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The Interplay of International Obligations Connected to the Conduct of Others: Toward a Framework of Mutual Compliance Among States Engaged in Partnered Warfare

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I. INTRODUCTION

When States engage in partnered warfare, that is, collaborate at different degrees in the conduct of a military operation, international law prescribes a number of obligations that regulate the conduct of each State and their cooperation. For instance, a State should not knowingly aid or assist another in the commission of a violation of international law. States should take these obligations into account from the outset to agree on the conditions and modalities of military collaboration, and to delimit minimum standards and shared interpretations that are acceptable to each party. It is essential to participate in partnered warfare on the basis of a common understanding of the applicable international law framework, as each State risks bearing responsibility in relation to wrongful conduct committed by a partner State.

This article examines international obligations that arise in relation to the conduct of other States and analyzes how they apply and interact in the context of partnered warfare. It investigates rules of State responsibility relevant to the context of partnered warfare (in particular, provisions on aid or assistance formulated in Article 16 of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)),[1] as well as a number of primary norms that impose obligations connected to the conduct of others (including general humanitarian law and human rights law obligations and specific obligations in the context of the transfer of detainees and arms transfers). It is argued that, taken together, these rules form the contour of an overarching framework of mutual compliance among States cooperating in military operations, whereby each State has a duty to ensure, and interest in ensuring, that partners respectively abide by their international obligations.

The scope of this article is limited to collaboration amongst States, and does not address potential issues of partnered warfare that arise when cooperating with non-State actors.[2] Nor does it analyze specific questions attached to collaboration in the framework of an international organization

1. International Law Commission, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10 at 26–30 (Draft Articles on Responsibility of States for Internationally Wrongful Acts) and 31–143 (General Commentary) (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ARSIWA].

2. On aid or assistance to non-State actors, see Ryan Goodman & Vladyslav Lanovoy, *State Responsibility for Assisting Armed Groups: A Legal Risk Analysis*, JUST SECURITY (December

such as the United Nations or NATO.[3] Instead, this article focuses on the various forms and degrees of military cooperation amongst States, and analyzes how international obligations that arise in relation to the conduct of partners result in limits and incentives on partnered warfare among States.

Part II introduces the different forms that military partnerships can take, and the varied degrees of cooperation it can involve. Part III examines in detail the myriad of negative and positive obligations that arise in connection with the conduct of military partners and reflects on the need to ascertain the proper balance between permissive approaches that may lead to co-responsibility and precautionary approaches that would hinder effective cooperation. Part IV argues that this collection of obligations forms the contours of a framework for mutual compliance amongst partnering States. Part V concludes.

II. MILITARY PARTNERSHIPS AMONG STATES: FORMS AND DEGREES OF COOPERATION

In contemporary warfare, States routinely form partnerships to conduct military operations, and bilateral State-to-State armed conflicts have become the exception. Collaborative military operations in the form of alliances or coalitions are not a new phenomenon, as the strategic advantages of joining forces in order to achieve common objectives have long been utilized.[4] In

22, 2016), https://www.justsecurity.org/35790/state-responsibility-aiding-assisting-armed-groups-legal-risk-analysis/; Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 563, 579–85 (2017). For an international relations perspective on State support to non-state armed groups, see Belgin San Akca, *Supporting Non-State Armed Groups: A Resort to Illegality?*, 32 JOURNAL OF STRATEGIC STUDIES 589 (2009); Brian Katz, *Imperfect Proxies: The Pros and Perils of Partnering with Non-State Actors for CT*, CSIS BRIEFS (Jan. 29, 2019), https://www.csis.org/analysis/imperfect-proxies-pros-and-perils-partnering-non-state-actors-ct.

3. For an overview of obligations at play in the context of partnered warfare involving an international organization, see Berenice Boutin, *Responsibility in Connection with the Conduct of Military Partners*, 56 MILITARY LAW AND THE LAW OF WAR REVIEW 57, 71–73, 76–77 (2018). For a thorough analysis of issues of aid or assistance by international organizations in the context of in military operations, see MAGDALENA PACHOLSKA, COMPLICITY AND THE LAW OF INTERNATIONAL ORGANIZATIONS: RESPONSIBILITY FOR HUMAN RIGHTS AND HUMANITARIAN LAW VIOLATIONS IN UN PEACE OPERATIONS (2020).

4. Richard R. Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 325, 325 (1952); MULTINATIONAL OPERATIONS, ALLIANCES, AND INTERNATIONAL MILITARY COOPERATION: PAST

the past decades, however, partnered warfare in the context of evolving battlefields has grown into increasingly complex and varied modalities, ranging from distant material support to joint operational missions.

