/assets/files/review/2011/irrc-882-bangerter.pdf> [<https://perma.cc/SX2D-HH4A>] (“Self-image is one of the most powerful generators of respect for IHL.”).

191. *ADH Report*, *supra* note 182, at 6–7, 7 n.13; ICRC REPORT, *supra* note 182, at 11.

192. *ADH Report*, *supra* note 182, at 34; ICRC REPORT, *supra* note 182, at 16–18; Bangerter, *supra* note 177, at 82.

193. Bangerter, *supra* note 177, at 82–83; ICRC REPORT, *supra* note 182, at 19–21; *ADH Report*, *supra* note 182, at 34. As an example, Geneva Call has used this strategy, encouraging non-state actors to sign Deeds of Commitment renouncing the use of land mines and other tactics that violate international humanitarian law. GENEVA CALL REPORT, *supra* note 189, at 10.

194. ICRC REPORT, *supra* note 182, at 22–23.

195. See Tonkin, *supra* note 146, at 797 (“Another requirement of Common Article 1 is the inclusion of clear and appropriate rules of IHL in the contract of employment. Indeed, this represents the most direct way of imposing conditions on PMSC employees. Such contractual clauses should be accompanied by adequate procedures for supervising contractors in the field.”).

B. Ex Post Recommendations

1. *Punishment Framework.*—The state should ensure that the non-state actor has an adequate punishment framework in place to deal with individuals who violate international humanitarian law.¹⁹⁶ A similar concept is found in diplomatic protection law: The ILC has noted that in that context the due diligence obligation does not require successfully preventing a private actor from taking an action, but it does require taking “adequate protective measures” to prevent the action, and punishing the private actor if the action is taken.¹⁹⁷

Many questions arise regarding what would constitute an “adequate” punishment framework. Although answering such questions in detail goes beyond the scope of this Article, the punishment framework should, at a minimum, include: (1) oversight and monitoring;¹⁹⁸ (2) investigation of alleged violations;¹⁹⁹ (3) prosecution of alleged violators;²⁰⁰ and (4) punishment of convicted violators. This recommendation is a response to the concern that non-state actors often feel unconstrained by the law since they are already acting unlawfully by taking up arms against a state.

Implementing punitive frameworks with regard to non-state actors does, however, pose a number of challenges largely unaddressed in the literature. Presumably, punishment mechanisms must be compliant with international humanitarian law. There is little guidance or clarity to help determine whether non-Western forms of adjudication would be sufficient to meet the due process requirements under Common Article 3. Nevertheless, providing for some mechanism of accountability for non-state-actor conduct may be essential for a state to exercise due diligence under Common Article 1.²⁰¹

196. See, e.g., MOYAKINE, *supra* note 80, at 360 (suggesting that countries employing PMSCs have a duty to create frameworks to address human rights violations arising out of their operations).

197. See Int'l Law Comm'n, Rep. on the Work of Its Twenty-Seventh Session, U.N. Doc. A/10010/Rev.1, at 71 (1975) (noting that, although the acts of private actors are not directly attributable to the state, the state has a duty to reasonably protect against and deal with harm caused by its contractors); see also MOYAKINE, *supra* note 80, at 324 (“That the duty to punish might be understood as a broad international obligation to legislate, investigate, prosecute, punish, and provide redress appears to be quite clear.”).

198. See MOYAKINE, *supra* note 80, at 324 (stating that the duty imposed upon states to take measures to prevent abuses by non-state actors applies to PMSCs).

199. See *id.* (stating that the duty imposed upon states to investigate abuses by non-state actors applies to PMSCs).

200. In the context of Common Article 1 obligations for PMSCs, Tonkin suggests that this may also entail extradition. See Tonkin, *supra* note 146, at 798 (“[I]f the violation constitutes a criminal offence over which the hiring state has jurisdiction, the state should take steps to arrest and prosecute or extradite the perpetrator.”).

201. The ICJ considered punishment a requirement of international obligations in *Bosnian Genocide*. *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 439 (Feb. 26).

2. *Cessation of Support*.—The state should withdraw some or all of its support to the non-state actor if it is found to have breached a certain threshold of international law violations. A state is more likely to incur responsibility for breach of its Common Article 1 obligations for supporting a non-state actor that it knows is violating international humanitarian law.

A single violation would not necessarily require a cessation of support. If the primary obligations owed by the state are due diligence obligations, Article 14(3) of the Draft Articles arguably comes into play. Article 14(3) provides: “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”²⁰² The state might decide that it is appropriate to give the non-state actor an opportunity to respond to the violation to prevent it from recurring.

Conclusion

Today, states are increasingly working with and through non-state actors in a range of contexts. As a result, there is a real and growing danger that states will use non-state actors to avoid their international legal obligations. The leading legal framework for addressing this danger—modern attribution doctrine—adopts a bright-line rule: A state is responsible, or it is not. This, in turn, has generated a set of perverse incentives for states that collaborate with non-state actors in armed conflict situations, granting them virtually free reign below the attribution threshold while discouraging them from exercising responsible control that might push them over the threshold. If the purpose of state-responsibility doctrine is to encourage states to engage responsibly with non-state partners and hold states accountable by punishing bad actors, the existing framework falls dangerously short.

The more robust interpretation of Common Article 1 of the Geneva Conventions recently endorsed by the ICRC in its landmark new commentaries could help address this shortcoming, closing much of the accountability gap left by modern attribution doctrine in armed conflict situations. Rightly understood, Common Article 1’s “to ensure respect” provision requires states to take steps to prevent non-state actors from violating international humanitarian law, even when they do not exercise effective or overall control over them. Failure to exercise due diligence to prevent non-state partners’ IHL violations constitutes an independent source of state responsibility.

202. *Draft Articles*, *supra* note 12, at art. 14, ¶ 3; see MOYAKINE, *supra* note 80, 325–26 (“The positive measures to be taken by States may include the duty to intervene when a violation of international law is likely to occur and to regulate the activities of private actors in order to prevent breaches of international humanitarian and human rights law.”).

Although Common Article 1 goes a long way toward closing the accountability gap, it does not fully resolve the incentives problem. States that instruct, train, and equip their non-state partners in an effort to fulfill their Common Article 1 duties are more likely to cross the threshold for attribution liability than states that eschew such prophylactic measures.²⁰³ In part as a result, states have already expressed reluctance to accept the positive obligations entailed in the new commentaries.²⁰⁴ To address this concern, states that take actions to meet their due diligence obligations under Common Article 1 should be permitted to plead an affirmative defense: If a state has exercised due diligence to ensure non-state actors abide by the Geneva Conventions, and those actors nevertheless do commit ultra vires violations, the state should not be held responsible. This innovation would not only comport with common sense, but would also encourage states to embrace the ICRC's more robust reading of Common Article 1 and take reasonable measures to ensure that their partner non-state actors comply with international law.

203. *See supra* Part IV.

204. For a discussion of U.S. State Department Legal Advisor Brian Egan's early reaction to the publication of the new commentaries, see Oona Hathaway & Zachary Manfredi, *The State Department Adviser Signals a Middle Road on Common Article 1*, JUST SECURITY (Apr. 12, 2016, 10:42 AM), <https://www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/> [<https://perma.cc/RVT5-LLXC>].