Military partnerships are an *ad hoc* form of military collaboration, where precise functioning and modalities are negotiated on a case-by-case basis by participating States.[5] Notwithstanding this intrinsic diversity, it is useful to present some general features that are commonly found in practice. Two broad categories can be distinguished, depending on whether States collaborate in the battlefield by forming a close or loose partnership, or whether cooperation occurs through forms of support that do not involve direct participation in operational activities.

The first category, partnerships at the operational level, includes coalitions of States as well as punctual joint missions. Coalitions can adopt an integrated multinational command, whereby troops are under the operational control of a multinational force commander who acts under the joint authority of all participating States, and where organs of each State are integrated at all levels of the chain of command.[6] In other cases, coalitions follow a "lead nation" model, where one of the coalition States leads the multinational command structure. Typically, the lead State provides the largest contingent, the top officers, and a large part of the facilities and equipment. The command structure is still unified, but it is not fully integrated, as the lead State formally has a preponderant role in the chain of command.[7] In recent

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AND FUTURE (Robert S. Rush & William W. Epley eds., 2006); NAVAL COALITION WARFARE: FROM THE NAPOLEONIC WAR TO OPERATION IRAQI FREEDOM (Bruce A. Elleman & S.C.M. Paine eds., 2008).

5. By contrast, multinational military operations under the aegis of an international organization follow established patterns. For U.N. peacekeeping operations, see U.N. DEPARTMENT OF PEACEKEEPING OPERATIONS AND DEPARTMENT OF FIELD SUPPORT, POLICY DIRECTIVE ON AUTHORITY, COMMAND AND CONTROL IN UNITED NATIONS PEACEKEEPING OPERATIONS (2008).

6. Joint Chiefs of Staff, Joint Publication 3-16, Multinational Operations 1 March 2019, ¶ II-5, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_16.pdf. For instance, the Allied Powers in World War II had adopted a unified multinational structure with authority vested in a Supreme Commander, see GORDON A. HARRISON, UNITED STATES ARMY IN WORLD WAR II, at 105 (1951).

7. U.S. Department of the Army, FM 3-16, The Army in Multinational Operations ¶ 2-12 (2014); Australia Defence Headquarters, ADDP 00.3, Multinational Operations ¶ 4-3 (2011). For instance, the coalition of International Force East Timor (INTERFET) operated under a multinational command dominated by Australia. *See* A. Ryan, *The Strong Lead-Nation Model in an Ad-Hoc Coalition of the Willing: Operation Stabilize in East Timor* 9 INTERNATIONAL PEACEKEEPING 23 (2002).

years, models of command structure in coalitions have become further diverse, such as operations against ISIL in Syria and Iraq conducted by multiple States seemingly without a clearly unified command.[8] It is also frequent for the intervening State to collaborate to some extent with the host State, on the basis of distinct command. Finally, partnerships at the operational level can take the form of punctual joint missions. This occurs where parallel military operations under distinct command punctually cooperate for a specific mission. For instance, in Afghanistan, U.S. forces of Operation Enduring Freedom carried out air strikes in support of NATO-led ISAF forces.[9]

The second category concerns logistical support, which designates less direct forms of military support, stopping short of direct involvement in offensive combat operations. Logistical support can take a wide range of shapes, including the transport of another State's troops and equipment, air-to-air refueling, aerial or naval surveillance, sharing of information, allowing the use of military bases or air space, providing medical facilities and services, lending assets, providing weapons, or financing.[10] For instance, the NATO-led 2011 bombing campaign in Libya was carried out with the logistical support of several States. These States provided intelligence or aerial refueling but did not engage directly in air-to-ground operations.[11] Even though it usually involves a relatively limited participation of the supporting State, logistical support can be crucial to ensure the efficient deployment and functioning of an operation.[12]

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8. For instance, next to Operation Inherent Resolve led by the United States, France deployed Operation Chammal. *See* Ministère des Armées, *Opération Chammal, Dossier de Reference*, https://www.defense.gouv.fr/operations/chammal/dossier-de-reference/operation-chammal (last updated Nov. 3, 2011).

9. Rebecca Barber, *The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan* 15 JOURNAL OF CONFLICT AND SECURITY LAW 467, 490 (2010).

10. *See* Georg Nolte & Helmut Philipp Aust, *Equivocal Helpers – Complicit States, Mixed Messages and International Law*, 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 2–4 (2009); Natalino Ronzitti, *Italy's Non-Belligerency During the Iraqi War, in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 197, 201 (Maurizio Ragazzi ed., 2005).

11. ROYAL AERONAUTICAL SOCIETY, LESSONS OFFERED FROM THE LIBYA AIR CAMPAIGN (2012); John A. Tirpak, *Lessons from Libya*, AIR FORCE MAGAZINE, Dec. 2011, https://www.airforcemag.com/article/1211libya/.

12. *See, e.g.*, Gabe Starosta, *Mission to Mali*, AIR FORCE MAGAZINE, Nov. 2013, https://www.airforcemag.com/article/1113mali/ (noting the logistical assistance provided by the U.S. Air Force to France's deployment in Mali in 2013, which included the transport

The different forms of partnerships—whether at the operational or logistical level—and the different degree of cooperation they imply—ranging from loose affiliation to close cooperation—will be of relevance when applying international obligations that arise in relation to the conduct of partners. Indeed, as will be explained below, a number of obligations take into account the degree of knowledge of the conduct of other States, as well as the capacity to influence this conduct, and, incidentally, the causal proximity between the respective actions and omissions of different partners.

III. THE INTERPLAY OF NEGATIVE AND POSITIVE OBLIGATIONS CONNECTED TO THE CONDUCT OF MILITARY PARTNERS

Against the background of the varied forms of military partnerships, this article examines international obligations that apply to a State's conduct in relation to the conduct of another State. Such obligations are triggered by the combination of an act or omission of one State that is related to the act or omission of another State. In essence, they consist of obligations to not actively help, nor blindly let others do what a State could not lawfully do itself. Accordingly, this Part proceeds as follows. Section A introduces key conceptual distinctions relevant to this discussion, before Section B surveys the range of negative obligations States must take not to facilitate or contribute to wrongful conduct undertaken by partner States. Section C examines positive obligations to ensure that partners refrain from engaging in wrongful conduct and Section D looks to the interplay of these obligations to highlight the difficult balance that military partners must strike between overly permissive and unduly precautionary approaches.

A. Clarifying Some Conceptual Distinctions with Practical Relevance

1. Negative and Positive Obligations

A first and crucial distinction must be made between negative and positive obligations. Negative obligations require refraining from engaging in certain conduct, while positive obligations require actively taking steps toward a certain result. Negative obligations are breached when the prohibition is not respected (obligation of result), while positive obligations are only breached

of French troops and cargo into Mali, as well as air-to-air refueling, and was characterized as "nothing less than essential in allowing the operation to proceed").

through a lack of due diligence (obligation of means).[13] In the context of partnered warfare and the obligations examined below, negative and positive obligations are two sides of the same coin. On the one hand, States must refrain from actively facilitating or contributing to violations by partners, and on the other hand they must take steps to prevent violations by others and not passively let partners commit wrongful conduct. Thus, there is a fine line between undue facilitation resulting in wrongful aid or assistance, and insufficient efforts in seeking compliance by partners.

2. Primary and Secondary Norms

A second important distinction is between primary and secondary norms. Primary norms are substantive in nature and prescribe the content of specific international obligations to engage in or refrain from certain conduct. Secondary norms focus on responsibility and provide the conditions for, and legal consequences of, engaging in a conduct that is against what is prescribed by substantive primary norms.[14] This distinction is, however, far from clear. Notably, while the ILC Articles on the Responsibility of States primarily focus on secondary norms and the consequences of a breach of international norms,[15] they also include a number of rules that have a primary dimension.[16] In particular, Chapter IV of Part I of the ARSIWA, "Responsibility of a State in Connection with the Act of Another State," contains general secondary rules of responsibility that at least partially qualify as primary norms, as they prescribe that a State incurs responsibility if it assists or controls another State in violating the obligations of the latter State.[17] These rules concern *derived* responsibility, in the sense that responsibility arises in connection with a violation of international law by another State, rather than solely out of one State's own conduct.[18] Secondary rules of derived responsibility thereby come very close to certain negative primary obligations that

13. Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562, 562 (Dinah Shelton ed., 2013).

14. ARSIWA, *supra* note 1, General Commentary, ¶ 2; Norberto Bobbio, *Nouvelles Réflexions sur les Normes Primaires et Secondaires*, *in* LA REGLE DE DROIT 104 (Ch. Perelman ed., 1971).

15. ARSIWA, *supra* note 1, General Commentary, ¶ 1.

16. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 339 (2013).

17. ARSIWA, *supra note* 1, art. 16 (Aid or assistance in the commission of an internationally wrongful act), art. 17 (Direction and control exercised over the commission of an internationally wrongful act), art. 18 (Coercion of another State).

18. Boutin, *supra* note 3, at 62–63.

are analyzed in the next Section. While formally part of the body of secondary norms, rules of derived responsibility concern not only *ex post* consequences of a breach, but also require States to ensure *ex ante* that they do not facilitate or contribute to wrongful conduct committed by another State.

3. *Lex Specialis* and *Lex Generalis*

A third distinction, particularly relevant in the context of this article, is the distinction between *lex generalis* and *lex specialis*. Rules of the ARSIWA form a *lex generalis*, applicable to any matter of international law,[19] while more specialized rules of international humanitarian law (IHL) and other bodies of law, such as international human rights law or international law regulating the arms trade, function as *lex specialis*. Traditionally, *lex specialis* prevails over *lex generalis* in case of conflict, but the general rules are not displaced merely because specific rules on the same subject exist.[20] Rather, general and specific rules that follow the same direction can be interpreted alongside one another. The *lex specialis* can be seen as a particular application of a more general rule, while the *lex generalis* provides orientation on the general goals.[21] Accordingly, ILC rules and primary norms can be interpreted together, and in combination lead to identifying an overarching regime for military partnerships.

B. Obligations not to Facilitate or Contribute to Wrongful Conduct by Partners

In the context of military partnerships, negative obligations in relation to the conduct of others play a key role. Partner States are bound by a number of obligations pursuant to which collaboration with another can be wrongful. It is thus critical for partners to assess these rules and to agree on the modalities and limits of collaboration prior to engaging in military action.

Within the rules of State responsibility, Article 16 ARSIWA provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

19. ARSIWA *supra* note 1, art. 55; General Commentary, ¶ 5.

20. *Id.* Commentary to art. 55, ¶ 4.

21. HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY 417 (2011).

Numerous commentators have discussed the precise content and nature of Article 16.[22] While some specific modalities of the provision, in particular its subjective element, remain unsettled,[23] it is accepted that Article 16 embodies customary international law.[24] For the purpose of this article, what is important to note is that Article 16 can be interpreted as a primary obligation not to knowingly aid or assist another State in breaching a substantive obligation that is binding on both the aiding and the aided States. The requirement of knowledge that the assistance would facilitate the commission of a wrongful conduct is formally one of actual (rather than constructive) knowledge. Nonetheless, the existence of knowledge on the part of the aiding State can be demonstrated by inference from factual circumstances.[25] The "double opposability" requirement indicates that aid or assistance is only wrongful if the aided State commits an internationally wrongful act (defined in Article 2 ARSIWA as a conduct attributed to that State and in breach of its obligations), and if the aiding State is bound by the same or an equivalent obligation (Article 16(b) ARSIWA).[26] Therefore, States partnering in warfare need to ensure collaboration does not result in unlawful assistance that would engage their responsibility. In particular, States that collaborate only indirectly through the provision of logistical support could engage their responsibility if their support facilitates or contributes to the commission of

22. *See especially* AUST, *supra* note 21; VLADYSLAV LANOVOY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY (2016); John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRITISH YEARBOOK OF INTERNATIONAL LAW 77 (1987); HARRIET MOYNIHAN, CHATHAM HOUSE, AIDING AND ASSISTING: CHALLENGES IN ARMED CONFLICT AND COUNTER TERRORISM (2016), https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism.

23. AUST, *supra* note 21, at 377; Vladyslav Lanovoy, *Complicity in an Internationally Wrongful Act*, *in* PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 134, 152 (André Nollkaemper & Ilias Plakokefalos eds., 2014); Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 2 REVUE BELGE DE DROIT INTERNATIONAL 371, 375 (1996).

24. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 420 (Feb. 26).

25. MOYNIHAN, *supra* note 22, at 12–14; André Nollkaemper et al., *Guiding Principles of Shared Responsibility in International Law*, 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW 15, 42–43 (2020).

26. *See* Lanovoy, *supra* note 23, at 159–60 (considering this requirement "overly formalistic").

wrongful conduct on the ground. Although partner States will to some extent not be bound by the same substantive obligations, the obligation not to aid or assist in violations is relevant at least with regard to customary rules of international law applying to armed conflict.

The ARSIWA contains an additional rule on aid or assistance, covering specifically cases of violations of *jus cogens*. Article 41(2) ARSIWA, in conjunction with Article 40 ARSIWA, provides that no State shall render aid or assistance in maintaining a situation created by a serious breach of obligations under peremptory norms of general international law.[27] This rule is particularly relevant to military operations, which may involve violations of the prohibition on the use force under the principles of the U.N. Charter and customary international law. If a military operation was initiated in breach of the prohibition on the use force, further participation and support by other States could violate Article 41. Here again, prior to partnering each State must assess the legal risks that collaboration could result in a serious violation of international law and weigh these risks accordingly.

The notion of wrongful aid or assistance to another State is also found within IHL. Common Article 1 of the 1949 Geneva Conventions provides, "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances,"[28] and has been interpreted as including not only an internal dimension pursuant to which each State has the obligation not to engage itself in violations of IHL, but also an external dimension,[29] which is particularly relevant in the context of partnered warfare. Accordingly, States have a duty to ensure that other States (and especially partner States) abide by the Conventions, which itself implies a negative obligation not to aid or assist other States in IHL violations.[30]

Nearly all forms of military collaboration examined in Part II can qualify as aid or assistance, and it is therefore crucial for partners to evaluate whether

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27. *See* ARSIWA, *supra* note 1, Commentary to art. 41, ¶ 11.

28. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

29. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 153, 156 (2016) [hereinafter COMMENTARY ON THE FIRST GENEVA CONVENTION]; Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 67 (2000).

30. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 29, ¶ 158; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 144, at 509 (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005) [hereinafter CIHL]; AUST, *supra* note 21, at 388.

other States are and remain operating within established boundaries of IHL. It should also be noted that the threshold of knowledge on the part of the aiding State under common Article 1 is lower than with Article 16 ARSIWA[31] and more akin to constructive knowledge. Under common Article 1, an aiding State can engage its responsibility not only if it actually knew, but also if it reasonably should have known, that a partner State was committing IHL violations. According to the 2016 ICRC Commentary on the First Geneva Convention, "[i]n the event of multinational operations, common Article 1 thus requires High Contracting Parties to opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would violate the Conventions, as this would constitute aiding or assisting violations."[32] Although this interpretation of the external dimension of common Article 1 as a binding obligation is not fully accepted by all States,[33] it has gained ample support in the past decades and is now the majority view.[34] Thus, it cannot be ignored in partnered warfare, as it is very likely that at least some of the partnering States will adopt and seek to abide by this interpretation of common Article 1.

Similarly, in the field of international human rights law, the duty of each State to secure human rights has a well-established external dimension, whereby States must respect human rights, but also protect human rights from violations by other States.[35] Hence, assistance provided by a State to

31. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 29, ¶ 160.

32. *Id.* ¶ 161.

33. Most notoriously, the United States takes the view that the duty to ensure respect by other States is more of a policy consideration than a legally binding obligation. *See, e.g.*, Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observation*, 92 INTERNATIONAL LAW STUDIES 235 (2016) (providing speech as prepared for delivery by Brian Egan, Legal Adviser, U.S. Department of State, 110th Annual Meeting of the American Society of International Law, Washington, D.C., April 1, 2016); Oona Hathaway & Zachary Manfredi, *The State Department Adviser Signals a Middle Road on Common Article 1*, JUST SECURITY (April 12, 2016), https://www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/.

34. 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 YEARBOOK OF INTERNATIONAL LAW 498, 498 (2001); Boisson de Chazournes & Condorelli, *supra* note 29, at 70; Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125, 127 (2010).

35. For a historical analysis of the "respect, protect, and fulfill" concept in human rights law, see Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 HUMAN RIGHTS LAW REVIEW 81 (2005).

conduct that results in human rights violations by another State can constitute a breach of the former State's obligations to protect individuals within its jurisdiction from human rights violations by third parties.[36] While IHL remains the primary legal framework applicable to military operations, it has become widely accepted that human rights obligations do not automatically cease to apply in time of armed conflict.[37] An in-depth analysis of human rights law applicability in armed conflict is beyond the scope of this paper,[38] but it can simply be recalled that core human rights law obligations apply, albeit with some qualifications, to the conduct of military obligations. The human rights dimension is also particularly relevant to scenarios of logistical assistance provided by States that do not formally take part in combat operations, and thereby operate within the human rights framework.

Significant practice from the European Court of Human Rights exists in the context of partnered warfare, most notably in relation to coalition operations in Iraq between 2004 and 2009, and the indirect participation of European States in the U.S. rendition program.[39] Interestingly, there is no for-

36. U.N. Human Rights Committee (HRC), General Comment No. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, ¶ 63; AUST, *supra* note 21, at 415; Maarten den Heijer, *Shared Responsibility Before the European Court of Human Rights*, 60 NETHERLANDS INTERNATIONAL LAW REVIEW 411, 422 (2013).

37. *See, e.g.*, Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 737 (2005). For the intersection of human rights law and international humanitarian law in non-international armed conflict, see Marco Sassòli & Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 599 (2008).

38. U.N. Human Rights Committee (HRC), General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, ¶ 11; Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 265 (2006); JENS DAVID OHLIN, THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (2016). On the extraterritorial application of human rights obligations, see MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011); *see also* Sigrun Skogly, *Extraterritorial Obligations and the Obligation to Protect*, 47 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 217 (2016).

39. *See, e.g.*, Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08 (2010) (ECtHR), http://hudoc.echr.coe.int/eng?i=001-97575; Al-Jedda v. the United Kingdom, App. No. 27021/08 (2011) (ECtHR), http://hudoc.echr.coe.int/eng?i=001-105612; El-Masri v. the Former Yugoslav Republic of Macedonia, App No. 39630/09 (2012); Nasr and Ghali v. Italy, App No. 44883/09 (2016).

mal requirement of double opposability within the framework of the European Convention on Human Rights (ECHR). Therefore, States party to the ECHR can engage their responsibility if they provide support or contribute to human rights violations by non-ECHR States. As will be further examined in Part IV, this contributes to the emergence of a broader framework for mutual compliance among military partners, where obligations binding on some of the partners will have implications on the functioning of the partnership as a whole. It is also noteworthy that the European Court of Human Rights applies a standard of constructive knowledge ("knew or ought to have known") in cases concerning assistance to human rights violations.[40]

Other more specific obligations not to aid or assist another State can be mentioned. With regard to the transfer of arms or ammunitions to a military partner, the Arms Trade Treaty (ATT) provides that a State "shall not authorize any transfer of conventional arms . . . if it has knowledge at the time of authorization that the arms . . . would be used in the commission of . . . grave breaches of the Geneva Conventions."[41] If a State opts to provide support to another State by allowing the latter to use military bases, it should be mindful of the general obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States."[42] Also relevant in the context of partnered warfare is Article 3 of the Convention Against Torture, which provides for an obligation not to "extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture."[43] In the context of extraordinary rendition, States that do not directly engage in rendition but provide some assistance to the extradition of individuals could be providing wrongful assistance in breach of Article 3 of the Convention Against Torture.

C. Obligations to Ensure that Partners Refrain from Engaging in Wrongful Conduct

Positive obligations provide the opposite and complementary dimension to negative obligations not to assist in wrongful conduct by partner States. They

40. El-Masri, *supra* note 39, ¶ 198.

41. The Arms Trade Treaty art. 6(3), Apr. 2, 2013, 3013 U.N.T.S. (entered into force Dec. 24, 2014).

42. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, ¶ 22 (Apr. 9).

43. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

require not merely refraining from assisting in other's violations of international law, but in taking proactive steps to ensure that partners do not engage in wrongful conduct.

Further to the negative obligation not to assist in IHL violations, common Article 1 has a positive external dimension which involves an obligation to "take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party."[44] The external positive dimension of the duty to ensure respect for IHL is an obligation of diligence which formally applies toward all States. Accordingly, the ICRC CIHL Study finds, "[States] must exert their influence, to the degree possible, to stop violations of international humanitarian law."[45] This rule will have specific implications in the case of partnered warfare, where closely collaborating States have a greater ability to influence the conduct of each other.[46] For instance, States participating in a coalition under a unified command will have a significant capacity to influence the conduct of each other, and therefore an obligation to do so in order to ensure respect for IHL and prevent violations. By contrast, States providing limited support have a lesser degree of influence yet remain bound to do what is reasonably possible. For instance, logistical support that is particularly crucial and necessary to an operation should be withdrawn in case of knowledge of wrongful conduct.

Next to the extent of capacity to influence the conduct of others, a criterion of reasonable foreseeability applies, whereby the "obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred."[47] This element of foreseeability in positive obligations pairs with the requirements of constructive knowledge in negative obligations. Indeed, constructive knowledge and foreseeability together point at a need to avoid "willful blindness" toward the conduct of partners, and to seek information rather than remaining passive and oblivious to the eventuality of violations.[48]

In addition to the general positive obligation to ensure compliance with IHL, the Third Geneva Convention contains specific obligations to seek

44. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 29, ¶ 164.
45. CIHL, *supra* note 30, r. 144, at 509.
46. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 29, ¶ 166.
47. *Id.* ¶ 164.
48. MOYNIHAN, *supra* note 22, at 14–15.

compliance in IHL for the transfer of individuals in custody. Article 12 provides that prisoners of war may only be transferred by one State to another after the former "has satisfied itself of the willingness and ability of [the other State] to apply the Convention."[49] According to the 2020 ICRC Commentary, this requires the transferring State to actively inquire and seek to obtain information to verify the willingness and ability of the other State to apply these safeguards.[50] The Commentary also indicates that a lack of willingness and ability on part of a State could be implied from a "poor record of compliance with its humanitarian obligations."[51] Further, Article 12 stipulates that, if the State to which the detainee was transferred fails to comply with IHL standards, the transferring State must "take effective measures to correct the situation or shall request the return of the prisoners of war."[52] Breach of this positive continuing obligation by the transferring State could engage its derived responsibility in relation to the mistreatment of the detainee by the other State.[53] A similar provision addressing the transfer of other protected persons is found in Article 45 of the Fourth Geneva Convention.[54]

In international human rights law, the obligation to protect from human rights violations also includes a positive obligation to take reasonable steps to seek compliance and prevent abuses by others.[55] In a case before the European Court of Human Rights concerning an individual abducted by Macedonia and surrendered to the United States as part of the U.S. rendition program, the Court held that the ECHR "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to [human rights violations]" and "[t]he State's responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk

49. Convention (III) Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

50. INTERNATIONAL COMMITTEE OF THE RED CROSS, UPDATED COMMENTARY ON THE THIRD GENEVA CONVENTION OF 1949 ¶ 1534 (2020) [hereinafter UPDATED COMMENTARY ON THE THIRD GENEVA CONVENTION].

51. *Id.*

52. Geneva Convention III, *supra* note 49, art. 12.

53. UPDATED COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 50, ¶¶ 1549–50. For an example of the application of this obligation, see the Rahmatullah case before the U.K. courts, which concerned the transfer to U.S. custody of an individual captured by the United Kingdom in Iraq. Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs [2011] EWCA (Civ) 1540; Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah [2012] UKSC 48.

54. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

55. Shelton & Gould, *supra* note 13, at 566.

of ill-treatment [by third parties]."[56] Although Macedonia did not itself commit torture or other inhumane treatment, it was found responsible for actively facilitating, and failing to take measures that would have prevented, wrongful conduct by the United States.[57]

Finally, another relevant positive obligation in the context of partnered warfare is found in Article 7 ATT, which applies to the transfer of arms not prohibited under Article 6 ATT, and imposes a requirement to assess prior to any transfer the potential that arms or ammunitions could be used to commit or facilitate serious violations of international law.[58]

D. Striking the Balance Between Permissive and Precautionary Approaches

In view of the constellation of negative and positive obligations and layers of rules that come into play in relation to the conduct of military partners, States need to strike a difficult balance between permissive and precautionary approaches. Permissive approaches, where military collaboration and support are decided without sufficient consideration of negative and positive obligations, risk significant legal consequences in terms of State responsibility for wrongful assistance or failure to ensure respect. Precautionary approaches, on the other hand, where collaboration is subject to excessively strict conditions, or altogether avoided, hinder the effectiveness of military operations and ultimately of achieving common objectives, including the maintenance of peace and security. When engaging in partnered warfare, States must find an equilibrium within the complementary ensemble of negative and positive obligations that both require States to refrain from cooperation that would actively facilitate or contribute to wrongful conduct by others and encourage States not to ignore other's wrongful conduct and to actively cooperate toward preventing violations.

While it has been occasionally argued that excessive legal constraints on (partnered) warfare are detrimental to achieving strategic objectives,[59] typically it is not the legal framework presented in this article that impedes inter-

56. El-Masri, *supra* note 39, ¶ 198.

57. *Id.* ¶ 211.

58. Arms Trade Treaty, *supra* note 41, art. 7.

59. For an example of this argument in the United Kingdom, see Richard Ekins, Jonathan Morgan & Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat* POLICY EXCHANGE (2015), https://policyexchange.org.uk/wp-content/uploads/2017/12/clearing-the-fog-of-law.pdf.

national military cooperation. Rather, it is the unwillingness of States to engage with it and to closely evaluate their respective obligations and interpretations, so as to agree on a framework for collaboration that satisfies both compliance with core international norms and operational efficacy. On the contrary, failure of certain partners to seek alignment and compliance may result in responsibility being attached to other partners, which would in the future be reluctant to participate in collaborative military operations with incautious States. And it indeed seems to be increasingly acknowledged by States that their mutual interest lies in a compliance-based approach to military cooperation that safeguards both the international rule of law and common strategic goals. Thus, in his 2016 remarks to the American Society of International Law, U.S. Department of State legal adviser Brian Egan insisted that the compliance of each military partner with international law "is essential to building and maintaining our international coalition," and that doing so "enhances rather than compromises our military effectiveness."[60] The question now turns to how best to achieve this result.

IV. TOWARD A FRAMEWORK OF MUTUAL COMPLIANCE IN PARTNERED WARFARE

Taken together, international obligations in relation to the conduct of military partners—and their criteria of knowledge, foreseeability, and capacity—form the contours of an emerging overarching framework for mutual compliance. Military partners cannot blindly engage in partnered warfare and only pay attention to individual compliance with their own obligations. They need to assess and interpret alongside their respective obligations in relation to the conduct of others, which together will lead toward ensuring mutual compliance in partnered warfare.

The duty to seek mutual compliance lies at the intersection of positive and negative obligations that come into play in partnered warfare.[61] In each of the obligations examined in this article, criteria of knowledge or foreseeability of the conduct of others, as well as capacity to influence that conduct are key. In the context of military operations, which, as seen in Part II, involve various forms of cooperation, the degrees of knowledge and capacity to influence, and thereby the thresholds for breach of obligations, will vary

60. Egan, *supra* note 33, at 236.

61. On the intersection of positive and negative obligations in State responsibility, see Monica Hakimi, *State Bystander Responsibility* 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 341 (2010); *see also* AUST, *supra* note 21, at 401.

depending on the extent of collaboration. For instance, military partners which closely collaborate in a coalition under unified command will presumably have more opportunities to acquire knowledge of each other's conduct and to influence this conduct. By contrast, in coalitions under the lead-nation model, partners will have less capacity to influence the conduct of the lead State. This is neither straightforward nor linear, as limited degrees of cooperation, such as logistical support, can yield high degrees of influence when a State provides crucial assistance (for example, the use of military bases that are essential to a bombing campaign) and holds the option of withdrawing support. Knowledge will also vary depending on forms and degrees of cooperation. Yet limited cooperation does not absolve a State from its duty to seek information or allow it to blindly cooperate with other States. This is particularly true with obligations that include criteria of constructive knowledge or foreseeability. Essentially, the relationship between degrees of knowledge and capacity on one hand, and forms of military cooperation on the other hand, is one of causality. A military partner will risk engaging its responsibility if its own actions or omissions causally contribute to the wrongful conduct of another State.[62]

To achieve mutual compliance as well as interoperability, States partnering in military operations need to—prior to engaging in cooperation—assess respective interests, views, and obligations, and agree on permissible conduct and limitations within the partnership. In practice, States seeking to ensure mutual compliance in military collaboration can and have made use of agreements—including status of forces agreements, rules of engagement, or memoranda of understanding—in which they reach agreed standards, expectations, and modalities of cooperation.[63] While undoubtedly commendable, formal agreements do not offer full-proof protection against the legal risks or the challenges of military collaboration. Dialogue between partners needs to be ongoing and iterative, and written agreements do not relieve States from their continuing obligations to seek compliance from partners.[64] As an operation evolves and knowledge on the conduct of others develops, States

62. On the central role of causation in situations of multiple responsibility of States, see Nollkaemper et al., *supra* note 25, at 25–28.

63. A large practice notably exists with regard to agreements on the handling of detainees in collaborative military operations. *See* UPDATED COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 50, ¶ 1537.

64. Stuart Hendin, *"Do as We Say, Not as We Do": A Critical Examination of the Agreement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of Afghanistan* 7 NEW ZEALAND ARMED FORCES LAW REVIEW 18, 31 (2007).

need to reassess the modalities of collaboration. As a more general point, it can be noted that the respective interpretations and understandings put forward by different States in this context can also usefully result in a clarification, and possibly a development or crystallization, of applicable legal norms.

When seeking to reach agreement and find common grounds on legal boundaries, States will usually partially be bound by different obligations and often put forward different legal interpretations. Yet, in the context of military collaboration, these differences will be mitigated by a number of factors. As discussed in this article, when it comes to obligations that arise in relation to the conduct of others, obligations binding on only some of the partners will have implications on the functioning of the partnership as a whole. Although partners are bound by different obligations, the States with stricter obligations will be reluctant to collaborate in the absence of guarantees that their own responsibility will not risk being engaged in relation to the conduct of partners with more relaxed obligations. Even when collaboration only concerns limited support, States will be wary of providing assistance to the operations of another State that questionably fits the former State's obligations. Indeed, as seen in practice, victims that cannot obtain redress from a principal wrongdoer can turn to States indirectly involved in the wrongful conduct to claim reparation.[65] As a result, it will often be in the best interest of all parties to attain a shared understating that aligns with the highest common denominator.

Combined with associated practice and policy, the various legal obligations examined in this article—secondary and primary, negative and positive, general and specific—point toward the emergence of an overarching legal regime of mutual compliance. Under this analysis, it is in the best legal and policy interest of each State, as well as of the international community, not to allow other States involved in military collaboration to breach obligations binding on some or all of the military partners.

V. CONCLUSION

When engaging in partnered warfare, States must carefully assess and balance their international obligations, and thereby establish certain preconditions, for partnering. This article analyzed international obligations arising in relation to the conduct of other States, including secondary rules of the law of

65. For instance, the case of *El-Masri* discussed above was brought against Macedonia on the grounds of facilitation and failure to prevent only after the United States dismissed its torture claim. *See* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

State responsibility and primary norms of IHL and human rights law. Such obligations, which concern the conduct of one State in relation to another State, inevitably affect the commitments of partners, in part as they can trigger the responsibility of a partner State in relation to conduct it did not directly commit. It is thus necessary for partnering States to assess the legal risks that collaboration could entail and to develop shared interpretations that can guide the modalities of the conduct of partnered warfare.

Military collaboration can take different forms, ranging from close cooperation to distant support. While international law has different implications depending on the extent of collaboration, it involves in each case negative obligations not to collaborate with others if it results in wrongful conduct, and positive obligations to take steps and exercise influence to foster compliance. Partnering States usually are bound by partly different obligations, but—because obligations discussed in this article arise in relation to the conduct of others—obligations binding on some partners have implications on the functioning of the partnership as a whole. Based on a detailed analysis of obligations and their respective thresholds and requirements, this article argued that, taken together, these rules form the contour of an overarching framework of mutual compliance among States cooperating in military operations, whereby each State has a duty to ensure that partners respectively abide by their international obligations.

In sum, the mutual interest of States partnering in warfare lies in a compliance-based approach to military cooperation that safeguards both the international rule of law and common strategic goals. In seeking to achieve mutual compliance, States have the opportunity to align their legal interpretations and polices toward the highest common denominator.